



## Compliance and Enforcement Decision CRTC 2013-544

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Ottawa, 8 October 2013

### **Aloplast Duke Windows and Doors Inc. – Violations of the Unsolicited Telecommunications Rules**

File number: PDR 9174-877

*In this decision, the Commission imposes total administrative monetary penalties of \$18,000 on Aloplast Duke Windows and Doors Inc. (Aloplast) for retaining a telemarketer to initiate, on Aloplast's behalf, telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so when Aloplast (1) was not registered with the National DNCL operator, (2) had not provided information to the National DNCL operator, (3) was not a registered subscriber of the National DNCL, and (4) had not paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.*

1. Between 5 April 2011 and 19 September 2012, the Commission received numerous complaints in relation to telemarketing telecommunications that appeared to have been initiated on behalf of the corporation Aloplast Duke Windows and Doors Inc. (Aloplast).<sup>1</sup>
2. The Commission investigated the complaints and, on 28 March 2013, a notice of violation was issued to Aloplast pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Aloplast that the telemarketer acting on Aloplast's behalf, 2094051 Ontario Inc. (2094051 Ontario), had initiated
  - 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);
  - three telemarketing telecommunications to consumers on behalf of a client that was not a registered subscriber of the National DNCL and that had not

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<sup>1</sup> Aloplast Duke Windows and Doors Inc., Toronto, Ontario, Tel.: 416-663-7972. Industry – Window and door installation.

<sup>2</sup> Part II, section 4 of the Unsolicited Telecommunications Rules states that a telemarketer shall not initiate, and the client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does 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 or the client of that telemarketer.

paid all applicable fees to the National DNCL operator, in violation of Part II, section 7<sup>3</sup> of the Rules; and

- three telemarketing telecommunications to consumers on behalf of a client that had not registered with, and had not provided information to, the National DNCL operator, in violation of Part III, section 3<sup>4</sup> of the Rules.
3. Aloplast was also informed that it was being held vicariously liable for the actions of 2094051 Ontario, pursuant to section 72.02 of the Act.
  4. The notice of violation set out administrative monetary penalties (AMPs) for nine violations at \$2,000 per violation, for a total amount of \$18,000.
  5. A separate notice of violation was issued the same day against 2094051 Ontario.
  6. Aloplast was given until 6 May 2013 to pay the AMPs set out in the notice of violation or to make representations to the Commission regarding the violations. Upon request by Aloplast, the deadline was extended to 27 May 2013.
  7. The Commission received representations from Aloplast made on its own behalf and on behalf of 2094051 Ontario (collectively, the companies) dated 22 May 2013.
  8. Based on the record of this proceeding, including the representations submitted, the Commission has identified the following issues to be addressed in this decision:
    - I. Did Aloplast commit the violations?
    - II. Is the amount of the AMPs reasonable?

#### **I. Did Aloplast commit the violations?**

9. 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.”
10. In Telecom Decision 2007-48, the Commission 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.

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<sup>3</sup> Part II, section 7 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on behalf of a client unless that client is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator.

<sup>4</sup> Part III, section 3 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on behalf of a client unless that client is registered with, and has provided information to, the National DNCL operator.

11. The Commission notes that the companies did not dispute having made the telecommunications for which the notice of violation against Aloplast was issued, but argued that they had exercised due diligence to prevent the violations in question. In particular, the companies submitted the following:
  - a) in 2012, some calls were made to consumers whose numbers were registered on the National DNCL due to a system glitch and a change in management at Aloplast;
  - b) the companies made every effort to follow the Rules, by registering with the National DNCL operator, purchasing subscriptions to the National DNCL, and maintaining their call centre by properly filtering the National DNCL; and
  - c) Aloplast had contacted the Commission in August 2012 seeking information on how to work with the National DNCL properly, and then made the appropriate corrections.
12. The companies added that they were willing to cooperate with the Commission in order to rectify the problem and follow the Rules.
13. The Commission notes that the representations did not specifically identify the reason for the alleged glitch in the companies' system, nor did they indicate how the change in management led to the violations in question. Moreover, the representations did not provide details of any measures taken to address the alleged glitch and ensure compliance with the Rules.
14. The Commission notes that the obligation to register with the National DNCL operator and to subscribe to the National DNCL lies with the person on whose behalf the telecommunications are being made. Aloplast was informed of its obligations to register with the National DNCL operator and to subscribe to the National DNCL in 2009 when it received a previous notice of violation for similar violations.
15. The Commission notes that the telecommunications for which the current notice of violation was issued were made when Aloplast did not have a valid registration with the National DNCL operator or a valid subscription to the National DNCL, and had not downloaded the National DNCL within the 31-day period preceding the date of each of the telecommunications.
16. The Commission notes that 2094051 Ontario had registered with the National DNCL operator and purchased subscriptions to the National DNCL. However, even if this is considered, there were gaps between its registrations and subscriptions, and the telecommunications at issue occurred when 2094051 Ontario did not have a valid registration and had not downloaded a copy of the National DNCL.
17. In light of the above, the Commission considers that the companies have failed to provide sufficient evidence for a defence of due diligence in respect of the violations contained in the notice of violation.

18. The Commission therefore concludes that Aloplast and 2094051 Ontario have not established, on a balance of probabilities, that they exercised due diligence to prevent the violations.
19. Accordingly, the Commission finds that 2094051 Ontario committed the violations set out in the notice of violation. Pursuant to section 72.02 of the Act, Aloplast is vicariously liable for the actions of 2094051 Ontario. Accordingly, the Commission also finds that Aloplast committed the violations set out in the notice of violation.

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

20. In their representations, the companies stated that
  - a) Aloplast is a small family business that is struggling to survive and to provide employment for over 20 individuals, and
  - b) Aloplast responded to the 2009 notice of violation and paid the AMP in full.
21. The Commission notes that the 2013 notice of violation set out AMPs for nine violations at \$2,000 per violation. 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 corporation.
22. The Commission also notes that a previous notice of violation was issued against Aloplast in 2009 for similar violations.
23. In Telecom Decision 2007-48, the Commission stated that the ability to pay the AMP was not an appropriate factor to be considered in the determination of the quantum of the AMP.
24. Also in that decision, the Commission stated that appropriate factors to be considered in determining the amount of an AMP include the nature of the violations, the number and frequency of complaints and violations, the relative disincentive of the measure, and the potential for future violations.
25. The Commission considers the making, by a telemarketer, of unsolicited telemarketing telecommunications to consumers whose numbers are registered on the National DNCL, at a time when its client is not registered with the National DNCL operator and is not subscribed to the National DNCL, a serious violation that causes significant inconvenience and nuisance to consumers. These telecommunications, by their nature, violate the expectation of consumers expressed through registration of their numbers on the National DNCL not to receive them.
26. Regarding the number and frequency of complaints and violations, the Commission notes that initiating a single telemarketing telecommunication may, in some circumstances, result in multiple violations of the Rules. Therefore, proof of the occurrence 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. In the present case, three violations occurred during each of the three telemarketing telecommunications in question.

27. In view of the financial information provided by Aloplast during the investigation, the Commission considers the company to be a small-sized business for the purposes of determining the appropriate AMP amount.
28. Based on the size of the company and given that this is the second regulatory enforcement activity taken by the Commission against Aloplast, the Commission considers that an AMP of \$2,000 per violation, for total AMPs of \$18,000, is reasonable to incent compliance and deter future violations of the Rules.
29. In light of the above, the Commission considers that total AMPs of \$18,000 are reasonable and necessary to promote regulatory compliance.

## **Conclusion**

30. In the circumstances of this case, the Commission considers that a penalty of \$2,000 for each of the three violations of Part II, section 4, for each of the three violations of Part II, section 7, and for each of the three violations of Part III, section 3 of the Rules is appropriate. The Commission therefore imposes total AMPs of \$18,000 on Aloplast.
31. The Commission hereby notifies Aloplast 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.
32. The Commission reminds Aloplast that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products or services, it is required to comply with the Rules. Examples of measures that Aloplast 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;

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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.

- 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.
33. The Commission advises Aloplast that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
34. The amount of \$18,000 is due by 7 November 2013 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 7 November 2013, 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.
35. 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**

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *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