

# Canada's Anti-Spam Legislation (CASL)

Anita Banicevic

Jennifer Longhurst

Gillian Stacey

Davies Ward Phillips & Vineberg LLP

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DAVIES

# A Brief History of Spam

Hormel invents **SPiced HAM**



Over 100 million lbs of SPAM Classic are shipped abroad to feed troops in WWII

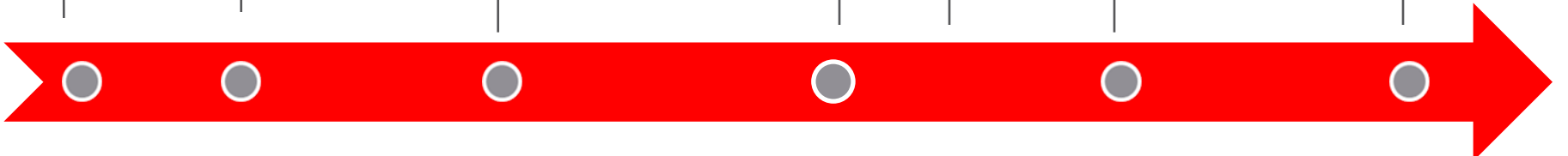
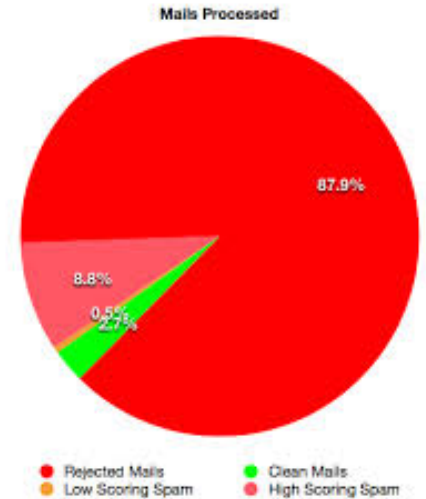
Monty Python's (now infamous) Spam sketch



Earliest documented commercial spam on ARAPANET

Abusive BBS users type the word SPAM repeatedly to force other users' text off the screen

First major commercial spam incident, originated by two lawyers



1937

1941-1945

1970

1978

1994

2014

# Just Call Me CASL (/ˈkæ.s.l/)



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

- ❑ Statute + CRTC Regulations + Industry Canada Regulations + CRTC Compliance & Enforcement Bulletin + FAQs + Regulatory Impact Analysis Statement (RIAS) + *Criminal Code*
  
- ❑ Consequential Amendments:
  - *Competition Act*
  - *Telecommunications Act*
  - *PIPEDA*

# Three Key Dates for CASL



## July 1, 2014

- Prohibits sending "commercial electronic messages" without express or implied consent
- Messages must meet certain form requirements unless exemptions from consent/form apply
- Broadens scope of misleading representation provisions of the Competition Act
- Prohibition on address harvesting
- Prohibition on altering transmission data



## January 15, 2015

- No installation of a computer program without express consent and prescribed disclosure (unless exemptions apply)



## July 1, 2017

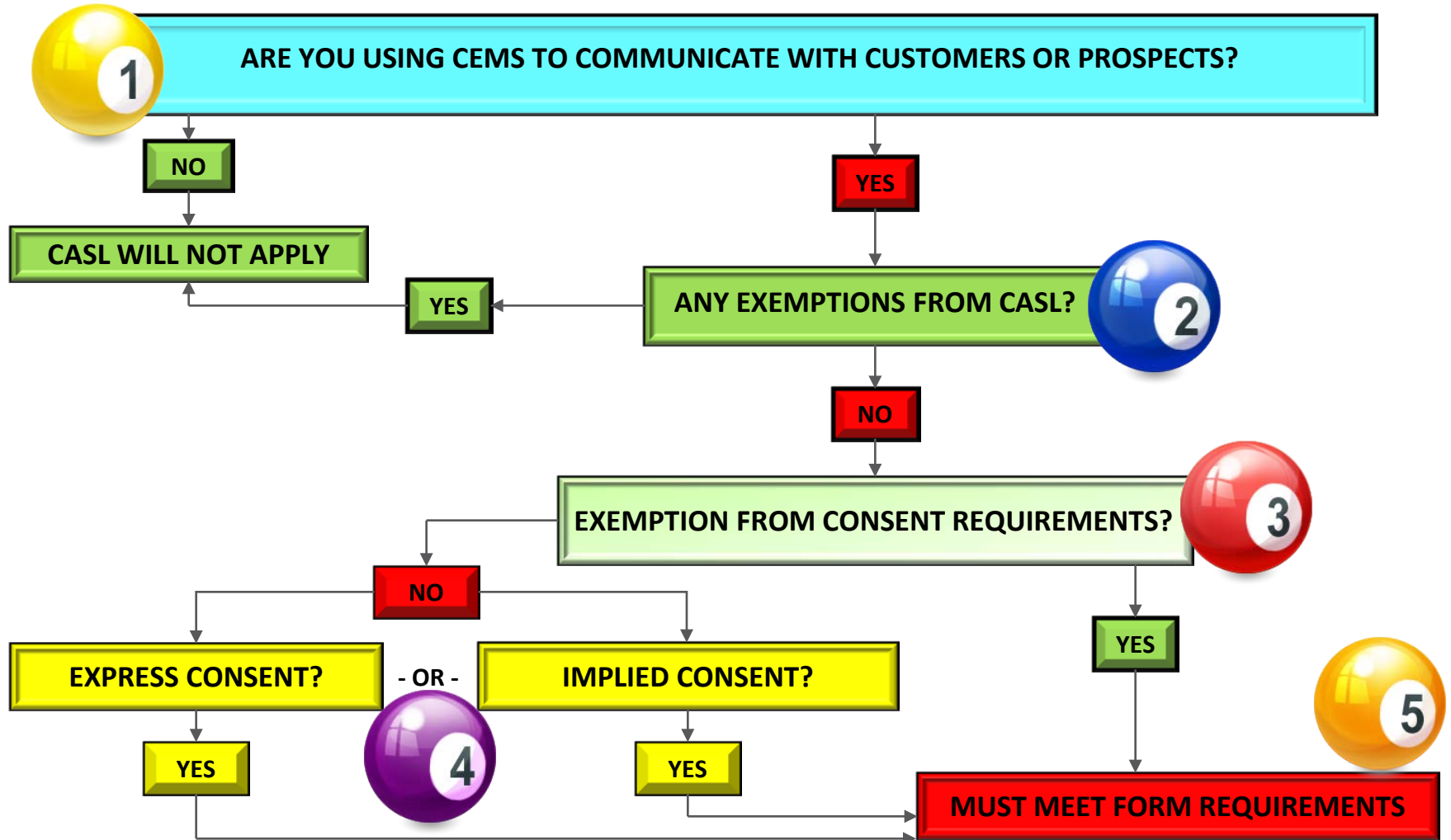
- Private right of action becomes available (where CRTC has not taken enforcement action)
- Three year "transition period" comes to an end



# Requirements for Commercial Electronic Messages ("CEMs")



# Applying CASL In 5 Easy Steps



# Is it an Electronic Message?



E-mails



Texts



Instant messages



Facebook, LinkedIn, Twitter or other social media messages to a user's account

sent to customers or prospective customers

**AND after July 1, 2014** any message asking for consent to send a CEM is itself a CEM and must meet consent and form requirements



# Is It a "Commercial" Electronic Message?



Broad definition of CEM in CASL (s. 1(2)):

*"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) above; 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."*





# Do Any Exemptions from CASL Apply?



Exemptions from Consent and Form Requirements:

- Family/personal communications**
  - CEMs between individuals with a "personal or family relationship"
- Internal communications within organization**
  - concerning affairs of that organization *i.e.*, between employees, reps, consultants or franchisees
- Inquiries related to recipient's commercial activities**
  - *e.g.* CEMs where **asking** for quote or services from recipient and responses to inquiries
- External business-to-business CEMs with an "existing relationship"**
  - and message concerns affairs of organization or recipient employee, rep, consultant or franchisee

# Exemptions: Form and Consent



- ❑ **CEMs of a legal nature**
  - satisfy a legal or juridical obligation
  - provide notice of or enforce a right, court order, judgment or tariff
  - enforce a right arising under federal, provincial, municipal or foreign law
- ❑ **CEMs sent & received on electronic messaging services, with conspicuous unsubscribe & implicit or explicit consent to receive**
  - *e.g.*, through mobile application, IM, BBM, text subscriptions
- ❑ **CEMs sent on closed secure account** by provider of account
  - *e.g.*, online banking website
- ❑ **CEMs accessed outside Canada**
  - must comply with local law if country has laws similar to CASL, otherwise must comply with CASL
- ❑ **Interactive voice, fax calls or voice recordings** sent to telephone account



# If CASL Applies, Are Any Exemptions from Consent Available?

- ❑ Exempt from getting consent if the CEM solely:
  - provides a **quote or estimate** requested by recipient
  - **completes or confirms a commercial transaction** previously agreed to by recipient
  - provides **warranty, recall, safety or security information** about something recipient purchased
  - provides notification of **factual information re: an ongoing subscription**, account, loan or membership
  - provides **information to employee re:** employment or benefits
  - **delivers a product, good or service** (or update) **customer is entitled to**

BUT such CEMs must still meet the form requirements



# Third Party Referrals

**One-time exemption** from consent requirements for "third party referral"

**First** CEM sent following a referral by a "person" with:

- an existing business or non-business relationship, or
- a personal or family relationship, and
- referring person must have such relationship with both the sender and recipient, and
- CEM must disclose full name of referrer and state message was sent as a result of the referral

## 4

# What is Consent?

Two forms of consent for CEMs:

- ❑ **Implied** – would be reasonable to conclude you have someone's permission to send CEMs
- ❑ **Express** – someone actively (written or oral) gave you permission to send a CEM

**Key difference** – implied consents will need to be "refreshed" continuously going forward; express consent good until revoked by recipient



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At last Igor finds a body with the appropriate consent form.

## 4

# What is Implied Consent?

**im•ply** (im-plī')

**tr.v. im•plied, im•ply•ing, im•plies**

1. To involve by logical necessity; entail: Life implies growth and death.

2. To express or indicate indirectly: His tone implied disapproval.

See Synonyms at suggest.

- "Existing business relationship"
- "Existing non-business relationship"
- Conspicuous publication of address
- Disclosure of electronic address to sender

**Even if you have implied consent, you must meet form requirements**



# What is Express Consent?

- ❑ May be obtained orally or in writing (including electronically)
  
- ❑ Must set out "clearly and simply":
  - **Purpose or purposes**
  - **Name** by which sender (or person on whose behalf message sent) carries on business
  - If sent on behalf of another, **ID of both sender and person(s) on whose behalf sent**
  - **Contact info:** Mailing address **and either** telephone number, email or web address of sender/person(s) on whose behalf sent
  - **Ability to withdraw consent:** Statement that consent can be withdrawn at any time
  - Express consent valid unless/until recipient unsubscribes



# Consent for Third Parties

## Consent for Unknown Third Parties

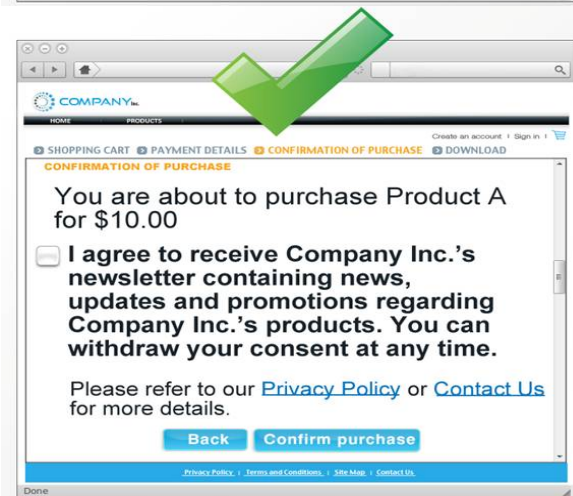
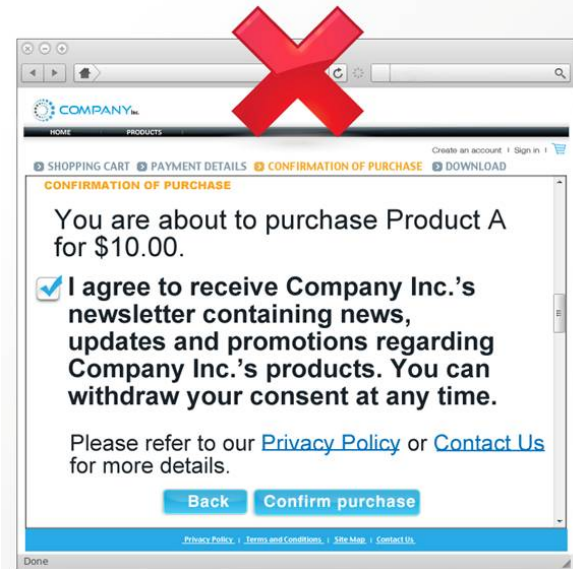
- ❑ Can obtain express consent on behalf of unknown third parties (e.g. can ask recipient for consent to receive CEMs from you **and** from others even if you don't know who the others are)
  
- subsequent CEMs from third party must identify sender and party who obtained consent and give recipient opportunity to unsubscribe from all third party CEMs
  
- third party CEMs need not, however, provide ability to unsubscribe from original party's CEMs
  
- IF recipient unsubscribes from third party CEMs, the third party must notify the original party and the original party must notify all other third parties to give effect to unsubscribe



# How to Obtain Express Consent



- ❑ Can do:
  - sign-up on website
  - in response to coupon offer or contest
  - sign-up at point of sale
  - over phone
  - product warranty or registration cards
  
- ❑ Cannot do:
  - pre-toggle or "pre-check" boxes
  
- ❑ Consents under s.6, 7 & 8 must be sought separately
  
- ❑ Cannot bundle consents with terms and conditions





# Sample Form of Consent

COMPANY Inc.

HOME PRODUCTS

SHOPPING CART PAYMENT DETAILS DOWNLOAD Create an account | Sign in |

### TERMS & CONDITIONS

Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est

I accept the Terms and Conditions.

I agree to the installation of Company Inc.'s Product A software. The function and purpose of Product A are to Lorem ipsum dolor sit amet, consectetur. To request removal or disabling of this computer program under [certain conditions](#), please contact us at this [electronic address](#).

I agree to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time. Please refer to our [Privacy Policy](#) or [Contact Us](#) for more details.

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Done



# Grandfathering of Existing Consents

RIAS: "Express consents, obtained [under PIPEDA] before CASL comes into force, to collect or to use electronic addresses to send [CEMs] will be recognized as being compliant with CASL"

## CASL Consent

VS.

## PIPEDA Consent

- prescribed information: name & contact details
- must include statement that consent can be withdrawn
- opt-in only

- principles, not prescription
- principle that consent valid until withdrawn, i.e. implied right to withdraw
- opt-out permissible



# Form Requirements for CEMs



## Each non-exempt CEM must:

- "clearly and prominently" identify sender/person(s) on whose behalf sent
- provide contact info for sender/person(s) on whose behalf sent
- include no cost, easy unsubscribe mechanism



# Sample Unsubscribe Mechanism

A screenshot of a web browser window displaying an unsubscribe form. The browser's address bar is empty. The website header includes the 'COMPANY Inc.' logo, navigation links for 'HOME' and 'PRODUCTS', and user options: 'Create an account', 'Sign in', and a shopping cart icon. The main content area is titled 'UNSUBSCRIBE' and contains the heading 'I would like to unsubscribe from receiving:'. Below this heading are two radio button options: 'All messages from Company Inc.' and 'All promotional messages from Company Inc. I will continue to receive notifications consisting of factual information about my account and purchases.' A blue 'Submit' button is positioned below the second option. The footer of the page contains links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'.



# *CASL - Amendments to Competition Act*

# Amendments to Misleading Advertising Provisions

- ❑ Amendments to Competition Act's misleading advertising provisions allow Bureau:



- to pursue misleading representations under civil provisions regardless of whether rep is misleading in a material respect where the representation is in:
  - sender info or URL (e.g., [losefivepoundstoday@easyweightloss.com](mailto:losefivepoundstoday@easyweightloss.com))
  - subject line of email (**FREE Today Only**)
- OR to pursue these same types of misleading representations under criminal provisions if **knowingly or recklessly** send or cause to be sent

# Misleading Advertising Provisions (cont'd)

- ❑ Bureau does not need to demonstrate that anyone was misled
- ❑ Offence can be made out if you permitted representation to be sent
- ❑ Offence is committed once message is sent (transmission is initiated) and it is immaterial whether the electronic address exists or whether message reaches its destination





# Other Important Competition Act Amendments



- ❑ Creates private right of action (in July 2017) under civil misleading advertising provisions



- ❑ Improves Bureau's ability to share information with its international counterparts

# CASL Tips for Advertisers

- ❑ Review your "forward to-a-friend" contests and marketing efforts:



- "referral" exemption from CASL unlikely to apply
- RIAS states that "due diligence defence exists in CASL, if those who promote FTAF campaigns **provide prospective clients and contestants with the limitations defined for family and personal relationships...** they can use these to reduce their liability"

# CASL Tips for Advertisers

- ❑ Review your existing relationships with third party or "affiliate" marketers:



- Assess risks of misleading advertising by third parties:
    - Bureau has taken the position that can be responsible for misleading representations of others on the theory that "permitted" representations to be made
  - Assess CASL-compliance risks:
    - CASL prohibits aiding, inducing "any act" that is contrary to form and consent requirements
- ❑ Review existing contracts



*Those Other Parts of CASL:  
Installation of Computer  
Programs, Message Routing  
and Address Harvesting*

# Installing Computer Programs (January 2015)



- Prohibition on installing a computer program on someone's computer system in the course of commercial activity without express consent of owner/user
- Only exception is when acting in accordance with a court order
- "Computer program" and "computer system" as defined in the *Criminal Code*



# Consents

## Deemed Express Consent

**For** TSPs to install software to protect, upgrade or update their networks or patch a failure in the system software or hardware

**Or** if the program is:

- a cookie
- HTML code
- Java Scripts
- an operating system
- a program executable only through the use of another computer program that you previously obtained consent to install

## Express Consent

To install programs or updates or upgrades in the course of commercial activity

- may be sought in advance of the actual installation
- consent must clearly and simply
  - describe the function and purpose of the computer program
  - provide information enabling consent to be withdrawn
  - Include contact information

TSP: Telecommunications service provider (defined)



# Consents (cont'd)

## Enhanced Consent

If program will cause computer system to operate in manner contrary to reasonable expectations of owner/user:

- collects personal information
- interferes with the owner's ability to control their device
- changes settings or preferences without the owner's knowledge
- interferes with data or prevents the owner from accessing it
- causes device to communicate with another without knowledge of the owner
- installs software that can be activated by a third party

Must:

- make this clear & prominent when requesting consent
- describe program's material elements, purpose and reasonably foreseeable impact on operation of computer system
- be separate and apart of the licence agreement or EULA

# Alteration of Transmission Data (July 2014)

- ❑ Prohibition on causing an electronic message to be sent to a destination that is different from that which the sender specified in the course of a commercial activity
- ❑ Unless express consent obtained (or you are a TSP)
- ❑ Consent must clearly and simply describe why, and for what purpose, consent is being requested, as well as provide the identity of the requester
- ❑ Right to withdraw consent must be stated





# Address Harvesting & Hacking (July 2014)

DAVIES

## ❑ Address Harvesting

- cannot collect electronic address with a computer program designed primarily for generating or searching for, and collecting, electronic addresses
- cannot use an electronic address collected by such a program

## ❑ Personal Information Harvesting

- cannot collect personal information through any means of telecommunication by accessing a computer system in contravention of an Act of Parliament
- cannot use personal information collected that way

### DOCTOR FUN



29 July 2003

Copyright © 2003 David Farley, d.farley@btbt.co.uk  
http://btbt.co.uk/Doctofun.html  
This cartoon is made available on the Internet for personal viewing only. Opinions expressed herein are solely those of the author.

"Now that's what I call data harvesting."



# *Enforcement & Remedies*



# Enforcement

- ❑ Who enforces CASL?
  - Canadian Radio-television and Telecommunications Commission (CRTC)
  - Competition Bureau
  - Office of the Privacy Commissioner of Canada
- ❑ What investigatory/enforcement powers are available under CASL?
  - Warnings, demands, notices & search warrants
- ❑ CASL applies broadly
  - extra-territorial application
  - information-sharing



# Penalties/Remedies

**“If you think  
compliance is  
expensive –  
try non-compliance.”**

*Former U.S. Deputy Attorney General Paul McNulty*

- ❑ **AMPS:** CRTC can impose significant "administrative monetary penalties" for violations
- ❑ AMPS may be assessed per violation
- ❑ Maximum AMPS:
  - Individuals – up to **\$1,000,000**
  - Everyone else – up to **\$10,000,000**
- ❑ Competition Act:
  - AMPS Individuals – **up to \$750,000 (first) or \$1M (for subsequent)**
  - AMPS Everyone else - **\$10M (first) or \$15M (for subsequent)**
  - Criminal: Fine + Jail - **up to 14 years (on indictment)**

# Penalties/Remedies (cont'd)



- ❑ **Personal liability:** Directors, officers, agents of a corporation that commits a violation are personally liable **IF** "they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against"
  
- ❑ **Vicarious liability:** Corporation vicariously liable if employees or agents committed violation while acting within the scope of their authority
  
- ❑ **Aiding/Inducing:** CASL prohibits aiding, inducing, procuring or causing to be procured "**any act**" that is contrary to form and consent requirements
  
- ❑ **Due diligence defence** (reverse onus)

# Penalties/Remedies (cont'd)



- ❑ **Undertakings:** Can enter into voluntary undertakings with CRTC and pay fine
  - terms of undertakings would be public BUT would preclude future issuance of notice of violation **AND** private actions



- ❑ **Private Actions (as of July 2017):**
  - available for any person who alleges that are affected by contravention of CEM provisions, computer spyware **AND/OR** misleading representations provisions
  - order may include damages **AND** AMPs

# Penalties/Remedies (cont'd)



## ❑ **Offences:**

- fail to comply with demand, notice or warrant
- obstruct, hinder, knowingly make false or misleading statements or provide false or misleading information to a person carrying duties under CASL

## ❑ **Fines for offences:**

- individuals up to \$10,000 first offence, up to \$25,000 second offence
- everyone else up to \$100,000 first offence, up to \$250,000 second offence

## ❑ **Director liability and employer vicarious liability** for offences

# Case Study: Near-Field Tracking

[thestar.com](http://thestar.com)

Tuesday, March 25, 2014

## **Businesses seek to capitalize on your smartphone's digital trail:**

Your smartphone leaves a trail wherever you go

On Friday nights, Czechoski offers up a rock band; on Sundays, Mondays and Tuesdays, the Queen West restaurant and bar's upper level is closed off. Both were decisions made by general manager Jeremy Schertzer after consulting the digital trail his customers sometimes unwittingly leave behind. "We use it to determine demographic trends," Schertzer said, adding, "I always thought it was a younger crowd than it is."

In an effort to cater to a business's demographic and optimize staffing as well as marketing, more companies are turning towards technology, taking advantage of Wi-Fi signals emitted by smartphones. The signals, a 12-digit code called a MAC address that's particular to a specific phone, emit 24/7, regardless of whether a person is actively attempting to connect with Wi-Fi.

Companies like Toronto-based Turnstyle Solutions set up sensors to capture them, allowing them to build anonymous customer profiles based on signal strength. Sometimes they can go a step further, offering options to opt-in when people sign in to a Wi-Fi hot spot enabling them to learn everything (with permission) from age and gender to personal contact information.





# Case Study (cont'd)

1. Is the MAC address personal information?
2. Does intercepting the WiFi signal contravene CASL?
3. Can you ask for opt-in to tracking as part of WiFi sign-in?
4. Is WiFi really "free" if agreeing to be tracked is a condition of use or is "free" misleading?

# Questions

We frequently obtain addresses of potential clients/customers at trade shows by them filling out a small entry for random draws and giveaways etc. We often, but not always, have an express box that they can check to opt out of any future emails etc.

If we email the clients whose names we obtained this way is this a breach of the legislation?

Also, what if one of our current clients provide us with an email address of someone they wanted to refer to us and we follow up with them directly?

# Next Steps: Getting Ready for CASL

## 1. **Assess where/how/when you may be caught**

- Electronic messages: e-mails, newsletters, social media, text?
- Computer programs: website, apps?
- Do you collect/harvest "personal information"?
- Avoid misleading subject lines, sender info, URLs, content
- Do you use third parties, do you cover affiliates/partners?

## 2. **Review your consents and tracking**

- Do you have/need express or implied consent?
- How do you get consents and do they comply with CASL?
- Consider converting implied consents to express consents
- How do you track, record and update consents?

## 3. **Review your unsubscribe mechanisms**

- Do they meet incoming CASL requirements?
- Implement procedures to give effect to unsubscribes within your organization and across third parties/partners

# Next Steps (cont'd): Getting Ready for CASL



## **4. Review your form disclosures**

- Do your CEMs meet CASL's form requirements?
- Do computer programs have the requisite disclosure (enhanced)?

## **5. Review your contracts with third parties/partners**

- Do you need specific covenants re: compliance with laws?
- Do you have indemnities and other protections from liability?
- Consider access to and audit rights of third party records

## **6. Update compliance policies and provide training**

- Assess and update policies and training needed to ensure consistency throughout operations, including vendors/partners
- Document training sessions and keep copies for due diligence
- Implement internal controls and reporting

# Questions?

Anita Banicevic

[abanicevic@dwpv.com](mailto:abanicevic@dwpv.com)

Jennifer Longhurst

[jlonghurst@dwpv.com](mailto:jlonghurst@dwpv.com)

Gillian Stacey

[gstacey@dwpv.com](mailto:gstacey@dwpv.com)

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