

## **CASL in Context: Compliance for Independent LSPs in Canada**

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## CASL in Context: Introduction

On September 11, 2014, the Calgary Chamber of Commerce hosted a presentation on Canada's anti-spam legislation (CASL), the first part of which came into effect on July 1, 2014. This complex law is apparently not yet clearly defined, despite being the strictest anti-spam law in the world. However, there were a few takeaways on the provisions currently in effect that I think are particularly important for us as independent language service providers who tend to run our businesses from behind a computer. Please note that what follows is based on the presentation as I understood it, and is not to be construed as any sort of legal advice; it is intended simply to summarize some key points for people in our profession. If you have any questions about this article or CASL please [contact me](#) or talk to an appropriate legal professional.

## Overview

CASL applies to absolutely any legal person, whether an individual, company, association or other legal entity. It regulates the delivery of "commercial electronic messages" (CEMs), a concept broadly defined to include messages sent by any means of telecommunication whatsoever (e.g. email, text, voice) in connection with a commercial activity, with or without an expectation of profit. This includes messages sent via social media and personal messages with commercial content, but it excludes two-way telephone conversations, voicemail, faxes and snail mail. Since the majority of online threats, from fraud to identity theft, are delivered by spam, spam undermines consumer confidence in the online marketplace and is seen as a major deterrent to e-commerce. CASL aims to regulate such actions that discourage the use of electronic means for business to create a more secure online environment and ultimately encourage the growth of e-commerce.

To comply with CASL, there are three main ideas with which you should be familiar: consent, identification and unsubscription. Under CASL, you must have a recipient's permission to receive CEMs *prior* to sending any electronic message, and each message must clearly identify you (the sender) and include a means for unsubscribing or withdrawing consent.

## Consent

Consent is a complex area. In general, consent must be given expressly through an opt-in mechanism rather than an opt-out mechanism, meaning the recipient must actively do something to say they would *like* to hear from you rather than, for example, ticking or unticking a box to *stop* receiving messages ("togglng", often used in the US). Consent can be collected in writing or orally, but be warned: the onus is on the sender to prove that consent existed, and oral consent is harder to prove. You cannot use an email to request consent, as such emails are considered spam under CASL. A decent means of collecting electronic consent would be through a webpage that keeps a record of the date, time, purpose and manner of consent (e.g. ticking a box, entering an email address).

There are also some exceptions to the requirement for explicit consent, for example where consent is implied or no consent is required. This is where the idea of consent gets a little trickier. I will focus on what is important to know for actively contacting clients and prospective clients.

### *Implied consent*

If you have an existing business or non-business relationship with someone, as defined under CASL, consent is implied. Examples of events giving rise to a business relationship include:

- ▲ purchase transaction
- ▲ business, investment, or gaming opportunity
- ▲ bartering of any of the above
- ▲ a written contract
- ▲ inquiry in respect to any of the above

Consent is also implied if the recipient has published their email address on a website or given you their business card, provided that there is no note saying they do not want to be contacted and that, in the case of a “delivered” card, the message relates to the business discussed.

### *No consent required*

Sometimes consent is actually not even required. This is true in the case of family relationships (which are very narrowly defined, excluding even sibling relationships!), personal relationships and certain types of CEMs. Most notably, under the CEM exceptions you can do the following without prior consent:

- ▲ request services
- ▲ respond to requests and inquiries
- ▲ message recipients in foreign countries, as long as you demonstrate a good faith effort to comply with the recipient’s *local* anti-spam laws
- ▲ message someone to whom you were referred by a third party with whom you have an existing business or non-business relationship (in this case you may *not* follow up electronically if you do not receive a reply; one email only!)

Even if consent is not required, it is still good practice to obtain consent as soon as possible. In all cases you must still comply with identification and unsubscribe requirements.

### *Expiration of consent*

It is important to note that some types of consent actually come with an expiration date. Express consent is considered valid for life, but implied consent is typically only valid for a period of two years. In other words, counting backward, the event implying consent must have occurred within the two years preceding the day before the CEM is sent. Of course, what would a rule be without any exceptions? So, in the case of business relationships arising from an inquiry (e.g. as opposed to from a transaction), consent is only implied for six months, and in the case of relationships that existed prior to July 1, 2014, consent is implied for three years instead of two (transitional grace period).



### **Identification and Unsubscription**

All CEMs must identify the sender in a specific way. Most importantly, they must identify and include the mailing address of the sender or the person on behalf of whom they are sent, and the address must be valid for at least 60 days after transmission. To ensure compliance, make sure identification information is clear and easily visible, and consider including other contact information in addition to the mailing address.

All CEMs must also provide a means for withdrawing consent or unsubscribing. There are some specific requirements, but basically it must be either the same means by which the CEM was sent or “any other electronic means”. Every CEM must also specify an electronic address or link to a webpage to which the unsubscription request can be sent. This address or link must also be valid for at least 60 days after transmission. The unsubscription option must be obvious, and the mechanism simple, quick, easy and free of charge. You must honor all unsubscription requests within 10 days, avoid sending “are you sure?” messages and ensure that unsubscription does not affect delivery of services.

### **Enforcement and Penalties**

CASL is enforced by three government agencies: the Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Bureau and the federal Privacy Commissioner. Penalties may include fines of up to \$10M for corporations or \$1M for individuals, and even criminal sanctions. Liability lies with the party that benefits from the CEM, but it is important to note that directors, officers and agents of an organization may also be held personally liable (up to \$1M) for going along with or approving actions that breach CASL.

Though not yet in force, it is also worth knowing that individuals and organizations will eventually be entitled to sue if they feel they have been affected by a violation of CASL, with maximum damages of \$1M per day.

No precedents have been set yet, but by July 29, 2014—only a few weeks after CASL came into effect—the CRTC had received well over 47,000 complaints. This is obviously a huge volume, and the CRTC has therefore had to devise a triage system for handling complaints. It is reasonable to assume the focus will be on the most severe cases.

I hope this summary provides a good starting point for those of you wondering or even worried about CASL and what it means for you as an independent service provider. For more details or other information, or if you have any questions or comments, please feel free to [email me](#). You can also visit [www.fightspam.gc.ca](http://www.fightspam.gc.ca), a website created by the Government of Canada to help businesses and individuals understand, navigate and comply with CASL.



## Summary Compliance Tips

Here is a brief summary of some actions you can take to comply with CASL:

1. Review any mailing lists and contacts to determine whether consent needs to be refreshed.
2. Develop CASL-compliant requests for consent (consider webpages and hard copies), making sure you and any other direct or indirect senders are clearly identified and that the recipient is clearly and easily able to withdraw consent.
3. Ensure you only use opt-in mechanisms and eliminate all opt-out options.
4. Make sure you are familiar with anti-spam laws of any foreign countries in which your clients are based.
5. Develop a system for maintaining very precise records of express consent obtained.
6. Develop a system for precisely identifying and recording instances of implied consent.
7. Develop a system for honoring unsubscription requests within 10 days.
8. Make sure consent to receive CEMs and the provision of services are completely independent.
9. Keep precise records (some of the following may be more applicable if you run a company with employees):
  - ▲ CEM policies and procedures (if written)
  - ▲ All written training documents related to CASL compliance
  - ▲ All unsubscribe requests and actions taken in response
  - ▲ All evidence of express consent
  - ▲ All current consent lists (express and implied)
  - ▲ CEM scripts (e.g. for identification and unsubscription requirements)

