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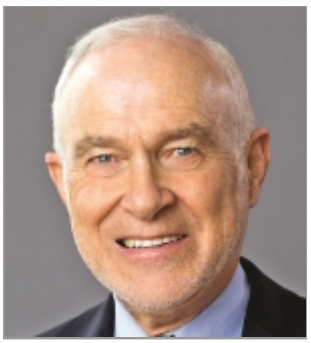
CASL

Parliament's review of Canada's anti-spam law: What we can expect

By **David Young**



David Young

(November 13, 2017, 9:18 AM EST) -- The House of Commons Industry Committee is currently wrapping up its expedited statutory review of Canada's anti-spam law (CASL). The committee's fast-tracking of this file is likely the result of attention earlier this year surrounding the projected coming into force (on July 1) of CASL's private right of action (PRA) — and its suspension pending the review.

The process of bringing forward any significant changes to the law will be inevitably lengthy, involving an in-depth review by the responsible government department (Innovation, Science and Economic Development Canada) following which comment by stakeholders and further review by the committee will be sought prior to any amendments being enacted.

However, it is instructive to hear the evidence of stakeholders, as well as the comments and questions of MPs, to gain some insight as to what the end result may be.

The committee's fast-track review is surprising. By contrast, statutory reviews of the federal privacy law (PIPEDA), typically have taken several years to initiate.

The committee has heard from a wide spectrum of stakeholders. Some, such as the government officials responsible for compliance, praised the beneficial effects of the law in reducing spam, while recognizing that some adjustments may be required. Others, including industry associations, have voiced strongly a number of problems with the law, which they see as wrongly focused, confusing and creating an inordinate compliance burden. In between these two perspectives, are ranged public interest advocacy groups and some outspoken academics who largely see the benefits in the law, while conceding that some improvements could be made, particularly in the realm of enforcement, and that better data is required to fully assess its beneficial — or not — effects.

What are the key issues involved in this review and what can we expect as the result?

It is fair to say that most if not all of the issues brought forward to the committee have originated with industry and not-for-profit stakeholders who have faced the challenges of complying — and the potential risks.

Industry stakeholders see the law as having overly complicated and burdensome compliance requirements. They argue further that, while as initially enacted it was intended to eliminate, or at least significantly reduce, unwanted, invasive and potentially fraudulent e-mail, in fact it has targeted reputable companies and small and large businesses alike.

Charities and not-for-profit groups argue that the law's complicated consent requirements

should not apply to them since they are not the "bad actors" that the law is intended to focus on and that — even more than small and medium-sized businesses — their members have limited resources available to ensure compliance, or to qualify under its myriad of exemptions. Furthermore, since many of their supporters serve on a voluntary basis, they should not be liable to CASL's potentially drastic penalties or the potential risks of the PRA.

The PRA could be characterized as the "elephant in the room," looming over all of the compliance issues. Testimony before the committee has included some commentary regarding the PRA. However for the most part evidence has focused on the broader issues of whether CASL is doing the job it was intended to do or is causing inordinate problems of compliance.

This lack of focus on the PRA is unfortunate.

The thrust of the concerns regarding the PRA address on one hand what are characterized as CASL's deficient or confusing substantive rules and on the other, lack of clarity as to how the PRA may actually play out in the courts and in the overall regulatory regime.

What has been missing from the committee's hearings is a considered analysis from litigation experts, who could shed light on both the benefits and the potential pitfalls of a PRA regime.

Where will we end up? My sense is that the PRA will remain, potentially in a more focused form. The mood today in regulatory circles is for more enforcement powers, not less. Even the regulators see the PRA as a compliance lever, notwithstanding that they would not be launching the actions. Clarifying and streamlining CASL's substantive compliance requirements should make the PRA more acceptable by making compliance requirements clearer and focusing potential claims on the real "bad actors."

It is instructive to note that under the U.S. CAN-SPAM law, the private action is only available to telecom providers — who have used it to pursue, successfully, spammers causing disruptions to their systems.

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