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A Primer on Canada's Anti-Spam Law

Over the past 15 years, as a result of threats involving unwanted and misleading electronic communications, including the loss of productivity of businesses and individuals,¹ as well as growing concerns with respect to identity theft, phishing, spyware and viruses, several jurisdictions have implemented legislative restrictions on the types of conduct that may be adopted with respect to online advertising and correspondence.

Canada's Anti-Spam Law ("**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 much the same way as the *Controlling the Assault of Non-Solicited Pornographic And Marketing Act* (also known as the *CAN-SPAM Act*), adopted in the United States in 2003, CASL prohibits sending commercial electronic messages to recipients unless they have provided their **consent** to receive them. CASL imposes significant hurdles for businesses and individuals wishing to reach out to existing customers, potential customers and other connections over the internet and, as a result, it may well be the most severe legislation governing email and text message communication in any jurisdiction in the world.

The possible consequences of sending a CEM that is not compliant with CASL are fines and civil lawsuits.

It is important to consider the impact of CASL given that it has significant *extra-territorial* reach: CASL applies to any

computer system located in Canada that is used to either send or access a CEM. This means that any person or entity that sends a CEM from Canada or to recipients in Canada, must comply with CASL. As a result, even businesses located outside Canada that conduct business in Canada through electronic means must ensure that they are in compliance with CASL.

Many important features of CASL are outlined in this brief publication.

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 description of the purposes for which consent is sought;
- the name of the business seeking consent (or the business on behalf of which consent is sought);
- the mailing address of the business seeking consent (or the business on behalf of which consent is sought);
- a telephone number **or** an email address **or** a web address for the business seeking consent (or the business on behalf of which consent is sought); and
- 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).

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 enforcement 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 specific information prescribed by CASL as follows:

- 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);
- 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);
- 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
- 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.

Exemptions

Despite CASL's broad reach and significant impact, certain kinds of CEM are exempt from the requirement to obtain consent prior to sending the CEM or from *both* the consent as well as the content requirements applicable to CEM. The application of an exemption to a given set of circumstances must be evaluated on a case-by-case basis.

Some examples of CEM that are exempt from both the consent as well as the content requirements prescribed by CASL are messages sent in response to a request, inquiry or complaint, and messages where the sender and recipient have a "family" or "personal" relationship, as defined under CASL.

If implied consent can be relied upon, then the requirement to obtain consent prior to sending a CEM does not apply, but the content requirements still apply to the CEM itself.

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 on 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 (an online dating site), 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 has 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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1. Canada's Anti-Spam Legislation – FAQ for Businesses and Organizations, published by the Government of Canada; available at <http://fightspam.gc.ca/eic/site/030.nsf/eng/00304.html> (last accessed on May 29, 2015).

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

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