

## Information Bulletin: Overview of Canada's Anti-Spam Legislation (CASL)

**On July 1, 2014**, many provisions of Canada's new anti-spam legislation will come into effect. This legislation includes restrictions on the sending of commercial electronic messages without the consent of the recipients. This legislation is relevant to Boards of Education as trustees and staff may engage in activities which the legislation will regulate when it comes into force. Of particular note to Boards of Education are the legislation's provisions which regulate the sending of electronic communications (e.g. emails) which may be viewed as Commercial Electronic Messages ("CEMs"). Accordingly, you will want to review your practices and procedures to ensure compliance with the new anti-spam rules.

At this time, there is uncertainty regarding how the legislation will be interpreted and applied.

This communication provides an overview of Canada's new anti-spam legislation, some examples of how it may apply to Boards of Education, some issues to consider with respect to compliance. Attached please find an example of a request for consent Boards can consider customizing for their use prior to July 1, 2014.

### **What is CASL?**

The federal government enacted "*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*" S.C. 2010, c. 23. This legislation is commonly referred to as Canada's Anti-Spam Law or CASL.

The stated purpose of the legislation "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." (CASL, s. 3)

When in force, CASL "will generally prohibit the:

- sending of **commercial electronic messages** without the recipient's consent (permission), including messages to email addresses and social networking accounts, and text messages sent to a cell phone;
- **alteration of transmission data** in an electronic message which results in the message being delivered to a different destination without express consent;
- **installation of computer programs** without the express consent of the owner of the computer system or its agent, such as an authorized employee;
- use of **false or misleading representations online** in the promotion of products or services;
- **collection of personal information** through accessing a computer system in violation of federal law (e.g. the Criminal Code of Canada); and

- **collection of electronic addresses** by the use of computer programs or the use of such addresses, without permission (address harvesting).<sup>1</sup> [Emphasis added]

## **Commercial Electronic Messages**

### **(a) What is a CEM?**

A CEM is any electronic message (for example, an email, text message) where “it would be reasonable to conclude” that one or more of its purposes is “to encourage participation in a commercial activity” (CASL, s. 1(1)). Commercial activities include transactions, acts or conduct that is of a commercial character, whether or not the person who carries it out has an expectation of profit. When assessing whether a message is a CEM, you will want to consider the content of the message, the hyperlinks in the message to content on a website or other database, and the contact information contained in the message. Some examples of CEMs include electronic “offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land” (CASL, s. 1(1))

### **(b) Examples of School District electronic communications which *may* include commercial purposes**

Although not all electronic messages a school district sends will be CEMs, some may be. Below please find some examples of communications which *may* be viewed as being commercial electronic messages:

- Offers for goods and services from a school (e.g. sale of school photos, yearbooks)
- Communications between school district staff about commercial activities not related to school district activities (e.g. staff selling goods)
- Communications regarding continuing education programs
- Communications regarding hot dog lunches and field trips that cost money
- Fundraising by charities that are not registered under the *Income Tax Act*

CEMs may be contained in various types of electronic communications such as newsletters and emails.

## **Consent and CEMs**

The following is a brief introduction to consents to CEMs under CASL.

### **(a) Obtaining consent to send CEMs**

Express consent may be obtained orally or in writing. Although oral consent is allowed, it is more prudent to obtain written consent.

A request for consent to send CEMs should be its own independent form as CASL does not permit CEM consents to be bundled with other terms and conditions.

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<sup>1</sup> Canada’s Anti-Spam Legislation, Fast Facts: [http://www.fightspam.gc.ca/eic/site/030.nsf/eng/h\\_00039.html](http://www.fightspam.gc.ca/eic/site/030.nsf/eng/h_00039.html)

**Important Note: Sending an electronic message to ask for consent to send CEMs will be considered a CEM under CASL as of July 1, 2014. Accordingly, if a school district wishes to obtain consent to CEMs by sending an electronic message, it should do so before the Act comes into force on July 1, 2014. Otherwise, the School District can obtain express consent after July 1, 2014 by non-electronic means (e.g. using a paper form).**

A paper consent to receive CEMs could be included in the school year registration package for parents/students to execute and return to the school. The CEM consent should be filled out by all individuals who will receive CEMs and should be its own independent form in the package.

The request for consent to send a CEM must ask the recipient to “opt-in” rather than requesting that recipients “opt-out” of receiving CEMs.

The person who sends the CEM has the onus of proving that that they had consent to send the message. Accordingly, it is important to carefully track consents.

#### **(b) Information to be included in a request for consent**

An express consent (electronic or paper) under CASL must include:

- The purpose for which consent is being sought;
- The name of the party seeking consent;
- If the consent is sought on behalf of another person, the name of the person on whose behalf consent is sought and a statement identifying both persons;
- The mailing address, and either the:
  - telephone number;
  - email address; or
  - web addressof the person seeking consent (or the person on whose behalf consent is sought); and
- A statement that the person whose consent is sought can withdraw their consent.

#### **(c) Sending CEMs after July 1, 2014**

There are three general requirements for sending a CEM:

- Consent;
- Identification information of the sender: This includes contact information, the mailing address plus a phone number/email/website. The electronic address or website included in the CEM must be valid for at least 60 days after the date the message was sent.
- An unsubscribe mechanism: The recipient must be able to unsubscribe at no cost to the recipient. Unsubscribe requests must be acted upon no later than 10 business days after receipt of the request.

Accordingly, when sending out communications that contain CEMs (e.g. emails, newsletters), the above information should be included in the communication.

#### **(d) Exceptions**

CASL provides for certain exceptions to compliance with provisions of CASL. Some examples of exceptions to the application of CASL include:

- A CEM that is sent by or on behalf of an individual to another individual with whom they have a personal or family relationship
- A CEM sent by a person within an organization to other persons within their organization where the CEM concerns the activities of the organization

#### **Penalties**

The maximum administrative monetary penalty for a violation of the legislation is \$1 million for an individual and \$10 million for an organization.

In addition to the administrative monetary penalties, CASL provides individuals and organizations with the right to initiate a court action for damages for breach of the legislation. If a court determines that there has been a contravention, the court could make various orders including requiring the contravening party to pay the complainant up to \$1 million for each day on which a contravention occurred.

An officer, director, agent or mandatary of an organization may be held liable for contraventions of CASL. It is possible that the term “director” may be interpreted to include school trustee.

#### **When does CASL come into force?**

On **July 1, 2014**, the anti-spam and data transmission provisions of CASL will come into effect.

On **January 15, 2015**, provisions regarding the unsolicited installation of computer software and programs come into effect.

As of **July 1, 2017**, the sections of CASL regarding the ability to bring private right of action in court will be in effect.

#### **Enforcement**

CASL will be enforced by the federal Competition Bureau, the Office of the Privacy Commissioner and the Canadian Radio-television and Telecommunications Commission (CRTC). The federal government has established a Spam Reporting Centre where complainants can report complaints regarding CEMs sent without consent and/or CEMs with false or misleading content.

#### **Some considerations**

There is some uncertainty regarding how the legislation will work in practice. It will assist an organization in defending against a complaint if the organization can demonstrate that it exercised due diligence. Based on the information currently available, below please find some steps for Boards of Education to consider with respect to CASL:

- Identify the circumstances when the Board sends out communications which may be CEMs.
- Review and revise existing practices, policies and procedures regarding sending of electronic communications to include new steps for CASL compliance.
- Provide information and training to trustees and staff regarding the new requirements.
- Obtain express consents from recipients of CEMs (particularly with respect to new students, new vendors etc.)
- Identify methods for recording and tracking records regarding consents

### **Government of Canada Resources**

The full text of CASL is available online: [http://fightspam.gc.ca/eic/site/030.nsf/eng/h\\_00211.html](http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00211.html)

The Government of Canada website regarding Canada's Anti-Spam Legislation:  
<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>