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- ◆ Contracts & Legal Document reviews
- ◆ Provide advice to Senior Administration on a diverse range of issues
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AHHH, THOSE E-MAILS!



Canadian Anti-Spam Legislation

CASL update

Information on the Canadian Anti-Spam Legislation ('CASL') which came into force on July 1, 2014, has been provided in two previous newsletters. (<http://www.uoguelph.ca/legalcounsel/>). CASL provides for stringent requirements for commercial electronic messages (CEMs) sent within Canada. Whether an electronic message is captured by CASL does not rely on the nature of the organization or the individual sending the message but rather on the nature and content of the message itself. A message is considered commercial if one or more of its purposes is to encourage participation in a commercial activity regardless of whether a profit is to be made. For example, an invitation to purchase tickets to a performance, a trip, or a workshop sent by one organization on its own behalf or on behalf of a second organization might be captured, if sent electronically. Messages which fall under the definition of CEMs must comply with the legislative requirements regarding consent, content and the availability of an unsubscribe mechanism.

Between July 1, 2014 and January 1, 2015, the CRTC received 200,000 complaints under CASL. A summary of some of the recent decisions are below:

- ◆ March 2015 – Compu-Finder: fined \$1.1 million for 3 instances of advertising professional development courses without the recipient's consent and one instance of sending a CEM without a functioning unsubscribe mechanism;
- ◆ March 2015 – Plentyoffish Media Inc: agreed to pay a \$48,000 fine with respect to an allegation that it sent a CEM which contained an unsubscribe mechanism with was not "clearly and prominently" set out and was not able to be "readily performed"; and
- ◆ June 2015 – Porter Airlines: agreed to pay a \$150,000 fine for failure to provide proof of consent from each email address that received its commercial e-mails and for sending e-mails without an unsubscribe button or one that was clearly labelled.

Questions regarding electronic communications and compliance with CASL can be directed to Office of Legal Counsel.

A Contract by any Other Name is Still a Contract...

It is not the format nor the name of a document that defines whether a contract exists. At its most general, a contract must have certain elements:

1. an offer and acceptance with sufficient specificity that the essential terms of the contract are understood, and
2. consideration - something of value must be exchanged for something else of value. This can include goods, cash, services, or even a promise.

Except for very specific circumstances, a contract does not even have to be in writing to be binding. Verbal contracts can also be binding. However, in terms of a written contract, emails can also constitute a written contract as indicated in a recent decision from the British Columbia Court of Appeal. In *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, the Court of Appeal was asked to review a lower court decision which held that through a series of emails, the parties had entered into a five-year sponsorship agreement.

- The parties had been in an equipment agreement and sponsorship arrangement since 2003. These agreements had included a co-terminus clause which meant that if one of the agreements was terminated, the second agreement would terminate as well.
- The agreements were scheduled to expire on August 31, 2008. In November 2007 (and prior to the expiry date), Canon emailed the Canucks to advise that Canon was interested in renewing the agreements for a further five-year term. Both parties wanted the new agreements to be executed simultaneously and in place when the old ones expired on August 31, 2008.
- On June 24, 2008, Canon and the Canucks met to discuss the Sponsorship Agreement. The Canucks presented an offer to sell Canon, sponsorship benefits for five years at a specific price. The Canucks told Canon this offer would be open for acceptance until July 11, 2008, and if Canon did not accept it the Canucks intended to go to the market.
- On July 11, 2008, Canon responded and set out Canon's offer to renew its sponsorship benefits at a different price point, and asked for a signed commitment by August 31, 2008 so the new agreement could start as the current one expired. ("July 11th offer")
- In early September, the Canucks decided to accept the July 11th offer, but did not immediately tell Canon as they were awaiting more information related to the equipment agreement.
- By September 22, 2008, both parties were confident the Equipment Agreement was in hand.
- On September 23, 2008, the Canucks sent an email to Canon setting out the Canucks' acceptance of Canon's July 11 sponsorship offer ("Sept 23rd email"). The Sept 23rd email included the agreed sponsorship benefits, the term of the agreement, and the price. All parties understood the September 23rd email, to be an acceptance of the July 11th offer. Once the Canucks accepted Canon's offer, the sponsorship benefits were fully activated. They were operational by the second home game on October 2, 2008
- Throughout October, the parties worked towards finalizing the Equipment Agreement. The parties' emails during this period indicate Canon was becoming frustrated with the Canucks' demands and delays. The Canucks executed the Equipment Agreement on October 30, 2008 but did not release it to Canon until December 5, 2008. The Canucks held on to the Equipment Agreement to put pressure on both parties to finalize the formal written Sponsorship Agreement without further delay.
- Between November 21st and 27th, versions of the Sponsorship Agreements were exchanged between the parties.
- The only point of contention between the parties was whether there would again, be a "co-terminus clause" in the Sponsorship Agreement (relating to the Equipment Agreement as had previously been in place).
- On December 10, 2008, Canon indicated to the Canucks that Canon was not prepared to have a co-terminus clause of any kind in the Sponsorship Agreement. On December 16, 2008, Canon advised the Canucks of Canon's position that there was no agreement. Canon indicated that it would make payments for any sponsorship benefits received to December 31, 2008.
- On December 17, 2008, the Canucks offered to remove the co-terminus clause from the Sponsorship Agreement. Canon refused to accept this offer.
- Canon took the position that no Sponsorship Agreement had been reached and refused to perform either of the two agreements. The Canucks sued for breach of contract.

- One of the issues at trial was whether the emails in July and Sept 2008 were sufficient to create a binding Sponsorship Agreement. The trial judge concluded that they were and therefore Canon was in breach in refusing to sign the documents to formalize the contract. **The fact that the arrangement was made by email with an expectation that there be a formal agreement did not change the fact that a binding contract existed.** The emails contained no express provision that a formal agreement was a precondition to the formation of an agreement. Further, all the essential terms of the contract had been agreed to in the emails and the fact that some details remained to be settled did not mean that a contract had not been reached.
- The Court of Appeal upheld the lower court's decision. Canon was ordered to pay \$825,987.00

A word from the wise.....

- i. Be careful when negotiating by email. Be careful not to "sign off" on anything or make it explicit if any kind of further approval is required.
- ii. Don't take any benefits under an agreement if it is still being negotiated and is not yet signed.
- iii. If the negotiator does not have authority to sign agreements on behalf of the University, make it clear that review and formal signed documents are a pre-condition to the formation of a contract.