

## BUSINESSES MUST COMPLY WITH CANADA'S ANTI-SPAM LEGISLATION - AN UPDATE

Designed to protect Canadian consumers from spam and other online threats, Canada's Anti-Spam Legislation (CASL<sup>1</sup>), among other things, prohibits the:

- sending or causing/permitting the sending of "commercial electronic messages" (CEMs) without the recipient's consent;
- installation of computer programs without the express consent of the owner of the computer system;
- use of false or misleading representations online in the promotion of products or services;
- collection of electronic addresses by the use of computer programs or the use of such addresses without permission;
- collection of personal information through accessing a computer system in violation of federal law, and
- alteration of transmission data in an electronic message which results in the message being delivered to a different destination without express consent.

The coming-into-force of the CASL was phased into three stages.

Most of the provisions of the CASL came into force in the first phase on July 1, 2014.

The second phase, which deals with the installation of computer programs, came into force on January 1, 2015.

Another phase of the CASL, dealing with transitional provisions with respect to implied consent, came into force on July 1, 2017. Another part of the final phase dealing with rights of private action, was originally scheduled to come into force on the same date. However, this has been postponed until a date to be determined.

### CEMs

Businesses should pay particular attention to the CASL provisions that apply to CEMs. A CEM is broadly defined as any electronic message (eg. email, text message, social media message) that, having regard to its content, it would be reasonable to conclude that it has as its purpose, or one of its purposes, to encourage participation in a commercial activity.<sup>2</sup>

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An "electronic message" is defined as: a message sent by any means of telecommunication, including a text, sound, voice or image message.

Commercial activity includes any transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so with the expectation of profit. Excluded from the definition of *commercial activity* is any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada.<sup>3</sup> A CEM that offers to sell or that advertises goods or services is therefore subject to CASL.

CASL's provisions apply to any CEM sent from or accessed by a computer in Canada. As a result, it impacts the electronic marketing practices of businesses that have an electronic presence in Canada, whether or not they are physically located in Canada.

CASL prohibits the sending of a CEM to an electronic address unless (a) the person to whom the message is sent has consented to receiving it, and (b) the message complies with prescribed form and content requirements. Certain types of CEMs are exempt from CASL's anti-spam prohibition, including:

- messages sent to family members<sup>4</sup>;
- CEMs sent with a quote or estimate in reply to a request made by the person having made a request for same<sup>5</sup>;
- CEMs with information on warranty, product recall or safety or security with respect to a product, goods or a service that the person to whom the message is sent uses, has used or has purchased;<sup>6</sup>
- CEMs sent by fax to a telephone account;<sup>7</sup>
- vocal recordings sent to a telephone account;<sup>8</sup>

<sup>1</sup> The complete title of the law is *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act.*

<sup>2</sup> CASL, section 1(2)

<sup>3</sup> CASL, section 1(1)

<sup>4</sup> CASL, section 6(5)

<sup>5</sup> CASL, section 6(6)(a)

<sup>6</sup> CASL, section 6(6)(c)

<sup>7</sup> CASL, section 8(b)

<sup>8</sup> CASL, section 6 (8)(c)

- inter-corporate communications concerning the organization's activities;<sup>9</sup>
- CEMs from a registered charitable organization if the purpose is to raise funds;<sup>10</sup>
- CEMs sent by or on behalf of a political party or organization, or a person who is a candidate, for publicly elected office and with the primary purpose soliciting a contribution.<sup>11</sup>

### **The Consent Requirement**

Consent to receive a CEM is generally required to be express. There are instances when an individual's consent may be implied. For example, consent may be implied if there is an "existing business relationship" or an "existing non-business relationship" between the sender and the recipient. The terms "existing business relationship" and "existing non-business relationship" are narrowly defined in CASL. There is an "existing business relationship" if the sender and recipient have engaged in certain specified types of business together in the two years preceding the date on which the CEM is sent (eg. a purchase of goods or services) or if the recipient of the CEM has made an inquiry to the sender in the previous six months.

An "existing non-business relationship" exists where an individual has, in the last two years, made a donation or gift to or performed volunteer work for a registered charity, a political party or other organization or has been a member of a non-profit organization operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit.<sup>12</sup>

Consent can also be implied in cases where the CEM is relevant to the recipient's business, role function or duties in a business or official capacity, namely: i) the recipient has "conspicuously published or caused to be conspicuously published" the email address to which the CEM is sent without the publication being accompanied by a statement that the person does not wish to receive unsolicited CEMs or ii) the recipient has disclosed to the person who has sent, or caused to be sent, the CEM without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address.<sup>13</sup>

The onus of proving consent, whether express or implied, is

<sup>9</sup> Electronic Commerce Protection Regulations, section 3(a)

<sup>10</sup> Electronic Commerce Protection Regulations, section 3(g)

<sup>11</sup> Electronic Commerce Protection Regulations, section 3(h)

<sup>12</sup> CASL, section 10(13)

<sup>13</sup> CASL, section 10(9)(b)

on the person alleging to have received it.<sup>14</sup>

The CRTC has published a Guidance on Implied Consent for businesses on its website:

<http://www.crtc.gc.ca/eng/com500/guide.htm>

### **End of transitional period**

A transitional period of three years was included in the legislation. Under this transitional provision, a recipient was deemed to have provided implied consent if the sender and recipient had an existing business or non-business relationship at the time the legislation came into effect and that relationship included the communication between them of CEM's. This transitional provision ended July 1, 2017. Unless express consent was obtained prior to this date, businesses which relied on this transitional provision must now obtain such consent, unless they fall under one of the exceptions expressly provided for in the legislation pertaining to implied consent.

It should be noted that an electronic message that is sent for the purpose of obtaining consent to send CEMs is itself considered a CEM, which may not be sent without consent. This poses a particular challenge for businesses that did not obtain the required consents before July 1, 2014 or do not have an existing business or non-business relationship that commenced during the transitional period and is still in existence.

### **The Form of Consent**

Where express consent is being obtained, the means by which it is requested must comply with the requirements of CASL. A request for express consent to send CEMs must clearly state:

- the purpose (s) for which the consent is being sought;
- prescribed contact information (name, mailing address, email address, etc.) of the person requesting consent, and
- a statement that the recipient may withdraw their consent.

Unlike anti-spam regulation in other jurisdictions, CASL takes an "opt-in" approach to consent. This means that a recipient must take an active step to indicate their consent, such as checking a box. An "opt-out" mechanism involving a pre-checked box will not comply with CASL.

<sup>14</sup> CASL, section 13

A request for consent to receive CEMs must also be clearly and separately identified and cannot be bundled with requests for consent to other terms (eg. general terms and conditions of use or sale).

### **CEM Content Requirements**

In addition to the consent requirement, CASL sets out specific form and content requirements for CEMs. In particular, each CEM must identify the sender, provide prescribed contact information for the sender, and set out an "unsubscribe" mechanism. The unsubscribe mechanism must be "able to be readily performed" and must take effect no later than ten business days after the unsubscribe request is sent.

### **Right to Private Action**

CASL also creates a private right of action to claim damages for persons who have been affected by a contravention of its provisions. The provisions relating to private actions were originally part of the last phase of the CASL to come into effect on July 1, 2017. However, following a decision less than a month prior to this date, the federal government decided to suspend the implementation of these provisions to a later date.

If the provisions of the CASL with respect to the right of private action are passed as presently drafted, if an undertaking has been made or a notice of violation has been served with respect to the actions, no private action can be taken.<sup>15</sup> Once a court agrees to hear an application, undertakings, which in principle can be made at any time, will no longer be possible.<sup>16</sup>

The statute of limitations to private action will be three years from the date the damage becomes known to the applicant, unless the court agrees to a longer period.<sup>17</sup>

### **Enforcement of the CASL**

The CASL is jointly overseen by three bodies: the Canadian Radio-television and Telecommunications Commission ("CRTC"); the Office of the Privacy Commissioner of Canada and the federal Competition Bureau. Matters involving sending of CEMs, the alteration of transmission data and the installation of computer programs without consent are under the jurisdiction of the CRTC.

<sup>15</sup> CASL, section 47(1)

<sup>16</sup> CASL, section 48(3)

<sup>17</sup> CASL, section 47(3)

### **Procedure and Penalties**

A contravention of CASL can result in an administrative monetary penalty ("AMP") ranging up to \$1,000,000 for an individual, and \$10,000,000 for any other person. A person having received a notice of violation (which can be issued by an inspector appointed by the CRTC who has reasonable grounds to believe the person has committed a violation under the CASL<sup>18</sup>) may voluntarily enter into an undertaking to pay an amount.<sup>19</sup> Although the undertaking ends the proceedings with respect to the acts or omission specified in the undertaking (and will also preclude private action<sup>20</sup>), businesses should bear in mind that the terms of the undertaking may be made public.<sup>21</sup>

A notice of violation can be appealed by making representations to the CRTC, who will decide on a balance of probabilities whether the person committed the violation and on the amount of the AMP. The CRTC may suspend the payment of the AMP subject to any condition it considers necessary to ensure compliance with the CASL.<sup>22</sup> The CASL stipulates that a violation of this law is not an offence and therefore, no one can be charged with such under the Criminal Code and furthermore, that a person cannot be found to be liable for a violation if they establish that they exercised due diligence to prevent the commission of the violation.<sup>23</sup>

The factors to be taken into account in assessing the amount of the AMP include, among other factors:

- the nature and scope of the violation;
- the person's history with respect to any previous violation under the CASL;
- any financial benefit that the person obtained from the commission of the violation;
- the person's ability to pay the penalty;
- whether the person has voluntarily paid compensation to a person affected by the violation.

The CASL stipulates that the purpose of an AMP is to promote compliance with the CASL and not to punish.<sup>24</sup>

<sup>18</sup> CASL, section 22(1)

<sup>19</sup> CASL, section 21

<sup>20</sup> CASL, section 48(1)

<sup>21</sup> CASL, section 39

<sup>22</sup> CASL, section 25(1)

<sup>23</sup> CASL, sections 30, 33(1)

<sup>24</sup> CASL, section 20(2)

### **Administrative Monetary Penalties**

The first AMP under the CASL was imposed by the CRTC in March, 2015 against a Quebec company, 3510395 Canada Inc. (doing business under the name “Compu.Finder”). The penalty was \$1,100,000 for a total of four violations.<sup>25</sup> Three of these violations consisted of Compu.Finder having “*sent or caused or permitted to be sent, to electronic addresses, commercial electronic messages, in three (3) patterns, without the consent of the persons to whom the messages were sent [...].*” The fourth violation was for not having adequate unsubscribe mechanisms, as required by the law.

Two further decisions with respect to AMPs have to date been published on the CRTC’s site.

#### **i) Blackstone**

On October 16, 2016, the CRTC imposed an AMP of \$50,000 (which was lowered from the initial AMP of \$640,000.00 set out in the Notice of Violation) against Blackstone Learning Corp. (“Blackstone”).<sup>26</sup>

During nine messaging campaigns between July 9 and September 18, 2014, Blackstone had allegedly sent a total of 385,668 CEMs which advertised Blackstone’s educational and training services and targeted mainly government employees. The notice of violation set out nine violations and an AMP OF \$640,000.

In representations to the CRTC, Blackstone raised in defence that the email addresses, being publicly available, had been “conspicuously published” and thus there was implied consent.

In its analysis, the CRTC stated that the conspicuous publication exemption and the requirements for the exemption set a higher standard than the simple public availability of an email address. The requirement that the CEM be relevant to the role or functions of the recipient creates the condition that the email address be published in such a manner that it is reasonable to infer consent to receive the type of message sent, in the circumstances.<sup>27</sup>

The CRTC concluded that the conspicuous publication exemption does not provide persons a broad licence to send CEMs to any email address they find online. Rather, it

provides for circumstances in which consent can be implied by such publication, to be evaluated on a case-by-case basis.<sup>28</sup>

In assessing the amount of the AMP, the CRTC, in noting the purpose of the CASL being the promotion of compliance with the CASL and not punishment, stated that an AMP should not preclude a person from continuing to operate on a commercial basis, as this would also preclude the compliant participation in the regulated activity going forward.<sup>29</sup> The duration of the violations was relatively short (approx. 2 moths), suggesting a lower penalty would be appropriate<sup>30</sup>.

However, the CRTC also took into account that Blackstone did not cooperate with the investigation and the investigative report showed a low likelihood of self-correction, as the non-compliant behavior did not change after receiving a notice to produce information as required under the CASL.<sup>31</sup> Yet, the CRTC recognized that the CASL was relatively new legislation and Blackstone had no history of non-compliance. At the time of the violations, Blackstone in error believed to have had implied consent and did not have the benefit of more recent guidance published in the topic of implied consent, such as the CRTC Guidance on Implied Consent, which was published on September 4, 2015.<sup>32</sup>

The CRTC found on a balance or probabilities that Blackstone had committed the nine violations and ruled that a total penalty of \$50,000 was proportionate to the circumstances, and reasonable and necessary to promote Blackstone’s compliance with the CASL.

#### **ii) Rapanos**

On March 9, 2017, the CRTC issued a Compliance and Enforcement decision under which it imposed an AMP of \$15,000 on an individual, William Rapanos. The decision followed an investigation of fifty-eight complaints to the Spam Reporting Center filed by fifty individuals concerning CEMS sent during campaigns advertising Mr. Rapanos’ flyer design and printing and distribution services.<sup>33</sup> The complaints pertained to three email campaigns between July

<sup>28</sup> par. 27

<sup>29</sup> par. 44

<sup>30</sup> par. 48

<sup>31</sup> Section 17 of the CASL authorizes an inspector, in the course of the inspection, to serve a notice requiring a person to produce a copy of a document in that person’s possession or control, or to prepare and produce a document based on data, information or documents in their control.

<sup>32</sup> par. 61

<sup>33</sup> Canadian Radio-television and Telecommunications Commission (CRTC 2017-65), Ottawa, March 9, 2017, File Nos. 9094-2014-00313-001 and 9102-2014-00313-008

<sup>25</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, March 5, 2015, File No. 9094-2014-00302-001

<sup>26</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, March 9, 2017, File Nos. 9094-2014-00313-001 and 9102-2014-00313-008

<sup>27</sup> par. 26

and October 2014. The notice of violation issued following the investigation contained a total of ten violations, namely: three for each of i) sending a CEM to an electronic address without consent; ii) sending a CEM without the prescribed information identifying the sender; and, iii) sending a CEM that did not set out information to enable the recipient to readily contact the sender, as well as one violation of not including a proper unsubscribe mechanism.

In his representations, Mr. Rapanos claimed to have been victim of identity theft and that someone else had sent the emails. However, he was unable to provide convincing evidence. Mr. Rapanos also raised in defence that the case violated his Charter rights, the commission of the violations not having been proven beyond a reasonable doubt. The CRTC explained that the CASL proceedings not being criminal proceedings, this level of proof under the Charter right did not apply. The CRTC concluded that, on a balance of probabilities, Mr. Rapanos committed the ten violations.

Mr. Rapanos also contested the amount of the AMP as being too high due to his financial situation. However, he did not provide required supporting documentation. The CRTC referred to principles in the Compliance and Enforcement Regulatory Policy 2015-109 (which deals with ADMs under the Voter Contact Registry) which state that when applying for a review of a notice of violation, it is insufficient for a party to claim inability to pay without providing detailed supporting documentation. The CRTC considered that, consistent with past practice, it would be appropriate to apply these same general principles.

In assessing the AMP, the CRTC, noting the purpose of the CASL to be the promotion of compliance with the CASL and not punishment, considered the penalty of \$15,000 (which would work out to be an amount of \$1,500 per violation) to be proportionate to the circumstances, and reasonable and necessary to promote compliance.

### **Voluntary Undertakings**

To date, a total of four decisions with voluntarily undertakings have been published on the CRTC's website.

The first such undertaking was taken by Plentyoffish Media Inc. ("Plentyoffish") in an amount of \$48,000. Plentyoffish was alleged to have sent CEMs without adequate unsubscribe mechanisms.<sup>34</sup>

<sup>34</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, March 25, 2015, File No. 9109-201400318-001

In November, 2015, Rogers Media Inc. ("Rogers") agreed to pay \$200,000 following the allegations that Rogers, over a period of one year, sent CEMs without adequate unsubscribe mechanisms and, during that same period, did not give effect to some unsubscribe requests within ten business days. In addition, Rogers had sent CEMs for which the unsubscribe mechanism did not contain an electronic address that was valid for a minimum of sixty days after being sent.<sup>35</sup>

Following allegations of failure to have adequate unsubscribe mechanisms and failure to give effect to an unsubscribe request within ten business days, Porter Airlines Inc. ("Porter") also made a voluntary undertaking in June, 2015. Porter was unable to provide proof of consent for certain CEMs and was also alleged to have failed to provide complete contact information as required under the CASL. Porter agreed to pay an amount of \$150,000.<sup>36</sup>

In September 2016, Kellogg Canada Inc. ("Kellogg") made a voluntary undertaking to pay \$60,000. According to the ruling, CEMs were allegedly sent by "Kellogg and/or its third party service providers" with obtaining consent. In addition to the payment, Kellogg also undertook to ensure that any third party authorized to send CEMs on its behalf would comply with regulations.<sup>37</sup>

<sup>35</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, November 19, 2015, File No.: 9109-201400319-001.

<sup>36</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, June 26, 2015, File No.: 9109-201400319-001.

<sup>37</sup> Canadian Radio-television and Telecommunications Commission, Ottawa, September 1, 2016, File No.: 9102-201400324-001.

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