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The New Canadian  
Anti-Spam  
Legislation (CASL)

**Spamming The  
Globe:  
Will Spreading The  
News About Your  
Business Get  
You Into Legal  
Trouble?**

May 2014

# What is CASL?

- CASL is a federal law that regulates the sending and content of commercial electronic messages (“CEMs”)
- CASL comes into effect on July 1, 2014 with respect to CEMs
- CASL comes into effect on January 15, 2015 with respect to installation of computer programs
- CASL comes into effect on July 1, 2017 with respect to private claims

# What is a CEM?

A CEM is broadly described as an electronic message that is of a commercial character, whether or not sent in the expectation of profit

- Includes messages that promote a product, business or investment opportunity
- Includes messages sent by means of telecommunication, including those sent to email accounts, instant messaging accounts, telephone accounts, and any other similar electronic method of sending a message
- Includes text, sound, voice, or image messages

## **To send a CEM on or after July 1, 2014, you need the consent of the recipient**

- Consent can be either Express or Implied
- The sender of the message is responsible to prove receipt of consent
- On or after July 1, 2014 an electronic request for consent is itself a CEM
- The recipient can withdraw either type of consent at any time

## **CASL does not apply to certain CEMs. These include:**

- Messages sent between individuals with a personal or family relationship
- Messages sent between employees of the same organization
- Messages sent by a representative of an organization (not defined) concerning the matters of the organization, where the recipient is a member of the organization
- Messages sent in response to a request, inquiry or complaint, or where the message was solicited by the recipient
- Messages sent in regard to a legal obligation
- Messages that complete or confirm a commercial transaction already entered into with the recipient

## Cont'd

- Messages that provide safety, warranty or recall information about a good or service that the recipient has used or purchased
- Messages that are interactive two-way voice communication, faxes to a telephone account, and voice messages sent to a telephone account are also exempt, although they may be subject to other laws
- Messages sent on behalf of a charity or political party or organization
- Messages sent and received where the necessary information and unsubscribe or opt-out mechanism are included on the platform, such as Twitter, Linked-In, and Facebook\* because of the possibility to unfollow a person or unlike a page

## Implied Consent exists if:

- The recipient has either:
  - a) conspicuously published his/her/its email address, or
  - b) disclosed his/her/its email address to you

and not stated he/she/it does not wish to receive CEMs, and the CEM is relevant to his/her/its business role

- You have an existing
  - i) business relationship or
  - ii) non business relationship (not the subject of this presentation)

## An existing business relationship exists if:

- The recipient of the CEM has purchased, leased, or bartered a good or service from you in the previous two years
  - Here, the implied consent “expires” two years after the purchase was made or whenever the recipient overtly withdraws consent
- or
- The recipient has made an inquiry about a product or service from you in the past six months
  - Here, the implied consent “expires” six months after the inquiry was made, or whenever the recipient overtly withdraws consent

# Express Consent

- Express Consent does not expire but, as with implied consent, can be withdrawn
- You must be able to prove express consent was granted
- For express consent to be valid, you must provide the necessary information when requesting it

## When asking for express consent:

- Ensure that the request is clearly identified and not bundled in with the terms of sale or other unrelated matters
- Require the recipient to actively choose to “opt-in” to receiving CEMs, such as checking (as opposed to unchecking) a box. Having to uncheck a pre-checked box and inclusion by default are not acceptable.
- Make sure that the opt-in language clearly states the purpose of the CEMs
- Include the name of the organization seeking consent, along with contact info, including address or P.O. Box, phone number, and email and/or website address
- Indicate that the recipient can choose to unsubscribe or withdraw consent at any time

## Transition clause

- If you have an existing business relationship on July 1, 2014 (meaning a purchase/sale since July 1, 2012 or an inquiry since January 1, 2014), and you have sent a CEM to the recipient previously, then implied consent is grandfathered for the three-year transition period
- Implied consent that exists on July 1, 2014 due to an existing business relationship is valid until July 1, 2017, or until withdrawn
- For business relationships formed AFTER July 1, 2014, the 6-month and 2-year expiration periods apply
- Due to the nature of implied consent and the transition clause, it is important, where possible, to seek express consent, and where express consent is not received, keep track of the expiry dates of implied consent

# CASL also sets out Required Content to be included in all CEMs

- CEMs must indicate the name of the organization sending the message, along with contact information, including address or P.O. Box, phone number, and email and/or website address that is valid for at least sixty days
- If the message is being sent on behalf of another entity, both entities must be identified, and it must be stated on whose behalf the message is being sent, along with contact info for at least one of them
- CEMs must state that the recipient can unsubscribe at any time, and must include a working unsubscribe mechanism
- CEMs must not have any misleading/false subject lines or sender names
- If it is an initial CEM being sent based on a referral, the full name of the person who made the referral must be included\*

\*An initial CEM to any person may be sent, without prior consent, if it is based on a referral by someone with a specified relationship with both sender and recipient. Thereafter, express or implied consent from the recipient is required.

# Unsubscribe Mechanism

- The unsubscribe function must include both the ability to unsubscribe using the same electronic means by which the message was sent, e.g. by replying to an email message, as well as providing the website or link to a website that will allow the recipient to unsubscribe and both must be valid for at least 60 days
- There can only be one step for the recipient to unsubscribe
- Requests to unsubscribe must be processed within 10 business days

## Practical Steps

- Ensure staff are informed about CASL and its provisions, and that everyone understands consent is required before sending out a CEM
- Review your communications to determine what messages are exempt and what messages are covered under CASL
- Try to obtain express consent to send CEMs prior to July 1, 2014, and ensure that consent is well-documented
- In the case of implied consent, keep track of the date it came into existence and expiration date
- Inventory all email addresses, message IDs, phone numbers, databases and email lists so that you can categorize and manage all data and emails
- Categorize data/emails according to type of consent (no consent, express consent, implied consent, and opted-out) and treat them accordingly

## Cont'd

- Ensure all required information is included with any request for consent, unsubscribe mechanisms, and with any CEMs being sent out
- Ensure the unsubscribe mechanism is CASL compliant and there are measures to ensure it takes effect within 10 days
- Email clients who have made an inquiry or purchase before July 1, 2014 to ensure that they are eligible for the implied consent grandfathering provisions
- Obtain express consent when a new relationship is formed whenever possible
- Prepare and disseminate guidelines on how certain types or categories of messages should be treated
- Review email signatures, logos, etc. to ensure they are not making an email into a CEM by the way they are written

# Practical Implications

- Penalties/AMPS/Due Diligence defence
- Class actions (as of July 1, 2017)
- Sale of agency
- International implications
- Canadian versus US law