



Telecom Decision CRTC 2009-756

Ottawa, 3 December 2009

Infax - Service d'Information sur Demande par Fax Inc. – Violations of the Unsolicited Telecommunications Rules

File numbers: PDR 9174-430 and PDR 9174-711

In this decision, the Commission imposes administrative monetary penalties totalling \$9,000 on Infax - Service d'Information sur Demande par Fax Inc. for initiating three fax telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating the telecommunications without having registered and having paid all applicable subscription fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

Introduction

1. Between 11 October 2008 and 20 July 2009, the Commission received numerous complaints in relation to fax telemarketing telecommunications made by Infax, services d'informations sur demande par fax inc. (Infax). On 22 September 2009, a notice of violation was issued to Infax pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Infax that it had initiated three fax telemarketing telecommunications to consumers whose numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4 of the Commission's Unsolicited Telecommunications Rules (the Rules);¹ that the company had initiated these telecommunications without having paid all applicable subscription fees to the National DNCL operator, in violation of Part II, section 6 of the Rules;² and that the company had failed to register with the National DNCL operator, in violation of Part III, section 2 of the Rules.³
2. Infax was given until 23 October 2009 to pay the administrative monetary penalties (AMPs) set out in the notice of violation or to make representations to the Commission with respect to the violations.
3. The Commission received representations by Infax, dated 14 October 2009, in accordance with the notice of violation.

¹ Part II, section 4 of the Rules provides 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.

² Part II, section 6 of the Rules provides that a telemarketer shall not initiate telemarketing telecommunications on its own behalf unless it is a registered subscriber to the National DNCL and has paid all applicable fees to the National DNCL operator.

³ Part III, section 2 of the Rules provides that a telemarketer must register, and provide information to, the National DNCL operator, whether or not the telemarketing telecommunications made by such telemarketer are exempt from the National DNCL Rules.

4. The Commission has identified the following issues to be addressed in its determinations:
 - I. Was Infax required to register with the National DNCL operator?
 - II. Was Infax required to subscribe to the National DNCL?
 - III. Has Infax established a defence of due diligence?
 - IV. Did Commission staff follow standard procedure with Infax?
 - V. Can one telemarketing telecommunication constitute multiple violations?

I. Was Infax required to register with the National DNCL operator?

5. Infax submitted that it was exempt from registering with the National DNCL operator because it only sent fax telemarketing telecommunications to business consumers. It also submitted that the National DNCL website was confusing because it appeared to equate exempted telemarketers with telemarketers who only make business telemarketing calls.
6. The Rules include the National DNCL Rules and the Telemarketing Rules. The Commission notes that Part III, section 1 of the Rules states that “The Telemarketing Rules apply whether or not the telemarketing telecommunication is exempt from the National DNCL Rules”. The Commission further notes that Part III, section 2 of the Rules states that “A telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it has registered with [...] the National DNCL operator.” Therefore, all telemarketers, even those making only exempt telemarketing telecommunications such as those to business consumers, must register with the National DNCL operator.
7. Accordingly, the Commission finds that Infax was required to register with the National DNCL operator.
8. The Commission considers that the National DNCL website provides clear information about the requirement for telemarketers who make exempt telemarketing telecommunications to register with the National DNCL operator. The Commission notes that the following instruction appears under the heading Frequently Asked Questions (FAQ): Who must register with the National DNCL operator?: “Even if the calls you make directly, or that are made on your behalf are exempted, you must still register.”⁴
9. The Commission also notes that on several occasions before the notice of violation was issued, Infax was informed that it was not exempt from registering with the National DNCL operator.
10. Accordingly, the Commission finds that the three telemarketing telecommunications initiated by Infax violated Part III, section 2 of the Rules.

⁴ <https://www.lnnte-dncl.gc.ca/ind/faqs-eng>

II. Was Infax required to subscribe to the National DNCL?

11. Infax submitted that it was not required to subscribe to the National DNCL because it only makes fax telemarketing telecommunications to business consumers and thus it was exempt from subscribing to the National DNCL.
12. The Commission notes that based on the evidence, Infax made three fax telemarketing telecommunications to residential numbers listed on the National DNCL. Therefore, the telemarketing telecommunications initiated by Infax were not exempt and the company was required to subscribe to the National DNCL. The Commission also notes that Infax had not paid all applicable fees to the National DNCL operator at the time the telecommunications were made.
13. Accordingly, the Commission finds that the three telemarketing telecommunications initiated by Infax violated Part II, section 6 of the Rules.

III. Has Infax established a defence of due diligence?

14. Infax submitted that the fact that the majority of the fax telemarketing telecommunications it initiated were made to business consumers was sufficient evidence that it had exercised due diligence.
15. The Commission notes that subsection 72.10(1) of the Act states that it is a defence for a person subject to a violation in a proceeding to establish that the person exercised due diligence to prevent the violation.
16. In *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007, the Commission established criteria to provide guidance about the elements that it would generally consider in assessing a defence of due diligence. These criteria were incorporated into Part VII of the Rules.
17. The Commission notes that Infax did neither demonstrate that the three fax telemarketing telecommunications it had initiated to persons listed on the National DNCL had resulted from an error, nor did it provide any evidence that it had taken all reasonable steps to comply with the Rules.
18. Accordingly, the Commission finds that Infax has not established a defence of due diligence.

IV. Did Commission staff follow standard procedure with Infax?

19. Infax submitted that Commission staff had skipped several steps in its investigation of the company.
20. The Commission notes that Infax did not elaborate on what steps it believed were skipped by Commission staff.

21. The Commission considers that it followed its standard procedures, as posted on its website,⁵ and that Infax had a reasonable opportunity to comply with the Rules in advance of the issuance of the notice of violation.

V. Can one telemarketing telecommunication constitute multiple violations?

22. Infax submitted that it was unreasonable that the notice of violation included three separate alleged violations arising from a single fax telemarketing telecommunication.
23. The Commission notes that Infax violated three separate Rules each time it initiated one fax telemarketing telecommunication, in particular: 1. initiating a fax telemarketing telecommunication to a residential number listed on the National DNCL; 2. initiating such fax telemarketing telecommunication when Infax was not registered with the National DNCL operator; and 3. initiating such fax telemarketing telecommunication when Infax had not subscribed to the National DNCL.

Conclusion

24. The Commission has reviewed Infax's representations and concludes that the company initiated three telemarketing telecommunications on its own behalf to telecommunications numbers registered on the National DNCL when it was not registered with the National DNCL operator, and without having subscribed to the National DNCL.
25. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the three violations of Part II, section 4 of the Rules; each of the three violations of Part II, section 6 of the Rules; and each of the three violations of Part III, section 2 of the Rules is appropriate. The Commission therefore imposes AMPs totalling \$9,000 on Infax.
26. The Commission hereby notifies Infax 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 30 days of the date of this decision and the Commission will place all related documentation on its website to allow public participation in accordance with Part VII of the *CRTC Telecommunications Rules of Procedure*. 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.
27. The amount of \$9,000 is due by **4 January 2010** 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 **4 January 2010**, 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.

⁵ http://www.crtc.gc.ca/eng/info_sht/t1034.htm

28. If payment of the debt has not been received within 30 days of the date of this decision, the Commission intends to certify the unpaid amount and register the certificate with the Federal Court in order to collect the amount owing.

Secretary General

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>