

February 5, 2013

Via email: Bruce.Wallace@ic.gc.ca

Mr. Bruce Wallace
Director, Security and Privacy Policy
Digital Policy Branch
Industry Canada
Jean Edmonds Tower North, 18th Floor, Room 1891D
300 Slater Street
Ottawa, ON K1A 0C8

Dear Mr. Wallace:

Re: Electronic Commerce Protection Regulations: Canada Gazette, Part I, January 5, 2013

We are writing on behalf of the Canadian Corporate Counsel Association (a CBA Conference), the Charities and Not-for-Profit Law Section and the Competition Law Section (collectively, the CBA Sections) to comment on Industry Canada's revised draft to the *Electronic Commerce Protection Regulations*, made pursuant to Canada's Anti-spam Legislation.

The Canadian Bar Association is a voluntary association of more than 37,000 Canadian lawyers, judges, notaries, law teachers and students. The CBA's primary objectives include improvement in the law and in the administration of justice.

While the CBA Sections appreciate Industry Canada's efforts in its proposed Regulations to provide clarity and legal certainty to key terms in the legislation and to exempt certain business activities, a number of outstanding issues call for further explanation. Given the substantial impact of this legislation on the charity and not-for-profit sector, consumers and businesses of all sizes engaged in electronic communications, outstanding issues should be addressed clearly and up front in the Regulations, wherever possible, rather than waiting for clarification in compliance guidelines.

The CBA Sections encourage Industry Canada to consult further with the public and constituent associations on the development of compliance guidelines to the extent the government relies on guidelines to address outstanding issues.

Validity of Prior Express Consents

The CBA Sections reiterate the concern expressed in our previous submission¹ on the vitiating of prior express consents valid under federal, provincial or territorial legislation. There does not appear to be a policy rationale for undermining the good faith effort by organizations to obtain legally valid consents prior to the Act coming into force. Recontacting consumers for consent already provided and automatic expiry of consent after a transition period will likely create confusion among consumers and undermine confidence in electronic commerce, contrary to the legislative objective. The CBA Sections recommend an additional regulation stating that a valid consent given under PIPEDA or other privacy legislation prior to the Act coming into force be deemed a valid consent under the Act.

Excluded Commercial Electronic Messages (CEMs)

The CBA Sections support the various exemptions introduced by Industry Canada to acknowledge legitimate commercial communications. We have several suggestions for better achieving the objective of excluding regular business to business communications from the scope of the Act.

Business to business communications not limited to “existing business relationship”

Section 3(a)(ii) of the proposed Regulations appears to limit unnecessarily the exemption for business to business communications to instances where the business relationship exists “at the time the message was sent.” There does not appear to be a valid policy reason to limit the exemption in section 3(a)(ii) so strictly.

The Regulatory Impact Analysis Statement confirms that regular business to business communication is not the type of threat intended to be captured by the Act. The CBA Sections believe that legitimate commercial communications between business persons may also include communications where there is not an “existing business relationship” as that term is defined in the Act.

This criterion also places organizations that do not have an existing business relationship at a competitive disadvantage in developing new transactions and opportunities relative to other organizations with an existing relationship. This is inconsistent with the position that business to business communications are not intended to be regulated under the Act.

To restrict the exemption so narrowly in the Regulations appears to have an unintended consequence of bringing certain business to business communications within the scope of the Act. This can be easily addressed in one of two ways:

1. by removing the phrase “*the organizations have a business relationship at the time the message was sent*” (as reflected in the proposed revisions below), so the only qualification would be that “*the message concerns the person’s role, functions or duties within or on behalf of the organization*”; or
2. by replacing the word “*and*” with “*or*” in the phrase “*at the time the message was sent and*” so the phrase would read “*if the organizations have a business relationship at the time the message was sent or the message concerns ~~the affairs of the organization~~ or that person’s role, functions or duties within or on behalf of the organization.*”

¹ CBA Submission on Industry Canada Anti-Spam Regulations, September 2011, <http://www.cba.org/CBA/submissions/PDF/11-43-eng.pdf>

The CBA Sections recommend including an additional exemption to facilitate communications related to recruitment of employees or contractors, or offers of employment, education or a business relationship, where an existing business relationship may not exist. There is no valid policy reason for these communications to be included in the scope of the Act. These types of regular business communications are sent daily by legitimate businesses and are not the kind of threats intended to be captured by the Act.

We propose the following revisions and additional exemptions (as marked by strike-throughs and underlined):

3. Section 6 of the Act does not apply to a commercial electronic message

- (a) *that is sent by an employee, representative, contractor or franchisee of an organization*
 - (i) *to another employee, representative, contractor or franchisee of the organization and that concerns the affairs of the organization, or*
 - (ii) *to an employee, representative, contractor or franchisee of another organization if ~~the organizations have a business relationship at the time the message was sent and~~ the message concerns ~~the affairs of the organization or that person's role, functions or duties within or on behalf of the organization;~~ or*
 - (iii) *to an employee, representative, contractor or franchisee of another organization or other persons, regardless of the existence of a business relationship between the organizations, concerning a prospective offer of employment, education or business relationship;*
- (b) *that is sent in response to a request, inquiry, complaint or is otherwise solicited by the person to whom the message is sent, or sent to recruit or offer persons employment, education or a business relationship;*

Exemption of messages sent to foreign-based customers

The CBA Sections propose an exemption for Canadians who provide services on behalf of foreign-based customers. As drafted, the Act and Regulations seem to capture the activities of persons operating in Canada, even if their business is to send commercial electronic messages solely to foreign residents on behalf of foreign-based companies. These businesses could, therefore, be subject to the Act and Regulations, as well as the laws applicable in other jurisdictions. This compliance obligation would be overly burdensome and would have a negative impact on the ability of Canadian businesses to attract and provide services to foreign-based customers, resulting in a competitive disadvantage in the global marketplace.

This can be addressed with an exemption of electronic messages sent from persons in Canada on behalf of persons outside Canada and received by persons outside Canada. We recommend the following exemption pursuant to section 6(5)(c) of the Act:

Section 6 of the Act does not apply to a commercial electronic message that, notwithstanding section 12(1),

- (i) *is sent on behalf of a person located outside Canada;*
- (ii) *relates to a product, good or service provided to a person or an organization outside Canada;*
- (iii) *is accessed using a computer system located outside Canada; and*

- (iv) *complies with the laws of the jurisdiction where the commercial electronic message is accessed.*

Third Party Referrals

The CBA Sections recommend that sections 4(1) and (2) of the Regulations be amended to refer to CEMs sent and received by a “person” rather than an “individual”. There is no valid policy reason why the sender or recipient could not be an organization, a partner in a partnership or an association, if the other criteria are met. Using the word “person” is a simple solution to this problem.

Detrimental Impact on Charities and Not-for-Profit Organizations (NPOs)

FAQs on the Act posted by Industry Canada on its website state that “charities that engage Canadians through email are not subject to the legislation if these communications do not involve selling or promoting a product.” Section 1(2) of the Act defines a CEM as an electronic message encouraging participation in a commercial activity. Commercial activity includes conduct of a commercial character, with or without an expectation of profit. Several examples of commercial activity are listed but the list is not exhaustive. This suggests that at least some revenue-generating activities of charities and NPOs are within the scope of communications covered by the Act.

The CBA Sections recommend that, through Regulations or compliance guidelines, Industry Canada confirm that the Act does not apply to electronic communications sent by registered charities or NPOs for purposes other than the direct and immediate generation of revenue. More clarity is required on exactly which electronic communications from charities and NPOs are considered CEMs and require consent, particularly for communications with a purpose other than revenue generation that may indirectly result in revenue for either the charities and NPOs, or third parties. These communications may warrant an exemption under the Regulations or it may be sufficient to indicate in the compliance guidelines that the measures do not apply in these circumstances.

The CBA Sections also recommend clarifying the applicability of implied consent to electronic communications of charities and NPOs within the scope of the legislation. Under the Act, consent to a CEM is implied where there is an existing business or non-business relationship between the recipient and the sender (section 10(9) and (13)). A business relationship is defined by a transaction or contract as described in section 10(10). A non-business relationship is limited to circumstances of a donation or gift to a charity, political organization or candidate for public office, volunteer work, or membership in a “club, association or voluntary organization” (section 10(13)).

This limited definition of a non-business relationship will exclude many relationships within the charity and NPO sector. The relationships of organizations with a focus on education, medical care, research collaboration and public affairs, for example, may not be based on donations and gifts, volunteer work or the definition of “club, association or voluntary association” included in the Regulations, and in those circumstances they may not be entitled to implied consent. It seems to be an inadvertent consequence of the legislation that charities and NPOs be placed at a disadvantage compared to businesses on the requirement to obtain express consents for electronic communications. This unnecessary new layer of administration will be a drain on the limited resources of charities and NPOs and will impede their good works.

Specifically, the definition of “club, association or voluntary organization” in section 7(2) of the Regulations duplicates the definition of a non-profit organization under section 149(1)(l) of the *Income Tax Act*. We question whether a definition for purposes of determining eligibility for exemption from tax on income is appropriate for legislation drafted to “promote the efficiency and

adaptability of the Canadian economy”. By adopting this definition, a significant portion of the charity and NPO sector will be excluded from relying on the implied consent provisions under section 10(13) of the Act. For example, as the Regulation is currently worded, a registered Canadian amateur athletic association, labour organization or fraternal benefit society might not be included as a “club, association or voluntary organization”. Members of a national sports organization, trade union or agricultural society would legitimately expect that they are members of a “club, association or voluntary organization”. Similarly, these organizations would expect that they are a “club, association or voluntary organization” for the purposes of having an “existing non-business relationship” with their members.

The CBA Sections recommend that Industry Canada expand the definition of “club, association or voluntary organization” in the Regulations to include the many sector entities which may not meet the limited definition of non-profit organization for income tax purposes. We highlight paragraphs 149(1) (1)(e),(g),(i), and (k) of the *Income Tax Act*, listing other tax-exempt entities, which should be included in a broader definition of a “club, association, or voluntary organization” under the Regulations to the Act.

It is critical that the uncertainty about application of the Act to the electronic communications of charities and NPOs be resolved before the Regulations come into force. Otherwise, charities and NPOs will be faced with the monumental task, with limited resources, of seeking consent for many of its electronic communications without a clear understanding of whether it is required.

Coming Into Force - Private Right of Action

Given the complexity and uncertainty of scope of the application of the Act and the Regulations, the CBA Sections recommend that the enactment of the private right of action under section 47 of the Act be delayed for at least the full transition period. We are concerned about the potential rise in class action lawsuits by those looking to exploit the ambiguities in the legislation.

Conclusion

The CBA Sections appreciate the opportunity to provide their input on Industry Canada’s draft Regulations to the Act. Please let us know if we can be of further assistance in developing regulations and compliance guidelines that will meet the government’s objective to bolster confidence in electronic commerce.

Yours truly,

(original signed by Sarah MacKenzie for Grant Borbridge, Brian Facey and Peter Broder)

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