Canada's New Anti-Spam Law[1] (CASL)

Executive Summary

The Government of Canada introduced Canada's Anti-Spam Law (CASL) on May 25, 2010. CASL received Royal Assent on December 15, 2010 and draft regulations providing key definitions and requirements were released in July 2011.[2] As of the time of publication, the provisions of the Act related to anti-spam have not yet taken effect.

The centre-piece of the Act are prohibitions aimed at preventing spam. CASL specifically regulates the sending of commercial "electronic messages," defined to include text, sound, voice and image messages sent to an email, instant messaging, telephone or similar account.

The Act also contains prohibitions on the unauthorized installation of computer programs (for example, spyware and other surreptitiously installed software) and the alteration of transmission data without prior consent. In order to combat phishing, the Act amends the *Competition Act* to create new prohibitions against sending false sender or subject matter information or false or misleading content in an electronic message. By addressing a broad range of Internet issues, CASL goes beyond anti-spam legislation in the U.S. that focuses on e-mail spam.

The Act requires express consent to the delivery of electronic messages, subject to limited exceptions. Most notably, businesses, charities and political parties with an established relationship with a recipient are generally permitted to rely on implied consent for the delivery of electronic messages for a period of two years after a purchase, donation or termination of the relationship, at which point express consent must be sought. The Act also sets out a number of exceptions to the consent requirement such as for commercial inquiries, applications, quotes, confirmations of transactions, warranty or product recall information, messages between those who have personal or family relationships, and messages that provide notification of factual information about an existing product, goods or a service.

With respect to form, electronic messages sent must identify the sender and provide accurate contact information as well as a working unsubscribe mechanism.

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[1] CASL is the re-introduction of the former *Electronic Commerce Protection Act* (ECPA), which had previously received Third Reading in the House of Commons but died in the Senate when Parliament was prorogued in December 2009. For the most part, CASL mirrors the ECPA as it had been tabled in the Senate prior to prorogation. This primer was prepared when CASL was first introduced. It has been updated to reflect the final version of the bill that received Royal Assent in December 2010 and the draft regulations issued by Industry Canada and the Canadian Radio-television and Telecommunications Commission (CRTC) in July 2011.

[2] *Notice to Interested Parties on Electronic Commerce Protection Regulations*, C. Gaz. 2011. Vol. 145, No. 27 ("CRTC Regulations); *Proposed Electronic Commerce Protection Regulations*, C. Gaz. 2011, Vol. 145, No. 28 ("Industry Canada Regulations)

The penalties for CASL violators are significant. The Act would allow the Canadian Radio-television and Telecommunications Commission (CRTC) to impose administrative monetary penalties of up to $1 million per violation for individuals and $10 million for businesses. There is also a private right of action that would allow consumers and businesses to take civil action against anyone who violates CASL, including statutory damages of up to $200 for each violation of the unsolicited electronic message provision of the Act, up to a maximum of $1 million each day.

Once CASL takes effect, it will impose new compliance requirements, and organizations that send electronic messages should consider starting to plan for these changes now. In particular, organizations that are sending commercial electronic messages should consider whether express consent is required or whether they can rely on a prescribed form of implied consent or one of the exceptions to the consent requirement. Organizations must also confirm their electronic messages and consent notices meet the Act's form and content requirements. A review of privacy policies and related consent procedures is also advisable.

In addition, organizations that install computer programs on another person's computer-based device (in the course of their commercial activities) should review their consent and disclosure practices to confirm compliance with the Act.

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If you have any questions, please contact us.

Adam Kardash
Partner and Co-lead of national Privacy and Data Management Practice, Osler, Hoskin & Harcourt LLP and Head, AccessPrivacy by Osler.
T. 416 862.4703
akardash@osler.com

Click the following links for information about Osler's' national Privacy and Data Management law practice group.

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Overview of CASL

1. Purpose of CASL

CASL establishes a regulatory framework to promote and protect electronic communications while discouraging the abuse of these resources because such conduct is said to:

- impair the availability, reliability and efficiency of electronic communications;
- impose additional costs on businesses and consumers;
- compromise privacy and the security of confidential information; and
- undermine the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities.

CASL also makes a number of amendments to related laws including the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), the *Canadian Radio-television and Telecommunications Commission Act* and the *Telecommunications Act*.

2. Scope

CASL regulates "commercial electronic messages."[3] This term is defined broadly to capture any message with a semblance of commercial activity, regardless of the type of organization sending the message. A "commercial electronic message" may include certain charitable and political messages, as well as messages sent by broader public sector entities. A message that contains a request for express consent to receive electronic messages is itself a commercial electronic message for the purposes of the prohibitions under the Act.[4]

CASL applies to electronic messages sent to, through or from Canada, meaning that it applies to international senders who send commercial electronic messages into Canada.[5]

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[3] An "**electronic message**" is defined in subsection 1(1) as a message sent by any means of telecommunication, including a text, sound, voice or image message. A "commercial electronic message" is defined in subsection 1(2) as a message that having regard to the content of the message, any hyperlinks in the message to content on a website, or the contact information contained in the message, it would be reasonable to conclude has as its purpose (or one of its purposes) to encourage participation in a commercial activity including messages that: (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land; (b) offers to provide a business, investment or gaming opportunity; (c) advertises or promotes anything referred to above; or (d) promotes a person, including the public image of a person, as being a person who does, or intends to do, anything referred to above.

[4] Subsection 1(3).

[5] Section 12.

In the event of a conflict between a provision of CASL and a provision of PIPEDA dealing with the protection of personal information, the provision of CASL takes precedence.[6]

3. Prohibitions

Subject to limited exceptions, the Act prohibits sending, or causing or permitting to be sent, a commercial electronic message to an electronic address[7] unless the recipient has consented to receiving it, "whether the consent is express or implied," and the message complies with the prescribed form and content requirements set out below.[8] There are only limited circumstances under CASL where consent may be implied.

To combat phishing, CASL also prohibits altering transmission data "so that the message is delivered to a destination other than, or in addition to that specified by the sender," without the express consent of the sender or the recipient.[9]

Finally, the anti-malware provisions prohibit installing or causing to be installed a computer program on any other person's computer system, or causing electronic messages to be sent from that computer system, if the computer system or sender is located in Canada at the relevant time, without the express consent of the owner of the computer system.[10]

CASL makes clear that the burden of proof lies with the person who alleges they have consent to do something that would otherwise be prohibited under the Act.[11] The details of these prohibitions are set out below.

4. Sending Commercial Electronic Messages

i. Express or implied consent required

Under CASL, a person can only send a commercial electronic message to a recipient that has consented to receiving it. In particular, the Act prohibits sending a commercial electronic message to an electronic address without first obtaining the recipient's express consent, with limited exceptions where consent may be implied or where consent is not required.

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[6] Section 2.
[7] CASL defines "**electronic address**" in subsection 1(1) as an address used in connection with the transmission of an electronic message to an electronic mail account, an instant messaging account, a telephone account, or any similar account.
[8] Section 6.
[9] Section 7.
[10] Section 8.
[11] Section 13.

This permission-based, largely "opt-in" approach to consent goes beyond the U.S. CAN-SPAM Act that allows marketing e-mail messages to be sent to anyone, without permission, until the recipient expressly requests that they cease (i.e., "opt out").

A person who seeks express consent must, when requesting consent, set out "clearly and simply" the following information in writing:[12]

- the purpose or purposes for which the consent is sought;
- the name of the person seeking consent and the person, if different, on whose behalf consent is sought;
- if the consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought;
- if the person seeking consent and the person, if different, on whose behalf consent is sought carry on business by different names, the name by which those persons carry on business;
- the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address of the person seeking consent and, if different, the person on whose behalf consent is sought and any other electronic address used by those persons; and
- a statement indicating that the person whose consent is sought can withdraw their consent by using any contact information referred to above.

ii. Implied consent

The Act sets out limited circumstances where consent may be implied, including situations where:[13]

- the person who sends the message has an "existing business relationship" or an "existing non-business relationship" with the person to whom it is sent (the definition of these two phrases is set out below);
- the recipient has conspicuously published their electronic address, this publication is not accompanied by a statement that they do not wish to receive unsolicited messages, and the message is relevant to their business role; or
- the recipient has disclosed to the sender the electronic address without indicating a wish not to receive unsolicited messages, and the message is relevant to their business role.

As a result, it appears that there may be situations where an organization may have valid implied consent, for example to a marketing communication, under PIPEDA, but not CASL.

[12] Subsection 10(1) and CRTC Regulations, Section 4.
[13] Subsection 10(9).

a) Existing business relationship

An "existing business relationship" is defined under CASL as a business relationship between the recipient and the sender of the commercial electronic message arising from:[14]

- the purchase or lease of a product, goods, a service, land or an interest or right in land, within the two year period immediately before the day on which the message was sent;
- the acceptance by the recipient, within the two year period, of a business, investment or gaming opportunity offered by the sender;
- the bartering of a product, goods, a service, land or an interest or right in land between the recipient and the sender, within the two year period;
- a written contract entered into between the recipient and the sender, if the contract is currently in existence or expired within the two year period; or
- an inquiry or application, within the six month period immediately before the day on which the message was sent, made by the recipient to the sender with respect to anything mentioned above.

The two year period referred to above begins on the day that any underlying subscription, account, loan, membership or other relationship terminates. In other words, implied consent may be relied upon for two years beginning on the day that the relationship ends.[15]

The Act makes clear that where a person has an existing business relationship and the business is sold, the person who purchases the business is considered to have, in respect of that business, an existing business relationship with that person.[16]

b) Existing non-business relationship

"Existing non-business relationship" is defined as a non-business relationship between the recipient and the sender of the commercial electronic message arising from:[17]

- a donation or a gift made by the recipient to the sender within the two year period immediately before the day on which the message was sent, where the sender is a registered charity, a political party or a person who is a candidate for publicly elected office;
- volunteer work performed by the recipient for the sender, or attendance at a meeting organized by the sender, within the two year period, where the sender is a registered charity, a political party or a person who is a candidate for publicly elected office; or

[14] Subsection 10(10).
[15] Subsection 10(14).
[16] Subsection 10(12).
[17] Subsection 10(13).

- membership by the recipient, within the two year period, where the sender is a club, association or voluntary organization.[18]

iii. Exceptions to consent requirements

There are limited circumstances in which a person does not need consent to send a commercial electronic message. For example, messages that are sent by or on behalf of an individual to another individual with whom they have a personal or family relationship (as defined in the regulations), as well as messages to a recipient that is engaged in a commercial activity where the message consists solely of an inquiry or application related to that activity.[19]

CASL's consent requirement also does not apply to a message that "solely":[20]

- provides a quote or estimate for the supply of a product, goods, a service, land or an interest or right in land requested by the recipient;
- facilitates, completes or confirms a commercial transaction that the recipient previously agreed to enter into with the sender;
- provides warranty information, product recall information or safety or security information about a product, goods or a service used by the sender;
- provides notification of "factual information" about:
    - the ongoing use or ongoing purchase of a product, goods or a service offered under a subscription, membership, account, loan or similar relationship by the sender; or
    - the ongoing subscription, membership, account, loan or similar relationship of the recipient;
- provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved; or
- delivers a product, goods or a service, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction they have previously entered into with the sender.

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[18] Under the regulations, "**membership**" is the status of having been accepted as a member of a club, association or voluntary organization in accordance with the membership requirements of the club, association or organization. A "**club, association or voluntary organization**" is a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than profit, if no part of its income is payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization the primary purpose of which is the promotion of amateur athletics in Canada (CRTC Regulations, Section 4).

[19] Subsection 6(5).

[20] Subsection 6(6).

iv. Form and content requirements

Under CASL, the contents of a commercial electronic message must clearly and prominently set out:[21]

- the name of the person sending the message and the person, if different, on whose behalf it is sent;
- if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent;
- if the person who sends the message and the person, if different, on behalf of whom it is sent carry on business by different names, the name by which those persons carry on business;
- the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address of the person sending the message and, if different, the person on whose behalf the message is sent and any other electronic address used by those persons; and
- an unsubscribe mechanism (see below).

The contact information outlined above must be valid for at least 60 days after the message has been sent.

CASL's form and content requirements do not to apply to commercial electronic messages:[22]

- that are sent by or on behalf of an individual to another individual with whom they have a "personal or family relationship," as defined in the regulations;[23] or
- that are sent "to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity."

[21] Subsection 6(2) and CRTC Regulations, Subsection 2(1). If it is not practicable to include the information referred to in this section in a commercial electronic message, that information may be provided by a link to a web page on the World Wide Web that is clearly and prominently set out and that can be accessed by a single click or another method of equivalent efficiency at no cost to the person to whom the message was sent (CRTC Regulations, Subsection 2(2)).
[22] Subsection 6(5).
[23] Under the regulations, a "**family relationship**" means a relationship between individuals who are connected by: (i) a blood relationship if one individual is the child or other descendant of the other individual, the parent or grandparent of the other individual, the brother or sister of the other individual or of collateral descent from the other individual's grandparent, (ii) marriage, (iii) a common-law partnership, and (iv) adoption. A "**personal relationship**" means the relationship, other than in relation to a commercial activity, between an individual who sends the message and the individual to whom the message is sent, if they have had an in-person meeting and, within the previous two years, a two-way communication (CRTC Regulations, Section 2).

v. Definition of sent

A message is considered to have been "sent" once its transmission has been initiated (by the sender).[24] It is immaterial whether the address to which the message is sent exists or whether the message reaches its intended destination, which highlights the importance of bounce (non-delivery report) management for e-mail marketers.

vi. Unsubscribe mechanism

CASL requires organizations to establish an unsubscribe mechanism that allows recipients to indicate, "at no cost to them," the wish to no longer receive commercial electronic messages, using:[25]

- the same electronic means by which the message was sent; or
- "if using those means is not practicable," any other electronic means that allows the recipient to indicate their preference.

The unsubscribe mechanism must also specify an electronic address, or provide a hyperlink, by means of which the recipient can indicate their preference to no longer receive messages.[26] Both the electronic address and the hyperlink must be valid for a minimum of 60 days after the message has been sent, and must be able to be performed in no more than two clicks or another method of equivalent efficiency.[27]
The unsubscribe mechanism must give effect to the request to no longer receive messages no later than 10 business days after the request has been sent, without any further action being required on the part of the requester.[28]

5. Installation of a computer program

The Act prohibits installing, or causing to be installed, a computer program on any other person's computer system, or causing electronic messages to be sent from that computer system, unless the express consent of the owner system has been obtained and there is an opportunity to withdraw that consent and have the program removed or disabled.[29] However, the computer system or any person causing or directing the computer program's installation must be located in Canada at the relevant time for this provision to apply.[30]

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[24] Subsection 6(4).
[25] Subsection 11(1)(a).
[26] Subsection 11(1)(b).
[27] Subsection 11(2); CRTC Regulations, Subsection 3(2).
[28] Section 11(3).
[29] Subsections 8(1), 10(1) and (3), and 11(5).
[30] Subsection 8(2).

A person seeking express consent for the installation of a computer program must, when requesting consent, set out in writing "clearly and simply" the following information:[31]

- the purpose or purposes for which the consent is sought;
- the function and purpose of the computer program that is to be installed;
- the name of the person seeking consent and the name, if different, on behalf consent is sought;
- if the consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought;
- if the person seeking consent and the person, if different, on whose behalf consent is sought carry on business by different names, the name by which those persons carry on business;
- the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address of the person seeking consent and, if different, the person on whose behalf consent is sought and any other electronic address used by those persons; and
- a statement indicating that the person whose consent is sought can withdraw their consent by using any contact information above.[32]

The Act also identifies certain functions that are said to be "contrary to the reasonable expectations of the owner" and therefore subject to a higher standard of disclosure. In particular, notice must be clear and prominent and provided separately and apart from the license agreement. The prescribed functions include changing or interfering with settings, preferences or commands already installed on the system without the owner's knowledge, causing the computer to communicate with another device without the owner's authorization, or installing a program that may be activated by a third party, again without the owner's knowledge. In such instances, the nature and purpose of these functions and their impact on the operation of the computer must be brought to the attention of the owner separately from any other information provided in the request for consent.[33] In addition, the person seeking consent must obtain an acknowledgement in writing from the person from whom consent is being sought that they understand and agree that the program performs the specified functions.[34]

The consent provisions do not apply to installation of updates or upgrades to programs that have been previously installed in accordance with the Act.[35] A person is also said to have expressly consented to the installation of a computer program if the program is, for example, a cookie; HTML code; Java Scripts; an operating system; and where "the person's conduct is such that it is reasonable to believe they consent to the program's installation."[36]

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[31] Subsections 10(1) and (3).
[32] CRTC Regulations, Section 4.
[33] Subsection 10(4) and CRTC Regulations, Section 5.
[34] Section 10(4) and CRTC Regulations, Section 5.
[35] Subsection 10(7).
[36] Subsection 10(8).

The Act sets out transitional provisions for the consent regime where a computer program has previously been installed on a person's computer system.[37] In particular, consent by the owner of the computer system to the installation of an update or upgrade is implied for a period of three years from the coming into force of the Act or until the person no longer consents to receiving the installation.

6. Enforcement

Oversight and enforcement under the Act rests with three agencies: the Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Bureau and the Office of the Privacy Commissioner of Canada. The CRTC is the primary enforcement agency, and has been given a wide range of investigative powers. The Competition Bureau and Privacy Commissioner may investigate complaints under the new provisions of their respective acts (see below) or defer an investigation to the CRTC. They may also consult with each other to the extent they consider appropriate to ensure effective regulation and to coordinate their activities.[38]

The Act also provides for the sharing of information by all three agencies with foreign governments or international organizations, where the information may be relevant to the investigation or proceeding relating to a violation of foreign laws that address conduct that is substantially similar to that which is prohibited in CASL or the administration of the Act.[39]

i. Administrative monetary penalties

CASL allows administrative monetary penalties of up to $1 million for an individual and $10 million in all other cases for each violation of any of sections 7 to 10 of the Act (which contain the prohibitions on unsolicited electronic messages, altering of transmission data, and installation of a computer program, respectively). The Act sets out factors relevant to an assessment of the amount of a penalty:[40]

- The purpose of the penalty;
- The nature and scope of the violation;
- The person's history with respect to any previous violations, undertakings or consent agreements under CASL and related Acts;
- Any financial benefit that the person obtained from the commission of the violation;
- The ability to pay the penalty;
- Whether compensation was voluntarily paid to a person affected by the violation; and
- Any other relevant factor or additional factors established by regulation.

[37] Section 67.
[38] Section 57.
[39] Section 60.
[40] Subsection 20(3).

ii. Directors' and Officers' Liability

CASL provides that an officer, director, agent or mandatary of a corporation is liable for a violation committed by the corporation if they "directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against."[41]

iii. Due Diligence Defence

The Act also contains a due diligence defence such that a person will not be found to be guilty of an alleged violation if they establish that they exercised due diligence to prevent the violation.[42]

iv. Undertakings

CASL provides for undertakings that may be entered into at any time and would restrict other enforcement actions, including a notice of violation. However, the CRTC may choose to make public the name of a person who enters into an undertaking as well as the nature and conditions of the undertaking and any amount payable.[43]

v. Notices of violation

A notice of violation will be served on a person where there are reasonable grounds that the person has committed a violation the Act. The notice of violation will set out any administrative monetary penalty, following which the person believed to have committed the violation will have 30 days to either pay the penalty or make representations to the CRTC.[44]

Where a person makes representations, the CRTC must decide "on a balance of probabilities" whether the person committed the violation and, if so, may impose the penalty set out in the notice of violation, or reduce or waive the penalty. The CRTC may make public the name of a person who is found to have committed a violation, as well as the nature the violation and any amount payable.[45]

Where a person is found to have committed a violation, they have 30 days to appeal the decision to the Federal Court of Appeal.

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[41] Section 31.
[42] Section 33.
[43] Section 21 and Subsection 39(a).
[44] Section 22.
[45] Section 25 and Subsection 39(b).

vi. Private right of action

The Act provides for a new private right of action for persons who allege they have been affected by violations of CASL or the new or amended provisions of the *Competition Act* or PIPEDA, to apply to court for an order against the person they allege is liable for the violation.[46] Remedies include compensation for actual loss or damage suffered or any expenses incurred as well as statutory damages of up to $200 for each violation of section 7 (unsolicited electronic communications) up to a maximum of $1 million for each day on which the violation occurred. In the case of violations of sections 8 and 9 (altering transmission data and installation of computer programs), damages are set at $1 million per day.[47]

7. Transitional provisions

Where there is an existing business or non-business relationship that already features electronic communication between the two parties, consent by the recipient of an electronic message is implied for a period of three years from the coming into force of the Act or until the person withdraws consent for such communication. For clarity, the existing business or non-business relationship in these circumstances must still meet the definition set out in the Act and include the communication between them of commercial electronic messages.[48]

8. Amendments to current legislation

In addition to the prohibited activities noted above, CASL amends the *Canadian Radio-television and Telecommunications Commission Act*, the *Competition Act*, the *Telecommunications Act* and PIPEDA to address spam and spam-related activities. Specifically, the false or misleading representation provisions as well as the deceptive marketing provisions of the *Competition Act* are amended to render false sender or subject matter information, false or misleading content as well as false locator information sent in an electronic message, illegal.[49]

CASL also amends PIPEDA to prohibit the collection of a person's electronic address through the use of a computer program designed for that purpose, without consent, and to prohibit the collection and use of personal information by means of unauthorized access to a computer system. The private right of action created by CASL will apply to these prohibitions. The rules about contraventions and reviewable conduct that includes director and officers liability now also apply to these new prohibitions.[50]

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[46] Section 47.
[47] Section 51.
[48] Section 66.
[49] Section 75.
[50] Sections 52 to 55.