



## Compliance and Enforcement Decision CRTC 2016-428

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Ottawa, 26 October 2016

*File number: PDR 9094-2014-00305*

### **Blackstone Learning Corp. – Violations of Canada’s Anti-Spam Legislation**

*The Commission finds that Blackstone Learning Corp. (Blackstone) committed nine violations of paragraph 6(1)(a) of Canada’s Anti-Spam Legislation by sending commercial electronic messages without consent, and imposes an administrative monetary penalty of \$50,000 on the company.*

#### **Introduction**

1. Between 4 July and 3 December 2014, the Commission received numerous submissions through the Spam Reporting Centre<sup>1</sup> in relation to unsolicited commercial electronic messages – namely, emails – that appeared to have been sent by Blackstone Learning Corp. (Blackstone). These messages advertised educational and training services offered by the company, and were targeted primarily to government employees.
2. Following an investigation, on 30 January 2015, Blackstone was issued a notice of violation pursuant to section 22 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (the Act or Canada’s Anti-Spam Legislation [CASL]) by a person designated for this purpose under section 14 of the Act.<sup>2</sup> The notice identified nine messaging campaigns totalling 385,668 commercial electronic messages sent by Blackstone between 9 July and 18 September 2014 without the consent of the recipients. As a result, a designated person stated that they had reasonable grounds to believe that Blackstone had committed nine violations of paragraph 6(1)(a) of the Act.

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<sup>1</sup> The Spam Reporting Centre is managed by the Commission and gathers information from various sources, including individual Canadians, on spam and other electronic threats to support the enforcement activities of the federal agencies responsible for enforcing compliance with *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*.

<sup>2</sup> Section 14 provides that the Commission may designate persons to exercise various investigative powers and enforcement functions set out in sections 15 through 46. For example, persons may be designated to issue preservation demands and notices to produce, to apply for and execute warrants, and to enter into undertakings or issue notices of violation with respect to alleged violations of the Act.

3. The notice of violation set out an administrative monetary penalty (AMP) of \$640,000.
4. Blackstone was given until 2 March 2015 to pay the AMP set out in the notice of violation or to make representations to the Commission regarding the violations or the amount of the penalty. The Commission received representations from Blackstone, dated 14 February 2015.
5. In its representations, Blackstone argued that the company was denied due process with respect to a notice to produce issued to the company during the investigation, and that it was seeking to appeal the notice to produce before the courts. Blackstone also argued that it had implied consent to send commercial electronic messages based on guidance provided by an official at the Department of Industry, and that the amount of the AMP was unreasonably high.
6. Pursuant to subsection 25(1) of the Act, the Commission must decide, on a balance of probabilities, whether Blackstone committed the violations and, if so, may impose, reduce, or waive the penalty set out in the notice of violation. The Commission may also suspend payment of the penalty subject to any conditions that it considers necessary to ensure compliance with the Act.
7. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:
  - Do Blackstone's efforts to appeal the notice to produce affect the review of the notice of violation?
  - Did Blackstone commit the violations?
  - If yes, is the amount of the AMP appropriate?

**Do Blackstone's efforts to appeal the notice to produce affect the review of the notice of violation?**

8. During the investigation period and prior to the issuance of the notice of violation, a person designated for the purpose of issuing a notice to produce under section 14 of the Act issued a notice to produce to Blackstone pursuant to section 17 of the Act, requiring the company to produce to a designated person information relating to its messaging practices, proof of consent relating to message recipients, and financial information for the company.
9. On 4 December 2014, Blackstone applied in writing to the Commission for a review of the notice to produce pursuant to section 18 of the Act. On 22 January 2015, the Commission denied the application and ordered Blackstone to produce the required information. On 1 February 2015, Blackstone indicated by email that it had filed an application for leave to appeal with the Supreme Court of Canada (SCC).
10. Subsection 27(1) of the Act grants a right of appeal of Commission decisions with respect to notices to produce, other than on a question of fact, to the Federal Court of Appeal, not to the

SCC.<sup>3</sup> This information was communicated to Blackstone in the Commission's review decision, as required by the Act.

11. On 2 March 2015, the Commission was copied on a letter sent to Blackstone from the Registrar of the SCC, indicating that the SCC was not the appropriate forum for Blackstone's appeal. The Commission is not aware of any appeal having been filed with the Federal Court of Appeal.
12. For these reasons, Blackstone's attempts to appeal the notice to produce raise no issues relevant to the review of the notice of violation.

### **Did Blackstone commit the violations?**

13. The specific violations at issue relate to paragraph 6(1)(a) of the Act.
14. Subsection 6(1) of the Act provides that it is prohibited to send or cause or permit to be sent to an electronic address a commercial electronic message, unless (a) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied, and (b) unless the message complies with subsection 6(2), which sets out additional requirements respecting form and content which are not at issue in the notice of violation under review.
15. Commercial electronic messages are defined in subsection 1(2) of the Act, which provides the following:

For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- (a) offers to purchase, sell, barter, or lease a product, goods, a service, land or an interest or right in land;
- (b) offers to provide a business, investment or gaming opportunity;
- (c) advertises or promotes anything referred to in paragraph (a) or (b); or
- (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c) or who intends to do so.

16. The notice of violation was supported by an investigation report that contained the evidence on which the notice was based, as well as a description of the reasonable grounds for the notice and the application of the factors that were considered to determine the amount of the penalty. The investigation report also included copies of submissions made to the Spam Reporting Centre, as well as additional information gathered by the designated person from

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<sup>3</sup> Subsection 27(2) provides that an appeal on a question of fact requires the leave of the Federal Court of Appeal.

governmental organizations to which messages were sent, including Shared Services Canada and the Canada Revenue Agency, as well as the governments of Alberta, British Columbia, and Ontario. This information included copies of emails and lists of email addresses to which messages were sent. The messages consistently referred to “Blackstone Learning Solutions Group” and both the messages and the websites they link to provided contact addresses affiliated with Blackstone or its registered director.

17. In its representations, Blackstone did not raise any arguments or provide any evidence refuting the designated person’s conclusion that the company sent the messages in question. The Commission thus determines, based on the designated person’s analysis, that the messages were either sent, or caused to be sent, by Blackstone.
18. The messages sent referred to and promoted educational and training programs in areas such as technical writing, grammar, and stress management. The cost of these programs was not specifically discussed; however, the nature of the language used, including references to various discounts and group rates, conveyed that these courses were services available for purchase from Blackstone. The Commission thus determines that the messages were sent for the purpose of advertising and promoting services commercially available from Blackstone, and were commercial electronic messages within the meaning of subsection 1(2) of the Act.
19. The notice of violation was also supported by witness statements from five complainants who attested to having received unsolicited messages from Blackstone to their email addresses, and indicated that they had no previous relationship with the company and had never consented to receive such messages. These statements supported the designated person’s conclusion that Blackstone did not have express consent to send the messages.
20. Blackstone did not challenge any of these elements. However, in its representations, the company argued that it had implied consent to send the messages at issue.
21. Subsection 10(9) of the Act provides that consent is implied for the purpose of section 6 only on the basis of an existing business or non-business relationship, conspicuous publication of the electronic address in question, direct disclosure of the electronic address by the recipient, or any circumstances set out in the regulations.
22. Blackstone argued in its representations that it had implied consent to send the messages at issue under the conspicuous publication exemption, based on a broad assertion that the email addresses to which it sent messages were publicly available. Blackstone provided a copy of an email exchange between the company’s director and an official at the Department of Industry, which it argued supported this position.
23. The response to Blackstone from the Department of Industry referred to the requirements of subsection 10(9), then reproduced this provision in its entirety, and underlined individual elements for further emphasis.

## Commission's analysis and determinations

24. This exchange of emails does not support the position put forward by Blackstone: the company posed a general question about the relationship between publication and implied consent, and the official's response merely referred Blackstone back to the relevant section of the Act.
25. Paragraph 10(9)(b) of the Act provides that consent is implied if the person to whom the message is sent has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent; the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address; and the message is relevant to the person's business, role, functions, or duties in a business or official capacity.
26. The conspicuous publication exemption and the requirements thereof set out in paragraph 10(9)(b) of the Act set a higher standard than the simple public availability of electronic addresses. In particular, the electronic address to which the message is sent must not be accompanied by a statement indicating that the person does not want to receive unsolicited commercial electronic messages. The requirement that it be relevant to the recipient's role or functions creates the condition that the address be published in such a manner that it is reasonable to infer consent to receive the type of message sent, in the circumstances.
27. For example, if a business conspicuously publishes on its website contact information for an employee at an address held by that business, this publication could create implied consent to send messages relevant to that person's role. If that business chooses to advertise through a third party and provides that employee's contact information for the purposes of that advertisement, this could also create implied consent to contact that person in relation to that advertisement, or their role, because the account holder caused the publication. However, if a third party were to reproduce this address or sell a list of such addresses on its own initiative, this would not create implied consent on its own, because in that instance neither the account holder nor the message recipient would be publishing the address, or be causing it to be published.
28. Paragraph 10(9)(b) of the Act does not provide persons sending commercial electronic messages with a broad licence to contact any electronic address they find online; rather, it provides for circumstances in which consent can be implied by such publication, to be evaluated on a case-by-case basis. Pursuant to section 13 of the Act, the onus of proving consent, including the elements of implied consent under paragraph 10(9)(b) of the Act, rests with the person relying on it. Various publications on both the Commission's website<sup>4</sup> and on the Department of Industry's web page related to the Act<sup>5</sup> stress the importance of detailed and effective record-keeping for this reason.

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<sup>4</sup> See, for example, the Commission's [Guidance on Implied Consent for CASL](#).

<sup>5</sup> The Department of Industry hosts a web page providing information with respect to the Act for both businesses and individuals at <http://fightspam.gc.ca>. This website is also one of the methods through which submissions can be made to the Spam Reporting Centre.

29. The notice to produce issued to Blackstone required it to produce information with respect to how it obtained consent, whether express or implied, to send commercial electronic messages. Blackstone did not respond to this notice, despite a Commission decision requiring it to do so.
30. Blackstone had a further opportunity to provide this information in its representations. However, Blackstone provided no supporting information to the Commission with respect to where or how it discovered any of the recipient addresses in question, when it obtained them, whether their publication was conspicuous, whether they were accompanied by a statement indicating that the person does not want to receive unsolicited commercial electronic messages, or how the company determined that the messages it was sending were relevant to the roles or functions of the intended recipients. The company's general assertions that it complied with the Act and that implied consent covers publicly available addresses do not sufficiently address the elements of paragraph 10(9)(b) of the Act.
31. Blackstone has therefore not demonstrated that it had consent to send the messages at issue.
32. For these reasons, the Commission determines, on a balance of probabilities, that Blackstone committed the nine violations of paragraph 6(1)(a) of the Act set out in the notice of violation.

### **Is the amount of the AMP appropriate?**

#### **Determining an appropriate AMP**

33. The notice of violation set out an AMP of \$640,000.
34. Subsection 20(3) of the Act sets out the following factors, which must be taken into consideration when determining the amount of an AMP:
  - (a) the purpose of the penalty (which, pursuant to subsection 20(2), is to promote compliance with the Act and not to punish);
  - (b) the nature and scope of the violation;
  - (c) the person's previous history with respect to any previous violation under the Act, any previous conduct that is reviewable under section 74.011 of the *Competition Act*, or any previous contravention of section 5 of the *Personal Information Protection and Electronic Documents Act*;
  - (d) the person's history with respect to any previous undertaking entered into under subsection 21(1) of the Act and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* relating to conduct reviewable under section 74.011 of that Act;
  - (e) any financial benefit that the person obtained from the commission of the violation;
  - (f) the person's ability to pay the penalty;

- (g) whether the person has voluntarily paid compensation to a person affected by the violation;
- (h) the factors established by the regulations; and
- (i) any other relevant factor.

35. Blackstone had no history of violations or undertakings under the relevant acts. There was no information on the record of the proceeding to indicate that the company had paid compensation to any persons affected by the violations, and there are no applicable additional factors established by the regulations.

36. The investigation report identified the following information as applicable to the remaining factors, or as additional relevant factors:

- that compliance with the Act can be promoted through the general deterrence associated with the AMP;
- that the non-compliant conduct reflected a large number of commercial electronic messages sent to recipients at a range of organizations, over approximately five months, and had not ceased as of the day before the notice of violation was issued;
- that some individuals did purchase services from Blackstone during the period in which messages were being sent, and that Blackstone may have been receiving a financial benefit as a direct result of messages sent in violation of the Act, but which cannot be quantified with the available information;
- that Blackstone's ability to pay could not be assessed because the company did not provide financial information as required in the notice to produce; and
- that Blackstone demonstrated a lack of cooperation by refusing to respond to the notice to produce, and did not indicate any likelihood of self-correction.

37. Blackstone objected to the amount of the AMP. The Commission has taken into account Blackstone's cursory representations concerning the amount insofar as possible; however, with the exception of the financial evidence submitted by Blackstone, these submissions were not generally of great assistance in determining an appropriate AMP.

38. In the analysis that follows, the Commission will assess each of the prescribed factors to the extent that the record before it allows.

### **The purpose of the penalty**

39. The investigation report took the purpose of the penalty into account and concluded that, in this case, compliance could be promoted through general deterrence and that the proposed AMP was not disproportionate to the non-compliance observed.

40. The Commission agrees that administrative decision makers may take general deterrence into account in imposing an AMP in the public interest. The SCC has affirmed this principle; however, the objective of general deterrence cannot override the requirement that an AMP not lead to the imposition of true penal consequences.<sup>6</sup>
41. A true penal consequence would include the imposition of an AMP that would appear to have as its purpose the redressing of the wrong done to society at large, rather than simply the securing of compliance within a limited sphere of activity.<sup>7</sup>
42. The magnitude of an AMP is not determinative; sometimes significant penalties are necessary to deter non-compliance or to ensure that the penalty is not simply considered a cost of doing business. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this may suggest that it is a true penal consequence.
43. In this case, Blackstone did not argue that the AMP was disproportionately higher than would be required to achieve the relevant regulatory purposes. In addition, the Act provides for significantly higher maximum penalties than some other AMP regimes (including the Unsolicited Telecommunications Rules and the Voter Contact Registry regimes, for which the Commission is also responsible). The potential for higher penalties provides the Commission and the designated person with a means to recognize and address more egregious non-compliance when it arises, but this does not mean that larger penalties are inherently more appropriate in comparison to regimes with lower maximum penalties. As provided for in the Act, the objective and effect of an AMP must always be to promote compliance, and must not be to punish.
44. The Commission must arrive at an amount that is representative of the violations that were committed and that represents enough of an impact on a person to promote changes in behaviour. However, if an AMP would preclude the person from continuing to operate on a commercial basis, it would also preclude that person's compliant participation in the regulated activity going forward.
45. In the Commission's view, the purpose of the penalty, when considered with respect to Blackstone specifically, suggests that a lower penalty than the one set out in the notice of violation would be appropriate.

#### **The nature and scope of the violations**

46. The investigation report covers the period from 4 July to 3 December 2014. It addressed the nature and scope of the violations by identifying the section of the Act at issue, and the number of individual commercial electronic messages associated with the violations (385,668), which it indicated were sent between 9 July and 18 September 2014. The commercial electronic messages were sent to employee electronic addresses at 25 Canadian federal and provincial government organizations.

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<sup>6</sup> *Cartaway Resources Corp. (Re)*, 2004 SCC 26

<sup>7</sup> *Guindon v. Canada*, 2015 SCC 41



47. The Act regulates a range of conduct, including prohibiting the alteration of transmission data and the installation of unwanted computer programs such as harmful software or malware. The violations of paragraph 6(1)(a) of the Act committed by Blackstone consisted of sending bulk advertisements for its business, by email, without proof of consent. The volume of complaints received prior to the issuance of the notice of violation, including at least 60 unique submissions to the Spam Reporting Centre, as well as the designated person's correspondence with some of those complainants, reflect that these messages were unwelcome and caused nuisance and frustration to a large number of Canadians.
48. While the number of unsolicited messages sent by Blackstone was significant and the messages were disruptive, the duration of the violations in question of approximately two months was relatively short. In the Commission's view, this suggests that a lower penalty than the one set out in the notice of violation would be appropriate.

### **Financial benefit**

49. The investigation report indicated that some purchases were made that may be attributable to the violations, but that there was insufficient information available to quantify or assess the extent of the benefit Blackstone may have received through committing the violations. This factor does not appear to have influenced the assessment of the AMP set out in the notice of violation.

### **Ability to pay**

50. The investigation report indicated that because Blackstone did not respond to the notice to produce, which required the company to produce financial information, this factor could not be taken into consideration.
51. The Commission clarified its approach to this factor in another context, after the notice of violation was issued to Blackstone. In discussing its policy approach to penalties with respect to the Voter Contact Registry,<sup>8</sup> the Commission explained that analysis of the ability to pay in that context need not be limited to specific financial information about a person's immediate ability to pay an AMP. While detailed financial information is extremely useful when available, this factor can also be assessed when necessary using other metrics that may serve as more general indicia of a person's revenue-generating capabilities. A similar approach may be appropriate in cases where specific financial data is unavailable prior to the issuance of a notice of violation.
52. As evidence relevant to the consideration of this, Blackstone submitted unaudited income statements for the preceding two years. As previously noted, these documents were never assessed in the investigation report due to Blackstone's non-compliance with the notice to produce. The Commission accepts Blackstone's evidence in this regard and considers that it demonstrates that Blackstone is a small business, and is consistent with the company's position that the AMP significantly exceeds the company's ability to pay and would represent several years' worth of its annual revenues.

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<sup>8</sup> See *Administrative monetary penalties under the Voter Contact Registry*, Compliance and Enforcement Regulatory Policy CRTC 2015-109, 27 March 2015.

53. Analysis of Blackstone's ability to pay suggests that a lower penalty than the one set out in the notice of violation would be appropriate.

#### **Other relevant factors**

54. The investigation report identified two other considerations in addition to those prescribed by the Act: a lack of cooperation with respect to a notice to produce, and a lack of any indicators of self-correction. The Commission considers that both of these factors may be relevant to the determination of the amount of an AMP where they are present.

55. Blackstone did not cooperate with the investigation. The company refused to respond to a notice to produce issued under section 17 of the Act, even after a Commission decision requiring that it do so.

56. In the Commission's view, lack of cooperation where required by the Act is a factor that may speak to the necessity of a penalty to ensure compliance with the regime, and was appropriately introduced in the investigation report in the circumstances. Blackstone's failure to respond to the notice to produce issued by the designated person, as well as its failure to act upon the subsequent Commission decision requiring that it do so, increases the need for a penalty to ensure Blackstone's future compliance with the Act.

57. The investigation report also asserted that Blackstone demonstrated a low likelihood of self-correction because the company's non-compliant behaviour did not change after it received the notice to produce in November 2014. However, Blackstone did make inquiries to the investigator following the issuance of the notice to produce about the nature of the problem, which, in the Commission's view, provides some evidence of the likelihood of self-correction.

58. Blackstone's correspondence with the Department of Industry is also relevant to the potential for self-correction. Blackstone's effort to understand the Act as it applied to the company's business practices before it came into force shows, to some extent, that the company was aware of and concerned with compliance with the regime, notwithstanding that its efforts to ensure it was operating in compliance were not particularly robust. While there is also information with respect to implied consent available on the Commission's website, some of this guidance was published only after the violations in this case occurred.

59. In the Commission's view, Blackstone's inquiries to the Department of Industry before the Act came into force and to the investigator in response to the notice to produce are indicators that there is some potential for self-correction, which would suggest that a lower penalty than the one set out in the notice of violation would be appropriate.

#### **Conclusion**

60. As stated in the Act, the purpose of a penalty is to promote compliance with the Act, and not to punish. To this end, the penalty set out in the notice of violation places great emphasis on the principle of general deterrence. The Commission accepts that this is a valid principle to be considered in the imposition of an AMP, but considers that the specific circumstances of Blackstone's case, and the violations that have taken place, require a lower AMP.

61. The Commission accepts that Blackstone is a small business with a relatively limited ability to pay. The evidence demonstrates that Blackstone was aware of the Act, and made appropriate, if limited, inquiries before the Act came into force and after learning that the company was under investigation. The Commission is concerned that the company did not cooperate with the investigation, but recognizes that CASL is a relatively new regulatory regime and that Blackstone has no history of non-compliance under CASL or related acts. The company erroneously believed it had implied consent to send commercial electronic messages and did not have the benefit of more recent guidance published on this topic, such as the Commission's Guidance on Implied Consent, published on 4 September 2015.
62. The Act regulates a broader range of conduct than the Commission's Unsolicited Telecommunications Rules do, and creates a different statutory regime than that created by the *Telecommunications Act*, under which those rules were made. Nonetheless, the specific circumstances of this case, which deal exclusively with unsolicited advertising, are similar in many ways to cases under the Unsolicited Telecommunications Rules and, in particular, cases involving the use of automatic dialing-announcing devices,<sup>9</sup> where express consent is a prerequisite to engage in telemarketing. In those cases, significantly lower penalties than the one set out in the current notice of violation have proven sufficient to ensure compliance among businesses situated similarly to Blackstone.
63. Having taken the investigation report and the submissions of Blackstone into consideration in its review of the prescribed factors, and for the reasons set out above, the Commission considers that a total penalty of \$50,000 is proportionate to the circumstances of the case, and is reasonable and necessary to promote Blackstone's compliance with the Act.
64. The Commission finds, on a balance of probabilities, that Blackstone committed the nine violations set out in the notice of violation, and imposes a total penalty of \$50,000 on the company.
65. The Commission hereby notifies Blackstone of its right to appeal this decision by bringing an appeal in the Federal Court of Appeal within 30 days after having been served with a copy of this decision. An appeal on a question of fact may be brought only with the leave of the Federal Court of Appeal, an application for which must be made within 30 days after having been served this decision.
66. The amount of \$50,000 is due by **25 November 2016** and is to be paid in accordance with the instructions contained in the notice of violation. For any amount owing that is not paid by **25 November 2016**, interest calculated and compounded monthly at the average bank rate plus 3% will be payable on that amount and will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.
67. If payment has not been received within 30 days after having been served this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

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<sup>9</sup> These types of calls are also commonly referred to as "robocalls."