

Private right of action under Canada's Anti-Spam Law (CASL)

Privacy & Information Protection Bulletin

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As of July 1, 2017, individuals and organizations will be entitled to institute a "private right of action" before the courts against those that contravene certain provisions of *Canada's Anti-Spam Law*[1] ("CASL"). In the event of a contravention of the message rules in CASL, a monetary penalty up to a maximum of \$1,000,000 per day may be imposed. This private right of action should be taken seriously *right now*. From this perspective and building on previous publications,[2] this bulletin discusses this new mechanism.

When? July 1, 2017

Application: The majority of CASL provisions regulating email solicitation in Canada came into force on July 1, 2014. However, the in force date was delayed for the private right of action. The table below provides a simplified view of the key dates on which different CASL provisions came, or will come, into force:

In effect	Provision(s)
July 1, 2014	All CASL provisions, excluding the provisions listed below.
January 15, 2015	Section 8 CASL on the unauthorized installation of computer programs, software, or applications.
July 1, 2017	Sections 47 to 51 and 55 CASL on the private right to action.

What? Compensation Order

Remedy: In addition to the Canadian Radio-Television and Telecommunications Commission (hereinafter the "CRTC") mechanisms, a private right of action is available to victims of certain contraventions of CASL.

Contraventions: A person may apply to a court of competent jurisdiction for a compensation order where the person alleges that they are affected by an act or omission:

1. that constitutes a contravention under sections 6 to 9 of CASL, i.e., the reception of unsolicited commercial electronic messages, the alteration of transmission data, or the installation of a computer program;
2. the person alleges that they have been the target of that constitutes conduct that is reviewable under section 74.011 of the Competition Act, i.e. false or misleading electronic messages within the meaning of amendments to the

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- Competition Act; or
3. that relates to a violation of the email harvesting and use provisions in sections 7.1(2) and (3) of the Personal Information Protection and Electronic Documents Act (PIPEDA).

Limitation period: Unless the court decides otherwise, the private right of action must be brought no later than three years after the day on which the contravention or reviewable conduct became known to the applicant (subsection 47(2) CASL).

Intervention: the Office of the Privacy Commissioner of Canada, the Commissioner of Competition and the CRTC may intervene in proceedings, depending on the jurisdiction under which the alleged contravention arises (section 50 CASL).

Who? A Person

Person: The private right of action is open to "a person", which includes an individual, partnership, corporation, organization, association, trustee, administrator, etc. (sections 1 and 47(1) CASL).

How? Procedure and Process

Affidavit: Every application shall be accompanied by an affidavit setting out the facts, the alleged contravention and, if applicable, the nature and amount of any loss/damage/expenses (subsection 47(3) CASL).

Safe harbour: Pursuant to section 48(1) of CASL, the court is prohibited from considering an application against a person for statutory damages under paragraph 51(1)(b) of CASL if the person has entered into an undertaking with the CRTC or been served with a notice of violation by the CRTC regarding the same conduct. A similar exemption applies for those persons liable under the extended liability (section 52) and vicarious liability (section 53) provisions in CASL, in cases where the corporation, employee, agent or mandatary, as the case may be, who committed the contravention has entered into an undertaking or been served with a notice of violation.

Class actions: Sections 47 to 51 and 55 CASL do not expressly include class actions. It is, however, widely accepted that the right of private action might fall within a group action.^[3]

How much? Up to \$1,000,000 Per Day

Quantum: With respect to the *quantum*, the court may order compensation equal to the amount of loss or damages suffered and expenses incurred ("compensatory damages"), in addition to \$200 for each contravention, up to a maximum of \$1,000,000 per day of contravention ("non-compensatory damages") (subsection 51(1) CASL). The statutory damages remedies differ slightly according to the type of contravention (subparagraphs 51(1)(b)(i) to (vii) CASL).

Criteria: To assess non-compensatory damages, the court must consider a series of factors such as the purpose of the order, the nature and scope of the contravention, the person's history with respect to previous contraventions and undertakings, any financial benefit that the person obtained from the commission of the contravention, the ability to pay, any factor established by the regulations, or any other relevant factor (subsection 51(3) CASL). Note that proof of injury suffered is not required for non-compensatory damages.

Solidarity: If several parties contravened a provision of the CASL, or covered thereunder, they are jointly and severally liable for the damages and penalties imposed by the court (section 55 CASL).

Why? To Encourage Compliance with the CASL

Prevention: An important element to be noted is the purpose of compensation: it is not intended to punish, but to prevent future violations. Subsection 51(2) of the CASL is unequivocal on this point, and states: "The purpose of an order under paragraph (1)(b) is to *promote compliance with this Act*, the *Personal Information Protection and Electronic Documents Act* or the *Competition Act*, as the case may be, and *not to punish*" [our emphasis].

Conclusion

American author Henry Miller wrote: "Some feel the rain beforehand, others just get wet." Consider this bulletin as an invitation to get an umbrella. July 1, 2017, and the private right of action are imminent, so it would be best to prepare for the future today to avoid the concerns of tomorrow.

In the meantime, we remain at your disposal for any question concerning the private right of action or the application of *Canada's Anti-Spam Law*, in order to ensure that your activities are compliant.

[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, SC 2010, c

[2] See Alex Cameron, "Canada's Anti-Spam Law (CASL): Final Regulations and Coming into Force", *Fasken Martineau Privacy and Information Protection Bulletin*, December 13, 2013; John P. Beardwood and Gabriel Stern, "Ten Key Requirements of the Canadian Anti-Spam Law You Need to Know", *Fasken Martineau Information Technology Bulletin*, January 6, 2013; Peter N. Mantas and Leslie J. Milton, "New anti-spam legislation provides new tools for class action certification", *Fasken Martineau Capital Perspectives Bulletin*, March 2012; John P. Beardwood and Gabriel Stern, "Complying with Anti-Spam Legislation: A Cross-Jurisdictional View", *Fasken Martineau Technology and Intellectual Property Bulletin*, May 20, 2011.

[3] For example, the CASL rules will still apply, but the *New Code of Civil Procedure* will also come into play (articles 571 and following of the C.C.P.) in Quebec. This will make it that much easier for groups of individuals to take action and to increase the amounts sought.