
HERE COMES CANADA'S ANTI-SPAM LEGISLATION: IS YOUR ORGANIZATION PREPARED?

*By Ryan M. Prendergast**

A. INTRODUCTION

Bill C-28, commonly referred to as “Canada’s Anti-Spam Legislation” (CASL) received Royal Assent on December 14, 2010.¹ As previously discussed in earlier *Charity Law Bulletins* and *Updates*,² CASL will impact how charities and non-profit organizations communicate with their donors, volunteers and members. Since CASL received Royal Assent, there has been much speculation concerning when CASL would come into force. However, on December 4, 2013, the Minister of Industry, James Moore, announced that CASL will come into force on July 1, 2014.³ This announcement was followed by the publication of final regulations under CASL in the *Canada Gazette*, Part II, Vol. 147, No. 26 on December 18, 2013.⁴ Most notably, the final form of regulations includes a specific exemption from CASL for select electronic messages sent by registered charities for fundraising purposes.

* Ryan M. Prendergast, B.A., LL.B., is an associate of Carters Profession Corporation.

¹ The full text of the legislation can be found online at: <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>.

² See Ryan Prendergast, “New Rules for Spam Impacts Registered Charities and Not-for-profits” *Charity Law Bulletin No. 238*, January 27, 2011 <http://www.carters.ca/pub/bulletin/charity/2011/chylb238.htm>; “Regulations for Anti-spam Legislation Released for Consultation” *Charity Law Bulletin No. 257*, August 18, 2011, <http://www.carters.ca/pub/bulletin/charity/2011/chylb257.htm>; “CRTC Releases Final Regulations under Anti-Spam Legislation”, *Charity Law Update*, March 2012, <http://www.carters.ca/pub/update/charity/12/mar12.pdf>; “Anti-Spam Legislation Expected to come into Force in 2013”, *Charity Law Update*, May 2012, <http://www.carters.ca/pub/update/charity/12/may12.pdf>; “Anti-spam Information Bulletins Released by CRTC”, *Charity Law Update*, October 2012, <http://www.carters.ca/pub/update/charity/12/oct12.pdf>; and “Industry Canada Publishes Revised Anti-Spam Regulations”, *Charity Law Bulletin No. 298*, January 30, 2013, <http://www.carters.ca/pub/bulletin/charity/2013/chylb298.htm>.

³ Government of Canada, “Harper Government Delivers on Commitment to Protect Canadian Consumers from Spam”, December 5, 2013, online at: <http://news.gc.ca/web/article-en.do?m=%2Findex&nid=798829>.

⁴ P.C. 2013-1324, C. Gaz. 2013. II., online at: <http://www.gazette.gc.ca/rp-pr/p2/2013/2013-12-18/html/sor-dors221-eng.php>.

This *Charity Law Bulletin* reviews the exemption under CASL for registered charities in the recently published final regulations, together with a summary of information contained in earlier *Charity Law Bulletins*, as well as a brief review of practical steps charities and non-profit organizations can take to prepare for CASL.

B. EXEMPTION FOR CHARITIES IN THE ELECTRONIC COMMERCE PROTECTION REGULATIONS

As noted above, the final regulations under CASL now include a new exemption for select commercial electronic messages sent by registered charities. As a review, a commercial electronic message is one in which it is reasonable to conclude it has as its purpose, or one of its purposes, to encourage participation in a “commercial activity.” This can include offers to sell a product, or providing a business or gaming opportunity. In this regard, paragraph 3(g) of the Electronic Commerce Protection Regulations (“Regulations”) now states that CASL does not apply to a commercial electronic message (“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**” (emphasis added).

The Regulatory Impact Analysis Statement issued by Industry Canada⁵ (“RIAS”) indicates that the exemption was added to address the concerns raised by the charitable sector that CASL would unduly impact the ability of registered charities to raise funds. As such, the RIAS states that “[t]o address these concerns, an exemption is introduced in these Regulations for fundraising messages sent by or on behalf of registered charities, regardless whether the recipient previously donated to or volunteered for the organization.”

While the exemption will provide significant relief for registered charities that were concerned about the impact of CASL on their fundraising activities, it should be noted that the exemption is of assistance only for registered charities. In this regard, a CEM that has fundraising as its primary purpose sent by a Canadian amateur athletic association or other qualified donees for tax purposes that are able to issue donation receipts to individuals or corporations will not be exempt under the Regulations. As well, it is not clear to what extent a CEM sent for fundraising purposes may also include commercial purposes before the CEM will no longer be considered having a “primary purpose” of raising funds. For example,

⁵ Industry Canada, Regulatory Impact Analysis Statement, December 4, 2013, online at: <http://fightspam.gc.ca/eic/site/030.nsf/eng/00271.html>

an electronic message that contains a solicitation for fundraising, but also includes an invitation to participate in a commercial activity that is displayed more prominently in the electronic message might arguably not be exempt under the Regulations. As well, while the Regulations exempt a specific type of electronic message sent by registered charities, they do not exempt all electronic messages sent by registered charities. In this regard, while a registered charity may successfully send 99 CEMs that are exempt as having a primary purpose of fundraising, if one CEM that does not have a primary purpose of fundraising is sent, then the charity may be exposed to penalties under the legislation if the CEM is not compliant with CASL. Having been exempted by the Regulations for the previous electronic messages will not mean that the occasional CEM will be protected by the Regulations.

It is hoped that guidance will be forthcoming from Industry Canada concerning how “primary purpose” is to be interpreted in order to provide best practices for charities.

C. GETTING READY FOR CASL

Now that charities and non-profit organizations know that July 1, 2014 will be the implementation date for CASL, organizations will have several months, together with a three-year transition period beginning on July 1, 2014, to prepare. In this regard, below is a summary of suggested steps to take, and items to review, in order to assist charities and non-profit organizations in preparing for the implementation date of CASL.

1. What happens on July 1, 2014?

On July 1, 2014, certain portions of CASL will come into force. Section 66 of CASL will provide a brief transition period with respect to organizations obtaining consent to send CEMs. In this regard, on the date that CASL comes into force, existing implied consents through business or non-business relationships will continue for a three-year period unless the recipient indicates that they no longer wish to receive CEMs from the sender.⁶

However, it is important to note that although charities and non-profit organizations will be able to rely on implied consent for existing non-business relationships (described below) for this three-

⁶ See also Industry Canada, -FAQs – “Canada’s Anti-spam Legislation”, online at: http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00050.html

year period, CEMs sent by charities or non-profit organizations which are not exempt under the Regulations will still need to comply with the form requirements under CASL. As a result, if a charity or non-profit organization plans on continuing to send CEMs after the implementation date, they will need to include the prescribed information discussed below.

2. Am I Sending a Commercial Electronic Message?

In order to determine if a particular message must comply with CASL, it will be necessary for charities or non-profit organizations to determine if they are sending a CEM. CASL defines a CEM as an electronic message where it would be "...reasonable to conclude [it] has as its purpose, or one of its purposes, to encourage participation in a "commercial activity".⁷ This determination is made based upon the content of the message, hyperlinks to content on a website, or contact information contained in the electronic message. This can include an electronic message that:

- “(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”

For charities, it is important to note that electronic messages which contain information about charitable gaming, such as charitable raffles or bingo events, may be caught by the definition of CEM.

However, in addition to the exemption for CEMs sent by registered charities that have a primary purpose of fundraising, Regulations under CASL also exempt a variety of other forms of electronic messages, including a CEM generally:

- Sent by an employee to an employee;
- Sent as a response to a request, inquiry or complaint;

⁷ CASL, s.1(2)

- Sent to satisfy a legal or juridical obligation, provide notice of an existing or pending legal right/obligation, enforce a legal right/obligation, enforce a right arising under law
- Sent as part of an electronic messaging service;
- Sent to a limited-access secure and confidential account;
- Sent to a foreign state listed by regulation; or
- Sent to solicit funds for a political candidate.

3. Do I Need Consent?

Section 6 of CASL prohibits the sending of a CEM unless the sender has consent from the receiver and the CEM contains certain prescribed information.

There are, however, exceptions to the need to obtain consent where the sender and receiver have a family or personal relationship as defined in the Regulations. As well, the requirement for the sender of a CEM to have consent does not apply for a CEM that is solely to:

- Deliver a quote for services;
- Facilitate, complete or confirm a commercial transaction;
- Provide warranty or recall information;
- Provide notification or information about subscription, account, membership or loan;
- Provide employment information; and
- Deliver goods or an upgrade under contract.

4. What If I had Consent Under PIPEDA?

Many charities and non-profit organizations will have already sought to obtain consent from their donors, members, subscribers, volunteers, etc., for the purposes of compliance with *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), as a matter of caution due to overlapping privacy laws across Canada. In most cases, consent obtained for privacy law purposes will not be sufficient for CASL. This is because such consents were often obtained through an opt-out mechanism where the individual agreed to receive information from the charity or that their personal information might be shared with third-parties unless they opted out of doing so. CASL, however, requires the receiver of a CEM to have expressly consented to having received it, unless there is implied consent based upon an existing business or non-business relationship discussed next.

5. How Do I Obtain Consent?

a) Express Consent

To obtain express consent, the charity or non-profit organization must explain the purpose or purposes for which the consent is being sought, i.e., that consent is being sought to send a CEM. The CRTC, which is also responsible for enforcing CASL, has published two information bulletins on its website that provide its interpretation concerning Regulations under CASL with regard to obtaining consent.⁸

In this regard, consent may be obtained orally or in writing for the purposes of CASL. The CRTC states that oral consent can be proven where verified by a third-party or through a “complete and unedited” audio recording.⁹ Clearly, such technical requirements will make it difficult for charities or non-profit organizations to obtain consent orally. The requirement to obtain consent “in writing” includes both paper and electronic forms of writing. The CRTC notes 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”.¹⁰ As such, charities and non-profit organizations that seek to obtain express consent online or through a physical form should not seek to obtain consent to send CEMs through a single check box or other action item that also provides consent for sharing personal information or other items that require consent. A separate box or action item should be used expressly for obtaining consent to send the individual a CEM.

If an organization is seeking express consent, it must include the name of the person or on whose behalf the consent is being sought, together with contact information for the organization, and a statement indicating that the person may withdraw their consent. However, express consents that are obtained prior to CASL coming into force will be valid, even if the request did not contain the requisite identification and contact information.

⁸ See CRTC, Compliance and Enforcement Information Bulletin CRTC 2012-548, October 10, 2012, online at: <http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm> and CRTC, Compliance and Enforcement Information Bulletin CRTC 2012-549, October 10, 2012, online at: <http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>.

⁹ CRTC, Compliance and Enforcement Information Bulletin CRTC 2012-548, October 10, 2012, at paragraph 23, online at: <http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>.

¹⁰ *Ibid*, at paragraph 16.

b) Implied Consent

It is also important to note that consent will be implied for certain relationships between the sender and the receiver. Consent is also implied where the receiver has “conspicuously published” his or her address and the person has not indicated that he or she does not wish to receive CEMs, provided the message is “relevant to that person’s business, role, function or duties in a business or official capacity.”¹¹

Most relevant to charities and non-profit organizations will be consents obtained through having an existing non-business relationship. In this regard, CASL defines a non-business relationship as being where:

- 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; or
- 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.

This means non-profit organizations will have implied consent from their members, with “membership” defined as having been accepted as a member in accordance with the membership requirements of the organization. The Regulations define a “club, association, or voluntary organization” by borrowing the definition of a non-profit organization for *Income Tax Act* purposes. Specifically, subsection 7(2) of the Regulations defines a “club, association, or voluntary organization” as:

“a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada”

As a result, other clubs, associations or voluntary organizations which are tax exempt under the *Income Tax Act* (“ITA”) but which are not non-profit organizations under paragraph 149(1)(l), would not appear to be able to rely upon the implied consent provision under

¹¹ CASL, 10(9)(b).

CASL. For example, labour organizations or fraternal benefit societies under paragraph 149(1)(k) of the *ITA* would legitimately expect that their members are also members of a “voluntary organization”, but they may not necessarily be non-profit organizations under CAS because they do not meet the definition of a non-profit organization under paragraph 149(1)(l).¹² As well, the reference to registered Canadian Amateur Athletic Associations with regard to the definition of a “club, association, or voluntary organization” is particularly nonsensical outside of defining an entity for tax purposes since it would not appear to have any bearing on communications law matters.

While implied consent will be of assistance to many charities and non-profit organizations, if the organization is sending CEMs to donors, volunteers, or members, as noted above, consent alone is not sufficient for compliance with CASL. Specifically, the CEM will still need to comply with the form requirements of CASL discussed below, even if consent is implied under CASL.

6. What Needs to be in a CEM that is Not Exempt from CASL?

CASL requires the following prescribed information to be in a CEM:

- The name by which the sender carries on business, or the name of the sender
- Address, and either a telephone number, email, or web address
- If sent on behalf of another person:
 - The name by which the sender carries on business, or the name of the sender
 - A statement indicating who is sending the message and on whose behalf it is being sent.

If it is not practical to include the prescribed information in the CEM, a charity or non-profit organization can include a link to a website that contains the prescribed information. This information must be set out **clearly** and **prominently** in the CEM and must be valid for a period of 60 days.

It is also important to note that the CEM must also include an unsubscribe mechanism. The mechanism must enable the receiver to indicate to the sender, at no cost, that they wish to no

¹² This point was raised by the Canadian Bar Association on February 5, 2013, in a submission to Industry Canada concerning their request for feedback on the draft Regulations. The full text of the submission can be found online at: <http://www.cba.org/CBA/submissions/pdf/13-07-eng.pdf>

longer receive any CEMs from the sender. Regulations under CASL require that the unsubscribe mechanism must be “readily performed”. In this regard, the CRTC states that “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”.¹³ Lastly, the request to unsubscribe must be given effect within 10 days of the request being received. Obviously, for many smaller charities, the logistics of tracking unsubscribe requests and complying with them within the timeline allotted by CASL will be both an administrative and technological burden.

D. CONCLUSION

Although the charitable and non-profit sector has lobbied against CASL in order to obtain a complete exemption from the administrative and financial burdens of compliance, with the final Regulations published and the implementation date now underway, it is clear that charities and non-profit organizations will now need to familiarize themselves with CASL in order to avoid running afoul of the new legislation. This is because only certain electronic messages sent by registered charities may be exempt, the application of implied consent for non-profit organizations is not clear, and CEMs sent by registered charities or non-profit organizations must still comply with the form requirements of CASL, even where consent to send them can be implied.

Violations of CASL concerning sending CEMs not in accordance with the legislation, 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. CASL will also allow 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. However, the ability to commence a private right of action under CASL will not commence until July 1, 2017. Directors and employers may also be vicariously liable for breaches of CASL by their employees or volunteers.

In this regard, charities and non-profit organizations should be reviewing electronic messages they send to verify if they are exempt from CASL, and if not, whether or not the organization has express or implied consent and if the CEM complies with the content requirements of the legislation. As well, organizations may also want to update any privacy policies or other communications policies to address

¹³ Compliance and Enforcement Information Bulletin CRTC 2012-548, October 10, 2012, at paragraph 12.

the potential liability for the board and the organization to demonstrate due diligence with regard to CASL. For charities and non-profit organizations that work with third-parties to distribute communications on their behalf, it will also be important to verify that the third-party is aware of CASL and has taken steps for itself to come into compliance.