



Compliance and Enforcement Decision CRTC 2019-317

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Blue Dream HT Ltd. – Violations of the Unsolicited Telecommunications Rules

The Commission imposes a total administrative monetary penalty of \$69,000 on Blue Dream HT Ltd. for sending telemarketing faxes (i) to a consumer whose number was registered on the National Do Not Call List (DNCL), (ii) while it was not a registered subscriber of the National DNCL, and (iii) to consumers whose numbers were registered or should have been registered on its internal DNCL, in violation of the Unsolicited Telecommunications Rules.

Introduction

1. Between 11 September 2016 and 17 July 2018, the Commission received 208 complaints about telemarketing faxes that appeared to have been sent by Blue Dream HT Ltd. (Blue Dream).
2. As a result of an investigation, on 2 October 2018, a person designated by the Commission¹ issued a notice of violation² to Blue Dream under the *Telecommunications Act* (the Act). The notice informed Blue Dream that it had sent telemarketing faxes that resulted in
 - one violation of Part II, section 4 of the Unsolicited Telecommunications Rules (the Rules), which prohibits the making of telemarketing telecommunications by a telemarketer to consumers whose numbers were registered on the National Do Not Call List (DNCL), without the consumers' express consent;
 - one violation of Part II, section 6 of the Rules, which prohibits the making 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

¹ Paragraph 72.04(1)(a) of the *Telecommunications Act* (the Act) states that the Commission may designate persons, or classes of persons, who are authorized to issue notices of violation.

² 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.

- 68 violations of Part III, section 14 of the Rules, which prohibits the making of telemarketing telecommunications to consumers whose numbers were or should have been registered on the telemarketer's internal DNCL.
3. The notice of violation set out administrative monetary penalties (the penalty) for 70 violations at \$1,000 per violation, for a total penalty of \$70,000.
 4. Blue Dream was given 30 days either to pay the penalty set out in the notice of violation or to make representations to the Commission.

Did Blue Dream commit the violations set out in the notice of violation?

5. Blue Dream is deemed to have committed the violations outlined in the notice of violation because it neither paid the penalty nor made representations in accordance with the notice. The Commission may therefore impose the penalty according to subsection 72.08(3) of the Act.

Is a total penalty of \$70,000 reasonable?

6. The Commission determines that it will not impose a penalty on one deemed violation because the Commission finds, as a matter of fact, that one violation fell outside the relevant period specified in the notice of violation. The Commission therefore considers that a total penalty of \$69,000 may be imposed if such a penalty is found to be reasonable.
7. The Commission has previously stated that the appropriate factors to be considered in determining the amount of a penalty for violations of the Rules include the nature of the violations, the number and frequency of complaints and violations, the potential for future violations, the person's ability to pay the penalty, and the relative disincentive of the measure (see Telecom Decision 2007-48 and Compliance and Enforcement Regulatory Policy 2015-109).
8. The Commission is of the view that the nature of the violations committed by Blue Dream is serious. The sending of unsolicited telemarketing faxes to consumers whose numbers are registered on the National DNCL or on a company's internal DNCL causes significant inconvenience and nuisance to consumers by violating the expectation that registering their numbers on the National DNCL or on a company's internal DNCL will ensure that they do not receive such faxes. Additionally, Blue Dream's failure to purchase a subscription to the National DNCL for all the area codes that it contacted is a significant breach of the Rules. Engaging in telemarketing without having a subscription increases the probability that unwanted telecommunications will be made to consumers whose numbers are registered on the National DNCL.
9. The Commission considers that both the number and frequency of complaints and violations committed by Blue Dream are high. The Commission received 208 complaints about telemarketing faxes that appeared to have been sent by Blue Dream under its various business names over a period of almost two years.

Sixty-seven of those complaints referred to telemarketing faxes sent during the period covered by the notice of violation and were validated through two witness statements. The sending of these 67 telemarketing faxes resulted in the 69 violations that Blue Dream is deemed to have committed during the period covered by the notice of violation. In addition, the evidence shows that, on several occasions, Blue Dream sent up to seven unsolicited telemarketing faxes to one business fax number on a single day.

10. The Commission is also of the opinion that the potential for future violations by Blue Dream is very high and constitutes an aggravating factor that justifies the total amount of the penalty. Between 2009 and 2013, Commission staff undertook graduated enforcement actions on three occasions to promote Blue Dream's compliance with the Rules. In addition, in December 2015, the Commission imposed a penalty of \$21,000 on Blue Dream for 14 violations of the Rules (see Compliance and Enforcement Decision 2015-572). The Commission considers that the number of violations in this case shows that Blue Dream has not corrected its non-compliant behaviour despite past enforcement actions.
11. The Commission considers that a total penalty of \$69,000 would not exceed Blue Dream's ability to pay, based on indicators of the company's capability to generate revenue. The Commission has noted in the past that analysis of the ability to pay was not limited to direct financial information. It can also proceed based on other indicators of a company's capacity to generate revenue, including the size of a business, the scope of its operations, and the number of people it employs (see Compliance and Enforcement Regulatory Policy 2015-109). The Commission notes that Blue Dream's business appears to be an established company because it has been in operation since 2008. In addition, on the basis of the information that Blue Dream provided during the investigation about the number of telemarketing faxes it sends in any given month and the revenue generated as a result, the Commission infers that Blue Dream has a stable revenue stream.
12. There are no financial statements on the record of this proceeding. However, the company had an opportunity to produce financial information with respect to its ability to pay as part of its representations to the Commission, but chose not to file any representations.
13. Regarding the relative disincentive of the measure, the purpose of a penalty is to promote compliance, not to punish. The amount of the penalty must therefore reflect the nature of the non-compliance, and must serve both as a deterrent to future non-compliance and as an incentive to comply with the Rules. For this reason, penalties must not be set 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. At the same time, the Commission must also ensure that a penalty does not result in a true penal consequence.³

³ *Guindon v. Canada*, 2015 SCC 41.

14. The Commission considers that the total penalty of \$21,000 that it imposed on Blue Dream in December 2015 may not have served to sufficiently deter non-compliance and promote the company's compliance with the Rules. The Commission is therefore of the opinion that a larger total penalty is justified in this instance.
15. In light of the above, the Commission finds, on a balance of probabilities, that a \$1,000 penalty for each deemed violation that occurred within the period covered by the notice of violation, for a total penalty of \$69,000, is reasonable and necessary, without being punitive.

Conclusions

16. As noted above, Blue Dream is deemed to have committed the 70 violations of the Rules set out in the notice of violation because it neither paid the penalty nor made any representations.
17. In the circumstances of this case, a penalty of \$1,000 per violation for the 69 violations of the Rules that occurred during the period covered by the notice of violation is appropriate. The Commission therefore imposes a total penalty of \$69,000 on Blue Dream.
18. The Commission hereby notifies Blue Dream of its right to apply to the Commission to review and rescind or vary this decision. Any review and vary application must be made within 90 days of the date of this decision, and the Commission will place all related documentation on its website⁴ (see section 62 of the Act).
19. Blue Dream can also seek leave of the Federal Court of Appeal to appeal this decision before that court. 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 (see section 64 of the Act).
20. The Commission reminds Blue Dream that it is required to comply with the Rules should it make telemarketing telecommunications in the future. Examples of measures that Blue Dream 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 before the date of a telemarketing telecommunication;

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 must be made.

- ensuring that it is using a version of the National DNCL obtained from the National DNCL operator no more than 31 days before 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 on its behalf 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.
21. The Commission warns Blue Dream that to ensure compliance with the Rules, the Commission may impose larger penalties for subsequent violations.
22. The amount of \$69,000 is due by **9 October 2019**. It must be paid in accordance with the instructions contained in the notice of violation. Any amount owing that is not paid by **9 October 2019** will accrue interest until the amount is paid in full.⁵
23. If payment has not been received within **30 days** of the date of this decision, the Commission intends to take collection measures. These measures may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

Related documents

- *Blue Dream HT Ltd. – Violations of the Unsolicited Telecommunications Rules*, Compliance and Enforcement Decision CRTC 2015-572, 22 December 2015
- *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 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

⁵ Interest is calculated and compounded monthly at the average bank rate plus 3% on the amount. Interest will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.