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Spam, Spammity Spam, wonderful Spam?

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The moniker "spam" for unsolicited and often indiscriminate electronic communications to multiple mailing lists, individuals, or newsgroups derives from a [famous sketch](#) in the British television comedy series Monty Python's Flying Circus. However, these days spam is no joke. It is a scourge on modern communications. Canada's Anti-Spam Legislation¹ (**CASL**) will be coming into force in three stages over the next four years:

1. on July 1, 2014, the majority of CASL including provisions relating to commercial electronic messages (CEMs), will come into force;
2. on January 15, 2015, provisions relating to the unsolicited installation of computer programs and cookies will come into force; and
3. on January 1, 2017, provisions relating to private rights of action under CASL will come into force.

What does this mean for you?

- Businesses and other organizations (including Crown Corporations when engaged in commercial activity), as well as individuals will need to comply with CASL when sending commercial electronic messages.
- There are steps that you may be able to take now to help ensure your compliance after CASL comes into force; that you cannot take after CASL comes into effect.

To What Does CASL apply? - What is a Commercial Electronic Message (CEM)?

CASL regulates the sending of CEMs. A CEM is a message sent by email, text, or via social network with its purpose or one of its purposes being to encourage participation in a commercial activity. This purpose can be gleaned from the content of the message, information on a website that is linked to in the message, or contact information provided in the message. Under CASL 'CEM' includes electronic messages that:

- offer, or advertise or promote the offer to purchase, sell, barter or lease a product, good, service, land or interest in land;
- offer, or advertise or promote the offer to provide a business, investment, or gaming opportunity; or
- promote a person, including the public image of a person, as being a person who does the above listed items or intends to do so.

¹ [*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 SC 2010 c.23 and its accompanying regulations \(formerly known as Bill C-28\).*](#)

It may be helpful to note that although all electronic messages with a commercial purpose are characterized as CEMs, CASL does not apply to all CEMs. For example, CASL does not apply where the CEM is:

- sent between employees, representatives, consultants, or franchisees of the same organization and the message concerns activities of that organization;
- sent from an employee, representative, consultant, or franchisee of an organization to an employee, representative, consultant, or franchisee of another organization and the message concerns activities of the recipient organization;
- a fax or voice message sent to a telephone account;
- sent in response to a request, inquiry or complaint or is otherwise solicited;
- sent to a person to satisfy a legal obligation, to provide notice of a right, or to enforce a right; or
- sent to a recipient with whom the sender has a personal or family relationship.

What does this mean for you?

First, determine whether or not electronic messages that you send are CEMs. Ask:

- Is there a commercial purpose to the message?
- Does this message encourage participation in commercial activity?

Second, determine whether or not those CEMs are subject to the compliance requirements. Ask whether the CEM fits under an exception to the compliance requirements.

How to Comply with CASL (see Figure 1 for a convenient flowchart for compliance)

Requirement 1: Satisfy Content Requirements

If you are sending a CEM after July 1, 2014, you must comply with the content requirements by:

- identifying the sender of the CEM
 - o If the sender and the person on whose behalf the CEM is being sent are not the same person, both individuals must be identified.
- providing the sender's contact information
 - o The contact information must include the sender's mailing address and the sender's telephone number, email address, or web address.
 - o The contact information that is provided must be valid and accurate for 60 days following the transmission of the CEM.
- including an unsubscribe mechanism
 - o The recipient must be able to easily and at no personal cost remove themselves from the sender's mailing list for future CEMs.
 - o If the mechanism operates by directing the recipient to a website or providing the recipient with an email address, then the website or email address must be valid for 60 days following transmission of the CEM.
 - o Once the sender of the CEM has received an indication that the recipient wishes to unsubscribe, the sender must without delay and no later than 10 days after the indication was sent give effect to the recipient's wishes.



What does this mean for you?

If you are sending a CEM and it is not exempt from CASL, make sure that it meets the content requirements by:

- including all of the necessary components;
- ensuring that the contact information will be valid for 60 days; and
- having an unsubscribe mechanism in place.

Requirement 2: Have Prior Consent

To comply with the consent requirements, you should obtain express consent from the recipient before you send the CEM by:

- clearly and simply setting out the purposes for which the consent is being sought;
- clearly identifying the person who is seeking consent;
 - o Where consent is being sought on behalf of another known person, that person must also be identified.
- providing contact information for the person who is seeking consent; and
- stating that consent can be withdrawn.

Consent can be given orally or in writing, but the onus of proving that consent was given is on the party relying on it. Therefore, it is wise to keep a record of when the consent was obtained, why it was obtained and the manner in which it was obtained.

Unlike the American CAN-SPAM Act, under CASL, express consent cannot be obtained through an opt-out mechanism. There must be some positive action by the recipient – silence or inaction will not constitute express consent nor will an unchecked opt-out box or a pre-checked opt-in box.

Although you should obtain express consent wherever possible, in some situations express consent is not required because an exception applies or because consent can be implied. Examples of such situations are where the CEM:

- is sent within 36 months of CASL coming into force to a recipient with whom you have an existing relationship that includes communication via CEM, and the recipient has not expressly withdrawn their consent;
- is a quote or estimate for the supply of goods, services, or property that is sent in response to a request by the recipient for a quote or estimate;
- provides information directly related to an employment relationship or benefit plan in which the recipient is currently involved or enrolled; or
- is the first just following a referral by an individual in an existing business relationship with the sender.



What does this mean for you?

Where it is possible and practical, request express consent from all of the members of your existing mailing lists.

- You can make these requests via email prior to July 1, 2014, **but following that date such requests will themselves be considered CEMs** and you will have to limit your requests to in person, via telephone, via fax, and via postal mail.
- If there is any question in the future as to your compliance with CASL, it will be up to you to prove that you have met the requirements – so, be sure to keep all of the records of express consent that you obtain.

If you are not able to obtain express consent, consider whether or not consent is required. Ask:

- Is this message subject to the consent requirements, or does it fit an exception?
- If consent is required, can consent be implied in this case?

What about Cookies?

Starting **January 1, 2015**, CASL will also regulate the installation of computer programs, including cookies. The legislation affects the installation of cookies on computer systems located in Canada as well as the installation of cookies by persons in Canada or directed by persons in Canada. Cookies should only be installed where the owner or authorized user of the computer system has expressly consented to their installation. In requesting express consent to install cookies, you should clearly and simply:

- explain the purpose(s) for which consent is being sought;
- identify the person seeking consent or the person on whose behalf consent is being sought; and
- describe, in general terms, the function and purpose of the cookie to be installed.

CASL also provides that where a person's conduct is such that it is reasonable to believe that they consent to the installation of the cookies in question, they will be considered to have expressly consented to the installation. However, the person who is relying on the consent has the onus of proving it.

What does this mean for you?

If your website uses cookies, implement a mechanism whereby all of the required information is clearly disclosed and after reading the disclosure, the user can expressly consent to the installation of cookies on their system.

If such a mechanism is not feasible for your business, ensure that the required information is clearly and prominently displayed on your website such that a person who continues to use your site after encountering the information is more likely to be considered to have consented to the installation by their conduct.

What happens if you don't comply?

The Canadian Radio and Telecommunications Commission (CRTC) has the statutory power to enforce compliance with CASL – including the power to impose significant administrative monetary penalties. The maximum administrative monetary penalty that can be imposed by the CRTC is \$1 million per violation for an individual and up to \$10 million for businesses and other organizations. CASL also provides that designated persons may apply to the court for an injunction to stop spam.



Starting **January 1, 2017**, private rights of action will be available to businesses and individuals to provide compensation for breaches of CASL. Victims of spam can apply to the court and may be awarded compensation for damage or expense incurred as a result of a breach of CASL as well as compensation for a mere breach of CASL (regardless of damages caused). Compensatory awards for merely breaching CASL can reach a maximum of \$200 for each breach, up to a maximum of \$1 million per day. Because individual damage or expense resulting from a violation need not be proven for a penalty to be imposed, CASL violations are likely to attract class action lawsuits.

Act now!

Time is very short to ensure that sufficient protocols and safeguards are in place for the beginning of July. Businesses, organizations, and individuals must start making the necessary changes now to ensure that they are compliant. Otherwise, they may be subject to enforcement action, including significant monetary penalties.

For more information, please contact [Lisa Chamzuk](#) at 604.631.6732 or [Allison Reed](#) (Articled Student) at 604.631.9192.

Further Reading:

[Opt-in not an option: How to comply with the new anti-spam law](#)

[New anti-spam laws target a safer online world](#)

[Link: Canada's Anti-Spam Legislation](#)

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Figure 1. CEM Compliance Tree

