

Canada's Anti-Spam Legislation (CASL)

April 2014

On July 1, 2014, Canada's new anti-spam legislation ("CASL") will come into force. This new legislation will regulate how all commercial electronic messages ("CEMs") are sent and received in the Canadian market place. The scope of the legislation is very broad; a CEM is any electronic message that encourages participation in a commercial activity, regardless of whether there is an expectation for profit. CEMs are not limited to e-mail, but include every type of electronic communication, such as social media and instant messaging. Every business, big or small, needs to understand this new legislation and take steps in order to comply with it.

Penalties

The penalties for non-compliance with CASL should be taken seriously. CASL, once in effect, will have the sharp teeth of three regulatory bodies, including the Canadian Radio-television and Telecommunications Commission, the Office of the Privacy Commissioner, and the Competition Bureau. Fines for infractions will be up to \$10 million for corporations and \$1 million for individuals. On top of the regulatory fines, consumers and businesses will have the right to bring a private right of action beginning on July 1, 2017. The penalty for the private right of action is \$200 per contravention.

New Prohibitions

The primary effect of CASL is to prohibit all CEMs, subject to certain exceptions, from being sent without the express or implied consent of the recipient. In addition, CASL sets out certain required content, including

prescribed contact information and an unsubscribe mechanism, which must be included in every CEM, again subject to certain exceptions.

Exceptions

CASL includes many exceptions to the consent and content requirements. Some CEMs don't require either consent or the required content. Other CEMs don't require consent, but must still include the required content. The following is a non-exhaustive list of exceptions:

Exceptions to the Consent and Content Requirements

1. An inquiry or application related to a commercial activity engaged in by the recipient;
2. CEMs between employees, representatives, consultants or franchisees of an organization, or of two organizations that have a relationship, concerning the recipient organization;
3. A response to a request, inquiry or complaint or otherwise solicited by the recipient;
4. The sender believes the CEM will be accessed in one of the listed foreign states, and the message complies with the laws of that state.

Exceptions to the Consent Requirement Only (Content Requirements Still Apply)

1. A quote or estimate of a good or service, if requested by the recipient;

2. Facilitating a commercial transaction that the recipient previously agreed to enter into;
3. Warranty or product recall information about a good or service that the recipient has purchased;
4. Information about ongoing use of a product or service under a subscription, membership, account, or loan;
5. Information related to an employment relationship or related benefit plan;
6. Delivering a product or a service that the recipient is entitled to receive under the terms of a transaction;
7. Referrals under certain circumstances, if the CEM includes certain prescribed information specific to this exception.

Implied Consent

CASL includes certain circumstances in which consent will be implied. As with the exceptions to the consent requirement listed above, a CEM where consent is implied will still need to include the required content. The following is a non-exhaustive list of situations where consent is implied:

1. The sender and the recipient share an existing business relationship, arising from:
 - The purchase, lease or bartering of a product or service in the prior two years;
 - Acceptance by the recipient of a business opportunity offered by the sender in the prior two years;

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- A written contract between the recipient and the sender, if in force or expired within the prior two years, that does not relate to the purchase, lease or bartering of a service or product or the acceptance of a business opportunity;
- 2. An inquiry or application within the prior six-month period, in respect of the purchase, lease or bartering of a product or service or the acceptance of a business opportunity;
- 3. The recipient has conspicuously published the electronic address and 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 recipient's business;
- 4. The recipient has given the sender the electronic address without indicating a wish not to receive unsolicited CEMs and the CEM is relevant to the recipient's business.

Express Consent

Under CASL, if the sender of a CEM does not have implied consent, express consent is required to send a CEM. Since a request for express consent is considered to be a CEM, any such request must be sent either to a recipient from whom the sender has implied consent when the request for express consent is sent, or prior to July 1, 2014, the date on which the Act comes into force.

Note however that in order to ease the transition, CASL provides for a transitional provision pursuant to which consent will be implied from CEM recipients who share an

existing business or non-business relationship with the sender for the first three years after the Act comes into force. This will provide businesses with a longer opportunity to seek express consent from recipients with whom they share an existing business or non-business relationship.

CASL establishes certain prescribed information which must be included in any request for express consent, including the purpose for which consent is sought, certain contact information, and a statement that the recipient can withdraw his or her consent.

Next Steps

The key for your organization today is to begin to implement systems and procedures to make sure that you are ready when CASL comes into force. Consider these first steps for getting ready:

1. Determine if the electronic messages you send are caught by the scope of the law, keeping in mind the definition of a CEM: an electronic message that encourages participation in a business transaction or activity, regardless of whether there is an expectation of profit.
2. For all CEMs:
 - Determine which recipients are excluded from the consent and content, or only consent requirement, and from which recipients you have implied consent.
 - Request express consent, ensuring that you include the prescribed information, from any recipients

whose implied consent may expire, or use the opportunity before CASL comes into force or the transitional provisions to request the express consent of any potential recipients. Remember that any request for consent will be a prohibited CEM unless the message falls under an exclusion or you have implied consent following the coming-into-force of CASL.

3. Implement a record keeping process to determine which recipients have provided consent.
4. Ensure that every CEM includes the required content, including certain contact information and an unsubscribe mechanism, unless subject to an exclusion.

How Can We Help?

Above are a few tips for preparing your organization for CASL. At Dale and Lessmann LLP we are working hard to stay on top of this new legislation so we can help ensure that your organization is prepared when CASL comes into effect. We can work together with your organization to ensure that you are ready for the new legislation. For more information, please contact Chad Finkelstein at cfinkelstein@dalelessmann.com or Jordan Morelli at jmorelli@dalelessmann.com

Useful Links

- [Government of Canada site](#)
- [The Act and Regulations](#)
- [Information Bulletins](#)

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