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Court Interprets Canada's Anti-Spam Law

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There are few businesses who would disagree that Canada's Anti-Spam Law (CASL) is complex and can be confusing. Core prohibitions are extremely broad but equally are exclusions that were put in place by Industry Canada to respond to the substantive feedback received once the Canadian business community began to really assess how to comply with the law.

The Canadian Radio-television and Telecommunications Commission (CRTC) has issued press releases and a decision in respect of its enforcement action under CASL. That information has helped businesses to see some issues of concern to the CRTC but has not addressed the deeper legal issues of how to interpret the provisions of **CASL** and especially the exceptions.

The **CASL** bar has looked for cases where a party might dispute aspects of the enforcement of **CASL** so that we could learn how a court would approach this legislation. We do not have a court decision in this context, yet, but a court of superior jurisdiction has considered provisions of **CASL** in the context of a request for injunctive relief claiming violation of **CASL** by sending unwanted electronic messages.

Bejm v. Law Society of British Columbia, 2015 BCSC 169, is a decision of the British Columbia Supreme Court in circumstances where the petitioner was seeking to prohibit the respondent law society from sending emails to him. The issue began as the law society sent email messages to the Mr. Bejm, who is not a lawyer, and asked him to sign an undertaking not to breach the unauthorized practice provisions of the *Legal Professions Act* (BC). The messages were sent via a social media service, Craigslist.

The court noted that the petition of the law society against the Mr. Bejm was not before the court and that what Mr. Bejm sought was a collateral attack, namely, that the law society had no authority to investigate unauthorized practice of law and, secondly, that sending messages that he had not requested was contrary to **CASL** and should be prohibited.

The court readily found that the law society's responsibility to uphold and protect the public interest in the administration of justice included the regulation of the practice of law.

On the second issue of non-compliance with **CASL** the court stated:

"[22] The second issue raised by Mr. Bejm is an alleged breach of the federal *Anti-Spam Act*. I need not go into that in great detail. However, it is clear that the legislation does not apply to the contact made by the Law Society with Mr. Bejm. First, I doubt very much that the emails meet the definition of "commercial activity" or the definition of "commercial electronic message" contained in the *Anti-Spam Act*. However, even if they do, it is quite clear that the Law Society's emails fall within exceptions to the *Anti-Spam Act*. Section 6(5)(b) and (c) exclude messages that are sent to a person who is in a commercial activity and consist only of an inquiry or application related to that activity. That appears to be what the Law Society has done here.

[23] Furthermore, s. 3 of the Regulations to that Act provides that s. 6 of the Act, which deals with commercial electronic messages, does not apply to a message that is sent to a person:

- (i) to satisfy a legal or juridical obligation,
- (ii) to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff,
- (iii) to enforce a right, legal or juridical obligation, court order, judgment or tariff, or
- (iv) to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state ...

The emails from the Law Society may fall within all four of those subsections, but certainly fall within subsections (i) and (ii)."

Importantly the court was not troubled by the broad and circular definition of "commercial electronic message" under **CASL** and importantly found that an exploratory message sent to a person promoting a business was exempt under sections 6(5)(b) and (c) of **CASL**. The analysis suggests that the conditions on this exemption are only that the recipient is "engaged in a commercial activity" and that the message is "an inquiry or application related to that activity".

This is a broad reading of this exemption and should give comfort to others who approach those conducting a "commercial activity" with a message that is "an inquiry or application related to that activity".

We will see how future courts deal with these provisions and how they will give life to them.

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