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# **Canada's Anti-Spam Law: An Update on CASL Enforcement and a Look at What Lies Ahead**

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# This Building Is Humming with Activity



**245,000 complaints made as of March 2015**  
**4 publicly disclosed investigations**

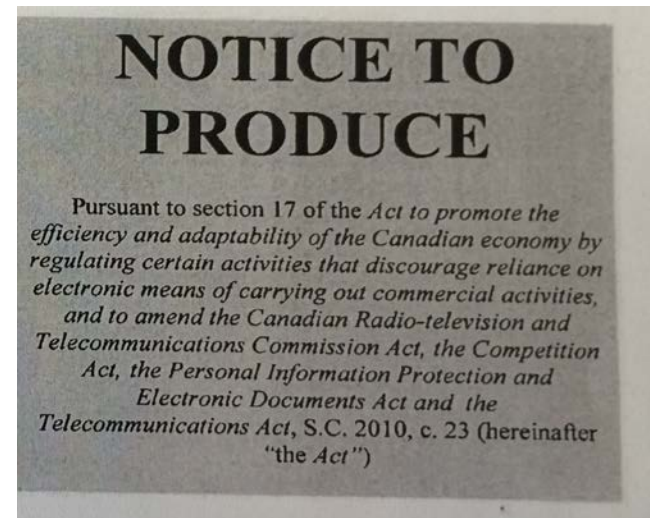
# The Price of Getting It Wrong

- Fines of up \$10 million for a corporation
- Broad **secondary and vicarious liability risks**
- Extensive production and seizure powers
- Exposure for directors, officers and agents **including** for “procuring” a CASL violation
- Beginning on July 1, 2017, CASL will permit lawsuits allowing:
  - compensation for loss, damages and expenses; **PLUS**
  - awards capped at \$1 million per day for breach of CASL **with risk of class actions**



# The Dreaded “Notice to Produce”

- **No** indication of the nature of the alleged offence
- **No** reasonableness trigger (unlike under PIPEDA)
- **Reverse onus** clause (s. 13) places burden to prove consent on target of complaint
- **Intensive** disclosure requirements with 2-week turnaround
- **Gag orders** contemplated
- Right of appeal to CRTC itself



# The Access Communications Case

- CRTC issues release on Oct. 7, 2014 announcing it has worked with a Sask. computer reseller and its ISP to stop millions of spam messages from being sent to Canadians
- Press release does not name company or comment on its state of due diligence
- Are “external factors” (a virus) a defence? A defence for small companies only? A defence if there was standard anti-malware protection?
- Are businesses with hijacked servers a “sender” of a message at all?
- What kinds of pressure were imposed on the ISP?



# The Compu-Finder Case

- Four alleged violations of CASL lead to \$1.1M assessment against executive training institute
- 30 days to submit written representations, pay fine or seek undertaking
- No question that the CRTC considers offers to train executives “commercial” in nature although the goal is professional education
- “Notice of Violation” **not** published, so public left to read through tea leaves of two-page press release
  - Sending of CEMs without consent
  - Unsubscribe mechanism



- c o m p u . f i n d e r -

# Compu-Finder & the Meaning of “Commercial”

- A “**commercial electronic message**” is an electronic message that, having regard to the content of the message, ... hyperlinks..., or the contact information contained in the message, it would be reasonable to conclude **has as ... one of its purposes, to encourage participation in a commercial activity ...**”
- A “**commercial activity**” is 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...*” (s.1(1)).
- How clear is the term? See [Decision P2013-d-01](#) (Alta.)  
**“To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity.”**

# What About Business-to-Business Messages?

- B2B messages exempted unless:
  - the organizations don't "have a relationship" **or**
  - the CEM isn't relevant to the recipient's business
- CRTC press release suggests "consumers didn't find Compu-Finder's offerings relevant to them"
- A clue to what counts as a "relationship" stems from the definition of a "personal relationship", which:
  - Requires direct, voluntary, 2-way communication
  - Requires relatively recent and frequent communications
  - Is limited to close relationships to "help prevent potential spammers from exploiting this concept" (FAQs)



-compu.finder-



# PlentyOfFish Gets Hooked

- CRTC announces \$48K voluntary undertaking with Plentyoffish Media Inc. (“**PMI**”) on March 18, 2015
- PMI allegedly violated parts of CASL & CRTC Regs that
  - require CEM to specify electronic address or link to which unsubscribes may be sent
  - require unsubscribe mechanism to be “clearly and prominently set out” & “readily performed”
- PMI given lenience for updating its mechanism quickly
- Compliance program to cover policies and procedures, training and education, monitoring, auditing and reporting mechanisms, and consistent disciplinary procedures



# The Avis/Budget Rental Car Case

- Commissioner of Competition seeks \$30M premised partly on violations of CASL (\$10M for three related companies)
- CASL introduced ss. 74.011 of *Competition Act*, prohibiting “false or misleading representation” in the sender information, subject matter information or body of a CEM
- Companies accused of misrepresenting cost of car rentals by failing to disclose non-optional fees
  - Subject header: “Up to 25% off” (when discount not applied to non-optional fees)
  - Body alleged to be materially false or misleading for similar reasons



# The Dangers of a Subject Header

**Subject:** Valued customer, relaxation that's more rewarding.  
Up to 25% off.

**Body:** Up to 25% off a weekend rental.

*Key: Different materiality standards for these two statements*

→ Subject-header prohibition **does not** require representation to be **materially** false or misleading under s. 74.011 of *Competition Act*



The image shows a screenshot of an email advertisement from AVIS. The header features the AVIS logo and navigation links for Reservations, Locations, Deals, and Cars & Services. The main content area includes a personalized greeting, a subject line, and a promotional offer. A large image of a person driving a car is shown, with a red banner at the bottom containing the text 'Because weekends should be fun. Up to 25% off a weekend rental.' and a 'Reserve Now' button. To the right, there is a red box with white text that says 'DOWNLOAD THE AVIS MOBILE APP' and lists the available platforms: Android, iPhone, Blackberry, and Mobile Windows. The AVIS logo is also present at the bottom of this box.

# Staving Off a CASL Penalty

A “due diligence” defence **may** apply if the company can prove “the existence and implementation of an effective corporate compliance program”

- CRTC does not see this as a “one size fits all”
- **The hard work must be done now to make it count later**
- Keys are a good written policy and procedure and responsive records of consents, CEMs, basis for exemptions



# Can I Do Indirectly What I Couldn't Do Directly?

- CASL implicates not only the sender, but also those who “cause” or “permit to be sent” an offending CEM
- Section 9 of CASL prohibits a person “to aid, procure or cause to be procured” a CASL violation
- Sections 45 and 53 of CASL fix vicarious liability on a company for offences committed by employees acting within the scope of their employment or by agents acting within the scope of their authority

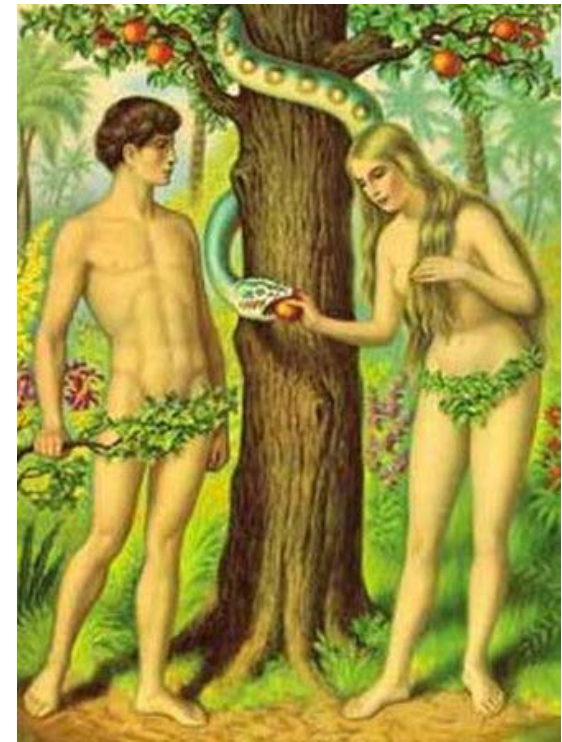


# CASL Software Provisions (Jan. 15, 2015)

“First off, don’t panic. CASL does not apply to owners or authorized users installing software on their own computer systems (e.g., personal devices such as computers, mobile devices or tablets).”

*CRTC Software Guidelines*  
(Nov. 10, 2014)

- **But watch out for undisclosed secondary programs or functions, which need not be “nefarious”**
- **These may be next frontier...**
- **And don’t forget about 2017!**



# Our CASL Panel

- **Wally Hill**, Vice President, Public Affairs and Communications, Canadian Marketing Association
- **Jason McLinton**, Senior Director, Federal Government Relations, Retail Council of Canada
- **Scott Smith**, Director of Intellectual Property and Innovation Policy at the Canadian Chamber of Commerce and the Director of the Canadian Intellectual Property Council

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