

**PETITION TO HER EXCELLENCY
THE GOVERNOR IN COUNCIL**

IN THE MATTER OF THE *TELECOMMUNICATIONS ACT*, R.S.C., 1993, C-38, AND THE MATTER OF TELECOM DECISION CRTC 2004-35 REVIEW OF TELEMARKETING RULES, REFERENCE 8665-C12-13/01, 21 MAY 2004, THIS PETITION IS MADE PURSUANT TO SECTION 12(1) OF THE *TELECOMMUNICATIONS ACT* AND BROUGHT BY:

THE RESPONSIVE MARKETING GROUP INC.,

UNIVISION MARKETING GROUP INC., AND

XENTEL DM INCORPORATED

(“APPLICANTS”)

Filed: August 20, 2004

1. PETITION

- 1.1. This Petition is made by the Applicants pursuant to Section 12 of the *Telecommunications Act*, R. S.C. 1993, c-38, as amended. The Applicants hereby request that the Governor in Council by order, vary or rescind Telecom Decision CRTC 2004-35, 21, May 2004, (the "Decision") or refer it back to the CRTC for reconsideration of all or a portion of it.
- 1.2. In this Petition, the Applicants request the Governor in Council to initiate a review of the appropriateness of the CRTC rendering the Decision which purports to regulate the not-for-profit fundraising tele-canvasser's telephone solicitation activity, violating s. 2(b) of the Canadian *Charter of Rights and Freedoms*, s.17 of the *Copyright Act*, and encroaching upon the jurisdiction of other statutes governing not-for-profit fundraising organizations.
- 1.3. Based on the balancing of rights of individuals to reduce and restrict the nuisances and annoyances of tele-canvassing and the rights of not-for-profits to carry on business and not be forced out of business, the Applicants request Governor in Council to order the CRTC to grant an interim stay of the Decision with respect to not-for-profits and their tele-canvasser service providers, until a full review is conducted and a final determination is reached.
- 1.4. In its final determination, the Applicants request that the Governor in Council:
 - a) order the CRTC to rescind the Decision; or
 - b) in the alternative, order the CRTC to exempt not-for-profit organizations and tele-canvassing service providers working with not-for-profits from telemarketing rules.

2. THE APPLICANTS

- 2.1. The Applicants submit that the procedure the CRTC follows in order to release a decision does not allow for comment period prior to finalizing a decision, unlike the process for issuing an Order, which allows for interested parties to make submissions. The fact that an application to review, vary and rescind must be initiated by an interested party at its own cost rather than making available an opportunity for interested parties to consult on an issue is prohibitive. Such is the present case. The Applicants are three tele-canvassing service providers who work primarily or only with not-for-profits as clients. The Applicants specialize in providing canvassing services to not-for-profits and have made a conscious business decision to work with not-for-profit organizations. Thus being sympathetic to the position of not-for-profits pursuant to the Decision, have embarked upon submitting an Application to the CRTC pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, and this Petition. Had the Applicants not done so, the majority of their clients would not have had the opportunity to challenge the Decision or participate individually in this review process on issues that directly and adversely impact them. Thus, before even addressing any provisions in the actual Decision, not-for-profits and other interested parties which cannot finance the legal proceeding underlying the Application and Petition are disadvantaged. Such a process seriously undermines the very pursuit of these organizations and the credibility of the CRTC. A Public Notice or Consultation on the rules in the Decision specifically would

have given all affected parties the opportunity to participate and the CRTC to be better informed to make a balanced set of rules.

- 2.2.** The Responsive Marketing Group Inc., established fifteen years ago, is a wholly-owned Canadian company providing direct marketing services to non-profit and political organizations across Canada and a relatively small number of North American corporations. Responsive's primary service is tele-canvassing and it raises over \$25 million annually for non-profits in Canada through tele-canvassing alone. By far the majority (98%) of Responsive's clientele are not-for-profits.
- 2.3.** Univision Marketing Group Inc., was founded more than twenty years ago and is a leading, full-service strategic fundraising and e-marketing agency with a donor-centric fundraising approach. It works with many large and well-respected non-profits across North America with extensive experience in sectors including: humanitarian, faith-based, healthcare, hospitals, environmental, educational, and political. Univision has a team of highly experienced fundraising consultants and professional fundraising service providers under one roof. Using in-house expertise, services and state-of-the-art technology, it develops and seamlessly implements custom-designed strategies to help achieve its clients' fundraising goals and objectives.
- 2.4.** Xentel DM Incorporated was established in 1979 and has been working with not-for-profit organizations to initiate and maintain relationships with donors and supporters of special events sponsored by its not-for-profit customers through telephone contact with mail follow-up. As a Canada-wide tele-canvassing service provider, Xentel enables not-for-profit organizations across Canada, ranging from small local entities such to large national and international entities, to reach a wider audience of potential supporters.

3. EXECUTIVE SUMMARY OF THE DECISION

- 3.1.** The CRTC takes it authority to deliver the Decision from two sections in the *Telecommunications Act*:

7. *It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives*

...

(i) *to contribute to the **protection of the privacy of persons**.* [emphasis added]

...

41. *The Commission may, by order, prohibit or **regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.***¹ [emphasis added]

- 3.2.** The preamble of the Decision states:

¹ *Telecommunications Act* S.C. 38.

In this decision, the Commission implements changes to the regulation of telemarketing service providers with more specific identification procedures, constraints on the use of predictive dialing devices and mandatory reinforcement of do not call lists for all telemarketing service providers. The Commission also requires the tracking and reporting of complaints and establishes a multi-faceted awareness program for both consumers and telemarketing service providers. The Commission recognizes the merits of expanded enforcement but finds that additional regulatory action is contingent on increased powers being provided through legislative change.

3.3. Clearly, as stated in the Decision, the CRTC:

recognizes that there must be a balance maintained between the right to privacy of consumers who are subjected to unsolicited calls and the right of the tele-canvassing service providers to conduct their business.

...

In this decision, the [CRTC] sets out certain regulatory changes that will provide additional clarity and consistency and assist consumers in dealing with unwanted unsolicited calls².

3.4. The CRTC defines “**telemarketing**” as:

the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation

where “**solicitation**” is defined as:

the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another party.

This includes solicitation of donations by or on behalf of not-for-profits. Not-for-profits may engage in tele-canvassing themselves, or hire other businesses or agencies for fund-raising campaigns.

3.5. The Decision requires telemarketing service providers to:

- a) inform the responding party right at the beginning of the call, before asking for any particular individual, the identity of the telemarketer and the organization he or she is calling on behalf;
- b) in this same preamble, provide the responding party with a toll-free telephone number through which comments or questions can be received and through which "do-not-call" (“DNC”) requests can be processed before any other communication;
- c) similarly, with fax communications, the top page of the fax must identify in 12 font or larger, the caller’s name, organization, originating time and date of fax, and provide a toll-free telephone number

² Telecom Decision 2004-35, at para. 98

- d) staff this toll-free telephone number during business hours along with an after-hours interactive voice mail backup;
- e) if, during the call, the responding party asks to be put on a DNC list, the request must be processed without requiring the responding party to do anything further;
- f) upon a DNC request, ask the responding party whether they would like to be removed from the telemarketer's other lists and if calling on behalf of another organization, that organization's list also;
- g) effective October 1, 2004, provide responding party with a unique registration number to confirm the DNC request; and
- h) if using predictive dialing devices ensure that they do not abandon more than 5% of calls, measured per calendar month, and maintain records to show the abandonment rate.

4. RECENT HISTORY OF SOLICITING BY TELEPHONE IN CANADA

- 4.1.** In the "Use Of Telephone Company Facilities For The Provision Of Unsolicited Telecommunications", Telecom Decision CRTC 94-10, dated 13 June 1994, the CRTC reviewed its regime regarding the use of telephone company facilities for unsolicited telecommunications, particularly by way of automatic dialing-announcing device ("ADAD's") In that Telecom Decision, the CRTC defined solicitation as selling or promoting a product or service, or soliciting money or money's worth, whether directly or indirectly and including solicitations made on behalf of another party.
- 4.2.** Interested parties to that Telecom Decision stressed the importance of telemarketing calls for efficient business operations and the importance of solicitation calls for charitable and non-profit organizations for fund raising, and some parties emphasized the importance of telemarketing to the Canadian economy generally and, in particular, to job creation.
- 4.3.** Market survey researchers, account collectors and charities had requested exemptions for their activities with respect to all or part of both the CRTC's proposed ban on ADAD use; based on the argument that there is a fundamental difference between the activities of a survey researcher and of a commercial telemarketer.
- 4.4.** In June 2000, the CRTC sought the public's and interested parties' comment to ensure geographical uniformity for telemarketing rules using automatic dialing and announcing devices, live voice calls and facsimile transmission. The telemarketing restrictions to date applied only to certain telephone companies and the CRTC proposed to extend the restrictions to apply uniformly to all telecommunications service providers.
- 4.5.** The CRTC then ruled in Order CRTC 2001-193, 5 March 2001, standardization of its telemarketing rules, extending them to all telecommunications service providers across the country and initiated a complete review of their effectiveness created rules and enforcement procedures for unsolicited telecommunications from for-profit and not-for-profit tele-canvassing service providers. In that Order, not-for-profits and for-profits are not differentiated in any way.

- 4.6.** The rules most relevant to not-for-profits from Order CRTC 2001-193, with which most not-for-profits already carried out and were in voluntarily compliance are:
- callers must identify the person or organization they represent;
 - upon request, callers must provide the telephone number, name and address of a responsible person the called party can write to;
 - callers must display the originating calling number, or an alternate number where the caller can be reached (except where the number display is unavailable for technical reasons);
 - names and numbers of called parties must be removed from calling lists within 30 days of the called party's request;
 - callers must maintain "do not call" lists which must remain active for three years;
 - random dialing and calls to non-published numbers are allowed
 - ADAD calls that solicit are prohibited, including calls made on behalf of a charity, radio station promotions, or calls referring the called party to a 900/976 service number.
- 4.7.** The Applicants accepted these previous rules in good faith because they were fundamentally sensible and acceptable, and not because the Applicants necessarily accepted the CRTC's purported jurisdiction of the use of telecommunications systems by tele-canvassers and jurisdiction over not-for-profits their tele-canvassing service providers.
- 4.8.** In Public Notice CRTC 2001-34, the CRTC conducted a review of its rules regarding unsolicited communications for the purpose of solicitation and invited public comment. There was a response by parties who commented on the effectiveness of the existing rules, that the rules in Order CRTC 2001-193 were acceptable, representing a fair and adequate balance between the interests of customers and telemarketers. The response identified enforcement of the rules as a major issue along with awareness of the rules by both consumers and telemarketers.
- 4.9.** The rules in the Decision do not directly flow from the public comments arising from Public Notice CRTC 2001-34 either, which consultation took place three years prior to the Decision. At that time, of the approximately 2800 public comments, half related to junk faxes, some related to commercial telemarketing, and very few if any related to not-for-profits. In addition to a lack of history of enforcement of previous rules in general, there is a lack of history of enforcement against not-for-profits. Moreover, the lack of any complaints against not-for-profits or their tele-canvassing service providers does not justify the applicability of the rules on not-for-profits, so exemption for not-for-profits and their tele-canvassing service providers from the rules is fully warranted.
- 4.10.** The Applicants respectfully submit that without a history of enforcement of the rules existing prior to the Decision or a public consultation on the specific rules, the CRTC should not impose new rules. The rules in the Decision are created by pushing the scope of its jurisdiction, simply because of a perceived public sentiment of annoyance or nuisance because of telephone solicitations. The history of enforcement of the existing rules should give rise to any new rules, if any are to be imposed by the CRTC. There is no demonstrated history of the CRTC enforcing previous rules.

5. PRIVACY CONCERNS AND LEGISLATION IN CANADA

- 5.1. The notion of privacy and protecting it has become a significant issue in daily business activities due to the commercial and legal obligations of governments and business entities having to clearly communicate to individuals why their personal information is being collected, how it will be used, why, when and how it will be disclosed, and how an individual can access his or her own personal information records held by an organization. Organizations must also have solutions for how new modes of program and service delivery impact the individual's personal information since technology presents its own privacy risks: transaction monitoring, data collection, directory services, identity theft and unintended disclosures of personal information.
- 5.2. The Applicants agree that individuals need to be fully informed of the privacy practices of the businesses they deal with so that they can make proper and informed choices regarding the types of programs and service delivery modes they will rely on and be assured of their privacy being protected. Thus, each of the Applicants is in compliance with relevant privacy legislation and has a publicly available, readily accessible privacy policy.

Federal Legislation

- 5.3. The purpose of *Personal Information and Protection of Electronic Documents (PIPEDA)* Act (Canada), is: to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. **Personal information** under *PIPEDA* means information about an identifiable individual. Business contact information, often referred to as 'business card' information, and publicly available information such as that in telephone directories are not considered to be personal information. In federal and provincial privacy legislation **“Organization”** generally includes various business structures and individuals acting in a commercial capacity, but not individuals acting in a personal or domestic capacity.

Provincial Legislation

- 5.4. Similarly, the purpose of *Personal Information Protection (PIPA) Act* (Alberta) is: to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable. The provinces of British Columbia and Quebec have similar legislation with similar definitions and requirements of businesses doing business with individuals.
- 5.5. Privacy legislation generally defines "personal information" as any information that can be used to identify, contact or distinguish a specific individual. Business card information is exempted from this legislation, as is publicly available data. The Applicants' calling lists and list data originate from information that is publicly available, such as names, addresses, area codes and telephone numbers, found in telephone directories. This

information is exempt from most privacy regulations. Although companies are legally entitled to compile and use such information, the Applicants ensure that individual's privacy is respected at all times, with the implementation of their own "DNC" lists and controls placed on the information they do use in their pursuit of charitable tele-canvassing. Members of the public can choose to have their otherwise publicly available information 'unlisted' so their name, home address and telephone number are no longer 'publicly available'. However, if a member of the public chooses to remain 'listed', there is a reasonable expectation that goes along with being listed in a public telephone directory—that someone will use the telephone number to reach them. Also, any records maintenance or renewal information held by or for a not-for-profit is provided voluntarily by the donor who has a previous relationship with the not-for-profit. This information is held in compliance with privacy legislation.

- 5.6.** Although, undeniably the focus has been on privacy of information, there is another notion in society of 'privacy of the person', not as a physical safety notion, but privacy in the sense of being free of undue annoyances and hassles. The Decision supports the perspective that tele-canvassing is an annoyance and nuisance from which the public should be protected from, without taking into account the success not-for-profits have with their tele-canvassing campaigns and the negligible complaints.

6. TELEMARKETING AND FREEDOM OF EXPRESSION IN THE UNITED STATES OF AMERICA

- 6.1.** Both the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") govern telemarketing and tele-canvassing, particularly in regard to DNC rules. The FTC, in its *Telemarketing Sales Rule* (TSR), has jurisdiction over inbound and outbound interstate telephone calls, but no jurisdiction over intrastate calls nor over common carriers, banks, credit unions, savings and loans, companies engaged in the business of insurance, and airlines. The FTC is instrumental and in fact operates the national DNC Registry with which the FCC cooperates.
- 6.2.** The FCC, by its *Telephone Consumer Protection Act*³ and Title 47. 64.1200⁴, has jurisdiction over outbound intrastate and interstate telephone calls and essentially over all industries. The FCC completely exempts all not-for-profits and tele-canvassers service providers working with not-for-profits:

(c) the term telephone call in sec. 64.1200(a)(2) of this section shall not include a call or message by, on or behalf of, a caller:

- (1) that is not made for a commercial purpose,
- (2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,
- (3) to any person with whom the caller has an established business relationship at the time the call is made, or
- (4) which is a tax-exempt not-for-profit organization⁵.

³ U.S. Code of Federal Regulations, Title 47 Telegraphs, Telephones, and Radiotelegraphs, Section 227

⁴ U.S. Code of Federal Regulations, Title 47, Volume 3, Telecommunications, Section 64.1200, Subpart L

⁵ CFR, Title 47, Sec 64.1200(c)

6.3. This definition of "telephone call" is from the section dealing with calls to a residential telephone line using an artificial or pre-recorded voice to deliver a message without prior express consent of a party. The definition of "telephone solicitation" is:

(f) As used in this section:

...

(3) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental or, or investment in, property, goods, or services which is transmitted to any person, but such term does not include a call or message:

...

(ii) by or on behalf of a tax-exempt nonprofit organization.⁶

The basis for exempting not-for-profits from the telemarketing rules is that the freedom of expression of not-for-profits and political parties is held to a higher degree and widely recognized, thereby resulting in these types of organizations begin accorded such exemptions.

6.4. The Supreme Court of the United States re-affirmed the long-standing principle in the United States that the First Amendment of the United States Constitution protects the right to engage in charitable solicitation its recent decision of *Illinois v. Telemarketing Associates Inc. et al*⁷. The main issue in this case was a fraud claim against Telemarketing Associates for failing to disclose the percentage of the donation that would actually be used for the charitable purpose as opposed to administrative costs or fees to the professional fundraiser. **The Supreme Court reiterated that the First Amendment protects the right to engage in charitable solicitation—in that charitable appeals for funds involve a variety of speech interests, being communication of information, dissemination and propagation of views and ideas, and the advocacy of causes.** The Supreme Court held that while the First Amendment protects the right to engage in charitable solicitation, it does not shield fraud, and like other forms of public deception, fraudulent charitable solicitation is unprotected speech. Public deception is generally governed by the *Competition Act* in Canada.

7. LEGAL ARGUMENT

CONSTITUTIONAL FREEDOM OF EXPRESSION

7.1. Similarly, in Canada, charitable solicitations involving the speech interests of communication of information, dissemination and propagation of views and ideas, and the advocacy of causes fall under the protection of section 2(b) of the *Charter of Rights and Freedoms*, which reads:

2. Everyone has the following fundamental freedoms:

...

⁶ CFR, Title 47, Sec 64.1200(f)

⁷ US SC 2003

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;⁸

- 7.2. Asking for a donation of any sort or supporting a cause constitutes a protected expression pursuant to section 2(b) of the *Charter*. Such requests clearly convey a meaning and have expressive content as contemplated by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 (S.C.C.).⁹ Requests for donations were expressly found to be protected by s. 2(b) by the Alberta Court of Appeal in *Epilepsy Canada v. Alberta (Attorney General)* (1994), 20 Alta. L.R. (3d) 44, 155 A.R. 212, 115 D.L.R. (4th) 501 (C.A.),¹⁰ and the soliciting of donations for a political party was found to be a protected expression by the Ontario Court of Appeal in *O.P.S.E.U. v. Ontario (Attorney-General)* (1993), 105 D.L.R. (4th) 157.
- 7.3. This freedom is contemplated in the enabling legislation that is relied upon by the CRTC in its attempt to regulate tele-canvassing service providers:
41. The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, *giving due regard to freedom of expression*.¹¹ [emphasis added]
- Further, the CRTC states in its Decision that it “took into account the right to freedom of expression set out in the *Canadian Charter of Rights and Freedoms* (the *Charter*).”¹²
- 7.4. The new restrictions under Telecom Decision CRTC 2004-35 clearly infringe freedom of expression, both by altering the content of communications by tele-canvassing service providers and their clients, the not-for-profits, by imposing mandatory statements that must be read prior to soliciting donations or support, and by requiring the tele-canvassing service providers and their clients, at their own expense, to maintain do-not-call lists and dedicated toll free do-not-call hotlines that must be manned during business hours, as well as setting up and maintaining a registration system to generate and track unique registration numbers for do-not-call requests. Tele-canvassing service providers may not solicit donations until they have complied with these requirements. Failure to do so may be enforced by the disconnection of their telecommunication services, a further infringement of the right to free expression.
- 7.5. This impairment is not merely an effect of the new restrictions, *but is in fact the CRTC’s intent*. Since freedom of expression is clearly entrenched upon by the restrictions, the real issue is whether this limitation of the right can be justified under section 1 of the *Charter*.

Section 1 of the *Charter* and the test in *R. v. Oakes*

7.6. Pursuant to s. 1 of the *Charter*:

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the

Canada Act 1982 (U.K.), 1982, c. 11.

⁹ *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 at 605-7 (S.C.C.).

¹⁰ *Epilepsy Canada v. Alberta (Attorney General)* (1994), 20 Alta. L.R. (3d) 44, 155 A.R. 212, 115 D.L.R. (4th) 501 at para. 5 (C.A.).

¹¹ *Telecommunications Act*, S.C. 1993, c. 38.

¹² Telecom Decision CRTC 2004-35 at para. 14.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be *demonstrably justified in a free and democratic society*. [emphasis added]

7.7. The root case for the interpretation of when a limit can “be demonstrably justified in a free and democratic society” is the case of *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.). That case establishes the following criteria:

1. The objective of the regulation must be of **sufficient importance** to warrant overriding a constitutionally protected right or freedom; and
2. Once a sufficiently significant objective is recognized, then the party seeking to infringe the right must show that the **means chosen are reasonable and demonstrably justified**, or in other words, “proportional”. In order to do so the proponent must show that
 - (a) the measures adopted are carefully designed to achieve the objective in question, or in other words, are “rationally connected” to the objective;
 - (b) the means impair the right or freedom as little as possible; and
 - (c) the effects of the measures are proportional to the objective.¹³

7.8. The onus of justifying the rules limiting freedom of expression rests upon the party seeking to impose the limitation, in this case, the CRTC:

The Presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria that justify the rights being limited.¹⁴

7.9. The standard of proof is one of a preponderance of probability, and requires that sufficient evidence be present to justify the limitation:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, “commensurate with the occasion”. Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit ... A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.¹⁵

The Objective of the Rules

7.10. In order to be justifiable under section 1 of the *Charter*, the objectives of the rules created by the CRTC must be shown to be of sufficient importance to justify overriding freedom of expression.

¹³ *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 at 227 (S.C.C.).

¹⁴ *R. v. Oakes* at 225-6.

¹⁵ *R. v. Oakes* at 226-7.

The standard must be high in order to ensure that objectives that are trivial or discordant with the principles of a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to **concerns that are pressing and substantial** in a free and democratic society before it can be characterized as sufficiently important.¹⁶ [emphasis added]

Furthermore, the objective must be within the purview of the rule making body. The CRTC “cannot rely upon an *ultra vires* purpose under s. 1 of the Charter.”¹⁷

7.11. In defining its objectives, the CRTC referred to sections 7(i) and 41 of its enabling legislation, the *Telecommunications Act*. For our purposes the relevant sections are:

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

...

(i) to contribute to the protection of the privacy of persons.

...

41. The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

7.12. The CRTC’s stated purpose is contained in paragraph 14 of the Telecom Decision:

It was pursuant to section 41 of the Act that the Commission introduced most of the telemarketing rules in effect today. The Commission, in establishing its rules, considered how best to fulfil the intent of section 41 and to achieve the objectives in section 7, while allowing for the legitimate uses of such communication. The Commission also took into account the right to freedom of expression set out in the *Canadian Charter of Rights and Freedoms* (the Charter).

Ostensibly, and subject the discussion below respecting enforcement, the purpose of the restrictions is “to contribute to the protection of the privacy of persons” and to “prevent undue inconvenience and nuisance”.

7.13. Protection of privacy is a laudable objective. However, the protection of privacy we are discussing here is not the restriction of the collection and dissemination of personal and private information, which in the current era of information mobility, necessarily means the control of the movement of information across borders, an obviously federal responsibility under the *Constitution Act, 1867*. It is rather the **protection of the individual from intrusion in his home or business**, the effects of which are necessarily local and is properly a matter of provincial jurisdiction under sections 92(13) and 92(16) of the *Constitution Act, 1867*: section 92(16) because it is a “Matter of a merely local or

¹⁶ *R. v. Oakes* at 227.

¹⁷ *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 at 366.

private Nature in the Province”; and section 92(13) because it deals with property rights and privacy rights in the province. As such the object is *ultra vires* the CRTC and cannot be a valid objective within the meaning of section 1 of the *Charter*.

- 7.14.** Furthermore, the concept of privacy as freedom from intrusion is embodied in the common law under the tort of nuisance. It was originally treated as a right to freedom from undue interference in the use and enjoyment of land. Later it was extended to include freedom from interference in non-property rights by the Supreme Court of Alberta, Appellate Division, in *Motherwell et al. v. Motherwell*, [1976] 6 W.W.R. 550:

[T]he maxim *sic utere tuo ut alienum non laedas* is frequently invoked in the cases and when this is done the maxim is employed as a statement of the principle of nuisance. The maxim is certainly of sufficient vintage to warrant such employment. It is attributed to Lord Coke and translated and defined in *The Dictionary of English Law* by Earl Jowitt, vol. 2, p. 1639, in these terms:

“(9 Co. Rep. 59) (Use your own property so as not to injure your neighbour’s) *Use your own rights so that you do not interfere with those of another.*”¹⁸ [emphasis added]

- 7.15.** The *Motherwell* case dealt specifically with harassment by persistent telephone calls and will be returned to below. It is clear the right to privacy that the CRTC is trying to protect in the Decision is identical to the rights that are protected by the law of nuisance. Nuisance is a tort, and as such is a matter of provincial jurisdiction.¹⁹ This lends weight to the argument that privacy as intrusion is a matter of provincial jurisdiction and therefore not a valid objective for the CRTC.
- 7.16.** In addition to attempting “to contribute to the protection of the privacy of persons”, in a manner which has a local effect and sounds suspiciously like the common law tort of nuisance, the CRTC was attempting to “prevent undue inconvenience and nuisance”. As we have seen, “nuisance” in the common law sense is a tort and as such is a matter of provincial jurisdiction. If it was the intention or effect that the new restrictions prevent nuisance in a common law sense, then the objective is again *ultra vires* the CRTC and the restrictions are unconstitutional.
- 7.17.** As will be shown below in the section dealing with proportionality of effects and objectives, if the objective to “prevent undue inconvenience and nuisance” is something less than nuisance in the common law sense, then the restrictions are unconstitutional for other reasons.

a) *The Proportionality Test*

- 7.18.** The Rational Connection Test

Pursuant to *R. v. Oakes*:

[T]he measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.

¹⁸ *Motherwell et al. v. Motherwell*, [1976] 6 W.W.R. 550 at 560 (Alta. S.C. - A.D.).

¹⁹ See *MacDonald v. Vapor Canada* (1976), [1977] 2 S.C.R. 134.

In short, they must be rationally connected to the objective.²⁰

7.19. In response to those complaints the CRTC imposes the following requirements on tele-canvassing service providers:

101. In order to enable called parties to better identify the telemarketer placing a live voice call, the Commission requires that the caller identify both the person and the organization calling. If an agency is calling on behalf of a client, the caller is required to identify himself/herself, the name of the agency as well as the client for whom the call is placed. This identification of the caller must be provided before any other communication and before asking for a specific individual.

102. The telemarketer must also provide a telephone number before any other communication and before asking for an individual. The Commission requires that the telephone number supplied must allow toll free access to the telemarketer for questions or comments about the call. The Commission also stipulates that the number provided must be manned during business hours with an after-hours interactive voice mail backup system.

The CRTC goes on to create new restrictions on the use of predictive dialing devices, also apparently as a remedy for problems with enforcement,²¹ although here the connection is less clear.

7.20. The CRTC noted that:

The majority of the parties who commented on the effectiveness of the existing rules agreed that *the current restrictions represented a fair and adequate balance between the interests of customers and tele-canvassing service providers*. Many parties agreed that the extension of the rules set out by the Commission in Order 2001-193 was a positive step. *Most identified adequate enforcement of the existing rules as the major issue* and that awareness of the rules by both consumers and tele-canvassing service providers was an area that required particular attention.²² [emphasis added]

and later:

The Commission notes that restrictions on and requirements for telemarketers have been well established in a series of Commission decisions and for the most part are included in the tariffs of incumbent service providers. The Commission also notes, however, the general agreement of all parties that *better enforcement of the existing rules is the major factor in increasing their effectiveness*.²³ [emphasis added]

7.21. At paragraphs 83 to 90 of the Decision the CRTC decides, essentially, that enforcement of the existing rules is difficult and expensive and that it lacks some of the powers it would like to have to make enforcement easier. Instead of enforcing existing rules, the CRTC decides that “Absent the legislative power to impose fines, the Commission is making certain adjustments to the current regulation by imposing some additional requirements on

²⁰ *R. v. Oakes* at 227.

²¹ Telecom Decision CRTC 2004-35 at paras. 109-10.

²² Telecom Decision CRTC 2004-35 at para. 20.

²³ Telecom Decision CRTC 2004-35 at para. 83.

tele-canvassing service providers ...”²⁴. The CRTC then notes that the current rules include a requirement for self-identification.²⁵ It further notes that:

chief among the complaints that it received in the course of this proceeding were the problems surrounding identification of and access to the particular telemarketer who had caused the concern.

- 7.22.** The issue of enforcement arises again and again in the Decision, the apparent consensus being that the existing rules would be adequate if they were enforced. Instead of dealing with enforcement, however, the Decision creates new obligations where no new obligations appear to be needed or are justified. The new rules are, essentially, a remedy without a mischief to correct. And it would appear, no more susceptible to enforcement than the previous rules.
- 7.23.** It is submitted that there is no rational connection between the mischief created by the failure to enforce existing identification requirements and the creation of more onerous identification requirements. That is, the requirement that tele-canvassing service providers identify themselves, their organization, and their organization’s client and maintain/staff a do-not-call call list is not a remedy for lack of enforcement generally. These new requirements certainly do nothing to remedy enforcement of the previous rules requiring identification, since, in effect, some compliance efforts are a necessary precursor to enforcing non-compliance. Similarly, the new rules respecting predictive dialers have nothing to do with problems of enforcing the existing rules whatsoever.
- 7.24.** The Applicants respectfully submit that there is no need nor point to creating more rules if the previous ones were not enforced. Given the history of lack of enforcement, there is no indication that there will be enforcement of the new rules.

a) **The Minimal Impairment Test**

- 7.25.** Pursuant to *R. v. Oakes*:

Secondly, the means, even if rationally connected to the objective in the first sense, should impair “as little as possible” the right or freedom in question...²⁶

There is an earlier set of rules regulating tele-canvassing service providers set out in Telecom Decision 94-10, Telecom Decision 97-8 and Order 2001-193. These rules impact on the freedom of expression less than the new rules under Telecom Decision CRTC 2004-35. The CRTC noted that

The majority of the parties who commented on the effectiveness of the existing rules agreed that *the current restrictions represented a fair and adequate balance between the interests of customers and tele-canvassing service providers*. Many parties agreed that the extension of the rules set out by the Commission in Order 2001-193 was a positive step. Most identified adequate enforcement of the existing rules as the major issue and that awareness of the rules by both

²⁴ Telecom Decision CRTC 2004-35 at para. 96.

²⁵ Telecom Decision CRTC 2004-35 at para. 99.

²⁶ *R. v. Oakes* at 227.

consumers and tele-canvassing service providers was an area that required particular attention.²⁷ *[emphasis added]*

The CRTC does not disagree with this proposition.

7.26. It is submitted that if the previous restrictions represented a fair and adequate balance between the interests of customers and tele-canvassing service providers, then a more restrictive regime is by definition not a minimal impairment of freedom of expression.

7.27. Further, it is submitted that, even in the absence of consensus respecting the old restrictions, the new restrictions are too onerous to tele-canvassing service providers and their not-for-profit clients to constitute a minimal impairment of freedom of expression. Prior to making any communication *whatsoever*, even requesting the person who is intended to receive the call, the telemarketer must:

- establish and maintain a do-not-call list;
- establish a toll-free telephone line to receive do-not-call calls;
- staff it during business hours;
- maintain an interactive voicemail system for use outside of business hours;
- create a system for generating and tracking unique registration numbers, which needs more staff to operate, and which requires the adaptation of the interactive voicemail system to generate and provide such registration numbers after hours;
- the individual caller must identify himself or herself, identify the caller's organization, identify the client organization, and provide the toll-free do-not-call number;
- if the person who is on the other end of the telephone (who is not necessarily the intended recipient of the call) asks to be placed on the do-not-call list the caller must ask whether he or she wishes to be put on the client's do-not-call list or the telemarketer's do-not-call list;
- the caller must place the intended recipient on the requested do-not-call list at the request of whoever picked up the telephone immediately, even if the do-not-call list is specific to the client, which presumably requires some sort of integration with the client's do-not-call list system, with no basis to believe the person making the request is doing so with the permission of the intended recipient of the call
- the caller must then generate a unique registration number even if the do-not-call request is with respect to the client, which presumably requires some sort of integration with the client's registration tracking system—not an easy or simple task.

7.28. If the telemarketer and the individual caller crosses all of these hurdles, *then* the caller may ask for the intended recipient of the call and may exercise his or her freedom of

²⁷ Telecom Decision CRTC 2004-35 at para. 20.

expression. It is submitted that this is not a minimal interference with freedom of expression, especially given the not-for-profit nature of the calls made by the Applicants.

a) **Proportionality of Effects and Objective**

7.29. Pursuant to *R. v. Oakes*:

Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

... Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified in a free and democratic society.²⁸ [emphasis added]

For examples relevant in this context, see *Epilepsy Canada v. Alberta (Attorney General)* (1994), 20 Alta. L.R. (3d) 44, 155 A.R. 212, 115 D.L.R. (4th) 501 (C.A.) at paragraphs 28 to 35.

7.30. The effects of the new restrictions are far reaching and are disproportionately severe in relation to the objective of protecting the privacy of individuals. To begin with, the restrictions are overly broad by virtue of the definition of the word “telemarketer”. The word “telemarketer” does not appear in the *Telecommunications Act*. It is, however, defined in the Decision:

Telemarketing refers to the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation where solicitation is defined as the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another party.²⁹

The definition is expressly made to include all local businesses and organizations engaging in small-scale tele-canvassing campaigns to promote their services in the neighbourhoods in which they operate, and solicitation of donations by or on behalf of not-for-profits.

7.31. A telemarketer, then, is someone who makes an unsolicited telephone call for the purposes of

1. selling or promoting a product or service; or
2. soliciting money or money's worth

either directly or indirectly. In addition to applying to for-profit businesses marketing themselves and not-for-profits soliciting donations of money, this definition would apply to charities or their service providers asking for donations of used clothes and goods, or food for food banks. It would to sales people “cold-calling” for sales leads. On the strict wording of the definition, it would apply to unemployed persons calling prospective employers looking for work.

7.32. This means that the local Cub or Scout group using the telephone to request people to leave out bottles for its bottle drive will have to create and staff a system for generating

²⁸ *R. v. Oakes* at 227-8.

²⁹ Telecom Decision CRTC 2004-35 at para. 12.

and tracking unique registration numbers, establish and maintain a do-not-call list, establish a toll-free telephone line to receive do-not-call calls, staff the do-not-call line during business hours, and maintain an interactive voicemail system capable of generating and providing unique tracking numbers for use outside of business hours. So will the local PTA, high school graduation committees, craft groups, and any other group or individual that solicits money, time, goods, services, or business by using the telephone to contact anybody he or she does not know. For that matter, so will the child down the street who wants to know if you need your lawn mowed or your walk shovelled. It is irrelevant that the CRTC may not choose to enforce the regulations against these small parties; for the purposes of assessing constitutionality, it is sufficient that it would retain the power to do so.

- 7.33. It should be obvious that the cost of this additional administration would be prohibitive for not-for-profits. With respect to for-profit agencies, only very large multinational businesses would be able to afford to market themselves in this fashion; for all other businesses it would become as unaffordable as television advertising.
- 7.34. It is also alarming that the new restrictions impact not only upon fundraising by private charities and other not-for-profits, but upon fundraising by political parties, as stated in *Epilepsy Canada v. Alberta (Attorney General)*:

The first thing to note is that freedom of expression is one of the most important *Charter* rights and values. If it is invaded, many other *Charter* rights and values are imperilled [*sic*]. If it is preserved, many other *Charter* rights and values can be indirectly defended. See *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, 968-69; *Comité pour la République du Canada -- Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 174 ff.

At first that may sound like overblown rhetoric because one assumes that this is merely legislation about raising funds for [not-for-profits]. But despite the narrower discussion above, and despite much of the oral argument, this Act covers much more than fundraising campaigns for [not-for-profits]. It is in no way confined to [not-for-profits], in either the legal or the popular sense. Section 1(1)(b), called a definition section, is really a scope section. The Act covers:

... any benevolent, philanthropic, patriotic, artistic, athletic, recreational, or civic purpose and any purpose that has as its object the promotion or provision of a **public** service.

The words "patriotic", "civic", and "public service" are pregnant. This Act may well bar seeking funds or goods or financial assistance for a political party, especially a civic political party or candidate. And even if it does not cover political parties or candidates seeking elected office, today a host of semi-political organizations seek funds. Many groups [the majority of which are not-for-profits] lobby to change or enforce the law or social or government policy. There are lobby groups for the environment, morals, criminal law, equality or preference of segments of the population, birth and reproduction, and so forth. Most of them rely upon the public for important parts of their funding. The critical importance of political free speech is explained in *Reference re Alberta Legislation*, [1938]

S.C.R. 100, 145-46; *R. v. Keegstra*, [1990] 3 S.C.R. 697, 737 [77 Alta. L.R. (2d) 193, [1991] 2 W.W.R. 1]; cf. *R. v. Zundel*, [1992] 2 S.C.R. 731, 752.³⁰

- 7.35. Restrictions on solicitation of donations for a political party or any other politically active non-for-profit, and most are active at some level at lobbying for change in their areas of service, are not merely in infringement of commercial expression but are an infringement of political expression and impact the ability of people with diverse views to communicate their beliefs. They restrict the diversity of publicly expressed opinions and ideas, and threaten the underpinnings of our democratic society. The Courts take a very restrictive view of restrictions of freedom of political expression.
- 7.36. It should also be noted that the new restrictions do not only impact on the rights of the person who makes the tele-canvassing calls, or that person's client. The ease with which a party may put herself or himself on a tele-canvassing service provider's do-not-call list affects every organization, including every not-for-profit organization or political party that employs or wishes to employ the tele-canvassing service provider. This is particularly true because at the time of the call the tele-canvassing service provider is not at liberty due to privacy legislation to advise the recipient of the call who else the tele-canvassing service provider represents.
- 7.37. Furthermore, many people do have one or more charities they wish to support and do not mind receiving calls from or for those charities; some may even welcome being advised of new programs and initiatives from certain charities. By placing herself on the tele-canvassing service provider's do-not-call list when a call is received, the recipient of the call may inadvertently prevent herself from receiving calls that she *does* want. The immediacy of the call prevents any sober second thought. The likelihood of a call recipient taking the toll-free number in case she wants to remove herself from the do-not-call list is remote indeed.
- 7.38. The inherent requirement of the decision to place the call recipient on the do-not-call list *before* the tele-canvasser requests or speaks to the intended recipient means that in many cases it may not be the intended call recipient who makes the decision to block future calls. Someone other than intended recipient may instead make the decision. The Decision then not only interferes with the tele-canvasser's right to free speech, but it interferes with the intended recipient's right to hear such communications. Arguably this is an infringement of the intended recipient's right to freedom of association under section 2(d) of the *Charter*. This is particularly troublesome when you consider that the unauthorized agent might be preventing communication with a political party or the agent of a political party or some other politically active not-for-profit. **At a minimum there should be a requirement that the correct recipient of the call be identified before any such instructions are taken.**
- 7.39. While the restrictions may be onerous, it is submitted that the objectives are not particularly pressing. It is true that privacy is currently an issue of some concern to the public. It is true that some people find commercial telemarketing annoying. The CRTC stated that "Concern was raised respecting "consumer inconvenience and annoyance"

³⁰ *Epilepsy* at paras. 23-5.

relating to telemarketing calls.”³¹ However, it is submitted that annoyance is certainly not sufficient reason to impair a constitutionally protected freedom.

- 7.40.** In *Epilepsy Canada v. Alberta (Attorney General)* the Court found mere annoyance was insufficient to justify an infringement of freedom of expression in the form of requests of not-for-profits for donations, saying

*And evidence was led to show a legislative justification much like inefficiency (splitting) and annoyance (reducing): see the evidence in chief of the Crown's expert witness, Professor Knopff, on pp. 360-61 of the Appeal Books. I do not think that such an aim is either pressing or substantial enough to warrant curtailing free speech.*³² [emphasis added]

- 7.41.** Nor is it of any assistance to the CRTC that the changes in restrictions might be a practical or convenient way to address the problems of privacy or enforcement, as the case may be. According to the Supreme Court of Canada:

This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating [the Charter].³³

- 7.42.** Still further, consider for a moment the common law tort of nuisance. Nuisance is a balancing of reciprocal or equal rights. Originally it dealt only with rights in land balancing the rights of neighbours, both of whom had a right to quiet enjoyment of their land. Later it was extended to all individual rights: “Use your own rights so that you do not interfere with those of another.”³⁴ Most importantly, since both parties have the same level of rights, both parties' rights are considered to be equally important, and must be balanced.

- 7.43.** In nuisance cases, where the rights of both parties are of equal importance, the conduct of the offending party was only considered to be a nuisance if it was both serious and protracted. The Court in *Motherwell* stated that “every annoyance is not a nuisance; the annoyance must be of a serious character, and of such a degree as to interfere with the ordinary comforts of life.”³⁵ Conduct must be such that it “seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset”.³⁶ The Conduct must not “interfere materially with the health or comfort of other persons in the ordinary enjoyment of their premises.”³⁷ In addition to being serious, the offending conduct must be frequent and ongoing; it must be “protracted and persistent”.³⁸ If the conduct is not both serious and ongoing, then it is not in law a nuisance; further, *the conduct is deemed not to have infringed the rights of the complaining party*, which are after all equal in law.

³¹ Telecom Decision CRTC 2004-35 at para. 3.

³² *Epilepsy* at para. 18.

³³ *R. v. Big M. Drug Mart Ltd.* at 366.

³⁴ *Motherwell* at 560.

³⁵ At 562, citing Chitty L.J. in *J. Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255 at 271-2.

³⁶ At 562, citing Lindley M.R. in *J. Lyons & Sons v. Wilkins* at 267-8.

³⁷ At 566, citing Townley J. in *Stoakes v. Brydges*, [1958] Q.L.N. 9 at 10.

³⁸ At 564.

- 7.44.** However, freedom of expression and freedom from nuisance are not equal or identical, nor are they reciprocal rights. Freedom of expression is a constitutionally protected right, which the Applicants submit, is a higher right than freedom from nuisance, even if it is a legislated right. Similarly, privacy is a legislated right, but not constitutionally protected.
- 7.45.** It is doubtful that the telephone calls of a particular telemarketer on behalf of a variety of not-for-profits, coming perhaps once a month, or even twice a week, would be actionable in nuisance, particularly if the telemarketer was polite and inoffensive in his conduct. Consider:
1. The rights protected in the tort of nuisance are equal;
 2. The common law of nuisance recognizes a right to privacy in the form of freedom from intrusion that is identical to the right to privacy that the CRTC is attempting to protect;
 3. The right in *Motherwell* that was weighed against freedom from intrusion was freedom of expression;
 4. Freedom of expression is a constitutionally protected right and freedom from nuisance is not; and
 5. There is no law in this country that supersedes the Constitution.
- 7.46.** If freedom of expression is a constitutionally protected right and it is, then the right to privacy in the form of freedom from intrusion cannot have greater precedence. Consequently, the test to balance freedom of expression with freedom from intrusion *cannot* be any less stringent than the test to balance rights in nuisance cases that contemplate the same sorts of activities.
- 7.47.** As yet, Courts have not defined a constitutionally protected right to privacy in the form of 'freedom from annoyance'. If freedom from intrusion is not constitutionally protected, then the test to balance freedom of expression against freedom from intrusion must be *more* onerous than the test in nuisance.
- 7.48.** If, on the other hand, there was a constitutionally protected right to privacy in the form of freedom from intrusion, then the most that can be said is that the test to balance freedom of expression against freedom from annoyance would have be *as* onerous as the test in nuisance. Consider that such a right would probably be based upon the right to security of the person. The Applicants submit that in order for conduct to infringe upon the right of security of the person it would have to be shown to “seriously interfere with the ordinary comfort of human existence and ordinary enjoyment of the house beset”; which is after all one of the tests for common law nuisance.
- 7.49.** It is true that there are some differences between the way the rights are balanced in nuisance cases and the type of restrictions the CRTC is employing. For example, in nuisance cases, the restriction on free expression when it is shown to infringe upon freedom from intrusion is in the form of damages, often nominal, and injunction, which effectively curtails the freedom. Under the scheme contemplated by the CRTC, the restriction takes the form of onerous pre-emptive regulatory requirements. However, where the effect of the regulatory requirements is such that it makes it impossible for

individuals or not-for-profit organizations to legally exercise freedom of expression, this has the effect of injunction except that instead of preventing expression to a named individual, as under the nuisance cases, it prevents expression to *any* individual.

- 7.50.** Because the rights the CRTC is balancing are identical to the rights that are balanced in nuisance cases, it is impossible to avoid analogy with the law of nuisance where the *effect* of an infringement of freedom of expression is as onerous as injunction or damages. This is consistent with the balancing of objectives and effects contemplated with *R. v. Oakes*: the more important the objective, the greater the effect that will be allowed; the more the behaviour impacts upon another's rights, and the more important those rights, the greater the effect on freedom of expression that will be allowed. It is submitted that if the CRTC wants to regulate behaviour that may be occasionally annoying, as opposed to serious and protracted, it must use a very light touch indeed.

8. FREEDOM OF EXPRESSION AND CONTENT OF TELEMARKETING CALLS

- 8.1.** The paragraphs that purport to limit the expression/speech of tele-canvassers for not-for-profits in the Decision are:

101. In order to enable called parties to better identify the telemarketer placing a live voice call the CRTC requires that the caller identify both the person and the organization calling. If an agency is calling on behalf of a client, the caller is required to identify himself/herself, the name of the agency as well as the client for whom the call was placed. ***This identification of the caller must be provided before any other communication and before asking for a specific individual.*** [emphasis added]

102. ***The telemarketer must also provide a telephone number before any other communication and before asking for an individual.*** The CRTC requires that the telephone number supplied must allow toll free access to the telemarketer for questions or comments about the call. The CRTC also stipulates that the number provided must be manned during business hours with an after-hours interactive voicemail backup system. [emphasis added]

Interpretation

- 8.2.** In addition to interfering with the constitutional freedom of expression rights of not-for-profits, we submit the Decision seeks to interfere with the right of the not-for-profits to create their own content of that expression and the rights granted by the *Copyright Act* of Canada R.S.C. 1985 as amended (the "*Copyright Act*").
- 8.3.** A typical preamble in a script for a tele-canvassing service provider for a new supporter is:

Good morning/afternoon/evening. It's (representative's name) from RMG calling on behalf of ABC Organization, is this Mr or /Ms. Recipient?

Hello Mr.or Ms. Recipient, this is (representative's name) from RMG and I am calling for the ABC Organization. We're a charitable organization dedicated to (cause/program)

I am calling you today because we've just launched our fundraising appeal for research and programs for 2004.

- 8.4. For a past supporter relationship, the script generally reads:

Hi, this is [representative's name] from Univision calling from the fundraising team of the ABC Organization.

May I please speak with Mr. or Ms. Supporter?

Last year, our staff and volunteers provided over 700,000 hours of service, nationwide and free of charge, to thousands of Canadians requiring our services.

We expect demand for our services to increase very soon but now many of our traditional sources of income are either frozen or shrinking.

- 8.5. The nature of the script as created is work worthy of copyright. It is clear that the telemarketer's scripts, for new supporters and for past relationships, and the verbal expression thereof are "work" as defined by the *Copyright Act*. The Applicants are seeking an exemption for both types of tele-canvassing calls.
- 8.6. The Decision requires tele-canvassing service providers to alter their telephone scripts to include a warning similar to a 'consumer warning' or disclosure commonly found on labels and packages of potentially dangerous consumer products, and the warnings associated with content of television shows, films, and music recordings, which we submit is not within the purview of the CRTC's mandate or jurisdiction.
- 8.7. The telephone scripts are "works" with copyright rights attached to them under the legislation, with the more common understanding of these rights being that the author of a creative work has the **exclusive** right to control the copying of that work. Copyright also includes the underlying 'moral rights' of an author of a work, in this case the telephone scripts. The CRTC's requirement that the charitable tele-canvassing service providers place a warning of sorts interferes with the moral rights of the authors of the telephone scripts. "Moral rights" are the rights reflecting the ability of authors to control the eventual fate and in essence the treatment of their works. Moral rights are based on the relationship between the creator and his or her work, and protect the personal and reputational, rather than purely monetary value of a work to its creator. The Decision interferes with the legislated "moral rights" of authors, being that only the author can make changes to their work – no one else.
- 8.8. In this case the authors are representatives of not-for-profits and/or tele-canvassing service providers.

8.9. The Law

Copyright in "works" is defined in S. 3 (1) of the *Copyright Act* as follows:

3 (1) "For the purposes of this Act "copyright", in relation to a work, means the *sole right to produce* or reproduce the work or any substantial part thereof in any material form whatever to perform the work or any substantial part thereof in public, or if the work is unpublished to publish the work or any substantial part thereof, and includes the sole right:

(a) to *produce*, reproduce, perform or publish any translation of the work.

(f) in the case of any literary, dramatic, musical or artistic work to communicate the work to the public by telecommunication

...and to authorize any such acts. [emphasis added]

3 (1.1) Simultaneous Fixing – A work that is communicated in the manner described in paragraph 1(f) is fixed even if it fixed simultaneously with its communication.

8.10. Section 14.1 (1) of the *Copyright Act*, states as follows:

Section 14.1(1) – Moral Rights

14.1(1) The author of a work has, subject to section 28.2, *the right to the integrity of the work* and, in connection with an act contained in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous. (emphasis added)

Section 14.1 (2) – No assignment of moral rights

14.1(2) Moral rights may not be assigned but may be waived in whole or in part.

Section 14.2(1) – Term

14.2(1) Moral rights in respect of a work subsist with the same term as the copyright in the work.

8.11. For a moral right waiver to be valid, it must be expressed in clear and unequivocal terms and based on informed consent of the reasons and applicable circumstances of the waiver.

As noted by Normand Tamaro in the Annotated *Copyright Act*:

Given the importance of many of the rights falling into the category of “moral rights”, (a violation could in some cases touch on the author’s religious or political convictions), a Federal Copyright statute would hardly justify the restriction of rights protected by both Federal and Provincial human rights legislation. Concerning the autonomy of Provincial legislation in those sectors falling under the Provincial jurisdiction, see *Peralta v. Ontario*, [1988] 2 S.C.R.1045 at 1046.

8.12. Additionally, under the heading ‘Moral Rights Infringement’ of the *Copyright Act*, section 28.1:

28.1 Infringement generally – Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2 (1) Nature of right of integrity – The author’s right to the integrity of a work is infringed only if the work is, to the prejudice or the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

8.13. Finally, the *Copyright Act* under the heading “Works in which copyright may subsist”, section 5.1 states:

5 (1) Conditions for subsistence of copyright – Subject to this *Act*, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country. [emphasis added]

8.14. And for ownership:

Section 13(1) – Ownership of copyright

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein. [emphasis added]

8.15. The *Copyright Act* further states in section 27: (1) Infringement generally:

Infringement of Copyright

27. (1) Infringement generally – It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

8.16. In addition, remedies are defined in the copyright as follows:

34. (1) Copyright – Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

(2) Moral rights – In any proceedings for an infringement of a moral right of an author, the court may grant to the author or to the person who holds the moral rights by virtue of subsection 14.2 (2) or (3), as the case may be, all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

8.17. The Decision seeks to “oblige” authors of scripts (Works) to waive their moral rights and thus create a new script containing a type of 'consumer warning' or disclosure. This is clearly in breach of the *Copyright Act*. The *Copyright Act* governs freedom of expression and allows the creator or author of the script or music or film to freely communicate content in a form of expression. CRTC seeking to modify that script is working outside of its jurisdiction and is breaching the moral rights of the individuals (employees of the not-for-profits) who create the telephone scripts for the not-for-profits. These scripts are carefully crafted works written to convey specific information.

8.18. We respectfully submit that the CRTC is not authorized to require that the telephone scripts be changed; rather the CRTC's mandate is ensure any content presented pursuant to

the *Telecommunications Act* or *Broadcasting Act* is in compliance with the particular license granted by CRTC. The CRTC may regulate the type of warning or disclosure required, as evidenced by the usually standard wording of rated television shows, films, and musical recordings. The warning or disclosure is not a part of content, it is independent of the actual content of the work, and appears before the content is seen, heard or read, again supporting our submission that while the CRTC may require a warning or disclosure to be presented for certain content, it cannot require changes be made to content that is under copyright protection.

- 8.19.** The only regulation of content the CRTC can do is to either not grant a license, re-characterize or revoke the telecommunications or broadcasting license based on the content. The CRTC cannot require a licensee to change its content in order to retain the license granted. By its own empowering legislation, the CRTC either issues a license for a particular telecommunications or broadcasting activity or not, and therefore, simply “turn[s] a telecommunications service on or off” based on compliance of a licensee of those services. The CRTC license is properly maintained as long the licensee complies with the terms of the license. Should the CRTC be of the opinion the license is breached, it does not have the right to require the licensee to alter content, especially of material that is copyrighted, it only has the right to either re-categorize the license or cancel it altogether. **The intent and scope of the *Telecommunications Act* of Canada is clearly related to granting licenses, categorizing content and managing a system.**

Conventional Handling of Disclosure

- 8.20.** In attempting to regulate the content of the telephone scripts, the CRTC is requiring not-for-profits to essentially place a 'consumer warning' or disclosure on each and every telephone call. In Canada, consumer warnings are traditionally and typically handled differently than the way CRTC is seeking to with this Decision. There are numerous statutory and common-law principles existing in Canada which govern the content of communications or forms of expression. One example is the *Criminal Code of Canada* provisions regulating the content of telephone calls for defamation, harassment, misrepresentation and other such causes of action arising therefrom.
- 8.21.** Additionally, in the film and music industries, a printed notice is supplied to the viewer or listener in the event a film or piece of music is considered to be for a mature audience or a warning attached indicating the content is subject to, for example, “offensive, violence, nudity or the like” comments. In this way, the right to freedom of expression of the filmmaker or the musician (creator of copyright material) is not regulated or governed in such a manner so as to be restricted or violated. Rather, Canadian censorship rules place films and music in ratings categories and require that a warning accompany the film or piece of music so that consumers are properly informed as to the content which they purchasing, receiving, reviewing, watching or listening. The CRTC does not regulate the content of films or music, even though it grants licenses to use communications and broadcasting systems to the filmmaker and musician.
- 8.22.** We submit that since the CRTC does not practice in regulating or monitoring content for films or music, it should not, and cannot regulate the content of telephone solicitations. That type of regulation is not within the CRTC's purview. If the content of telephone solicitations should be regulated, and we would argue that it should not to the high degree

as the CRTC seeks to in its Decision, then we submit that there are other regulatory bodies or statutes which should undertake such regulation, a detailed discussion of those applicable to not-for-profits follows below.

Telecommunications' Carriers and Tele-canvassing service providers

8.23. At the same time, we submit that while the CRTC may be attempting to regulate telephone solicitations, it is actually not within its purview to even really regulate tele-canvassing service providers. The *Telecommunications Act* does not have clear jurisdiction over tele-canvassing service providers. The *Telecommunications Act* does not even include a definition for "tele-canvassing service providers", "tele-canvassing" or "telemarketing". It does however define telecommunications carriers in its definitions section:

"Canadian Carrier" means a "telecommunications common carrier that is subject to legislative authority of Parliament".

"Telecommunications Common Carrier" means a person who owns or operates a transmission facility used by that person or another person to provide telecommunication services to the public for compensation.

"Telecommunications Facility" means any facility apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications and includes a transmission facility.

8.24. The *Telecommunications Act* does not provide a definition of telemarketing service providers, only the CRTC does in the Decision. Generally these service providers do not own or operate transmission facilities, they simply access a transmission facility for the purpose of carrying out their business activities. By simply using telecommunications' facilities, tele-canvassing service providers or their clients cannot be seen to put themselves within the mandate of the *Telecommunications Act*.

8.25. The *Telecommunications Act* states in section 22 that:

22 (1) The Governor in council may in relation to *Canadian carriers* eligibility under s. 16 to operate as telecommunications common carriers make regulations

(a) respecting information that is to be provided, the persons by whom and to whom it is to be provided, the manner in which and the time within which it is to be provided and the consequences of failing to provide it

8.26. We submit this regulation clearly applies to only Canadian Carriers and Telecommunication Common Carriers as defined in the *Telecommunications Act*.

8.27. Therefore, if the CRTC had jurisdiction to require a 'consumer' type warning to be included at the beginning of every telephone solicitation, which we respectfully deny, the CRTC could only require that of entities that it has jurisdiction over, such as the Telecommunication Common Carriers, but not tele-canvassing service providers. Thus, it would be incumbent upon the telecommunications carriers who allow telemarketing activity over their transmission facilities to supply that type of warning, and not the tele-canvassing service providers in their telephone script.

- 8.28.** We respectfully submit that the CRTC does not have the right to approve any controlling or influencing of telecommunications content, it simply grants or retracts licenses for telecommunications or broadcasting activity, and does not regulate content.

9. NOT-FOR-PROFIT SECTOR CONCERNS

- 9.1.** The dominant purpose of a not-for-profit is 'charitable' in a legal sense—providing a public benefit. The word "charity" is derived from the 12th century, from the French *charité* which comes from the Latin *caritas* or *carus* meaning "dear". 'Charity' was originally meant to provide 'relief from poverty'. In modern society, the common law definition of 'charity' has evolved to encompass causes which are directed to the advancement of human achievement and the quality of life. 'Charity' revolves around 'public benefit', generally meaning that there should be an overall benefit to society, whether directly or indirectly and to identifiable groups or individuals.
- 9.2.** The general premise of a not-for-profit organization is that funds generated for its activities are directed to a particular cause, social, cultural, religious or political, rather than the process of generating the funds. The business model followed by most not-for-profits is relatively low administrative costs, with the majority of the funds generated being directed to the particular cause, for instance: research for illnesses and medical conditions or support for a specific group in society—disabled or disadvantaged individuals. Not-for-profits often run with skeleton administrative staff to keep operational costs as low as possible, filling their program staffing needs with professionals, volunteers and service providers as needed. In fact, not-for-profits frequently rely as heavily on donations of people's time as cash donations. The value and need for not-for-profits is fully entrenched in modern society, and particularly is a real force in filling the gaps that arise from, for example, government cutbacks to social programs. Not-for-profits protect and advance social change, and their activities are the foundation of a 'civil society', that free, democratic and pluralistic society to which Canadians have become accustomed and seek to protect.
- 9.3.** In terms of actual dollar figures, the 24 not-for-profits, a small fraction of the total number of such organizations in Canada, that support the Application and Petition with their letters of support in Schedule "A", generated over \$45 million dollars largely through tele-canvassing in 2003 alone. It is clear that the not-for-profit sector generates millions and millions of dollars every year in Canada for worthy, important programs.
- 9.4.** The Applicants emphasize that not-for-profits are one of the cornerstones of Canadian society.
- 9.5.** In the last number of years, not-for-profits and the voluntary sector themselves have suffered significantly from government cutbacks. The effects have been so great that these organizations have evolved their business model to establish their own relationships with individuals and corporate supporters rather than relying government funding. Fundraising campaigns throughout Canada increase in number of goals every year, with not-for-profits creating various partnership and sponsorship programs to engage the long-term support of business donors alone. At the same time, these organizations cannot rely only on business donors, and thus, they reach out to individual members of the public. One of the most accessible and effective ways in which not-for-profits initiate, develop and maintain a relationship with a supporter is tele-canvassing. Of the variety of methods

of reaching supporters, tele-canvassing is the highest in effectiveness, generating response rates that are often two to four times higher than direct mail or door-to-door campaigns. The real appeal of tele-canvassing is the cost-effective manner in which not-for-profits can connect with supporters in a personal interactive way of communication—critical when asking someone for his or her hard earned money.

- 9.6.** Most not-for-profits cannot afford to set up their own tele-canvassing centres or to recruit, train and maintain suitable staff. Instead, they rely upon professional tele-canvassing service providers—the tele-canvassing service providers such as the Applicants, who specialize in working with not-for-profits, underwriting some or all costs while charging reasonable fees. It is quite common for dozens of not-for-profits to use the same specialized professional telemarketer to generate support and donations from the public. Unlike telemarketing in the for-profit sector, it is common for not-for-profits' donor files to overlap to a very high degree---up to 90% of donors to one organization may be donors to another.
- 9.7.** Because of this overlap, one household may receive several telephone canvassing calls from one or several professional tele-canvassers, and in order to maintain balance, not-for-profits approach tele-canvassing with the public perspective at the forefront. Since tele-canvassing is such a valuable tool, both the not-for-profits and professional tele-canvassers are cognizant that they must be responsive to the concerns of the public, regardless of the means of communication. This sensitivity is demonstrably very real in the not-for-profit sector, thereby placing not-for-profits a special position in the public view. Not-for-profits are very effective at demonstrating the benevolent nature of their work, which further distinguishes them from commercial telemarketing activity.
- 9.8.** The failure of the CRTC to recognize the distinct and valuable role of not-for-profits in Canadian society, particularly to the well-being of supporters and recipients, to the economy, and to the individual relationship a donor forms with its favourite charity or cause is detrimental to the impact of the benevolence of not-for-profits, and non-governmental social programs. The Applicants urge the CRTC to consider the Application and this Petition in light of the fact that Canadian social history has established how different the work of the Applicants is from commercial activities, and how crucial their work is to the strength of the fabric of Canada.
- 9.9.** Not treating not-for-profits as 'special', and not exempting them from being treated like commercial tele-canvassing service providers pursuant to telemarketing rules really derogates from the value of the contributions of not-for-profits from their fundamental role in the creation and maintenance of Canadian civil society as we know it.

Impact of the Decision on Not-for-Profit Organizations

- 9.10.** We submit for consideration supporting materials in Schedule "A", consisting of letters from various not-for-profits detailing the impact of this Decision on their specific organizations. The Applicants encourage the CRTC to review the letters and accord them the necessary value in the Application and this Petition.

Specific Impact On Not-for-Profit Organizations

- 9.11.** Certain aspects of the Decision are likely to significantly diminish the ability and success of not-for-profits to communicate effectively with their supporters, thereby depriving

these organizations of essential financial resources to serve their purposes, and in turn depriving individual Canadians of services and support, and depriving supporters of the right and value of contributing and being involved in making a difference in the moral fabric of Canada.

9.12. The provisions of the Decision that adversely affect the not-for-profit sector at issue in the Application and this Petition are the following items from the list above:

- identifying the telemarketer and organization in a preamble *before* asking for a specific person
- making a toll-free telephone number available in the *preamble*
- *staffing* this toll-free telephone number during business hours with after-hours voice mail backup
- processing DNC requests made during a tele-canvassing call
- asking whether responding party would like to be removed from both the telemarketer's list and not-for-profits list
- from October 1, 2004, providing a unique registration number to confirm the DNC request

9.13. Firstly, the Decision now requires a lengthy preamble of disclosure to the actual nature of the telephone call and even before ascertaining if the caller is speaking to the intended party. This preamble keeps a recipient on the line without allowing the caller to identify the intended recipient, and is counter-productive to its intended benefit. Recipients who do not recognize the not-for-profit calling or are not aware that someone else in the household supports the not-for-profit are more likely to hang-up before even hearing the entire preamble, which results in an increase in the number of unsuccessful communications to intended recipients and unsuccessful solicitations. At the same time, the disclosure is meaningless to those other than the intended recipient, and again will result in higher numbers of hang-ups if for instance children answer the telephone and disconnect in the middle of the preamble.

9.14. Not-for-profits generally use the following type of introduction in the telephone scripts:

“Good day Mr. Or Ms. Doe, this is Tom Brown of ABC Society calling...”

or

"Hello, this is Tom Brown of ABC Society calling for Mr. Or Ms. Doe"

9.15. Due to the longer preamble and the requirement to provide a toll-free in this preamble, the Applicants anticipate that their clients' campaigns may experience a reduction of at least 10% to 15% in donations and ticket purchases to fundraising events by the consumer. The Applicants have found that respondents to tele-canvassing calls are quite annoyed by the long initial disclosure, particularly if the person picking up the telephone is not the person the tele-canvasser is calling for. The rate of hang-ups has increased by 10% to 15% already, and the tele-canvasser's productivity decreases accordingly. One pronounced

effect of the longer preamble is past supporters of a not-for-profit who are aware of the organization and deem the long preamble as wasting their time, giving them a reason to decline their support. This results in not-for-profits losing established supporters and funds that, in the past they have been able to rely on receiving.

- 9.16.** Furthermore, the Applicants estimate that costs associated with updating and implementing new scripts will also have an impact from which some not-for-profits and tele-canvassing service providers will not be able to recover. One of the Applicants' technical and systems staff have to date incurred 100 work days at a cost of approximately \$34,000 to \$40,000, with more work to be done before the new scripts can be properly implemented to comply with the Decision. This is a very high cost to the not-for-profits, and an impact which cannot be reversed over time.
- 9.17.** This provision of the Decision should at least be revised to allow the not-for-profit to determine the appropriate place in its script to provide the toll-free number and DNC information and certainly at the end of the call, or require the not-for-profit to provide the information immediately upon the intended recipient's request.
- 9.18.** Secondly, the Decision requires a toll-free number be made available and staffed during business hours with voicemail backup after hours. Dedicated live operators are very costly for not-for-profits. Not-for-profits are expected by their supporters and Canadians as a whole to maintain low administrative costs, and the cost to comply with this aspect of the Decision will increase administrative costs significantly. The Applicants estimate the cost of operating a toll-free number dedicated to each client campaign to be approximately \$150 per day—an extra charge payable by the campaign in toll-free related charges. This does not include the cost of hiring, equipping and training staff to answer the toll-free line, which could run in excess of \$300,000 a year for one applicant alone. Adding to that cost are expansion and upgrades of customer service systems, for which one Applicant has already incurred \$40,000 in cost, and estimates an additional \$20,000 per year in non-staff operating costs. These are costs that increase the operating costs of the tele-canvassing service provider, and in turn increase the cost of services to the not-for-profit. Even though final figures are not available, it is undeniable given the estimates above that this requirement dramatically reduces the funds available to the not-for-profit to direct toward its mandated causes.
- 9.19.** We submit that this rule should at the very least be revised to allow not-for-profits to make available a toll-free telephone number which has voicemail all the time. Live staffing should not be a requirement because it is too onerous on the majority of not-for-profits. The Applicants would be amenable to a requiring a reasonable time frame in which to respond to a voice message, for instance, informing callers that their call will be returned within 3 business days.
- 9.20.** Thirdly, the Decision's DNC provisions require that if the caller is a tele-canvassing service provider and is making calls on behalf of a not-for-profit, then upon a request to be put on a DNC list, the caller must ask the recipient if he or she would like to be placed on DNC lists of that specific not-for-profit and/or of the professional telemarketer as well. Due to privacy legislation, the caller may not be able to disclose the other not-for-profits it works with, therefore the recipient cannot be making an informed decision if they ask to be placed on the professional telemarketer's DNC list, thereby removing themselves from

the call lists of not-for-profits that the recipient may truly wish to support. This also jeopardizes the relationship that tele-canvassing service providers have developed with not-for-profits, if not-for-profits believe that their call lists will be negatively impacted because of an uninformed DNC request by one recipient in the household, they potentially lose the support of other members of the household for their organization.

- 9.21.** This rule should at the very least be amended to require that a DNC request apply to the specific not-for-profit on whose behalf the telephone solicitation is being made, unless the intended recipient specifically requests he or she wants to be removed from the call lists of every organization. In that case, only that recipient should be removed from the call lists, and not every person in the household. If this revision is not made, not-for-profits who use tele-canvassing service providers risk the reduction of their call lists without knowing whether the recipient actually wanted to be taken off their specific list. The result of this is that these not-for-profits will be unfairly penalized with a shrinkage in their established and potential database of supporters. This may be an unintended consequence of the Decision. However it is a serious consequence that undermines responsible stewardship where not-for-profits hire a tele-canvassing service provider to increase their scope of supporters.
- 9.22.** At the same time, if a recipient other than the intended recipient hears the name of a not-for-profit or a cause that he or she is not supportive of, there is a high likelihood that that not-for-profit is vetted before reaching the intended recipient. The not-for-profits most affected by this are those which represent views that society deems controversial or not mainstream, for example: gun control, women's rights, abortion, environmental issues, politics or religious issues. Professional tele-canvassers already experience a higher than average hang up and DNC request rate for those types of organizations than for others, and the new DNC rules will result in a lower success rate of connecting with and soliciting donations from supporters, thus providing incentive for tele-canvassing service providers to refrain from doing business with these types of organizations. This deprives these organizations of having a voice in our democratic society, and results in increasing their administrative costs if they are forced to establish their own tele-canvassing system or engage in other less efficient forms of solicitation. The ramifications are very serious for all not-for-profits.
- 9.23.** Fourthly, the requirement to provide each DNC requestor with an individual registration number from October 1, 2004 onward is similarly onerous as some of the other rules discussed above. This becomes an issue of records management and an increased administrative burden on a not-for-profit, which again, derogates from the real mandate—which is not to become buried in administrative issues and costs, but to provide the service or support for a particular cause.
- 9.24.** If the CRTC proceeds with instituting a national DNC list, which has a broader and more devastating effect than just one professional telemarketer putting a telephone number on its DNC list, we submit that not-for-profits should be exempt. Not-for-profits each maintain their own DNC lists and readily comply with DNC requests, again being sensitive to the public's concerns regarding telephone solicitation.

- 9.25.** Compliance with the onerous terms of the Decision would only increase the operating costs of not-for-profits, without a commensurate increase in benefits to the causes the not-for-profits support.
- 9.26.** The Applicants estimated that the Decision will greatly impact overall short and long term growth and sustainability of both the not-for-profits and tele-canvassing service providers. Prior to the Decision, the Applicants were planning for growth, on average, of 8% to 10% in 2004, and now, have reduced that to no growth at all, which again, dramatically impacts the not-for-profits and the potential employment available with tele-canvassing service providers.

10. GOVERNANCE OF CHARITABLE AND NOT-FOR-PROFIT ORGANIZATIONS

- 10.1.** Charitable and/or not-for-profit organizations are governed by provincial legislation. In Alberta for instance, not-for-profits are mainly governed by the *Charitable Fund-Raising Act*³⁹ and its *Regulations*⁴⁰, and the *Societies Act*⁴¹. In Manitoba, *The Charities Endorsement Act*⁴² and in Saskatchewan, *The Charitable Fund-Raising Businesses Act*⁴³, govern charities.
- 10.2.** We submit that if any legislation or governmental agency is charged with the right to regulate the content of not-for-profit communications to supporters or potential supporters, or to require not-for-profit tele-canvassers to change their scripts, the legislation that already governs not-for-profit organizations appears to have jurisdiction.
- 10.3.** As indicated by the Alberta *Charitable Fund-Raising Act*, the purposes of such legislation is:

Purposes

2 The purposes of this Act are

- (a) to ensure that the public has sufficient information to make informed decisions when making contributions to a charitable organization or for a charitable purpose, and
- (b) to protect the public from fraudulent, misleading or confusing solicitations and to establish standards for not-for-profits and fund-raising businesses when making solicitations.

10.4. And in section 1:

"solicitation" means

- (i) a direct or indirect request for a contribution in which it is stated or implied that the contribution will be used by a charitable organization or for a charitable purpose, or

³⁹ R.S.A., Chapter C-9

⁴⁰ (Consolidated up to 57/2004) ALBERTA REGULATION 108/2000

⁴¹ R.S.A., Chapter S-14

⁴² CCSM, C-60

⁴³ c. C-6.2, The Statutes of Saskatchewan, 2002, as amended

- (ii) a request for a contribution through a direct or indirect request to buy a good or service in which it is stated or implied that all or a portion of the purchase price will be used by a charitable organization or for a charitable purpose;

10.5. And further,

Providing information during solicitation

6(1) A person who makes a solicitation in person must, before accepting a contribution, provide the person who is being solicited with

- (a) the information required by the regulations in the manner and form required by the regulations, and
- (b) an adequate opportunity to review the information.

(2) A person who makes a solicitation by telephone must provide each person who is being solicited and who gives a contribution with the information required by the regulations in the manner and form required by the regulations.

(3) A person who makes a solicitation through printed material, television or other media must provide the information required by the regulations in the manner and form required by the regulations.

10.6. Section 5 of the *Charitable Fund-Raising Act* governs the time allowed for telephone solicitations, being between 8 a.m. and 9 p.m. only. This limits the possibility that a telemarketing call is made in the very early morning or very late in the evening, and reflects the considerations made by the legislation in balancing the rights of the not-for-profit to communicate with supporters and the right of recipients to not be intruded upon.

10.7. The form of the solicitations as specified in the Regulations is:

5(1) For the purposes of section 7(c) of the Act, every charitable organization that makes solicitations must **make available for inspection** in Alberta

- (a) original or true copies of its audited financial statements or financial information return required under section 8 of the Act for the financial year in which the solicitations were made;
- (b) **reasonable samples of publications or other information provided to persons solicited and any telephone scripts used to make the solicitations;**

(2) For the purposes of section 7(c) of the Act, every fund-raising business that makes solicitations must maintain in Alberta

- (a) reasonable samples of publications or other information provided to persons solicited and any telephone scripts used to make the solicitations; [emphasis added]

10.8. In addition to charitable fund-raising legislation, the *Competition Act*, R.S.C., 1985, c. C-34 regulates telemarketing and specifically the content of a telemarketing call, in section 52.1:

52.1 (1) In this section, "telemarketing" means the practice of using interactive telephone communications 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.

(2) No person shall engage in telemarketing unless

(a) **disclosure is made, 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 the communication;**

(b) **disclosure is made, 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

(c) disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

(3) No person who engages in telemarketing shall

(a) make a representation that is false or misleading in a material respect;

(b) conduct or purport 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.

(4) In a prosecution for a contravention of paragraph (3)(a), the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) The **disclosure of information** referred to in paragraph (2)(b) or (c) or (3)(b) or (c) **must be made during the course of a telephone communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the telephone communication.** [emphasis added]

10.9. The *Competition Act* does not exempt not-for-profits, and therefore, given the disclosure requirements in this act, properly harmonizes with provincial legislation to govern the content of a not-for-profit's tele-canvassing call. The purpose of the *Competition Act* supports the value and role of not-for-profits in the Canadian economy:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

10.10. Further, the Applicants submit that by the CRTC's own words in the Decision:

the CRTC recognizes that there must be a balance maintained between the right to privacy of consumers who are subjected to unsolicited calls and the right of the tele-canvassing service providers to conduct their business,

the CRTC properly recognizes the role of privacy legislation in governing telemarketing. The purpose of *PIPEDA* is clear:

to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act and the Statute Revision Act

10.11. The purpose of *PIPA* is also clear, and is along a similar intent as other provincial privacy legislation:

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

10.12. The CRTC has acknowledged in a past decision⁴⁴ that its jurisdiction on privacy emanates not from *PIPEDA*, but from the *Telecommunications Act* giving the CRTC discretionary powers, which we submit are far outside of its mandate and purpose, and which may result in differing determinations than *PIPEDA*. This discretionary power undermines the purpose and strength of federal and provincial privacy legislation and weakens the CRTC's justification of using privacy concerns to regulate charitable fund-raising.

10.13. The Applicants submit that the interplay between provincial fund-raising legislation, the *Competition Act*, and privacy legislation, properly synchronize to govern the content of a

⁴⁴ Telecom Decision CRTC-2003-33 Confidentiality Provisions of Canadian Carriers

not-for-profit organization's telephone solicitation and information held by a not-for-profit. In addition to being outside of its jurisdiction in regard to the *Charter of Rights and Freedoms* and violating the *Copyright Act*, the CRTC in its Decision encroaches upon the jurisdiction and purpose of charitable fund-raising and privacy legislation, and the *Competition Act*.

11. RELIEF SOUGHT

11.1. On the basis of the reasons submitted in this Petition, the Applicants request that the Governor in Council order:

- a) an immediate interim stay of the Decision with respect to not-for-profits and their tele-canvasser service providers, until a full review is conducted;
- b) conduct a review of the Decision in an expedited manner;
- c) order the CRTC to rescind the Decision; or
- d) in the alternative, order the CRTC to exempt not-for-profit organizations and tele-canvassing service providers working with not-for-profits from telemarketing rules;

ALL OF WHICH IS RESPECTFULLY SUBMITTED