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CASL is Coming!

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I. Introduction

The first provisions of Canada's Anti-Spam Legislation ("**CASL**" or the "**Act**"),[1] one of the world's most rigorous anti-spam legislation, will finally come into force on July 1, 2014.[2] While CASL first received royal assent in 2010, it has not yet come into force pending the creation of various clarifying regulations. The initial sections that will come into force relate to the sending of Commercial Electronic Messages ("**CEMs**"), to be followed by those provisions relating to the unsolicited installation of software, which will come into force on January 15, 2015. Lastly, the sections of the Act allowing for a private right of action against spammers will come into force on July 1, 2017.[3]

The objective of CASL is to encourage the growth of electronic commerce by promoting confidence and trust in the online marketplace by "effectively [combatting] spam and other related electronic threats". [4] The Act sets out to punish individuals and entities that use spam and malicious software, in an effort to ensure that the significant cost consequences of such disruptive activities are internalized by the parties employing them.[5]

The impact of CASL on individuals, e-commerce and business, both in Canada and abroad, will be widespread and profound. As Canada aims to become "a leader in anti-spam legislation", organizations that operate in Canada or market to Canadians must take measures to acquaint themselves with CASL and adapt to its requirements.[6]

The following article provides a high level review of CASL and its regulations in an effort to guide businesses seeking to ensure compliance with this new and aggressive piece of legislation. The article will focus on the earliest of restrictions to come into force (those related to CEMs) and will discuss those provisions of the Act pertaining to the installation of software.

II. CASL's Structure

Simply put, CASL prohibits the sending of CEMs and installation of software on the computers of recipients/owners absent their prior consent. Absent limited exceptions, CASL requires individuals that are the subject of CEMs to actively and expressly "opt in" to receive such email, placing the onus on the sender to seek the recipient's consent to receive CEMs before taking any further action.[7]

The Act has also been clarified over the past several years by accompanying regulations. The first of these clarifying regulations were prepared by the Canadian Radio-television and Telecommunications Commission (CRTC). The

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[1] *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*, SC 2010, c 23. ["CASL" or "the Act"]
[2] James Moore, "Regulatory Impact Analysis Statement", Industry Canada: Electronic Commerce Protection Regulations, online: <http://fightspam.gc.ca/eic/site/030.nsf/eng/00271.html> . ["RIAS"]
[3] *Ibid*.
[4] *Ibid* at p 1.
[5] *Ibid*.
[6] *Ibid*.
[7] "Government of Canada Introduces Anti-Spam Legislation (CASL): Questions and Answers", online: Digital Policy Branch (February 15, 2013) <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html>

*Electronic Commerce Protection Regulations (*the "CRTC Regulations"*)* prescribe various content requirements for CEMs and requests for consent. Non-compliance with the CRTC Regulations' content requirements exposes individuals and organizations to substantial liability.[8]

Additionally, in response to concerns over the onerous obligations and restrictiveness of CASL, Parliament and Industry Canada enacted an additional set of regulations. These Governor in Counsel Regulations, also called the *Electronic Commerce Protection Regulations* (the "IC Regulations") aim to limit the effect of CASL by providing various exemptions from the express "opt-in" regime or otherwise exclude certain CEMs altogether, some of which are discussed in greater detail below.[9]

To date, the only meaningful guidance regarding the impact and scope of CASL has been Industry Canada's Regulatory Impact Analysis Statement (the "RIAS"), which was issued along with the IC Regulations. While the RIAS does offer some helpful guidance regarding the interpretation of CASL, and endeavours to offer certain clarification of difficult provisions, it is important to remember that the RIAS ultimately does not have the force of law and thus its usefulness is quite limited.

III. Risk of Non-Compliance

CASL is legislation with teeth, particularly from a Canadian perspective. Non-compliance with CASL may result in severe penalties for both organizations and individuals. Once the Act is in full force, non-compliant parties will be subject to the following sanctions:

1. Maximum administrative penalties of $1,000,000 and $10,000,000 ordered against individuals and other "persons", respectively, who fail to comply with CASL;[10]
2. A private right of action against any allegedly non-compliant party for an amount equal to the actual loss or damage suffered by the applicant/recipient of non-compliant CEMs. The maximum monetary awards that may be ordered pursuant to such actions vary, but in some cases may exceed $1,000,000;[11] and
3. Criminal sanctions may also apply.[12]

Furthermore, officers, directors or agents who acquiesce or participate in the violation of CASL will be held *personally* liable for such violations, whether or not an action is commenced against the organization on whose behalf the CEM was sent.[13]

IV. Commercial Electronic Message Prohibition

Under CASL, CEMs are electronic messages that encourage participation in "commercial activities", irrespective of any expectation of profit.[14]

(a) Commercial Activities

Consistent with the broad scope of CASL, "commercial activities" are broadly defined to include not merely offers of purchase or sale, but also the advertising of offers, investments, and the promotion of persons who participate in such

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[8] *Electronic Commerce Protection Regulations,* CRTC 2012-183 ["CRTC Regulations"]
[9] *Electronic Commerce Protection Regulations*, 81000-2-175 (SOR/DORS). ["IC Regulations"]
[10] CASL, *supra* note 2 at s 20(4).
[11] *Ibid* at s 47(1) and 51.
[12] *Ibid*. CASL amends the *Competition Act*, RSC 1985, c C-34, making prohibited conduct under CASL also reviewable under the *Competition Act*.
[13] *Ibid* at s 31.
[14] *Ibid* at s 1(1).

commercial activities.[15] Thus, any form of communication that encourages participation in a commercial activity could ostensibly constitute a CEM. However, the mere fact that a message involves commercial activity, hyperlinks to a person's website, or business related electronic addressing information does not make it a CEM under the Act. If none of its purposes is to encourage the recipient in additional commercial activity, it is not considered a CEM. Needless to say, there remains a certain amount of confusion as to the exact meaning of this term, which may cause some compliance difficulties.

(b) Request for Consent

To facilitate overall compliance with the Act from the outset, the legislation also treats a "request for consent" for the sending of CEMs as CEMs.[16] In theory, individuals should begin their correspondence with other persons by first requesting consent from a proposed recipient in a manner that complies with CASL. This step must be taken in advance of sending what would otherwise be considered a CEM.

As a result, it remains unclear where the limits of the term CEM lie. The RIAS has confirmed that implied consent acquired in compliance with the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") may no longer constitute adequate consent and will be offside the consent provisions of CASL.[17] On the other hand, express consents, obtained before CASL comes into force, to collect or use email addresses to send CEMs will be recognized as compliant with CASL. Organizations and individuals seeking to establish correspondence with potential recipients must therefore review their existing databases of electronic addresses and request for consent protocols to ensure they are consistent with CASL.

V. Consent

No person may send CEMs, or cause or permit such messages to be sent, without first obtaining the intended recipient's express or implied consent.[18] Where a claim or allegation is brought pursuant to CASL, the evidentiary burden of proving the consent was granted and that the sender complied with the Act lies with the sender of the CEM.[19] Accordingly, consent, whether verbal or written, must be properly documented.

(a) Express Consent

When seeking express consent, the sender is not merely required to outline the purpose for which consent is being sought or "clearly and simply" identify themselves and, if sending the message on another's behalf, identify that other person.[20] The identification obligations for the "request for consent" additionally require the following:

1. The sender must outline the name by which the person seeking consent carries on business;[21]
2. If the sender is seeking consent on another's behalf:
    a. the name by which that person carries on business; and
    b. a statement indicating which person is seeking consent (i.e. the sender or the other named party);[22]

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[15] *Ibid* at s 1(2).
[16] *Ibid* at s 1(3).
[17] RIAS, *supra* note 3 at p 10.
[18] CASL, *supra* note 2 at s 6(1).
[19] *Ibid* at s 13.
[20] *Ibid* at s 10; See also: "FAQs: About the Law", Canada's Anti-Spam Legislation, (January 20, 2013) <http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00050.html>
[21] CRTC Regulations, *supra* note 8 at s 4(a)
[22] *Ibid* at s 4(b)-(c).

3. The mailing address, and either a telephone number or voice messaging system, email address or web address of the person seeking consent;[23] and
4. The contact information must be valid for the period covered by the consent.[24]

The purpose of incorporating these requirements in the original request for consent, according to CASL, is to enable the recipient of the message to readily contact the sender.[25] This obligation to provide contact information, together with the requirement that the request for consent include a statement informing the recipient that they can withdraw consent,[26] ensures that the recipient is apprised of their right not only to "opt-in" to the CEMs, but also to "opt-out" at any time.

(b) Implied Consent

Consent can only be *implied* in very specific circumstances and within strict timelines. In fact, according to CASL, consent can only be implied where:

1. there is an "existing business relationship" or "non-business relationship" between the sender and recipient;
2. the recipient's electronic address is conspicuously published and the recipient has not indicated that they do not wish to receive unsolicited CEMs; or
3. the recipient has disclosed, to the sender, their electronic address, to which the CEM was sent, without having indicated a desire not to receive unsolicited CEMs and the messages are relevant to the person's business, role or duties. [27]

(c) Implied Consent in Existing Business Relationships

The "existing business relationship" rule requires that, in the two (2) years preceding the sending of a CEM, the recipient,

- Purchased, leased, or bartered for, a product, good, service, land, or interest in land from the sender;
- Accepted a business, gaming or investment opportunity offered by the sender;
- Entered into a contractual arrangement with the sender and the contract is currently effective or had expired within two (2) years of sending the CEM; or
- Sent the sender an inquiry or application related to any of the aforementioned matters within six (6) months of the CEM being sent.[28]

Additionally, notwithstanding the fact that a person has previously "unsubscribed" or "withdrawn" their consent to receive CEMs, "implied consent due to an existing business relationship is reinstated with every new or subsequent transaction" that satisfies the definition of "existing business relationship" above.[29]

(d) Implied Consent in Existing Non-Business Relationships

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[23] *Ibid* at s 4(d).
[24] CASL, *supra* note 2 at s 11(4).
[25] *Ibid* at s 6(2)(b).
[26] CRTC Regulations, *supra* note 9 at s 4(e).
[27] CASL, *supra* note 2 at s 10(9)
[28] *Ibid*, at s 10(10).
[29] RIAS, *supra* note 3 at p 11.

Alternatively, the recipient and sender will be deemed to have been in an existing non-business relationship where, in the two (2) years prior to the sending of a CEM, the recipient has:

- made a donation or gift to the sender registered charity, political party or a political candidate;
- volunteered for, or attended a meeting organized by the sender, that is a registered charity, political party, or candidate for political office; or
- held a membership in the sender, which is a club, association or voluntary organization.[30]

Where the sender and recipient are not in one of the aforementioned relationships, or where the conditions that would permit the implication of consent are no longer present, the sender must revert to the basic request for *express* consent rules of CASL.

(e) Third Party Referrals ("TPR")

As a limited exception to the standard consent requirements of CASL, senders of CEMs are not obligated to seek consent in their *first* CEM to a recipient where that recipient was referred to the sender by a third party.[31] To take advantage of the TPR exception, both the sender and recipient must be in an existing relationship (personal, family, business, or non-business) with the third party.[32] To ensure the recipient is aware of the origin of the message, however, CASL obliges the sender to include a statement in the CEM noting that the message was sent pursuant to a referral and the full name of the referring third party.[33]

As the TPR exemption applies solely to the first message sent, that message should include a "request for consent" to ensure compliance with CASL moving forward.

(f) Three Year Transition Period

Consents obtained prior to the enactment of CASL may satisfy the requirements of the Act. However, where the form of prior requests for consent fail to comply with the Act, or where no consent was ever documented, the senders of CEMs will have three (3) years from the day the Act comes into force to verify and confirm that they are CASL compliant.[34] Accordingly, to the extent that a sender and recipient are in an existing business or non-business relationship as of July 1, 2014, and the recipient has not expressly withdrawn their consent to receiving CEMs, consent is implied until July 1, 2017, after which the two (2) year or six (6) month clock will start to run as described in Section V above will begin to run.[35]

VI. Withdrawing Consent

All CEMs must incorporate an "unsubscribe mechanism" to protect a recipient's right to control the messages it receives, notwithstanding their prior consent.[36] This mechanism must specify that the recipient may, at no cost, "unsubscribe" from further CEMs by indicating such an intent by using either the same electronic means used to send the message or any other practicable electronic means.[37] To further simplify the process, CASL requires that the sender provide an electronic address or link to which the indication may be easily sent.[38] This unsubscribe

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[30] CASL, *supra* note 2 at s 10(13).
[31] IC Regulations, *supra* note 10 at s 4(1).
[32] *Ibid*.
[33] *Ibid*.
[34] RIAS, *supra* note 3 at p 11.
[35] CASL, *supra* note 2 at s 66.
[36] CASL, *supra* note 2 at s 6(2)(c).
[37] *Ibid* at s 11(1)(a).
[38] *Ibid* at s 11(1)(b).

mechanism, like the sender's contact information, must be valid for at least sixty (60) days after the day on which the message was sent, to ensure recipients have sufficient opportunity to readily terminate their subscription.[39]

Once either the "unsubscribe " or the "withdrawal of consent" mechanism is triggered, the sender has ten (10) business days to give effect to the recipient's intention. Failure to do so constitutes a violation of CASL, exposing the sender to substantial penalties.[40]

VII. Excluded Commercial Electronic Messages

In addition to the implied consent exception, CASL provides for a number of other exemptions, which serve to relieve senders from the burden of adhering to CASL.

(a) Business to Business Exemption

The IC Regulations provide an exemption for CEMs sent by employees, representatives, consultants or franchisees "within organizations or sent between organizations that already have a relationship", where the messages concern the activities of the organization receiving or sending the message.[41]

These exclusions were enacted in response to "the most serious concerns raised" in relation to the broad, and potentially undesirable, effects of CASL.[42] The business-to-business exemptions, however, are intended to shelter businesses from the effects of CASL by excluding "ordinary, transactional business communications" and other "internal" communications concerning the "activities of an organization" from the scope of the Act.[43]

(b) Extra-Jurisdictional CEMs

The ambit of CASL extends exclusively to messages sent from, or accessed by, computer systems located in Canada, arguably giving the Act extra-territorial application. CASL does not apply to CEMs that are simply routed through Canada.[44]

Faced with concerns that some businesses in Canada would be obliged to comply with both CASL and the laws of foreign jurisdictions,[45] an exclusion was incorporated into the IC Regulations explicitly exempting CEMs sent from Canada that a sender "reasonably believes" will be accessed in one of the *prescribed* foreign states (e.g. the United States, Spain etc.).[46] As a caveat to the use of the Extra-Jurisdictional CEM exemption, the IC Regulations require that the CEMs sent from Canada must comply with the local laws of that prescribed foreign state.[47] These particular IC Regulations were created to reduce the burden on businesses sending CEMs to recipients in prescribed foreign states by recognizing the existence of legislation in those states that regulates the conduct prohibited by CASL.[48] Unfortunately, all businesses that operate in Canada, including US subsidiaries or foreign-owned companies, will have to undertake this analysis to determine whether CASL requirements apply to their email.

(c) Registered Charities, Political Parties and Candidates

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[39] *Ibid* at s 6(3) and 11(2).
[40] *Ibid* at s 11(3).
[41] IC Regulations, *supra* note 10 at s 3(a).
[42] RIAS, *supra* note 3 at p 6.
[43] *Ibid*.
[44] *Ibid* at p 3.
[45] *Ibid* at p 8.
[46] IC Regulations, *supra* note 10 at s 3(f) and Schedule (Paragraph 3(f)).
[47] *Ibid*.
[48] RIAS, *supra* note 3 at p 8.

The IC Regulations also exempt messages that are sent by or on behalf of registered charities, political parties or candidates, so long as the *primary* purpose behind such messages is fund-raising or soliciting contributions.[49] Not-for Profit Corporations, however, remain subject to CASL's consent and content obligations.

(d) Personal and Family Relationships

The rules regulating the transmission of CEMs relieve individuals that are in a personal or family relationship from having to comply with CASL.[50] The IC Regulations define "personal relationship" as a relationship where, taking into consideration any relevant factors such as the sharing of interests, experiences, and length of time the individuals have been communicating, it would be reasonable to conclude the individuals are involved in direct, voluntary, two-way communications as part of a personal relationship.[51]

In contrast, to be exempt from CASL on the basis of a "family relationship" the IC Regulations narrowly require that the parties be related to one another through "marriage, common-law relationship or any legal parent-child relationship".[52]

(e) Enforcing Legal Rights

The IC Regulations contain an exemption for CEMs that are sent to "enforce legal rights".[53] Accordingly, where a message is sent to satisfy a legal or juridical obligation, to give notice of or enforce such an obligation, court order, judgment or legal right, the CEM need not comply with the consent and content requirements of CASL.[54]

(f) Additional Exclusions

The IC Regulations also contains exemptions for (i) messages sent in response to a request, inquiry or is otherwise solicited by the person to whom the message is sent[55]; and (ii) messages sent over a limited-access secure and confidential account[56].

VIII. Other Exceptions to CASL

Finally, the following other forms of CEMs are exempt from the consent requirements of CASL although the form requirements remain:

1. Replies to requests by the recipient of the CEM for quotes or estimates for the supply of goods, property or services;[57]
2. Messages that facilitate, complete or confirm commercial transactions in which the recipient is involved;[58]
3. Messages that provide warranty, product recall, safety or security information regarding products or services the recipient uses or has purchased;[59]

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[49] IC Regulations, *supra* note 10 at s 3(g)-(h).
[50] CASL, *supra* note 2 at s 6(5)(a).
[51] IC Regulations, *supra* note 10 at s 2(b).
[52] *Ibid* at s 2(a).
[53] RIAS, *supra* note 3 at p 7.
[54] IC Regulations, *supra* note 10 at s 3(c).
[55] Ibid at 3(b).
[56] Ibid at 3(e)
[57] CASL, supra note 2 at s 6(6)(a).
[58] *Ibid* at s 6(6)(b).
[59] *Ibid* at s 6(6)(c).

4. Messages that provide factual information about products or services purchased by the recipient as part of an on-going subscription or membership, or information about that subscription or account;[60]
5. Messages pertaining directly to employment or benefit plans in which the recipient is involved;[61] and
6. Messages delivering products, goods, services or updates to which the recipient is entitled under the terms of a transaction previously entered.[62]

IX. Best Practices

Even though the initial provisions of CASL will be coming into force in July, it is clear that the interpretation of this Act remains a "work-in-progress". Accordingly, Industry Canada and the CRTC recommend that individuals and entities potentially involved in the sending of CEMs, and other activities within the scope of CASL, continue reviewing government websites for new developments. Nevertheless, with little time remaining before the legislation takes effect, affected organizations will need to be aware of this Act and take immediate steps to ensure that they are undertaking a compliance plan. If you think that CASL will apply to your organisation, we recommend the following "best practices" to be prepared for CASL:

1. Select a compliance team. This may be the same person or people who look(s) after Privacy Compliance.
2. Audit current practices - review and categorize what types of emails and electronic messages are currently sent and why they are sent. The purpose is to identify which are CEM's and which are not.
3. Inventory existing databases for contacts who receive CEMs. Check all possible sources of electronic mailing lists in your organization - customers, business/association partners, suppliers, etc.
4. Review all current electronic mailing lists and CEMs that are sent to determine:
    a. whether there an "existing business relationship" that would qualify for the three year transition period in CASL;
    b. what type of consent is required; and
    c. what consent has been obtained.
5. Review your current express consent language and revise it to be compliant with CASL.
6. Request express consent from mailing lists using email. Remember, this has to be done before July 1, 2014 as after July 1, 2014, unless you fall into one of the classes of exemptions for consent, you cannot use a CEM to request express consent.
7. Update documents and templates that may be used with external contacts so they include express consent. Include wording in terms and conditions of use, purchase orders, contracts and other agreements to include express consent.
8. Keep a database of implied consents so you can identify when an implied consent expires. The database will need to be able to have a "stop send" date where CEMs will no longer be sent to a contact who has given implied consent after the expiration of the 2 year or 6 month period. Also, if express consent is subsequently given, there needs to be a mechanism to update this information.
9. Update your unsubscribe mechanism to ensure it is compliant with CASL.
10. Train employees regarding CASL and its compliance requirements.

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[60] *Ibid* at s 6(6)(d).
[61] *Ibid* at s 6(6)(e).
[62] *Ibid* at s 6(6)(f)

11. Review compliance procedures with third party service providers who have access to or utilize electronic addresses/contacts. Make sure these third party suppliers are contractually obligated to comply with CASL. For example, if you purchase mailing lists, ensure the provider has obtained express consent. Do not assume U.S. providers will be compliant with CASL.
12. For new contacts, establish a mechanism to obtain express consent (not by CEMs).
13. Scrub/purge contacts for whom you do not have express consent, implied consent or for whom there is no exemption. These need to be disabled so that no CEMs are sent to them after July 1, 2014.
14. Document your CASL Policy. This will be very important to show due diligence which is a defence for directors, officers and employees.
15. Check with your insurance provider to find out if you can purchase a special rider for CASL.

Lisa is a partner in Torkin Manes' Business Law Group, specializing in the areas of information technology and business law and is the leader of the firm's Technology, Privacy & Data Management Group. Lisa has particular expertise in preparing and negotiating technology agreements. She also provides technology-related advice on financings and acquisitions, including export control and open source advice on cross-border deals. She has considerable experience helping non-Canadian companies, especially American entities, create appropriate legal agreements for their entry into Canadian marketplace.

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