

NATIONAL DO NOT CALL LIST : IMPACT ON CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

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A. INTRODUCTION

On December 13, 2004 the federal Minister of Industry, the Honourable David L. Emerson, introduced *An Act to Amend the Telecommunications Act* (“Bill C-37” or the “Act”)¹ which, if passed, would have the effect of establishing a national Do Not Call List. This legislation would also give new powers to the Canadian Radio-television and Telecommunications Commission (“CRTC”) to impose penalties on telemarketers who did not respect the list. This proposed list would be funded by the telemarketers themselves on a cost-recovery basis. In the event that Bill C-37 becomes law, the CRTC will entertain a consultation process and ask the Canadian public for their input about how to implement this new legislation. The purpose of this *Charity Law Bulletin* (“Bulletin”) is to explore these proposed amendments to the *Telecommunications Act* and their possible impact on charities and not-for-profit organizations that engage in telemarketing.

¹ Bill C-37, *An Act to Amend the Telecommunications Act*, 1st Sess., 38th Parl., 2004 (1st reading in the House of Commons December 13, 2004) available at http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-37/C-37_1/C-37_cover-e.html.

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B. BACKGROUND

A previous Bulletin entitled “New Telemarketing Rules Will Have Onerous Impact on Charities”² described new rules for telemarketing that were introduced by the CRTC in June 2004 by virtue of Telecom Decision CRTC 2004-35. On September 28, 2004 most of these new rules were stayed as a result of Telecom Decision CRTC 2004-63, which resulted from an application made by the Canadian Marketing Association (the “CMA”) and other interested parties. Consequently, the CRTC reverted back to operating under the telemarketing rules which existed prior to Decision 2004-035, with the exception that Telephone Service Providers (“TSP”s) are still required to file semi-annual telemarketing statistics as required by paragraphs 118 to 123 of the otherwise stayed decision.

The current telemarketing rules are summarized at the end of Telecom Decision 2004-63 and include the following:³

Faxes

- Calling hours are restricted to weekdays between 9AM and 9:30PM and
- weekends between 10AM and 6PM. Restrictions refer to the time zone of the called party.
- Must identify the person or organization on behalf of whom the fax/call is made, including the telephone number, fax number and name and address of a responsible person to whom the called party can write. This rule also applies to organizations sending unsolicited fax calls on behalf of another organization.
- Must display the originating calling number or an alternate number where the call originator can be reached (except where number display is unavailable for technical reasons).
- Sequential dialing is not permitted.
- Fax calls are not permitted to emergency line or healthcare facilities.
- Names and numbers must be removed within 7 days of the called party’s request.

² Terrance S. Carter. “New Telemarketing Rules Will Have Onerous Impact on Charities.” *Charity Law Bulletin No. 46* (June 30, 2004). www.carters.ca.

³ The telemarketing rules that apply are derived from Telecom Decision CRTC 94-10, Telecom Order CRTC 96-1229, Telecom Decision CRTC 97-8 and Order CRTC 2001—193, as summarized in the Appendix to Telecom Decision CRTC 2004-63 available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2004/dt2004-63.htm>.

- DO NOT CALL lists are to be maintained by the calling party and remain active for three years.

Telephone Calls:

- Callers must identify the person or organization they represent.
- Upon request, callers must provide the telephone number, name and address of a responsible person the called party can write to.
- Callers must display the originating calling number or an alternate number where the caller can be reached (except where the number display is unavailable for technical reasons).
- Names and numbers of called parties must be removed within 30 days of the called party's request.
- DO NOT CALL lists are to be maintained by the calling party and remain active for three years.
- There are no calling hour restrictions on live voice calls.
- Sequential dialing is not permitted.
- Calls are not permitted to emergency line or healthcare facilities.
- Random dialing and calls to non-published numbers are allowed.⁴

C. BILL C-37

The primary purpose of "Bill C-37" is to give the CRTC the powers it needs to establish a national Do Not Call List and to penalize telemarketers who do not comply with the prohibitions and requirements that the Commission establishes under the legislation. This proposed legislation would allow the CRTC to create and administer a Do Not Call List database, to conduct investigations into alleged infringements of the telemarketing regulations, and to impose fines of up to \$1,500 on individuals and up to \$15,000 on corporations who infringe the telemarketing rules. Organizations would be liable for any violation of the rules committed by an "employee, or an agent or mandatary, of the person action in the course of the employee's employment or the scope of the agent's or mandatary's authority."⁵ One violation will be counted for each day an infringement of the rules is committed.⁶

By virtue of section 72.1 of the proposed legislation, a defence of "due diligence" and other applicable common law defences would be available in relation to an alleged violation of the telemarketing requirements.

⁴ CRTC Fact Sheet "Telemarketing" available at www.crtc.gc.ca/eng/INFO_SHT/t1022.htm.

⁵ *Supra* note 1, at s.72.02

⁶ *Supra* note 1, at s. 72.03

There is a two year limitation period set out in subsection 72.12(1) with respect to any proceedings in respect of a violation. There is a five year limitation period with respect to any proceedings to collect fines payable because of an infringement of the Act.⁷ The proposed legislation provides that, “the Commission may make public the nature of a violation, the name of the person who committed it, and the amount of the administrative monetary penalty.”⁸ If a person or organization charged with an offence under this Act pays the fine, they will be considered to have committed the violation and all proceedings in respect of it will cease.⁹

D. CONSIDERATIONS FOR CHARITIES

In Telecom Decision CRTC 2004-63, wherein the CRTC stayed the new telemarketing rules, it was agreed that,

a number of smaller businesses and not-for-profit organizations that rely heavily on telephone solicitation in order to sell products and services or to obtain donations and funding may have to abandon the use of telecommunications for this purpose if forced to implement these new measures.¹⁰

The CRTC also agreed with the suggestion made by the CMA that it would make more sense to set up a national Do Not Call List but noted that,

It would be counter-productive to establish such a list without appropriate start-up funding and without an effective fining power for enforcement, such as the power to impose AMPs, [Administrative Monetary Penalties] which is not available to the Commission under current legislation.¹¹

Most interested parties agree that a national Do Not Call List established under Bill C-37 would be much more practical than the requirements which would have been imposed on telemarketers by virtue of the regulations that were stayed in December 2004, and much less expensive to administer.

⁷ *Supra* note 1, at s.72.09(2)

⁸ *Supra* note 1, at s.72.13

⁹ *Supra* note 1, at s.72.08

¹⁰ Telecom Decision CRTC 2004-63 at para 13, available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2004/dt2004-63.htm>.

¹¹ *Ibid* at para.51.

A survey performed by Environics in December of 2003 reported that 66 per cent of Canadians would place their name on the national Do Not Call List if it existed. This survey also reported that telemarketing calls are almost twice as likely to come from charities (44%) as they are from the private sector (27%).¹² If these results are correct, the establishment of a national Do Not Call List could have the effect of greatly limiting the number of people charities are allowed to call to solicit donations, thereby limiting the amount of donations which they receive.

The CRTC promises to consult Canadians about the implementation of the national Do Not Call List if, and when, Bill C-37 is enacted. One of the main issues at this point will be whether or not certain organizations should be exempted from a Do Not Call List. It would be wise for charities and not for profit organizations relying heavily on telemarketing for the solicitation of donations to take an active part in the consulting process and to suggest to the CRTC that they should be exempt from the Do Not Call List. As is evidenced by CMA's success in convincing the CRTC to stay the previous amendments to the telemarketing rules, it may be possible for interested parties to influence the way in which the CRTC will implement the national Do Not Call List.

¹² Environics Survey Results on Telemarketing (Survey December 2003/ Results January 2004) can be found at www.ic.gc.ca.