CASL – Government Suspends Private Right of Action

June 07, 2017

The Government of Canada published today an Order in Council suspending the implementation of the private right of action under Canada's Anti-Spam Legislation (commonly known as "**CASL**"). The rest of CASL remains in force, July 1, 2017 still marks the end of the special transition rule for implied consent to receive CEMs, and CASL contraventions continue to be subject to regulatory enforcement and potentially severe administrative monetary penalties.

CASL – Overview

CASL creates a comprehensive regime of offences, enforcement mechanisms and potentially severe penalties designed to deter the sending of unsolicited or misleading commercial electronic messages ("CEMs") and other forms of online fraud and deceptive practices.

The Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Bureau and the Office of the Privacy Commissioner of Canada have enforcement responsibility under CASL. They have broad enforcement powers for that purpose, and can impose potentially severe administrative monetary penalties for CASL contraventions. Since CASL came into force in 2014, the CRTC has taken enforcement action against organizations and individuals who have violated CASL's CEM rules, and has issued enforcement decisions and accepted voluntary undertakings (settlements) imposing administrative monetary penalties ranging from $15,000 to $1.1 million.

Suspension of CASL Private Right of Action

CASL's private right of action, which was scheduled to come into force on July 1, 2017, allows any individual or organization affected by a CASL contravention to sue the persons who committed the contravention or are otherwise liable for the contravention and seek: (1) compensation for actual loss, damage and expense suffered or incurred by the applicant; and (2) statutory (non-compensatory) damages of up to $200 for each contravention and $1,000,000 for each day on which the contravention occurred.

It was generally expected that CASL's private right of action would be invoked to support class actions seeking large statutory damages awards on behalf of large groups of individuals affected by unlawful CEM campaigns.

Order in Council P.C. 2017-0580, dated June 2, 2017, indefinitely suspends the effective date of the private right of action. The Precis for the Order in Council explains that the purpose of the Order is to delay the coming into force date of the private right of action “in order to promote legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk".

The Government's News Release explains that the private right of action is being suspended "in response to broad-based concerns raised by businesses, charities and the not-for-profit sector", who should “not have to bear the burden of unnecessary red tape and costs to comply with the legislation". The News Release includes the following statement by the Minister of Innovation, Science and Economic Development:

“Canadians deserve to be protected from spam and other electronic threats so that they can have confidence in digital technology. At the same time, businesses, charities and other non-profit groups should have reasonable ways to communicate electronically with Canadians. We have listened to the concerns of stakeholders and are committed to striking the right balance.”

The News Release confirms that CASL will be subject to parliamentary review in accordance with a review process contemplated by CASL.

Ongoing Regulatory Enforcement

Although the private right of action has been suspended, CASL contraventions remain subject to regulatory enforcement, which can involve time-consuming and costly regulatory investigations and enforcement proceedings and result in potentially significant administrative monetary penalties.

There are a number of important steps that organizations should take to enhance their CASL compliance and mitigate the risks of regulatory enforcement, including: (1) review/ update their CASL compliance program; (2) verify their due diligence documentation; and (3) review/update their CASL complaint/litigation response plan.

Organizations should also be mindful that July 1, 2017 marks the end of a special transition rule for implied consent to receive CEMs arising from certain relationships that existed on July 1, 2014. For more information, see BLG bulletin *Canada's Anti-Spam Legislation – Preparing for the End of Special Transition Rule for Implied Consent to Receive CEMs*.

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