

**Enforcement of CASL's Anti-Spam Rules by the
Canadian Radio-television and Telecommunications Commission (CRTC):
Words, Deeds, Tools and Processes**



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by Bill Hearn, Partner, Fogler Rubinoff, LLP
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Overview

- Words - What's the CRTC's general approach to CASL enforcement?
- Deeds - What's the history of the CRTC's enforcement of CASL?
- How are complaints made to the Spam Reporting Centre?

Overview

- What are the tools and processes the CRTC uses to enforce CASL?
 - Preservation demand
 - Notice to produce
 - Warrant
 - Undertaking
 - Notice of violation
 - Determination of responsibility and restraining order
 - Appeal to Federal Court of Appeal
 - Recovery of penalty and other amounts
 - Injunction
 - Court orders for enforcement
 - Making information public
 - Disclosure to Privacy Commissioner of Canada, Commissioner of Competition or Foreign States

Overview

- What factors determine the amount of administrative monetary penalties (AMPs) and monetary payments for undertakings?
- What are some takeaways from the CRTC's enforcement of CASL over the past 18 months?

CRTC's General Enforcement Approach

Words - *CRTC's FAQs*

- **Efficiently promote compliance** while preventing relapses
- Deter others from non-compliance by making them understand what is required to comply and the consequences if they don't comply
- Achieve a high level of voluntary compliance and **deter severe non-compliance**
- Take enforcement approach dictated by the specific circumstances of each case
- Adopt appropriate enforcement response based on various factors listed in CASL including the nature, seriousness and impact of the alleged CASL violation, the history of non-compliance and any preventative measures taken
- **Be proportionate and measured**

CRTC's General Enforcement Approach

Words - *CRTC's FAQs*

- When assessing a measure or penalty for non-compliance, will **take into account steps that show due diligence** (e.g., tracking how email addresses have been obtained and including an unsubscribe option where required)
- Will focus on cases where there are a significant number of complaints or there is a major transgression
- Will **emphasize education and compliance, not punishment**
- In the case of a violation, an undertaking with CRTC will eliminate the possibility of private lawsuit (See section 48(1) of the provisions relating to the private right of action under CASL that don't come into force until July 1, 2017.)

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- Access Communications (AC), October 7, 2014
 - In July 2014, the Spam Reporting Centre received reports of spam messages being routed through AC an Internet service provider (ISP)
 - During its investigation, the CRTC discovered that the spam was actually coming from the server of a small Saskatchewan –based computer reseller, a customer that used AC as its ISP
 - The customer's server had become infected with malware which caused it to join a botnet
 - Millions of malicious spam messages had been sent from the infected server without the knowledge of the customer or AC (e.g., 73 million messages in July alone)
 - Once alerted to the situation by the CRTC, the customer and AC fully cooperated and removed all traces of the malware; working together with the CRTC, the customer and AC prevented millions of spam messages from being sent to Canadians as well as the potential harm these messages may have caused
 - There was no undertaking, monetary payment or AMPs
 - In the CRTC's press release, Manon Bombardier, the CRTC's Chief Compliance and Enforcement Officer (Chief C&EO) touted this investigation as a success, illustrating how the CRTC can tailor its enforcement actions to the situation at hand

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- 3510395 Canada Inc., dba Compu.Finder (C.F) , March 5, 2015
 - CRTC issued a notice of violation to C.F, which included an AMP of \$1.1 million
 - Notice alleged four CASL violations – that, from July 2014 to mid-September, 2014, C.F sent commercial electronic messages (CEMs):
 - In three patterns without consent (resulting in three violations); and
 - Containing an unsubscribe that did not function properly (resulting in one violation) – i.e., the unsubscribe was not valid for a minimum of 60 days after the CEM was sent and C.F did not give effect to the unsubscribe indication without delay and in any event within 10 business days of the indication
 - Further, the CRTC's analysis of complaints to the Spam Reporting Centre showed that C.F accounted for 26% of all complaints in this industry sector
 - C.F sent unsolicited CEMs to addresses it found by scouring websites; many recipients complained that C.F's offerings in the CEMs were not relevant to them

History of CRTC's Enforcement

Deeds - *Reported CRTC Enforcement Actions*

- 3510395 Canada Inc., dba Compu.Finder (C.F) , March 5, 2015
 - In the CRTC's press release, the Chief C&EO alleged that C.F "flagrantly violated the basic principles of the law" and that the notice of violation is "to encourage a change of behaviour" on C.F's part
 - C.F was given 30 days to submit written representations to the CRTC, or pay the \$1.1 million AMP, or request an undertaking with the CRTC
 - Unfortunately, from a transparency standpoint, there are no further details in any CRTC press release regarding the status of this enforcement action but it is generally known that:
 - C.F. did not pay the \$1.1 million AMP
 - Instead, it submitted written representations to the CRTC (which may include a submission challenging the constitutionality of CASL's AMPs)
 - The CRTC has not yet made a determination of responsibility decision
 - Once made, C.F. may appeal the CRTC's decision to Federal Court of Appeal (and that appeal may include a constitutional challenge of CASL)

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- Plentyoffish Media Inc. (POF), March 25, 2015
 - POF paid \$48,000 as part of an undertaking to resolve one alleged violation of CASL's unsubscribe mechanism requirement – i.e., that in POF's CEMs the unsubscribe was not clearly and prominently set out and could not be readily performed
 - From July 1, 2014 to October 8, 2014, POF sent CEMs to registered users of its online dating site services with an unsubscribe mechanism that allegedly did not comply with CASL
 - Once made aware of the investigation by the CRTC, POF updated its unsubscribe mechanism to comply with CASL
 - CRTC's press release confirmed that the CRTC appreciated that POF changed its practices once it became aware of the problem
 - As part of the undertaking, POF agreed to develop and implement a CASL compliance program, which included training and education of staff and corporate policies and procedures

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- Porter Airlines Inc. (Porter), June 29, 2015
 - Porter paid \$150,000 as part of an undertaking to resolve various alleged CASL violations, including those relating to unsubscribe mechanisms, the provision of contact information and proof of consent – in particular, that allegedly:
 - In some instances, Porter had sent CEMs that did not contain an unsubscribe mechanism; in others, the unsubscribe mechanism was not clearly or prominently set out; in a few other instances, Porter failed to honour, within 10 business days, requests from some recipients to unsubscribe from receiving future CEMs
 - In some CEMs, Porter's contact information had not been provided as required by the sender identification requirements under CASL
 - For some emails sent between July 2014 and February 2015, Porter was unable to provide proof, satisfactory to the CRTC, that Porter had obtained consent for each electronic address that received CEMs
 - As part of the undertaking, Porter agreed to enhance its existing CASL compliance program by increasing training and education for staff and improving corporate policies and procedures

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- Porter Airlines Inc. (Porter), June 29, 2015
 - Once made aware of the CRTC's investigation, Porter immediately took corrective action to fully comply with CASL (a fact for which the CRTC expressed appreciation in its press release)
 - In Porter's undertaking filed in Federal Court, the CRTC acknowledged that **“Porter had taken steps, with due diligence and in good faith, to implement procedures and processes aimed at obtaining consent in a valid manner, as required under the Act, identifying itself as the sender of its commercial electronic messages, providing a compliant unsubscribe mechanism, and fulfilling unsubscribe requests”**
 - In the CRTC's press release, the Chief C&EO expressed the CRTC's administrative position that “to be fully compliant with the law, proof of consent is required for each electronic address” and that businesses are not compliant with CASL “by relying on general business practices or policies as proof of consent for the majority of the electronic addresses to which they send their commercial emails”

History of CRTC's Enforcement

Deeds - Reported CRTC Enforcement Actions

- Rogers Media Inc. (Rogers), November 20, 2015
 - Rogers paid \$200,000 as part of an undertaking to resolve alleged violations of various CASL requirements between July 2014 and July 2015, including that Rogers allegedly sent some CEMs:
 - Containing an unsubscribe mechanism that did not function properly or which could not be readily performed by the recipient
 - Where the electronic address used to unsubscribe was allegedly not valid for the required 60 days following the sending of the message
 - Where Rogers failed to honour, within 10 business days, requests from some recipients to unsubscribe from receiving future CEMs
 - As part of the undertaking, Rogers agreed to improve its existing CASL compliance program to ensure its activities are fully compliant with CASL
 - In its press release, the CRTC acknowledged that Rogers cooperated fully with the CRTC during its investigation and took steps to better comply with CASL
 - In the CRTC's press release, the Chief C&EO stated that "Companies must respect the choices of Canadians who do not wish to receive commercial emails, and must make it easy for them to unsubscribe from their mailing lists"

Complaints About CASL Enforcement

Making Complaints to the Spam Reporting Center (SRC)

- Anyone (consumers, businesses and other organizations) can report violations of CASL to the SRC
- Complaints may be submitted electronically through Fightspam.gc.ca (<http://fightspam.gc.ca/eic/site/030.nsf/frm-eng/MMCN-9EZV6S>) and are accessed by the applicable CASL enforcement agency (i.e., the CRTC, the Competition Bureau (Bureau) or the Office of the Privacy Commissioner of Canada (OPC)), depending on the nature of the complaint
- Complaints about spam, altering transmission data or malware are accessed by the CRTC; the Bureau accesses complaints about deceptive electronic messages; and the OPC accesses complaints about phishing and electronic address harvesting
- There are two options for making complaints: (1) completing a detailed Web-based form called “Submit Information to the Spam Reporting Centre” or (2) simply forwarding the email to the spam@fightspam.gc.ca email address

Complaints About CASL Enforcement

Making Complaints to the Spam Reporting Center (SRC)

- Complaints are subject to an Industry Canada Privacy Notice Statement describing, among other things, what information is collected and how it is handled - i.e., collected, used, shared, accessed & corrected, stored, protected and retained
- Complainants are given reference numbers for their complaints if successfully submitted
- Complainants aren't contacted unless the applicable CASL enforcement agency requires additional information
- Not all complaints are investigated
- At last count (at least as published by the CRTC in March 2015)– only 9 months after CASL had come into force), there were almost 50 times as many spam complaints made by email (roughly 245,000) than by the web-based form (roughly 5,000)
- Evidently, the SRC receives roughly 1,000 complaints per day
- Don't know how many investigations are underway but there have been only 5 reported enforcement actions to date

CRTC's Enforcement Tools and Processes

Preservation Demand

- CRTC may order a telecommunications service provider (TSP) to preserve transmission data in its possession or control for verifying compliance with CASL or assisting an investigation/proceeding regarding a contravention of foreign laws substantially similar to CASL
- The demand lasts for 21 days after being served unless extended by the CRTC for one further 21 day period; the demand may include conditions to prevent disclosure of its contents where it is reasonable to believe that disclosure would jeopardize the CRTC's investigation; within 5 days of being served the demand, the TSP may apply to the CRTC for a review on the grounds that the preservation demanded would place an undue burden on the TSP

Notice to Produce

- CRTC may order any person to produce, or prepare and produce, a document in their possession or control for verifying compliance with CASL or assisting an investigation/proceeding regarding a contravention of foreign laws substantially similar to CASL
- The notice must require the document(s) to be produced to the CRTC within the time, at the place and in the form specified in the notice; the notice may include conditions to prevent disclosure of the document's contents where it is reasonable to believe that disclosure would jeopardize the CRTC's investigation; at any time before they are required to produce, the person may apply to the CRTC for a review on the grounds that the requirement to produce is unreasonable in the circumstances or that production would disclose privileged information

CRTC's Enforcement Tools and Processes

Warrant

- On an *ex parte* application, a justice of the peace may issue a warrant authorizing the CRTC to enter a place to verify compliance with CASL or assist an investigation/proceeding regarding a contravention of foreign laws substantially similar to CASL
- The warrant may contain conditions (including to protect privileged information); subject to these conditions, the CRTC may, among other things, examine anything found in the place, remove anything found in the place for examination or copying, and prohibit or limit access to the place; the owner, person in charge and every person found in the place must give the CRTC all assistance (including information, data and documents) that is reasonably required to enable the CRTC to execute the warrant

Undertaking

- At any time, a person may enter into a voluntary undertaking with the CRTC to resolve alleged CASL violations provided the undertaking is accepted by the CRTC, identifies every alleged CASL contravention, contains any conditions that the CRTC considers appropriate (which may include a requirement to pay a specified monetary amount – technically, not an AMP)
- If a person enters into an undertaking, no notice of violation may be served on them for any alleged CASL violation covered by the undertaking; or if the notice has already been served, the proceeding commenced is ended
- Also, an undertaking with the CRTC will eliminate the possibility of a private lawsuit once the private right of action comes into force on July 1, 2017

CRTC's Enforcement Tools and Processes

Notice of Violation

- The CRTC may issue a notice of violation, and cause it to be served on a person, if the CRTC believes on reasonable grounds that the person has committed a CASL violation
- The notice must: name the person; identify all CASL violations at issue; set out the AMP and time and manner of payment; inform the person (i) that they may make representations to the CRTC within 30 days (or such longer period as set out in the notice) after the notice has been served and the manner for making the representations, (ii) that if they do not pay the AMP or make representations, they will be deemed to have committed the violation and the AMP will be imposed, and (iii) that if they are found or deemed to have committed a violation, they may be the subject of a court order enforcing compliance

Determination of Responsibility

- If a person makes representations in response to the notice of violation, the CRTC will decide, on a balance of probabilities, whether the person committed the alleged CASL violation and, if so, may impose the AMP set out in the notice, or reduce or waive the AMP, subject to any conditions that the CRTC considers necessary to ensure CASL compliance
- In proceedings under CASL (including determinations of responsibility), the CRTC has the powers of a superior court with respect to the attendance and examination of witnesses and the production and examination of documents and things
- The CRTC must cause a copy of its decision (including any restraining order the CRTC makes directing the person to stop contravening CASL) to be served on the person together with a notice of their right to appeal

CRTC's Enforcement Tools and Processes

Appeal to Federal Court of Appeal

- An appeal may be brought to the Federal Court of Appeal from a CRTC decision regarding:
 - (i) review of a preservation order,
 - (ii) review of a notice to produce, or
 - (iii) determination of responsibility or a restraining order relating to that determination
- An appeal on a question of fact may be brought only with leave of the Federal Court of Appeal
- The application for leave must be brought within 30 days after the decision or order is made
- The appeal must be brought within 30 days after the leave to appeal is granted

CRTC's Enforcement Tools and Processes

Recovery of Penalty and Other Amounts

- Within five years after the day on which an AMP or other monetary amount becomes payable by a person subject to a notice of violation or undertaking, the CRTC may commence a proceeding in Federal Court to recover the amount (plus reasonable expenses incurred in attempting to recover the amount) as a debt owing to Her Majesty in right of Canada
- The CRTC may issue a certificate certifying the unpaid amount of any debt; registration of that certificate in the Federal Court has the same effect as a judgement of that court for the amount set out in the certificate and all registration costs

Injunction

- On 48 hours' notice (or no notice where the urgency of the situation is such that notice is not in the public interest), the CRTC may apply to a court of competent jurisdiction for an injunction ordering any person named in the application to refrain from doing anything or to do anything that, in the opinion of the court, is required for CASL compliance

Court Orders for Enforcement

- A CRTC preservation demand, notice to produce, undertaking and determination of responsibility order may be made an order of a court of competent jurisdiction and may be enforced as an order of that court

CRTC's Enforcement Tools and Processes

Making Information Public

- The CRTC may make public: (i) regarding undertakings, the name of the person entering it, the nature of the undertaking (including the CASL violation at issue), the conditions of the undertaking and the amount payable under it; and (ii) regarding anyone deemed or found by the CRTC or on appeal to have committed a CASL violation, the name of the person, the CASL violation at issue, and the amount payable as a result

Disclosure to Privacy Commissioner of Canada(OPC), Commissioner of Competition (Commissioner),Foreign States

- The CRTC may disclose information obtained by it in enforcing CASL to: (i) the OPC if the CRTC believes that the information relates to the OPC's CASL enforcement responsibilities (e.g., phishing and electronic address harvesting); or (ii) the Commissioner if the CRTC believes that the information relates to the Commissioner's CASL enforcement responsibilities (e.g., deceptive electronic messages)
- The CRTC may also disclose information under a written agreement between the Government of Canada/CRTC and a foreign state/CRTC's counterpart in that foreign state where, among other things, the CRTC believes that the information may be relevant to an investigation/proceeding in that foreign state of conduct in contravention of that foreign state's laws that is substantially similar to the conduct prohibited under CASL

AMPs under CASL

General

- Purpose of AMP is to promote CASL compliance, not to punish
- Maximum penalty for a single violation of CASL is \$1,000,000 for an individual and \$10,000,000 for any other person
- The Governor in Council may make regulations (i) designating provisions whose contravention constitutes a separate violation in respect of each day during which it continues and (ii) establishing factors for the purposes of determining the amount of an AMP [**No such regulations have been made.**]
- A person must not be found to be liable for a violation if they establish that they exercised due diligence to prevent the commission of the violation – CASL section 33(1)

AMPs under CASL

Factors When Determining AMP Amount

- The CRTC must take into account the following factors when determining the amount of an AMP (or a monetary payment under an undertaking):
 - the purpose of the AMP
 - the nature and scope of the violation (CRTC FAQs elaborate as `seriousness and impact`)
 - the person's history regarding any previous CASL violations or CASL undertakings
 - any financial benefits that the person obtained from committing the violation
 - the person's ability to pay the penalty (which, as a matter of practice, the CRTC seems to determine solely on the basis of the person's gross revenue, not profit)
 - whether the person has voluntarily paid compensation to a person affected by the violation
 - the factors established by the regulations (so far, none)
 - any other factor (per CRTC words and deeds, the person's level of cooperation during the CRTC's investigation, their due diligence in trying to prevent CASL violations, their readiness to correct problems identified by the CRTC, and general and specific deterrence)

Some Takeaways

- There is still lots of uncertainty as to how the CRTC applies many of the provisions of CASL and how the CRTC calculates penalties
- There are only five reported CRTC enforcement actions and the details of each are limited to the CRTC's press release and a summary of the notice of violation or undertaking in question
- The undertakings themselves are filed with the Federal Court and generally accessible only through the court not via the CRTC's website
- In special circumstances, CRTC may not AMP a spam sender whose server has been compromised, unbeknownst to the sender, if the sender cooperates fully and promptly after being alerted to the problem by the CRTC

Some Takeaways

- Depending on the circumstances, the CRTC may treat violations of the consent requirement, the sender identification requirement and the unsubscribe requirement as equally serious violations of CASL
- The CRTC does not seem open to allowing full cooperation with the investigation and evidence of the sender's due diligence to result in an undertaking that does not have any penalty; rather such factors go only to reducing the amount of the monetary payment
- For the CRTC, being proportionate and measured and emphasizing education and compliance (not punishment) does not mean the CRTC is reluctant to impose significant penalties

Some Takeaways

- Expanding on a recent lament by Canadian lawyer David Elder (following the CRTC’s enforcement action against Rogers announced November 20th), a troubling trend seems to be emerging toward CRTC enforcement against legitimate Canadian companies who, despite good faith efforts to establish rigorous and effective CASL compliance programs, have still made honest and modest **mistakes** in their attempts to comply with the **new**, complex and vague provisions of CASL
- Consistent with the CRTC’s expressed “general enforcement approach” set forth in its CASL FAQs, it is submitted that the CRTC should give consideration to focusing on cases where there is a major transgression - i.e., by taking action against the most damaging and deceptive types of spam

Questions

“Anyone who has never made a mistake has never tried anything new.”
Albert Einstein

Thank You

Bill Hearn, Partner
Fogler, Rubinoff LLP

77 King Street West, Suite 3000
TD Centre North Tower
Toronto, ON M5K 1G8

416.941.8805

bhearn@foglers.com

If you'd like a copy of a recent article of mine on Canadian advertising law, please
email me at bhearn@foglers.com

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