

**Petition to the  
Governor in Council  
Government of Canada**

**to vary**

**Telecom Decision CRTC 2008-6**

**by Imagine Canada Inc.  
&  
The Association of Fundraising Professionals (AFP)**



**April 28, 2008**

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## 1.0 SUMMARY OF REQUESTED RELIEF

1. This is a Petition by Imagine Canada and the Association of Fundraising Professionals (the Petitioners) to the Governor in Council under Section 12 of the *Telecommunications Act*<sup>1</sup> (the *Act*). The Petitioners understand that an order by the Governor in Council to intervene in the decision-making of a regulatory and adjudicative body is an exceptional remedy that should be sought in exceptional circumstances only. It is the view of the Petitioners that the Commission's decision, insofar as it applies to Canada's charities, is the very sort of exceptional circumstance that Parliament anticipated when providing for this remedy under the *Telecommunications Act*. We are aware of no prior Petition by or on behalf of charities and sincerely hope that there will not be a need for another. In this exceptional context, we are asking that the Governor in Council apply its discretion over political and public-policy decision-making in Canada and exercise its statutory powers to make this order for and on behalf of Canada's charities.
2. In particular, the Petitioners are asking the Governor in Council to require the Canadian Radio-television and Telecommunications Commission (the CRTC or Commission) to vary or rescind a fairly narrow and particular aspect of its Telecom Decision CRTC 2008-6<sup>2</sup> relating to the national Do-Not-Call List (DNCL).<sup>3</sup> Specifically, the Petitioners are objecting on public policy grounds to the Commission's decision that "it is necessary to make rules requiring all telemarketers..., including those making unsolicited telecommunications that are exempt from the National DNCL Rules, to register with...the National DNCL operator... and to pay a fee".<sup>4</sup> Canada's charities object, as a matter of public policy, to the requirement that they must register and pay fees under a national regulatory regime governing a set of regulated activities which Parliament has determined are exempt activities when carried out by charities and therefore fall outside the subject regime.

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<sup>1</sup> Telecommunications Act 1993, c.38

<sup>2</sup> Telecom Decision CRTC 2008-6 dated January 28, 2008: "Delegation of the Commission's investigative powers With regard to Unsolicited Telecommunications Rules complaints."

<sup>3</sup> The national DNCL is established under sections 41.2 to 41.7 of the *Act* and is expected to become operational in September 2008. See the DNCL Fact Sheet [http://www.crtc.gc.ca/eng/INFO\\_SHT/t1026.htm](http://www.crtc.gc.ca/eng/INFO_SHT/t1026.htm).

<sup>4</sup> *Ibid* at paragraph 35

## 2.0 WHO IS IMAGINE CANADA

3. Imagine Canada is a federal not-for-profit corporation and registered charity under the *Income Tax Act* of Canada. Its mandate is to look into and out for Canada's charities and nonprofit organizations. It is a national umbrella organization with over one thousand members, who are themselves Canadian charities and nonprofit organizations. Its members include both large and small charities in every region of the country--from the United Way of Canada, to the Canadian Cancer Society, John Howard Society, Heart and Stroke, CNIB, YMCAs, and a thousand more, carrying out diverse community-based activities from children's help lines to amateur sport, homeless shelters, immigrant integration and many more. Imagine Canada also operates the Imagine Canada Caring Companies program, which brings together many of Canada's Fortune 500 companies with financial institutions and smaller businesses that commit to returning 1% of their pre-tax earnings to charitable and community causes. Imagine Canada is overseen by a pan-Canadian board of directors who serve without compensation. It is financed through modest membership fees paid by Canada's charities and nonprofits, by donations and revenues earned from its research and related activities.

## 3.0 WHO IS AFP

4. The Association of Fundraising Professionals (AFP) represents nearly 28,000 members in more than 190 chapters throughout the world, working to advance philanthropy through advocacy, research, education and certification programs. The Association fosters development and growth of fundraising professionals and promotes high ethical standards in the fundraising profession. In Canada, AFP Canada and the *Society of Canadian Treasurers* (SCT) work together to provide networking and professional resources for our fundraising professionals.

#### 4.0 OVERVIEW OF CANADA'S CHARITIES

5. Canada's 81,000 registered charities draw upon dedicated workers and volunteers to ensure that our citizens and communities get the programs and services that they need. They weave a rich tapestry of community-based organizations, created by Canadians to address the needs and issues that they care about most. In 2003, registered charities reported receiving a total of \$7.9 billion in charitable donations for that year and having a total volunteer complement of approximately 12.9 million volunteers, who donated approximately 1.6 billion volunteer hours, the equivalent of roughly 810,000 full-time jobs<sup>5</sup>. By 2006, donations had increased from \$7.9 billion in 2003 to \$8.5 billion in 2006, with 5.8 million Canadians claiming charitable donation tax credits<sup>6</sup>.

#### 5.0 SUBMISSIONS

6. The Petitioners submit that the CRTC's Rule requiring charities to register with and pay regulatory fees under the national DNCL is:
  - (i) contrary to public policy principles and values that have long been exhibited by the Government of Canada vis-à-vis Canada's charities, by placing a regulatory burden on charities that is double that imposed on corporate and commercial telemarketers,
  - (ii) contrary to Canadian telecommunications policy on the issue of telemarketing by charities, and
  - (iii) contrary to the public policy principles and practices governing the financing of federal regulatory regimes.

These submissions are set out in more detail below.

#### 5.1 The Rule contravenes federal public policies and values in respect of charities

7. Charities are distinct from other corporate and commercial entities as a matter of public policy, law, and Canadian values. Unlike commercial entities, charities must first be incorporated as not-for-profit corporations and then must seek and secure registered

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<sup>5</sup> The National Survey on Nonprofit and Voluntary Organizations, 2003, on Canadian charities.

<sup>6</sup> Statistics Canada: <http://www.statcan.ca/Daily/English/071101/d071101c.htm>

charity status from the Canada Revenue Agency (CRA) under the *Income Tax Act of Canada (ITA)*. Once registered, charities benefit from a variety of favourable federal policies and practices that reflect the valuable work that charities do in our communities. One important example is the favourable tax treatment that charities receive under the *ITA*--not only is their income exempt from taxation under the *ITA*, but charities can also issue tax benefits in the form of charitable receipts to their donors.<sup>7</sup> Tax policies that stimulate giving by Canadians to charities are another important example of favourable policies extended by the Government of Canada to our Canadian charities. In Budgets 2006, 2007 and 2008, for example, the Government of Canada provided Canadians with a capital gains exemption on gifts of listed stock to charities. These measures have served their stated purposes extremely well, resulting in significant new funding by Canadians to charities.

8. The impact of the subject CRTC Rule is that not only are charities required to establish and pay for their own organizational-level DNCL regimes as required under the *Act*, they must also, under this Rule, register with and pay for the national regime, from which their activities are exempt. Not only are charities not afforded any recognition or different or favourable treatment from corporate and commercial entities, they are subject to highly unfavourable treatment, having to finance and comply with not one but two regimes. Charities acknowledge that the law provides that they must maintain their own organizational-level lists. They object to having to also register with and pay for the national regime from which their calls are exempt.
9. Furthermore, in consideration for the favourable tax and other policies provided to charities, charities are subject to regulation and scrutiny on how they apply their donated and other incomes. Charities must apply their income to charitable purposes and incur only such reasonable operating expenses as are required to operationalize those goals. Paying for the costs of a federal regulatory regime from which the activities of charities

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<sup>7</sup> Section 149.1 of the *Income Tax Act of Canada*

are exempt is not a charitable purpose, nor is it a reasonable operating expense for registered charities.

10. We disagree with the Commission's view, in Paragraph 30 of its Decision, that the fees and financing of the DNCL are unrelated to the administration of the DNCL. In our opinion, this interpretation unduly strains a common sense understanding of the clear relationship between financing and administration. We also strenuously disagree with the Commission's view, in Paragraph 34 of its Decision, that the benefits of levying fees on charities outweigh the negative impact of such fees on charities. While there may be benefits to public bodies of charging individuals and organizations for services they do not receive, the harm to such individuals or organizations is, in our view, a more serious matter. We respectfully submit that the CRTC is unduly straining, in these Paragraphs, to rationalize its effort to do indirectly what Parliament has prohibited it from doing directly.

## **5.2 The Rule contravenes federal telecommunications policies on telemarketing by charities**

11. The *Telecommunications Act* provides that telemarketing calls by charities are exempt calls<sup>8</sup>. The *Act* is very clear on point. It states that "the [National DNCL] Rules do not apply to certain types of unsolicited calls such as calls made by or on behalf of any of the following organizations: (a) registered charities." The CRTC does not dispute this interpretation. In its 2007 decision on point, the Commission states that "the *Act* is clear that telecommunications made by or on behalf of registered charities... are exempt from the National DNCL Rules".<sup>9</sup>

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<sup>8</sup> Subsection 41.7 (a) of the Telecommunications Act. The definition of telemarketing under *the Act* includes "calls made for donations by or on behalf of charities". The Act then makes clear that telemarketing calls by or on behalf of charities are statutorily exempt from the DNCL.

<sup>9</sup> Telecom Decision CRTC 2007-48.

12. This public policy decision to exempt calls by charities which was, in turn, enshrined in the *Act*, reflects the will of Parliament that charities should, as in other federal public policy arenas, be subject to favourable policies relative to corporate and commercial entities when carrying out similar activities. The subject ruling by the CRTC effectively undermines and defeats this policy objective by requiring charities to register and pay fees under the scheme, notwithstanding the determination by Parliament that the telemarketing activities of charities are not included in the national DNCL regime.

### 5.3 The Rule contravenes federal public policies on the financing of regulatory regimes

13. Organizations and individuals should not be subject to regulatory charges by government bodies unless there is a clear and rational basis for the charge.<sup>10</sup> It is well established that governments and public bodies may levy fees when the primary purpose of the fee is as a “service charge” or “user fee” -- in short, there “must be a relationship between the charge and the [regulatory] scheme itself”.<sup>11</sup>
14. The Petitioners acknowledge the right of the CRTC to charge user fees or service charges to individuals or organizations whose telemarketing activities are included in the national DNCL regulatory scheme. However, the Petitioners dispute that the Commission, or any other regulatory or public body, can levy fees on parties whose activities fall outside or are expressly exempt from the very activities covered by the regime. For example, should recreational fishermen be expected to register with and cover the costs of a commercial fishing regime, when recreational fishing is expressly exempt from the regime? Likewise, how can charities that carry out telemarketing activities be reasonably required to register

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<sup>10</sup> The Supreme Court of Canada has set out the principles by which government bodies may impose levies on individuals or organizations in a trilogy of cases. Accordingly, these factors have become known as the “*Lawson/ Eurig/ Westbank* factors”. See *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at 363; *Eurig*, *supra* at paras 15 & 21; and *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 22

<sup>11</sup> See also *620 Connaught Ltd. v. Canada (AG)*, 2006 FCA 252, which updates and applies the *Lawson/ Eurig/ Westbank* factors

with and pay fees to cover the costs of a telemarketing regime from which their telemarketing activities have been expressly exempted?

15. The DNCL Rules make it clear that these levies, which will be paid to the CRTC's subcontractor to cover the costs of operating the national DNCL enforcement regime, are clearly intended to be a user fee or service charge. The fees are to be paid exclusively by telemarketers. Telemarketers are expected to use the national DNCL registry in order to check phone numbers and avoid calling numbers included on the List. Charities have no need to "use" the national DNCL List --they are entitled to call numbers listed on the national DNCL as such calls by charities are exempt calls.
16. In sum, charities object to being treated as users and having to register and pay user fees when they are not in fact users under the national DNCL. Organizations--and perhaps charities in particular-- should not be subject to regulatory or other user fees or service charges for programs and services from which their activities are excluded.

## **6.0 ORDER SOUGHT**

17. Having regard to our submissions above, the Petitioners respectfully request that the Governor in Council make the following order:
  1. Affirm that, given that telemarketing calls by or on behalf of registered charities are exempt calls, charities do not need to register with nor pay fees to the national DNCL operator or otherwise participate in or pay for the national DNCL program,
  2. Vary Decision 2008-6 to add the words "with the exception of charities," to the phrase "... including those making unsolicited telecommunications that are exempt from the National DNCL Rules," or rescind the application of the Rule to registered charities, or order the CRTC to carry out such rescission or variance, and
  3. In the event that the Governor in Council refers the matter back to the Commission for rescission or variance, require the Commission to vary or rescind the order prior to the date by which the levies on charities go into effect, in accordance with



subsection 12(5)(b) of the *Act*, which empowers the Governor in Council to specify a date before which the Commission shall complete its reconsideration.

All of which is respectfully submitted this 28<sup>th</sup> day of April, 2008, by:

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