



## Compliance and Enforcement Decision CRTC 2018-483

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*File number: PDR 9174-1589*

### **Bouchard Parent Associés Inc., operating as Royal LePage Tendance – Violations of the Unsolicited Telecommunications Rules**

*The Commission imposes a total administrative monetary penalty of \$23,050.65 on Bouchard Parent Associés Inc., operating as Royal LePage Tendance, for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so while it was not registered with the National DNCL operator and was not a registered subscriber of the National DNCL, in violation of the Unsolicited Telecommunications Rules.*

#### **Introduction**

1. In 2014, an investigation by the Commission's enforcement staff found that Hamel Systèmes d'information 2000 Inc. (HSI 2000) provided contents of the National Do Not Call List (DNCL) to its clients through its commercial website, Telelisting. The investigation also found that Bouchard Parent Associés Inc., operating as Royal LePage Tendance (Royal LePage Tendance), was one of HSI 2000's clients and was potentially violating the Unsolicited Telecommunications Rules (the Rules).
2. On 10 August 2017, a person designated by the Commission issued a notice of violation<sup>1</sup> to Royal LePage Tendance pursuant to section 72.07 of the *Telecommunications Act* (the Act).<sup>2</sup> In the notice, Royal LePage Tendance was informed that it was liable for initiating telemarketing telecommunications between 22 March 2013 and 6 April 2015, which resulted in
  - 22 violations of Part II, section 4 of the Rules,<sup>3</sup> which prohibits the initiation of telemarketing telecommunications by a telemarketer to consumers whose

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<sup>1</sup> Paragraph 72.004(a) of the *Telecommunications Act* states that the Commission may designate a person, or a class of persons, that is authorized to issue notices of violation or accept an undertaking.

<sup>2</sup> 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.

<sup>3</sup> Part II, section 4 of the Rules states that a telemarketer shall not initiate, and a 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 on the National DNCL, unless

numbers were registered on the National DNCL, without the consumers' express consent;

- 892 violations of Part II, section 6 of the Rules,<sup>4</sup> which prohibits the initiation of telemarketing telecommunications by a telemarketer that is not a registered subscriber of the National DNCL and that has not paid the applicable fees to the National DNCL operator; and
  - 892 violations of Part III, section 2 of the Rules,<sup>5</sup> which prohibits the initiation of telemarketing telecommunications by a telemarketer that has not registered with, and that has not provided information to, the National DNCL operator.
3. The notice of violation set out administrative monetary penalties (AMPs) for 1,806 violations at \$30.45 per violation, proposing a total penalty amount of \$55,000.<sup>6</sup>
  4. Royal LePage Tendance was given until 9 September 2017 to pay the total AMP amount set out in the notice of violation or to make representations to the Commission regarding the violations.
  5. The Commission received representations from Royal LePage Tendance dated 7 September 2017.
  6. In its representations, Royal LePage Tendance argued, among other things, that a majority of the 1,806 alleged violations are not founded or supported by sufficient evidence.
  7. With regard to the amount of the AMP, Royal LePage Tendance claimed that its real estate agents did not commit the violations of Part II, section 4 of the Rules, and that the aggravating factor associated with those violations should be dismissed.
  8. Finally, regarding its ability to pay the proposed AMP, Royal LePage Tendance claimed that the corporation's financial statements for the 2012-2013 and 2013-2014 fiscal years, which it had previously provided to Commission enforcement staff, demonstrate that its financial sustainability is weak.

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express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer or the client of that telemarketer.

<sup>4</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.

<sup>5</sup> Part III, section 2 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it has registered with, and provided information to, the National DNCL operator, and has paid all applicable fees charged by the Complaints Investigator delegate.

<sup>6</sup> 1,806 multiplied by \$30.45 is \$54,992.70. The notice of violation rounded the proposed total AMP amount up to \$55,000.

## Issues

9. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:

- Did Royal LePage Tendance commit the violations?
- If yes, is the total amount of the AMP reasonable?

### **Did Royal LePage Tendance commit the violations?**

10. The notice of violation was supported by, among other things, the Telelisting data that HSI 2000 provided to the Commission, and by statements made by Royal LePage Tendance's co-owner to the Commission's enforcement staff during the investigation. Royal LePage Tendance's co-owner admitted that 20% of its real estate agents were conducting telemarketing activities and that, prior to Royal LePage Tendance registering with the National DNCL operator and subscribing to the National DNCL for the first time in October 2014, its real estate agents relied on the Telelisting red list to identify numbers on the National DNCL.

11. Based on the purpose of the Telelisting service and on the evidence presented in the investigation report, it is clear that some of Royal LePage Tendance's real estate agents used Telelisting for the purpose of making telemarketing telecommunications during a period when Royal LePage Tendance was not a registered subscriber of the National DNCL and had not registered with the National DNCL operator.

12. In its representations, Royal LePage Tendance stated that most of the notes associated with telephone numbers allegedly called by its real estate agents

- show that telemarketing telecommunications were not attempted;
- show that the telephone number was not in service or belonged to a business;
- show that the real estate agent had an existing business relationship with the consumer whose telephone number was called; and/or
- are insufficient to prove that telemarketing telecommunications were attempted.

13. After a review of all of Royal LePage Tendance's real estate agent notes provided by HSI 2000, the Commission agrees with Royal LePage Tendance's claim that in many cases, the notes either imply that a telecommunication was not attempted or appear to be inconclusive as to whether a telecommunication was attempted or not. The Commission determines that, on a balance of probabilities, the evidence presented is not sufficient to conclude that Royal LePage Tendance's real estate agents initiated

509 telemarketing telecommunications associated with 1,031 of the violations alleged in the notice of violation.<sup>7</sup> These violations are therefore dismissed.

14. Royal LePage Tendance argued in its representations that eight telephone numbers were not in service, and provided evidence showing that two telephone numbers belonged to a business. Royal LePage Tendance claimed that, therefore, the ten calls to these telephone numbers were exempt from the Rules.
15. Pursuant to Part II, section 2 of the Rules, the National DNCL Rules (i.e. Part II of the Rules) do not apply to a telemarketing telecommunication made to a business consumer.
16. However, Part III, section 1 of the Rules states that the Telemarketing Rules (i.e. Part III of the Rules) apply whether or not the telemarketing telecommunication is exempt from the National DNCL Rules.
17. In light of the above, the Commission dismisses the two violations of Part II, section 6 of the Rules associated with the telemarketing telecommunications made to business telephone numbers, but maintains the two violations of Part III, section 2 of the Rules associated with these calls.
18. Further, the Commission maintains the violations of Part II, section 6 and Part III, section 2 of the Rules associated with the telemarketing telecommunications initiated to telephone numbers that were not in service, since both Part II and Part III of the Rules refer to the initiation and not to the successful completion of a telemarketing telecommunication.
19. Royal LePage Tendance also argued in its representations that, in the case of 24 telemarketing telecommunications, the real estate agent had an existing business relationship (EBR) with the customer called.<sup>8</sup> Royal LePage Tendance therefore claimed that these telemarketing telecommunications were exempt from the Rules.

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<sup>7</sup> These include 13 violations of Part II, section 4 of the Rules, 509 violations of Part II, section 6 of the Rules, and 509 violations of Part III, section 2 of the Rules.

<sup>8</sup> An EBR, pursuant to subsection 41.7(2) of the Act, means 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 (a) the purchase of services or the purchase, lease or rental of products, within the eighteen-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made from the person or organization on whose behalf the telecommunication is made; (b) 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; or (c) any other written contract between the person to whom the telecommunication is made and the person or organization on whose behalf the telecommunication is made that is currently in existence or that expired within the eighteen-month period immediately preceding the date of the telecommunication.

20. Pursuant to subsection 41.7(1) of the Act and Part II, subsection 3(b) of the Rules, the National DNCL Rules do not apply in respect of a telemarketing telecommunication made to a person
- (i) with whom the person making the telecommunication, or the person or organization on whose behalf the telecommunication is made, has an EBR, 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.
21. After a review of the evidence, the Commission finds that the real estate agent notes associated with 15 of the 24 telemarketing telecommunications suggest that the real estate agent had an EBR with the consumer called. The Commission therefore dismisses one violation of Part II, section 4 of the Rules and 15 violations of Part II, section 6 of the Rules associated with these telemarketing telecommunications.
22. Pursuant to section 72.16 of the Act,<sup>9</sup> 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.
23. Moreover, Telecom Information Bulletin 2009-283 clearly indicates that real estate brokerages, such as Royal LePage Tendance, are liable for violations of the Rules by their real estate agents.
24. In light of the circumstances of this case, the Commission finds that telemarketing telecommunications were made by Royal LePage Tendance, resulting in the following 757 violations of the Rules:
- eight violations of Part II, section 4 of the Rules for initiating telemarketing telecommunications to consumers whose numbers were registered on the National DNCL, without the consumers' express consent;
  - 366 violations of Part II, section 6 of the Rules for initiating telemarketing telecommunications while not being a registered subscriber of the National DNCL and not paying the applicable fees to the National DNCL operator; and
  - 383 violations of Part III, section 2 of the Rules, for initiating telemarketing telecommunications without having registered with, and without having provided information to, the National DNCL operator.

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<sup>9</sup> Formerly section 72.02 of the Act.

### **Is the total amount of the AMP reasonable?**

25. The purpose of a penalty is to promote compliance, not to punish. The Commission has previously stated that the appropriate factors to be considered in determining the amount of an AMP for violations of the Rules include the nature of the violations, the number and frequency of complaints and violations, the relative disincentive of the measure, the potential for future violations, and the person's ability to pay the penalty.<sup>10</sup>
26. Regarding the number and frequency of complaints and violations, the initiation of a single telemarketing telecommunication may, in some cases, result in multiple violations of the Rules. In the present case, multiple violations occurred during each of the multiple telemarketing telecommunications. While fewer violations have been retained in this decision relative to those set out in the notice of violation, the number of violations retained is high and covers a period of over a year, during which Royal LePage Tendance was not registered with the National DNCL operator and did not subscribe to the National DNCL.
27. Regarding the nature of the violations, the making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL is a serious violation. These calls cause significant inconvenience and nuisance to consumers by violating the expectation that they will not receive unsolicited telemarketing calls by registering their numbers on the National DNCL. Additionally, Royal LePage Tendance's failure to purchase a subscription to the National DNCL or register with the National DNCL operator reflected significant breaches of the Rules. Registering and subscribing are two of the core responsibilities of telemarketers under the National DNCL regime. Furthermore, engaging in unsolicited telemarketing without having a subscription increases the likelihood that unwanted calls will be made to consumers whose numbers are registered on the National DNCL.
28. Since the Commission has maintained eight of the 22 violations of Part II, section 4 of the Rules alleged in the notice of violation, the Commission determines that it will not dismiss the aggravating factor associated with these violations, as requested by Royal LePage Tendance.
29. Regarding the relative disincentive of the measure, the Commission must strive to ensure that the AMPs it imposes serve as an incentive to comply with the Rules, and that they are not so low as to make it financially advantageous for a telemarketer or a client of a telemarketer to pay the amount as a cost of doing business.

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<sup>10</sup> In Telecom Decision 2007-48, the Commission identified four factors: 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. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission further identified ability to pay as a factor to be considered in determining the amount of an AMP.

30. In this case, the subscription fees that Royal LePage Tendance would have had to pay for the period during which it was not a registered subscriber of the National DNCL and had not registered with the National DNCL operator would be in the range of \$8,000. The Commission therefore considers that Royal LePage Tendance gained a financial benefit from its non-compliance with the Rules.
31. However, this is the first time that a notice of violation has been issued to Royal LePage Tendance, and no previous enforcement action under the Rules has been taken against the company. Royal LePage Tendance also demonstrated efforts toward self-correction. It registered with the National DNCL operator and purchased a subscription before being approached by the Commission's enforcement staff, and had a valid subscription at the time it filed its representations.
32. Regarding ability to pay, Royal LePage Tendance referred to the financial statements for the 2012-2013 and 2013-2014 fiscal years, which it had previously provided to Commission enforcement staff to support that its financial sustainability is weak. These financial statements do not appear to support an inability to pay AMPs for 757 violations at \$30.45 per violation, for a total penalty amount of \$23,050.65.
33. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission noted that analysis of this factor was not limited to direct financial information, and could proceed based on other indicia of a company's revenue-generating capabilities, including the size of a business, the scope of its operations, and the number of people it employs. Based on its website, Royal LePage Tendance operates three offices in the Greater Montreal Area and employs approximately 90 real estate agents. Accordingly, Royal LePage Tendance appears to be a medium-sized real estate brokerage within the Quebec market and under the Royal LePage banner, which is a long-standing national real estate company that is well established in Canada. Based on the information cited above, the Commission considers that the proposed penalty would not exceed Royal LePage Tendance's ability to pay.
34. Pursuant to Compliance and Enforcement Regulatory Policy 2015-109, it is reasonable to place the burden on Royal LePage Tendance to provide documentation or detailed information supporting an inability to pay the amount of the AMP or rebut any analysis of this factor set out in the notice of violation. Royal LePage Tendance had an opportunity to produce more recent financial information in its representations and to rebut the analysis of this factor presented with the notice of violation, but did not do so.
35. In light of the above considerations, the Commission considers that the penalty amount of \$30.45 per violation, for a total AMP of \$23,050.65, is reasonable and necessary to promote compliance with the Rules.

## **Conclusions**

36. In the circumstances of this case, a penalty of \$30.45 for each of the eight violations of Part II, section 4 of the Rules; 366 violations of Part II, section 6 of the Rules; and

383 violations of Part III, section 2 of the Rules is appropriate. The Commission therefore imposes a total AMP of \$23,050.65 on Royal LePage Tendance.

37. The Commission hereby notifies Royal LePage Tendance of its 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 must be made within 90 days of the date of this decision, and the Commission will place all related documentation on its website.<sup>11</sup> 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 Court grants in exceptional circumstances.
38. The Commission reminds Royal LePage Tendance that, should it continue to initiate telemarketing telecommunications, it is required to maintain compliance with the Rules. Examples of measures that Royal LePage Tendance should adopt or continue to follow 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.
39. The Commission advises Royal LePage Tendance that to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
40. The amount of \$23,050.65 is due by **18 January 2019** 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 **18 January 2019**, interest calculated and compounded monthly at the average bank rate plus 3% will be payable on the 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.
41. 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

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<sup>11</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.



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
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Unsolicited Telecommunications Rules and the National Do Not Call List Rules as they relate to the real estate industry*, Telecom Information Bulletin CRTC 2009-283, 15 May 2009
- *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