

November 28, 2018

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
235 Queen Street
Ottawa, ON K1A 0H5

Dear Mr. Taillefer:

Re: Proposed Technical Changes to Canada's Anti-Spam Legislation

We are writing on behalf of the Canadian Bar Association Privacy and Access Law Section, Charities and Not-for-Profit Law Section and Canadian Corporate Counsel Association (CCCA) (together, CBA Sections) to propose technical changes to Canada's Anti-Spam Legislation (CASL)¹.

The Canadian Bar Association is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Privacy and Access Law Section comprises lawyers across Canada with an in-depth knowledge of privacy and access to information law and policy. The members of the Charities and Not-for-Profit Law Section specialize in all areas of charities and not-for-profit law. The CCCA provides a national forum for in-house counsel in Canada.

The CBA Sections were invited by Innovation, Science and Economic Development Canada to suggest specific drafting and technical changes to improve CASL. Our proposed wording changes are described below. We would be pleased to discuss other possible amendments, such as a broader exemption for Business-to-Business (B2B) communications, at the appropriate time.

A. Definition of Commercial Electronic Message

The definition of "commercial electronic message" (CEM) is overly broad and vague. It potentially encompasses activities that go beyond the illustrative examples listed in CASL. For example, a link to an organization's website in an otherwise exempt email for purely informational purposes may cause that email to be considered a CEM. CASL requires thoughtful amendments to clarify what is and is not a CEM and to ensure it focuses on the purpose of the legislation.

We recommend the following amendment to the definition of CEM in CASL:

Meaning of commercial electronic message

¹ *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 (S.C. 2010, c. 23).*

1 (2) 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 primary or principal purpose, ~~or one of its purposes~~, to encourage participation in a commercial activity, including an electronic message that ...

B. Application of unsubscribe requirements to informational messages

The main problem with this section as currently worded (for the listed categories of “public service messages”) is that only the consent requirement is excluded. The unsubscribe requirement, stipulated in section 6(2)(c), is not excluded. It is not appropriate, and is potentially misleading, to require an unsubscribe in such messages. There should not be any suggestion that a recipient can require a sender not to send public service messages in the future and such an interpretation of CASL’s intent would not be accurate. We propose that reference to section 6(2)(c) be added to the introductory line of section 6(6) so as to exclude the unsubscribe requirement.

Section 6(6) of CASL, which sets out partial exemptions, implies that messages without any sales or promotional component (e.g., certain messages that provide “notification about factual information”) are CEMs. As well, some exemptions in this section conflict with exemptions in the Regulations (e.g., the exemption for providing a requested quote or estimate).

We recommend the following amendment to section 6 of CASL:

Exception

(6) Paragraphs (1)(a) and 2(c) ~~does do~~ not apply to a commercial electronic message that solely...

The sender identity and contact information requirements under section 2(1)(d) of the Electronic Commerce Protection Regulations² (CRTC) are overly complicated and, in part, unnecessary for section 6(6) messages. For ease of reference, section 2(1)(d) of the CRTC reads as follows:

(1) (d) the mailing address and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the message...

We propose that the sender ID requirement for section 6(6) messages be clarified and simplified by adding a section 2(3) to the CRTC that reads as follows:

(3) For purposes of messages governed by subsection 6(6) of the Act, the information required under paragraphs (d) above shall be any of the mailing address, telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the message or, if different, the person on whose behalf the message is sent.

Overall consideration of the approach to exemption and exceptions would be appropriate when a substantive review of CASL is undertaken.

C. Requirements for Installing Computer Programs

Section 8(1) of CASL prohibits a person from installing or causing to be installed a computer program on another person’s computer system without consent. Since this provision was drafted, more and more apps are installed via third parties (for example, by Apple’s App Store and the Google Play Store). Users are performing the installations as they trigger the download of the apps.

If consent was not obtained from a user for an app installation because consent was not needed, the maker of the app also would not have received consent to “push” updates to that user pursuant to

² [Electronic Commerce Protection Regulations \(CRTC\)](#), SOR/2012-36.

section 10(7) of CASL. This could have the unintended effect of restricting companies from sending critical security updates and bug fixes to app users, exposing users to greater risks from hackers and other cyber criminals.

However, section 10(8) of CASL lists computer programs that a person is deemed to have expressly consented to, with section 10(8)(a)(vi) allowing for additional types of computer programs to be specified by regulation. The simplest means of correcting the identified issue would be to expand the list of additional types of computer programs specified in section 6(c) of the Electronic Commerce Protection Regulations, SOR/2013-221 to include security and other updates. This change would allow companies more freedom to resolve critical security issues and provide upgraded features to users without having to seek additional consent, and would be consistent with the intent of CASL to enhance efficiency and facilitate the use of electronic means of carrying out commercial activities.

We recommend the following amendment to section 6(c) of the Electronic Commerce Protection Regulations, SOR/2013-221:

Specified computer programs

6. The following programs are specified for the purposes of subparagraph 10(8)(a) (vi) of the Act:

(c) a program that:

(i) is necessary to correct a failure in the operation of the computer system or a computer program installed on it ~~and~~; or

(ii) updates or upgrades of an installed computer program, provided that such update or upgrade does not cause the computer program to perform a function described in subsection 10(5) of the Act unless express consent was previously provided for the function in accordance with subsection 10(4) of the Act.
is installed solely for that purpose.

With these changes, CASL could also be amended and simplified by deleting section 10(7) if desired.

As a housekeeping item, we also suggest consistent use of the term “computer program” in CASL and the CRTC. “Program” is used in a number of spots, rather than the defined term “computer program”.

D. Requirement for Separate Consents

Section 4 of the CRTC requires that express consent be sought separately for sending CEMs (section 6), altering transmission data (section 7), and installing a computer program on someone else’s computer (section 8). *Compliance and Enforcement Bulletin 2012-548*³ requires that consents be kept separate from the request for consent for general terms of use and conditions of sale. The multitude of consent requirements is confusing to both consumers and businesses. While this approach may make sense when unexpected or potentially harmful activities are contemplated, it is not necessary in all cases.

The CBA Sections would welcome the opportunity to discuss how to make these requirements more practical and efficient for businesses and consumers alike, and to ensure the requirements reflect the original legislative intent.

³ <https://crtc.gc.ca/eng/archive/2012/2012-548.htm>

E. Scope of PRA

The CBA Sections continue to support⁴ the delay in bringing the private right of action clauses into force. We recommend delaying until at least the next statutory review.

F. Definition of Club, Association

Comments/Rationale

The definition of “a club, association or voluntary organization” in section 7(2) of the Electronic Commerce Protection Regulations, SOR/2013-221 is similar but not the same as the definition of a “non-profit” in section 149(1)(l) of the *Income Tax Act* (ITA). Having two slightly different definitions of similar terms in different federal laws could lead to confusion (for example, raising the question of whether all non-profits under the ITA are non-profits under CASL). Overly complex rules add to the administrative burden and costs on non-profits and charities and are not in the public interest.

Various tax exempt entities also included in the ITA should receive similar treatment under CASL, such as those referenced in ITA sections 149(1)(e) (agricultural organizations, etc.), (g) (registered Canadian amateur athletic associations), (i) (certain housing corporations) and (k) (benevolent societies, etc.). However, the definition of “a club, association or voluntary organization” in section 7(2) of the Electronic Commerce Protection Regulations, SOR/2013-221 implies that only tax exempt entities included in section 149(1)(l) of the ITA are covered by CASL.

We recommend that section 7(2) of the Electronic Commerce Protection Regulations, SOR/2013-221 be amended as follows:

For the purposes of paragraph 10(13)(c) of the Act, a club, association or voluntary organization is a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada, and includes, without limitation, an organization described in paragraph 149(1)(e), (g), (i), (k) and (l) of the Income Tax Act.

We trust these comments will be helpful in updating CASL, and look forward to contributing to a broader review of the legislation. Please let us know if you have any questions.

Yours truly,

(original letter signed by Gaylene Schellenberg for Lorne Randa, Susan Manwaring and Michael McKinney)

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⁴ See our earlier letter to Charles Taillefer, Director, Privacy and Data Protection Directorate, ISED, dated Feb 3, 2017, concerning *Private Right of Action Provisions in Canada's Anti-Spam Legislation* (Ottawa: CBA, 2017).