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Bill C-28: Canada's Anti-Spam Legislation Passes — the Impact on Your Marketing Programs and Practices

Eva Chan
Associate
Borden Ladner Gervais LLP

Rebecca Chan
Partner
Borden Ladner Gervais LLP

The Canadian Parliament finally has passed Bill C-28, which was formerly known as the *Fighting Internet and Wireless Spam Act* [*FISA*]. It is anticipated that *FISA* will come into force in six to eight months, once regulations are in place.

FISA affects how business and other organizations market and advertise to clients and prospects using unsolicited commercial electronic messages (spam). It also impacts the use of software and other technology in communicating with customers (*e.g.* phishing). Finally, a privacy compliance review may be needed as a result of *FISA*'s passage. This article focuses on *FISA*'s impact on marketing and advertising activities of business and other organizations.

A. Prohibition on Sending "Spam"

FISA prohibits the sending of a commercial electronic message to an electronic address (*e.g.* e-mail, instant messaging) unless: (a) the recipient of the message has consented to receiving it; and (b) the message sets out certain information including how to unsubscribe from future messages. The prohibition applies to the sender and any person who acts on behalf of the sender, such as advertising and marketing agencies hired by a company.

A commercial electronic message is a message sent by any means of telecommunication (including a text, sound, voice or image message) where it would be reasonable to conclude that one of its purpose is to encourage participation in a commercial activity. The content, hyperlinks, and contact information contained in the message would be considered in determining the purpose of the message. A commercial activity means any particular transaction, act or conduct or regular course of conduct that is of a commercial character, whether or not the person who carries it out does so expecting profit.

A *FISA* violation is not a criminal offence, and there is no possibility of imprisonment. Nonetheless, officers and directors can be held personally liable for violations, and employers can be held liable for violations committed by their employees or agents acting within the scope of their employment. There is a due diligence defence available.

Most notably, *FISA* contains a private right of civil action available to businesses and consumers affected by a violation of *FISA*, the unlawful collection, use, or disclosure of personal information in violation of the *Personal Information Protection and Electronic Documents Act* (Canada), S.C. 2000, c. 5 [*PIPEDA*], or misleading electronic messages in violation of the *Competition Act*, R.S.C. 1985, c. C-34 (Canada). The action may be brought against the persons who committed the violation and others liable for it, if not already subject to an undertaking or a notice of violation issued by the CRTC. The remedies available in a private action include compensation for loss, damage, and expense plus an additional payment of: (i) up to $200 for each contravention to a maximum of $1 million for each day a contravention occurred in respect of a violation of the spamming prohibition; and (ii) up to $1 million for each day a contravention occurred in respect of a violation of the installation of a computer program prohibition.

D. Amendments to Other Legislation

FISA amends the *Competition Act*. Amendments include prohibiting the sending of electronic messages with false or misleading representations, whether in the sender information, subject matter of an electronic message, or in a locator (including a URL). The prohibition does not require the electronic message to be a commercial electronic message. Also, the definition of "telemarketing" would be broadened to cover "communicating orally by any means of telecommunication" and no longer simply applying to "interactive telephone communications".

FISA also amends *PIPEDA*. Amendments include preventing the unauthorized collection or use of an individual's electronic address if it was collected through a computer program designed for collecting electronic addresses. Also the unauthorized collection or use of personal information obtained through accessing a computer system in an illegal manner is prohibited.

In addition, *FISA* amends the *Telecommunications Act* (Canada) S.C. 1993, c. 38, resulting in a possibility for the Do Not Call List to be replaced with a new regime.

E. Impact on Marketing Programs and Services

Once *FISA* is in force, before sending out any commercial electronic messages, businesses will have to determine whether they have the proper consent and that their messages include the information and unsubscribe mechanism required by *FISA*. Businesses will also need to review their electronic marketing practices to determine whether they distribute any software that would be captured under *FISA*. If they do, they must comply with disclosure and consent requirements.

Moreover, businesses will need to ensure that their third party service providers are knowledgeable about *FISA* and will comply with *FISA* when assisting with and implementing marketing programs and services.

Compliance under other legislation should also be taken into account given *FISA*'s amendments on electronic messages generally under the *Competition Act,* the collection and use of personal information under *PIPEDA*, and telemarketing under the *Telecommunications Act*.

Businesses should start reviewing their marketing practices now to determine how to comply with *FISA*, as the internal process to effect compliance could require substantial lead time.

[*Editor's note*: Eva Chan, 416-367-6722, evachan@blg.com; Rebecca C.W. Chan, 416-367-6723, rchan@blg.com;]

Private Loans: Disclosure of Mortgage Statements to Third-Party Creditors Violates *PIPEDA*

Lisa Brost
Partner
McMillan LLP

Richard McCluskey
Associate
McMillan LLP

A recent decision of the Ontario Court of Appeal should be heard as a warning bell by financial institutions that are in the practice of providing mortgage information about their clients upon the request of their clients' creditors. In *Citi Cards Canada Inc. v. Pleasance*,[1] the Court held that banks are not obligated to furnish this type of information and that such disclosure is actually prohibited by the *Personal Information Protection and Electronic Documents Act* [*PIPEDA*].[2] In providing mortgage discharge statements upon a creditor's request, banks may have been unwittingly violating federal privacy law.

Facts

This notable case centred on fairly common facts. In *Citi Cards*, a credit card company (the "creditor") obtained a judgment against the debtor for outstanding credit card debt. The creditor sought to enforce its judgment by way of a sheriff's sale of the debtor's home. However, the sheriff refused to carry out the sale without mortgage discharge statements (the "mortgage statements") from The Canada Trust Company and Toronto-Dominion Bank (the "banks"). As the debtor could not be located, the creditor requested the mortgage statements directly from the banks. The banks refused to provide the statements, taking the position that *PIPEDA* prohibited the disclosure of this information to third parties. The creditor turned to the court for an order compelling the banks to produce the mortgage statements.

A Debtor's Right to Privacy Trumps the Interests of a Judgment Creditor

The Court of Appeal, upholding the lower court's ruling, refused to order the banks to turn over the mortgage statements. The Court's concern was that such production would violate the privacy rights of the debtor as set out in *PIPEDA*, not to mention those of his wife, who co-owned the house.

PIPEDA, a ten-year old piece of legislation, regulates how companies deal with information about individuals collected in the course of their commercial activities. The Court held that *PIPEDA* applied to the banks and agreed that the sought-after mortgage statements constituted "personal information" that were prohibited from disclosure pursuant to the regime.

In coming to this conclusion, the Court also looked at the stated purpose of the legislation, which is to "balance the privacy rights of individuals" with the "needs of organizations to collect, use or disclose personal information for reasonable purposes." The court emphasized that the interests that need balancing are those of the individual (*i.e.* the debtor) and those of the organizations who collect information (*i.e.* the banks). The fact that a third-party judgment creditor also had an interest in these mortgage statements was of no importance when considering the debtor's privacy rights pursuant to *PIPEDA*.

Exceptions Do Not Apply

The creditor argued that two exceptions to the general prohibition against disclosure applied, entitling it to the statements.

First, it argued that the banks were under an obligation to provide the mortgage statements to "comply with an order of the court." However, the only court order that would require production was the one sought on the current application. The Court criticized the circularity of this argument.

Secondly, the creditor argued that a "required by law" exception applied. It argued that since the debtor would be required by law to disclose the information if examined in aid of execution, the banks should be so required as well. The Court rejected this argument for numerous reasons, not the least of which was that the creditor's reasoning directly conflicted with the wording of the legislation.

Alternative Remedies Available

The Court also refused to order the production of the mortgage statements because there was an alternative remedy available: the creditor could bring a motion to examine the debtor's wife. In light of her privacy interests, and those of her husband, the Court held that this was an appropriate next step in lieu of making an order which would otherwise violate *PIPEDA*.

Implications for Financial Institutions

This is the first time that the Court of Appeal has ruled on the application of *PIPEDA* to this type of information. As the Court pointed out in its ruling, the furnishing of mortgage statements by financial institutions in these situations is a matter of uneven treatment in Ontario, with some, but not all, lenders providing them upon request. The Court has now clearly stated that institutions providing mortgage statements to third parties, in the absence of a judicial order, are breaching their clients' privacy rights. Financial institutions should review their policies to ensure they do not inadvertently violate *PIPEDA* and accidentally find themselves subject to its penalties.

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1 [2011] O.J. No. 15, 2011 ONCA 3 [*Citi Cards*].

2 S.C. 2000, c. 5.