

# 8<sup>th</sup> Annual Information Privacy and Data Protection CASL UPDATE

fogler  
rubinoff



*Colleen Spring Zimmerman*  
*Partner*

Fogler, Rubinoff LLP  
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# Agenda

- Overview of CASL - Refresher
- Enforcement Mechanisms
  - Administrative Monetary Penalties
  - Offences
  - Private Right of Action
- CASL Enforcement Efforts
  - Case Studies
  - Impacts
  - CRTC Guidance
- Computer Programs
- Where Are We
  - Shift in Actions
  - Compliance Guides



## I – Overview of CASL - Refresher

- All commercial electronic message (“CEMs”):  
A “commercial electronic message” is an electronic message that, having regard to the content of the message, has as its purpose, to encourage participation in a commercial activity
- Not apply to non-commercial activity, voice, fax or auto-recorded voice calls (robo-calls) or broadcast messaging, including tweets or posts
- Applies to email, telephone, instant messaging

# I – Overview of CASL

Sending CEMs need:

- Consent (express or implied); and
- Compliance with mandated content/unsubscribe information
- Unless the CEM falls within one of the exemptions
- Promotion content not run afoul of *Competition Act* (see Avis/Budget)

# I – Overview of CASL

- End of 3 year transition period
- July 1, 2017
- Private Right of Actions and reduced implied consent standard
- Impact
- Analyze databases



## II – Enforcement Mechanisms

- Administrative Monetary Penalties (“AMPs”)
- Undertakings
- Notice to produce
- Search Warrants
- Private Right of Action

## II – Enforcement Mechanisms

### Administrative Monetary Penalties (“AMPs”)

- Violations of the legislation:
  - \$10,000,000 for an organization
  - \$1,000,000 for an individual

## II – Enforcement Mechanisms

### Offences under the Anti-Spam Legislation

- Punishable by summary conviction
  - Fines of up to \$10,000 (first offence) or \$25,000 (subsequent offence) for an individual
- Commit an offence if you:
  1. Fail to comply with a preservation demand;
  2. Fail to comply with a notice to produce; or
  3. Fail to provide assistance to execute a warrant
- Officers, directors or agents are liable if they direct, authorize, assent to, acquiesce in or participate in the offence
- Corporations can be vicariously liable for the actions of their employees
- Defence of due diligence is available





## II – Enforcement Mechanisms

### Private Right of Action

- Before the Courts
  - Against those who contravene CASL
- A monetary penalty up to a maximum of \$1,000,000 per day that the contravention occurred
- July 1, 2017 entry into force of this provision

## II – Enforcement Mechanism

- Notices of violation
  - Issued by one of the regulators, outlining the violation of CASL and the penalty
- 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

## III – Overview of CASL

### Spam Reporting Centre (“SRC”)

- <http://fightspam.gc.ca> – the Government website that allows consumers, businesses and other organizations to report violations of CASL
- The CRTC, Competition Bureau and Office of the Privacy Commissioner (the three CASL enforcement agencies) use the information provided to investigate violations
- Millions of complaints

### III – CASL Enforcement Efforts

#### **Compu-Finder Quebec Company (March 5, 2015)**

- First notice of violation issued under CASL

#### Facts:

- Promoting training courses and email addresses obtained from searching websites
- CEMs sent without the recipient's consent
- CEM sent with non-complying unsubscribe functions
- Violations occurred between July 2 – September 16, 2014 (note date)
- CRTC issued a fine of \$1,100,000 on March 5, 2015

## III – CASL Enforcement Efforts

### **PlentyOfFish Media Inc. (March 25, 2015)**

#### Facts:

- Failed to include a CASL-compliant unsubscribe mechanism in commercial emails sent to its subscribers
- Violations occurred from July 1 – October 8, 2014 (note date)
- PlentyOfFish entered into undertaking with the CRTC
- Paid \$48,000 penalty under the undertaking

## III – CASL Enforcement Efforts

### Porter Airlines (June 29, 2015)

#### Facts:

- Unable to provide consent for each CEM;
- Some CEMs did not contain an unsubscribe mechanism;
- Unsubscribe mechanism was not clearly or prominently labelled
- Did not honour unsubscribe requests within 10 business days
- Violations took place between July 2014 and April 2015 (note date)
- Porter entered into an undertaking with the CRTC
- Paid a \$150,000 fine

## III – CASL Enforcement Efforts

### **Rogers Media Inc. (November 19, 2015)**

#### Facts:

- Unsubscribe did not enable the person to unsubscribe or unsubscribe was not readily available
- Unsubscribe requests were not given effect within 10 business days
- Electronic address in the unsubscribe was not valid for 60 days after the message was sent
- Violations took place between July 2014 and July 2015 (note date)
- Rogers entered into an undertaking with the CRTC
- Paid a \$200,000 fine

## III – CASL Enforcement Efforts

### **Kellogg Canada Inc. – September 1, 2016**

#### Facts:

- CEMs sent without consent by either Kellogg or its service provider
- Violations occurred between October – December 2014 (note date)
- Kellogg entered into an undertaking with the CRTC
- Paid a \$60,000 fine



### III – CASL Enforcement Efforts

## Blackstone Learning Corp. – October 26, 2016

### Facts:

- CEMs sent without consent
- Violations occurred between July and December, 2014 (note date)
- Notice of violation set out an AMP of \$640,000
- Total penalty of \$50,000 imposed (to be paid by November 25, 2016)

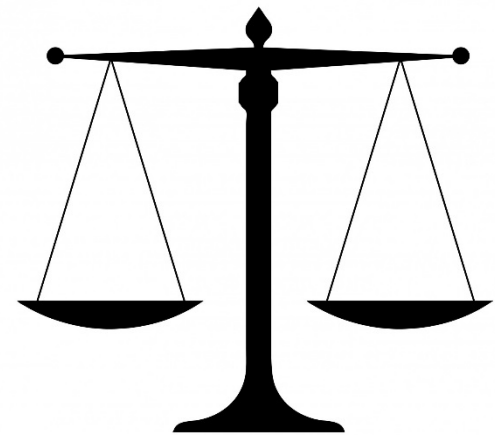
## III – CASL Enforcement Efforts

### Competition Bureau: Avis and Budget – June 2016

- The Bureau filed an application with the Competition Tribunal alleging that Avis, Budget and their parent company advertised false and misleading pricing information (namely advertising prices that are not attainable due to additional mandatory imposed fees)
- The Bureau sought \$30 million in AMPs and refunds for customers
- The Bureau moved under CASL - Avis and Budget used electronic messages to disseminate the false or misleading representations (allegedly)

## III – Enforcement-Private Right of Action

- In force July 1, 2017
- Only in respect of actions after July 1, 2017?
- Actual and statutory damages (issue if an undertaking in force or a Notice of Violation has been served)
- Regulation needed
- Class Actions



# IV – Computer Programs

## Installation

- Requirements for installing computer programs came into force as of January 15, 2015
- Businesses installing software or computer programs on other persons' computers must 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
- The consents have to be separate for each purpose

# V - Where Are We

## Corporate Compliance Guidelines

- Documented, implemented and effective Corporate compliance policies and programs needed
- Risk-management strategy
- Involve Senior Management
- Record keeping
- Reduce the likelihood of violating CASL
- Establish a due diligence defence in the case of a violation of CASL

## V – Where Are We

- Databases
- Unsubscribe option capability
- Contacts and exempted categories

## V – Where Are We

- Website, webinars, newsletters, alerts - can be used to establish express consent
- Adding express consent to retainer letters/agreements –ensure this is separate from retainer agreement
- 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.)

# V – Where Are We

- To Do:
  - Make person/group responsible for compliance.  
Need management buy-in
- Analyze all existing contacts in database
  - Existing or potential clients?
  - Current existing business relationships, or within past 2 years?
  - Understand how you obtained each contact on this list – other than existing clients (networking, business trips, business cards, seminars/webinars, client events, referrals, newsletter/online sign ups, meetings?)



# V – Where Are We

- How does organization develop additional contacts
  - Networking, business trips, business cards, seminars/webinars, client events, referrals, newsletter/online sign ups, meetings?
  - How added to database
- Audit regularly



# Thank You

# Questions

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