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Canada's Anti-Spam Legislation (CASL)

By Mark Blumberg¹ (June 12, 2014)

In December 2010, Canada passed Canada's Anti-Spam Legislation² ("CASL"). CASL will be in force on July 1, 2014, with the sections related to the unsolicited installation of computer programs or software coming into force on January 15, 2015. It is a complicated piece of legislation that will apply to commercial electronic messages ("CEM") that are either sent from, or accessed on, a computer system in Canada, unless an exemption applies.

A CEM is broadly defined as an electronic message that encourages participation in a commercial activity, regardless of whether there is an expectation of profit. CASL applies to non-profit organizations and registered charities and includes messages sent by any means of telecommunication including text, sound, voice or image.

However, CASL will not apply to electronic communications if the message is not a CEM, or if the message is a CEM, if an exemption applies. One such exemption applicable to Canadian registered charities is:

- If the message is sent by or on behalf of a registered charity and has the primary purpose of raising funds.

Therefore, Canadian registered charities are permitted to send electronic messages such as emails, where the message has as its primary purpose raising funds for the charity. In these cases, the charity does not need to have explicit or implicit consent, provided no other element of the electronic message would cause the message to be considered to be a CEM.

CASL will permit CEMs to be sent where consent has been obtained and the message contains prescribed information. Consent under CASL can be explicit or implicit. If an organization currently has explicit consent from its recipients, it is expected that the consent will be grandfathered under CASL. However, to obtain explicit consent under CASL the recipient must opt-in, the request must contain information on the purpose for consent, identify the sender (name, address/phone number or email) and notify the member that consent can be withdrawn.

It is important to note that once CASL is in force, CEMs cannot be sent to recipients seeking consent unless there is implied consent from an existing business or non-business relationship. Instead, requests for explicit consent after July 1, 2014 should be made by paper or orally.

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² An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (S.C. 2010, c. 23).

Implicit consent from a non-business relationship may include:

- A donation or gift to a registered charity, a political party or organization or a person who is a candidate for publicly elected office for a two-year period following the donation or gift;
- Volunteer work performed for a registered charity, a political party or organization or a person who is a candidate for publicly elected office for a two-year period following termination; or
- Membership in a club, association or voluntary organization, as defined in the Regulations, for a two-year period following termination.

Implicit consent may also be inferred if a recipient provided or conspicuously published his/her electronic address and does not state that s/he does not wish to receive unsolicited CEMs and the message relates to the member's employment or official capacity.

CASL also regulates the content of CEMs, so even where a CEM does not require consent or implicit or explicit consent has been obtained, each CEM sent to recipients must contain the following information:

- Identity of the sender;
- Contact information of the sender (mailing address and telephone number, email address, or web address); and
- Unsubscribe mechanism that is valid for a minimum of 60 days after the message is sent.

If an organization receives an unsubscribe request, it must act on the request within 10 business days.

Organizations are also responsible for ensuring that any third party sending electronic messages on the organization's behalf are complying with CASL. Contracts between the organization and the third party should include the requirement that the third party be compliant with CASL.

Despite the complexity of CASL some of the most straightforward and simple parts of legislation are considered to be good practice when sending emails. In particular, the inclusion of proper unsubscribe mechanisms that are available and easy to use in all emails sent to recipients. Organizations should also review their email lists and take a more segmented and directed approach to the use of emails. Making an effort to send emails that relate to the interests of the recipients and also align with the desired frequency of receiving emails will result in a better relationship between organizations and their supporters.

For more information on CASL, its application and its requirements, please refer to the Government of Canada's website *Canada's Anti-Spam Legislation* at <http://fightspam.gc.ca>.

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