

 <p><b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2014 10<sup>th</sup> Anniversary Toronto – June 13, 2014</b></p>
	<p><b>Complying with Canada's Anti-Spam Legislation: Legal Update for Not-for-Profit Organizations</b></p> <p>By Ryan M. Prendergast, B.A., LL.B. <a href="mailto:rmp@carters.ca">rmp@carters.ca</a> 1-877-942-0001</p> <p>© 2014 Carters Professional Corporation</p> <p><small>CARTERS PROFESSIONAL CORPORATION    Ottawa   Toronto   Mississauga   Orangeville TOLL FREE: 1-877-942-0001    <a href="http://www.carters.ca">www.carters.ca</a>   <a href="http://www.charitylaw.ca">www.charitylaw.ca</a>   <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a></small></p>

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<p><b>A. OVERVIEW OF TOPIC</b></p> <ul style="list-style-type: none"><li>• Current Status of Canada's Anti-Spam Legislation ("CASL")</li><li>• What is CASL?</li><li>• Application to Commercial Electronic Messages</li><li>• Penalties under CASL</li><li>• Steps to Take Before CASL in Force</li></ul>	
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<p><b>B. CURRENT STATUS OF LEGISLATION</b></p> <ul style="list-style-type: none"><li>• On December 14, 2010, Bill C-28, <i>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</i> (S.C. 2010, c. 23) received Royal Assent</li></ul>	
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- On March 7, 2012 the CRTC registered the final form of its regulations
  - The regulations were also published in the *Canada Gazette*, Part II, Vol. 146, No. 7 on March 28, 2012
- On December 4, 2013, Industry Canada registered the final form of its regulations
  - The regulations were also published in the *Canada Gazette*, Part II, Vol. 147, No. 26 on December 18, 2013

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- On December 4, 2013, the Ministry of Industry James Moore announced that that CASL will come into force on July 1, 2014
  - <http://news.gc.ca/web/article-en.do?m=%2Findex&nid=798829>
- On January 15, 2015, sections of CASL related to the unsolicited installation of computer programs or software come into force
- Private rights of action will not come into force until July 1, 2017

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- Further resources concerning CASL
  - Text of CASL: <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>
  - Telecom Regulatory Policy CRTC 2012-183 (CRTC regulations): <http://www.crtc.gc.ca/eng/archive/2012/2012-183.htm>
  - Electronic Commerce Protection Regulations: <http://www.gazette.gc.ca/rp-pr/p2/2013/2013-12-18/html/sor-dors221-eng.php>
  - Compliance and Enforcement Information Bulletin CRTC 2012-549 <http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>
  - Compliance and Enforcement Information Bulletin CRTC 2012-548: <http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>
  - See also [www.fightspam.gc.ca](http://www.fightspam.gc.ca)

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### C. WHAT IS CASL?

- Section 3 states that the purpose of the of CASL to regulate conduct that:
  - (a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;
  - (b) imposes additional costs on businesses and consumers;
  - (c) compromises privacy and the security of confidential information; and
  - (d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad

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- What does the CASL apply to?
  - Not just spam, also targets:
    - alteration of transmission data in an electronic message which results in the message being delivered to a different destination without express consent (phishing); and
    - installation of computer programs without the express consent of the owner of the computer system or its agent, such as an authorized employee (spyware, malware, key loggers, etc.)



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- Who enforces CASL?
  - The Canadian Radio-television and Telecommunications Commission (CRTC) to issue administrative monetary penalties for violations of Anti-Spam Legislation  Canadian Radio-television and Telecommunications Commission / Conseil de la radiodiffusion et des télécommunications canadiennes
  - The Competition Bureau to seek administrative monetary penalties or criminal sanctions under the *Competition Act*
  - The Office of the Privacy Commissioner to exercise new powers under an amended *Personal Information Protection and Electronic Documents Act*



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- What is spam?
  - “Spam generally refers to the use of electronic messaging systems to send unsolicited, bulk messages. Spam messages may contain deceptive content, support illegal activities and may also be used to deliver electronic threats such as spyware and viruses”
    - Glossary from [fightspam.qc.ca](http://fightspam.qc.ca)
  - However, this is not the definition that is used in CASL concerning the prohibition of “spam”

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#### D. APPLICATION TO COMMERCIAL ELECTRONIC MESSAGES

- Section 6 of the CASL prohibits “to send or cause or permit to be sent” a “commercial electronic message”
  - Unless:
    - The person to whom the electronic message is sent has consented to receiving it, whether the consent is express or implied; **and**
    - The CEM contains the prescribed information
- Section 6 prohibition does not apply to faxes, or recordings sent to telephone account
- Section 6 prohibition does include text messages, or electronic messages sent on a social media site in some cases

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- What is a “commercial electronic message” (CEM)?
  - Reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a “commercial activity” based on:
    - content of the message
    - the hyperlinks in the message to content on a website or other database
    - the contact information contained in the message



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- Includes:
  - (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
  - (b) offers to provide a business, investment or gaming opportunity;
  - (c) advertises or promotes anything referred to in paragraph (a) or (b); or
  - (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so



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- “commercial activity” means “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit, other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada”
- Definition expands on the definition for “commercial activities” in the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)

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### E. PENALTIES UNDER CASL

- Violation of section 6 or other prohibitions contained within CASL can result in monetary penalties of up to \$1,000,000 for individuals and \$10,000,000 for corporations
  - Early indication from CRTC is that they will apply a compliance continuum, i.e., education before punishment
- CASL also allows for a private right of action by an individual who alleges that they were affected by any act or failure to act that lead to a breach of the CASL
  - Not to come into force until July 1, 2017



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- Section 52 of CASL also provides that an "officer, director, agent or mandatary of a corporation" that commits a contravention of sections 6 to 9 of CASL is liable for the contravention if they "directed, authorized, assented to, acquiesced in or participated in the commission of that contravention."
- Subsection 53 also makes a person vicariously liable for breaches committed by their employees
- Due diligence defence provided under subsection 54(1)



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### F. STEPS TO TAKE BEFORE CASL IN FORCE

- What happens on July 1, 2014?
  - 3-year transitional period starts when CASL comes into force
  - consents to send CEMs are implied in the case of pre-existing business and non-business relationships, i.e., donors to registered charities
  - However, this period will end if the recipient says that they don't want to receive any more CEMs



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- What should my organization be doing to prepare?
  - Start reviewing electronic messages sent to donors, subscribers, third-parties, i.e., anyone.
    - Ask:
      - Are these CEMs?
      - If they are CEMs, are they exempt from CASL?
      - If they are not exempt, do we:
        - Have consent?
        - Have the prescribed requirements?

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**1. Is the electronic message a CEM?**

- Is it encouraging participation in a *commercial activity*?
- Does it contain hyperlinks or contact information for an individual that would encourage the participation in a commercial activity?
- Does it include an offer to purchase or sell a product, good, or service?
- Does it include offers to provide a business, investment or gaming opportunity?
- Does it advertise or promote a person who does any of the above?

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**2. If it is a CEM, is there an exemption?**

- Is the CEM exempt from **ALL** of CASL
  - The CEM is sent to someone who whom the sender has a personal or family relationship
  - The CEM is sent to a person engaged in commercial activity and consists solely of an inquiry or application related to that activity
  - The CEM is sent to another employee in the organization and the message concerns the activities of the organization, or the message is sent to an employee of another organization with which the organization has a relationship

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- The CEM is sent in response to a request, inquiry or complaint or is otherwise solicited by the person to whom the message is sent
- the CEM sent to satisfy a legal obligation; to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff
- the CEM sent and received on an electronic messaging service if the information and unsubscribe mechanism
- the CEM sent to a limited-access secure and confidential account (i.e., a bank portal or members only portal)

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- Are there specific exemptions for charities?
- Yes:
  - Regulations exclude a CEM that is sent by or on behalf of a registered charity as defined in subsection 248(1) of the *Income Tax Act* and the message has as its primary purpose raising funds for the charity
  - Unclear what scope a "primary purpose" will have
  - Does not apply to non-profit organizations or other entities that are not registered charities

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- Is the CEM exempt from the consent requirements of CASL?
  - Is the CEM providing a quote or estimate?
  - Does the CEM confirm a commercial transaction?
  - Does the CEM provide warranty information, product recall information or safety or security information?
  - Does the CEM provide notification or factual information about a product under a subscription, membership, or similar relationship?
  - Does the CEM provide information related to an employment relationship or related benefit plan?
  - Does the CEM deliver a product, goods or a service, including product updates or upgrades?

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**3. If the CEM is not exempt from all or part of CASL, does the organization have:**

- Consent?; and
- Does the CEM contain the prescribed information requirements
- Do we have consent?
  - Consent may be express or implied
    - Consent implied where the receiver conspicuously published the electronic address to which the message is sent, and the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages (ex. On a website)

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- Consent may also be implied where the electronic address to which the message is sent is disclosed without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address (ex. Through a business card)
- Implied consent also arises through an existing business or non-business relationship
- What is a non-business relationship?
  - The receiver has made a donation in the immediate two-year period the day before the CEM was sent and the sender is a registered charity
  - The receiver has volunteered in the immediate two-year period the day before the CEM was sent and the sender is a registered charity

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- The receiver was a member in the immediate two-year period the day before the CEM was sent and the sender is a “club, association, or voluntary organization” as defined in regulation
- Who is a member of a “club, association or voluntary organization”
  - “membership is the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements”
- What is a “club, association or voluntary organization”?
  - Regulations from Industry Canada uses similar definition of a “non-profit organization” as defined in the *Income Tax Act* (Canada)
  - exemption does not include other tax-exempt entities

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- What is a business relationship?
  - The receiver purchased a product, good, or service from the organization within the two-year period immediately before the day on which the message is sent
  - The receiver accepted a business, investment or gaming opportunity within the two-year period immediately before the day on which the message is sent
  - A written contract was entered into during the two-year period before the message is sent
  - The receiver made an inquiry or application within the six-month period immediately before the day on which the message is sent

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- Do we have express consent?
  - Onus is on the organization to prove that it had express consent
  - Express consent may be obtained orally or in writing
    - CRTC requires oral consent to be demonstrated by a complete and unedited audio recording of the consent or verified by a third-party
  - Need a paper or electronic copy of the consent having been given

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- What must be in the CEM?
  - Does the CEM set out the name of the organization?
  - Does the CEM include the mailing address of the organization and either:
    - A telephone number providing access to an agent or a voice messaging system
    - An email address or a web address of the organization

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- If it is not practical to include the prescribed information in the CEM, can include a link to a website that contains the prescribed information
  - This information must be set out **clearly** and **prominently**
  - Must be valid for 60 days
- Must also include an unsubscribe mechanism:
  - Must enable the receiver to indicate to the sender, at no cost, that they wish to no longer receive any CEMs from the sender
  - Regulations require that the unsubscribe mechanism must be “readily performed”



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- If the unsubscribe mechanism is not in the same electronic message, but is instead done through a link to a website, the link must be valid for a minimum of 60 days after the CEM is sent
  - Unsubscribe must be given effect within 10 days of the request being received
- CRTC Compliance and Enforcement Information Bulletin 2012-548 says "readily performed" includes a "link in an email that takes the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender"

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- Review Existing Consents to prepare for after 3-year transitional period
  - How have we obtained consent in the past? Do we have records of those consents?
  - Are consents obtained under PIPEDA sufficient if they were opt-out?
    - No!
  - Options:
    - Turn implied consents into express consents, or obtain express consent going forward (easiest option)
    - Create databases to track differing levels of consent, etc. (very difficult)

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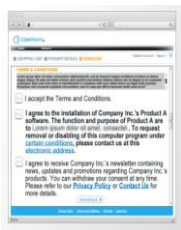
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- CRTC requires that requests for consent must not be "subsumed in, or bundled with, requests for consent to the general terms and conditions of use or sale"



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- May use a separate tick-box or icon in obtaining express consent, but must be proactively checked (i.e., cannot be already checked for the person)



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- Also acceptable: Typing an email address into a field to indicate consent
- Note that an electronic message seeking express consent is a CEM
  - Therefore, should obtain express consent before July 1, 2014
  - Must include prescribed information; and
  - A statement indicating that the person whose consent is sought can withdraw their consent
  - If you obtained valid express consent prior to CASL coming into force, will be able to continue to rely on that express consent after CASL comes into force, even if your request did not contain the requisite identification and contact information



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- What Else can Be Done?
  - Update Privacy Policy and/or other communication policies
    - Ensure that employees are aware of CASL
    - Corporation can be vicariously liable for breach of CASL by employees
    - Having a policy is not enough; need to ensure that it is implemented and updated from time to time
  - Review Liability Shields like Insurance
    - Are the directors covered under the current directors' and officers' policies for breach of CASL?
    - Can the board rely on due diligence defence?



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- What about social media sites?
  - The publication of blog posts or other publications on microblogging and social media sites does not fall within the intended scope of CASL
  - However, CASL will apply if using direct messaging service to an electronic address via social media, ex. DMing on Twitter or sending a personal message on Facebook
- Ensure that Third-parties are Compliant with CASL
  - Many charities use third-parties to provide bulk electronic messages to donors/members
  - Compliance by third-parties with US legislation not sufficient for the purposes of compliance with CASL

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