

Background to Telemarketing in Canada

The major difference in the statutory regimes governing telemarketing in Canada and the U.S. is that our *Competition Act* which governs deceptive telemarketing has a private cause of action, section 36. In general, all offences described in Part VI of the *Competition Act*, which include conspiracy (section 45), bid rigging (section 47), illegal trade practices (section 50), false or misleading advertising (section 52) deceptive telemarketing (section 52.1), multi-level marketing plans (section 55), and pyramid selling, (section 55.1) can be enforced by private individuals pursuant to section 36. This is an important difference because the FTC need not rely solely upon the Competition Bureau for enforcement purposes. Let me explain this in more detail, with specific reference to the three problems Mr. Hugh Stevenson identified in his 2001 statement to the U.S. Subcommittee on Investigations, of the Committee of Governmental Affairs and some specific solutions.

First Problem: **Information Gathering Roadblocks:** “[The FTC’s] ability to obtain information about foreign targets is much more limited. In addition, as a practical matter, we generally lack the ability to compel foreign targets or third parties to respond to our information requests.”

In Canada, the way to compel “third party suppliers, former employees, express package companies, telephone and Internet service providers, and financial institutions” to provide information is to start an action against them directly, **solely for the purposes of**

discovery. Discovery actions are allowed if: 1) the person seeking the discovery has some bona fide claim against the alleged wrongdoers; and 2) the person seeking discovery must share some sort of relation with the person from whom discovery is sought.

Generally, this means that the persons against whom discovery is being sought should be “mixed up in the tortious acts of others so as to facilitate their wrongdoing, even though this is through no fault of their own.”

The authority for discovery actions is discussed in the enclosed case, from the Ontario Court of Appeal, **Straka v. Humber River Regional Hospital et al.**, [2000] 51 O.R. (3d) 1.

This is generally the law of Canada. These discovery orders are known as Pharmacol/Bankers Trust orders. These orders combined with confidentiality requirements are very effective for getting financial institutions to disclose banking records on a confidential basis - the financial institution is ordered not to reveal to their client that they have disclosed his or her banking information. These are very powerful orders and lead directly to the next enforcement step.

Second Problem: Inability to Enforce Injunctive Relief and Equitable Relief: You say that while the FTC has significant powers to obtain injunctions and asset freezes from U.S. judges, that authority does not extend to foreign courts. There is a way around this problem. Assuming that the appropriate Pharmacol/Bankers Trust order has been obtained and assets have been discovered in Ontario, for example, then a section 36 action, with the necessary injunctive relief, can be commenced in that foreign, to FTC, jurisdiction. Since the *Competition Act* is Federal in scope, the action can be commenced

in any province at either the Superior Court level or in the Federal Court. (I have also included a paper, sent by regular mail, discussing the possibility of obtaining mareva orders in Canada, if the main action is in another jurisdiction. This paper may be of general interest, but its basic premise is probably not directly relevant to the FTC cross-border cases, as it presumes that the only tied to the jurisdiction of Canada is the location of assets.)

Third Problem: The reach of asset freezes: Again, once the necessary Pharmacol/Bankers Trust orders have disclosed the existence of assets, mareva relief can be pleaded and obtained within the section 36 action.

Let me give you an example of how we used this process. We currently represent a group of 160 individuals who had the misfortune to contract with Universal Payphones. The FTC brought a similar action against American Universal Vending, Civ. No. 00-0155 (W.D.N.Y.). Two years ago, we froze assets in the Canadian Banks and forced the banks to turn over their records to us. We are now using those records and Pharmacol/Banker's Trust orders to trace those funds.

In slightly more detailed., and mindful of client confidentiality, we obtained Universal Payphone's banking records in Ontario. Our Competition Bureau acted very quickly once they had complaints about this business opportunity. Complaints were made in August, 1999 and by the middle of September, 1999 the Competition Bureau had obtained an interim order against Universal Payphones, which was made final in or around March,

2000 on consent.

In the middle of December, 1999, relying in part on the Competition Bureau's materials, we brought a motion for injunctive relief and an order compelling the banks to produce these records to us. Second, we identified a number of transactions that were very suspicious, transfers of money to individuals. We believe that we have identified where these funds ultimately went and are now compelling foreign banks to deliver, on a confidential basis, their banking records to us. Finally, once we have the complete transaction record, we will bring a section 36 action against the principal behind the Universal Payphones fraud, with the necessary injunctive relief.

We believe that this entire tracing process will take between 2 and 3 years. We fund the litigation work based on monies that we have recovered and anticipate that the individual investors will receive 30-40 cents on the dollars through our recovery efforts. While it may not be in the public interest to pursue this tracing litigation, our private clients by joining this action for a flat fee of \$500 or \$1000 have signalled their commitment to obtaining a private redress against Universal Payphones. I believe that this is a very good example of the benefits of a public/private law partnership: the future investors are protected by quick action by either the FTC or the Competition Bureau, while those investors who choose to band together to obtain private redress can do so, but not at the expense of the public interest