

Canada's Anti-Spam Legislation (CASL)

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DAVIES

CASL

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

LCAP

Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications

Just Call Me CASL



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*
 - *Personal Information Protection and Electronic Documents 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
- Three-year transition period (where existing business or non-business relationship)
- Broadens scope of misleading representation provisions of the Competition Act



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

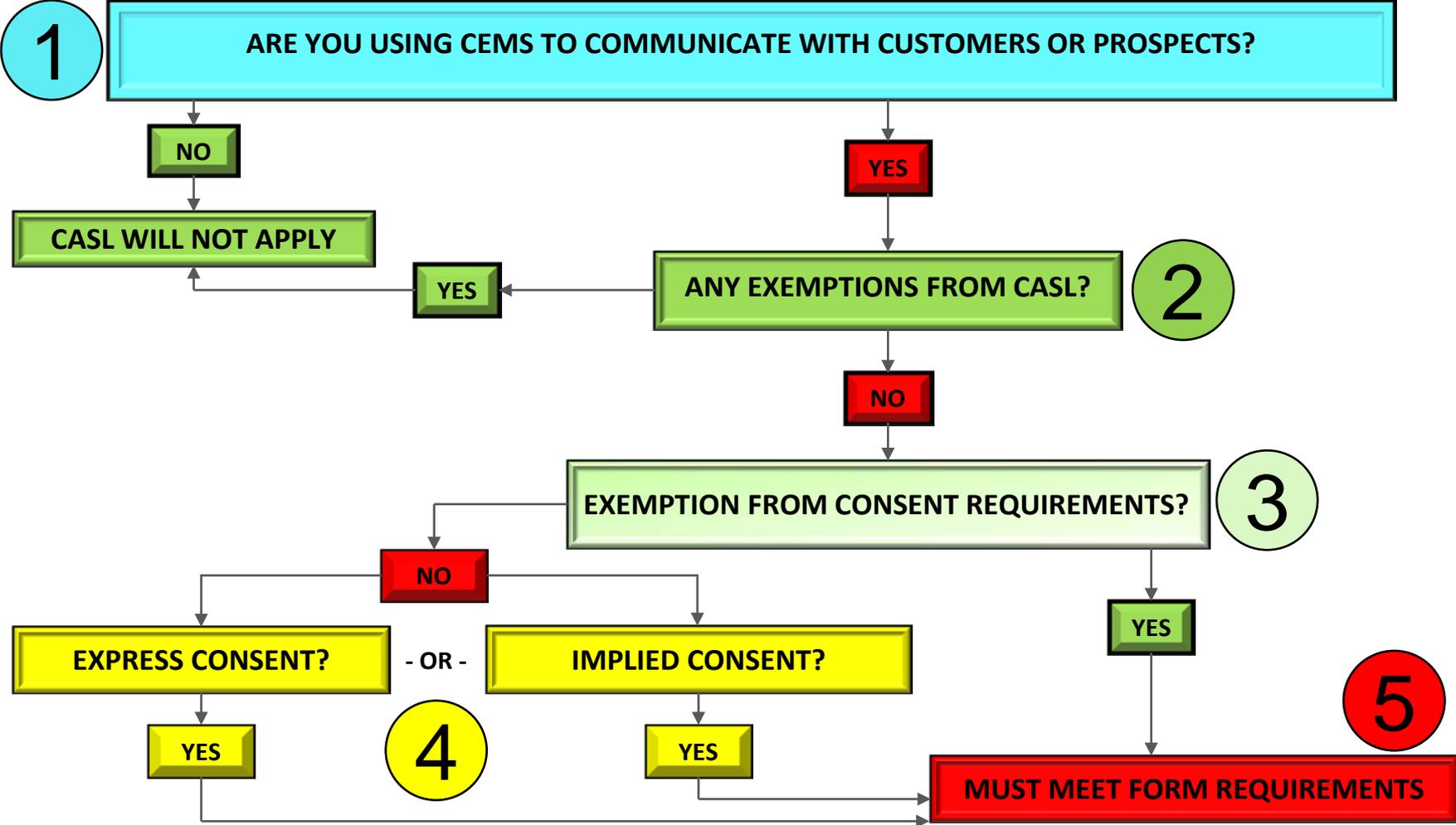




Requirements for Commercial Electronic Messages ("CEMs")



Applying CASL In 5 Easy Steps



1 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

1

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

- **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**

3 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

3 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

④ What is Implied Consent?

- "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

4 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
- Presumably obtained express consents remain valid under new law until revoked
 - express consents can be sold as a business asset

Consent for Unknown Third Parties

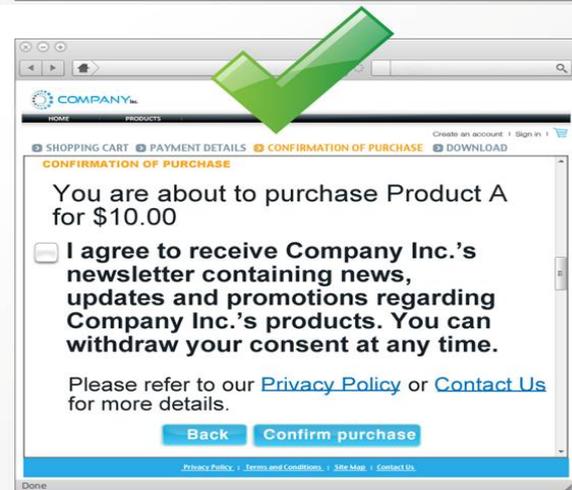
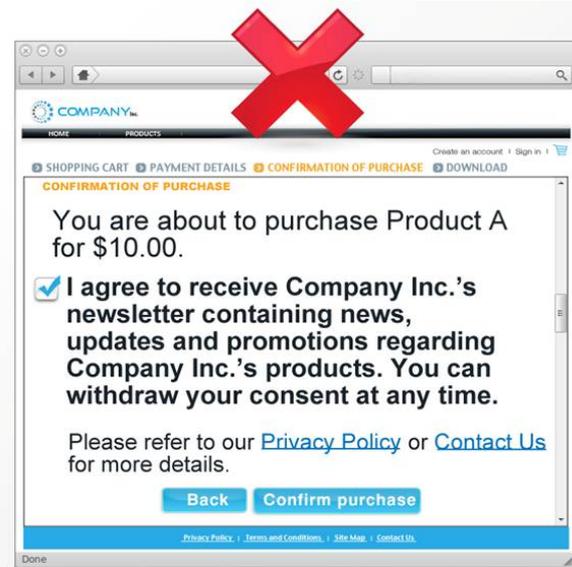
- Can obtain express consent on behalf of unknown third parties (e.g. can ask recipient for consent to receive CEMs from you **and** from others even if you don't know who the others are)
 - subsequent CEMs from third party must identify sender and party who obtained consent and give recipient opportunity 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.

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How to Obtain Express Consent

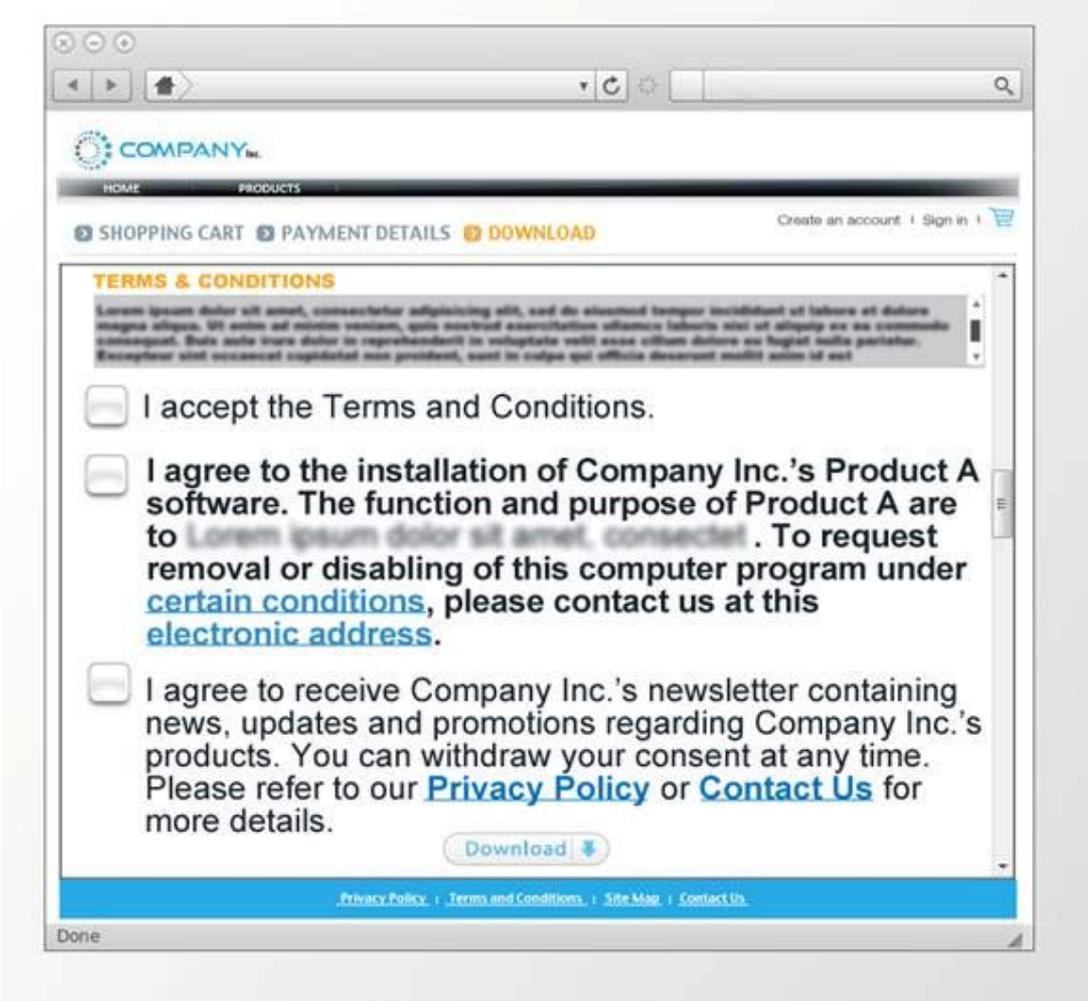


- Can do:
 - sign-up on website
 - in response to coupon offer or contest
 - sign-up at point of sale
 - over phone
 - product warranty or registration cards
- Cannot do:
 - pre-toggle or "pre-check" boxes
- Cannot bundle consents with terms and conditions



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Sample Form of Consent



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Another Example for Acquiring Express Consent

A screenshot of a web browser window showing a website for "COMPANY Inc.". The browser's address bar is empty. The website has a navigation menu with "HOME" and "PRODUCTS". A "SHOP" button is visible. On the left, there are links for "Product A", "Product B", and "Product C". The main content area features a large blue starburst graphic with "40% OFF!" and the text "ALL PRODUCTS 40% off for a limited time only!". Below this is a sign-up form with the text: "Enter your email below 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." The form includes an input field labeled "your email" and a blue "Submit" button. At the bottom of the page, there are links for "Privacy Policy", "Terms and Conditions", "Site Map", and "Contact Us". A large green checkmark is overlaid on the top right of the browser window. The browser's status bar at the bottom shows "Done".

Regulatory Impact Analysis Statement, published with the regulations:

"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

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

VS.

PIPEDA Consent

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

5 Records of Consent

- Onus on sender to maintain adequate records to prove consent
- Must keep records of consent for period that you communicate with person
- Keep record of name, e-mail address, how you obtained consent (e.g., email opt-in, by phone), date, nature of consent (express or implied)
- If collecting consent by phone, plan to keep recordings

5 Form Requirements for CEMs



Prescribed Form/Content for all Non-Exempt Messages:

- Must "Clearly and Prominently" identify sender/person(s) on whose behalf sent
 - 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 for sender/person(s) on whose behalf sent
 - Mailing address and either telephone number, email or web address of sender/person(s) on whose behalf sent (can link to website)
 - Contact info must be valid for 60 days from date CEM is sent
- Include no cost, easy unsubscribe mechanism
 - Same means as message sent, or other electronic means
 - Electronic address or link to web page for unsubscribe (valid for 60 days)
 - Set out clearly, simple and easy and can be readily performed
 - Must unsubscribe "without delay", no later than **10 business days**

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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".

Next Steps: Getting Ready for CASL

- 1. Assess where/how/when your company engages in CEM communications with customers/potential customers**
 - Does your company use e-mail distribution lists? Social media messages?
 - What type of promotional communications does your company engage in? For instance – "refer-a-friend" e-mails/promotions (with e-mails coming from your company)

- 2. Assess whether company uses third parties to engage in CEM communications on your behalf?**
 - For instance, does your company use sales agents, distributors, advertising agencies, affiliate marketers, PR firms, IR services?
 - Consider reviewing contracts with such parties to ensure they are required to be CASL compliant, and consider need for specific indemnities and compliance audits

Next Steps: Getting Ready for CASL



3. Assess current consent and tracking mechanisms

- How are consents obtained, stored, updated? Are customer consents consolidated across mediums?
- Do you currently have implied consents or express consents?
- Develop appropriate tracking mechanisms and record-keeping for consents going forward

4. Assess whether need to obtain any express consents prior to July 1, 2014

- Does your company have all necessary consents for existing recipients of e-mail communications/blasts?
- Note transition period for existing business or non-business relationships

Next Steps: Getting Ready for CASL



5. Assess unsubscribe mechanisms

- Do mechanisms meet CASL requirements?
- Are procedures in place in give effect to unsubscribe with affiliates/partners?
- Will recipients be removed within 10 days?

6. Assess whether current marketing communications meet CASL form requirements

- Are changes necessary?

7. Assess whether marketing communications raise any issues re: potentially misleading subject line, sender, URL, metadata, content

Next Steps: Getting Ready for CASL



- 8. Ensure employees and third parties receive appropriate compliance training**
 - Document training sessions for due diligence
 - Develop CASL compliance policy (or component of existing policy)
 - Ensure consistency throughout operations



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



**“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

- **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

- **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

- **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



Thank you!

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