



## Compliance and Enforcement Decision CRTC 2021-205

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Ottawa, 16 June 2021

*File number: PDR 9174-2835*

### **2590054 Ontario Inc., operating as Top Tier Moving and Storage – Violations of the Unsolicited Telecommunications Rules**

The Commission imposes a total administrative monetary penalty of \$29,756.04 on 2590054 Ontario Inc., operating as Top Tier Moving and Storage, for making telemarketing calls (i) to consumers whose telephone numbers were registered on the National Do Not Call List (DNCL), (ii) while it was not registered with the National DNCL operator, (iii) while it was not a registered subscriber of the National DNCL, and (iv) outside of the permitted hours, resulting in 14,804 violations of the Unsolicited Telecommunications Rules.

#### **Introduction**

1. Between 14 August 2018 and 29 January 2020, the Commission received 21 complaints from consumers about telemarketing calls that appeared to have been made by 2590054 Ontario Inc., operating as Top Tier Moving and Storage (Top Tier).
2. As a result of an investigation, on 26 February 2020 a person designated by the Commission<sup>1</sup> issued a notice of violation<sup>2</sup> to Top Tier under the *Telecommunications Act* (the Act). The notice of violation was accompanied by supporting materials, including a cover letter setting out the reasons why the penalty proposed in the notice of violation was considered appropriate; copies of the evidence gathered during the investigation, including information provided by Top Tier; and the investigation report detailing Commission enforcement staff's analysis of the evidence.
3. The notice informed Top Tier that between 4 October 2017 and 17 July 2019 it made telemarketing calls that resulted in
  - 4,862 violations of Part II, section 4 of the Unsolicited Telecommunications Rules (the Rules), which prohibits telemarketers from initiating telemarketing telecommunications to consumers whose numbers are registered on the National Do Not Call List (DNCL), without the consumer's express consent;
  - 9,734 violations of Part II, section 6 of the Rules, which prohibits telemarketers from initiating telemarketing telecommunications on their own behalf if they are

<sup>1</sup> 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.

<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.

- not registered subscribers of the National DNCL and have not paid the applicable fees to the National DNCL operator;
- 9,734 violations of Part III, section 2 of the Rules, which prohibits telemarketers from initiating telemarketing telecommunications on their own behalf if they are not registered with, and have not provided information to, the National DNCL operator; and
  - 568 violations of Part III, section 23 of the Rules, which restricts the times at which consumers can receive telemarketing telecommunications to between 9:00 a.m. and 9:30 p.m. from Monday to Friday, and between 10:00 a.m. and 6:00 p.m. on Saturday and Sunday.
4. The notice of violation set out a total administrative monetary penalty (the penalty) of \$50,000 for 24,898 violations, at \$2.01 per violation.<sup>3</sup>
  5. Top Tier was given until 19 June 2020 to either pay the penalty set out in the notice of violation or make representations to the Commission.
  6. The Commission received representations from Top Tier by email on 7 May 2020, in which it stated that it follows all the guidelines and that it downloads the National DNCL. The company further stated that it drops a call if the telephone number is on the DNCL, and that it maintains its own active do not call list. Top Tier added that it is a small, growing company, which it said its net revenue shows.

## **Issues**

7. Based on the record of this proceeding, the Commission has identified the following issues to be addressed:
  - Did Top Tier commit the violations set out in the notice of violation?
  - If yes, is a penalty of \$50,000 appropriate?

## **Did Top Tier commit the violations set out in the notice of violation?**

8. Top Tier's representations did not specify which of the 24,898 alleged violations of the Rules it wished to dispute, nor did it provide any reasons for disputing the violations. While Top Tier's representations appeared to challenge the notice of violation as a whole, the company did not include any documentation or evidence in support of its challenge.
9. The Commission notes that nothing in the notice of violation's supporting materials or Top Tier's representations indicates either that the company obtained consumers' express consent before making telemarketing calls or that the calls it made qualified for an exemption under the Rules. According to Part V, subsection 2, and Part VII, subsection 1(b) of the Rules, the onus is on the telemarketer to demonstrate that the

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<sup>3</sup> The notice of violation rounded the proposed penalty down to \$50,000 from \$50,044.98.

consumer has given valid, express consent or that an exemption applied to the telemarketing calls it made to consumer telephone numbers registered on the National DNCL.

10. The Commission also notes that the investigation report contained evidence that Top Tier was not registered with the National DNCL operator or subscribed to the National DNCL when it placed telemarketing calls to Canadian consumers. Top Tier appeared to claim it was duly registered and subscribed but did not provide any evidence of that in its representations. According to Part III, section 5 and Part II, section 8 of the Rules, telemarketers are responsible for keeping, for a period of three years, proof of their registration with the National DNCL operator when they initiate telemarketing calls.
11. The Commission further notes that Top Tier did not dispute that it made telemarketing calls outside of permissible calling hours, although it had the opportunity to do so as part of its representations.
12. In light of the above, the Commission finds that Top Tier failed to demonstrate that it did not commit the violations set out in the notice of violation.
13. The Commission notes that during the investigation, Top Tier provided calling records covering the period between 13 March 2017 and 20 February 2019. According to the analysis of those records in the investigation report, Top Tier made 10,324 telemarketing calls in that period, resulting in 24,898 violations of the Rules.
14. However, based on its own analysis of the calling records, the Commission found that of those 10,324 telemarketing calls identified by Commission enforcement staff, a total of 6,226 were made between 4 October 2017 and 17 July 2019, which is the period covered by the notice of violation. The other 4,098 calls were made before the period covered by the notice of violation began.
15. Given that a notice of violation is a legally binding document, the Commission considers that the dates in the notice that set out the period of alleged violations cannot be modified.
16. Accordingly, the Commission determines that the 4,098 telemarketing calls that Commission enforcement staff found Top Tier had made before the start of the period specified in the notice of violation cannot be considered violations of the Rules for the purposes of this review proceeding.
17. In light of the above, the Commission finds, on a balance of probabilities, that during the period covered by the notice of violation Top Tier made 6,226 telemarketing calls resulting in **14,804 violations** of the Rules, or more specifically:
  - 2,866 telemarketing calls to consumers whose telephone numbers were registered on the National DNCL for more than 31 days, without their express

consent or an applicable exemption, resulting in 2,866 violations of Part II, section 4 of the Rules;

- 5,800 telemarketing calls while it was neither registered with the National DNCL operator nor subscribed to the National DNCL, resulting in 5,800 violations of Part II, section 6 of the Rules and 5,800 violations of Part III, section 2 of the Rules; and
- 338 telemarketing calls outside of permissible calling hours, resulting in 338 violations of Part III, section 23 of the Rules.

### **Is a penalty of \$50,000 appropriate?**

18. The Commission considers that a total penalty of \$50,000 as set out in the notice of violation is not appropriate given that it found that Top Tier committed 14,804 violations during the period covered by the notice of violation. In light of this finding, the Commission will now determine if a penalty of \$2.01 for each of the 14,804 violations, for a total penalty of \$29,756.04, is appropriate in the circumstances of this case.

19. In order to determine what is an appropriate penalty, the Commission examines the nature of the violations, the number and frequency of complaints and violations, the person's ability to pay the penalty, the potential for future violations, and the relative disincentive of the measure (see Telecom Decision 2007-48 and Compliance and Enforcement Regulatory Policy 2015-109).

### **Nature of the violations**

20. The Commission considers that making unsolicited telemarketing calls to consumers whose numbers are registered on the National DNCL causes them significant inconvenience and nuisance by violating their expectation that they will not receive unsolicited telemarketing calls because they have registered their numbers on the National DNCL. In addition, engaging in telemarketing without being registered with the National DNCL operator or subscribed to the National DNCL is a significant breach of the Rules, since it increases the likelihood that unwanted calls will be made to consumers whose numbers are registered on the National DNCL. Furthermore, telemarketing calls made outside of permissible hours cause significant nuisance to consumers by violating their expectation that they will not be bothered during hours of rest.

21. In light of the above, the Commission finds that the nature of the violations committed by Top Tier is serious.

### **Number and frequency of complaints and violations**

22. The Commission is unable to determine how many of the 21 complaints were received during the period covered by the notice of violation and how many were received after that period. It is also unable to determine whether the issues raised in the complaints were directly related to the violations set out in the notice of violation.

Accordingly, the Commission finds that the number and frequency of complaints should not influence the amount of the penalty in this case.

23. As for the number and frequency of violations, Top Tier committed 14,804 violations during a 21-month period, or an average of approximately 705 violations per month for the entire period. The Commission finds that the number and frequency of violations are high.

#### **Potential for future violations**

24. The Commission notes that there is no evidence either in the notice of violation's supporting materials or in Top Tier's representations indicating that the company has taken any steps to address the compliance issues brought to its attention by Commission enforcement staff. Furthermore, according to the information available on the record of this proceeding, the company, which was not registered with the National DNCL operator or subscribed to the National DNCL during the period covered by the notice of violation, has still not registered.
25. Accordingly, the Commission finds that Top Tier's potential for future violations is high.

#### **Relative disincentive of the measure**

26. The Commission notes that the purpose of any penalty is to promote compliance with the Rules and not to punish. The amount of the penalty must therefore reflect the nature of the non-compliance, and must serve as both a deterrent to future non-compliance and 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 penalty as a cost of doing business.<sup>4</sup>
27. The Commission considers that Top Tier gained a financial benefit from its non-compliance with the Rules by avoiding the costs associated with the subscriptions it was required to purchase prior to making unsolicited telemarketing calls. In this case, those costs would have totaled between \$14,000 and \$28,000.<sup>5</sup>
28. In light of the above considerations, the Commission finds that a total penalty of \$29,756.04 is justified in the circumstances of this case. The Commission considers that this total penalty amount strikes a fair balance between being non-punitive, as it is not of an order of magnitude that would prevent Top Tier from continuing to use telemarketing strategies in a manner that complies with the Act, and serving as a deterrent to non-compliance, since it represents more than the cost of doing business.

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<sup>4</sup> *Guindon v. Canada*, 2015 SCC 41

<sup>5</sup> Subscription fees to the National DNCL are set by the Commission and vary based on the length of the subscription and the number of area codes for which the subscription is made (see *Unsolicited Telecommunications Fees Regulations* SOR/2013-7).

## Ability to pay

29. The Commission notes that the investigation report did not include financial statements, information regarding the company's size or its capacity to generate revenue, or other evidence to justify the claim that the company has the ability to pay a penalty of \$2.01 per violation.
30. The Commission also notes that although Top Tier had the opportunity, as part of its representations, to produce financial information with respect to its ability to pay and evidence to support its claim that it is a small company, it did not do so.
31. The Commission indicated in Compliance and Enforcement Regulatory Policy 2015-109 that its analysis of ability to pay is not limited to direct financial information; it can also be based on other characteristics of a company's capacity to generate revenue, including its size, the scope of its operations, and the number of people it employs.
32. The Commission considers that although the limited information on the record of this proceeding suggests that Top Tier is a small business that has been operating for at least four years in a fairly large geographical area, there is not enough information to draw conclusions regarding Top Tier's overall revenue-generating capabilities.
33. The Commission is therefore of the view that in the absence of any information from Top Tier addressing its ability to pay, nothing on the record of this proceeding demonstrates, on a balance of probabilities, that a penalty of \$2.01 per violation, for a total penalty of \$29,756.04, exceeds Top Tier's ability to pay.
34. In light of the above, the Commission finds that a total penalty of \$29,756.04 is appropriate, proportionate to the circumstances of this case, and necessary to promote compliance with the Rules.

## Conclusions

35. As noted above, the Commission finds, on a balance of probabilities, that during the period covered by the notice of violation, Top Tier made 6,226 telemarketing calls resulting in **14,804 violations** of the Rules.
36. The Commission also finds that in the circumstances of this case, a penalty of \$2.01 per violation for 14,804 violations of the Rules is appropriate. The Commission therefore imposes a total penalty of **\$29,756.04** on Top Tier.
37. The Commission hereby notifies Top Tier 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 after the date of this decision (see section 62 of the Act).<sup>6</sup>

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<sup>6</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

38. Top Tier 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 after 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).
39. The Commission reminds Top Tier that it is required to comply with the Rules should it make telemarketing telecommunications in the future. Examples of measures that Top Tier 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; (ii) honour consumers' requests that they not be contacted by way of telemarketing telecommunications; and, (iii) ensure that consumers receive telemarketing telecommunications only within the permitted hours.
40. The Commission advises Top Tier that to ensure compliance with the Rules, the Commission may impose larger penalties for subsequent violations.
41. The amount of \$29,756.04 is due by **16 July 2021**. It must be paid in accordance with the instructions contained in the notice of violation. Any amount owing that is not paid by **16 July 2021** will accrue interest until the amount is paid in full.<sup>7</sup>
42. If payment has not been received by the date indicated in the previous paragraph 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

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for review and vary applications to reflect the modified time limit in which such applications must be made.

<sup>7</sup> 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.

## 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 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