

CASL's Private Right of Action – Class Action Goldmine or Proxy for the Regulator?

IT.CAN Teleconference Roundtable

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Overview

1. Outline of main features of the PRA
2. Non-compensatory damages under s. 51(1)(b)
3. Practical considerations
4. Statutory defences
5. Conclusions – (i) risk assessment
(ii) legislative policy considerations

PRA Context

- Private Right of Action (PRA) under *CASL* comes into force on July 1, 2017.
- Since most of *CASL* came into force on July 1, 2014, CRTC has enforced *CASL* by prosecuting violations.
- Commencing July 1, 2017, *CASL* will also be enforced by private lawsuits for contraventions of the anti-spam and spam-related rules in *CASL*, *PIPEDA* and the *Competition Act*.

PRA Context (cont.)

- Provides for private parties impacted these rules to claim "actual loss or damage suffered" *and* statutory damages.
- Potential for large damage awards
 - e.g. for contraventions of *CASL*, up to \$1 million for each day a contravention occurs
- Widespread concern within business community of exposure to class proceedings.

MAIN FEATURES OF THE PRA

Scope

Section 47(1) applies to *contraventions* of ss. 6-9 of *CASL*, which prohibit:

- sending non-compliant CEMs (s. 6)
- altering transmission data in an electronic message without consent (s. 7)
- installing computer programs on any other person's computer system without consent (s. 8)
- aiding, inducing or procuring any act contrary to ss. 6-8 (s. 9)

Section 47(1) applies to contraventions of prohibition in *PIPEDA* against collection and/or use of:

- electronic addresses harvested by the use of computer programs designed to search for and collect such information (ss. 5 and 7.1(2), *PIPEDA*)
- personal information by unlawfully accessing, using or interfering with computer systems (ss. 5 and 7.1(3), *PIPEDA*)



Section 47(1) applies to *reviewable conduct* under s. 74.011 of the *Competition Act*, where a person, for the purpose of promoting any business interest:

- sends or causes to be sent a false or misleading representation in the sender information or subject matter information of an electronic message
- sends or causes to be sent an electronic message that is false or misleading in a material respect
- makes or causes to be made a false or misleading representation in a locator



PRA pierces "corporate veil" – S. 52

An officer, director, agent or mandatory of a corporation may be liable for the contraventions or reviewable conduct of that corporation if they "directed, authorized, assented to, *acquiesced in* or participated in" such conduct.

- Corporate veil does not protect directors and officers of a corporation from personal liability.
- Personal liability may attach if they *acquiesced* to the corporation's contraventions or reviewable conduct.
- I.e., an officer who was aware of the conduct but did nothing to prevent it could be personally liable.

Vicarious liability of employers – S. 53

A person is liable for a contravention or reviewable conduct committed by or engaged in by their employee acting within the scope of their employment or their agent or mandatory acting within the scope of their authority whether or not the employee, agent or mandatory is identified or proceeded against.

PRA Compensatory Damages

- Court may order compensation for actual loss or damage suffered or expenses incurred by the applicant.
- Damages for actual losses suffered by applicants under PRA will be subject to the principles of causation and remoteness.
- Examples may include costs (for technology, consulting and human resources) incurred to redress damage to computer systems caused by malware and spyware; deployment of resources to address and resolve customer complaints; monies lost to electronic financial fraud / identity theft schemes distributed by spam; operational costs; and wasted time and productivity.



NON-COMPENSATORY (STATUTORY) DAMAGES

Court may order statutory damages of up to:

- \$200 for each contravention of ss. 6 and 9 (non-compliant CEMs and aiding contraventions) not exceeding \$1,000,000 per day
- \$1,000,000 per day for contraventions of ss. 7, 8 (transmission hacking and unauthorized computer downloads) and 9 (aiding contraventions)
- \$1,000,000 per day for contraventions of the email address harvesting and unlawful collection and use provisions of *PIPEDA* (ss. 5, 7.1)
- \$200 for each *occurrence* not exceeding \$1,000,000 for each day for reviewable conduct under s. 74.011 of the *Competition Act* (misleading emails)

What are statutory damages?

- Typically used where difficult to determine the precise value of the loss suffered (calculation impractical; injury subjective or loss is minimal).
- May serve not only as compensation but to promote deterrence/compliance.
- A further objective may be to provide individual/small/unsophisticated plaintiffs with a remedy to recover some damages, where actual loss is difficult to prove or is minimal.
- If goal is primarily to promote compliance, why not just use the regulatory process (AMPs)?

Legislative objectives of statutory damages

Purpose of an order for non-compensatory damages is to promote compliance with *CASL*, *PIPEDA* and the *Competition Act* "and not to punish" (s. 51(2)).

- In civil proceedings, the goal of damages is to compensate the plaintiff for their loss.
- In contrast, statutory damages are in addition to the "actual loss or damage suffered... by the applicant".
- Despite its stated purpose,
 - other reasons may apply - e.g., to provide a user-friendly remedy where actual loss may be difficult or costly to prove
 - these damages may be punitive and result in a windfall for successful applicants

Factors court must consider in awarding statutory damages

- Purpose of an order under s. 51(1)(b) is to promote compliance, not to punish.
- Court must consider prescribed factors including:
 - purpose of order, nature and scope of contravention, person's history of contraventions, any financial benefit obtained by person, ability to pay, whether the applicant has received any compensation – s. 51(3).
- Identical to factors CRTC must consider in awarding AMPs under s. 20(3) of *CASL*, and similar to factors Competition Tribunal must consider in awarding AMPs for reviewable conduct (including misleading emails) under the *Competition Act* (ss. 74.011 and 74.1(5)).



CRTC shows restraint in recent AMPs decisions

Blackstone Learning Corp. dated October 26, 2016

- CRTC reduced AMP sought in notice of violation from \$640,000 to \$50,000.
- Blackstone sent 385,000 non-compliant CEMs in 2 months, refused to self-correct, refused to co-operate with CRTC and failed to conduct meaningful due diligence.
- CRTC gave overriding weight to principle of proportionality and Blackstone's ability to pay.
- AMP sought (\$650,000) represented several years' of Blackstone's revenues.
- CRTC stated that an AMP that precludes a person from operating on a commercial basis is undesirable.

CRTC shows restraint in recent AMPs decisions (cont.)

William Rapanos dated March 9, 2017

- Notice of violation sought an AMP of \$15,000 for 10 violations of *CASL* for sending 58 non-compliant CEMs.
- CRTC awarded \$15,000 AMP (\$1,500 per violation).
- Rapanos refused to provide documents on his ability to pay and showed no identifiers of self-correction (he sent more non-compliant CEMs after receiving notice of investigation).
- As such, CRTC found that \$15,000 was proportional to the goal of promoting compliance (both specific and general).

PRA - PRACTICAL CONSIDERATIONS

Who are the likely plaintiffs?

- Given the potential costs of PRA applications, only well-resourced parties will likely be plaintiffs.
 - class counsel on behalf of a proposed class; public interest advocacy groups; other sophisticated litigants (e.g. strike-suit plaintiffs?)
- Unlikely that individuals who may have received spam will, on their own, initiate an application (given the cost/benefit analysis).

PRA - PRACTICAL CONSIDERATIONS

(cont.)

Non-compensatory damages in class proceedings

- In determining an award of statutory damages, will courts apply the prescribed factors in the same manner as the CRTC under regulatory track (s. 20(3))?
- What will this mean for a PRA class proceeding?
- Application of these factors should lead to the determination of an aggregate award, not what will be received by each class member, as statutory damages are not for actual loss or damage suffered by applicants.
- If the potential award for statutory damages ranges only in the tens of thousands (as in *Blackstone Learning Corp.* and *Rapanos*), will that provide sufficient incentive for class counsel to invest in PRA class proceedings?

STATUTORY DEFENCES - SHELTER FROM THE PRA



Statutory Defences –

CRTC may switch from PRA proceeding to regulatory track

Section 48(1) - The court may not consider an application for an order against a person under paragraph 51(1)(b) that alleges a contravention of any of sections 6 to 9 (CEMs and computer downloads) if the person:

- has entered into an undertaking under s. 21(1) or
- has been served with a notice of violation under s. 22 (1)

Section 48(3) - If the court determines that it may consider an application for an order against a person under paragraph 51(1)(b):

- no undertaking by the person may be entered into under s. 21(1)
- no notice of violation may be issued under s. 22(1)

When is an undertaking available as a shield?

- Before the PRA application is "considered" by the court (s. 48(1)).
- But not *after* "the court determines that it may consider an application for an order against a person under paragraph 51(b)" (s. 48(3)).
- Note that undertakings can only shield a business from a statutory damages order under the PRA (s. 51(1)(b)) but not from an order for actual loss or damage (s. 51(1)(a)).



Statutory defences - analysis

- Up to what point in the PRA proceeding can this defence be used?
- When notice of application is issued?
- When any interlocutory motion is commenced?
- When does the court first "consider" (s. 48(1)) or determine it may consider (s. 48(3)) a PRA application?
- Until such time, presumably
 - a respondent may communicate with the CRTC to change the track from private litigation to regulatory
 - CRTC may initiate or pursue an investigation leading to a notice of violation or undertaking (e.g. as a result of complaints received by the Spam Reporting Centre or media coverage)

Is undertaking available after PRA proceeding is commenced?

- Section 48(3) suggests an undertaking is available *before* a Court determines it can consider an order against the respondent.
- Policy for shielding a person from PRA if it enters into an undertaking *before* a proceeding is commenced is that the goals of enforcing CASL (compliance, preventing recidivism and deterrence) are achieved by *either* regulatory measures (AMPs) *or* PRA.
- Policy applies with equal force *after* a PRA proceeding has been commenced.
- But until the Courts decide, uncertainty remains.

Obstacles to obtaining an undertaking

- CRTC is not obliged to enter into an undertaking, much less to shield a business from PRA proceedings.
- Undertaking must be consistent with CRTC's regulatory goals of promoting compliance with *CASL*, preventing recidivism and deterrence.
- CRTC controls the terms and timing of any undertaking.
- Undertaking must be in connection with an act or omission referred to in the PRA application.
- If undertaking does not cover all acts or omissions referred to in the PRA application, it will not be a full shield.
- CRTC may not agree to an AMP that is less than potential exposure under PRA.



Risks and limits of seeking an undertaking

- Business must self-report the full extent of its contraventions to CRTC.
- CRTC may refuse or insist on terms that business cannot accept.
- If an undertaking is not reached, business has put itself in the cross-hairs of CRTC for regulatory action.
- While regulatory action may be preferable to a PRA proceeding, business may face both proceedings if notice of violation does not cover all acts or omissions, or includes acts or omissions not, referred to in PRA proceeding.
- An undertaking provides a potential shield from PRA proceedings for statutory damages but not from PRA proceedings for actual loss or damage suffered.



Private Litigation vs. Regulatory Action

- What investigative resources are available to private litigants (class counsel) and how effective are they vs. those available to the regulator?
- What are the costs for a private litigant (class counsel) to investigate?
- Given the potential costs of PRA applications (including investigations), they likely will only be pursued in respect of major / egregious spam or other breaches (e.g., those receiving wide media coverage).
- In such cases, is it realistic (or responsible) for the public regulator (CRTC) not to pursue regulatory proceedings?

Due Diligence Defence

Section 54(1) - *A person must not be found to have committed a contravention of any of sections 6 to 9 of this Act or of section 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or to have engaged in conduct that is reviewable under section 74.011 of the Competition Act, if they establish that they exercised due diligence to prevent the contravention or conduct, as the case may be.*

- Mirrors due diligence defence for violations of *CASL* in ss. 33(1) and (2).

Compliance programs may include:

- written compliance policies for employees, contractors and third parties authorized to send CEMs
- appointing compliance officers to ensure compliance
- training programs for employees, partners and contractors
- tracking CEM complaints and resolution
- implementing updated monitoring and auditing mechanisms
- consistent disciplinary procedures
- annual review of the compliance program
- good record-keeping practices

CONCLUSIONS – RISK ASSESSMENT

- Uncertain how and to what extent applicants and counsel will utilize PRA.
- Uncertain how courts will approach statutory damage awards under the PRA.
- Uncertain as to the circumstances where CRTC may enter into undertakings or issue notices of violation that would shield against PRA proceedings.
- Clear that businesses should ensure their compliance programs are robust and well documented as due diligence is a full shield to PRA proceedings for both statutory and actual damages.
- Clear that if a business contravenes CASL, it should take steps to prevent recurrence as such efforts are "identifiers of self-correction" that may lower a statutory damages award.



CONCLUSIONS – LEGISLATIVE POLICY CONSIDERATIONS

- PRA should be considered primarily a regulatory/penal provision intended to encourage compliance as opposed to compensate for losses. However potential monetary awards may not provide a sufficient incentive.
- If the true objective of the provision is as a proxy for regulatory action – which if not undertaken at the outset, maybe activated at any time prior to a court considering an application – as opposed to an effective means of enabling compensation for injured parties - what is the rationale for it?
- Does the CRTC intend to adopt policy guidance as to when it will or will not intervene and pursue a matter in the regulatory track? Such guidance would assist both potential applicants and respondents.



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