

REUTERS/Benoit Tessier

Canada's Anti-Spam Legislation and Its Impact on US Businesses

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Agenda

- Overview of Canada's Anti-Spam Legislation (CASL)
 - Application of CASL to US Businesses
- Anti-spam Provisions
- Enforcement and Penalties
- Best Practices and Compliance Strategies
- Key Issues for M&A and Commercial Agreements
- Comparing CASL to US Law

Overview of CASL

- Key Prohibitions
 - Sending unsolicited commercial electronic messages (CEMs) to an electronic address
 - Altering transmission data without express consent
 - Installing computer programs without express consent
 - Making false and misleading representations
 - Collecting e-addresses using computer programs without consent
 - Collecting personal information through unauthorized access to a computer system

Application of CASL to US Businesses

CASL applies to any individual or organization that sends, or causes or permits to be sent, a commercial electronic message if a computer system located in Canada is used to send or access the message, unless the message is subject to an exception specified in CASL.

Anti-spam Provisions: What Is Prohibited?

- CASL Prohibits:
 - Sending a commercial electronic message to an electronic address, unless:
 - ✓ **Consent** (express or implied) has been obtained and
 - ✓ **Form and content** requirements are met



Anti-spam Provisions: Key Definitions

- What is a commercial electronic message (CEM)?
 - A message sent by any means of telecommunication (e.g., text, sound, voice or image) that has as its purpose, or one of its purposes, to encourage participation in a commercial activity
 - An electronic message that **requests consent** to send a CEM

Anti-spam Provisions: Key Definitions (*cont'd*)

- What is commercial activity?
 - Any transaction that is of commercial character whether or not for profit

Anti-spam Provisions: Key Definitions (*cont'd*)

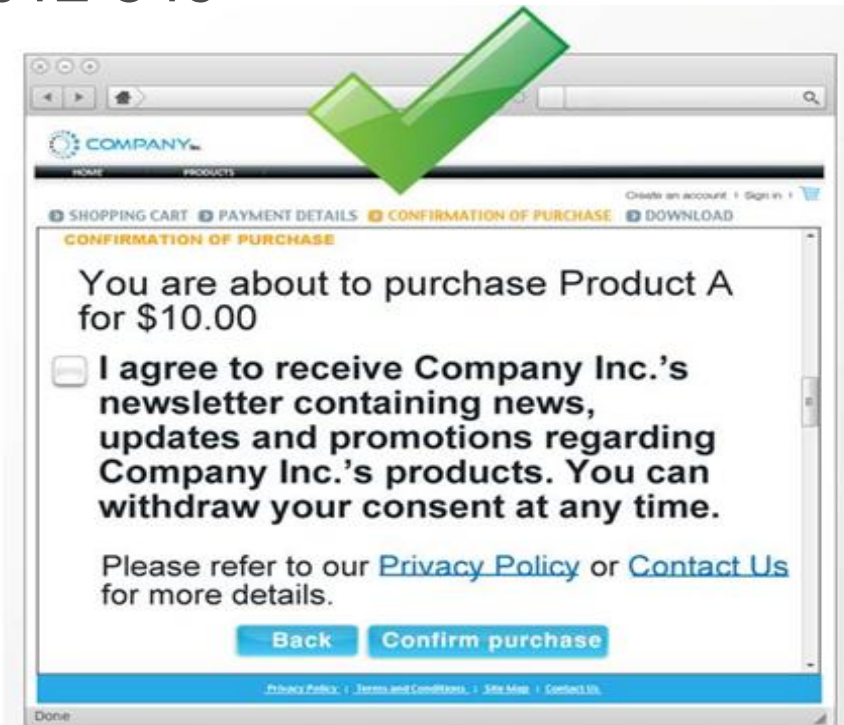
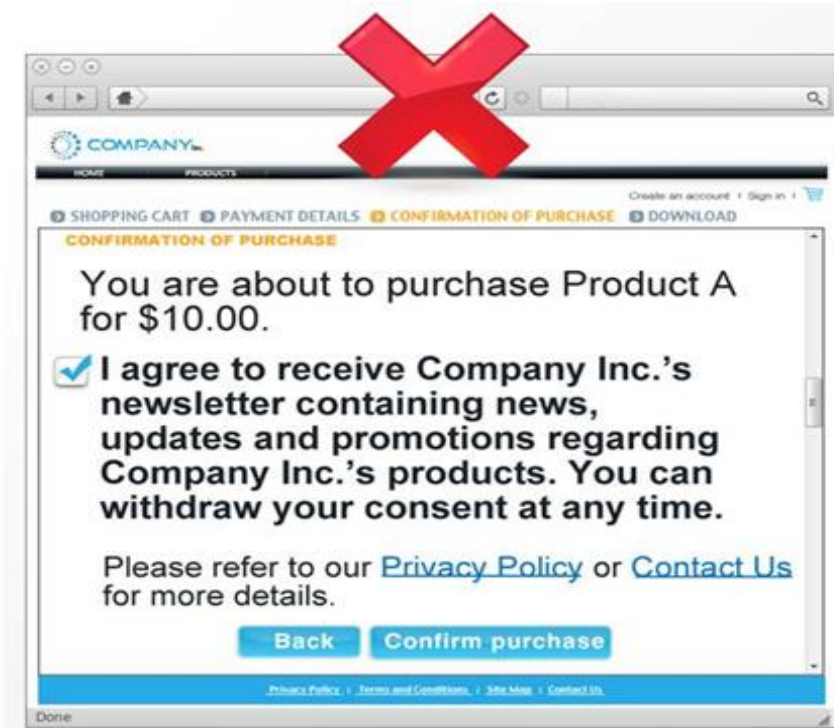
- What is an “electronic address”?:
 - An email account @
 - An instant messaging account 
 - A telephone account 
 - Any similar account ...
- What about social media?
 - Facebook or LinkedIn posts?
 - "Inmails"?

Anti-spam Provisions: Express Consent

- How is express consent obtained?
 - Requires active “opt-in”
 - May be obtained orally or in writing
- Request for express consent must clearly and simply state:
 - The purpose(s) for which consent is being sought
 - Specific information about the person seeking consent and, if applicable, the person on whose behalf consent is being sought
 - A statement that the person can withdraw their consent at any time

Anti-spam Provisions: Express Consent (cont'd)

- Example used in Compliance and Enforcement Information Bulletin CRTC 2012-549



Anti-spam Provisions: Express Consent (cont'd)

The screenshot shows a web browser window displaying a 'TERMS & CONDITIONS' form for 'COMPANY Inc.'. The browser's address bar is empty, and the page header includes navigation links for 'HOME' and 'PRODUCTS', along with a shopping cart icon and links for 'Create an account', 'Sign in', and 'DOWNLOAD'. The form itself is titled 'TERMS & CONDITIONS' and contains three checkboxes, each followed by a paragraph of text. The first checkbox is for accepting the Terms and Conditions. The second checkbox is for agreeing to the installation of 'Product A' software, with specific details about its function and removal. The third checkbox is for agreeing to receive a newsletter. At the bottom of the form is a 'Download' button with a downward arrow icon. The footer of the page contains links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'. The browser's status bar at the bottom shows 'Done'.

COMPANY Inc.

HOME PRODUCTS

SHIPPING CART PAYMENT DETAILS DOWNLOAD Create an account | Sign in |

TERMS & CONDITIONS

I accept the Terms and Conditions.

I agree to the installation of Company Inc.'s Product A software. The function and purpose of Product A are to Lorem ipsum dolor sit amet, consectetur . To request removal or disabling of this computer program under [certain conditions](#), please contact us at this [electronic address](#).

I agree to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time. Please refer to our [Privacy Policy](#) or [Contact Us](#) for more details.

Download

[Privacy Policy](#) | [Terms and Conditions](#) | [Site Map](#) | [Contact Us](#)

Done

Anti-spam Provisions: Form and Content Requirements

- What information must be provided in a CEM?
 - Specific information that identifies the sender or person on whose behalf the CEM is sent
 - Statement indicating which person is sending the CEM and which person on whose behalf the message is being sent, if applicable
 - Information enabling the recipient to contact the sender of the CEM, which is valid for 60 days
 - A functional unsubscribe mechanism that meets prescribed requirements

Anti-spam Provisions: Form and Content Example

Blakes

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This email communication is CONFIDENTIAL AND LEGALLY PRIVILEGED. If you are not the intended recipient, please notify me at the telephone number shown above or by return email and delete this communication and any copy immediately. Thank you.

L'information paraissant dans ce message électronique est CONFIDENTIELLE. Si ce message vous est parvenu par erreur, veuillez immédiatement m'en aviser par téléphone ou par courriel et en détruire toute copie. Merci.

Exemptions: Full Exemption from CASL

- Where the sender reasonably believes the message will be accessed in a specified country and the message conforms to the anti-spam law of that country
- Personal and family relationships
- Inquiries sent to a person engaged in a commercial activity in relation to that activity

Exemptions: Full Exemption from CASL (*cont'd*)

- Intra-business messages under certain circumstances
- Inter-business messages under certain circumstances
- Responses to requests, inquiries or complaints

Exemptions:

Full Exemption from CASL (*cont'd*)

- Messages sent and received on an electronic messaging service under certain circumstances
- Messages sent to a limited-access secure and confidential account where messages can only be sent by the person who provides the account
- Messages sent to satisfy certain legal obligations

Exemptions: Full Exemption from CASL *(cont'd)*

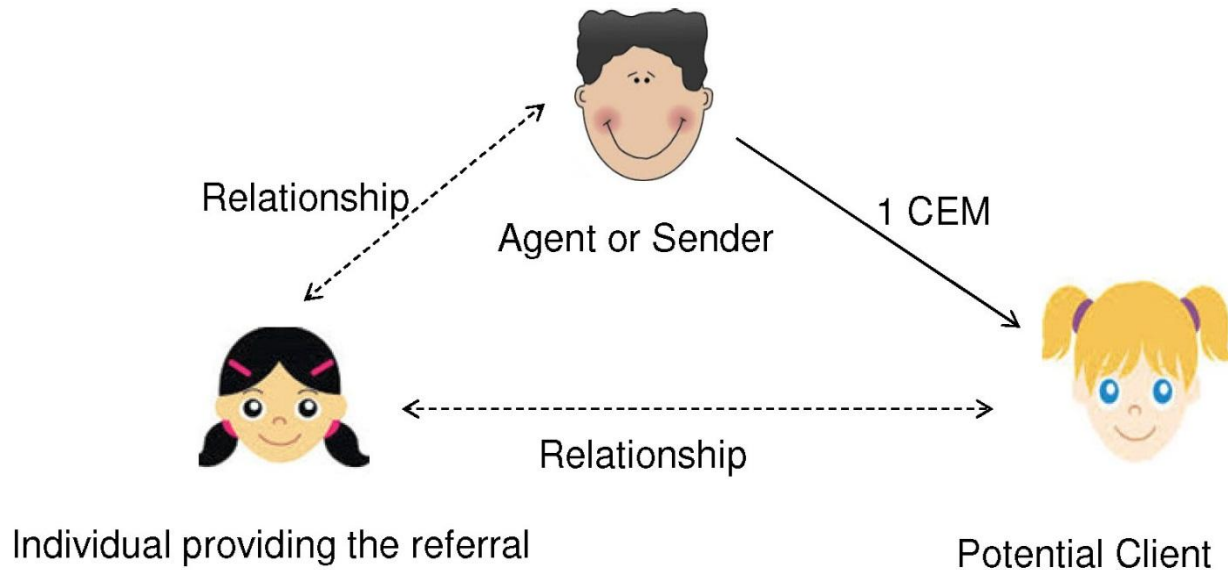
- Messages sent by a registered charity for the primary purpose of fundraising
- Messages sent by a political party, organization or candidate for the primary purpose of soliciting a contribution

Exemptions: Exemption from Consent Requirement

- Certain messages are exempt from the requirement of obtaining consent if they solely:
 - Provide a requested quote or estimate
 - Facilitate or confirm a previously agreed-on commercial transaction
 - Provide warranty/safety information
 - Provide factual information about an ongoing subscription, membership, etc.
 - Provide information related to an employment relationship, etc.
 - Deliver a product, good or service under a prior transaction
- Form and content requirements still apply

Exemptions: Exemption from Consent Requirement (*cont'd*)

- First messages sent through a third-party referral are exempt if certain conditions are met



Exemptions: Implied Consent

- An organization has implied consent to send CEMs to persons:
 - With whom it has an existing business relationship for a prescribed period of time
 - With whom it has an existing non-business relationship for a prescribed period of time
 - Who voluntarily disclose their electronic address or who conspicuously publish their electronic address:
 - Without indicating they do not wish to receive unsolicited CEMs; and
 - The message is relevant to the person's business, role, functions or duties in a business/official capacity
- Form and content requirements still apply

Transition Period

- CASL contains a three-year transitional period that extends the period of implied consent if:
 - The parties had an existing business relationship or existing non-business relationship on or before July 1, 2014 (without regard to the time limits that normally apply)
 - The relationship has previously included communication by CEMs; and
 - The recipient has not opted-out of receiving CEMs

Enforcement and Penalties

Violation	Penalty	Private Right of Action
Sending unsolicited CEMs	Maximum per breach: C\$1-million for individuals C\$10-million for corporations	Maximum: C\$200 per breach, not to exceed C\$1-million per day <u>Plus</u> Actual damages suffered or expenses incurred

Enforcement and Penalties: Vicarious Liability

- An officer, director or other manager of a corporation can be held liable for a violation if he or she directed, authorized, assented to, acquiesced in or participated in the commission of the violation
- An organization can be held liable for a violation by its employee/agent who is acting within the scope of his or her employment/authority
- Due diligence is a defense

Best Practices and Compliance Strategies

- **CATEGORIZE** the electronic messages you send by type and recipient
- **CONSIDER** whether the electronic messages you send are exempt from CASL
- **DETERMINE** whether you have express or implied consent from the recipient
- **ASSESS** if the CEM complies with the form and content requirements

Best Practices and Compliance Strategies *(cont'd)*

- **MEET** with your IT department to develop technology-based solutions to assist the organization to comply with CASL
- **DEVELOP** a CASL-compliant request for express consent and send it to your contact database if there is implied consent under CASL
- **ESTABLISH AND ADOPT** internal policies to require employees to comply with CASL
- **CREATE** a formal training program for all employees and keep track of attendance

Best Practices and Compliance Strategies *(cont'd)*

- **SCRUB** your contacts database
- **UPDATE** contracts to address CASL compliance
- **CREATE** a compliance and audit program to ensure on-going compliance

Key Issues for Transactional Lawyers where an M&A Target has a Connection to Canada

- Due diligence Questions
 - What has been the target's approach to complying with CASL? Does it have a CASL policy? Has it done any employee training?
 - Does the target purchase contact lists?
 - Does the target maintain a central contact database? Is it up-to-date? How does it track express and implied consent?
 - Does the target's terms of service include CASL consent?
 - Does the target use a prescribed format for all commercial electronic messages which it sends ?

Key Issues for Transactional Lawyers where an M&A Target has a Connection to Canada (cont'd)

- Acquisition Agreement
 - Representations and warranties to address CASL
 - CASL policy
 - Status of consents
 - Information about contacts database
 - Status of CASL complaints, if any
 - Transfer of consents
 - Express consents should be transferred as a separate asset
 - Implied consents move with the business by operation of law

What to Look for in Commercial Agreements

- Covenants
 - Obligation to comply with CASL
 - Other specific obligations
 - Requests for consent to comply with CASL
 - Send CEMs only to persons who have consented to receive them
 - CEMs to comply with the form, content and other requirements
 - CEMs include a functional unsubscribe mechanism
 - Employee training
 - Designated contact
 - No false or misleading commercial representations
 - No computer programs are installed on third party computer systems without consent

Comparing CASL to US Law

	CASL	CAN-SPAM Act	TCPA
Messages covered	<p>Commercial electronic messages that encourage participation in commercial activity, including:</p> <ul style="list-style-type: none"> - Emails - Text messages - Instant messages - Direct messages through social media sites 	Commercial email messages	Text messages
Scope	Applies where <i>one</i> of the purposes of the message is commercial	Applies where <i>primary</i> purpose of email is commercial	Where an advertisement or constitutes telemarketing

Comparing CASL to US Law (cont'd)

	CASL	CAN-SPAM Act	TCPA
Consent regime	Requires express opt-in consent (unless exemptions apply or there is implied consent)	Opt-out	Requires prior express written opt-in consent for advertisement or telemarketing (unless exemptions apply)
Identification requirements	Sender Person on whose behalf message is sent Prescribed contact information	Sender's postal address	Sender
Unsubscribe requirements	Valid for 60 days after message sent Sender must give effect to unsubscribe mechanism within 10 business days	Valid for at least 30 days after message sent Sender must give effect to opt-out within 10 business days	See Consent regime above Industry practice is to provide opt out

Comparing CASL to US Law (cont'd)

	CASL	CAN-SPAM Act	TCPA
Penalties/enforcement	<p>Administrative monetary penalties of C\$1 million for individuals and C\$10 million for corporations</p> <p>Private right of action coming into effect July 1, 2017, with C\$200 per breach up to C\$1 million per day <u>plus</u> damages and expenses</p> <p>Employer liability</p> <p>Vicarious liability for directors and officers</p>	<p>Violation as unfair or deceptive act or practice under Federal Trade Commission Act:</p> <ul style="list-style-type: none"> - Injunctive relief - Civil penalties up to US\$16,000 per email in violation <p>Other federal and state regulator enforcement</p>	<p>Forfeiture penalties, including up to US\$16,000 per violation</p> <p>Private right of action:</p> <ul style="list-style-type: none"> - Injunctive relief - US\$500 per violation or US\$1,500 for willful or knowing violation <p>State regulator enforcement</p>
Federal Regulator	<p>Canadian Radio-television and Telecommunications Commission</p> <p>Competition Bureau</p> <p>Office of the Privacy Commissioner of Canada</p>	Federal Trade Commission	Federal Communications Commission

Related Practical Law Resources

- Article, Canada's Anti-Spam Legislation and its impact on US Businesses
- Practice Note, CAN-SPAM Act Compliance
- Practice Note, Direct Marketing

Relevant resources are available with a free,
no-obligation trial to Practical Law.
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Questions