
CRTC CLARIFIES APPLICATION OF CASL TO CHARITIES

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A. INTRODUCTION

Prior to Canada's anti-spam legislation (CASL) coming into force on July 1, 2014, there was general uncertainty concerning how CASL would apply to registered charities. When the final Governor-in-Council regulations for CASL were announced on December 4, 2013, a specific exemption was included for commercial electronic messages (CEMs) sent by or on behalf of a registered charity where the "primary purpose" of the CEMs is to raise funds for the charity.

On July 4, 2014, three days after CASL came into effect, the Canadian Radio-Television and Telecommunications Commission (CRTC) updated their "Frequently Asked Questions about Canada's Anti-spam Legislation" webpage (FAQ) concerning the application of CASL to registered charities. In particular, the CRTC attempted to address the uncertainty concerning the meaning of "primary purpose" with regard to the exemption. This *Charity Law Bulletin* provides a summary of the information contained in the updated CRTC FAQ.

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B. OVERVIEW OF FAQ

1. Clarification Concerning “Primary Purpose”

In addition to providing more basic information concerning CASL and registered charities, the FAQ also answers “When will a CEM sent by a registered charity be seen as having, as its ‘primary purpose’, the raising of funds for a charity?” The CRTC stated in their responses that,

The “primary purpose” of a CEM means the main reason or main purpose of the CEM. There could be a secondary or additional purpose to the message, but the principal purpose of the CEM must be to raise funds for the charity.

The response may not necessarily provide any additional certainty for registered charities, outside of stating that the “primary purpose” is the “principal purpose”. However, the statement that there may be additional purposes to the message, i.e., that the electronic message need not entirely be about raising funds, will be of assistance to registered charities in determining whether their fundraising messages are exempt under CASL.

The FAQ also provided helpful examples to illustrate the application of “primary purpose”, the first three of which the CRTC considers to be exempt, and the fourth which the CRTC considers to not be exempt:

Example 1: A CEM, sent by or on behalf of a charity, which promotes an event and/or the sale of tickets for an event – such as a dinner, golf tournament, theatrical production or concert or other fundraising event – where the proceeds from ticket sales flow to the registered charity.

Example 2: A registered charity sends, by e-mail, a newsletter which provides information about the charity’s activities or an upcoming campaign, and does not contain any material that seeks to encourage the recipient to participate in a commercial activity, then the message would not be a CEM for the purpose of CASL.

Example 3: A registered charity sends, by e-mail, a newsletter which provides information about the charity’s activities or an upcoming campaign, but which also contains a section which solicits donations and may also mention corporate sponsors who supported the charity (but does not encourage the recipient to participate in a commercial activity with that sponsor). While this message may be considered a CEM under CASL, the primary purpose of the message may be viewed as raising funds; therefore, the exemption in the GiC Regulations would apply.

Example 4: A registered charity sends, by e-mail, a newsletter which provides information about the charity’s activities or about a particular social issue. If this e-

mail also advertises the corporate sponsors of a charity's event and encourages the recipient to participate in a commercial activity with that sponsor, then section 6 of the CASL may apply without any exemption. The primary purpose of the message may not be to raise funds for the charity.

While the examples provided on the FAQ are helpful, some responses may cause confusion. The first example will be of comfort to many arts organizations that primarily advertise various concerts or other art productions being put on to raise funds for the charity. The example, however, of a newsletter providing information about the charity's activities but which does not encourage the participation in a commercial activity would not be a CEM in any event and so would not be an example of something which would require an exemption. Although the second example does confirm that "the message would not be a CEM for the purpose of CASL", this information is confusingly located under the heading of examples of CEMs where the primary purpose is raising funds.

The good news, though, is the fact that the CRTC does recognize that charities may still identify corporate sponsors in their communications without concern that the electronic message will become a CEM, provided that they "do not encourage the recipient to participate in a commercial activity with that sponsor." Determining when such communication encourages the recipient to participate in a commercial activity with a sponsor, and when it does not, will continue to be a challenge. However, it is likely that the exemption would not apply where a corporate sponsor is simply identified through "cause related marketing" whereby a charity promotes a good or service of the non-charitable sponsor on the basis that a portion of the revenues will be paid to the charity.

2. Application of Implied Consent

The FAQ also provides additional information with respect to implied consent under CASL for charities. While CASL specifically provides implied consent where the recipient of a CEM has made a donation or volunteered with the charity in the preceding two-years, CASL also provides implied consent for members of a "club, association, or voluntary organization".

It was not clear whether or not this membership relationship also applied to registered charities. The FAQ notes that implied consent "is created when a person makes a donation or gift to the registered charity, or performs volunteer work or attends a meeting organized by the charity". It is unclear whether "attends a meeting organized by the charity" is meant to indicate that "membership" in a

registered charity is also applicable, since that may be implied by the statement that someone attending a meeting is a member. However, since it is not always the case that a meeting organized by a charity is attended by members, or is exclusive to members, it may be prudent to contact the CRTC where there is uncertainty in relying upon implied consent from membership.

3. Focus of the CRTC

In answering positively to the question “Does Section 6 of CASL [the prohibition against sending a CEM without consent and proscribed information] apply to messages sent by registered charities?”, the CRTC concluded with a statement that,

Given that legitimate messages sent by registered charities raising funds are exempt under the Act, the CRTC will focus on messages sent by those attempting to circumvent the rules under the guise of a registered charity.

This statement appears to suggest that the application of section 6 to registered charities is a solution to a problem which has never existed. The Charities Directorate under administrative guidelines concerning fundraising already has the ability to revoke or deny registration of charities which are solely involved in fundraising as a commercial endeavour instead of charitable activities. As well, it is unlikely that the Charities Directorate will see a flood of applications by businesses attempting to gain registered charity status in order to cloak their CEMs as fundraising messages in order to circumvent CASL.

C. CONCLUSION

While the FAQ will be of assistance to registered charities in determining whether their electronic communications are compliant with CASL, it is likely that there will continue to be a need for further guidance with regard to the application of CASL to registered charities.

The FAQ may be viewed online at: <http://www.crtc.gc.ca/eng/com500/faq500.htm>.

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