

## **CHARITIES, TELEMARKETING AND THE NATIONAL DO NOT CALL LIST: AN UPDATE ON RECENT CRTC CHANGES**

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### **A. INTRODUCTION**

On July 3, 2007 the Canadian Radio-Television and Telecommunications Commission (“CRTC”) released Telecom Decision CRTC 2007-48 (“Decision 2007-48”). This *Charity Law Bulletin* (“Bulletin”) summarizes aspects of that decision that are relevant to charities and provides an update to *Charity Law Bulletin No. 46*, posted in June 2004, which provided an overview of the details of Telecom Decision CRTC 2004-35 (“Decision 2004-35”), that originally introduced the telemarketing rules.

### **B. BACKGROUND**

Decision 2004-35, released in May 2004, established restrictions on unsolicited live voice and fax calls made for the purpose of solicitation, including requirements of self-identification, restrictions on the hours for fax calls, compulsory provisions for delisting recipients, prohibitions against sequential dialling and prohibitions on calls to emergency lines and healthcare facilities. The application of these restrictions made no exception for charitable organizations. Decision 2004-35 also discussed the potential for a National Do Not Call List (“DNC list”), but the potential for this was dismissed because there was no legislative basis for the CRTC to have any capacity for its enforcement.

Decision 2004-35 was stayed by the CRTC in September, 2004, following an application by the Canadian Marketing Association (“CMA”) for the decision’s review and variance. All of the restrictions in Decision 2004-35 were stayed except for the requirement that telecommunications service providers track and report their complaint statistics. That requirement became effective on January 1, 2005.

CMA’s application was later accompanied by the application of three other organizations, each requesting that Decision 2004-35 be stayed, reviewed, rescinded, and/or varied. One of the additional applicants was the Association of Fundraising Professionals (“AFP”). AFP is an organization of professional fundraisers who raise funds on behalf of a wide variety of charities. AFP raised several specific concerns about the burdensome impact that the restrictions in Decision 2004-35 could have on charitable organizations.

In their submissions, AFP requested that the CRTC vary Decision 2004-35 by exempting charitable organizations from the telemarketing restrictions and rules,<sup>1</sup> submitting that Decision 2004-35 failed to strike a reasonable balance between the charitable sector’s need to raise funds efficiently and the public’s need to be free from undue intrusiveness. AFP suggested that Decision 2004-35 would prove extremely burdensome to many charities, resulting in a significant loss of organizational capacity and funding.<sup>2</sup> Noting that charitable organizations are in a unique position, AFP suggested that there is a manifest difference between a charity contacting a potential donor for a contribution and a for-profit corporation contacting a potential buyer for a product.<sup>3</sup>

In November 2005, Bill C-37, *An Act to amend the Telecommunications Act*<sup>4</sup> received Royal Assent. This Act came into force in June of 2006 and amended the *Telecommunications Act*<sup>5</sup> (the “Act”), granting the CRTC the necessary powers to establish and enforce a DNC list, and also providing an exemption for charitable organizations registered under s. 248 (1) of the *Income Tax Act* from the DNC list requirements.

In February 2006, before the legislative amendments to the Act came into force, the CRTC released Telecom Public Notice CRTC 2006-4 (“Notice 2006-4”). Notice 2006-4 initiated a public proceeding and

<sup>1</sup> See Application for the Association of Fundraising Professionals to Review and Vary Telecom Decision CRTC 2004-35, ¶ 13 at [http://www.crtc.gc.ca/PartVII/eng/2004/8662/a84\\_200410035.htm](http://www.crtc.gc.ca/PartVII/eng/2004/8662/a84_200410035.htm).

<sup>2</sup> *Ibid* at ¶ 12.

<sup>3</sup> *Ibid* at ¶ 47.

<sup>4</sup> S.C. 2005, c. 50.

<sup>5</sup> S.C. 1993, c. 38.

consultation regarding the DNC list, the telemarketing rules and the disposition of the review of Decision 2004-35. Decision 2007-48, which was released in July 2007, represents a response to the CRTC's consultation and review.

### **C. DECISION 2007-48**

There are three primary issues the CRTC focused their attention towards in Decision 2007-48. The first issue was the establishment of a DNC list. The second issue was possible reforms to the telemarketing rules originally outlined in Decision 2004-35 and various other regulations. The third issue was the need for an investigation of complaints process for the violation of both the DNC list and the telemarketing rules. The following overview briefly outlines several of the changes outlined in Decision 2007-48.

#### **1. The establishment of a National Do Not Call List**

For telemarketers in general, the most relevant portion of Decision 2007-48 was the establishment of rules and guidelines for a DNC list. The purpose of this list is “to provide consumers with an effective and efficient means of preventing unwanted telemarketing telecommunications from as many telemarketers or clients of telemarketers as possible.”<sup>6</sup> The rules and guidelines for the DNC list outlined in Decision 2007-48 have the potential to severely restrict the current abilities of telemarketers throughout Canada.

In accordance with Parliament's amendments to the Act, the CRTC chose to extend charitable organizations registered under s. 248 (1) of the *Income Tax Act* an exemption to the rules of the DNC list. A registered charity will not be required to subscribe to the DNC list, nor can they be found to have violated the DNC list rules or guidelines. This exemption does not extend to non-registered charities or the non-registered affiliates of registered charities. Any charitable organization or organization affiliated with a charity that is not registered under the *Income Tax Act* must subscribe to the DNC list and abide by its rules and guidelines.

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<sup>6</sup> Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 2007-48: Unsolicited Telecommunications Rules framework and the National Do Not Call List (July, 2007) at ¶ 140.

Under Decision 2007-48, the DNC list allows consumers who prefer not to receive unsolicited calls to register their home telephone, wireless telephone, or fax number for a period of three years. During the time their number is registered, telemarketers will be prohibited from using it for telemarketing save and except for a 31 day grace period beginning on the day that the consumer registers their number.

Once the CRTC has selected an independent operator for the DNC list and taken necessary steps for the list to be in operation, all non exempt telemarketers and clients of telemarketers must subscribe to the DNC list and pay the requisite subscription fee prior to initiating any telemarketing telecommunication. Complaints and violations will be handled by the DNC list operator and *prima facie* violations will be referred to the CRTC for the issuance of violation notices.

## 2. Telemarketing rules

In Decision 2007-48, the CRTC assessed the appropriateness of each of the telemarketing rules introduced in Decision 2004-35. This assessment was done in light of the introduction of a DNC list and the newly assigned powers of the CRTC, as well as submissions made pursuant to the review of Decision 2004-35.

Within the applications to review and vary Decision 2004-35, several organizations submitted that certain parties, including charities registered under the *Income Tax Act*, who enjoyed an exemption from the DNC list rules and guidelines should also be exempt from telemarketing rules. CRTC refused to accept these submissions. They specifically noted that their definition of solicitation has always included charities that solicit for cash donations, donations of goods and volunteer time. Although fundraising falls under provincial jurisdiction, telecommunications falls under federal jurisdiction and is governed by the CRTC. The CRTC supports the conclusion that “consumers do not consider telemarketing made by or on behalf of charities to cause any less undue inconvenience and nuisance, or to be less of an invasion of privacy, than telemarketing made by or on behalf of for-profit organizations.”<sup>7</sup>

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<sup>7</sup> *Supra* note 6 at ¶ 423.

The telemarketing rules considered in Decision 2007-48, and those outlined below, apply to registered and non-registered charitable organizations in equal application to all other entities that conduct telemarketing.

a) Individual Do Not Call Lists

In reference to the do not call lists of individual telemarketers and their clients, the CRTC recognized that while most consumers who do not wish to receive calls will register for the DNC list, consumers should still be provided the option of limiting only specific telemarketers from using their number. The CRTC also confirmed that amendments to the Act require organizations exempt from the DNC list, such as registered charities, to continue to maintain their own lists and honour consumer requests not to be called.<sup>8</sup>

No changes were made to the requirement that requests to be put on do not call lists should be processed immediately.<sup>9</sup> With regard to the length and date of registration on these lists, the CRTC determined that individual lists should have the same 31 day grace period provided for the DNC list and should similarly maintain the registration for a period of 3 years.<sup>10</sup>

The CRTC removed the requirement that a unique registration number should be provided to consumers at the time they request to be added to an individual do not call list. Telemarketers are required, however, to provide a toll-free number that consumers can call to verify their registration on that telemarketer's individual do not call list.<sup>11</sup>

b) Caller Identification Requirements

The caller identification requirements that were part of Decision 2004-35 received a great deal of attention in the applications for variance. These requirements created an obligation on telemarketers to immediately inform the consumer of certain information at the beginning of a call. In reference to charities, AFP specifically raised the importance for charities to be able to identify their purpose in the first few seconds of a call. Another organization suggested that the costs of the caller

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<sup>8</sup> *Ibid* at ¶ 250.

<sup>9</sup> *Ibid* at ¶ 254.

<sup>10</sup> *Ibid* at ¶ 258 and ¶ 260.

<sup>11</sup> *Ibid* at ¶ 276.

identification requirements could result in such a loss of revenue that not-for-profit organizations would be at risk of closing their operations simply by implementing the procedure.<sup>12</sup>

The CRTC removed the requirement that a toll free number manned during business hours must always be provided to the consumer at the beginning of a call. It was held instead that a contact number must be provided but only when it has been requested. They further indicated that the purpose of that number must be for contacting an employee or representative of the telemarketer to ask questions and make comments about the telemarketing communication. This number must be either local or toll-free.<sup>13</sup> Although the decision removed the requirement for a live operator, the number must be answered with a voicemail system informing the consumer that his or her telephone call will be returned within three business days. The telemarketer must ensure that the consumer does not encounter a full mailbox.

The CRTC varied the requirement that the telemarketer must immediately provide identification information before any other communication and before asking for the desired individual. This was replaced with the requirement that identification information be provided only after the telemarketer has reached the intended recipient of the telecommunication.<sup>14</sup>

The requirement that telemarketers provide the name of the representative making the telecommunication, the name of the telemarketer for which the representative is making the telecommunication and, if applicable, the name of the client of the telemarketer on behalf of which the telecommunication is being made was maintained.<sup>15</sup> Telemarketers will also have to provide their name and address to a consumer wishing to write down their concerns or complaints. Further, the CRTC maintained the requirement that telemarketing by fax must identify the telemarketer and client of the telemarketer and include a voice and fax number and name of the person responsible for sending the telecommunication in 12 font at the top of the page along with the originating date and time of the fax.<sup>16</sup>

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<sup>12</sup> *Supra* note 6 at ¶ 281-283.

<sup>13</sup> *Ibid* at ¶ 303.

<sup>14</sup> *Ibid* at ¶ 298.

<sup>15</sup> *Ibid* at ¶ 312.

<sup>16</sup> *Ibid* at ¶320

Finally, utilization of call number display of the originating telemarketing telecommunications number or an alternative number where the telemarketer can be reached remains a requirement.<sup>17</sup>

c) Predictive Dialling Devices

The CRTC made no changes to the regulations surrounding the restrictions on predictive dialling devices that were found in Decision 2004-35. The CRTC did, however, develop clear definitions for “predictive dialling devices”, “abandoned call” and “abandonment rate”. Predictive dialling devices include any device, system, or computerized software that automatically dials telecommunications numbers. An abandoned call is one placed by a predictive dialling device to which, when answered by the consumer there is no live telemarketer available to speak within two seconds, and the abandonment rate means the percentage of telecommunications placed by a predictive dialling device which are abandoned calls.<sup>18</sup>

3. Investigation of Complaints for Violation of Unsolicited Telecommunications Rules

The DNC list rules and guidelines together with the telemarketing rules constitute the unsolicited telecommunications rules. Guidelines for handling consumer complaints about the violation of the unsolicited telecommunications rules were outlined in Decision 2007-48 after being made possible by the legislative amendments to the Act that came into force in 2006. The chosen DNC list operator will manage the actual filing of complaints. However, the CRTC will maintain the role of investigator and the issuer of notices of violation in monetary penalties.<sup>19</sup>

When a complaint has been filed, the CRTC will investigate that complaint to determine whether a violation of the rules has occurred. If a violation is found, the CRTC can determine whether they will issue a notice of violation and/or impose an administrative monetary penalty that can range from \$1,500-\$15,000 per violation.<sup>20</sup>

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<sup>17</sup> *Supra* note 6 at ¶ 327.

<sup>18</sup> *Ibid* at ¶ 371.

<sup>19</sup> *Ibid* at ¶ 497.

<sup>20</sup> *Ibid* at ¶ 517.

In making their determination, the CRTC will look to the nature of the violation, the frequency of complaints and violations, the relative disincentive of a monetary penalty and the potential for future violation.

#### **D. CONCLUDING COMMENTS**

The denial of an exemption to the telemarketing rules for charitable organizations that solicit donations is an obvious disappointment to the charitable sector. Because of this, charitable organizations must remain aware of the various rules in Decisions 2005-35 and 2007-48. Specifically, these organizations must ensure that they maintain their own do not call list in the manner proscribed by the CRTC.

The CRTC confirmed the exemption of charitable organizations from the DNC list rules as it was provided for when Parliament amended the Act. The DNC list has the potential to cause a tremendous adjustment for the telemarketing industry in general. This exemption for registered charities means far less of an adjustment for charitable organizations, as well as a greater degree of potential for the solicitation of donations.

None of the changes implemented by decision 2007-48, including the telemarketing rules, will be enforced until such a time as the DNC list is established. In anticipation of this occurrence, charities and their board of directors should review and implement the rules to avoid the possibility of a consumer filing a complaint of violation leading to a notice of violation or a monetary penalty.

Decisions 2004-35 and 2007-48 can be viewed at: <http://www.crtc.gc.ca/eng/welcome.htm>.