

# Committee recommends changes to anti-spam law

BY ELIZABETH RAYMER

For Law Times

A government standing committee has made recommendations for revision of Canada's Anti-Spam Legislation to provide clarity to organizations, including assisting them in interpreting and applying the law.

The Standing Committee on Industry, Science and Technology made 13 recommendations in its report, released last month.

The theme of INDU's recommendations was clarification, says David Elder, who practises communications, competition and privacy law with Stikeman Elliott LLP in Ottawa.

"There is uncertainty and vagueness in the law, which makes it difficult [for businesses] to comply; when you combine that with heavy financial penalties, it makes it difficult" for Canadian businesses to market their products and services.

"It would be desirable to have more transparency and certainty in terms of the enforcement models," he says.

When Parliament enacted it in 2010, CASL amended the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act. The duty of enforcing the Act is shared by the CRTC, the Competition Bureau and the Office of the Privacy Commissioner of Canada.

The Act came into force in 2014, and it prohibits commercial conduct that would impair the reliability and best use of electronic means of carrying out commercial activities; notably, companies have been penalized for sending "spam" email to individuals.

Following a series of hearings with stakeholders in the fall — witnesses included the CRTC, the Canadian Chamber of Commerce, the Canadian Marketing Association (which Elder represented) and the Canadian Bar Association — the standing committee "pointed out they had heard loud and clear that there is a certain amount of lack of clarity in the law, including a chill on electronic marketing," says Elder.

A number of businesses, including prominent companies such as Rogers Communications and Porter Airlines, have had to pay significant fines for violating the legislation.

"These were companies trying to comply [with the legislation], but inevitably things go wrong: Servers act up, things don't come through," Elder says.

And although affected companies "took immediate steps to comply," they were typically fined upwards of \$200,000, he notes.



David Elder says the majority of the corporate sector believes it would be a bad idea to allow private individuals to sue for damages for violations of anti-spam laws.

Recommendations of the standing committee to amend CASL include:

- to clarify CASL's definition "of 'commercial electronic message' to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance. In particular, the status of administrative and transactional messages should be clarified";

to "clarify the provisions pertaining to 'implied consent' and 'express consent' to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance";

- to increase efforts to educate Canadians, "especially small businesses," about the requirements of the Act and the technological tools available to them to assist with compliance.

Another significant recommendation was that the government further investigate the impact of implementing the pri-

private right of action once changes and clarifications have been implemented to the Act and its regulations.

Canada would be one of just a few jurisdictions that allows a private right of action, says Elder, under which anyone who is aggrieved based on a violation of the law can bring an action for damages of up to \$200 per day per incident.

"Not only can they sue for actual damages but for statutory damages, which need not be proved," says Elder. "There's real concern there for class actions."

The majority of the corporate sector thought it was a bad idea to allow private individuals to sue for damages, he adds.

Molly Reynolds, a senior associate at Torys LLP who focuses on privacy, anti-spam and e-discovery matters, said she sees the recommendations "as conservative progress toward reform and the reaction to those

recommendations as largely one of cautious optimism."

"The committee identified many of the key problems or ambiguities in CASL, especially around consent and the definition of a CEM, but the recommendations do not give much guidance on how those issues should be resolved by the government," she said.

She also said the committee "did thorough, high-quality work in its consultation and review process." However, she said there could have been more communication around "how the areas needing clarification could be improved."

"Because a lot more work will need to be done by the government to assess whether to reform any of the items highlighted by the committee and if so, what changes to make to the Act or regulations, I don't expect the law will be changed on any expedited timeline." **LT**



## Municipal Elections Compliance Audit Committee Recruitment York Region

York Region's municipalities are recruiting experienced professionals for appointment to their 2018-2022 Municipal Elections Joint Compliance Audit Committee.

The Committee is required by the *Municipal Elections Act, 1996* to consider applications requesting audits of candidates' campaign finances. Committees may be required to appoint auditors and determine if legal proceedings are required as a result of the auditors' reports.

Applicants with a background in accounting, auditing, law, election administration, and/or public administration are preferred.

### Applicants should:

- have an understanding of municipal campaign finance provisions;
- demonstrate analytical decision-making and excellent communication skills;
- have experience working with or as a member of government boards, task forces and/or quasi-judicial bodies; and
- have flexibility to attend meetings during daytime and evening hours.

Applicants cannot be candidates in the 2018 Municipal Election nor can they have committed to providing professional advice to any person running for office in any York Region municipality. Applicants also cannot be Members of Council or current employees of any York Region municipality.

The Committee's term of office is four years, beginning in 2018. Successful applicants will receive a retainer of \$400 and a per diem of \$350 (plus mileage).

For more information about the Committee  
visit [RichmondHill.ca/2018Election](http://RichmondHill.ca/2018Election) or email [elections@richmondhill.ca](mailto:elections@richmondhill.ca).

To apply, visit [RichmondHill.ca/2018Election](http://RichmondHill.ca/2018Election).

The application deadline is 4:30 p.m. on Friday, February 2, 2018.