

Email Marketing Law in Canada Has Changed ...

Are You Ready?

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**Canadian Email Marketing Law has
changed ... Are You Ready?
May 29, 2014**

OVERVIEW

1. What is Canada's Anti-Spam Legislation (CASL)?
2. What are the Commercial Electronic Messages (CEMs)?
3. What are CASL's requirements?
4. What CEMs are exempt? What CEMS have implied consent?
5. What penalties apply if I don't comply?
6. A checklist to help your compliance work

1. What is Canada's Anti-spam Law ("CASL")?

- 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)
- Unofficial short title - "Canada's Anti-Spam Legislation" or "CASL"

CASL – Background and History

- Regulates a broad range of activities including:
 - i) Commercial emails or messages via other electronic medium
 - ii) Hacking, malware and spyware
 - iii) Phishing, fraudulent or misleading practices
 - iv) Privacy invasion via your computer
 - v) Collecting email address without consent (harvesting)
- Fundamental underlying principle - consent

What is CASL?

- CASL received Royal Assent in December 2010
- CRTC and Industry Canada have authority under CASL to make regulations
- CRTC, Competition Bureau and Privacy Commissioner of Canada have certain enforcement and investigation powers
- CRTC will operate the Spam Reporting Centre

In Force Dates

- Majority of CASL comes into force July 1, 2014
- January 15, 2015 – provisions related to computer programs
- July 1, 2017 – private right of action

Will CASL Apply To My Organization?

- CASL's provisions are very broad; it's not just "spam"
- CASL has the potential to impact any individual or organization that sends electronic messages (i.e. email, text, image) to an electronic address (i.e. business, consumer, individual)
- CASL applies to anyone who sends a message from a computer system located in Canada or to anyone outside Canada who sends a message that the recipient accesses from a computer system in Canada

2. What are Commercial Electronic Messages (CEMs)?

- Threshold issue – is it a commercial electronic message (“CEM”)?
- CASL looks at the message, not the sender
- General prohibition against transmitting a CEM to an electronic address, unless:
 - The intended receiver consents to its receipt, and
 - The message includes certain prescribed information
- Subject to certain limited exemptions / exclusions

3. What Are CASL's Requirements?

Consent Requirements

- CEMs may only be sent with recipient's express or implied consent
 - Once CASL is in force, there are restrictions on how you may obtain consent to send CEMs - an electronic message that requests consent is deemed to be an CEM under CASL
- Onus of proving consent rests with sender (due diligence)

Express Consent

- Request for express consent must set out:
 - Purpose(s) for which consent is sought (“clearly and simply”)
 - Prescribed information identifying person seeking consent and any other person on whose behalf consent is sought (as set out in CRTC Regulation)

Consent Requirements to Send CEM

- Request for express consent may be obtained orally or in writing or a combination thereof
- Must set out the following information:
 - Identification of sender(s) (including affiliates)
 - Sender's contact information
 - Statement that person can withdraw their consent

Consent Requirement to Send CEMs

- Opt-out consent is not sufficient under CASL
 - CRTC requires a positive or explicit indication of consent (i.e. providing email address or checking toggle box)
- Onus is on sender to prove consent

Consent Requirements – Implied Consent

Implied Consent – Definition of “Existing Business Relationship”

Implied Consent – Non-Business Relationship

Transitional Period

Information Requirements For CEMs

- CEMs must include identifying information for sender or person on whose behalf the message is sent (as prescribed by regulation)
- Must set out a means by which to contact the sender (to be effective for at least sixty days)
- Must give the recipient a method to “opt out”, or to “unsubscribe”, from receiving messages

Requirements For “Unsubscribe Mechanism”

- Must allow recipient to advise sender to stop sending messages
- Must set out electronic address or link to an “unsubscribe” page
- Must be effective for 60 days
- Must be given effect within 10 days following receipt
- Must be at no cost to person
- → must be clearly and prominently set out in message and must be able to be readily performed

Messages that are Exempt from CASL

- Between individuals who have a “personal” or “family” relationship (as defined)
- To a person who is engaged in a commercial activity if it consists solely of an inquiry or application related to that activity
- Messages sent in response to a request, inquiry or complaint or is otherwise solicited by the person to whom the message is sent

Messages that are exempt from CASL

- Messages sent internally within a business by employee, representative, consultant or franchisee, where the CEM concerns the activities of the business
- Messages sent between businesses, if they have a relationship and the message concerns the activities of the organization to which it is sent

4. What CEMs Are Exempt From Consent Requirements?

5. What Penalties Apply If I Don't Comply?

- Individuals – fines up to \$1 million/violation
- Corporations – fines up to \$10 million/violation
- CASL also allows for a private right of action by anyone affected by a prohibited act, including right to statutory damages to a maximum of \$1,000,000 (\$200 for each electronic message sent) per day
- CASL sets out various factors to be taken into account when determining amount of penalty

What Penalties Apply If I Don't Comply?

- Private Right of Action
- Extended liability – officers or directors liable for wrongful acts of corporation / vicarious liability of corporation for employees
- Risk of class actions

- Organizations may be able to rely upon a due diligence defence against claims of non-compliance
- Need to be able to demonstrate that have taken proactive steps to establish policies, procedures and processes to address CASL compliance and properly monitor and enforce those policies

6. A Checklist for your Compliance Work

- The checklist below includes various activities your organization should consider undertaking as part of its CASL compliance efforts for CEMs:
 - Conduct electronic communications audit and gap analysis (what CEMs do you send, to whom, how and why)
 - Identify all of the purposes for which your organization communicates electronically and those purposes for which you require consent
 - Determine what forms of consent you will rely upon and develop processes to capture consent
 - Seek to replace implied consent with express consent prior to July 1, 2014

A Checklist for your Compliance Work

- Ensure that you are able to maintain evidence of consent
- Ensure that CASL information requirements and unsubscribe information is incorporated into your CEMs
- Develop an unsubscribe mechanism
- Review and update forms, applications and agreements, including third party contracts
- Draft a CASL compliance policy and update related policies
- Monitor CASL compliance
- Provide CASL education and training
- Review insurance policies to see if they cover defence costs; generally speaking insurance does not pay fines or penalties

Other Compliance Considerations

- Your compliance choices will be IT dependent. For example, if your contact management database cannot record express consent, implied consent or applicable exemptions, you may have to provide the CEM mandatory language in all CEMs in order to ensure compliance
- You will also need to review your technology and software capabilities to ensure that they satisfy prescribed requirements (i.e. CEM information requirements, unsubscribe mechanism)

Other Compliance Considerations

- Before July 1st, turn your implied consent into express consent for each purpose for which it will be used (business communications, marketing)
- Look at “touch points” and build consent to the receipt of CEMs into your process (i.e. application forms, mailing lists, agreements, retainer letters)
- Review and update your website privacy policies and terms of use to mesh with your CASL policies
- Do some database housekeeping – are your contact databases up to date and can they record/track consent status?

Other Compliance Considerations

- Review your contracts with third parties, including those who market on your behalf – require CASL compliance from them and indemnities if they breach
- Internal due diligence – establish procedures to monitor compliance and internal ongoing education of existing and new employees
- Consider creating an employee email policy / revise acceptable use policies to address personal email sent through business email addresses

Other Compliance Considerations

- Now is the time to obtain consent electronically
- Once CASL is proclaimed into force it will be an offence to send an email to get consent
- If you alter transmission data in an electronic message or if you install a computer program on another person's device in the course of commercial activity, there are additional activities your organization should consider

Three Key Steps Before July 1st

- Express consent
- Website and forms: Opt in, not Opt out
- Unsubscribe Mechanism

Additional Information

- Main government website - www.fightspam.gc.ca
- Sign up for Miller Thomson's CASL Updates and visit our website, www.millerthomson.com as we continue to develop resource materials and compliance tools

Questions?



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Thank you!

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