

Understanding CASL

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Craig T. McDougall and Thomas A. Sides

Understanding CASL

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- 6) Software and Data Provisions
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1. Background and Key Dates

- Controversial legislation introduced 2010
- Comes into force July 1, 2014
- Provisions related to installation of computer programs – January 15, 2015
- Private Right of Action – July 1, 2017
- Deemed consent for pre-existing relationships ends July 1, 2017
- Exemptions with respect to updates for installed computer programs ends January 15, 2018

1. Background and Key Dates

- Cannot send a CEM to an electronic address unless consent is obtained, and formalities for consent met
- Penalties per breach - \$1 million for individuals and \$10 million for corporations
- Private right of action \$200 per breach up to \$1 million per day

1. Background and Key Dates

- Vicarious liability for employees
- Officers/directors can be held liable – due diligence key
- Extra-territorial application: any CEMs received or accessed in Canada
- Applies to B2B and B2C communications
- Does **not** apply to 2-way voice telephone calls, recorded phone messages or unsolicited faxes

2. Commercial Electronic Messages

- CEM = electronic message that has as one of its purposes the encouragement of commercial activity
- A request for consent is a CEM covered by the Act
- Electronic address = email, IM, telephone, but not fax number
- Newsletters, polling, surveys do not encourage commercial activity; banner ads target IP address not electronic addresses

2. Commercial Electronic Messages

- Every CEM must contain the following clearly and prominently:
 - Name by which sender carries on business, if different from its name
 - If sent for another, the name by which the person on whose behalf the message is sent, carries on business
 - If the message is sent on behalf of another, a statement indicating who is sending it and on whose behalf it is being sent

2. Commercial Electronic Messages

- Mailing address and telephone number providing access to agent or messaging system, and an email address or web address of the sender or the person on whose behalf it was sent. Such information must remain valid for at least 60 days from when it was sent
- An unsubscribe mechanism that can be readily performed (either in the CEM or through a link)
- To the extent that the information above and the unsubscribe mechanism cannot be included in the CEM, a webpage readily accessible through a link clearly and prominently displayed in the CEM

3. Exemptions and Exclusions

EXCLUSIONS

- **“Family” or “Personal” relationship** with recipient. Direct, voluntary, 2-way communication; reasonably conclude personal relationship exists. Factors for personal relationship, and “family” set forth in regulations.
- **Internal Organizational Messages.** Any message that is sent by an employee, representative, consultant or franchisee of an organization to another employee, representative, consultant or franchisee of the organization and the message concerns the activities of the organization.
- **B2B Messages.** Any message that is sent by an employee, representative, consultant or franchisee of an organization to an employee, representative, consultant or franchisee of another organization if **(1)** the organizations have a relationship and **(2)** the message concerns the activities of the recipient organization.

Exclusions (cont'd)

- **Electronic Messaging Service Messages.** If the message is sent and received within an electronic messaging service (such as a social media or mobile application) provided that the ID and unsubscribe requirements of CASL are satisfied through publication, accessible through the user interface and the recipient consents to the message either expressly or by implication.
- **Managed Secure Accounts.** Messages sent to a limited-access secure and confidential account to which only the person that provides the account can send messages.
- **Responding to Complaints.** Messages sent in response to a request, inquiry or complaint or are otherwise solicited by the person to whom the message is sent.
- **Political Contribution.** Message sent by political party or organization, or candidate and has as primary purpose soliciting a contribution.

Exclusions (cont'd)

- **Fundraising by a Registered Charity.** Registered Canadian charities may send messages without complying with CASL provided that the message has as its primary purpose raising funds for the charity.
- **Messages Sent from Canada to Other Countries with Anti-Spam Laws.** If the message is being sent from Canada to a foreign country with anti-spam legislation and the message complies with the foreign country's legislation.
- **Legal Process Messages.** Messages can be sent to a person (i) to satisfy a legal or juridical obligation, (ii) to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff, (iii) to enforce a right, legal or juridical obligation, court order, judgment or tariff, or (iv) to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state.

*These messages **do not require consent and do not require an unsubscribe function.***

3. Exemptions and Exclusions

EXEMPTIONS

- Messages that fall **solely** within one of the following categories are **exempt** from CASL's consent requirements:
 - provide a quote or estimate
 - confirm a transaction
 - provide warranty/safety information
 - provide factual information about an ongoing subscription

Exemptions (cont'd)

- provide information about an employment benefits plan
- deliver a product or service, including updates or upgrades
- 3rd party referrals if certain requirements are met

Caution: if foregoing messages also contain an offer or promotion, they could become “CEMs”.
No exemption from unsubscribe feature.

4. Consent – Deemed, Implied and Express

- Consent is the basis for CASL
- **Express** consent is preferred, but in certain circumstances **implied** and **deemed** consent can be relied upon.

4. Deemed Consent

- Deemed consent to receive CEMS applies where there is a pre-existing business or non-business relationship *prior to July 1, 2014*
- Deemed consent is a transitional provision to allow organizations to obtain express consent prior to the end of the transitional period on July 1, 2017

Implied Consent – Existing Business Relationship

- **Existing Business Relationship.** Consent is implied if the sender and the recipient have an existing business relationship, defined as:
 - the purchase or lease of a product, goods, a service, land or an interest or right in land
 - the acceptance by the recipient of a business, investment or gaming opportunity
 - a written contract entered into between the sender and the recipient

In each case, no more than **2 years** may have passed from the end of the transaction or the contractual relationship.

- an inquiry or application by the recipient, within the **6-month** period immediately before the message is sent

Implied Consent

- **Conspicuous Publication and Related to the Recipient's Business.** Consent is implied if the person has conspicuously published the electronic address without a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address **and** the message is relevant to the person's business, role, functions or duties in a business or official capacity. (Email address on company website)
- **Provided without Qualification and Related to the Recipient's Business.** Consent is implied if the recipient has disclosed the electronic address to the sender without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address, **and** the message is relevant to the person's business, role, functions or duties in a business or official capacity. (Business card rule)

4. Implied Consent

- Existing non-business relationship
 - Donation/gift within last 2 years
 - Volunteering within last 2 years
 - Membership within last 2 years

4. Express Consent

- Express Consent
 - Written – meeting certain prescribed requirements
 - Oral
 - Must be recorded
 - Requires active opt-in, no pre-checked “I accept” option

5. Express Consent Requirements

- Request must be set out clearly and simply
- Must be sought “separately” - cannot be buried in another document (e.g., terms of use, license agreement, purchase documents)
- Identify purpose for which consent is sought
- Identify the name of the organization or the name by which it carries on business (if different)

5. Express Consent Requirements

- Express Consent Requirements

- If the message is sent on behalf of another, a statement which person is seeking consent and which person on whose behalf consent is sought
- If the message is sent on behalf of another, the name under which they carry on business if different from their name
- The mailing address, and either a telephone number providing access to an agent or voice messaging system, an email address or web address
- A statement that consent can be withdrawn at any time

6. Software and Data Provisions

- Provisions relating to altering **transmission data** (i.e. telecom functions of routing, dialling, etc.) comes into effect July 1, 2014
- Altering transmission data prohibited without express consent (unless by telecom service provider for purposes of network management)
- No implied consent like for CEMs
- Withdrawal mechanism must be implemented within 10 business days

6. Software and Data Provisions

- Software provisions come into effect January 15, 2015
- Prohibition from installing computer programs on systems in the course of commercial activity, or installing programs causing the sending of an electronic message from a computer without express consent (specific requirements exist)
- Aiding, inducing, procuring, or causing to be procured any of the foregoing is also prohibited and subject to penalties

6. Software and Data Provisions

- 3 year transitional provision deeming consent for updates and upgrades to existing programs installed before January 15, 2015
- Computer system located in Canada or person installing or causing installation is in Canada
- Certain other deemed consent with respect to telecommunications service providers protecting or updating their networks
- Deemed consent where addressing a failure in software or hardware

6. Software and Data Provisions

- Deemed express consent if the program in:
 - A cookie
 - HTML code
 - Java scripts
 - An operating system
 - An executable through installed program to which user has already consented

Provided that: reasonable to believe person consented to program's installation ... must have notice of functionality through disclosure or operation is obvious

6. Software and Data Provisions

- Providing **additional** information in a consent request arises for more invasive programs:
 - Knowledge and intent that software will cause computer system to operate in a manner contrary to reasonable expectations of the owner
 - Collects stored personal information
 - Interferes with control of the system
 - Changes or interferes with data, settings, preferences or commands
 - Communicates with another system or device
 - Installs a program that may be activated by a third party

6. Software and Data Provisions

- Consent requests must be set out clearly and prominently and separately from any agreement or terms and conditions
- Consent must be requested for updates and upgrades, but can be made at time of installation

7. Next Steps

- Determine what CEMs your company uses and whether express or implied consents are relied upon, and if any exceptions and exemptions apply
- Prior to July 1, 2014, ensure that company complies with the requirements of CEMs for CEMs to be sent after that date
- Make requests for express consent prior to July 1, 2014 where possible

7. Next Steps

- Use the 3 year deemed consent transitional period (where it applies) to make further requests for express consent for CEMs
- Establish a system for documenting and storing key data elements: consents (date, time and manner for express consents), and requests for withdrawal of consent and unsubscribing, and for promptly acting on such requests for withdrawal and unsubscribing
- Ensure that company contact information remains valid for at least 60 days from date of sending a CEM
- To establish due diligence defence: error reporting and action plans, documented employee education and hierarchy of approval for higher risk CEMs

7. Next Steps

- Seek further information and assistance prior to July 1, 2014 if your company plans to alter transmission data
- Seek further information and assistance prior to January 15, 2015 if the software installation provisions are relevant to your company

For assistance please contact us:

Craig T. McDougall craig.mcdougall@dentons.com
780-423-7398

Thomas A. Sides tom.sides@dentons.com
780-423-7138