



**CASL COMPLIANCE:**

# A Primer on Canada's Anti-Spam Legislation

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## Part 1

# Will Your Marketing Campaign be the Target of a Class Action Lawsuit or Regulatory Investigation for Failing to Comply with CASL?

*Written by David O. Klein, Esq.*

### **What is Canada's Anti-Spam Legislation ("CASL")?**

CASL<sup>1</sup> was passed into law on December 15, 2010, and is widely regarded as the strictest anti-spam legislation in the world. The Canadian Radio-Television and Telecommunications Commission, the Canadian Competition Bureau and the Office of the Privacy Commissioner of Canada are all empowered to enforce and issue administrative monetary penalties for violations of CASL.

### **How is CASL Different than CAN-SPAM?**

CASL is far broader and more restrictive in its application than the U.S. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"). For instance, while CAN-SPAM regulates the content and form of e-mail messages and establishes an "opt-out" regime, CASL prohibits all commercial electronic messages that are sent without proper consumer consent, including e-mail, text, social media, sound and image messages. Additionally, CASL places restrictions on the use of spyware and malware, which are not addressed by CAN-SPAM. Most importantly: 1) the monetary penalties that may be levied under

CASL are exponentially higher than those of CAN-SPAM; and 2) CASL will allow individuals to file private and class action lawsuits to collect statutory damages.<sup>2</sup>

### **What is a Commercial Electronic Message?**

CASL defines a “Commercial Electronic Message” or “CEM” as a business-related message sent by any means of telecommunication, including e-mail, text, sound or image messages.

### **What Entities are Subject to CASL?**

Any individual or business entity that sends, or assists in sending, a CEM to a consumer in Canada is subject to CASL. Moreover, any CEM that is sent from, routed to or accessed from a device in Canada is subject to CASL regulations.<sup>3</sup>

### **What are the Exceptions to CASL?**

Most business-to-business CEMs and those that are purely informational in nature are not subject to CASL regulations. Additionally, marketing companies and individuals will not be liable under CASL if the CEMs are:

- not intended to be accessed in or routed through Canada, and conform to the laws of the target country;
- sent within six (6) months of receiving a consumer’s request, inquiry or complaint;
- sent from a charitable organization or solely consist of political content;
- sent to consumers with whom the sender has an existing business relationship;
- sent to consumers with whom the sender has a familial, personal or other non-business relationship;
- sent on a one-time basis to consumers referred by a person that has an existing relationship with the sender;
- sent to consumers based on the authorization of a third party that has already secured the consumers’ consent<sup>4</sup>; or
- sent to a person engaged in commercial activities, and solely address issues relating to those activities.

### **What are the CASL Consent Rules?**

CASL permits the sending of CEMs to a consumer if the consumer expressly or implicitly consents to receive the CEMs.<sup>5</sup> Every CEM, even those sent with consent, must include a simple, clear and cost-free mechanism that allows consumers to revoke their consent and unsubscribe from the receipt of future CEMs.

## 1) Express Consent

Express consent may be properly obtained either orally or in writing, provided that the sender clearly discloses the purpose and manner of consent and the consumer affirmatively provides his/her consent. Electronic or digital forms of consent are acceptable forms of consent under CASL (i.e., consent obtained via email, website form, text message, or voice recording).<sup>6</sup>

If a dispute concerning consent arises, the sender bears the burden of proof to demonstrate that the consumer consented to receive CEMs in the manner provided. Evidence of Internet-provided written consent includes, but is not limited to, website pages that contain consumer consent language and fields, associated screenshot of the consent webpage as seen by the consumer, complete data record submitted by the consumer (with time and date stamp), together with the applicable consumer's computer IP address. For any type of oral consent, the sender must be able to verify the consent with a complete and unedited recording of the consumer providing consent. It is a best practice for advertisers to maintain a record of each consumer's consent for at least three (3) years, which is the statute of limitations to bring an action under CASL.<sup>7</sup>

*Sample Website Consent Language:*

I consent to receive electronic messages relating to [PURPOSE] that are sent to the e-mail address, social media profile and/or phone number above, by [ADVERTISER'S CORPORATE NAME], located at [ADDRESS]. Consent may be withdrawn at any time. Please Contact Us for details.<sup>8</sup>

## 2) Implied Consent

There are three (3) main ways in which consent to receive CEMs is implied under CASL:

- If there is an existing business or non-business relationship with the sender formed within the last two (2) years;
- If the consumer publicly publishes his/her electronic address(es) without limiting the right to receive CEMs; or
- If the consumer discloses his/her electronic address(es) to the sender without limiting the right to receive CEMs.

*Sample Unsubscribe Language that Must Appear in all CEMs<sup>9</sup>*

This electronic message was sent to you by [ADVERTISER'S CORPORATE NAME], located at [ADDRESS]. To unsubscribe from receiving further communications, contact us at [WEBSITE, PHONE NUMBER or EMAIL ADDRESS]<sup>10</sup>

## What are the Penalties for Failing to Comply with CASL?

CASL provides for either actual damages or statutory damages of \$200.00 per each violation, up to a maximum of C\$1 million/day for individuals and C\$10 million/day for corporate entities. More importantly, corporate officers, directors and agents may be held personally liable if they directed, authorized, acquiesced or participated in the commission of a CASL violation.<sup>11</sup> In determining the final amount of statutory damages to award, courts analyze the personal/ corporate history of the violator(s), the financial benefit obtained and the nature and scope of the violation(s). Considering that marketing campaigns may involve millions of CEMs, potential damages under CASL may escalate very quickly.

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**1** 1 CASL S.C. 2010, ch. 23.

**2** The CASL provision authorizing private rights of action is scheduled to go into effect on July 1, 2017.

**3** If the sender presents evidence that it has made a good faith effort to comply with CASL requirements, the sender will not face liability under CASL. See CASL § 33.

**4** Must include the name of the referring party to whom the consent was provided and include an unsubscribe mechanism that reaches both the sending and referring parties.

**5** CASL Regulations 81000-2-175.

**6** It should be noted that after July 1, 2014, any message requesting consent will likely be construed as a CASL violation. Therefore, any attempt to secure consent via e-mail, text or instant message should be sent to consumers prior to July 1, 2014.

**7** CASL § 23(1).

**8** The checkbox and the consumer's personal information must not be pre-populated in order to obtain valid express consent under CASL. Only the advertiser's address is required to be listed and the Contact Us link should list the advertiser's phone number, e-mail address and/or website.

**9** A hyperlink within the CEM containing the requisite language is also acceptable.

**10** The contact information provided must be valid for at least 60 days after the message is sent and any unsubscribe request must be honored within 10 business days of receipt.

**11** CASL §§ 20, 31, 51.





## Part 2

# Proof of Express Consent Under CASL: The TrustedForm Solution

*Written by ActiveProspect*

Once the proper disclosures are added to web forms where leads are collected, marketers must reliably capture and store evidence that proper consent was obtained for all Internet leads. Creating a reliable, consistent system for recording proper consent that will hold up under legal scrutiny presents a significant challenge for marketers. ActiveProspect has solved this problem with its patent-pending TrustedForm Lead Certification solution. It is a simple way to achieve compliance, avoid business disruptions and maintain the ability to communicate directly with consumers.

### **How it Works**

TrustedForm issues Certificates of Authenticity that independently verify the origin of Internet leads. It works by adding the TrustedForm script to the web page where leads are collected. The script then issues a TrustedForm Certificate for every lead generated on the site. This Certificate is a virtual document that provides critical evidence of express consent for each lead. Each TrustedForm Certificate is accessed by a unique URL so that it can be easily referenced as one additional field with each lead record in your database. Since it is presented as a complete authoritative document, it can be easily printed or passed along to the appropriate parties as needed. TrustedForm provides a centralized repository of authoritative evidence of consent, by storing all of your TrustedForm Certificates in your TrustedForm account for as long as needed.

TrustedForm Certificates independently collect and store the following information:

- Date and time of the consumer's visit to the web page;
- URL where the consumer completed the form. If the form is in an iframe, it also captures the parent URL where the form is framed;
- The IP address, browser, and operating system of the visitor who submitted the form;
- Real-time screenshot of exactly what the consumer saw when he or she visited the form page. This is important for a visual inspection of what the consumer saw and indicates whether data such as the email address and consent check box were pre-populated on the web form; and
- A complete copy of the HTML and images of the web page where the proper CASL consent and disclosure language appears and where the consumer provided his/her information. This is important to be able to interact with the web page as it existed at that point in time and allows for real-time page scanning for disclosure language.

A TrustedForm Certificate, in conjunction with a record of all the lead data that was submitted by the consumer, creates authoritative evidence of whether consent was properly obtained. In addition, TrustedForm contains other features that are important for verifying consent compliance.

**Lead Fingerprinting** technology is embedded in every TrustedForm Certificate. This feature solidifies evidence of consent by allowing a marketer to independently verify that the email address that was received with the lead data was the same email address that was actually inputted on the web form by the consumer. The verification process takes place in real time prior to the marketer emailing the consumer.

**Real-Time Page Scanning** verifies the presence of required consent and disclosures, and/or absence of restricted content, all in real time. This allows marketers to immediately verify consent prior to emailing the consumer, eliminating the need for manual review.

## **ADDRESSING THE CHALLENGES OF VERIFYING AND STORING EVIDENCE OF CONSENT**

TrustedForm addresses a variety of CASL compliance challenges:

**Challenge:** Must have proof of consent for every lead.

Any consumer contacted can bring a suit against a business for non-compliance with the regulations. Therefore, proof of consent must be stored for every single lead received in a marketing database. Businesses must be able to provide proof of consent for each individual by proving that the consumer in question was presented with the proper consent language and verifying the phone number submitted on the form.

**Solution:** Store a TrustedForm Certificate for every lead.

**Challenge:** Long-term storage of proof of consent.

It is a best practice for advertisers to maintain a record of each consumer's consent for at least three (3) years, the statute of limitations to bring an action under CASL. The best proof of consent is capturing an exact copy of the web page as seen by each individual consumer. However, capturing a full unique copy of the web page with all the image files for EVERY single lead, presents a massive data storage challenge.

**Solution:** TrustedForm solves this problem by indefinitely storing all this data on your behalf in your secured TrustedForm account. The system has been designed to easily scale with massive amounts of data storage.

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**Challenge:** URLs are insufficient evidence, as websites constantly change.

Consider how many times a website may change over three (3) years. Furthermore, many of the sites where leads are collected are dynamic websites (content changes for each individual visitor). To ensure compliance, a business should be able to prove exactly what the consumer saw when he or she submitted a form. A URL will not meet this requirement. A compliant record can be achieved with a real-time screenshot or page snapshot.

**Solution:** In addition to the URL, TrustedForm captures a real-time screenshot of exactly what the consumer saw when he or she visited the web page.

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**Challenge:** Verify that compliant consent language and associated form fields are present.

It is a best practice for disclosure/consent language and associated form fields to be presented to the consumer in a clear and conspicuous manner.

**Solution:** In addition to real-time page scanning, TrustedForm allows for visual review of exactly what the consumer saw, including whether fields were pre-populated.

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**Challenge:** Independent, authoritative, and reliable evidence.

In a legal dispute or customer complaint, it is the word of one party against the other. The consumer will claim that he or she did not give consent, while the lead buyer will argue that proper consent was obtained. Therefore, it is important to have authoritative evidence that is captured and stored by an independent third party because the burden of proof of compliance with the CASL ultimately rests with the marketer. This evidence needs to be in a form that can be clearly and easily presented as proof to the judicial fact-finder and to the individual consumer.

**Solution:** Retain competent counsel to draft CASL-compliant consent/disclosure language to be added to your web forms and emails to consumers. TrustedForm is a proven comprehensive solution for independently verifying consumer express consent in online leads. TrustedForm Certificates provide a clear, simple, and authoritative document for each lead.



# Conclusion

Compliance with the new CASL regulations as they relate to Internet leads is a three step process:

- 1.** Include CASL-compliant consent and disclosure language on your web forms and obtain express consumer consent;
- 2.** Capture and store a TrustedForm Certificate for each of your leads; and
- 3.** Verify in real time that the proper disclosures and associated form fields were present, using the TrustedForm page scanning feature.

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**ActiveProspect** is a marketing automation middleware platform that instantly qualifies internet leads. We help marketers automate their unique processes for acquiring qualified sales leads, building accurate email subscriber lists, and providing superior transparency for legal compliance. Each month, millions of opt-in Internet leads are processed on the ActiveProspect platform on behalf of customers across a wide range of industries. As industry innovators, we invented the concept of lead certification to help marketers independently verify the origin and authenticity of Internet leads. Founded in 2004, ActiveProspect is headquartered in Austin, Texas.

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