Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Compliance and Enforcement Decision CRTC 2014-424

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Lev Olevson, carrying on business as Capital Windows and Doors and Advantage Pro – Violations of the Unsolicited Telecommunications Rules

The Commission imposes total administrative monetary penalties of $8,000 on Lev Olevson for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so when he was not a registered subscriber of the National DNCL and had not paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

1. Between 26 April 2012 and 30 January 2013, the Commission received numerous complaints in relation to telemarketing telecommunications that appeared to have been made by Mr. Lev Olevson, carrying on business as both Capital Windows and Doors[1] (Capital Windows) and Advantage Pro.[2]

2. These complaints were investigated and, on 24 May 2013, a notice of violation was issued to Mr. Olevson pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Mr. Olevson that he had initiated, on his own behalf,

    - four telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4[3] of the Commission's Unsolicited Telecommunications Rules (the Rules); and

    - four telemarketing telecommunications to consumers without being a registered subscriber of the National DNCL and having paid all applicable

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1 Lev Olevson, carrying on business as Capital Windows and Doors, Ottawa, Ontario, Tel.: 613-680-0492. Industry – Sale and installation of windows and doors.

2 Lev Olevson, carrying on business as Advantage Pro, Ottawa, Ontario, Tel.: 613-321-1283. Industry – Sale and installation of windows and doors.

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

fees to the National DNCL operator, in violation of Part II, section 6[4] of the Rules.

3. The notice of violation set out administrative monetary penalties (AMPs) for eight violations at $1,000 per violation, for a total amount of $8,000.

4. Mr. Olevson was given until 24 June 2013 to pay the AMPs set out in the notice of violation or to make representations to the Commission regarding the violations.

5. The Commission received representations from Mr. Olevson dated 21 June 2013.

6. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:

    - Did Mr. Olevson commit the violations?
    - Has Mr. Olevson met the burden of proving the defence of due diligence?
    - Is the amount of the AMPs reasonable?

Did Mr. Olevson commit the violations?

7. In his representations, Mr. Olevson admitted to having placed telemarketing calls when he did not have a subscription to the National DNCL, and did not contest having contacted consumers whose telecommunications numbers were registered on the National DNCL.

8. Accordingly, the Commission finds that Mr. Olevson committed the violations set out in the notice of violation.

Has Mr. Olevson met the burden of proving the defence of due diligence?

9. 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.

10. In Telecom Decision 2007-48, the Commission established a list of criteria to serve as a guide when assessing whether a telemarketer has demonstrated due diligence to prevent a violation of the Rules. The Commission determined that the burden rests with the person raising the defence to demonstrate that the telecommunication resulted from an error and that, as part of its routine business practices,

    i) the person has established and implemented adequate written policies and procedures to comply with the Rules and to honour consumers' requests that they not be contacted by way of telemarketing telecommunications;

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[4] 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.

ii) the person provides adequate ongoing training to employees and makes all reasonable efforts to ensure adequate ongoing training is provided to any person assisting in its compliance with the Rules and any written policies and procedures established under paragraph (i);

iii) the person uses the National DNCL obtained from the National DNCL operator no more than 31 days prior to the date any telemarketing telecommunication is made;

iv) the person uses the telemarketer's or, where applicable, the client of the telemarketer's do not call list that was updated no more than 31 days prior to the date any telemarketing telecommunication is made;

v) the person uses and maintains records documenting a process to prevent the initiation of a telemarketing telecommunication to any telecommunications number that has been registered for more than 31 days on the National DNCL, the telemarketer's do not call list or, where applicable, the client of the telemarketer's do not call list;

vi) the person monitors and enforces compliance with the Rules and its written policies and procedures referred to in paragraph (i); and

vii) in the case of a person who has retained a telemarketer to engage in telemarketing on its behalf, the person has entered into an agreement between itself and the telemarketer requiring that the latter comply with the Rules.

11. In his representations, Mr. Olevson raised these same factors, and argued that during the date range of the violations at issue, he made consistent efforts to

- establish and implement policies and procedures to comply with the Rules, including, but not limited to, maintaining an internal do not call list;
- honour and immediately act upon consumer requests to be removed from call lists; and
- update and maintain adequate records to prevent further telemarketing communication to any consumers who expressed a desire to be removed from call lists.

12. Mr. Olevson did not argue or indicate that the telecommunications at issue resulted from an error.

13. While Mr. Olevson stated that he had implemented policies and procedures to comply with the Rules, his representations did not elaborate upon or include written copies of these policies and procedures, nor were they previously provided during the investigation into his telemarketing practices.

14. Further, Mr. Olevson provided no information with regard to how employees are trained in respect of these policies and procedures, or how compliance with these measures is monitored.

15. The Commission considers that due diligence requires that procedures be in place to ensure that all required subscriptions to the National DNCL are maintained. Mr. Olevson did not have a subscription to the National DNCL on the dates of any of the four telemarketing calls at issue and provided no evidence with respect to any procedures that he may have had in place to ensure that such a subscription was held and maintained.

16. The Commission further considers that even before Mr. Olevson's subscription to the National DNCL expired, he had not downloaded the list in more than six months.

17. Mr. Olevson described practices relating to the processing of internal do not call requests from consumers. The Commission considers that the violations at issue do not relate to the maintenance of an internal do not call list, but rather to Mr. Olevson's failure to maintain a subscription to the National DNCL, and to telemarketing telecommunications made to consumers registered on the National DNCL. Mr. Olevson's assertion of a due diligence defence is silent on these points.

18. The Commission considers that adherence to the Rules that relate to internal do not call lists is not an alternative to compliance with the National DNCL Rules; both are requirements under the Rules.

19. Accordingly, the Commission finds on a balance of probabilities that Mr. Olevson has not adequately discharged the burden to prove the defence of due diligence raised in his representations.

Is the amount of the AMPs reasonable?

20. Mr. Olevson submitted that the total AMP amount of $8,000 was excessive, citing that

    - a more moderate penalty would similarly allow the Commission to achieve its objectives and encourage future compliance from his companies;
    - neither of his businesses has the financial means to pay the AMPs, which will directly affect his personal finances since he is the sole proprietor of both businesses;
    - the AMPs are inconsistent with the AMPs previously imposed on him; and
    - the AMPs inappropriately take into consideration the total number of complaints, notwithstanding that only four complaints were supported by written statements from consumers.

21. In Telecom Decision 2007-48, the Commission stated that appropriate factors to be considered in determining the amount of an AMP include the nature of the

violations, the number and frequency of complaints and violations, the relative disincentive of the measure, and the potential for future violations.

22. The Commission considers the making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL to be a serious violation that causes significant inconvenience and nuisance to consumers, and violates the expectation of consumers expressed through their registration with the National DNCL that they will receive fewer telemarketing calls.

23. The Commission further considers that the initiation of telemarketing telecommunications to consumers while not having a subscription to the National DNCL is a significant breach of the Rules. Subscribing to the list is one of the core responsibilities of telemarketers under the National DNCL regime – subscribing not only ensures that certain types of telecommunications will not be made to numbers on the National DNCL, but the fees collected also provide for the sustainability of the regime.

24. Regarding the number and frequency of complaints and violations, the Commission notes that initiating a single telemarketing telecommunication may, in some circumstances, result in multiple violations of the Rules. Therefore, proof of the occurrence of a telemarketing telecommunication may be used to support the finding of more than one violation of the Rules when multiple violations relate to that telecommunication.

25. With regard to Mr. Olevson's argument about complaints that are not supported by statements from consumers, the Commission notes that AMPs were imposed with respect to eight violations, all of which were supported by witness statements relating to four telemarketing telecommunications made by Mr. Olevson's two businesses.

26. The Commission considers that information included in the notice of violation about the total number of complaints received does not directly influence the amount of the AMPs. Rather, it provides relevant context to the nature of the violations, and underscores that they are reflective of a significant and noteworthy problem with Mr. Olevson's telemarketing operations.

27. Regarding the relative disincentive of the measure, in view of the information Mr. Olevson provided in his registrations with the National DNCL operator, the Commission considers his companies to be small businesses for the purpose of determining the appropriate AMP amount.

28. With respect to Mr. Olevson's submission regarding the financial situation of his businesses, the Commission stated in Telecom Decision 2007-48 that the ability to pay an AMP was not an appropriate factor to be considered in the determination of the amount of the AMP. The Commission considers that the general size of the telemarketer is a relevant factor, but is of the view that, contrary to Mr. Olevson's

proposal, net income is not, as a general rule, an appropriate indicator of the revenue-generating capability of the telemarketer, because it can be affected by many unrelated factors.

29. Mr. Olevson also argued that the amount of the AMPs is inconsistent with the enforcement actions the Commission has previously taken regarding his businesses.

30. The Commission previously imposed total AMPs of $2,000 on Mr. Olevson for telemarketing telecommunications conducted while he was carrying on business as Capital Windows and Doors.[5] Further, Mr. Olevson was issued a citation, published on 6 March 2012, for telemarketing telecommunications conducted while he was carrying on business as Advantage Pro.

31. The Commission should ensure that the AMPs it imposes are not set so low as to be financially advantageous for a telemarketer to pay the amount as a cost of doing business. The Commission further notes that more moderate enforcement actions previously taken did not result in Mr. Olevson bringing his businesses' telemarketing operations into compliance with the Rules.

32. The Commission considers that increasing the amount of the AMPs in these circumstances is consistent with past Commission decisions, and with the need to provide an appropriate disincentive and to address the potential for future violations.

33. In light of the above, the Commission considers that total AMPs of $8,000 are reasonable and necessary to promote compliance with the Rules.

Conclusion

34. In the circumstances of this case, the Commission considers that a penalty of $1,000 for each of the four violations of Part II, section 4 of the Rules and for each of the four violations of Part II, section 6 of the Rules is appropriate. The Commission therefore imposes total AMPs of $8,000 on Mr. Olevson.

35. The Commission hereby notifies Mr. Olevson of his right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act and to seek leave of the Federal Court of Appeal to appeal this decision before that court 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.[6] In accordance with section 64 of the Act, an application for leave to appeal must be made to the Federal Court of Appeal within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.

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5 See Telecom Decision 2012-195.

6 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.

36. The Commission reminds Mr. Olevson that, should he continue to initiate telemarketing telecommunications on his own behalf or engage telemarketers for the purpose of solicitation of his products or services, he is required to comply with the Rules. Examples of measures that he should adopt to ensure compliance with the Rules include, but are not limited to, 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 (a) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (b) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.

37. The Commission advises Mr. Olevson that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.

38. The amount of $8,000 is due by **11 September 2014** 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 **11 September 2014**, 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.

39. 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

Related documents

- *Mr. Lev Olevson, carrying on business as Capital Windows and Doors – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2012-195, 30 March 2012
- *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