

## BURNABY BOARD OF TRADE – POLICY BULLETIN

### AMENDING AND REPLACING CANADA’S ANTI-SPAM LEGISLATION

While Canada’s Anti-Spam Legislation (CASL) came into effect on July 1, 2014, the final transition periods for the law end this year on July 1, 2017.

Upon its implementation, CASL created a provisional period of 3 years where consent to receive commercial electronic messages was deemed to be implied where there was an existing business or non-business relationship. This transition ends on July 1, 2017 at which point this consent expires. In addition, July 1, 2017 also marks the time when CASL’s “private right of action” comes into force and allows individuals to personally seek damages against business and organizations for spam. Therefore, it is more imperative than ever that CASL be immediately amended to remove the most damaging aspects of the law and be replaced with a more effective law that protects Canada’s ability to communicate and compete in the global digital economy.

The legislation is intended to protect individuals from unwanted commercial electronic messages<sup>1</sup> by requiring organizations acquire prior consent from intended recipients, as well as abide by certain content protocols to ensure sender transparency and consent withdrawal/unsubscribe options. However, in practice CASL creates competitive disadvantages for Canadian businesses, particularly small businesses. CASL has a chilling effect on business prospecting and imposes labyrinthine records-keeping requirements on businesses to manage the rolling expiration of implied consent.

In fact, following the initial implementation of CASL, legitimate email traffic was reduced just as much as spam as companies scaled back email marketing efforts. In one review it was found that following the CASL implementation there was “no significant change in the percentage of emails received by Canadians that were spam.”<sup>2</sup>

The CASL legislation states that its purpose is to prevent spam because it “impairs the...use of electronic means to carry out commercial activities” and because spam “imposes additional costs on businesses.”<sup>3</sup> Unfortunately, the provisions and requirements of CASL itself have impaired the ease and effectiveness of electronic communications and have

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<sup>1</sup>A commercial electronic message is the term used by CASL for any electronic message that encourages participation in a commercial activity, whether there is an expectation of profit or not. This is primarily related to emails but also includes text-messages and other electronic forms of communication.

<sup>2</sup> Cloudmark, *Security Threat Report, 2015 Q1*, Accessed online: [https://www.cloudmark.com/releases/docs/threat\\_report/cloudmark-security-threat-report-15q1.pdf](https://www.cloudmark.com/releases/docs/threat_report/cloudmark-security-threat-report-15q1.pdf)

<sup>3</sup> 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, (2010, c. 23). Retrieved from the Justice Laws website: <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

imposed significant compliance costs on businesses.

### **CASL's Impact on Prospecting**

One of the most significant problems with CASL is that it can consider sales prospecting spam. Since CASL forbids sending emails to an individual without prior consent, prospecting for new clients via email can be considered spam and a violation of the act.

Even if recipients have made their email publicly available, CASL only provides permission to contact them if “the message is relevant to the person’s business, role, functions or duties in a business or official capacity,”<sup>4</sup> a determination made by the recipients themselves when they decide whether or not to report the message as spam. In practice, CASL creates an environment where salespeople must be 100% certain their product or service will be immediately interpreted as relevant by their potential customer or risk being in violation of the law.

Unfortunately, CASL also makes it unduly difficult to seek consent to send electronic messages in the first place by explicitly forbidding asking for consent electronically. This provision outlaws sending an electronic message to a prospect introducing yourself and your business and thus makes digital prospecting illegal. CASL should be amended to allow businesses to seek consent via electronic means.

As a result of these restrictions CASL pushes more communications onto less efficient and more costly modes – mainly telephone or mail. In an increasingly digital and mobile age, salespeople must rely on reaching prospects directly at their phone, or hoping that they (and not an assistant or secretary) open the mail. In this situation, relying on the existing unsubscribe requirements should suffice for protecting recipients from unwanted communications and therefore this restriction on using electronic messages to seek consent should be removed.<sup>5</sup>

Albeit, while the regulations which put CASL into force provide for a business-to-business exemption, it is too limiting and favours existing businesses with existing relationships over new businesses or new relationships. This blanket exemption removes the consent requirement for messages sent from “an employee, representative, consultant or franchisee of an organization...to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship. (*emphasis added*)”<sup>6</sup> This exemption, while useful overall, does not help new businesses which are hoping to build new relationships and find customers. The exemption also does not apply to prospecting at all as the entire purpose of prospecting is to develop a new relationship with a potential customer. CASL

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<sup>4</sup> An Act to promote the efficiency and adaptability of the Canadian economy. (2010, c. 23).

<sup>5</sup> All commercial electronic messages are currently required to have a working unsubscribe mechanism which is functional for 60 days after the message is sent, is of no cost to use, and is readily performed without delay. This policy does not to seek to change this requirement and would expect it or similar requirements to be included in any future spam law that replaces CASL.

<sup>6</sup> Electronic Commerce Protection Regulations. *Canada Gazette Part II*, 147 (26). Retrieved from the Canada Gazette website: <http://www.gazette.gc.ca/rp-pr/p2/2013/2013-12-18/html/sor-dors221-eng.php>

should therefore be amended to exempt all business-to-business communications from the consent requirements.

### **CASL's Rolling Expiration of Consent**

Another significant hindrance to business, especially small business, is the record-keeping requirements surrounding the rolling expiration of consent provided for in CASL.

CASL provides for 'implied consent' in several scenarios, including when a customer makes a purchase from a business or an individual makes an inquiry of a business. However, instead of bestowing unqualified consent for contacting these existing customers and warm leads, CASL creates a regime of untenable rolling expiration dates. CASL provides implied consent for two years following a purchase and for six months following an inquiry. If during that time another purchase or inquiry is made, the expiration date is reset and the countdown begins anew.

Considering that the burden of proof is on the business to prove consent exists, businesses must keep meticulous records for each contact of when they had an interaction with an individual, what type of interaction it was (purchase vs inquiry), if the contact represents a business or themselves as an individual, and the date when this consent expires. Without these types of records to prove consent exists, a complaint of spam may put the business in violation of CASL and susceptible to fines or penalties. To manage these rolling expiration dates efficiently, businesses realistically need software or computer programs which is an expense out of reach of many small businesses. Otherwise, businesses rely on complex spreadsheets or countless different mailing lists which is a significant administrative burden. Even worse, these requirements may convince some businesses to avoid sending some electronic messages altogether and forgo potential businesses development opportunities.

Take an illustrative example of a baker who sells a bride her wedding cake. Upon completion of that sale, the baker has two years in which he can contact the bride with marketing materials and ideally gain her express consent to join a mailing list. However, if the baker does not capture that consent in a CASL-approved manner, upon the bride's second anniversary the consent expires. Despite having the contact information for a happy customer, the baker now cannot contact the bride to sell a third anniversary cake, a baby shower cake, or any other product. This illustrates how a small business without marketing employees or software can find its business development efforts hampered by CASL.

Instead of providing qualified implied consent with rolling expiration dates, CASL should be amended to provide for implied consent following a purchase or an inquiry until such a time as the recipient unsubscribes. Again, relying on the unsubscribe mechanism provides enough protection against unwanted communications without imposing significant administrative burdens on businesses.

Overall, CASL is a confusing, cumbersome and complex law which imposes costly administrative burdens on the business community, creates competitive disadvantages for Canadian businesses, and impacts every legitimate business while doing little to stop the most damaging phishing and hacking spam which often originate with overseas criminal

organizations. CASL can and should be amended to remove its most onerous aspects while a replacement law is drafted which impacts actual spam and negative spamming activities and not legitimate business communications.

The Burnaby Board of Trade recommends that the federal government, in an effort to alleviate the Canadian business community from the most damaging aspects of CASL,:

1. Amend CASL immediately to:
  - a. Permit using commercial electronic messages (CEMs) to seek consent for sending customers future commercial electronic messages (CEMs).
  - b. Exempt all business-to-business communications from the consent requirements entirely, not just for organizations which “have a relationship.”
  - c. Abolish the two-year and six-month expirations for implied consent completely and make implied consent based on a customer purchase or inquiry permanent until an unsubscribe request is made.
2. Commence consultations with the business community and other stakeholders on the creation of a new law to govern and regulate electronic communications and fight spam which would then replace CASL.