

Hey Hosers and Keeners, Canada Anti-Spam Law Changes Take Effect July 1

Canada's anti-spam law (CASL) is important for all marketers, not just Canucks. Its consent-first framework for email, SMS/texts and other commercial electronic messages (CEMs) took effect July 1, 2014. It applies to anyone sending CEMs to recipients living in or traveling through Canada or whose message travels through a server or system in Canada. And, on July 1, 2017, two changes occur making CASL more forceful and dynamic:

- **Basis for Relying on Implied Consent Narrows When Transition Period Ends.** That means:
 - Marketers will no longer be able to rely on the transitional provisions that deemed senders to have implied consent to send CEMs if: (i) they had an existing business or non-business relationship (as defined in CASL) with a person that included sending CEMs; and (ii) the person hadn't opted out.
 - After July 1, 2017, senders may only send CEMs to recipients who have given express written consent or whose implied consent is currently valid under CASL – that is, 24 months after a purchase or six months after an inquiry.
- **The Private Right of Action Takes Effect Increasing Expected Enforcement and Litigation.**
 - Starting July 1, 2017, CASL allows individuals allegedly affected by a CASL breach to seek a court order against the violators. Many lawyers and commentators expect increased CASL litigation (possibly including class actions) and agency enforcement to result.
 - Courts can award damages equal to any actual loss, expense or damage suffered plus \$200 per day for each breaching CEM up to a maximum of \$1 million for each day a breach occurred.
 - In the case of a corporation violator, courts can impose personal liability on officers, directors or agents of a corporation violator who directed, authorized, assented to, acquiesced in, or participated in the violation.

Under CASL, you are exempt from liability if you can prove you "exercised due diligence" to prevent the violation. As a result, many marketers started efforts in 2014 to evaluate their recipient lists for Canadian addresses and other indications CEMs could be received or accessed in Canada, and conducted campaigns for obtaining express consent before the transition period ends. Now is a good time to put your thinking toque on and reevaluate your preparations. Here's a checklist of actions to consider:

1. Are you still relying on CASL's transitional implied consent to send CEMs? If yes, try to get express consent before July 1.
2. Are you keeping records sufficient to document receipt of express consent? The burden is on the sender to prove consent.
3. Have you established any written policies or compliance procedures? If not, you may want to establish written policies and procedures for identifying Canadian recipients, removing them from the list or getting express consent, retaining evidence of express consent, tracking complaints, and auditing compliance.
4. Do you need to conduct any employee training to inform them about their role in ensuring compliance?

You can do it, eh? Let us know if we can help. Lori Beam chairs the firm's Advertising, Marketing and Promotions practice group. Contact her at lbeam@sb-kc.com or 816-265-4110. * This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an

attorney prior to making any legal decisions.