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CANADA'S ANTI-SPAM LEGISLATION – ARE YOU READY?

By Catherine Carscallen

Canada's "anti-spam" legislation¹ (commonly referred to as "CASL") will begin to take effect on **July 1, 2014**, when the majority of the provisions of CASL, including the provisions related to the sending of "commercial electronic messages", come into force. The provisions dealing with installation of computer programs (not addressed in this bulletin) will come into force on **January 15, 2015** and the provisions dealing with the private right of action for contraventions of CASL will come into force on **July 1, 2017**.

CASL will significantly affect the electronic communication practices of businesses operating in Canada. Subject to limited exceptions, CASL will prohibit the sending of a "commercial electronic message" to an electronic address unless the recipient has consented to receive it and the message complies with the prescribed form and content requirements (specified disclosure of identification and contact information and unsubscribe mechanism).

CASL doesn't just apply to Canadian businesses. The electronic messaging provisions will apply where a computer system located in Canada is used to *send* or *access* the electronic message. As a result, CASL will apply to commercial electronic messages sent by foreign businesses to Canadian customers or proposed customers.

Businesses, including directors and officers of corporations, need to understand the scope of CASL, how it will affect their operations and the potentially severe consequences of non-compliance.

What is a Commercial Electronic Message?

CASL will apply to more than what is typically considered "spam". A commercial electronic message (a "CEM") is an electronic message (e.g., email, text message, instant message, etc.) that it would be reasonable to conclude has as *its purpose, or one of its purposes, to encourage participation in a commercial activity* (whether or not such activity is carried out in the expectation of profit). Factors to consider in determining whether a purpose is to encourage participation in a commercial activity include the content of the message, hyperlinks in the message to a website or database, or contact information in the message. Examples of CEMs include:

- offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- offers to provide a business, investment or gaming opportunity;

¹ *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 (S.C. 2010, c.23).*

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A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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- advertising or promoting any of the foregoing, or a person who does or intends to do any of the foregoing.

Exemptions from CASL

CASL will not apply if the CEM is not sent to an “*electronic address*” which is defined as an electronic mail account, instant messaging account, telephone account or any similar account. According to the CRTC’s CASL website (<http://www.crtc.gc.ca/eng/casl-lcap.htm>) some social media accounts may constitute a “similar account” and whether a communication using social media is sent to an electronic address will depend on the circumstances including how the specific social media platform functions and is used. By way of example, the CRTC considers that a Facebook wall post would not be captured, however, messages sent to other users using a social media messaging system (e.g., Facebook or LinkedIn messaging) would qualify.

Specifically excluded from CASL are two-way voice communications between individuals and faxes or voice recordings sent to a telephone account. In certain of those circumstances, however, Do Not Call List rules may apply.

In addition, CASL does **not** apply to any CEM that is:

- sent by or on behalf of an individual to another individual with whom they have a *personal relationship*² or a *family relationship* (as those terms are defined);
- sent to a person engaged in a commercial activity and that consists solely of an inquiry or application related to that activity;
- sent within an organization and the message concerns the activities of the organization;
- sent between organizations if the organizations have a relationship and the message concerns the activities of the recipient organization;
- sent in response to a request, inquiry, or complaint or is otherwise solicited by the recipient;
- sent to satisfy a legal obligation, or provide notice of an existing or pending right or legal obligation, or to enforce a right or legal obligation;
- sent and received on an electronic messaging service if the identification and contact information and unsubscribe mechanism required under CASL are conspicuously published and readily available on the user interface through which the message is accessed and the recipient consents to receive it;
- sent to a limited-access secure and confidential account to which messages can only be sent by the account provider to the recipient; (e.g., on-line banking site);
- where reasonable to believe that the message will be accessed in a foreign state listed in the Schedule to the regulations and the message conforms to the law of such state that addresses conduct substantially similar to the commercial electronic message provisions of CASL;
- sent by or on behalf of a registered charity and the message has as its primary purpose raising funds for the charity; or

² According to guidance documents published by the CRTC, legal entities, such as corporations, cannot have a “personal relationship”; therefore, someone who sends a CEM on behalf of a corporation may not claim to have a personal relationship with the recipient.



- sent by or on behalf of a political party or organization or a candidate for publicly elected office and the message has as its primary purpose soliciting a contribution.

Consent, Form and Content Requirements

Subject to limited exceptions, CASL imposes three general requirements for sending a CEM to an electronic address: consent (which may be express or, in some circumstances, implied), identification and contact information, and an unsubscribe mechanism.

Identification and Contact Information

A CEM must set out clearly and prominently:

- the name of the sender and any other person (including affiliate(s)) on whose behalf the message is sent; and
- the mailing address and either a telephone number providing access to an agent or voice messaging system, an email address or a web address for the sender and any other person on whose behalf the message is sent, which must be valid for at least 60 days after the message is sent.

If a CEM is sent on behalf of another person, the message must also contain a statement indicating which person is sending the message and the person on whose behalf it is sent. Where it is not practical to include the identification and contact information in the message itself, that information may be posted on a webpage that is readily accessible by the recipient, at no cost, by means of a link clearly and prominently set out in the message.

Unsubscribe Mechanism

A CEM must also set out clearly and prominently a readily-useable unsubscribe mechanism that:

- enables the recipient to indicate, at no cost, the wish to no longer receive *any CEMs, or any specified class of CEMs*, from the sender or, if different, the person on whose behalf the message was sent using the same electronic means or if those means are not practicable, any other electronic means that will enable the recipient to do so; and
- specifies an electronic address, or a link to a webpage, to which the indication may be sent, which must be valid for a minimum of 60 days after the message was sent.

An unsubscribe request must be acted on within *10 business days* of it being made by a recipient.

Consent

Subject to limited exceptions, CASL requires that senders of CEMs obtain consent from recipients prior to sending messages. Consent may be express or, in certain circumstances, implied. Businesses need to be aware that the consent requirements under CASL are not the same as those under Canadian privacy law.



Express Consent

Express consent may be obtained orally or in writing (which includes both paper and electronic forms). In either case, CASL places the onus on the sender of the CEM to prove that it has obtained consent to send the message.

To be valid, a request for express consent under CASL must be sought separately and set out clearly and simply:

- the purpose(s) for which consent is being sought;
- the name of the person seeking consent and, if seeking consent on behalf of another, the name of that person;
- if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought;
- the mailing address, and either a telephone number providing access to an agent or voice messaging system, an email address or web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and
- a statement that the person whose consent is sought may withdraw their consent.

Note an electronic message sent to request consent to send a CEM is itself a CEM for which consent is required.

Information bulletins (non-binding guidance documents) published by the CRTC indicate that express consent must be obtained through *opt-in (not opt-out) mechanisms* and may not be subsumed in or bundled with requests for consent to general terms and conditions of use or sale. The CRTC considers default toggling or pre-checked boxes to be opt-out forms of consent and therefore they cannot be used as a means of obtaining express consent under CASL. Rather, the person whose consent is sought must take a positive action to indicate their consent. The information bulletins also provide examples of recommended or best practices and considerations that may make tracking or recording consent easier and therefore easier to prove.

Implied Consent

Consent is implied for the purpose of sending CEMs in the following circumstances:

- if the person who sends the message (or causes or permits it to be sent) has an *existing business relationship* or an *existing non-business relationship* (as those terms are defined) with the recipient;
- the recipient has “conspicuously published” or caused to be conspicuously published their electronic address, without a statement that they do not wish to receive unsolicited CEMs at that address, and the message is relevant to the recipient’s business, role, functions or duties in a business or official capacity; or
- the recipient has disclosed to the person sending the message (or who causes or permits it to be sent), their electronic address, without a statement that they do not wish to receive



unsolicited CEMs at that address, *and* the message is relevant to the recipient's business, role, functions or duties in a business or official capacity.

An "existing business relationship" means a business relationship between the recipient and the person who sent or caused or permitted the message to be sent (sender), arising from:

- the purchase, lease or barter of a product, goods, a service, land or an interest or right in land, within the preceding 2 year period;
- the acceptance by the recipient, within the preceding 2 year period, of a business, investment or gaming opportunity offered;
- a written contract between the recipient and sender in respect of a matter not referred to under the two bullets above, if the contract is in existence or expired within the preceding 2 year period; or
- an inquiry or application, within the preceding 6 month period, made by the recipient, in respect of anything mentioned under the first two bullets above.

An "existing non-business relationship" means a non-business relationship between the recipient and the person who sent or caused or permitted the message to be sent (sender) arising from:

- a donation or gift by the recipient to sender, volunteer work performed by the recipient for sender, or attendance at a meeting organized by sender, within the preceding 2 year period, where sender is a registered charity, political party or organization, or candidate for publicly elected office; or
- *membership* by the recipient in sender within the preceding 2 year period, where sender is *club, association or voluntary association* (as those terms are defined).

Businesses relying on an "existing business relationship" or "existing non-business relationship" for implied consent to send CEMs will need to track the time periods referred to above. As this may be challenging for businesses, they should consider seeking express consent which is valid until the recipient unsubscribes.

Exemptions from Consent Requirement

CASL exempts the following types of CEMs from the consent requirement, if the CEM solely:

- provides a quote or estimate for supply of a product, goods, service, land or interest or right in land, in response to a request by the recipient;
- facilitates, completes or confirms a transaction that the recipient previously agreed to enter into;
- provides warranty, product recall or safety or security information about a product, goods or service that the recipient uses, has used or has purchased;
- provides factual information about the ongoing use or ongoing purchase by the recipient of a product, goods or service offered under subscription, membership, account, loan or similar relationship;



- provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating or enrolled; or
- delivers a product, goods or service, including updates or upgrades, that the recipient is entitled to receive under the terms of a transaction previously entered into.

Note, however, in these circumstances, these CEMs will still need to comply with the form and content requirements under CASL (identification/contact information and unsubscribe mechanism).

There is also a one-time exemption from the consent requirement for the *first* CEM sent for the purpose of contacting the recipient following a *referral* by an individual who has an *existing business relationship*, an *existing non-business relationship*, a personal relationship or a family relationship with both the sender and the recipient. The CEM must disclose the name of the individual who made the referral and state that the message is sent as a result of the referral. The CEM must also comply with the form and content requirements (identification/contact information and unsubscribe mechanism).

Consent On Behalf of Unknown Parties

CASL provides that a person may seek express consent on behalf of an unknown third party as long as certain conditions set out in CASL and its regulations are met with respect to the use that may be made of that consent by third parties.

Transitional Provision

CASL provides for a transition period of 3 years commencing July 1, 2014 during which a person's consent to receive CEMs from another person is *implied* unless the person gives notification that they wish to unsubscribe *if* on July 1, 2014 those persons have an *existing business relationship* or an *existing non-business relationship* (without regard to the 2 year or 6 month periods in the definitions of those terms) and the relationship includes the communication between them of CEMs. The form and content requirements (identification/contact information and unsubscribe mechanism) must still be complied with in such circumstances.

Other Prohibited Conduct

Installation of Computer Programs – CASL also contains provisions regulating the installation of computer programs on a person's computer system in the course of a commercial activity. These provisions, which include consent and disclosure requirements subject to certain specific exceptions, will come into force on January 15, 2015.

Misleading Advertising – CASL amends the *Competition Act* to prohibit, for the purpose of promoting any business interest or the supply or use of a product, knowingly or recklessly making:

- a false or misleading representation in the sender information or subject matter information of an electronic message or a locator (e.g., a URL); or
- a representation in an electronic message that is false or misleading in a material respect.



Businesses will need to be careful to avoid making overly boastful statements in subject matter lines including in circumstances where such statements are intended to be subject to terms, conditions or qualifications in the body of the message.

Address Harvesting, Data Mining, etc. – CASL also amends the *Personal Information Protection and Electronic Documents Act* to prohibit the collection and use, without consent, of:

- an individual's electronic address if the address is collected by "address harvesting" programs (programs designed to generate or search for and collect electronic addresses); and
- an individual's personal information collected through any means of telecommunication if the collection is made by accessing a computer system in an unlawful way.

Alteration of Transmission Data – CASL prohibits, in the course of a commercial activity, the alteration of transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender without the sender's or the recipient's express consent.

Aiding and Abetting – Under CASL, it is also prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to the CEM and certain other provisions of CASL referred to above.

Why Businesses Shouldn't Ignore CASL

There are potentially severe penalties for non-compliance with the CEM provisions of CASL including administrative monetary penalties of up to \$1,000,000 per violation for individuals and \$10,000,000 per violation for corporations and other persons. In addition, as of January 1, 2017, a private right of action will allow anyone affected by a contravention of CASL to commence proceedings and pursue compensation equal to damages and expenses incurred and, in the case of contravention of the CEM provisions, \$200 per contravention up to a maximum of \$1,000,000 per day a contravention occurred.

Officers and directors of corporations may face personal liability if they directed, authorized, assented to, acquiesced or participated in a violation or offence. Employers are also vicariously liable for violations or offences committed by their employees acting within the scope of their employment.

Businesses should take steps, and officers and directors should exercise their duties, so as establish the "due diligence defence" that is available under CASL. In the event of a contravention of CASL, evidence of the exercise of "due diligence" to prevent its commission may serve as a full defence or a mitigating factor in the determination of penalties or damages.

Conclusion – Steps to Prepare and Comply

As the July 1, 2014 in-force date is fast approaching, businesses need to understand how CASL will affect their electronic communication practices and prepare for compliance. Here are some steps businesses should consider taking:



1. Identify one or more persons to review CASL, audit your current practices and develop a compliance plan designed to satisfy a “due diligence” defence. Develop and implement policies and procedures to address CASL’s requirements. Educate and train employees. Review policies and procedures regularly and update as necessary.
2. Review the types and forms of electronic messages that you send and determine which ones are CEMs subject to CASL. Review the exemptions from CASL and determine if they exempt you entirely from CASL or only from the consent requirement.
3. Review your contact list for electronic communications. Do you have valid express consent to send CEMs? Can you rely on implied consent to continue to send CEMs? Put in place processes to maintain a record of consents received (e.g., how and when received and for what purpose). For implied consent, this should include a record of the basis on which implied consent is relied upon and, as applicable, when such implied consent expires. Consider requesting express consent, which is not time limited and remains valid until consent is withdrawn. Where possible, use the transition period to obtain express consent.
4. Update processes and forms for requesting consent. Ensure that they include disclosure of all prescribed information (e.g., purpose, identification and contact information, statement that may withdraw consent, etc.) and a compliant unsubscribe mechanism. Update templates used to send electronic messages and ensure that they also include disclosure of all prescribed information (identification and contact information) and a compliant unsubscribe mechanism. Put processes in place to receive, record and process unsubscribe requests within 10 business days (and, as applicable, to provide notices to affiliates or other third parties).
5. Review arrangements with third parties. Do you use third parties to assist with your electronic communications or do third parties rely on consents you obtained to send CEMs? Revise contractual arrangements with third parties as necessary to require comply with CASL.

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