

Cassels

CASL Private Right of Action - Gone For Now, But Can It Be Forgotten?

Bernice Karn

June 8, 2017

To the relief of many in the Canadian business community, in a surprise last minute move the Federal Government issued an Order-in-Council on June 7 effectively shelving the private right of action under Canada's anti-spam legislation (CASL) for the foreseeable future.

The June 7th Order-in-Council repealed paragraph (c) of the 2013 Order-in-Council that set July 1, 2017, as the date on which the private right of action would come into force. In a news release, Innovation, Science and Economic Development Canada stated that "*Canadians deserve an effective law that protects them from spam and other electronic threats that lead to harassment, identity theft and fraud. At the same time, Canadian businesses, charities and non-profit groups should not have to bear the burden of unnecessary red tape and costs to comply with the legislation.*" However, the matter is far from over, as the government has stated that it will ask a parliamentary committee to review the legislation.

Under the private right of action, any private litigant can sue for a breach of any or all of sections 6 – 9 of CASL, the "electronic address harvesting" provisions of the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and the provisions of the *Competition Act* dealing with false/misleading representations in electronic messages, no matter how minor, and can claim statutory damages in addition to compensatory damages.

The statutory damages available under the private right of action are significant and cumulative, potentially reaching \$1 million per day for each "contravention" of the anti-spam provisions of CASL. In addition, contravention of the CASL prohibitions on network traffic redirection and spyware carry \$1 million per day in damages. CASL also allows litigants to claim similar levels of damages for certain breaches of PIPEDA and the *Competition Act*, as well as damages for aiding and abetting. Not only are the potential statutory damages under CASL astronomical, the private right of action in CASL may have a retrospective application.

While this suspension of the private right of action is welcome news, businesses need to be mindful that the balance of CASL still remains in effect and subject to oversight of the CRTC, the Office of the Privacy Commissioner and the Competition Bureau. The regulatory regime still provides for significant "administrative monetary penalties" for non-compliance.

The three year transitional period under CASL comes to a close on July 1, 2017. After that date, senders of

Cassels

commercial electronic messages can no longer rely on existing business relationships and existing non-business relationships that pre-dated CASL's enactment on July 1, 2014. After July 1, 2017, senders will need express, fully informed, opt-in consents to send emails and other forms of commercial electronic communications to those message recipients unless an exception or one of the very specific and detailed forms of implied consent applies.

CASL is a technical statute and achieving compliance is often a confusing exercise. We will continue to keep our readers updated on significant developments as they occur.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.