



## Compliance and Enforcement Decision CRTC 2021-387

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### **2442947 Ontario Inc., operating as Trust Windows Corp. – Violations of the Unsolicited Telecommunications Rules**

The Commission imposes a total administrative monetary penalty of \$59,497 on 2442947 Ontario Inc., operating as Trust Windows Corp., for telemarketing calls made on its behalf (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 59,497 violations of the Unsolicited Telecommunications Rules.

#### **Introduction**

1. Between 24 March 2017 and 14 November 2018 the Commission received 40 complaints from consumers about telemarketing calls that appeared to have been made by or on behalf of 2442947 Ontario Inc., operating as Trust Windows Corp. (Trust Windows).
2. As a result of an investigation, on 12 November 2020 a person designated by the Commission<sup>1</sup> issued a notice of violation<sup>2</sup> to Trust Windows 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 calling records and a call script; and the investigation report detailing Commission enforcement staff's analysis of the evidence.
3. The notice informed Trust Windows that telemarketing calls made on its behalf between 31 May 2018 and 14 December 2018 resulted in
  - 1,910 violations of Part II, section 4 of the Unsolicited Telecommunications Rules (the Rules), which states that clients of telemarketers shall make all reasonable efforts to ensure that telemarketers do not initiate telemarketing

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<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.

telecommunications to consumers whose numbers are registered on the National Do Not Call List (DNCL), without the consumers' express consent;

- 41,600 violations of Part II, section 7 of the Rules, which prohibits telemarketers from initiating telemarketing telecommunications on behalf of a client if they are not registered subscribers of the National DNCL and have not paid the applicable fees to the National DNCL operator;
  - 14,987 violations of Part III, section 3 of the Rules, which prohibits telemarketers from initiating telemarketing telecommunications on behalf of a client if the client is not registered with, and has not provided information to, the National DNCL operator; and
  - 1,002 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 \$59,499 for 59,499 violations, at \$1.00 per violation.
  5. The Commission received representations from Trust Windows on 3 December 2020, in which the company disputed the validity of the calling records that the designated person relied on in deciding to issue the notice of violation. Trust Windows also stated that its business operations and sales have been disrupted by the pandemic and that it does not have the means to pay the penalty of \$59,499 at this time.
  6. According to subsection 72.08(2) of the Act, if a person makes representations in accordance with a notice of violation, the Commission must decide, on a balance of probabilities, whether the person committed the violations. If it decides that the person did indeed commit the violations, it may impose the penalty.

## **Issues**

7. Based on the record of this proceeding, the Commission has identified the following issues to be addressed:
  - Did Trust Windows commit the violations set out in the notice of violation?
  - If yes, is a penalty of \$59,499 appropriate?

### **Did Trust Windows commit the violations set out in the notice of violation?**

8. The Commission notes that a contract obtained during the investigation shows that Trust Windows made formal arrangements with MHC Marketing Services Inc., a company doing business as Core22, to initiate calls on its behalf soliciting its window and door products to homeowners. The contract states that Trust Windows hired Core22 to develop market research strategies to identify consumer requirements, that

Core22 would act as a broker for research campaigns to vendors who would contact homeowners to conduct surveys and offer free in-home individualized energy assessments, that the results collected from each survey would be submitted to Trust Windows, and that these results would be payable based on an invoiced amount.

9. The Commission considers that the contract between Trust Windows and Core22 established a principal/agent relationship between the two entities.<sup>3</sup> The contract, which was in effect during the period identified in the notice of violation, set out a legal relationship between the two entities in which both agreed that Core22, the agent, would act within the scope of the authority given to it by Trust Windows, the principal.
10. Given this contractual relationship, the Commission finds that Trust Windows is vicariously liable<sup>4</sup> for the conduct of Core22 that led to the alleged violations. Core22 was acting within the scope of the authority given to it by Trust Windows when it initiated calls on behalf of the company soliciting its products and services.
11. The Commission notes that a call script obtained during the investigation shows that the purpose of the calls initiated by Core22 on behalf of Trust Windows was to find out about the consumers' current level of satisfaction with their windows and doors, and to set up a free in-home assessment to discuss how they could benefit from upgrading them.
12. The Commission considers that this purpose is in accordance with the definitions of "Telemarketing" and "Solicitation" set out in the Rules.<sup>5</sup> Accordingly, the Commission finds that the calls initiated by Core22 on behalf of Trust Windows were telemarketing telecommunications within the meaning of the Rules.
13. Under the Rules, clients of telemarketers are required to maintain records showing that they have registered with the National DNCL operator as well as proof of any subscriptions they have purchased for a period of three years from the date the records are created (see Part III, subsection 5(b) and Part II, subsection 8(b)).<sup>6</sup> Clients of telemarketers must purchase subscriptions for the area codes they intend the telemarketer to call on their behalf. They must also download the telephone numbers from a version of the National DNCL that is not older than 31 days, and delete these numbers from their calling lists. Clients of telemarketers are responsible for making

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<sup>3</sup> In Telecom Information Bulletin 2009-283, the Commission stated that a principal/agent relationship occurs when one person, an agent, acts on behalf of another person, the principal.

<sup>4</sup> According to 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.

<sup>5</sup> According to the Rules, "Telemarketing" means the use of telecommunications facilities to make unsolicited telecommunications for the purpose of solicitation and "Solicitation" means the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another person.

<sup>6</sup> See also Telecom Decision 2008-6, paragraphs 35 to 38.

sure their calling lists are current and that telemarketers making calls on their behalf do not call consumers whose numbers are registered on the National DNCL.

14. The Commission notes that Trust Windows was registered with the National DNCL operator for about three and a half months of the six-and-a-half-month period covered by the notice of violation. Based on the information on the record of this proceeding, Trust Windows was not registered with the National DNCL operator for the period of 12 September 2018 to 14 December 2018. Furthermore, nothing in the materials supporting the notice or in the company's representations indicates that Trust Windows was subscribed to the National DNCL during the entire period covered by the notice of violation, or indeed that the company provided Core22 with up-to-date calling lists that excluded consumer telephone numbers registered on the National DNCL for more than 31 days.
15. The Commission finds that nothing on the record of this proceeding indicates that the company obtained consumers' express consent before authorizing telemarketers to make telemarketing calls on its behalf. Pursuant to Part V, section 2 of the Rules, the onus was on Trust Windows to demonstrate that valid express consent was given by the consumers who were contacted on its behalf for solicitation purposes.
16. The Commission also finds that nothing on the record indicates that the telemarketing calls made on behalf of Trust Windows were subject to exemptions under the Rules or the Act.<sup>7</sup>
17. In addition, the Commission notes that Trust Windows did not dispute that telemarketing calls were made on its behalf outside of permissible calling hours, although it had the opportunity to do so as part of its representations.
18. With respect to the validity of the calling records obtained from Core22 during the investigation and disputed by Trust Windows, the Commission notes that the calling records included all the specific details requested by Commission enforcement staff in the request for information dated 13 December 2018. The Commission also notes that despite having been provided with a copy of the calling records as part of the materials supporting the notice of violation, Trust Windows did not specify which call details it considered were missing. Accordingly, the Commission finds that there is nothing about the calling records indicating that they are invalid.
19. Based on its own review of the calling records obtained during the investigation, the Commission counted 1,909 telemarketing calls made to consumers whose numbers were registered on the National DNCL for more than 31 days, and not 1,910 as set out in the notice of violation. The Commission also counted 1,001 telemarketing calls made to telephone numbers in Canadian area codes outside of permissible calling hours, and not 1,002 as set out in the notice.
20. Therefore, in light of the above, the Commission finds, on a balance of probabilities, that during the period covered by the notice of violation Core22 initiated

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<sup>7</sup> Exemptions to the Rules are listed in paragraph 41.7 of the Act and Part II, section 3 of the Rules.

41,600 telemarketing calls on behalf of Trust Windows, resulting in 59,497 violations of the Rules, or more specifically,

- 1,909 telemarketing calls to consumers whose numbers were registered on the National DNCL for more than 31 days, without their express consent or an applicable exemption, resulting in 1,909 violations of Part II, section 4 of the Rules;
- 41,600 telemarketing calls while Trust Windows was not subscribed to the National DNCL, resulting in 41,600 violations of Part II, section 7 of the Rules;
- 14,987 telemarketing calls while Trust Windows was not registered with the National DNCL operator, resulting in 14,987 violations of Part III, section 3 of the Rules; and
- 1,001 telemarketing calls outside of permissible calling hours, resulting in 1,001 violations of Part III, section 23 of the Rules.

**Is a penalty of \$59,499 appropriate?**

21. The Commission considers that the total penalty of \$59,499 set out in the notice of violation should be adjusted to reflect the finding that Trust Windows committed 59,497 violations during the period covered by the notice. In light of this finding, the Commission will now determine if a penalty of \$1.00 for each of the 59,497 violations, for a total penalty of \$59,497, is appropriate in the circumstances of this case.
22. 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 potential for future violations, the relative disincentive of the measure, and the ability to pay the penalty (see Telecom Decision 2007-48 and Compliance and Enforcement Regulatory Policy 2015-109).

**Nature of the violations**

23. The Commission considers that Trust Windows' failure to register with the National DNCL operator for a part of the period covered by the notice of violation and failure to purchase a subscription to the National DNCL for the area codes that telemarketers contacted on its behalf are significant breaches of the Rules. By authorizing telemarketers to make telemarketing calls on its behalf without first filtering out numbers registered on the National DNCL, Trust Windows increased the probability that unwanted calls would be made to consumers whose numbers are registered on the National DNCL.
24. The Commission also considers that making unsolicited telemarketing calls to consumers whose numbers are registered on the National DNCL causes significant inconvenience and nuisance to consumers by violating their expectation that they will

not receive unsolicited telemarketing calls by registering their numbers on the National DNCL. In addition, calls made outside the permissible calling hours cause significant nuisance to consumers by violating their expectation that they will not be bothered during hours of rest.

25. In light of the above, the Commission finds that the nature of the violations committed by Trust Windows is serious.

**Number and frequency of complaints and violations**

26. The Commission notes that the 40 complaints received were not part of the record of this proceeding and there is no information in the investigation report to indicate that they were validated through speaking to complainants or seeking witness statements. For this reason, the Commission is unable to determine how many of the 40 complaints were received during the period covered by the notice of violation or whether the issues raised in the complaints were directly related to the violations set out in the notice of violation.

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

28. As for the number and frequency of violations, Trust Windows committed 59,497 violations during the six-and-a-half-month period covered by the notice of violation, or an average of approximately 7,932 violations per month for the entire period. The Commission finds that the number and frequency of violations are very high.

**Potential for future violations**

29. The Commission notes that this is the first time a notice of violation has been issued to Trust Windows, and no previous enforcement action has been taken against the company under the Rules. The Commission also notes that Trust Windows renewed its registration with the National DNCL operator in January 2019 after Commission enforcement staff issued their first request for information to the company, and that in its representations the company stated it has ceased all telemarketing telecommunications.

30. The Commission therefore considers that Trust Windows took positive actions to prevent the reoccurrence of violations after Commission enforcement staff brought its obligations under the Rules to its attention, and that the company appears to no longer be engaged in telemarketing to Canadians.

31. Accordingly, the Commission finds that Trust Windows' potential for future violations is low.

**Relative disincentive of the measure**

32. 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>8</sup>

33. The Commission considers that Trust Windows 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 authorizing telemarketers to make telemarketing calls on its behalf. In this case, those costs would have approximated \$15,000.<sup>9</sup>

34. In light of the above, the Commission finds that a total penalty of \$59,497 would serve as an appropriate disincentive in the circumstances of this case. The Commission considers that this amount would place the penalty in excess of the cost of doing business, without making the amount so large as to prevent Trust Windows from using telemarketing strategies in a manner that complies with the Rules.

**Ability to pay**

35. The Commission notes that the investigation report did not include any financial statements or other financial information to justify the claim that the company has the ability to pay a penalty of \$1.00 per violation, for a total penalty of \$59,499 as set out in the notice of violation.

36. The Commission further notes that Trust Windows' claim that it is unable to pay the penalty because the pandemic has negatively impacted its business operations was not supported or validated by any additional evidence or information.

37. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission stated it considers that, in situations where a person applies for review of a notice of violation and argues that an inability to pay should lower or mitigate the amount of the penalty set out in the notice, it is reasonable to place the burden on that person to provide documentation or detailed information supporting their position or rebutting any analysis of this factor set out in the notice. Although Trust Windows 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 the pandemic has disrupted its business operations, it did not do so.

38. 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.

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<sup>8</sup> See Compliance and Enforcement Regulatory Policy 2015-109, paragraph 17.

<sup>9</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 [Telemarketer Subscription Rates](#)).

39. The Commission considers that while the limited information on the record of this proceeding suggests that Trust Windows has been conducting business operations for at least six years in a large and populous metropolitan area, there is not enough information to draw conclusions regarding Trust Windows' overall revenue-generating capabilities.
40. Nevertheless, despite the fact that the designated person submitted limited evidence regarding Trust Windows' ability to pay the penalty, the Commission is of the view that in the absence of information from Trust Windows addressing its ability to pay, nothing on the record of this proceeding demonstrates, on a balance of probabilities, that a penalty of \$1.00 per violation, for a total penalty of \$59,497, exceeds Trust Windows' ability to pay. The Commission notes that this determination is consistent with the Commission's approach in past Compliance and Enforcement decisions when examining the ability to pay of a telemarketer or client of a telemarketer.<sup>10</sup>
41. In light of the above, the Commission finds that a total penalty of \$59,497 is appropriate, proportionate to the circumstances of this case, and necessary to promote compliance with the Rules.

## Conclusions

42. The Commission finds, on a balance of probabilities, that during the period covered by the notice of violation, 41,600 telemarketing telecommunications were made on behalf of Trust Windows, resulting in **59,497 violations** of the Rules.
43. The Commission also finds that in the circumstances of this case, a penalty of \$1.00 per violation for 59,497 violations of the Rules is appropriate. The Commission therefore imposes a total penalty of **\$59,497** on Trust Windows.
44. The Commission hereby notifies Trust Windows 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>11</sup>
45. Trust Windows 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).
46. The Commission reminds Trust Windows that it is required to comply with the Rules should it make telemarketing telecommunications or authorize telemarketers to do so

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<sup>10</sup> See, for example, Compliance and Enforcement Decisions 2021-205 and 2020-67.

<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.

on its behalf in the future. Examples of measures that Trust Windows 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.

47. The Commission advises Trust Windows that to ensure compliance with the Rules, the Commission may impose larger penalties for subsequent violations.

48. The amount of \$59,497 is due by **20 December 2021**. It must be paid in accordance with the instructions contained in the notice of violation. Any amount owing that is not paid by **20 December 2021** will accrue interest until the amount is paid in full.<sup>12</sup>

49. If payment has not been received by **20 December 2021**, 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

- *2590054 Ontario Inc., operating as Top Tier Moving and Storage – Violations of the Unsolicited Telecommunications Rules, Compliance and Enforcement Decision CRTC 2021-205, 16 June 2021*
- *9250-5114 Québec Inc., operating as Rénovation Domicili-air – Violations of the Unsolicited Telecommunications Rules, Compliance and Enforcement Decision CRTC 2020-67, 20 February 2020*
- *Administrative monetary penalties under the Voter Contact Registry, Compliance and Enforcement Regulatory Policy CRTC 2015-109, 27 March 2015*

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<sup>12</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.

- *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
- *Delegation of the Commission's investigative powers with regard to Unsolicited Telecommunications Rules complaints*, Telecom Decision CRTC 2008-6, 28 January 2008, as amended by Telecom Decision CRTC 2008-6-1, 20 October 2008
- *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