



## Compliance and Enforcement Decision CRTC 2020-319

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### **Devonshire Realty Inc., operating as Maxwell Devonshire Realty – Violations of the Unsolicited Telecommunications Rules**

*The Commission finds that the notice of violation issued to Devonshire Realty Inc., operating as Maxwell Devonshire Realty, was not issued within the two-year limitation period prescribed under the Telecommunications Act, and therefore declines to impose an administrative monetary penalty.*

#### **Introduction**

1. From 1 January 2015 to 3 February 2018, the Commission received complaints about telemarketing calls related to real estate services.
2. As a result of these complaints, Commission enforcement staff initiated an investigation into 1 Touch Solutions Inc. (1 Touch Solutions), a telemarketing company focused on generating leads for its clients in the real estate, mortgage, and insurance industries.
3. Commission enforcement staff found that Mr. Kelly Grant, a real estate agent of Devonshire Realty Inc., operating as Maxwell Devonshire Realty (Maxwell Devonshire Realty), was one of 1 Touch Solutions' clients.
4. On 4 September 2019, a person designated by the Commission<sup>1</sup> issued a notice of violation<sup>2</sup> under the *Telecommunications Act* (the Act) to Maxwell Devonshire Realty. The notice informed Maxwell Devonshire Realty that telemarketing calls made on its behalf between 10 July 2015 and 30 June 2016 resulted in
  - one violation of Part II, section 4 of the [Unsolicited Telecommunications Rules](#) (the Rules), which requires clients of telemarketers to make all reasonable efforts to ensure that telemarketers do not initiate telemarketing telecommunications on their behalf to consumers whose numbers are registered on the National Do Not Call List (DNCL), unless the consumers have provided them with express consent to be contacted via telemarketing telecommunication;

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<sup>1</sup> 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.

<sup>2</sup> 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.

- 59 violations of Part II, section 7 of the Rules, which prohibits telemarketers from making telemarketing telecommunications on behalf of a client unless that client is a registered subscriber of the National DNCL and has paid the applicable fees to the National DNCL operator; and
  - 59 violations of Part III, section 3 of the Rules, which prohibits telemarketers from making telemarketing telecommunications on behalf of a client that has not registered with the National DNCL operator.
5. The notice of violation set out administrative monetary penalties (the penalty) for 119 violations at \$50.42 per violation, and a total penalty of \$6,000.
  6. The notice of violation conformed with the content requirements of the Act.<sup>3</sup>
  7. Maxwell Devonshire Realty was given 30 days to either pay the penalty set out in the notice of violation or to make representations to the Commission.
  8. The Commission received representations from Maxwell Devonshire Realty on 17 September 2019.
  9. In its representations, Maxwell Devonshire Realty argued that the proceeding was initiated too late because the designated person issued the notice of violation later than two years after the date on which the subject-matter of the proceeding became known to the Commission. Additionally, Maxwell Devonshire Realty submitted that it has never engaged in telemarketing and disputed that it can be held vicariously liable<sup>4</sup> for the violations set out in the notice of violation.

**Was the notice of violation issued within the prescribed limitation period?**

10. Subsection 72.12(1) of the Act states that any proceedings related to a violation are to begin within a prescribed limitation period.
11. For the reasons that follow, the Commission finds that the designated person did not issue the notice of violation within the prescribed limitation period, and that the notice is therefore untimely.

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<sup>3</sup> According to subsection 72.07(2) of the Act, a notice of violation must name the person believed to have committed a violation, identify the violation, and set out (a) the penalty for the violation as set out in section 72.01; (b) the right of the person, within 30 days after the notice is served, or within any longer period that the Commission specifies, to pay the penalty or to make representations to the Commission with respect to the violation, and the manner for doing so; and (c) the fact that, if the person does not pay the penalty or make representations in accordance with the notice, the person will be deemed to have committed the violation and the Commission may impose the penalty.

<sup>4</sup> According to section 72.16 of the Act, a person is liable for a violation that is committed by an employee of the person acting in the course of the employee's employment, or by an agent or mandatary of the person acting within the scope of the agent's or mandatary's authority, whether or not the employee or agent or mandatary who actually committed the violation is identified or proceeded against.

12. The issuance of a notice of violation within the prescribed limitation period is a fundamental element of a proceeding related to a violation, which ensures that the Commission is exercising its powers lawfully and is not acting outside of its statutory grant of power.
13. Limitation periods aim to provide fairness in the treatment of alleged violators and to enable them to put forward a complete defence. Their ability to put forward a complete defence may be compromised by the lapse of time or undue delay in taking action. As a result, the limitation period set out in subsection 72.12(1) of the Act requires an interpretation that results in a fair treatment of alleged violators while providing the Commission with an appropriate amount of time to conduct its investigations.
14. The English version of subsection 72.12(1) of the Act states the following:

No proceedings in respect of a violation may be commenced later than two years after the day on which **the subject-matter of the proceedings became known to the Commission.** [emphasis added]
15. The French version of that subsection reads as follows:

Les procédures en violation se prescrivent par deux ans à compter de la date où **le Conseil a eu connaissance des éléments constitutifs de la violation.** [emphasis added]
16. The Commission considers that at first glance, there seems to be a discrepancy between the English and French versions of subsection 72.12(1) that may lead to ambiguity. The English version refers to knowledge of “the subject-matter of the proceedings,” whereas the French version of the provision refers to “des éléments constitutifs de la violation” (the constitutive elements of the violation).
17. By virtue of the equal authenticity rule, the English and French versions of subsection 72.12(1) are equally authentic and authoritative. Any interpretation of this subsection therefore requires relying on both versions to eliminate any discrepancies and searching for a shared meaning between the two versions.
18. The Commission used the principle of bilingual statutory interpretation to reconcile the English and French versions of subsection 72.12(1) of the Act and determine their common meaning. The common meaning will favour the version that is plain and not ambiguous. Where one version is broader than the other, the common meaning also favours the more restricted or limited meaning.
19. The Commission considers that the language used in the English version is broad and creates ambiguity, while the French version is clear and unequivocal, given that it refers to “des éléments constitutifs de la violation” (the constitutive elements of the violation) as opposed to “the subject-matter of the proceedings.” Accordingly, the Commission interprets “the subject-matter of the proceedings” to mean the “constitutive elements of the violation.”

20. The Commission further considers that establishing when the Commission became aware of the constitutive elements of the violation requires determining
- (i) who at the Commission needed to become aware of the constitutive elements of the violation, and
  - (ii) when that person became aware of those elements.
21. In the Commission's view, the knowledge of persons designated by the Commission as inspectors to enforce the Act constitutes knowledge of the Commission for the purposes of the limitation period set out in the Act.<sup>5</sup>
22. The Commission considers that the two-year limitation period begins to run when a Commission inspector has sufficient and credible information to reasonably believe that (i) specific violations have been committed, and that (ii) such violations have been committed by an identifiable individual or group. Both elements need to be present for the two-year limitation period to start running.<sup>6</sup>
23. The Commission considers that the degree of knowledge required for the limitation period to start running is not to be mistaken with the information and evidence that need to be communicated when issuing a notice of violation. It is therefore possible that when the inspector acquires knowledge of the constitutive elements necessary for the limitation period to start running, the designated person does not yet have all the information necessary to issue a notice of violation. Accordingly, the inspector has two years to obtain complementary information to meet the obligations and standard of proof required under the Act to issue a notice of violation.<sup>7</sup>
24. The Commission notes that, as opposed to some other legal regimes where limitation periods start running on the day on which the violation was committed, the Act provides for a longer delay between the commission of the violation and the starting point of the limitation period. This longer delay is to the advantage of the Commission inspector. Because limitation periods are restrictive provisions, as a general legal principle, they have to be strictly interpreted, and any ambiguity must be resolved in favour of the party whose rights are affected. For this reason, the Commission considers that the Commission inspector and the person designated under the Act to issue notices of violation have the onus to demonstrate when the inspector was made aware of the constitutive elements of alleged violations.<sup>8</sup>

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<sup>5</sup> Subsection 71(1) of the Act states that the Commission may designate any qualified person as an inspector for the purpose of verifying compliance or preventing non-compliance with the provisions of the Act for which the Commission is responsible and with the decisions of the Commission under the Act.

<sup>6</sup> See *Thériault v. Canada (Royal Canadian Mounted Police)*, 2006 FCA 61, paragraph 47.

<sup>7</sup> See footnote 6.

<sup>8</sup> See *Doyon v. Canada (Attorney General)*, 2009 FCA 152; and *Directeur des poursuites criminelles et pénales c. Entreprises Judes Landry ltée*, 2013 QCCQ 1830.

25. The Commission inspector stated in the investigation report that the subject-matter of the proceeding became known on 15 September 2017, when 1 Touch Solutions provided him with a copy of a signed contract between 1 Touch Solutions and Mr. Grant. The Commission inspector asserted that it was on or shortly after 15 September 2017 that sufficient information that concretely confirmed violations of the Rules was received or generated.
26. In its representations, Maxwell Devonshire Realty disagreed with the designated person's position as to when the limitation period started running and argued that the proceeding was initiated too late.
27. Maxwell Devonshire Realty noted that according to the investigation report, on 26 July or 1 August 2016, 1 Touch Solutions provided the Commission inspector with 59 leads generated as a result of telemarketing calls, which 1 Touch Solutions had previously sent to Mr. Grant at Maxwell Devonshire Realty. In light of that information, Maxwell Devonshire Realty submitted that the Commission was aware of the subject-matter of the proceeding no later than 1 August 2016, three years and one month prior to the issuance of the notice of violation.
28. According to the materials supporting the notice of violation, 1 Touch Solutions provided the Commission inspector with the client list on 26 July 2016, and with the 59 leads and a copy of an invoice addressed to Mr. Grant on 1 August 2016.
29. The client list identified Mr. Grant as a client of 1 Touch Solutions, identified the company as Realty Executives-Devonshire, and showed the volume of calls planned and made on his behalf.
30. The 59 leads identified Mr. Grant as a client of 1 Touch Solutions and provided the name, telephone number, and address of the person contacted; the date of the call; details about the person's property; and the person's intentions to sell or purchase a property in the near future. Additionally, the invoice was addressed to Mr. Grant at Maxwell Devonshire Realty's office address and showed that the amount charged was for outbound telemarketing services.
31. In light of the above, the Commission finds that the client list, the leads, and the invoice accurately identified the key constitutive elements of the violations and the dates on which the violations allegedly occurred. On 1 August 2016, the inspector also knew of the identity of the alleged violator – Mr. Grant – and was aware of the existence of an agency relationship between Mr. Grant and Maxwell Devonshire Realty.
32. The Commission considers that evidence regarding the remaining elements of the violations was readily available to the Commission inspector. The inspector had the means to verify, on or shortly after 1 August 2016, whether any telephone number registered on the National DNCL was called. The Commission further considers that

it would have been reasonable for the inspector to verify the registration and subscription status of Maxwell Devonshire Realty on or shortly after 1 August 2016.<sup>9</sup>

33. In the Commission's view, the contract between 1 Touch Solutions and Mr. Grant does not provide additional information as to Maxwell Devonshire Realty's vicarious liability for the alleged violations. Moreover, the contract was not necessary for the Commission inspector to believe that Mr. Grant had committed violations of the Rules, given the information that was already known since or shortly after 1 August 2016.
34. The Commission considers that confirming Maxwell Devonshire Realty's vicarious liability for the commission of the violations by Mr. Grant was part of the steps that the Commission inspector needed to take after being informed of the identity of the violator to meet the obligations and standard of proof under the Act necessary to issue a notice of violation.
35. The Commission therefore finds that the limitation period started running on 1 August 2016 because this is when the Commission inspector had sufficient credible and persuasive information to reasonably believe that specific violations had been committed, and that those violations had been committed by Mr. Grant of Maxwell Devonshire Realty. Accordingly, the notice of violation for the alleged violations related to the telemarketing calls from which the 59 leads were generated had to be issued no later than 1 August 2018. However, as noted above, it was issued on 4 September 2019.

## Conclusions

36. In light of the above, the Commission determines that the notice of violation is untimely because it was not issued to Maxwell Devonshire Realty within the two-year limitation period prescribed under the Act. In light of this finding, it is not necessary for the Commission to determine on a balance of probabilities whether the violations were committed. The Commission therefore declines to impose a penalty.
37. As required under subsection 72.08(4) of the Act, the Commission hereby notifies Maxwell Devonshire Realty 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 of the date of this decision, and the Commission will place all related documentation on its website<sup>10</sup> (see section 62 of the Act).

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<sup>9</sup> According to the investigation report, Commission enforcement staff confirmed on 24 July 2019 that neither Mr. Grant nor Maxwell Devonshire Realty was registered with the National DNCL operator or subscribed to the National DNCL between 10 July 2015 and 30 June 2016.

<sup>10</sup> In *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011, 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.

38. As required under subsection 72.08(4) of the Act, the Commission also notifies Maxwell Devonshire Realty that it may 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 of 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).

Secretary General