ICLG

The International Comparative Legal Guide to:

Insurance & Reinsurance 2015

4th Edition

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

Acuña, Sahurie, Hoetz & Cifuentes
Advokatfirmaet Steenstrup Stordrange DA
Advokatfirman Vinge KB
AlixPartners
ALTENBURGER LTD legal + tax
Anderson Mōri & Tomotsune
Arthur Cox
Attorneys at Law Borenius Ltd
Bedell Cristin Guernsey Partnership
Blaney McMurtry LLP
Cabinet BOPS
Camilleri Preziosi
Chalfin, Goldberg, Vainboim & Fichtner Advogados Associados
Clyde & Co LLP
CMS
Creel, García-Cuéllar, Aiza y Enríquez, S.C.
DAC Beachcroft Colombia Abogados SAS
DAC Beachcroft SLPU
Gün + Partners
Kyriakides Georgopoulos Law Firm
McMillan LLP
MJM Limited
Morton Fraser LLP
Oppenhoff & Partner Rechtsanwälte Steuerberater mbB
Osterling Abogados
Studio Legale Giorgetti
Tuli & Co
Willkie Farr & Gallagher LLP

GLG
Global Legal Group

GLG
Global Legal Group

Contributing Editors
Jon Turnbull & Geraldine Quirk, Clyde & Co LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Senior Editor
Suzie Levy

Editor
Rachel Williams

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
Colin/Wikimedia Commons

Printed by
Ashford Colour Press Ltd
February 2015

ISBN 978-1-910083-33-8
ISSN 2048-6871

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Recent Developments in Canadian Privacy Law and CGL Coverage

Lori D. Mountford

David R. Mackenzie

Blaney McMurtry LLP

As in many other jurisdictions, Canadian law has struggled to keep pace with electronic and technological change. The law has done a poor job of protecting personal information. Privacy rights have not been well developed. Efforts are underway to remedy the legal shortfall. Developments in Canadian legislation and expansion of common law privacy rights are indicative of a move to protect the personal information and privacy of Canadians.

These changes are particularly notable for liability insurers. Electronic communication and mass data storage have created undeniable economic opportunity for Canadian business. Canadians are amongst the world's heaviest users of social media. Because more Canadians are using electronic communications, internet-based devices, and mass data storage (cloud and otherwise), there is greater opportunity than ever for loss of personal and private information. At the same time as such losses are becoming more likely, the range of potential legal sanctions arising out of misuse of information and communications technology is expanding.

In this article, we explore one particular Canadian legal development and assess its likely implications for Canadian liability insurance carriers. Canada's Anti-Spam Legislation ("CASL") has recently come into force. Stated broadly, CASL seeks to protect individuals from unwanted electronic messages. It does so by creating monetary consequences for those who send commercial electronic messages to Canadians in contravention of CASL's provisions.

Standard Canadian CGL Coverage

Before examining CASL, we will briefly review the pertinent provisions found in the standard CGL form widely used in Canada.[1] There are two coverage grants under the standard form CGL policy most likely to be implicated in respect of claims for loss of personal or private information or invasion of privacy. First, there is the property damage liability cover under Coverage A. Second, there is the personal and advertising injury liability cover under Coverage B.

The insuring agreement under Coverage A extends to sums the insured becomes legally obligated to pay as compensatory damages because of property damage. "Property damage" is defined, in part, to mean physical injury to tangible property, including resulting loss of use, and loss of use of tangible property not physically injured. As discussed further below, a key coverage issue in respect of a claim under CASL may be the "loss of use" element of the property damage definition.

The current standard form CGL policy in Canada contains noteworthy exclusionary language as regards Part A. The definition of "property damage" has, in recent years, been amended to expressly provide that electronic data is not tangible property. "Electronic data" is defined broadly for this purpose as "information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy discs, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment". As well, standard form CGL coverage now contains an Electronic Data Exclusion under Coverage A. It negates coverage for "'compensatory damages' arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data". Interestingly, "electronic data" is not defined in connection with the exclusion.

The insuring agreement under Coverage B extends to sums the insured becomes legally obligated to pay as compensatory damages because of personal and advertising injury. "Personal and advertising injury" is defined to include, amongst other things, injury arising out of "[o]ral or written publication, in any manner, of material that violates a person's right of privacy". This coverage is subject to an exclusion for personal and advertising injury "arising out of an electronic interactive website, chatroom, interactive forum or bulletin board the insured hosts, owns, or over which the insured exercises control".

Attempts have and will continue to be made to modernise certain aspects of the Canadian standard CGL form to better reflect cyber and technology risks. It is hoped that this article may be part of that discussion.

Canada's Anti-Spam Legislation

The Canadian government has responded to both the proliferation of electronically generated and stored personal information, and the increased risk to personal privacy presented thereby through a series of legislative initiatives. One of those initiatives, CASL, is of particular note.[2] The majority of its provisions came into force on July 1, 2014. CASL creates legal consequences for conduct which had not yet previously been recognised as actionable. Electronic spam sent by a policyholder may now result in monetary liability.

The goal of CASL is to protect the sanctity of our nation's inboxes. At its core, CASL prohibits sending e-mails, texts or instant messages, for a commercial purpose, without prior consent of the recipients. CASL applies to all "commercial electronic messages" sent from or received in Canada. A "commercial electronic message" is a message sent by means of telecommunication, including text, sound, voice or image (but not fax or telephone) that promotes or encourages commercial activity on the part of the recipient with or without an expectation of profit.[3] Although there are a number of exceptions to application of these provisions within CASL, it is a law of broad application.

Persons and organisations conducting business in Canada may face significant penalties for non-compliance with the legislation's provisions. CASL provides for "an administrative monetary penalty" in the event of violation of up to $1 million for individuals and $10 million for corporations.[4] The Canadian Radio-television and Telecommunications Commission is tasked with issuing and, where disputed, deciding notices of violation.[5]

Particularly important for liability insurers are the provisions which will, in coming years, grant a private right of action to those targeted by electronic spam in contravention of CASL.[6] It is this aspect of CASL upon which we will focus.

The provisions providing for private action do not come into effect until 1 July 2017.[7] As of that date, a person receiving an unsolicited commercial electronic message will be able to apply to the court for "compensation in an amount equal to the actual loss or damage suffered or expenses incurred by the applicant", plus a statutory sum. Specifically, a statutory sum of up to $200 "for each contravention" to a maximum of $1 million "for each day on which a contravention occurred" may be awarded.[8] Aggregation of claims is specifically contemplated by the legislation. It follows that the statutorily-created right of action presents significant monetary exposure for offenders and, potentially, their insurers. This is especially so if the statutory sums are pursued by way of class action.

The purpose of both the administrative monetary penalty (re violation) and the statutory sum (re contravention) is expressly stated to be: "to promote compliance with [the] Act" and "not to punish".[9] The legislation sets out a non-exhaustive list of factors to be considered when determining the amount. These include the above purpose, the nature and scope of the violation/contravention, previous violation(s)/contravention(s), any financial benefit derived, ability to pay and whether the offender has voluntarily paid/the applicant has received compensation.[10]

Also notably, liability for a violation/contravention committed by a corporation extends to its officers and directors in certain circumstances, and liability of an employee acting within the scope of employment can extend to their employer.[11]

CASL and Coverage Under the CGL Policy

There has not previously been legislation like CASL in Canada. The standard Canadian CGL form was not drafted with the risks posed by CASL in mind. Canadian insurers will wish to review the coverage they provide in light of the new potential liabilities faced by their policyholders. Insurers will wish to carefully assess whether they will cover the CASL risk under their CGL forms or through other coverage, e.g. cyber and technology liability forms. We expect that Canadian carriers will not want to sell overlapping coverage in respect of such liability risks. Regardless, it is advisable that, well in advance of 1 July 2017, insurers (and policyholders alike) consider the scope of privacy cover intended under the CGL in respect of CASL claims and whether it is achieved by existing policy wording or revisions are necessary.

While the legislation is new in Canada and little domestic legal precedent exists to guide insurers, much may be learned from the American experience. There, the *Telephone Consumer Protection Act* (the "*TCPA*") has been in force for more than 20 years.[12] The *TCPA* protects consumers against receipt of unwanted or junk faxes. Like CASL, it creates a private right of action and allows for statutory sums to be awarded (albeit as an alternative to recovery for actual monetary loss where less than the statutory sum, and in conjunction with injunctive relief). Like CASL, statutory sums under the *TCPA* are calculated on the basis of the number of individual violations, namely, $500 "for each such violation".[13]

Private enforcement actions of the *TCPA* in the United States have generated a remarkable amount of insurance coverage litigation. Unless changes are made to the standard CGL form in Canada, similar litigation can be expected in this country. It is, in the authors' view, almost a certainty that insurers and policyholders will find themselves disputing whether or not private right claims for contraventions of CASL fall within CGL cover. Of course, the particular wording of the insurance policy at issue will govern.[14]

Based upon the existing standard Canadian CGL form, however, three issues are likely to predominate in these disputes. First, are the claims under CASL in respect of "compensatory damages"? Second, can the sending of a commercial electronic message in contravention of CASL trigger the CGL's property damage liability coverage? Third, is the sending of an e-mail to a private individual a "publication" which violates that person's "right of privacy" within the personal and advertising injury liability cover?

A. Compensatory Damages

Under the current standard form CGL policy, "compensatory damages" is defined to mean "damages due or awarded in payment for actual injury or economic loss", but not to include "punitive or exemplary damages…". This accords with the general treatment of the term as denoting an award of money substituting for harm or loss suffered by the plaintiff. Restitutionary and punitive damages are not compensatory in this sense.

A claim for "compensation in an amount equal to the actual loss or damage suffered or expenses incurred by the applicant" under s. 51(1)(a) of CASL will likely constitute a claim for "compensatory damages" as that term is defined by the standard CGL policy. While the sum awarded to an individual in this regard is likely to be minimal (after all, what is the cost of receiving an unwanted e-mail?), the coverage implications are significant. Standard form Canadian CGL coverage requires insurers to defend their policyholders against covered claims seeking compensatory damages. It follows that a duty to defend is likely to arise in respect of such claims – provided, that is, such claims pursuant to CASL satisfy the remainder of the insuring agreement requirements under Coverage A or Coverage B of the policy. Although the indemnity exposure presented by a claim for damages under s. 51(1)(a) is potentially infinitesimal, the defence costs exposure is not.

It can be expected that a private action seeking a sum for actual loss suffered or expenses incurred as a result of a contravention of CASL will include a claim for the statutory sum under s. 51(1)(b)(i) as well. Will indemnity be owed for a judgment awarding the statutory sum? Coverage under the standard CGL form for the statutory sum is far from clear – even if it turns out that such claim otherwise falls with the property damage liability or personal and advertising injury liability coverage grants. Does a statutory sum of up to $200 per contravention, not exceeding $1 million per day, under s. 51(1)(b)(i) of CASL constitute "compensatory damages"?

This will be controversial. On the one hand, the Act itself indicates that the statutory sum is not intended to be punitive. The stated purpose is to promote compliance rather than to punish. Some of the factors to be considered by the court in determining the amount under s. 51(3) are, arguably, compensatory in nature, e.g. whether the applicant has received compensation in connection with the contravention. On the other hand, compliance with the Act is, arguably, promoted by deterrence (not compensation) in respect of other factors, e.g. previous contraventions and the offender's ability to pay.

In the U.S., statutory damages under the *TCPA* have been held to qualify as "damages" within a CGL policy. Recall that the *TCPA* provides for a private right of action to enjoin a violation and/or "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater".[15]

In *Columbia Cas. Co v HIAR Holding, LLC*, the Missouri Supreme Court held that a class action suit under the *TCPA* seeking statutory damages of $500 per fax sent in connection with the insured's junk fax advertising campaign was a claim for "sums that the insured becomes legally obligated to pay as damages".[16] The term "damages" was undefined. The insurer's argument that the statutory damages are a penalty intended to deter rather than compensate for actual injury was rejected. The court characterised the statutory sums as remedial and not penal, in part, reasoning that such damages represent a liquidated sum for uncertain or hard-to-quantify actual damages.

Reliance for the latter proposition was placed upon *Universal Underwriters Ins. Co v Lou Fusz Automotive Network, Inc*.[17] There, the Eighth Circuit held that the statutory sums constituted "damages" under an injury insuring agreement. "Damages" were defined under the garage liability policy to mean "amounts awardable by a court of law", but not "civil penalties, fines or assessments". The court essentially accepted that the fixed statutory amount under the *TCPA*, in part, compensates for the cost of receiving unwanted faxes. It found that the "uncertain and hard-to-quantify actual damages" including "loss of use of equipment and phone lines for outgoing and incoming faxes, the expense of paper and ink, and the resultant inconvenience and annoyance … interfere[nce] with company switchboard operations and burdens [on] the computer networks of … recipients" are "compensable harms encompassed by a liquidated sum within the fixed amount".

Note that the U.S. policy wording considered in the noted cases is slightly different than the current standard CGL form in Canada. The former requires "damages" and the latter "compensatory damages". Even if statutory damages are remedial and not penal, are they "compensatory"? Unlike CASL, the *TCPA* makes specific and separate provision for treble damages in respect of "wilful or knowing" violations, tending to suggest that the fixed damages, alone, are not a penalty. As well, the statutory damages which will be available under CASL are not minimums awarded ***in lieu*** **of** actual monetary loss, but maximum awards available **in addition to** compensatory damages. It may be possible to distinguish *HIAR Holding* and *Lou Fusz* on these bases. The last distinction strikes the writers', at least, as being particularly persuasive.

Based upon the above analysis, future third party claims for contravention of CASL may well be found to satisfy at least the "compensatory damages" requirement under the insuring agreements within both Section A and Section B of the standard form Canadian CGL policy. Where damages are sought for actual loss suffered or expenses incurred this will likely be the case. Whether claims for statutory sums will also be found to constitute "compensatory damages" is more difficult to predict, but possible.

B. Property Damage

The CGL extends coverage to claims seeking compensatory damages arising out of "property damage". As defined, "property damage" includes physical injury to tangible property, or loss of use of tangible property that has not been physically injured. Canadian insurers have attempted to eliminate the risk posed by corruption or loss of electronic data by amending the definition to expressly provide that electronic data is not tangible property. Is that amendment sufficient to avoid property damage liability coverage for claims arising under CASL? The American experience suggests it may not be.

A very recent Illinois decision highlights a potential problem. In *Travelers Property Casualty Company of America v DISH Network, LLC*, the defendant was sued for *TCPA* violations.[18] The plaintiffs asserted that they had received unwanted telemarketing calls from the defendant. The court ruled that telemarketing calls precluded the use of a telephone for other purposes, while the telemarketing call was ongoing. The use of tangible property, namely the telephone, was lost for that period of time. This fell within the second branch of the "property damage" definition and property damage liability coverage was triggered.

Such concern may be less pronounced in Canada under CASL, as CASL expressly does not apply to fax messages. A computer, smart phone, or other electronic device is not precluded from receiving other e-mails or text messages simply because it is simultaneously receiving an electronic communication that violates CASL. However, the possibility remains that astute plaintiffs' counsel may plead claims in a manner intended to trigger "loss of use" coverage. For example, a plaintiff could allege that they were prevented from using their laptop or mobile device for other purposes during the time it took to read and delete the commercial message. The recent amendment to the standard form CGL policy, removing electronic data from the scope of "property damage", does not foreclose coverage for this kind of potential claim.

C. Publication, in Any Manner, Which Violates a Person's Right of Privacy

Policyholders are most likely to assert that CASL claims trigger the personal and advertising injury coverage found in the CGL form. They will argue that CASL claims seek compensatory damages arising out of "[o]ral or written publication, in any manner, of material that violates a person's right of privacy". Both elements of this Part B coverage are likely to be in issue. Is a commercial e-mail 'published' when it is sent to an individual recipient's e-mail account? Is the sending of such an e-mail a violation of the recipient's "right of privacy"?

i. Publication

What constitutes publication? "Publication" is not a defined term in the standard form Canadian CGL policy. The scope of the term "publication" in the CGL has not been clearly defined by Canadian courts. It is open to inquiry, then, to ask whether a policyholder has "published" an e-mail sent in violation of CASL.

Common law definitions of "publication", particularly in the defamation context, suggest that the word will be interpreted broadly. In the defamation context, the Supreme Court of Canada has found that publication of a defamatory statement occurs when a statement is transmitted to at least one person, other than the person being defamed.[19] All that matters is receipt of the defamatory message by a third party.

There is no relevant third party in the CASL context. Liability is triggered under the Act where a sender transmits a commercial electronic message to a recipient without the recipient's consent. A third party is necessary for liability in the defamation context (otherwise, how would the plaintiff's reputation have been damaged?). It is not, however, necessary in the anti-spam context.

The harm against which CASL protects is the receipt of unwanted electronic spam. In its most straightforward form, "publication" could be understood to mean the sending and receipt of a message. If so, "publication" would occur anytime a commercial electronic message is sent by the policyholder and it is received by the individual recipient. Many American *TCPA* cases have reached a similar conclusion in respect of fax transmissions.[20] If insurers do not wish to cover such transmission of electronic messages in their CGL policies, attention should be paid to the scope of "publication" in the standard form and consideration given to its revision.

ii. The Right of Privacy

Insurers may object that the above approach improperly interprets the term, as it interprets "publication" in isolation from the rest of the clause. They will point to the phrase "material that violates a

person's right of privacy" as informing the meaning of "publication" such that involvement of a third party is required.

Insurers may argue that the personal and advertising injury liability cover does not simply require "publication" of any material but, rather, publication of material that, in substance, is private. That is to say, the insuring agreement is not triggered unless the content of the material is such that its publication violates a person's right to privacy. It is the material or its content that is subject to privacy interests. An e-mail sent out by a retailer about an upcoming sale, for example, is unlikely to contain private information about a third party. Essentially, this amounts to an argument that coverage for the personal and advertising injury offence at issue is limited to so-called "secrecy privacy" or concerned with public disclosure of embarrassing private facts.

Policyholders, in turn, will respond that people's privacy rights go beyond secrecy interests and include, amongst other things, the right to be left alone. The intrusion of an unwanted e-mail or text message is a breach of their "seclusion privacy". Under this interpretation, the mere act of "publishing" the text or e-mail constitutes a breach of privacy rights capable of triggering personal and advertising injury liability cover.

Much, then, may depend on the scope of the "right of privacy". When will an e-mail or text message, sent to a recipient in violation of CASL, violate a person's privacy rights?

There are a number of American *TCPA* decisions in which courts have reviewed the substance of the material in issue, in order to determine whether such material violated privacy rights. However, a number of those decisions have concerned non-standard policy wordings.[21]

Other American *TCPA* decisions have focussed on the act of publication, not the substance of the message. They have found violation of a person's right to privacy occurred when commercial entities sent unsolicited fax advertisements to business fax machines[22] or made unsolicited telemarketing phone calls to individuals.[23] The violation of the right to privacy extended to the right to be left alone or the right to seclusion. The underlying claims in these cases were held to fall within the advertising injury and/or personal injury liability coverage policy provisions.

American courts are only now beginning to take up the question as to whether or not receipt of a text message or an e-mail also violates the right to seclusion. Unlike fax machines where a printed piece of paper is effectively sent into the recipient's home or business, nothing physical results from an e-mail or text.

It is too early to tell whether Canadian courts will ascribe a scope to the right of privacy whereby simple receipt of an e-mail or text can constitute a violation of privacy. That being said, the rate of expansion of privacy rights in Canada is accelerating.

The Ontario Court of Appeal recently confirmed breach of privacy to be actionable as a common law tort in *Jones v Tsige*.[24] Prior to 2012, it was uncertain whether one could sue for invasion of privacy in the absence of an enabling statute granting a private right of action.[25] More recently, the Ontario Superior Court of Justice has confirmed that it may be possible to pursue a common law right of action even if a remedy is provided by statute.[26]

Tsige has triggered a growing wave of litigation in respect of privacy rights, at least in Ontario. No case has yet provided guidance in respect of tort rights and electronic devices. However, public law may be instructive as to the direction the court will take.

Jurisprudence under Section 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") is particularly noteworthy.[27] Section 8 protects against unreasonable search and seizure. The individual's reasonable expectation of privacy features prominently in the cases. The Supreme Court of Canada recently addressed Section 8 privacy rights in respect of Internet search histories.

In *R v Spencer* the Supreme Court declared that Internet users have a reasonable expectation of anonymity and privacy in their online activity.[28] The defendant had been convicted of possession of child pornography after police used an IP address to obtain his name from the internet service provider. They had done so without a warrant. The defendant challenged the "search" of the internet service provider's records under Section 8 of the *Charter*. The court ruled that matching a person's identity with his anonymous browsing activity was a violation of the defendant's privacy interests. Online users, the court ruled, reasonably expect anonymity over the Internet. In protecting the rights of the defendant in this manner, the court extended the scope of constitutional privacy rights to include electronic and online activities.

Notably, the United States Supreme Court issued a similar ruling in *Riley v California* wherein the warrantless search incident to arrest of a suspect's cell phone was found to be unconstitutional (violating the Fourth Amendment right to be secure against unreasonable search and seizure).[29] In so finding, the court acknowledged not only the capacity for cell phones to store a significant quantity of personal information, but also that certain of the data, e.g. Internet browsing history, GPS monitoring, installed apps, can be extremely revealing of an individual's private interests and concerns. Chief Justice Roberts wrote:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life", *Boyd, supra*, at 630, 6 S.Ct. 524. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought …

If constitutional rights of privacy include protections for electronic devices and activities, as these cases suggest, then it may be that computers and mobile devices are entitled to significant common law privacy protections. Courts have begun to treat the electronic and cyber-world in a manner similar to a person's private residence — at least in constitutional terms. If this trend continues, receipt of an e-mail or text in violation of CASL may be a violation of a person's "right of privacy" within the meaning of the CGL policy. Insurers who seek to rely solely on assertions of the limited scope of the "right of privacy" in denying coverage for CASL claims, may be surprised by the results.

iii. Exclusion for Electronic Media

The 1 April 2014 edition of advisory wording for Commercial General Liability, IBC 2100, included revisions to Exclusion 2.k., which exclusion applies to Coverage B. The revised standard exclusion now reads:

> This insurance does not apply to:
>
> k. Interactive Websites, Electronic Chatrooms, Interactive Forums or Bulletin Boards
>
> "Personal and advertising injury" arising out of an electronic interactive website, chatroom, interactive forum or bulletin board the insured hosts, owns, or over which the insured exercises control.

It appears that the intention was to update the exclusion to catch losses arising out of social media. It does not, however, appear to have any bearing on the expected typical CASL claim. CASL claims will arise out of the sending of texts or e-mails by the policyholder, and not out of their websites, interactive forums or online bulletin boards (whatever those terms are found to mean). The exclusion is not likely to have application.

Conclusion

The objective of Canada's Anti-Spam Legislation is to protect Canadians from unwanted commercial electronic messages. Canadians will soon be entitled to seek CASL remedies through private rights of action. Should a policyholder violate the terms of CASL and find themselves subject to such suit, they may look to their CGL policy for coverage. This will be particularly so if they do not have cyber and technology coverage providing specialised coverage (or, alternatively, if they believe there is coverage under both of their cyber and CGL forms).

The standard form CGL policy in Canada was not drafted with CASL in mind. As presently drafted, there are arguments that policyholders may advance which could result in CASL claims falling within CGL cover. Insurers who do not wish to provide coverage against CASL claims are well-advised to review their policy forms and make appropriate changes in order to address the issues raised in this paper.

Endnotes

1 In Canada, the Insurance Bureau of Canada (the "IBC") provides model policy and endorsement wordings. The IBC is a national industry association representing Canadian home, car and business insurers. While the IBC wordings serve as benchmarks for the industry, their adoption or modification is discretionary. The CGL provisions referenced throughout this paper are taken from the 1 April 2014 edition of the Commercial General Liability Policy IBC form 2100.

2 *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* SO 2010, c 23.

3 *Ibid*, ss 1(1) "commercial activity", "electronic message", 1(2), 6(1), 6(8) and 12.

4 *Ibid*, s 20.

5 *Ibid*, ss 1(1) "Commission", 14, 22, 24, 25 and 34-37.

6 *Ibid*, s 47.

7 Order 81000-2-1795 (SI/TR) made by the Governor General in Council under CASL, http://fightspam.gc.ca/eic/site/030.nsf/eng/00272.html.

8 CASL, *supra* note 2, ss 51(1)(a) and (b)(i).

9 *Ibid*, ss 20(2) and 51(2).

10 *Ibid*, ss 20(3) and 51(3).

11 *Ibid*, ss 31, 32, 52 and 53.

12 47 U.S. Code §227.

13 *Ibid*, s (b)(3). The court is granted discretion to increase the monetary award by up to three times in respect of intentional violations.

14 *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33.

15 *Supra* note 12, s (b)(3).

16 411 SW 3d 258 (Mo 2013) [*HIAR Holding*]. This case abrogated *Olsen v Siddiqi*, 371 SW 3d 93 (Mo App 2012) where the statutory minimum damages under the *TCPA* were held to be penal in nature and, therefore, not covered under a CGL policy. The court, there, had accepted that the legislation is remedial when recovery for actual monetary loss is sought and penal when the $500-per-occurrence statutory damage award is sought.

17 401 F 3d 876 (8th Cir (Mo) 2005) [*Lou Fusz*].

18 2014 WL 1217668 (CD Ill 2014) [*Dish*].

19 *Grant v Torstar Corp*, 2009 SCC 61.

20 See for e.g. *Valley Forge Ins. Co v Swiderski Electronics*, Inc, 860 NE 2d 307 (Ill 2006): "…we observe that Rizzo's complaint alleges conduct by Swiderski that amounted to 'publication' in the plain and ordinary sense of the word. By faxing advertisements to the proposed class of fax recipients as alleged in Rizzo's complaint, Swiderski published the advertisements both in the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public."

21 See e.g. *Cynosure, Inc v St. Paul Fire & Marine Ins. Co*, 645 F 3d 1 (1st Cir (Mass) 2011). The advertising injury liability coverage was for "making known to any person or organisation covered material that violates a person's right of privacy".

22 See e.g. *Hooters of Augusta, Inc v American Global Ins*. Co, 157 Fed Appx 201 (11th Cir (CA) 2005) and *Owners Ins. Co v European Auto Works, Inc*, 695 F 3d 814 (8th Cir (Minn) 2012).

23 See e.g. *Dish, supra* note 18.

24 2012 ONCA 32 [*Tsige*]. It is uncertain whether other provinces will follow suit. See *Avery v Canada (Attorney General)*, 2013 NBQB 152 at para 54 where the court declined to rule whether it would recognise the existence of a tort of invasion of privacy at common law in New Brunswick. See also *Ari v Insurance Corp of British Columbia*, 2013 BCSC 1308, where a claim for common law breach of privacy was struck for disclosing no reasonable cause of action.

25 Prior to *Tsige*, an appellate court had yet to rule on the issue. British Columbia, Manitoba, Saskatchewan and Newfoundland all had statutes in place that established a limited right of action for invasion of privacy. See *Privacy Act*, RSBC 1996 c 373; *Privacy Act*, RSM 1987 c P125; *Privacy Act*, RSS 1978, c P-24; and *Privacy Act*, RSN 1990, c P-22.

26 See *Hopkins v Kay*, 2014 ONSC 321.

27 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

28 2014 SCC 43.

29 134 S Ct 2473 (US Cal 2014).

Acknowledgment

Special thanks are reserved for articling student, Lisa Bruni, who assisted with research for this chapter.

Lori D. Mountford
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5
Canada

Tel: +1 416 596 2889
Fax: +1 416 593 5437
Email: lmountford@blaney.com
URL: www.blaney.com

Lori Mountford is a senior associate at Blaney McMurtry LLP and a member of the firm's Insurance Coverage Counsel and Insurance Litigation Groups. She obtained her LL.B. at the University of Toronto in 1998 and was admitted to the Ontario Bar in 2000.

Lori's focus is insurance coverage involving opinion work and representation of insurers in policy disputes. Lori is an experienced litigator. She has appeared before the Ontario Superior Court of Justice, the Financial Services Commission of Ontario and private arbitrators.

David R. Mackenzie
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario M5C 3G5
Canada

Tel: +1 416 597 4890
Fax: +1 416 594 5092
Email: dmackenzie@blaney.com
URL: www.blaney.com

David is a partner in Blaney McMurtry LLP's insurance group. His practice focuses on insurance coverage, reinsurance, and complex multi-party disputes. He is called to the Bar in Ontario, British Columbia and Washington State.

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaney McMurtry LLP is a multi-service firm, helping clients overcome challenges and seize opportunities for more than 50 years, with a comprehensive yet personalised, approach to advice and representation.

In particular, the firm has a wealth of depth and experience in serving the insurance industry in both coverage and defence of a broad range of claims, and is recognised as one of the leading insurance law practices in Canada.

Blaney McMurtry is a member of the Risk Management Counsel of Canada, a national association of law firms providing services to the risk management industry. The firm is also a member of TAGLaw, one of the world's largest legal networks.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk