



**CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES  
SOCIÉTÉ CANADIENNE DES DIRECTEURS D'ASSOCIATION**

**CANADA'S NEW ANTI-SPAM LAW WORKSHOP**

**BRIAN BOWMAN  
PITBLADO LAW**

**1. Does the Anti-Spam Law apply?<sup>1</sup>**

- There are two key requirements under the Anti-Spam Law: the obligation to get consent to send a commercial electronic message (a “CEM”), and the obligation to include certain content in that CEM.
- However, there are numerous exceptions to these requirements:

Type of Message	Consent Required?	Include Required Content?
Not a CEM	No	No
CEM exempted from Anti-Spam Law	No	No
CEM exempted from consent requirements	No	Yes
Implied consent exception applies to CEM	Yes (but deemed to have been obtained)	Yes
CEM that requires express consent	Yes	Yes

**(a) Commercial Electronic Messages**

- The Anti-Spam Law applies to CEMs – if it’s not a CEM, then the Anti-Spam Law won’t apply to it. This means the sender does not need to get consent to send the electronic message, nor is the sender required to include certain content in the message.
- “Electronic message” means a message sent by “any means of telecommunication, including a text, sound, voice or image message”. Would include Facebook, Twitter, Instagram, etc.
- A CEM is any electronic message with any kind of commercial purpose:

<sup>1</sup> While the Anti-Spam Law has been passed, its key provisions have not yet been proclaimed into force. Industry Canada released the finalized “Electronic Commerce Protection Regulations” (the “Regulations”) on December 4, 2013. CRTC finalized its regulations March 28, 2012.

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 it has as its purpose, or one of its purposes, to encourage participation in a commercial activity.

- Consider not just the message, but content that is linked to the message. An empty message that contains only a link to a site which, in and of itself, is commercial in nature, would be a CEM.
- An electronic message need not have a solely commercial flavour, or even a predominantly commercial flavour, in order to be a CEM. As long as at least one purpose is commercial, the electronic message is a CEM.
- Electronic messages that request consent to send a CEM are, in and of themselves, CEMs.

**(b) Certain CEMs are exempted from the Anti-Spam Law**

- The Anti-Spam Law provides that some types of CEMs are not subject to the Anti-Spam Law, even though they are CEMs. If a CEM is not subject to the Anti-Spam Law, then the sender doesn't need consent to send it, and the CEM doesn't need to contain content that is required by the Anti-Spam Law.
- The following CEMs are exempted from the Anti-Spam Law:
  - CEMs sent to a person with whom the sender has a personal or family relationship: A "personal relationship" is a relationship between two people who have had "direct, voluntary two-way communications", and it would be reasonable to conclude the relationship is personal (taking into account factors such as the peoples' interests, and the frequency of their communication). A "family relationship" includes blood relationships, marriage, common-law partnerships and relationships by way of adoption and those two people have had direct, voluntary two-way communications. However, a recipient can indicate that he or she does not wish to receive CEMs in these circumstances, in which case, the Anti-Spam Law will apply;
  - CEMs sent to a recipient who is engaged in a commercial activity, and relates solely to the recipient's commercial activities;
  - CEMs sent between employees, representatives, consultants or franchisees of an organization, which concern the organization's affairs. This exception applies to CEMs sent inside a single organization;
  - CEMs sent by an employee, representative, consultant or franchisee of one organization to an employee, representative, consultant or franchisee of another organization, and the organizations have an existing relationship and the CEM relates to the activities of the organization to which the CEM is sent. This exception applies to CEMs that are sent between multiple organizations;

- CEMs sent in response to a commercial solicitation, request or complaint from the recipient, or are otherwise solicited by the recipient;
- CEMs sent to satisfy legal obligations, or to enforce legal rights or provide legal notice;
- CEMs that are sent by a person for the purpose of contacting the individual to whom the message is sent following a referral by any individual who has an existing business relationship, an existing non-business relationship, a family relationship or a personal relationship with the person who sends the message and the CEM discloses the full name of the individual who made the referral and states that the CEM is being sent as a result of the referral;
- CEMs that are sent by or on behalf of a political party or organization, or a person who is a candidate for publicly elected office and the primary purpose of the CEM is a solicitation for a contribution;
- CEMs that are sent on behalf of a registered charity and the primary purpose of the CEM is to raise funds for the charity;
- CEMs that the sender reasonably believes will be accessed in a foreign state listed in the Schedule to the Regulations and the message conforms to the anti-spam laws of the foreign state;
- CEMs sent and received on an electronic messaging service, if the information required under subsection 6(2) of the Act is clearly published and readily available on the user interface through which the CEM is accessed, and the person to whom the CEM is sent consents to receive it either expressly or implicitly; and
- CEMs sent to a limited-access secure and confidential account to which CEMs can only be sent by the person who provides the account to the person who receives the CEM, such as a banking websites.

## **2. Do you need consent, and if you do, how do you get it?**

- If the message is a CEM, and if it is subject to the Anti-Spam Law, you will not need to obtain consent if the CEM fits under the exceptions to consent that are set out in the Anti-Spam Law. If one of these exemptions applies, the sender will not need to obtain consent, in order to send the CEM, but the sender will still need to include required content in the CEM.
- If no exemption applies, then the sender must obtain consent, in order to send the CEM. There are two ways to get consent: implied consent, and express consent.

**(a) CEMs for which consent is not required**

- The Anti-Spam Law provides that a sender does not need to obtain consent, in order to send the following CEMs (but the content requirements set by the Anti-Spam Law will still apply):
  - sender is providing a quote or estimate in response to a request from the recipient;
  - CEM facilitates, completes or confirms a commercial transaction previously agreed to by the recipient;
  - CEM provides information about warranties, recalls, safety or security;
  - CEM provides information about ongoing use or an ongoing subscription, membership or account;
  - CEM provides information about an employment relationship or a related benefit program related to the person to whom the message is sent;
  - CEM delivers a product or upgrades that the recipient is entitled to, under the terms of a previous transaction; and
  - CEM involves a third party referral: A single CEM can be sent to a third party recipient without that recipient's consent, as long as the name of the person who made the referral is disclosed, and the person making the referral has an existing business, personal or family relationship with the person who is sending the message and the message's recipient. So, this allows a business to send unsolicited CEMs without consent, if the sender has a referral from a third-party who has an existing business or non-business relationship with the recipient.

**(b) Implied consent**

- If a CEM is of a certain type, then the Anti-Spam Law presumes the recipient has already provided its consent to receive the CEM. As you'll see, implied consent arises in circumstances where it is reasonable to assume the recipient would consent to receiving the CEM. If implied consent applies, then the sender does not need to obtain express consent from the recipient. The CEM must still contain the prescribed content, however.
- The following circumstances give rise to implied consent:
  - CEM is sent to a person with whom the sender has an "existing business relationship": In the last two years, the sender and recipient must have been involved in:

- the purchase or lease of a product, service or land;
- a business opportunity;
- bartering; or
- a valid contract, between the sender and the recipient;
- CEM is sent to a person with whom the sender has an “existing non-business relationship”. A sender has an existing non-business relationship with the recipient, if:
  - the sender is a registered charity, political party or association or a qualifying club or organization. A qualifying club, association and voluntary organization is defined as a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure, recreation or other not-for-profit purposes, or for amateur athletics; and
  - the recipient has made a donation to, volunteered at, attended a meeting of, or had a membership with, the sender, within the last two years;
  - recipient has “conspicuously published” its electronic address: if the recipient has placed its electronic address on, for example, a website, without including a statement that it does not wish to receive unsolicited messages, then the sender has implied consent to send a CEM that is relevant to the recipient’s business; and
  - recipient has provided an electronic address to the sender, without stating that it does not want to receive CEMs: if the recipient provides, for example, a business card containing an electronic address to the sender, without including a statement that it does not wish to receive unsolicited messages, then the sender has implied consent to send a CEM that is relevant to the recipient’s business.
- Keep in mind that implied consent will not be available if the respondent has unsubscribed, or withdrawn consent to receiving CEMs. Implied consent will also no longer be available if the applicable triggering event (i.e., the last business transaction between sender and recipient) occurred too long ago in the past.

**(c) Express consent**

- Consent may be obtained in writing, or orally. If you are going to obtain consent orally, ensure you have a system that effectively documents and proves that you obtained consent.

- The request for consent must include:
  - the name of the person seeking consent (or the name under which they carry on business);
  - the name of the person on whose behalf the message is sent, if applicable (or the name under which they carry on business);
  - if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought;
  - contact information about the sender, or the person on whose behalf the message has been sent: mailing address, and any of a telephone number, email or website address; and
  - a statement that indicates the recipient can withdraw consent to receive CEMs, in the future.
- The CRTC, which will administer the Anti-Spam Act, has put forward certain positions about how it will administer the law:
  - according to the CRTC, opt-out consent does not provide effective consent, for the purposes of the Anti-Spam Law. This means consent cannot be obtained by way of a pre-checked off box – the recipient must take some positive action to show it has consented to receiving CEMs;
  - the CRTC is also of the view that consent to receive a CEM cannot be hidden within the terms of another agreement, such as an online terms of service. A user must be able to accept online terms of service while rejecting a request for consent to receive CEMs – the two consents cannot be placed into a single request; and
  - the CRTC wants senders to record and store information about how it has obtained express consent: the date, time, purpose and manner of the consent should be stored in a database. Verification can also be achieved by way of a point-of-sale consent form. With respect to oral consent, the CRTC requires a sender to either provide a complete and unedited audio recording, or have an independent third party verify the consent.
- A third party can be used to obtain consent, on behalf of a sender that is not known to the recipient. In other words, a person may, on behalf of an unknown sender, obtain a recipient's express consent to receive CEMs from the unknown sender. In order to be valid, the consent must provide that:

- the recipient can unsubscribe to receiving CEMs and can, at the same time the unsubscribe request is made, alert the person to whom consent was provided that consent has been withdrawn; and
- the third party will be responsible for notifying all of the senders that consent to receive CEMs has been withdrawn. The onus is thus on the party that collected consent on behalf of other senders to ensure those other senders receive the unsubscribe request.
- If you're required to obtain consent, you can be guided by the provisions of your privacy policy, which should address the consent and identifying purposes fair information principles of privacy laws. An effective consent must be an informed consent, and a person can only provide an informed consent if he or she knows what they are consenting to. So, the consent language should clearly and simply set out the purpose for which consent is being sought.
- Sample consent language might indicate:

Please type in your email address below if you would like to receive email and e-newsletters about products and services from ABC Ltd.

This email is being sent to you by ABC Ltd. You can contact us at 123 Anywhere Street, Citytown, Province, A1A 1A1, or by email at [info@abcltd.com](mailto:info@abcltd.com). Please visit our [Privacy Policy](#) for more information. <<**Underlined text links to a web page that contains the Privacy Policy**>>

You can stop receiving email and newsletters about our products and services at any time, by [clicking here](#). <<**Underlined text links to a web page that contains an unsubscribe mechanism**>>

### 3. What content needs to be included in your CEMs?

#### (a) Disclosures

- Identifies the sender: Must include the name by which the sender carries on business, or the sender's actual legal name.
- Provides information about CEMs sent on behalf of a third party:
  - some CEMs are sent by one person on another person's behalf. These CEMs must indicate the name of the sender, and also the name of the person on whose behalf the message has been sent (which may be the name by which the person carries on business, or their actual legal name). They must also indicate who is sending the message, and the person on whose behalf it is sent; and

- according to the CRTC, a person who sends CEMs, but has no role in the CEM's content or the choice of its recipients, need not be identified in the message. This means that a person who sends an advertisement on behalf of an advertiser would need to identify itself but an email list service provider would not.
- Provides the sender's contact information: A mailing address and any one of a telephone number (with voice mail), email or website address. If the CEM is being sent on another person's behalf, then that person's contact information must be included.
- Information can be provided in the CEM itself, or, if not practical, on a separate website that can be accessed by way of a hyperlink from the CEM (good for text messages).

**(b) Unsubscribe mechanism**

- The recipient must be presented with the opportunity to stop receiving CEMs from the sender.
- Whatever method is used must be set out "clearly and prominently and must be able to be readily performed". This means the unsubscribe mechanism must be "accessed without difficulty or delay, and should be simple, quick, and easy for the consumer to use".
- A sender that receives an unsubscribe request must stop sending CEMs to the recipient not more than 10 business days after the request is made.
- As with the required information above, the recipient can be directed to a website where the unsubscribe mechanism is hosted.
- The contact information that is provided by the sender must remain valid for at least 60 days after the CEM is sent. In other words, a CEM's unsubscribe mechanism must be capable of being used for at least 60 days after the CEM is sent.
- A sample unsubscribe mechanism might read as follows:

**UNSUBSCRIBE**

[Click here](#) to unsubscribe from receiving messages from ABC Ltd.

<<**Underlined text links to a web page that contains the following**>>

I would like to unsubscribe from receiving:

- All electronic messages from ABC Ltd. Please be advised that this may restrict our ability to send messages to you in the future.
- All promotional electronic messages from ABC Ltd. I will continue to receive notifications consisting of factual information about my account and services that ABC Ltd. already offers to me.



- Alternatively, the unsubscribe mechanism might be contained entirely within the commercial electronic message itself:

**UNSUBSCRIBE**

If you do not wish to receive electronic messages from ABC Ltd. in the future, please reply by email with your name <<**and other identifying information, such as an email address**>> to unsubscribe@abcltd. <<**a dedicated email address could be set up to receive unsubscribe requests**>> Please be advised that this may restrict our ability to send messages to you in the future.

#### 4. Best practices, trips and traps

##### (a) Using a third party service provider to send your CEMs

- If you contract with a third party service provider to manage your outgoing electronic messages, you should have an agreement, and that agreement should speak to the following issues:
  - does the service provider have policies and practices in place, in order to comply with the Anti-Spam Law?
  - what is the service provider's reputation, as regards its willingness to comply the Anti-Spam Law?
  - does the service provider commit to complying with the Anti-Spam Law?
  - where is the service provider located, and is it familiar with the Anti-Spam Law (which will apply to CEMs that are sent to Canadians, even if the service provider is not located in Canada)?
  - does the service provider offer audit logs and access to its handling of electronic addresses, so that its compliance with the Anti-Spam Law can be objectively monitored?
  - ask to see sample consent language, unsubscribe language and required CEM content. Does the service provider have this language, and does it measure up to the Anti-Spam Law?
  - will the service provider indemnify you for losses (including indirect damages and defence fees) that arise from the service provider's noncompliance with the Anti-Spam Law?
  - does the service provider limit its liability to you in any circumstances?
  - are there restrictions on the service provider's right to subcontract/assign its performance under the agreement?

- can you terminate the agreement, if the service provider does not comply with the Anti-Spam Law?

**(b) Avoiding spam through the “conspicuous publication” exception to consent**

- If you place your email address on your website, or on a business card, and do not indicate that you do not wish to receive unsolicited CEMs, then you can be sent CEMs, even if you haven’t given express consent to receiving them.
- The key is indicating that you do not wish to receive unsolicited CEMs. Sample language you might include on your website or on a business card might include:

Our posting of our email address on our <<**website/business cards**>> does not signify our consent to receiving commercial electronic messages. Do not send us commercial electronic messages unless we have provided you with our express consent to do so.

**(c) Is “old consent” still good consent?**

- You may have already obtained consent to collect, use or disclose an individual’s personal information, under the *Personal Information Protection and Electronic Documents Act* (“**PIPEDA**”) (or substantially similar privacy legislation, in the case of British Columbia, Alberta or Quebec). Is this consent effective, for the purposes of the Anti-Spam Law? The Anti-Spam Law is not clear on this issue.
- According to the CRTC, opt-out consent does not provide effective consent, for the purposes of the Anti-Spam Law. In other words, your PIPEDA opt-out consent will not be effective for the purposes of the Anti-Spam Law: express, opt-in consent is required.
- If you currently have implied consent to send a CEM, note that there are special transitional provisions for “existing business or non-business relationships” that pre-date the introduction of the Anti-Spam Law. In these circumstances, the Anti-Spam Law provides for a three-year period following the expiration of a person’s membership with an association or club, or business transaction with a sender, before that person’s express consent to receiving CEMs is required (as opposed to the two-year period following these triggers that is otherwise set out in the Anti-Spam Law). In other words, an organization can keep sending messages to recipients in these circumstances for three years after their membership lapses, or after the business transaction concludes. This period is subject to earlier termination if the recipient withdraws his or her consent before the expiration of this three-year transition period.

**(d) What about charities and not-for-profits?**

- The “existing non-business relationship” implied consent option indicates that charities and not-for-profits are subject to the Anti-Spam Law, if they send CEMs to recipients. However, CEMs sent by a registered charity whose message has the primary purpose of raising funds for the charity are excluded CEMs under the Regulations.
- The Anti-Spam Act indicates that commercial activity includes conduct of a commercial nature, “with or without an expectation of profit”. So, just because an organization is a non-profit, doesn’t mean it can’t send CEMs.
- The “existing non-business relationship” implied consent option is available to “clubs, associations, or voluntary organizations”. The Regulations define a “club, association or voluntary organization” as one that is “organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit” with the requirement that no income is payable to its members. Is the definition broad enough such that an amateur athletic association, labour organization or a fraternal benefit society, for example, is entitled to rely on implied consent?

**(e) Managing and tracking compliance with the Anti-Spam law**

- Understand what kind of electronic messages you are sending and will send, to whom are you sending them, and why – would they be CEMs?
- Create a checklist, and conduct an audit of your email list databases. Would any of your CEMs be exempted from the Anti-Spam Law?
- Determine whether you have effective consent for your CEMs. If you need consent, develop a strategy to obtain it. Once the Anti-Spam Law is in force, an electronic message requesting consent will be regarded as a CEM. So, now is the time to obtain the consent you’ll need, since there are no consequences under the Anti-Spam Law for seeking consent to receive CEMs, before the Anti-Spam Law comes into force. Possible methods of obtaining consent include:
  - requesting consent when the sender interacts with the recipient for other purposes (such as meeting in person; if the recipient has asked the sender for information; if the recipient has bought a product from the sender; or if the recipient has set up an online account with the sender);
  - requesting consent when the sender sends a CEM to the recipient, using the implied consent option; or
  - requesting consent when the sender sends a CEM to the recipient that does not require consent under the Anti-Spam Law.
- Get your unsubscribe mechanism up and running.

- Make sure third parties who send out CEMs on your behalf have a plan to comply with the Anti-Spam Law, and make your own plan, in case they don't. They should be able to demonstrate that they are tracking consents, and that they will include the prescribed information in each CEM.
- Don't forget to train your own employees, as well. Directors and officers can be personally liable if they authorize or acquiesce in breaches of the Anti-Spam Law. Employers may also be vicariously liable for their employees' actions. Showing you undertook due diligence – developing staff policies and training – could be an important part of your defence.

*The information in this paper is general in nature and is not intended to constitute legal advice. For more information and specific legal advice tailored to your organization's needs, please contact:*

**BRIAN BOWMAN**  
Pitblado Law  
2500-360 Main Street  
Winnipeg MB R3C 4H6

Direct: (204) 956.3520  
E-mail: [bowman@pitblado.com](mailto:bowman@pitblado.com)  
Blog: [brianbowman.ca](http://brianbowman.ca)  
Twitter: [@BrianBowmanWpg](https://twitter.com/BrianBowmanWpg)