



OFFICE OF LEGAL COUNSEL

Canadian Anti-Spam Legislation (CASL)

BACKGROUND

On December 4, 2013, the federal government announced the coming into force of the Canadian Anti-Spam Legislation (“CASL”). CASL was originally passed in 2010 but not called into force pending the establishment of relevant regulations from both Industry Canada and the CRTC.



The goals of the legislation are to limit the negative effects on electronic commerce that can result from spam, and to protect the public from unsolicited and harassing commercial electronic messages (“CEM”).

CASL limits the sending of CEMs (with certain exceptions) unless the recipient has provided consent to receive such message. The legislation also provides proscriptive requirements as to form and content for CEMs including an easy to use and timely “unsubscribe” mechanism.

Even if interpretation of CASL is currently unsure of how CASL may apply to electronic communications by the University, consideration should be given to the proscribed requirements of the CASL in terms of best practices in the area of electronic communication.

1. Is the University subject to CASL?

It is early days in terms of interpreting the meaning of CASL with respect to communications sent out by the University. Under section 3 of the regulations, it states that the proscriptive requirements under section 6 (i.e. consent requirements, form etc.) do not apply to CEMs that are sent on behalf of a registered charity and the message has as its primary purpose raising funds. Given that the University is indeed a registered charity and that all our activities are primarily related to the support of our core academic activities, it is not yet clear how the University’s activities will intersect with CASL.

2. What is a Commercial Electronic Message?

This definition is one of the central pillars of CASL. A CEM:

- A) is electronic. **It includes emails, texts, SMS, electronic alerts and instant messages.** It does not include direct telephone conversations, faxes/voicemails sent to a machine, hardcopy materials sent using traditional delivery methods (i.e. mail);
- B) does not have to be solely commercial in nature. It is sufficient if one of its purposes is to encourage the recipient to participate in a commercial activity; and
- C) does not have to be for profit.

What We Do:

- ◆ Contracts & Legal Document reviews
- ◆ Provide advice to Senior Administration on diverse range of issues
- ◆ Notary and Commissioner of Oath services for documents **pertaining to University business**
- ◆ Central legal contact for external parties including lawyers, paralegals and process servers
- ◆ Workshop facilitation

Contact us:
 University of Guelph
 Office of Legal Counsel
 UC Room 403
 Guelph, ON N1G 2W1
 P: 519 824-4120, x53082
 F: 519 767-5259
 W: www.uoguelph.ca/legalcounsel/

3. What is the definition of “commercial”?

The Act does not specify; a definition of commercial as provided by Merriam-Webster is:

- *“related to or used in the buying and selling of goods and services;*
- *concerned with earning money; or,*
- *relating to or based on the amount of profit that something earns”.*

How the term “commercial” will be interpreted in future and its specific relevance to the University is yet to be determined.

4. What are the proscribed requirements for CEMs under the Act?

Under section 6 of the Act, it is prohibited to send or cause to be sent, CEMs unless:

- the recipient has provided consent to receiving the messages (See consent requirements in question 5 below);
- the CEM contains specific information regarding the sender including the identity of the sender and the sender’s contact information;
- there is an ability to “unsubscribe”. The “unsubscribe” needs to be available by way of the same electronic means by which the CME was sent or by any other electronic means such as an electronic address or link to a homepage. Once received, the unsubscribe message must be given effect within 10 business days.

5. How can the recipient’s consent be obtained?

Under the legislation, it is the sender who must prove the requisite consent exists.

Express: It is assumed that unless express consent has already been sought, it doesn’t exist. However, between now and July 1, some organizations may be sending pre-emptive requests for consent in order to be in compliance. Express consents must contain an explanation of the purposes for which the consent is being sought, identifying information about the sender and a statement that consent may be withdrawn (identifying the different categories (i.e., newsletters, event announcements etc.)).

Implied: the Act does permit organizations to rely on implied consent for an identified purpose in certain circumstances and for a limited time-period. Implied consent may arise in circumstances where there is an existing and active relationship between the parties in the last two years or if there has been an inquiry/application within the last six months.

In that instance, consent will be implied (unless expressly retracted) for three years following the July 1, 2014 “in force” date to provide an opportunity to either get express consent or to establish the requirements for implied consent. Other circumstances where implied consent may arise is if the CME is sent to an email published in a business context such as on a business’s public website and where no public decline of CEMs is apparent.

Operationally, if consent is obtained orally (i.e. over the phone), the sender will need to develop a standard process to record and maintain proof of such consents.

6. Under the Act, what kinds of CEMs are exempt from the legislation?

Certain kinds of CEMs are exempt from the proscribed elements found in section 6 of CASL (see questions 4 & 5 above). Some of the more significant exemptions include:

- internal business communications;
- CEMs from those with a family or personal relationship, as defined;
- CEMs sent regarding the existing relationship between two organizations;
- CEMs sent in response to a request or otherwise solicited by the recipient;
- CEMs sent by a political candidate or entity where the primary purpose is soliciting a contribution (*sorry*); and
- CEMs sent by a registered charity where the primary purpose is fundraising

7. What's at stake if the Act is breached?

Besides administrative monetary penalties which could be as high as \$10 million, a private right of action for an individual has been established under the legislation as of 2017. Anyone affected by a prohibited act under the legislation can take action for monetary compensation for loss, damages and expenses.

8. So what should happen between now and July 1, 2014?

- a. Review the electronic communications sent by your unit/department – newsletters, notifications, announcements, offers. Do the communications contain, even in part, information which is outside the core academic activities of the University and may be considered commercial? If “no”, then they are not captured by CASL. If “yes”, go to step b.
- b. If the message falls under the definition of a CEM, does it fall under any of the exceptions (see *Question 6*)? If “no”, then go to step c. Even if the answer is “yes” consider whether the steps in step c should be considered in terms of “best practices”?
- c. Consider the proscribed requirements under section 6 of the Act.
 - i. Is there consent of the recipient; express or implied? (see *Question 5*)? If neither expressed nor implied consent exists, consent can still be obtained by electronic means prior to July 1. On and after July 1, 2014, communication to ask for consent will have to be by non-electronic means.
 - ii. Does the electronic message contain name and contact information of the unit/department sending it?
 - iii. Is there a user friendly unsubscribe mechanism? Can an “unsubscribe” message if received, be removed within 10 business days?
- d. Consider how to keep records establishing consent on a “storable, searchable and retrievable” basis. The burden of proof to establish proper consent will rest with the sender.

As indicated at the beginning of this newsletter, interpretation of CASL is still evolving. In the meantime, if you have questions stemming from your department or unit, contact the Office of Legal Counsel at ext. 53082. As well, please note that Legal Counsel will be hosting 1.5 hour CASL update sessions in **UC 442** on the following dates:

Monday, May 12: 1:30-3 p.m.

Tuesday, May 20: 1:30-3 p.m.

Wednesday, May 21: 1:30-3 p.m.

Please contact Christina Hollingbury at c.hollingbury@exec.uoguelph.ca to reserve your spot.