

November 6, 2017

Subject: CFIB Response to the Standing Committee on Industry, Science and Technology's Statutory Review of Canada's Anti-Spam Legislation

Dear Committee Members:

We are writing on behalf of the 109,000 small- and medium-sized enterprise members of the Canadian Federation of Independent Business (CFIB) to provide feedback on the Standing Committee on Industry, Science and Technology's review of Canada's Anti-Spam Legislation (CASL).

It is important to note that CFIB supports CASL's objective of spam reduction. Indeed, the law was originally promoted as a necessary tool for the government to go after "the worst offenders," and this is something most of our members would support. However, CASL has also proven to be complicated, cumbersome and costly for smaller companies that increasingly rely on digital communications. We strongly recommend the government rethink the way in which CASL tries to achieve its desired objectives. International examples have shown there are other ways of reducing spam, namely by focusing on principles rather than exceptions.

CASL may be stifling innovation and growth

Digital technologies have transformed how small businesses communicate. Close to 80% of small business owners report that digital technologies are important to the success of their business¹ and 89% say they frequently or occasionally send emails to customers and business contacts.² As a result, when CASL legislation was first implemented, many small business owners feared that it would severely limit their ability to communicate electronically with clients.

In the past five years, technological advances have largely solved many of the issues that CASL intended to target. Most email programs are now equipped with advanced spam filters, so most Canadians rarely see spam anymore. It has also become a best practice to allow customers to "unsubscribe" from email notifications they no longer wish to receive. In fact, the majority of actual spam that Canadians receive seems to originate from countries outside Canada, where CASL legislation cannot be applied. So the question then becomes, is CASL actually helping reduce spam in Canada or is it limiting the ability of smaller firms to be innovative in how they interact with their customers?

¹ CFIB, *Crossing the Digital Divide*, January 2017.

² CFIB, *Canada's Anti-Spam Law (CASL) Survey*, June 2014, n=5,403.

Low small business awareness of CASL

In June 2014, just before CASL was implemented, CFIB conducted a survey and found that almost 34% of small business owners had heard of CASL, but did not know about the requirements, and 15% had not even heard of the legislation. Sixty-two percent of respondents said that they had not taken any steps to comply with the legislation.³ In July 2015, a year after CASL came into effect, 24% of business owners had heard of the legislation but did not know about the new requirements, and 10% did not know about it at all. These results are troubling as they indicate that a third of business owners were still largely unaware of the new rules. Despite this lack of awareness, 69% of business owners believed their business was fully compliant. This may indicate that many do not believe that the legislation applies to their business, as they may not perceive their communications with customers to be “spam.”⁴

Since CASL’s implementation, CFIB’s member support team continues to regularly receives calls from business owners asking what CASL is and what it means to their business. We believe that many are still unaware that the legislation applies to any commercial electronic message they send. Although the government has attempted to provide some guidelines to promote compliance, it has been limited and not always that easy to comprehend. This could be due in part to the law’s “ban all (with exceptions)” structure, which creates a multitude of grey areas, making compliance that much more difficult, especially for a small business that cannot afford to access costly legal counsel.

CASL increases compliance burden for SMEs

While we were very pleased to see the government announce the indefinite suspension of the private right of action clause, other requirements outlined in CASL remain onerous for many small business owners. Those who are aware of CASL still struggle to understand how to comply due to the legalistic nature of the information available. Opaque concepts like “express” or “implied” consent do not give clear direction on compliance, particularly in the latter case. This is further complicated by the fact that businesses are required to track those who have provided implied versus express consent and must clear certain types of consents after two years or six months. This requirement is time-consuming and complex for a small business; they either build a solution from scratch or hire an outside firm to enable them to purge this data, and are therefore trusting that the firm is CASL compliant. It is very important that information available on CASL be simple and tailored to the needs of small businesses so they can take the necessary steps to comply.

For more complex questions, it is also essential that small business owners be able to easily seek guidance from government officials. In the past, when CFIB members have sought government advice, they were unable to reach officials through the telephone query line. Responses to emails took up to 10 business days and the information provided was incomplete. We continue to regularly receive calls from members who have heard of “new email laws” but are not sure whether they apply to their business or if they are in compliance.

³ CFIB, *Canada’s Anti-Spam Law (CASL) Survey*, June 2014, n=5,403.

⁴ CFIB, *Canada’s Anti-Spam Law (CASL) Survey*, June 2015, n=7,889.

Finally, the government has repeatedly stated that CASL's purpose is to go after the "the worst offenders." By extension, small businesses that send a few emails per day/week/month to clients are therefore not CASL's target. In a 2014 letter to CFIB, Industry Minister James Moore quoted CRTC Chairman Jean-Pierre Blais, essentially confirming this point. If this is the case, why are small businesses spending significant resources on CASL compliance? Moreover, the government has to invest significantly into compliance and communication tools aimed at these small businesses, when it could better invest its time and resources on the "worst" offenders. In short, many organizations, including small businesses, are spending a great deal of time and scarce resources on CASL compliance, rather than growing their business.

CASL going forward

We believe that awareness levels of CASL remain low among small business owners, so it is important that the government focus first on education rather than enforcement. In 2014, 38% of respondents said they were supportive of CASL as long as the focus was on boosting knowledge of CASL requirements rather than enforcing fines for non-compliance. Additionally, entrepreneurs believed that exemptions should be made for businesses that send relatively few emails.⁵

We therefore make the following recommendations to the committee:

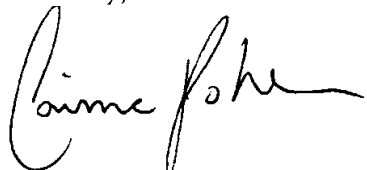
- ▶ Reconsider how CASL is applied by exempting businesses that send less than a certain threshold of emails per year or month. As technological advances have largely solved the issues that CASL was created to tackle, we do not believe the relatively few electronic communications sent by small businesses to customers should be targeted by the current legislation. Further, we urge flexibility for seasonal businesses or those with "busy seasons."
- ▶ If CASL continues to be applied to small users, ensure that all government entities involved in implementing CASL legislation, including CRTC, make a better effort at boosting knowledge of CASL's requirements among small businesses.
- ▶ Eliminate the rules requiring businesses to track and purge recipient data every 2 years and 6 months.
- ▶ Ensure that all business-to-business (B2B) communications are truly exempted from CASL by refocusing the legislation on principles rather than exemptions.
- ▶ Ensure that non-compliance will be first addressed with education, not enforcement (i.e. no fines).
- ▶ Ensure that the CRTC is better able to offer support and tools to small business owners who face fines and penalties if they make a mistake.

As SMEs rely more and more on electronic communications and social media, we are concerned that CASL will continue to add both a compliance burden and increase uncertainty for small business owners. Government now has the opportunity to fix CASL by reconsidering how it is applied to small business, simplifying it and making it easier for businesses to comply.

⁵ CFIB, *Canada's Anti-Spam Law (CASL) Survey*, June 2014, n=5,403.

If you have any questions or would like to meet to discuss this issue further, please feel free to contact us at our Ottawa office at 613-235-2373 or by email at corinne.pohlmann@cfib.ca.

Sincerely,

A handwritten signature in black ink, appearing to read "Corinne Pohlmann". The signature is fluid and cursive, with the first name being more prominent.

Corinne Pohlmann
Sr. Vice-President, National Affairs & Partnerships

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Louis-Martin Parent
Director, President's Office