

Top Ten Things You Need To Know About Canada's Anti-Spam Law

written by Rory Lodge | December 10, 2013



On December 15, 2010, the Canada's Parliament passed Bill C-28 which is Canada's anti-spam law ("CASL"). Despite becoming law nearly 3 years ago, it is likely not to come into force for at least another year, since the regulations intended to give the new regime operational detail have been in flux since the first draft regulations were made public in 2011 and CASL will not be proclaimed to be in force until such regulations are finalized. Industry Canada is expected to release revised regulations by mid-December 2013. Following the finalization of those regulations CASL will be proclaimed, coming into force sometime in 2014.

Here are the top ten things you need to know about CASL:

- 1. CASL's Threshold Is Very Low:** The basic prohibition contained in CASL is against sending a "commercial electronic message", which includes all forms of electronic communication including e-mails, texts and instant messages as long as they encourage participation in a commercial activity, to customers, donors, members and others unless the recipient has consented to receiving the message.
- 2. The Sweep of CASL Is Very Broad:** Although CASL was conceived initially as a weapon to fight "spam", its application extends to all businesses and non-profit organizations, regardless of whether the commercial electronic message sent by those organizations would ordinarily be considered "spam".
- 3. Mandatory Content Will Be Prescribed:** A compliant commercial electronic message must contain certain prescribed information, including the identity of the sender, the sender's contact information and a readily-usable "unsubscribe" mechanism which must remain operative for 60 days from the date of the message. An unsubscribe request must be acted on within 10 days of it being made by a recipient.
- 4. Mandatory Consent Requirements Will be Imposed:** Consent from the recipient of the commercial electronic message must be express consent given on an opt-in basis. That is, consent cannot be implied or "read in" and recipients must actively give consent. Moreover, the request for consent must clearly set out the purposes for which it is

being requested and identify the requestor in the prescribed manner.

5. Certain Communications Will be Exempt from CASL: Certain communications are exempt from the content and consent requirements of CASL:

- a. commercial electronic messages within a business sent by an employee, representative, contractor or franchisee of the organization and that concerns the affairs of the organization;
- b. commercial electronic messages between businesses that have an ongoing business relationship, and that are sent by employees, representatives, contractors or franchisees of the organizations concerning the affairs of the organizations or the person's role;
- c. commercial electronic messages from friends or family;
- d. commercial electronic messages to a business where it is an inquiry or application related to that business;
- e. commercial electronic messages from a business responding to inquiries, requests, complaints or other solicitations;
- f. commercial electronic messages that are sent to satisfy a legal or juridical obligation.
- g. In addition, there is a one-time exemption for a commercial electronic message sent to someone to whom the sender has been referred by a friend or business relation of the recipient, although such a communication still has to comply with the content requirements.

6. Certain Communications Will be Deemed to Have Received Implied Consent: Certain other communications are deemed by CASL to have been consented to by their recipients so only need comply with the prescribed content requirements:

- a. commercial electronic messages where the parties have an existing business or non-business relationship that has been active in the last 2 years;
- b. commercial electronic messages where the sender has received an inquiry or application within the last 6 months from the recipient in respect of a potential transaction or other defined business or non-business opportunity (this differs from the case of communications noted at paragraph 5(e) above in that the sender can send further commercial electronic messages past the original inquiry if it is within the 6 month period described);
- c. commercial electronic messages where the recipient has provided or published his or her electronic address without any restriction, and the message relates to the person's job or business.

7. Non-profits Will Be Challenged to Distinguish "Commercial" and Non-Commercial Communications: The challenge for non-profit organizations will be to separate the communications that have no "commercial" purpose from those that do and therefore must comply with the CASL. An e-mail communication will qualify as a commercial electronic message if any of its purposes encourages participation in a commercial activity, whether or not there is an expectation of profit. For example, a donation request which refers to the use of a web service facility which charges a fee, such

as PayPal or Canada Helps, will likely be subject to the CASL. Even a donation request e-mail that does not refer to such a facility may well constitute a commercial electronic message as it is soliciting funds.

8. Express Opt-in Consents Will be Necessary: Most organizations that currently maintain e-mail contact lists that are compliant with the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") – will find that those lists do not qualify under CASL for lack of appropriate consent. As a result, they will need to be re-qualified by fresh, opt-in consents.

9. Maintenance Obligations Respecting Your E-mail Lists Will Increase: Organizations that maintain e-mail contact lists will need to remove names from the list at the 2 year-post transaction or 6 month post-inquiry point, unless express consent has also been obtained from recipients. However, as a transition measure, CASL eliminates this requirement for a period of 3 years after the Act comes into effect in respect of only those e-mail communications that fall under the category of "implied consent" (see paragraph 6 above).

10. It Will Pay to be Prepared: Organizations that want to get a head start on compliance with CASL should consider obtaining express consent from those persons currently on their lists, as sending e-mails to such people after the legislation is in force may violate its provisions if the commercial electronic message is not exempt, or the recipients have not provided implied consent.

Conclusion

CASL will impose unanticipated, often cumbersome and expensive requirements on virtually every business and non-profit organization active in Canada. The rules, while still not finalized, are complex and will be open to interpretation in many gray areas. Lawyers at McMillan LLP have been involved with the CASL regime since its inception, are very familiar with its ins and outs and would be pleased to assist your organization in managing its compliance with CASL.

Article by Sharon E. Groom, David Young and Amrita Mann

McMillan LLP