



## Telecom Decision CRTC 2010-51

Ottawa, 2 February 2010

### **Application to review and vary Telecom Decisions 2009-604, 2009-605, and 2009-607 regarding violations of the Unsolicited Telecommunications Rules by Best Price Movers Ltd., McTavish Logistics Ltd., and YYZ Logistics Ltd.**

File number: 8662-M66-200914433

1. The Commission received an application by Best Price Movers Ltd., McTavish Logistics Ltd., and YYZ Logistics Ltd. (collectively, "the Companies"), dated 26 October 2009, requesting that the Commission review and vary Telecom Decisions 2009-604, 2009-605, and 2009-607. In those decisions, the Commission imposed administrative monetary penalties (AMPs) totalling \$12,500 on the Companies.
2. In their application, the Companies requested the following relief: a declaration that the Unsolicited Telecommunications Rules (the Rules) violate paragraph 2(b)<sup>1</sup> of the *Charter of Rights and Freedoms* (the Charter) and cannot be saved under section 1<sup>2</sup> of the Charter because they do not minimally impair the Companies' rights.
3. The application was based on the following grounds: (1) the Commission had denied the Companies procedural fairness by failing to answer certain questions they had posed and by failing to provide the Companies additional time to file further representations and (2) the Commission erred in its paragraph 2(b) and section 1 Charter analysis.

### **Background**

4. On 13 July 2009, the Commission issued a notice of violation to the three companies pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notices informed the Companies that they had initiated telemarketing telecommunications to consumers whose numbers had been registered on the National Do Not Call List (DNCL), in violation of Part II, section 4<sup>3</sup> of the Rules. The Companies were given until 14 August 2009 to pay the AMPs set out in the notices or to make representations to the Commission with respect to the violations.
5. On 16 August 2009 the Companies submitted a request for and were granted an extension of time to file their representations to 3 September 2009.
6. On 3 September 2009, the Companies filed representations which consisted of eleven questions to the Commission as well as general submissions regarding the Charter. The Companies also asked for a further extension of time to file additional representations. This request for further

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<sup>1</sup> Paragraph 2(b) of the Charter states that everyone has the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

<sup>2</sup> Section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>3</sup> 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.

time was denied and the Companies were notified that their 3 September 2009 submission was considered to be the Companies' representations in response to the three notices of violation.

7. Of the questions posed by the Companies, the Commission found the following issues to be relevant to the allegations raised in the notices of violation:
  - I. Did natural justice provide the Companies an opportunity to cross-examine under oath any complainants who had filed affidavits during the investigation into the Companies' telemarketing activities?; and
  - II. Did the National DNCL regime violate the constitutional right to freedom of expression, as enshrined in paragraph 2(b) of the Charter?
8. After considering the evidence and the representations before it, the Commission found that:
  - I. In the circumstances, the Companies did not have a right to cross-examine those complainants who had filed affidavits during the investigation into the Companies' telemarketing activities; and
  - II. The National DNCL regime is not unconstitutional.
9. The Commission found that the Companies had violated the Rules as stipulated in the three notices of violation and imposed AMPs totalling \$12,500 in Telecom Decisions 2009-604, 2009-605, and 2009-607.

### **Criteria to review and rescind, or vary Commission Telecom Decisions**

10. 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.
11. The Commission interprets the Companies' review and vary application as an assertion that there was an error in law in the original decisions resulting from: (1) a denial of procedural fairness prior to the issuance of the decisions and (2) the Commission's incorrect analysis of paragraph 2(b) and section 1 of the Charter.

### **Is there substantial doubt as to the correctness of the original decisions?**

#### **a) Were the Companies denied procedural fairness prior to the issuance of the decisions?**

12. The Companies submitted that they had been denied procedural fairness in the process leading to the issuance of the decisions because the Commission had failed to respond to some of the questions posed by the Companies, and had failed to give the Companies additional time to respond to the allegations contained in the notices of violation.

13. The Commission notes that the *Act* and Telecom Decision 2007-48 established the process for all parties subject to a notice of violation. The process includes the right to make representations in response to a notice of violation, and the timelines for doing so. While parties can ask questions in order to understand the nature of the allegations and prepare their representations, the established process does not include additional steps for asking questions such as those submitted by the Companies and the Commission considers that the Companies had no corresponding legitimate expectation of such process.
14. The Commission also notes that the eleven questions posed by the Companies in the representations were reviewed and that the majority of these questions were deemed irrelevant to the allegations contained in the three notices of violation. Even if answered, they would not have had an impact on the Commission's determination of whether or not the Companies had violated the Rules.
15. With respect to the time to respond to the allegations, the Commission is of the view that the Companies were given adequate time to respond to the allegations. As noted above, the Companies' initial request for an extension of time to submit representations was granted, despite being received on 16 August 2009, two days beyond the 14 August 2009 deadline established in the three notices of violation. Pursuant to the extension, on 3 September 2009 the Companies filed representations but requested another extension of time to file additional representations. This second request was denied and the Companies were notified that their submission of 3 September 2009 was considered their representations.
16. Accordingly, the Commission finds that the failure to reply to all eleven questions posed by the Companies does not constitute a breach of procedural fairness. The Commission also finds that the process leading to Telecom Decisions 2009-604, 2009-605, and 2009-607 was procedurally fair and that the Companies were afforded sufficient time to respond to the allegations contained in the notices of violation.

**b) Did the Commission err in its analysis of Paragraph 2(b) and Section 1 of the Charter?**

17. The Companies submitted that requiring a telemarketer to pay unreasonable subscription fees for the National DNCL under the threat of AMPs violates the Companies' constitutional right of freedom of expression, as enshrined in paragraph 2(b) of the Charter, and that this breach is not saved by section 1 of the Charter as it does not minimally impair their rights.
18. The Commission considers that the National DNCL regime does not constitute a government action which impairs the Companies' freedom of expression. The Commission notes that it does not constitute a ban on telemarketing activities in Canada, but rather establishes a regulatory regime whereby the public can register to prevent unwanted solicitation by means of telecommunication with a fee imposed to defray administration costs. The Commission considered in Telecom Decision 2007-48 that National DNCL subscription fees are a cost of doing business.
19. The Commission further notes that in the case of the Companies, the total cost of an annual subscription to the National DNCL for two area codes (the area codes in which complaints were received) would be \$3,220 (2 x \$1,610) per company. The Commission previously found these fees to be reasonable to defray the costs of administering the system by the National DNCL operator.

20. Consequently, the Commission is of the view that the requirement to pay a subscription fee to the National DNCL operator is not unconstitutional. However, in the event that the National DNCL regime was found to violate the Companies' freedom of expression rights, the Commission is also of the view that it would be saved by s.1 of the Charter.

### **Conclusion**

21. In light of the above, the Commission finds that the Companies have failed to demonstrate that there is substantial doubt as to the correctness of the original decisions.
22. Accordingly, the Commission **denies** the Companies' application.

### **Other matters**

23. The Commission notes that the AMPs of \$12,500 imposed on the Companies in Telecom Decisions 2009-604, 2009-605, and 2009-607 continue to accumulate interest calculated and compounded monthly at the average bank rate plus three percent from **30 October 2009**. The AMPs are payable on the total amount including interest and will accrue during the period beginning on **30 October 2009** and ending on the day before the date on which payment is received.
24. As part of its collection activities, the Commission intends to certify the unpaid amount and register the certificate with the Federal Court.

Secretary General

### **Related documents**

- *Best Price Movers Ltd. – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2009-604, 30 September 2009
- *McTavish Logistics Ltd. – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2009-605, 30 September 2009
- *YYZ Logistics Ltd. – Violations of the Unsolicited Telecommunications Rules*, Telecom Decision CRTC 2009-607, 30 September 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

*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>.*