Up & coming issues in privacy class actions

Privacy-related class actions are becoming increasingly prevalent in Canada, and with the government's anti-spam legislation (CASL), we may see even more cases. We will explore practical steps to help your company avoid potential class actions and take guidance from recent case law to assist companies currently facing class proceedings.

CASL private right of action: what you need to know

What?

Subject to limited exceptions, CASL prohibits (i) causing, permitting or the sending of commercial electronic messages unless the recipient has provided express or implied consent and the message complies with prescribed form and content requirements; and (ii) installing or causing to be installed a computer program on a device without consent.

Who?

Individual consumers will soon be able to bring civil actions for alleged violations of CASL against individuals, corporations, as well as officers and directors (if they directed, authorized, assented to, acquiesced in or participated in the applicable activity). CASL class actions are anticipated.

When?

Originally scheduled to come into force July 1, 2017, the Government of Canada has temporarily suspended its enforcement pending parliamentary review. While the suspension of the private right of action removes the immediate risk of these class actions and other private litigation, it is still important to prepare as it is unclear whether the it may take effect in the future. Other provisions of CASL remain in force and are subject to enforcement by the CRTC and other regulators.

How much?

The court may order compensatory damages as well as statutory damages of up to $200 per contravention of the message provisions (i.e. per non-compliant email sent). Violations of the message and computer program requirements are capped at $1 million each day.

Why?

The purpose of the statutory damages provision is to promote compliance with CASL, *PIPEDA*, or the *Competition Act*, as applicable – not to punish offenders.

Where?

The scope of CASL is not limited to activities in Canada. Organizations located outside of Canada that send messages to computers located in Canada or install computer programs on devices in Canada must also comply with CASL requirements.

Five steps to prepare for the CASL private right of action

1. Review and update your organization's anti-spam message inventory and approach in light of the CRTC's latest guidance and enforcement.
2. Implement CASL training refreshers, including the implications of the CASL private right of action.
3. Evaluate your organization's existing monitoring and auditing practices in light of the CRTC's guidelines to help businesses develop corporate compliance programs ("Compliance and Information Bulletin 2014-326"); update the policies and practices where needed.

4. Ensure record keeping (especially regarding consent) is effective and comprehensive.

5. Going forward, keep up-to-date on decisions where plaintiffs rely on the private right of action.

Latest developments in privacy class actions

***Canada v John Doe*, 2016 FCA 191**

This case confirms that not all intrusion upon seclusion claims will be certified, and further clarifies the narrower set of facts that may be required to establish the tort of "publicity given to private life" in Canada.

TAKEAWAY: Defendants can be successful in defeating claims for intrusion upon seclusion at the certification stage.

***Evans v Bank of Nova Scotia* (unreported)**

In 2012, an employee gave bank account data relating to 643 customers to his girlfriend, who sold it to third parties. In early 2016, the defendant reached a modest settlement ($1,155,000 plus $444,000 in costs) which only compensated those customers who actually suffered identity theft.

TAKEAWAY: This case potentially sets a low bar for settlement of future cases.

***Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447**

The Court substantially reduced fees payable to plaintiff's counsel when approving this settlement, since the class suffered minimal damages and the "real villains" were the hackers and not the defendant.

TAKEAWAY: A company's voluntary efforts to compensate affected customers and rehabilitate its brand may be recognized and rewarded by the courts – even in the settlement context.

Cases to watch

***Douez v. Facebook Inc.*:** Proposed class action seeking damages under the *B.C. Privacy Act* was stayed by the Court of Appeal because of a forum selection clause in favour of the California courts. In this appeal, the Supreme Court of Canada will provide guidance on the enforcement of forum selection clauses, particularly in provinces with statutory torts.

Tocco and Briggs v. Bell: Following the Privacy Commissioner of Canada's investigation, plaintiffs filed a $750 million dollar claim alleging that Bell's targeted ads program did not provide sufficient information about the nature of information being collected and the use and disclosure of that information.

***Alta Christine Little v. Horizon Health Network* (New Brunswick) and *Hemeon v. South West Nova District Health Authority* (Nova Scotia):** If these cases proceed to trial as scheduled in April and June 2017, respectively, they will be the first privacy class actions taken to trial in Canada. Both cases involve personal health information and allegations of negligence and intrusion upon seclusion (among other things).