



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

February 3, 2017

Via email: charles.taillefer@canada.ca

Charles Taillefer
Director, Privacy and Data Protection Directorate
Digital Policy Branch, Spectrum, Information Technologies and Telecommunications
Innovation, Science and Economic Development, Government of Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Mr. Taillefer:

Re: Private Right of Action Provisions in Canada's Anti-Spam Legislation

The Canadian Corporate Counsel Association and the Privacy and Access and Competition Law Sections of the Canadian Bar Association (collectively, the CBA Sections) appreciate the opportunity to comments on Innovation, Science and Economic Development Canada's consultation on the private right of action provisions of Canada's Anti-Spam Legislation (CASL).

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Sections comprise lawyers with an in-depth knowledge of privacy and access policy and law, competition law, policy and foreign investment review, and issues relevant to in-house counsel.

The CBA Sections have commented on CASL in the past, and support a delay in bringing the private right of action provisions into force (currently scheduled for July 1, 2017), until after the statutory review of CASL has been completed. This delay would give the government an opportunity to assess the appropriateness of the private right of action provisions in the context of CASL as a whole, and engage meaningfully with interested parties on their experience with CASL over the last three years. Any areas of concern could then be addressed – through legislative amendments following the review or other means –reducing unnecessary risk to organizations acting in good faith.

Delaying implementation of the private right of action provisions will not leave individual Canadians without enforcement of CASL. A robust and comprehensive public enforcement regime is in place, with dedicated staffing and funding. This is the case for CASL's messaging and software download provisions, as well as for the address harvesting and computer scraping provisions in ss. 7.1(2) and (3) of the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and the misleading representations provisions in section 74.011 of the *Competition Act*. Organizations

have a significant incentive to comply – with administrative monetary penalties of up to \$10,000,000 for corporations.

So far, the regulatory bodies empowered under CASL, the *Competition Act* and PIPEDA, have been effective in actively enforcing violations by large and small organizations. The Canadian Radio-television and Telecommunications Commission has been particularly active enforcing CASL, issuing numerous notices of violations and fines since CASL came into force. Similarly, the Competition Bureau continues to be active in its enforcement of misleading representations. For its part, the Office of the Privacy Commissioner of Canada recently released a detailed, reasoned report of findings against an organization engaged in address harvesting.

Although CASL has been in force for almost three years, there are still many areas of interpretive uncertainty for organizations seeking to fully comply with the Act. For example, ambiguous sections of CASL and the *Competition Act* include:

- Subsection 6(6) of CASL – applicability of CASL requirements to informational messages;
- Subsection 10(8) of CASL – applicability of CASL to the installation of cookies;
- Section 67 of CASL – effect of the computer program transitional provision
- The scope of the business to business exemption in CASL – in light of the commentary in the Regulatory Impact Analysis Statement; and
- Section 74.011 of the *Competition Act* – whether this could be construed to apply to private communications between commercial parties.

Bringing the private right of action provisions into force before the review of CASL may create a situation where private litigation is launched while these ambiguities remain. Organizations acting in good faith, who have been diligent in their compliance activities, could still find themselves facing significant claims under the private right of action provisions. Delaying the coming into force until after the review would provide the opportunity to address these areas of ambiguity through the statutory review process.

On a related note, the private right of action provisions themselves have the potential to become a significant source of uncertainty in the future. Regulatory agencies are in the process of developing a body of CASL decisions and guidance. However these efforts are at early stages, and considerable uncertainty remains. Once the private right of action provisions come into effect, CASL will be interpreted by a variety of courts, with the possibility of parallel or conflicting jurisprudence between regulatory and court findings, and even between different provinces.

From a policy perspective, if the private right of action provisions are brought into force before the statutory review is completed, the class action liability risk and interpretive uncertainty could discourage innovative and legitimate electronic commerce activity at the very time when the government is encouraging Canadian businesses to embrace electronic commerce.

The CBA Sections recommend that the government delay bringing the private right of action provisions into force until the completion of the upcoming statutory review – during which a thorough analysis of the implications of the private right of action could be accomplished.

We appreciate the opportunity to provide our comments on the timing of the private right of action provisions, and would be pleased to discuss them with you in further detail. We look forward to providing our input on additional issues related to CASL during the statutory review process.

Yours truly,

(original letter signed by Kate Terroux for Stephen A. Rotstein, Loïc Berdnikoff and Rodney Frank)

Stephen A. Rotstein
Chair, Canadian Corporate Counsel Association

Loïc Berdnikoff
Chair, CBA Privacy and Access Law Section

Rodney Frank
Chair, CBA Competition Law Section