

# CASL

## What you need to know about Canada's new Anti-Spam Legislation

Jason McLinton, Senior Director, Retail Council of Canada &  
Scott Smith, Director, Canadian Chamber of Commerce  
January 29, 2014



# Format for this webinar

- Will focus on Commercial Electronic Messages
- Who does the law apply to?
- Why Now?
- Key Concepts
- Transition
- Preparing for compliance



# Who does the law apply to?

- Essentially – everyone
  - Corporations, non-profits, individuals, colleges & universities, trade associations, hospitals, incorporated & unincorporated businesses, etc.
- The exemptions are for registered charities & political parties who are seeking donations



# CASL - Why now?

- Public consultations on spam & malware began in 2004
- Legislation passed in 2010 but did not come into force until regulations were finalized
- Electronic Commerce Protection Regulations adopted in 2013 (CRTC enforcement enabling regulations adopted in 2012)
- Legislation takes effect on July 1, 2014
- Waiting for enforcement guidelines from CRTC



# Key Concepts

- Commercial Electronic Messages – CEMs
- Consent – You can't send a CEM without it
- Prescribed information – Information that must be in every CEM you send
  - Including an unsubscribe mechanism
- Records – Burden of proof is on you
- Penalties – Administrative & civil



# What is a commercial electronic message?

## CEM defined in the Act as:

- **Meaning of commercial electronic message**
- (2) For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that
  - (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
  - (b) offers to provide a business, investment or gaming opportunity;
  - (c) advertises or promotes anything referred to in paragraph (a) or (b); or
  - (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.
- **Other commercial electronic message**
- (3) An electronic message that contains a request for consent to send a message described in subsection (2) is also considered to be a commercial electronic message.

# What does that mean?

- If you are sending a message that entices someone to buy something – it's a CEM
- If you are sending a message to ask someone to give you permission to send them a CEM – it's a CEM



# What does that mean?

- Email, SMS Texts, instant messages & social network messages are all electronic messages
- The majority of B2C messages are commercial
- Many B2B messages are commercial





# What does that mean?

- The CRTC determines what is commercial content – the message, the intent, the links all factor in the decision
- If it's a CEM, you must have consent to send it or fit into one of the exemptions in the regulations
- There are no exceptions to what is considered a CEM – if it has commercial content, it's a CEM... but there are exemptions to when the rules apply



# What are the exemptions?

- Even if a message is a CEM, you will not need consent to:
  - Send a quotation upon request
  - Complete a transaction
  - Provide warranty, recall or safety information
- In all of these cases you **must** still include the prescribed information & an unsubscribe mechanism



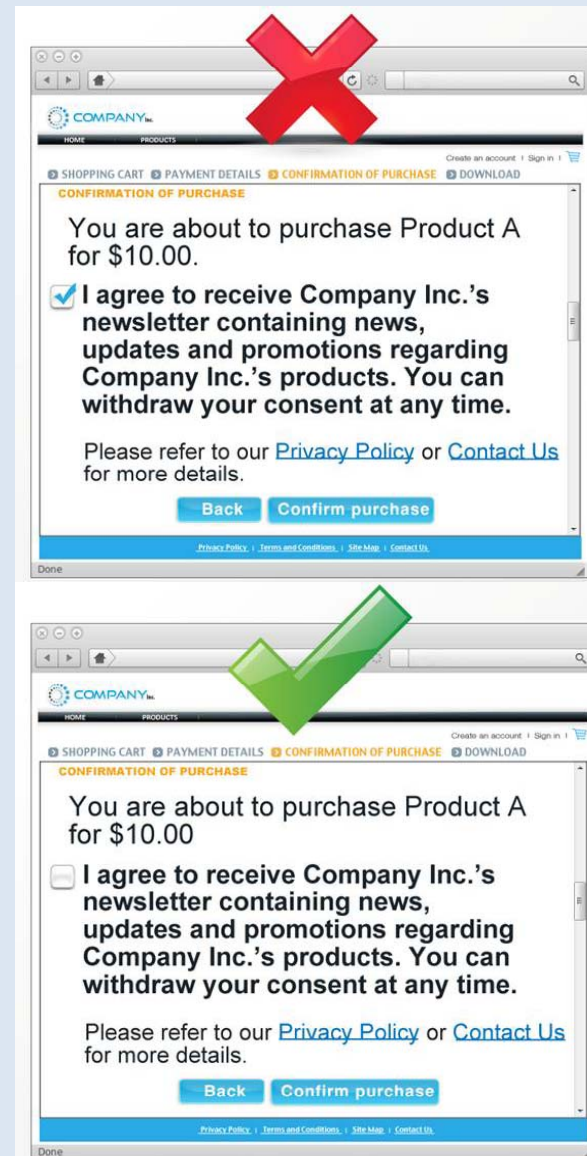
# What is consent?

- Anyone who receives a CEM from you must have given you their permission to do so ahead of time
- There are two types of consent:
  - Express, meaning someone actively gave you permission to send them a CEM
  - Implied, meaning it would be reasonable to conclude you have someone's permission to send them a CEM based on prior relationships
- You cannot send an electronic message asking for this permission after July 1

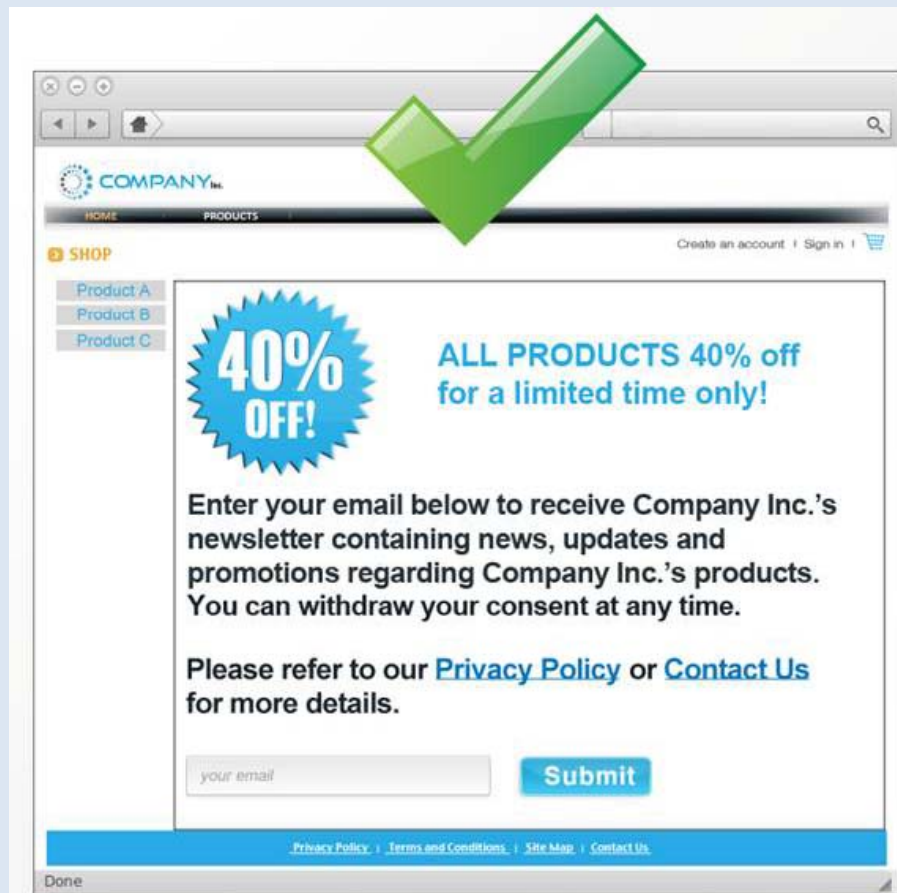


# Express Consent

- An active, positive indication that someone wishes to receive CEMs
- Can be in the form of:
  - Sign-up on a website
  - Response to a contest or coupon offer
  - Sign-up at point of sale
  - Sign-up over the phone
- **Cannot** “pre-toggle,” **must** disclose prescribed info & **must** maintain records



# Another example for acquiring express consent



# How not to acquire consent X Coupons, Draws or Surveys

40% Off!!

Enter your email below to redeem your free gift certificate for 40% off and to qualify for our grand prize draw of over 1,000 prizes.

\_\_\_\_\_ [SUBMIT]



## How not to acquire consent

### X Follow-up emails to coupons, etc.

Please find your coupon for 40% off attached. You have also been entered in our grand prize draw for a chance at one of over 1,000 prizes!!

I agree to receive Company Inc.'s newsletter. You can withdraw your consent at any time.



# Implied Consent

- A Family relationship
  - Related by marriage or parent child relationship where direct, two-way communication can be demonstrated
- A Personal relationship
  - Evidence of sharing of interests through direct two-way communications over a period of time
- A business or non-business relationship
  - Several exemptions from section 6 of the Act





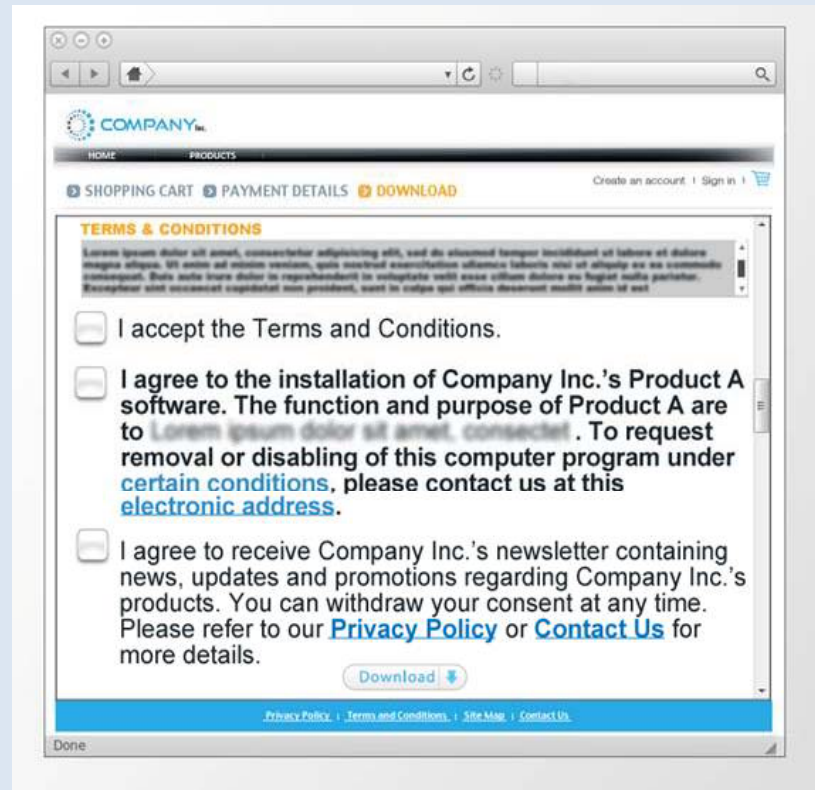
# Business relationship exemptions

- Even if a message is a CEM, CASL does not apply (consent will not required) for messages sent:
  - Within an organization
  - Between organizations that have a relationship
  - To satisfy a complaint
  - To respond to an inquiry
  - To satisfy a legal obligation
- That also means there is no requirement to include prescribed information or unsubscribe mechanism for these types of messages

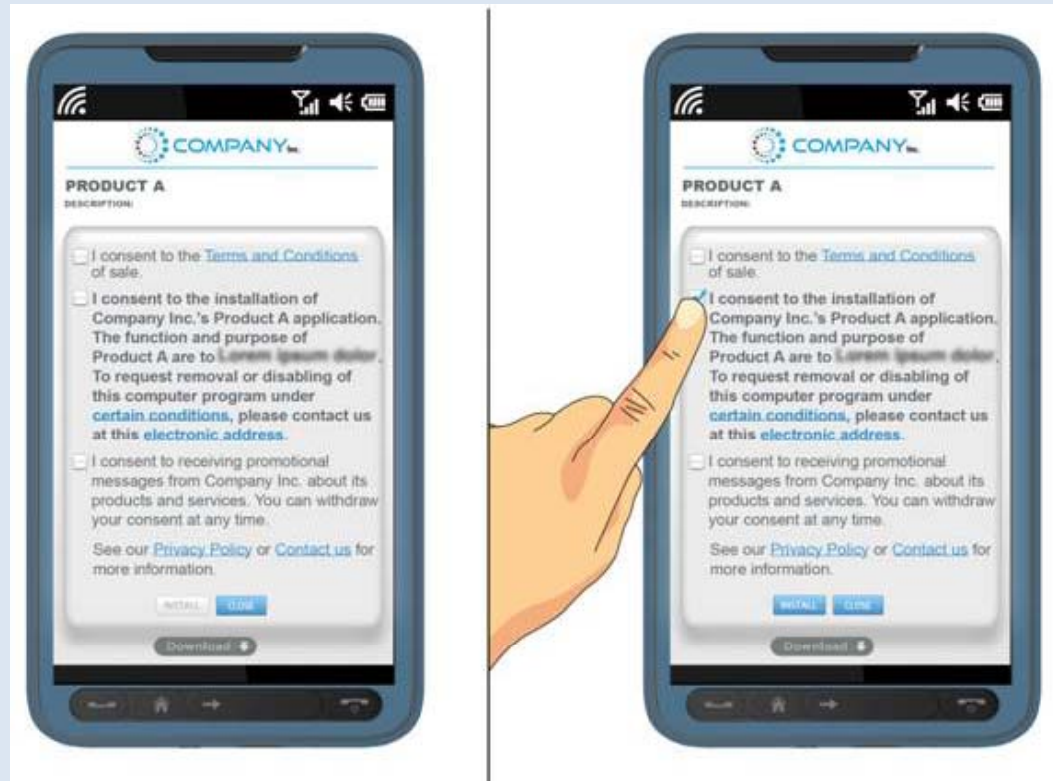


# Other consent considerations

- “Sought Separately” – computer programs & CEMs must have separate consents
- You cannot bundle consent – a consent to receive CEMs cannot be tied to an agreement, purchase or contest



# Examples for acquiring consent Separate



# How not to acquire consent

## X Multiple

- I accept the terms and conditions. I agree to the installation of Company Inc.'s software. I accept to receive Company Inc.'s newsletter.



# Prescribed Information

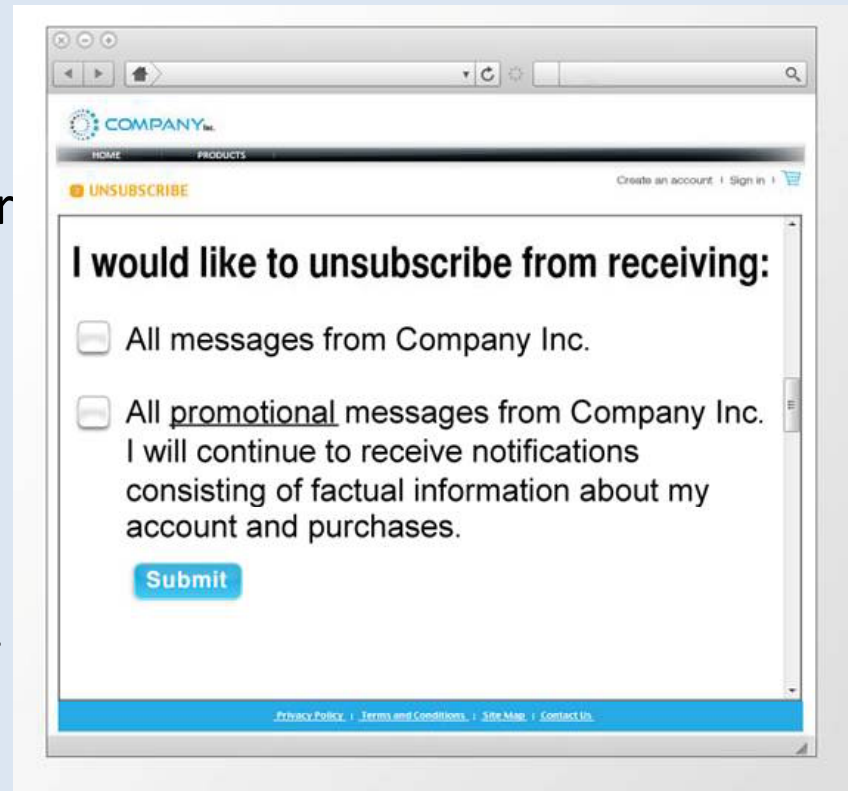
All CEMs under CASL **must**:

- Identify who sent the message
- **AND** identify who the message is sent on behalf of
- Provide contact information for both of the above – that means snail-mail address
- The addresses must be valid for a minimum of 60 days after the message is sent



# An unsubscribe mechanism

- Must be by same electronic means as the CEM
- If that's not practical (such as in an SMS text), then by other electronic means & a web address
- It must be included in every message sent
- It must be at no cost to the receiver
- If the receiver unsubscribes – within **10** business days, you must ensure that no further messages are sent!



The screenshot shows a web browser window with the address bar and navigation buttons. The page header includes the 'COMPANY Inc.' logo, 'HOME' and 'PRODUCTS' links, and 'UNSUBSCRIBE' in orange. There are also links for 'Create an account', 'Sign in', and a shopping cart icon. The main content area is titled 'I would like to unsubscribe from receiving:' and contains two radio button options: 'All messages from Company Inc.' and 'All promotional messages from Company Inc. I will continue to receive notifications consisting of factual information about my account and purchases.' A blue 'Submit' button is located below the options. The footer contains links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'.

# Sample email

**This week's special: 40% off everything in the store!**

This message was sent to you by Agency ABC on behalf of XYZ Ltd. Please contact us at [example@xyzltd](mailto:example@xyzltd) or at <<mailing address>>.

## **UNSUBSCRIBE**

If you do not wish to receive electronic messages from XYZ Ltd. in the future, please reply by e-mail with your name <<and other identifying information, such as an e-mail address>> to [unsubscribe@xyzltd](mailto:unsubscribe@xyzltd). Please be advised that this may restrict our ability to send messages to you in the future.



# Records – Burden of proof is on you

- You **must** have a record of how consent was acquired:
  - For express consent, that means an electronic database, paper records, audio files or other means to record the time, date, circumstances & active permission of the receiver
  - For implied consent, that means a record of the nature of the relationship & record of any two way communications (preferably copies of electronic communications)





# Penalties

- AMPs (administrative monetary penalties) for violations are a maximum of \$1million for individuals & \$10million for organizations
- AMPs are imposed by CRTC or designate
- AMPs are intended to encourage compliance



# Penalties

- Violations are not a criminal offence
- Can be appealed to Federal Court
- Not liable if due diligence can be demonstrated
- PRA (Private Right of Action) not in force for 3 years



# Transition

- Law does not come into force until July 1, 2014 for CEMs
  - January 15 2015 for computer programs
- Obligatory legislative review in 2017



# Transition

- Law also stipulates 3 year transition period
- Some consents remain valid during transition period (express consents that do not conform to prescribed requirements)



# Transition cautions

CRTC FAQs released in December...

- Determining if the content of a message constitutes a CEM will likely have to be decided on a case by case basis
- In practical terms, some consents acquired prior to coming into force will not be acceptable (consents acquired under PIPEDA)
- Err on the side of caution



# How to prepare

## 1. Review your processes

- Who are you sending messages to?
- What is the content of these messages?
- Do you have proper consent?
- How are you going to prove you have consent?
- How are you going to manage requests to unsubscribe?
- Are your staff properly trained?



# How to prepare

## 2. What you can do now:

- Get consent for your current mailing lists if you're not certain they're covered
- Start keeping records of consents



# How to prepare

## 3. What you can do as of July 1:

- Start including prescribed information in your CEMs unless an exemption applies
- Stop sending electronic messages as your first point of contact
- Stop sending CEMs without consent





# Next Steps

- Industry Canada / CRTC sessions in February & March
  - First session is Feb 5 in Toronto. You can register at [caslsessionslcap@crtc.gc.ca](mailto:caslsessionslcap@crtc.gc.ca)
  - Exploring possibility of targeted sessions for RCC / CCC members



# Questions?



# FAQs

Q: Can we continue to use third party lists that we purchased previously?

*A: In most cases, yes...as long as you have a record & future messages have the required information & unsubscribe mechanism...as long as you have a record, you will not need to get a new express consent*



# FAQs

Q: Can I send a message to all my customers to announce the legal changes, & then ask that they respond via a survey to confirm or deny that they are providing consent?

A: *Before July 1, 2014, yes. After July 1, 2014, yes if you have consent. Note that if you have a record of how the electronic address was acquired before July 1, 2014, consent is considered implied until July 1, 2017, & you could send this type of message, unless of course the recipient unsubscribes.*



# FAQs

Q: Can I send a CEM to another business without express consent? Does it have to contain an unsubscribe mechanism?

A: In some cases, yes. Some business to business communications are exempt from the form & content requirements & therefore do not have to contain an unsubscribe mechanism.

- To employees, between similar businesses that have a relationship or to contractors that have similar business interests



# FAQs

Q: I work for an industry association & often send CEMs to my members. Does this mean I'm exempt from the requirement for express consent? What about the form & content of CEMs? If they unsubscribe from receiving CEMs from me, can I still send them their renewal notice?

A: An industry association is a corporation. You can send a CEM to another business without express consent as long as you have a relationship & have records, business to business communications are exempt from the form & content requirements & therefore do not have to contain an unsubscribe mechanism. However, in practical terms, it may be prudent to include an unsubscribe mechanism to messages such as newsletters & advertisements. It is also important to note that membership prospects may not be covered under the business exemption.



# FAQs

Q: We sell through distribution. Would we be considered as having an existing business relationship with the end customer? Does this mean we're exempt from the requirement for express consent? What about the form & content of CEMs?

A: *It depends on who the end customer is. If the end customer is a consumer, then no. If it is another business, you would need to be able to demonstrate & have a record of the relationship.*



# FAQs

Q: How long do we need to maintain records of consents?

A: *For as long as you intend to communicate with the receiver. In practical terms, it is prudent to keep those records well beyond the last communication date. The law stipulates that a proceeding may be initiated up to 3 years after the violation was noted by the CRTC.*





# FAQs

Q: At a trade show, would scanning a person's badge be considered consent if they agree. Would the list derived from show management be used as proof of consent?

A: *No, if the condition of entering the trade show was “bundled” with the request for consent. Yes if entering the trade show was separate + if you clearly ask the person if they grant their consent to receive exactly what type of CEMs & indicated that scanning their badge was the way you were making a record of that consent.*



# FAQs

Q: For conferences or trade shows, would e-blasts to previous attendees to let them know online registration is now open or a reminder to register ok? Would this be a case of a business relationship that does not require express consent as long as they have attended or pre-registered in the past 2 years?

A: *For most existing business relationships, consent is implied for 2 years or until the person withdraws their consent. It is implied for 6 months when the “existing business relationship” consists only of an inquiry or application. As a transitional measure, consent is implied for existing business relationships until July 1, 2017, or until the person withdraws their consent.*



# Annex A – Further reading

- The Act, where most of the new requirements are listed (<http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>)
- The last version of the proposed regulations that define key terms & list exemptions, likely to change before they are finalized, expected this fall (<http://gazette.gc.ca/rp-pr/p1/2013/2013-01-05/html/reg1-eng.html>)



# Annex A – Further reading

- CRTC's regulations & interpretation bulletins & FAQs that clarify how they interpret, & intend to enforce, the new rules
  - <http://www.crtc.gc.ca/eng/archive/2012/2012-183.htm>
  - <http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>
  - <http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>
  - <http://www.crtc.gc.ca/eng/casl-lcap.htm>

Thank You!



# Contact

Jason McLinton, Senior Director  
Federal Government Relations  
Retail Council of Canada  
613.656.7903  
jmclinton@retailcouncil.org

Scott Smith, Director  
Intellectual Property &  
Innovation Policy  
Canadian Chamber of  
Commerce  
613.238.4000 (251)  
ssmith@chamber.ca

