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Legitimate Businesses Should Be At Least As Concerned As Fraudsters About the *Competition Act*-Related Amendments Under Canada's New Anti-Spam Legislation

Davit Akman, Brenda Pritchard, Brian Fraser, & Christopher Oates[1]

I. INTRODUCTION

On July 1, 2014, Canada's Anti-Spam Legislation ("CASL")—the Canadian version of U.S. CAN-SPAM—came into force. While much has been written about the consent and disclosure/form requirements for commercial electronic messages imposed by the new legislation, and the draconian penalties for non-compliance,[2] comparatively little has been said about the amendments to the Canadian *Competition Act* under CASL related to false or misleading representations in commercial electronic messages (the "Spam Amendments").

The Spam Amendments significantly expand the potential antitrust risk associated with sending commercial emails and other electronic messages in (and to) Canada through the creation of new enforcer/plaintiff-friendly criminal and civil offenses, backed by (among other things) the threat of jail and multi-million dollar "administrative monetary penalties" as well as an expansive private right of action for compensatory and statutory damages. Given the difficulty and expense of locating—much less enforcing fines or damages awards against—the perpetrators of email and internet frauds like the Nigerian 419 scam, the burden of the Spam Amendments will fall most heavily on legitimate businesses in Canada, the United States, and elsewhere using electronic channels (*i.e.*, email, SMS, social media or instant messaging) to promote products or services in Canada. These legitimate businesses will make easier targets for the Canadian Competition Bureau and class action plaintiffs' lawyers alike.

II. THE "SPAM AMENDMENTS" TO THE COMPETITION ACT

A. New Criminal and Civil Provisions

The *Competition Act* (the "Act") is Canada's principal antitrust statute. The Act has long included both a general criminal prohibition against false or misleading representations (section

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[2] *See*, *e.g.*, Peter R Murphy, "Preparing Your Organization for CASL's Commercial Electronic Message Requirements" (April 2014), *Gowlings* (blog), online: <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=3252>; Gowlings, "Webinar – Canada's New Anti-Spam Legislation: What you need to know to comply" (May 28 2014), online: Gowlings <https://event.on24.com/eventRegistration/EventLobbyServlet?target=registration.jsp&eventid=795050&sessionid=1&key=B461410813834B2A2A264819DD88DC3C&sourcepage=register>; and Christopher Oates, "Canada's Anti-Spam Legislation comes into force July 1, 2014" (December 2013) *Gowlings* (AdBytes), online: <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=3108>.

52) and a general civil prohibition against deceptive marketing practices (section 74.01). These prohibitions are substantially similar, except that liability under the criminal prohibition also requires proof that the representation was made "knowingly or recklessly." Both require a representation—made to the public—to promote a product, service, or business interest that is false or misleading in a material respect. The Act provides that in determining whether a representation is false and misleading in a material respect, both the literal meaning and the general impression conveyed by the representation are to be considered; therefore, a representation that is literally true may still be found to be false or misleading if the "general impression" it conveys is false or misleading. A representation will be "material" if it could affect a consumer's decision with respect to a product or service.

In addition to these general prohibitions, the Act also contains a number of criminal and civil provisions targeting specific advertising and marketing practices, including deceptive telemarketing, false or misleading ordinary price claims, representations not based on adequate and proper testing, and bait and switch selling.

CASL amends the Act to add new criminal and civil prohibitions aimed specifically at emails and other electronic messages sent for the purpose of promoting any business interest or the supply or use of a product or service (see sections 52.01 and 74.011, respectively). In particular, the Spam Amendments make it a criminal offense (if knowledge or recklessness can be proved) or a civil reviewable matter (if intent cannot be proved) to:

1. send, or cause to be sent, an electronic message that is false or misleading in a material respect;
2. send, or cause to be sent, a false or misleading representation in the sender information or subject matter information of an electronic message; or
3. make a false or misleading representation in a URL or other locator.

The first of these new prohibitions is no more than the specific articulation and application to electronic messages of the current general criminal and civil prohibitions against false or misleading representations—indeed, it is arguably utterly redundant. However, the latter two prohibitions create new offenses that apply a more stringent standard to email and other electronic messages than to print, broadcast, or in-store advertising, thereby expanding the antitrust risk for businesses using email and other electronic messages to promote their goods and services.

Under those provisions, the literal meaning and general impression conveyed by a representation in the sender information, the subject matter information, or the locator information in an electronic message are to be assessed on a stand-alone basis; that is, without regard to any other part of the message, including any conditions or qualifications in the body of the message. This is unlike other forms of advertising, where appropriate clarifications or qualifiers can be included (when done properly) to inform the general impression of the advertising message as a whole. Further, where the sender information, subject line information, or locator information of an electronic message is found to contain a false or misleading representation, the advertiser faces liability under the Act regardless of the materiality of that representation (viewed in the overall context of the electronic message in question).

The discrete assessment mandated by the new provisions, in combination with the absence of a materiality threshold, mean that representations in subject lines, sender information, and URLs (and other locators) will have to stand on their own in order to minimize antitrust risk. Thus, the new provisions will likely restrict the extent and manner in which innovative and/or aggressive advertisers can (safely) use electronic messages to promote their goods and services to customers and prospects in Canada.

For example, a subject matter line offering free or discounted products or services (*e.g.*, "Free Weekend Rental") could be condemned as false or misleading despite conspicuous qualifying terms and conditions in the body of the message which render the representation in the subject line truthful and non-misleading.[3] It remains to be seen whether including disclaimer or qualifying language in email subject lines (*e.g.*, "terms and conditions apply" or "blackout dates may apply") or incorporating terms and conditions in the body of an electronic message into email subject lines by reference (*e.g.*, "see below/attached for terms and conditions") will be effective in shielding advertisers from liability.

B. Serious Consequences for Non-Compliance

The potential chilling effect on businesses wishing to engage in legitimate (but aggressive or innovative) marketing activities through email and other electronic messages is likely to be aggravated by the severe consequences of non-compliance.

Like the Act's existing criminal misleading advertising provisions, the new spam-inspired criminal misleading advertising prohibitions are backed by serious penalties, including up to 14 years imprisonment, a fine in the discretion of the court, or both. The consequences for contravening the new civil provisions can also be severe. As with the current civil deceptive marketing provisions, violations of the new civil provisions will expose businesses to, among other things, administrative monetary penalties ("AMPs") of up to CAN $10 million for a first offense, and of up to $15 million for each subsequent contravention of the Act.

Further, contraventions of the new criminal provisions may expose an advertiser to potential civil liability under the statutory right of action for damages in section 36 of the Act through class actions by, or on behalf of, consumers who claim to have suffered loss or damage as a result of those contraventions. Under section 36, a person who has suffered loss or damage as a result of conduct that is contrary to any criminal provision of the Act (or the failure to comply with an order issued under the Act), may sue for and recover single damages from the person who engaged in that conduct equal to "the loss or damage proved to have been suffered."

The Act does not currently provide a right of action for reviewable civil conduct. (The right to sue for misleading advertising under section 36 requires a violation of section 52 of the Act—the criminal prohibition against false or misleading representations.) However, as of July 1, 2017, CASL will expose companies using email and other electronic messages to advertise their products and services (and, in prescribed circumstances, the officers, directors, and agents of those companies) to civil liability in respect of contraventions of the new civil provisions.

[3] Sender information like freeweekendrental@A1rentacar.com or a URL like www.A1rentacar.com/freeweekendrental/special raise similar questions.

Under the new statutory cause of action created by CASL, anyone "affected" (*e.g.*, consumers, businesses, and ISPs) by an alleged contravention of section 74.011 will be able to sue for compensatory damages equal to their actual losses or damages suffered or expenses incurred, and for statutory damages (without proof of loss) of $200 per contravention, to a maximum of $1 million for each day on which the conduct occurred.[4]

C. Aggressive Regulatory and Private Enforcement Should Be Anticipated

Businesses expecting the Canadian Competition Bureau to look the other way on "technical" or "trivial" breaches of the new sender/subject/locator provisions will almost certainly face a rude awakening. In recent years, advertising and marketing practices have been the subject of unprecedented scrutiny by the Bureau, and while Canada's antitrust enforcer has reserved criminal prosecution for the most egregious and fraudulent conduct, the Bureau has consistently sought the maximum available fine in civil matters, including in cases involving competitively benign conduct.

For example, in its recent case against Chatr Wireless Inc.,[5] the Competition Bureau alleged that Chatr had made false and misleading representations in "fewer dropped calls" performance claims and that the company had failed to comply with the provision of the Act that requires proper and adequate testing prior to making a performance claim. Initially, the Bureau requested, among other relief, the maximum AMP of $10 million, an order prohibiting Chatr from making claims about dropped call performance for 10 years, and an order compelling Chatr to pay restitution to Chatr customers for the period in which the impugned representations were made.

At the liability phase of the proceeding, the court concluded that Chatr had not engaged in false or misleading advertising but that proper and adequate testing had not been undertaken in all relevant markets prior to the making of the impugned performance representations, contrary to the Act. Despite the fact that proper tests conducted after the launch of the ad campaign supported the "fewer dropper calls" claims, the Commissioner still sought an AMP of $5 to 7 million, together with a prohibition order, on the basis that making the claims prior to completion of all valid testing was contrary to the Act. Ultimately, Chatr was ordered by the court to pay a fine of $500,000.

For its part, the new statutory right of action, which will permit recovery for technical or trivial misstatements without proof of either intent or loss, raises the specter of the abuses associated with U.S. private antitrust litigation; namely, a flood of frivolous and unmeritorious class action claims and strategic litigation by business rivals. Coupled with several recent plaintiff-friendly decisions establishing lax standards for class certification in Canada,[6] and the fact that the court in the *Chatr* case accepted that the level of sophistication to be expected of

[4] CASL provides that the court shall deduct any amounts ordered paid by way of statutory damages from any AMPs imposed in respect of the same conduct.

[5] *See, Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315 and *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146.

[6] *See, e.g., Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

consumers is low (they should be considered "credulous and technically inexperienced"), the new right of action promises to be a boon to class action plaintiffs' lawyers, and a source of serious concern for legitimate businesses operating in Canada.

III. CONCLUSION

It remains to be seen whether, as the Canadian government claims, CASL "will help protect Canadians, while ensuring that businesses can continue to compete in the global marketplace," or whether it will instead impose significant and unwarranted costs on companies advertising through email and other electronic channels, thereby discouraging reliance by legitimate businesses on electronic messages for commercial communications. Regrettably, the *Competition Act*-related amendments introduced by CASL are likely to substantially increase the antitrust risk for legitimate businesses with respect to commercial electronic messages, and ultimately threaten to undermine and impede e-commerce and legitimate advertising and marketing activities in Canada.