

## CANADA'S ANTI-SPAM LAW ("CASL") WHAT YOU NEED TO KNOW

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### WHAT IS CASL?

On July 1, 2014, Canada's anti-spam legislation ("CASL") came into effect.

CASL is broad in scope and will affect the business operations of companies, including those not in the business of sending spam. The general fundamental principle underlying CASL is that commercial electronic messages can only be sent with the recipient's consent.

### WHAT IS A COMMERCIAL ELECTRONIC MESSAGE ("CEM")?

A commercial electronic message ("CEM") is a message, sent electronically, which, as one of its purposes, encourages the recipient to participate in commercial activity.

In determining whether a message is a CEM, consideration will be given to the content of the message, any hyperlinks in the message to website content or to a database, and contact information in the message. None of these factors is determinative.

### WHAT IS AN ELECTRONIC MESSAGE?

CASL defines an "electronic message" as an email account, a telephone account, an instant messaging account, or any other similar account. It is possible some social media accounts might constitute a "similar account". Messages sent using a social media messaging system (e.g., Facebook or LinkedIn messaging) would likely qualify as sending messages to an "electronic address".

### HOW WILL CASL AFFECT MY BUSINESS?

CASL sets out requirements for sending CEMs to electronic addresses. Barring any exceptions or exclusions which might apply, anyone sending a CEM to an electronic address will need to comply with the three essential requirements set out in section 6 of CASL:

- Obtain consent: express or implied consent must be obtained except in certain specified circumstances where consent is not needed
- Provide sender identification information

- Provide an unsubscribe mechanism

## **WHAT IS EXPRESS CONSENT?**

Express consent (i.e., to receiving CEMs) can be obtained either orally or in writing. The onus to prove consent is on the person sending a CEM. Express consent is valid unless and until it is withdrawn.

## **WHAT IS IMPLIED CONSENT?**

CASL implies consent if the sender of the CEM has:

- (a) an “existing business relationship” with the recipient, (as explicitly defined in CASL, including specified business relationships which are not more than two years old, certain business relationships arising from written contracts which are either ongoing or have expired within the previous two years, and business relationships arising from an inquiry or application made within the previous six months );
- (b) an “existing non-business relationship” with the recipient (as explicitly defined in CASL, including one arising from a donation or gift made by the recipient, volunteer work by the recipient, or membership in a club, association or volunteer organization, as defined, all within the last two years);
- (c) conspicuously published his or her electronic address, which publication is not accompanied by a message indicating a wish not to receive unsolicited CEMs, and the CEM is relevant to the person’s business;
- (d) disclosed his or her electronic message to the sender without indicating a wish not to receive unsolicited CEMs, and the message is relevant to the person’s business; or
- (e) the message is sent in circumstances set out in the regulations.

## **WHEN DOES CONSENT NOT NEED TO BE OBTAINED?**

Consent does not need to be obtained in certain circumstances, including the following:

- 1) a CEM in response to a request for a quote or a service;
- 2) a CEM which facilitates, completes or confirms a commercial transaction;

- 3) a CEM which provides warranty information, product recall information or safety or security information about a product, goods, or a service that the person to whom the message is sent uses, has used or has purchased;
- 4) the first CEM after a referral – where the referral source has a personal, family or existing business or non-business relationship with the recipient and sender, and the referral source's name is mentioned in the CEM; and
- 5) additional situations specified in CASL and the regulations.

In such situations, the other two requirements (i.e., the identification of sender and an unsubscribe mechanism) are still required. As noted below, there are other specified situations which are completely exempt from all three essential requirements.

## **WHAT IS AN UNSUBSCRIBE MECHANISM?**

Under CASL, all non-exempt CEMs must include an unsubscribe mechanism. This might be accomplished by including a clearly and prominently displayed hyperlink in an email which allows the recipient to unsubscribe (i.e., to further CEMs) by simply clicking on it. Alternatively, an unsubscribe mechanism hyperlink might be to a webpage which is readily accessible without delay and at no cost to the recipient.

An unsubscribe mechanism can be broad or offer a choice to the recipient to unsubscribe from some, or all, of the CEMs your business sends. CASL requires it to be simple, quick and free to the recipient.

## **WHAT EXEMPTIONS ARE CONTAINED IN CASL AND HOW WILL THEY AFFECT MY BUSINESS?**

There are a number of completely exempt circumstances outlined in CASL which businesses may be able to rely upon, including certain inter- and intra-business communications, communications sent to those with whom a personal or family relationship exists, and various other categories set out in CASL and the applicable regulations.

## WHAT IS THE TRANSITION PERIOD?

CASL provides for a 3-year transition period, commencing July 1, 2014, during which time businesses can continue to send CEMs, including those seeking to obtain express consent, provided:

- A business or non-business relationship exists on July 1, 2014 (the two year and six month periods set out in the definition of “existing business relationship” and “existing non-business relationship” do not apply for the purposes of the transitional provision)
- The relationship includes communication by CEMs
- The recipient has not withdrawn consent

## WHAT ARE THE PENALTIES UNDER CASL?

The penalties under CASL are very significant. Maximum administrative penalties are \$1 million for individuals and \$10 million for businesses, per violation.

Officers, directors and agents of a corporation can be liable if they directed, authorized, consented to, or acquiesced or participated in the CASL violation. Employers are vicariously liable for their employees under CASL.

## WHAT DO I NEED TO KNOW BEFORE I HIT SEND?

Before you or anyone in your business sends a CEM, it is now necessary to ask:

- (a) Do I have the recipient’s express or implied consent to send it?
- (b) If not, can I rely on an exception or exemption within CASL?

**If we can assist in answering your questions about how CASL applies to your business, please contact one of our lawyers for advice:**

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