

THE APPLICATION OF THE *COMPETITION ACT* TO FUNDRAISING BY CHARITIES AND NOT-FOR- PROFIT ORGANIZATIONS

*By Terrance S. Carter**

A. INTRODUCTION¹

Fundraising, by necessity, is occupying a greater role for charities in recent years, due to a combination of government cutbacks in support for charities, competition amongst charities for available donations, and an increased demand for services being placed upon charities by the public. Budgetary pressures and time constraints may preclude a charity from properly evaluating the legal consequences of the various fundraising programs it undertakes, but the risks associated with improper fundraising programs can, however, easily negate any benefit that is realized.

This Bulletin focuses on one particular area of liability for charities and not-for-profits in the sphere of fundraising, which is the application of the federal *Competition Act*.² The 1999 amendments to the *Competition Act* created increased exposure to liability for charities and not-for-profits that are involved in fundraising programs. Accordingly, charities and not-for-profits must be careful not to embark on a fundraising campaign before considering their responsibilities under the *Competition Act*.

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¹ This Bulletin is based in part on a paper by Terrance S. Carter, "Looking a Gift Horse in the Mouth: Avoiding Liability in Charitable Fundraising" (April 16, 2004; revised November 9, 2004) at 119-124, online:

<http://www.carters.ca/pub/article/charity/2004/tsc0416.pdf>.

² R.S.C. 1985, c. C-34.

B. RELEVANT SECTIONS OF THE *COMPETITION ACT*

The *Competition Act* is a federal act and applies throughout Canada, with a purpose to maintain and encourage competition throughout Canada.³ It contains both criminal and civil provisions. If a charity or a not-for-profit organization contravenes the provisions of the *Competition Act*, the Commissioner of Competition may initiate an inquiry into whether the conduct is reviewable, and if so, both the organization and the individuals in the organization may be held liable.

There are several provisions that have important application to charities and not-for-profit organization in relation to telemarketing and internet fundraising, as well as door to door and other forms of fundraising solicitation. In particular, the amendments to the *Competition Act* in 1999 created liability for fundraisers, as well as charities, their boards of directors, and their officers if the fundraising activities of the charity violate the legislation. The amendments that have direct impact upon fundraising practices are summarized below.

First, the definition of “business” under section 2(1) of the *Competition Act* now specifically includes “the raising of funds for charitable or other non-profit purposes.” This definition has brought in both charitable and not-for-profit organizations, as well as their officers, directors, agents, and any professional fundraisers on behalf of the organization.⁴ The Competition Bureau has stated that “this amendment clarifies that persons engaged in fundraising efforts will be covered by the deceptive telemarketing and deceptive marketing practices provisions.”⁵

Section 52(1) of the *Competition Act* discusses false or misleading representations, and states that “no person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.” Contravening this section constitutes a criminal offence that could include fines at the discretion of the court and/or imprisonment for a maximum of 14 years.⁶

³ Donald J. Bourgeois, *Charities and Not-For-Profit Fundraising Handbook*, 2nd ed. (Markham: LexisNexis, 2006) at 108.

⁴ *Ibid.* at 109.

⁵ Competition Bureau Canada, “Improvements to the *Competition Act*...Deceptive Telemarketing” (March 18, 1999), online: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/00836.html>.

⁶ *Competition Act*, *supra* note 2, s. 52(5).

Section 52.1(2) focuses on disclosure, prohibiting anyone from being involved in telemarketing unless there has been disclosure:

...in a fair and reasonable manner at the beginning of each telephone communication, of the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of that communication...[as well as] disclosure...in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and...in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed in the regulations.

Other important provisions in the *Competition Act* relate to deceptive telemarketing. Section 52.1(3) states that no person who engages in telemarketing shall:

- (a) make a representation that is false or misleading in a material respect;
- (b) conduct or purpose to conduct a contest, lottery or game of chance, skill or mixed chance and skill, where
 - (i) the delivery of a prize or other benefit to a participant in the contest, lottery or game is, or is represented to be, conditional on the prior payment of any amount by the participant, or
 - (ii) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person's knowledge, that affects materially the chances of winning;
- (c) offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or
- (d) offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

A violation of the disclosure requirements in section 52.1(2) or the deceptive telemarketing provisions in section 52.1(3) constitutes a criminal offence, with punishment that may include fines at the discretion of the court, and/or imprisonment for up to 14 years.⁷ If the corporation commits an offence, the officers and directors who were in a position to direct or influence the policies of the organization are parties to and guilty of the offence.⁸ If the offence is committed by an employee or agent of the corporation (whether or not

⁷ *Ibid.*, s. 52.1(9).

⁸ *Ibid.*, s. 52.1(8).

the employee or agent is identified), that is sufficient proof that it was committed by the corporation, unless the corporation can establish that it exercised due diligence to prevent the commission of the offence.⁹

The *Competition Act* also discusses deceptive marketing practices, stating that “reviewable conduct” occurs when the person or organization, for the purpose of promoting the supply or use of a product, or for the purpose of promoting a business interest:

- (a) makes a representation to the public that is false or misleading in a material respect;
- (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
- (c) makes a representation to the public in a form that purports to be
 - (i) a warranty or guarantee of a product, or
 - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.¹⁰

The possibility that directors and officers of a charity or not-for-profit organization may be personally liable for criminal prosecution from deceptive telemarketing, or false or misleading representations, will necessitate that the board of a charity, as well as its officers and senior management, become actively involved in reviewing and approving procedures involved in telemarketing, and thereafter to regularly ensure that those procedures are being carefully followed.

C. RECOMMENDATIONS FOR AVOIDING LIABILITY UNDER THE *COMPETITION ACT*

In light of the increased exposure to liability for charities, not-for-profits, and individuals under the new provisions of the *Competition Act*, it is essential that preventative steps be implemented to reduce the exposure as much as possible. In this regard, section 74.1(5) confirms that, where an administrative penalty is possible, there are both mitigating and aggravating factors. If, for example, the offending organization can demonstrate a history of compliance with the *Competition Act*, it is possible that the penalties may be reduced or waived altogether. Having and adhering to a fundraising policy may also assist in lessening the amount of any administrative monetary penalty, as it will, if properly drafted and implemented, demonstrate an organization’s commitment to operating in compliance with applicable legislation. As a result, it is

⁹ *Ibid.*, s. 52.1(7).

¹⁰ *Ibid.*, s. 74.01(1).

essential for charities and not-for-profits to adopt fundraising practice to guard against improper telemarketing and misrepresentation in fundraising.

A few recommendations for charities and not-for-profit organizations are as follows:

1. Ensure that the fundraising materials (including scripts) accurately describe the charity, its activities, and the purposes for which those donations will be used.
2. Consider providing written instructions to telephone solicitors, as well as door to door canvassers advising them that any misrepresentation could result in a severe penalty for them personally as for the charity that they are acting on behalf of.
3. Ensure that the telephone fundraising scripts used by employees, volunteers and contract fundraisers disclose at the outset both the identity of the organization and the purpose for the call.
4. Ensure that the contract with telephone solicitors includes a provision requiring adherence to the disclosure and misrepresentation provisions of the *Competition Act*.
5. Ensure that any promotional materials concerning lotteries or contests include the required disclosures, such as the number and value of the prizes and any available information that materially affects the chances of “winning.” Winners should be chosen either randomly or on the basis of their skill, and the organization must ensure that the prizes are distributed properly.
6. Advise the governing board of the charity or not-for-profit concerning the measures that have been taken and the procedures that are in place to ensure compliance with the provisions of the *Competition Act*.
7. Have the board of the charity or not-for-profit organization adopt a policy committing the organization, its directors, officers, employees, and volunteers to, at all times, avoid making

“false or misleading representations” on behalf of the organization. Then ensure that such policy is provided to everyone in the organization, including volunteers as well as employees.¹¹

8. Finally, it is possible to obtain an opinion from the Competition Bureau on whether a proposed fundraising program is in compliance with the *Competition Act*. The Competition Bureau facilitates compliance with the law by providing written opinions in return for a monetary fee. The Competition Bureau’s website encourages company officials, lawyers, and others to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the *Competition Act*. These written opinions are binding on the Commissioner of Competition when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Competition Bureau.¹²

¹¹ For another author’s discussion of how to avoid liability under the *Competition Act*, see Bourgeois, *supra* note 3 at 108-113.

¹² Competition Bureau, “What You Should Know About Telemarketing” (February 11, 2003), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01228.html>. For an example of a written opinion, see Competition Bureau, “Promotional Contest – Charitable Sweepstakes” (August 20, 2004), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00848.html>.

D. CONCLUSION

In consideration of the heightened public anxiety that has resulted from frequent telemarketing scams, it is likely that the Competition Bureau will be under pressure to be diligent in enforcing compliance with the provisions of the *Competition Act*. In this regard, the Competition Bureau is now able to apply for judicial authorization to intercept private communications, without the consent of either party to a telephone call (ie. a wire tap), to investigate more serious cases.¹³

The amendments to the *Competition Act* in 1999 that many charities and not-for-profits are still not aware of constitute a substantive change in the law with regard to fundraising across Canada, as charities and not-for-profit organizations are no longer exempt from the application of the Act. These organizations and their legal counsel will therefore need to carefully study the Act when considering implementing a fundraising program, given the substantive penalties that may result and even the possibility of criminal charges being laid.

¹³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 183(c). See also W. Laird Hunter, "Can I Take a Few Minutes of Your Time?" in *Not-For-Profit News* (April 1999) 26 at 27.