

PreSeason, the NFL and CASL



The NFL is trying to clean up its thug image and, after the notoriety following Will Smith's 2015 movie [Concussion](#), is working hard to eliminate public perception that it doesn't care about the physical well-being of its athletes.

Kerry Hyder is a defensive end in the Detroit Lions training camp, battling for a roster position. He's been here before, in other training camps for other teams, trying to finally land a full-time football job. In venture capital terms, Hyder is post-startup but still minimal-revenue.

The National Football League recently [fined him](#) over \$18,000 for roughing Cincinnati Bengals quarterback AJ McCarron in the third quarter of a relatively meaningless preseason game on Aug. 18. The play was so mild, so innocuous, that I can't find video of it. It was just a normal part of an average boring preseason game, resulting in no injury, no victim, no ugliness, but yet, the regulatory body imposed a fine on the player after the game. He's only making \$1,000 a week during the preseason.

He's not the only player to be fined this preseason by the NFL. Two others (Houston's John Simon and the Seahawks Jarran Reed) were also fined for similar roughing infractions. Just in [Week 1](#) of the preseason, seventeen players in total were fined for onfield play.

The NFL told its teams that it would be enforcing the roughing rules more closely, and has followed through on that with financial penalties. Other players have to be taking notice

and consequently changing how they play the game to comply with the rules.

There are direct parallels between Hyder and your business. Think of the CRTC as the NFL. Think of all your daily electronic business communications as the game. And now, think of CASL as the rules the NFL-CRTC has told you it will enforce.

The [CRTC](#) (Canada's Radio-Television and Telecommunications Commission) was created in 1976 to regulate broadcasting and telecommunications. It reports through the federal Minister of Canadian Heritage to Parliament. Enforcement of internet-related regulatory issues has grown into its area of jurisdiction, which means the CRTC is the primary body charged with enforcing *Canada's AntiSpam Legislation* (CASL).

There is considerable background on CASL [in this article](#) with links to prior articles on what CASL is, why it exists, what are the basic requirements and why July 1, 2017 is going to be a terrible date for business. Please go back to those for context. We have repeatedly pointed out that the biggest CASL financial cost to a company will be its lawyers, with the actual fines being imposed by the CRTC coming second.

The CRTC has told us it will enforce the rules as written, and has told us what standards are expected of us. The [Enforcement Advisory](#) published earlier this year described the high bar that compliance with CASL must hurdle over. There will be fines levied for failure to comply.

In case you think you can ignore CASL, ask CompuFinder (fined \$1,100,000 for CASL infractions), Porter Airlines (\$150,000), Plenty of Fish (\$48,000) or Rogers Media (\$200,000) what they think. Inside sources have told us Rogers' legal bills for internal and external counsel was roughly \$2,000,000, not including lost time and the resources then consumed by an after-the-fact compliance effort.

To that list we can now add [Kellogg Canada Inc.](#) Kellogg's, whose brands include Froot Loops, Special K, Pop-Tarts, Corn Flakes, Eggo and Rice Krispies, was fined \$60,000 in August, 2016 because, "from 1 October 2014 to 16 December 2014, inclusively, messages were sent by Kellogg and/or its third party service providers ... to recipients without consent of their recipients." (from the [CRTC's webpage](#)).

That CRTC investigation has been underway for some time. How much do you think Kellogg's has paid to its lawyers to deal with this?

Just as the NFL followed through on its rules enforcement, so too is the CRTC. The Supreme Court of Canada in *Guindon v Canada* in 2015 said that Administrative Monetary Penalties (the fancy-pants way of saying "a fine"), the kind the CRTC can levy under CASL, are a valid part of the legal landscape, so expect to see further fines and settlements as other investigations wind their way through the system.

...and it's only going to get worse!

As of July 1, 2017 (a mere ten months from now) CASL infractions will give rise to a private right of action, supportable by class action litigation. Anyone to whom you send an email or a text can sue you, and then the onus is on you to prove you had consent to send that message. Whether you had consent is irrelevant under CASL – you have to be able to prove you had that consent. So look at your record-keeping: could you prove that today? If not, you are not CASL-compliant and your business is at risk.

It doesn't matter that you may think the law is silly, disproportionate or inapplicable: it exists and it applies to you. How much do you want to pay to your lawyers and the plaintiffs' class action lawyers? Wouldn't it be cheaper to simply comply with CASL?

Kerry Hyder's play on AJ McCarron was innocuous but was

outside of the clear rules of the game, resulting in a direct penalty imposed by the regulator. The same thing is happening with the CRTC and CASL.

We are in CASL's preseason. The real season begins July 1, 2017. Learn the rules and play within them to avoid serious penalty.