

NATURAL LEGACIES:

Your Educational Guide to Conservation in BC



Canada's Anti-Spam Legislation

This report outlines electronic communication law in Canada, including an overview of Canada's Anti-Spam Legislation (CASL). A detailed analysis of the general prohibitions and requirements for compliance under CASL is performed. The report then outlines issues of consent, unsubscribe mechanisms, and situations where the legislation may or may not apply.

DISCLAIMER

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1.0 Canada’s Anti-Spam Legislation	3
1.1 General Prohibitions	3
1.2 Penalties for Non-Compliance	3
1.3 What It Covers	4
1.4 Exceptions	4
1.5 Registered Charities.....	5
1.5.1 Fundraising Activities	5
1.5.2 Non-Commercial Messages	6
2.0 Compliance Basics	6
2.1 Message Content Requirements.....	6
2.1.1 The Need for Consent.....	6
2.1.2 Identify Yourself	8
2.1.3 Provide Contact Information	8
2.1.4 No False or Misleading Comments	8
2.1.5 CASL-Compliant Unsubscribe Mechanisms.....	8
2.2 Social Media	8
2.3 Even if the Legislation Doesn’t Apply	9
3.0 Summary	9

1.0 Canada's Anti-Spam Legislation

Canada's Anti-Spam Legislation¹ ('CASL') as it is colloquially known (formally: "An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend...") is intended to reduce unwanted commercial messages being sent to Canadians. The legislation only applies to messages sent and received within Canada.

The legislation is cumbersome, has numerous exemptions and has a phased implementation. Penalties for noncompliance however can be high, thus adherence to the legislation is important for any Canadian organization.

1.1 General Prohibitions

CASL applies to all senders of commercial messages, whether personal or corporate. Under the new legislation, senders cannot send (or cause or permit to be sent) a commercial electronic message to an electronic address unless:

- (a) the person to whom the message is sent has consented to receiving it (whether the consent is express or implied); and
- (b) the message complies with the requirements for message content for commercial electronic messages under CASL (outlined in the Compliance Basics section of this document, below).²

1.2 Penalties for Non-Compliance

Persons who violate Canada's Anti-Spam Legislation can be liable to maximum penalties up to \$1,000,000 per individual and \$10,000,000 per organization.³

The amount of the penalty will depend on a variety of factors, such as the nature and scope of the violation, the person's history and finances, and benefits obtained from the violation.⁴ The Canadian Radio-television and Telecommunications Commission (CRTC) is the authority responsible for enforcement of CASL. The CRTC has noted that they emphasize education and compliance as opposed to punishment.⁵

¹ *Canadian Anti-Spam Legislation*, SC 2010, c 23. <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

² *Canadian Anti-Spam Legislation*, SC 2010, c 23, s6(1). <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

³ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s20(4).

⁴ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s20(3).

⁵ Canadian Radio-television and Telecommunications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation". <http://www.crtc.gc.ca/eng/com500/faq500.htm>

1.3 What It Covers

“*Commercial Electronic Messages*” (CEM)⁶

Under the Act, commercial electronic messages means messages sent by any means of telecommunication, including text, sound, voice, or image. For clarity, this means phones, texting, emailing, social media (in some circumstances), etc. Further, the CASL requirements do not apply unless a commercial transaction is involved or solicited.

But what is a commercial electronic message? The key is to determine if the action is intended to induce commercial activity. Some things to look for include:

- Message content
- Hyperlinks included in the message
- Contact information in the message⁷

For example, the simple inclusion of a logo, a hyperlink or contact information in an email signature does not necessarily make an email a commercial electronic message. Conversely, a tagline in a message that promotes a product that encourages the recipient to purchase that product would make the message a commercial electronic message.⁸

1.4 Exceptions

There are several exceptions in Canada’s Anti-Spam Legislation for when messages can be sent without consent. These include:⁹

1. CEM sent to personal or family relations
2. Inquiries relating to a recipient’s commercial activity
3. CEM providing requested service/product quotes
4. CEM continuing a commercial transaction (that was previously agreed to)
5. CEM providing product warranties, recalls, upgrades or similar information
6. CEM dealing with ongoing subscriptions, memberships, or similar relationships
7. CEM concerning an employment relationship

⁶ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s1(2)

⁷ Canadian Radio-television and Communications Commission, “Frequently Asked Questions about Canada’s Anti-Spam Legislation” (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

⁸ Canadian Radio-television and Communications Commission, “Frequently Asked Questions about Canada’s Anti-Spam Legislation” (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

⁹ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s6. <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

Further exceptions include¹⁰:

- Correspondence sent within an organization
- Correspondence sent between organizations with a previously existing relationship (the message must concern the activities of the recipient organization)
- Correspondence sent on platforms where identification and unsubscribe information is clearly published and readily available to users
- Correspondence sent and received within limited access secure and confidential accounts (such as messages between a bank and an account holder)
- Correspondence sent in response to complaints, inquiries or requests
- Correspondence sent on behalf of registered charities or political parties primarily for fundraising purposes (see Registered Charities section below)

1.5 Registered Charities

Registered charities (as recognized under the *Income Tax Act*¹¹) are exempt from the CASL consent requirements in two ways:

1. The message is primarily for fundraising activities
2. The message is not commercial in nature

Non-profits that are not registered charities under the Income Tax Act are not eligible for the exemptions.

1.5.1 Fundraising Activities

The regulations passed pursuant to the legislation specifically exempt, for the purpose of fundraising, registered charities from the anti-spam legislation's restrictions.¹² As long as the message being sent is primarily intended for the purposes of fundraising for a registered charity, then there is no need to comply with the legislation.¹³ Fundraising is subject to Canada Revenue Agency guidelines;¹⁴ other revenue-generating activities are not exempt from the legislation. For example, a CEM sent to promote a fundraising event and/or the sale of tickets where the proceeds flow to a registered charity would qualify for this exception.¹⁵

¹⁰ *Electronic Commerce Protection Regulations*, SOR/2012-36, s 3. <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-36/page-1.html>

¹¹ *Income Tax Act*, RSC 1985, c 1 (5th Supp), p 3097 ("Registered Charity" Definition). <http://laws-lois.justice.gc.ca/PDF/I-3.3.pdf>

¹² *Electronic Commerce Protection Regulations*, SOR/2012-36, s 3(g)(h). <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-36/page-1.html>

¹³ Canadian Radio-television and Communications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

¹⁴ Canada Revenue Agency, Fundraising By Registered Charities Guidance CS-013, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/fndrsng-eng.html#N1031F>

¹⁵ Canadian Radio-television and Communications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

1.5.2 Non-Commercial Messages

CASL does not apply or need to be complied with if messages being sent have no commercial intent.

For example, newsletters simply providing an update on the charity's activities and news would likely not be seen to have any commercial intent and thus would not be subject to CASL.¹⁶ However, if the newsletter includes advertisements for corporate sponsors and encourages recipients to purchase something from that sponsor then the legislation would likely apply, notwithstanding any potential fundraising exemptions.¹⁷

2.0 Compliance Basics

Section 6 of Canada's Anti-Spam Legislation sets out the requirements and prohibitions for the sending of commercial electronic messages generally outlined below. Organizations should make sure that their correspondence adheres to these rules in order to avoid any potential penalties.

2.1 Message Content Requirements

A commercial electronic message complying with the legislation must:¹⁸

- (a) have recipients' consent to be sent
- (b) provide information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;
- (c) provide contact information for one of the people referred to in (b) above; and
- (d) not be false or misleading;
- (e) set out an unsubscribe mechanism complying with CASL standards.

2.1.1 The Need for Consent

Commercial electronic messages can only be sent with consent. There are guidelines for obtaining consent. Consent can be oral as well, but at all times records of the consent given including date and method for obtaining consent must be retained.

¹⁶ Canadian Radio-television and Communications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

¹⁷ Canadian Radio-television and Communications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

¹⁸ *Canadian Anti-Spam Legislation, SC 2010, c 23, s.6.* <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

How Do You Get Express Consent?

A person or group seeking express consent must provide to the intended recipient¹⁹:

- a. The purpose(s) for seeking consent
- b. Who or what group is seeking consent

Under the new legislation, previously obtained consent may not be valid. As such, existing populated email databases may likewise be invalid. In order to comply with this, organizations must ensure that the purposes for which consent was originally obtained apply to all subsequently sent commercial electronic messages. If the purposes for which consent was originally obtained no longer apply, new consent must be sought²⁰.

IMPORTANT: Canada's Anti-Spam Legislation provides for a three year transition period for existing relationships involving commercial electronic messages. Consent can continue to be implied unless expressly revoked until the transition period expires on July 1, 2017.

Thus, express consent is now required for all new subscribers not subject to the exemptions outlined in the legislation, summarized in this document below. Express consent will need to be confirmed for existing subscribers before July 1, 2017.

Implied Consent

Implied consent is consent that can be assumed through various actions. There must be an existing business or non-business relationship between the sender and recipient or a recipient's address was conspicuously published or sent to the sender and the message relates to the recipient's functions or activities in a business or official capacity.²¹

Under the transitional provisions, implied consent is allowed until the deadline of July 1, 2017. However, implied consent will be terminated if a recipient communicates a desire to cease receiving commercial electronic messages.

Implied consent will be sufficient even after the July 1, 2017 deadline to allow for commercial electronic message exchanges where there is an existing business or non-business relationship. This consent will expire 2 years after the termination of a relationship.²²

¹⁹ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s10(1)(a).

²⁰ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s10(1)(a).

²¹ Canadian Radio-television and Communications Commission, "Express Consent Versus Implied Consent" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/infograph3.htm>

²² *Canadian Anti-Spam Legislation*, SC 2010, c 23, s10(10), s10(13). <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

A non-business relationship could include a donation to, membership in or volunteering for a registered charity or political organization (or candidate).²³

2.1.2 Identify Yourself

All CEM communications should identify the sender. If the sender is sending a message on behalf of another person or group, then both the identity of the sender and the identify of whomever the message is being sent for must be included.

2.1.3 Provide Contact Information

Contact information for senders must be provided. If the message is being sent on behalf of a person or group, contact information for both the person or group sending the message and for the person or group on whose behalf the message is being sent must be provided. Senders must ensure that the contact information provided remains valid for at least 60 days.²⁴

2.1.4 No False or Misleading Comments

Information provided in a CEM cannot be false or misleading. Failure to comply may result in administrative penalties up to \$250,000.00.²⁵

2.1.5 CASL-Compliant Unsubscribe Mechanisms

An unsubscribe mechanism must be in the same medium in which the original message was sent unless that is impractical. A website or hyperlink may be used. All options must be at no cost to the recipient.²⁶

2.2 Social Media

Whether communications on social media are covered by the legislation depends on a case-by-case scenario. What matters for social media especially is how the social media platform is being used.

For example, a Facebook wall post would likely not be captured. However, messages sent to other users using a social media messaging system (e.g. Facebook messaging and LinkedIn private messaging) would qualify as sending messages to "electronic addresses" and thus must comply with the legislation.

Websites, blogs and micro-blogs would typically not be considered to be electronic addresses.²⁷

²³ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s10(13).

²⁴ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s6(3).

²⁵ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s46. <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html>

²⁶ *Canadian Anti-Spam Legislation*, SC 2010, c 23, s11.

²⁷ Canadian Radio-television and Communications Commission, "Frequently Asked Questions about Canada's Anti-Spam Legislation" (February 19, 2015), online: <http://www.crtc.gc.ca/eng/com500/faq500.htm>

2.3 Even if the Legislation Does Not Apply

CASL is relatively new and has significant phase-in provisions. Thus, there is no relevant case law concerning its application. As a result, prudent senders, regardless of the type of message, should adhere to the principles of the CASL.

If the CASL does not apply to a given communication, there is no requirement to include a clear means of unsubscribing to messages. It is a good idea to provide one nonetheless. This will ensure that the messages are being received voluntarily and protect the sender in case exemptions in the legislation ever change. Messages should always clearly identify where and who they're coming from. They should also ideally include a charitable registration number (if applicable) in the identifying information within the message to make it clear what the purpose of the communication is for.

3.0 Summary

Under Canada's Anti-Spam Legislation, organizations must comply with regulations governing the sending of commercial electronic messages. This is intended to minimize unwanted disruptions for the Canadian public. Failure to comply with the legislation may result in administrative monetary penalties. In general, commercial electronic messages must be sent with consent. Organizations must also provide information identifying the sender in addition to providing contact details. Commercial electronic messages should not be false or misleading, and a compliant unsubscribe mechanism must be provided.

Consent can either be express or implied for the purposes of sending commercial electronic messages. The Act sets out various requirements for both. For express consent, organizations must provide the purposes for obtaining consent, and personal information regarding the sender. A variety of scenarios govern situations where consent can be implied. Messages sent by registered charities that are for the purposes of fundraising and/or which are non-commercial in nature are exempt under the CASL.

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