

WHAT IS THE PUBLIC SECTOR?

Which entities are impacted by rules governing the public sector can vary from jurisdiction to jurisdiction. Whether access to information and lobbying laws affect schools and hospitals, for example, will depend on the jurisdiction and the relevant law in question.



CROWN ASSETS AND DEBTS

Crown assets and management can raise significant legal issues and expertise of legal counsel should be sought. Many jurisdictions in Canada restrict the ability of a third party to assign debts owing to the Crown, even by way of security. The rules vary across jurisdictions but, in some cases, no assignment whatsoever is permitted except with certain consents from the Crown. Consents can take time to obtain and should be planned for. These restrictions can have a significant impact on financing of arrangements where a public-sector entity is a counterparty.



LOBBYING

The federal government, most provinces and a growing number of municipalities have lobbying regimes in place, which typically apply both to “consultant” lobbyists and “in-house” lobbyists. Regulatory regimes for lobbying do not prohibit communications with public office holders, but they do require public disclosure that communications took place, and that those engaged in such communications be registered with the applicable regulator. Unless an exception is available, communications to public office holders about a matter that is lobbying must always be registered and disclosed when the communication comes from a “consultant” lobbyist.



DISPUTES

Disputes with public-sector counterparties will often require special notification or adherence to procedural requirements and proceed in a manner quite different from a private dispute or complaint. Public-sector entities are generally reluctant to agree to arbitration or foreign choice of law clauses and are more likely to contest a case that might otherwise be settled for fear of setting a precedent.



PROCUREMENT

Many Canadian public-sector contracts proceed by way of competitive procurement process. To bid on a project, an entity may have to “pre-qualify.” To ensure a fair and competitive procurement process, and the overall maintenance of integrity, there are various rules of engagement that bidders must comply with. Procurement disputes and litigation will often require careful compliance with technical rules.



SECURITY CLEARANCES

Private-sector entities dealing with the Canadian government may require security clearances under the federal Industrial Security Program. Clearance can be a pre-condition to participation in certain RFPs. The process for clearance application can take a number of months, and requires disclosure of considerable information about individuals, facilities and technology.



FINANCIAL APPROVALS

Canadian public-sector financial approvals are complex, often requiring several steps, including a legislative appropriation, a Treasury Board approval and sign-offs at the relevant department or agency level. These restrictions are not just limited to government-owned entities, but often extend to government-funded entities.



ACCESS TO INFORMATION

Canada’s federal and provincial governments all have rules requiring the disclosure of certain records kept by those governments. Accordingly, parties communicating with governments must keep in mind that their correspondence and materials could end up in the public domain. Federally, rules relating to the disclosure of information on government contracts in excess of C\$10,000 are set by the Treasury Board. There is a broad right to request access to any record that is under the control of a government institution.



GIFTS

Increasingly, Canadian lobbying and conflict of interest laws are restricting the ability of private-sector parties to provide gifts to public officials. Where lobbying laws are not engaged, small gifts will often be permitted by persons who do not deal with government and where the gift does not create an actual or perceived conflict of interest, or compromise the integrity of the recipient or their organization.

Consideration should also be taken to avoid offending any anti-corruption laws and the prohibition against influence peddling in the *Criminal Code*.

CONTACT

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