

September, 2017

**An Update on Canada's Telemarketing and  
Do Not Call List Requirements**

Compliance with *Canada's Anti-Spam Legislation* ("CASL") may have caused many businesses to pay less attention to compliance requirements for telemarketing, including the National Do Not Call ("DNC") List. The DNC regime is administered by the Canadian Radio-television and Telecommunications Commission ("CRTC") under the federal *Telecommunications Act*. Additional requirements relating to false or misleading representations and deceptive telemarketing are administered by the Competition Bureau under the *Competition Act*. Enforcement activities and court proceedings illustrate the importance of telemarketing compliance for businesses that conduct their own telemarketing as well as for those that outsource telemarketing.

**CRTC Enforcement Actions, 2016-2017**

Recent cases identify some of the CRTC's primary concerns and illustrate its investigative and settlement procedures.

In June, 2016, the CRTC reported on \$1.23 million in settlement payments for making non-compliant telemarketing calls, by six Canadian companies, some of whom had used third-party call centres.<sup>1</sup> These cases illustrate the legal requirement for businesses to remain responsible for compliance when they outsource their telemarketing to service providers, even where the service provider is not based in Canada. Contraventions included service providers failing to subscribe to the national DNC List; failing to verify the client's DNC subscriptions and registrations, and making telemarketing calls outside of designated calling hours. In addition to paying the applicable settlement amounts, the

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<sup>1</sup> CRTC June 29, 2016 news release: <https://www.canada.ca/en/radio-television-telecommunications/news/2016/06/six-companies-pay-1-23-million-for-making-telemarketing-calls-to-canadians.html>

two client companies and the four call centres agreed to implement compliance programs to avoid future violations.

### Home-Services Telemarketing

Several of the CRTC's investigations have involved the home-services sector. Based on consumer complaints,<sup>2</sup> the CRTC investigated Toronto Breeze Air Duct Cleaning Services and determined that unsolicited telemarketing calls had been made to numbers registered with the National DNC List. Toronto Breeze had not subscribed to the National DNC List or registered with the National DNCL operator. CRTC investigators met with a company director in December, 2013 to advise him of the company's obligations, including vicarious liability for telemarketing calls made on behalf of Toronto Breeze by third-party telemarketers. The contraventions continued and a notice of violation was issued in February, 2015. In its March 8, 2016 decision, the CRTC imposed administrative monetary penalties ("AMPs") of \$39,000 on Toronto Breeze, which did not appeal the decision.

In the case of Ali Tariq and Aqua Duct Cleaning Services,<sup>3</sup> allegations were also made of unsolicited telemarketing calls being made to numbers on the National DNC List. The individual and company involved had not subscribed to the National DNC List or registered with the National DNC List operator. However, Mr. Tariq denied direct knowledge of Aqua Duct and its telemarketing activities. (He did acknowledge operating Toronto Breeze, and so was liable for the finding noted above.) Reviewing the investigation report, the CRTC determined that a sufficient link to Mr. Tariq had not been determined. Accordingly, no AMP or other penalty was imposed for this case.

In October, 2016,<sup>4</sup> the CRTC reported that six home-improvement companies had received Notices of Violation and been assessed penalties totalling \$420,000 for making non-compliant telemarketing calls. The violations were for calling Canadians whose

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<sup>2</sup> For the CRTC's March 8 2016 Toronto Breeze decision see: <http://www.crtc.gc.ca/eng/archive/2016/2016-88.htm>

<sup>3</sup> The CRTC's March 8, 2016 Aqua Duct decision: <http://www.crtc.gc.ca/eng/archive/2016/2016-89.htm>.

<sup>4</sup> October 4, 2016 <https://www.canada.ca/en/radio-television-telecommunications/news/2016/10/complaints-canadians-telemarketing-calls-lead-420-000-penalties-six-home-improvement-companies.html>

numbers were registered on the National DNC List, failing to register with or subscribe to the List, using inaccurate versions of the List, and making calls during restricted hours.

The same month,<sup>5</sup> the Commission determined that Robert Gendron, carrying on business as Dynique Restoration and Victorian Restoration, had violated the Unsolicited Telecommunications Rules by making telemarketing calls to numbers that were registered on the National DNC List; failing to subscribe to the national DNC List; and failing to register with the DNC List operator. AMPs of \$18,000 were imposed.

In August, 2017, the CRTC issued notice of a “show cause” proceeding against Topline Air Duct Cleaning and its principal, Mr. Naveed Raza.<sup>6</sup> In the course of an investigation that began in 2015, the Commission’s enforcement officers had met with Mr. Raza and requested information, which was not provided. The enforcement proceeding is now based on provisions of the *Telecommunications Act* that involve obstruction of an investigation and making false or misleading statements to an inspector, in addition to the initial telemarketing contraventions. The specified information was required to be provided by early September. Non-compliance may result in findings of violations and the imposition of AMPs of \$15,000 and \$10,000 upon the company and the individual respectively.

### International Telemarketing

The Telemarketing Rules apply to marketing activities that target Canadians, even where telemarketing calls are initiated from outside Canada. A 2016 case involved three Canadian-based companies and two Indian-based call centres.<sup>7</sup> Investigator determined that telemarketers falsely identified themselves as representing Microsoft, the U.S. Department of Homeland Security, or the Government of Canada. This aspect of the case made it a particular concern to the CRTC. In a March 2016 speech, Jean-Pierre Blais, then CRTC Chair,<sup>8</sup> noted that the “scam artists” used the “fraudulent authority of

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<sup>5</sup> October 3, 2016: <http://www.crtc.gc.ca/eng/archive/2016/2016-391.htm>

<sup>6</sup> August 9, 2017: <http://www.crtc.gc.ca/eng/archive/2017/2017-281.htm>.

<sup>7</sup> For the March 10, 2016 news release, see: <https://www.canada.ca/en/radio-television-telecommunications/news/2016/03/five-companies-selling-anti-virus-software-must-pay-over-640-000-for-making-telemarketing-calls-to-canadians.html>.

<sup>8</sup> March 22, 2016, posted at <https://www.canada.ca/en/radio-television-telecommunications/news/2016/03/jean-pierre-blais-to-the-canadian-marketing-association.html>.

these disguises to peddle anti-virus software”. During the calls, the telemarketers asked to be given remote access to home computers, on the pretext of removing viruses and malicious software. None of the companies had subscribed to the National DNC List or registered with the National DNC List operator. The three Canadian-based companies were assessed penalties of \$56,000, \$76,000 and \$194,000 and the companies based in India were assessed penalties of \$25,500 and \$292,000. In its investigation and enforcement, the CRTC received support from the RCMP, the Indian Central Bureau of Investigation and local law enforcement in India.

In another 2016 case, two individuals operating from India were found liable for violating the Unsolicited Telecommunications Rules by calling numbers on the National DNC List; failing to subscribe to the List; and failing to register with the DNC List operator. AMPs of \$1,500 per violation, for a total of \$25,000, were assessed. In its November, 2016 decision,<sup>9</sup> the CRTC determined that on a balance of probabilities, the individuals had committed the violations, but reduced the amount of the AMPs to \$7,500. The reductions were based on a lack of evidence that the individuals continued to engage in telemarketing directed to Canadians, and that the risk of future violations was not high.

Due to the international nature of telemarketing activities, the CRTC has entered into co-operation agreements with agencies in other countries. For example, in June, 2016, it announced its participation in the London Action Plan, a network of 11 agencies that investigate international spam and unsolicited phone calls. The agencies committed to sharing information and intelligence about unsolicited communications.<sup>10</sup>

#### “Robocalls” using ADADs

Responding to consumer concerns, the CRTC has focused on “robocalls”, telemarketing calls that are made using automatic dialing-announcing devices (“ADADs”). Specific rules for the use of ADADs are included in Part IV of the Unsolicited

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<sup>9</sup> Compliance and Enforcement Decision 2016-441, November 7, 2016: <http://www.crtc.gc.ca/eng/archive/2016/2016-441.htm>

<sup>10</sup> CRTC June 14, 2016 news release on international co-operation: <https://www.canada.ca/en/radio-television-telecommunications/news/2016/06/crtc-partners-with-international-agencies-to-fight-spam-and-unsolicited-phone-calls.html>.

Telecommunications Rules.<sup>11</sup> Telemarketers may not initiate telemarketing calls using ADADs without the consumer's express consent to receive such calls. Even where unsolicited telecommunications are not used to solicit business, the use of ADADs is generally restricted<sup>12</sup> to the hours of 9 am to 9:30 pm on weekdays, and 10 am to 6 pm on weekends (the time is based on the time zone of the person receiving the call). All such calls must begin with a clear message identifying the person on whose behalf it is being made and a brief description of the call's purpose. An e-mail or postal mailing address must be provided and a local or toll-free number where the originator of the message can be reached. Calls must display the originating number or another number where the originator can be reached.

Probit Inc. applied to the CRTC for amendments to the Rules to permit the use of ADADs for survey research. The CRTC's analysis of the request referenced as exemplified in its policy announcements and previous enforcement decisions. The Commission denied Probit's request, mentioning the "unique nuisance and inconvenience posed to consumers by ADADs" and upholding the application of the ADAD Rules for unsolicited calls made in connection with survey research.<sup>13</sup>

In a June, 2016 notice,<sup>14</sup> the CRTC reported that seven organizations had paid a total of \$475,000 for making non-compliant robocalls and that another was ordered to pay \$18,000. Referring to much broader investigation and enforcement activities, the CRTC stated that it had been working with international partners and had "conducted a sustained campaign" to investigate businesses that disregard the rules and make non-compliant robocalls. It is committed to "work collaboratively to protect the privacy of Canadians and to combat unsolicited calls".

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<sup>11</sup> The Unsolicited Telecommunications Rules were initially set out in Telecom Decision 2007-48 and have been updated by subsequent decisions. The current, amalgamated Unsolicited Telecommunications Rules are posted at: <http://crtc.gc.ca/eng/trules-reglest.htm>.

<sup>12</sup> Additional time-of-calling restrictions may be imposed under provincial consumer protection legislation.

<sup>13</sup> Compliance and Enforcement Decision CRTC 2016-107, Probit Inc. – Application to seek relief in respect of the Unsolicited Telecommunications rules. March 21, 2016. The quote is from paragraph 25.

<sup>14</sup> CRTC June 14, 2016 news release on robo calls: <https://www.canada.ca/en/radio-television-telecommunications/news/2016/06/crtc-targets-telemarketers-making-robocalls.html>. Quotes are from p. 2 of this release.

## Competition Bureau Enforcement Activities

As noted above, the Competition Bureau's telemarketing enforcement activity supplements the CRTC's activity and is based on the general "misleading representation" provisions of the *Competition Act* and on specific "deceptive telemarketing" provisions. For example, s. 52.1(2) requires that specific disclosures be made at the beginning of each telemarketing communication, in a fair and reasonable manner: (a) of the identity of the person on whose behalf the call is being made, the nature of the business interest or product being promoted, and the purpose of the communication and (b) the price of any product whose supply or use is being promoted and any material restrictions applicable to its delivery. The *Competition Act's* s. 52.1(9) provides that the criminal offence of "deceptive telemarketing" is subject to conviction by indictment, with fines in the discretion of the court or imprisonment for up to 14 years, or by summary conviction, with a fine of up to \$200,000 and imprisonment for up to one year.<sup>15</sup>

In October, 2016, the Bureau sentenced several Montreal-based individuals in connection with criminal deceptive telemarketing activities involving the sale of office supplies and medical kits.<sup>16</sup> These telemarketers had falsely implied that they represented businesses having an existing relationship with the victim's company, that certain products or services were required under government rules, or implied that the call was being made on behalf of a government agency. As in many of the CRTC enforcement actions, the Competition Bureau co-operated with other agencies, including the RCMP, provincial police forces, the Canadian Border Services Agency and various U.S. investigation and enforcement agencies.

The Bureau<sup>17</sup> had investigated a scheme for the sale of subscriptions to online directories using misleading sales techniques, targeted at thousands of businesses in Canada, the United States, and Europe. In the Quebec court proceeding that resulted,

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<sup>15</sup> The text of the Competition Act is available at: <http://laws.justice.gc.ca/eng/acts/C-34/page-14.html#docCont>.

<sup>16</sup> Competition Bureau Press Release, October 28, 2016: <https://www.canada.ca/en/competition-bureau/news/2016/10/sentencing-deceptive-telemarketing-case.html>.

<sup>17</sup> Competition Bureau Press Release, February 7, 2017: [https://www.canada.ca/en/competition-bureau/news/2017/02/montreal\\_based\\_company\\_fined\\_450000\\_for\\_deceptive\\_telemarketing.html](https://www.canada.ca/en/competition-bureau/news/2017/02/montreal_based_company_fined_450000_for_deceptive_telemarketing.html).

Mega Byte Information pleaded guilty and agreed to pay a fine of \$450,000. The company's president was prohibited from engaging in telemarketing for 10 years.

In May 2017,<sup>18</sup> the Competition Bureau announced the outcome of an investigation into a company that used telemarketing, directed primarily to businesses in the United States, for the sale of online and hard-copy business directory listings. The Montreal-based company, Thompson Hill Publishing, had used call centres located in India and Egypt. The Bureau concluded that victims of the scam were misled into believing that they were renewing existing listings, when the purpose of the telemarketing calls was in fact to sell new listings. The company pleaded guilty and agreed to pay fines totalling \$180,000 for making false or misleading representations and engaging in deceptive telemarketing. The company and two of its managers were prohibited from engaging in or associating with any telemarketing activities for five years.

Please address any questions about telemarketing, the National DNC List, or any other advertising and marketing matters to Carol Anne O'Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

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| Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy. |
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<sup>18</sup> Competition Bureau Press Release: [https://www.canada.ca/en/competition-bureau/news/2017/05/telemarketing\\_companypleadsguiltytocriminalcharges.html](https://www.canada.ca/en/competition-bureau/news/2017/05/telemarketing_companypleadsguiltytocriminalcharges.html).