

ESPC Update on Review of Canada's Anti- Spam Legislation

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Summary

- Summary of CASL review
- ESPC issues
- ESPC meeting with ISED
- Predictions
- Recap of CASL enforcement so far
- Summary of PIPEDA review

CASL Review

- CASL (mostly) in effect since July 1, 2014
- **Review of Act by Parliamentary committee**
65 Three years after the day on which this section comes into force, a review of the provisions and operation of this Act must be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose.
- Review conducted by House of Commons Standing Committee on Industry, Science and Technology ("INDU")
- Began September 26, 2017; final report presented to Parliament December 13, 2017

CASL Review: Summary

- Committee heard from **41 witnesses** and received **29 written briefs** (ESPC was first stakeholder to submit written brief, both detailed and short versions)
- Witnesses mostly critical of CASL; some advocate that CASL is fundamentally flawed, while others argued for more discrete changes
- Relatively small number of supporters
 - Public/privacy/anti-spam advocates
 - CASL compliance service providers
- December 13, 2017 final report entitled “[Canada’s Anti-Spam Legislation: Clarifications are in Order](#)”
- Very little meaningful analysis and few substantive recommendations, focused on providing “further clarity”

CASL Review: the ESPC's Issues

1. Transactional and relationship-type messages

- Subs.6(6) was included in CASL to address (bogus) concerns that CASL would inadvertently prevent sending important transactional and relationship-type messages
- However, subs.6(6) can and has been interpreted to include these messages by stating that **consent** is not required for a commercial electronic message that solely...
- Thus, according to CRTC, an unsub **is** required
- Raised by many stakeholders in review
- ESPC recommendation: remove subs. 6(6) as it is unnecessary and confusing
- INDU recommendations: *"....clarify whether electronic messages listed under section 6(6) of the Act fall under the definition of 'commercial electronic message'" and ". In particular, the status of administrative and transactional messages should be clarified."* (Recommendations 2,6)

CASL Review: the ESPC's Issues

2. Cookies

- Cookies are not computer programs according to definition under CASL ("*data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function.*")
- However, to address (bogus) stakeholder concerns that computer program rules would apply to cookies, CASL was drafted to state that express consent is deemed if the "*program is...a cookie... and the person's conduct is such that it is reasonable to believe that they consent to the program's installation.*" (subs.10(8))
- CRTC has interpreted this to mean that cookies are computer programs ([CRTC defines cookies as "non executable computer programs"](#))
- Raised solely by ESPC
- ESPC recommendations:
 - Remove reference to cookies from subs.10(8)
 - State that for further clarity that cookies are not computer programs
- INDU recommendation: none (no reference to cookies or computer program rules whatsoever)

CASL Review: the ESPC's Issues

3. Identification of senders

- CASL contemplates that one person may “send” a CEM “on behalf of” another person
- CRTC staff have interpreted CASL to mean that ESPs who assist senders in creating and delivering email campaigns send “on behalf of” their clients (e.g., ESPs that provide personalization technologies)
- In such situations this means that ESP must be identified as person who sends on behalf of clients
- Raised by ESPC and one other stakeholder (at urging of ESPC)
- ESPC recommendation: clarify that the person who “sends” for the purpose of CASL is the person who purports to have a consent relationship with the recipient, or, where consent is not required, the person who seeks to engage in commercial activity with the recipient.
- INDU recommendation: “...consider how to best incorporate messages sent on behalf of an authorized person with regards to section 6(2)(a) of the Act.”

CASL Review: the ESPC's Issues

4. Administrative Monetary Penalties

- AMPs have almost unlimited ceiling (\$10 million/violation)
- Concerns over AMPs raised by many stakeholders in review
- ESPC recommendations:
 - Reduce maximum penalties to \$15k/violation (in line with Unsolicited Telecommunications Rules)
 - Should be explicitly linked to history of violations (max. of \$5k for 1st, \$10k for 2nd, \$15k for 3rd and subsequent)
 - Clarify that penalties under s.6 are on campaign level (not per individual email)
 - Penalties should only apply to intentional penalties
- INDU recommendation: none

CASL Review: the ESPC's Issues

5. Private Right of Action

- PRA is extraordinary remedy – available to any person (or class of persons) affected by violation of CASL & related amendments to PIPEDA and *Competition Act*
- PRA is currently not in effect – delayed pending outcome of review and subsequent decision by government
- Concerns raised by many stakeholders in review
- ESPC recommendations:
 - Remove PRA
 - Alternatively, remove statutory damages
- INDU recommendation: *“further investigate the impact of implementing the private right of action, once changes and clarifications have been implemented to the Act and its regulations. At the same time, it could consider if an award of damages should be based on proof of tangible harm.”*

CASL Review: Process

- INDU requested comprehensive government response within 120 days (by Apr. 12, 2018)
- Government does not have to follow or give any weight to recommendations
- Real decision-makers are within the Department of Innovation, Science and Economic Development (“ISED”, formerly Industry Canada)

ESPC Meeting with ISED

- January 26, 2018
- ESPC attendees:
 - Reed Freeman
 - Shaun Brown
- ISED attendees (Marketplace Framework Policy Branch):
 - Mark Schaan – Director General
 - Charles Taillefer – Director, Privacy and Data Protection Policy Directorate
 - Marc-André Sénéchal – Sr. Policy Analyst, Privacy and Data Protection Policy Directorate
- Overall impressions
 - Appreciative of ESPC’s willingness to meet and keen to listen to concerns
 - ISED officials well-informed on CASL, despite all being relatively new to file
 - These officials have no personal investment in CASL; however, clear preference for focused and concrete issues and proposals (not considering dramatic overhaul of CASL)

ESPC Meeting with ISED

- Focused on 1) identification of senders, and 2) cookies (less likely to be raised by other stakeholders)
- Indicated no awareness of these issues before reading our brief
- Appeared very receptive to the challenges we raised and appreciative of specific and concrete proposals
- Meeting was an overall success; ISED has impression of ESPC as collaborative and reasonable association
- We offered for ESPC and its members to be of any assistance going forward

Next Steps

- Government response to INDU review should be tabled soon
- This is a very long process – though changes to CASL are expected, this will likely take several years
- Not a lot of productive sitting time for Parliament between now and shut down for next election which will occur no later than Oct. 2019
- Also no political upside to making changes prior to election
- Following government response ISED will likely seek “pre-drafting authority” from cabinet, which allows ISED to work with Department of Justice (“DOJ”) on legislative proposals which will serve as basis for public consultations
- More formal drafting instructions would follow public consultations
- We will continue to monitor process and engage where necessary

Predictions (to be taken with big grain of salt)

1. Transactional and relationship-type messages:
 - Will be addressed, possibly with removal of subs.6(6) or further clarifying language
2. Cookies:
 - Will be addressed by removal of cookies from subs.10(8)
3. Identification of senders:
 - Will be addressed, possibly through clarifying language in CASL or guidance materials
4. Penalties:
 - Will not be addressed
5. PRA:
 - Will likely be addressed, through removal of statutory damages more likely than complete removal

Recap of CRTC Enforcement

- Four undertakings:
 - [Plenty of Fish](#): overly complicated unsubscribe (\$48k)
 - [Porter](#): no records of consent, incomplete contact info, unsubscribe not readily available (\$150k)
 - [Rogers](#): non-compliant unsubscribe (\$200k)
 - [Kellogg](#): no consent (\$60k)
 - [Mr. Halazon and TCC](#): non-compliant unsubscribe (\$10k)
- Administrative monetary penalties: each involved allegations of multiple violations, including sending CEMs without consent
 - [Compufinder](#): \$200,000, Commission reduced from staff recommendation of \$1.1 million
 - [Blackstone Learning](#): \$50k, Commission reduced from staff recommendation of \$640k
 - [William Rapanos](#): several violations, including CEMs sent without consent \$15k

Review of *Personal Information Protection & Electronic Documents Act* (PIPEDA)

- PIPEDA is federal private sector privacy legislation
- Review by House of Commons Standing Committee on Access to Information, Privacy & Ethics ("ETHI")
- Overall process is very similar to CASL review
- Also responsibility of ISED Marketplace Framework Policy Branch
- Began February 2017; report tabled February 28, 2018:
[*Towards Privacy by design: Review of the Personal Information Protection and Electronic Documents Act*](#)
- Much more detailed and comprehensive than INDU CASL review report

PIPEDA Review: Notable Recommendations

- Stronger enforcement powers for Privacy Commissioner, including order-making powers and fines
- Improve algorithmic transparency
- Allow personal information to be used for “legitimate business interests”
- Examine how to protect depersonalized data
- Specific rules to address privacy of minors
- Right to data portability
- Right to erasure
- De-indexing rights
- Work with EU to ensure Canada retains adequacy status

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