

Canada's Anti-Spam Legislation (CASL) Training

Video 4 of 4

André Leduc – Industry Canada & Shaun Brown – nNovation LLP

Moderated by Neil Schwartzman, CAUCE

Monday, June 06, 2011

MAAWG

© slide PDF files and videos copyrighted by the
Messaging Anti-Abuse Working Group (MAAWG)

Disclaimer:

The views expressed in the presentation are not those of the Canadian Radio-television & Telecommunications Commission, the Competition Bureau, or the Office of the Privacy Commissioner of Canada.

Moreover, the information and advice provided herein does not constitute legal advice and should not be used as a substitute for seeking legal counsel.



Messaging Anti-Abuse Working Group

MAAWG CASL Training Videos

(over 90 minutes of training)

<u>Video 1</u> 30 minutes	<u>Video 2</u> 17 minutes	<u>Video 3</u> 7 minutes	<u>Video 4</u> 37 minutes
A. Overview and next steps	C. Enforcement and penalties	D. Comparison to U.S. CAN-SPAM Act	E. Practical implementation issues – liability issues
B. Substantive requirements under CASL, <i>Competition Act</i> and PIPEDA			F. Practical implementation issues – operational issues

Note: The interactive Q&A sessions for this training course are available to MAAWG members by logging onto www.MAAWG.org and navigating to the 22nd General Meeting Presentations page

E: PRACTICAL IMPLEMENTATION ISSUES UNDER CASL – LIABILITY & CONSENT

Shaun Brown
Counsel, nNovation LLP

MAAWG

Is this spam?

From: *****; Barrister & Solicitor, ***** LLP
> Toronto, Ontario
>
> February 15, 2011
>
> Dear Owner, Director or Compliance or Information Officer:
>
> Re: Protecting your Company from Telemarketing Complaints and CRTC
Imposed
> Fines (Do Not Call List)
>
> Because your company may use telemarketing or email marketing as an avenue
to attract new business, it is important that your company protect itself in the event
that the Canadian Radio-television and Telecommunications
> Commission (CRTC) receives complaints and launches an investigation.
>
> I'm a lawyer based in downtown Toronto who specializes in Canadian
> telemarketing and the recently enacted email SPAM laws and rules. I also
> represent and defend companies and persons being investigated by the CRTC
> for potential violations of those rules. In addition, prior to becoming a
> lawyer 14 years ago I was involved in the telecommunications industry.
>
> As you're likely aware, the CRTC's National Do Not Call List and
> Telemarketing Rules have been in existence for almost three years now. Also,
> the Government of Canada recently passed a new law, Fighting Internet Spam
> Act, which may seriously impact your company's ability to market through
> email and the internet.
>
> Recently, one company was fined a staggering 1.3 million dollars by the CRTC
> for violating telemarketing rules in Canada. Another was recently fined 500
> thousand dollars. Telemarketing investigations by the CRTC can have a
> serious impact on your bottom line or your company's survival.
>
> Even if you have not yet been targeted or investigated by the CRTC, in our
> view it is imperative to pro-actively establish telemarketing policies and
> procedures to mount a defense against potential complaints if you are
> investigated. Our firm has the depth and expertise in order to assist in
> this regard if so required.

> It is clearly understood that once you have been contacted for the first
> time by the CRTC, it means that you are on their target list. My legal team
> can help protect you in the event the CRTC starts this red flag process.
>
> Our legal team includes counsel who understand internal CRTC functions.
As
> such we understand the intricacies of telemarketing law inside and out and
> can adequately defend and potentially pre-empt any action by the CRTC.
>
> If you feel like you require assistance or consultation to protect your
> interests and pre-empt any concerns with the CRTC, our legal team can
offer
> the following services:
>
> 1. Defending you against CRTC violations and allegations;
> 2. Corresponding on your behalf with CRTC investigators and agents;
> 3. Appealing any convictions or allegations entered against you;
> 4. Auditing your privacy, telemarketing and internal policies to protect you
> from the CRTC;
> 5. Even if you are not under investigation, conducting a due diligence and
> risk assessment to ensure you can provide a solid defence if the CRTC
comes
> knocking;
> 6. Providing on-going or one-time legal consulting services to keep your
> company compliant with all the laws and rules;
> 7. Providing training to privacy and compliance staff; or
> 8. Simply meeting with you to discuss your concerns, worries or questions
> about telemarketing and recently enacted SPAM law in Canada.
>
> Please feel free to contact myself for a consultation, or if you are having
> any issues with the CRTC.
>
> I thank you for your time and look forward to hearing from you.
>
> Sincerely,
>
> *****
> Lawyer
>
> ***** LLP

Is it spam? Maybe ...

> Sent: February-15-11 1:30 PM
> To: *****
> Subject: Re: CRTC Telemarketing complaints, investigations and fines
>
>
>
> Mr. *****,
>
>
>
> Thank you for your email. I hope the irony is not lost on you that this
> email, soliciting business where we have no existing relationship (that I
> can recall...), is itself spam! At least, it would violate the anti-spam
> legislation (not really named FISA, as you refer to it), even if sent within
> the three year transition period provided in that law.
>
>
>
> Best wishes,
>

Is it spam? You betcha!

>

***** the anti-spam amendments have not yet come into force and secondly, you
> have advertised yourself as a consultant and a lawyer on a commercial
> website without notice not to contact . The e-mail that I had sent does
> have an opt out option we will certainly take you off the list. I wish you
> all the best in your pursuits

>

>

> *****

>

> Partner

Considerations for non-Canadian senders

- CASL applies if you are sending to Canada
- Is difficult (if not impossible) to know where all subscribers are located
- Courts in various jurisdictions increasingly willing to recognize and enforce foreign judgments
 - *Facebook v. Guerbuez*: Quebec superior court recognizes California judgment

Liability for Service Providers

- Does not apply to a TSP “*merely because the service provider provides a telecommunications service that enables the transmission of the message.*”
- Most clearly for ISPs
- Email service providers?
 - Likely depends on types of services offered by the service provider
 - Who is actually sending?

Liability for Service Providers (cont'd)

- Section 9 is relevant: is prohibited to “aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.”
- Due diligence clause also potentially relevant
 - What have you done to prevent the commission of a violation?
 - Education and awareness, agreements, willingness to ‘fire’ clients

Express consent: requirements

- Express consent not defined
- Must *clearly* explain purposes
 - E.g., “*I would like to receive emails about offers from [company]*”.
- Sender must identify themselves when obtaining consent
- Identify others if applicable
- Onus is on sender to provide evidence of express consent

Express consent: additional considerations

- What is “express” consent?
 - Opt-in vs. Opt-out; single opt-in, notified opt-in, double opt-in
- *Best practice*: double opt-in
- Also, think about reminding recipients why they are receiving your messages

List Building & Growth: risky propositions

- Purchasing
 - Not a violation of CASL *per se*, but can result in violations
 - Must consider application of privacy legislation
- Email appending
- Address harvesting (violation of PIPEDA)
- If it sounds too good to be true....

Leveraging Lists

- There are proper ways to send third party offers to your (others) subscribers
- Considerations
 - Relevance
 - Ensuring subscribers know who is sending
 - Consent allows for third party offers; e.g. *“I would like to hear about offers from [company] and its partners.”*

Q&A: CASL TRAINING JUNE 2011

This Q&A segment is only available to MAAWG members

Because discussion at MAAWG meetings is confidential, access to the interactive portion of this training session is available only to members.

If you are a MAAWG member, you can view the Q&A for the CASL training session by logging in at www.MAAWG.org, then go to “Past Meeting Presentations” and select 22nd General Meeting (June 7-9, 2010 San Francisco).

F: PRACTICAL IMPLEMENTATION ISSUES UNDER CASL – OPERATIONAL ISSUES

Shaun Brown
Counsel, nNovation LLP

MAAWG

Identification requirements

- What is required?
 - Name, postal address, web address,
 - CRTC regulations will be important
- When is a message “sent on behalf of another person?”
- What is a “sender”?
- Who needs to be identified?
 - Advertisers, list owners/operators
 - ESPs? Agencies? Others?

Forward-to-a-Friend // Send-to-a-Friend

- Offering incentives to forward could result in liability
 - Section 9: is prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to section 6
- Impose limits on forwards (how many, to whom)
- Exemption under 6(5): CASL does not apply to messages sent between people with personal or family rel'p
- Share to social – does CASL apply?
 - CASL only applies to CEM sent to an electronic address

B2B Considerations

- No general exemption for B2B
- Implied consent:
 - Conspicuous publication
 - Recipient discloses electronic address to sender
- Relevance will be a key issue
- Electronic addresses from web must be collected manually (address harvesting prohibited)

What about existing subscribers?

- Good time to consider quality of existing lists
- Do you have evidence of express consent?
- If express consent is required, get creative
 - Response to reconfirmation messages low
 - Offer incentives, new campaign features, etc.
- Consider incentives for your marketing dep't

Unsubscribe considerations

- As law is written, obligation arises when unsub is sent, not received
- Must be implemented without delay, i.e., no messages can be sent after an unsubscribe is sent
- List owner should be responsible for processing unsubscribe

Email Authentication

- SPF & SenderID
- DK/DKIM
- ADSP and other Moo-cow considerations

Follow-up Questions?

Shaun Brown
nNovation LLP
sbrown@nnovation.com

André Leduc
Industry Canada
Andre.leduc@ig.gc.ca

Q&A: CASL TRAINING JUNE 2011

This Q&A segment is only available to MAAWG members

Because discussion at MAAWG meetings is confidential, access to the interactive portion of this training session is available only to members.

If you are a MAAWG member, you can view the Q&A for the CASL training session by logging in at www.MAAWG.org, then go to “Past Meeting Presentations” and select 22nd General Meeting (June 7-9, 2010 San Francisco).

MAAWG



**This video is presented by the
Messaging Anti-Abuse Working Group**

Canada's Anti-Spam Legislation (CASL) Training

can be viewed in four segments
from the public training pages at www.MAAWG.org.

This has been part 4 of 4.

Our thanks to the presenters and moderator
for developing the materials in this training session
and allowing MAAWG to videotape it
for the benefit of professionals worldwide.

© slides, PDF files and videos are copyrighted by the Messaging Anti-Abuse Working Group (MAAWG)