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Canada's Anti-Spam Laws and Implications for the Health Industry

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OVERVIEW

1. What is Canada's Anti-Spam Legislation and how will it apply to health industry clients?
2. What are the key requirements?
3. What exemptions will apply?
4. What are the penalties for failing to comply?
5. How do health industry clients prepare for CASL?

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) Spam 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)
- Website for detailed information: www.fightspam.gc.ca
- Fundamental underlying principle - consent

What is CASL?

- CASL received Royal Assent in December 2010
- CRTC has regulation making powers under CASL, as well as certain enforcement and other regulatory powers
 - CRTC's Electronic Commerce Protection Regulation published in March 2012
 - Rules on the form and content of a commercial electronic message (CEM) and requirements for express consent

What is CASL?

- Information Bulletins issued under the CRTC Regulation
 - 2012-548 – Guidelines on the interpretation of the CRTC Regulation
 - 2012-549 – Guidelines on the use of toggling as a means of obtaining express consent under CASL
- CRTC will run the spam reporting centre

What is CASL?

- On December 4, 2013, Industry Canada issued its Electronic Commerce Protection Regulation
 - Defines and clarifies various exemptions under CASL (i.e., “family relationship”, “personal relationship” and “existing non-business relationship”)
 - Prescribes requirements where consent obtained on behalf of a third party

What is CASL?

- Majority of CASL comes into force July 1, 2014
 - Transition period is not as long as anticipated
 - Window of opportunity to become compliant is short
- January 15, 2015 – in force date for provisions related to computer programs
- July 1, 2017 – in force date for private right of action

Will CASL apply to my organization?

- Anti-spam provisions are very broad
- CASL has the potential to impact any individual or organization in Canada that sends electronic messages (i.e. email, text, sound, voice, image) to an electronic address (i.e. business, consumer, individual)
- Threshold issue – is it a commercial electronic message?

2. Key Requirements – Commercial Electronic Messages

- General prohibition against transmitting a commercial electronic message (“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

2. Key Requirements – CEMs

- “Electronic message” - a message sent by any means of telecommunication including a text, sound, voice or image message
 - i.e. email, text, instant message, tweets, etc.
- “Electronic address” - an address used to receive an electronic message, including an email, instant messaging, phone or similar account

2. Key Requirements – CEMs

- “Commercial” – an electronic message which, having regard to the content (or links to web content), it would be reasonable to conclude that its purpose or one of its purposes is to encourage participation in “commercial activity”, including:
 - An offer to purchase, sell or lease goods or services
 - An offer to provide a business, sell or lease investment or gaming opportunity
 - Advertising or promotion of these activities or of a person carrying out or intending to carry out these activities

2. Key Requirements - CEMs

- Commercial activity
 - Any transaction, act or conduct or regular course of conduct that is of a commercial character, whether or not done in expectation of profit
- No general carve out for not-for-profits, charities and volunteer associations

2. Key requirements - CEMs

- Type of entity not necessarily determinative - need to consider particular activity
 - Further guidance from Industry Canada (FAQs)?
 - Same approach as under PIPEDA?
 - Procurement of goods and services
 - Business development initiatives
 - Related business entities - joint ventures, research, shared service organizations, voluntary associations, charitable organizations and foundations

2. Key Requirements – CEMs

- Consent requirements
- Information requirements
- Unsubscribe mechanism

2. 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
- Onus of proving consent rests with sender (due diligence)

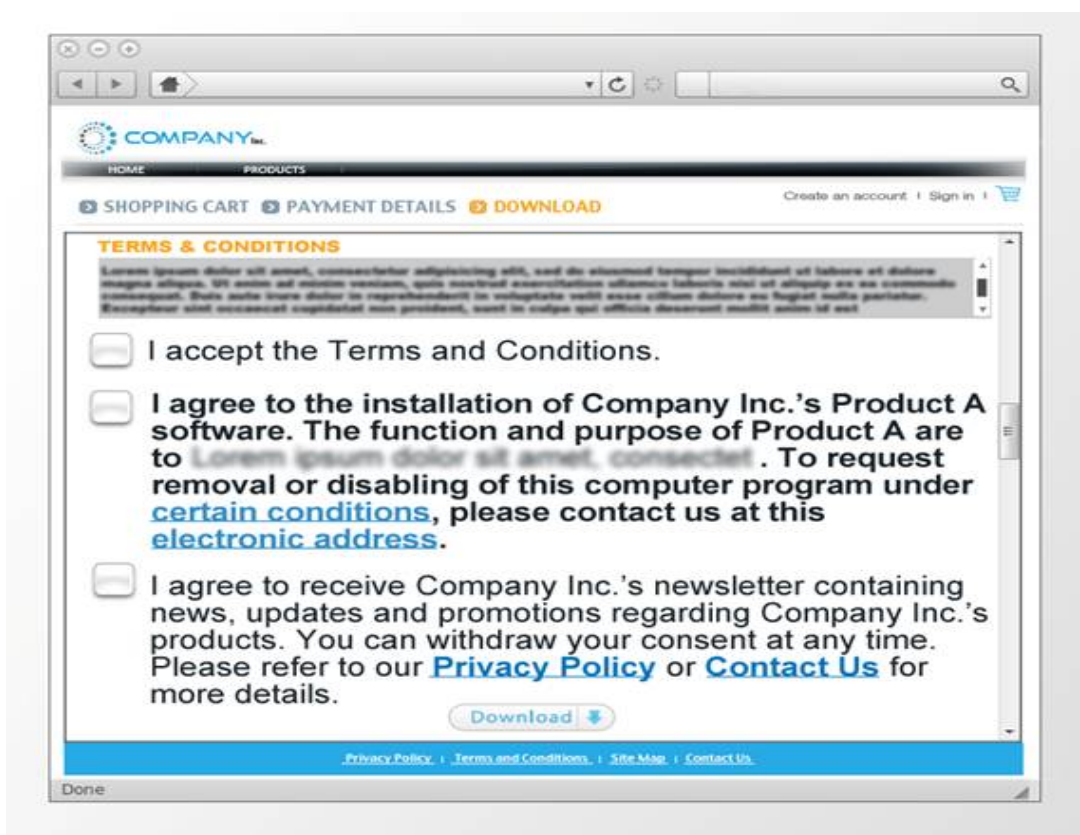
2. Express Consent

- 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)

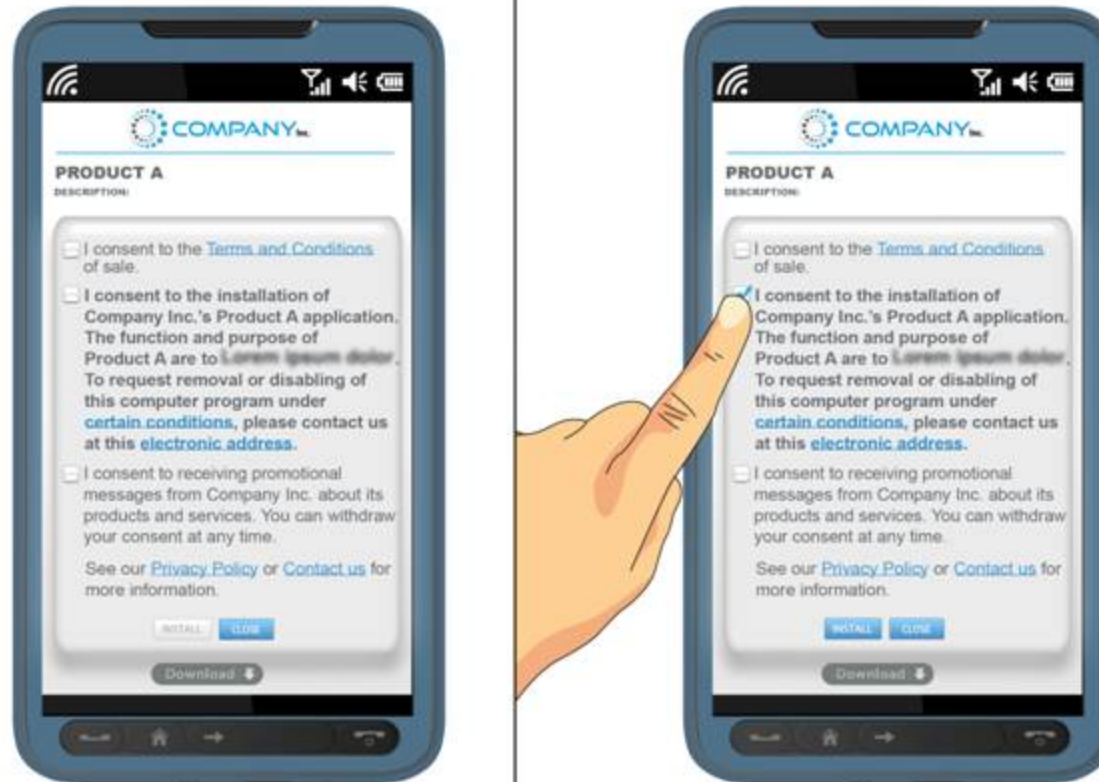
2. Consent Requirements

- Express consent must also be sought for:
 - alteration of transmission data in electronic messages (s. 7)
 - installation of a computer program on another person's computer in the course of a commercial activity (s. 8)
- Express consent must be “sought separately” for each act contemplated under CASL
- Must be distinct / cannot be bundled with terms and conditions of use or sale or other types of consent

2. Consent Requirements – (Example from CRTC 2012-548)



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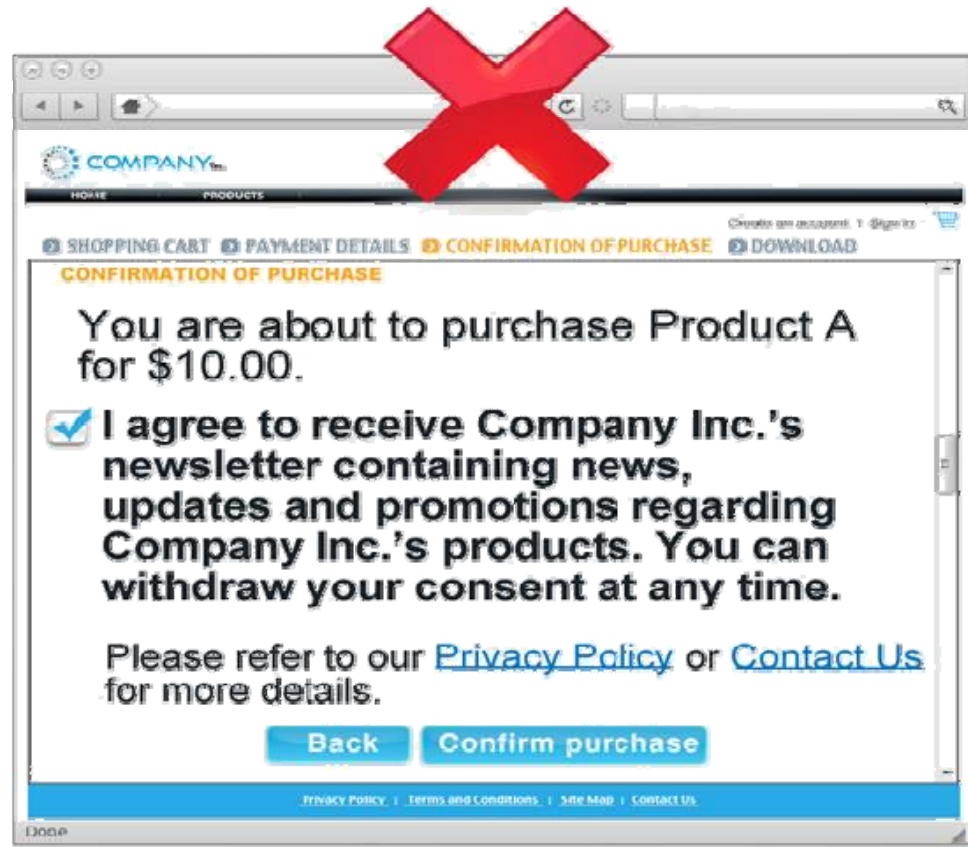
2. Consent Requirements to send CEM (CRTC Regulation)

- 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

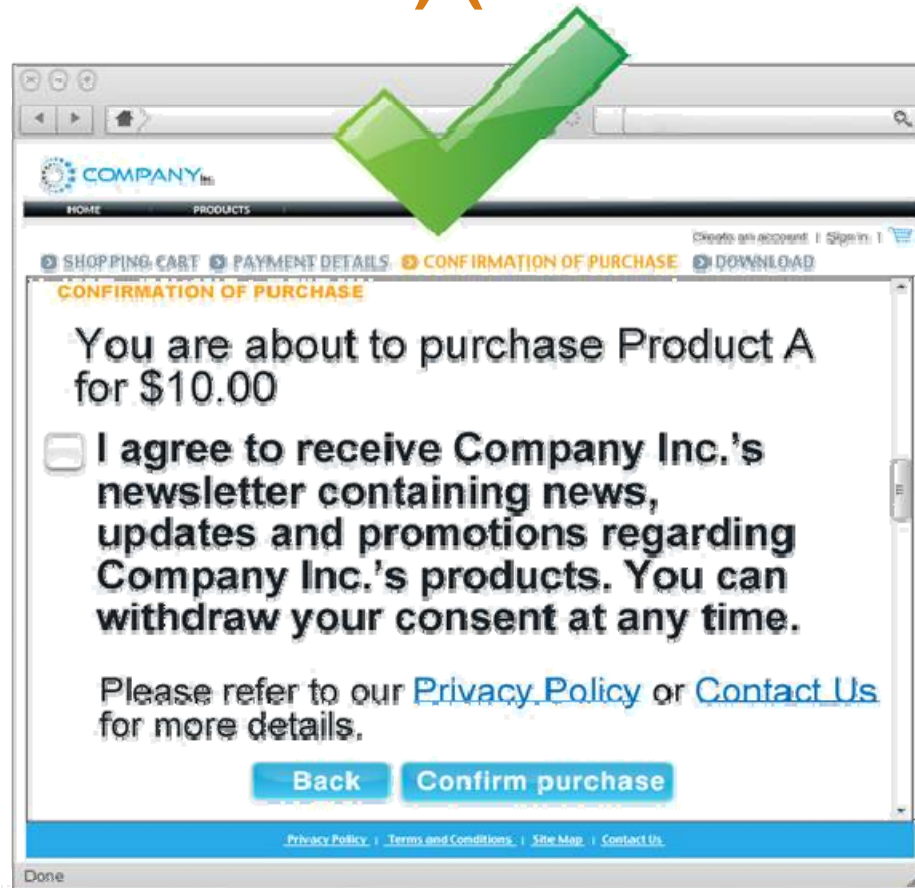
2. Consent Requirement to send CEMs (CRTC Regulation)

- 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
 - Oral consent – verified by independent third party or unedited audio recording maintained (CRTC 2012-548)
 - Written consent – may be a paper based form or recorded in an electronic database (consider recording date, time, purpose and manner of consent in database) (CRTC 2012-548)

2. Consent Requirements - Examples (CRTC 2012-549) (pre-checked box)



2. Consent Requirements - Examples (CRTC 2012-549) (checked box)



A screenshot of a web browser displaying a 'CONFIRMATION OF PURCHASE' page for 'COMPANY Inc.'. The page features a navigation bar with 'HOME' and 'PRODUCTS', and a secondary navigation bar with 'SHOPPING CART', 'PAYMENT DETAILS', 'CONFIRMATION OF PURCHASE', and 'DOWNLOAD'. The main content area shows the text: 'You are about to purchase Product A for \$10.00'. Below this is a consent checkbox that is checked, with the text: 'I agree to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time.' At the bottom of the consent section, it says: 'Please refer to our [Privacy Policy](#) or [Contact Us](#) for more details.' There are two buttons: 'Back' and 'Confirm purchase'. A large green checkmark is overlaid on the top right of the page. The footer contains links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'.

2. Consent Requirements - Examples (CRTC 2012-549) (typing email address)



A screenshot of a web browser displaying a website for "COMPANY Inc.". The page features a navigation bar with "HOME" and "PRODUCTS" links, and a search icon. A large green checkmark is overlaid on the top right of the browser window. The main content area is titled "SHOP" and includes a sidebar with "Product A", "Product B", and "Product C" links. The central promotional banner reads "40% OFF! ALL PRODUCTS 40% off for a limited time only!". Below this, a text block states: "Enter your email below to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time." It also includes links for "Privacy Policy" and "Contact Us". At the bottom of the form is an input field labeled "your email" and a "Submit" button. The footer contains links for "Privacy Policy", "Terms and Conditions", "Site Map", and "Contact Us".

2. Consent Requirements - Implied Consent

- Consent may be implied where:
 - there is an “existing business relationship” or “existing non-business relationship”
 - recipient has “conspicuously published” email address (i.e. company website) and message is relevant to recipient’s business role
 - recipient has disclosed email address to sender (i.e. provided business card) if message is relevant to person’s role or duties in business or official capacity

2. Implied Consent – Definition of “existing business relationship”

- In the two years prior to the sending of the CEM, the recipient had a business relationship with the sender arising from:
 - The purchase or lease of a product, goods, a service, land or an interest or right in land from the sender
 - Acceptance of a business, investment or gaming opportunity offered by the sender
 - A written contract is entered into relating to any matters not listed above
 - Six months before the message is sent, the sender received from the recipient an inquiry or application about one of the items above

2. Implied Consent – Non-Business Relationship

- Consent to sending of CEM implied where there is an “existing non-business relationship”
 - Sender is registered charity, political party or candidate for office, and recipient made donation or performed volunteer work in last two years
 - Sender is club, association or voluntary association, and recipient has been a member in the preceding two years

Transitional Period

- CASL provides for a three year transition period after being declared in force, during which time there will be an implied consent for parties who are already in an existing business or existing non-business relationship

2. 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

2. 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

3. Who and what activities are exempt?

- Some types of CEMs are excluded from the application of CASL
- Some CEMs are excluded from the consent requirements, but are still subject to information requirements

3. What CEMs are Excluded?

- Between individuals who have a “personal” or “family” relationship
- To a person who is engaged in a commercial activity if it consists solely of an inquiry or application related to that activity
- Internally within a business, where the CEM concerns the activities of the business
- Between businesses, if they have a relationship and the message concerns the activities of the organization to which it is sent

3. What CEMs are Excluded?

- Those enforcing a right or legal obligation
- From a registered charity where the message has as its primary purpose raising funds for the charity
- Political party, organization or candidate to solicit contributions
- Interactive two-way voice communications
- Faxes or voice messages sent to telephone accounts

3. What CEMs are Exempt from Consent?

- Provision of a quote or estimate in response to request by the recipient
- Warranty information, product recall or safety or security information to a recipient who has purchased goods or services
- Provision of factual information about a product or service offered under a subscription or similar basis
- Provision of information about employment or benefit plan in which recipient is involved
- Delivery of product or updates pursuant to contractual terms
- Response to a referral from someone with an existing business relationship, non-business relationship, family or personal relationship, but only for the first CEM
- → **NOTE** – must still provide contact information and unsubscribe

4. What are the penalties?

- Administrative monetary penalties (“AMPS”)
 - 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

4. What Penalties Apply?

- Economic disincentives, rather than criminal sanctions to protect electronic commerce
 - Administrative Monetary Penalties
 - 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
 - Domestic and international co-operation
 - Prosecution of Offences (Anti-Spam Reporting Centre)

5. How do You Prepare for these Changes?

- Conduct an electronic message audit to determine what activities are captured –
 - what CEMs you send, to whom, how and why
- Determine form(s) of consent you will rely upon and identify what internal resources, training and technology is necessary to support these activities
- Review technology and software capabilities to ensure that they satisfy prescribed requirements (i.e. information requirements, unsubscribe)

5. How do You Prepare for these Changes?

- Before in force date – turn your implied consent into express consent for each purpose for which it will be used (business communications, marketing)
- Build consent to the receipt of CEMs into your go forward process (i.e. application forms, mailing lists, agreements)
- Review and update your website privacy policies and terms of use
- Do some database housekeeping – ensure database records consent status (implied or express)

5. How do You Prepare for these Changes?

- Review your contracts with third parties – require CASL compliance
- Internal due diligence – establish procedures to monitor compliance and internal ongoing education of employees
- Consider creating an employee email policy to reduce the amount of personal email sent through business email addresses
- Consider buying insurance

5. How do You Prepare for these Changes?

- Many of the requirements are IT dependant
- Now is the time to prepare to obtain consents electronically
- Once CASL is proclaimed into force it will be an offence to send an email to get consent

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