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## **CRTC Releases CASL Decision Clarifying the Limits of Implied Consent**

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With the first [written reasons](#) being issued by the Canadian Radio-Television and Telecommunications Commission (CRTC) in an Anti-Spam case under Canada's legislation (CASL), we can start to understand how the various requirements in the statute will be applied. The CRTC found that Blackstone Learning Corp. ("Blackstone") violated CASL by sending commercial electronic messages without consent. The resulting fine imposed by the CRTC was an administrative monetary penalty (Penalty) of \$50,000. Importantly, the CRTC decision provides guidance on the scope of the "conspicuous publication" exemption and on the penalties likely to be levied under CASL.

The decision related to nine email campaigns which ran from July 9 – September 18, 2014 and involved the distribution of 385,668 emails promoting Blackstone's programs to employees at federal and provincial government organizations. These email campaigns led to over 60 complaints to the CRTC Spam Reporting Centre, prompting a CRTC investigation. On January 30, 2015 CRTC issued a Notice of Violation setting out an administrative monetary penalty of \$640,000. Blackstone appealed.

The two key issues in the decision were:

1. Does sending an email to a publicly available email address violate CASL?
2. If yes, was \$640,000 an appropriate Penalty?

### Violation of CASL

While the Blackstone emails did not provide detail on cost of its programs, there was sufficient description of discounts and group rates for CRTC to conclude that the emails were commercial electronic messages (CEMs).

The CRTC rejected Blackstone's defence that the recipients' email addresses were conspicuously published (such that an exemption applied) because they were sent to publicly available email addresses. CRTC stated that:

"the conspicuous publication exemption and the requirements thereof set out in paragraph 10(9)(b) of the Act set a higher standard than the simple public availability of electronic addresses" (emphasis added).

To meet the conspicuous publication exemption, the electronic address must:

- not be accompanied by a message specifically outlining that the individual does not want to receive unsolicited commercial messages; and
- be relevant to the recipient's role or function. In determining whether or not a message would be relevant to the recipient's role or function,

the CRTC clarified that the way that the email address is published, such as on the company's website or through a third party, must lead to a reasonable understanding of consent to receive the type of commercial electronic message being sent. This is significant interpretation of one of the few exemptions in CASL. That is, that there must be something more than a publicly available list or directory of emails for the exemption to apply.

### Amount of Penalty

In considering an appropriate Penalty, the CRTC took into account the following considerations: (a) the purpose of the Penalty; (b) the nature and scope of the violations; (c) financial benefits; (d) ability to pay; and (e) other relevant factors.

Based on these factors, as well as the fact that Blackstone had contested the Penalty, CRTC determined that a Penalty of \$50,000 was a reasonable amount to encourage Blackstone to comply with CASL.

### **Conclusion:**

This decision serves as a reminder of the importance of taking CASL seriously, and of considering email marketing practices carefully. In particular, the decision highlights the need for organizations to proceed carefully if their messages rely on an exemption under CASL.

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