



Compliance and Enforcement Decision CRTC 2016-391

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Robert Gendron, carrying on business as Dynique Restoration and Victorian Restoration – Violations of the Unsolicited Telecommunications Rules

The Commission imposes total administrative monetary penalties of \$18,000 on Robert Gendron, carrying on business as Dynique Restoration and Victorian Restoration, for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL) while he (i) was not a registered subscriber of the National DNCL and had not paid all applicable fees to the National DNCL operator, and (ii) was not registered with, and had not provided information to, the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

Introduction

1. Between 4 December 2013 and 13 February 2015, the Commission received complaints in relation to telemarketing telecommunications that appeared to have been made by or on behalf of Mr. Robert Gendron, carrying on business as Dynique Restoration and Victorian Restoration.
2. These complaints were investigated and, on 30 November 2015, a notice of violation was issued to Mr. Gendron pursuant to subsection 72.07(1) of the *Telecommunications Act* (the Act).¹ The notice informed Mr. Gendron that he was liable for initiating telemarketing telecommunications resulting in
 - seven violations of Part II, section 4 of the Commission's Unsolicited Telecommunications Rules (the Rules), which prohibits the initiation of telemarketing telecommunications to consumers whose telecommunications numbers are registered on the National Do Not Call List (DNCL);
 - seven violations of Part II, section 6 of the Rules, which prohibits the initiation of telemarketing telecommunications unless the telemarketer is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator; and

¹ Subsection 72.07(1) of the Act states that a person authorized to issue notices of violation who believes on reasonable grounds that a person has committed a violation may issue, and shall cause to be served on that person, a notice of violation.

- four violations of Part III, section 2 of the Rules, which prohibits the initiation of telemarketing telecommunications unless the telemarketer has registered with, and provided information to, the National DNCL operator, and has paid all applicable fees charged by the Complaints Investigator delegate.
3. The notice of violation set out administrative monetary penalties (AMPs) for 18 violations at \$1,000 per violation, for a total amount of \$18,000.
 4. Mr. Gendron was given until 30 December 2015 to pay the AMPs set out in the notice of violation or to make representations to the Commission regarding the violations.
 5. The Commission received representations from Mr. Gendron dated 18 December 2015.

Issues

6. The Commission has identified the following issues to be addressed in this decision:
 - Did Mr. Gendron commit the violations?
 - Do the representations filed by Mr. Gendron raise a valid defence against the violations?
 - Is the amount of the AMPs reasonable?

Did Mr. Gendron commit the violations?

7. The notice of violation was supported by attestations by individuals that they were registered on the National DNCL when they received the telemarketing call by or on behalf of Mr. Gendron,² that they had no prior existing business relationship with Mr. Gendron, and that their phone number is not associated with a business. The calls were made on dates when Mr. Gendron had not registered with the National DNCL operator or subscribed to the National DNCL.
8. In his representations, Mr. Gendron did not deny having made the telemarketing telecommunications set out in the notice of violation. Further, Mr. Gendron acknowledged that he initiated telemarketing telecommunications without having a valid registration or subscription with the National DNCL and that he performed telemarketing telecommunications without prior consent from the recipient consumers.
9. Accordingly, the Commission finds that, on a balance of probabilities, Mr. Gendron committed the violations outlined in the notice of violation dated 30 November 2015.

² As set out in section 72.16 of the Act, a person is liable for a violation that is committed by an employee of the person acting in the course of the employee's employment, or by an agent or mandatary of the person acting within the scope of the agent's or mandatary's authority, whether or not the employee or agent or mandatary who actually committed the violation is identified or proceeded against.

Do the representations filed by Mr. Gendron raise a valid defence against the violations?

10. Mr. Gendron submitted that following receipt of a citation letter sent by Commission staff dated 29 February 2012, he registered and subscribed to the National DNCL operator, despite the letter not containing information on how to use the list or the requirements to download it. Mr. Gendron stated that his fine should be reduced in light of his efforts to inform himself of the Rules and become compliant, and the lack of related assistance. He submitted that the violations occurred since he did not fully understand how to comply with the Rules and that the notice of violation ought to have been issued earlier to allow for timely corrective actions on his part.
11. A lack of awareness of the Rules is not considered to be a valid defence against violations of the Rules. Persons initiating unsolicited telecommunications for the purpose of telemarketing are choosing to engage in a regulated activity and, as such, are responsible for ensuring that their conduct complies with the Rules. The Commission considers that it is not the duty of the investigator to provide such assistance.
12. However, the citation letter to which Mr. Gendron referred included direct quotations of specific sections of the Rules that were relevant to his company's telemarketing conduct at that time, and indicated that Mr. Gendron was obligated to comply with all of the Rules. The letter also included a link to the full text of the Rules on the Commission's website, as well as a link to the National DNCL operator's website, which provides information to telemarketers on their obligations under the Rules. Mr. Gendron continued to place telemarketing calls to consumers on the National DNCL despite the issuance of the citation letter.
13. Accordingly, the Commission finds that, on a balance of probabilities, Mr. Gendron's representations do not raise a valid defence against the violations at issue.

Is the amount of the AMPs reasonable?

14. Mr. Gendron indicated that he is in financial difficulty and that the amount of the AMPs represents a significant portion of his net income. Mr. Gendron offered to cease telemarketing telecommunications altogether if the Commission were to remove the AMPs.
15. In Telecom Decision 2007-48, the Commission stated that the 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.³
16. The purpose of enforcement action by the Commission is not to discourage, punish, or prohibit telemarketing activity, but to promote compliance with the Rules. The proposal by Mr. Gendron to refrain entirely from telemarketing if the penalty is waived is inconsistent with this goal.

³ In addition, the Commission stated in Compliance and Enforcement Regulatory Policy 2015-109 that the ability to pay is a factor to be considered when determining the amount of an AMP, because it relates to the relative disincentive of the measure.

17. The Commission has already taken enforcement action by issuing a citation letter in 2012, which did not include a financial penalty. Since the citation letter did not result in Mr. Gendron bringing his activities into compliance with the Rules, a penalty is warranted to address the potential for further violations.
18. The making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL is a serious violation that causes significant inconvenience and nuisance to consumers, and violates the expectation of consumers expressed through their registrations with the National DNCL that they will receive fewer telemarketing calls. In this case, Mr. Gendron was neither registered with the National DNCL operator nor subscribed to the National DNCL during the period set out in the notice of violation.
19. Regarding the number and frequency of complaints and violations, Mr. Gendron made non-compliant telemarketing telecommunications over the period from 4 December 2013 to 13 February 2015.
20. Regarding the relative disincentive of the measure, the Commission must ensure that the AMPs it imposes (i) 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, and (ii) serve as an incentive to comply with the Rules. Compliance includes, among other things, registering with the National DNCL operator and purchasing subscriptions to the area codes of the consumers that will be contacted.
21. Despite operating a relatively small business, Mr. Gendron avoided paying \$10,965 in National DNCL subscription fees based on the area codes called for which he did not hold a valid subscription.
22. Pursuant to section 72.01 of the Act, every contravention of a Commission prohibition or requirement under section 41 of the Act constitutes a violation, and an individual who commits such a violation is liable for an AMP of up to \$1,500 per violation. In this case, total AMPs of \$18,000 (18 violations at \$1,000 per violation) are reasonable and necessary to promote compliance with the Rules by Mr. Gendron.
23. In the circumstances of this case, a penalty of \$1,000 for each of the seven violations of Part II, section 4 of the Rules; seven violations of Part II, section 6 of the Rules; and four violations of Part III, section 2 of the Rules is appropriate.

Conclusions

24. The Commission imposes total AMPs of \$18,000 on Mr. Robert Gendron, carrying on business as Dynique Restoration and Victorian Restoration.
25. The Commission hereby notifies Mr. Gendron of his right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act, and to seek leave of the Federal Court of Appeal to appeal this decision before that court under section 64 of the Act. Any review and vary application under section 62 of the Act is to be made within

90 days of the date of this decision,⁴ and the Commission will place all related documentation on its website. In accordance with section 64 of the Act, an application for leave to appeal must be made to the Federal Court of Appeal within 30 days of the date of this decision or within such further time as a judge of the Federal Court of Appeal grants in exceptional circumstances.

26. The Commission reminds Mr. Gendron that, should he initiate telemarketing telecommunications or engage telemarketers to initiate telemarketing telecommunications in the future, he is required to comply with the Rules. Examples of measures that Mr. Gendron should adopt to ensure compliance with the Rules include 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 (i) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (ii) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.

27. The Commission advises Mr. Gendron that to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.

28. The amount of \$18,000 is due by **2 November 2016** 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 **2 November 2016**, interest calculated and compounded monthly at the average bank rate plus 3% 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.

29. 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

- *Administrative monetary penalties under the Voter Contact Registry*, Compliance and Enforcement Regulatory Policy CRTC 2015-109, 27 March 2015

⁴ 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 are to be made.

- *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