



Compliance and Enforcement Decision CRTC 2014-92

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Ottawa, 28 February 2014

2260948 Ontario Inc., operating as Vinyl Window Pro – Violations of the Unsolicited Telecommunications Rules

File number: PDR 9174-1351

In this decision, the Commission imposes total administrative monetary penalties of \$12,000 on 2260948 Ontario Inc., operating as Vinyl Window Pro, for employing Telemarket4u Inc. to initiate telemarketing telecommunications on its behalf to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so while Vinyl Window Pro (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 1 June and 20 October 2012, the Commission received numerous complaints in relation to telemarketing telecommunications that appeared to have been initiated by Telemarket4u Inc.¹ (T4U) on behalf of 2260948 Ontario Inc., operating as Vinyl Window Pro² (Vinyl).
2. These complaints were investigated and, on 28 March 2013, a notice of violation was issued to Vinyl pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Vinyl that, pursuant to section 72.02³ of the Act, it was being held vicariously liable for the conduct of T4U, which had initiated the following on Vinyl's behalf:
 - four telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4⁴ of the Commission's Unsolicited Telecommunications Rules (the Rules);

¹ Telemarket4u Inc., Thornhill, Ontario, Tel.: 416-312-4279. Industry – Call centre services.

² 2260948 Ontario Inc., operating as Vinyl Window Pro, Toronto, Ontario, Tel.: 647-729-2277. Industry – Window and door installation.

³ Section 72.02 of the Act states that a person is liable for a violation that is committed by an employee, or an agent or mandatary, of the person acting in the course of the employee's employment or the scope of the agent's or mandatary's authority, whether or not the employee, agent or mandatary who actually committed the violation is identified or proceeded against in accordance with the Act.

⁴ 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.

- four telemarketing telecommunications to consumers on behalf of a client (Vinyl) that was not a registered subscriber of the National DNCL and that had not paid all applicable fees to the National DNCL operator, in violation of Part II, section 7⁵ of the Rules; and
 - four telemarketing telecommunications to consumers on behalf of a client (Vinyl) that was not registered with, and had not provided information to, the National DNCL operator, in violation of Part III, section 3⁶ of the Rules.
3. The notice of violation set out administrative monetary penalties (AMPs) for 12 violations at \$1,000 per violation, for a total amount of \$12,000.
 4. Vinyl 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. This deadline was subsequently extended to 5 June 2013.
 5. The Commission received representations from T4U dated 29 May 2013. The Commission received no other correspondence from Vinyl in response to the notice of violation, and considers T4U's representations to have been made on behalf of itself and Vinyl.
 6. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:
 - I. Is Vinyl liable for the violations?
 - II. Is the amount of the AMPs reasonable?

I. Is Vinyl liable for the violations?

7. In the representations it submitted, T4U did not contest having committed the violations for which the notice of violation was issued, and confirmed that it had placed the calls on behalf of Vinyl.
8. The Commission considers that pursuant to section 72.02 of the Act, Vinyl is vicariously liable for violations committed by T4U, which was acting in its employ and on its behalf.
9. Accordingly, the Commission finds that Vinyl is liable for the violations set out in the notice of violation.

⁵ 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 the applicable fees to the National DNCL operator associated with that client's subscription have been paid.

⁶ 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 has registered with, and provided information to, the National DNCL operator.

II. Is the amount of the AMPs reasonable?

10. T4U submitted that AMPs of \$12,000 were excessive, and argued that an AMP of \$3,000 be imposed instead because
 - a) T4U had purchased a subscription to the National DNCL, and had no reason to believe that its client, Vinyl, had to be registered with the National DNCL operator and subscribed to the National DNCL;
 - b) Vinyl believed that T4U was the company responsible for being registered with the National DNCL operator and subscribed to the National DNCL;
 - c) since the issuance of the notice of violation, Vinyl has registered with the National DNCL operator and subscribed to the National DNCL, and T4U is accessing Vinyl's subscription;
 - d) this was the first time that Vinyl or T4U had been found in violation of the Rules; and
 - e) the AMPs will cause severe financial hardship to Vinyl and may force it to cease operating.
11. The Commission notes that this is the first time a notice of violation has been issued to Vinyl, but considers that lack of familiarity with the Rules is not a valid defence.
12. Regarding T4U's claim that it had purchased a subscription, the Commission notes that the violations at issue relate to calls placed to telecommunications numbers in the 403 area code on 9 July, 27 August, 27 September, and 5 October 2012. T4U did not have a subscription for the 403 area code at the time of any of these calls. T4U's most recent subscription for this area code had expired in 2011, and it was never used to download the National DNCL.
13. The Commission considers that the confusion over which company was responsible for subscribing to the National DNCL is not a relevant factor, given that neither company had, at the relevant time, a subscription for the area code in which the violations at issue actually occurred. The Commission notes, however, that Vinyl maintained a subscription to the National DNCL in the period following the issuance of the notice of violation.
14. Regarding Vinyl's financial situation, in Telecom Decision 2007-48, the Commission stated that the ability to pay an AMP was not an appropriate factor to be considered in the determination of the amount of an AMP. The Commission considers that the way in which a business is managed, including its other financial obligations, should not have an impact on the amount of the AMP.
15. 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.

16. The Commission considers the making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL, and doing so while not being subscribed to the National DNCL, to be 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.
17. Regarding the number and frequency of complaints and violations, the Commission notes that initiating a single telemarketing telecommunication may, in some cases, result in multiple violations of the Rules. In the present case, three violations occurred during each of the four telemarketing telecommunications in question.
18. Regarding the relative disincentive of the measure, the Commission should ensure that the AMPs it imposes are not set so low as to be financially advantageous for a telemarketer or a client of a telemarketer to pay the amount as a cost of doing business. The Commission notes that Vinyl had not previously registered with the National DNCL operator nor subscribed to the National DNCL, and had therefore avoided paying the required subscription fee since at least 1 June 2012.
19. In light of the above, and given Vinyl's size and the fact that the notice of violation was the first one issued to the business, the Commission considers a penalty of \$1,000 for each of the 12 violations cited in the notice of violation is appropriate.

Conclusion

20. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the four violations of Part II, section 4, for each of the four violations of Part II, section 7, and for each of the four violations of Part III, section 3 of the Rules is appropriate. The Commission therefore imposes total AMPs of \$12,000 on Vinyl.
21. The Commission hereby notifies Vinyl 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.⁷ 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.

⁷ 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.

22. The Commission reminds Vinyl 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 Vinyl 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.
23. The Commission advises Vinyl that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
24. The amount of \$12,000 is due by 31 March 2014 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 31 March 2014, 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.
25. 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