



## OFFICE OF GENERAL COUNSEL

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Canada's Anti-Spam  
Legislation Update

This is the first issue in the first volume of *Res Controversa*, the newsletter of the Office of General Counsel ("OGC"). We hope you find it helpful.

Our ambition is to publish three times yearly, with quick analysis and updates on legal issues of significance to the university community.

Ryan MacMillan of the OGC is the editor of *Res Controversa*. If you have comments, or if you would like us to address a particular question, please send a note to Ryan at [Ryan.MacMillan@uwaterloo.ca](mailto:Ryan.MacMillan@uwaterloo.ca).

### Office of General Counsel

What We Do:

- Contracts & Legal Document reviews
- Legal advice for senior officers and Board of Governors on a diverse range of issues
- Legal advice to managers and employees regarding employment activities
- Immigration advice and support
- Advice on a host of legal issues for all academic and academic support units.

## Canada's Anti-spam Legislation ("CASL") Update

[Recent Changes that Affect the University](#)—detail below.

### CASL's Background

For a quick primer on CASL, see [Frequently Asked Questions on the OGC web site by following this link: https://uwaterloo.ca/office-of-general-counsel/canadas-anti-spam-legislation](https://uwaterloo.ca/office-of-general-counsel/canadas-anti-spam-legislation)



## **CRTC ENFORCEMENT ADVISORY – Records of Consent**

**Enforcement Advisory—Records of Consent.** On 27 July 2016, the Canadian Radio-television and Telecommunications Commission (“CRTC”) issued an Enforcement Advisory on CASL requirements for keeping records of consent to receive commercial electronic messages (“CEM”).

**Consent:** The transitional period of July 1, 2014 to July 1, 2017 allowed for **deemed consent** where CEMs might be sent to anyone with whom the sender has an existing business or existing non-business relationship. In order to demonstrate this deemed consent, there must have been communication by way of CEM with the recipient before 1 July 2014. Further, the sender must demonstrate that, before 1 July 2014, the recipient:

- Had completed a commercial transaction with the sender’s business at anytime in the past; or
- Had made a commercial inquiry with the sender’s business at anytime in the past

On 1 July 2017, this deemed consent expires. From this date forward, CEMs may be sent only if the sender has implied or express consent. [Failure to do so could result in contravening the law.](#) Implied consent can be proven where the recipient:

- Has completed a commercial transaction with the sender’s business in the last 24 months; or
- Has made a commercial inquiry with the sender’s business in the last 6 months

It should also be noted that, regardless of whether during or after the transitional phase, consent to receive CEMs can be shown where the recipient has conspicuously published their email, or if they have given express consent that they wish to receive CEMs. The recipient can withdraw any form of consent at anytime. Every CEM, whether consent is express or implied, must contain an unsubscribe mechanism that allows the recipient to opt out of receiving CEMs.

**Benefits of Good Record Keeping:** Good record keeping practices can provide various benefits, including helping a CEM sender: **(1)** investigate and respond to consumer complaints; **(2)** identify potential non-compliance issues and the need for corrective action, and demonstrate that corrective action was implemented; and **(3)** establish a due diligence defense in the case of a CASL violation.

**Recommended Records:** CEM senders should consider keeping paper or electronic records of: **(1)** all evidence of express and implied consents (e.g. audio recordings, copies of signed consent forms and completed electronic forms) to receive CEMs; **(2)** documented methods through which consent was collected; **(3)** policies and procedures regarding CASL compliance; and **(4)** all unsubscribe requests and resulting actions.

### **UW CASL Compliance**

At the University of Waterloo, responsibility for CASL compliance resides at the local level. If your unit sends out CEMs, be sure to maintain records in compliance with this advisory.



**Government agencies responsible for enforcement of the law:**

1. CRTC may impose administrative monetary penalties for violations of CASL.
2. The Competition Bureau may seek monetary penalties or criminal sanctions under the *Competition Act*.
3. The Office of the Privacy Commissioner may exercise new powers under an amended *Personal Information Protection and Electronic Documents Act*.

These agencies have various enforcement tools (i.e.: preservation demands, production notices, and warrants).

## **PRIVATE RIGHT OF ACTION**

A private right of action was originally included in CASL to allow anyone affected by a prohibited act to seek damages in court, including class action suits. This provision of CASL has been temporarily suspended and will not take effect on 1 July 2017, as originally intended. However, this private right of action could be reinstated by the government, potentially on short notice. It is important to note that while the private right of action has been delayed, administrative penalties are still a possible sanction that can be levied for noncompliance.

## **Why Should We Care?**

CASL is considered one of the most stringent pieces of anti-spam legislation in the world. The penalties for infractions include monetary penalties of up to \$10 million for an organization such as the University of Waterloo. Subject to its implementation, the new private right of action means that recipients need not file a complaint with the government and wait for that administrative process to work. Recipients could bring individual or class action law suits against the University directly through the courts for CEMs sent in violation of CASL. Our office will monitor developments in this respect.

## **IMPORTANT DISCLAIMER**

**There is still some uncertainty as to how this new legislation may apply to a university as an educational institution. At some point, changes to the law could come into effect. These changes may include reviving the private right of action, as well as giving greater clarification as to how this law applies to educational institutions. Departmental practices that differ across the University may bring forth compliance issues.**

The information contained in this newsletter is not meant to be legal advice, and the reader should not depend on it as legal advice. For clarification of this law specific to your situation, or for any other matters on which legal advice may be required on behalf of the University of Waterloo, please contact the Office of General Counsel.