



Telecom Decision CRTC 2012-329

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Ottawa, 12 June 2012

Euro-Seal Window Industries Ltd. – Violations of the Unsolicited Telecommunications Rules

File numbers: PDR 9174-931 and 9174-1059

In this decision, the Commission imposes an administrative monetary penalty of \$29,000 on Euro-Seal Window Industries Ltd. for initiating, on its own behalf, 14 telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), 11 telemarketing telecommunications to consumers without being a registered subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator, 2 telemarketing telecommunications while not using a current version of the National DNCL, 1 telemarketing telecommunication during which it failed to provide to a consumer a valid call-back telephone number, and 1 telemarketing telecommunication during which it failed to provide to a consumer a call-back telephone number that connected to a voice mail system capable of taking messages, in violation of the Unsolicited Telecommunications Rules.

1. Between 8 March 2010 and 24 October 2011, the Commission received numerous complaints in relation to telemarketing telecommunications made by Euro-Seal Window Industries Ltd. (Euro-Seal).¹
2. On 2 February 2012, a Notice of Violation was issued to Euro-Seal pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Euro-Seal that it had initiated, on its own behalf,
 - fourteen voice telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National DNCL, in violation of Part II, section 4² of the Unsolicited Telecommunications Rules (the Rules);

¹ Euro-Seal Window Industries Ltd., Concord, Ontario, Tel.: 416-650-5070. Industry – Windows and doors.

² Part II, section 4 of the Unsolicited Telecommunications Rules states that a telemarketer shall not initiate, and a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does 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 or the client of that telemarketer.

- eleven voice telemarketing telecommunications 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 6³ of the Rules;
 - two voice telemarketing telecommunications without using a current version of the National DNCL obtained from the National DNCL operator, in violation of Part II, section 13⁴ of the Rules;
 - one voice telemarketing telecommunication during which it failed to provide a consumer, for the purpose of asking questions, a telephone number that allows access to an employee or other representative of the telemarketer, in violation of Part III, section 17(a)⁵ of the Rules; and
 - one voice telemarketing telecommunication during which it failed to provide to a consumer a way of taking calls either by a live operator or a voice mail system that is always capable of taking messages from the consumer, in violation of Part III, section 20(b)⁶ of the Rules.
3. The Notice of Violation set out an administrative monetary penalty (AMP) for 29 violations at \$1,000 per violation, for a total amount of \$29,000.
 4. Euro-Seal was given until 16 March 2012 to pay the AMP set out in the Notice of Violation or to make representations to the Commission regarding the violations.
 5. The Commission received representations from Rubin & Christie LLP, on behalf of Euro-Seal, dated 16 March 2012.
 6. Based on the information contained in the representations, the Commission has identified the following issues to be addressed in its determinations:
 - I. Did Euro-Seal commit four of the original twenty-nine violations?
 - II. Is the amount of the AMP reasonable?

³ 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.

⁴ Part II, section 13 of the Rules states that a telemarketer and a client of a telemarketer shall use a version of the National DNCL obtained from the National DNCL operator no more than thirty-one (31) days prior to the date that any telemarketing telecommunication is made.

⁵ Part III, section 17(a) of the Rules states that a telemarketer initiating a voice telemarketing telecommunication shall provide the following information in a clear manner upon request: a) a voice telecommunications number that allows access to an employee or other representative of the telemarketer for the purpose of asking questions, making comments about the telemarketing telecommunication, or making or verifying a do not call request.

⁶ Part III, section 20(b) of the Rules states that the telecommunications numbers to be provided pursuant to section 17 shall be answered either by a live operator or with a voice mail system that is always capable of taking messages from the consumer.

I. Did Euro-Seal commit four of the original twenty-nine violations?

7. With respect to violations of Part II, section 4 of the Rules, Rubin & Christie LLP, on behalf of Euro-Seal, stated that two of the associated witness statements did not meet the necessary elements to prove contravention of Part II, section 4 of the Rules, and that
 - one consumer identified the telecommunications number of the telemarketer that had called using an Internet search; and
 - one consumer may not have been listed on the downloaded version of the National DNCL if it was downloaded less than 31 days prior to the call.
8. The Commission notes that Euro-Seal did not deny making calls to these two consumers.
9. The Commission also notes that while one consumer may have discovered the telecommunications number for Euro-Seal using the Internet, the consumer indicated in their witness statement that the caller clearly stated that the call was on behalf of Euro-Seal.
10. The Commission also notes that Euro-Seal had not paid any fees related to purchasing a subscription during the time of the second disputed call, and therefore could not have verified whether or not the number appeared on a valid copy of the National DNCL.
11. With respect to the one violation of Part III, section 17(a) of the Rules, Rubin & Christie LLP, on behalf of Euro-Seal, stated that
 - the consumer was aware of an alternative number indicated on his call display where he could reach the company;
 - the consumer may not have heard clearly what the caller said due to personal animosity during the call; and
 - Euro-Seal indicated that all employees are given a valid call-back number in the company-approved script and provided a copy of a script used by employees when making the calls.
12. The Commission notes that displaying a valid contact number does not supersede the requirement to provide a voice telecommunications number when requested by the called party.
13. The Commission also notes that the call-back number indicated on the script differs from the one that the consumer indicated was given to him by the caller during the call. The consumer indicated in its witness statement that the call-back number provided was 416-123-4567.

14. With respect to the one violation of Part III, subsection 20(b) of the Rules, Rubin & Christie LLP, on behalf of Euro-Seal, stated that
- there is no indication of what time the consumer received the telemarketing telecommunication call. Therefore, the customer may have called back after business hours;
 - if the voice mail box was full, malfunctioning, or it was after business hours, the customer could have called back the following day; and
 - while it is possible that there may have been a temporary malfunction of the voice mail system at the time of the consumer's alleged call, Euro-Seal believes that this is extremely unlikely in the circumstances.
15. The Commission notes that Part III, section 20(b) of the Rules requires that a business provide either a live agent or a voice mail system that is always capable of taking messages from the consumer, and that there is no limitation on the time at which the consumer can leave a message.
16. The Commission also notes that in the disputed witness statement, the consumer stated that he was provided the telecommunications number 888-650-8870 as a call-back number and that the voice mail box was full when he tried to call back.
17. In light of the above, the Commission finds that, on a balance of probabilities, Euro-Seal has committed the four disputed violations.

II. Is the amount of the AMP reasonable?

18. Euro-Seal stated that
- it is not in a financial position to pay an AMP of \$29,000, particularly when it is imposed with only one month to pay;
 - the financial health of anyone charged with an offence or given a Notice of Violation should always be a factor, not in determining whether or not to impose a penalty contained in a Notice of Violation, but with respect to the monetary amount set by the AMP;
 - no investigation into its ability to pay was undertaken;
 - more time for payment should be allowed;
 - the Commission should reduce the amount of the AMP levied against Euro-Seal to \$500 per violation and reduce the number of violations to 25;
 - while the purpose of the AMP is to be a deterrent and to be more than a minor cost of doing business, the Commission should also take into account that the imposition of an overall fine that is excessive and cannot be paid within a very short time frame may impair the continued existence of Euro-Seal; and

- when reaching this decision, the Commission did not annunciate or reach a decision setting out which factors were appropriate and which factors were inappropriate.
19. The Commission notes that Euro-Seal has not consistently subscribed to the National DNCL and therefore did not pay the required subscription fee between May 2009 and March 2011.
 20. Euro-Seal submitted financial statements for 2009 and 2010 that were prepared by an accounting firm and certified by Euro-Seal's president. These certified statements were used by Commission staff to determine the size and type of business Euro-Seal represents when making a determination.
 21. In light of the above, and given the size of the business and that the Notice of Violation was the first one issued to the business, the Commission considers that a penalty of \$1,000 per violation for the 29 violations cited in the Notice of Violation is appropriate.
 22. The Commission also notes that paragraph 521 of *Unsolicited Telecommunications Rules framework and the National Do Not Call list*, Telecom Decision CRTC 2007-48, 3 July 2007, states the following:

The Commission finds that examples of appropriate factors to be taken into consideration in determining whether to issue a notice of violation, and what the amount of the associated AMP should be, include the following:

- the nature of the violation (minor, serious, very serious, negligent or intentional);
- the number and frequency and complaints and violations;
- the relative disincentive of the measure; and
- the potential for future violation.

Conclusion

23. 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, 6, and 13; and Part III, sections 17(a) and 20(b) of the Rules is appropriate. The Commission therefore imposes a total AMP of \$29,000 on Euro-Seal.
24. The Commission hereby notifies Euro-Seal 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. 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.

25. The Commission reminds Euro-Seal that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products and/or services, it is required to comply with the Rules. Examples of measures that Euro-Seal should adopt to ensure compliance with the Rules include, but are not limited to, the following:
 - 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 for valid call-back telecommunications numbers.
26. The Commission advises Euro-Seal that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
27. The amount of \$29,000 is due by 12 July 2012 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 12 July 2012, 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.
28. 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