

A Primer on Canada's Anti-Spam Law



Canada's Anti-Spam Legislation (“**CASL**”) came into force on July 1, 2014. Since then, businesses are not permitted to send commercial electronic messages (“**CEM**”) except in accordance with CASL. In particular, CEM may not be sent to recipients unless they have provided their consent to receive them. The possible consequences of sending a CEM without having the correct consent are fines and civil lawsuits.

Implied Consent

Where a business can make a connection between an email address and either (i) a purchase made by the holder of that email address within the previous 2 year period, or (ii) an inquiry made by the holder of that email address within the previous 6 month period, the person will be considered to have implicitly consented to receive CEM from the business.

Express Consent

CASL provides that a request for express consent to send CEM to a recipient may be presented in any form (i.e., email, website pop-up, in-store sign-up forms, contest participation ballots, etc.) but must contain each of the following:

- a) a description of the purposes for which consent is sought;
- b) the name of the business seeking consent (or the business on behalf of which the request is sent);
- c) the mailing address of the business seeking consent (or the business on behalf of which the request is sent);
- d) a telephone number **or** an email address **or** a web address for the business seeking consent (or the business on behalf of which the request is sent); and
- e) a statement indicating that the person whose consent is sought can withdraw their consent.

The consent request must provide an “opt-in” option (i.e., toggle boxes must not be pre-checked).

The contact information provided must be valid for at least **60 days** after the request is sent.

Express consent to receive CEM does not expire, and remains valid until it is withdrawn by the person having provided their consent.

Proving Consent

In each case where a business relies on either express or implied consent of a recipient to receive CEM, the business must be in a position to **prove** such consent. This is important because the business may face audits, inspections, penalties, claims, suits or other measures by the relevant authorities or individuals.

Proving consent requires demonstrating a clear connection between a given email address and a purchase or an inquiry (in the case of implied consent), or that consent was provided by a recipient in writing or verbally (in the case of express consent).

Proving that valid express consent has been obtained will also require proving, in each case, that the requirements described above with respect to a request for consent were respected.

Mandatory Content

Since July 1, 2014, all CEM (not only a request for consent!) must contain the following information:

- a) the name of the business sending the message (or, where sent by one business on behalf of another, the name of the business on behalf of which the message is sent, as well as a statement saying which business is actually sending the message on behalf of which other business);
- b) the mailing address of the business sending the message (or, if different, the mailing address of the business on behalf of which the message is sent);
- c) a telephone number **or** an email address **or** a web address for the business sending the message (or, if different, the business on behalf of which the message is sent); and
- d) an unsubscribe feature that allows the person receiving the message to unsubscribe from the mailing list. This may be in the form of a link to a website or in any other clear and simple form. Unsubscribe requests must be respected within **10 days**.

The contact information provided and the unsubscribe feature must remain valid for at least **60 days** after the message is sent.

Enforcement

On March 5, 2015, the Canadian Radio-television and Telecommunications Commission (the “**CRTC**”) issued a Notice of Violation under CASL against Compu-Finder, a Quebec-based corporate training company, ordering Compu-Finder to pay a penalty of \$1.1 million for four alleged violations of CASL.

Compu-Finder allegedly sent CEM without recipients’ consent and without including a properly functioning unsubscribe feature between July 2 and September 16, 2014. According to the CRTC, Compu-Finder accounted for 26% of all complaints

submitted to the Spam Reporting Centre for its industry sector. Compu-Finder's CEM were sent primarily to businesses, with a view to promoting training courses in topics such as management, social media and professional development. The complaints indicated that Compu-Finder's CEM did not contain offerings that were relevant to recipients.

The CRTC's first Notice of Violation clearly indicates that CASL applies and will be enforced against non-compliant business-to-business communications.

This widely publicized Notice of Violation also demonstrates that the CRTC is actively investigating complaints about violations of CASL, and will pursue enforcement.

Notices of violation have also been issued against prominent businesses, namely Porter Airlines and Plenty of Fish, each of which have entered into undertakings with the CRTC (a form of settlement) and agreed to pay fines.

The maximum penalty under CASL is \$1 million per violation by an individual and \$10 million per violation by a business. While penalties are established using factors outlined in CASL, including the nature of the violation, any previous violations, as well as other relevant facts, the CRTC enjoys significant discretion with respect to the assessment and application of penalties. The CRTC may also impose other sanctions or issue warnings.



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The content of this article is intended to provide general commentary only and should not be relied upon as legal advice.

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