

November, 2016

**Canada's Anti-Spam Legislation, Enforcement Update:**  
**CRTC Decision on Blackstone Learning and Kellogg Undertaking**

In October, 2016, the Canadian Radio-television and Telecommunications Commission ("CRTC") issued a decision involving violations of *Canada's Anti-Spam Legislation* ("CASL") by Blackstone Learning Corp.<sup>1</sup> In September, the CRTC announced that Kellogg Canada Inc. had entered into a voluntary undertaking to update its CASL compliance program and to make a monetary payment of \$60,000.<sup>2</sup> As with earlier decisions and announcements,<sup>3</sup> these two enforcement actions provide useful guidance to businesses with respect to their own CASL compliance.

**Blackstone Learning: Absence of Consent; Reduced AMP**

As discussed in the Blackstone Decision, the government's Spam Reporting Centre received numerous complaints between July 4 and December 3, 2014 about unsolicited e-mails sent to employees of federal government departments and agencies, advertising the Blackstone Learning's educational and training services. In the Blackstone Decision, the CRTC provided detailed information from the investigation that was conducted in response to those complaints, and the January 30, 2015 notice of violation that was issued to Blackstone Learning by the CRTC's chief compliance officer.<sup>4</sup> The notice of

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<sup>1</sup> CRTC, Compliance and Enforcement Decision CRTC 2016-428. October 26, 2016: <http://www.crtc.gc.ca/eng/archive/2016/2016-428.htm> (the "Blackstone Decision").

<sup>2</sup> September 1, 2016. The CRTC announced that Kellogg Canada Inc. had entered into an undertaking: <http://www.crtc.gc.ca/eng/archive/2016/ut160901.htm>.

<sup>3</sup> Five 2015 decisions were discussed in my November 2015 article, posted at <http://www.caobrienlaw.com/files/resources/CAOB%20Enforcement%20of%20CASL%20Nov%202015.pdf>. These decisions addressed situations involving: unsolicited e-mails; non-functioning, inadequate or misleading "unsubscribe" mechanisms; inadequate sender contact information; the failure to implement "unsubscribe" requests; and false or misleading representations made in the CEMs.

<sup>4</sup> The "designated person" under CASL is authorized to issue notices to produce and notices of violation. Those decisions and actions are subject to review by the Commission, and following that review the Commission may reduce or waive any penalties and impose any other conditions considered necessary to ensure compliance.

violation had identified nine messaging campaigns, involving over 385,000 commercial electronic messages (“CEMs”) that were sent from July to September 2014 without the consent of the recipients. That notice had imposed an administrative monetary penalty (“AMP”) of over \$640,000.

Blackstone Learning provided representations to the CRTC in early 2015, claiming that it had implied consent to send the CEMs and arguing that it had been denied due process. The company also incorrectly attempted to appeal the notice of violation to the Supreme Court of Canada.

In the Blackstone Decision, the CRTC addressed the company’s arguments with respect to implied consent. The regulator stated that the “conspicuous publication exemption [sets] a higher standard than the simple public availability of electronic addresses.” In addition, the e-mail address must not be accompanied by a statement indicating that the person does not want to receive unsolicited e-mails, and the CEM must be relevant to the recipient’s role or functions. The “address must be published in such a manner that it is reasonable to infer consent to receive the type of message sent, in the circumstances.”<sup>5</sup> The CRTC notes that the exemption in s. 10(9)(b) of CASL does not provide a broad license to contact any electronic address found online; rather it “provides for circumstances in which consent can be implied by such publication, to be evaluated on a case-by-case basis”. CASL’s s. 13 makes it clear that the sender bears the onus of proving consent, including all of the elements of an implied consent. As noted in previously issued guidance documents, this imposes an obligation for detailed reference keeping.<sup>6</sup> Since Blackstone Learning provided only general assertions, and no supporting information with respect to the implied consents it was attempting to rely upon, the Commission determined that the company had not demonstrated that it had such implied consents, and found that violations of the s. 6 prohibition had taken place.<sup>7</sup>

The CRTC also considered whether the amount of the AMP was appropriate. Its decision to reduce the AMP from \$640,000 to only \$50,000 is notable. CASL’s s. 20(3) sets out the factors to be considered in determining the amount of an AMP: that the

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<sup>5</sup> Blackstone Decision, paragraph 26.

<sup>6</sup> Blackstone Decision, paragraph 28.

<sup>7</sup> Blackstone Decision, paragraphs 30, 31.

purpose of a penalty is to promote compliance and not to punish; the nature and scope of the violation; the company's previous history with respect to violations under CASL, the misleading advertising provisions of the *Competition Act* or the collection, use and disclosure obligations under the *Personal Information Protection and Electronic Documents Act*; any financial benefit obtained through the violations; the company's ability to pay the penalty; any compensation that had been paid to CEM recipients; and any other relevant factor.

In this case, the factors cited by the Commission as justifying the significant reduction were that: the company was a small business with a relatively limited ability to pay; CASL was a relatively new regulatory regime; and there was no history of non-compliance. However, the latter two factors would also have existed in a number of the 2015 cases<sup>8</sup> where companies agreed to pay significant AMPs. Factors that would have been expected to result in a higher AMP, such as that Blackstone Learning did not appear to have cooperated with the CRTC's investigation and refused to respond to a Notice to Produce, seem not to have been given much weight. Although noting that 385,668 non-compliant CEMs had been sent, the CRTC minimized this number by treating them as flowing from nine individual campaigns. In assessing the nature and scope of the violations, the Commission stated that while the number of unsolicited CEMs was significant, they were sent during a relatively short time frame of approximately two months.<sup>9</sup>

Based on the Blackstone Decision, companies may decide not to enter into voluntary agreements to settle alleged violations of CASL, or may seek to have the Commission review notices of violations issued by the chief compliance officer in hopes of having an order for AMPs reduced. Small businesses in particular, may now argue that an inability to pay should mean that only minimal AMPs should be awarded against them. The change to regulatory incentives caused by the decision may lead to increased regulatory uncertainty, in the long run.

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<sup>8</sup> See my article referenced above at footnote 3, which notes AMPs as follows: CompuFinder, \$1.1 million; Plenty of Fish, \$48,000; Porter, \$100,000; and Rogers, \$200,000. The proceeding against Avis and Budget was settled by a Consent Agreement filed with the Competition Tribunal on June 2, 2016, and the companies agreed to pay AMPs of \$3 million, and costs of \$250,000: [http://www.ct-tc.gc.ca/CMFiles/CT-2015-001\\_Registered%20Consent%20Agreement\\_82\\_66\\_6-2-2016\\_6072.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Registered%20Consent%20Agreement_82_66_6-2-2016_6072.pdf)

<sup>9</sup> Blackstone Decision, paragraph 48.

### **Kellogg Canada: Unsolicited CEMs; More Confidential Process**

To a lesser extent, some compliance guidance is provided through the negotiated agreement entered into by Kellogg Canada. The important difference between the Kellogg and Blackstone Learning situations is that Kellogg was able to have many of the details about its alleged violations of CASL kept confidential, and to resolve the situation more quickly, by entering into an undertaking voluntarily, without having to proceed through the adversarial process that applied to the Blackstone Decision. The notice of the Kellogg undertaking refers only to “alleged” breaches of CASL, and contains no explicit acceptance of liability, but the company’s agreement to update its compliance program and to make the monetary payment of \$60,000 was sufficient to resolve the complaints.

The Kellogg undertaking resulted from CEMs sent by Kellogg and its third-party service providers, without recipient consent, during the period October 1, 2014 to December 16, 2014. In the undertaking Kellogg agreed to update its compliance program, to ensure that third parties sending CEMs on its behalf also comply, and to make a monetary payment of \$60,000. The compliance program “will cover elements such as reviewing and revising written policies and procedures regarding compliance, training programs for Kellogg employees, tracking of commercial electronic message complaints and their subsequent resolution, and implementing updated monitoring and auditing mechanisms to assess compliance”. As noted by the CRTC, the undertaking “fully and completely resolves all outstanding issues with respect to Kellogg’s or its subsidiaries’ alleged non-compliance with the Act”.

### **Private Right of Action: Coming Into Force in July 2017**

A final point to consider now, in terms of compliance, is that the private right of action provisions will soon become available, with respect to violations of CASL. Class actions are likely. Under s. 51(1)(a) plaintiffs will be able to obtain compensation of the amount of their actual loss or damage suffered, or expenses incurred, but under s. 51(1)(b), there will also be access to statutory damages, meaning that plaintiffs will not be required to prove their actual damages arising from the CASL violations. For violations of the s. 6 prohibitions against sending CEMs without the required consent or without the necessary sender information and unsubscribe mechanism, CASL provides for statutory

damages of a maximum of \$200 for each contravention, to a maximum of \$1 million for each day on which a contravention occurred. Similar levels of statutory damages are available for violations of other provisions of the Act. These upcoming changes to CASL should provide an additional incentive, if that is still required, to ensure that all relevant procedures and activities comply with CASL.

Please address any questions about CASL or any other advertising and marketing matters to Carol Anne O'Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

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