

Canadian Anti-Spam Legislation (CASL) Campaign and Database Compliance Checklist

Database Checklist

Use this Checklist as a guide to assessing existing databases for compliance with Canada's Anti-Spam Legislation (CASL).¹ This will assist in determining what subscribers, if any, will require reconfirmation² before or after CASL comes into force on July 1, 2014. **This document is provided for informational purposes only, and is not intended as legal advice.**

Status of Subscriber	Deadline for Reconfirmation
<p>1. Express consent</p> <p>Express consent exists if a subscriber has indicated that they would like to receive Commercial Electronic Messages (CEMs) in response to a request made accordance with CASL and related regulations, bearing in mind the following considerations:</p> <ul style="list-style-type: none"> The Canadian Radio-television and Telecommunications Commission (CRTC) and Industry Canada have indicated that they consider express consent obtained in accordance with the Personal Information Protection and Electronic Documents Act (PIPEDA) before CASL comes into force to be compliant with CASL. CASL states that any person claiming to have consent bears the burden of proving it. Thus, even if you have consent, consider whether you would have the ability to prove the existence of consent in response to an enforcement action. 	<p>Reconfirmation not necessary</p> <div style="text-align: right;"><input type="checkbox"/></div>
<p>2. Implied Consent</p> <p>a. Existing business relationship that arises before CASL comes into force³</p> <p>(i) the recipient has made a purchase, accepted a business opportunity, or bartered for something from the sender any time in the past; July 1, 2017</p> <p>(ii) the recipient has been party to a written contract with the sender any time in the past; or July 1, 2017</p> <p>(iii) the recipient made an inquiry or application in respect of anything referred to in (i) any time in the past. July 1, 2017</p> <p>b. Existing business relationship that arises after CASL comes into force</p> <p>(i) the recipient has made a purchase, accepted a business opportunity, or bartered for something from the sender in the past 24 months; Before expiry of 24 month time period</p>	<div style="text-align: right;"><input type="checkbox"/></div> <div style="text-align: right;"><input type="checkbox"/></div> <div style="text-align: right;"><input type="checkbox"/></div> <div style="text-align: right;"><input type="checkbox"/></div>

1. 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 the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23.

2. "Reconfirmation" refers to a request for express consent from existing subscribers.

3. This is based on the transitional provision in s. 66 of CASL, which establishes that an existing business relationship or existing non-business relationship that arises before CASL comes into force, without regard to the time periods that normally apply under those relationships, is deemed to exist for a period of three years after CASL comes into force (unless the recipient unsubscribes). Note that for the transitional provision to apply, a sender must have sent at least one CEM to the recipient based on this relationship before CASL comes into force.

Status of Subscriber	Deadline for Reconfirmation
(ii) the recipient has been party to a written contract with the sender in the past 24 months; or	Before expiry of 24 month time period
(iii) the recipient made an inquiry or application in respect of anything referred to in (i) in the past 6 months.	Before expiry of 6 month time period
c. Existing non-business relationship that arises before CASL comes into force ⁴	
(i) the recipient has made a gift or donation to, has volunteered for, or has attended a meeting organized by the sender any time in the past, and the sender is a registered charity, political party or organization, or a political candidate for publicly elected office ⁵ ; or	July 1, 2017
(ii) the recipient has had a membership ⁶ any time in the past in the sender organization, where the sender is a club, association or voluntary organization. ⁷	July 1, 2017
d. Existing non-business relationship that arises after CASL comes into force	
(i) the recipient has made a gift or donation to, has volunteered for, or has attended a meeting organized by the sender in the past 24 months, and the sender is a registered charity, political party or organization, or a political candidate for publicly elected office; or	Before expiry of 24 month time period
(ii) the recipient has had a membership in the past 24 months in the sender organization, where the sender is a club, association or voluntary organization.	Before expiry of 24 month time period
e. The recipient has conspicuously published their electronic address, which is not accompanied by a statement that the recipient does not wish to receive unsolicited messages, and the message is related to the professional or official capacity of the recipient.	Reconfirmation not necessary
f. The recipient has disclosed their address to the sender without indicating a wish not to receive unsolicited messages, and the message is related to the professional or official capacity of the recipient.	Reconfirmation not necessary
3. No consent	<p>Before July 1, 2014.</p> <p>Reconfirmation may not be necessary if you are only sending messages that are excluded from CASL.</p>

For more information about CASL contact Shaun Brown at sbrown@novation.com, or **613.656.1297**

4. See note 3.

5. As defined in federal or provincial legislation.

6. "Membership" is defined in subsection 7(1) of the Electronic Commerce Protection Regulations (Industry Canada).

7. "Club, association or voluntary organization" is defined in subsection 7(2) of the Electronic Commerce Protection Regulations (Industry Canada).

Campaign Checklist

Use this Checklist as a guide to assessing new or existing campaigns for compliance with Canada's Anti-Spam Legislation (CASL).¹ This document is provided for informational purposes only, and is not intended as legal advice. For further assistance in understanding your obligations under CASL, please contact Shaun Brown at sbrown@novation.com, or 613.656.1297.

1. Does CASL apply (is the message a commercial electronic message, or CEM)? Yes if

- a. the electronic message is 'commercial'. An electronic message is "commercial" if it encourages participation in a commercial activity, including a message that: (a) promotes a product, business or investment opportunity; or, (c) promotes a person who does one of those things; and
- b. the message is sent to an electronic address. An electronic address is an address used for the transmission of an electronic message to an email account, instant messaging account, telephone account, or any similar account.²

If yes to both (a) and (b), proceed to step 2. If no to either question, CASL does not apply (no need to proceed).

2. Is the message excluded from CASL? A CEM is excluded from CASL if it is sent

- a. to someone with whom the sender has a family or personal relationship;³
- b. to someone engaged in commercial activity consisting of an inquiry or application related to that activity;
- c. to another employee, representative, consultant or franchisee of the organization and the message concerns the activities of the organization;
- d. to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the recipient organization;
- e. in response to a request, inquiry or complaint or is otherwise solicited by the recipient;
- f. to satisfy a legal or juridical obligation;
- g. to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff;
- h. to enforce a right, legal or juridical obligation, court order, judgment or tariff;
- i. and received on an electronic messaging service if prescribed identifying information and unsubscribe mechanism are conspicuously published and readily available on the user interface through which the message is accessed, and the recipient consents expressly or by implication;
- j. to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the recipient;
- k. with the reasonable belief that the message will be accessed in a foreign state that is listed in the schedule to the regulations⁴ and the message conforms to the anti-spam law of that state;
- l. by or on behalf of a registered charity⁵ for the primary purpose raising funds for the charity; or

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2. CASL does not apply to live or recorded voice or fax communications that are addressed under the Unsolicited Telecommunications Rules.

3. As defined in section 2 of the Electronic Commerce Protection Regulations (Industry Canada).

4. There are 116 states listed in the Schedule to the Electronic Commerce Protection Regulations (Industry Canada).

5. As defined in subsection 248(1) of the Income Tax Act.

m. by or on behalf of a political party or organization, or a political candidate for publicly elected office⁶, for the primary purpose soliciting a contribution.⁷

If yes to any of (a) through (m), CASL does not apply (no need to proceed).

3. Is the message based on a referral? A single message can be sent based on a referral without consent if the following requirements are met

- a. the sender discloses in the message the ordinary or full name of the person who made the referral; and
- b. the individual who made the referral has a family relationship, personal relationship or an existing business relationship with both the sender and the recipient.

If the answer is yes to both (a) and (b), proceed to step 7. If no to either requirement, proceed to step 4.

4. Is the message excluded from requiring consent pursuant to subsection 6(6)?⁸ Yes if the message solely

- a. provides a quote or estimate sent in response to a request for a quote or estimate;
- b. facilitate, complete or confirm a commercial transaction previously agreed to by the recipient;
- c. provides information pertaining to warranty, recall, safety or security about a product purchased or used by the recipient;
- d. provides information about the ongoing use, purchase, or is otherwise about a subscription, membership,
- e. account, loan or similar ongoing relationship;
- f. provides information about an employment relationship or related benefit plan; or
- g. delivers goods or services, including product updates or upgrades.

If yes to any of (a) through (f), then consent is not required. Proceed to step 7.

5. Can consent be implied? Consent can be implied if any of the following circumstances apply

- a. An existing business relationship exists between the sender and recipient if
 - (i) the recipient has made a purchase, accepted a business opportunity, or bartered for something from the sender in the past 24 months;
 - (ii) the recipient has been party to a written contract with the sender in the past 24 months; or
 - (iii) the recipient made an inquiry or application in respect of anything referred to in (i) in the past 6 months.
- a. An existing non-business relationship exists between the sender and recipient if
 - (i) the recipient has made a gift or donation to, has volunteered for, or has attended a meeting organized by the sender in the past 24 months, and the sender is a registered charity, political party or organization, or a political candidate for publicly elected office; or
 - (ii) the recipient has had a membership⁹ in the past 24 months in the sender organization, where the sender is a club, association or voluntary organization.¹⁰

6. As defined in federal or provincial legislation.

7. As defined in subsection 2(1) of the Canada Elections Act.

8. There is some uncertainty with respect to subsection 6(6) of CASL. This Checklist is based on a strict interpretation, which assumes that a message that solely does any of the things listed in this subsection is a CEM, and therefore exempted only from the requirement for consent (requirements to provide prescribed information and an unsubscribe mechanism in each message still apply). However, according to the definition of a CEM (see step 1 of this Checklist), it is arguable that some of these messages are not CEMs, and therefore exempted from CASL altogether. Please seek legal advice if you have questions about how to interpret and apply this subsection.

9. "Membership" is defined in subsection 7(1) of the Electronic Commerce Protection Regulations (Industry Canada).

10. "Club, association or voluntary organization" is defined in subsection 7(2) of the Electronic Commerce Protection Regulations (Industry Canada).

- b. The recipient's electronic address has been conspicuously published, is not accompanied by a statement that the recipient does not wish to receive unsolicited messages, and the message is related to the professional or official capacity of the recipient.
- c. The recipient has disclosed their address to the sender without indicating a wish not to receive unsolicited messages, and the message is related to the professional or official capacity of the recipient.

If any of (a) through (d) apply, then consent can be implied. Proceed to step 7. If none of (a) through (d) apply, then express consent is required. Proceed to step 6.

6. Express consent. An organization must do all of the following when requesting express consent

- a. clearly and simply describe the purpose for obtaining consent;
- b. provide the name¹¹ of the person seeking consent;
- c. if consent is sought on behalf of another person, provide the name of that person, and indicate which person is seeking consent and on whose behalf consent is sought (check if N/A);
- d. if the identity of the person on whose behalf consent is being obtained is currently unknown, be as specific as possible when describing on whose behalf consent is obtained (check if N/A);
- e. provide the mailing address, and any one of a telephone number,¹² an email address or a web address of the person seeking consent or the person on whose behalf consent is sought (if different);
- f. inform the individual that they can unsubscribe at any time;
- g. ensure that the process for obtaining consent qualifies as "express" consent;¹³ and,
- h. ensure that evidence of express consent is retained.

7. Requirements when sending a CEM. A non-exempted CEM must meet all of following requirements.

- a. Identifying information. The following information must be included in every CEM¹⁴
 - (i) the name of the sender;
 - (ii) if the message is sent on behalf of another person, provide the name of that person as well, and indicate who is sending and on whose behalf the message is sent (check if N/A); and
 - (iii) the mailing address, and either a telephone number, an email address or a web address of the sender or the person on whose behalf the message is sent (if different).
- b. Unsubscribe mechanism. A CEM must include an unsubscribe mechanism that
 - (i) allows the recipient to unsubscribe from receiving further messages either by the same means by which the message is sent, or, where not practicable, by another electronic means, at no cost;¹⁵
 - (ii) is able to be "readily performed";
 - (iii) is valid for a minimum of 60 days after the message is sent; and
 - (iv) takes effect without delay, and in any event after no more than 10 business days.

11. A "name" refers to the name by which a person carries on business.

12. A telephone number must either provide access to an agent or a voice messaging system.

13. Please refer to the CRTC Guidelines on the use of toggling as a means of obtain express consent under Canada's anti-spam legislation (CRTC 2012-549) for guidance from the Canadian Radio-television and Telecommunications Commission (CRTC) on how to obtain express consent.

14. If it is not practical to include identifying information in the body of a message then this information can be provided on a webpage through a link included in the message.

15. An unsubscribe mechanism may, for example, require an individual to reply to a message or to click on a link to an unsubscribe page.

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returnpath.com

rpinfo@returnpath.com

Shaun Brown



Shaun Brown is a partner with nNovation LLP, an Ottawa-based law firm that specializes in regulatory matters. With several years of experience both in the public and private sectors, Shaun's practice focuses on e-commerce, e-marketing, privacy, access to information and information security, assisting with compliance and representing clients before tribunals and in litigation-related matters. He speaks and writes regularly on privacy, marketing and information management issues, and is the co-author of *A Complete Guide to e-Marketing under Canada's Anti-Spam Legislation*, published by Carswell. Shaun has an in-depth understanding of the online marketing industry, both from an operational and legal perspective, and has worked with many organizations across various sectors in preparing for Canada's Anti-Spam Legislation.

For more information about CASL or to receive legal consultation, contact Shaun Brown at sbrown@nnovation.com, or **616.656.1297**