

Comparing CASL to CAN-SPAM

Canada's Anti-Spam Law

Raising the bar for online business communications in North America

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Canada's Anti-Spam Law (CASL)

- CASL was enacted in December 2010 and is slated to **enter into force in 2013**
- CASL is **intended to promote e-commerce** by deterring spam, identity theft, phishing, spyware, viruses, botnets, and misleading commercial representations online
- CASL **creates new offences, enforcement mechanisms and penalties** to address these online threats



Canada's Anti-Spam Law (CASL)

- Canada is the **last of the G-8 countries** to introduce an overarching law to combat spam, which continues to represent about 80% of all global e-mail traffic
- Canada has distinguished itself in making its legislation **tough**:
 - Higher consent standards
 - Detailed content requirements
 - significant penalties: **“Canada’s \$10 million anti-spam law”**



Comparing CASL to U.S. CAN-SPAM Act: A Snapshot

Comparing CASL to CAN-SPAM

Some **Similarities** – **both** CASL and CAN-SPAM:

- **Are aimed at** unsolicited online communications, and unfair/deceptive online practices
- **Require consent** to send commercial electronic messages
- **Directly impact business communications** with customers, prospective clients, and subscribers



Comparing CASL to CAN-SPAM

Key Differences – CASL has:

- Clear **reach outside Canada**
 - CASL expressly applies to messages “**accessed** from a computer system in Canada”: message can be **sent** from outside Canada
- Higher **standard for consent**
 - Opt-in (CASL) versus Opt-out (CAN-SPAM)
- Broader **application**
 - CASL also applies to installation of computer programs
- Higher **penalties**
 - \$10 million maximum penalty for CASL contravention



Comparing CASL to CAN-SPAM

- **The Implications:**
- **More online activities** will be caught by CASL
- More activities affecting Canadians will be caught by CASL, **even if initiated outside Canada**
- **More steps will be needed** under CASL to communicate online
- **Greater exposure to liability** under CASL



Comparing CASL to CAN-SPAM

Let's Take a Closer Look at:

- Objective of the legislation
- Scope: Who, What, Where
- Consent
- Disclosure (Message Content)
- Violations and Enforcement

and...

- Next Steps for Businesses



The Objective

The Objective: U.S. CAN-SPAM Act, 2003

U.S. Senator Ron Wyden (D-Ore.), October 22, 2003:

*"Today, the Senate has sent the message that the government is **going on the offensive against kingpin spammers**. Americans are tired of just watching and fretting over in-boxes clogged with unwanted e-mail, and this legislation is an **important step toward giving them more control**."*



The Objective: CASL, 2010

The Honourable Tony Clement, Minister of Industry, May 25, 2010:

*“The proposed (legislation) is intended to **deter the most damaging and deceptive forms of spam**, such as identity theft, phishing and spyware, from occurring in Canada and to help **drive spammers out of Canada.**”*



Scope: Who, What and Where

Scope: Who (Reach)

CASL

- (For spam) senders of “commercial electronic messages”
- **Potential vicarious liability:**
 - Expressly includes **directors, officers**, agents or mandataries of a corporation
 - Expressly includes **employers of employees** acting within scope of employment

CAN-SPAM

- (For spam) senders of “commercial electronic **mail** messages”
- Directors, officers, employers not referenced



Scope: What (Activities)

CASL

- Spam
- Malware, spyware, botnets
- Network re-routing
- False or misleading representations online
- **Installation of computer programs**
- Address harvesting

CAN-SPAM

- Spam
- Purely malicious spam (i.e. not “primarily commercial”) **not covered**
- False/misleading transmission information (addresses aspects of network re-routing)
- Installation of computer programs **not covered**
- Address harvesting



Scope: What (Messages)

CASL

A “commercial electronic message” is:

- An electronic **message**
 - including text, sound, voice, image
- Sent to an **electronic address**
 - including e-mail, IM, phone or “any similar account”

CAN-SPAM

A “commercial electronic **mail** message” is:

- An electronic mail message
 - **email only**



Scope: What (Messages)

CASL

A “commercial electronic message”:

- Has as its purpose or **one of its purposes...**
 - considering message content, hyperlinks, or contact info...
 - to encourage participation in **a commercial activity:**
 - transaction, act or conduct of a commercial character
 - **whether or not in expectation of profit**

CAN-SPAM

A “commercial electronic **mail** message”:

- The **primary purpose** of which is
 - **commercial advertisement or promotion** of a commercial product or service
 - Including content on a website operated for a commercial purpose
- Excludes “**transactional or relationship**” messages



Scope: Where (Jurisdiction)

CASL



- Activities outside Canada
 - Spam: computer system in Canada used to send or **access** message
 - Software installation: computer system receiving the program in Canada (or if installer is in Canada, or operating under direction of person in Canada)
 - Altering transmission data: computer system in Canada used to send/route or access message

CAN-SPAM



- Activities outside U.S.
 - Not expressly addressed in CAN-SPAM Act
 - Considered case-by-case pursuant to conflict of laws rules
 - See: *Facebook, Inc. v. Guerbuez*, 2008 U.S. Dist. LEXIS 108921 (N.D. Cal. 2008) [enforced by Quebec Superior Court in 2010]



Consent

Consent

CASL

- CEMs can be sent if:
 - You have the **express** or **implied** consent of the recipient (“opt-in”), or if
 - **consent is not required** under CASL

CAN-SPAM

- CEMs can be sent unless:
 - The recipient opts out of future commercial email



Consent

CASL



- **Exceptions to the consent requirement:**
 - Message between individuals with personal or family relationship
 - An inquiry or application to a person engaged in a commercial activity
 - Quote or estimate, requested by recipient
 - Facilitating, completing or confirming a pre-existing transaction
 - Warranty, product recall or safety/security information
 - Factual information regarding subscription, membership, account, loan
 - Ongoing information about recipient's employment or benefit plan
 - Delivering a product, good or service, including updates/upgrades

CAN-SPAM



- Exception to consent – **“transactional or relationship messages” are not CEMs:**
 - facilitating or confirming transaction that the recipient already has agreed to;
 - warranty, recall, safety, or security information about a product or service;
 - information about a change in terms or features or account balance information regarding a membership, subscription, account, loan or other ongoing commercial relationship;
 - information about an employment relationship or employee benefits; or
 - delivering goods or services as part of a transaction the recipient already agreed to



Consent

CASL



- **Implied consent:**
 - Commercial transaction with the recipient OR
 - Business, investment or gaming opportunity with recipient
 - within the previous two years
 - Inquiry from the recipient in the previous six months about the above
 - Written contract with the recipient, still in effect or expired within previous two years
 - Recipient has conspicuously published his or her electronic address, and message is relevant to his or her business role or function
 - Recipient has disclosed electronic address, and the message is relevant to his or her business role or function

CAN-SPAM



- **Implied consent** is generally available:
 - For unsolicited messages where the recipient has not opted out of receiving them



Consent

CASL



- **Getting express consent:**
 - Purpose for the consent
 - Name
 - Mailing address, and either phone number, e-mail or web address
 - Statement that the person can withdraw consent

CAN-SPAM



- No corresponding requirement since consent is generally “opt out”



Disclosure (Message Content)

Disclosure (Message Content)

CASL 

The message must:

— In message itself or via clear and prominent website link:

- Identify the sender (including “sent on behalf of”);
- Include mailing address, and either phone, email or web address; and
- Include an unsubscribe mechanism

CAN-SPAM 

The message must:

- Identify the sender (CAN-SPAM defines who designated “sender” is)
- Include physical postal address
- Include email address or other form of Internet-based communication to unsubscribe



Violations and Enforcement

Violations and Enforcement

CASL 

- CRTC: primary enforcement agency, including administrative **monetary penalties** (AMPs)
 - Maximum penalty is \$10 million for an organization, per violation
 - Relevant factors include purpose of penalty, nature & scope of violation, history, financial benefit, ability to pay
 - May enter into compliance undertaking with CRTC

CAN-SPAM 

- FTC: primary enforcement agency, including administrative penalties
 - Each individual email in violation of CAN-SPAM is subject to penalties of up to \$16,000



Violations and Enforcement

CASL



- Directors and officers' liability / Employers' liability
- Importance of "due diligence":
 - No liability where due diligence taken to prevent the violation

CAN-SPAM



- D&O and employers' liability not expressly set out in legislation



Violations and Enforcement

CASL



- Private Right of Action
 - For an **individual or organization** who has been affected by a contravention, to obtain a court order for compensation
 - Acts or omissions (e.g. spam-related)
 - Remedies include compensation for loss or damage suffered or expenses incurred, and a maximum penalty of:
 - \$200 per contravention of anti-spam;
 - max \$1 million per day for spam, malware, spyware, message routing, PI harvesting, misrepresentation; and
 - max \$1 million per act of aiding, inducing, procuring breach of spam, malware, spyware, message routing.
- Class Actions?

CAN-SPAM



- Private Right of Action
 - No PRA for an individual
 - PRA available to a “**provider of Internet access service**”, “adversely affected by a violation”
 - Injunctive relief
 - Monetary damages for actual loss incurred
 - Statutory damages based on number of unlawful messages transmitted
 - PRA taken by ISPs, MySpace, FaceBook



Next Steps: for CASL

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- Regulations
 - CRTC regulations on CEM content & consent final March 2012
 - Further Industry Canada regulations to be issued for consultation
- Entry into force
 - Expected **2013**
 - Some steps should be taken **now** to be compliant in time
 - See “Next Steps for Doing Business in Canada”
- Spam Reporting Centre
 - Once operational, will accept electronic messages, analyze trends in spam and other “threats to electronic commerce”



Next Steps: for CASL

New roles and responsibilities for three government agencies:

- Canadian Radio-television and Telecommunications Commission (**CRTC**)
 - spam, malware, botnets, network re-routing
- **Competition Bureau**
 - false/misleading representations online
- **Office of the Privacy Commissioner**
 - address harvesting, dictionary attacks, spyware (personal information)



Next Steps: for CASL

- **International Cooperation**

- CASL mandates the three agencies to share information and consult with their international equivalents, including FTC

- **Bulletins / Interpretive Guidelines?**

- Many definitions and requirements remain broad and unclear in CASL and the regulations
- Like Anti-Spam agencies around the world, CRTC and other agencies are expected to issue bulletins, in due course...



Next Steps: for Doing Business in Canada

Next Steps: for Businesses

- Three-Year Transition Period
 - For three years after entry into force of anti-spam and computer program update/upgrade provisions:
 - Implied consent where existing business or non-business relationship
 - In all cases, recipient can still withdraw consent at any time
 - **Businesses must obtain express consent during the three-year transition period, to continue afterwards.**



Next Steps: for Businesses

- CASL Audit

- Conduct an **audit of online communications** with clients, prospects, and third parties, including:

- bulk email, automated messages, periodic client newsletters and updates
 - processes for installation of software updates/upgrades

- CASL Checklist

- **Review** above communications (e-mail, computer program installation) against **CASL requirements**:

- consent, unsubscribe, and disclosure
 - available exceptions



Next Steps: for Businesses

- CASL Compliance Policy should:
 - Update your website and internal **Privacy Policy**
 - Update **forms and procedures that document consent**
 - Address **unsubscribe requirements** and timeframes
 - Update existing **customer service processes**
 - Include **information/training for employees, management and Board of Directors**
 - Address **third-party contract requirements** (limitation of liability, representations & warranties), including address rental
- Consider insurance (traditional policies may not cover)



Next Steps: for Businesses

- When operating in the North American market...
meet both **CASL** and **CAN-SPAM** requirements





More Information on CASL:

www.fmc-law.com/AreaOfExpertise/Anti_Spam.aspx

www.techstartupcenter.com blog post: [Anti-Spam applies to software installation \(Part I\)](#)

www.techstartupcenter.com blog post: [Anti-Spam applies to software installation \(Part II\)](#)

[Article: Canada's Anti-Spam Law Overview and Implications for Businesses](#)

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Questions?

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