

## CompuFinder Redux - CRTC Reconsiders \$1.1 million Administrative Monetary Penalty

November 1, 2017

CompuFinder, the first company unlucky enough to be the subject of a widely reported notice of violation prosecution under Canada's anti-spam legislation (CASL), is back in the news. Readers may recall that, on March 5, 2015, the CRTC published a press release advising that it had issued a CASL notice of violation against CompuFinder, assessing an administrative monetary penalty (AMP) in the amount of \$1.1 million. CompuFinder was a company selling educational and training services, primarily in Quebec. The 2015 notice of violation was based on violations of CASL stemming from commercial electronic messages (CEMs) sent without consent, as well as for sending CEMs that did not have properly functioning unsubscribe mechanisms, not ensuring that the unsubscribe mechanism worked for a period of 60 days following message transmission and not acting on unsubscribe requests within the time limit mandated by CASL.

In May of 2015 CompuFinder made representations to the CRTC on the notice of violation, advancing several arguments challenging the basis for the notice of violation and the quantum of the AMP. It is important to recognize that CompuFinder is a small, privately held company with annual revenues in the neighbourhood of \$1.5 million and annual profits of \$100,000. Obviously, a notice of violation for \$1.1 million would be catastrophic for an organization of this size, and in fact, in August of 2016 CompuFinder filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* and in November of 2016, the company made a proposal to its creditors.

As a result of its consideration of the company's representations, the CRTC reduced the administrative monetary penalty from \$1.1 million to \$200,000. The Compliance and Enforcement Decision (CRTC 2017-368) maintains that CompuFinder committed the CASL infractions in question, but, in setting out the rationale for its decision, the CRTC makes several important points that businesses of any size should note.

### Evidence Supporting the Notice of Violation

CompuFinder argued that the evidence appended to the notice of violation contained a number of deficiencies, omitting relevant details that made it difficult for CompuFinder to find the evidence of consent in the particular alleged cases. A number of the alleged messages were presented to CompuFinder in a UTF-coded transmission format that would be difficult to understand by an individual. The CRTC accepted this argument and excluded 115 messages from the 451 messages originally considered to be problematic, as well as excluding other messages that were incomplete, duplicates or fell outside the relevant time period. The CRTC stated that: "While preserving evidence in its original form is important to ensure its

authenticity, care must be taken to ensure that the review proceeding that flows from a notice of violation is fair.”

The implication here is that, if served with a notice of violation, an organization should carefully scrutinize the appended evidence. If insufficient information is provided, it may be possible to have the scope of the matter narrowed, ultimately leading to a lower AMP.

## Business to Business Exemption

The Governor in Council regulations under CASL contain an exemption for “business to business” communications. As drafted, the exemption appears to have a broad application, and CompuFinder relied on this exemption in its submissions to the CRTC.

The business to business exemption has three elements:

- The CEM must be sent by an employee, representative, consultant or franchisee of an organization to an employee, representative, consultant or franchisee of another organization;
- The two organizations have a “relationship”; and
- The CEM concerns the activities of the recipient organization.

One would think that this exemption should be given a large and liberal interpretation, given that other CASL exemptions and forms of implied consent tend to be quite detailed in their statutory descriptions. However, in the CompuFinder case, the CRTC made the following important observations about the business to business exemption:

- **Relationship** – An organization paying for training for one employee is not sufficient to demonstrate that the organization had or intended to create a relationship that would permit the sender to take advantage of a complete exemption from section 6 of CASL (i.e., the consent requirements) and thus send CEMS to directly solicit every other employee of that organization;
- **Course of Correspondence** – A long history of correspondence with the recipient, in of itself, is not determinative of the existence of a “relationship”. The contents of the correspondence, the frequency of the communication and whether or not the messages were reciprocated or even welcome are factors to be considered;
- **Relevance** – To take advantage of the business to business exemption, the sender’s messages must be *relevant* to the recipient’s organization’s activities. One employee’s attendance at a CompuFinder course was not enough to establish that advertisements for *all* CompuFinder courses were relevant to the recipient organization’s activities; and
- **Existing Business Relationship** – CompuFinder tendered copies of invoices and proofs of payment for courses taken by employees of various organizations in order to argue the applicability of the business to business exemption. However, the decision is not clear about who actually paid

for the invoices in each case – i.e., whether it was the organization or the individual who attended the course. The decision mentions in passing that the invoice “might be considered evidence of an existing business relationship *with the specific employee* who attended that training session, and such a relationship could create implied consent to send CEMs to that employee, pursuant to paragraph 10(9)(a) of the Act.” The CRTC goes on to say that it would require more information to conclude that the relationship created by the transaction was with the individual’s employer. With respect, this obiter is not helpful because it obscures the difference between the existing business relationship (EBR) form of implied consent and the business to business exemption. The decision seems to say that the CRTC will, by default, first assume that these situations might be cases of the EBR (which is a time limited form of implied consent arising from various transactions, enquiries or applications) and that it will only look at applying the business to business exemption if further evidence of a wider relationship with the employer is adduced. Where an *organization* is purchasing a course for use by one of its employees, the purchaser is not the individual, and we are of the view that this is one piece of evidence that should be taken into account in assessing whether there is a “relationship” between the sending and receiving organizations for the purpose of the business to business exemption.

## Unsubscribe Mechanism

The unsubscribe mechanisms in some of CompuFinder’s emails either didn’t work, weren’t available for 60 days after message transmission or weren’t implemented in time. The interesting aspect of the evidence on the unsubscribe mechanism is that some messages apparently contained two unsubscribe mechanisms, one of which worked, and one of which did not. While CompuFinder argued that it met the requirements of CASL as long as one of the mechanisms worked, the CRTC saw things differently.

Section 3(2) of the *Electronic Commerce Protection Regulations (CRTC)* under CASL requires that the unsubscribe mechanism “must be able to be readily performed.” The CRTC noted that some individuals who received the messages with two unsubscribe mechanisms were confused and frustrated about whether or not they could actually unsubscribe. It appears that the CRTC applied the subjective interpretation of the message recipient in assessing whether the unsubscribe was “able to be readily performed.”

## Conspicuous Publication

CASL contains a form of implied consent whereby consent to receive CEMs is implied if the receiving person has conspicuously published or caused to be conspicuously published, the electronic address to which the message is sent without any accompanying message that the person does not wish to receive CEMs. CompuFinder argued that a number of the email addresses that it used were obtained from various web addresses. The CRTC did not accept this argument, pointing out the following:

- Conspicuous publication does not mean that the CEM sender has a broad license to send CEMs to

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any email address found online. This form of implied consent is available in limited circumstances where consent can be reasonably inferred on a case-by-case basis;

- For conspicuous publication to apply, the message recipient must have published or caused the publication of the electronic address. It is not available for the use of online directories compiled by third parties on their own initiative;
- The conspicuous publication form of implied consent also contains a relevance requirement. Senders cannot make broad assumptions about relevance. However, this aspect of the decision highlights one of the difficulties in the drafting and interpretation of CASL – relevance of the message to whom? The “conspicuous publication” section of CASL does not refer to individuals; rather, this section refers to “persons,” which has a broad definition encompassing individuals, legal entities and other groups. So, when CASL says that the message must be relevant to the “person’s business, role, functions or duties in a business or official capacity,” is that referring to relevance to the individual who received the message, or, if the message is received at a work or other “official” address, does it mean relevance to the receiving organization? The CRTC referred to relevance to both the individual message recipients and their organizations. However, given that the CRTC found that CompuFinder could not establish relevance to either the individuals or their organizations, it ultimately did not have to decide that interpretive issue.

## Due Diligence

It is open to an organization that is served with a notice of violation to demonstrate that it took all reasonable steps to avoid the violation in question. In its representations to the CRTC, CompuFinder pointed to its compliance efforts, which included hiring new employees prior to July of 2014 to reach out to customers to obtain consent, emailing requests for consent prior to July 1, 2014 (CASL’s coming into force date), consulting the CRTC for guidance on the business to business exemption, and hiring a consultant in May of 2015 to develop a formal compliance program.

The CRTC took issue with these arguments, especially with respect to compliance efforts that took place after the period of time during which CompuFinder’s CASL violations took place. The CRTC was of the view that the impact of these compliance efforts were unclear since CompuFinder did not argue that it in fact had express consent for any of the offending messages and no evidence was presented as to the number of message recipients who had been contacted (through the course of these compliance efforts) to solicit their express consent.

Interestingly, the CRTC seemed to penalize CompuFinder for taking an overly broad interpretation of the business to business exemption and not proceeding cautiously and seeking advice from other sources. Given that the CRTC has been clear that it is not bound by any guidance that it provides and, at the time of CompuFinder’s infractions, there was a general lack of knowledge about how CASL ultimately would be interpreted, the CRTC seems to be judging CompuFinder harshly.

The decision emphasizes that CompuFinder should have followed the guidance previously published by the CRTC, which highlighted the importance of written policies, ongoing audit and monitoring, procedures with dealing with third parties for confirming compliance and adequate employee training. Failure by CompuFinder to implement this guidance ultimately resulted in the CRTC rejecting CompuFinder's due diligence defence.

## Quantum of AMP

Potential AMPs under CASL can be as high as \$10 million per incident and, by initially assessing a \$1.1 million AMP in the CompuFinder case, the CRTC signalled that it was taking CASL enforcement very seriously. CASL provides that the following factors must be considered in assessing the appropriate amount of an AMP:

- The purpose of the penalty;
- The nature and scope of the violation;
- The person's history of prior CASL violations as well as prior violations of the *Competition Act* and the *Personal Information Protection and Electronic Documents Act* in relation to the provisions of those statutes that were introduced through the enactment of CASL;
- The person's history with respect to prior CASL undertakings and undertakings in relation to reviewable conduct under section 74.011 of the *Competition Act*;
- The financial benefit the person obtained from the CASL violation;
- Ability to pay;
- Whether the CASL violator voluntarily paid any compensation to persons affected by the violation;
- Factors established by the regulations; and
- Any other "relevant factor".

The CRTC reviewed the facts of the CompuFinder case and ultimately reduced the amount of the initial AMP to \$200,000. In laying out its reasoning for the reduction, a number of comments made by the CRTC are noteworthy. By way of background, the CRTC commented that CompuFinder had no previous history of violations, there was no evidence that CompuFinder had paid compensation to any complainants, the record contained no information about any financial benefits obtained by CompuFinder as a result of the CASL infractions, and no additional factors to be considered had yet been prescribed by regulation.

The following considerations are significant with respect to the reduction by the CRTC of the AMP to \$200,000:

- **Purpose of the Penalty** - Both CompuFinder and the CRTC agreed that the purpose of the AMP should be promotion of CASL compliance through general deterrence. However, CompuFinder felt that the purpose of the penalty needed to be considered not only in light of general deterrence, but also in light of the company's particular circumstances. CompuFinder argued that the fairly new

nature of CASL and the company's more recent efforts toward compliance suggested a more moderate approach on the size of the AMP would be appropriate. CompuFinder's position was that the initial AMP went beyond general deterrence and served as punishment. The CRTC appeared to agree, stating that if the amount of the AMP is out of proportion to the amount required to achieve CASL's regulatory purposes, then the AMP could be seen imposing as imposing true penal consequences and if the penalty would essentially put the violator out of business, that would preclude that person from participating in the regulated activity in a compliant manner, which is inconsistent with the regulatory purposes of the statute. The CRTC held that an AMP was necessary to achieve the purpose of general deterrence, but that the \$1.1 million AMP was out of proportion to promote CompuFinder's compliance specifically;

- **Nature and Scope of the Violations** - As noted above, the number of violations was reduced from 451 on the original notice of violation to 317. Although the offending emails were only sent over a period of approximately two months and a half months, the CRTC characterized them as "in general, disruptive and unwelcome, and caused nuisance to their recipients". The reduction in number of specific violations from 451 to 317, as well as evidence that one recipient provided incorrect unsubscribe information, factored in to the reduction of the AMP;
- **Ability to Pay** – The CRTC stated that an organization's revenues were a more reliable indicator of ability to pay rather than profits and recognized that a \$1.1 million AMP would threaten the continued existence of a small company such as CompuFinder, which only had annual revenues of \$1.5 million. The filing by CompuFinder of a Notice of Intention under the *Bankruptcy and Insolvency Act* lent support to those solvency concerns;
- **Cooperation** – Although section 20(3) of CASL does not explicitly list the offending organization's cooperation in the investigation as a factor to be considered in assessing the amount of an AMP, the CRTC nevertheless said that cooperation is an important consideration in most cases because it promotes more effective administration of CASL. While the investigation report cited lack of cooperation by CompuFinder, the CRTC ultimately decided that, if there was a lack of cooperation, it was not a significant factor in this case because it did not represent an attempt to stall or frustrate the investigation and in any event the investigation was not delayed. Reading between the lines, it seems that the CRTC was willing to give some leeway in the case because it was the first prosecution under CASL, so understandably there was likely some confusion as to the process and requirements;
- **Self-Correction** – The CRTC mentioned that CompuFinder's recent efforts to improve compliance were a positive indicator that argued for a lower AMP. This consideration is interesting because, again, this is not a factor explicitly listed in section 20(3) of CASL as one of the factors to take into account in assessing the amount of an AMP;
- **Proportionality** – Although the initial investigation report considered the overall proportionality of the penalty to be an "other relevant factor" in assessing the appropriate amount of the AMP, the CRTC did not see proportionality as a factor on its own. In the CRTC's view, if an AMP reasonably reflects the factors set out in CASL and other relevant factors, it will be proportionate and serve its regulatory purpose; and

- **Section 11 of the Charter of Rights and Freedoms (Charter)** – CompuFinder also argued that the AMP was a true penal consequence that engaged section 11 of the Charter, which protects a person's rights in criminal and penal matters. The CRTC issued a separate decision (Compliance and Enforcement Decision 2017-367) on this issue, but ultimately decided that the factors enunciated by the Supreme Court<sup>1</sup> in determining whether a monetary sanction is punitive did not lead to the conclusion in this case that the AMP was a true penal consequence. Instead, the CRTC relied upon its analysis of the factors listed above and in section 20(3) of CASL to come to the conclusion that the size of the AMP was merely disproportionate to the violations in question.

## Conclusion

Although one can argue about some of the logic applied by the CRTC in the CompuFinder decision, the case is welcome news for those who are seeking specific guidance on CASL, particularly on the parameters of the “business to business” exemption. The decision also reiterates the importance of a proper CASL compliance program that satisfies the elements necessary, in the CRTC's view, to establish a due diligence defence. However, CASL remains a troubled statute, with a number of difficulties in applying it in practice. CASL is currently undergoing a parliamentary review and we can only hope that the stakeholder submissions will lead the current government to clarify the law and make compliance more achievable in light of business realities today.

CompuFinder has a right to appeal this decision to the Federal Court of Appeal. We will continue to monitor further developments and keep our readers informed as they arise.

Read the full decision [here](#).

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<sup>1</sup> *Guindon v. Canada*, 2015 SCC 41.