Letter of the Law

The Sky's the Limit—But Not for Limited Partners

The word "limit" carries many connotations, depending on the context. In inspirational quotes, it is used to evoke images that are actually the opposite of its literal meaning: Don't limit your challenges, challenge your limits; you are your only limit; the limit is not in the sky—it is in the mind; and so on.

In law and, unfortunately, in life this word has the same unimaginative, uninspiring and claustrophobic meaning Mr. Webster has given it: "something that bounds, restrains or confines." So it is with limited partnerships—the vehicle of choice for a wide array of business investments, including real estate development and construction projects.

Where limited partnerships are concerned, "limit" means the same thing for two different purposes: limited liability and limited participation in the business.

Unlike a partner in an ordinary partnership, a limited partner is liable to the extent of its capital contribution to the partnership but, as a trade-off, it must not participate in the management of the partnership. According to the *Partnership Act* in British Columbia, the management function should belong solely to the general partner.

Other jurisdictions, including Alberta, Saskatchewan and Ontario, apply a control test, which appears to be a more stringent standard than the management test as indicated in a Saskatchewan decision discussed below. Manitoba takes the middle ground and permits the limited partner to advise the partnership on the management of the business.

This article focuses on the management standard in B.C. Unfortunately, because of the limited (no pun intended) case law on the matter reference to cases in other jurisdictions is necessary.

Ironically, a court decision that helpfully defines what constitutes management activity is from Saskatchewan. In *Stillwater Forest Inc. v. Clearwater Forest Products Ltd. Partnership*, a limited partner that accepted an offer of financing without consulting the partnership's board was deemed to have participated in the management of the business. However, the limited partner was not liable as a general partner because of Saskatchewan's control standard. The financing was subject

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SINGLETON LEGAL COUNSEL URQUHART

(Continued from cover)

to the general partner's approval and was, in any event, incidental to the partnership's business. Under similar circumstances, a limited partner in B.C. would have likely lost its limited liability protection.

There are no hard and fast rules regarding the nature and extent of activity that results in the loss of limited liability protection. Decisions across Canada are consistent in holding that each case must be determined on its own facts, including the nature of the partnership's business, the actions of the limited partner, and the terms of the limited partnership agreement.

The unpredictable, factually driven nature of the law in this area is seen in the differing results reached in *Haughton Graphics Ltd. v. Zivot et. al.* (an Ontario High Court decision), and *Nordile Holdings Ltd. v. Breckenridge* (a British Columbia Court of Appeal decision).

Both cases considered a common occurrence in limited partnerships, namely, dual roles occupied by limited partners. For instance, this happens when limited partners are concurrently directors of the general partner. The issue before the courts was whether, in such circumstances, the limited partners ought to be held liable as general partners.

Haughton Graphics involved a claim for payment of a debt for printing services supplied by the plaintiff to a limited partnership acting through two individuals who were concurrently limited partners and president and vice-president of the general partner. The plaintiff knew it was dealing with a limited partnership but was not aware of its structure or legal significance. The Ontario court determined the two limited partners were liable for the debt based on the control test. They made managerial decisions, dealt directly with the plaintiff, and acted as operating minds of the partnership. No doubt a similar result would have been reached in B.C.

In *Nordile Holdings*, the limited partners were also directors and officers of the general partner. However, they were not held liable for the limited partnership's financial obligations under a real property purchase agreement. A crucial distinction was that at trial, the parties entered into an agreed statement of facts whereby the plaintiff accepted that the limited partners had, at all material times, participated in the management of the limited partnership, but only *in their capacities as directors and officers of the general partner.*

In the face of such an admission, the Court was unwilling to find liability since the evidence did not disclose a sufficient degree of managerial control. It is difficult to say whether the result would have been the same if the agreed statement of facts had read differently.

However, one thing is clear. Persons considering a foray into the world of limited partnerships should consider carefully the risks associated with their activities that might be perceived as managerial by the courts.

Given the limited case law in this area and the fact-driven nature of the inquiry, clients are well advised to seek legal rather than inspirational advice before challenging the limits—at least in this area of the law.

For more information on the limits of limited partnerships, please contact

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The electronic version of this article at ***www.singleton.com*** contains links to the *Act* and cases mentioned above.

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Letter of the Law is the quarterly newsletter of the law firm of Singleton Urquhart LLP. The articles are summaries of legal trends and may not be applicable in specific circumstances: for further information about any subject or for legal advice about specific situations, contact members of the firm. Articles and back issues are available at www.singleton.com.

EDITOR'S NOTE

The conveniences of the digital age, as with any new technology, often bring with them outcomes that can be downright frustrating.

Electronic spam often jams up our inboxes after we have handed over our email address to an online retailer, booked a holiday or, perhaps, subscribed to a publication. Suddenly, all manner of unwanted spam arrives.

A few years back, the Government of Canada brought in anti-spam legislation intended to address these unwelcome intrusions into our electronic space.

As David Edinger and Kyle Thompson point out in this issue, while new amendments to the anti-spam legislation have been deferred to a parliamentary committee for now, they can still give the law a bit more bite. Ultimately, there may also be unintended consequences. Their article gives you a summary of what to expect.

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Celebrating Friends and a New Brand

On Thursday, May 25 SU held our Annual Client Appreciation Reception at Vancouver Convention Centre West. We had a great response to the event and enjoyed the company of many of our friends and clients. Guests enjoyed spectacular views of Vancouver's waterfront and the North Shore mountains, B.C. wines, delicious canapés, and live jazz courtesy of Famous Players Band (right) as well as incredible sleight-of-hand tricks by illusionist and magician, Vitaly Beckman (top, right).

This was more than a celebration of these relationships. We were also proud to present a sneak peek of SU's new brand and logo, which will be launched this coming fall. The new look represents where we are headed as a firm, changing alongside the business community in Vancouver and beyond. It also represents how we at Singleton Urquhart have kept pace with that change, and how we're growing alongside our clients as we look to the future.

We're very excited about the new look and will keep you posted as we get closer to the launch.

Upcoming SU Events

Hard to believe it's almost time again for our ***Annual Singleton Urquhart Golf Tournament***, which will take place this year on Wednesday, September 19. The event will once again be hosted at Morgan Creek Golf Course. We welcome golfers of all levels and ability to come out and play. If you are interested in attending to golf or even if you'd just like to join us for dinner or want to consider sponsorship, please contact Joanne Maguire at jmaguire@singleton.com. We look forward to seeing you there!

* * *

On September 21, SU's ***Workplace Law Group*** will present a session on ***"Preparing for the Holidays—A Holiday Party (Social Liability) Update"***.

The holidays are a time to eat, drink and be merry with friends, family, colleagues, customers and clients. They can also be fraught with potential workplace-related challenges, issues, and liability. A clear understanding of your organization's obligations as well as your employees' and guests' rights can eliminate concern and ensure that your obligation to maintain a safe workplace is met.

Join VERONICA ROSSOS, co-chair of Singleton's ***Workplace Law Group***, for a discussion about how best to prepare for the holiday season, before it starts. For more information, please go to our website at www.singleton.com, or contact Joanne Maguire at jmaguire@singleton.com.

* * *

Later this fall on November 21, VERONICA ROSSOS will also present a webinar for the Chartered Professionals in Human Resources British Columbia and Yukon chapters on the topic of "***Privacy: Latest Issues Regarding Privacy and Tracking Employees***".

* * *

We're also starting to plan for our annual women's event and will be sending out invitations soon. Please make a note in your calendar to save some time for a mid-November date—this is a "can't miss it" kind of event.

STAY CONNECTED! BEAT THE WAIT-LISTS!

Sign up for our newsletter & info on upcoming events

Want to have the edge on signing up for SU's popular events? Our workshops and information sessions on timely topics presented by SU's qualified lawyers are often wait-listed. Don't miss out! If you are interested in hearing more about any of our upcoming events or want to receive your own copy of *Letter of the Law*, please contact Joanne Maguire at *jmaguire@singleton.com*.

Product Defect Claims: The Trick is Proving Cause

PRODUCT LIABILITY | *Wise v. Abbott Laboratories Ltd.*

At some point in our lives as consumers, we have all fallen victim to a faulty or defective product. Depending on the product, serious damage or loss can ensue.

At that point, a customer may decide to pursue compensation for his or her losses. In starting such an action, causation will be one of the most significant issues to prove.

"Causation" means that the loss or damage a party has suffered is directly caused by the defective product. While a convincing level of certainty is required to show causation, this determination is not a mathematical calculation nor does a scientific standard of certainty have to be met.

However, the greater the certainty a party can prove, the better the chances of demonstrating the cause-and-effect relationship. For this, expert evidence will go a long way. For example, if a vehicle is purchased with defective brakes and an accident occurs, even if there was no issue with respect to the brakes, a party would still have to show that the defective brakes caused the accident. By no means is this always an easy task.

For instance, in the case of *Wise v. Abbott Laboratories Ltd.*, Mr. and Mrs. Wise brought a proposed class action against Abbott Laboratories with the principal allegation that the AndroGel treatment for hypogonadism made by Abbott Laboratories caused serious cardiovascular events. Notably, the case also distinguished between a manufacturer's failure to warn—in this case Abbott Laboratories' failure to warn about the possible side effects—and the issue of causation.

The allegations in *Wise* stemmed from the fact that following the treatment Mr. Wise suffered cardiovascular events. Both parties presented expert evidence, but the onus to demonstrate the cause-and-effect relationship with the treatment remained with the Wises.

The experts recognized that there was an *association* between the product and the cardiovascular events. In other words, there was a possibility of a possibility that the product caused the cardiovascular events. But this was not enough. Mr. Wise's experts needed to show that the product in fact *caused* the injury, not that it was merely possible to cause an injury.

A popular guideline to analyze the existence of causation in epidemiological studies (known as the Bradford Hill Factors) lists the following nine factors:

1. **Biological plausibility**
2. **Consistency with other knowledge**
3. **Alternative explanations**
4. **Specificity of the association to a specific condition or disease**
5. **Temporality**
6. **Cessation of exposure**
7. **Strength of the association**
8. **Dose-response.**

Before any conclusion about association and any conclusion on causation can be reached, the outcome of the above factors must be examined to determine whether it is a result of chance.

Since none of the experts could testify that an inference of causation could be drawn, the judge refused to do so. However, the association between the two was not enough to meet the standard of general causation. The standard required Mr. Wise to demonstrate that but for the defective product, Mr. Wise would not have suffered the cardiovascular events.

There is some importance in demonstrating that the loss and defective product are associated. The Court in *Wise* noted that the association was enough to trigger a duty to warn. However, the failure to warn did not make Abbot Laboratories liable for damages because of the lack of causation. In short, while the association demonstrated that Abbot Laboratories had a duty to warn, there was insufficient evidence to show that the breach of that duty caused Mr. Wise harm.

For more information about product liability and your rights as a consumer, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the case mentioned above.

Thinking of Selling Your Business?

BUSINESS LAW

This is the first instalment in an ongoing series of articles providing practical information about all things business.

So, you're thinking about selling your business... Maybe you've been approached by a potential buyer; maybe you're thinking about speaking with a business broker; or maybe you're looking to retire or try something new. If so, there are some key things you should be thinking about at the beginning of this journey.

Having assisted with both the purchase and sale of businesses, we have found these three tips to be incredibly useful to clients:

1. **Prepare for the due diligence process.** This process gives a potential purchaser the opportunity to review all the details about your business. It covers everything from your legal organization, all your key agreements, your employment agreements and your insurance to your financial status. You could describe it as an intimate, get-to-know-you, do-I-like-you? phase. And the key to it all—getting organized. This means finding all of the above documents (including all signed copies), and having them easily accessible and organized. If possible, make them available in a PDF and/or scanned format. Also, you need to think about who you are disclosing your information to—are they are a competitor? Is it a fishing expedition? In getting organized, you are also looking at confidentiality, and processes to protect your information, as outlined below.

2. **Have your team in place.** Selling your business involves every aspect of your business, so it involves all your key team members, even for the preliminary steps of getting organized before the sale. Your team of advisors can include your lawyer, accountant, bookkeeper, insurance agent, banker, financial advisor and more. Having that list of people ready to assist by starting early with the necessary lines of communication is important for a smooth beginning in any sale transaction. That said, if you are looking at a letter of intent or a document setting out basic terms of the transaction, it is important to have your lawyer and accountant involved at that time. Often there are agreed terms which can be difficult to go back on if they are key to the deal, and have implications you would not be aware of without legal or accounting advice.

3. **Understand privacy, compliance and confidentiality.** In this age of electronic transfers and information sharing, it is vital to know what your obligations are and how to protect your information as well as the personal information you are responsible for under current privacy legislation, such as that of your employees. One of the very first documents you are likely to see is a confidentiality/non-disclosure agreement. This should not be treated like a cookie-cutter document. Any confidentiality/non-disclosure agreement needs to be tailored to your individual situation so that it considers the type of business, the type of information being shared and the jurisdiction.

Each business and business owner is unique. If you're thinking of selling, the distinctive qualities of both you, as the owner, and your business need to be independently analyzed and discussed. Getting organized early will save time, stress and, above all, cost.

In our next article, we will discuss in more detail confidentiality and non-disclosure in the due diligence process—issues to consider, how to manage your confidentiality, and how to create processes to protect your information.

For more information about selling your business, please contact:

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The electronic version of this article is available at ***www.singleton.com***.

WELCOME ABOARD!


RACHYL MYARA


PETER MENNIE


VIRGINIA ZHAO

We are pleased to announce that **RACHYL MYARA** and **PETER MENNIE** were recently called to the Bar and have joined **SU** as associates. Rachyl and Peter will be focused on general civil litigation. Both Rachyl and Peter articled at **SINGLETON URQUHART**.

We also recently welcomed **VIRGINIA ZHAO** as an associate to our corporate commercial group. Virginia advises clients on corporate commercial transactions and corporate reorganizations as well as wills and estate planning.

In addition, we wish to warmly welcome summer students **BROOKE HABERSTOCK** and **KAITLIN KUEFLER** to the firm.

OFF TO A HEARTY START!

In recognition of the tremendous work they do, **SU** staff were served a hearty hot breakfast by **SU** lawyers and management on the first day of our annual staff appreciation week in April. Left to right: Partners **WEI KIAT SUN** and **MARK THOMPSON**; COO **BLAIR LILL**; and partners **SCOTT BREARLEY** and **ALANA DALE-JOHNSON** dished up a good start to a good day to (front, right) **HALEY-MORGAN JONES** and dozens of other staff members.

ROCK ON!

Vancouver's annual musical throw-down in support of the Canadian Bar Association of B.C.'s Benevolent Society was a rockin' success June 9, raising $175,000 this year alone. Founded 16 years ago by **SU**'s **DEREK BRINDLE, Q.C.** the Annual Battle of the Bar Bands is a long-standing, fun, semi-competitive event that brings out the best in the legal community as they rock the Commodore Ballroom to raise money for a good cause. $1.9 million has been raised to date. **SU**'s **ROGER HOLLAND** (pictured left in the white T-shirt) and **IAN JONES** (not pictured), are part of the band Standard of Hair, which took second place this year.

THE INSIDE SCOOP

SU's Annual Workplace Law Seminar was held on March 30 at the Wosk Centre. Titled "Secrets, Lies and Executions—An Employer's Guide", the seminar received excellent feedback so we have since launched a morning breakfast series featuring some of the topics raised by attendees. The first in the series, "Managing and Accommodating Medical Marijuana in the Workplace", was delivered in-house by **VERONICA ROSSOS** June 8. The next session will be held September 21. ***See page 3 for more details.***

OUT & ABOUT

SU and its lawyers have had a busy spring!

In early May, **SINGLETON URQUHART** was a sponsor and exhibitor at the Architectural Institute of British Columbia conference held at Vancouver Convention Centre West. **JOHN SINGLETON, Q.C.** co-chaired a session on "Understanding Architects' Professional Liability Insurance (PLI) and Claims" while **STEVE BEREZOWSKYJ** co-presented on "An Architect's Guide to Not Getting Sued".

May 25–28 **DEREK BRINDLE, Q.C.** and **HELMUT JOHANNSEN** attended the Canadian College of Construction Lawyers 20th Annual Conference in Quebec City. Both Derek and Helmut are Past Presidents of the Canadian College of Construction Lawyers. At the end of May, they also co-chaired a two-day conference, Expert Witness Forum West. The conference was presented by The Canadian Institute at Metropolitan Hotel Vancouver.

In addition, **MIKE HEWITT** presented on "Risk Management" at a seminar sponsored by the CPA Professional Liability Plan Inc. on May 31.

As part of the Insurance Brokers Association of B.C.'s (IBABC) 69th Annual Conference held June 15 in Whistler, **STEVE VORBRODT** and **SCOTT BREARLEY** presented on "Insurance Parties at Odds—Cases, Coverages and Opportunities".

IN THE SPOTLIGHT

DEREK BRINDLE, Q.C. was recently featured in the "In the Spotlight" section of The Continuing Legal Education Society of British Columbia website, where he was recognized for his long-standing reputation as a volunteer.

ROGER HOLLAND was recently named Vice President of the YVR Art Foundation, an independent, nonprofit and charitable organization founded in 1993 by Vancouver Airport Authority to support B.C. First Nations art and artists.

The Ins and Outs of Tenant Relocation

Affordability. The real estate boom. Housing costs. Economic growth. Developer opportunity. In British Columbia, these political issues dominated the recent provincial election.

In the City of Vancouver, housing issues are even closer to the heart of current politics. Hot-button real estate issues facing Mayor Robertson's council have caused the City to attempt to manage and regulate the lucrative, booming development industry. To this end, the City has taken a variety of steps to address rental housing issues, including implementing community plans to manage development. One relatively recent City Hall initiative developers now face is Vancouver's Tenant Relocation and Protection Policy (TRPP).

Established in December 2015 and amended in February 2016, the policy imposes strict tenant relocation requirements on developers seeking development permits for occupied rental buildings in Vancouver. As development permits are required for major renovations and all redevelopment, including redevelopment into condo projects, any developer in the current real estate market seeking to capitalize on newly acquired properties or those they already own must comply.

The tenant relocation policy is an additional set of regulations over and above *B.C.'s Residential Tenancy Act*, which requires a landlord ending a tenancy to redevelop a property to give two months' notice and one month free rent. The policy imposes a variety of obligations on landlords, including:

- complying strictly with all TRPP requirements, both substantive and administrative, in pre-permitting, permitting, construction and occupancy stages of a redevelopment or renovation project;
- advising tenants of redevelopment plans well in advance of applying for permits, much less starting work;
- paying compensation depending on length of tenancy, up to 6 months of total rent compensation;
- paying moving costs up to $1,000 for each rental unit;
- in certain zoning areas, offering a right of first refusal in the redeveloped building at 20% less than market rate once construction is finished and an occupancy permit has been issued; and
- working closely with tenants, especially those identified as "vulnerable tenants," to assist them in finding similar suitable housing at average Vancouver rental rates established by Canada Mortgage and Housing Corporation (CMHC) for the applicable neighbourhood.

The problem? In most neighbourhoods, CMHC average Vancouver rents simply aren't available for new tenancies. For this reason and others, complying with the TRPP can be a difficult and costly process for landlords. Dedicated internal staff and external consultants can be necessary in order to manage the process in a timely manner.

Other challenges also exist. Because the City of Vancouver has no power to assist a landlord in terminating a tenancy, even when the stringent requirements of the relocation policy have been met, landlords can be forced to resort to Residential Tenancy Branch (RTB) processes to effectively terminate the tenancy of a difficult tenant.

As many of us know, RTB processes can take months, if not years, which can create massive and costly problems for a construction schedule. For example, a developer could have all necessary TRPP, demolition and development permits in place, offer a tenant a compensation package well over and above the legal requirements, and still face construction delays if the tenant refuses to move.

Further, the RTB can be difficult to predict, and has in the past refused to grant eviction orders even where extensive renovations have been planned. But developers do have legal options at both the Residential Tenancy Branch and in court in the event a dispute is going sour.

The best advice is to establish communication channels with the City early; comply with all recommendations and requirements of the tenant relocation policy from a very early stage; and ensure renovation plans are consistent with the legal requirements for a terminating a tenancy. Negotiating strategically with tenants is also important.

Seeking legal assistance from someone familiar with both the RTB and the TRPP requirements at an early stage can help avoid serious difficulties both with the City and individual tenants, and help assist landlords in managing disputes to favourable resolutions.

For more information on tenant relocation, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the ***Act*** and policy mentioned above.

Spam is About to Get More Expensive

CANADA'S ANTI-SPAM LEGISLATION

You have probably already heard about Canada's Anti-Spam Legislation (CASL), which came into force on July 1, 2014. It regulates unsolicited commercial electronic messages—commonly known as spam—in Canada.

Your business may have already incurred compliance costs. But if you are not already compliant, or are unsure if you are, you may now also have new and costly provisions to worry about. Luckily, the now-uncertain timing of the new provisions gives businesses additional time to ensure compliance.

As of July 1, 2017, CASL was scheduled to have new provisions come into force for the first time. These provisions create a private right of action, permitting any member of the public who has suffered an infringement of CASL or other laws regulating spam to sue for damages based on the recipient's actual loss, if any, and for statutory damages up to $200 per infraction (i.e., per piece of spam). The statutory damages are "limited" to a maximum of $1,000,000 for each day with an infraction.

Why such draconian statutory damages when individual damages are likely to be so much lower? Spam is rarely sent only to a single individual. Instead, messages are communicated en masse. So the statutory damages create an incentive for private enforcement against spammers by creating significant incentives for litigation, including by class action proceedings. While introducing the bill that would eventually become CASL for its second reading in Parliament, the then-Minister of Industry specifically contemplated that class action suits by individuals would complement the civil administrative regime in enforcing CASL.

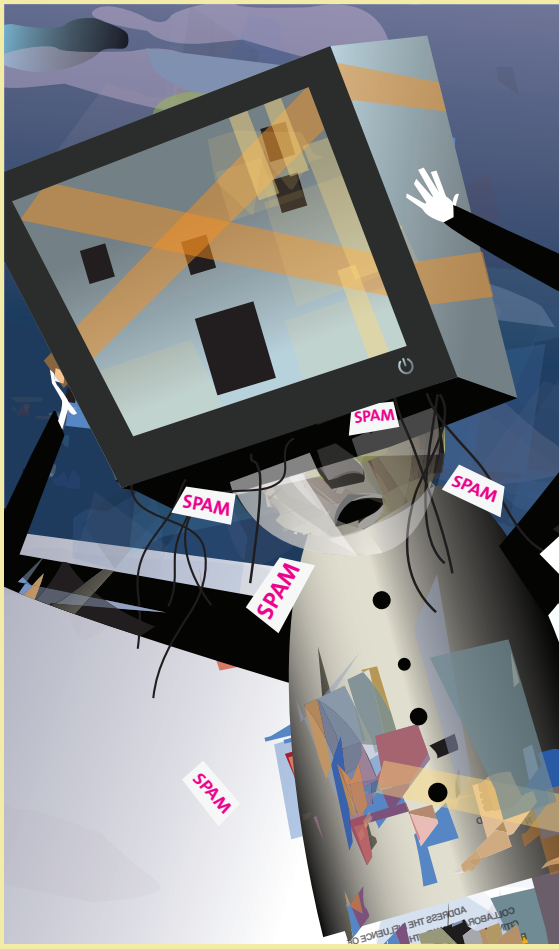
Unsurprisingly, the anti-spam legislation and its private right of action have some sharp critics who argue the law may unfairly penalize organizations that broadly comply with the law and that the potential costs of defending class action litigation may have a chilling effect on businesses. Some critics even argue that CASL may be unconstitutional in that overbroad definitions create excessive restriction on the free expression of commercial speech.

Perhaps the greatest fear is that the private right of action will incentivize "CASL trolls"—for-profit litigants who target reputable businesses that may have inadvertently violated the anti-spam legislation. Whether such trolls emerge from under the metaphorical bridge will depend, in large part, on Canadian lawyers and judges. To date, Canadian courts have taken a relatively dim view of such litigants.

Regardless, would-be litigants under CASL face challenges. They must identify and serve the alleged infringer and establish the infringement, which can be difficult in the digital era when online identities can nest like Russian troika dolls. Also, while the anti-spam legislation includes broad provisions that grant Canadian courts jurisdiction whenever spam is sent or accessed by a computer system in Canada, their jurisdiction may still be subject to judicial consideration. If another jurisdiction, such as the United States, is held to be more appropriate, litigation will have to be started there at potentially greater cost.

As drafted, the private right of action under CASL is also subject to an important limit: There is no private right of action where the party that violated CASL has entered into an undertaking or has been served with a Notice of Violation by one of the three enforcing regulatory authorities. In other words, once a regulatory authority takes steps against an infringing party, the prospect for class action litigation against them is foreclosed. This suggests that the drafters of Canada's Anti-Spam Legislation may have intended to encourage rational businesses and organizations to jump into the regulatory frying pan in order to avoid the class action fire.

As of June 7, 2017, the private right of action provisions were sent to a parliamentary committee to reconsider them and CASL's overall scheme of benefits and burdens to businesses and others.



If any of the above rings alarm bells for you, contact us. The final piece of the CASL puzzle, the private right of action litigation, may only be delayed. We can advise you on how best to protect your business now.

For more information on Canada's Anti-Spam Legislation and the upcoming changes, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the legislation mentioned above.