



## Telecom Decision CRTC 2012-478

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Ottawa, 7 September 2012

### **Eatons Commercial & Residential Services Ltd. – Violations of the Unsolicited Telecommunications Rules**

File number: PDR 9174-1146

*In this decision, the Commission imposes an administrative monetary penalty of \$8,000 on Eatons Commercial & Residential Services Ltd. for initiating, on its own behalf, (1) three telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating these telemarketing telecommunications without being a registered subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator; and (2) one telemarketing telecommunication to a consumer whose telecommunications number was registered on the National DNCL, and for initiating this telemarketing telecommunication without being registered with, and having provided information to, the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.*

1. Between 15 June 2010 and 6 February 2012, the Commission received numerous complaints in relation to telemarketing telecommunications made by Eatons Commercial & Residential Services Ltd. (Eatons).<sup>1</sup>
2. On 15 February 2012, a Notice of Violation was issued to Eatons pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Eatons that it had initiated, on its own behalf,
  - eight telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4<sup>2</sup> of the Commission's Unsolicited Telecommunications Rules (the Rules);
  - six telemarketing telecommunications to consumers without being a registered subscriber to the National DNCL and having paid all applicable fees to the National DNCL operator, in violation of Part II, section 6<sup>3</sup> of the Rules; and

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<sup>1</sup> Eatons Commercial & Residential Services Ltd., Burnaby, British Columbia, Tel.: 604-683-4328. Industry – Home services.

<sup>2</sup> Part II, section 4 of the Unsolicited Telecommunications Rules states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is registered on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

<sup>3</sup> Part II, section 6 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator.

- one telemarketing telecommunication to a consumer without being registered with the National DNCL operator, in violation of Part III, section 2<sup>4</sup> of the Rules.
3. The Notice of Violation set out an administrative monetary penalty (AMP) for fifteen violations at \$1,000 per violation, for a total amount of \$15,000.
  4. Eatons was given until 15 March 2012 to pay the AMP set out in the Notice of Violation or to make representations to the Commission regarding the violations. Upon request, an extension was granted until 16 April 2012.
  5. The Commission received representations from Eatons dated 16 April 2012.
  6. Based on the information contained in the representations, the Commission has identified the following issues to be addressed in its determinations:
    - I. Did Eatons commit the violations?
    - II. Did Eatons establish a defence of due diligence?
    - III. Is the amount of the AMP reasonable?
    - IV. Should Eatons be entitled to an award of costs?

**I. Did Eatons commit the violations?**

7. The violations for which the Notice of Violation was issued are based on telemarketing telecommunications supported by eight witness statements. Eatons filed representations contesting six of the witness statements.
  - a. **Contested witness statement 1**
8. Eatons stated that the consumer who submitted the first witness statement had also made a complaint to the Better Business Bureau (BBB) concerning the telemarketing call mentioned in her statement and, through a series of correspondence with the BBB and Eatons, had indicated, on 30 August 2011, that she was satisfied with the responses from Eatons. Eatons argued that a settlement made with the BBB prevented her from filing a separate complaint with the Commission relating to the same call.
9. The Commission notes that it was not part of the discussions between the consumer, Eatons, and the BBB, and that such discussions and/or settlements have no bearing on the Commission's mandate to enforce the Rules in the public interest. The Commission further notes that, in accordance with the Act and Telecom Decision 2007-48, it retains discretion within the framework provided by the Act for investigations, issuances of Notices of Violation, and the imposition of AMPs. Therefore, the terms of the alleged settlement reached on 30 August 2011 cannot be imposed on the Commission.

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<sup>4</sup> Part III, section 2 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it has registered with, and provided information to, the National DNCL operator.

10. The Commission further notes that, as part of this proceeding, Eatons admitted to calling this consumer and did not deny calling her for telemarketing purposes on the date mentioned in the witness statement.
11. In light of the above, the Commission considers that, on a balance of probabilities, Eatons made the telemarketing call in question to a consumer whose telecommunications number was registered on the National DNCL, and that it made the call without being a subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator.
12. The Commission therefore concludes that, with regard to this consumer, Eatons committed one violation of Part II, section 4 of the Rules and one violation of Part II, section 6 of the Rules.

**b. Contested witness statement 2**

***i. Did the consumer who provided the second witness statement misidentify Eatons as the company that initiated the telemarketing call in question?***

13. Regarding the second witness statement, Eatons noted that the consumer indicated in his statement that the telemarketer had called to offer him home cleaning services; however, Eatons submitted that it provides annual tuning and inspection service for gas appliances, gas appliance installations and repairs, and gas duct cleaning.
14. Eatons also submitted that when an Internet search is done with the words “Eatons” and “cleaning,” four other businesses that use the name “Eaton’s” and are located in British Columbia come up; therefore, it is clearly possible that the call was made by another business.
15. The Commission notes that Eatons offers gas duct-cleaning services, and considers that these services can be considered as part of the broader category of home cleaning services. The Commission also notes that the number displayed as the originating number noted in the witness statement belongs to Eatons, according to its website, and that Eatons did not deny that this number is associated with it.

***ii. Was the consumer obligated to confirm to whom the telephone number on his call display belonged?***

16. The consumer indicated in his witness statement that he had determined the originating telephone number by call display. Eatons submitted that the witness did not provide any evidence that he confirmed with the telemarketer that this number did in fact belong to Eatons. Eatons also submitted that neither the call display nor a transcription of the calls that had appeared on the call display on the day of the call have been provided by the Commission as part of the record for the Notice of Violation.
17. The Commission considers that the consumer did not have an obligation to confirm with the telemarketer that the telephone number displayed belonged to the company. The Commission notes that the consumer stated in his witness statement that, during

the call, the caller said he was calling from Eatons. The Commission also notes that Eatons did not deny that the number indicated as the originating number in the witness statement was associated with the company.

***iii. Should the witness statement have been relied on as evidence?***

18. Eatons submitted that the witness statement was signed over a month and a half after the alleged date of the telemarketing call and that, therefore, the originating number of the call mentioned in the statement may not be accurate.
19. The Commission notes that, in Telecom Decision 2012-436, in circumstances similar to those of the present case, it considered that it is reasonable to conclude that the information contained in a witness statement is sufficient for the Commission to make a determination on a balance of probabilities if this information is not refuted by the person against whom the Notice of Violation was issued.
20. With respect to the time limit of an investigation, subsection 72.12(1) of the Act states the following:

No proceedings in respect of a violation may be commenced later than two years after the day on which the subject-matter of the proceedings became known to the Commission.
21. The Commission notes that the witness statement was obtained on 16 December 2011 and the Notice of Violation was issued on 15 February 2012, which was less than two years after the date of the telemarketing call in question, that is, 27 October 2011.
22. In light of the above, the Commission considers that it was appropriate to rely on the witness statement as evidence. The Commission considers that, on a balance of probabilities, Eatons made the telemarketing call in question to a consumer whose telecommunications number was registered on the National DNCL, and that it made this call without being registered with, and having provided information to, the National DNCL operator.
23. The Commission therefore concludes that, with regard to this consumer, Eatons committed one violation of Part II, section 4 of the Rules and one violation of Part III, section 2 of the Rules.

**c. Contested witness statements 3 to 6**

24. Eatons submitted that the telecommunications numbers mentioned by the complainants in witness statements 3, 4, 5, and 6 as having received the telemarketing calls in question are associated with businesses. Eatons argued that these telephone numbers cannot be registered with the National DNCL and that the complaints should be deemed invalid.
25. The Commission notes that according to Part II, section 2 of the Rules, the National DNCL Rules do not apply to a telecommunication made to a business consumer,

and, according to Part VII, subsection 1b)(iii) of the Rules, a person will not be held liable for violating the Rules if that person demonstrates that, at the time of the call, the consumer was a business.

26. The Commission notes that, in their witness statements, each of the four witnesses said that his or her telephone number was not associated with a business. However, an Internet search conducted subsequent to the receipt of Eatons' representations indicates that each of these telephone numbers appears to be associated with a business.
27. In light of the above, the Commission considers that, on a balance of probabilities, the telephone numbers of these four complainants were, at the time of the calls, each associated with a business.
28. The Commission therefore concludes that, with regard to these four complainants, Eatons did not commit four violations of Part II, section 4 of the Rules and three violations of Part II, section 6 of the Rules.

**d. Non-contested witness statements**

29. Subsection 72.08(3) of the Act states that a person who neither pays the penalty nor makes representations in accordance with the Notice of Violation is deemed to have committed the violation.
30. Because Eatons did not contest two of the witness statements, the company is deemed to have committed the violations outlined in the Notice of Violation in regard to the telemarketing calls cited by consumers in these statements.
31. The Commission therefore concludes that, with regard to these consumers, Eatons committed two violations of Part II, section 4 of the Rules and two violations of Part II, section 6 of the Rules.

**Conclusion**

32. Of the eight violations of Part II, section 4 of the Rules set out in the Notice of Violation, the Commission finds that, on a balance of probabilities, Eatons committed four of the violations.
33. Of the six violations of Part II, section 6 of the Rules set out in the Notice of Violation, the Commission finds that, on a balance of probabilities, Eatons committed three of the violations.
34. The Commission also finds that, on a balance of probabilities, Eatons committed the violation of Part III, section 2 of the Rules set out in the Notice of Violation.

## **II. Did Eatons establish a defence of due diligence?**

35. The Commission notes that subsection 72.1(1) of the Act states that “it is a defence for a person in a proceeding in relation to a violation to establish that the person exercised due diligence to prevent the violation.”
36. The Commission also notes that, in Telecom Decision 2007-48, it established a partial list of the criteria that should be used as a guide when assessing a defence of due diligence. These criteria are set out in Part VII of the Rules.
37. Eatons submitted that, even before being contacted by the Commission, it had implemented adequate measures and had written policies, procedures, and agreements in order to comply with, and to monitor and enforce compliance with, the Rules. These include providing adequate training to employees, using a version of the National DNCL obtained from the National DNCL operator no more than 31 days prior to the date any telemarketing telecommunication is made, using and maintaining records that document a process to prevent the initiation of a telemarketing telecommunication to any telecommunications number that has been registered for more than 31 days on the National DNCL, and, in the event a telemarketer is making calls on Eatons’ behalf, having an agreement signed by such a telemarketer to ensure that it complies with the Rules.
38. Eatons also submitted that, upon becoming aware of problems with its systems dialer provider that would allow calls to go through to numbers registered on the National DNCL, it took immediate steps to remedy these problems.
39. The Commission notes that Eatons appears to have established written policies and procedures to comply with the Rules and that, in these documents, Eatons mentions that it monitors and enforces compliance with the Rules. However, the Commission notes that Eatons did not follow its own policies and procedures since there were gaps between the subscriptions purchased, the National DNCL was not downloaded regularly, and Eatons did not use the National DNCL obtained from the National DNCL operator, or updated, no more than 31 days prior to the date any telemarketing telecommunication was made.
40. The Commission considers that, according to the information provided by Eatons and the record of the proceeding, it is not possible to conclude that the company’s procedures would prevent calling a consumer whose telecommunications number has been registered on the National DNCL for at least 31 days.
41. In regard to an agreement with a telemarketer making calls on its behalf, no evidence was provided that Eatons had hired a third party to make telemarketing calls on its behalf. Therefore, Eatons’ argument relating to the existence of this agreement is not relevant.
42. In light of the above, the Commission considers that, on a balance of probabilities, there is insufficient evidence for Eatons to rely on a defence of due diligence against the violations contained in the Notice of Violation.

43. The Commission therefore concludes that Eatons did not establish a defence of due diligence.

### **III. Is the amount of the AMP reasonable?**

44. Eatons claimed that the AMP is unreasonable since

- all the violations relate to eight complainants; and
- Eatons is a small business and its viability relies on being able to manage its ongoing expenses.

45. Eatons submitted that the AMP should be reduced to \$1,000 per witness statement.

46. The Commission notes that initiating a single telemarketing telecommunication may, in some circumstances, result in multiple violations of the Rules. Therefore, a witness statement used to demonstrate the existence of a telemarketing telecommunication may be used to support the finding of more than one violation of the Rules when multiple violations relate to that telecommunication.

47. The Commission further notes that section 72.01 of the Act states that an AMP of up to \$15,000 per violation can be issued for a company.

48. In the present situation, each of the four witness statements considered valid is associated with two violations.

49. The Commission notes that Eatons had held valid subscriptions to the National DNCL before receiving the Notice of Violation, but that there were several gaps between the subscription periods during which the company avoided paying the required subscription fee.

50. In light of the above, and given the size of the company and the fact that the Notice of Violation was the first one issued to the company, the Commission considers that a penalty of \$1,000 per violation for each of the eight violations is appropriate.

### **IV. Should Eatons be entitled to an award of costs?**

51. Eatons submitted that, in the event that it is successful in defending itself, it should be entitled to an award of costs from the Commission to cover its legal costs.

52. The Commission notes that in Telecom Regulatory Policy 2010-963, it re-affirmed the general principle that its costs awards are not intended to apply to private commercial interests and notes that Eatons has provided no rationale for departing from this principle or from the *Guidelines for Assessment of Costs*.

53. In light of the above, the Commission finds that an award of costs should not be granted to Eatons.

## Conclusion

54. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the violations of Part II, section 4; Part II, section 6; and Part III, section 2 of the Rules is appropriate. The Commission therefore imposes a total AMP of \$8,000 on Eatons.
55. The Commission hereby notifies Eatons of its right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act and to appeal this decision to the Federal Court of Appeal under section 64 of the Act. Any review and vary application under section 62 of the Act must be made within 90 days of the date of this decision, and the Commission will place all related documentation on its website.<sup>5</sup> An appeal from this decision may be brought in the Federal Court of Appeal with the leave of that Court. Leave to appeal must be applied for within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.
56. The Commission reminds Eatons that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products and/or services, it is required to comply with the Rules. Examples of measures that Eatons should adopt to ensure compliance with the Rules include, but are not limited to, the following:
- registering with the National DNCL operator;
  - subscribing to the National DNCL;
  - downloading the National DNCL at least once every 31 days prior to the date of a telemarketing telecommunication; and
  - establishing and implementing adequate written policies and procedures to comply with the Rules, which include documenting a process to (a) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (b) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.
57. The Commission advises Eatons that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
58. The amount of \$8,000 is due by 9 October 2012 and is to be paid in accordance with the instructions contained in the Notice of Violation. For any amount owing that is not paid by 9 October 2012, interest calculated and compounded monthly at

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<sup>5</sup> In Telecom Information Bulletin 2011-214, the Commission issued, pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, revised guidelines for review and vary applications to reflect the modified time limit in which such applications must be made.

the average bank rate plus three percent will be payable on that amount and will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.

59. If payment has not been received within 30 days of the date of this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

### **Related documents**

- *Mr. Ed Barna, carrying on business as Byo Steem – Application to review and vary Telecom Decision 2012-75 regarding violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2012-436, 9 August 2012
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010
- *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007, as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007