

Spam bill a 'bit of a Frankenstein's monster'

BY GLENN KAUTH
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Inviting potential clients for lunch is a fairly standard practice for lawyers.

But new federal legislation is sparking worries noon-hour gatherings may be under threat if the invite comes by e-mail.

"I can go for friendly lunches. I can't go for business lunches," says Mark Hayes, the founding partner of the new Toronto boutique firm Hayes eLaw LLP.

The concern stems from provisions in the proposed Electronic Commerce Protection Act, announced by the government in April as a bid to crack down on spam. It would penalize businesses that, among other violations, send unsolicited e-mails — with commercial intent — to people unless they've done business with them during the last 18 months.

So far, consumer advocates are hailing the bill, which includes exemptions for e-mails involving personal or family relationships. "It's good for consumers and it's good for business," says David Fewer, the acting director of the Canadian Internet Policy and Public Interest Clinic.

The legislation stems from recommendations from the government's task force on spam and includes administrative penalties of up to \$1 million for individuals and \$10 million for businesses that flout its provisions. It also allows for a new private right of action for people who claim a business improperly collected or used their private data under the Personal Information Protection and Electronic Documents Act, says Barry Sookman, a partner at McCarthy Tetrault LLP in Toronto and co-chair of its technology law group. Under the regime, officers, directors, and employers could now also be liable for the misdeeds of their employees, Sookman notes.

The government frames the law as a consumer protection issue. "Our government knows how damaging spam can be to Canadians and Canadian businesses, and that is why we are cracking down on Internet fraud and other forms of malicious activities," Industry Minister Tony Clement said in a news release announcing the bill. "With this landmark legislation, our government

will help protect consumers from Internet spam and related threats and boost confidence in the electronic marketplace."

Besides spam, the law purports to crack down on identity theft, phishing, and spyware. In doing so, it takes a technology-neutral approach that treats all forms of electronic messages — whether they be unsolicited messages on cellphones or on computers — the same way. Responsibility for enforcing its provisions would fall to the Canadian Radio-television and Telecommunications Commission, the Competition Bureau, and the federal Privacy Commissioner.

But while Hayes, whose practice focuses on intellectual property, technology, and privacy law, says the bill is great news for consumers, it goes too far in restricting communications between businesses. "When I read through it, I see it as a little bit of a Frankenstein's monster," he tells *Law Times*.

"I think if this was done on a business-to-consumer basis ... it could be a very valuable thing in terms of business-to-consumer relationships. I think there is a real problem with spam."

But, he adds, "It's ways too wide for business-to-business."

As an example, he notes that while his Rolodex from his many years of practice includes a long list of lawyers he has met, he doesn't necessarily have what the new law defines as a pre-existing business relationship with them during the last 18 months. Often, he has met them at conferences, which doesn't fit within proposed exemptions allowing e-mails in cases where someone has, among other scenarios, bought or leased goods or land during that timeframe. As a result, he believes the law would require him to phone those people first in order to send an e-mail announcing his new law firm. "That is one I think is nonsensical," he says, arguing for amendments that recognize the importance of business contacts.

In the case of lunch invites, the same principle applies. Unless the lunch has no commercial intent, he argues he wouldn't be able to send an e-

mail invitation to someone who hasn't used his services recently. He points out as well that often he doesn't see clients that often. They come to him when they have a problem, meaning that once the 18-month window has passed, restrictions on e-mailing them apply. Even sending out newsletters about legal developments won't be an option, he says.

Sookman, too, feels the law goes too far since it restricts sending anything with a commercial purpose unless the recipient has given consent or an exemption applies. "It takes the most marvelous medium for being able to transact business and makes it illegal," he says.

Sookman also takes issue with the bill's spyware provisions, which targets the malicious programs surreptitiously installed on people's computers by requiring consent before loading any new software. Spyware, of course, can damage and slow down people's equipment, so putting a stop to it is good. But as Sookman points out, not all software installations are bad. Websites written in Java, for example, commonly install what's called an applet so a visitor can view them. Now, in order for that to happen, he believes web surfers would have to go to a separate Java-free page first where they could give their consent to the applet.

"It would be the only country in the world essentially to ban common programs like Java or Flash," Sookman says.

As well, Hayes says the law as it stands would restrict automatic software updates. In his view, that can be impractical since often systems aren't set up to ask for consent to updates. With a device such as a printer programmed to receive updates as necessary, there currently is no option for consent, he points out.

"They've looked at problems and drafted [the law] in wide language to ensure that they capture all of the things that occur," Hayes says. "I think the concern in the industry is that there has been very little consultation with the people who would have to manage these types of things on the ground."

In the meantime, businesses will have to consider ways of complying with the law as it

awaits passage by the House of Commons. They'll need, for example, to look into tracking who they send e-mails to in order to regularly be up to date on people they haven't done business with in the last 18 months. As well, any permitted messages — those that fall under an exemption—will need to include an unsubscribe option, Sookman notes. Still, people can have input on the bill during upcoming committee hearings, something Sookman recommends they do.

"Every sector will be affected and every sector needs to analyze how their business will be affected," he says.