

A SIMPLIFIED EXPLANATION OF



# CASL

CANADA'S NEW LAW ON SPAM

THE LEADS HUB



DEVRY SMITH FRANK LLP

# UNDERSTANDING CASL

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## CANADA'S NEW LAW ON SPAM

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Businesses and governments have been making significant strides in their never-ending battle against spammers. Some of the most offensive spammers have been apprehended and anti-spam technologies are getting a lot smarter. But that hasn't stopped the Government of Canada from tackling this still ongoing problem head on through the country's own Anti-Spam Legislation or CASL for short. But like many pieces of legislation, CASL can be a bit tricky to understand even if you check out their official page at <http://fightspam.gc.ca> . The objective here is to make CASL easier for everyone to understand.



### **Scope and Goal of CASL**

Spam is commonly associated with all the annoying junk email that somehow bypasses the anti-spam filters and hits the inbox. Marketers may also need to be on the lookout for what constitutes “spam”, according to CASL, technically refers to any type of commercial electronic message (CEM) sent to an individual who did not express any consent in receiving such material.

**It is not limited to email messages as it also includes text messages (to mobile devices) and social media direct messaging services.**

But despite the law's name, CASL reaches beyond the spam borders targeting malicious and potentially devastating content including malware and spyware. Phishing is another huge problem that needs to be taken care of as fake and misleading pages can result in identity theft and online fraud.

*In this report we will focus on sending and receiving emails and what impact this new legislation will have on how we operate our businesses once this law goes into effect on July 1, 2014.*

### **How it Benefits Ordinary Users (Recipients)**

CASL's official website doubles as an educational tool that is designed to make ordinary computer users more aware of the dangers of spam. The site explains how simple it is to identify spam and the measures that need to be taken to avoid getting victimized. Generally, you should avoid emails that demand highly personal information as the vast majority of legitimate businesses do not ask such. The law also discourages people from giving in to any suspicious emails or websites that demand money in exchange for large prizes.

## The Effect on Marketers and Businesses

The new law limits the way businesses and marketers can legally communicate with people. It centers primarily on getting the recipient's consent before commercial and non-harmful messages are sent.

The basics are you cannot send a commercial electronic message (CEM) to anyone that has not given you express or implied permission to do so.

## What is a “Commercial Electronic Message” or CEM

Your email is a CEM if the intent of the email is to encourage the recipient of the email to participate in a commercial activity. The expectation of profit is not required. In plain English it means any email that:

1. Advertises or promotes your business
2. Offers a business, investment or gaming opportunity.
3. Promotes a person that does anything referred to in 1 or 2 above.

The key here is if the intent or underlying purpose is to encourage participation in a commercial activity, it is considered a commercial electronic message. Most of us can figure out 99% of the time the intent of our message.

This not only includes the text, but also images, videos, hyperlinks, etc. contained within your email.

For example, if you have a link in your email or email signature that links to your website that is considered a CEM as the intent of your website is to encourage people to do business with your company.

## How Must Each CEM Be Formatted?

Each email you send out, even if you have consent, must contain the following:

1. **Sender Identifying Information:** This is your name, mailing address and one of your telephone number, email address or website address.
2. **An Unsubscribe Mechanism:** Includes an unsubscribe link or other mechanism that will allow the receiver to unsubscribe with no cost to the receiver. Unsubscribe must be effective within 10 days.



## Express Consent

This is the best type of consent. You get a person to opt in to a form on your site or they can give you written or oral permission. You must clearly define what recipients will receive when subscribing. If a person has opted in previously and you can provide details of where and when they signed up, you are covered.



However, if you are not sure you can send them an email requesting them to opt-in, but only before July 1, 2014. After that your email for express consent would be considered a “CEM” and therefore Spam.

Many of the consent approaches in getting people to opt in to mailing lists are no longer allowed. For instance, a registration form where the check box to subscribe to a newsletter is checked by default is a consent method that is prohibited. In this case the subscriber must check the box themselves.

## Implied Consent

There are circumstances where CASL will recognize certain forms of implied consent. For example:

Existing Business Relationship:

1. If the sender and recipient engaged in a business relationship, emails can be exchanged. The purchasing of a product or even a donation is enough for the exemption to apply. Initially, any previous business relationship will qualify, however beginning on July 1, 2017, the business relationship must have existed within the previous two years.
2. If the recipient made an inquiry or application within the previous six months in respect to anything in 1 above.
3. Receiving a business card is another form of implied consent that is allowed as long as there is no indication that the recipient does not wish to receive CEMs. The email must be relevant to their business role, functions or duties.
4. If someone posts their email on a website and does not indicate on their website they do not wish to receive CEM's, you may email them providing it is relevant to their business role, functions or duties.

## Shared Consent

A third party can introduce you or refer you to a recipient providing the referrer has an existing business or personal relationship with the recipient. You may send a single email to them. If they do not reply, you cannot send another email. Even in these emails, you must provide an unsubscribe option, and you must specify who referred you to them.

## Consent is Not Required When

1. You are responding to an inquiry
2. You are providing a quote or estimate that was requested.
3. You are confirming or completing a commercial transaction.
4. You are providing factual information (warranty, safety, updates, etc) about the ongoing use or purchase of a product, service, subscription, etc.
5. The email is directly related to an ongoing employment relationship.

## Exemptions

The following types of emails are exempt and not subject to penalties.

1. **Family Relationships:** Individuals that are related through marriage or common law relationships.
2. **Personal Relationships:** Individuals that have had direct, voluntary and two communications and it would be reasonable to conclude they have a personal relationship.
3. **Charities:** This exemption only applies to registered charities. This does not apply to non-registered charities or non-profits.
4. **Political Parties:** Yes - Political parties and organizations can still email you at will.

## CASL Enforcement

The CTRC is enforcing CASL and the law takes effect on July 1, 2014. Will they start to enforce day one? Will there be a grace period or leniency initially? No one knows and only time will tell. Some of the tools and penalties at their disposal are:

1. Penalties of up to \$1 Million for individuals and up to \$10 Million for businesses.
2. Public shaming
3. Injunctions and restraining orders
4. Notice to produce and search warrants



## How to Properly Adapt to CASL

- First and foremost, the law only applies to material that is accessed in Canada. If there is a need to adapt, a good way to get started would be to double check your site or business's privacy policies. You must make sure that you are giving your visitors a choice to agree to receive promotional content via your designated channels and you record proof of such. Because proof of consent is more

important than ever, you should avoid oral consent methods such as obtaining it over the phone unless you are willing to record the conversation.

- It is also important to make sure that existing subscribers have a clear way to opt out of receiving the CEMs at any given moment to avoid conflicts. Even though there are implied consent workarounds, it is best to avoid them and be more direct in getting people to agree to receive CEMs.
- Remind recipients that they have opted in. For example add an email footer that says “you are receiving this message because you signed up to receive x”.
- Educate and monitor your employees on CASL compliance.
- Because of the full text of Canada’s proposed anti-spam law consists of multiple pages, it is recommended to seek legal guidance from your lawyers as well. Take all the pieces of information you find online regarding the CASL (including this one) as a guide to prep up for the upcoming changes.

## Benefits of CASL



The Canadian Anti-Spam Legislation obviously sides with the furious consumers and business people that are fed up with all the unwanted CEMs. It also gives these people a better sense of security knowing that there are less fake emails and text messages to worry about that may lead to security issues. While this law isn’t expected to downright eliminate spam as a collective effort is required, existing laws similar to the CASL are already active in other countries and managed to lower spam rates. This new law may even influence other countries to take spam more seriously and help contribute by decreasing the spam rates all over the world.

It may seem like businesses are slightly getting punished but the CASL can also serve as an opportunity for real legitimate companies to improve their image. By being more open to the consumer regarding the type of promotional content they can expect by express consent, businesses will be forced to work a little bit harder in keeping each individual on the mailing list. This may mean improving the quality of the promotional content just so ordinary folks don’t dismiss it as spam and file a suit. Since the CASL intends to deter the most deceptive forms of CEM, companies can now take the spotlight that might currently be enjoyed by these shady companies. Marketers may also rethink their current strategies in getting people informed and come up with more modern and pleasant ways to promote things.

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This guide was created by IED Web Marketing and Devry Smith Frank LLP for the purpose of simplifying the CASL legislation for our clients and for individuals looking for clarification on how CASL will affect their business. This is not intended to be legal advice and we recommend all individuals and businesses to seek professional legal advice or visit <http://fightspam.gc.ca> for more information.

For businesses seeking professional legal advice, please contact [Devry Smith Frank LLP](#).

For businesses seeking professional email marketing assistance, please contact [The Leads Hub](#).