

Summary Guidance on Canada's Anti-Spam Legislation (CASL) for REALTOR® Members

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Canada's Anti-Spam Legislation (CASL) is a law that regulates the use of email, text messages and other forms of electronic messages for marketing purposes, as well as the installation of computer programs and applications (Apps). The provisions of CASL regarding commercial electronic messages (CEMs) will come into force on July 1, 2014. The provision of CASL regarding the installation of computer programs and Apps will come into force on January 15, 2015.

CASL contains significant penalties for non-compliance. The Canadian Radio-television Telecommunications Commission (CRTC) can impose fines of up to \$10 million per violation. The law also allows any person to sue if they have been sent a CEM or if an App has been installed on a device contrary to the rules, though this private right of action will not be in force until July 1, 2017. Because of these significant penalties, it is very important for REALTOR® members to comply with CASL.

Complying with CASL means there are five questions you should ask yourself before sending an electronic message:

1. Is the message a CEM?
2. Is the CEM subject to CASL?
3. Is there consent to send the CEM?
4. Does the CEM contain the required information?
5. Does the CEM contain an unsubscribe mechanism?

This brief guide will walk you through these five questions and provide an overview of the primary requirements for sending CEMs and installing Apps. For more information please refer to the comprehensive guidance document provided for REALTOR® members.

1. Is the message a CEM?

CASL generally applies to the sending of a CEM, which is broadly defined to include an electronic message involving commercial activity, including advertisements, offers or promotions relating to the purchase or sale of goods or services, as well as information about a business or investment opportunities. This would likely include a message that:

- provides information about a listing or open house;
- provides information regarding the sales record of a REALTOR® member;
- asks an individual if they are interested in buying or selling a property.

The following messages would not likely be considered a CEM:

- a message that delivers a standard form;
- a message that solely relates to a real estate transaction, such as an email sent to an existing client providing a copy of an offer of purchase;
- a message to a client or colleague that discusses only personal matters.

CASL applies to many forms of electronic messaging, including email, SMS text messages, and certain messages sent via social networking. It does not apply to live or recorded voice messages, or fax messages.

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2. Is the CEM subject to CASL?

There are certain messages that are exempt from CASL, such as:

- Messages sent to someone who the sender has a family or personal relationship with;
- Messages sent to inquire about or apply for a product or service;
- Messages sent to respond to an inquiry or complaint about a product or service;
- Messages that are communications among employees of an organization;
- Messages that are communications between employees of two organizations that have a relationship (e.g., between two brokerages that are cooperating on a sale);
- Messages sent to enforce a legal right.

All CEMs sent by REALTOR® members that do not qualify for these exemptions must comply with the requirements for sending CEMs under CASL.

3. Is there consent to send the CEM?

If the CEM is not exempt from CASL, as explained above, the default rule is that the REALTOR® member must have consent from the recipient before a CEM is sent. Consent may be either express or implied, depending on the circumstances. Some messages are exempt from the Act.

3.1. Implied consent

If consent can be implied, then a CEM can be sent without explicitly asking for permission. Consent may be implied in any of the following five circumstances:

1. The first CEM sent to follow up on a referral if the individual who made the referral has a family relationship, personal relationship, or an existing business relationship with both the REALTOR® member who sends the message and the person to whom the message is sent. The REALTOR® member must disclose in the message the name of the person who made the referral.
2. The REALTOR® member and the recipient have an existing business relationship. An existing business relationship arises where the REALTOR® member and the recipient have done some form of business together in the two years before the message is sent (e.g., a purchase, a sale or a contractual relationship), or an inquiry was made by the recipient in the six months before the message is sent.
3. The REALTOR® member and the recipient have an existing non-business relationship. A non-business relationship exists where the sender: (a) is a charity, political party or political candidate, and the recipient has volunteered or made a donation within the previous two years; or (b) is a club, association of volunteer organization of which the recipient has been a member within the previous two years.
4. The recipient has conspicuously published their electronic address (e.g., on a website), has not expressly stated that they do not wish to receive unsolicited messages, and the content of the message is related to the recipient's business or official capacity.
5. The recipient has disclosed their electronic address directly to the REALTOR® member, has not expressly stated that they do not wish to receive unsolicited messages, and the content of the message is related to the recipient's business or official capacity.

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Note that CEMs cannot be sent once the time periods described in 2 and 3 above expire, unless express consent is obtained. However, there is also a transitional provision for implied consent which provides that if an existing business relationship or existing non-business relationship has existed at any time prior to July 1, 2014, and the REALTOR® member and recipient have communicated through electronic communications, then consent is implied up to July 1, 2017, unless the recipient unsubscribes.

This means there is a three year window for REALTOR® members to send a CEM to obtain express consent, which does not expire unless a person withdraws their consent. It is important to note that normally an email sent to obtain consent would be considered a CEM itself, which means the sender would have to have consent before sending the email in order to comply with CASL. However, if express consent is sought in an email sent during this transitional period, then consent is implied for that CEM.

3.2 Express consent

If consent cannot be implied, then express consent is required. Express consent means that the recipient has been asked for consent and has responded affirmatively. The following information must be provided when requesting consent:

- The REALTOR® member must clearly explain the purpose for requesting consent, and inform the individual that they can withdraw their consent (i.e., unsubscribe) at any time.
- Identifying information must be set out clearly and prominently, including:
 - The name of the REALTOR® member; and
 - The contact information of the REALTOR® member, including a mailing address, and either a telephone number, email address, or web address.

Express consent can be obtained electronically, in writing, or verbally. REALTOR® members should keep evidence of the consent that is obtained.

4. Does the CEM contain the required information?

Every CEM that is sent must contain the following information, set out clearly and prominently:

- The name of the REALTOR® member; and
- The contact information for the REALTOR® member, including a mailing address, and either a telephone number, email address, or web address.

5. Does the CEM contain an unsubscribe mechanism?

Every CEM must contain a functional unsubscribe mechanism that enables the recipient to unsubscribe from receiving any further CEMs easily and at no cost. The unsubscribe mechanism might require the recipient to reply to a CEM with “unsubscribe” in the subject line, or click a link to a web-based unsubscribe page. The law states that unsubscribe requests must be processed ‘without delay’, and in any event no later than 10 business after the request has been sent.

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6. What are the rules for installing Apps?

The owner of a computer or device must provide express consent before an App is installed. Express consent means that the owner of the device has been asked for consent to install the App and has responded affirmatively.

When asking for consent, the owner must be provided with the purpose for requesting consent, a general explanation of the App, and the name and contact information of the person asking for consent.

Additional requirements apply if the App performs certain functions. For example, if the App collects personal information from a mobile device, this must be brought to the specific attention of the owner of the device.

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