



## Telecom Decision CRTC 2011-628

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Ottawa, 28 September 2011

### **Green Shield Windows and Doors Ltd. – Violations of the Unsolicited Telecommunications Rules**

File numbers: PDR 9174-888 and 9174-950

*In this decision, the Commission imposes an administrative monetary penalty of \$12,000 on Green Shield Windows and Doors Ltd. for initiating ten telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating two of these telecommunications without having paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.*

1. Between 10 January and 20 November 2010, the Commission received numerous complaints in relation to telemarketing telecommunications made by Green Shield Windows and Doors Ltd. (Green Shield).<sup>1</sup>
2. On 17 March 2011, a notice of violation was issued to Green Shield pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Green Shield that it had initiated
  - ten 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); and
  - two telemarketing telecommunications without having paid all applicable fees to the National DNCL operator, in violation of Part II, section 6<sup>3</sup> of the Rules.
3. Green Shield was given until 17 April 2011 to pay the administrative monetary penalty (AMP) set out in the notice of violation or to make representations to the Commission regarding the violations.

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<sup>1</sup> Green Shield Windows and Doors Ltd., London, Ontario, Tel.: 519-453-0000. Industry – Window and door distribution.

<sup>2</sup> Part II, section 4 of the Unsolicited Telecommunications Rules (the Rules) states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is 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.

4. The Commission received representations from Green Shield dated 11 April 2011.
5. Based on the information contained in the representations, the Commission has identified the following issues to be addressed in its determinations:

- I. Is Green Shield entitled to an oral hearing with the right to cross-examine witnesses?
- II. Should the 185 complaints submitted against Green Shield be struck from the record as prejudicial?
- III. (a) Are the witness statements inadmissible as hearsay?  
  
(b) Do the witness statements establish the necessary elements of the alleged violations?
- IV. Has Green Shield established a defence of due diligence?
- V. Is the amount of the AMP reasonable?
- VI. Should an award of costs be granted to Green Shield?

**I. Is Green Shield entitled to an oral hearing with the right to cross-examine witnesses?**

6. Green Shield submitted that the common law right of procedural fairness requires that it be permitted to appear at an oral hearing and to cross-examine witnesses. Green Shield submitted that the following factors lean in favour of the Commission granting it an oral hearing with the right to cross-examine witnesses:

- the only evidence to support the allegations consists of unsworn witness statements;
- the reliability of the witness statements is disputed; and
- Commission staff is permitted to give an oral presentation to the Commission panel while Green Shield is not.

7. The Commission notes Green Shield's submission with respect to the reliability of the witness statements. The Commission has examined all of the arguments put forward by Green Shield in its written representations and in summary finds that they do not negate the fact that the unsolicited calls were made at the times and on the dates that the witnesses stated, that they do not challenge the substance of the witness statements, and that the elements of such statements have been independently verified by the staff investigation. The Commission notes that upon issuance of the notice of violation, a copy of the investigation report was given to Green Shield for comments.

8. Green Shield also submitted that the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) state that the Commission may provide an opportunity for parties to make written or oral representations.

9. The Commission notes that section 2 of the Rules of Procedure states the following:

Except if they otherwise provide, these Rules apply to all proceedings before the Commission other than a proceeding arising from...a contravention of a prohibition or requirement of the Commission for which a person is liable to an administrative monetary penalty under sections 72.01 to 72.15 of the *Telecommunications Act*.

Thus, the Commission notes that the Rules of Procedure do not apply in this instance.

10. The Commission notes that an oral hearing with the right to cross-examine witnesses is only necessary in certain situations, such as those where the Commission has insufficient information to make a decision on the basis of a written record and considers that an oral component is needed to obtain that information. The Commission considers that a written record is satisfactory in the circumstances of the present case and that it has sufficient information on the written record to make a decision.

11. The Commission notes that paragraph 72.07(2)(c) and subsection 72.08(2) of the Act, and *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48,<sup>4</sup> [3 July 2007] as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007 (Telecom Decision 2007-48) provide for an expeditious procedure, including the opportunity to make representations. If representations are made, the Commission must decide on a balance of probabilities whether the violation was committed.

12. The Commission notes, however, that even though the Rules of Procedure do not apply, the procedure adopted in this instance is consistent with them in that the written process has allowed the telemarketer a full opportunity to see and examine the case against it and to address the case through written representations.

13. Further, the Commission considers that as a general rule, the written process contemplated in the Act allows the Commission to obtain the information needed to make decisions.

14. The Commission also considers that it would be inefficient and ineffective to provide for an oral hearing as a general practice, and that the current process provides telemarketers with sufficient opportunity to make representations. Green Shield has availed itself of that opportunity.

15. The Commission therefore finds that, in the circumstances of this case, Green Shield is not entitled to an oral hearing with the right to cross-examine witnesses.

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<sup>4</sup> See paragraphs 532-537

## **II. Should the 185 complaints submitted against Green Shield be struck from the record?**

16. Green Shield submitted that the mention of the number of complaints at issue (185) is not supported by evidence and should be struck from the record as prejudicial. It cited paragraph 10(d) of the Rules of Procedure, which states that the Commission may amend or strike out a document. Green Shield further submitted that the inclusion of the 185 complaints violates the rules with regard to similar fact evidence and that the use of unproven allegations of such complaints in order to fix a higher AMP amount would be prejudicial to Green Shield.
17. The Commission notes that, as an administrative tribunal which ensures regulatory compliance on a balance of probabilities, it is not bound by the strict judicial rules of evidence that would apply in criminal law matters.
18. The Commission is of the view that the inclusion of the number of complaints is an indication of the potential seriousness of the situation that needs to be addressed by measures of regulatory compliance. Further, as indicated in Telecom Decision 2007-48,<sup>5</sup> the number of complaints received about a telemarketer is one of several factors the Commission uses to assess the quantum of an AMP.
19. The Commission notes that all complaints it investigates have been validated on a *prima facie* basis by the National DNCL operator, and further triaged and verified by Commission staff through an investigation that includes identifying the correct telemarketer name and number, assessing the nature of the complaint, and excluding complaints where a telemarketer may be exempt from the Rules. The Commission notes that the procedure followed is consistent with the expeditious process set out in the Act. The Commission also notes, as set out above, that the Rules of Procedure do not apply to telemarketing proceedings.
20. Accordingly, the Commission finds that the complaints should not be struck from the record.

## **III. (a) Are the witness statements inadmissible as hearsay?**

21. Green Shield submitted that the witness statements should be struck from the record as hearsay because none of them are testimony sworn under oath or penalty of perjury.
22. The Commission notes again that it is not bound by the strict judicial rules of evidence such as would apply in a criminal case, unless a statutory provision specifically states otherwise. In addition, sworn witness statements or affidavits are not, as a rule, necessarily required in order for the Commission to obtain the information it needs to make a determination on a balance of probabilities. In the context of ensuring compliance with the Rules, the use of witness statements is a standard and acceptable practice.

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<sup>5</sup> See paragraph 521

23. Further, the Commission finds that the witness statements are not hearsay because they were submitted by the witnesses themselves and not admitted for the truth of what a third party said.

24. The Commission therefore finds that the witness statements are admissible.

**(b) Do the witness statements establish the necessary elements of the alleged violations?**

25. Green Shield submitted that the witness statements have failed to establish the necessary elements of the alleged violations – that is, the initiation of calls to consumers whose numbers are registered on the National DNCL.

26. The Commission notes that, in general, the fact that the unsolicited calls were made at the dates and times indicated are proven not only through witness statements, but through the confirmed findings of the investigation report, which includes the details of the telemarketer's National DNCL subscription, confirmation that the complainants whose complaints led to the notice of violation had registered with the National DNCL, corporate searches, requests for information, investigator notes, and correspondence with the telemarketer, which accompanied the Notice of Violation that was sent to Green Shield.

27. The Commission considers that the witness statements establish the necessary elements of the alleged violations and are to be read in association with the investigation report provided to Green Shield. Accordingly, the Commission upholds the witness statements as an integral part of the material used to establish the elements of the violation.

**IV. Has Green Shield established a defence of due diligence?**

28. 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.

29. In Telecom Decision 2007-48, the Commission established criteria to provide guidance about the elements that it would generally consider in assessing a defence of due diligence. These criteria were incorporated into Part VII of the Rules.

30. Green Shield addressed these criteria and submitted that

- it has implemented adequate written policies and procedures to comply with the Rules;
- its management meets regularly with staff to keep them updated on changes in regulation;
- it downloads the National DNCL and updates its internal do not call list every 31 days;

- it is in the process of developing a procedure to prevent the initiation of calls to numbers registered on the National DNCL; and
  - it has hired legal counsel to provide it with advice on industry standards for monitoring and enforcing compliance.
31. The Commission notes that Green Shield has failed to provide evidence of its written policies and procedures and of any training programs and plans. The Commission considers that meetings between management and staff do not equate to ongoing compliance training.
32. The Commission notes that there were significant lapses in Green Shield's National DNCL subscription and that this situation was not remedied during the course of the investigation; it was only rectified when Green Shield received the notice of violation.<sup>6</sup> The Commission also notes that Green Shield has downloaded the National DNCL infrequently.<sup>7</sup>
33. The Commission further notes that Green Shield continued to make telemarketing telecommunications to consumers whose numbers were registered on the National DNCL after its subscription had expired and provided no evidence, prior to and since the issuance of the notice of violation, that it has developed a process to prevent unwanted calls.
34. The Commission notes that Green Shield did not address in its representations its failure to renew or keep a valid subscription with the National DNCL operator. The Commission also notes that Green Shield failed to reply to Commission staff letters and emails dated 27 August and 13 September 2010.
35. The Commission notes Green Shield's submission that it has hired legal counsel to provide it with advice on industry standards for monitoring and enforcing compliance, but is of the view that this does not constitute evidence of due diligence.
36. The Commission considers that, on a balance of probabilities, there is insufficient evidence for Green Shield to rely on a defence of due diligence against the violations contained in the notice of violation.
37. In light of the above, the Commission finds that Green Shield has not established a defence of due diligence.

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<sup>6</sup> Green Shield was only subscribed to the National DNCL on the following dates: 14 March to 14 June 2010 and 17 July to 17 October 2010. A three-month subscription was also purchased on 17 March 2011, the date of the issuance of the notice of violation.

<sup>7</sup> Green Shield's download history of the National DNCL is as follows: 22 March, 8 April, 17 July, and 13 August 2010.

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

38. Green Shield submitted that its violations of the Rules were the result of negligence, not intent. It added that there were a small number of violations, that it is a small company, and that it has engaged professionals to assist with compliance with the Rules. It also submitted that telemarketers who participate in proceedings should not be penalized as harshly as those who do not, and that a reduced AMP for those who participate responsibly would provide an incentive for engagement.
39. The Commission notes that the notice of violation set out an AMP for 12 violations at \$1,000 per violation, for a total of \$12,000, which is in line with situations of a similar nature.
40. The Commission also notes that negligence is not a sufficient defence to lower an AMP, especially when the telemarketer was provided with sufficient opportunity to engage Commission staff prior to the issuance of the notice of violation. For example, prior to the issuance of the notice of violation, Commission staff had communicated with Green Shield to identify its concerns. The company was given an opportunity to address these concerns but failed to take corrective measures.
41. In light of the above, the Commission finds that the AMP is appropriate and should not be reduced or removed.

## **VI. Should an award of costs be granted to Green Shield?**

42. Green Shield 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.
43. The Commission notes that section 56 of the Act states the following:
  - (1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.
  - (2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.
44. The Commission notes that, in accordance with the Act, a costs respondent who will pay the costs must be identified. The Commission notes that no such costs respondent has been identified by Green Shield.
45. The Commission further notes that Green Shield has not been successful in defending itself against the issued notice of violation before the Commission.
46. The Commission therefore finds that an award of costs should not be granted to Green Shield.

## Conclusion

47. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the violations of Part II, sections 4 and 6 of the Rules is appropriate. The Commission therefore imposes a total AMP of \$12,000 on Green Shield.
48. The Commission hereby notifies Green Shield 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 30 days of the date of this decision, and the Commission will place all related documentation on its website. 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.
49. The Commission reminds Green Shield 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 Green Shield should adopt to ensure compliance with the Rules include, but are not limited to, the following:
- subscribing to the National DNCL;
  - downloading the National DNCL at least once every 31 days prior to the date of the 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.
50. The Commission advises Green Shield that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
51. The amount of \$12,000 is due by 28 October 2011 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 28 October 2011, interest calculated and compounded monthly at 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.
52. 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