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# THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 13, 2014

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

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

rmp@carters.ca  
1-877-942-0001

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	<b>THE OTTAWA REGION CHARITY &amp; NOT-FOR-PROFIT LAW SEMINAR</b> Ottawa – February 13, 2014
	<b>Communicating with Donors: Navigating Canada's New Anti-Spam Laws</b>  By Ryan M. Prendergast, B.A., LL.B. <a href="mailto:rmp@carters.ca">rmp@carters.ca</a> 1-877-942-0001 © 2014 Carters Professional Corporation
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<b>A. OVERVIEW OF TOPIC</b>	
<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 Electric Messages</li><li>• Implied Consent for Charities and Non-profit Organizations</li><li>• Penalties under CASL</li><li>• Steps to Take Before CASL in Force</li></ul>	
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<b>B. CURRENT STATUS OF LEGISLATION</b>	
<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 THE 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

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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. 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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- 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”?
  - Proposed regulations from Industry Canada uses the 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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

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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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- Electronic Commerce Protection Regulations excluded CEMS
  - 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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### F. 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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### G. 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., members of non-profit organizations
  - However, this period will end if the recipient says that they don't want to receive any more CEMs



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- Is consent enough? No.
  - Review solicitations sent to donors/members
  - Do they contain "commercial" content?
    - i.e., is the electronic message primarily for the purpose of raising funds, or does it also include an offer for a product or other services?
  - Do they contain the prescribed disclosures from CASL and the Electronic Commerce Protection Regulations?

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- What must be in the 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

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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
  - Are consents obtained under PIPEDA sufficient?
    - No!
  - Turn implied consents into express consents, or obtain express consent going forward
  - 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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- 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

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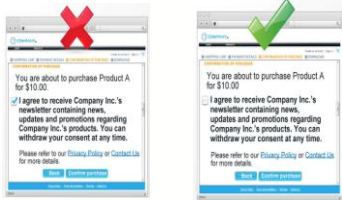
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- May use a separate tick-box or icon in obtaining express consent, but must be proactively checked (i.e., cannot be already checked for the person)



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- 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 July 1, 2014



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- Is there an exception to consent? (must still have the prescribed requirements of content)
  - Delivers a quote for services;
  - Facilitates, completes or confirms a commercial transaction;
  - Providing warranty or recall information;
  - Provides notification or information about subscription, account, membership or loan;
  - Employment information; and
  - Delivers goods or an upgrade under contract

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- Referrals (must still have the prescribed requirements of content)
  - Electronic Commerce Protection Regulations
    - Does not apply to the first CEM sent through a referral where the referee has an existing business, non-business, family, or personal relationship
    - The CEM must identify full name of the individual who made the referral

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- Is the message completely excluded from CASL?
  - Employee to employee
  - Response to a request, inquiry or complaint
  - 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
  - Part of an electronic messaging service
  - Limited-access secure and confidential account
  - To a foreign state
  - Solicitations for a political party or charity

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- Family relationship
  - Sender and receiver are related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication
- Personal relationship
  - “taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person”

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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
  - 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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- Ensure that Third-parties are Compliant with CASL
  - 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 CASL

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