

WHAT YOU NEED TO KNOW ABOUT THE NEW CANADA ANTI-SPAM LAW

Overview

Unwanted e-mail, cell phone text messages, and various other forms of electronic messages can be an annoyance and a drain on productivity, and at their worst, can be used to commit fraud or carry damaging malware. However, many businesses legitimately advertise their products and services via various electronic means and the sending of unsolicited commercial electronic messages has become a commonly accepted method of doing business.

Canada officially enacted its anti-spam legislation¹ (the “**Act**”) at the end of 2010; however, the first portions of it are set to come into force on July 1st, 2014. While presumably intended to stop the most unwanted and deceptive forms of spam, the law will profoundly affect all businesses that send electronic messages.

For most businesses, the critical aspects of the Act are as follows:

- the requirement for consent to send a commercial electronic message (“**CEM**”) and the imposition of certain requirements with respect to the form of those messages (this part of the Act comes into force on July 1st, 2014);
- a prohibition on the installation of a computer program on a user’s system without express consent (this part of the Act comes into force on January 15th, 2015); and
- the creation of a private right of action for those who suffer damages as a result of a breach of the Act (this part of the Act comes into force on July 1st, 2017).

Many people consider spam to be something that relates to offering illegal or dubious products or services such as non-licensed medical products or fake college diplomas. However, the Act covers a much more comprehensive list of messages than that. Effective as of July 1st, 2014, virtually every person/business/organization sending electronic messages to customers or potential customers will be affected by it. To understand the significance of the new anti-spam legislation and the impact that it is going to have on Canadian businesses, it is necessary to review some key provisions of the *Act* and the *Regulations* made under it.

Meaning of Commercial Electronic Message

A CEM is a message sent by any means of telecommunication, including a text, sound, voice or image message, that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the

¹ The Act is officially called: *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.*

message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity. This includes electronic messages that:

- offer to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- offer to provide a business, investment or gaming opportunity;
- advertise or promote anything referred to in the above two bulleted items; or
- promote a person, including the public image of a person, as being a person who does anything referred to in any of the above bulleted items or who intends to do so.

A message is only a CEM if it is reasonable to conclude that at least one of its purposes is to encourage participation in a commercial activity. 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 if none of its purposes is to encourage the recipient in additional commercial activity. If the message involves a pre-existing commercial relationship or activity and provides additional information, clarification or completes the transaction involving a commercial activity that is already underway, then it will not be considered a CEM since, rather than promoting commercial activity, it carries out that activity.

However an electronic message may come within the definition of a CEM if it is reasonable to conclude that one of the purposes is to encourage the recipient to engage in additional commercial activities, based on, for example, the prevalence and amount of commercial content, hyperlinks or contact information. If the purpose or one of the purposes is to advertise, promote, market or otherwise offer a product, good, service, business or gaming opportunity or interest in land, then such a message is clearly a CEM.

A CEM is considered to be sent when the transmission has been initiated and it is irrelevant whether or not the address to which it is sent exists or if it reaches its intended destination.

An electronic message that contains a request for consent to send a CEM is also considered to be a CEM. For this reason, it is important to request and collect as many consents as possible prior to July 1st, 2014.

This all-encompassing definition of a CEM makes it virtually impossible to send CEMs without the prior consent of the recipient, unless an exception applies. The breadth of the legislation challenges common conceptions of spam, and will affect many regular businesses and their previously legitimate activities. These businesses will have to start taking into account the many additional requirements that the new *Act* will impose.

Excluded Electronic Messages

Electronic messages that are sent for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defense of Canada are not CEMs and therefore are not subject to the requirements concerning CEMs.

The Act also does not apply in respect of broadcasting by a broadcasting undertaking.²

Unsolicited Commercial Electronic Messages

As mentioned above, sending a CEM to an electronic address³ (or causing one to be sent), from a computer in Canada or to a computer in Canada, is prohibited, unless:

- the person to whom the message is sent⁴ has consented to receiving it, whether the consent is express or implied; and
- the message is in a form that conforms to the prescribed requirements; and
 - sets out prescribed information that identifies the person who sent the message and the person, if different, on whose behalf it is sent;
 - sets out information enabling the person to whom the message is sent to readily contact one of the persons referred to above; and
 - sets out an unsubscribe mechanism.

The contact information referred to above must remain valid for a minimum of 60 days after the message is sent.

Information Required to be Included in CEMs

The prescribed requirements referred to above are contained in regulations released by the Canadian Radio-Television and Telecommunications Commission (“CRTC”). Those regulations stipulate that the following information must be set out in any CEMs:

- the name by which the person sending the message carries on business, if different from his or her name, if not, the name of the person;
- if the message is sent on behalf of another person, the name of the person on whose behalf the message is sent (or the name under which such person carries on business);
- 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; and
- the mailing address⁵, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the message or, if different, the person on whose behalf the message is sent.

² For the definitions of “broadcasting” and “broadcasting undertaking”, please refer to the Act.

³ “electronic address” means an address used in connection with the transmission of an electronic message to (a) an electronic mail account; (b) an instant messaging account; (c) a telephone account; or (d) any similar account.

⁴ The person to whom an electronic message is sent means the holder of the account associated with the address to which the message is sent, along with any person who it is reasonable to believe is or might be authorized by the account holder to use the account.

⁵ The mailing address must consist of the senders valid, current street or civic address, postal box, rural route address or general deliver address. This address must be valid for a minimum of 60 days after the message has been sent.

If it is not practicable to include the information referred to above in a CEM, then that information may be posted on a page on the World Wide Web that is readily accessible by the person to whom the message is sent at no cost to them by means of a link that is clearly and prominently set out in the message.

Consent

Consent can be express or implied and the manner of obtaining it is prescribed by the *Act*. When requesting consent, the following information must be clearly and simply set out:

- the purpose or purposes for which the consent is being sought; and
- prescribed information that identifies the person seeking consent and, if the person is seeking consent on behalf of another person, prescribed information that identifies that other person (subject to the rules, set out below, concerning unknown third party consents).

The prescribed information mentioned above is currently contained in the regulations released by the CRTC. Those regulations stipulate that a request for consent may be obtained orally or in writing and must include:

- the name of the person seeking consent or the name by which the person seeking consent carries on business, if different from their name;
- if the consent is sought on behalf of another person, the name of the person on whose behalf consent is sought or the name under which such person carries on business, if different from their name;
- if 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;
- the mailing address⁶, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and
- a statement indicating that the person whose consent is sought may withdraw their consent.

When consent is obtained on paper or electronically, it is in both cases, deemed by the CRTC to have been obtained “in writing”. This also includes checking a box on a web page to indicate consent where the record of the date, time, purpose and manner of that consent is stored in a database and filling out a consent form at a point of purchase.

Mechanisms such as an unchecked opt-out box or a pre-checked opt-in box cannot be used to

⁶ The mailing address must consist of the senders valid, current street or civic address, postal box, rural route address or general deliver address. This address must be valid for a minimum of 60 days after the message has been sent.

obtain express consent. The user must make a positive action (such as checking a box, or inserting an email address) to indicate that he or she provides consent. As a best practice, following the receipt of express consent, confirmation of consent should be sent to the person whose consent was given.

Requests for consent must not be subsumed in or bundled with requests for consent to the general terms and conditions of use or sale.

If you obtain valid express consent prior to July 1st, 2014, then you will be able to continue to rely on that express consent after July 1st, 2014, even if the request for consent did not contain the requisite identification and contact information. However, all CEMs sent on or after July 1st, 2014 must contain the requisite information (i.e. the information set out above under the heading: “Unsolicited Commercial Electronic Messages”).

Implied Consent

Consent may be considered to be implied only if:

- the person who sends the message (or causes or permits it to be sent) has an existing *business relationship* or an existing *non-business relationship* with the person to whom it is sent;
- the person to whom the message is sent has disclosed or conspicuously published the electronic address to which the message is sent, provided that the CEM is relevant to the person’s work and the person has not indicated that he or she does not wish to receive unsolicited CEMs at that electronic address;
- the message is sent in the circumstances set out in the regulations.

“existing business relationship” means a business relationship between the message recipient and any person who sent or caused or permitted to be sent the message (in either case, for the purposes of the bulleted items below, the “**Sender**”), arising from:

- 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, by the message recipient from the Sender (provided that in the case of a membership, subscription, loan or lease, the above described two year period starts when the membership, subscription, loan or lease terminates);
- the acceptance by the message recipient, within the period referred to in the above bulleted item, of a business, investment or gaming opportunity offered by the Sender;
- the bartering of anything mentioned in the first bulleted item above between the message recipient and the Sender;
- a written contract entered into between the message recipient and the Sender in respect of a matter not referred to in any of three above bulleted items, if the contract is currently in existence or expired within the period referred to in the first

- bulleted item above; or
- an inquiry or application, within the six-month period immediately before the day on which the message was sent, made by the message recipient to the Sender, in respect of anything mentioned in any of the first three bulleted items above.

“existing non-business relationship” means a non-business relationship between the message recipient and any person who sent or caused or permitted to be sent the message (in either case, for the purposes of the bulleted items below, the “**Sender**”), arising from:

- a donation or gift made by the message recipient to the Sender, volunteer work performed by the message recipient for the Sender, or attendance at a meeting organized by the Sender, in each case within the two-year period immediately before the day on which the message was sent, where the Sender is a registered charity as defined in subsection 248(1) of the *Income Tax Act*, a political party or organization, or a person who is a candidate, as defined in an Act of Parliament or of the legislature of a province, for publicly elected office;
- membership⁷ by the message recipient, in the Sender, within the two-year period immediately before the day on which the message was sent, where the Sender is a club, association or voluntary organization⁸.

Sharing Contact lists With Unknown Third Parties

Persons/businesses may seek consent to allow other specified or unspecified persons/businesses to send CEMs. For example, a travel agent might seek consent from a client to allow other service providers that are unidentified at the time consent is sought, to also send their own CEMs to that client. After such consent is received, the travel agent may provide the client’s information to a travel insurance agent so that such insurance agent can send a CEM to the client advertising its travel insurance products. Excluding the identification of unknown third parties, the original consent request must contain the other information prescribed above (under the heading “Consent”).

When a third party consent is used, the person/business relying on that consent must identify itself and provide an unsubscribe mechanism, as required when sending any CEM. However, in addition, the individual who provided consent must have the ability to unsubscribe from any third party CEMs that rely on the original consent, and the manner of doing so must be within the CEM received from the third party. This means that persons/businesses using this form of consent to send CEMs must be able to notify the original requester (who obtained the third

⁷ membership is the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.

⁸ 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 personal 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 whose primary purpose is the promotion of amateur athletics in Canada.

party consent) that the recipient's consent to receive CEMs from unidentified third parties is withdrawn. When consent to receive messages from a third party is withdrawn, the original requestor must notify each third party to whom the consent was provided that the consent has been withdrawn.

There is no requirement for the third parties to provide a mechanism to withdraw consent from all CEM's directly from the person who acquired consent; the requirement is only for the removal of consent to receive CEMs from third parties.

To continue the above travel agent example, the travel insurance agent is not required to provide an unsubscribe mechanism that would allow the client to stop receiving CEMs from the travel agent. The travel insurance agent is only required to provide mechanisms allowing the client to unsubscribe from further CEMs flowing from travel insurance agent or any other unidentified third parties associated with the travel agent.

Exemptions to the Requirement for Consent

CEMs may be sent without the consent of the person receiving it and *without* being in the form described above when the message is:

- sent by or on behalf of an individual to another individual with whom they have a personal⁹ or family¹⁰ relationship;
- sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity;
- sent by an employee, representative, consultant or franchisee of an organization
 - to another employee, representative, consultant or franchisee of the organization and the message concerns the activities of the organization, or
 - to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the organization to which the message is sent;
- that is sent in response to a request, inquiry or complaint or is otherwise solicited by the person to whom the message is sent;
- that is sent to a person:
 - to satisfy a legal or juridical obligation,
 - to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff,
 - to enforce a right, legal or juridical obligation, court order, judgment or tariff, or

⁹ "personal relationship" means individuals who have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

¹⁰ "family relationship" means individuals related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication.

- to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state;
- that is sent and received on an electronic messaging service if the information and unsubscribe mechanism that are required under the Act are conspicuously published and readily available on the user interface through which the message is accessed, and the person to whom the message is sent consents to receive it either expressly or by implication;
- that is sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the message (*e.g.* an online banking account);
- a message that sender or person who cause or permits the message to be send reasonably believes will be accessed in a foreign state that is listed in the schedule to the Regulations provided that the message conforms to the law of the foreign state that addresses conduct that is substantially similar to conduct prohibited under the Act;
- that is sent by or on behalf of a registered charity and the message has as its primary purpose raising funds for the charity; or
- that is sent by or on behalf of a political party or organization, or a person who is a candidate for publicly elected office and the message has as its primary purpose soliciting a contribution.

CEMs may be sent without the consent of the person receiving it *provided* they are in the form described above under the heading “Information Required to be Included in CEMs” when the message:

- solely provides a quote or estimate for the supply of a product, goods, a service, land or an interest or right in land, that was requested by the message recipient;
- facilitates, completes or confirms a commercial transaction that the person to whom the message is sent previously agreed to enter into with the sender or the person, if different, on whose behalf the CEM is sent;
- provides warranty information, product recall information or safety or security information about a product, goods or a service that the message recipient uses, has used or has purchased;
- provides notification of factual information about (i) the ongoing use or ongoing purchase by the message recipient of a product, goods or a service offered under a subscription, membership, account, loan or similar relationship by the message sender or the person, if different, on whose behalf the CEM is sent, or (ii) the ongoing subscription, membership, account, loan or similar relationship of the message recipient;
- provides information directly related to an employment relationship or related benefit plan in which the message recipient is currently involved, is currently participating or is currently enrolled; or
- delivers a product, good or a service, including product updates or upgrades, that the message recipient is entitled to receive under the terms of a transaction that he or she has previously entered into with the message sender or the person, if different, on

whose behalf the CEM is sent.

Third Party Referrals

Where an existing client of a person/business has an existing relationship (personal, family, business, or non-business) with another person (the “prospective client”), and that existing client refers the prospective client to the person/business by providing the prospective client’s electronic address information, the person/business is permitted to send a single message to the prospective client (without the prospective client’s consent), as long as the person/business has provided the prospective client with (a) the full name of the individual who made the referral, and (b) the identification and unsubscribe requirements as set out in the Act.

There are a variety of other ways referral marketing can continue to occur under Act without the use of the exclusion. For example, the individual making the referral may provide the person’s/business’s contact information to the prospective client, so he/she/it may contact the person/business themselves; or the person making the referral may ask the prospective client for their consent to have the person/business contact them directly.

Inapplicability of the Act

To provisions of the Act concerning CEMs do not apply to:

- a telecommunications service provider merely because the service provider provides a telecommunications service that enables the transmission of the message.
- a CEM:
 - that is, in whole or in part, an interactive two-way voice communication between individuals;
 - that is sent by means of a facsimile to a telephone account; or
 - that is a voice recording sent to a telephone account.

Burden of Proof

If a business is relying on the fact that it has consent to send a CEM, then it has the onus of proving that it has such consent. In light of this onus, the best practice will be for businesses to document their relationship with clients and any express consents received. It will also make sense for businesses to establish inter-firm e-communication policies and to designate the person responsible for its maintenance and enforcement. It is recommended that businesses record the date, time, purpose and manner consents are received.

The CRTC considers the onus of demonstrating oral consent to be discharged where the oral consent can be verified by an independent third party; or where a complete and unedited recording of the consent is retained.

Purchase of Consent

Customers' consent to being sent CEMs by a business is considered under the *Act* to be an asset that is purchased on a sale of the business. Therefore, to the extent that customers have consented to the owner of a business sending them CEMs, the purchaser of a business will also be considered to have that consent following the purchase. As a purchaser, it will be important to ascertain whether the business being purchased has the express or implied consent required under the *Act* and in respect of whom.

Unsubscribe Mechanism

Even once consent to send unsolicited CEMs is obtained, the *Act* still requires that these messages have an unsubscribe mechanism that may be readily performed and that (according to the Regulations released by the CRTC) is set out clearly and prominently. In order for an unsubscribe mechanism to be "readily performed" it must be accessed without difficulty or delay and should be simple, quick and easy for the consumer to use.

The unsubscribe mechanism must:

- enable the CEM recipient to indicate, at no cost to them, the wish to no longer receive any CEMs, or any specified class of such messages, from the person who sent the message or the person, if different, on whose behalf the message is sent, using:
 - the same electronic means by which the message was sent, or
 - if using those means is not practicable, any other electronic means that will enable the person to indicate that wish (for example, posted on a webpage that is readily accessible and at no cost to the recipient); and
- specify an electronic address, or link to a page on the World Wide Web that can be accessed through a web browser, to which the indication may be sent. This address must remain valid for a period of 60 days after the message is sent.

Further, effect must be given to an unsubscribe request without delay, and in any event no later than 10 business days after the request is sent, without any further action being required on the part of the person who so indicated.

Installation of Computer Programs

In addition to the prohibitions concerning electronic commercial messages, a person may not, in the course of a commercial activity, install or cause to be installed a computer program on any other person's computer system or, having so installed or caused to be installed, a computer program, cause an electronic message to be sent from that computer system, without the express consent of the owner or an authorized user of the computer system or in accordance with a court order.

This type of activity is not the subject matter of this paper; however, it is important that businesses be aware of this prohibition. This part of the Act does not come into force until January 15th, 2015.

Applicability of Act

Sending the CEMs from or to outside Canada does exclude one from being subject to the Act. The prohibition concerning CEMs applies to any CEM sent *from* or *received by* a computer in Canada.

Penalties

Businesses that violate the Act may be subject to substantial fines. Penalties for non-compliance are up to \$1 million per violation for an individual and \$10 million per violation for other entities. Officers and directors may also be held liable if they participate in or acquiesce to the breaches. As well, employers can be held vicariously liable for actions of their employees acting within the scope of their authority. Businesses will not be found liable if they exercise due diligence to prevent an offence.

In addition, the Act also provides a private right of action for those who suffer from a breach of the Act to claim damages, expenses and penalties capped at \$1 million per day. The part of the Act that creates this right does not come into force until July 1st, 2017.

Transitional Provisions

The Act will come into force on July 1, 2014. Until June 30th, 2017, so long as:

- there is an existing business relationship or an existing non-business relationship with a person, and
- that relationship includes the communication of CEMs, and
- notification has not been given that consent to receiving CEMs is revoked;

then such person's consent to receiving CEMs from the person with whom they have such relationship, is implied. Once that three year period expires or consent is withdrawn, such consent may only be implied in the circumstances described in and in accordance with the implied consent provisions of the Act, as discussed earlier in this paper. That three year period should be used to obtain the express consent of any such persons, because once that period expires, sending a CEM to such people to obtain such consent will be prohibited under the Act (absent any exemptions).

Compliance

The first step in ensuring that you are in compliance with the Act is to familiarize yourself with its requirements. Hopefully this article has assisted in that respect.

The next step and possibly one of the most difficult is to get company-wide buy in with respect to the compliance effort.

Businesses will also need to assess what CEMs they send out, inventory their existing databases of contact lists and consents, and examine their consent collecting practices. Following this, gaps in compliance must be identified and compliance programs developed around CEM compliance. This will involve:

- updating databases to include consents (express or implied) / exemptions to the requirement for consent for each contact;
- developing a means to record proof of consent;
- developing a means of determining if there is implied consent and identifying the person who has the authority to make that determination;
- developing templates for ensuring that CEMs sent by the business contain the prescribed identification, unsubscribe and other information;
- developing forms of documents to collect express consent;
- obtaining express consents;
- developing contracts with outsourcers and agents to ensure that when sending CEMs on the business's behalf, they comply with the Act;
- putting in place contracts with "unknown third parties" so that if they receive unsubscribe notices, they notify the business of such;
- training all employees concerning the Act and its requirements; and
- auditing compliance with the Act periodically.

Questions

If you have any questions about the Act or implementing policies in connection with it, please do not hesitate to contact Dan Coderre at:

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