



November 9, 2017

Mr. Dan Ruimy, M.P.
House of Commons Standing Committee on
Industry, Science and Technology
Sixth Floor, 131 Queen Street
Ottawa, ON
K1A 0A6

Via email: indu@parl.gc.ca

Dear Mr. Ruimy:

Shaw Communications Inc. (“Shaw”) is one of Canada’s leading, facilities-based connectivity companies, whose services include a retail mobile wireless service (“Freedom Mobile”), broadband internet, broadcast distribution (Shaw Cable in Western Canada and, nationally, Shaw Direct direct-to-home satellite service), digital telephony and business telecommunications services. We appreciate the opportunity to make this submission. As a company that provides its customers with connectivity and innovative services over advanced digital networks, Shaw strongly supports the central objective of Canada’s Anti-Spam Law (CASL), namely, the promotion of strong consumer confidence in electronic commerce. Shaw has taken CASL compliance very seriously and has devoted significant time, technical and human resources to implementing compliance systems that satisfy not only our legal obligations but, critically, the expectations of our customers.

The level of effort and cost required to ensure compliance is significant, given that Shaw has over 14,000 employees and provisions connectivity and a wide range of digital services to over 7 million subscribers across Canada. Measures taken in support of compliance include significant investments to: create reliable and secure digital consent repositories; design and implement clear company policies and practices on CASL compliance; develop and roll-out extensive in-person and electronic employee training modules to ensure compliance; design and implement internal processes that ensure that commercial communications, computer program installations, and any arrangements with third parties that include the provisioning thereof, are fully vetted from a CASL perspective; develop in-house legal expertise, and hire dedicated staff to manage CASL compliance processes.

Having engaged in diligent CASL compliance over the past five years, we appreciate this opportunity to share our learnings and make several specific suggestions as to how CASL can be improved to enable the continued achievement of its objectives while addressing aspects of the language and enforcement approach that have a potentially undesirable effect on the public interest and Canadian companies. These include provisions that do not further the law’s objectives, create confusion for businesses and consumers, give rise to the possibility of a disproportionate response to unintentional violations, and incent the use of CASL for vexatious purposes or improper gain.

1. Definition of Consumer Electronic Message (CEM) and Electronic Address, s.6(6) Exemptions

CASL includes a very broad definition of CEMs, the sending of which must generally be based on consent and the provision of certain mandatory information (including an option to unsubscribe from CEMs), in a prescribed form (“form requirements”). In Shaw’s area of business – where advanced, innovative services are provisioned and robust customer support and care is essential to service efficacy – we and our customers will benefit mutually from greater clarification as to what communications are *not* “commercial” in the eyes of CASL enforcement agencies.

Furthermore, we strongly recommend the removal of subsection 6(6) of CASL, which exempts the communication of a range of non-commercial messages (such as factual information about a service) from consent requirements but arguably imposes form requirements on such communications. This can dissuade a company from sending factual messages that would benefit a customer, particularly where the technical format of the communication makes it difficult to accommodate the form requirements. Moreover, it causes confusion for customers who select the “unsubscribe” option attached to a non-CEM. In so doing, they will find themselves unsubscribed from only CEMs, as required by CASL, but will continue to receive non-CEMs, which are not subject to unsubscribe requirements.

Furthermore, CASL should be amended to specify that an IP address does not constitute an electronic address, as the current lack of clarity results in an unintended and overly broad application of the anti-spam provisions of CASL. For example, digital cable and satellite boxes, modems and customer devices to which program content and related messaging (e.g. on a program guide) is delivered may be argued to constitute “electronic addresses”. This arguably renders messages that are an integral part of a cable or satellite service to which the customer subscribes subject to CASL. At the same time, it is technically impossible to include form and unsubscribe requirements on information presented on a broadcasting user interface, and even if it were possible, such information would seriously degrade the customer experience. In short, although the IP address of a cable or satellite box, modem or device was unlikely to have been the intended target of CASL requirements, the broad definition of “electronic address” (and, in particular, subsection (d) of the definition which includes “any similar account”) could arguably apply. We respectfully submit that this ambiguity should be addressed by a statutory clarification.

2. Investigative Process and Enforcement

As the Committee has heard from many witnesses, the range of remedies available to CASL enforcement bodies creates the potential for enforcement actions that are highly disproportionate to an incident in question. Some companies may find themselves subject to significant administrative monetary penalties (AMPs) for unintentional, technical failures, while intentional wrongdoers are subject to lesser AMPs based on their ability to pay (a factor introduced by enforcement bodies that is not expressed in the legislation or regulations).

Other than in the case of intentional disregard of CASL requirements, Shaw strongly believes that the first step in enforcement should be the issuance of a warning letter disclosing an alleged violation and requiring feedback and, if necessary, corrective action. Embodying such an approach as a standard step will ensure that unintentional violations (which may be unknown to a company – for example, in the case of a broken “unsubscribe” link) are remedied quickly and fairly. In such instances, enforcement bodies may seek evidence of that a problem has been remedied.

A warning letter alone will have a strong impact on an unintentional transgressor acting in good faith, as the incentive to avoid reputational damage will deter additional breaches without the need to impose significant AMPs. Beyond warning letters issued as an initial response to alleged transgressions, Shaw agrees with the submission of Rogers Communications Inc. that penalties should be linked to the severity of an infringement and intentionality.

Finally, Shaw respectfully submits that the issuance of detailed factual descriptions and findings be issued in all cases where undertakings are accepted or AMPs imposed, in order to ensure that industry can understand and adjust its practices appropriately, if necessary, to findings. Given the broad and frequently ambiguous language of various CASL provisions, the public interest is best served when companies that are subject to CASL understand the parameters of the legislation from the perspective of enforcement bodies. Beyond industry guidance and public decisions, Shaw also supports the introduction of a mechanism for the provision of “advisory opinions” that can be issued on a confidential basis and without putting a company that is attempting to be CASL-compliant in jeopardy.

3. Private Right of Action

Shaw strongly supports the continued suspension of the private right of action (“PRA”) introduced by Minister Bains in June, 2017. The CASL PRA creates unwarranted exposure to excessive claims against companies that make conscientious efforts to comply and have no intention to subvert CASL. In addition, as discussed below, it will not materially enhance CASL compliance and threatens to burden the Canadian court system.

The fact that a PRA would be available in conjunction with statutory damages of \$1 million per violation, with no requirement that a claimant demonstrate actual harm, makes the mechanism ripe for exploitation. In a different context (specifically, the “notice and notice” regime under the *Copyright Act*), Shaw has observed companies and their representatives taking advantage of opportunities to make claims, facilitated by the statutory scheme, based on unproven copyright infringements and without demonstrating actual damages. Furthermore, we are aware that new class action suits have been filed, presumably driven by the availability of statutory damages under the *Copyright Act*. Based on these developments, we do not believe that concerns about the unintended and unfair effects of a PRA pursuant to CASL are exaggerated or misplaced. To ensure that these concerns do not come to pass, Shaw recommends that the PRA be suspended indefinitely or removed entirely.

Maintenance of the PRA is not necessary to ensure the efficacy of CASL. The robust potential administrative monetary penalties (“AMPs”) already in place for CASL violations provide Canadian companies with more than sufficient incentive to comply with CASL and stand as strong deterrents and available punitive measures. Furthermore, the PRA is not a well-designed mechanism to ensure the efficiency of the Canadian court system or the perception of fairness in connection with Canada’s laws. In the alternative, if the PRA is maintained and the suspension is lifted, the provision should be amended such that it applies only to instances of intentional and flagrant disregard of CASL.

Conclusion

Shaw thanks the Committee for the opportunity to submit written comments in connection with the statutory review of CASL. We have worked diligently to establish and operate an effective and systematic approach to compliance, not only in response to potential AMPs, but because we understand and respect our customers’ demands for appropriate communications and protection of their privacy. While remaining absolutely committed to satisfying these expectations, our experience with CASL has brought to light areas where consumers, the public interest and businesses will benefit from clarification

and amendments. We have provided a summary of these issues in this submission, and would be happy to provide further details if requested.

Best regards,

A handwritten signature in blue ink, appearing to read "Cynthia Rathwell". The signature is fluid and cursive, with a long horizontal stroke at the end.

Cynthia Rathwell
Assistant General Counsel, Regulatory and Legislative Strategy
Shaw Communications Inc.
Tel: 613-688-6753