Canada’s Anti-Spam Legislation

CASL- Have the Regulators Been Bulls or Bears?

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Seminar Outline

I. Quick Overview of CASL

II. Review of CASL Enforcement Efforts- CEMs
   • Case Studies – Lessons Learned and CRTC Guidance

III. Computer Programs

IV. Enforcement Mechanisms
   • Administrative Monetary Penalties
   • Offences under the Anti-Spam Legislation
   • Private Right of Action

V. Going Forward
   • Shift in Culture
   • Governance/Corporate Compliance Guidelines
Overview – Application of the Legislation

• Applies to all commercial electronic messages ("CEMs")

• A "commercial electronic message" is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that:

  a) offers to purchase, sell, barter or lease a product, good or service...;

  b) offers to provide a business, investment or gaming opportunity; or

  c) advertises or promotes anything referred to in (a) or (b) or who intends to do so.
Overview – CEM Requirements

To send a CEM, you need:

a) consent (express or implied); and
b) compliance with mandated content/unsubscribe information

unless the CEM falls within one of the exemptions

Note: Watch for representations within CEM to not run afoul of *Competition Act* (Avis/Budget)
DON'T PANIC!

Panic Attack

Decreased Frontal Lobe activity.

Increased brain activity in the Thalamus indicating sensory overload resulting in unusual perceptions.

Decreased brain activity in Frontal Lobes causing confusion, disorientation, and the potential for impulsive behavior.
IF ONE OF THESE CONDITIONS APPLIES = FULL EXEMPTION ON CONSENT + CONTENT

No obligation for consent or content requirements if CEM is:

1. By or on behalf of an individual with whom there is a family or personal relationship, as defined by regulation (Personal Relationship Exemption).
2. Sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that business (Business Inquiry Exemption) – and the message is sent in response to such inquiry, request or complaint or is solicited by the person to whom the message is sent;
3. Sent:
   i. Within an organization or between organizations that already have a relationship, where the message concerns the activities of the organization to which the message is sent;
   ii. On platforms (e.g., website) where the required identification and unsubscribe information is conspicuously published on the user interface (avoid needless repetition in message);
   iii. And received within limited-access secure and confidential accounts to which only the provider of the account can send messages, such as banking websites;
   iv. Or solicited in response to complaints, inquiries and requests;
   v. Due to a legal or jurisdictional obligation or to enforce a right, legal or jurisdictional obligation, court order, judgment or tariff; to provide notice of an existing or pending right, legal or jurisdictional obligation, court order, judgment or tariff; or to enforce a right arising under a law of Canada, of a province or municipality of Canada, or of a foreign state;
   vi. By or on behalf of registered charities for fundraising purposes; or
   vii. By or on behalf of a political party or organization, or a person who is a candidate for publicly elected office and the message has as its primary purpose soliciting a contribution.

A) You do not require consent
1. The recipient requested a quote or estimate from you;
2. The CEM is in relation to an existing transaction;
3. The CEM provides warranty, recall or safety information for something the recipient purchased;
4. The CEM gives notification of factual information as part of an on-going subscription, membership or account;
5. The CEM provides employment information;
6. The CEM delivers a product, good or service, including updates or upgrades that the recipient is entitled to under the terms of a previous transaction;
7. Referral by person who has an existing relationship with the sender and recipient and message discloses the full name of the individual or individuals who made the referral and states that the message is sent as a result of the referral (one time).

B) You have implied consent
1. You and the CEM's recipient have an existing business relationship. An "existing business relationship" is defined as a business relationship between the sender and receiver arising from:
   i. The purchase or lease of a product, good or service within the last two years; or
   ii. An inquiry or application in the last six months.
2. The CEM's recipient has either provided her electronic address to the sender (i.e., handing over a business card), or conspicuously disclosed her electronic address (i.e., through a website), without indicating that she does not want to receive communications and the CEM is relevant to her business role.
3. You and the CEM's recipient have an existing non-business relationship. A "non-business relationship" is defined as a relationship between the sender and receiver arising from a donation, gift, membership in a club, or volunteer activity within the last two years.

C) You obtain express consent
When seeking express consent, you must set out:
1. The purpose or purposes for which the consent is being sought; and
2. Information identifying the person seeking the consent.

CONTENT: WHAT INFORMATION MUST BE INCLUDED IN A CEM?

1. The sender's information (i.e., company name) or on whose behalf the message is sent.
2. The sender's contact information (i.e., a valid mailing address and a phone number or email address – these must be valid for a minimum of 60 days after the CEM has been sent).
3. An unsubscribe mechanism (via return email or link and the unsubscribe takes effect within 10 days).
Enforcement Mechanisms – Overview

Spam Reporting Centre ("SRC")

- [http://fightspam.gc.ca](http://fightspam.gc.ca) is the Government website that allows consumers, businesses and other organizations to report violations of CASL

- The three CASL enforcement agencies (the CRTC, Competition Bureau and Office of the Privacy Commissioner) use the information provided to the SRC to investigate CASL violations

- CRTC has received over 600,000 complaints
Review of CASL Enforcement Efforts

Compu-Finder Quebec Company (March 5, 2015)

- Promoting training courses for businesses
- Emails obtained largely from scouring websites
- The first notice of violation issued under CASL
- CRTC issued a fine of $1,100,000 on March 5, 2015
- Alleged violations occurred between July 2 – Sept. 16, 2014
- Accounted for more than one-quarter of the spam complaints received at Spam Reporting Centre (over 245,000 complaints filed)

Causes:

- sending CEMs without the recipient’s consent
- sending CEM with non-complying unsubscribe function
Findings under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*

**PIPEDA Report of Findings #2016-003**

Investigation into the personal information handling practices of “Compu-Finder” (3510395 Canada Inc.)

April 21, 2016

**Report of Findings**

Complaint under the *Personal Information Protection and Electronic Documents Act (“PIPEDA” or the “Act”)*
Lessons Learned from Compu-Finder

- Flagrant and continuous violations of CASL
- **Cannot rely on the conspicuous disclosure exemption** to send CEMs, if CEM is not reasonably relevant to the recipient’s business, role, functions or duties
- Don’t use email harvesting software without express consent
- Don’t mislead the regulators - Information provided to OPC was inconsistent with what the OPC found
- Be prepared to answer questions from regulators for specific electronic addresses and don’t just rely on policies and processes
- Compu-Finder challenging results and CASL
Related Guidance from CRTC:

**Enforcement Advisory – Professional Training Industry**

*When is a CEM relevant to the recipient’s business, role, functions or duties?*

**Example 1:** A training company sends a CEM to the COO on how to be an administrative assistant

- **Not** relevant to the recipient's business, role, functions or duties in a business or official capacity

**Example 2:** A training company sends a CEM to the marketing officer to promote a course on how to develop social media platforms for e-marketing

- Relevant to the recipient's business, role, functions or duties in a business or official capacity
  - Note: the sender of a CEM has the onus of proving consent

If relying on business card/conspicuous publication, sender has the responsibility of demonstrating how its situation meets the criteria for implied consent
Review of CASL Enforcement Efforts (cont’d)

Related Guidance from CRTC: How Can I Prove Implied Consent?

• CASL Compliance Policy/Governance – Starting Point

• Conspicuous Publication Exemption
  • Collecting emails from websites/media publications. Record screenshots or have a record of the publication where the address was listed, including information such as the date, email address and URL.

• Use of third party to acquire email list acquired over the Internet/media publications
  • Sender must still be able to prove that consent was implied. The sender should undertake due diligence and use contractual obligations (reasonable steps) to assure itself that the list satisfies CASL.

• Disclosure of Electronic Address verbally or in writing (business card exemption)
  • Send the person an email referencing the conversation and date where the disclosure was made, and then keep this email (and any response) in their records.
  • Note that confirmation email sent may be considered a CEM. Ensure that proper identification information and an unsubscribe mechanism are included in the message.

Note that these examples are not exhaustive
Review of CASL Enforcement Efforts

PlentyOfFish Media Inc. (March 25, 2015)

- The company failed to include a CASL-compliant unsubscribe mechanism in commercial emails sent to its subscribers
- The violations occurred from July 1 – October 8, 2014
- PlentyofFish entered into undertaking with the CRTC
  - Pay $48,000 penalty under terms of undertaking
Review of CASL Enforcement Efforts (cont’d)

Porter Airlines (June 29, 2015)

• The CRTC alleged:
  • Unable to provide consent for each CEM;
  • Some CEMs did not contain an unsubscribe mechanism;
  • Unsubscribe mechanism was not clearly or prominently set out; and
  • Did not honour unsubscribe requests, in some cases, within 10 business days.
• Porter entered into an undertaking with the CRTC and has agreed to pay a $150,000 fine
Review of CASL Enforcement Efforts (cont’d)

Lessons Learned – Porter/POF

• General compliance with CASL is not enough
  • Need to substantiate consent for each CEM
  • Ensure unsubscribes are prominent, effective and take effect within the required timeframe

• **Conduct audits and random spot** tests to ensure that mechanisms put in place are performing properly – this helps to spot any issues and helps with any due diligence defence should a notice of violation be issued

• Cooperation and real efforts to change practices MAY help reduce fines
Review of CASL Enforcement Efforts (cont’d)

Rogers Media Inc. (November 19, 2015)

• The CRTC alleged:
  • Unsubscribe either didn’t enable the person to unsubscribe or unsubscribe was not readily available;
  • Unsubscribe requests were not given effect within 10 business days;
  • Electronic address referenced in unsubscribe was not valid for 60 days after the message was sent;
• Rogers entered into an undertaking with the CRTC and has agreed to pay a $200,000 fine
Lessons Learned – Rogers

• Ensure “unsubscribes” are:
  • clearly and prominently displayed
  • Easy to use (readily available)
  • If the unsubscribe refers to an email address, ensure that that email address remains active and functional for no less than 60 days after the CEM was sent
• Unclear whether cooperation helped reduce fine
Review of CASL Enforcement Efforts (cont’d)

**Kellogg Canada Inc.** - September 1, 2016

- CRTC alleged:
  - Between October – December 2014, CEMs sent without consent by either Kellogg or its service provider
  - Kellogg entered into an undertaking with the CRTC and has agreed to pay $60,000 fine
Lessons Learned - Kellogg

Ensure:

- Service Provider complies with CASL/doesn’t throw you offside
- Written CASL compliance policies are in place and review them regularly to ensure current
- Employee Training Programs occur
- Tracking each CEM, as well as complaints and subsequent resolutions
- Update monitoring practices and auditing mechanisms to assess compliance
Related Guidance from CRTC: Enforcement Advisory - How To Keep Records of Consent

Onus of proving consent remains with the person(s) sending, causing or permitting the sending of CEMs.

Senders of CEMs to keep a hard copy or electronic record of, among other information:

- all evidence of express and implied consent (e.g. audio recordings, copies of signed consent forms, completed electronic forms) from consumers who agree to receive CEMs
- documented methods through which consent was collected
- policies and procedures regarding CASL compliance
- all unsubscribe requests and resulting actions
The Competition Bureau filed an application with the Competition Tribunal alleging that Avis, Budget and their parent company advertise false and misleading pricing information (by way of advertising prices that are not attainable due to additional mandatory fees imposed).

- The Bureau sought $30 million in administrative monetary penalties and refunds for customers.
- The Bureau moved under CASL because Avis and Budget allegedly used electronic messages to disseminate the alleged false or misleading representations.
Avis and Budget to ensure prices advertised are accurate

Avis and Budget to pay a $3 million penalty to resolve concerns over unattainable prices

June 2, 2016, OTTAWA, Ontario, Competition Bureau

As part of an agreement reached with the Competition Bureau, Aviscar Inc. (Avis) and Budgetcar Inc. / Budgetauto Inc. (Budget) will pay a $3 million administrative monetary penalty for what the Bureau concluded was false or misleading advertising for prices and discounts on car rentals and associated products. They will also be paying $250,000 towards the Bureau’s investigative costs and will be required to implement a corporate compliance program.

A Bureau investigation concluded that certain prices and discounts initially advertised by the two companies were not attainable because consumers were charged additional mandatory fees that were only disclosed later when making a reservation. The prices were advertised on Avis and Budget’s websites, mobile applications and in emails, as well as in certain newspaper advertisements, television commercials and flyers. The Bureau concluded that the representations were misleading even though an estimate of the fees was disclosed before consumers completed their reservation. The mandatory fees could increase the cost of a car rental by 5% to 20% above the original advertised price, depending on the rental location and vehicle type.
Review of CASL Enforcement Efforts (cont’d)

Lessons Learned from Avis and Budget

• CASL isn’t just about consents and unsubscribe requirements

"Consumers are entitled to clear and precise information when making their purchasing decisions and need to be confident that the information they receive regarding additional fees is truthful and accurate." - John Pecman, Commissioner of Competition

• The Bureau’s application shows that CASL is also being used to go after the content of CEMs (not just whether a company has consent to send a CEM or whether the CEM contains proper unsubscribe mechanisms)
Computer Programs

Installation

• As of **January 15, 2015**, new requirements for installing computer programs came into force:
  • Businesses installing software or computer programs on another person’s computer must now have their consent

• Relevant legislation:
  • Section 7 of CASL prohibits alteration of transmission data in CEM without consent
  • Section 8 of CASL prohibits installation of a computer program in the course of commercial activity without consent
    • e.g., new program that tracks geolocation in order to provide a service that depends on geography

• The consents have to be separate for each purpose
  • e.g., grant consent for installation of a computer program, but withhold consent for CEMs
CRTC serves its first-ever warrant under CASL in botnet takedown


The Canadian Radio-television and Telecommunications Commission (CRTC) today announced that it served its first-ever warrant under Canada's anti-spam law (CASL) to take down a command-and-control server located in Toronto, Ontario as part of a coordinated international effort.

Law enforcement agencies from around the globe have disrupted one of the most widely distributed malware families: Win32/Dorkbot. This malware family has infected more than one million personal computers in over 190 countries.

Dorkbot spreads through USB flash drives, instant messaging programs, and social networks. Once a computer becomes compromised, it can be instructed to: steal passwords used for online banking and payments; download and install dangerous malware; and join other infected computers in sending multiple requests to a specific server in the hopes of overwhelming its capacity to respond (known as a distributed denial of service attack).

As part of this investigation, the CRTC is working in close collaboration with its partners, including the Federal Bureau of Investigation, Europol, Interpol, Microsoft Inc., the Royal Canadian Mounted Police (RCMP), Public Safety Canada and the Canadian Cyber Incident Response Centre.

The CRTC will continue to collaborate with its domestic and international partners to aggressively pursue investigations of alleged violations under Canada’s anti-spam legislation (CASL) to protect Canadians from online threats.
Enforcement Mechanisms – Overview

1. Administrative Monetary Penalties ("AMPs")
2. Undertakings
3. Registration with the court-enforced as contempt orders
4. Injunctions, restraining orders
5. Preservation demand
6. Notice to Produce
7. Offences under the Anti-Spam Legislation
8. Search Warrants
9. Private Right of Action
10. Public Shaming
Administrative Monetary Penalties ("AMPs")

- **Violations of the legislation** (i.e. sending unsolicited electronic messages, altering transmission data or installing computer programs) can result the following penalties:
  - $10,000,000 for an organization
  - $1,000,000 for an individual

- Officers, directors or agents are **liable** if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation

- Corporations are also **vicariously liable** for the actions of an employee

- Defence of due diligence is available
Offences under the Anti-Spam Legislation

- Offences are punishable by summary conviction
  - Fines of up to $10,000 (first offence) or $25,000 (subsequent offence) for an individual
  - Fines of up to $100,000 (first offence) - $250,000 (subsequent offence) for a corporation

- Every person commits an offence who:
  1. Fails to comply with a preservation demand;
  2. Fails to comply with a notice to produce; or
  3. Fails to provide assistance to execute a warrant

- Officers, directors or agents are liable if they directed, authorized, assented to, acquiesced in or participated in the commission of the offence
- Corporations are also vicariously liable for the actions of an employee
- Defence of due diligence is available
Private Right of Action

- A person who alleges that they have been affected by an act or omission under the legislation may apply to a court for an order to pay up to a maximum of $1,000,000 for each day that the contravention occurred.

- Of note:
  - The private right of action is subject to a three-year limitation period.
  - July 1, 2017 entry into force of this provision.
Enforcement Mechanisms – Overview (cont’d)

• CASL is enforced by way of notices of violation (a notice issued by one of the regulators, outlining the violation of CASL and penalty)

• The individual/company then has 30 days to either (a) enter into an undertaking (i.e. a form of settlement where the entity agrees to pay a penalty) or (b) appeal the notice of violation

• Recent Undertakings:
  • Rogers, Porter Airlines, PlentyOfFish and Kellogg entered into undertakings with the CRTC
Going Forward

Corporate Compliance Guidelines

The development and proper implementation of a documented and effective corporate compliance policy and program is a risk-management strategy.

It helps to

• reduce the likelihood of businesses violating CASL, and
• establish a due diligence defence in the case of a violation of CASL.
Going Forward

Corporate Compliance Guidelines (cont’d)

• Senior management involvement
  • Senior management should play an active role in fostering a culture of compliance. Designate a senior manager as the chief compliance officer who is responsible and accountable for the development, management and execution of the business’s corporate compliance program

• Risk assessment
  • The chief compliance officer should conduct a risk assessment to determine which business activities are at risk for violating CASL

• Written corporate compliance policy
  • After conducting a risk assessment, develop a written corporate compliance policy to mitigate risks
  • Policy should be easily accessible to all employees, including managers
**Going Forward**

**Corporate Compliance Guidelines (cont’d)**

**Record Keeping**
Ensure good recordkeeping practices to:
- identify potential non-compliance issues
- investigate and respond to consumer complaints
- respond to questions about the business’s practices and procedures
- monitor their corporate compliance program
- identify the need for corrective actions and demonstrate that these actions were implemented
- establish a due diligence defence in the event of complaints to the Commission against the business

**Third Party Contracts**
Ensure detailed provisions are in place and acted upon (audit checks) to ensure compliance and help establish due diligence defence
What are my Next Steps?

1. Determine person/group responsible for compliance. Need management buy-in

2. Look at all existing contacts
   i. What are they made of? Existing or potential clients?
   ii. How old are the clients? Do we have current existing business relationships, or within past 2 years?
   iii. Understand how you’ve obtained this list- other than existing clients (networking, business trips, seminars/webinars, client events, referrals, newsletter/online sign ups?)
   iv. What country is the contact in?

3. Understand how organization develops additional contacts
   i. networking, business trips, seminars/webinars, client events, referrals, newsletter/online sign ups?
What are my Next Steps? (cont’d)

4. CRM Software/Database - Build fields to track dates and contextual information based on business development that is relevant for determining exemptions and reliance on express/ implied consent

5. Ensure unsubscribe option capability and operationalized (note who has to have unsubscribe)

6. How many contacts fit into “exempted category”? 

7. How many can you imply consent?
What are my Next Steps? (cont’d)

8. Build website language for webinars, newsletters, alerts that establish express consent

9. Consider adding express consent to retainer package - but ensure it’s separate from retainer agreement

10. If third parties are involved in acquiring electronic addresses or sending CEMs, ensure those contracts and that relationship reflects CASL obligations (consent, record keeping, notification of unsubscribes, etc.)

11. Have written CASL policy

12. Training of staff and lawyers

13. Audit
Thank You

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