THE CANADIAN BAR ASSOCIATION

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Industry Canada Anti-spam Regulations

NATIONAL COMPETITION LAW AND THE NATIONAL PRIVACY AND ACCESS LAW SECTIONS
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 and the National Privacy and Access Law Sections 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 and the National Privacy and Access Law Sections of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Competition Law and National Privacy and Access Law Sections (the CBA Sections) are pleased to participate in Industry Canada's (IC) consultation on the draft *Electronic Commerce Protection Regulations* (Draft Regulations) made pursuant to the anti-spam legislation[1] (the Act). The CBA Sections comprise over 2900 lawyers from across Canada who have in-depth knowledge in the areas of competition and antitrust law, and privacy and access to information law. The CBA Sections have been active in providing commentary to government on developments in this area of the law.

The CBA Sections appreciate IC's ongoing consultations with stakeholders to determine the regulation of commercial electronic messages (CEMs). This submission complements the CBA Sections' submission to the Canadian Radio-television and Telecommunications Commission's (CRTC) draft *Electronic Commerce Protection Regulations*. In addition, the submission is consistent with the CBA Section's September 2009 submission to the House of Commons Committee on Industry, Science and Technology on Bill C-27, entitled "*Bill C-27, Electronic Commerce Protection Act (ECPA)*".

The CBA Sections are comprised of lawyers who represent diverse interests in their practice. Given that diversity, certain parts of this submission provide more than one perspective. This is the case in Parts III (B), and V. When more than one perspective is provided, the CBA Sections do not take a firm position.

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1 *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 (the Act).

II. SUMMARY

The submission discusses possible amendments to the draft definitions of "personal and family relationships" and the impact of those definitions on digital marketing activities. The CBA Sections believe that the requirement of an "in person meeting" in the definition of "personal relationship" in the Draft Regulations is needlessly restrictive, especially in a world increasingly reliant on digital communications as a means of initiating and maintaining personal relationships. CBA Sections' members hold differing views with respect to the definition's requirement for a "two-way communication in the previous two years". The CBA Sections recommend an additional regulation exempting organizations from the Act's consent, form/content and unsubscribe requirements where a CEM is required or authorized by law. With respect to transactional or service-related CEMs, from one perspective businesses should not be burdened with the practical challenges of including an unsubscribe mechanism in this type of CEMs, while the alternative perspective is that their inclusion does no harm and provides consumers with a second source of information to use to unsubscribe from non-transactional CEMs. The CBA Sections recommend an additional regulation stating that a valid express consent given under the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and/or other privacy legislation prior to the Act coming into force will be deemed express consent for the purposes of ss. 6 to 8 of the Act.

III. PERSONAL OR FAMILY RELATIONSHIP EXEMPTION

The Act provides certain exemptions to the consent, form/content and unsubscribe requirements. One of the exemptions includes a class of CEMs sent by or on behalf of an individual to another individual with whom they have a "personal or family relationship" (paragraph 6(5)(a) of the Act).

Given the Act's broad definition of a CEM, the CBA Sections recommend that CEMs between individuals with legitimate non-commercial personal or family relationships be exempt from the Act's consent, form/content and unsubscribe requirements. The "personal or family relationship" exemption is particularly important for refer-a-friend/invite-a-friend and other similar types of marketing initiatives. These initiatives are consumer initiated, increasingly prominent and a staple of digital marketing campaigns in all industry sectors.

Paragraphs 2(a) and (b) of the Draft Regulations state:

> 2. For the purposes of paragraph 6(5)(a) of the Act
>
> (a) "family relationship" means the relationship between individuals who are connected by
>
> (i) a blood relationship, if one individual is the child or other descendant of the other individual, the parent or grandparent of the other individual, the brother or sister of the other individual or of collateral descent from the other individual's grandparent,
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> (ii) marriage, if one individual is married to the other individual or to an individual connected by a blood relationship to that other individual,
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> (iii) a common-law partnership, if one individual is in a common-law partnership with the other individual or with an individual who is connected by a blood relationship to that other individual; and
>
> (iv) adoption, if one individual has been adopted, either legally or in fact, as the child of the other individual or as the child of an individual who is connected by a blood relationship to that other individual; and
>
> (b) "personal relationship" means the relationship, other than in relation to a commercial activity, between an individual who sends the message and the individual to whom the message is sent, if they have had an in-person meeting and, within the previous two years, a two-way communication. (Emphasis added)

A. "Family Relationship" Definition

The definition of "family relationship" in paragraph 2(a) of the Draft Regulations sets out several types of relationships that would qualify. The CBA Sections believe there is a typographical error at the end of sub-paragraph 2(a)(iii) where the word "and" is used instead of the word "or". It is most likely that a family relationship would arise through one of the four connections cited in sub-paragraphs (i) to (iv). However, the use of the word "and" instead of the word "or" suggests that individuals must be connected by all four to come within the definition. We believe that this is a simple drafting error.

B. "Personal Relationship" Definition

The definition of "personal relationship" in paragraph 2(b) of the Draft Regulations contains several criteria which must be met, including "an in-person meeting" and, within the "previous two years", a two-way communication.

The CBA Sections believe that the requirement for "an in-person meeting" needlessly restricts the scope of the exemption and would likely result in a broad range of digital communications

initiatives being found in contravention of the Act. In a world increasingly reliant on digital communications, personal relationships may be initiated and maintained in an online or other electronic context. Provided the relationship was created in a non-commercial context, there is no apparent policy rationale to exempt them from the definition. These personal relationships are often formed through online dating services, online gaming platforms, or social networking platforms, and are maintained solely through electronic communications, such as Skype, video chat, and instant messaging. The CBA Sections recommend that the definition of "personal relationship" be redrafted in a technologically neutral manner and that the requirement for an "in-person meeting" be removed to permit the exemption of online personal relationships from the application of s. 6 of the Act.

CBA Sections' members differ in their views about the definition's requirement for a two-way communication within the "previous two years". From one perspective, the definition's requirement unnecessarily excludes from the definition personal relationships in which there has only been sporadic communication. As long as there is a legitimate personal relationship, there does not appear to be any compelling policy rationale to require communications within a certain time period in order for the relationship to qualify as "personal". An increasing number of online services and platforms offer individuals the ability to easily connect with past friends for personal purposes. The time-restricted definition of personal relationship may result in CEMs being unnecessarily subject to the Act's regime. These CBA Sections' members believe that the definition of "personal relationship" should not contain any time restrictions.

These CBA members also believe that the draft definition is likely to pose practical challenges for organizations that establish legitimate digital marketing features, such as Refer-a-friend/Invite-a-friend. The notices required by organizations to ensure consumer compliance before using such features would be cumbersome and confusing. Based on the current definition of "personal relationship", prudent organizations would have to draft notices to consumers referring to the "two year" and "in-person" requirements. Consumers know which of their relationships are personal and do not expect to be subject to such restrictions.

From the alternative perspective, the two year time-restricted definition of "personal relationship" is necessary and reasonable. A reasonable time restriction must be established so that organizations cannot use the "personal relationship" as a cover for their CEMs.

IV. REQUIRED OR AUTHORIZED BY LAW

Organizations regularly send electronic messages when required, or authorized, by law. For example, under the Ontario *Consumer Protection Act*, an organization must deliver a copy of an agreement with a consumer on completion of the Internet transaction. The Ontario *Consumer Protection Act Regulations* specifically permit delivery of the agreement by "… e-mail to an e-mail address that the consumer has given the supplier for providing information related to the agreement."[2] [Emphasis added] In addition, provincial electronic commerce statutes contain provisions enabling organizations to satisfy notice and writing requirements through electronic means.[3] Presumably, electronic messages of this nature would not be subject to the Act because they do not "encourage participation in a commercial activity".

However, electronic messages sent to comply with a legal requirement (or authorized by law) appear to fall within the type of transactional messages contemplated by s. 6(6) of the Act. These electronic messages provide information to complete a commercial transaction, on product recall, or on product safety or security (paragraphs 6(6)(b) and (c)). Electronic messages of this type appear to be a class of messages that should be exempt from the Act. It is, however, uncertain whether this type of CEM falls within one of the exemptions in s. 6(6) of the Act. For purposes of clarity, the CBA Sections recommend that these CEMs be expressly exempted as a class under paragraph 6(5)(c) of the Act from the consent, form/content and unsubscribe requirements in s. 6(1) and (2). The exemption could be worded to include CEMs "that contain information or a document required or authorized by law to be sent to the recipient."

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2 *Consumer Protection Act*, 2002, SO 2002, c.30, Sch A, s.39(3) and *General,* O Reg 17/05, s.33(3). See also, for example: *Business Practices and Consumer Protection Act*, SBC 2004, c.2, s.48(3); *Fair Trading Act*, RSA 2000, c.F-2, s.5(1) and *Internet Sales Contract Regulation*, ALTA Reg 81/2001, s.5(3); *Consumer Protection Act*, SS 1996, c.C-30.1, s.75.6 and *Consumer Protection Regulations*, 2007, RRS c.C-20.1, Reg 2, s.8(2); *Consumer Protection Act*, CCSM, c.C200, s.129(2); *Consumer Protection Act*, RSNS 1989, c.92, s.21Z and *Internet Sales Contract Regulations*, NS Reg 91/2002 , s.5(2); *Consumer Protection and Business Practices Act,* SNL 2009, c.C-31.1, s.31(3).

3 *Electronic Commerce Act*, 2000, SO 2000, c 17. See also: *Electronic Transactions Act*, S.A. 2001, c. E-5.5; *Electronic Transactions Act*, S.B.C. 2001, c. 10; The *Electronic Commerce and Information Act*, C.C.S.M. c. E55; *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5; *Electronic Commerce Act*, S.N.L. 2001, c. E-5.2; *Electronic Commerce Act*, S.N.S. 2000, c. 26; *Electronic Commerce Act,* S.Nu. 2004, c. 7; *Electronic Commerce Act*, R.S.P.E.I. 1988, c. E-4.1; An *Act* to establish a legal framework for information technology, R.S.Q. c. C-1.1; *Electronic Information and Documents Act*, 2000, S.S. 2000, c. E-7.22(Saskatchewan); and *Electronic Commerce Act*, R.S.Y. 2002, c. 66.

V. TRANSACTIONAL COMMUNICATIONS

The CBA Sections' believe that electronic communications that are solely service-related communications, whether or not they are part of an "existing business relationship", are not CEMs under the Act because they are not intended "to encourage participation in a commercial activity" (s. 1(2) of the Act). These messages would generally remain subject to PIPEDA. It is possible, however, that some service-related or transactional CEMs may fall under the provisions of the Act, such as paragraph 6(6)(d). This possibility requires clarification from IC through regulations.

The CBA Sections recommend clarification with respect to service-related communications and the requirement for an unsubscribe mechanism in paragraph 6(2)(c) of the Act. The "unsubscribe mechanism" may conflict with contracts or terms of use that permit users to "opt out" of receiving marketing messages, but not service-related messages because organizations require a method of communicating with their customers. The unsubscribe mechanism requirement would override contractual terms, creating confusion for users and businesses alike.

A. Exemption from the Unsubscribe Requirement

Subsection 6(6) of the Act provides a list of CEMs that are transactional in character (transactional CEMs). Consent is not required under the Act to send a transactional CEM, although these CEMs must contain the content and unsubscribe mechanism referred to in s. 6(2).

From one perspective, the inclusion of an unsubscribe mechanism for transactional CEMs will adversely impact consumers and businesses. Consumers benefit from legitimate businesses using electronic means to communicate efficiently and cost-effectively. A transactional CEM is an example of how businesses make "optimal use of electronic means to carry out commercial activities",[4] and is the type of activity that the Act promotes and facilitates.

Businesses do not currently include an option to unsubscribe to the vast majority of transactional CEMs because it is unnecessary. It is also unlikely that consumers would expect

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4 *Supra* note 1, at s. 3.

an unsubscribe option in transactional CEMs. In addition, the implementation of such a process could be a costly burden to businesses and could raise a series of practical challenges for organizations, especially those that operate exclusively in the online context. Transactional CEMs form a core part of an increasingly large number of product and service offerings, and employment relationships. The Act does not require consent for transactional CEMs, and should not require organizations to enable individuals to withdraw consent for this class of CEMs by means of an unsubscribe process.

It is difficult to see how requiring an unsubscribe mechanism in transactional CEMs would serve a policy objective of the Act. It would most likely impose burdens on businesses with no corresponding benefits for consumers. CBA Sections' members with this perspective recommend including the following exception to the unsubscribe mechanism requirement:

> "A commercial electronic message sent to a person solely for one or more of the purposes under paragraphs 6(6)(a) to (g) does not require an unsubscribe mechanism."

B. No Exemption from the Unsubscribe Requirement

The alternative perspective favours maintaining the unsubscribe mechanism requirement for transactional CEMs listed in s. 6(6) of the Act. While the consumer would not be able to unsubscribe from receiving transactional CEMs, because they are related to a product purchased or a service received by the consumer, the alternative view is that their inclusion does no harm and provides consumers with a second source of unsubscribe information to use to unsubscribe from non-transactional CEMs from the same company or business. While this would be consistent with the policy objectives of the Act, other CBA Sections' members reiterate that businesses would face practical challenges implementing such a requirement in transactional CEMs.

The CBA Sections agree that transactional CEMs would continue to be subject to all other form/content requirements under the Act.

VI. PRIOR EXPRESS CONSENTS

Paragraph 6(1)(a) of the Act prohibits the sending of a CEM unless the recipient has provided an "implied" or "express" consent to its receipt. Subsection 10(9) of the Act provides the criteria necessary for a valid implied consent under s. 6 of the Act. For example, paragraph

10(9)(a) provides that a consent will be implied where the sender of the message has an existing business or non-business relationship with the recipient. In contrast, the Act is silent on what constitutes a valid express consent.

The Act does, however, address express consent in two other important ways. First, it correctly places the onus of proving that consent has been obtained on the person alleging consent (s. 13). Second, it requires that the request for consent include the purpose for consent, the prescribed information identifying the person seeking consent, and any other prescribed information (paragraphs 10(1)(a)-(c) of the Act). Once the Act is in force, requests for consent to send a CEM will be required to comply with the provisions under s. 10(1) of the Act and any information requirements prescribed under the regulations.

The CBA Sections believe that the scope and validity of an express consent obtained prior to the Act's coming into force should be determined having regard to all the facts. The Act does not itself preclude reliance on such express consents. Many Canadian organizations have created lists of email addresses by way of an express consent process in compliance with PIPEDA and/or applicable provincial privacy legislation.

This is of particular concern to organizations, given that the information requirements for requests for express consent in the Draft CRTC Regulations are more onerous than requests for consent under PIPEDA or other privacy legislation. For instance, under PIPEDA, a valid express consent need not be in writing. An organization would be able to obtain an express consent from an individual without the detailed contact information or a statement related to withdrawal of consent as required under the Draft CRTC Regulations (paragraphs 4(d) and (e)).

Some consumers may not expect the Act to vitiate their prior consent to an organization, nor may they expect to receive multiple requests by organizations for another express consent after the Act comes into force. There does not appear to be a policy rationale for undermining all of the good faith effort by organizations to obtain legally valid express consents prior to the Act coming into force.

The CBA Sections recommend that an additional regulation, pursuant to paragraph 64(1)(m) of the Act, stating that a valid express consent given under PIPEDA and/or other privacy

legislation prior to the Act coming into force, be deemed a valid express consent for the purposes of ss. 6 to 8 of the Act.

VII. CONCLUSION

The CBA Sections appreciate the opportunity to provide comments on IC'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.