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CRTC and Competition Bureau Enforcement of CASL

During 2015 the Canadian Radio-television and Telecommunications Commission (“CRTC”) and the Competition Bureau have taken several actions to enforce Canada’s Anti-Spam Legislation (“CASL”), which came into effect in July, 2014. Businesses were required to review and update their procedures for collecting and using e-mail addresses and for conducting e-mail marketing campaigns. The CRTC has primary responsibility for enforcing CASL, but the Competition Bureau also has an important role with respect to misrepresentations made using e-mail. The 2015 enforcement actions of these agencies illustrate why it is so important to ensure that e-mail marketing campaigns comply with CASL.

Compu-Finder: Unsolicited E-Mails, Non-Functioning “Unsubscribe”

The CRTC’s first enforcement action, in March 2015, was against a Quebec-based corporate training business, Compu-Finder, which sent commercial electronic messages (“CEMs”) that were not only unsolicited by the recipients, but also did not contain a properly functioning “unsubscribe” mechanism.¹ Complaints about these e-mails were made between July 2, 2014 and September 16, 2014. The Compu-Finder enforcement is of particular interest since although CASL was enacted as a type of consumer protection legislation, this company was targeting other businesses rather than consumers. The CRTC found that the CEMs sent by Compu-Finder did not benefit from CASL’s “business-to-business” exemptions.

¹ “CRTC Chief Compliance and Enforcement Officer issues \$1.1 million penalty to Compu-Finder for spamming Canadians”, CRTC press release, March 5, 2015: <http://news.gc.ca/web/article-en.do?nid=944159>.

Plenty of Fish: Inadequate “Unsubscribe”

The popular online dating service, Plenty of Fish, was the CRTC’s second enforcement target, also in March, 2015. The CRTC determined that, between July 2, 2014 and October 8, 2014, the service sent CEMs to its registered users with an unsubscribe mechanism that was not clearly and prominently set out and which could not be readily performed. To avoid a contested proceeding, Plenty of Fish voluntarily undertook to develop a CASL compliance program and to pay an administrative monetary penalty (“AMP”) of \$48,000.²

Porter: Inadequate Unsubscribe and Contact Information

On June 29, 2015, Porter Airlines avoided extended enforcement proceedings by entering into an agreement with the CRTC to improve its CASL compliance and to pay \$150,000.³ The CRTC’s complaint was based on CEMs sent between July 2014 and April 2015. For some of the CEMs, Porter had not included any unsubscribe mechanism. For others, the unsubscribe mechanism was not “clearly or prominently set out” as required. In addition, for some CEMs, Porter had not provided complete sender contact information. Finally, it had failed to implement unsubscribe requests within 10 business days, as required. In this case, as in some of the others this year, the CRTC appeared to take into account that Porter cooperated and immediately took corrective action to comply with CASL.

Rogers Media: Inadequate Unsubscribes and Not Implementing Requests

Most recently, in November, 2015, Rogers Media agreed to pay \$200,000 as a part of an undertaking to resolve complaints about its alleged violations of CASL.⁴ The CRTC alleged that Rogers Media had sent CEMs containing an unsubscribe mechanism that did not function properly and could not be readily performed. In addition, for some CEMs, the e-mail address provided for unsubscribe requests was not valid for the

² “Plentyoffish Media Inc. pays \$48,000 for alleged violation of Canada’s anti-spam law”, CRTC press release, March 25, 2015: <http://news.gc.ca/web/article-en.do?nid=954949>.

³ “Porter Airlines Inc. agrees to pay \$150,000 for allegedly violating Canada’s anti-spam law”, CRTC press release, June 29, 2015: <http://news.gc.ca/web/article-en.do?nid=993469>.

⁴ “Rogers Media Inc. agrees to pay \$200,000 for allegedly violating Canada’s anti-spam law”, CRTC press release, November 20, 2015: <http://news.gc.ca/web/article-en.do?nid=1021499>

required 60 days after the CEM had been sent. Finally, Rogers Media failed to honour recipients' unsubscribe requests within 10 business days, as required.

Avis and Budget: False and Misleading Representations

CASL amended the *Competition Act* to provide that where false or misleading representations are contained in CEMs, additional sanctions can apply. The *Competition Act* is enforced by the Competition Bureau and the CASL amendments to the *Competition Act* gave the Bureau the right to apply for AMPs of up to \$10 million where false or misleading representations are made in CEMs.

In March, 2015, the Competition Bureau initiated proceedings against Avis and Budget for advertising with misleading prices, seeking a total of \$30 million in AMPs, as well as restitution for consumers and prohibition orders. The Bureau alleged that the companies imposed a number of "non-optional fees" that were not incorporated into advertised prices but were misrepresented at the time of sale as being taxes, surcharges or fees mandated by governments or other third parties. The costs were described as a "car tax", "tire management fee" or "environmental fee" and increased car rental costs by approximately 35%. The Bureau alleged that the fees are not taxes or mandatory fees, but are merely costs of doing business that the companies are passing on to consumers.

The representations were made since at least 2009 and were made in newspaper and television advertisements, promotional flyers, websites, on mobile applications, and orally, as represented by scripts for call centres. The Bureau also cited CEMs sent in contravention of CASL's requirements for the period beginning in July, 2014. In seeking a remedial order from the Competition Tribunal, the Bureau referred to such aggravating factors as the companies' size (they are the largest car rental companies in Canada), their national reach of their advertising, the frequency of the misleading representations over an extended period of time, the fact that the misleading prices were material to purchase decisions, and the amount of money the companies had collected (more than \$35 million) in non-optional fees from March 2009 to March 2015.

The proceeding before the Competition Tribunal is ongoing. The fact that the Bureau is challenging representations made in multiple channels, including by e-mail, is a signal to all types of businesses to comply with CASL, as well as with the *Competition Act*.

If you have questions about CASL or its enforcement by the CRTC and the Competition Bureau, contact Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.