

New anti-spam law looms ahead

It is becoming well known that as of July 1st Canada's new anti-spam law will apply to "commercial electronic messages," express or implied consent of the recipient will be required, and CEMs will need to comply with form and content requirements (including an unsubscribe mechanism). Essentially any electronic message that encourages participation in a commercial activity will be a CEM. The new law contains a myriad of complex provisions, and these questions will test your knowledge.



GO TO CANADIANLAWYERMAG.COM TO WATCH A WEIRFOULDS LLP LAWYER TALK ABOUT THIS QUIZ.

1 You know that under the anti-spam law a three-year transitional phase applies commencing July 1st so that some of the rules are more relaxed. Your company can prove that contacts in its database are customers who have bought goods or services over the last five years. Will it be lawful to send CEMs to the contacts on July 1st (assuming that the CEMs comply with form and content requirements)?

- (A) Yes
- (B) No
- (C) It depends

2 You are asked by someone at your company whether it will be lawful on July 1st to send CEMs to friends. You answer:

- (A) Yes
- (B) No
- (C) It depends

3 Rather than sending out a request for consent to CEMs by way of e-mail, your company decides to conduct a telephone campaign to obtain express oral consent. A company employee phones various businesses and requests consent in accordance with the content requirements of the anti-spam rules. At the end of each call, your employee makes a record of a "yes" or "no" answer. Is this a "best practice"?

- (A) Yes
- (B) No

4 A representative of your company's sales team goes to a function, engages in some "chitchat" with numerous individuals, and obtains their business cards that include e-mail addresses. Your company supplies widgets and it is clear from the business cards that each individual buys widgets for their business. You are asked whether it will be lawful for the representative to send e-mails to the individuals on July 1st in order to promote the company's widgets (assuming that the e-mails comply with form and content requirements for CEMs). You answer:

- (A) Yes
- (B) No
- (C) It depends

5 Your company's e-commerce web site is set up so that individuals, upon registration, check a box that they expressly agree to receipt of certain promotional e-mails. You review the relevant web page to determine anti-spam compliance as of July 1st, and it becomes perfectly clear that the web page clearly and simply set out the purposes for which consent is sought together with all of the contact information that is prescribed by the new rules. (By the way, you also check that all privacy law requirements have been addressed.) Should you put your feet up and relax on the basis that the web site is "good to go" for requesting express consents commencing July 1st?

- (A) Yes
- (B) No
- (C) It depends

1 (C) It depends. Consent will be implied if the sender of the CEM has an “existing business relationship” with the recipient that is defined to include a business relationship arising from the purchase of products or services in the two years prior to the date on which the CEM is sent. For the first three years under the new law (i.e., until June 30, 2017), consent will be implied without reference to the two-year period, provided that the recipient does not withdraw consent, *and provided that the relationship included the exchange of CEMs*. The company’s contact list of customers and other records should be vetted in order to determine whether the relationship included the exchange of CEMs. If the exercise is not successful, other potential grounds for express or implied consent should be explored.

2 (C) It depends. The question is not whether a person is a “friend” but whether the individuals have a “personal relationship.” If so, the CEM is exempt from the form and content requirements of the new anti-spam law (such as an unsubscribe mechanism). A personal relationship exists if the individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions, and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated, or whether the parties have met in person.

3 (B) No. This procedure exposes the company to some risk if the recipient complains and denies that consent was given. Businesses face a reverse onus — the onus of proving

consent is on the person who claims that they have consent. According to the CRTC guidelines, a complete and unedited audio recording of a consent, or verification of oral consent by an independent third party, would discharge the onus of proof. A company must establish the standard of proof with which it will be comfortable. A company may choose to seek express written consent in order to avoid risks.

4 (A) Yes. Consent is implied where the recipient has disclosed their address to the sender, has not indicated they do not wish to receive unsolicited commercial messages, and the message is relevant to the recipient’s business, role, functions, or duties in a business or official capacity (sometimes dubbed the “business card exemption”). Under these facts, this test would be met. On the other hand, if the sender of the message was promoting the sale of hot tubs for use in the recipient’s backyard, this “business card exemption” would not apply.

5 (B) No. You missed something. All requests for consent to CEMs must set out clearly and simply a statement indicating that the person whose consent is sought can withdraw their consent. The web page should be changed before July 1st.

YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*

A DAILY BLOG OF CANADIAN LEGAL NEWS

WWW.CANADIANLAWYERMAG.COM/LEGALFEEDS

DAILY UPDATES
major court rulings
news roundup
EVENTS



POWERED BY

CANADIAN LAWYER
LAW TIMES

