



Compliance and Enforcement Decision CRTC 2021-399

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2260948 Ontario Inc., operating as Smart Choice Window and Door Systems – Violations of the Unsolicited Telecommunications Rules

The Commission imposes a total administrative monetary penalty of \$42,000 on 2260948 Ontario Inc., operating as Smart Choice Window and Door Systems, 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, and (iii) while it was not a registered subscriber of the National DNCL, resulting in 21 violations of the Unsolicited Telecommunications Rules.

Introduction

1. Between 24 March 2017 and 14 October 2019, the Commission received 61 complaints from consumers about telemarketing calls that appeared to have been made by 2260948 Ontario Inc., operating as Smart Choice Window and Door Systems (Smart Choice).
2. As a result of an investigation, on 30 October 2020 a person designated by the Commission¹ issued a notice of violation² to Smart Choice 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 Smart Choice; and the investigation report detailing Commission enforcement staff's analysis of the evidence.
3. The notice informed Smart Choice that, between 18 September 2017 and 31 October 2018, it made telemarketing calls that resulted in

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.

- seven violations of Part II, section 4 of the [Unsolicited Telecommunications Rules](#) (the Rules), which states that a telemarketer shall not initiate a telemarketing telecommunication to consumers whose numbers are registered on the National Do Not Call List (DNCL), without the consumers' express consent;
 - seven violations of Part II, section 6 of the Rules, which 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; and
 - seven violations of Part III, section 2 of the Rules, which 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.
4. The notice of violation set out a total administrative monetary penalty (the penalty) of \$42,000 for 21 violations, at \$2,000 per violation.
 5. The Commission received representations from Smart Choice on 30 November 2020, in which the company stated that the calls it made were not telemarketing calls since they were made as part of a referral system. The company also questioned the validity of one of the seven consumer statements.
 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:
 - Do phone calls initiated as part of a referral system constitute telemarketing calls?
 - Should the Commission consider one of the seven witness statements invalid?
 - Did Smart Choice commit the violations set out in the notice of violation?
 - If yes, is a penalty of \$42,000 appropriate?

Do phone calls initiated as part of a referral system constitute telemarketing calls?

8. The Commission notes that Smart Choice acknowledged that it contacted some potential customers by telephone. However, it argued that it did not violate any sections of the Rules since calls were made to phone numbers obtained through referrals from current and potential clients. Clients were invited to fill out a referral

form and provide the names and phone numbers of up to five referrals. Clients would receive gift cards for the referrals, as well as have the chance to win other prizes. Other referrals were obtained through social media and Internet ads.

9. In Telecom Decision 2007-48, the Commission indicated that those who receive telemarketing calls as a result of referrals may view these calls as a source of undue inconvenience or nuisance and that, accordingly, referrals do not constitute an exemption to the Rules.
10. As to whether the calls made by Smart Choice to potential customers were “telemarketing calls,” Part I, section 1 of the Rules defines “telemarketing” as “the use of telecommunications facilities to make unsolicited telecommunications for the purpose of solicitation.” As for “solicitation,” it is defined, also in Part I, section 1, as “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.”
11. With regard to the “unsolicited” component, the Commission notes that the record suggests that the seven calls covered by the notice of violation were indeed unsolicited, as evidenced by the consumer statements stating that the consumers had not provided consent to receive telemarketing calls made by or on behalf of Smart Choice.
12. The referrals obtained by Smart Choice therefore resulted in the company using “telecommunications facilities to make unsolicited telecommunications” with the goal of “selling or promoting a product or service,” all of which falls under the definition of “telemarketing,” pursuant to the Rules.
13. In light of the above, the Commission finds that the calls made by Smart Choice using a referral system constituted telemarketing calls, as defined under the Rules. As such, Smart Choice had an obligation to make these calls in accordance with the Rules.

Should the Commission consider one of the seven witness statements invalid?

14. In its representations, Smart Choice argued that it found one of the seven consumer statements in the investigation report to be suspicious and questioned its validity, since it was filed by a previous business partner. Smart Choice claimed that following an unsuccessful business transaction, the owner of Smart Choice had initiated legal actions against this former business partner.
15. The Commission notes that while Smart Choice questioned the validity of this particular witness statement, it submitted no supporting evidence to discredit the statement.
16. The Commission also notes that the previous business partner was not the only person to have complained to the Commission about an unsolicited call from Smart Choice and to have filed a consumer statement after filing a complaint. Six other

consumers also filed statements, including two who had the same area code number (905) as the previous business partner.

17. While it may look unusual for a previous business partner to have received a telemarketing call from Smart Choice, there is nothing on the record to conclude that this complaint and statement were based on false claims of telemarketing calls made by Smart Choice.
18. In light of the above, the Commission finds that there is nothing on the record to find that this consumer statement is invalid.

Did Smart Choice commit the violations set out in the notice of violation?

19. The Commission will now determine whether the telemarketing calls by Smart Choice resulted in violations of the Rules, as set out in the notice of violation, namely: making (i) 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, and (ii) telemarketing calls to telephone numbers in Canadian area codes without being registered with the National DNCL operator, or subscribed to the National DNCL.

Making 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

20. Pursuant to Part II, section 4 of the Rules, a telemarketer shall not call a consumer's telephone number that has been registered on the National DNCL without the consumer's express consent. Part VII subsection (b) of the Rules enumerates other applicable exemptions.
21. The Commission notes that in the present case, all seven consumer statements confirm that those who received a call from Smart Choice were registered on the National DNCL for more than 31 days prior to receiving the call. The Commission also notes that the consumer statements specifically indicate that neither the consumer, nor anyone residing with them, gave express consent to receive telemarketing calls made by or on behalf of Smart Choice.
22. The Commission further notes that Smart Choice provided no evidence to demonstrate that consumers had given valid express consent to be contacted, or that any of the exemptions regarding the requirement to obtain such consent applied to the calls it made. Pursuant to the Rules, the onus is on the telemarketer to demonstrate an exemption, or that express consent was obtained.
23. Finally, while Smart Choice noted that there are companies in Alberta operating as Vinyl Window Pro and Smart Windows or Smart Glass that appear to make telemarketing calls, Smart Choice confirmed that the number identified in the seven consumer statements is indeed its number.

Making telemarketing calls to telephone numbers in Canadian area codes without being registered with the National DNCL operator, or subscribed to the National DNCL

24. Pursuant to Part II, section 6 and Part III, section 2 of the Rules, telemarketers have the responsibility to register with the National DNCL operator and purchase subscriptions for the numbers they wish to call.
25. The Commission notes that not only did the National DNCL operator confirm that there was no existing National DNCL registration for any of the business names associated with Smart Choice during the period covered by the notice of violation, but Smart Choice itself acknowledged that it was not registered with the National DNCL operator and that it did not subscribe to the National DNCL during that period.
26. In light of the above, the Commission finds, on a balance of probabilities, that during the period covered by the notice of violation Smart Choice made seven telemarketing calls resulting in 21 violations of the Rules, or more specifically,
 - seven violations of Part II, section 4 of the Rules, which states that a telemarketer shall not initiate a telemarketing telecommunication to consumers whose numbers are registered on the DNCL, without the consumers' express consent;
 - seven violations of Part II, section 6 of the Rules, which 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; and
 - seven violations of Part III, section 2 of the Rules, which 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.

Is a penalty of \$42,000 appropriate?

27. In order to determine whether a total penalty of \$2,000 per violation, for a total of \$42,000, as set out in the notice of violation, is appropriate, 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.³ The Commission notes that Smart Choice did not address the appropriateness of the penalty in its representation.

³ See Telecom Decision 2007-48 and Compliance and Enforcement Regulatory Policy 2015-109.

Nature of the violations

28. The Commission considers that the making of unsolicited telemarketing calls, based in some cases on an inappropriate referral system, 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 by registering their numbers on the National DNCL.
29. The Commission also considers that 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.

Number and frequency of complaints and violations

30. With respect to the number and frequency of violations, the Commission notes that no call records were provided by Smart Choice during the investigation. Accordingly, estimating the actual number of telemarketing calls made during the period covered by the notice of violation to telephone numbers registered on the National DNCL for more than 31 days is not feasible.
31. As for the number and frequency of complaints, the Commission notes that while 61 complaints against Smart Choice were received between 24 March 2017 and 14 October 2019, approximately 18 months within that 30-month period lie outside the period covered by the notice of violation. The Commission further notes that due to the complaints not being included in the record of this proceeding, it is not possible to determine how many of the 61 complaints were received during the period covered by the notice, or whether the issues raised in the complaints were directly related to the violations set out in the notice of violation.
32. Accordingly, the Commission will take into consideration the total number of consumer statements on record (seven). This is in line with the Commission's past approach of imposing administrative monetary penalties based on the witness statements on the record rather than on the number of complaints received.⁴

Potential for future violations

33. The Commission notes that this is not the first time that a notice of violation has been issued to this company. Despite a name change, Smart Choice is the same legal entity as Vinyl Windows Pro, which was subject to an administrative monetary penalty of \$12,000 imposed by the Commission in Compliance and Enforcement Decision 2014-92 for 12 violations of Part II, sections 4 and 7 and Part III, section 3 of the Rules.

⁴ See, for example, Telecom Decision 2014-424.

34. However, the violations Smart Choice committed this time are not entirely the same type of violations as those set out in Compliance and Enforcement Decision 2014-92, where it had employed a telemarketing company to initiate telemarketing calls on its behalf.
35. The Commission further notes that Smart Choice seems to have demonstrated good faith in its recent marketing practices, having opted for a referral system to obtain new customers and believing (although incorrectly) that referral calls did not constitute telemarketing calls. This seems to be the reason why Smart Choice did not believe it was under the obligation to adhere to the Rules.
36. Nonetheless, Smart Choice demonstrated a lack of regard or understanding for the Rules even though it should have known that it had a duty to ensure it was acting in accordance with the Rules when making telemarketing calls to potential clients.
37. The Commission therefore considers that Smart Choice's present and past conduct favours a per-violation penalty that is higher than the first penalty imposed in 2014, namely \$1,000 per violation.

Relative disincentive of the measure

38. 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.⁵
39. The Commission considers that Smart Choice 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 telemarketing calls. In this case, those costs, for the 13-month period covered by the notice of violation, would have been \$9,396 (or \$447.43 per violation).⁶
40. In light of the fact that this is the second notice of violation issued to the company now operating under the name Smart Choice in seven years, the Commission finds that imposing a higher penalty per violation than that imposed in Compliance and Enforcement Decision 2014-92, where the penalty was \$1,000 per violation, would serve as an appropriate disincentive in the circumstances of this case.

⁵ See Compliance and Enforcement Regulatory Policy 2015-109, paragraph 17.

⁶ 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](#)). In this case, the total cost for all three area codes would have been a one-year subscription fee (\$8,625), plus an additional one-month subscription fee (\$771).

41. In light of the above, the Commission finds that a penalty of \$2,000 per violation, for a total penalty of \$42,000, would place the penalty in excess of the cost of doing business, without making the amount so large as to prevent Smart Choice from using telemarketing strategies in a manner that complies with the Rules.

Ability to pay

42. The Commission notes that other than Smart Choice's 2018 unaudited yearly financial statement, no other financial indicator can be found in the investigation report to support the designated person's claim that Smart Choice has the ability to pay a penalty of \$2,000 per violation.
43. The Commission notes, however, that although Smart Choice had the opportunity, as part of its representations, to produce financial information with respect to its ability to pay, it did not do so. Furthermore, at no point did Smart Choice contest its ability to pay the penalty set out in the notice.
44. 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.
45. The Commission considers that while the limited information on the record of this proceeding suggests that Smart Choice is a small business that has been operating under that name for about five years, there is not enough information to draw conclusions regarding its overall revenue-generating capabilities.
46. Nevertheless, despite the fact that there is limited evidence regarding Smart Choice's ability to pay the penalty, the Commission is of the view that in the absence of information from Smart Choice addressing its ability to pay, nothing on the record of this proceeding demonstrates, on a balance of probabilities, that a penalty of \$2,000 per violation, for a total penalty of \$42,000, exceeds Smart Choice's 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 a client of a telemarketer.⁷
47. In light of the above, the Commission finds that a total penalty of \$42,000 is appropriate, proportionate to the circumstances of this case, and necessary to promote compliance with the Rules.

⁷ See, for example, Compliance and Enforcement Decisions 2021-205 and 2020-67.

Conclusions

48. The Commission finds, on a balance of probabilities, that during the period covered by the notice of violation, Smart Choice made seven telemarketing calls resulting in **21 violations** of the Rules.
49. The Commission also finds that in the circumstances of this case, a penalty of \$2,000 per violation for 21 violations of the Rules is appropriate. The Commission therefore imposes a total penalty of **\$42,000** on Smart Choice.
50. The Commission hereby notifies Smart Choice 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).⁸
51. Smart Choice 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).
52. The Commission reminds Smart Choice that it is required to comply with the Rules should it make telemarketing telecommunications in the future. Examples of measures that Smart Choice 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.
53. The Commission advises Smart Choice that to ensure compliance with the Rules, the Commission may impose larger penalties for subsequent violations.

⁸ 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.

54. The amount of \$42,000 is due by **18 January 2022**. It must be paid in accordance with the instructions contained in the notice of violation. Any amount owing that is not paid by **18 January 2022** will accrue interest until the amount is paid in full.⁹
55. If payment has not been received by **18 January 2022**, 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*
- *Lev Olevson, carrying on business as Capital Windows and Doors and Advantage Pro – Violations of the Unsolicited Telecommunications Rules, Compliance and Enforcement Decision CRTC 2014-424, 12 August 2014*
- *2260948 Ontario Inc., operating as Vinyl Window Pro – Violations of the Unsolicited Telecommunications Rules, Compliance and Enforcement Decision CRTC 2014-92, 28 February 2014*
- *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*

⁹ 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.