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CASL

The real impact of postponing CASL's private right of action

By **David Young**

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(June 19, 2017, 8:40 AM EDT) -- On Thursday, June 7, the federal government suspended indefinitely the private right of action (PRA) under CASL (Canada's anti-spam legislation), originally scheduled to come into effect July 1, 2017. The government indicated that the provision would be reviewed and potentially amended by the parliamentary committee tasked to conduct the three-year review of CASL under the requirement stipulated in the act.

Timing for the review has not been stated but it is reasonable to expect that any "new" PRA would be delayed at least 2-3 years.

In suspending the PRA, the government in effect acknowledged that the provision as currently written is problematic and that it could have created significant legal uncertainty for diverse stakeholders, not only as a result of its provisions but also due to the fact that some of CASL's prescriptive rules are ambiguous and potentially contradictory. The government implied that, as written, the provision may have caused unintended consequences for persons having legitimate reasons for communicating electronically with third parties.

The suspension of the PRA and its reconsideration within the impending statutory review of the legislation is timely. July 1 will be the third anniversary of CASL's coming into force and is a significant date quite apart from the PRA. Importantly, it represents the end of CASL's three-year transition period for implied consents, which has provided flexibility for organizations seeking to comply with the law's complicated — and not easily understood — rules for consent.

The end of the transition period means that organizations will need more rigorous internal record-keeping and due diligence procedures to ensure that they either have the required express or implied consents to send "commercial electronic messages" (CEMs), or qualify under one or more of the statute's numerous and often difficult to interpret exemptions.

July 1 also represents the end of a three-year "run-in" period for the legislation during which much focused analysis of its provisions was undertaken by both business and not-for-profit stakeholders — as well as by the designated regulators, primarily the CRTC.

All of the designated regulators, including the Office of the Privacy Commissioner and the Competition Bureau (which have specific enforcement jurisdictions under the legislation), have undertaken enforcement actions under the CASL provisions, with the result that there is a growing body of regulatory activity available to guide stakeholders in understanding both the compliance requirements and the consequences of noncompliance.

It may be expected that for all of these reasons the regulators will now be looking to up their game in terms of CASL enforcement and, conceivably, look to the suspension of the PRA as an additional reason for doing so.

Concerns with the PRA, voiced by business and nonprofit stakeholders alike, included the liability risks that it posed for them and their directors and officers, even when many were still unclear as to the precise compliance requirements of the legislation. These concerns were magnified by the realization that — far from providing a simple "user-friendly remedy" for private individuals affected by noncompliant practices — the PRA would be a litigation remedy likely accessible only to well-resourced parties such as class action plaintiffs and their counsel.

Confusion as to the value of the PRA arises when a closer analysis of its procedural rules indicates that, for significant and potentially egregious large-scope incidents, regulatory track enforcement could pre-empt it. In addition, factors to be considered in any PRA award indicate that its application would have been primarily penal in nature, rather than offering a practicable means for affected people to claim compensation for harm otherwise difficult to establish in a court of law.

Business and nonprofit stakeholders had argued strenuously that the PRA was unnecessary as an additional regulatory enforcement tool. Enforcement, they submitted, has been very effective to date. Furthermore, it was argued that the potential negative impacts of the PRA for small and medium-sized organizations, including the potential risks that they would face notwithstanding their best intentions to comply with the law, far outweighed any benefit from a compliance perspective.

The one stakeholder group likely disappointed with the PRA suspension will be the class action plaintiffs bar — whom it has been suggested were counting the days until they could launch claims. However closer analysis of the how the provision would have played out in practice suggests that any anticipated onslaught of claims may have been

exaggerated.

The statutory review of CASL is important because all aspects of the law now will be under review, and potentially adjusted, to take into account the concerns articulated by stakeholders during its first three years. To have determined that some provisions of the law should be clarified if not amended as a result of this review, without delaying the PRA — which potentially could have provided a basis for claims under those very provisions — would have been illogical.

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