Borden Ladner Gervais

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Colleges Ontario – Primer on CASL

Canada's new anti-spam legislation (known as "**CASL**") will be in effect in large part on JULY 1, 2014. It will affect the email practices of almost every person in Canada, including colleges. As a result of CASL, colleges need to think differently about the emails and other electronic messages sent to students, prospective students, parents of students or prospective students, alumni, donors, governmental bodies, vendors and suppliers, members of the general public, and others. Since CASL is a federal law, it will apply to all colleges within Canada. In this primer, we provide some background on CASL and why it is important to the college sector. We also include some of the key "dos" and "don'ts". We are working on a more detailed Q&A that will be provided at the end of April.

BACKGROUND

The purpose of CASL is to increase the efficiency and productivity of Canadians online by reducing the flow of unsolicited email messages. Studies cited by the government's background report on anti-spam show that over 80% of global email traffic is spam. The Canadian government first enacted CASL in 2010. There were several rounds of public consultation with businesses, not-for-profit groups and other stakeholders. In December 2013, the Canadian government announced that CASL will come into force as follows:

- July 1, 2014 – most provisions of CASL come into force, including those relating to the sending of commercial electronic messages
- January 15, 2015 – the provisions of CASL relating to computer programs will come into force
- July 1, 2017 – the private right of action (a special enforcement tool) under CASL will come into force

CASL consists of an Act and two Regulations. The Act has a very long name, which is why it is referred to generally as "CASL". The two Regulations are the Canadian Radio-television and Telecommunications Commission ("CRTC") Regulations and the Governor in Council Regulations. The main governmental bodies responsible for the enforcement and implementation of CASL are the CRTC, the Privacy Commissioner of Canada and the Competition Bureau. Industry Canada also is involved with raising public awareness of the new law. The government has published several guidelines to help interpret and understand CASL: *Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC)* and *Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation*.

While this primer focuses on CASL's provisions respecting electronic messages and the impact on colleges' email practices, please note that CASL also contains requirements pertaining to the installation of computer programs and the alteration of transmission data in an electronic message.

As a starting point, it is important to remember that under CASL **the basic rule, subject to a few exceptions, is that commercial electronic messages cannot be sent unless both consent and content requirements are met.** We elaborate on what this means below.

APPLICATION: WHAT IS A "COMMERCIAL ELECTRONIC MESSAGE"?

CASL applies to "*commercial electronic messages*". This has a specific meaning in the

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law. What does commercial electronic message (or "CEM") mean?

- "electronic message" includes emails, text messages, and sound, voice, or image messages. It does NOT include live two-way phone calls, faxes or "snail" mail.
- "commercial" means any transaction, act or conduct that is of a commercial character. It is not necessary for there to be an expectation of profit, or a requirement for payment of any sort.
- "commercial electronic message" means an electronic message that has as its purpose, or *one of its purposes*, encouraging participation in a commercial activity.

Some have questioned whether colleges, as providers of educational services, engage in "commercial activity" and whether the emails they send could be considered CEMs at all. We wish to note that CASL does not have an exemption that applies to colleges, universities, schools or charities generally. Whether or not CASL applies to a specific situation will depend on the type of electronic message sent, the recipient and the relationship, if any, between the sender and the recipient.

We recognize that colleges send a wide variety of emails, and although not all of these emails may be CEMs that are subject to CASL, some of them will be. The definition of "commercial" includes any activities with a commercial character, whether or not there is an expectation of profit. Since the term "commercial electronic message" is so broadly defined, it can include any email that has a purpose of promoting or marketing the college, encouraging people to enrol or attend the college, or promoting events at the college. When talking about CASL, we think the starting point is to take a broad approach to what emails are considered to be CEMs, and then analyze whether particular types of messages can fall into one or more of the exemptions. Some of the exemptions are described below. As this is new legislation, a more cautious approach is warranted.

EXAMPLES OF COMMERCIAL ELECTRONIC MESSAGES

- Emails to potential students, promoting or marketing the college or its programs
- Emails inviting potential students to an open house or information session
- Emails to students about course enrolment or tuition and payment information
- Emails to alumni about events (regardless of whether there is a cost to attend) or continuing education
- Emails to alumni with newsletters or other publications
- Emails to employers promoting hiring students in a college program
- Emails sent by a college employee using his/her college email address to any other person, whether within or outside the college, soliciting donations for a personal cause or other commercial activity unrelated to the college

THE BASIC RULE

The basic rule under CASL is that a CEM is not to be sent to any person unless both the consent requirement and the content requirement are met.

1. **Consent requirement** - A person's consent must be obtained before a CEM is sent to that person. Consent can be express or implied. Express consent requires the recipient to do something proactive to indicate agreement to receive CEMs from the sender. Examples of express consent include: giving an email address to be added to a mailing list and checking off a box to indicate "Yes" to receiving marketing emails from a college.

   Implied consent has a specific meaning under CASL. In some cases, a CEM may be sent to a person even though express consent to receiving electronic messages

has not been given. We have set out some of the categories of implied consent in the "Exemptions" section below. We will provide more information about implied consent and other exemptions in an upcoming Q&A.

AND

2. **Content requirement** – every CEM must have certain content, namely: A) certain information about the sender (e.g., the college) AND B) an unsubscribe mechanism.

   A. Certain information about the sender:
   - Legal name and business name of the sender (if the sender uses a business name to carry on business)
   - Mailing address AND telephone number, email address or web address

   The above info must be valid for a minimum of 60 days after the day the message is sent.

   EXAMPLE:
   ABC College of Ontario or "ABC College"
   123 Main Street, Toronto, Ontario A1B 2C3
   (416) 555-1234 info@abccollege.ca

   B. Unsubscribe Mechanism
   CASL requires there to be a free, easy way to unsubscribe from receiving commercial electronic messages. Typically, this means the recipient can unsubscribe by clicking an "Unsubscribe" link found in the email, or replying to the email with "Unsubscribe" in the subject line. Specifically, the requirements are:

   - The recipient should be able to unsubscribe using the same electronic means by which the message is sent. For example, a recipient must be able to unsubscribe from receiving emails by sending an email and must be able to unsubscribe from receiving texts by responding to the text message (e.g., with "STOP" or "UNSUBSCRIBE" as the message)
   - The message must include an email address or link to which the unsubscribe request can be sent
   - **Unsubscribe requests must be implemented within 10 business days.**

VIOLATIONS

Failure to comply with CASL could result in significant fines to the college, among other things. CASL has administrative monetary penalties of up to $1 million per violation (for individuals) and up to $10 million per violation (for corporations). If a college employee sends an email that contravenes CASL (such as an email without the necessary consent, or an email that does not have the requisite unsubscribe mechanism), the college could be held liable, if the employee was acting within the scope of his or her employer. Board members and officers of the college could also be held personally liable for violations.

EXEMPTIONS

Under CASL, there are some circumstances where a CEM may be sent without complying with the consent and/or the content requirements outlined above. These will be discussed in more detail in the upcoming Q&A. We outline them briefly here:

1. **Existing business relationship** – there is implied consent to send CEMs to people who have purchased a product or service from the sender in the past 2 years. This would include, for example, students who attended the college in the 2 year period immediately preceding the day the message is sent. **The content requirements**

(i.e., the sender's contact information and unsubscribe mechanism) must still be in the message (see above).

2. **Existing non-business relationship** – there is implied consent to send CEMs to: a) current members of a club, association or other voluntary organization, and those who ceased to be members in the past 2 years, and b) if the sender is a registered charity as defined in subsection 248(1) of the *Income Tax Act* (Canada), people who have donated to or volunteered for that charity in the past 2 years. This would include, for example, current members of the college's Alumni Association and people who have donated to the college in the 2 year period immediately preceding the day the message is sent. Please note that this is not a complete exemption for charities. **The content requirements (i.e., the sender's contact information and unsubscribe mechanism) must still be in the message (see above).**

3. **Fundraising** – a registered charity (as defined in subsection 248(1) of the *Income Tax Act* (Canada)), may send CEMs where the primary purpose of the message is fundraising, without complying with the consent or content requirements. Again, please note that this is not a complete exemption for charities.

4. **"Business to business" exemption**
   a. *Internal communications* - CEMs sent by an employee of college A to other employees of college A do not need to comply with the consent or content requirements, as long as the message relates to the activities of college A. For example, the Drama Program director of college A can send emails to employees of the college about a play that is being presented by the Drama department.

   b. *External communications* – CEMs sent by an employee of college A to an employee of Company B do not need to comply with the consent or content requirements if college A and Company B have a relationship and the message relates to the activities of the organization. For example, college A can send emails to Company B about setting up an alumni event for the college, where Company B is currently providing services to the college such as catering or marketing.

5. **Response to a request, inquiry or complaint** – CEMs that are a response to a specific request, inquiry or complaint are exempt from the consent and content requirements. For example, an email responding to a person's inquiry about a particular program at the college is exempt from the consent and content requirements. This does not mean, however, that the person's email address may be added to the college's mailing lists. The exemption only applies to emails sent in response to that person's request.

6. **Facilitating/Confirming a Transaction** – CEMs that facilitate or confirm a transaction are exempt from the consent requirement (but not the content requirements.) For example, emails that solely confirm a student's enrolment in a program or receipt of payment would not require consent; **the content requirements (i.e., the college's contact information and unsubscribe mechanism) must still be in the message (see above).**

7. **Factual information** – CEMs that provide factual information only are exempt from the consent requirements (but not the content requirements.) For example, emails that solely provide factual information about courses a student is enrolled in, e.g., class cancellations, or change in class dates or exam information would not require the student's consent but would still need to include the **content requirements (i.e., college's contact information and unsubscribe mechanism) must still be in the message (see above).**

8. **Safety or security information** – There is an exemption from the consent requirements for electronic messages that provide safety and security information. For example, emails that solely provide campus security alerts or safety information would not require consent. **The content requirements (i.e., college's contact information and unsubscribe mechanism) must still be in the message (see above).**

TRANSITION PERIOD

There is a 3-year transition period under CASL. From July 1, 2014 to June 30, 2017 (the "**Transition Period**"), there is implied consent to send CEMs to those people with whom the college has an "existing business relationship" or "existing non-business relationship" (see Exemptions section above). The Transition Period applies to these categories of recipients without regard to the 2-year time limit in those categories, which means implied consent can apply to all current and former students of the college, all current and former members of the Alumni Association and all current and former donors and volunteers of a registered charity. The college may continue sending CEMs to these recipients during the Transition Period, provided that: 1) the content requirements are complied with (see above), 2) as at July 1, 2014, the college has already been communicating with the recipient via CEMs, and 3) the recipient has not unsubscribed from receiving CEMs (i.e., if the recipient unsubscribes during the Transition Period, the college can no longer rely on the Transition Period exemption to send further CEMs).

While the Transition Period is helpful because it permits a college to continue sending emails to the contacts on its lists until June 30, 2017, it is not a permanent solution or a substitute for obtaining express consent. If, for example, the college (as a registered charity) sends CEMs to a former donor during the Transition Period, and that person does not make a further donation during the Transition Period, the college may not be able to continue sending CEMs to that person when the Transition Period expires, because the recipient no longer falls under the definition of existing non-business relationship. Similarly, if a college sends CEMs to a student during the Transition Period, and the student graduates 1 year into the Transition Period, the college may not be able to continue sending CEMs to that person when the Transition Period expires, because at that point the recipient no longer falls under the definition of existing business relationship (which has a 2 year time limit, after the Transition Period ends). Colleges are encouraged to use the Transition Period to obtain express consent whenever possible from these recipients.

KEY "DOS" AND "DON'TS"

1. DO NOT SEND UNSOLICITED COMMERCIAL ELECTRONIC MESSAGES.

As noted above, the basic rule under CASL is that a sender needs the recipient's consent in order to send a CEM. If a sender does not have consent from a person (whether express or implied), CASL prohibits the sender from sending CEMs to that person. CASL encourages organizations to obtain express consent. Express consent is the "gold" standard because there is no time limit. If a person gives express consent to receive CEMs from the

college, the college may send them messages indefinitely, subject to the person unsubscribing or otherwise withdrawing consent (and assuming that the consent was worded broadly to include all CEMs, and the request for consent complies with CASL). We will provide more specific guidelines on express consent in the Q&A.

2. DO NOT ADD PEOPLE TO MAILING LISTS WITHOUT THEIR CONSENT.

Be careful about adding new contacts to the college's mailing lists. Just because a person consents to receiving information from the college for one purpose, it does not mean the person has consented to receiving all marketing or promotional emails from the college, or that that person can be added onto every mailing list that the college has. For example, if a prospective student asks for information about a particular program and the college emails that information, that does not mean the person can be added onto the college's general mailing lists for sending newsletters, fundraising materials, etc. We will provide more guidance on mailing lists in an upcoming Q&A.

3. DO INCLUDE THE CONTENT REQUIREMENTS IN ALL COMMERCIAL ELECTRONIC MESSAGES.

As noted above, generally speaking the content requirements need to be in every CEM that is subject to CASL. This may apply even if there is implied consent to send the message.

4. DO NOT IGNORE REQUESTS TO UNSUBSCRIBE.

As discussed above, starting July 1, there is a legal requirement for unsubscribe requests to be effective within 10 business days after the request was sent. Given the purpose of CASL, it is a best practice to start honouring unsubscribe requests now, and to do so in a quick and efficient manner.

5. DO NOT "COLD EMAIL" PERSONS WITH WHOM YOU HAVE NOT DEALT BEFORE.

CASL prohibits sending unsolicited CEMs. If an email is sent to an unknown person, or a person that has no relationship with the college (e.g., a potential student, a potential donor, a new vendor/supplier) and that email promotes the college in any way or has some commercial purpose, that practice could violate CASL. As mentioned above, CASL does not apply to phone calls or paper mail, so CASL does not prohibit colleges from contacting these people by phone or mail instead.

6. DO NOT PANIC!

Many organizations across Canada, including other educational institutions and charities, are assessing how to comply with CASL. One of the difficulties is that since CASL is new legislation, there is some uncertainty about what some of the provisions mean and how they should be interpreted. Since there is a limited amount of time before July 1, we recommend that the college take action now to get into compliance with CASL. We will be producing a detailed Q&A and checklist of action items to assist you in this process.

AUTHORS

Adrian Liu
416.367.6585
aliu@blg.com

Victoria Prince
416.367.6648
vprince@blg.com

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