



Telecom Decision CRTC 2010-279

Ottawa, 14 May 2010

Infax – Service d’Information sur Demande par Fax Inc. – Application to review and vary Telecom Decision 2009-756 regarding violations of the Unsolicited Telecommunications Rules

File number: 8662-J73-200917437

In this decision, the Commission determines that Infax has failed to demonstrate that there is substantial doubt as to the correctness of Telecom Decision 2009-756. Accordingly, the Commission denies Infax’s application to review and vary Telecom Decision 2009-756, and maintains the administrative monetary penalties of \$9,000 imposed on Infax in that decision.

1. The Commission received an application by Infax – Service d’Information sur Demande par Fax Inc. (Infax), dated 21 December 2009, requesting that the Commission review and vary Telecom Decision 2009-756. In that decision, the Commission imposed administrative monetary penalties (AMPs) totalling \$9,000 on Infax for violations of the Unsolicited Telecommunications Rules (the Rules).
2. Infax submitted that its application was based on the following grounds:
 - Infax only initiates fax telemarketing telecommunications to businesses;
 - the complainant was only faxed because of an error in Infax’s database that identified the complainant’s number as a business number and, therefore, this was a simple error protected by the defence of due diligence;
 - at no time did the complainant contact Infax and ask to be removed from its calling list, which would have enabled Infax to comply with the request within 24 hours as it normally does; and
 - in the event that Infax is found to have violated the three Rules, Infax should only be penalized once instead of three times for violating each of the Rules, for a total penalty of \$3,000 rather than \$9,000.

Background

3. 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 a consumer whose number had been registered on the National Do Not Call List (DNCL), in violation of Part II, section 4 of the Rules;¹
 - 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

- failed to register with the National DNCL operator, in violation of Part III, section 2 of the Rules.³
4. Infax was given until 23 October 2009 to either pay the AMPs set out in the notice of violation or make representations to the Commission with respect to the violations. The Commission received representations from Infax dated 19 October 2009.
 5. After considering the evidence and the representations before it, the Commission found that Infax had violated the Rules as stipulated in the notice of violation and imposed AMPs totalling \$9,000.

Criteria to review and rescind, or vary Commission Telecom decisions

6. In Telecom Public Notice 98-6, the Commission outlined the criteria to consider review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: i) an error in law or in fact, ii) a fundamental change in circumstances or facts since the decision, iii) a failure to consider a basic principle which had been raised in the original proceeding, or iv) a new principle which has arisen as a result of the decision.
7. The Commission interprets Infax's review and vary application as an assertion that there were errors in fact and law in the original decision resulting from
 - the Commission's finding that Infax had initiated three telemarketing faxes to a consumer listed on the National DNCL;
 - the Commission's finding that Infax did not establish a defence of due diligence;
 - the Commission's alleged failure to consider whether the complainant has contacted Infax to ask to be removed from its calling list; and
 - the Commission having penalized Infax three times, rather than once, for each of the Rules it violated, given that the three complaints originated from a single complainant.
8. Infax also submitted that there had been a change in facts since the decision was issued – namely, that it had decided to register with the National DNCL operator and subscribe to the National DNCL starting the week of 4 January 2010.

Is there substantial doubt as to the correctness of the original decision?

- a) **Did the Commission err by finding that Infax had initiated telemarketing faxes to a consumer listed on the National DNCL?**
9. The Commission notes that the investigation that led to the notice of violation relied on three separate fax telemarketing telecommunications, obtained from a complainant whose residential telecommunications number was registered on the National DNCL, to establish that Infax had initiated three fax telemarketing telecommunications in violation of the Rules. Each of these faxes contained Infax's name and phone number as the initiator of the faxes.

10. The Commission notes that in Infax's 19 October 2009 representations and in the present application, the company submitted that it only initiated fax telemarketing telecommunications to business consumers. However, Infax provided no evidence to dispute the correctness of the Commission's finding in Telecom Decision 2009-756 that it had made three fax telemarketing telecommunications to residential numbers listed on the National DNCL.
11. Accordingly, the Commission determines that it did not err in finding that Infax had initiated three fax telemarketing telecommunications to a residential number listed on the National DNCL.

b) Did the Commission err by finding that Infax did not establish a defence of due diligence?

12. 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.
13. The Commission also notes that in Telecom Decision 2007-48, it 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.⁴
14. Infax submitted in its representations of 19 October 2009 and in its present application that the complainant's telephone number was incorrectly coded in its system as a business number, and that faxing to this number was a simple error protected by the defence of due diligence.
15. In Telecom Decision 2009-756, the Commission found that Infax neither demonstrated that the three fax telemarketing telecommunications it had initiated to persons listed on the National DNCL had resulted from an error reflective of the criteria established in Telecom Decision 2007-48 and incorporated into Part VII of the Rules, nor did it provide any evidence that it had taken all reasonable steps to comply with the Rules. For example, by having initiated the fax telemarketing telecommunications in question without having subscribed to the National DNCL, Infax failed to implement policies and procedures to honour consumers' requests that they not be contacted by way of a telemarketing telecommunication.
16. The Commission notes that Infax neither provided evidence to dispute the correctness of the finding in Telecom Decision 2009-756, nor did it provide evidence of due diligence.
17. Accordingly, the Commission determines that it did not err in finding that Infax's alleged error was not a simple error protected by due diligence.

c) Did the Commission err by allegedly failing to consider whether the complainant had contacted Infax to ask to be removed from its calling list?

18. The Commission notes that the complainant's residential telecommunications number has been registered on the National DNCL since 20 October 2008.

19. The Commission considers that consumers register their residential telecommunications numbers on the National DNCL to ensure that no further telecommunications from telemarketers are received and to avoid the necessity of making individual removal requests to each and every telemarketer. Consumers are not required by the Rules to contact telemarketers and request that they be removed from the telemarketers' calling lists.
 20. As such, the Commission considers that the burden was on Infax, and not on the complainant, to ensure that telemarketing faxes were not initiated to the complainant in the first place.
 21. The Commission therefore considers Infax's claim that the complainant did not ask to be removed from its calling list to be irrelevant.
 22. In the present application, Infax also argued that it would have had 31 days to remove the complainant's number from its calling list, had the complainant made such a request. For the foregoing reasons, the Commission considers that this argument is irrelevant to a determination of Infax's liability under the Rules.
 23. Accordingly, the Commission determines that it did not err by failing to consider the fact that the complainant had not contacted Infax.
- d) Did the Commission err by penalizing Infax three times, rather than once, for each of the Rules it violated, given that the three complaints originated from a single complainant?**
24. Section 72.03 of the Act provides that a violation that continues for more than one day constitutes a separate violation for each day it continues.
 25. In Telecom Decision 2009-756, the Commission found that Infax violated three separate Rules each time it initiated one fax telemarketing telecommunication by, in particular,
 - initiating a fax telemarketing telecommunication to a residential number listed on the National DNCL (\$1,000/fax initiated on three separate days = \$3,000 for three instances);
 - initiating the fax telemarketing telecommunication when Infax was not registered with the National DNCL operator (\$1,000/fax initiated on three separate days = \$3,000 for three instances); and
 - initiating the fax telemarketing telecommunication when Infax had not subscribed to the National DNCL (\$1,000/fax initiated on three separate days = \$3,000 for three instances).
 26. In the present application, Infax submitted that it should only be penalized once, rather than three times, for each of the Rules it violated, given that the three complaints originated from a single complainant. In its view, the total AMPs should therefore be \$3,000 instead of \$9,000. However, Infax provided no evidence to dispute the correctness of the finding in Telecom Decision 2009-756 that it had violated three separate Rules each time it initiated a telemarketing fax to a number listed on the National DNCL.

27. The Commission notes that the fax telemarketing telecommunications to the complainant were initiated on three separate days. The Commission finds that each of these fax telemarketing telecommunications constitutes a separate violation of each of the three Rules in question.
28. Accordingly, the Commission determines that it did not err by finding in Telecom Decision 2009-756 that Infax violated three separate Rules each time it initiated a fax telemarketing telecommunication to the residential number in question.
- e) **Does Infax's decision to register and subscribe to the National DNCL constitute a fundamental change in facts since the original decision, raising doubt as to its correctness?**
29. Infax submitted that there had been a change in facts since the issuance of the decision, namely that it had decided to register with the National DNCL operator and subscribe to the National DNCL.
30. The Commission notes that Infax's decision to register with the National DNCL operator and subscribe to the National DNCL does not alter the fact that at the time that the three telemarketing faxes were initiated to a residential number listed on the National DNCL, Infax had neither registered with the National DNCL operator nor subscribed to the National DNCL, in contravention of the Rules.
31. Accordingly, the Commission determines that there has not been a fundamental change in circumstances or facts that raises substantial doubt as to the correctness of Telecom Decision 2009-756.

Conclusion

32. In light of the above, the Commission finds that Infax has failed to demonstrate that there is substantial doubt as to the correctness of Telecom Decision 2009-756. Accordingly, the Commission **denies** Infax's application.

Other matters

33. The Commission notes that the AMPs of \$9,000 imposed on Infax in Telecom Decision 2009-756 continue to accumulate interest, calculated and compounded monthly at the average bank rate plus three percent from **4 January 2010**. The AMPs are payable on the total amount including interest and will accrue during the period beginning on **4 January 2010** and ending on the day before the date on which payment is received.
34. If payment of the debt 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

- *Infax – Service d'Information sur Demande par Fax Inc. – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2009-756, 3 December 2009
- *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
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

¹ Part II, section 4 of the 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 Part VII of the Rules provides the following:

1. A person will not be held liable for violating the Rules if
 - a) the person demonstrates, as part of its due diligence defence, 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 Unsolicited Telecommunications Rules and to honour consumers' requests that they not be contacted by way of a telemarketing telecommunication;
 - (ii) the person provides adequate ongoing training to employees and makes all reasonable efforts to ensure that adequate ongoing training is provided to any person assisting in its compliance with the Unsolicited Telecommunications 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 thirty one (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 thirty one (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 thirty one (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 that 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 Unsolicited Telecommunications Rules.

[Paragraph (b) deleted in this footnote.]
 - c) The circumstances described in paragraphs (a) and (b) are not exhaustive.

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