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Addressing the questions regarding the CRTC's enforcement of CASL

In the first Compliance and Enforcement Decision issued by the Canadian Radio-television and Telecommunications Commission ('CRTC') under Canada's Anti-Spam Law 2010 ('CASL'), the regulator significantly reduced the penalty previously issued to a company, Blackstone Learning Corporation, and narrowly interpreted exceptions to the requirements to attain express consent for direct marketing under CASL ('Decision'). David Elder of Stikeman Elliott LLP analyses, *inter alia*, the reduction of the penalty and the application of the CRTC's reasoning to future sanctions that may be levied.

In the Decision, the CRTC considered representations made by Blackstone, a provider of educational and training services to business and government, with respect to a Notice of Violation that had been issued by CRTC staff pursuant to CASL. The Notice of Violation had required Blackstone to pay an Administrative Monetary Penalty ('AMP') of CAN 640,000 (approx. €449,000). However, following a review, the amount payable was reduced to CAN 50,000 (approx. €35,000), even though Blackstone was found to have sent 385,668 commercial electronic messages without consent, over a two-month period.

Under CASL, the CRTC may designate persons or classes of persons to exercise powers in relation to any matter referred to in the designation. Somewhat unusually, the enforcement powers under CASL, including to issue preservation demands, Notices to Produce, and Notices of Violation, are actually granted to such **designated persons, rather than to the CRTC itself**. The CRTC has designated a chief compliance officer, and potentially **other staff members, to exercise such powers**.

Where a power is exercised by a designated person, representations may be made by the subject of a CASL investigation to the members of the CRTC, who can review the action of the designated person and revoke or

amend that action, as appropriate. With respect to Notices of Violation, upon receipt of representations from the subject of the notice, the CRTC must decide, on a balance of probabilities, whether the subject committed the violation, and if so, may impose, reduce, waive or suspend payment of the penalty set out in the notice.

The imposition of the fine

CASL explicitly states that the purpose of the penalties that may be issued thereunder is to promote compliance with CASL, and not to punish; however, some have questioned whether the size of some of the penalties imposed to date were really necessary in order to promote compliance, given the novelty of CASL and the efforts made by a number of the fined companies to ensure compliance.

CASL also sets out a number of factors that are to be taken into account when assessing penalties for violations of CASL, including:

- The purpose of the penalty;
- The nature and scope of the violation;
- Any history of previous non-compliance with CASL or any previous undertakings with the CRTC respecting compliance;
- Any financial benefit that the person obtained from the commission of the violation;

- The person's ability to pay;
- Whether the person has voluntarily paid compensation to a person affected by the violation.

In the Decision, the CRTC appears to have reduced the applicable penalty largely on the basis that Blackstone "is a small business with a relatively limited ability to pay," as well as that CASL is a relatively new regulatory regime, which Blackstone had no history of non-compliance under. The amount was reduced notwithstanding that Blackstone apparently did not cooperate with the CRTC investigation, refusing to respond to a Notice to Produce issued pursuant to CASL, even after a CRTC decision requiring that it do so.

While the significant reduction in the AMP payable by Blackstone is noteworthy of itself, the case may be particularly notable as the reduction, and the factors cited by the CRTC in support of that decision, may raise questions about the appropriateness of some of the AMPs previously paid with respect to earlier investigations, and the application of the CRTC's reasoning to future penalties that may be levied.

In this regard, prior to the Decision, other than the CAN \$1.1 million (approx. €771,000) Notice of Violation issued to Compu-Finder, another corporate training provider, all of the AMPs paid to date under CASL - ranging from CAN 48,000 to

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CAN 200,000 (approx. €140,000) - were paid pursuant to undertakings into which companies voluntarily entered in order to settle investigations by CRTC staff. There was no review of these settlements by the appointed members of the CRTC.

Consistent with the CRTC's rationale in the Decision, CASL would also have been a relatively new regulatory regime in the previously-settled CASL cases, and each of the companies concerned would also have had no history of non-compliance with CASL. Moreover, unlike in the Decision, in each of the previous undertakings, the companies (Plentyoffish Media, Porter Airlines, Rogers Media and Kellogg Canada) cooperated fully with the staff investigation and took immediate steps to rectify alleged non-compliance. Although few details of these cases are provided by the CRTC, it is also believed that each of these companies had in place some kind of CASL compliance program, and that many of the violations they had committed were the result of technical and process errors, rather than deliberate or reckless conduct.

Interestingly, the CRTC also noted that, although CASL provides for significantly higher maximum penalties - up to CAN 10 million per offence - than some other AMP regimes (including, notably, the CRTC's Unsolicited Telecommunications Rules), this does not mean that larger penalties are inherently more appropriate in comparison to regimes with lower maximum penalties. Rather, in the CRTC's view, the potential for higher penalties provides the CRTC with a means to recognise and address more egregious non-compliance when it arises.

The conspicuous publication exception

The Decision is also noteworthy as it confirms the narrowness of one of the forms of implied consent available under CASL. CASL generally requires that senders of electronic marketing and promotional messages obtain prior express consent from message recipients, subject to a number of narrow exceptions and exemptions. One such exception is that CASL deems implied consent to exist where the person to whom a commercial electronic message is sent has conspicuously published (or caused to be conspicuously published) the electronic address to which the message is sent, provided that such publication is not accompanied by a statement indicating that the person does not want to receive such messages, and that the content of the message is relevant to the recipient's business, role, functions or duties in a business or official capacity.

In its representations to the CRTC, Blackstone had argued that it had implied consent to send the messages in question based on the 'conspicuous publication' exception, and on a broad assertion that the email addresses to which it had sent messages were publicly available. In rejecting this argument, the CRTC noted that the conspicuous publication exception in CASL sets a higher standard than the mere public availability of an electronic address. The CRTC noted that the message must have been published in such a manner that it would be reasonable to infer consent in the circumstances. As examples of such circumstances, the CRTC noted that if a business conspicuously publishes, on its website,

contact information for an employee, including an electronic address, such publication could constitute implied consent to send messages relative to that person's role. Similarly, if the business chose to advertise through a third party, providing an email address for the purposes of that advertisement, that could also create implied consent. By contrast, if a third party were to reproduce or sell that email address on its own initiative, the exception would not be available because neither the account holder nor the message recipient would have published the address, nor caused it to be published.

This finding should not be surprising, as the plain language of the statute outlines that the conspicuous publication exception is available where the message recipient has 'published or caused to be published' his or her electronic address. This necessarily implies some deliberate action, or at least informed assent, on the part of the recipient or the account holder (ie. the recipient's employer).

Conclusion

It remains to be seen whether the guidance from the CRTC in the Decision will inspire companies in future to make representations to the appointed members of the CRTC with respect to alleged violations of CASL, in the hope of reducing the AMPs payable, rather than entering into voluntary undertakings with CRTC staff. However, all senders of electronic marketing messages into Canada should take note of the clear interpretation provided with respect to the scope of the 'conspicuous publication' exception.