

## **A “Private Right of Action” under Canada’s Anti-Spam Legislation** *Upping the ante on anti-spam violations*

September 2016

Most employers should already be familiar with Canada’s Anti-Spam Legislation (“CASL”)<sup>1</sup>, which came into force on July 1, 2014. For those unaware, CASL regulates the sending of commercial electronic messages and requires individuals and entities that distribute commercial electronic messages to obtain prior consent (direct or implied) from intended recipients.

Though most provisions of CASL have been in force for two years now, the enforcement date of certain key provisions was delayed until next year – July 1, 2017. These soon-to-be enforced provisions create a private right of action that allow any person (*i.e.*, individual, partnership, corporation, organization, association, trustee, administrator, *etc.*) to commence a legal proceeding on grounds another individual or entity has breached certain provisions of CASL. In the event of a contravention a monetary penalty up to a maximum of \$1,000,000 per day may be imposed.

As the private right of action may expose an organization to costly penalties and litigation, organizations should take the opportunity now to revisit their communication practices to ensure they are CASL compliant.

### ***How the private right of action provisions will work***

The private right of action provisions of CASL, sections 47 to 51 and 55, permit any person to apply to a court alleging they have been affected by an individual or entity’s contravention of the legislation.

After hearing the application, the court can order the offending individual or entity pay the person the loss or damage suffered or incurred, ***as well as*** statutory damages (*i.e.*, non-compensatory loss) up to a maximum of \$1,000,000 for each day on which a contravention occurred. In determining the amounts payable for a non-compensatory contravention, the court will consider a number of factors including the nature and scope of the contravention, the alleged offender’s history with respect to previous contraventions and undertakings, any financial benefit the alleged offender obtained from the contravention, and the offender’s ability to pay.

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<sup>1</sup> 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, SC 2010, c 23.

Procedurally, a person seeking redress must commence proceedings no later than three years after the day on which the contravention became known to that person, and provide affidavit evidence of the nature and amount of the loss, damage or expense. The Office of the Privacy Commissioner of Canada (“OPC”), the Commissioner of Competition, and the Canadian Radio-television and Telecommunications Commission (“CRTC”) may intervene in proceedings, depending on the jurisdiction under which the alleged contravention arises.

### **Summary**

Enforcement of CASL is not new. The CRTC, Competition Bureau and OPC, currently ensure individuals and entities comply with their CASL obligations. The Spam Reporting Centre, managed by the CRTC, gathers information on spam and electronic threats to support the efforts of enforcement agencies. The private right of action will be an additional enforcement mechanism.

Litigation, in particular costly class action, may loom large when the private right of action provisions take effect on July 1, 2017. Organizations should therefore take steps now to revisit their communications policies and procedures to ensure compliance with CASL.

**To learn more about CASL and to ensure your communications are compliant, contact the privacy experts at Sherrard Kuzz LLP.**

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