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## Canada's Anti Spam Legislation: How will you market post July 1, 2014?

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### **1. Background to the Legislation:**

The federal anti spam legislation was passed in 2010. The legislation has no official short title and is being referred to as "Canada's Anti Spam Legislation" or "CASL". On December 4, 2013 the federal government announced that CASL will go into effect on July 1, 2014.

Among other things, CASL prohibits a sender from transmitting a commercial electronic message ("CEM") to an electronic address, unless:

- a) the intended receiver consents to its receipt, and

b) the message includes certain prescribed information.

CASL applies for CEMs sent business to business, business to consumer or between individuals, and the onus is on the sender to establish that he/she/it has the consent of the recipient to send the recipient a CEM.

“Commercial” is defined in CASL and refers to an electronic message that “encourages participation in commercial activity”. Commercial activity” means any transaction, act or conduct or regular course of conduct that is of a commercial character, whether or not done in expectation of profit - so that not for profits and charities (with one exemption for registered charities’ fund raising) - are also subject to CASL. “Electronic message” is technology neutral so this covers CEMs in any form including email as well as social media.

Under CASL both the CRTC and Industry Canada have regulation and enforcement powers.

Since 2010 the CRTC has issued:

a) the “Electronic Commerce Protection Regulation (CRTC)”, published in March 2012, which provides the rules for among other matters, the content for seeking consent to send CEMs to obtain express consent and unsubscribe mechanisms;

b) two Information Bulletins under the CRTC’s 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; and

c) some commonly asked questions and answers were posted by the CRTC recently on its website to help provide further guidance to the public.

The CRTC will operate the spam reporting centre for complaints by the public.

On December 4, 2013 Industry Canada issued its Regulation giving us added definitions and some exemptions from CASL. These were long awaited and contain the final rules to help businesses organize for compliance for July 1, 2014 - which is not a long time to prepare.

Links to these resources are set out below.

## **2. Get Consent or Face Possible Consequences:**

Absent express consent, the sender of the CEM should either fit inside the rules for implied consent or an exemption to CASL.

The penalties for a breach of CASL can mean monetary penalties of up to \$10 million, personal liability on officers and directors, vicarious liability for the conduct and omissions of employees and agents, and as of July 1, 2017 the possibility of being sued in a class action. This puts a heavy burden on businesses in Canada to work rapidly for compliance.

## **3. So How Will Businesses Be Able to Market After July 1, 2014?:**

Given the foregoing how are Canadian businesses going to market by sending CEMs to existing customers or new targets once CASL goes into effect? Once CASL is in force on July first, it is too late to send an email to collect consent.

Remember that CASL consent is not consent for compliance with privacy statutes for use of personal information to send the individual marketing materials. You need two separate consents for both privacy law and CASL to be able to (i) use personal information to market to individuals and (ii) to market by electronic means.

The following is a general discussion of possible means to obtain express or implied consent for CASL, or exemptions from obtaining consent, for your marketing efforts. Some of the phrasing in the Act and Regulations are open to a variety of interpretations, and as such caution may be needed before relying on too broad a reading.

The following information is general in nature and needs to be reviewed with your legal counsel to meet your business's individual needs and operations:

**a) Express Consent:**

Before July 1, 2014 businesses may be able to obtain express consent from their existing customers and other parties on their contact lists. Just organizing a contact management data base and sending out a request for consent to you providing ongoing newsletters, conference invitations, event invitations, marketing information and other "commercial" activities, is daunting. Then you also need to establish how and when the recipient consented to giving you their consent, such that in the event of a complaint, you are able to prove you have consent.

For example, you may want to have in your paper or electronic credit application at the start of the transaction, the information needed to obtain express consent to deal by electronic means for the transaction. Or you might include consent to electronic communications to receipt of your marketing materials in your warranty registration card for products sold or leased to the end user customer by your dealer or distributor.

**b) Implied Consent Generally:**

CASL provides that if the parties are in an "existing business relationship", then absent an unsubscribe to receipt of your CEMs, you have implied consent to sending your existing customer CEMs for the length of the relationship, plus two years. "Existing business relationship" is defined in section 10(10) of the Act to mean a relationship arising from the purchase or lease of a product or service or an interest in land, or a business or investment opportunity within two years before the day on which the CEM was sent.

This same section also provides implied consent under an "existing business relationship" that lasts for six months after you send the CEM to the recipient about an enquiry or application concerning a purchase or lease of a product or service or a business or investment opportunity.

The hard part of this is tracking when the business relationship ends, and diarizing to ensure that the contact does not get further CEMs from your marketing data base following two years or for six months from that respective end date.

Hence the work of many businesses now to convert this implied consent into express consent before July 1, 2014.

**c) Implied Consent in the Transition Period:**

Section 66 of CASL has a transition provision that will grant a longer period for implied consent for your "existing business relationships" until July 1, 2017, unless the person unsubscribes or otherwise withdraws consent to getting your CEMs. This means you need to diarize for the first half of 2017 for work to be completed by July 1, 2017 to ensure that parties who are two years

passed the end of their “existing business relationship” with you, stop getting your marketing CEMs.

**d) Oral Consent:**

If you attended a CFLA event, networked and collected some business cards, you may have obtained oral consent for you to follow up and send your new contact your marketing or other CEMs. Oral consent is fine, but you have the burden of establishing proof of consent if there is a complaint. As such your IT systems should be able to record and make searchable your note to file as to when you got the contact’s oral consent.

**e) Internet Ads and Toggle Consent:**

You could post your marketing materials on your website and invite parties to contact you for more details. In the process of asking for more information, you could enable a click box on your site to collect express consent to you sending the materials to them by electronic means.

The CRTC Guideline 2012-549 shows examples of collecting consent by use of a toggle button on a smart device or on a website to let the customer click the box to show consent. Other examples include having the customer enter their email address as a means of showing their consent to receipt of CEMs from you. The customer has to click or insert information to show their positive step to consent; you cannot pre-populate these fields.

And you need to be able to store this consent in your IT data base with a search function to allow you to find that click consent in the event of a complaint.

**f) One Time Reply to a Request for Information:**

Section 6(6) of CASL allows you to respond once to an enquiry for a quotation or estimate related to the sale of a good or service, or the sale or an interest in land from a third party without obtaining consent. For example, someone asks you to send them your price for your product or its technical specifications. You will be able to respond, but you will also want to use that response as a means to collect their express consent to dealing with you by electronic means for added communication. Your consent form with the mandatory content could be built into your reply email giving a link or toggle button to seek click consent.

**g) Implied Consent for “Business Card” Contacts:**

This is likely the exemption that will be most used in business to business marketing.

Section 10(9)(b) of CASL provides there is implied consent to the receipt of CEMs where the recipient person has conspicuously published their electronic address and that posting is not accompanied by a statement that he or she does not want to receive unsolicited CEMS at this electronic address. To qualify, the message must be relevant to the recipient’s business, role or functions. This section does not refer to the person having to be in an “existing business relationship” with your company.

For example, if you plan to market your 2015 model year vehicles to managers of vehicle fleets, you may be entitled to rely on this “business card” implied consent to send such fleet managers at target companies CEMs about these vehicles using their business email address, as long as they have not posted a notice against receiving CEMs or already unsubscribed from receiving your emails. But if you plan to market vacation travel, then your CEM would not qualify for this exemption, since your vacation product is not related to the fleet manager recipient’s business role.

#### **h) Parties in a Business Relationship:**

Section 3(a)(ii) of the Industry Canada Regulation provides a bit of room to maneuver. It provides that you may send a CEM to an employee, representative, consultant or franchisee at another organization if the organizations have a relationship and the message concerns the activities of the organization to whom the message is sent.

This section does not use the defined phrase, “existing business relationship”, but rather states that the organizations “have a relationship”. How far one might push this phrase is not clear. For example, you might be able to send marketing CEMs to business contacts at other CFLA member businesses that have a relationship through common membership, assuming your CEM concerns the recipient’s business activities.

#### **i) The Fall Back Position:**

If you cannot fit within one of the foregoing or another portion of CASL, then your fall back position for marketing after July 1, 2014 will be to return to two way voice communications, such as phone calls or Skype, faxes, and recorded messages sent to phone accounts, which are exempted from CASL’s consent requirements by section 6(8).

And you can, at great expense, return to the use of Canada Post to mail paper materials.

Now is not too soon to work with your marketing department and IT departments to determine what forms of electronic means are used to send out your marketing materials and work to obtain and record express and implied consent with the capacity to retrieve this information. The IT work is not to be underestimated. Your IT department needs to understand your marketing methods and then consider how to enable:

- a) tracking of when you got express consent;
- b) when any time limits in implied consent rules end, such as the transition period or the two year limit after the business deal was completed;
- c) how the consent was obtained, such as express consent in your credit application or from your click box on your website, or obtained orally by exchange of business cards at a networking event;
- d) enable your unsubscribe mechanism to ensure that the recipient’s request is honoured within ten business days of their unsubscribe message to you; and
- e) enable your system to be searchable to be able to prove the foregoing in the event of a later complaint.

#### **4. Links to Resources:**

- a) The CRTC’s webpage provides links to the Act, its Regulations, the two Guidelines and the frequently asked questions and answers:

<http://www.crtc.gc.ca/eng/casl-lcap.htm>

- b) The federal government’s Fight Spam webpage with links to other resources, including the role of the federal privacy office and the Competition Bureau in enforcement of CASL:

<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>

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