

Impact of Canada's Anti-Spam Legislation on Long Term Care Homes

By Kathryn Frelick



The federal government has enacted anti-spam legislation, unofficially known as "Canada's Anti-Spam Legislation" or "CASL." Although this legislation was passed by Parliament in late 2010, it is not yet in force, pending the adoption of regulations to clarify certain obligations under the new legislation.

In very general terms, CASL prohibits the sending of unsolicited commercial electronic messages, which include text messages and emails, without receiving express or implied consent from the recipient. It also prescribes certain information and form requirements for commercial electronic messages, including a mandatory "unsubscribe" mechanism.

While the anti-spam provisions have attracted most of the public's attention, CASL also contains a number of other provisions to address conduct that discourages the use of electronic technologies by undermining confidence in their use, increasing the cost of using these technologies, or compromising privacy and security of confidential information. These include malware and spyware provisions, provisions prohibiting the alteration of transmission data, amendments to the *Personal Information Protection and Electronics Documents Act* relating

to harvesting of electronic addresses through the use of a computer, and amendments to the Competition Act that specifically address false and misleading representations in electronic messages.

Long term care homes need to be concerned about this legislation because of the breadth of the legislation and because of the significant penalties and liability associated with violations of CASL. As LTC homes rely more heavily upon electronic communications, including for fundraising purposes, compliance with CASL will require changes to processes, systems and technologies. As a result, it is important to look at these issues now.

Commercial electronic messages

The anti-spam provisions of CASL affect a wide variety of "electronic messages," which are defined as messages sent by any means of telecommunication, including text, sound, voice or image messages.

Subject to certain exceptions, CASL prohibits a sender from transmitting a "commercial electronic message" (or CEM) to an electronic address without the express or implied consent of the recipient. Certain information requirements in the message must also be met, for example, information about the sender and an unsubscribe mechanism.

The anti-spam provisions of CASL apply only to CEMs. A message is defined by CASL as being commercial in nature if it encourages "participation in a commercial activity," such as a message that offers to purchase or sell goods or services; offers to provide a business,



investment or gaming opportunity; or advertises or promotes any such activities. "Commercial activity" is defined as any conduct that has a commercial character, whether or not it is carried on for profit. Thus, this definition is purposely broad.

A challenge for LTC homes will be to determine which of their activities and electronic messages, if any, concern "commercial activity." It is yet to be seen how these definitions will be interpreted. It is likely that certain activities will be considered to have commercial character and therefore emails encouraging participation in those activities will be deemed commercial electronic messages.

Consent requirements

Subject to specific exceptions, the intended recipient of a CEM must provide prior consent to the sending of the message, including for the purposes of obtaining that consent. The CRTC has finalized regulations which specify the required form and content of CEMs. CASL requires specific "opt in" consent.

CASL includes provisions for implied consent between parties that have an existing business or

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non-business relationship. That said, the implied consent provisions are quite specific and have time frames associated with them that must be tracked. As a result, LTC homes will need to look carefully at the type of consent they use.

Exemptions

CASL sets out circumstances in which neither the consent requirement nor the information requirements are applicable. Industry Canada has circulated draft regulations which are intended to clarify and define the scope of exemptions under the Act. These are intended to reduce the chance of catching legitimate business activity. The full scope of these exemptions will be known once the draft regulations are finalized.

Penalties

The consequences of non-compliance with CASL are serious. The statute provides for a wide range of remedies, including fines of up to \$1 million for an individual and up to \$10 million for corporations. Corporate officers and directors can be held personally liable for corporate violations, and employers can be held liable for violations committed by their employees or agents acting within the scope of their employment or authority.

In addition, there is a private right of action created by CASL. The Act allows any business or consumer to take civil action directly against anyone who violates the Act. CASL contemplates that a litigant could recover its actual damages and additional amounts that could amount to as much as \$1 million per day.

Business strategies

LTC homes should consider taking the following steps to prepare for CASL:

- Conduct an inventory of their activities to determine which activities may be captured by CASL.
- Determine what form(s) of consent is (are) advisable for various activities, and identify what internal resources, training and technology is necessary to support these activities.
- Review and update website policies, terms and conditions to ensure proper consent processes for the collection of personal information and CEMs.
- Review and update any forms used for obtaining express consent to send CEMs (including emails or newsletters).
- Review technology and software capabilities, forms and agreements to ensure that they satisfy prescribed requirements.
- Examine and update procedures for documenting and tracking the receipt of consent.
- Ensure that CEMs contain the prescribed information, including an unsubscribe mechanism that meets the requirements of the Act.
- Ensure that any outsourcing agreements with third parties for electronic marketing or other functions require compliance with CASL. **LTC**



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