

Canada's Anti-Spam Law - Two Years Later

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INTRODUCTION

It has been just over two years since Canada implemented its anti-spam law, commonly referred to as "CASL." Prior to July 1, 2014, Canada was the only G8 country without specific anti-spam legislation in force. Now, Canada is home to what some consider the strictest anti-spam legislation in the world.

COMMERCIAL ELECTRONIC MESSAGES

CASL's most significant effect is a general prohibition against sending a commercial electronic message. Commercial electronic messages, or "CEMs," are messages whose purpose is to encourage participation in a commercial activity. Examples of messages that fall within the scope of a CEM include: (1) offers to purchase or sell products, goods, or services; (2) offers to provide a business, investment or gaming opportunity; (3) messages that advertise or promote either of the above; and (4) messages that promote an individual as being an individual who does any of the above.

If your insurance brokerage sends any kind of electronic message that advertises or promotes your services (for example, a monthly e-newsletter) those communications are likely to fall within the scope of CASL. The legislation is very broad, and not limited only to messages of a promotional nature. To fall within the prohibitions in CASL, the 'commercial' aspect of the message need not be the sole, or even dominant purpose of the communication. Your communications may be captured by CASL if they contain any sort of commercial aspect, having regard to the content of the message, the contact information contained in the message, or hyperlinks to content on a website. That is, even if a message contains no commercial content, it may still be deemed to be a CEM. A hyperlink to a website which contains commercial content contained in your email is sufficient to deem your email a CEM.

CASL creates three general requirements for CEMs: the requirement to obtain the recipient's consent, the requirement to include certain identification information, and the requirement to provide the recipient with an unsubscribe mechanism.

CONSENT TO SEND CEMs

Consent can be given expressly by the recipient, or it can be implied. CASL's requirement to obtain express consent cannot be satisfied by opt-out consent – the individual must take affirmative action to agree to receive a CEM (such as ticking a box or clicking a button). In addition, the individual must be given the option to agree to the general terms of service for the product or service she or he is being offered, separate and apart from the consent to receive CEMs. In other words, an individual cannot be required to agree to receive CEMs, as a condition of receiving the product or service in question.

Implied consent does not require any positive action from the sender before sending a CEM, so it is important to understand the circumstances under which implied consent may exist. For insurance brokers, the most relevant



circumstance where consent can be implied is where an "existing business relationship" exists between the sender and the recipient. An existing business relationship arises where the sender has:

- Sold goods or services to the recipient within the two years before the message was sent;
- Provided a business opportunity that was accepted by the recipient within the preceding two years;
- Entered into a written contract with the recipient, and the contract is either active or expired within the preceding two years; or
- Received an inquiry from the recipient within the previous six months.

There are also some exemptions to the consent requirements. For example, CASL does not require consent to send messages that:

- Facilitate, complete or confirm a commercial transaction that has already been agreed to by the recipient.
- Provide warranty, product recall, safety or security information about a product, good or service that the recipient has used or purchased.
- Provide notification of factual information.
- Provide information directly related to an employment relationship or benefit plan.
- Deliver a product, good or service that the recipient is entitled to receive under the terms of a previous transaction.

In addition to the consent exemptions, there are some full exemptions from CASL. For example, communications sent in response to a request, inquiry or complaint or otherwise solicited by the recipient are exempt from CASL.

OTHER REQUIREMENTS

A CEM must contain proper identification information, including the sender's name, mailing address, and either a telephone number or email address. The sender must also provide the recipient with access to an unsubscribe



mechanism, which enables the person to indicate, at no cost to them, the wish to no longer receive CEMs. Effect must then be given to the unsubscribe request within 10 days. The identification information and unsubscribe mechanism must be set out clearly and prominently.

PENALTIES

During the first few days after CASL came into force, more than 1,000 complaints were filed with the CRTC. As of January 2015, the CRTC reported that approximately 210,000 complaints had been made.

CASL contains an administrative penalty regime, which can result in fines up to \$1 million for individuals and \$10 million for organizations. Directors and officers of organizations can be held personally liable if they authorized or acquiesced in the violation of CASL, and can be held vicariously liable for actions of their employees and agents. Since July 2014, the CRTC has handed out several large fines to organizations. The first major notice of violation issued by the CRTC included a penalty of \$1.1 million against Compu Finder. In June 2015, Porter Airlines agreed to pay \$150,000 as part of an undertaking for alleged CASL violations.

ON THE HORIZON

Until July 1, 2017, organizations may rely on implied consent with individuals whom they had an existing business relationship with on the date that CASL came into force. On July 1, 2017, those implied consents will expire and organizations will only be able to rely on implied consent in a situation where they have an existing business relationship that has arisen in the last two years.

Also beginning on July 1, 2017, a “private right of action” under CASL will come into force. This means that individuals who receive a CEM in violation of CASL will not be limited only to making a complaint to the CRTC; individuals will also have recourse through the courts, being able to sue the organization and individuals who violated CASL for damages.

COMPLIANCE

CASL is one of the most comprehensive and complex laws of its type in the world. Insurance brokers should study its application to their activities to determine whether their electronic communications are subject to the legislation, what type of consents are required, and whether any exemptions are applicable. Organizations that send CEMs should consider an appropriate strategy for ensuring compliance, including opt-in consent programs, a system for overseeing and managing those consents, an unsubscribe mechanism, and appropriate internal policies related to compliance with CASL. Consultations with your legal counsel will help you determine and implement appropriate compliance strategies, and minimize your potential risk under CASL.

The information in this Legal Update is general in nature and does not constitute legal advice. This Legal Update is provided to you by Judy Payne (Partner) and Niall Nazarko (Associate), at Pitblado Law. Should you have any questions regarding how CASL will affect your business practices, we hope that you will contact Judy (204-956-3525, payne@pitblado.com), Niall (204-956-3524, nazarko@pitblado.com) or another member of the Pitblado team (204.956.0560, www.pitblado.com). #

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