THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

# CRTC Draft Regulations Consultation 2011-400

**NATIONAL COMPETITION LAW SECTION AND**
**NATIONAL PRIVACY AND ACCESS LAW SECTION**
**CANADIAN BAR ASSOCIATION**

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## PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section and National Privacy and Access Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section and National Privacy and Access Law Section of the Canadian Bar Association.

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## I. INTRODUCTION

1. The Canadian Bar Association's National Competition Law Section and National Privacy and Access Law Section (CBA Sections) are pleased to provide their comments on the draft *Electronic Commerce Protection Regulations* (CRTC) (Draft Regulations). The CBA Sections comprise over 2900 lawyers who have in-depth knowledge in the areas of competition and antitrust law as well as privacy law matters and access to information. The CBA Sections have been active in providing commentary on developments in competition and privacy and access law and policy.

2. The CBA Sections support the continuing efforts of the government and the Canadian Radio-television and Telecommunications Commission (Commission) to address commercial electronic message (CEM) issues, including fraudulent and deceptive electronic communications practices, mindful of the statutory purpose "to promote the efficiency and adaptability of the Canadian economy by regulating conduct that discourages the use of electronic means to carry out commercial activities".[1] This submission is consistent with the CBA Sections' September 2009 Submission entitled *Bill C-27, Electronic Commerce Protection Act (ECPA)*.

3. The CBA Sections are comprised of lawyers who represent diverse interests in their practice. Certain parts of this submission provide more than one perspective. This is the case in Parts IV(A, B and C), V and VI (A) of the submission. Where more than one perspective or viewpoint is provided in the discussion, the CBA Sections do not take a firm position.

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[1] Section 3 of *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*. S.C. 2010, c. 23. (Act).

# II. SUMMARY

4. The submission highlights three general areas of concern with the Draft Regulations: (a) jurisdiction; (b) consistency of Draft Regulations with the Act and its purposes; and (c) clarity and technology-neutrality. Parts IV, V and VI provide detailed comments about s. 2, 3 and 4 of the Draft Regulations. Generally speaking, the CBA Sections believe that certain wording, especially in s. 2 of the Draft Regulations, is not clear and may lead to confusion and misunderstanding among consumers and businesses. This is especially the case in paragraph 2(1)(d).

5. The submission discusses whether the Commission has sufficient authority to make certain draft regulations. The CBA Sections' believe that the Commission has abundant authority to make paragraphs 2(1)(a)-(c), 3(1), and 4(a)- (c) of the Draft Regulations. However, CBA Sections' members hold differing perspectives as to whether the Commission's regulation making authority is sufficient for paragraphs 2(1)(d), s. 2(2), paragraphs 3(2), and 4(d) and (e) of the Draft Regulations.

6. Finally, the CBA Sections question whether the requirement in s. 4 of the Draft Regulations that a request for consent be in writing is warranted. This requirement appears contrary to the approach to consent taken under privacy laws in Canada, such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA). [2]

# III. GENERAL AREAS OF CONCERN

## A. Jurisdiction

7. The CBA Sections believe that regulations made by the Commission must fall within its authority under the Act. Subsection 64(2) of the Act states:

> s. 64(2) The Commission may make regulations
>
> (a) respecting the form of a request for consent for the purposes of subsections 10(1) and (3);
>
> (b) respecting undertakings under subsection 21(1);

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[2] *Personal Information Protection and Electronic Documents Act,* SC 2000, c. 5.

(c) respecting the service of documents required or authorized to be served under this Act including the manner and proof of service and the circumstances under which documents are to be considered to be served; and

(d) prescribing anything that is to be prescribed under this Act.

8. The CBA Sections suggest that the Commission's authority to prescribe regulations under paragraph 64(2)(d) of the Act is limited to matters that are "to be prescribed" and excludes specific matters assigned under section 64 to the Governor in Council or to the Commission. The authority of the Commission under paragraph 64(2)(d) does not extend to "anything that *may be* prescribed" under the Act, but rather to "anything that *is to be* prescribed" under the Act. Arguably, this more limited scope of authority is in contrast to the much broader scope of residual authority to prescribe regulations assigned to the Governor in Council under paragraph 64(1)(m) of the Act, which states that the Governor in Council may make regulations "generally, for carrying out the purposes and provisions of this Act."

## B. Consistency with the Act and its purposes

9. The Act represents the culmination of many years of grappling with the potential benefits and risks of regulating the use of, among other things, CEMs. At the heart of this grappling has been the serious risk of unduly restricting CEMs, to the detriment of both Canadian consumers and Canadian businesses, including businesses of all sizes seeking to compete in a global, competitive and increasingly electronic marketplace. It is important that regulations under the Act minimally impair the use of CEMs and only in a manner that is consistent with the balance struck in the Act, and is consistent with and contributes to the purpose of the Act, which is "to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities."[3]

## C. Clarity and Technological Neutrality

10. Given the complexity and variety of forms of electronic communication in today's economy, and their ongoing rapid evolution, any regulations under the Act must be clear and technology-neutral. The regulations must allow businesses and consumers to engage in commercial communications, confident that the communications comply with the Act while at

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[3] *Supra* note 1.

the same time ensuring that the forms of electronic communication are able to quickly adapt to rapidly changing technologies.

11. Parts IV, V and VI provide in-depth comments regarding sections 2, 3 and 4 of the Draft Regulations.

# IV. SECTION 2 OF THE DRAFT REGULATIONS

## A. Paragraph 2(1)(d)

12. Subsection 2(1) of the Draft Regulations states:

> s. 2.(1) For the purposes of subsection 6(2) of the Act, the following information must be set out in any commercial electronic message:
>
> (a) the name of the person sending the message and the person, if different, on whose behalf it is sent;
>
> (b) if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent;
>
> (c) if the person who sends the message and the person, if different, on behalf of whom it is sent carry on business by different names, the name by which those persons carry on business; and
>
> (d) the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address of the person sending the message and, if different, the person on whose behalf the message is sent and any other electronic address used by those persons.

13. Section 2 of the Draft Regulations states that it is made for the purposes of s. 6(2) of the Act, which provides:

> s. 6.(2) The message must be in a form that conforms to the prescribed requirements and must
>
> (a) set out prescribed information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;
>
> (b) set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (a); and
>
> (c) set out an unsubscribe mechanism in accordance with subsection 11(1).

14. The CBA Sections believe that paragraphs 2(1)(a)-(c) of the Draft Regulations fall squarely under the Commission's authority to prescribe in paragraph 6(2)(a) because they set out the information that must be provided in a CEM to identify the sender, or the person on whose behalf the message was sent.

15. Some CBA Sections' members believe that the Commission's regulation making authority is limited to the "prescribed requirements" as to the form of a CEM, pursuant to s. 6(2) of the Act, and to the "prescribed information that identifies" the sender or, if different, the person on whose behalf the message was sent, pursuant to paragraph 6(2)(a). From this perspective, the "contact information" prescribed in paragraph 2(1)(d) of the Draft Regulations falls outside the Commission's regulation making authority because paragraph 6(2)(b) of the Act does not contain the word "prescribed" and because paragraph 2(1)(d) does not prescribe the form of a CEM or information that identifies the sender of the CEM.

16. Again, from this perspective, Parliament chose in paragraph 6(2)(a) to authorize the Commission to prescribe in regulations identifying information when it used the word "prescribed," while the absence of that word from paragraph 6(2)(b) is evidence that Parliament did not authorize the Commission to prescribe contact information.

17. The alternative perspective is that the drafters most likely did not intend to restrict the Commission's regulation making authority to only paragraph 6(2)(a) of the Act, but rather intended that that authority would extend to paragraphs (b) and (c) as well. Under this alternative perspective, the words "prescribed requirements", in s. 6(2) of the Act, likely grant the Commission the requisite authority to make regulations under all of paragraphs 6(2)(a)-(c) of the Act. Given Parliament's words in paragraph 64(2)(d) of the Act granting the Commission authority to prescribe "anything that is to be prescribed under this Act," the Commission most likely has the requisite authority to prescribe the contact information required under paragraph 2(1)(d) of the Draft Regulations.

## B. Is paragraph 2(1)(d) necessary and consistent with the Act?

18. From one perspective, even if the Commission had jurisdiction to make paragraph 2(1)(d) of the Draft Regulations, there are additional reasons why the paragraph should not become law. Paragraph 6(2)(b) of the Act requires CEMs to include "information enabling the

person to whom the message is sent to readily contact one of the persons referred to in paragraph (a)". By imposing this requirement for contact information in CEMs, but not specifying what information must be included, the Act accommodates the wide-ranging practices and technologies used by organizations sending CEMs. The ability to "readily contact" an organization may vary in different circumstances and with different CEM technologies, particularly as these adapt and evolve over time. The meaning of the requirement "to readily contact" will likely be developed over time through jurisprudence under the Act. The Act arguably provides for flexibility of contact options and is consistent with the promotion of a cost-effective framework within which businesses may operate and adapt to changes in the economy and technology.

19. In addition, paragraph 2(1)(d) imposes considerable burdens on businesses and organizations (particularly small and medium sized) and may create consumer confusion, thus discouraging the use of electronic means to carry out commercial activities. In particular:

> (1) many businesses, especially those engaged in electronic commerce, may not have a mailing address or a telephone number that is set up to receive contacts from consumers who receive CEMs from or on behalf of the business;
>
> (2) the proposed requirement to include a telephone number and mailing address undermines the benefits of conducting commerce electronically;
>
> (3) many businesses may wish to use some types of CEMs, but may not need or have the means to create and operate a website;
>
> (4) the proposed requirement that both the sender and the person on whose behalf a message is sent be available for contact imposes a greater burden than is imposed under the Act, which indicates that it is sufficient that a recipient be able to contact either the sender or, if different, the person on whose behalf the message is sent. This is stated explicitly in paragraph 6(2)(b) of the Act respecting CEMs generally, and in s. 11(1) of the Act respecting an unsubscribe mechanism. A single contact should be sufficient for the purposes of paragraph 6(2)(b) of the Act; and
>
> (5) the proposed requirement to include "any other electronic address" could be interpreted by some organizations to mean a very large number of electronic addresses (e.g., every employee's email address, instant message accounts, telephone numbers, etc.).

20. Again, the alternative perspective affirms the Commission's approach to paragraph 2(1)(d) of the Draft Regulations by providing valuable clarity for both consumers and businesses as to what contact information should be included by the sender in a CEM to ensure compliance with paragraph 6(2)(b) of the Act.

21. At the very least, the wording of paragraph 2(1)(d) should be revised to ensure that businesses that use CEMs will not be overburdened and to provide clarity on certain phrases, such as "any other electronic address," which are open to diverse interpretations and misinterpretations by both consumers and industry.

## C. Additional Comments

**Clarification in paragraph 2(1)(c)**

22. The CBA Sections recommend that for purposes of clarity paragraph 2(1)(c) be revised to read "if the person who sends the message and the person, if different, on behalf of whom it is sent carry on business by different names, the name by which each of those persons carry on business."

**Subsection 2(2) of the Draft Regulations**

23. Paragraph 6(2)(c) of the Act provides that a CEM must "set out an unsubscribe mechanism in accordance with s. 11(1)". Subsection 2(2) of the Draft Regulations adds to the detailed unsubscribe mechanism provisions set out at s. 11(1) of the Act. Some CBA Sections' members believe that s. 2(2) of the Draft Regulations exceeds the Commission's regulation making authority on the basis that paragraph 6(2)(c) of the Act does not contain the word "prescribe", s. 2(2) of the Draft Regulations does not provide requirements as to the form of a CEM or the information identifying the sender or the person on whose behalf the CEM is sent. As well, paragraph 6(2)(c) of the Act does not contemplate or permit regulations by the Commission under s. 11(1) of the Act. However, as described above, other Sections' members believe that s. 6(2) of the Act most likely authorizes the Commission to prescribe details regarding the unsubscribe mechanism under paragraph 6(2)(c) of the Act, but clarity is required as to jurisdiction.

24. Putting aside the jurisdiction question, the Commission should consider whether an amended s. 2(2) would achieve that subsection's objective in a manner that is more consistent with the Act. For example, it could be reworded to state:

> **s. 2**. (2) If it is not practicable to include either the information referred to in subsection (1) or the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act in a commercial electronic message, that information may be provided by a link to a web

page on the World Wide Web that is clearly and prominently set out and that can be readily accessed at no cost to the person to whom the message is sent.

25. Giving organizations a choice to provide either the information in s. 2(1) or the unsubscribe mechanism in a CEM is more practical. In addition, by removing the requirement that organizations make the information or the unsubscribe mechanism accessible to consumers on the World Wide Web by a single click or another method of equivalent efficiency, the apparent objective of s. 2(2) will be achieved in a technology neutral manner.

## V. SECTION 3 OF THE DRAFT REGULATIONS

26. The CBA Sections believe that s. 3(1) of the Draft Regulations falls squarely within the Commission's regulation making authority because it prescribes information relating to the form of the CEM pursuant to s. 6(2) of the Act.

27. However, some CBA Sections' members are of the view that s. 3(2) of the Draft Regulations exceeds the Commission's jurisdiction because it adds to the detailed unsubscribe mechanism provisions in s. 11(1) of the Act by requiring that "the unsubscribe mechanism… be able to be performed in no more than two clicks or another method of equivalent efficiency". Under this view, for reasons similar to those set out in Part IV (A) and (B), the Commission lacks authority to make s. 3(2) of the Draft Regulations. In particular, s. 6(2)(c) of the Act does not contain the work "prescribe" and thus, the Commission lacks specific authority to prescribe regulations respecting the unsubscribe mechanism in s. 11(1) of the Act. Other Sections' members, for reasons set out above, take the view that the Commission has the requisite authority under the Act to make s. 3(2) of the Draft Regulations.

28. Even if the Commission has jurisdiction to make s. 3(2) of the Draft Regulations, there is nothing for the Commission to add to the unsubscribe mechanism detail set out in s. 11(1) of the Act.[4] If anything were to be added by way of regulation, it would be sufficient to require that

[4] Essentially, subsection 11(1) of the Act provides that (i) an unsubscribe mechanism be available at no cost to the recipient of a CEM using the same electronic means by which the CEM was sent or, if that is not practicable, an alternative electronic means that will enable the recipient to indicate the wish to unsubscribe, and (ii) that the recipient be provided an electronic address or a link to a World Wide Web page accessible through the recipient's web browser and to which an indication of the wish to unsubscribe may be sent.

the unsubscribe mechanism be user friendly. Paragraph 3(2) could be amended to read "[t]he unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be able to be readily performed." This wording would achieve the objective of s. 3(2) in a technology-neutral manner. It is common to include a link to a webpage where a user is asked to indicate certain preferences, because the user may be subscribed to more than one list, or because the sender may be able to offer the user a list that is more tailored to the products and services that interest the user. In which case, the user may prefer to simply change subscriptions. It is also common to ask a user to confirm an email or other electronic address on an unsubscribe page. These processes are not difficult, time-consuming or inconvenient and can be "readily performed", but they may require a total of more than two "clicks".

29. It is not clear what method would qualify as a "method of equivalent efficiency" to two clicks under s. 3(2).

# VI. SECTION 4 OF THE DRAFT REGULATIONS

30. Section 4 of the Draft Regulations sets out the information to be required in a request for consent under the Act, pursuant to s. 10(1) and (3) of the Act. CBA Sections believe that the Commission has the requisite regulation making authority for paragraphs 4(a)-(c) of the Draft Regulations.

31. Again, some CBA Sections' members believe that paragraphs 4(d) and (e) of the Draft Regulations exceed the Commission's regulation making authority, while other Sections' members believe that the Commission has the requisite authority to make those paragraphs pursuant to paragraphs 64(2)(a), and 10(1)(b) and (c) of the Act.

## A. Requests for Consent – Information Required and Withdrawal of Consent

32. Section 4 of the Draft Regulations provides:

> 4. For the purposes of subsections 10(1) and (3) of the Act, a request for consent must be in writing and must be sought separately for each act described in sections 6 to 8 of the Act and must include
>
> (a) the name of the person seeking consent and the person, if different, on whose behalf consent is sought;

(b) if the consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought;

(c) if the person seeking consent and the person, if different, on whose behalf consent is sought carry on business by different names, the name by which those persons carry on business;

(d) the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address of the person seeking consent and, if different, the person on whose behalf consent is sought and any other electronic address used by those persons; and

(e) a statement indicating that the person whose consent is sought can withdraw their consent by using any contact information referred to in paragraph (d).

33. The CBA Sections believe that paragraphs 4(a) to (c) of the Draft Regulations fall squarely within the Commission's regulation making authority because they prescribe the information to be provided in a request for consent that identifies the person seeking consent.

34. From one perspective, paragraphs 4(d) and (e) of the Draft Regulations exceed the Commission's regulation making authority by going beyond "prescribing information" to impose mechanisms for contact and for unsubscribing that are inconsistent with the Act. Even if the Commission had jurisdiction to prescribe paragraphs 4(d) and (e), those paragraphs should not become law for reasons similar to those provided under Parts IV (A and B) of this submission. The better approach is the one found in paragraph 6(2)(b) of the Act. If that approach was adopted, the paragraphs would read:

(d) information enabling the person whose consent is sought to readily contact one of the persons referred to in paragraph (a); and

(e) a statement indicating that the person whose consent is sought can withdraw their consent by using any information provided pursuant to paragraph (d).

35. However, from the alternate perspective, the Commission has the requisite regulation making authority in paragraphs 64(2)(c) of the Act, "regulations prescribing anything to be prescribed under the Act", and especially 10(1)(c) of the Act, which grants the Commission authority to require "any other prescribed information." The words "any other prescribed information" provide the Commission with broad regulation making power to prescribe by regulation any additional information, such as contact information, that the person seeking express consent must include in a request for consent.

## B. Written Request for Consent

36. The CBA Sections believe that requiring that a request for consent be "in writing" in s. 4 of the Draft Regulations is unnecessary and inconsistent with the Act. Section 13 of the Act provides that where consent is required under s. 6 to 8 of the Act, the onus of proving that the consent has been obtained rests with the person making that claim. Thus, under threat of significant sanctions under the Act, those who would send a CEM, alter a transmission or install a computer program have a clear incentive to ensure that they have proof that consent has been obtained. Thus, it is unnecessary to require written requests for consents. While many businesses may decide to request consents in writing, that should be their decision. In addition, a requirement for written requests is inconsistent with the Act which does not require that consent itself be in writing. In other words, it would be inconsistent with the Act to require requests for consent to be made in writing when the consent itself need not be made in writing;

37. Moreover, the requirement for a written request for consent is not consistent with social norms or business practices, or with the approach taken under privacy laws. Circumstances abound where written requests for consent would be contrary to ordinary human interaction and business practice (e.g. "Do you want me to send you that information?"). Consents are frequently obtained orally. This reality is reflected in privacy laws. Indeed, requiring a request for consent to send a CEM to be in writing is not consistent with rules under the various longstanding privacy laws that have applied very effectively to collect and use personal information in Canada. These laws, including, for example, PIPEDA, permit express consent to collect, use and disclose personal information to be given orally or in writing, and contemplate that the onus of proving such consent rests with the organization that seeks to rely on it. There is no requirement under these laws that any request for consent be made in writing. For consistency with this approach, which has worked well for the past 10 years, a similar rule should apply under the Act, such that requests for consent may be made orally as well as in writing. The application of a rule consistent with the approach to date under Canada's privacy laws would in no way undermine the requirement in s. 13 of the Act that a person be able to prove that a request has been made (including all of the information stipulated under the Act and any regulations) or that consent has been obtained. In most cases, businesses will likely have in place documentation to demonstrate that consents have been obtained.

38. A requirement that requests for consent be in writing would impose needless costs and burdens on many businesses. Such a requirement would add rigidity under a law that already

will present organizations of all sizes with many challenging and costly new requirements. The focus of the regulations should be on minimizing the complications and new requirements under the new law to assist organizations with compliance. With respect to obtaining consent to do an act otherwise prohibited under s. 6 to 8 of the Act, the focus should be on compliance with the requirement to obtain and record consent.

## V. CONCLUSION

39. The CBA Sections appreciate the opportunity to provide comments on the Commission's Draft Regulations. We would be pleased to respond to questions and to provide further information regarding any of the issues addressed in this submission.

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