
CASL AMENDMENTS TO CANADA'S COMPETITION ACT

*By Ryan Prendergast**

A. INTRODUCTION

As many readers may know, Bill C-28, commonly referred to as “Canada’s Anti-Spam Legislation” (CASL) came into force On July 1, 2014. While the focus of several *Charity Law Bulletins* and *Charity Law Updates* has been on CASL’s direct impact to charities and non-profit organizations, CASL also makes amendments to several pieces of existing federal legislation including the *Competition Act*, the *Telecommunications Act*, and the *Personal Information Protection and Electronic Documents Act*. This *Charity Law Bulletin* focuses on the amendments made to the *Competition Act* (the “Act”) that are relevant to charities in Canada, particularly in relation to fundraising. Of specific importance is the creation of sections 52.01, 52.02, 74.011, and 74.012.

The Act maintains and encourages competition in Canada in order to promote the efficiency and adaptability of the Canadian economy. The amendments made to the Act under CASL extend the powers of the Competition Bureau and the Commissioner of Competition to investigate and enforce CASL’s anti-spam provisions by adding electronic mailing activity to the Act’s regime regulating misleading and deceptive practices.

B. SECTION 52.01

CASL amends the Act by adding section 52.01, which broadens the criminal “false or misleading representation” provisions that were already in place in the Act. This new section prohibits any person,

* Ryan M. Prendergast, B.A., LL.B., is an associate of Carters Profession Corporation. He would like to thank Bart Danko, B.A., M.E.S., J.D., Student-At-Law, for his assistance in the preparation of this *Bulletin*.

for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly sending or causing to be sent:

- ◆ a false or misleading representation in the sender information or subject matter information of an electronic message;
- ◆ a representation that is false or misleading in a material respect in an electronic message; and
- ◆ a false or misleading representation in a “locator”.

The terms “locator,” “sender information,” and “subject matter information” are defined below:

“locator” means a name or information used to identify a source of data on a computer system, and includes a URL;

“sender information” means the part of an electronic message – including the data relating to source, routing, addressing or signalling – that identifies or purports to identify the sender or the origin of the message; and

“subject matter information” means the part of an electronic message that purports to summarize the contents of the message or to give an indication of them.

A new definition of “electronic message” is also added to the Act through CASL, referring to “a message sent by any means of telecommunication, including a text, sound, voice or image message.”

The Competition Bureau clarified in an online FAQ that these provisions do apply to registered charities and non-profit organizations. The Competition Bureau has stated that:

In general, the false or misleading representations and deceptive marketing practices provisions of the *Competition Act* apply to anyone promoting, directly or indirectly, the supply or use of a product or service, or any business interest, by any means, including by charities and other not-for-profit organizations. Generally, this does not include advertisements or representations made solely for a political or charitable purpose, but does include the raising of funds for charitable or other non-profit purposes.¹

¹ Competition Bureau, “Frequently Asked Questions about Canada’s Anti-Spam Legislation”. Online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03765.html>.

As a result, registered charities soliciting funds will need to ensure that the “locator,” “sender information,” and “subject matter information” contained in electronic messages sent by them do not include false or misleading statements.

Once transmission of the message has been initiated, an electronic message is considered to have been sent, regardless of whether the electronic message is actually delivered, or if the electronic address to which it is sending exists. In establishing that there has been a contravention of this section, the court will consider the “general impression conveyed by a representation as well as its literal meaning,” but it is not necessary to establish that any person was actually deceived or misled. Contravention of this section may lead to being found guilty on indictment with a fine and/or for imprisonment of up to 14 years, or a summary conviction leading to a fine of up to \$200,000 and/or imprisonment of up to one year.

C. SECTION 74.011

Section 74.011 is similar to section 51.02 of the Act, but creates a civil reviewable provision, i.e., proof that the contravention of the Act occurred “knowingly or recklessly” is not required but must be shown on a balance of probabilities. This section is similarly contravened by any person who makes or sends a representation, or permits a representation to be made or sent in relation to promoting a business interest or product that contains false or misleading information in an electronic message, or in the sender information, subject matter information, or locator. Although a contravention of section 74.011 may not lead to imprisonment, a court or tribunal may impose a significant administrative monetary penalty as a consequence of violating this part of the Act.

D. SECTION 52.02 AND 74.012

Sections 52.02 and 74.012 allow for the Commissioner of the Competition Bureau to assist in the investigation or proceedings in a foreign state, international organization of states, or international organization, when conduct is substantially similar to the conduct prohibited in section 52.02 and 74.011. The Commissioner may use any of their investigative powers which they deem necessary, and even disclose the information, if the foreign state or other body makes assurances including that the information will be restricted to the relevant proceeding, treated with confidentiality, and in the case of

74.012, if finding a contravention would not have consequences that would be considered penal under Canadian law.

E. CONCLUSION

In order to comply with the amendments in the Act brought by CASL, it is important that charities examine and amend their marketing, advertising and electronic mailing practices. Otherwise, charities may be subject to severe penalties, as created by amendments to the Act. Charities would be wise to institute policies for practices including soliciting for fundraising to ensure that their electronic messages, and their constituent parts (i.e., locator, sender information, subject matter information) are not misleading in anyway, and thus avoid the serious repercussions that the Act carries.