
21ST ANNUAL CHURCH & CHARITY LAW SEMINAR

Mississauga – November 13, 2014

Communicating with Flock in a Post Anti-Spam World

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A. OVERVIEW OF TOPIC

- Review of Canada's Anti-Spam Law (CASL) Basics
- Application to Commercial Electronic Messages Sent by Registered Charities Clarified
- Practical Steps to Comply with CASL following the July 1, 2014 Implementation Date
- Developing a Compliance Program

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B. REVIEW OF CANADA'S ANTI-SPAM LAW (CASL) BASICS

- 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

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- Section 6 prohibition does include text messages, or electronic messages sent on a social media site in some cases
- 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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- 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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- Liability for Directors and Officers
 - 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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C. CLARIFICATION OF APPLICATION TO COMMERCIAL ELECTRONIC MESSAGES SENT BY REGISTERED CHARITIES CLARIFIED

- 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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- Clarification from CRTC
 - July 4, 2014 – CRTC updated its “Frequently Asked Questions” webpage regarding the application of CASL to registered charities
 - The FAQ indicates that “*primary purpose*” 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 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

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- *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

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- *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

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- *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.
 - 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.

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D. PRACTICAL STEPS TO COMPLY WITH CASL FOLLOWING THE JULY 1, 2014 IMPLEMENTATION DATE

- I Missed the July 1, 2014 deadline to get express consent! What do I do now?
 - 3-year transitional period
 - Consents to send CEMs are implied in the case of pre-existing business and non-business relationships, i.e., donors to registered charities prior to July 1, 2014
 - Does not apply to existing business or non-business relationships that came into existence after July 1, 2014



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- Review existing consents to obtain express consent during the 3-year transitional period
 - How have we obtained consent in the past? Do we have records of those consents?
 - 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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- What should my organization be doing during the transition period?
 - Review 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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- 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

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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)
- 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”

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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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- Note that an electronic message seeking express consent is a CEM
 - CANNOT send where no existing express or implied consent from the recipient
 - 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



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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

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E. DEVELOPING A COMPLIANCE PROGRAM

- Why should registered charities implement a compliance program for CASL?
 - CG-013 *Fundraising by Registered Charities* states that registered charities cannot engage in fundraising activities that are illegal or are contrary to public policy
 - Examples include “those that are criminally fraudulent, or violate federal or provincial statutes governing charitable fundraising, charitable gaming, the use of charitable property, or consumer protection”

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- On June 19, 2014, the Canadian Radio-television and Telecommunications Commission (CRTC) released Compliance and Information Bulletin CRTC 2014-326: <http://www.crtc.gc.ca/eng/archive/2014/2014-326.htm>
 - CRTC stated that the bulletin is meant to “help businesses facilitate compliance” with CASL and/or the Canadian Radio-television and Telecommunications Commission Unsolicited Telecommunications Rules
 - The bulletin describes important components of an effective corporate compliance program and provides guidance to develop such a program

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F. COMPONENTS OF A CASL COMPLIANCE PROGRAM

1. Senior Management Involvement

- CRTC guidelines suggest larger organizations have senior management name a member “as the business’ chief compliance officer, who is responsible and accountable for the development, management, and execution of the business’ corporate compliance program”
- Small to mid-sized organizations may simply “identify a point person who is responsible and accountable for compliance”

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2. Conducting a Risk Assessment

- CRTC recommends “Conducting a risk assessment to determine which business activities are at risk for the commission of violations under the telemarketing rules and/or CASL”
- What are the areas of risk for a registered charity or non-profit organization?
 - Newsletters and other mass emails
 - Review fundraising solicitations sent by the registered charity?
 - Are they exempt under CASL?

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- Related business activities
 - ex., rental of excess capacity, private school gift shop, or museum restaurant
- Conferences and other educational events organized by non-profit organizations
- Use of consent obtained from third-parties or provided to third-parties

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3. Written Corporate Compliance Policy

- CRTC recommends that an organization “update the policy as often as necessary to keep pace with changes in legislation, non-compliance issues, or new services or products”
 - This may involve modifying the policy to account for a new related business activity or fundraising campaign which may not be exempt
- It is also important to make the policy accessible to all employees, including managers, and in the case of registered charities and NPOs, volunteers assisting in sending emails or other electronic messages on behalf of the organization

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- What should a policy include?
 - establish internal procedures for compliance with the CASL;
 - address related training that covers the policy and internal procedures;
 - establish auditing and monitoring mechanisms for the corporate compliance program;
 - establish procedures for dealing with third-parties (for example, partners and subcontractors) to ensure that they comply with CASL; and
 - address record keeping, especially with respect to consent

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4. Record Keeping

- Why keep records? CRTC view:
 - identify potential non-compliance issues;
 - investigate and respond to consumer complaints;
 - respond to questions about the organization's practices and procedures;
 - monitor their corporate compliance program;
 - identify the need for corrective actions and demonstrate that these actions were implemented; and
 - establish a due diligence defence in the event of complaints to the Commission against the business

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- What types of records should be kept?
 - CASL records (CRTC view):
 - commercial electronic message policies and procedures;
 - all unsubscribe requests and actions;
 - all evidence of express consent (e.g. audio recordings or forms) by consumers who agree to be contacted via a commercial electronic message; and
 - commercial electronic message recipient consent log

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- What other records should be kept?
 - Written acknowledgements from employees that they have received training concerning CASL and its impact on the registered charity or NPO
 - Results of any audit or review of a corporate compliance program
 - Records of disciplinary action, if any, taken against an employee or volunteer for any contravention of the compliance program
 - Results of any risk assessment made in relation to a charitable, related business, or other activity

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5. Training Program

- CRTC suggests that organizations “consider developing and implementing a training program, including refresher training, regarding the corporate compliance policy for current and new employees, including managers”
- Organizations should “monitor employee comprehension of the corporate compliance policy” and “evaluate the effectiveness of this training at regular intervals”
- Any training program should be flexible based upon the size of the organization
 - Smaller charities and NPOs may only have the resources to conduct annual refreshers on CASL

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6. Auditing and Monitoring

- Arguably the most important component of any CASL compliance program
- The existence of a compliance program or written CASL policy will not be of any assistance if they are ignored or not followed by a registered charity or NPO
- Regular auditing should:
 - prevent and detect misconduct
 - assess the effectiveness of the compliance program
- It's also important for the smaller charities and NPOs to ensure the board is aware of the audit

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7. Complaint Handling System

- CRTC recommends that the chief compliant officer or point person “put in place a complaint-handling system to enable customers to submit complaints to the business”
- Why have a complaint handling system?
 - A complaint handling system is not related to the obligation of the organization to action unsubscribe requests or otherwise comply with CASL
 - However, having a process to respond to complaints may deter aggrieved individuals from filing a complaint with the CRTC or other regulator

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7. Corrective (disciplinary) action

- Taking action against employees who contravene CASL on behalf of the organization will demonstrate the seriousness of the organizations approach to CASL, and possibly deter other employees
- Larger registered charities or NPOs may have employees that are responsible for communicating with donors, volunteers, or members
- However, smaller charities likely rely on the assistance of volunteers
 - As non-employees or interns, volunteers are not generally subject to discipline

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8. Who Else Should Be Involved In A Compliance Strategy?

- 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
 - A copy of the CASL policy or other relevant components of the compliance strategy may be provided to third-parties
 - However, it should be clear that they are not to rely on the for the purposes of compliance with CASL


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- Insurers?
 - Any CASL compliance strategy may be subject to individuals not following it, the strategy falling out of date, or unintended consequences
 - A written policy may not be a complete bar to a complaint
 - Therefore, charities and NPOs should determine whether or not their insurer or other policy providers will provide coverage for non-compliance with CASL
 - Charities and NPOs that work with third-party fundraisers may want to require that they indemnify the charity or NPO if a complaint occurs



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