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Canada's Anti-spam Law: A Primer for York University

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CASL Purpose

- The purpose of CASL is to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities, because that conduct
- (a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;
- (b) imposes additional costs on businesses and consumers;
- (c) compromises privacy and the security of confidential information; and
- (d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad. (s. 3)

Scope of CASL

- Anti-SPAM
- Anti-spyware/malware
- Amendments to *PIPEDA* prohibiting address harvesting and personal information harvesting
- Amendments to the *Competition Act* prohibiting false or misleading representations in electronic messages, sender information in electronic messages, subject matter information in electronic messages, locaters

CASL History

- Received royal assent on December 15, 2010.
- Original draft regulations were published in the summer of 2011 by the CRTC and Industry Canada. The Canadian business community raised serious objections to their strict requirements.
- The CRTC enacted revised regulations, which were finalized on March 28, 2012. The new regulations eased up on some of the more onerous requirements.
- Revised draft regulations from Industry Canada on January 5, 2013. They are open for comment until February 4, 2013.
- CASL expected to be in force in late 2013 (at the earliest) or 2014.

**Does York need to be
concerned about the anti-
spam provisions in CASL?**

CASL and York U

- CASL does not exempt universities, charities, or non-profit organizations and will apply to many York U activities that use electronic messages, including emails, newsletters, bulletins, advertisements, notices, social media.
- Areas for consideration include:
 - Admissions and Recruitment: How York U advertises, promotes and communicates with prospective students
 - Administration: How York U communicates with current students, service providers, stakeholders
 - Fundraising: How York U deals with Alumni, student groups, associations, York U Foundation

Very High Liability

- Administrative monetary penalties (AMPS) with caps up to \$1 million for an individual and \$10 million for anyone else. (s.20(4))
- Private rights of action by anyone affected by a prohibited act (s.47(1)) with liability that consists of:
 - compensation for loss, damages and expenses; and
 - extensive awards that are capped at:
 - \$1 million per day for breach of SPAM, malware, spyware, message routing, address and personal information harvesting, and *Competition Act* provisions;
 - \$1 million for each act of aiding, inducing, or procuring a breach of the SPAM, malware and spyware, and message routing provisions, plus liability up to \$1 million per day for breach of SPAM, malware, spyware, and message routing provisions.
- Risk of class actions.

Extensive Accessorial and Vicarious Liability

- ↪ Liability extends to any person who *aids, induces or procures* a prohibited act. (s.9)
- ↪ Senders of CEMs are liable for acts of their employees within the scope of their authority. (s.32, s.53)
- ↪ Liability extends to officers, directors, and agents if they directed, authorized, assented to, *acquiesced*, or participated in the prohibited act. (s.31, s.52)
- ↪ Implications for York U

Anti-SPAM provisions and regulations: Overview

The Anti-SPAM Prohibition:

Consent, Form and Content

S.6(1) It is prohibited to send or cause or permit to be sent to an *electronic address a commercial electronic message* unless:

- a) the person to whom the message is sent has *consented* to receiving it, whether the consent is *express* or *implied*; and
- b) the message complies with subsection (2).

(2) The electronic messages must be in a form that *conforms to the prescribed requirements* and must:

- a) *set out prescribed information* that identifies the person who sent the message;
- b) *set out information* enabling the person to whom the message is sent to readily *contact the sender*; and
- c) set out the *prescribed unsubscribe mechanism*.

What Messaging Systems are Covered

- “**electronic message**” means a message sent by *any* means of telecommunication, including a text, sound, voice or image message. (s1(1)) (But, excludes interactive two-way voice communication between individuals, fax messages to a telephone account, voice recordings to a telephone account. (s.6(8))
- “**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*. (s.1(1))
- Covers opt-in closed messaging systems e.g., instant messaging, online portals, SMS, electronic alerts, and other messaging systems and methods.

What is a CEM?

A “**commercial electronic message**” is an electronic 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 message, it would be reasonable to conclude *has as its purpose, or one of its purposes, to encourage participation in a commercial activity*, including an electronic message that (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land; (b) offers to provide a business, investment or gaming opportunity; (c) advertises or promotes anything referred to in paragraph (a) or (b); or (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so. (s.1(2))

What is a CEM? –cont’d

A “**commercial activity**” is any particular transaction, act or conduct or any regular course of conduct that is of a commercial character *whether or not the person who carries it out does so in the expectation of profit*, other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs of the defence of Canada” (s.1(1)).

What is a CEM? Examples

- Promoting upcoming events including concerts, plays, sporting events, and/or any other student events where there is an admission charge
- Offering goods or services for which there is a charge (including sales at the book store, or promotional material for on campus merchants)
- Fundraising requests including the solicitation of participation in charity drives or sponsored events
- Student communications concerning tuition, housing, parking, food services, fees for activities
- Promotion of third party commercial activities e.g., credit cards for students or alumni
- Student recruitment
- Promotion of new courses to prospective students
- Promote sponsorship opportunities for corporations

General Exceptions

Consent, Form and Content Exceptions

1. Where sender and recipient have a personal or family relationship (s.6(5)(a))
2. An inquiry or application related to a person engaged in a commercial activity. (s.6(5)(b))
3. Messages sent in response to requests, inquiries or complaints (**Draft** IC Regs -3(b))
4. Messages sent due to a legal obligation or to enforce a legal right including a pending legal right (**Draft** IC Regs - 3(d))
5. Messages sent within an organization that concern the business affairs of that organization (**Draft** IC Regs - 3(a)(i)).
6. Messages sent between organizations with a business relationship that concern the recipient's business, role, functions or duties (**Draft** IC Regs - 3(a)(ii)).
7. Messages sent by a foreign organization to a foreign recipient that is accessed while roaming in Canada (**Draft** IC Regs – 3(c))

NOTE: Draft IC Regulations are subject to comment and finalization. Accordingly, the above noted exceptions from the Draft IC regulations may change in response individual and organizational feedback.

Consent: Express or Implied

Express (no expiry, subject to unsubscribe):

- i. obtained orally or in writing for a particular purpose
- ii. *clearly and simply* set out prescribed form and content information including the name of the requester, the purpose of the request, the mailing address, email or website of the requester; and
- iii. be *sought separately* for each act described in the Act (sending of messages, alteration of transmission data, installation of a computer programs)

Getting Express Consents to Send CEMs

s.6 of the Act and s. 4 of the CRTC Regs

Prescribed Requirements:

- (a) the purpose or purposes for which the consent is being sought;
- (b) the name by which the person seeking consent carries on business, if different from their name, if not, the name of the person seeking consent;
- (c) if the consent is sought on behalf of another person, (i) the name by which the person on whose behalf consent is sought carries on business, if different from their name, if not, the name of the person on whose behalf consent is sought; and (ii) a statement indicating which person is seeking consent and for which person consent is sought;
- (d) the mailing address, 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
- (e) a statement indicating that the person whose consent is sought can withdraw their consent.

Consent: Express or Implied

Implied (expires after an initial period – often 2 years):

Based on a closed list of categories:

- i. where there is an ‘*existing business relationship*’ or an ‘*existing non-business relationship*.’
- ii. where the recipient has “*conspicuously published*” the electronic address without a statement that the person does not wish to receive unsolicited CEMs AND the message is relevant to the person’s business, role, functions or duties in a business or official capacity;
- iii. where the recipient has disclosed, to the person who sends the message, the electronic address without indicating a wish not to receive unsolicited CEMs, AND the message is relevant to the person’s business, role, functions or duties in a business or official capacity;

Implied Consent to Send CEMs

“**Existing business relationship**” is a *business relationship* arising from (s.10(10)):

- a) the purchase or lease of a product, goods, a service, land or an interest or right in land, within the 2-year period immediately before the day on which the message was sent;
- b) the bartering of anything mentioned in paragraph (a)...
- c) a written contract entered into between the recipient and the sender in respect of a matter not referred to in any of paragraphs (a) to (c), if the contract is currently in existence or expired within the period referred to in paragraph (a); or
- d) an inquiry or application, within the 6-month period immediately before the day on which the message was sent, made by the recipient to the sender, in respect of anything mentioned in any of paragraphs (a) to (c).

Can York rely on this exception?

Implied Consents to Send CEMs

“**Existing non-business relationship**” is a non-business relationship arising from (s.10(13)):

- a) a donation or gift made by recipient to the sender within the 2-year period immediately before the day on which the message was sent, where the sender is a *registered charity*, a political party or organization, or a person who is a candidate for publicly elected office;
- b) volunteer work performed by the recipient for the sender, or attendance at a meeting organized by the sender, within the 2-year period immediately before the day on which the message was sent, where the sender is a *registered charity*, a political party or organization, or a person who is a candidate for publicly elected office; or
- c) **membership**, as defined in the regulations, by the recipient, in the sender, within the 2-year period immediately before the day on which the message was sent, where the sender is a *club, association or voluntary organization*, as defined in the regulations.

Implied Consent to Send CEMs

(Draft Industry Canada reg. 7.(1))

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

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 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 the primary purpose of which is the promotion of amateur athletics in Canada.

Unsubscribe Requirements

The *Unsubscribe Mechanism* **must**:

- be set out *clearly and prominently* and be able to be *readily performed*;
- enable the recipient to indicate, at no cost to them, the wish to no longer receive any commercial electronic messages, **or any specified class of such messages**, from the sender, using (i) the *same electronic means* by which the message was sent, or (ii) if using those means is not practicable, any other electronic means that will enable the person to indicate the wish; 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 (the address or Web page must be valid for 60 days). (s.11(1) & (2))

Problems with scope of CEMs

- ↪ Some messages that might not be CEMs may be treated as CEMs to which the form and unsubscribe provisions apply. For example:
- ↪ The **consent** requirement does not apply to a CEM *that solely* (s.6(6)):
 - ↪ provides a quote or estimate... if the quote or estimate was requested;
 - ↪ *facilitates, completes or confirms a commercial transaction;*
 - ↪ provides warranty information, product recall information or *safety or security information about a product, goods or a service;*
 - ↪ *provides notification of factual information about (i) the ongoing subscription or use or ongoing purchase by the person to whom the message is sent of a product, goods or a service offered under a subscription, membership, account, loan or similar relationship;*
 - ↪ *provides information directly related to an employment relationship or related benefit plan;*
 - ↪ *delivers a product, goods or a service, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction...*

Overview of the Anti-Spyware/Malware Provisions and Proposed Regulations

The prohibition

8. (1) A person must 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, unless:
- (a) the person has obtained the express consent of the owner or an authorized user of the computer system and complies with [the disclosure requirements of] subsection 11(5); or
 - (b) the person is acting in accordance with a court order.

Problems:

Implied consents cannot be relied upon. Only express consents are valid, assuming compliance with the disclosure requirements.

Written agreements or click-wraps may comply. Web wrap agreements will likely not comply.

Scope of prohibition

- Applies to “*computer programs*” (including apps and updates) installed on another person’s “*computer system*”
 - Computer programs are not limited to malware or spyware.
 - Computer systems could include: servers, PCs, smartphones, tablets, ebook readers, the “Cloud”, websites and web services, industrial machines, appliances, autos, and other consumer products.

Disclosure requirements to comply with “malware” and “spyware” provisions

Two levels of disclosure required when obtaining consent.

1. Minimum Disclosure: A person who seeks express consent, must *clearly and simply describe, in general terms* the function and purpose of the computer program that is to be installed if the consent is given.

Disclosure requirements to comply with “malware” and “spyware” provisions

2. Enhanced Disclosure: If the computer program meets one of the specified “malware” or “spyware” criteria, then the person who seeks express consent must:

→ *clearly and prominently, and separately and apart from the licence agreement,*

- (a) describe the program’s material elements that perform the function or functions, including the nature and purpose of those elements and their reasonably foreseeable impact on the operation of the computer system; and
- (b) bring those elements to the attention of the person from whom consent is being sought in the prescribed manner.

Disclosure requirements to comply with “malware” and “spyware” provisions

- **Enhanced Disclosure:** The enhanced disclosure standard applies where
 - the program performs functions that the person knows and intends will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the owner or authorized user of the computer
 - collects personal information;
 - interferes with control of the computer;
 - changes or interferes with settings preferences or commands;
 - obstructs, interrupts, or interferes with access to data;
 - causes the computer to communicate with another computer without authorization,;
 - installing a computer program that can be activated by a third party;
 - installing a bot, or something set out in the regulations;
 - but not merely transmission data. (s.10(5) &(6)).

Exclusions from the consent and disclosure requirements

A person is considered to expressly consent to the installation of a computer program if:

- a) the program is:
 - i. a cookie,
 - ii. HTML code,
 - iii. Java Scripts,
 - iv. an operating system,
 - v. any other program that is executable only through the use of another computer program whose installation or use the person has previously expressly consented to, or
 - vi. any other program specified in the regulations; and
- b) the person's conduct is such that it is reasonable to believe that they consent to the program's installation. (s.10(8))

Note, there is no express waiver of the disclosure requirement, but disclosure is only required where express requests are being sought.

Exceptions for Software Updates, Upgrades and Patches

The formalities for obtaining express consent are not required for the installation of an update or upgrade so long as the installation or use of the computer program being updated was expressly consented to and the person who gave the consent is entitled to, and does receive the update under the terms of the express consent. (s.10(7))

Problem:

There is no express exception that permits installation of an update or upgrade without consent.

The original consent to install a program must include a consent to install updates or upgrades or they cannot be installed without requesting and obtaining a new consent.

Withdrawal of consent for “spyware” functionality

Withdrawal of consent: If the computer program installed meets one of the specified “malware” or “spyware” criteria, the person who installs the program with consent must:

- for 1 year, provide an electronic address to which a request can be sent to remove or disable the computer program if the requestor believes that the function, purpose or impact of the computer program installed under the consent was not accurately described when consent was requested; and
- if the consent was based on an inaccurate description of the material elements of the enumerated function or functions, must, without cost to the person who gave consent, assist that person in removing or disabling the computer program as soon as feasible. (s.11(5))

Transitional Provisions

Transitional provisions

- A person's consent to receiving commercial electronic messages from another person is implied until:
 1. the person gives notification that they no longer consent to receiving such messages; or
 2. 3 years after the day on which the Act comes into force, if (a) those persons have an existing business relationship or an existing non-business relationship; and (b) the relationship includes the communication between them of commercial electronic messages.
(s. 66)

Problems:

York U must determine if it has express consent or the requisite EBR or ENBR to avail itself of these transitional provisions.

Path to Compliance

Path to Compliance

Steps to be taken before CASL becomes effective.

1. Due diligence defense.
2. Assign or delegate a centralized resource to manage compliance?
3. Conduct a review/survey of each department, to identify current communications (or software installation) practices, disclosures, methods of obtaining consent and unsubscribe techniques?
4. Analyze data and assess sufficiency of current practices, does York have express consents or does it fall into exceptions?
5. Develop a plan to address GAPS, establish policies and procedures to ensure ongoing compliance and institutionalize the monitoring of CASL activities?
6. Start getting express consents ASAP?

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