



## Telecom Decision CRTC 2012-331

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Ottawa, 12 June 2012

### **1740396 Ontario Inc. carrying on business as The Grocery Group – Violations of the Unsolicited Telecommunications Rules**

File number: PDR 9174-1105

*In this decision, the Commission imposes an administrative monetary penalty of \$2,000 on 1740396 Ontario Inc., carrying on business as The Grocery Group, for initiating one telemarketing telecommunication on its own behalf to a consumer whose telecommunications number was registered on the National Do Not Call List (DNCL), and for initiating this telemarketing telecommunication without being a registered subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.*

1. Between 1 November 2010 and 31 January 2012, the Commission received numerous complaints in relation to telemarketing telecommunications made by 1740396 Ontario Inc., carrying on business as The Grocery Group (The Grocery Group).<sup>1</sup>
2. On 7 February 2012, a Notice of Violation was issued to The Grocery Group pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed The Grocery Group that it had initiated, on its own behalf,
  - three 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
  - three 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.

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<sup>1</sup> 1740396 Ontario Inc., carrying on business as The Grocery Group, Markham, Ontario, Tel.: 905-296-1515. Industry – Sale and delivery of groceries.

<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 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.

3. The Notice of Violation set out an administrative monetary penalty (AMP) for six violations at \$1,000 per violation, for a total amount of \$6,000.
4. The Grocery Group was given until 8 March 2012 to pay the AMP set out in the Notice of Violation or to make representations to the Commission regarding the violations.
5. The Commission received representations from The Grocery Group dated 27 February 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 The Grocery Group commit the violations?

II. Is the amount of the AMP reasonable?

**I. Did The Grocery Group commit the violations?**

7. The Grocery Group contested the validity of the three witness statements supporting the Notice of Violation. It submitted that it had an existing business relationship with one of the consumers and that it had not called the other two consumers.

**a) Did The Grocery Group have an existing business relationship with one of the consumers who had provided a witness statement?**

8. Under Part II, section 3(b) of the Rules, the Rules do not apply to telecommunications to a recipient (i) with whom the person making the telecommunication has an existing business relationship, and (ii) who has not made a do not call request in respect of the person or organization on whose behalf the telecommunication is made.
9. The Grocery Group provided a copy of a “Request a callback” form on which the telephone number, the city of residence, and the last name mentioned correspond to the information provided by the first consumer in her witness statement. This form is dated 14 March 2011 and, according to the witness statement, the telemarketing telecommunication was made on 16 March 2011.
10. The Commission considers that, on a balance of probabilities, the evidence regarding this telecommunication indicates that the consumer and the company had an existing business relationship at the time of the telemarketing telecommunication, as defined in subsection 41.7(2) of the Act.<sup>4</sup>

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<sup>4</sup> Subsection 41.7(2) of the Act defines “existing business relationship” as a business relationship that has been formed by a voluntary two-way communication between the person making the telecommunication and the person to whom the telecommunication is made, arising from, *inter alia*, an inquiry or application, within the six-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made in respect of a product or service offered by the person or organization on whose behalf the telecommunication is made.

11. The Commission therefore finds that The Grocery Group did not commit one of the three violations set out in the Notice of Violation with regard to contacting a consumer whose telecommunications number was registered on the National DNCL.
12. The Commission notes that the obligation to hold a valid subscription to the National DNCL does not apply in this case because of the existing business relationship between the consumer and The Grocery Group. As such, the Commission finds that, with regard to this consumer, the company did not commit one of the three violations with regard to contacting a consumer without holding a valid subscription to the National DNCL and without having paid the applicable fees.

**b) Did The Grocery Group make telemarketing telecommunications to the two other consumers who provided witness statements?**

13. The consumer who provided the second witness statement indicated that
  - the caller said that he was calling on behalf of The Grocery Group;
  - he was directed to the company's website by the caller; and
  - the number identified by the consumer as being the originating number is the number that appears on The Grocery Group's website.
14. The Grocery Group stated that no call was made to the consumer who provided the second witness statement, and that no outgoing call could have been made from the telephone number mentioned as the originating number in this statement since, being a toll-free number, it is a virtual number and the company does not have rollover capability.<sup>5</sup> To support its allegation, The Grocery Group provided a telephone invoice.
15. The Commission notes that the telephone invoice provided covers the period from 10 February to 9 March 2011, while the telephone call to this consumer was made on 16 March 2011.
16. In light of the above, the Commission finds that, on a balance of probabilities, The Grocery Group made the telemarketing telecommunication in question (a) to the consumer who provided the second witness statement while his telecommunications number was registered on the National DNCL, and (b) without being a subscriber of the National DNCL and having paid all the appropriate fees to the National DNCL operator.
17. In regard to the third witness statement, The Grocery Group argued that it did not make the call on 12 March 2011 described in the statement. The company indicated that this date was a Saturday and that it has never made calls on weekends.

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<sup>5</sup> Rollover capability is the capability to redirect either an outbound or an inbound phone call.

18. The Commission notes that The Grocery Group did not deny making the call to the consumer who provided the third witness statement but rather contested having made the call on the date mentioned in the witness statement.
19. The Commission notes that, according to the information provided by The Grocery Group, the company does not appear to have made any telephone calls on weekends. This conclusion is supported by the calling logs generated by Call Center Development Services (CCDS),<sup>6</sup> which were provided in response to a Request for Information letter that was sent to the company and covered the period from 21 July to 16 August 2011. It is also supported by the telephone invoice that was provided with the representations and covered the period from 10 February to 9 March 2011.
20. The Commission also notes that the date mentioned in the witness statement as being the date of the call (12 March 2011) was a Saturday.
21. The Commission further notes that according to the letter from CCDS that The Grocery Group provided in its representations, The Grocery Group did not dial this consumer's telephone number on 12 March 2011.
22. In light of the above, the Commission finds that, on a balance of probabilities, The Grocery Group did not make a telemarketing telecommunication on 12 March 2011 to the consumer who provided the third witness statement.
23. The Commission therefore finds that The Grocery Group did not commit one of the violations set out in the Notice of Violation with regard to contacting a complainant whose telecommunications number was registered on the National DNCL and one of the violations of having made a telemarketing telecommunication without being a registered subscriber to the National DNCL and without having paid all applicable fees.

### **Conclusion**

24. Of the three violations set out in the Notice of Violation for having made telemarketing telecommunications to consumers whose numbers were registered on the National DNCL, the Commission finds that, on a balance of probabilities, The Grocery Group committed one of these violations.
25. Of the three violations set out in the Notice of Violation for having made telemarketing telecommunications to consumers without having a valid subscription to the National DNCL and without having paid all applicable fees to the National DNCL operator, the Commission finds that, on a balance of probabilities, The Grocery Group committed one of these violations.

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

26. In its representations, The Grocery Group did not question the amount of the AMP imposed for each of the violations.

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<sup>6</sup> CCDS is the automated dialer service provider used by The Grocery Group.

27. The Commission notes that The Grocery Group 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 has avoided paying the required subscription fee.
28. 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 is appropriate.

## **Conclusion**

29. 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 \$2,000 on The Grocery Group.
30. The Commission hereby notifies The Grocery Group 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. 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.
31. The Commission reminds The Grocery Group 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 The Grocery Group 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.
32. The Commission advises The Grocery Group that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.

33. The amount of \$2,000 is due by 12 July 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 12 July 2012, 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.
34. 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