



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN



Canadian Corporate Counsel Association
Association canadienne des conseillers (ères)
juridiques d'entreprises

October 23, 2017

Via email: indu@parl.gc.ca

Dan Ruimy, M.P.
House of Commons Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Dear Mr. Ruimy:

Re: Statutory Review of Canada's Anti-Spam Law

The Canadian Corporate Counsel Association and the Privacy and Access Law and Competition Law Sections of the Canadian Bar Association (collectively, the CBA Sections) appreciate the opportunity to comment on the statutory review of Canada's Anti-Spam Law (CASL or the Act).

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 law and policy, competition law and policy and issues relevant to in-house counsel.

The CBA Sections applaud the government's efforts to combat fraudulent and deceptive electronic communications. However, CASL must strike a balance between ensuring a secure online environment to protect consumers and allowing businesses to compete in a global marketplace. Our comments come from this perspective. The CBA Sections have concerns with many elements of CASL¹, not all of which we can discuss in this short letter. Outlined below are our major concerns.

Need for More Extensive Consultation

More than three years since CASL's implementation, there still remains great uncertainty about many of its aspects. It is an overly complex statutory and regulatory regime that continues to raise numerous questions for consumers and businesses alike. Conflicting interpretations only make understanding and complying with CASL more difficult, especially for small and medium sized businesses, charities and non-profits. The CBA Sections support the suspension of the private right of action (PRA) provisions pending the statutory review. We believe that a more extensive, inclusive and transparent consultation (which considers, among other things, the need for and the appropriate scope of any PRA) is needed. The time-limited review by the House of Commons Committee and the three-page limit on submissions is inadequate to address the complexities and challenges of CASL in its current form, and the requirement for a statutory review does not contemplate such a limited process.

Wrongly Focused

CASL was adopted primarily to target spam and other electronic threats by bad actors and to protect consumers from those activities. However, its application and enforcement have been largely focused on

¹ See also Canadian Bar Association, *Private Right of Action Provisions in Canada's Anti-Spam Legislation* (February 2017), available [online](#); *Electronic Commerce Protection Regulations* (February 2013), available [online](#); *Industry Canada Anti-Spam Regulations* (September 2011), available [online](#); CRTC Draft Regulations Consultation 2011-400 (September 2011), available [online](#), and Bill C-27 Electronic Commerce Protection Act (September 2009), available [online](#).

legitimate businesses doing their best to comply with a new complex legal regime. The statutory review should ensure that the stated purpose of CASL is accurately reflected in compliance requirements, industry guidance and enforcement.

Overbroad Approach

The current regime unduly restricts commercial electronic messages (CEMs) to the detriment of Canadian consumers, businesses, charities and non-profits. CASL and its supporting regulations are not consistent with the legislative purpose – to protect consumers from unwanted, damaging and deceptive CEMs. The broad definition for CEMs that is open to significant interpretation unnecessarily limits types of electronic messages that benefit consumers, and has a chilling effect on innovation and legitimate competition.

Unclear Legislation and Lack of Guidance

CASL has many unclear and confusing provisions. The interpretative uncertainty increases the likelihood of unintentional noncompliance, and is exacerbated by a lack of clear guidance from the government and the Canadian Radio-television and Telecommunications Commission (CRTC). The guidance that does exist is incomplete, inconsistent and often difficult to find. Some of the more problematic areas include:

- **Definition of CEM:** The definition of CEM is overly broad and vague. It potentially sweeps in activities that go far beyond the illustrative examples listed in the Act. 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. The Act requires thoughtful amendments to clarify what is and is not a CEM and to ensure it focuses on CASL’s stated purpose.
- **Application of unsubscribe requirements to informational messages:** Subsection 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 subsection conflict with exemptions in the Regulations (e.g., the exemption for providing a requested quote or estimate).
- **Requirements for Installing Computer Programs:** Subsection 10(8) of CASL deems express consent to be given for downloading certain programs, such as an operating system. However, it is unclear what conduct will meet the threshold of evidence of a ‘reasonable belief’ that a person consents to the installation of a computer program. It appears that the requisite conduct should be less than express consent (to give the deemed consent provision meaning) but it is not clear what lesser standard is sufficient. The CASL Requirements for Installing Computer Programs Information Sheet states that this is not satisfied where the user does not disable Javascript or cookies in their browser, but it does not state what conduct would be sufficient: for example, if user does not disable, does that mean that the user consents?
- **Requirement for Separate Consents:** Section 4 of the Regulations requires that express consent be sought separately for sending CEMs (section 6), alteration of transmission data (section 7), and installation of a computer program on someone else’s computer (section 8). Compliance and Enforcement Bulletin 2012-548 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.
- **Scope of PRA for False/Misleading Representations:** Section 74.011 of the *Competition Act* prohibits false or misleading representations in an electronic message and is contemplated to be subject to the PRA provisions of CASL. This is of particular concern because certain subsections contain no materiality threshold and the scope of the PRA’s application remains unclear. This is but one example of the importance of careful review of the necessity for the PRA and appropriate scope (see below).
- **Administrative Monetary Penalties:** The enforcement to-date suggests that each CEM sent to each consumer is not considered a separate violation, but no guidance has been provided.

Disproportionate Enforcement and Oversight

We support the CRTC's efforts to target damaging and deceptive forms of malware and spyware. However, we have concerns with the enforcement and oversight powers granted to CRTC staff. There is a lack of transparency as to how the CRTC decides which cases to investigate and the monetary fines to impose. We understand that the CRTC has resisted access to information requests that seek to understand the process for addressing complaints and conducting investigations. Also, it is unclear from reported decisions to what extent the CRTC is applying the Act's due diligence defense. As well, organizations are typically not advised of complaints prior to a CRTC investigation, or provided any informal opportunity to respond to complaints and make any necessary changes to their practices. An informal mechanism could avoid the need for a costly in-depth investigation.

Concerns have also been raised about the CRTC's conduct of investigations. If the purpose of penalties under CASL is to promote compliance and not to punish, the government should limit enforcement powers to serious violations or conduct causing real harm to consumers, business and the marketplace, rather than focusing on organizations that fall afoul of CASL due to inadvertence or a confusing legislative structure.

Private Right of Action (PRA)

We support the federal government's decision to suspend the PRA pending this statutory review. A thorough analysis of the appropriateness of the PRA in the context of the whole of CASL is necessary. Under the PRA, organizations acting in good faith, who have been diligent in their compliance activities, could find they still face significant claims.

Bringing the PRA into force without clear guidance is premature. A robust and comprehensive public enforcement regime is in place already under CASL (and the *Competition Act*), notwithstanding the PRA, with dedicated staffing and funding. In our view, lack of compliance is more likely to be the result of the confusing and onerous nature of CASL, rather than the threat of current enforcement efforts being insufficient.

Treatment of Charities and Non Profits

CASL's complicated compliance requirements represent an inordinate cost and resource burden for Canadian charities and non-profits. These organizations provide a valuable service to civil society and should not be overburdened with unnecessary compliance costs. The onerousness of CASL may lead to non-compliance and possible regulatory and PRA exposures for organizations and their directors and officers, many of whom serve voluntarily. These organizations have limited resources and face the greatest risk of being devastated by excessive monetary penalties or defending against class action claims under the PRA provisions. Furthermore, the likelihood of egregious non-compliance is very low. The CBA Sections recommend that Canadian charities and non-profits be exempt from CASL requirements relating to CEMs, except for the ID, content and unsubscribe requirements.

In summary, further consultation is needed in this statutory review to achieve the objectives of CASL. We appreciate the opportunity to offer our initial comments on CASL and look forward to discussing our concerns and possible options.

Yours truly,

(original letter signed by Gillian Carter for Nick Slonosky, Suzanne Morin and Anita Banicevic)

Nick Slonosky
Chair, Canadian Corporate Counsel Association

Anita Banicevic
Chair, CBA Competition Law Section

Suzanne Morin
Chair, CBA Privacy and Access Law Section