



## Compliance and Enforcement Decision CRTC 2014-90

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Ottawa, 28 February 2014

### Advantage Pro Portes et Fenêtres – Violations of the Unsolicited Telecommunications Rules

File number: PDR 9174-1368

*In this decision, the Commission imposes total administrative monetary penalties of \$6,000 on Advantage Pro Portes et Fenêtres (Advantage Pro) for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so when Advantage Pro (1) was not registered with the National DNCL operator, (2) had not provided information to the National DNCL operator, (3) was not a registered subscriber of the National DNCL, and (4) had not paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.*

1. Between 18 April 2012 and 29 January 2013, the Commission received numerous complaints in relation to telemarketing telecommunications that appeared to have been initiated by Advantage Pro Portes et Fenêtres (Advantage Pro).<sup>1</sup>
2. These complaints were investigated and, on 24 May 2013, a notice of violation was issued to Advantage Pro pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Advantage Pro that it had initiated, on its own behalf,
  - two telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4<sup>2</sup> of the Commission's Unsolicited Telecommunications Rules (the Rules);
  - two telemarketing telecommunications to consumers without being a registered subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator, in violation of Part II, section 6<sup>3</sup> of the Rules; and

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<sup>1</sup> Advantage Pro Portes et Fenêtres, Montréal, Quebec, Tel.: 514-342-0808. Industry – Window and door installation.

<sup>2</sup> 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.

<sup>3</sup> 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.

- two telemarketing telecommunications to consumers without registering with, and providing information to, the National DNCL operator, in violation of Part III, section 2<sup>4</sup> of the Rules.
3. The notice of violation set out administrative monetary penalties (AMPs) for six violations at \$1,000 per violation, for a total amount of \$6,000.
  4. Advantage Pro 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 Advantage Pro 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:
    - I. Did Advantage Pro commit the violations?
    - II. Is the amount of the AMPs reasonable?

**I. Did Advantage Pro commit the violations?**

7. In its representations, Advantage Pro did not contest having committed the violations for which the notice of violation was issued.
8. Accordingly, the Commission finds on a balance of probabilities that Advantage Pro committed the violations set out in the notice of violation.

**II. Is the amount of the AMPs reasonable?**

9. Advantage Pro submitted that AMPs of \$6,000 were excessive, stating that
  - a) Advantage Pro was not familiar with the Act and the Rules, and did not know that they applied in Quebec;
  - b) the amount of the AMPs was set taking into account irrelevant considerations, namely unsubstantiated complaints of violations;
  - c) Advantage Pro's current financial situation is such that it cannot pay the AMPs without causing serious harm to the business and its partners; and
  - d) Advantage Pro will commit to establishing and implementing a compliance program if the Commission imposes more moderate AMPs.
10. With regard to Advantage Pro's argument that it was not familiar with the Act or the Rules, the Commission does not consider this to be a valid defence. Further, the

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<sup>4</sup> 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, and provided information to, the National DNCL operator.

Commission notes that complaints relating to unsolicited telemarketing calls allegedly made by Advantage Pro were received after a request for information letter, which informed the business of its obligations under the Rules, was sent out on 27 February 2013.

11. With regard to Advantage Pro's claim of unsubstantiated complaints, the Commission considers that the total number of complaints received provided relevant context to the company's conduct, but notes that the AMPs were imposed with respect to six violations that were supported by two witness statements.
12. 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. In the present case, three violations occurred during each of the two telemarketing telecommunications in question. Therefore, the notice of violation set out AMPs for six violations.
13. With respect to Advantage Pro's submission regarding its financial situation, 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 size of the telemarketer is a relevant factor, but is of the view that net income is not, as a general rule, the appropriate indicator of the revenue-generating capability of the telemarketer. In this regard, the Commission notes that net income can be affected by many unrelated factors. The Commission considers that the way in which a business is managed, including its other financial obligations, should not have an impact on the amount of the AMP.
14. The Commission also stated in Telecom Decision 2007-48 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.
15. The Commission considers the making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL, and doing so while not being subscribed to the National DNCL, to be a serious violation that causes significant inconvenience and nuisance to consumers. These telecommunications, by their nature, violate the expectation of consumers expressed through registration of their numbers on the National DNCL not to receive them.
16. 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 notes that Advantage Pro has not registered with the National DNCL operator and/or subscribed to the National DNCL, and has therefore avoided paying the required subscription fee since at least 18 April 2012.

17. In light of the above, and given the size of Advantage Pro and the fact that the notice of violation was the first one issued to the business, the Commission considers that a penalty of \$1,000 for each of the six violations cited in the notice of violation is appropriate.
18. With regard to Advantage Pro's submission that it would commit to establishing and implementing a compliance program, the Commission considers that the company should have already had these measures in place in order to ensure compliance with its obligations under the Rules.

## **Conclusion**

19. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the two violations of Part II, section 4, for each of the two violations of Part II, section 6, and for each of the two violations of Part III, section 2 of the Rules is appropriate. The Commission therefore imposes total AMPs of \$6,000 on Advantage Pro.
20. The Commission hereby notifies Advantage Pro 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.<sup>5</sup> 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.
21. The Commission reminds Advantage Pro that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products or services, it is required to comply with the Rules. Examples of measures that Advantage Pro 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

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<sup>5</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.

- 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.
22. The Commission advises Advantage Pro that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
  23. The amount of \$6,000 is due by 31 March 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 31 March 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.
  24. 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**

- *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