MAPLEGROW CAPITAL INC.

Brief for The House of Commons Standing Committee on Industry, Science and Technology

October 15, 2017

Maplegrow Capital Inc. is a Canadian provider of financial and compliance consulting services, including CASL-compliance related services. We thank the Committee for this opportunity to share our experience in the market and to submit one recommendation. We will be brief.

Maplegrow has been in business since 1996 and has been providing CASL compliance services since 2012. In addition to assisting companies achieve CASL functional compliance, we have made many public appearances and written many articles on CASL. Our principal Peter M. Clausi, BA, JD, majored in Computer Science prior to being called to Ontario's bar, and has a lengthy history of shareholder activism, compliance and governance. He also has experience in class action litigation.

Rather than consume the Committee's time here, we refer you to Mr. Clausi's profile at LinkedIn [1].

We have reviewed the witness testimony given to date (Oct 14, 2017) to this Committee.

Our CASL consulting experience leads us to conclude that Canadian businesses fall into three categories: those that know nothing about CASL, those that know about CASL and want to comply, and those that know about CASL and don't care about complying.

First, the group that knows nothing about CASL: many Canadian businesses still know nothing about CASL and it is not possible for the regulators to bring enforcement proceedings against all of them. Without nation-wide compliance the legislation cannot achieve its intended purpose. It is clear that something is needed to educate these companies about their CASL-compliance obligations.

The second group is in good faith trying to achieve compliance. Human Resources, Legal, IT, Compliance and senior management work together to create, implement, revise and supervise CASL protocols. The creation of those protocols and their good faith implementation brings four results:

- a lessened likelihood of a CASL breach taking place;
- in the event of a CASL breach, a lessened likelihood of damage;
- in the event of a CASL breach, the availability of a due diligence defence; and
- in the event of a CASL-related conviction, a less severe punishment than would otherwise be imposed.

There is a cost to these internal CASL compliance protocols. (As an aside, we generally recommend to clients to outsource the technical end of compliance.) The members of this second group must be continually motivated to ensure that the real costs of compliance are less than the risks and financial costs of non-compliance.

The third group is especially troublesome, and unfortunately, to date represents the attitude of many Canadians. Ignorance of the law (as in the first group) is one matter; a deliberate thumbing of one's nose at the law is another level altogether. Those that know of their CASL obligations but choose to ignore them undermine the entire system, and must be dealt with harshly. The regulators, though, lack the resources to investigate and prosecute every CASL breach.

Each of the three groups above currently lacks a business incentive to continue with the cost of internal CASL compliance, and the regulators cannot possibly be aware of, investigate, and prosecute every

[1] https://www.linkedin.com/in/peter-clausi-29b2a0/

breach. The sheer volume of electronic communications in Canada makes that impossible.

Which brings us to the point of this brief. It is our view, from the frontlines of the CASL battle and with our involvement in defence class action litigation, that the PRA supportable by class action litigation must be part of any CASL legislation.

The PRA moves the majority of the cost, decision and risk of enforcement off the regulators and onto the free market. Class action litigators will on a contingency basis take those cases that are easiest to win with the greatest financial return. The insurance market will create some form of language for the corporate insurance policy and for the Directors and Officers insurance, making the proceeds of insurance the target for those opportunistic litigators.

News of these actions will flow through the CRTC's website, social media, the national newspapers and through other media. Canadians will hear that there is a real cost to breaching CASL, and the risk of that cost will motivate companies into compliance.

The insurance market will continue to balance risk against return, adjusting the premiums and T's&C's as the market moves. We already see this in the broader D&O market, where premiums rise and fall in accordance with court decisions re-defining director liability.

With the PRA in place, the CASL space will eventually be regulated by the fear of those class action lawyers and by the insurance companies, in accordance with the risks of the market. The three groups referred to above will be motivated into compliance, even if solely to avoid being the target of expensive class action litigation.

We close by referring to the 2005 Report of the Task Force on Spam[2], which was titled "*Stopping Spam – Creating a Stronger, Safer Internet*" and was addressed to the Minister of Industry. Many of the observations made in that Report echo today. We draw your attention to page 14 of the Report where the Task Force recommended:

There should be an appropriate private right of action available to persons, both individuals and corporations. There should be meaningful statutory damages available to persons who bring civil action.

It is our opinion that CASL without a Private Right of Action is hollow and unfair. It would only punish those companies that in good faith incurred the costs of compliance while allowing scofflaws to continue with their breaches. It is our submission that Canada's interests cannot be sufficiently advanced without a PRA.

[2] http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/Collection/Iu64-24-2005E.pdf