

# TOP TEN THINGS YOU NEED TO KNOW ABOUT CANADA'S ANTI-SPAM LAW

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On July 1, 2014, Bill C-28 which is Canada's anti-spam law ("CASL") will finally come into force. Industry Canada's final regulations were released on December 4, 2013 and so we now have a clear picture of what the rules are.

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

- 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.
- 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".
- 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.
- 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.
- Certain Communications Will be Exempt from CASL:** Certain communications are exempt from the content and consent requirements of CASL:
  - commercial electronic messages within a business sent by an employee, representative, contractor or franchisee of the organization and that concern the activities 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 activities 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. commercial electronic messages sent on an electronic messaging service where consent (implied or express) has been received and the unsubscribe mechanism is on the user interface;
- h. commercial electronic messages sent by a registered charity where the primary purpose of the message is fundraising;
- i. commercial electronic messages sent by a political party/organization/candidate where the primary purpose is soliciting a contribution;
- j. 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:**

Non-profit organizations such as registered charities and political parties are exempt from compliance if the CEM has a primary purpose of seeking donations, or soliciting a contribution (respectfully). The challenge therefore will be to separate the communications that have a primary purpose of fundraising or seeking a contribution from those that are more commercial in nature and therefore must comply with the CASL. An e-mail communication will qualify as a commercial electronic message if its primary purpose encourages participation in a commercial activity, whether or not there is an expectation of profit.

**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 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.

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## **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against



making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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