



Telecom Decision CRTC 2012-173

PDF version

Ottawa, 23 March 2012

Les Aliments S.R.C. Inc. – Violations of the Unsolicited Telecommunications Rules

File number: PDR 9174-1028

In this decision, the Commission imposes an administrative monetary penalty of \$24,000 on Les Aliments S.R.C. Inc. for initiating two telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating these telecommunications without having paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

Introduction

1. Between 6 January and 17 March 2011, the Commission received numerous complaints in relation to telemarketing telecommunications made by Les Aliments S.R.C. Inc. (Les Aliments S.R.C.).¹
2. On 29 September 2011, a notice of violation was issued to Les Aliments S.R.C. pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Les Aliments S.R.C. that it had initiated
 - three telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4² of the Commission's Unsolicited Telecommunications Rules (the Rules); and
 - three telemarketing telecommunications without holding a valid subscription to the National DNCL and without having paid the applicable fees to the National DNCL operator, in violation of Part II, section 6³ of the Rules.

¹ Les Aliments S.R.C. Inc., Montréal, Quebec, Tel.: 514-721-1831. Industry – Food delivery services.

² Part II, section 4 of the Unsolicited Telecommunications Rules (the Rules) states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

³ 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.

3. Les Aliments S.R.C. was given until 31 October 2011 to pay the administrative monetary penalty (AMP) set out in the notice of violation or to make representations to the Commission regarding the violations.
4. The Commission received representations from Les Aliments S.R.C., dated 27 October 2011, in which the company stated that it had not committed the two violations with regard to one of the complainants because it had an existing business relationship with the complainant, and that it should be acquitted of the other four violations because it had acted in good faith and had exercised due diligence. It also stated that an AMP of \$6,000 per violation was excessive.
5. The Commission has identified the following two issues to be addressed in its determinations:
 - I. Did Les Aliments S.R.C. commit the violations?
 - II. Is the amount of the AMP reasonable?

I. Did Les Aliments S.R.C. commit the violations?

a) Did Les Aliments S.R.C. have an existing business relationship with one of the complainants?

6. Under subsection 3(b) of Part II of the Rules, the Rules do not apply to telecommunications to a recipient (i) with whom the person making the telecommunication has an existing business relationship, 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.
7. Les Aliments S.R.C. stated that it had an existing business relationship with one of the complainants, since it had signed a contract for the purchase of food products less than 18 months before the call addressed in the complaint. The company submitted to the Commission a copy of the contract signed by the complainant.
8. The Commission notes that the notice of violation indicates that three telemarketing telecommunications were made to consumers whose telecommunications numbers were registered on the National DNCL. The Commission considers that the evidence regarding one of these telecommunications meet the criteria under the definition of an “existing business relationship” set out in subsection 41.7(2) of the Act.⁴ The Commission therefore finds that Les Aliments S.R.C. did not commit one of the violations set out in the notice of violation, i.e. having contacted one of the complainants whose telecommunications number was registered on the National DNCL.

⁴ Subsection 41.7(2) of the Act states that an “existing business relationship” 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 the purchase of services or the purchase, lease, or rental of products, within the 18-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.

9. The Commission also notes that the obligation to hold a valid subscription to the National DNCL does not apply if the telecommunication falls under one of the exemptions set out in Part II, section 3 of the Rules. Because Les Aliments S.R.C. meets the criteria for such an exemption with regard to the telecommunication made to the complainant with which it had an existing business relationship, the Commission finds that the company did not commit one of the three violations with regard to contacting a consumer without holding a valid subscription to the National DNCL and without having paid the applicable fees.

b) Did Les Aliments S.R.C. exercise due diligence?

10. The Commission notes that subsection 72.1(1) of the Act states that “it is a defence for a person in a proceeding in relation to a violation to establish that the person exercised due diligence to prevent the violation.”
11. The Commission also notes that in *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, it established a partial list of the criteria that should be used as a guide when assessing a defence of due diligence. These criteria are set out in Part VII of the Rules.
12. The Commission further notes that regarding the other two violations of Part II, section 4 of the Rules and the two violations of Part II, section 6 of the Rules, Les Aliments S.R.C. identified two of the criteria: having obtained express consent from the consumers to receive unsolicited telecommunications, and having provided training to its new employees. The company claimed that it did not subscribe to the National DNCL because it sought new customers only at public events targeted towards adults, and that at those events, potential customers could fill out a document containing a stipulation that they agreed to have the company contact them.
13. The Commission notes that Les Aliments S.R.C. did not submit any evidence that the other two complainants signed a document authorizing the company to contact them. In addition, according to the statements of these two consumers, they did not seek information or submit requests to Les Aliments S.R.C. in the six months before the call.
14. The Commission also notes that Les Aliments S.R.C. did not submit any evidence regarding the content of the training program provided to its new employees. The Commission therefore considers that, on a balance of probabilities, the training provided to new employees is not comparable to providing “adequate ongoing training to employees” as set out in the Rules.
15. In light of the above, the Commission considers that, on a balance of probabilities, there is insufficient evidence for Les Aliments S.R.C. to rely on a defence of due diligence against the four violations contained in the notice of violation regarding the two telecommunications not covered by the exemption due to an existing business relationship.

16. Finally, the Commission notes that good faith is not a defence set out in the Act or the Rules. In addition, if Les Aliments S.R.C. had been acting in good faith, it would have followed the advice of Commission staff and submitted its revised procedures before engaging in telemarketing activities or continuing them following the issuance of the citation dated 18 June 2010.
17. Accordingly, the Commission concludes that Les Aliments S.R.C. made two calls to consumers whose telecommunications numbers were registered on the National DNCL without holding a valid subscription or having paid the applicable fees.

II. Is the amount of the AMP reasonable?

18. Les Aliments S.R.C. maintained that an AMP of \$6,000 per violation was excessive because (i) the violations were not a repeat offence, (ii) the company was acting in good faith, and (iii) the amount is higher than what the Commission has imposed in similar circumstances.
19. The Commission notes that the notice of violation dated 29 September 2011 was the first notice of violation issued to Les Aliments S.R.C. However, Les Aliments S.R.C. was the subject of a citation dated 18 June 2010. This citation was issued following an inquiry led by Commission staff, and informed the company that it had violated the Rules by, among other things, making telemarketing calls to consumers whose numbers were registered on the National DNCL, and by making telemarketing calls on its own behalf without holding a valid subscription to the National DNCL. As required by the citation, the company committed to comply with the Rules and the Act and to take various corrective measures, including abstaining from contacting persons whose numbers were registered on the National DNCL, subscribing to the National DNCL, and paying the related fees. The violations that are the subject of the notice of violation on which this decision is based therefore constitute a second set of violations committed by Les Aliments S.R.C. The second set of violations were committed after the company was informed that it had violated the Rules and after it had committed to complying with the Rules and to taking corrective measures.
20. Regarding the good faith defence, as mentioned above, this is not a defence set out in the Act or the Rules.
21. In light of the above and given the size of the company, the Commission finds, by majority decision, that an AMP of \$6,000 per violation is reasonable.

Conclusion

22. In the circumstances of this case, the Commission considers that Les Aliments S.R.C. committed two violations of Part II, section 4 of the Rules and two violations of Part II, section 6 of the Rules. The Commission also considers, by majority decision, that it is appropriate to impose a penalty of \$6,000 for each violation of Part II, section 4 of the Rules, and \$6,000 for each violation of Part II, section 6 of the Rules. The Commission therefore imposes on Les Aliments S.R.C. a total AMP of \$24,000.

23. The Commission hereby notifies Les Aliments S.R.C. of its right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act and to appeal this decision to the Federal Court of Appeal 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. An appeal from this decision may be brought in the Federal Court of Appeal with the leave of that Court. Leave to appeal must be applied for within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.
24. The Commission reminds Les Aliments S.R.C. that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products and/or services, it is required to comply with the Rules. Examples of measures that Les Aliments S.R.C. should adopt to ensure compliance with the Rules include, but are not limited to, the following:
 - subscribing to the National DNCL;
 - downloading the National DNCL at least once every 31 days prior to making a telemarketing telecommunication;
 - establishing and implementing adequate written policies and procedures to comply with the Rules, which include documenting a process to (a) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered on the National DNCL for more than 31 days, and (b) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.
25. The amount of \$24,000 is due by **23 April 2012** 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 **23 April 2012**, interest calculated and compounded monthly at the average bank rate plus three percent will be payable on that 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.
26. 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 include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General