



McCarthy Tétrault *Advance*[™]
Building Capabilities for Growth

Council of Ontario Universities

CASL Update

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Voluntary undertakings & NOV

- Plentyoffish, Mar. 2015, \$48K (unsubscribe not clear and prominent and not readily performed)
- Porter June, 2015, \$150 (Can't prove consent, lack contact info in CEM, no or unclear unsubscribe [2, 1 not working=not clear or prominent], 1 unsubscribe not given effect to)
- Rogers Media Nov. 2015 \$200K (no, or non-functioning, or failing to give effect, to unsubscribe, unsubscribe electronic address not valid 60 days)
- Kellogg Aug. 2016, \$60K (no consent)
- Notice of Violation: Compu-Finder Mar. 2015, \$1.1 million (no consents, not functioning unsubscribe)

Blackstone Learning Corp. Compliance and Enforcement Decision CRTC 2016-428, Oct 26, 2016

- 385,668 CEMs sent by Blackstone in 9 messaging campaigns over 2 months – no consent
- Notice of violation set out AMPs of \$640,000.
- “The Commission finds that Blackstone Learning Corp. (Blackstone) committed nine violations of paragraph 6(1)(a) of Canada’s Anti-Spam Legislation by sending commercial electronic messages without consent, and imposes an administrative monetary penalty of \$50,000 on the company.”

Blackstone Learning Corp. Compliance and Enforcement Decision CRTC 2016-428, Oct 26, 2016

- “The conspicuous publication exemption and the requirements thereof set out in paragraph 10(9)(b) of the Act set a higher standard than the simple public availability of electronic addresses...
- Paragraph 10(9)(b) of the Act does not provide persons sending commercial electronic messages with a broad licence to contact any electronic 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. Pursuant to section 13 of the Act, the onus of proving consent, including the elements of implied consent under paragraph 10(9)(b) of the Act, rests with the person relying on it. Various publications on both the Commission’s website and on the Department of Industry’s web page related to the Act stress the importance of detailed and effective record-keeping for this reason.”

Blackstone Learning Corp. Compliance and Enforcement Decision CRTC 2016-428, Oct 26, 2016

- “As stated in the Act, the purpose of a penalty is to promote compliance with the Act, and not to punish. To this end, the penalty set out in the notice of violation places great emphasis on the principle of general deterrence...
- The Commission accepts that Blackstone is a small business with a relatively limited ability to pay. The evidence demonstrates that Blackstone was aware of the Act, and made appropriate, if limited, inquiries before the Act came into force and after learning that the company was under investigation. The Commission is concerned that the company did not cooperate with the investigation, but recognizes that CASL is a relatively new regulatory regime and that Blackstone has no history of non-compliance under CASL or related acts. The company erroneously believed it had implied consent to send commercial electronic messages and did not have the benefit of more recent guidance published on this topic...
- The Commission finds, on a balance of probabilities, that Blackstone committed the nine violations set out in the notice of violation, and imposes a total penalty of \$50,000 on the company.”

William Rapanos, Compliance and Enforcement Decision CRTC 2017-65, March 9, 2017

- 35 CEMs sent on 2 occasions, without the consent of the recipients, missing the required identification and contact information, and failing to set out an unsubscribe mechanism. (6 violations)
- 15 CEMs sent 1 occasion without the consent of the recipients and missing the required identification and contact information. (2 violations)
- 8 CEMs sent on 1 occasion, without the consent of the recipients and missing the required identification and contact information. (2 violations)
- “...the purpose of a penalty is to promote compliance with the Act and not to punish. Having taken the investigation report and Mr. Rapanos’ representations into consideration in its review of the prescribed factors, and for the reasons set out above, the Commission finds, on a balance of probabilities, that Mr. Rapanos committed the 10 violations set out in the notice of violation, and imposes a total penalty of \$15,000.”

Bejim v Law Society of BC 2015 BCSC 169

“The second issue raised by Mr. Bejm is an alleged breach of the federal *Anti-Spam Act*. I need not go into that in great detail. However, it is clear that the legislation does not apply to the contact made by the Law Society with Mr. Bejm. First, I doubt very much that the emails meet the definition of “commercial activity” or the definition of “commercial electronic message” contained in the *Anti-Spam Act*. However, even if they do, it is quite clear that the Law Society’s emails fall within exceptions to the *Anti-Spam Act*. Section 6(5)(b) and (c) exclude messages that are sent to a person who is in a commercial activity and consist only of an inquiry or application related to that activity. That appears to be what the Law Society has done here.”

Bejim v Law Society of BC 2015 BCSC 169

- ↪ “Furthermore, s. 3 of the Regulations to that Act provides that s. 6 of the Act, which deals with commercial electronic messages, does not apply to a message that is sent to a person:
 - ↪ (i) to satisfy a legal or juridical obligation,
 - ↪ (ii) to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff,
 - ↪ (iii) to enforce a right, legal or juridical obligation, court order, judgment or tariff, or
 - ↪ (iv) to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state ...
- ↪ The emails from the Law Society may fall within all four of those subsections, but certainly fall within subsections (i) and (ii).”

Private Right of Action

Offences under ss. 6-9 of CASL

- CEMs and unsubscribes
- Altering transmission data
- Installation of computer program

Offences introduced by CASL into PIPEDA & *Competition Act*

- Address harvesting
- False or misleading subject-header, sender information, locator or body of a CEM
- Will it come into force?

Private Right of Action

Compensation for loss, damages and expenses PLUS

- awards capped at maximum of \$200 per contravention and \$1 million per day for breach of CEM and Competition Act, with risk of class actions
- awards capped at \$1 million per day for program violations

Getting ready for PRA

- Audits
- Policies
- Due Diligence
- Fire drills

Transitional provisions

Existing business or non-business relationships

66. A person's consent to receiving commercial electronic messages from another person is implied until the person gives notification that they no longer consent to receiving such messages from that other person or until three years after the day on which section 6 comes into force, whichever is earlier, if, when that section comes into force,

(a) those persons have an existing business relationship or an existing non-business relationship, as defined in subsection 10(10) or (13), respectively, without regard to the period mentioned in that subsection; and

(b) the relationship includes the communication between them of commercial electronic messages.

Expires July 1, 2017

Transitional provisions

Software updates and upgrades

67. If a computer program was installed on a person's computer system before section 8 comes into force, the person's consent to the installation of an update or upgrade to the program is implied until the person gives notification that they no longer consent to receiving such an installation or until three years after the day on which section 8 comes into force, whichever is earlier.

Expires January 1, 2018

What CEMs does CASL apply to?

- Recruitment?
- Promotion of programs?
- Housing?
- Bookstore?
- Parking?
- Food services?
- Sports events?
- Loyalty/affinity programs, alumni, fundraising?
- Internal messages?
- Procurement?

What CEMs does CASL apply to?

- “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, goods, a service, land or an interest or right in land;**
 - **(b) offers to provide a business, investment or gaming opportunity...**

What CEMs does CASL apply to?

- **CASL:** “commercial activity” means any particular 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 in the expectation of profit, other than 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.
- **PIPEDA:** “commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

What CEMs does CASL apply to?

- OPC: The Application of PIPEDA to Municipalities, Universities, Schools, and Hospitals: Dec. 2015 PIPEDA and the MUSH Sector
- “The Constitution Act, 1867 gives the provinces authority over municipal institutions, education and hospitals. PIPEDA is based on the federal government's jurisdiction over "the regulation of trade and commerce.”
- While municipalities, educational institutions and hospitals may occasionally provide services on a fee basis, they are not, on the whole, engaged in trade and commerce as contemplated by the Canadian Constitution. Furthermore, these institutions are completely or largely dependent on municipally or provincially levied taxes and provincial grants.
- As a result, our Office is of the view that, as a general rule, PIPEDA does not apply to the core activities of municipalities, universities, schools, and hospitals. By core activities we mean those activities that are central to the mandate and responsibilities of these institutions.” (emphasis added)

What CEMs does CASL apply to?

PIPEDA and the MUSH Sector:

“Providing a service for a fee does not necessarily trigger the application of the Act if the service is part of the institution's core activities. For example, charging a fee for a private room or charging extra for a fiberglass cast does not automatically make a hospital or even that transaction subject to the Act. Similarly, a municipality can charge a per bag fee to collect garbage, or charge for the use of a playing field or arena, without becoming subject to the Act.”

What CEMs does CASL apply to?

PIPEDA and the MUSH Sector:

“A municipality, university, school or hospital may become subject to the Act when it engages in a non-core commercial activity, unless substantially similar provincial legislation applies. For example, if a university sold or bartered an alumni list, that activity would be considered a commercial activity and that particular transaction would be subject to the Act. As well, personal information collected by a university or a hospital in the course of operating a parking garage would probably be subject to the Act since this would not be considered a core activity.”

What CEMs does CASL apply to?

PIPEDA and the MUSH Sector:

“A coffee shop in a hospital or university, a TV rental service in a hospital, a university bookstore or any other business conducting commercial activity operated by a third party within one of these institutions would be subject to the Act, unless substantially similar provincial legislation applies.”

What CEMs does CASL apply to?

- CRTC FAQ:
- “Does CASL apply to federal, provincial, territorial and municipal governments?”
- CASL does not apply to the activities of the federal, provincial and territorial governments. CASL does apply, however, to crown corporations, including municipal governments, when the corporation is acting in the course of any commercial activity.”

What CEMs does CASL apply to?

- ↪ Recruitment?
- ↪ Promotion of programs?
- ↪ Housing?
- ↪ Bookstore?
- ↪ Parking?
- ↪ Food services?
- ↪ Sports events?
- ↪ Loyalty/affinity programs, alumni, fundraising?
- ↪ Internal messages?
- ↪ Procurement?

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