
NEW TELEMARKETING RULES WILL HAVE ONEROUS IMPACT ON CHARITIES

*By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
Assisted by Nancy E. Claridge, B.A., M.A., LL.B. Candidate*

A. INTRODUCTION

The Canadian Radio-television and Telecommunications Commission (“the Commission”) implemented new telemarketing rules, which went into effect June 21, 2004. In Telecom Decision CRTC 2004-35 (“Decision 2004-35”), the Commission implemented changes to the regulation of telemarketers with more specific identification procedures, constraints on the use of predictive dialling devices and mandatory reinforcement of do not call lists for all telemarketers. The new rules apply without exception or exemptions for volunteers, existing or past donors, or individuals with a previous relationship with the charity. This *Charity Law Bulletin* (“the Bulletin”) outlines these new rules that will prove onerous for many charities. The full text of the Commission’s decision can be viewed at <http://www.crtc.gc.ca>.

B. BACKGROUND

Telemarketing refers to the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation, where solicitation is defined as the selling or promoting of a product or service, or the soliciting of money or money’s worth, whether directly or indirectly and whether on behalf of another party. This includes solicitation of donations by or on behalf of charitable organizations. The Commission derives its authority in respect of unsolicited telecommunications from s. 41 of the *Telecommunications Act* (“the Act”),

S.C. 1993, c. 38, which provides that the Commission “may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.”

C. RELATED REGULATIONS

The Commission first approved certain restrictions on the use of automatic dialing-announcing devices (“ADADs”) for telephone solicitation in *Use of Automatic Dialing-Announcing Devices*, Telecom Decision CRTC 85-2, issued February 4, 1985. The Commission later set out the rules and conditions for unsolicited communications using voice or fax transmission in *Use of telephone company facilities for the provision of unsolicited telecommunications*, Telecom Decision CRTC 94-10, issued June 13, 1994, and Telecom Order CRTC 96-1229, issued November 7, 1996.

In Telecom Decision 94-10, the Commission determined that the restrictions on ADADs use had not been an effective means of preventing undue inconvenience and nuisance to consumers, and found that it was in the public interest to prohibit the use of ADADs to make unsolicited calls for solicitation of money or money’s worth. Decision 2004-35 also imposed a number of restrictions on unsolicited live voice and fax calls, including the requirement for telemarketers to maintain company-specific do not call lists. The Commission also established specific enforcement procedures whereby might be disconnected by the telephone company for a violation of the conditions of service.

In Order 96-1229, the Commission added further restrictions to unsolicited fax transmissions for solicitation. These included restrictions on hours during which such faxes could be sent and confirmation of the seven day period within which a fax broadcaster must add a consumer to its do not call list.

In *Local Competition*, Telecom Decision CRTC 97-8, issued May 1, 1997, the Commission extended the telemarketing rules and conditions to the competitive local exchange carriers (“CLECs”) operating in the territories of those incumbent local exchange carriers (“ILECs”) to whom the rules applied. In *Telemarketing restrictions extended to all telecom service providers*, Telecom Decision CRTC 2001-193, the Commission extended the rules to all ILECs, including independent telephone companies, all CLECs, interexchange

carriers (“IXCs”), wireless service providers (“WSPs”) and resellers of telecommunications services provided by the above companies and their customers.

D. CHANGES TO CURRENT RULES

As noted above, the Commission has, prior to Decision 2004-35, established restrictions on unsolicited live voice and fax calls for solicitation which include, but are not confined to, requirements for self-identification, restrictions on hours for fax calls, compulsory provisions for de-listing recipients who so request, prohibitions against sequential dialing and prohibitions against calls to emergency lines or healthcare facility lines.

These restrictions apply only to unsolicited calls made for the purpose of solicitation. They do not apply to unsolicited live voice and fax calls that do not solicit, including calls for emergency purposes, account collection and market and survey research. In Decision 2004-35, the Commission made the following changes to the regulations:

1. Identification of Caller

In order to enable called parties to better identify the telemarketer placing a live voice call, the Commission requires that the caller identify both the person and the organization calling. If an agency is calling on behalf of a client, the caller is required to identify himself/herself, the name of the agency as well as the client for whom the call is placed. **This identification of the caller must be provided before any other communication and before asking for a specific individual.**

2. Provision of a toll-free telephone number, manned during business hours

The telemarketer must also provide a telephone number before any other communication and before asking for an individual. The Commission requires that the telephone number supplied must allow toll free access to the telemarketer for questions or comments about the call. The Commission also stipulates that the number provided must be manned during business hours with an after-hours interactive voice mail backup system.

3. Fax caller identification

In order to enable consumers to correctly identify the source of an unsolicited fax, the Commission requires that caller identification must be provided at the top of the first page of the fax in font size 12 or equally clear print that is at least as large. The identification must contain the caller's name, along with the name of any agency calling on behalf of the client, and must provide the originating date and time of the fax. The Commission also requires telemarketers to include a contact telephone and fax number on the front page of all unsolicited faxes. These numbers must provide toll free access and must be manned during business hours with an after-hours interactive voice mail backup, and they must also allow for the processing of do not call requests.

The Commission does not feel that a prohibition on unsolicited faxes is required at this time.

4. Maximum abandonment rate for PDDs

The Commission established a maximum abandonment rate for predictive dialing devices ("PDDs") at 5%, measured over a calendar month, to reduce the number of hang-ups and dead air calls that consumers experience. Telemarketers using PDDs must maintain records that provide clear evidence that they have complied with this rule.

The Commission also requires telecommunications service providers ("TSPs") to specifically monitor complaints regarding dead air and to report these to the Commission. The Commission will continue to monitor the number of complaints to determine if further consideration is required.

5. Explicit consent required before future solicitation is presumed to be acceptable

The Commission is of the view that explicit consent must be obtained before a future solicitation is presumed to be acceptable. The Commission considers that even when a consumer purchases a service or product from a company, or donates to a particular charity, there is no "implied consent" as a result of that purchase to receive future solicitations.

6. ADAD restrictions

Decision 2004-35 confirmed Decision 94-10, which determined that it was in the public interest to prohibit the use of ADADs to make unsolicited calls for the purpose of solicitation. The Commission also found that ADAD calls for the purpose of soliciting existing customers would not be permitted, and that it was not in the public interest to prohibit unsolicited ADAD calls where no attempt was made to solicit, such as calls for emergency purposes, to collect overdue accounts, for market or survey research, and to schedule appointments. The rules regarding the use of ADADs is as follows:

- The use of ADADs to make unsolicited calls for the purpose of solicitation is prohibited, including calls made on behalf of a charity;
- Weekday calling hours for permitted calls are from 9:30 a.m. to 8:00 p.m.; Saturdays from 10:30 a.m. to 5:00 p.m.; and Sundays from noon to 5:00 p.m.;
- Calls must begin by identifying the person or business on behalf of whom the call is made, including a mailing address and a toll-free telephone number. If the message exceeds 60 seconds, this information must be repeated at the end of the call;
- ADAD calls must display the originating calling number or an alternate number where they can be reached (except where number display is unavailable for technical reasons);
- Permitted unsolicited ADAD calls must not be placed to emergency lines or healthcare facilities;
- Sequential dialing is prohibited; and
- Equipment must disconnect within 10 seconds after the called party has hung up.

7. Do not call lists

Under existing regulations, all telemarketers must maintain a do not call list of consumers who have requested that they not be called again. The lists are to be maintained by the calling party and remain active for three years.

Effective October 1, 2004, all telemarketers must provide the requesting party with a **unique registration number** at the time of the request. This registration number will confirm receipt of the request and, if further calls are received, will serve as proof that the request was made. This requirement also applies to requests that are faxed to the telemarketer. The Commission further requires telemarketers to process do not call requests at the time of the call, rather than forcing

consumers to place another call. Names and numbers must be added within 7 days of the called party's request with respect to faxes, and within 30 days for telephone calls.

When an agency calling on behalf of clients receives a do not call request during a call, it must ask the requesting party if the name and number should be removed from only the client's list, only the agency's list or both.

8. National do not call list

While the Commission saw considerable merit in the establishment of a national do not call list, the Commission considered that implementing a national list without appropriate start-up funding and without effective enforcement powers would be counter productive.

E. LACK OF EFFECTIVE ENFORCEMENT MEASURES

Despite well-established restrictions on and requirements for telemarketers in a series of decisions, the Commission lacks effective enforcement measures that would increase the effectiveness of existing rules. The Commission heard arguments that certain telemarketers viewed the possible disconnection penalty as an acceptable cost of doing business and not as a deterrent. Further, the disconnection sanction is rarely employed against telemarketers even when complaints indicate a breach of the rules. The Commission recognizes that telemarketers are often very large customers of the carriers and those TSPs are often telemarketers themselves.

The Commission does not currently have the authority to impose fines pursuant to the statutes that empower it. It was noted that the power to impose administrative monetary penalties ("AMPs") would provide a flexible, timely and cost-effective response to violations that do not warrant criminal prosecutions or other costly and lengthy procedures. Accordingly, the Commission was of the opinion that appropriate legislative changes are required in order to undertake suitable enforcement of the rights of both consumers and telemarketers.

F. CONCLUSION

The changes implemented by Telecom Decision CRTC 2004-35 will have a significant impact on the operation of fundraising activities by charitable organizations. The new rules apply without exception or exemptions for volunteers, existing or past donors, or individuals with a previous relationship with the charity. Although the Commission currently lacks effective enforcement mechanisms, charities and their boards of directors should review and implement the new rules to avoid possible suspension or disconnection of telecommunications service by their TSP.



CARTER & ASSOCIATES
PROFESSIONAL CORPORATION
Barristers, Solicitors & Trade-mark Agents
Affiliated with Fasken Martineau DuMoulin LLP
Avocats et agents de marques de commerce
Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux
Orangeville (519) 942-0001
Ottawa (613) 235-4774
Toll Free: 1-877-942-0001
www.carters.ca

By Appointment / Par rendez-vous
Toronto (416) 675-3766
London (519) 937-2333
Vancouver (877) 942-0001
www.charitylaw.ca

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carter & Associates. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish the solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2005 Carter & Associates