

Canada's New Anti-Spam Law

David Fraser

Spam



“...and you spent 5.73 years of your life deleting spam from your e-mail.”

Overview

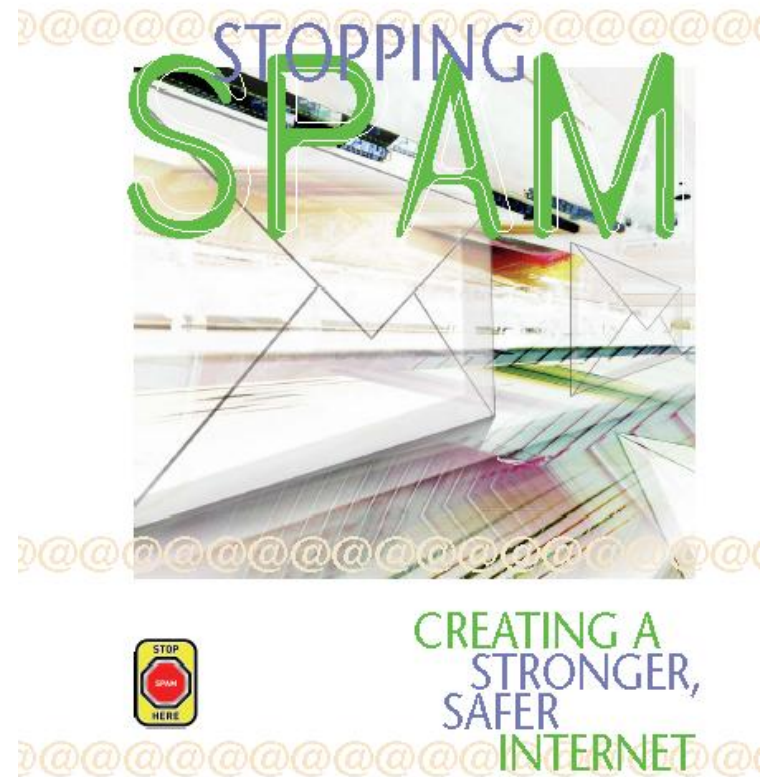
- Background
- Overview of legislation
- Anti-spam rules
- Key concepts
- Violation and penalties
- Private right of action
- Comparison to US CAN-SPAM Act
- Amendments to other legislation
- Preparation before Act in force

Background

- Currently in Canada: No specific law
 - Privacy laws
 - Criminal Code: Fraud, impersonation, etc.
- Canada has been one of the few advanced countries without an anti-spam law
- Law has been passed but is not yet in force
- Will come partially into effect on July 1, 2014

How did we get here?

- Canada's Anti-spam task force
- Established in May 2004
- Reported in May 2005



Report of the Task Force on Spam
May 2005

Canada

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Spam Task Force recommendations

- Task force recommended, among other things, that the failure to abide by an **opt-in regime** for sending unsolicited commercial email should be made an offence;



History of Anti-spam bills

- *Electronic Communications Protection Act* (Bill C-27)
- Introduced in parliament April 2009
- Passed House committee in October 2009
- Referred to Senate in November 2009
- Died when Parliament was prorogued in December 2009

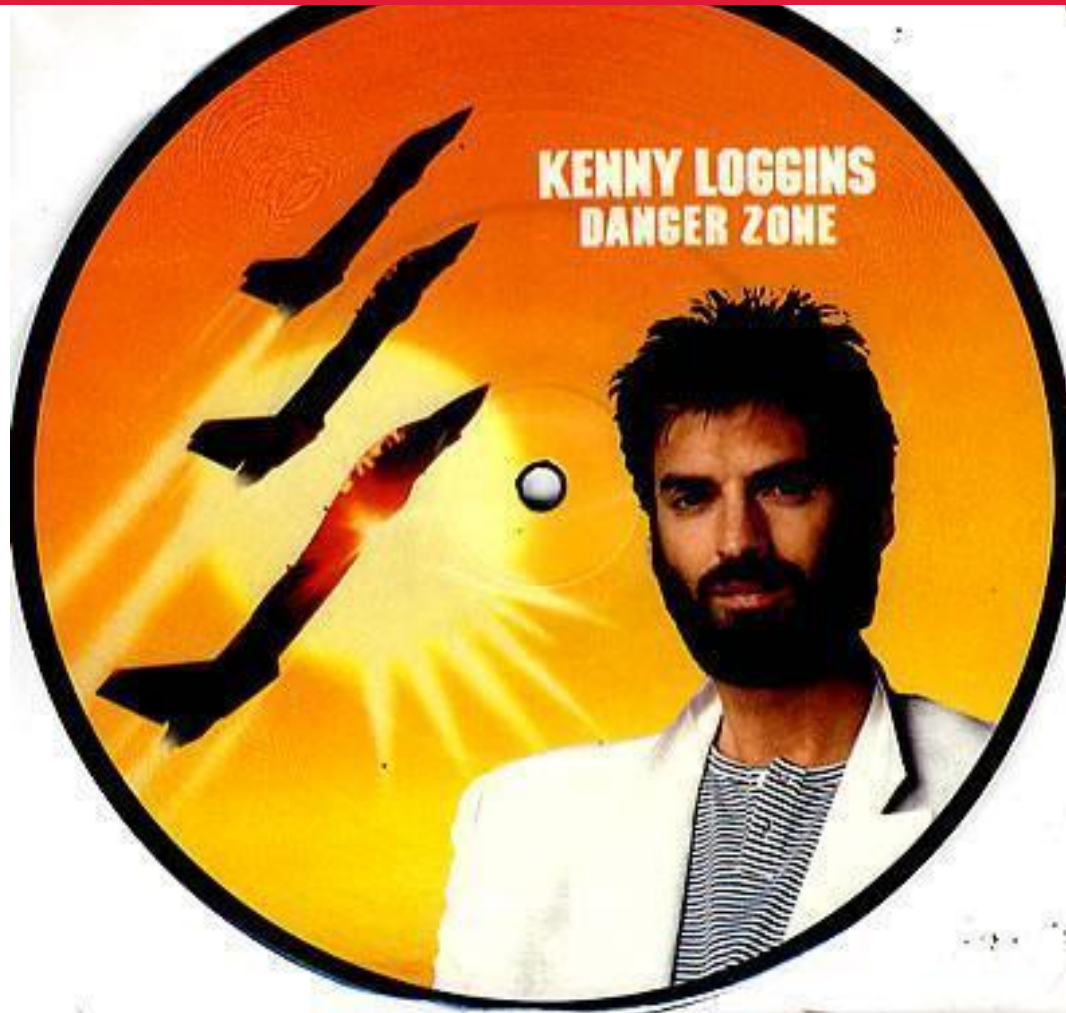
History of Anti-spam bills

- *ECPA* reintroduced as Bill C-28 in 2010
- Known informally as “Canada’s Anti-spam Law”
- Received Royal Assent in December 2010
- SC 2010, c 23
- Full name of legislation is...

Canada's Anti-Spam Law

An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities reliance on electronic means of carrying out commercial activities, and to amend the *Canadian Radio Telecommunications Commission Act*, the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* and *Telecommunications Act*. (usually referred to as “CASL”)

Warning ...



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WARNING!

**DANGER
ZONE**

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Structure of Act

- Covers
 - Spam
 - Spyware
 - Alteration of transmission data (to redirect or copy an electronic message)
- Amends
 - *CRTC Act* – Enforcement regime
 - *Competition Act* – false or misleading messages/sender information
 - *PIPEDA* – address harvesting/accessing computer to collect PI
 - *Telecommunications Act* – potential repeal of Do-Not-Call List

Regulations

- Electronic Commerce Protection Regulations
 - Definitions (personal relationship, family relationship)
 - Conditions for use of consent by others
- Telecom Regulatory Policy CRTC 2012-183
 - Information to be included in messages
 - Information to be included in request for consent
 - Specified functions of computer programs

CASL

- When it comes into force the Act will prohibit:
 - Sending of “commercial electronic messages” without consent of the recipient;
 - Alteration of transmission data in an electronic message which results in the message being delivered to a different destination without consent;
 - Alteration of computer programs without consent;
 - Use of false or misleading representations online in promotion of products or services;
 - Collection of personal information through accessing computer system in violation of federal law; and
 - Collection of electronic addresses using computer programs.

Anti-spam Rules

- Rules apply to “electronic messages” (no minimum number), when sent:
 - by telecommunication
 - to an “electronic address” – email, IM, phone or similar account
 - for the purpose of encouraging participation in a commercial activity
 - if a computer system located in Canada is used to send or access the message

General prohibition

6. (1) No person shall send or cause or permit to be sent to an electronic address a commercial electronic message unless

(a) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and

(b) the message complies with subsection (2).
[regarding the form of message]

Limited Exceptions

- General prohibition does not apply:
 - Where a limited family or personal relationship (defined in regulations)
 - To business inquiries (about recipient's commercial activity)
 - Certain B2B and B2C commercial messages described in the regulations
 - Referrals (covered in regulations)
 - To solely transactional messages- exhaustive list in Act

Form of CEMs

(2) The message must be in a form that conforms to the prescribed regulations and must

- (a) set out the prescribed information [contained in CRTC regulations] that identifies the person who sent the message and the person – if different – on whose behalf it is sent;
- (b) set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (a); and
- (c) set out an unsubscribe mechanism in accordance with subsection 11(1).

Key Concepts

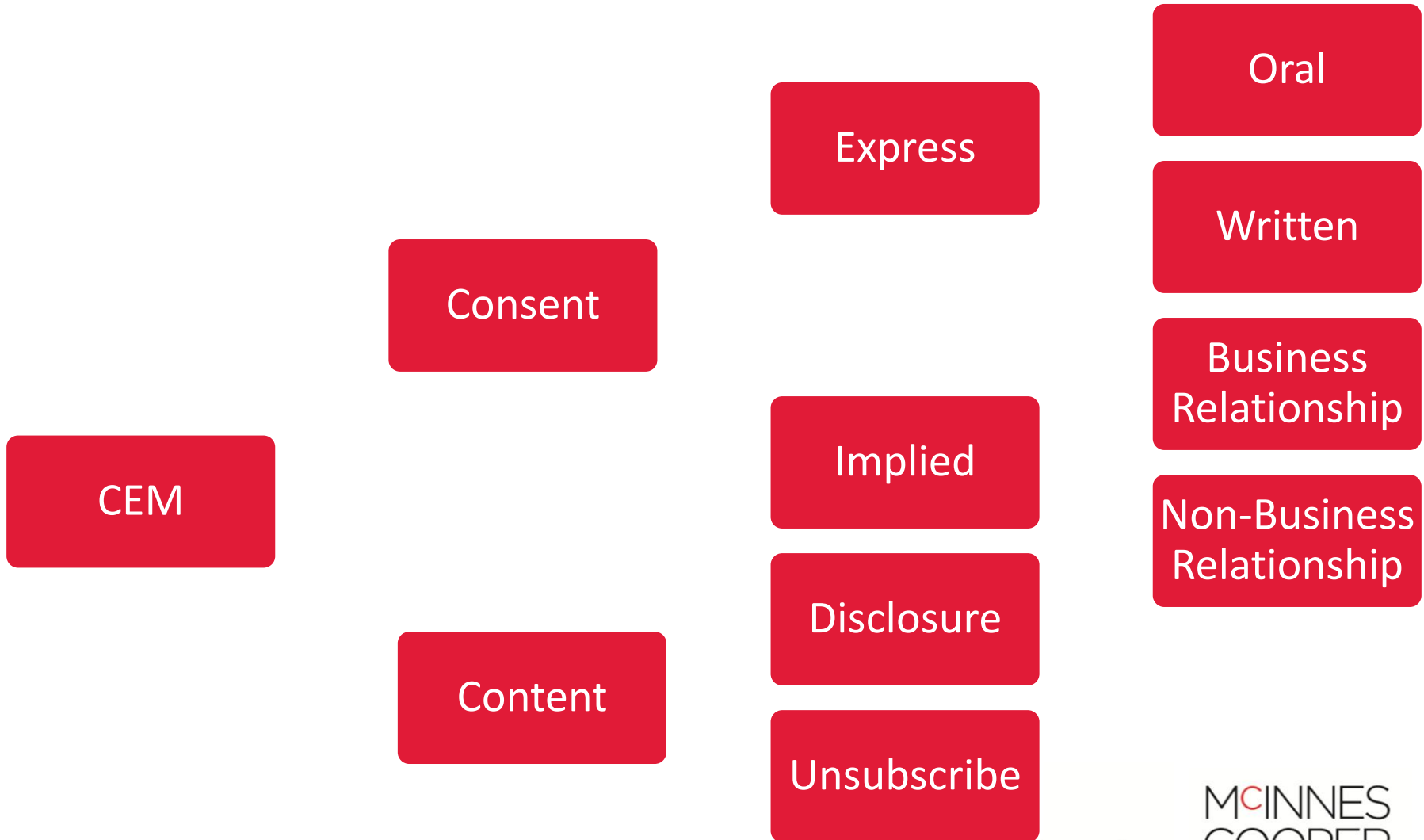
- “electronic address” – email, IM, phone or similar account
- “commercial activity” act of commercial character, even if no expectation of profit
- “electronic message” means a message sent by any means of telecommunication, including a text, sound, voice or image message.
- “Commercial electronic message” is defined in Act
- Unsubscribe mechanism is required
- Consent – may be express or implied

“Commercial Electronic Message”

...a commercial electronic message is 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); 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.

CEMs: Consent & Content



Form of CEM

- Information required in any CEM (from CRTC regs)
 - Name of sender or person on whose behalf the CEM is sent
 - Mailing address and telephone number, email address or website address of sender or person on whose behalf the CEM is sent
- Unsubscribe mechanism must be capable of being readily performed.
- Mandatory information and unsubscribe mechanism must be set out clearly and prominently

Unsubscribe Mechanism

- Unsubscribe mechanism must:
 - Allow recipient to indicate, at no cost to them, desire not to receive CEM from sender
 - Using same electronic means by which original CEM was sent or other electronic means if not practical
 - Specify an electronic address or web page where can unsubscribe
- Electronic address or web page for unsubscribing must be valid for 60 days
- Must give effect to unsubscribe request “without delay” but no later than 10 days

Consent

- Need express or implied consent to send CEM
- Onus is on YOU to prove consent
- Consent is implied only if:
 - There is an existing business relationship (EBR) or existing non-business relationship (ENBR) between sender and recipient; or
 - Recipient has published or disclosed the electronic address without indicating that does not want to receive unsolicited CEMs and CEM is relevant to person's business role.

“Existing business relationship”

- Transaction within past two years
 - Acceptance of opportunity within past two years
 - Bartering transaction within past two years
 - Written contact in force or expired within past two years
 - Inquiry or application in past six months
-
- EBR passes to purchaser of business

Examples of Existing Business Relationship

Quote or
estimate as
requested

Commercial
Transaction

Warranty/Safety
Information

Subscription,
Membership or
loan information

Employment
information

Delivering
product/service

First CEM per a
referral

“Existing non-business relationship”

- Donation to sender, if registered charity, in last two years
- Donation to sender if registered political party or candidate, in last two years
- Past volunteer to registered charity, political party or candidate, in last two years
- Member of club, association, etc in last two years – definitions in regulations

Family & Personal Relationships

- Prohibition does not apply where a family or personal relationship – both defined in Industry Canada Regulations
- Family relationship definition – similar to ITA – persons descended from common grandparent, including aunts, uncles, cousins, nieces and nephews.
- Personal relationship definition – relationship between two people who have had voluntary communications where reasonable to conclude the relationship is personal.

Seeking Consent

- Disclosure requirements for consent:
 - Purpose
 - Must be requested orally or in writing
 - Identity and contact information
 - Consent withdrawal statement
- A request for consent is considered a CEM – *don't e-mail someone asking for permission to e-mail them **after July 1, 2014***

Violations and penalties

- CRTC is main regulatory body responsible for enforcement
- Contravention involves “administrative monetary penalties” - not a “punishment” but intended to ensure compliance
- Max penalties - individual: **\$1M**; corporation: **\$10M**
- Factors to be considered in determining amount of penalty
- Offender can give an “undertaking” that halts enforcement
- Officers and directors of companies may be *personally liable*
- CRTC can name and shame violators
- Due diligence defence

**Respect
My
Authoritah!**



Private right of action

- Individual can sue for actual damages and maximum of \$200 per contravention, not exceeding \$1,000,000 per day for unsolicited CEMs
- Lists factors for court to consider in assessing statutory damages
- No private right of action if sender served with notice of violation or entered into undertaking with CRTC.

Comparison to CAN-SPAM Act

- CAN-SPAM = U.S. **C**ontrolling the **A**ssault of **N**on-**S**olicited **P**ornography **A**nd **M**arketing Act of 2003

CAN-SPAM	CASL
Applies only to emails	Applies to IM, text messages and more
Relies on opt-out consent	Requires express consent, with few exceptions (opt-in)
Applies only in “primary purpose” is commercial	Applies if <u>any</u> content is commercial

What to do now ...

- Adopt procedures for obtaining and documenting consent: Seek fresh, express consent from customer and contact lists before CASL comes into force
- Understand and document where existing lists came from and what consent may already have been obtained
- May need to restructure your databases to document consent, EBRs and ENBRs (and expiry of these)
- Take steps to trigger “grandfathering” provisions—send CEMs to EBRs or ENBRs

What to do now ...

- Modifying form of all your messages to meet CEM content obligations: CEM content, unsubscribe and withdrawal of consent
- Update documents such as
 - Third party services agreements – e.g. address harvesting, and appropriate reps, warranties and indemnities
 - Internal Privacy and email marketing policies and procedures
 - Published policies and statements

About David ...

David is a partner with McInnes Cooper and is well-known as one of Canada's leading internet, technology and privacy lawyers. He regularly advises a range of clients from start-ups to Fortune 100 companies on all aspects of technology and privacy laws. He blogs on privacy law at blog.privacylawyer.ca

In addition, David is the Past President of the Canadian IT Law Association and the former Chair of National Privacy and Access Law Section of the Canadian Bar Association. David has been included in the inaugural (2006) and each subsequent edition of The Best Lawyers in Canada. He is listed among the world's leading lawyers in Internet and eCommerce Law in the International Who's Who of Business Lawyers. In 2009, David was named as one of Canada's "Top 40 Lawyers Under 40" by Lexpert, and is listed in Lexpert's guide to leading lawyers in Canada. In 2011, David was named by The Lawyers Weekly as one of Canada's top 24 legal social media influencers. In 2013, David was among the finalists for Canadian Lawyer magazine's most influential Canadian lawyers.

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