



BUSINESS LAW GROUP

Canada's New Anti-Spam Legislation

June 30, 2014

Canada's new anti-spam legislation was passed in December 2010 and it will come into force on July 1, 2014. It is intended to curb the problem of unwanted electronic communications being sent to Canadians (spam), as well as the downloading of computer programs on to a person's computer without their consent, while at the same time ensuring that organizations are able to continue to compete in the global marketplace. CASL addresses a number of electronic activities in relation to the use and promotion of products and services. One of the main activities that it addresses is the sending of commercial electronic messages to recipients.

CASL generally prohibits organizations (profit and not-for-profit) from sending commercial electronic messages without the recipient's permission, including messages to e-mail addresses, social networking accounts, and text messages to mobile phones. Commercial electronic messages are messages sent for the purpose of encouraging participation in commercial activity (i.e. promoting the sale of goods or services).

This means that organizations will need to review the content of their electronic messages to determine if each message has a commercial component to it. If it does, then the organization will need to comply with CASL, which means, obtaining the consent of the recipient of the electronic message, including specific content in the message to identify the sender, and including an easy way the recipient can unsubscribe from receiving electronic messages in the future.

Generally, consent to receipt of the commercial electronic message will need to be obtained prior to sending the message. This consent can either be express "opt in" consent or implied consent. In order for consent to be considered implied, there must be either:

- (a) evidence of some kind of existing business relationship between the sender and the recipient. Examples of existing business relationships:
 - the recipient has purchased or leased a product or service from the sender within the two-year period immediately before the day on which the message is sent;

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- in some cases an inquiry or application made by a recipient in a certain time period prior to the sending of the commercial electronic message will also give rise to a situation of implied consent; or
- (b) a case where the recipient has conspicuously published his or her e-mail address without notification that such person does not want to receive unsolicited e-mail messages and the message is relevant to the person's business, role, functions or duties in a business or official capacity.

There are exemptions available in the regulations to CASL, which include:

- Internal messages – i.e. Messages sent by employees, representatives, consultants or franchisees to another employee, representative, consultant or franchisee concerning the activities of the organization
- Messages to another organization if the two organizations have a relationship and the message concerns the activities of the recipient organization
- Messages that are solicited by the recipient (e.g. through a request, inquiry, complaint or otherwise)
- Messages sent to a person to satisfy a legal or juridical obligation
- Messages to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff
- Messages to enforce a right, legal or juridical obligation, court order, judgment or tariff,
- Messages to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state
- Messages sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the message
- Message that the sender reasonably believes will be accessed in a foreign state that is listed in the schedule and the message conforms to the law of the foreign state (provided the law in the foreign state has prohibitions that are substantially similar to those in s. 6 of the Act)
- Messages sent by or on behalf of a registered charity as defined in the *Income Tax Act* and the message has as its primary purpose raising funds for the charity
- Messages sent by or on behalf of a political party or organization or a person who is a candidate (as defined in an Act of Parliament or the legislature of a province) for publicly elected office and the message has as its primary purpose soliciting a contribution as defined in subsection 2(1) of the Canada Elections Act

There is also an exemption with respect to “referrals” which means that the new law will not apply to the **first** commercial electronic message sent to a recipient following a referral by an individual who has an existing relationship (whether business or personal) with the person who sends the message and the recipient and that discloses the full name of the individual who made the referral and states that the message is sent as a result of the referral.

While in many cases you may already have implied consent, it would be prudent to obtain express consent from the people you want to send electronic messages to, before sending commercial electronic messages.

Many organizations have options for individual to subscribe to receipt of electronic communications through their website. A simple way to obtain express consent is to allow potential recipients to click an “I would like to subscribe” button, or something of that nature. What organizations can no longer do, is to pre-populate an “I would like to subscribe” button. This is called “opting out” and it will no longer be permitted. Instead, the consumer must be able to freely choose what he/she wants to do.

It would also be a good idea to set out clearly the purpose for which the consent is being sought (i.e. to send you newsletters or blog posts with information that we feel might be of interest to you).

As noted above, organizations must now have an easy way to allow recipients to ‘unsubscribe’ from receipt of future electronic communications. This could be something as simple as advising recipients that if they send a reply e-mail with ‘unsubscribe’ in the subject line, you will take them off your mailing list. You could also include something a little more sophisticated, such as including an unsubscribe button in each electronic communication, which, when checked, take the person to your website to be unsubscribed from your mailing list immediately. In either case, you have 10 days to unsubscribe a person when you receive such a request.

It is very important that organizations ensure that their electronic activities comply with the requirements of CASL. Organizations that do not comply risk serious financial fines/penalties (up to \$10 million) as well as criminal charges, civil charges, and possibly personal liability for its directors.

If you would like to discuss CASL and how it applies to your organization, please contact [Kim Cunnington-Taylor](#) at 613-231-8299 or by e-mail at kim.cunnington-taylor@nelligan.ca.