

Canadian Advertising Law Update and Canada's Anti-Spam Legislation (CASL)

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DAVIES

Outline

1. Developments in Canadian Advertising Law
2. Overview of Canada's Anti-Spam Legislation ("CASL")
 - a. Key requirements of CASL
 - b. Amendments to Competition Act
 - c. CASL Enforcement/Remedies



Developments in Canadian Advertising Law



Misleading Representations Remain an Enforcement Priority



- Misleading representations remain an "area of concern" for Competition Bureau
 - Fits with Bureau's "relevance" agenda
 - Strategy of active enforcement, including litigation
- Bureau focus on:
 - (1) the digital economy;
 - (2) the retail sector; and
 - (3) health care/pharma

Areas of Interest

Pricing/Sales

\$99/
night



**resort fees \$50/night

Performance Claims



Deceptive Testimonials



Digital Marketplace



Recent Enforcement Activity

- Competition Bureau has recently:
 - ❑ conducted search under criminal misleading advertising provisions
 - ❑ launched civil proceedings against a major retailer for allegedly misleading pricing representations
 - ❑ launched an investigation against a major car rental company concerning its online rental rates/advertising
 - ❑ collaborated extensively with other international authorities re: investigation and enforcement

Recent Enforcement Activity: Pricing Representations

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The **BRICK.**

PLUS! YOU CAN PAY
NOTHING FOR **18 MONTHS!**

DON'T PAY A CENT! **NOT EVEN THE TAXES!** FOR **18** MONTHS!

Plus! You'll Pay Absolutely Nothing For 21 MONTHS!*

Pricing Representations (cont'd)

Court File No.
13-58195

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Plaintiff

and

LEON'S FURNITURE LIMITED / MEUBLES LEON LTÉE
and THE BRICK LTD.

Defendants



STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

"Contrary to the literal meaning and general impressions conveyed by the representations, consumers are not able to defer the entire cost of a purchase. Instead, consumers typically have to pay an assortment of fees at the time of the purchase. These fees include a surcharge in the form of an "administrative", "processing", or "membership fee", as well as delivery charges, electronics disposal or recycling fees, and taxes."

Consumer Experience	
	Leon's Ltd.
Purchase Price	\$1,500
Deferred Payment Option Surcharge	\$89.95
15% Deposit	\$225.00
Taxes (based on 13% HST in Ontario)	\$206.69
Total due at time of purchase	\$521.64
Purchase Total	\$1,796.64

Recent Enforcement Activity (cont'd)



- **Leons/The Brick (contested/trial pending)**

- **Implications:**

- How to handle required disclosure re: all applicable charges even financing terms etc?
- At what point are charges mandatory (i.e., what if most but not all people would incur)?
- Would "drip" pricing concept apply in digital context? How?

Recent Enforcement Activity: Performance Claims



- **Hyundai / Kia consent agreements re: fuel consumption**

- on August 2, 2013, Bureau announced consent agreements re: inaccurate fuel consumption ratings in ads
- ratings were based on testing conducted at joint testing facilities in Korea
- consent agreements require:
 - compensation for cost difference between advertised and corrected fuel consumption plus additional 15%; and
 - compliance with "deceptive marketing practices provisions as set out in Part VII.1 of the Act" for 10 years

Recent Enforcement Activity – Performance Claims



- **Rogers Communications/Chatr (contested)**

- concerned performance claims regarding dropped calls ("fewer dropped calls")
- Bureau sought maximum monetary penalties and restitution
- Decision of Ontario Superior Court issued in August, 2013
 - allegation of false and misleading representations dismissed, minor reviewable conduct found under testing provisions

- **Implications:**

- **What constitutes false or misleading in material respect?**
 - does attribute advertised have to be discernible?
 - no, but small differences in dropped call rates are discernible and relevant
- **Approach to General Impression**
 - General impression of advertisement assessed from perspective of "credulous and technically inexperienced wireless consumer"

Recent Enforcement Activity: Performance Claims



- **Chatr decision: Implications (Cont'd)**
 - **When is testing necessary?**
 - Court held not sufficient to have technological fact, must have testing
 - Raises question of whether always need to test (e.g., laws of gravity)?
 - **What constitutes an "adequate and proper test"?**
 - Bureau position: must have multiple tests, each with statistically significant results (using 95% confidence intervals); must have tests validated by third party
 - Court did not agree need 95% statistical significance – Chatr's results significant at 95% in any event
 - Court did not agree that need tests validated by third party or multiple tests

Recent Enforcement Activity: Digital Marketplace

- **Premium Text (contested/trial pending)**
 - In 2012, Bureau commenced proceedings against Bell, TELUS, Rogers and the Canadian Wireless Telecommunications Association re: representations made by third party providers of digital content (e.g., premium text messages or ringtones)
 - Commissioner not seeking order against providers actually making the representations at issue
 - CWTA brought issue to Bureau
 - **Implications:**
 - When are you liable for representations of third parties?
 - What does it mean to "permit" representation to be made?
 - What constitutes sufficient disclosure in digital context?

Lessons and Implications

- Aggressive enforcement stance in Canada
 - high profile cases/industries; media coverage; large penalties; leverage
 - attracts attention of private and class plaintiffs
- Co-ordinated enforcement with other jurisdictions
- Unpredictable exercise of discretion
- Use of civil consent agreements
 - high degree of Bureau control – no Tribunal oversight
 - strict compliance monitoring by Bureau (e.g., Beiersdorf, Ecomm)
 - breach is a criminal offence and creates private rights of action
 - raises stakes for subsequent orders (e.g., Bell, Direct Energy)



Overview of Canada's Anti-Spam Legislation ("CASL")

DAVIES

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

CASL's Application to U.S. Businesses



- ❑ CASL applies to commercial electronic messages that are sent or accessed on a computer system in Canada
- ❑ Earlier proposed exemption re: roaming was removed from regulations
- ❑ How do you exclude Canadians?
 - Show took all steps to exclude Canadians (e.g., limit sign-up based on IP address, remove known Canadian e-mail addresses, or mailing addresses)
- ❑ CASL also allows for information sharing between authorities

CASL 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



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 each violation
- ❑ Maximum AMPS under CASL:
 - Individuals – up to **\$1,000,000**
 - Everyone else – up to **\$10,000,000**

Penalties/Remedies (cont'd)

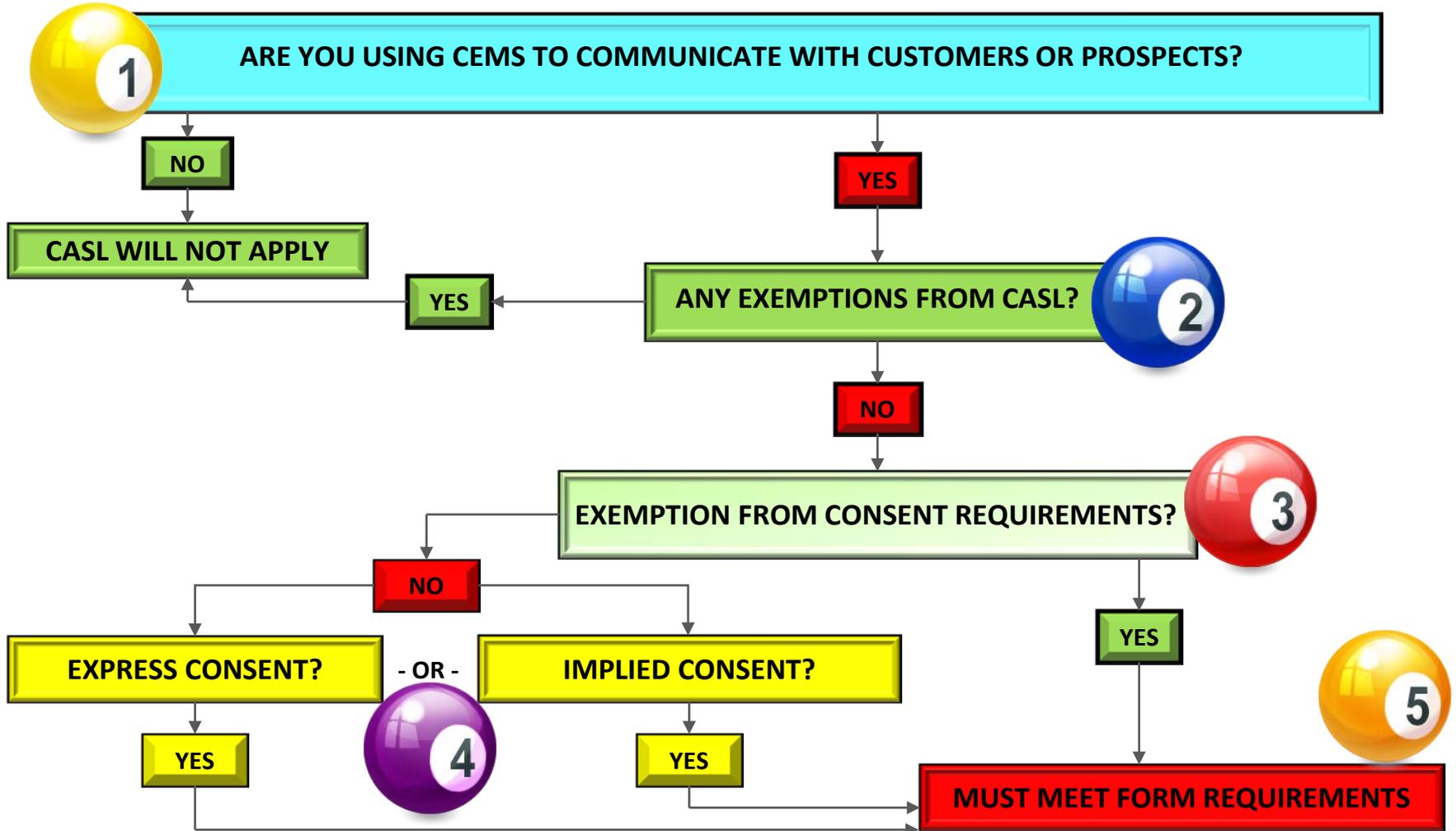


- ❑ **Personal liability:** Directors, officers, agents of a corporation that commits a violation are personally liable **IF** "they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against"
- ❑ **Vicarious 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)



Applying CASL's Requirements for 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

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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.



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

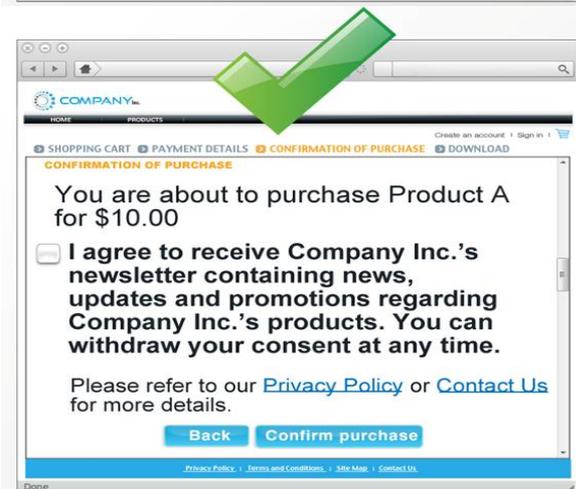
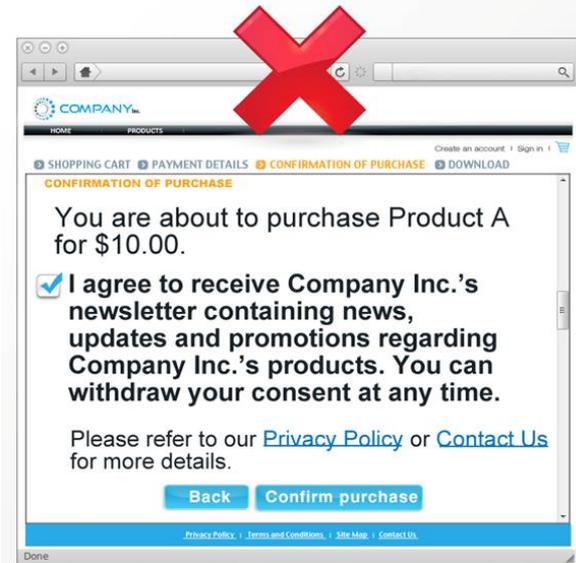


- ❑ Can do:
 - sign-up on website
 - in response to coupon offer or contest
 - sign-up at point of sale
 - over phone
 - product warranty or registration cards

- ❑ 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



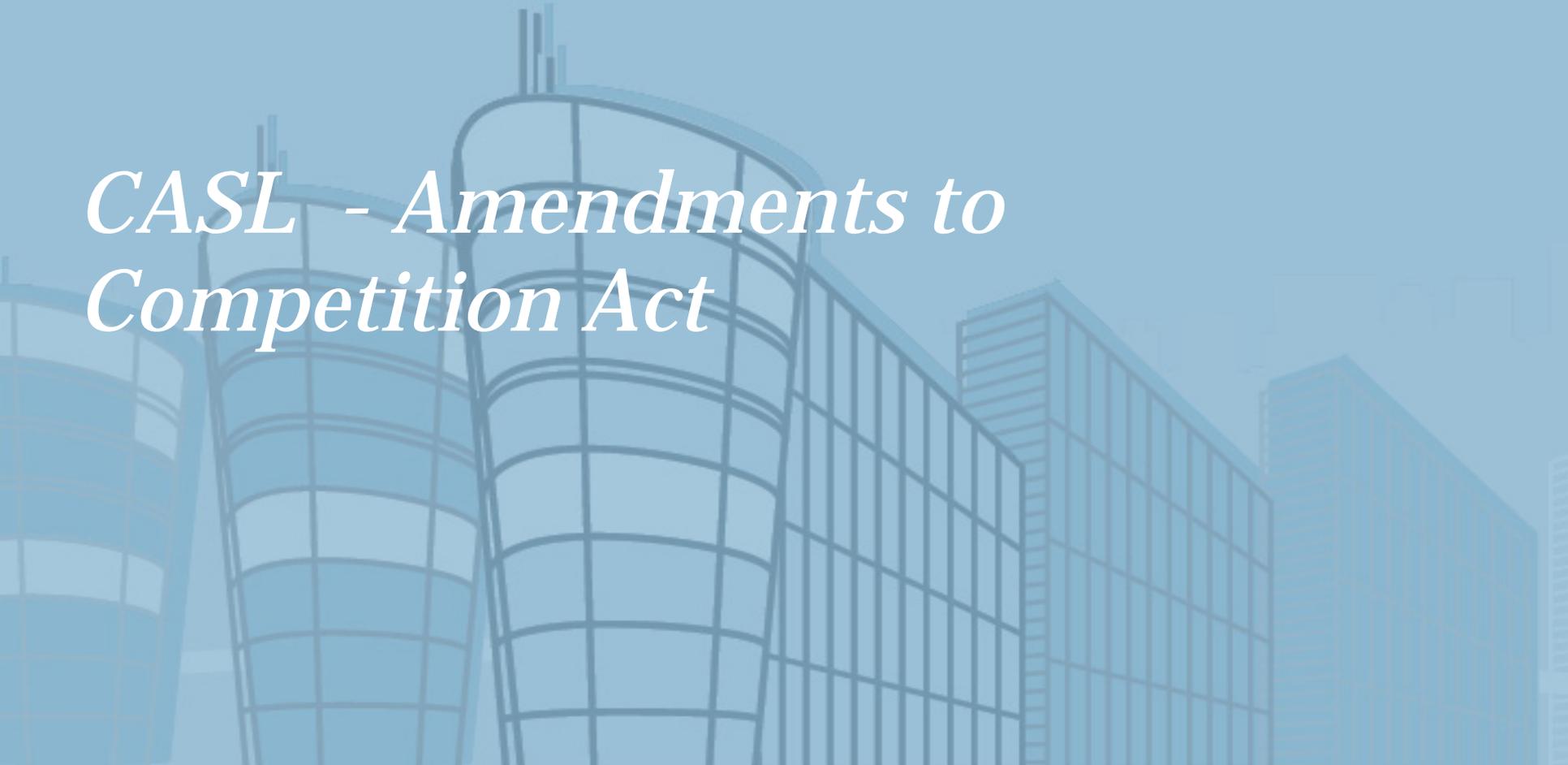
Form Requirements for CEMs

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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





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)
 - 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

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?

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

7. For advertisers:

- Review your forward-to-a-friend contests and marketing efforts
- Assess existing relationships with third party or "affiliate" marketers

Questions?

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