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**610-294 PORTAGE AVE
WINNIPEG, MANITOBA
R3C 0B9**

TEL: 204.985.8540

FAX: 204.985.8544



E-MAIL: centre@pilc.mb.ca

Writer's direct line: (204) 985-8545
Email: bfroese@pilc.mb.ca

SENT BY FAX AND EMAIL

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Madam:

**Re: Telecom Public Notice CRTC 2006-4
Establishment and Enforcement of the DNCL
and Other Telemarketing Rules**

1. The following comments are submitted on behalf of the Consumers Association of Canada (Manitoba Branch) and the Manitoba Society of Seniors ("CAC/MSOS") for consideration by the Commission. CAC/MSOS appreciates the opportunity to provide its comments and recommendations in this important proceeding.
2. The Consumers Association of Canada (Manitoba Branch) is an independent, non-profit volunteer organization dedicating to educating and informing consumers in Manitoba, and to representing consumer interests to all levels of government and all sectors of society. It believes consumers are empowered when they are fully informed and are able to make the best choices regarding the products and services they buy, and part of that is the decision whether or not to be contacted by telemarketers.
3. The Manitoba Society of Seniors represents Manitoba seniors by promoting their needs and concerns through a united voice on issues that affect them. In the context of the national DNCL and telemarketing rules, MSOS is particularly concerned about protecting vulnerable seniors from unscrupulous and aggressive telemarketers who employ pressure tactics to make sales.
4. Together, CAC/MSOS have participated in a number of proceedings before the Commission, and this proceeding raises a number of important consumer protection issues and principles. CAC/MSOS hopes that the national DNCL will operate in a manner that recognizes and respects both the rights of those consumers who choose not to be contacted by telemarketers without their consent and those who wish to be contacted about products and services available to them.
5. Paragraphs 40 to 51 of Public Notice 2006-4 describe the issues to be examined by the Commission relating to the establishment and enforcement of

the national DNCL rules, as well as telemarketing rules in general. What follows are general comments on the new legislation and then specific comments on each particular issue.

General Comments on the DNCL

6. CAC/MSOS is in the process of conducting a survey of Manitoba consumers for the specific purpose of this proceeding. A small preliminary sample of survey results from Winnipeg residents reveals that consumers see the DNCL as a positive initiative to deal with the problem of unwanted calls by telemarketers. Consumers surveyed to date overwhelmingly indicated they intend to register on the DNCL when it becomes operational.

7. The preliminary survey results also showed, however, that while most respondents had heard of the proposed DNCL, they were not aware of specific details of the amendments to the *Telecommunications Act* that established its framework, in particular the exemption provisions. The vast majority of respondents were surprised to learn that even if they register their telephone number on the DNCL, they may still receive a large number of calls.

8. According to s. 2.1 of the amendments to the Act, there is to be a review of the DNCL after three years. CAC/MSOS believes that it is vitally important to a proper review of the legislation that there be accurate monitoring and recording of complaints, not only relating to telemarketers subject to the DNCL, but also to those falling under one of the exceptions. If, for instance, it turns out that consumers are still experiencing problems with unwanted and unsolicited calls even after the DNCL is implemented, changes to the legislation might be warranted so there are fewer exempted callers.

9. Based on the survey results to date and its own expertise, CAC/MSOS believes there are four key elements to establishing an effective DNCL, namely:

- public awareness campaigns so consumers know how the national DNCL will work and so they will have sufficient information to make fully informed decisions about whether or not they wish to be contacted by telemarketers;
- making the DNCL as consumer-friendly as possible;
- it is imperative that there be meaningful and consistent enforcement of the rules, including proper monitoring of complaints, thorough and timely investigations, and the imposition of penalties against violators; and
- the cost of the DNCL should not be borne by consumers.

SPECIFIC ISSUES IN TELECOM PUBLIC NOTICE CRTC 2006-4

(a) Should the DNCL and other telemarketing rules to be established by the Commission in this proceeding be included in the ILEC's tariffs?

10. In past decisions, the Commission has taken notice of the continuing and increasing problem of unwanted and unsolicited calls from telemarketers. It has also expressly commented on the fact that the disconnection sanction is rarely employed by telephone service providers, even when breaches of the rules have been established.¹

11. The legislation creating the national DNCL was brought about in response to these concerns and it now gives the Commission authority to impose monetary penalties against telemarketers who violate the rules.

12. Even in light of the new enforcement powers given to the Commission, however, CAC/MSOS believes there is still a need for the DNCL rules and telemarketing rules to be included in the ILEC's tariffs. Consumers want effective enforcement of the DNCL and telemarketing rules, and the more options available to deter violators, the better. Any additional enforcement tool available to either the Commission or telephone service providers such as suspension or disconnection of service is one more weapon in the arsenal against telemarketers who deliberately flout the law or refuse to respect the rights of consumers not to be contacted. CAC/MSOS supports the view expressed by the Commission in Telecom Decision CRTC 2004-35 that depriving service is one means of dealing with telemarketers who do not intend to comply with the rules.²

13. The lack of proper enforcement by telephone service providers in the past may also be alleviated to some degree with the new enforcement powers given to the Commission. For example, if the Commission imposes a monetary penalty against a telemarketer who repeatedly violates the rules, it is more difficult for a service provider to justify failing to take its own enforcement action as well and suspend or disconnect telephone service.

(b) What should the specific DNCL rules be?

14. Before commenting on what the specific DNCL rules should be, it is first necessary to examine the scope of the legislation to clarify the telemarketers captured by the DNCL rules. There are a number of exemptions, including registered charities, and companies with whom the customer is in an existing business relationship.

15. CAC/MSOS is concerned that telemarketers may try to circumvent the rules by disguising the nature of their calls to fall within one of the exceptions. For example, a telemarketer may begin a call by saying the company is only doing a survey and then try to sell a particular product.³ CAC/MSOS wishes to specifically draw to the Commission's attention

1 See Telecom Decision CRTC 2004-35 at paras 3 and 83-90.

2 at para 87.

3 See for example a media release from the U.S. Federal Trade Commission dated January 6, 2006 about a marketer of adjustable beds who allegedly called over 900,000 consumers and told them they were doing a survey of sleep habits and then made a sales pitch. Like the law in Canada, the legislation in the U.S. also

these types of “dual purpose calls” and recommends that the DNCL operator and the Commission bear this in mind when investigating complaints. CAC/MSOS believes that the exemptions should be interpreted as narrowly as possible to reflect the intent of the national DNCL, which is to reduce the number of unwanted calls to the greatest extent possible.

16. With respect to specific rules, CAC/MSOS recommends that telemarketers be prohibited from contacting individuals within 7 days of registration on the national DNCL. Consumers expect that once they register, telemarketers will stop calling them within a reasonable period of time and any grace period allowed should favour consumers and not telemarketers.

17. The current telemarketing rules require fax telemarketers to enter a person's number on their do not call lists within 7 days, and voice call telemarketers are required to enter a person's number within 30 days. In Telecom Decision CRTC 94-10, the Commission found the 30-day period to be reasonable because the average marketing campaign lasts about one month and generally individuals will not be contacted more than once during that time.⁴

18. CAC/MSOS believes that the national DNCL should reflect the wishes of consumers to stop receiving calls as soon as possible and not be based on what is easiest or preferable for telemarketers. In the absence of proof that 7 days is an unreasonable or unrealistic time period within which telemarketers can access the national DNCL and update their lists, CAC/MSOS believes this is an appropriate grace period.

19. CAC/MSOS also recommends that, with the consent of the individual, telephone directories or other directories that may be accessed by telemarketers, should mark in some way, for instance by an asterisk, numbers that telemarketers should not call. This would give added protection to consumers who do not wish to be contacted without their prior consent.

(c) What, if any, other telemarketing rules are necessary and appropriate?

20. Given the significant number of exemptions in the legislation, even with the creation of a national DNCL consumers will still be subject to receiving a number of unwanted and unsolicited calls.⁵ For that reason, and also to protect consumers who choose not to register on the national DNCL, the justification for having telemarketing rules other than those relating to the national DNCL still exists.

21. CAC/MSOS recommends not only that other telemarketing rules be kept, but that they be as vigilantly monitored and enforced as it hopes the DNCL rules will be, including the

exempts genuine survey calls but as this example illustrates, unscrupulous telemarketers may still try to find a way around it. The press release can be found at www.ftc.gov/bcp/conline/edcams/donotcall/mediacenter.html
4 at p. 11.

5 According to the proceedings of the Standing Senate Committee on Transport and Communications, First Session, 38th Parliament, 2004-05; November, 2005, at p. 23:15, over 60% of telephone calls in Canada are from people exempted from the national DNCL.

imposition of significant monetary penalties against violators. Violations of telemarketing rules should be considered just as serious as violations of the DNCL rules, as calls from individuals or organizations falling within the exemptions can be just as inconvenient and annoying.⁶

22. With respect to the current telemarketing rules, CAC/MSOS recommends that:

(a) the rule prohibiting the use of ADADs to make unsolicited calls for solicitation remain in effect because the rationale for the rule still applies. In Telecom Decision CRTC 94-10, the Commission expressly noted that “in general, unsolicited ADAD calls cause greater inconvenience or nuisance than unsolicited live voice calls, and are more likely to be perceived as an intrusion, because ADAD calls do not permit the called party to interact with the caller”;

(b) if fax telemarketing is not captured by the national DNCL, then the rules applicable to fax telemarketers should be changed to prohibit fax telemarketing without the prior consent of the consumer.⁷ This is the approach taken in the U.K.;⁸

(c) in the alternative, if the Commission decides to allow fax telemarketing without prior consent and if fax telemarketing is not subject to the national DNCL, then changes should be made to current rule regarding fax telemarketing hours. CAC/MSOS recommends that faxes only be permitted to be sent between the hours of 9 a.m. and 8 p.m. on weekdays and between noon and 6 p.m. on weekends;

(d) the rules setting out the identifying information that must be included on faxes be kept;

(e) the rule prohibiting fax telemarketers from sequential dialling or sending faxes to emergency lines or healthcare facilities be kept;

(f) if fax telemarketers will not be captured by the national DNCL, then to protect consumers who choose not to register on the national DNCL, the rule requiring them to maintain individual do not call lists should remain in place. However, CAC/MSOS does recommend the existing rule be changed such that individual do

6 In Telecom Decision CRTC 94-10, the Commission noted on p. 6 that “based on the record of the proceeding, the Commission finds no material distinction, in terms of nuisance, inconvenience and invasion of privacy, between a call to solicit on behalf of a charity and one made to solicit on behalf of a “commercial organization”.

7 Unwanted and unsolicited faxes are just as much of an inconvenience and a nuisance as unwanted and unsolicited telephone calls, and they are costly as well, particularly with respect to residential consumers with fax machines in their homes. Fax telemarketing uses up the recipient's paper and toner and needlessly ties up what is often the only phone line in the house. This is something the Commission specifically noted in Telecom Order CRTC 96-1229, at p. 2, where the Commission stated, “... unsolicited fax calls cause greater inconvenience than unsolicited live voice calls since there is no means by which persons can interact with or hang up on the faxing party while the fax is being transmitted” and “... unsolicited fax transmissions require use of the recipients' own materials and equipment to deliver the unsolicited message.”

8 Section 20 of U.K.'s *Privacy and Electronic Communications (EC Directive) Regulations 2003*. This legislation can be accessed at <http://www.opsi.gov.uk/si/si2003/20032426.htm>

not call lists maintained by fax telemarketers would not expire after 3 years. CAC/MSOS believes that numbers should remain on the list until the individual chooses otherwise or the individual no longer uses that number;

(g) the rule requiring fax telemarketers to display the originating calling number unless that is not possible for technical reasons be kept;

(h) in addition to monetary penalties, the rule regarding suspension or termination of service remain as an enforcement option against fax telemarketers who violate the rules;

(i) the current rules relating to the hours permitted for telemarketing voice calls be changed to impose restrictions. CAC/MSOS recommends that voice calls only be permitted between 9:00 a.m. and 8:00 p.m. on weekdays and from between noon and 6:00 p.m. on weekends;

(j) the telemarketing voice call rule requiring certain identifying information to be disclosed by callers be kept;

(k) voice call telemarketers still be required to maintain their own do not call lists in order to protect consumers not registered on the national DNCL. As noted above with respect to fax telemarketers, CAC/MSOS recommends that numbers remain on the list until the individual advises otherwise or the number is no longer being used by that person;

(l) the rule allowing voice call telemarketers 30 days to register a person's number on their own do not call list be changed from 30 days to 7 days;

(m) the rule regarding displaying the originating or alternate number be kept;

(n) the rule prohibiting sequential dialling or calls to emergency lines or health care facilities by voice call telemarketers be kept;

(o) in addition to monetary penalties, the rule regarding suspension or termination of service remain as an enforcement option against voice call telemarketers who violate the rules.

(c) Is it appropriate to develop non-binding guidelines for the imposition of penalties and, if so, what should those guidelines be?

23. CAC/MSOS believes it is appropriate to develop guidelines to ensure consistent and effective enforcement of both the DNCL rules and the telemarketing rules. Without guidelines or some identifiable criteria upon which penalties will be imposed, there is a risk of arbitrary decisions and that does not instill public confidence.

24. The only concern that CAC/MSOS has with this proposition is that if guidelines are established and they are not binding, there is a risk they will not be followed in all appropriate cases. CAC/MSOS therefore recommends that if the guidelines are not going to be followed in a particular situation, that a valid reason be given and that there be some type of monitoring to ensure penalties are being imposed when it is warranted and the spirit of the guidelines is maintained.

25. The new legislation allows for monetary penalties up to a maximum amount of \$1,500 to an individual and up to \$15,000 to a corporation and that each call that violates the rules is a separate violation. CAC/MSOS believes that every violation of the DNCL rules or the telemarketing rules is serious because the rights of consumers not to be contacted must be respected. Having said that, CAC/MSOS is not opposed to a “range” of penalties depending on the severity of the particular violation and the number of complaints or violations.

26. CAC/MSOS recommends that guidelines be developed to take into account the nature of the violation, for instance whether it is a repeat offender, whether the telemarketer has ignored prior requests to be placed on company-specific do not call lists, or whether the telemarketer is aggressive or uses pressure tactics. In addition, CAC/MSOS recommends that consideration be given to the impact of the call on the consumer, for instance if it disturbed sleep, tied up the phone line at a critical time or caused the consumer to incur costs.

27. In addition to monetary penalties or disconnection of service, CAC/MSOS also recommends that s. 72.13 of the new legislation be used as a means of combating unwanted telemarketing by making consumers aware of who the violators are. That section allows for the name of the telemarketer or the company on whose behalf the call was made, the nature of the violation and the amount of the penalty to be published. Consumer awareness is an important enforcement tool.

(d) Should the Commission establish non-binding guidelines regarding the investigation of complaints and issuance of notices of violation and, if so, what should those guidelines be?

28. As noted above, CAC/MSOS believes it is appropriate to establish guidelines when it comes to enforcement to avoid inconsistent or arbitrary results and to foster consumer confidence in the ability of the DNCL operator and the Commission to enforce the law. The national DNCL will only be effective if it is properly monitored and accurate records of complaints are kept and investigated.⁹

29. According to the survey results obtained by CAC/MSOS to date, consumers do not want there to be a high “complaint threshold” before action is taken. They expect complaints to be taken seriously and acted upon in some way. CAC/MSOS is concerned that if a high

⁹ In Telecom Decision CRTC 2004-35, the Commission expressly noted at paras 115-117 the importance of maintaining accurate and detailed statistics to measure compliance and to identify and address continuing problems.

threshold is set, telemarketers who know they are violating the law will simply make up to that number of calls knowing they will not be investigated.¹⁰ CAC/MSOS is also concerned that if only certain complaints will be investigated, consumers will lose confidence in the Commission and the intent of the national DNCL and telemarketing rules will be defeated.

30. For those reasons, CAC/MSOS recommends that if a complainant has provided the minimum amount of information necessary to identify the telemarketer (either the name or phone number) and the date of the call, then action be taken, whether it be to issue a notice of violation or some kind of warning.

31. At the proceeding before the Standing Senate Committee on Transport and Communications, there was a discussion about the types of telemarketers that would be targeted and comments were made that only those showing a “pattern of abuse” would be investigated.¹¹

32. CAC/MSOS certainly agrees that those types of telemarketers should be vigilantly investigated and punished through the imposition of significant monetary penalties and/or disconnection, however it believes that the scope of investigations should be much broader. For example, it should not be assumed that only large companies that call thousands of consumers are the only group that cause problems. Small local companies who deliberately violate the law, even for a short period of time, are just as culpable. Similarly, organizations that provide benefits to society, such as charities, should not escape investigation simply because the calls are not intended for personal gain. For example, a charity that refuses to properly maintain its own do not call list warrants the same level of enforcement as does a large commercial telemarketer. CAC/MSOS also wishes to point out that it is not only telemarketers who deliberately violate the rules that should be targeted, but also those who through either neglect or wilful blindness fail to take adequate steps to comply with the law.

33. With respect to the reach of the new legislation, it is acknowledged that it may be difficult to enforce if the telemarketing originates outside of Canada. However, if some link to Canada can be established, then it should be possible to effectively enforce the rules. For instance, penalties could be imposed and/or there could be disconnection of service if:

- the call originates in Canada;
- the company on whose behalf the call is made carries on business in Canada or has an office address in Canada;
- a Canadian telephone service provider is used to make the calls.

34. CAC/MSOS recommends that the Commission, the DNCL operator and telephone

10 As a similar example, in Telecom Decision CRTC 94-10, the Commission reduced the notice period from 5 days to 2 days because of certain callers taking advantage of the existing 5-day period to make a large number of calls they knew violated the tariff.

11 Proceedings of the Standing Senate Committee on Transport and Communications, First Session, 38th Parliament, 2004-05; November, 2005, at p. 23:26.

service providers do all they can to determine if a Canadian link can be established. In addition, the Commission could work with other jurisdictions such as the U.K. and the U.S. to see what can be done to reduce the amount of unsolicited telemarketing that originates in other countries.

35. With respect to defences, CAC/MSOS recommends that guidelines be established setting out the evidence required to prove justification or due diligence on the part of the telemarketer or company on whose behalf the call was made. For example, in order to successfully defend a violation of the rules, a telemarketer or company should have to show such things as:

- it has established written procedures to comply with the DNCL and telemarketing rules;
- it has provided training to its staff about the rules and the proper procedures;
- it has accessed the national DNCL list and updated its records within the time period required;
- if it is exempt from the DNCL, then proof that it has maintained its own accurate and current do not call list.

36. These types of guidelines would ensure that there is a standard in place that must be met to justify a breach of the rules.

(e) What should the elements be of the prohibitions or requirements, contravention of which would constitute a violation?

37. Section 72.07(1) of the new legislation states that a notice of violation may issue if there are reasonable grounds to believe a person has committed a violation of either a DNCL rule or a telemarketing rule. Each of the specific rules has its own elements and prohibitions, as the following examples illustrate:

- The elements that make up a violation under the DNCL rules are: the telemarketer, or company on whose behalf the call is made, does not fall under one of the exemptions and a call is made to a number registered on the DNCL after whatever grace period may be allowed. If those elements are present, then a violation has occurred. The onus then shifts to the telemarketer or company to justify the violation;
- The elements that make up a violation under the telemarketing rule are straightforward. For instance, if a telemarketer calls outside the hours permitted, then a violation has occurred. The onus then shifts to the telemarketer or

company to justify the violation.

(f) Should the DNCL rules apply to telemarketers making the calls, to the companies on whose behalf telemarketers are engaged, or to both?

38. In order to protect consumers and to achieve the spirit and intent of the national DNCL and the telemarketing rules, CAC/MSOS believes they should apply to both. Companies who contract with telemarketers should not escape liability if the rules are breached or be allowed to avoid the rules by getting someone else to do the calling.

39. Holding both telemarketers making the calls and companies on behalf of whom they are calling, is very important to proper enforcement of the rules and is an incentive for both to maintain accurate records and take all steps necessary to abide by the law.

(g) Should the DNCL rules apply to voicecasting calls?

40. CAC/MSOS believes that the DNCL rules and the telemarketing rules should apply to voicecasting calls. There is no justification for excluding these types of calls and if they are not subject to the same rules, CAC/MSOS is concerned telemarketers may switch to using them to avoid the rules. These calls are also of particular concern to CAC/MSOS because there is no way to interact with the caller.

41. CAC/MSOS does not have specific details as to the extent of the problem of voicecasting calls, however it notes the letter by Rogers Wireless to the Commission dated March 17, 2006 regarding a Part VII Application dated December 6, 2005. In that letter, Rogers Wireless indicates that according to Ontario Consumer Credit Assistance, approximately 24 million messages per year are left on customers' voice mailboxes. This is a significant number of calls, and the fact that consumers must bear the cost of retrieving the messages because they must use their own air time charges, and sometimes also incur long distance charges as well, is of particular concern.

III) Other matters

(a) Commission costs

42. In paragraph 51 of Public Notice 2006-4 the Commission states that it will require additional resources to implement its new statutory responsibilities, including one-time start up costs and ongoing resource requirements. The Commission further states that these costs may come from Canadian carriers that file tariffs and pay telecommunications fees. The estimated start up costs for the national DNCL are \$1.1 million and annual ongoing costs are estimated to be \$.5 million.

43. CAC/MSOS will require further details as to the estimated start up and ongoing costs in order to be able to fully respond to this point and may provide further comments in reply. In the meantime, however, CAC/MSOS can say that it is concerned that start up and ongoing costs will ultimately end up being passed on to consumers. It opposes this because consumers should not have to pay for the right not to be contacted by telemarketers.

Conclusion

44. CAC/MSOS thanks the Commission for its consideration and hopes that these comments and recommendations are of assistance. CAC/MSOS is more than happy to provide any further information required by the Commission.

Yours truly,

Original signed by

Beverly Froese
Attorney

/bf

cc: Interested Parties – Public Notice 2006-4 (by email only)

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