
20TH ANNUAL CHURCH AND CHARITY LAW SEMINAR

Mississauga – November 14, 2013

Communicating with Donors: Navigating Canada's New Anti-Spam Law

By Ryan M. Prendergast, B.A., LL.B.

rmp@carters.ca

1-877-942-0001

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Toronto · Ottawa
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Toll Free: 1-877-942-0001

	THE 20TH ANNUAL CHURCH & CHARITY LAW™ SEMINAR Mississauga – November 14, 2013
	Communicating with Donors: Navigating Canada's New Anti-Spam Laws By Ryan M. Prendergast, B.A., LL.B. rmp@carters.ca 1-877-942-0001 © 2013 Carters Professional Corporation
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A. OVERVIEW OF TOPIC	
<ul style="list-style-type: none">• Current Status of Anti-Spam Legislation• What is the Anti-Spam Legislation?• Application to Commercial Electronic Message• Implied Consent for Charities and Non-profit Organizations• Penalties under Anti-Spam Legislation• Steps to Take Before Anti-Spam Legislation in Force	
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B. CURRENT STATUS OF LEGISLATION	
<ul style="list-style-type: none">• 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 (the "Anti-Spam Legislation")	
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- The Anti-Spam Legislation is not yet proclaimed in force
 - The anticipated date of proclamation is still not know
 - Expected to be proclaimed in force in 2014
 - Regulations for the Anti-Spam Legislation are still being finalized
 - Regulations by Canadian Radio-television and Telecommunications Commission (CRTC) have been finalized
 - Regulations by Industry Canada have not yet been completed



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- On March 7, 2012 the CRTC registered the final form of its regulations referred to as the Electronic Commerce Protection Regulations
 - The regulations were also published in the *Canada Gazette*, Part II, Vol. 146, No. 7 on March 28, 2012
 - CRTC had previously released draft regulations on June 30, 2011

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- On January 5, 2013, a revised set of the proposed Electronic Commerce Protection Regulations were pre-published by Industry Canada in Part I of the *Canada Gazette* Vol. 147, No. 1 for a consultation period of 30 days, ending February 4, 2013
 - Previously, Industry Canada released draft regulations on July 9, 2011, which were published in the *Canada Gazette*, Part I, for a 60-day consultation period
- Assumed that once the Electronic Commerce Protection Regulations are finalized, the Anti-Spam Legislation will come into force shortly thereafter

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- Further resources concerning Anti-Spam Legislation
 - Text of Anti-Spam Legislation: <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>
 - 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>
 - Draft Industry Canada regulations: <http://gazette.gc.ca/rp-pr/p1/2013/2013-01-05/html/reg1-eng.html>
 - See also www.fightspam.gc.ca

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C. WHAT IS THE ANTI-SPAM LEGISLATION?

- Section 3 states that the purpose of the of the Anti-Spam Legislation 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 Anti-Spam Legislation 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 the Anti-Spam Legislation?
 - 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.gc.ca
 - However, this is not the definition that is used in the Anti-Spam Legislation concerning the prohibition of “spam”

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D. APPLICATION TO COMMERCIAL ELECTRONIC MESSAGES

- Section 6 of the Anti-Spam Legislation 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

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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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- What information must be in a CEM to comply with the Anti-Spam Legislation?
 - Name of the sender or the name on whose behalf the CEM was sent
 - If CEM sent on behalf of someone else, a statement indicating who is sending the CEM and on whose behalf it is being sent
 - Contact information of the sender, i.e., telephone number that leads to an agent or voicemail, mailing, email, or web address

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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 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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E. CONSENT FOR CHARITIES AND NON-PROFIT ORGANIZATIONS




- Can only send a CEM where there is consent, either express consent or implied
 - Implied consent includes:
 - There is an “existing business” or “non-business relationship”
 - The receiver has “conspicuously published” his or her address and hasn’t indicated he or she doesn’t want to receive spam
 - As provided for in regulation



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- 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
 - 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



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- What is a “club, association or voluntary organization”?
 - Proposed regulations from Industry Canada uses the definition of a “non-profit organization” as defined in the *Income Tax Act* (Canada)
 - Problematic because this exemption does not include other tax-exempt entities that are also clubs, associations or voluntary organizations



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- Section 6 prohibition also does not apply where:
 - There is a “personal” or “family” relationship
 - The electronic message is sent to someone engaged in “commercial activity” and the message is solely an inquiry related to that activity
 - Or certain other situations including:
 - provides a quote or estimate for the supply of a product, goods, a service, land or an interest or right in land
 - facilitates, completes or confirms a commercial transaction



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F. PENALTIES UNDER ANTI-SPAM LEGISLATION

- Violation of section 6 or other prohibitions contained within Anti-Spam Legislation can result in monetary penalties of up to \$1,000,000 for individuals and \$10,000,000 for corporations

Anti-Spam Legislation 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 Anti-Spam Legislation


- Early indication from CRTC is that they will apply a compliance continuum, i.e., education before punishment



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- Section 52 of Anti-Spam Legislation also provides that an “officer, director, agent or mandatary of a corporation” that commits a contravention of sections 6 to 9 of Anti-Spam Legislation 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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G. STEPS TO TAKE BEFORE ANTI-SPAM LEGISLATION IN FORCE

- Review solicitations sent to donors/members
 - Do they contain the requirements of the Electronic Commerce Protection Regulations
 - Do they contain “commercial” content
 - i.e., is the electronic message purely a solicitation for donations, or does it also include an offer for a product or other services?
 - Can you separate communications to donors/members?



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- Review Existing Consents
 - Are consents obtained under *Personal Information Protection and Electronic Documents Act* sufficient?
 - No – requirements for express consent under Anti-Spam Legislation differ
 - Turn Implied Consents into Express Consents, or obtain express consent going forward

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- How do you obtain express consent?
 - Must explain the purpose or purposes for which the consent is being sought
 - May be obtained orally or in writing
 - CRTC information bulletin 2012-548 states that oral consent can be proven where verified by a third-party or through a “complete and unedited” audio recording
 - “in writing” includes both paper and electronic forms of writing




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- Must include the name of the person or on whose behalf the consent is being sought
- Contact information; and
- A statement indicating that the person whose consent is sought can withdraw their consent
- 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)
- Express consent cannot be obtained through opt-out consent mechanisms
-  - 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 proclamation

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- Update Privacy Policy and/or other communication policies
 - Ensure that employees are aware of Anti-Spam Legislation
 - Corporation can be vicariously liable for breach of Anti-Spam Legislation by employees
- Review Liability Shields like Insurance
 - Are the directors covered under the current directors' and officers' policies for breach of Anti-Spam Legislation?
 - Can the board rely on due diligence defence?




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- Ensure that Third-parties are Compliant with Anti-Spam Legislation
 - Many charities and non-profit organizations 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 Anti-Spam Legislation


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- When should our organization be preparing for the Anti-Spam Legislation?
 - Once the regulations are finalized, the government will indicate what date the Anti-Spam Legislation will be proclaimed in force in order for affected parties to prepare
 - On proclamation, there is implied consent for a period of three-years if there is an existing business or non-business relationship
 - This implied consent will end if the recipient indicates that they no longer want to receive CEMs

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