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Navigating Canada's Anti-Spam Law

Canada-Southern Africa Chamber of Business

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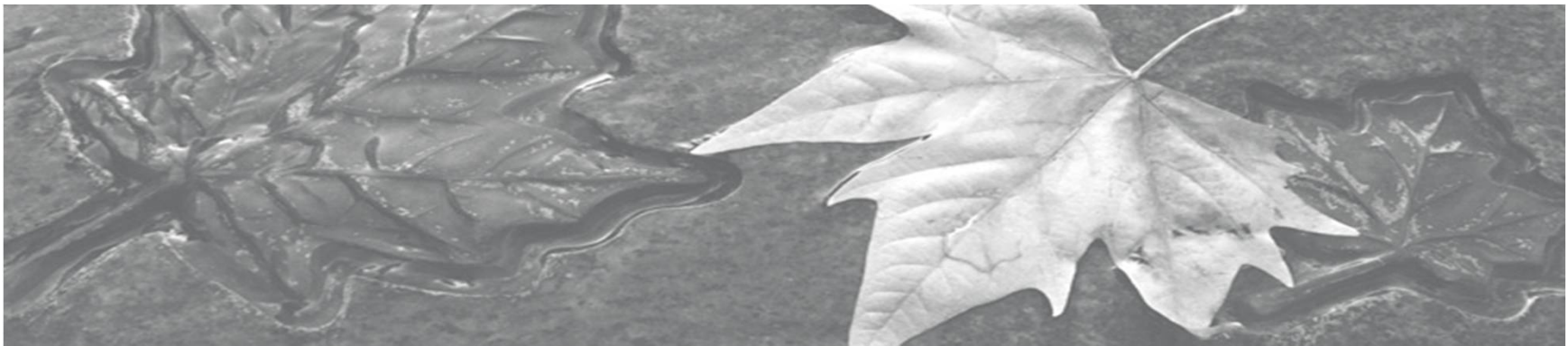
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Topics for Presentation

- Overview of legislation
- Key Provisions
 - **Commercial Electronic Message**
 - **Consent - implied or express**
 - **Message Content and unsubscribe requirements**
 - **Exclusions from consent and unsubscribe**
 - **Exclusions from consent only**
- Enforcement and Sanctions
- Recommended Actions

Overview of Canada's Anti-Spam Law

- “CASL” is the acronym used for “Canada’s anti-spam legislation”
- CASL applies to all “commercial electronic messages” (a.k.a. CEMs), but there are exemptions and exclusions
- Most of CASL’s provisions will come into force July 1, 2014, making it a violation to send a commercial electronic messages without consent or an unsubscribe mechanism (where required)
- In general, enforcement will be focused on encouraging compliance despite possible administrative monetary penalties of \$1 million to \$10 million and, after July 1, 2017, the possibility of civil claims for damages/compensation.



General Framework

- **Scope:** All commercial electronic messages (CEMs) are caught, with some exceptions
- **Consent:** In order to send a CEM you must have consent (implied or express), but there are exceptions
- **Implied Consent:** “Implied” consent is limited to those circumstances set out in the Act
- **Obtaining Consent:** There are requirements around how recent implied consent must be, although transitional provisions will assist in the short term
- **Unsubscribe:** Any CEM must have an unsubscribe mechanism and must include the name and address of the sender (with some exceptions)

Threshold Question: Is it “commercial”

- Definition of “commercial” in the Act is very broad
- It is commercial if message has one of the following purposes:
 - Offers to purchase, sell, barter or lease a product, service, land...
 - Offers to provide a business, investment or gaming opportunity
 - Advertises or promotes anything referred to above; or
 - Promotes a person, including the public image of a person, engaged in one of the above activities

Question: Would sending a Happy New Year message from company e-mail be a CEM?

Express Consent – General

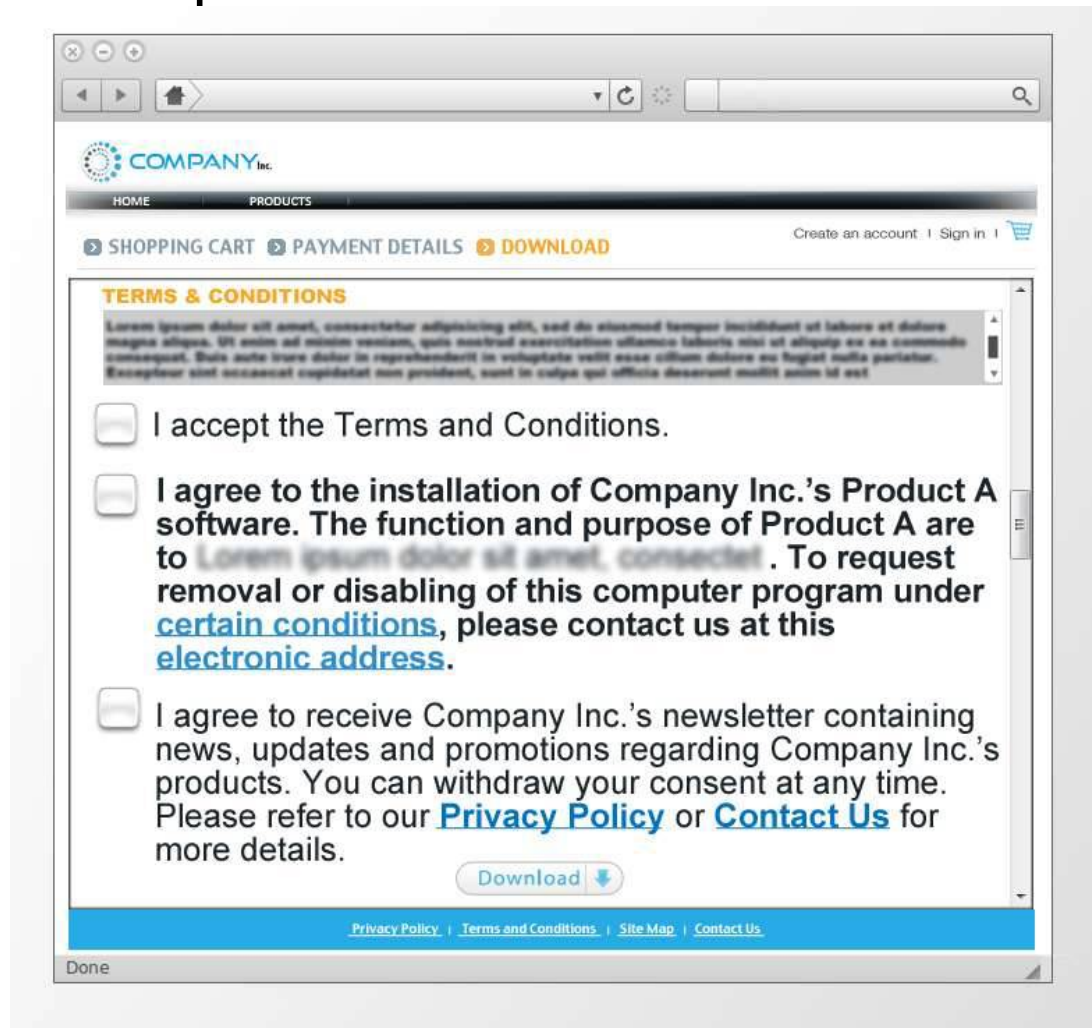
- Express consent may be either written or oral
- Express consent must be opt-in → there must be positive step taken on behalf of person “consenting”
- When obtaining must be for clearly explained purpose
- Can’t be for general purpose such as “for the purpose of better serving you and responding to your needs”

Express Consent – Written

- Pre-checked box on a form/internet page is not express consent as that is “opt-out”
- Consent for CEMs must be sought separate from other consents:
 - Cannot be tied to, or bundled with, other requests such as consent to the general terms and conditions for use or sale
 - Consent should be separate for each act for which consent is sought
 - Consumers should be allowed to grant their consent to the terms and conditions of sale, while refusing to grant their consent for receiving future messages

Express Consent – Written example

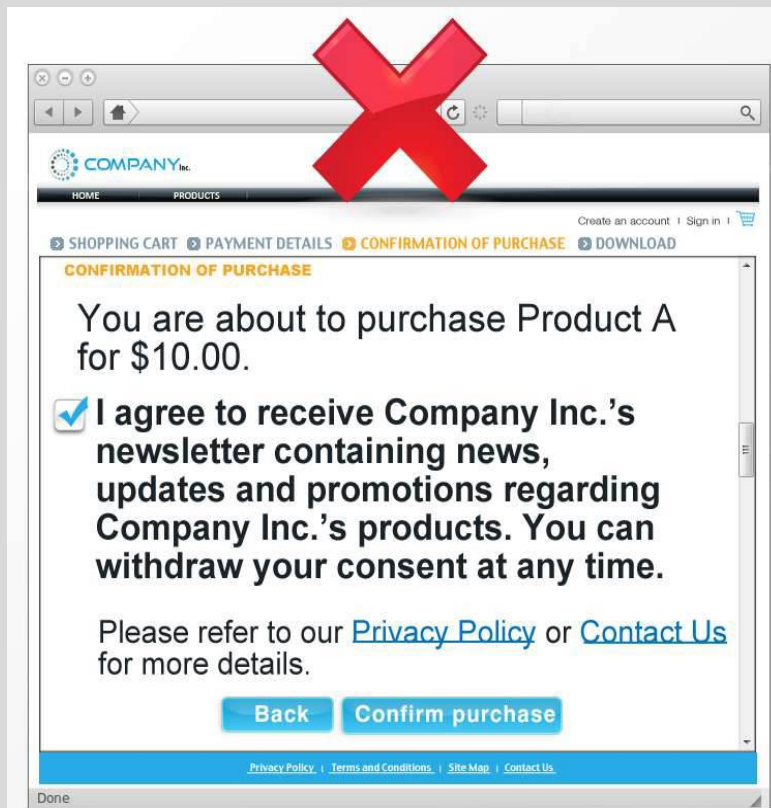
- CRTC: Example of Written Consent



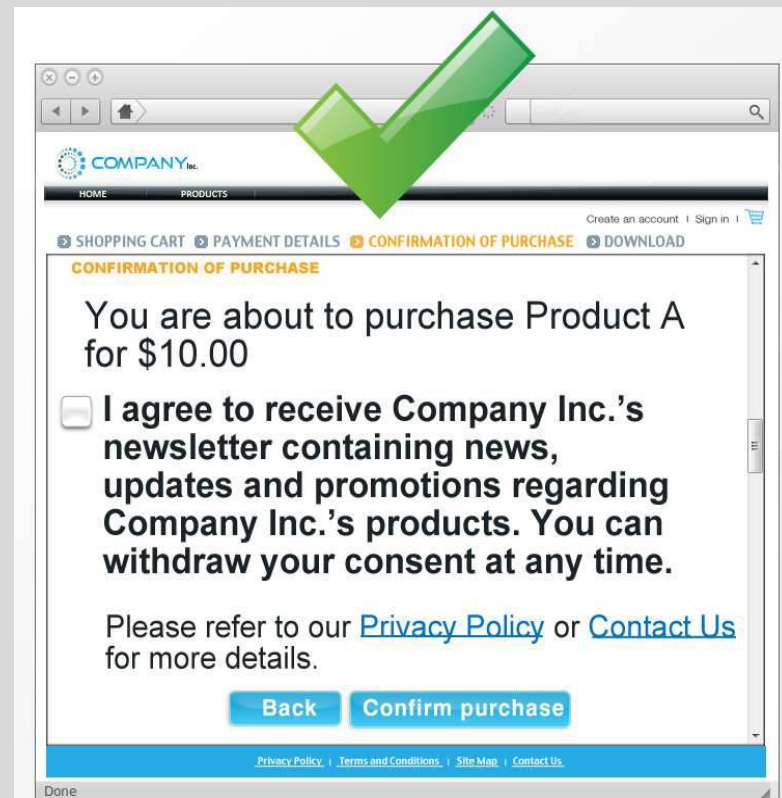
Express Consent – Written example

- CRTC: Unacceptable/Acceptable Toggling

Unacceptable – Assumes Consent



Acceptable – Consent must be indicated



Express Consent – Oral

- Oral consent possible
- Must be verifiable.
- Verification options could include:
 - Oral consent can be verified by an independent third party
 - Can retain a complete and unedited audio recording of the consent
- BUT proof of EXPRESS oral consent is not limited to these means
- Consider privacy implications of recording consent – disclosure to person being recorded

Implied Consent – Key Provisions

- Consent may be implied if there is an “existing business relationship”
- “EBR” includes relationship arising from:
 - the purchase or lease of product, goods, service, or land or interest in land
 - a written contract currently in existence or expired within 2 years
 - an inquiry or application, within the last 6 months
- If Existing Business Relationship exists you can email up to July 1, 2017
- **BUT** you still need an unsubscribe mechanism with each CEM if relying on implied consent

Implied Consent – Other Provisions

- Certain circumstances in which consent will be implied
 - address was:
 - conspicuously published (e.g. on a website); or
 - given to you by the intended recipient (e.g., business card)
 - **AND** the person did not indicate they did not want unsolicited electronic messages
 - **AND** CEM relates to the recipient's functions or activities

CEM Content – Generally

- Each CEM must include:
 - name under which sender does business
 - mailing address
 - phone number to an agent or message service, *or* a web or email address
 - unsubscribe mechanism
- If it is not practicable to include this information it may be posted on a readily accessible web page by means of a prominent link

CEM Content – “Unsubscribe” Requirement

- Unsubscribe mechanism must:
 - allow the person to indicate their wish to no longer receive any CEMs (or types of CEMs)
 - be possible using the same electronic means as the CEM, or another electronic means if it is not practicable for the same electronic means to be used
 - specify an electronic address or link that can be accessed through a web browser to which the unsubscribe request may be sent
- Address/link must be valid for at least 60 days after the message is sent
- Sender must give effect to the unsubscribe “without delay” and within 10 days (without requiring any further action)

Exclusion from Consent and Content Requirements

- **Business to Business CEMs**
 - If CEM is sent by employee, representative, etc., of an organization to another employee, representative, consultant or franchisee of another organization and the organizations have a relationship and the message concerns the activities of the organization to which the CEM is sent
- **CEMs within businesses** are also exempt from consent and unsubscribe requirements
- **CEMs sent in response** to a request solicited by the person to whom the message is sent

Exclusion from Consent and Content Requirements

- **CEMs under legal or juridical obligation**
- **CEMs sent to family or personal relationship** (if sent under the personal name of the person having a family or personal relationship)
- **CEMS from charitable, political or other not-for-profit activities**

Exclusion from Consent Requirement Only

- **CEM** provides a **quote or estimate**, as requested by the person receiving the message
- **CEM** facilitates, completes or **confirms a transaction**
- **CEM** provides **warranty information**, product recall information or safety or security information about a product that the person has used or purchased
- **CEM** provides **factual information about the ongoing use** or purchase by person relating to a subscription, membership, account, loan or similar relationship
- **CEM** delivers a product that the person is **entitled to receive** under terms of a transaction previously entered into

Enforcement and Sanctions for Non-Compliance

- Administrative monetary penalties
 - maximum \$1 million per violation for an individual
 - maximum \$10 million per violation for corporations
- Private right of action (including a class action for sending without consent/without “unsubscribe”)
 - compensation for losses or damages actually suffered by the claimant (or expenses)
 - administrative penalty (maximum of \$1,000,000 for each day of the contravention)
- Penalty is to take into consideration that the purpose of the penalty is to encourage compliance, not to punish
- Due diligence is a defence

Recommended Actions

- Do an inventory/survey of email / e-communications by your company
- Determine which CEMs are B2B (outside of Act)
- Decide whether to convert “implied consent” to “express consent” (recognizing some contacts may be lost in the process)
- Develop procedures for revising mailing/contact lists to avoid sending CEMs after expiry of implied consent (note: track consents on a rolling basis)
- For new contacts, get express consent or prepare to track contact
- Craft “unsubscribe” messages
- Consider notifying the regulator and entering into voluntary undertaking if compliance issue arises
- **TRAIN YOUR EMPLOYEES ON CASL REQUIREMENTS!**

Questions?

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