



## CANADA'S NEW ANTI-SPAM LAW

By Farzad Forooghian

Canada's new anti-spam law (commonly referred to as "CASL") comes into force on July 1, 2014. Among other things, CASL will prohibit the sending of many types of electronic messages without the recipient's consent.

### BASIC ANTI-SPAM PROHIBITION

CASL prohibits the sending of a commercial electronic message (a "CEM") to an electronic address unless the person to whom the message is sent has consented to receiving it, and the CEM complies with prescribed form and content requirements.

Essentially, a CEM is any electronic message designed, in whole or in part, to encourage participation in a commercial activity. Commercial activity is any transaction, act or conduct of a commercial character, whether or not carried out for profit.

A CEM specifically includes an electronic message that:

- 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; or
- Advertises or promotes any of the first two, or promotes a person as being a person who does any of the foregoing.

CASL covers an extremely broad range of electronic messages. For example, it is likely that many electronic messages sent by public companies to their contact databases (for example, issuance of news releases and corporate updates) are CEMs.

## CONSENT REQUIREMENT

Under CASL, consent to receive a CEM can be implied or express.

### Implied Consent

CASL provides that consent may be implied in the following circumstances:

- Where the recipient and the sender have an “existing business relationship” or an “existing non-business relationship”;
- Where a recipient has conspicuously published his or her electronic address, the publication is not accompanied by a statement that the recipient does not wish to receive unsolicited CEMs, and the CEM is relevant to the person’s business, role, functions or duties in a business or official capacity; and
- Where a recipient has disclosed his or her electronic address to the sender without indicating that the recipient does not wish to receive unsolicited CEMs and the CEM is relevant to the person’s business, role, functions or duties in a business or official capacity.

An “existing business relationship” exists where the recipient made an inquiry to the sender in the previous six months or the recipient and the sender have engaged in the following types of business together in the previous two years:

- The purchase or lease or bartering of a product, goods, a service, land or an interest or right in land;
- The acceptance by the recipient of a business, investment or gaming opportunity; or
- The entering into of a written contract between the sender and recipient in respect of a matter not referred to above.

An “existing non-business relationship” exists where an individual has made a donation or gift in the last two years, or performed volunteer work in the last two years, to or for a registered charity or political party, organization or candidate or where the individual is a member of certain clubs, associations or voluntary organizations.

### Express Consent

A valid request for express consent must be sought separately and must set out clearly and simply:

- The purpose for which consent is being sought;
- Specific information about the person seeking consent and, if applicable, the person on whose behalf consent is being sought; and
- A statement that the recipient can withdraw their consent.

Once CASL comes into force, an electronic message requesting consent to send a CEM will be considered a CEM for which consent is required.

## FORM AND CONTENT REQUIREMENTS

CASL also sets out specific form and content requirements for CEMs. In particular, each CEM must clearly and prominently identify the sender, provide prescribed contact information for the sender, and set out a mechanism for the recipient to unsubscribe.

The prescribed contact information must be valid for a minimum of 60 days after the message has been sent and includes:

- The sender's business name (if different from the sender's name);
- If the CEM is sent on behalf of another person, the name of the person on whose behalf the CEM is sent or by which that person carries on business (if different);
- If the CEM is sent on behalf of another person, a statement indicating who is sending the CEM and the person on whose behalf the message is sent; and
- The sender's mailing address and either: the sender's phone number, email address or web address.

The unsubscribe mechanism must:

- Use the same electronic means by which the CEM was originally sent;
- Be capable of being readily performed;
- Function at no cost to the recipient;
- Allow the recipient to unsubscribe from receiving messages from any person who has been provided with the recipient's electronic address; and
- Be implemented without delay (10 business days at most).

## EXEMPTIONS

CASL exempts the following types of CEMs altogether:

- CEMs sent by an individual to an individual recipient with whom the sender has a personal relationship or a family relationship (as defined in the CASL regulations); and
- CEMs sent to a person engaged in a commercial activity and consist solely of an inquiry or application related to that activity.

CASL and its regulations also provide a number of additional exemptions. A full review of the various exemptions is outside the scope of this bulletin.

## TRANSITION PERIOD

CASL provides for a three-year transition period during which consent can continue to be implied (unless expressly revoked) where an existing business or non-business relationship included sending CEMs.

## PENALTIES

The potential penalties for non-compliance with CASL are significant and include administrative monetary penalties of up to \$1,000,000 for individuals and \$10,000,000 for corporations. On July 1, 2017, a private right of action will come into force for persons suffering actual loss or damage as a result of non-compliance with CASL.

## COMPLIANCE CHECKLIST

Organizations are encouraged to build and implement CASL compliance strategies, for example:

- Review your current practices for sending electronic messages and assess which ones are CEMs.
- Assess whether your CEMs are subject to CASL in whole or in part, or fit within one of the available exemptions. For example, CEMs sent to persons with a personal or family relationship are exempt from the consent requirement.
- Get necessary IT infrastructure in place.
- Determine if you currently have implied consent to send CEMs. Note that existing implied consents will expire three years after CASL comes into force.
- Determine if you currently have express consent to send CEMs.
- Obtain any required express consents prior to July 1, 2014. Ensure that mechanisms to collect express consent (ex. email requests, pages on your website) are CASL-compliant.
- Ensure that your database of contacts tracks consents. For example, your database should identify when implied consents expire.
- Implement systems to ensure that CEMs are not sent without implied or express consent.
- Ensure that CEMs sent after July 1, 2014 satisfy the form and content requirements of CASL. Create templates for CEMs.
- Create and implement an unsubscribe mechanism to meet the requirements of CASL.
- Ensure that third parties sending CEMs on your behalf comply with CASL.
- Train individuals in your organization on CASL compliance.
- Review and audit compliance, and maintain compliance records.

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