

Consultation on Electronic Commerce Protection Regulations (Industry Canada)

Comments of the Public Interest Advocacy Centre

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Table of Contents

Introduction.....	3
Consumer Interest in Anti-Spam Regulations	3
“Personal Relationship”	4
Referrals from Third Parties	5
Conclusions.....	5

Introduction

1. The Public Interest Advocacy Centre ("PIAC") is pleased to provide the Electronic Commerce Branch with comments on the proposed *Electronic Commerce Protection Regulations* published in the *Canada Gazette*, Part I, Vol. 147, No. 1 on January 5, 2013, at p. 29 et seq.
2. Canadian consumers have a direct and crucial interest in the timely and efficient implementation of the anti-spam regulations which have been the subject of this version of the proposed regulations as well as the prior version, which PIAC commented upon together with Option consommateurs.¹ PIAC/OC also filed their comments on the CRTC-led consultation on the CRTC proposed regulations on other aspects of the anti-spam law on 7 September 2011.² These comments, however, are of PIAC alone.

Consumer Interest in Anti-Spam Regulations

3. Consumers have a specific interest in the content and effect of the anti-spam regulations proposed by Industry Canada. That interest is in the efficient and effective application of Canada's Anti-Spam Legislation³ to reduce the volume of spam they must deal with and to provide them control over commercial electronic messages. The regulations should enable this consumer control.
4. This new version of the regulations appears to create two fairly extensive exceptions to the otherwise coherent structure of CASL and its intent to give consumers and citizens control over CEMs. One exception is for "personal relationships" and another for referrals. We deal with each of these in turn.

¹ See Comments of the Public Interest Advocacy Centre and Option consommateurs ("PIAC/OC") on the proposed *Electronic Commerce Protection Regulations* published in the *Canada Gazette*, Part I, Vol. 145, No. 28 on July 9, 2011.

² See Telecom Notice of Consultation CRTC 2011-400, *Call for comments on draft Electronic Commerce Protection Regulations (CRTC)* (30 June 2011), as modified by Telecom Notice of Consultation CRTC 2011-400-1 (15 August 2011), online: <http://www.crtc.gc.ca/eng/archive/2011/2011-400.htm>.

³ *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", or "Canada's Anti-Spam Legislation" or "CASL").

“Personal Relationship”

1. PIAC notes the changes made to the definition of “personal relationship” as stated in subsection 2(b)(i) of the draft Regulations. “Personal relationship” now is left to be defined by the nature of the communications, which must be “two-way”, “direct” and “voluntary” but which may now be “virtual” instead of in-person. In addition, there is no time limit as before but a consideration of “frequency” of contact. All of these factors are to be judged on a “reasonableness” standard.
2. While we appreciate that the “virtual” relationship that is being respected can be a real one, our lingering concern with this section of the regulations is that it is not clear who judges the “reasonableness” of the conclusion there is a personal relationship. No doubt marketers will insist it is themselves or a “reasonable person”; we foresee disputes with consumers who insist that the standard should be more subjective or at the least subjective-objective, that is, a reasonable person in the particular individual's circumstances would conclude there was a personal relationship. Who gets to judge the “reasonableness” should be specified.
3. As we noted in our previous submission on these regulations: “Refer-a-friend/Invite-a-friend campaigns in the market now does not make them non-commercial nor solicited. The consumer who receives such a commercial electronic message from another individual, with whom they have not had an in-person meeting nor within the previous two years a two-way communication, may reasonably consider such a message to be unsolicited. Organizations using social media marketing campaigns must ensure that they are not enabling individuals to forward marketing messages to consumers who do not fall under the “personal relationship” definition.” We submit that enforcement of this exception may pose a challenge to regulators as media campaigns rely on the “reasonableness” of inferring a personal relationship from tenuous or machine-generated indicators. Given the potential breadth of the exception under subs. 6(5)(a) of the Act, regulators will have to remain vigilant under the regulation of “personal relationship” as now written.
4. PIAC does note the requirement in s. 2(b)(ii) that the message must further not be prohibited by the recipient. This is helpful to control the messaging that may be abusing this revised definition, however, we doubt that consumers will be able to keep up with the potential flood of unwanted messages using the exception.

Referrals from Third Parties

5. PIAC notes with resignation the effectiveness of the lobbying efforts of certain industries that are heavily reliant on referral marketing to introduce a referral exception to the general consent regime, now found at s. 4 of the draft regulations.
6. We are encouraged by the limiting of the solicitation based on the referral to only one CEM. This must not be extended to two, three or more attempts - which would become abusive.
7. We also note that it is crucial that the name of the referring person be provided to the recipient: both so that the recipient may indicate to the referring person that they no longer wish that person to give out their name as a referral but perhaps more importantly, to catch situations where marketers assume such a referral exists when in fact the "referring person" in fact was unaware of the consequences of mentioning the recipient or did not believe the marketer was asking for the names of relatives, friends, co-workers, etc. for the purposes of referral marketing. This requirement of the name of the referring person absolutely must stay; without it this exception becomes the tunnel through which a massive truckload of marketing via CEMs will arrive.

Conclusions

8. PIAC submit that the paramount consumer interest in these regulations now is largely that they be finalized, in present form, so that the CRTC may implement the CASL.
9. That being said, we trust that the Industry department and the CRTC will monitor the two new proposed exceptions and take appropriate enforcement steps if they are used improperly.

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