



Telecom Decision CRTC 2011-305

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Ottawa, 10 May 2011

1716878 Ontario Inc., carrying on business as Direct to Home Groceries – Violations of the Unsolicited Telecommunications Rules

File numbers: PDR 9174-749, 9174-810, 9174-834, and 9174-910

In this decision, the Commission imposes an administrative monetary penalty of \$10,000 on 1716878 Ontario Inc., carrying on business as Direct to Home Groceries, for initiating five voice telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating these telecommunications without being a registered subscriber or having paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

1. Between 5 March 2009 and 11 August 2010, the Commission received numerous complaints in relation to telemarketing telecommunications made by 1716878 Ontario Inc., carrying on business as Direct to Home Groceries (DTHG).¹
2. On 4 October 2010, a notice of violation was issued to DTHG pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed DTHG that it had initiated
 - five voice telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4² of the Commission's Unsolicited Telecommunications Rules (the Rules); and
 - five voice telemarketing telecommunications without being a registered subscriber or having paid all applicable fees to the National DNCL operator, in violation of Part II, section 6³ of the Rules.

¹ 1716878 Ontario Inc., carrying on business as Direct To Home Groceries, 5280 South Service Road, Burlington, Ontario L7L 5H5, Tel.: 905-631-7190. Industry – in-home grocery.

² 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.

³ 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. DTHG was given until 4 November 2010 to pay the administrative monetary penalty (AMP) set out in the notice of violation or to make representations to the Commission regarding the violations.
4. The Commission received representations from DTHG dated 3 February 2011, in accordance with an extension to the original deadline that was granted after the notice of violation was issued.
5. In its representations, DTHG submitted that a computer glitch had occurred and that it was not knowingly contacting consumers registered on the National DNCL. DTHG also submitted that it is in severe financial distress and that a fine of \$10,000 would completely shut down its operation. DTHG provided no documentation in support of its representations.
6. The Commission has identified the following issues to be addressed in its determinations:
 - I. Has DTHG established a defence of due diligence?
 - II. Is the amount of the AMP reasonable?

I. Has DTHG established a defence of due diligence?

7. DTHG submitted that consumers registered on the National DNCL had been contacted because of a computer glitch, and that it was not knowingly contacting such consumers.
8. DTHG did not make representations regarding its failure to renew its subscription to the National DNCL.
9. 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.
10. In *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, the Commission 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.
11. The Commission notes that DTHG's evidence of due diligence for calls made to consumers whose numbers were registered on the National DNCL was limited to only noting the failure of its hardware. DTHG did not submit any additional evidence of other reasonable steps or any business practices that could demonstrate due diligence in preventing calls to consumers whose numbers are registered on the National DNCL.
12. Furthermore, the Commission notes that DTHG continued to make telemarketing telecommunications to consumers whose numbers were registered on the National DNCL after its subscription had expired.

13. In light of the above, the Commission finds that DTHG has not established a defence of due diligence.

II. Is the amount of the AMP reasonable?

14. DTHG submitted that it is in severe financial distress and asked the Commission to reconsider the AMP of \$10,000.
15. The Commission notes that the financial health of a corporation is not a factor in determining whether to impose or reduce a penalty contained in a notice of violation.
16. In light of the above, the Commission finds that the penalty is appropriate and should not be reduced or removed.

Conclusion

17. In the circumstances of this case, the Commission considers that a penalty of \$1,000 for each of the violations of Part II, sections 4 and 6 of the Rules is appropriate. The Commission therefore imposes a total AMP of \$10,000 on DTHG.
18. The Commission hereby notifies DTHG 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 30 days of the date of this decision, and the Commission will place all related documentation on its website. 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.
19. The Commission reminds DTHG that should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purposes of solicitation of its products and/or services, it is required to comply with the Rules. Examples of measures that DTHG should adopt to ensure compliance with the Rules include, but are not limited to
 - subscribing to the National DNCL;
 - downloading the National DNCL at least once every 31 days prior to the date of the 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.

20. The amount of \$10,000 is due by **9 June 2011** 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 **9 June 2011**, 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.
21. 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