

# Canada's Anti-Spam Legislation (CASL) Training

**Video 1 of 1**

**André Leduc – Industry Canada & Shaun Brown – nNovation LLP**

**Moderated by Neil Schwartzman, CAUCE**

Monday, June 06, 2011

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Messaging Anti-Abuse Working Group (MAAWG)

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(over 90 minutes of training)

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<b>B. Substantive requirements under CASL, <i>Competition Act</i> and PIPEDA</b>			<b>F. Practical implementation issues – operational issues</b>

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## A: OVERVIEW AND NEXT STEPS

**André Leduc**  
Senior Policy Analyst, Industry Canada

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# Training Session Roadmap

(Read legislation at <http://bit.ly/khllvS>)

1. Overview and next steps
2. Substantive requirements under CASL, *Competition Act* and PIPEDA
3. Enforcement and penalties
4. Comparison to CAN-SPAM Act
5. Practical implementation issues – liability
6. Practical implementation issues – operational

# Goals

- Understand main requirements under CASL
- Be able to identify whether CASL applies
- Address fears and concerns
- Know what to do if you make a mistake
- Go beyond bare minimum for legal compliance (look at best practices)
- Facilitate discussion, answer questions

## How We Got Here

- April 24, 2009 – Bill C-27, the *Electronic Commerce Protection Act* (ECPA) introduced in parliament
- December 30, 2009: Parliament prorogued
- May 25, 2010 – reintroduced as the *Fighting Internet and Wireless Spam Act* (FISA)
- December 15, 2010 – Royal Assent (with no name)
- Regulations – Part 1 to be posted soon, Part 2 Fall 2011
- Coming into Force expected late 2011 early 2012

## Bill C-28: Overview

- Standalone legislation (CASL), and amendments to: PIPEDA; *Competition Act*; *Telecommunications Act*; *CRTC Act*
- CASL is a regulatory regime that applies to commercial activity: based on general branch of the Federal Trade and Commerce Power (91(2))



## Substantive Rules

- Section 6: regime for sending a commercial electronic message (CEM)
- Section 7: prohibition against unauthorized altering of transmission data
- Section 8: prohibition against installation of computer programs without consent
- Competition Act amendments: False and misleading information (content, sender info, locators)
- PIPEDA amendments: address harvesting; dictionary attacks; collection of personal information through unauthorized access to a computer systems

## Next Steps ...

- Regulations
  - Some PIPEDA amendments posted in Canada Gazette early April, balance to follow soon
  - Consultation period (60-75 days)
- Spam Reporting Center
- Coming into force – late 2011/early 2012

## Q&A: CASL TRAINING JUNE 2011

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## **B: SUBSTANTIVE REQUIREMENTS UNDER CASL, *COMPETITION ACT* AND PIPEDA**

**André Leduc**  
Senior Policy Analyst, Industry Canada

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## CEM Regime: Application

- Applies to any message sent from or accessed by a computer located in Canada (applies to senders from outside of Canada)
- More than email: IM; SMS; social media; etc.
- Voice, fax currently excluded (covered by DNCL)
- No minimum # to be caught by rules

# Commercial Electronic Message

- Broadly defined to include any message with any semblance of commercial activity
  - Product or service
  - Business opportunities
  - Promotes an individual who does any of the above
- Message to request consent deemed to be CEM

## Three Fundamental Rules

1. Consent (express or implied)
2. Identification
3. Unsubscribe

## Consent: Exemptions

- Family or personal relationship (to be defined in the regulations)
- Inquiry or application regarding the recipient's commercial activity (i.e., message sent from purchaser to vendor)



## No Consent Required

- Quotes or estimates, if requested
- Facilitates commercial transaction
- Warranty or safety information
- Information about ongoing subscription, membership, etc.
- Information related to employment relationship or benefit plan
- Delivers good or service

\*Identification and unsubscribe requirements still apply

## Implied (deemed) consent

- Consent is deemed in four circumstances:
  1. Existing business relationship
  2. Existing non-business relationship
  3. Conspicuous publication of electronic address
  4. Recipient has disclosed electronic address to the sender
- No implied consent for referrals
- In most cases implied consent last for 2 years – window of opportunity to obtain express consent
- Transitional period for implied consent – 3 years for existing business and non-business relationships at coming into force

## Consent checklist

1. Does section 6 apply (see exemptions)?
2. If so, do I need consent (other requirements still apply)?
3. If not, can I rely on implied consent?
4. If not, how do I obtain express consent?

## Identification

- Identify sender as well as person on whose behalf message is sent
- Contact information for either of above

## Unsubscribe mechanism

- Must be functional for 60 days
- No cost
- Same means by which message is sent unless impracticable
- Include either electronic address or link
- Must process without delay (no messages sent after unsub submitted)

## Defining “Sent”

- Message is sent once transmission has been initiated
- Does not matter whether:
  - Message reaches destination
  - electronic address exists

## ***Competition Act Amendments***

- Prohibits false or misleading representations in:
  - Subject (subject line) or sender info (header, from line, etc.)
  - Locators
  - Content of message
- Materiality only applies to content of messages; lack of materiality means lower evidentiary burden
- PRA applies to these provisions

## PIPEDA Amendments

- Removes ability to rely on any exemptions for:
  - Address harvesting
  - Dictionary attacks
- Also prohibits the unauthorized collection of PI via a computer system
- PRA applies to any of these acts



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## C: ENFORCEMENT AND OVERSIGHT

**André Leduc**

Senior Policy Analyst, Industry Canada

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# Enforcement Overview

Combination of public and private enforcement:

1. Regulatory enforcement – including administrative monetary penalties (AMPs)
  - Administrative as opposed of criminal
2. Private Right of Action

## Public Enforcement: Three Agencies

- Canadian Radio-television and Telecommunications Commission (CRTC)
  - Enforcement agency with powers available under CASL
- Competition Bureau
  - False and misleading representations in electronic messages
  - AMPs regime already exists in the *Competition Act*
- Office of the Privacy Commissioner (OPC)
  - Enforcement of provisions in PIPEDA (address harvesting; dictionary attacks; collection of personal information through unauthorized access to a computer systems)
  - No AMPS



## A New Role for the CRTC

- Supervises and regulates the telecommunications and broadcasting sectors
- Enforcement mandate under Do Not Call List
- First significant penalties imposed in December, 2010
- Investigator and adjudicator in first instance (contrast with Competition Bureau)

## Investigatory Powers

- Preservation demands
  - Apply to TSPs
- Production notices
  - Apply to any person
- Warrants for entry and inspection
  - Can be brought on an *ex parte* basis

# AMPS: Administrative Monetary Penalties

- Exist under a number of regulatory Canadian regimes
- Purpose: deterrence, not punishment
- Apply to violations of CASL
- CRTC has the ability to impose AMPs without going to court
- Maximum of \$1 million for individuals, \$10 million for organizations per violation
- Significant degree of flexibility
  - Number of factors to be considered
  - Penalties can be suspended

## Other Remedies Available to LEA

- Injunctions and restraining orders (s.41)
- Undertakings (s.21) (NB. Limits the PRA)
- Offences (s.42, s.43, s.46)

## Extended Liability

- Orgs are vicariously liable for actions of employees and agents
- Directors and officers are liable for actions of corporations
- Is prohibited to “aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.” (so-called “follow the money”)

## Private Right of Action (PRA)

- PRA can be exercised by any person affected by a violation of CASL as well as related provisions in *Competition Act* and PIPEDA
- Remedies:
  - Damages suffered and expenses incurred
  - Statutory damages of \$200 per violation, up to \$1 million per day
- Class actions possible
- Enforcement agencies have right to intervene

# Protection for Honest Mistakes

1. Undertakings & Compliance (s.21)
  - At any time
  - Restricts other action (notice of violation and statutory damages under PRA)
2. Due Diligence Defence and Common Law Principles (s.33)
  - Cannot be found liable
  - Justification or excuse consistent with the Act
3. Factors to be Considered re: AMPs (s.20)
  - Nature and scope of violation
  - Financial benefit
  - Any relevant factor

## Review & Appeals

- Can request CRTC to review production notices and preservation demands
- CRTC decisions can be appealed to Federal Court of Appeal



## Domestic & International Cooperation

- Coordination and consultation between 3 enforcement agencies responsible for compliance
- Information sharing and consultation between the three agencies and their international equivalents

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## D: COMPARISON TO CAN-SPAM

**Shaun Brown**  
Counsel, nNovation LLP

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## Similarities with CAN-SPAM

- Requirements to accurately identify sender
- Prohibition false and misleading transmission data/subject lines
- Requirement for unsubscribe mechanism
- Liability for brands who knowingly allow spam to be sent on their behalf (e.g., affiliate marketing)



# Key Differences Between CASL & CAN-SPAM

CASL	CAN-SPAM
Addresses broad range of Internet issues (spam, spyware, pharming, etc.)	Addresses spam only
Applies to all forms of electronic messaging (email, SMS, IM, etc.)	Applies only to email
Applies to “commercial electronic messages” (very broad)	Applies to messages that are 1) commercial; or 2) transactional or relationship (more narrow)
Applies regardless of proportion of commercial content	Applies only if ‘primary purpose’ is commercial
Primarily opt-in; permission based	Opt-out; you can technically mail any person at least once

## More Differences Between CASL & CAN-SPAM

CASL	CAN-SPAM
No specific rules for certain types of content	Specific rules for sexually-oriented content
Must give effect to unsubscribe request <u>right away</u>	Must give effect to unsubscribe request <u>within 10 business days</u>
Unsubscribe request takes effect when it is <u>sent</u>	Unsubscribe request takes effect when it is <u>received</u>
Unsubscribe mechanism must be valid for 60 days	Unsubscribe mechanism must be valid for 30 days
PRA available to anyone affected by a violation of the Act	PRA available only to providers of Internet Access Services

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## **E: PRACTICAL IMPLEMENTATION ISSUES UNDER CASL – LIABILITY & CONSENT**

**Shaun Brown**  
Counsel, nNovation LLP

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# Is this spam?

From: \*\*\*\*\*; Barrister & Solicitor, \*\*\*\*\* LLP  
> Toronto, Ontario  
>  
> February 15, 2011  
>  
> Dear Owner, Director or Compliance or Information Officer:  
>  
> Re: Protecting your Company from Telemarketing Complaints and CRTC  
Imposed  
> Fines (Do Not Call List)  
>  
> Because your company may use telemarketing or email marketing as an avenue  
to attract new business, it is important that your company protect itself in the event  
that the Canadian Radio-television and Telecommunications  
> Commission (CRTC) receives complaints and launches an investigation.  
>  
> I'm a lawyer based in downtown Toronto who specializes in Canadian  
> telemarketing and the recently enacted email SPAM laws and rules. I also  
> represent and defend companies and persons being investigated by the CRTC  
> for potential violations of those rules. In addition, prior to becoming a  
> lawyer 14 years ago I was involved in the telecommunications industry.  
>  
> As you're likely aware, the CRTC's National Do Not Call List and  
> Telemarketing Rules have been in existence for almost three years now. Also,  
> the Government of Canada recently passed a new law, Fighting Internet Spam  
> Act, which may seriously impact your company's ability to market through  
> email and the internet.  
>  
> Recently, one company was fined a staggering 1.3 million dollars by the CRTC  
> for violating telemarketing rules in Canada. Another was recently fined 500  
> thousand dollars. Telemarketing investigations by the CRTC can have a  
> serious impact on your bottom line or your company's survival.  
>  
> Even if you have not yet been targeted or investigated by the CRTC, in our  
> view it is imperative to pro-actively establish telemarketing policies and  
> procedures to mount a defense against potential complaints if you are  
> investigated. Our firm has the depth and expertise in order to assist in  
> this regard if so required.

> It is clearly understood that once you have been contacted for the first  
> time by the CRTC, it means that you are on their target list. My legal team  
> can help protect you in the event the CRTC starts this red flag process.  
>  
> Our legal team includes counsel who understand internal CRTC functions.  
As  
> such we understand the intricacies of telemarketing law inside and out and  
> can adequately defend and potentially pre-empt any action by the CRTC.  
>  
> If you feel like you require assistance or consultation to protect your  
> interests and pre-empt any concerns with the CRTC, our legal team can  
offer  
> the following services:  
>  
> 1. Defending you against CRTC violations and allegations;  
> 2. Corresponding on your behalf with CRTC investigators and agents;  
> 3. Appealing any convictions or allegations entered against you;  
> 4. Auditing your privacy, telemarketing and internal policies to protect you  
> from the CRTC;  
> 5. Even if you are not under investigation, conducting a due diligence and  
> risk assessment to ensure you can provide a solid defence if the CRTC  
comes  
> knocking;  
> 6. Providing on-going or one-time legal consulting services to keep your  
> company compliant with all the laws and rules;  
> 7. Providing training to privacy and compliance staff; or  
> 8. Simply meeting with you to discuss your concerns, worries or questions  
> about telemarketing and recently enacted SPAM law in Canada.  
>  
> Please feel free to contact myself for a consultation, or if you are having  
> any issues with the CRTC.  
>  
> I thank you for your time and look forward to hearing from you.  
>  
> Sincerely,  
>  
> \*\*\*\*\*  
> Lawyer  
>  
> \*\*\*\*\* LLP

## Is it spam? Maybe ...

> Sent: February-15-11 1:30 PM  
> To: \*\*\*\*\*  
> Subject: Re: CRTC Telemarketing complaints, investigations and fines  
>  
>  
>  
> Mr. \*\*\*\*\*,  
>  
>  
>  
> Thank you for your email. I hope the irony is not lost on you that this  
> email, soliciting business where we have no existing relationship (that I  
> can recall...), is itself spam! At least, it would violate the anti-spam  
> legislation (not really named FISA, as you refer to it), even if sent within  
> the three year transition period provided in that law.  
>  
>  
>  
> Best wishes,  
>

# Is it spam? You betcha!

>

\*\*\*\*\* the anti-spam amendments have not yet come into force and secondly, you  
> have advertised yourself as a consultant and a lawyer on a commercial  
> website without notice not to contact . The e-mail that I had sent does  
> have an opt out option we will certainly take you off the list. I wish you  
> all the best in your pursuits

>

>

> \*\*\*\*\*

>

> Partner

## Considerations for non-Canadian senders

- CASL applies if you are sending to Canada
- Is difficult (if not impossible) to know where all subscribers are located
- Courts in various jurisdictions increasingly willing to recognize and enforce foreign judgments
  - *Facebook v. Guerbuez*: Quebec superior court recognizes California judgment

## Liability for Service Providers

- Does not apply to a TSP “*merely because the service provider provides a telecommunications service that enables the transmission of the message.*”
- Most clearly for ISPs
- Email service providers?
  - Likely depends on types of services offered by the service provider
  - Who is actually sending?

## Liability for Service Providers (cont'd)

- Section 9 is relevant: is prohibited to “aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.”
- Due diligence clause also potentially relevant
  - What have you done to prevent the commission of a violation?
  - Education and awareness, agreements, willingness to ‘fire’ clients

## Express consent: requirements

- Express consent not defined
- Must *clearly* explain purposes
  - E.g., “*I would like to receive emails about offers from [company]*”.
- Sender must identify themselves when obtaining consent
- Identify others if applicable
- Onus is on sender to provide evidence of express consent

## Express consent: additional considerations

- What is “express” consent?
  - Opt-in vs. Opt-out; single opt-in, notified opt-in, double opt-in
- *Best practice*: double opt-in
- Also, think about reminding recipients why they are receiving your messages



## List Building & Growth: risky propositions

- Purchasing
  - Not a violation of CASL *per se*, but can result in violations
  - Must consider application of privacy legislation
- Email appending
- Address harvesting (violation of PIPEDA)
- If it sounds too good to be true....

## Leveraging Lists

- There are proper ways to send third party offers to your (others) subscribers
- Considerations
  - Relevance
  - Ensuring subscribers know who is sending
  - Consent allows for third party offers; e.g. *“I would like to hear about offers from [company] and its partners.”*

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# F: PRACTICAL IMPLEMENTATION ISSUES UNDER CASL – OPERATIONAL ISSUES

**Shaun Brown**  
Counsel, nNovation LLP

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# Identification requirements

- What is required?
  - Name, postal address, web address,
  - CRTC regulations will be important
- When is a message “sent on behalf of another person?”
- What is a “sender”?
- Who needs to be identified?
  - Advertisers, list owners/operators
  - ESPs? Agencies? Others?

## Forward-to-a-Friend // Send-to-a-Friend

- Offering incentives to forward could result in liability
  - Section 9: is prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to section 6
- Impose limits on forwards (how many, to whom)
- Exemption under 6(5): CASL does not apply to messages sent between people with personal or family rel'p
- Share to social – does CASL apply?
  - CASL only applies to CEM sent to an electronic address

## B2B Considerations

- No general exemption for B2B
- Implied consent:
  - Conspicuous publication
  - Recipient discloses electronic address to sender
- Relevance will be a key issue
- Electronic addresses from web must be collected manually (address harvesting prohibited)

## What about existing subscribers?

- Good time to consider quality of existing lists
- Do you have evidence of express consent?
- If express consent is required, get creative
  - Response to reconfirmation messages low
  - Offer incentives, new campaign features, etc.
- Consider incentives for your marketing dep't



## Unsubscribe considerations

- As law is written, obligation arises when unsub is sent, not received
- Must be implemented without delay, i.e., no messages can be sent after an unsubscribe is sent
- List owner should be responsible for processing unsubscribe

# Email Authentication

- SPF & SenderID
- DK/DKIM
- ADSP and other Moo-cow considerations

## Follow-up Questions?

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Industry Canada  
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If you are a MAAWG member, you can view the Q&A for the CASL training session by logging in at [www.MAAWG.org](http://www.MAAWG.org), then go to “Past Meeting Presentations” and select 22<sup>nd</sup> General Meeting (June 7-9, 2010 San Francisco).

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**This video is presented by the  
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## **Canada's Anti-Spam Legislation (CASL) Training**

can be viewed in four segments  
from the public training pages at [www.MAAWG.org](http://www.MAAWG.org).

This has been part 4 of 4.

Our thanks to the presenters and moderator  
for developing the materials in this training session  
and allowing MAAWG to videotape it  
for the benefit of professionals worldwide.

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