



**Submission for the
Statutory Review of Canada's Anti-Spam Legislation**

The Canadian Real Estate Association

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Standing Committee on Industry, Science and Technology

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On behalf of its 125,000 REALTOR[®] members, The Canadian Real Estate Association (CREA) is pleased to participate in the House of Commons Standing Committee on Industry, Science and Technology's statutory review of Canada's Anti-Spam Legislation (CASL).

CREA commends the federal government's efforts to combat spam and malware through CASL and values the opportunity to share insights and concerns as well as provide recommendations for improvement.

Insights and Concerns

CREA recognizes the importance of CASL and supports its objectives to curb unsolicited electronic messages as they significantly undermine the value of the Internet for commerce and economic growth in Canada. However, the anti-spam legislation has come with its share of challenges and some of our challenges are highlighted below.

Transactional and Relationship Messages

CREA is concerned with the application of Subsection 6(6). This section of the legislation deals with messages commonly referred to as "transactional and relationship" messages, including certain messages that provide maintenance notifications and factual information about safety, recalls, membership, subscription, billing or other ongoing services (for example maintenance notification about MLS[®] Systems or WEBForms[®]). While this subsection states that these types of electronic messages are exempt from CASL's consent requirements, the legislation still requires that such messages include the required identification information and an unsubscribe mechanism. This creates confusion and raises a number of concerns.

Firstly, most electronic messages described in Subsection 6(6)—with limited exemptions—are not commercial electronic messages (CEMs) according to the statute's definition of CEM. Therefore, CASL should not apply. There is no reason for legislation that is created to regulate commercial activity to be applied to non-commercial messages and further to be subject to the requirement to include an unsubscribe. These types of "transactional and relationship messages" do not fall within the statutory definition of a CEM and the government should be wary of unintentionally expanding the definition of CEM and making the application of the legislation overly broad. Making these messages subject to CASL goes beyond the intended intent of the legislation, which was to increase consumer protection and reduce spam.

Furthermore, requiring an unsubscribe on these messages gives the public the impression that they can opt-out of these types of notifications (which they should not be able to) and creates further ambiguity and confusion. Moreover, it could result in people opting out of important service notifications and could further create other legal compliance issues. CREA recommends removing Subsection 6(6) from the legislation in an effort to limit the scope of legislation to actual commercial electronic messages that do require an unsubscribe.



Installation of Apps that Auto Update

Unclear and confusing provisions within Section 8 of CASL along with conflicting CRTC interpretations severely increase the likelihood that many organizations are unintentionally violating this section of the legislation. This is exacerbated by a lack of clear guidance from the CRTC regarding these provisions, in particular where mobile applications are concerned. Section 8 of CASL requires any installation of a computer program, on a person's computer system (or electronic device), to obtain the prior express consent of the owner, or an authorized user of that device in the manner prescribed by CASL. CRTC has stated that section 8 does not apply to applications that are self-installed, which is helpful, but if mobile applications automatically update without the user being prompted to install the update, then CASL would apply and the application must comply with the provisions set out in Section 8. Given the fact that CASL requires the request for consent to be made before the application is installed and not bundled with other requests or general terms and conditions, it is extremely difficult to comply with the requirements given how app stores operate. CREA supports the CRTC's efforts to target damaging malware and spyware but these provisions go beyond that objective and create uncertainty in a growing world of mobile applications that are created for the purpose of making one or more aspects of everyday life easier, quicker and/or more enjoyable. Further clarification from the government and CRTC is needed on this front, to ensure mobile applications do not unintentionally violate CASL.

Private Right of Action

We applaud the government's decision to suspend the private right of action pending this statutory review. CREA recommends that it be removed from CASL entirely.

Given the CRTC's enforcement powers and ability to impose monetary penalties, we believe this statute already provides appropriate motivations for people and organizations to comply with the legislation. Imposing further penalty regimes—such as the Private Right of Action—is unnecessary, given the objective of CASL is to promote compliance and consumer protection not to penalize people or companies that violate the legislation.

Moreover, giving private individuals the ability to bring actions when they think they have received messages in contravention of the legislation could lead to frivolous court actions against defendants with substantial assets or deep pockets, further clogging up the Justice system. The government should limit enforcement to the CRTC given their resources and investigative powers to be able to determine when serious violations or conduct causing real harm have occurred.



Enforcement and Administrative Penalties

CASL allows for administrative penalties ranging from \$1 to \$10 million and this creates a significant amount of risk for any organization that sends electronic messages. However, after three years of being in force, there has been very little communication about what companies were doing that breached CASL and what steps Canadians can take to avoid contravening the regime. The majority of CRTC's enforcement of CASL has been through undertakings, where relatively little information about the alleged CASL breaches are made public. For example, the CRTC's website says only this about Kellogg's activities that apparently breached CASL: "messages were allegedly sent by Kellogg and/or its third party service providers during the period of 1 October 2014 to 16 December 2014 to recipients without consent".¹ Was Kellogg's relying on a ground of implied consent that the CRTC did not accept? Was their evidence of consent not sufficient?

Organizations need more information about how CASL is being enforced in order to ensure that they are in compliance with the regime and not at risk of an unjustified penalty. As highlighted above, the administrative penalties can be quite severe and the current enforcement model is unclear and ambiguous. In particular, it lacks guidance for assessing penalties based on the history of violations and the magnitude of the violation. Furthermore, any enforcement and monetary penalties should take into consideration the intent of an organization because monetary penalties are not always the most appropriate tool if the government's aim is to promote compliance and consumer protection. Enforcement should not unfairly target organizations trying to comply with the law. In these circumstances, a formal written warning and/or citations, prior to formal investigation and penalty would be more appropriate and reasoned. There is a need for greater transparency as to how CASL will be enforced and the monetary fines that may be imposed.

We thank the Committee for the opportunity to provide this submission during this very important statutory review.

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¹ Undertaking: Kellogg Canada Inc., 1 September 2016, CRTC Website, <<http://www.crtc.gc.ca/eng/archive/2016/ut160901.htm>>.