



Canada's New Anti-Spam Legislation

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THECIS Breakfast





The fine print...

This presentation was prepared by Bennett Jones LLP to provide general information on recent legal developments and topical issues relating to anti-spam legislation in Canada. Due to the general nature of this presentation, nothing herein should not be relied upon as legal advice.



AN INTRODUCTION TO THE ANTI-SPAM ACT



Introduction

- History of Spam
 - 1978: Gary Thuerk
 - 1994: "Green Card" spam
 - 1995 to Present: The Spam King
 - 2008: Mega-D Botnet



Introduction

- Spam by the numbers
 - According to Symantec's July 2013 Intelligence Report:
 - 67.6% of e-mail was spam
 - 1 in 736.5 e-mails were identified as phishing attacks
 - 1 in 465.1 e-mails contained malware
 - Cost of spam is difficult to calculate but it:
 - is a drain on business and personal productivity;
 - undermines the reliability of electronic message networks for business users and threatens consumer confidence in the online marketplace; and
 - increases the cost of doing business on consumers, businesses, and internet service providers (ISPs) and other network.



World Responses

- USA: CAN-SPAM Act of 2003
- EU: Directive on Privacy and Electronic Communications (2003)
- Australia: Spam Act 2003
- China: Regulations on Internet email Services (2006)



Canada's response...

- Bill C-28
 - "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".
- Stated purpose of the Anti-Spam Act:
 - "... 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 ..."
- Two sets of regulations: CRTC and Industry Canada
- **Although this Act received Royal Assent on December 15, 2010, it is not yet in force.**



Scope

- The *Anti-Spam Act* :
 - prohibits sending "commercial electronic messages" to an electronic address without consent (though exceptions may apply);
 - requires explicit consent to alter the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender;
 - prohibits installing a computer program on any person's computer system address without consent;
 - prohibits causing a program on any person's computer system to send an electronic message; and
 - captures activities that aid, induce, procure or cause to be procured any of the foregoing.



Key Definitions

- An “electronic message” means a message sent by any means of telecommunication, including a text, sound, voice or image message.
- A “commercial electronic message” is defined as an electronic message that, having regard to its content, it would be reasonable to conclude is intended to encourage participation in a commercial activity.
- An “electronic address” is 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



Core Anti-Spam Provision

- It is prohibited to send or cause or permit to be sent to an electronic address a commercial electronic message unless:
 - the person to whom the message is sent has consented to receiving it, whether the consent is express or implied;
 - the messages:
 - identifies the person who sent the message and the person — if different — on whose behalf it is sent;
 - provides contact information of the foregoing persons; and
 - sets out an unsubscribe mechanism.
- As foregoing applies if a computer system located in Canada is used to send or access the electronic message, the Anti-Spam Act may have extra-territorial effect.



Formalities

- Formal requirements for all commercial electronic messages:
 - Must contain the name of the sender or the name under which the sender carries on business;
 - If sent on behalf of another person, must contain that name or the name under which that person carries on business;
 - If sent on behalf of another person, must contain a statement indicating which person is sending the message and which person on whose behalf the message is sent;
 - Must contain the mailing address, and either:
 - A telephone number;
 - An email address; or
 - A web address; and
 - An unsubscribe mechanism



CONSENT



Consent Requirements

- To disseminate commercial electronic messages, one of the following must be relied upon:
 1. express consent;
 2. implied consent;
 3. an exception for consent under the *Anti-Spam Act*; or
 4. the message is exempt under the *Anti-Spam Act*
- Note: Onus is on person who alleges they have consent to prove it.



Express Consent

- When seeking express consent, simply the following information must be set out clearly:
 - the purpose(s) for which consent is being sought;
 - information identifying who is requesting consent; and
 - any other prescribed information (CRTC Regulations)
- Consent must be sought separately for installation of computer programs
- Note: An electronic message seeking consent to receive commercial electronic messages is a commercial electronic message. Thus, consent needed to send such a message.



Express Consent – Specified Computer Functions

- Additional consent requirements may be imposed to install a computer program that:
 - Collects personal information stored on the computer system;
 - Interferes with the owner's or an authorized user's control of the computer system;
 - Changes or interferes with settings, preferences or commands already installed or stored on the computer system;
 - Changes or interferes with data that is stored on the computer system in a manner that obstructs, interrupts or interferes with lawful access to or use of that data;
 - Causes the computer system to communicate with another computer system, or other device, without the authorization of the owner or an authorized user of the computer system;
 - May be activated by a third party without the knowledge of the owner or an authorized user of the computer system; or
 - Performs any other function specified in the regulations.



Implied Consent

- Consent may be implied and allow for the sending of commercial electronic messages in the following situations:
 1. The sender has an existing business relationship or an existing non-business relationship with the recipient;
 2. The recipient:
 - has *conspicuously published* the electronic address to which the message is sent;
 - has not attached a statement to the published address that they do not wish to receive unsolicited commercial electronic messages at that electronic address; and
 - the electronic message is relevant to the recipient's business, role or duties; or
 3. The recipient:
 - has *disclosed to the sender* the electronic address to which the message is sent;
 - has not indicated that they do not wish to receive unsolicited commercial electronic messages at that electronic address; and
 - the electronic message is relevant to the recipient's business, role or duties.



Implied Consent – Existing Business Relationship

- "Existing business relationship" means a business relationship arising from:
 - (a) 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 person to whom the message is sent from any of those other persons;
 - (b) the acceptance by the person to whom the message is sent, within the period referred to in paragraph (a), of a business, investment or gaming opportunity offered by any of those other persons;
 - (c) the bartering of anything mentioned in paragraph (a) between the person to whom the message is sent and any of those other persons within the period referred to in that paragraph;
 - (d) a written contract entered into between the person to whom the message is sent and any of those other persons 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
 - (e) an inquiry or application, within the six-month period immediately before the day on which the message was sent, made by the person to whom the message is sent to any of those other persons, in respect of anything mentioned in any of paragraphs (a) to (c)



Implied Consent – Registered charities

- Consent will be implied if there is an "existing non-business relationship" between the parties. Such a relationship must arise from:
 - a donation or gift made by the recipient within the last 2 years (if the sender is a registered charity as defined in the *Income Tax Act*);
 - volunteer work performed by the recipient within the last 2 years (if the sender is a registered charity as defined in the *Income Tax Act*); or
 - the recipient attended a meeting organized by the sender within the last 2 years (if the sender is a registered charity as defined in the *Income Tax Act*); or
 - the recipient having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements
 - Generally, 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.
- Even if consent is implied, must still comply with other formalities.



Exceptions to Consent

- The requirement for consent does not apply to commercial electronic messages that:
 - provides a quote or estimate for the supply of a product, or service if the quote or estimate was requested;
 - facilitates, completes or confirms a commercial transaction that recipient previously agreed to enter into;
 - provides warranty information, product recall information or safety or security information about a product or a service that the recipient uses, has used or has purchased;
 - provide factual information about the use or ongoing purchase by the recipient of products or services offered under a subscription, membership, or similar relationship by the sender;
 - provides information directly related to the recipient's employment relationship or related benefit plan; or
 - provides a product or service that the recipient is entitled to under a previous transaction.



Exceptions to Consent

- Commercial electronic messages are also exempted from the consent requirements where:
 - Sent by an employee, representative, contractor or franchisee of an organization to another such person that concerns the affairs of the organization;
 - Sent by an employee, representative, contractor or franchisee of an organization to another such person in another organization if the organizations have a business relationship at the time and the message concerns the affairs of the organization;
 - Solicited by the recipient;
 - Sent to a person outside of Canada, but received in Canada, where the sender did not know and could not reasonably be expected to know such; or
 - Sent in relation to various legal obligations or rights.



Exception – Third Party Referrals

- Applies to the first commercial electronic message sent
- Only applies to "individuals," not "persons"
 - Public comments have asked for this to change
- Disclosure of who referred required



Exemptions

- The requirements to obtain consent or comply with any of the required formalities do not apply to commercial electronic messages where the recipient:
 - has a personal or family relationship with the sender;
 - is engaged in commercial activity and the message consists solely of an inquiry or application related to that activity.
- Also don't apply to commercial electronic messages that are:
 - in whole or in part, an interactive two-way voice communication between individuals;
 - sent by means of a facsimile to a telephone account; or
 - voice recordings sent to a telephone account.



Use of Consent

- Industry Canada regulations control "list sharing"
- List sharing is not prohibited, but:
 - A person who obtains express consent may authorize any person to use the consent, on two conditions:
 - The person who obtained the consent must be identified; and
 - The authorized person provides an unsubscribe mechanism for both the authorized person and the person who obtained the consent.
- The person who obtains consent must "ensure" that withdrawals of consent are given effect
 - Comments on this section overwhelmingly negative



POTENTIAL LIABILITY



Administrative Monetary Penalty

- Significant penalties:
 - Maximum penalty for an individual = \$1,000,000.00; and
 - Maximum penalty for any other person (corporations) = \$10,000,000.00.
- Available for a violation of certain prohibitions (including those relating to electronic commercial messages).
- The purpose of a penalty is to promote compliance and not to punish.
- An officer, director, agent of a corporation that commits a violation is liable for the violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against.



Private Right of Action

- A private right of action exists for violations of the core prohibitions in the Anti-Spam Act, as well as specified violations under the *Personal Information Protection and Electronic Documents Act* and *Competition Act*.
- Penalties include:
 - Compensation in an amount equal to the actual loss or damage suffered or expenses incurred; and
 - A maximum of \$200.00 for each violation, not exceeding \$1,000,000.00 for each day the violation occurred.



TRANSITION PERIOD



Transition period

- 3-year transition period commences when sections 6 and 8 come into force
- Consent implied during transition period for CEMs where:
 - (a) an existing business or non-business relationship exists; and
 - (b) the relationship includes the communication of CEMs.
 - May be revoked
- Consent implied during transition period for software upgrades
 - May also be revoked



COMPLIANCE STRATEGIES



How to comply...

- Be proactive
- Review existing communication practices internally as well as with applicable external service providers
- Develop a database that identifies which commercial electronic messages:
 - (i) require express consent and must comply with formalities;
 - (ii) must comply with formalities; and
 - (iii) neither require consent nor comply with formalities.
- Collect necessary consents



Additional considerations...

- Ensure records of consent are retained and retrievable
- Create and maintain an easy-to-use and effective unsubscribe mechanism
 - Ensure compliance with list sharing provisions
- Create templates for your business' electronic commercial messages which satisfy the prescribed requirements
- Develop *Anti-Spam Act*-compliance policy to address applicable provisions in the law and provide copies of this policy to all relevant employees and service providers



Additional considerations...

- Maintain records of all procedures and policies implemented in order to ensure compliance with the *Anti-Spam Act*.
 - Such documentation may later support a due diligence defense.
- Monitor development in the *Anti-Spam Act* and the regulations and adapt practices as necessary.
 - Recall that the Industry Canada regulations have yet to be finalized and are subject to change.



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QUESTIONS?