Not-for-Profit Law

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Lessons for Canada in the American Approach to Telemarketing Fraud against Charities

Earlier this year, the U.S. Federal Trade Commission (FTC) won massive judgments against two different telemarketing groups for misrepresenting to donors the benefits to charities associated with their solicitations. Canadian officials would do well to take note of these successes.

One FTC case stemmed from the telemarketer suggesting, during solicitations, that he or she worked directly for the charities on whose behalf funds were being sought and that these groups received all proceeds of donations. In fact, only a small percentage of each gift went to the charity. The other action related to a cause-related marketing scheme, where goods were sold at a premium with a percentage of the proceeds purportedly going to charities or disabled individuals. The claim that charities or the disabled benefited was untrue.

The penalties imposed were staggering. The first group forfeited nearly $19 million (U.S.) in assets. The second group faces a $26.3 million (U.S.) judgment. In both cases, regulators obtained orders prohibiting the principals associated with the schemes from involvement in future soliciting.

Under U.S. law, the FTC enjoys wide authority to move against consumer fraud and, more specifically, to enforce a prohibition on "unfair and deceptive practices" in commerce. In contrast, Canada's *Competition Act* focuses more on "false or misleading representations" usually related to products. In addition to this discrepancy, the constitutional authority given to the federal government differs in the two countries making it more difficult for Canadian regulators to seek civil penalties.

As well as the *Competition Act*, the Canadian legal framework also features a variety of provincial consumer protection laws, and in some provinces, statutes specifically governing fundraising practices. In the U.S., many states also have consumer protection legislation and often also have laws regulating fundraising.

But the kind of conduct attacked by the FTC frequently falls outside of what would be provincial jurisdiction, or is beyond the scope of current provincial statutes in Canada. Modern technology allows unscrupulous operators to set up in jurisdictions without strong legislation or with lax enforcement and conduct their business across borders to reach markets in other provinces. Like privacy, environmental, and securities legislation, a federal presence in this field is becoming essential for effective regulation. In part, this could entail playing a multi-jurisdictional, multi-agency co-role as is sometimes done by the FTC in the U.S.

Some provincial legislation, such as the Alberta *Charitable Fund-Raising Act,* potentially applies to groups located outside the province. However, with limited enforcement resources and challenges of executing remedies or sanctions against entities without assets in their jurisdiction, regulators often don't act in cases where the conduct originates elsewhere.

At the best of times, enforcement proceedings can be extremely lengthy and assets can be spent or vanish before a case is concluded. Aside from monetary penalties, judicial orders designed to prevent principals from engaging in their impugned conduct again in the future may be difficult to enforce in other provinces. Moreover, in contrast to the large penalties exacted in the U.S. by the FTC, sanctions available under some provincial legislation can be so minimal as to amount to a cost of doing business rather than a true deterrent.

There is no hard evidence that the kind of systematic fraud uncovered by the FTC is regularly occurring in Canada. We do know, though, that Canadian donors identify concern about how much of their donations are actually going to their causes as a major reason for not giving more generously. We also know that charities don't have the time, resources, or expertise to protect themselves against unscrupulous representations sometimes made ostensibly on their behalf. Lastly, third-party and cause-related marketing fundraising have mushroomed in Canada in recent years.

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Given this, an enforcement initiative under the *Competition Act* or, even better, legislation to strengthen federal authority over deceptive practices merits serious consideration. Also needed are regulatory resources and penalties that are substantial enough to deter businesses and their principals from engaging in practices that sully the name of specific charities or undermine donor confidence in charities and their work. Civil penalties available on the scale of those in the U.S. would be ideal.

Especially troublesome is the neglect in Canada of the regulation of cause-related marketing. A charity may not even be aware that a business is using its name (and intellectual property) as a means to promote a product or service. Provincial regulation of cause-related marketing is haphazard. Alberta's fundraising legislation does include a disclosure requirement for this type of solicitation as well as provisions prohibiting misrepresentations or unauthorized representations. But most provinces don't regulate this type of activity.

If the cause-related marketing is carried on without involving the use of any of a registered charity's resources, the federal charities regulator, the Canada Revenue Agency, has no way to compel disclosure or other actions by the business undertaking the marketing. And no other federal agency is mandated to review the

types of representations that accompany such arrangements. This leaves charities and consumers highly vulnerable to abuse.

As we have seen again recently, the internal spending of charities is an area far more apt to draw the attention of politicians and regulators than the doings of businesses claiming to be helping out a charitable cause. Late last year, a private member's bill was introduced in Parliament to require disclosure of the top salaries paid by registered charities and capping compensation for charity executives at $250,000.

The transparency provided by the proposed statute no doubt strikes a chord with the public. It unfortunately also feeds into a widely-held perception that services provided by charities ought to be delivered professionally but at little or no administrative cost. That may have been a viable model when many charitable functions were supplied by faith-based groups with abundant access to low-cost labour and a large infrastructure. However, it doesn't accord with the realities of contemporary Canadian society.

Whether – if passed – the legislation will significantly change compensation practices is unknown, given competitive market forces and the need to attract talented leadership for multi-faceted organizations. With occasional exceptions, the jobs that the boards and management of charities do in determining suitable pay for their staff is probably fairly reasonable.

More fruitful, it is suggested here, both in terms of rooting out excesses and protecting donor confidence in appropriate use of charitable dollars, would be a Canadian initiative akin to the FTC's to ensure monies channelled through businesses to charities actually get there and get there in the proportions promised.

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