

# CRTC Issues First CASL Penalty Against an Individual: Insurance Implications

March 2017

Since its enactment in 2014, we have seen significant penalties issued against corporate entities for violations of Canada's Anti-Spam Legislation (CASL); however, it was a first for the Canadian Radio-television and Telecommunications Commission (CRTC) when, in a recent compliance and enforcement decision, an administrative monetary penalty was issued against an individual.

In March, the CRTC issued decision 2017-65 with respect to unsolicited commercial electronic messages (CEMs) sent by Mr. William Rapanos advertising flyer design, printing, and delivery through Canada Post. They were brought to the attention of the CRTC by 50 separate recipients who alleged that the messages were sent to their e-mail accounts without their consent.

After an investigation, the CRTC issued a notice of violation of the Act to Mr. Rapanos. He disputed the notice, claiming that a third party might have sent the advertisements using his unsecured internet connection or that he was potentially the victim of identity theft. Ultimately, the CRTC did not accept Mr. Rapanos' assertions and he was found, on a balance of probabilities, to be guilty of 10 violations of CASL. The CRTC issued a \$15,000 penalty against Mr. Rapanos taking into consideration a number of factors, including the individual's lack of cooperation during the investigation and a failure to demonstrate any efforts to ensure future compliance with the act.

In this case, it was the direct actions of Mr. Rapanos that resulted in multiple violations of CASL. However, the anti-spam legislation does allow for individual directors and officers to incur liability, even where they are not directly responsible for the distribution of CEMs, if "they directed, authorized, assented to, acquiesced in or participated in" actions of a corporate entity that result in a CASL violation. The maximum penalty for a violation in the case of an individual is \$1 million. In addition, as of July 1, 2017, individuals affected by a

contravention of CASL will be able to exercise a private right of action against individuals, a corporation, or its directors and officers.

It is unlikely that any insurance coverage would be available to Mr. Rapanos as his actions appear to constitute an intentional violation of the law, which would not be insurable. The insurance coverage that could be available to individual directors and officers alleged to have violated CASL will depend upon a number of important directors' and officers' insurance (D&O) policy provisions, as well as the questions of the insurability of any CASL administrative monetary penalties.

The typical D&O insurance policy could provide defense cost coverage to individual directors and officers for both regulatory investigations, as well as private actions, provided the directors and officers were acting in their capacity at the time the alleged violations occurred, and provided there are no exclusions in the policy that would preclude coverage. For example, some D&O insurance policies will now contain exclusionary language that specifically precludes insurance coverage for violations of CASL. As well, even without this language, a bodily injury exclusion with an invasion of privacy component might limit coverage or directors may not be able to demonstrate that their actions do not fall within the D&O exclusion for a "willful violation of statute."

As the administrative monetary penalty (AMP) regime in CASL is aimed at compliance, rather than being punitive in nature, coverage may be available under some D&O policies for AMPs, subject to insurability.

In addition to taking steps to ensure compliance with CASL, organizations should review their insurance policies to ascertain what coverage is available in the event they, their directors and officers, or other individual insureds, are investigated for possible violations of the anti-spam legislation. Favourable policy provisions can improve available coverage in the event of a claim. For assistance with reviewing your insurance program, please contact an Aon representative.

# Prepared by

**Brian Rosenbaum LL.B**

Senior Vice President  
and National Director  
Financial Services Group  
Legal and Research Practice  
t +1.416.868.2411  
brian.rosenbaum@aon.ca

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