

**CRTC Telecommunications Sales Practices
Review and Report – What Telecommunications
Company Employees Need to Know**



**PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC**

Public Interest Advocacy Centre

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Introduction: What is the Telecommunications Sales Practices Review?

You may have heard that the Canadian Radio-television and Telecommunications Commission was asked by the federal government to hold a public inquiry into how telecommunications companies sell their services (meaning services for Internet, home phone, wireless phone and even including paid TV) to Canadians and whether or not they do so fairly and transparently.¹

CRTC Questions to Employees of Telecommunications Companies (Current or Former)

The CRTC was specifically asked by the government to try to hear from current and former employees about the sales practices and how sales are carried out in fact. Here are the questions that the CRTC has asked current and former employees:

Current and former employees of service providers

4. The OIC stipulated that the views of the employees of the service providers, as well as the sales guidelines set by the service providers, are among the important sources of information to be considered in evaluating the retail sales practices of the service providers. Interested persons are encouraged to review the section of this notice entitled “Current or former sales or customer service representatives of the service providers,” which provides further information in this regard.

- Q7. Which service provider do you or did you work for and in what capacity? During what time frame did you work for this service provider?***
- Q8. Did you have sales guidelines or procedures you had to follow or were encouraged to follow? Provide a copy if possible. What did they say about misleading or aggressive sales practices?***
- Q9. In your own personal experience, were the sales guidelines or procedures followed? What were the impacts of the sales guidelines or procedures on your approach to sales interactions with consumers? Were there incentives that you felt encouraged you to ignore sales guidelines or procedures to your personal benefit as an employee? Were you ever encouraged or threatened by your management in a way that you believe encouraged you to disregard any sales guidelines or procedures?***
- Q10. What is your personal experience of the actual impact of misleading or aggressive sales practices on consumers and employees, if any?***

¹ See Telecom and Broadcasting Notice of Consultation CRTC 2018-246, Report regarding the retail sales practices of Canada’s large telecommunications carriers (16 July 2018). Online: <https://crtc.gc.ca/eng/archive/2018/2018-246.htm> See also: Governor in Council, Order in Council (“OIC”) P.C. 2018-0685, reproduced in Appendix 1.

PIAC’s Comment on these Questions:

PIAC is very concerned about current and former employees’ contributions to the CRTC inquiry. First, the testimonies of current and former employees are crucial to the CRTC’s complete understanding of the sales process and how it may or may not align with the telecommunications companies’ sales policies and procedures.

Second, there may be risks for employees (current or past) in answering these questions and providing evidence to the CRTC. We deal with this below under the heading “A Very Serious Word about Confidentiality and Employment Law.”

Besides these overarching concerns, PIAC believes the above questions do not clearly outline the issue of the suitability of the services sold to the customer; that is, although the sale may not have been aggressive or misleading, was the service sold really a needed or useful one to the customer and appropriate to their means and needs? Current and former employees’ views on the suitability of services sold in addition to stories of aggressive or misleading sales are key.

A Very Serious Word about Confidentiality and Employment Law

Current and former employees should know that several legal duties, requirements, contracts, non-disclosure agreements, statutes and regulations may apply to them and the work they did or are still doing for their employers. This does NOT mean that you cannot write to the CRTC to comment online or even to make a formal oral statement at the CRTC’s public hearing. However, it does mean that you should be aware of the law and practice in this area to protect yourself.

PIAC is NOT offering you legal advice here. The FIRST thing to do is to check with a lawyer before responding to the CRTC’s invitation to comment. PIAC regrets that this should be a necessary step; we have tried to convince the CRTC to immunize employees, to the extent it can, from legal consequences for giving good faith accounts of their knowledge of the sales environment. However, the CRTC has been reluctant to take this approach or to caution the telecommunications companies to refrain from such legal retaliation, therefore, speaking to your lawyer is necessary.

Everything we discuss below should be familiar to your lawyer and the lawyer should be able to relate your personal situation to the law and practice. The following is intended only to permit you to have a reasonable conversation with your lawyer about relating these sales stories to the CRTC in the conduct of its inquiry. This is also not intended to be advice about speaking to media or how to speak to or write to anyone outside of the formal CRTC process. Doing so without advice from a lawyer can put you at risk.

In encouraging current and former employees to provide such evidence to the CRTC, there is a real risk of exposing these (ex-)employees to potential legal risk based on their legal duties to their (former) employer. Generally, both laws and contractual and other employment obligations (such as “non-disclosure agreements”) limit what employees can say about their former employers or what their work was like or how it was performed. That is not to say that these

obligations are absolute or that they continue indefinitely. However, the safest assumption is usually that they do apply and only if there is another legal excuse can an employee testify or make a written statement about their current or former employer or work experience without risk of legal action against them.

What is “Privilege”? Two Flavours: Absolute and Qualified

One of these legal excuses – that does allow an employee to discuss their employer or work – is the concept of legal “privilege”. This is an evidentiary rule that allows discussion of these matters in public in specific circumstances. There are two “flavours” of privilege: absolute and qualified. Generally, like chocolate and vanilla, while both are nice, one is better than another.

Absolute privilege (chocolate!) means that a person can give any evidence and say anything, without fear of any future legal consequences (whether for employment confidentiality claims, defamation (slander/libel), interference with economic relations, etc.). This rule is designed so that people can say things in court, or in Parliament, without fear of being sued for what they said. It would be hard to even use courts or run a country without this freedom to speak. The privilege is said to attach to the occasion, that is, to the actual court hearing or Parliamentary session. It’s not a personal privilege or due to any one person’s status.

Qualified privilege (vanilla.) protects most statements in the same way from legal consequence, except those that are deliberately false or malicious and, possibly, totally irrelevant ones. For the purposes of this CRTC inquiry into sales practices, the reason why we are talking about qualified privilege at all is because qualified privilege can still be available when the “occasion” is not court-like enough for the absolute privilege exception discussed above. The CRTC is usually considered a “quasi-judicial” administrative tribunal, not a court.

It is not clear on the law whether the CRTC’s sales inquiry itself, however, is “judicial-like” enough – that is, enough like a real court – to mean all witnesses would automatically enjoy absolute privilege. Courts have said that some administrative tribunals are quasi-judicial enough that their witnesses should be treated like court witnesses but some tribunals are not. Sometimes, courts look at the nature of the proceeding itself (as is the case here: it is an inquiry leading to a report to the Cabinet, which appears less formal and court-like; however, the CRTC also did issue a formal “Notice of Consultation” for this hearing, which is as formal as the CRTC gets) to see if it is so court-like that it is an “occasion” of absolute privilege.

With a qualified privilege, the law recognizes certain other “occasions” besides court or Parliament where it is in the interest of society to accord privilege to witnesses. The CRTC written and oral hearing proceedings are, generally speaking, such an occasion. As noted, however, there is some uncertainty regarding how deserving this inquiry and report are and whether they would be a (qualified) privilege “occasion”.

Qualified privilege is limited. The witness must be acting in good faith. Provided this inquiry and proceeding is an occasion that could support qualified privilege, then as long as a witness in the CRTC process does not purposely try to mislead or act maliciously towards another person or company, he or she should be able to make a statement that is wrong or inaccurate, or that is otherwise normally at risk of inviting a legal case against the speaker, without legal

consequences. That is: good faith testimony about what the witness believes should be privileged under this “qualified” (limited) privilege.

In *Adam v Ward*, [1917] A.C. 309 (H.L.), a leading case on privilege, it was explained that such an occasion of qualified privilege is one where the individual making the statement objectively has a legal, social, or moral duty to make it, and in turn that the person who receives the statement has an objectively corresponding interest or duty to receive it. This appears to describe what any current or former employee’s prospective evidence likely would be answering and it appears that the CRTC is interested in precisely these details to try to inquire into the state of telecommunications and related sales with its sales practices inquiry, as stated in its Notice of Consultation. Ultimately such a determination is, however, up to the courts.

The CRTC Process and Confidentiality (and *In Camera* Sessions)

The CRTC has recognized that employees (current and former) do face potential consequences for merely trying to assist the inquiry by telling the CRTC about the sales practices and environment at the telecommunications companies. As noted in the Notice of Consultation for this inquiry, the CRTC has directed employees to the section entitled: “Current or former sales or customer service representatives of the service providers.”

This section of the Notice explains that employees (current and former) can choose to submit their comment and evidence confidentially under the CRTC’s *Rules of Practice and Procedure*. Presumably, the CRTC believes that this confidentiality process will protect current and former employees from legal consequences for providing their evidence. PIAC has three problems with this process:

1. The process to claim confidentiality and to file confidential comments is awkward and unintuitive. We believe current and former employees may not use it correctly, or may become frustrated with the complication of the process and either file their comments without claiming confidentiality (at least, properly) or choose not to comment.
2. Even if the employee is able to file their comment with a claim for confidentiality, the CRTC does not mention that procedurally, any party to the proceeding (including the employee’s current or former employer) can seek to remove the confidentiality or part of it and have the comment made fully public, which would defeat the purpose of the effort to file confidentially and would trap the employee into potentially being exposed (and facing legal retaliation or other consequences).
3. Even if the comments remain confidential, that brings its own serious limitation. No other party besides the CRTC will see the full comment; many key parts, or perhaps the whole thing, will be known only to the CRTC. Other parties, such as PIAC, that might have used the comment to advance the consumer interest, will not be able to do so. In other words, secret comments like this will not help lead to an open, transparent hearing and promote change in the industry, which, we feel, is the true goal of the hearing.

Filing Comments “Confidentially”

If, nonetheless, an employee or former employee wishes to submit comments confidentially in spite of the shortcomings above, this can be done, however, it is awkward. PIAC will attempt to describe how this is done, but, we are not responsible for mistakes. You can call or contact the CRTC to ask for assistance with this process. Exceptionally, the CRTC has indicated it will attempt to identify and redact such comments itself or at the least assist. We do not know how they intend to do that or what they will do. This paragraph was included in a letter from CRTC staff to PIAC when we inquired into how current and former employees would be protected from legal repercussions if they chose to submit comments in writing or give oral evidence:

“Submissions in response to the Notice are being reviewed on an ongoing basis by Commission staff in order to identify confidentiality or related issues facing those employees who wish to participate in this proceeding. Other measures are also available to the Commission, such as ordering that a public hearing be held in part in camera. These measures are available, if required, to address any party’s specific concern arising from submitting information on the public record of this proceeding.”

The employee (current or former) must obtain a special account to submit comments confidentially. If the employee simply uses the comment link that the CRTC has provided, then that comment will be posted publicly, with the employee’s name visible. The special accounts are for access to a portal called “My CRTC account”. The user must first either obtain a “Sign-in Partner” account (which uses your banking login, if you are a participating bank customer) or a “GCKey” account (the government’s own authentication service).²

Next, you must prepare yourself for filing confidential documents with the CRTC by familiarizing yourself with the CRTC process for doing so under their rules and procedures. The CRTC Notice of Consultation outlines these initial considerations and procedures in paragraphs 43-48. We do not reproduce the paragraphs in full here, however, note that the CRTC says you must:

1. [C]onsult the Act, the Rules of Procedure, and Broadcasting and Telecom Information Bulletin 2010-961 for further details;
2. [D]esignate the following types of information as confidential:
 - information that is a trade secret;
 - financial, commercial, scientific, or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
 - information the disclosure of which could reasonably be expected

² See Government of Canada, “Cyber Authentication Renewal Initiative Frequently Asked Questions For Users”. Online: https://crtc.gc.ca/eng/forms/form_405.htm#s2-1

- to result in material financial loss or gain to any person,
- to prejudice the competitive position of any person, or
- to affect contractual or other negotiations of any person.
- [P]rovide reasons why the disclosure of the information would not be in the public interest, including the specific and direct harm that would likely result from the disclosure, and
- [P]rovide any supporting documents.

Notice how badly the possible categories for current and former employees to claim confidentiality (“result in material financial loss or gain to any person” or “affect contractual or other negotiations”) fit what the employee is actually trying to do. The law the CRTC cites above (section 39 of the *Rules of Practice and Procedure*) therefore may not protect employee whistleblower information. However, the rest of this note assumes for now that it does.

1. Redact your document. This means create a version with the text that may identify you or violate your legal obligations to your employer blocked out so it cannot be read. Make sure to also keep an unredacted (fully readable) copy for the CRTC.
2. Note that the *Rules of Practice and Procedure* of the CRTC, quoted above, require an applicant (you) who wishes to file confidential documents to claim confidentiality under justify, at the time of filing (not later) why confidentiality is required and why it is not in the public interest to provide public disclosure of the document(s) you are trying to keep confidential. Therefore you must first claim you will suffer “material financial loss” or, possibly, interference with “contractual or other negotiations”. Then you must give an explanation why you expect these results from potential disclosure of the information, citing “specific and direct harm” you will suffer if there is public disclosure. Very likely this will be mentioning that you are a (current or former) employee and fear retaliation or other legal consequences of public revelation of your confidential information from your (former) employer or another party. You also may wish to add other reasons.
3. We must not here, that EVEN IF YOU FILE CONFIDENTIALLY, an employer or former employer (or indeed, any other party in this proceeding) could apply to the CRTC to remove your confidentiality claim for some or all of your confidentially submitted documents.
4. We cannot detail here the process for disputing this request to disclose your information publicly or how you should defend your confidentiality claim. It is simply too detailed and we are not offering legal advice. Please consult a lawyer should this occur.
5. Now file both copies of your comment (redacted and unredacted) via the CRTC Website. From the home page, click on the “Business” heading and then select “Forms and My CRTC account login” from the dropdown menu. Then, select the “Telecom Cover Page” link from the bulleted list you see on the screen. Read the long privacy, cookies and security notice on that page and at the bottom, click on the “Proceed to Telecom Cover Page” button. Log in either with your “Sign-in Partner Log In” or your “GCKey Log In”.

6. Select your language and then fill in the long form that appears. This form will ask you for your contact information. Provided you later claim confidentiality, this should be kept confidential by the CRTC. However, to be sure, you should indicate in the text of your description on the form (see below) that you wish to remain anonymous.
7. Where it says on the form: “* You must select the relevant type of submission to ensure that it is appropriately routed: (required)”, you should select “Other document(s)”.
8. When you do, a box headed “Submission” pops up with three text boxes to fill out. In the first text box, titled “File, application or Notice number(s): (required)” type: “TBNC 2018-246, Sales Practices Review.”
9. In the second text box, titled “Subject: (required)” type: “CONFIDENTIAL Comment from (current/former) employee”.
10. In the third text box, titled “Description of Information Submitted: (required)” type a short description of your comments in the attached document. However, keep this description short and be sure to say: “This comment is filed confidentially.” If you wish to appear to give oral testimony at the hearing, you should indicate so here and also in the text of your redacted and unredacted documents.
11. Then click on the button “Upload Files”. Check that your documents (your redacted and unredacted comment and related documents) conform to the requirements listed for type of document (note, usually Word or PDF format, and only 10 MB in total).
12. When you file the confidential version (that is, the full, unredacted document – and any confidential attachment), MAKE SURE to click the radio button for “CONFIDENTIAL” . It should appear in the uploaded file list with the word “Confidential” in the “Confidentiality” column. Please double-check this to get it right. It will be almost impossible to change later and if done backwards, could expose the information you wish to keep confidential.
13. When you file the public version (that is, the redacted document), click on “NOT CONFIDENTIAL”. The instructions at the top of the form read: “Confidential documents must always be accompanied by an abridged non-confidential version.” REMEMBER: the blacked-out (redacted) version of your document must be filed as “NOT CONFIDENTIAL” in the Confidentiality column. If the whole document is confidential (e.g., an attachment such as a sales training manual) then describe the contents in general terms and state “content redacted in accordance with s. 39 of the Rules of Practice and Procedure”.
14. Click the “Next” button. It should display a “Telecom Cover Page” with your form. If all looks in order on the summary page, click “Submit”. If not, click “Previous” and change what you need to.

15. Once you click submit, the documents are sent to the CRTC for processing. Hopefully, the CRTC will properly anonymize your comment (as noted above, the CRTC has indicated they will keep a lookout for employee comments) and keep the confidential version secret and post only the redacted version publicly.

Conclusion

We hope that this gives you an idea of the law surrounding commenting publicly (even confidentially) during this CRTC sales inquiry process.

We hope that you appreciate why PIAC would prefer employees could simply give evidence with privilege and that the CRTC would seek to promote this approach.

We hope, finally, that the telecommunications companies who have employees who wish to reveal the actual sales practices will try to learn from these stories and not retaliate legally.

Despite all of this uncertainty, we do hope that some current and former employees will be brave, while being careful legally, and tell their stories of sales practices that the CRTC needs to know and the public needs to hear in order to change this situation for the better.