



Canada's Anti-Spam Legislation (CASL) is coming – Are you ready?

June 12, 2014

**Wendy Hulton
Daniel Ujcz**



The views expressed in this presentation are solely those of the presenter and should not be attributed to Dickinson Wright LLP/Dickinson Wright PLLC. We make no claims, promises or guarantees about the accuracy, completeness or adequacy of any information referred to or contained herein.

No person should act or refrain from acting in reliance on any information found herein without first obtaining appropriate legal advice. This presentation was presented for informational purposes only and does not constitute legal or other professional advice and does not create a solicitor-client and/or attorney-client relationship between you and the presenter.

© 2014 Dickinson Wright LLP/Dickinson Wright PLLC

CASL BASICS

Spam



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

CASL Regulates:

- sending of commercial electronic messages;
- altering of transmission data in an electronic message;
- unsolicited installation of computer programs;
- misleading practices through electronic messages or websites;
- use of spyware, malware, botnets, and phishing;
- automated collection of electronic addresses (email harvesting); and
- unlawful use of computers to collect personal information.

CASL does not apply to:

- non-commercial activity
- voice, facsimiles or auto-recorded voice calls (robo-calls)
- broadcast messaging including tweets and posts

CASL Implementation Dates

- anti-spam provisions: July 1, 2014;
- installation of computer programs: January 15, 2015; and
- CASL private right of action provisions: July 1, 2017



What is CASL? What is SPAM?

Why should I care (if you are not a member of the Nigerian royal family)

- Fines (up to \$1 million for individuals and \$10 million for organizations)
- Brand Damage - Reputational Risk – being identified as a “spammer” or violator of CASL

The CRTC, the Canadian Commissioner of Competition and the Canadian Privacy Commissioner all have CASL enforcement powers.

CRTC Enforcement Process

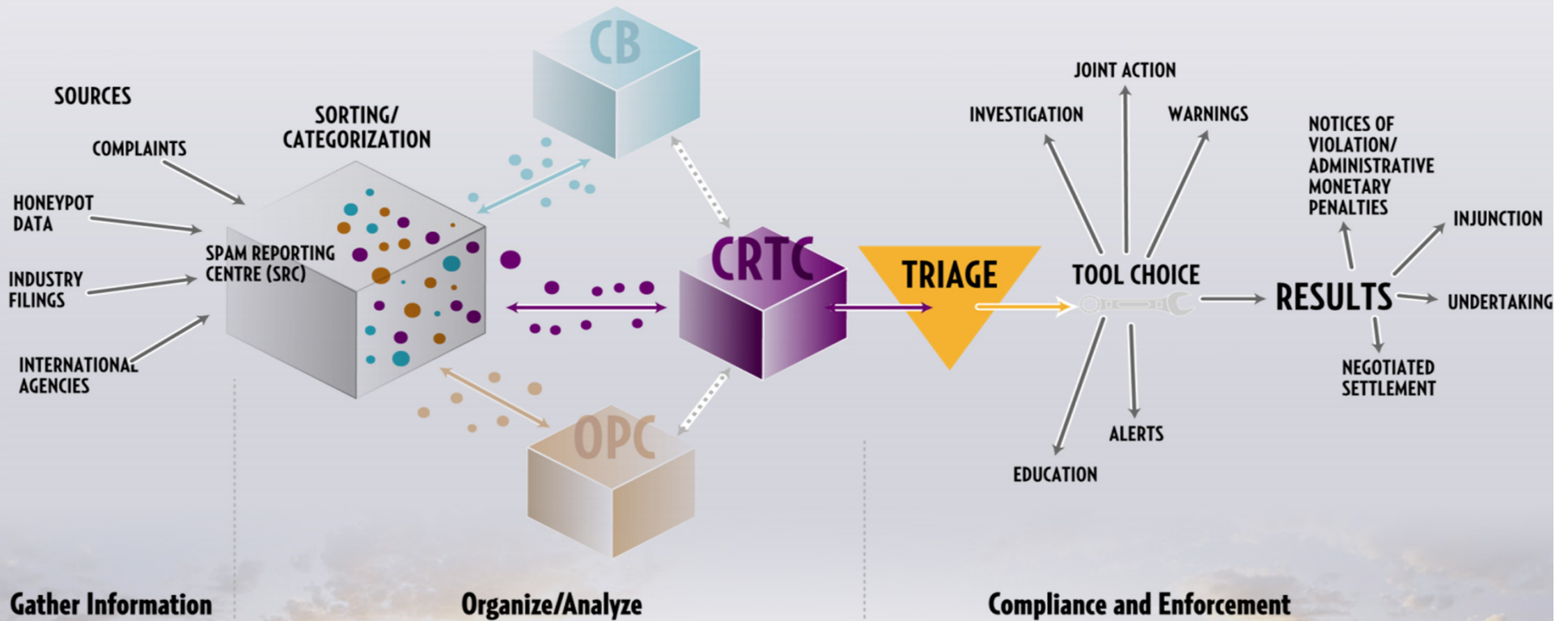


Image Source: CRTC Powerpoint Presentation

The Basics - What do I need:

1. Do you send CEMs
2. Do you need consent or do you fall under one of the CASL exemptions?
3. Do you have consent to send CEMs?
4. Do you have implied or express consent to send CEMs?
5. Do your CEMs satisfy the CASL content requirements?
6. Do you have a template or checklist for CASL compliant CEMs?
7. Do you have an unsubscribe mechanism – how quickly does it work?

The Basics - What do I need: - Cont'd.

8. Do you have system to record oral consents, a field in your database to record express opt-in consents or track the date of online purchases, contracts or inquiries?
9. Have you trained your employees?
10. Do you have a plan for monitoring and updating compliance activities?

CASL BASICS



CASL prohibits sending (or causing to be or permitting to be sent) a CEM unless the recipient expressly or implicitly consents to receiving the message.

What is a CEM?

“**Electronic messages**” mean a message sent by any means of telecommunication, and includes text, sound, voice, and image messages. “Electronic address” means an address used in connection with the transmission of an electronic message, and includes email, text messaging/SMS, instant messaging, social networks (Facebook[®], LinkedIn[®], etc.), other online services (e.g., web forums, portals), telephone accounts, and “any similar account”.

“**Commercial**” refers to anything that “encourages participation in commercial activity”, including: (i) an offer to purchase, sell or lease products, goods or service; (ii) an offer to provide a business, sell or lease investment or gaming opportunity; or (iii) advertising or promotion of these and other activities or of a person carrying out or intending to carry out these and other activities.

What is a CEM? – Cont'd.

A “commercial activity” is “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, *whether or not the person who carries it out does so in the expectation of profit...*”

Factors that would affect the determination of whether a message encourages participation in commercial activity include:

- i. content of the message;
- ii. hyperlinks in the message to content on a website or other database; and
- iii. contact information contained in the message

CONSENT

How to obtain Express Consent – Pre – July 1st, 2014

To obtain express consent **before** July 1, 2014 – you don't need to include all the required information under CASL but you need to clearly and simply set out the purpose(s) for which you are seeking consent.

CONSENT – Cont'd.

To obtain express consent on or **after** July 1, 2014, you will need:

- the purpose(s) for which consent is sought (in order to be a valid, you must identify and obtain specific and separate consent for each type of communication);
- identity and contact information of your organization and any person whose behalf the consent is sought, including a statement indicating which person is seeking consent and which person on whose behalf consent is sought; and
- a statement that the recipient may withdraw consent.

CONSENT – Cont'd.

Recap: Express consent needs to be sought separately for each of the following:

- sending of CEMs
- alteration of transmission data in electronic messages in the course of a commercial activity
- installation of a computer program on another person's computer in the course of a commercial activity

What Counts as Express Consent?

- Oral or verbal consent is fine
- Electronic “Opt in” consent

What Counts as Express Consent? – Cont'd.

How can do you obtain Opt in Express consent

- Requires a positive action to indicate that s/he is providing consent.
- update preferences page that uses a separate tick-box for each type of communication, which must be proactively checked by the person whose consent is being sought in order to indicate consent or a separate icon for each type of communication which must be proactively clicked by the person from whom consent is being sought.
- a separate icon which must be proactively clicked by the person from whom consent is being sought.
- default toggling (eg use of a pre- checked box) is NOT regarded as express consent.
- requests for consent must not be subsumed in, or bundled with, requests for consent to the general terms and conditions of use.

Checking a Box to Indicate Consent

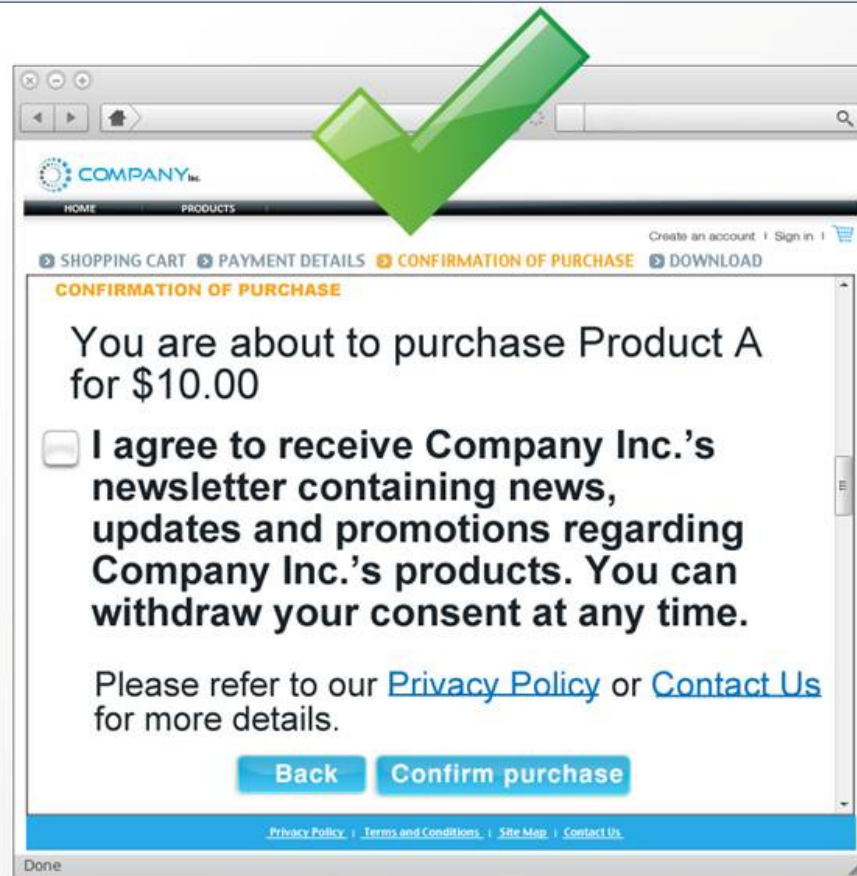


Image source: *Canada's anti-spam legislation*, Compliance and Enforcement Information Bulletin CRTc 2012-548

Typing an Email Address into a Field to Indicate Consent

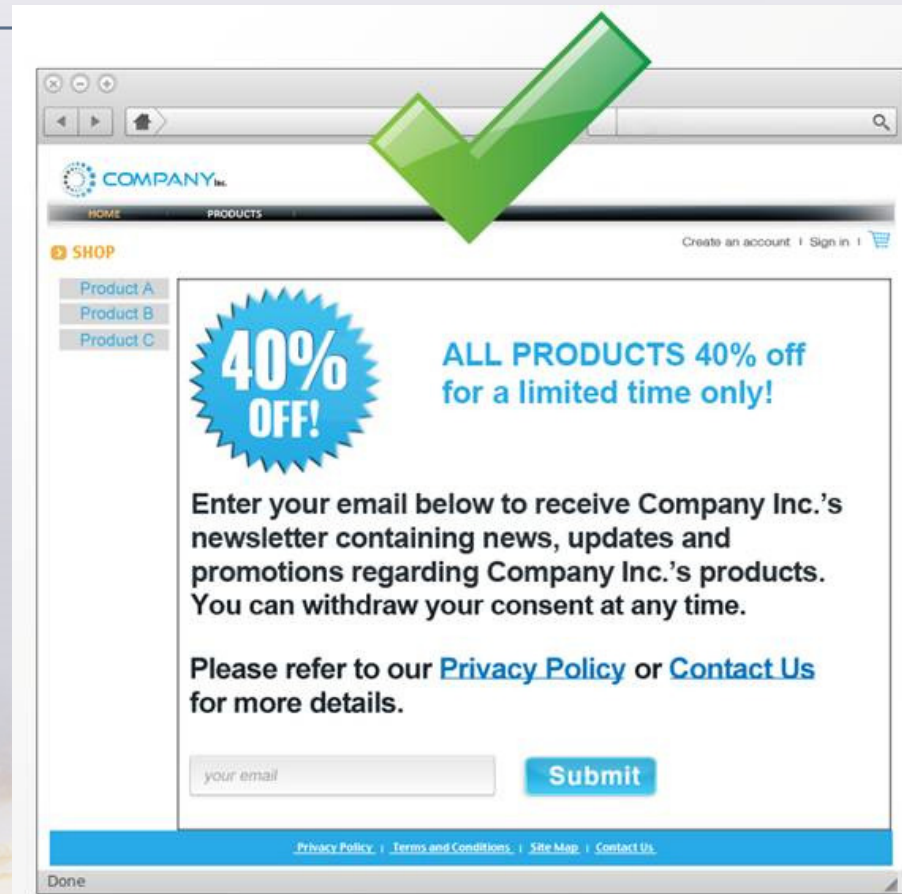


Image source: *Canada's anti-spam legislation*, Compliance and Enforcement Information Bulletin CRTC 2012-548

IMPLIED CONSENT

Implied consent from an “existing non-business relationship”

Charity or Political Party - a donation or gift made by the person to whom the message is sent, or related to volunteer work performed by the recipient, within the two-year period immediately before the day on which the message was sent, where that other person is a registered charity, a political party or organization, or a person who is a candidate.

Members of a club, association or voluntary organization - where the person to whom the message is sent, in any of those other persons, within the two-year period immediately before the day on which the message was sent, where that other person is a club, association or voluntary organization, as defined in the regulations.

Existing Non-Business Relationship - Membership

- You may rely on the existing non-business relationship to imply consent, to members of an association, club or voluntary organization, however, you must still meet the information requirements and add an unsubscribe mechanism to your CEMs.
- You should ensure that you are only sending to members.
- “Membership” means the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.
- You should also ensure that your association falls within the following:
 - a club, association, or voluntary organization is a non-profit organization
 - organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit
 - no part of its income is payable for the personal benefit of any member unless the member is an organization whose primary purpose is the promotion of amateur athletics in Canada.

Existing Business Relationships

Existing Business Relationship:

CASL permits sending a CEM to a person who the organization has an “existing business relationship” with. This applies where there is a business relationship between the recipient and the sender arising from the purchase of a product, goods or a service within the 2-year period immediately before the day on which the CEM was sent, or arising from an inquiry or application within the 6-month period immediately before the day on which the CEM was sent.

TRANSITION/GRACE PERIOD

Three Years – until June 30, 2017 implied consent to send CEMs where as of July 1, 2014 there was an existing business or non-business relationship.

- provided that the recipient has not withdrawn consent
- the relationship had included the exchange of emails

IMPLIED CONSENT

Implied Consent from Existing Business Relationship

No CASL requirement to convert implied EBR consent into express consent BUT you need to keep track of the of which exemption applies and when it expires.

- 6 months?
- 2 years?
- 3 years?

Express consent doesn't expire!

EXCEPTIONS

(Where you don't need consent)

Business to Business Communications:

CEMs can be sent between different organizations (including their employees) where the organizations have a “relationship”.

Disclosure/publication of address:

CASL permits organizations to send a CEM to a recipient who has conspicuously published his or her electronic address, provided that there is no statement that the person does not wish to receive unsolicited CEMs at the electronic address and the message is relevant to the person's business, role, functions or duties in a business or official capacity.

EXCEPTIONS

(Where you don't need consent) – Cont'd.

CEMs sent/received on EM service

If the disclosure and unsubscribe mechanism are conspicuously published and readily available on the user interface and the recipient has given express/implied consent to receive it (e.g. BB Messenger).

CEMs to Limited Access/Confidential Account

Includes the CEMs that can only be sent by the account provider to the receiver (e.g. messages sent by financial institutions to customers).

Communications that fall outside the scope of CASL (no consent/no form/content requirement/no unsubscribe mechanism):

- Family or personal communications (no commercial elements)
- Response to a commercial inquiry
- Internal business communications
- To provide warranty, product recall or safety information
- Information related to an employment relationship
- Legal communications
- Canada Post

No Consent is required to send electronic messages in connection with:

- Quotes or estimates
- Messages that facilitate or confirm transactions
- Provides warranty, recall, safety or security information
- Provides information about
 - ongoing use or ongoing purchases
 - ongoing subscription, membership, accounts, loans or similar
 - employment relationships or benefit plans
- Delivers a product good or service, including updates and upgrades

To Recap: CASL does not apply to messages that are sent:

1. Within or between business, where there's an ongoing relationship;
2. In response to a request;
3. To enforce a legal right or obligation;
4. Via closed messaging systems;
 - a) Proprietary system
 - b) Messaging systems where ID and unsubscribe included on platform
5. To a foreign jurisdiction in compliance with their spam law; (see Schedule 1 in the ECPR);
6. By registered charities raising funds; and
7. By political candidates or organizations, soliciting political contributions.

WHAT NEEDS TO BE INCLUDED IN CEM

- Name of person or business sending the message (or on whose behalf the message is sent and a statement indicating this).
- persons situated between the person sending the message and the person on whose behalf the message is sent need not necessarily be identified (For example, where they are responsible for distribution of a CEM but have no role in its content or choice of the recipients).
- Mailing address - sender's valid, current street (or civic) address, postal box address, rural route address, or general delivery address.
- address must remain valid for a minimum of 60 days after the message has been sent.
- Plus one further type of contact information such as: telephone number, email or web address.

RECORD KEEPING

(or how to stay out of trouble)

- Onus of proving sufficient consent rests with the sender of a CEM
- Recipient of a CEM does not have to prove that they did not provide consent

How can I prove that I have express consent?

With all express consent, it will be up to the organization to prove that it obtained consent.

Create a protocol for updating database with field indicating date and purpose for which consent was granted.

RECORD KEEPING (or how to stay out of trouble) – Cont'd.

The following forms are sufficient for demonstrating oral consent:

- where oral consent can be verified by an independent third party; or
- where a complete and unedited audio recording of the consent is retained by the person seeking consent or a client of the person seeking consent.

How long can I use my pre-existing consents?

Section 66 deems implied consent for a period of 36 months (unless the recipient withdraws consent earlier) where there is an existing business or non-business relationship and the relationship includes the communication of CEMs.

UNSUBSCRIBE MECHANISM

How does it need to work?

- Consumer friendly – simple and easy
- Readily performed without delay or difficulty
- Unsubscribe links need to remain active for at least 60 days
- You must honour unsubscribed requests indefinitely, unless you receive a new explicit opt-in request

How must it be presented?

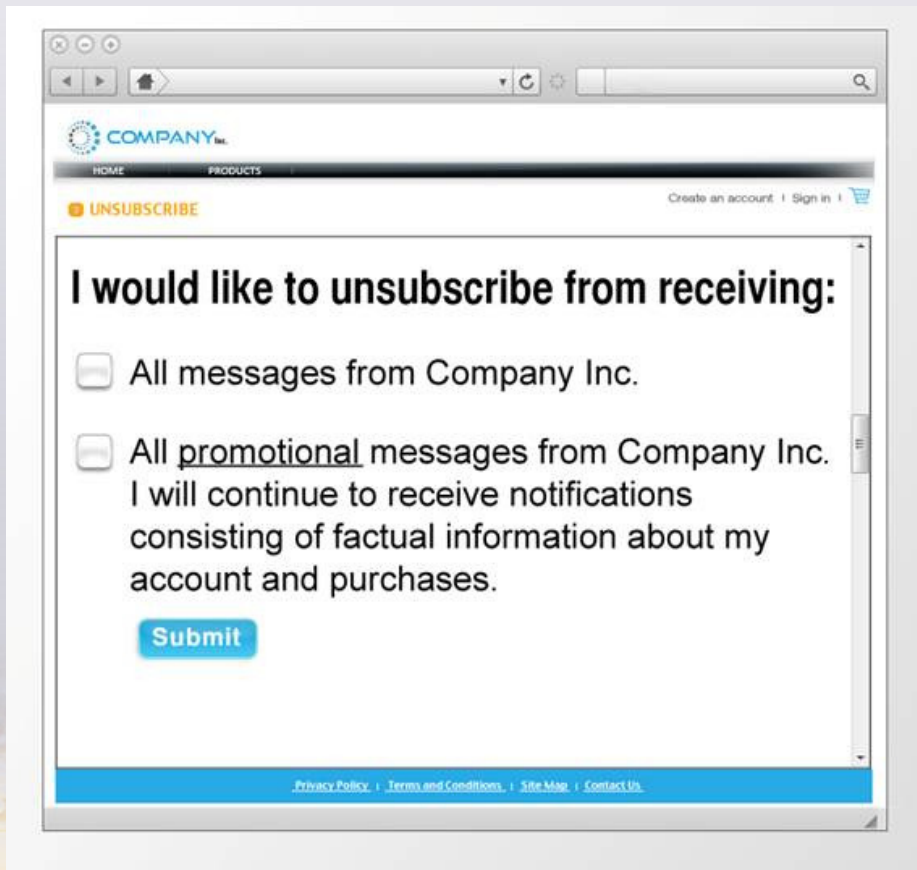
It must be set out clearly and prominently.

UNSUBSCRIBE MECHANISM – Cont'd.

Examples:

- a link in an email that takes the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender.
- for a short message service (SMS), the user should have the choice between replying to the SMS message with the word “STOP” or “Unsubscribe” and clicking on a link that will take the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender.
- she can unsubscribe from receiving all or some types of CEMs from the sender.

UNSUBSCRIBE MECHANISM – Cont'd.



The screenshot shows a web browser window with the following elements:


- Browser address bar and navigation buttons.
- Company logo: **COMPANY Inc.**
- Navigation menu: **HOME** | **PRODUCTS**
- User links: **Create an account** | **Sign in** | 
- Section header: **UNSUBSCRIBE**
- Form content:
 - I would like to unsubscribe from receiving:**
 - All messages from Company Inc.
 - All promotional messages from Company Inc. I will continue to receive notifications consisting of factual information about my account and purchases.
- Submit button: **Submit**
- Footer: [Privacy Policy](#) | [Terms and Conditions](#) | [Site Map](#) | [Contact Us](#)

Image Source: *Canada's anti-spam legislation*, Compliance and Enforcement Information Bulletin CRTC 2012-548

UNSUBSCRIBE MECHANISM – Cont'd.

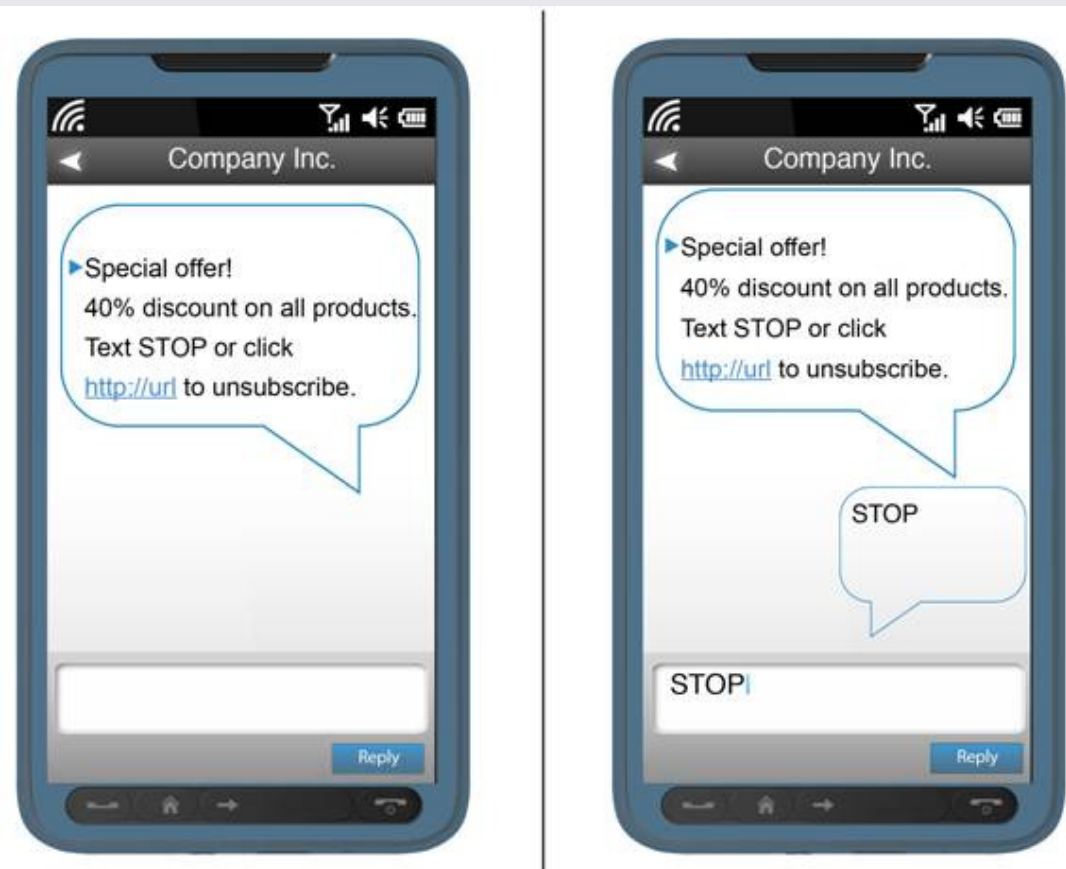


Image Source: *Canada's anti-spam legislation*, Compliance and Enforcement Information Bulletin CRTC 2012-548

THIRD PARTY REFERRALS

Where there is an existing relationship (personal, family, business, or non-business) between a person, and an individual, and the existing client refers a prospective client or customer to the agent or person by providing the prospective client's electronic address information. The existing client making the referral must have an existing relationship (personal, family, business, or non-business) with the prospective client that they are referring to the agent.

THIRD PARTY REFERRALS – Cont'd.

CASL permits the agent or business to send a single message to the prospective client, as long as the agent has both provided the prospective client with the full name of the individual who made the referral, and has included the identification and unsubscribe requirements as set out in *the Act*.

Special Cases – Third Party Referrals

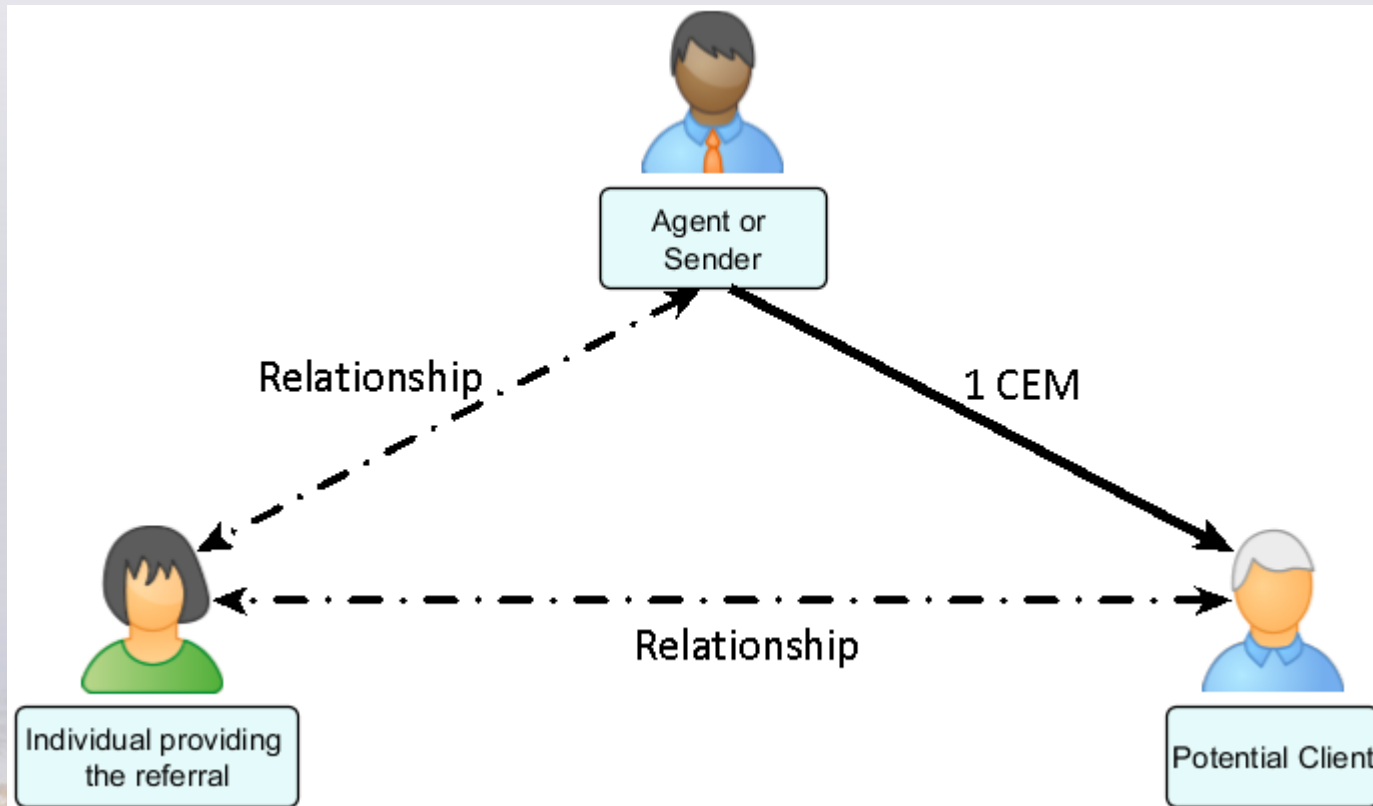


Image Source: Industry Canada Powerpoint Presentation

CEMS FROM UNKNOWN THIRD PARTIES

Businesses can seek consent to allow other businesses to send CEMs, even where those other businesses are not yet identified when the consent is sought.

The "unknown third party" requirements for the collection, and use of consent to allow such unidentified third parties to send CEMs:

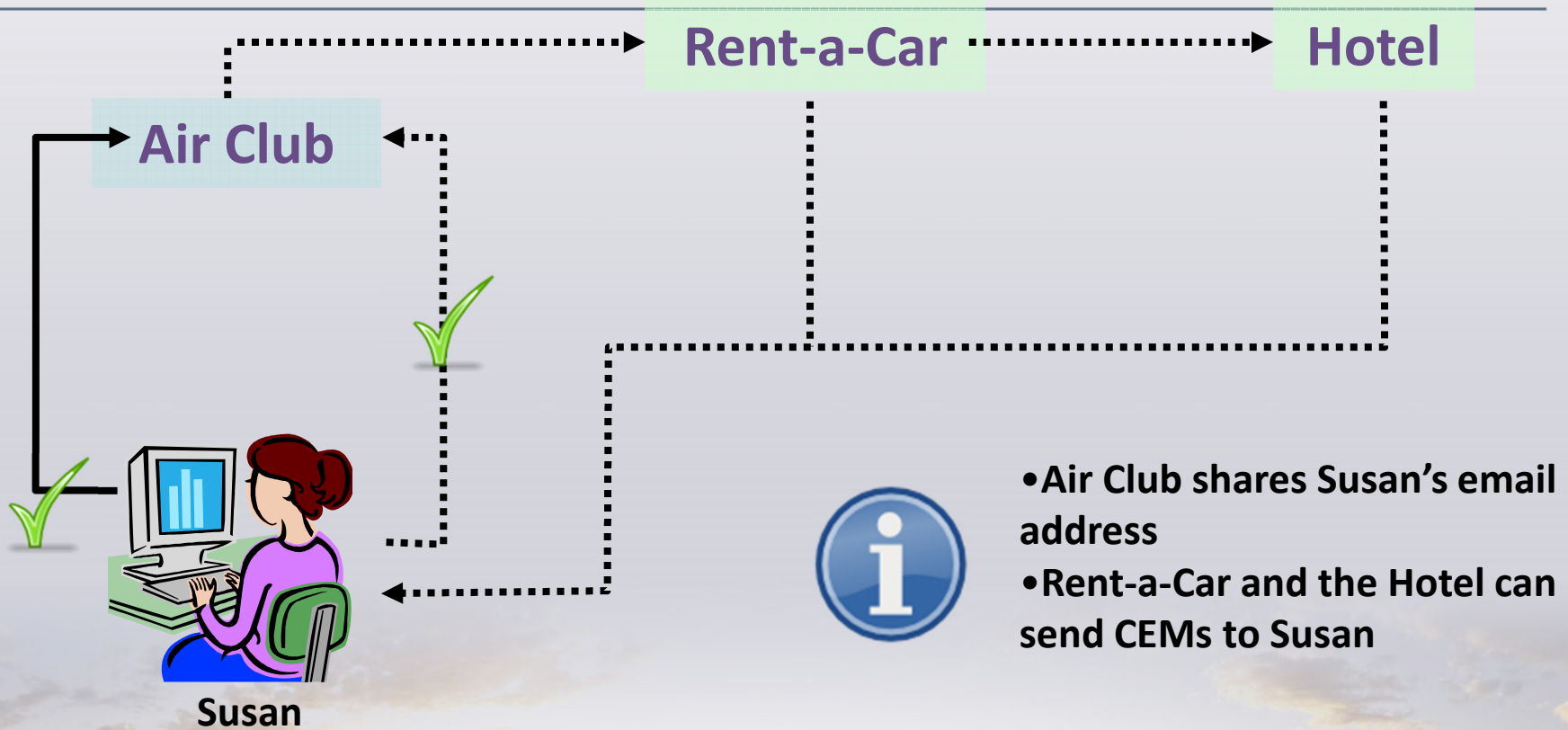
- any time a third party business uses that consent, they must provide the opportunity for the recipient to withdraw consent from all third parties. The recipient (*i.e.* the individual who provided consent) must have the ability to unsubscribe from third party messages, and the mechanism allowing them to do so must be within the CEMs they receive from those third parties.
- this means that businesses using this form of consent to send CEMs must be able to alert the original requester that the recipient's consent to receive messages from unidentified third parties is withdrawn.

CEMS FROM UNKNOWN THIRD PARTIES - Cont'd.

- when consent to receive messages from a third party has been withdrawn by the individual, the original requestor must notify each third party to whom the consent was provided that the consent has been withdrawn.
- there is no requirement for the third parties to provide the opportunity to withdraw consent from all commercial messages directly from the person who acquired consent; the requirement is limited to removal of consent to receive messages from third parties.

The purpose of these provisions is to ensure that the person who obtains consent on behalf of an unidentified third party remains responsible for ensuring that the person who gave consent has an effective and simple means of withdrawing their consent to receive messages from unidentified third parties.

Special Cases – Unknown Third Parties



Susan
"Send me CEMs **AND** let
Third Parties send me CEMs"

Image Source: Industry Canada Powerpoint Presentation

Special Cases – Unknown Third Parties

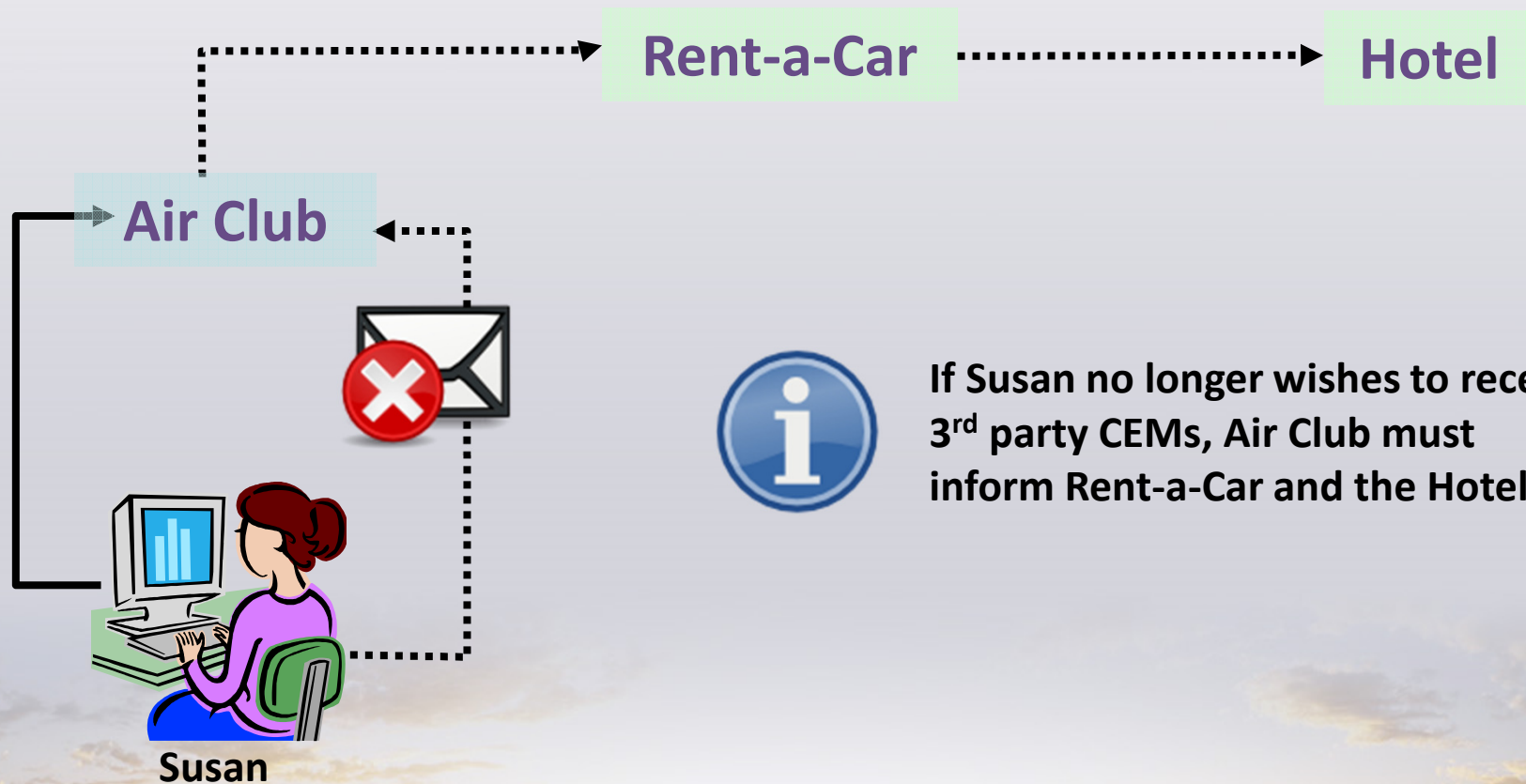


Image Source: Industry Canada Powerpoint Presentation

Special Cases – Unknown Third Parties

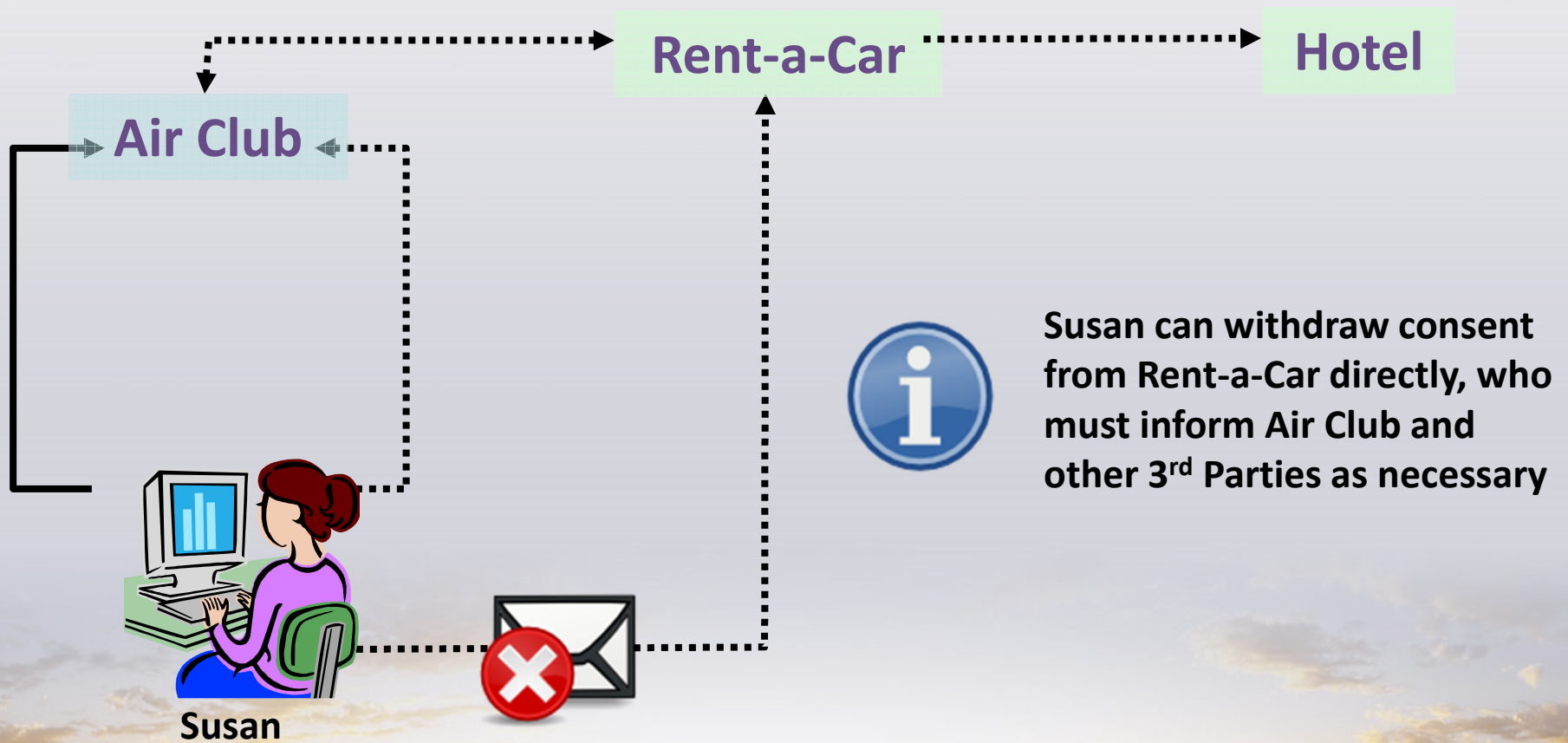


Image Source: Industry Canada Powerpoint Presentation

PRIVACY POLICY

Do I need to update my privacy policy?

EMPLOYEES AND CASL

Do I need a CASL policy for my employees?

Do I need to educate my employees about CASL?

CASL vs. U.S. CANSPAM

CASL applies to Non-residents (located outside of Canada) that sends a message to an individual or organization located in Canada.

How does CASL apply to non-residents?

CASL's provisions applicable to the sending of commercial electronic messages apply where a computer system located in Canada is used to send or access such messages.

Consent is required to install program updates or upgrades

CASL software-related regulations - designed to control surreptitious installation of software, particularly “invasive software”.

Generally, express, clear consent is required.

Installation of invasive software imposes additional requirements. Implied consent (or “deemed express consent”) may be relied upon in other cases:

- cookies, HTML code, Java scripts;
- upgrades for telecom network security;
- “reasonable” installs - where it is reasonable to expect that the user would consent.

Consent is required to install program updates or upgrades – Cont'd.

- Consent can be assumed for updates and upgrades that fall into previously discussed categories
- Consent to updates or upgrades may be sought in advance of the actual installation
- Requests for consent for updates and upgrades must respect additional requirements if triggered

Software provisions come into force **January 15, 2015**

WHAT ELSE????

Altering transmission data is prohibited (Phishing) - when an individual causes an electronic message to be sent to a destination that is different from that which the sender intended.

CASL amends PIPEDA to prohibit address harvesting.

Review your agreements with third party suppliers to ensure CASL compliance – include contractual provisions for:

- Handling of Referral/contact lists
- Content of emails sent on behalf of your organization
- Notification if service provider is cited for CASL violation
- Indemnification for any costs/damages from service providers breach of CASL
- Agree to provide your organization with regular notification of any unsubscribe requests
- Agree to maintain records of consents
- Agree to permit your organization to inspect and audit service providers CASL compliance efforts

?? Questions ??

Does sending a LinkedIn request to connect count as a CEM?

Does sending a friend an email asking them to join you for lunch and your online signature contains a link to your company's website count as CEM?

Does CASL apply to the small mom and pop operations?

Tips

Create a CASL compliance plan/timeline

Conduct an inventory of your organizations CEMs

Consider adding a link to opt in on the home/landing page of your website

Give people a reason to sign up (avoid the term “newsletter”) offer an incentive

Add a privacy statement to your opt in form

Create a centralized unsubscribe policy & database (then test it)

Due Diligence – can you prove that you undertook a reasonable effort to ensure compliance? Undertake a CASL compliance audit

Links:

CASL and its Regulations:

http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00211.html

Government of Canada - Fightspam website:

<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>

Compliance and Enforcement Information Bulletin CRTC 2012-548:

<http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>

Compliance and Enforcement Information Bulletin CRTC 2012-549:

<http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>

www.dickinsonwright.com

WENDY HULTON

P: 416.777.4035 | whulton@dickinsonwright.com

199 Bay Street | Suite 2200 | Commerce Court West | Toronto, ON | M5L 1G4

DANIEL UJCZO

P: 614.744.2579 | dujczod@dickinsonwright.com

150 E. Gay Street | Suite 2400 | Columbus, OH | 43215

**Exploring opportunities.
Expanding possibilities.**