

# GETTING READY FOR CANADA'S ANTI-SPAM LEGISLATION – ISSUES FOR CHARITIES

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# Agenda

1. Overview of Canada's Anti-Spam Law
  - (a) What is Canada's Anti-Spam Law ("CASL")?
  - (b) What are Commercial Electronic Messages ("CEMS")?
  - (c) What are CASL's requirements?
  - (d) Who is exempt? What kind of messages are exempt?
  - (e) What penalties apply if I don't comply?
2. Issues for Charities
3. How do I prepare my organization for these changes?

## 1(a) What is Canada's Anti-Spam Law ("CASL")?

- 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* (S.C. 2010, c. 23)
- There is no official short title for this Act. It is called unofficially, "Canada's Anti-Spam Legislation" or "CASL"

# CASL – Background and History

- Regulates a broad range of activities including:
  - i) Spam emails or messages via other electronic medium
  - ii) Hacking, malware and spyware
  - iii) Phishing, fraudulent or misleading practices
  - iv) Privacy invasion via your computer
  - v) Collecting email address without consent (harvesting)
- Website for detailed information: [www.fightspam.gc.ca](http://www.fightspam.gc.ca)
- Fundamental underlying principle → may only be carried out with consent

# What is Canada's Anti-Spam Law ("CASL")? (Cont'd)

- Bill C-28 – CASL received Royal Assent in December 2010
- Act will come into force on date to be proclaimed
- Date for Act and Regulations to come in force not yet known
  - CRTC Regulations (published March 2012)
  - Industry Canada Regulations (still pending)

# What is Canada's Anti-Spam Law ("CASL")? (Cont'd)

- Canadian Radio and Television Commission ("CRTC") has regulation making powers under CASL, as well as certain enforcement and other regulatory powers
  - CRTC's "Electronic Commerce Protection Regulation" published in March 2012
  - Form and content of a commercial electronic message (CEM)
  - Detailed requirements when making request for express consent
- See CRTC Information Bulletins (2012-548 and 2012-549)

# What is Canada's Anti-Spam Law ("CASL")? (Cont'd)

- In January 2013 an updated draft of the Governor in Council regulation to CASL was sent out by Industry Canada, for comment until February 4, 2013. Over 250 submissions were delivered.
  - Defines and clarifies various exemptions under Act (eg., “family relationship”, “personal relationship”, “existing non-business relationship” and third party referral exemption)
  - Prescribes requirements where consent obtained on behalf of a third party

## 1(b) What are Commercial Electronic Messages (“CEMs”)?

- CASL prohibits a sender from transmitting a commercial electronic message (“CEM”) to an electronic address, unless the intended receiver consents to its receipt, and the message includes certain prescribed information
- “Electronic messages” include messages sent by any electronic means - email, text, instant messenger or any other similar means of telecommunication



# What are Commercial Electronic Messages (“CEMs”)? (Cont’d)

- “Commercial” refers to anything that “encourages participation in commercial activity”, including:
  - An offer to purchase, sell or lease goods or service
  - An offer to provide a business, sell or lease investment or gaming opportunity
  - Advertising or promotion of these activities or of a person carrying out or intending to carry out these activities

(Section 1(2))

# 1(c) What are CASL'S Requirements?

- i. Consent requirements
- ii. Information requirements
- iii. Unsubscribe mechanism

## i) Consent Requirements

- CEMs may only be sent with recipient's express or implied consent
- Onus of proving consent rests with sender

# Express Consent

- Request for express consent must set out:
  - Purpose(s) for which consent is sought; and
  - Prescribed information identifying person seeking consent and any other person on whose behalf consent is sought

(Section 10)

# Express Consent for sending CEMs (CRTC Regulation)

- Request for express consent may be obtained orally or in writing
- Must set out the following information:
  - Identification of sender(s) (including affiliates)
  - Sender's contact information; and
  - A statement indicating that person can withdraw their consent

# Implied Consent

- Consent may be implied in certain circumstances, for example where:
  - there is an “existing business relationship” or “existing non-business relationship”
  - the recipient has “conspicuously published” its electronic address and has not indicated a desire to not receive unsolicited CEMs, and if message is relevant to recipient’s business role
  - The recipient has disclosed its electronic address to sender without indicating a wish not to receive unsolicited CEMs, if message is relevant to person’s role or duties in business or official capacity

(Section 10(9))

# Implied Consent – Definition of “existing business relationship”

- In the two years prior to the sending of the CEM, the recipient had:
  - Purchased or leased or bartered a product, goods, a service, land or an interest or right in land from the sender,
  - Accepted a business, investment or gaming opportunity offered by the sender,
  - A written contract is created between the recipient and the sender for a matter not listed above, or
  - Six months before the message is sent, the sender received from the recipient an inquiry or application about one of the items above.

(Section 10(10))

# Implied Consent – Non-Business Relationship

- Consent to sending of CEM implied where there is an “existing non-business relationship”
  - Sender is registered charity, political party or candidate for office, and recipient made donation or performed volunteer work in last two years
  - Sender is club, association or voluntary association, and recipient has been a member in the preceding two years

(Section 10(13))



# Express or Implied Consent

- Key Point: consents obtained under privacy laws may not be sufficient – opt-out consent is not sufficient
- Transitional Period:
- CASL provides for a three-year transition period after being declared in force, during which time there will be an implied consent for parties who are already in an existing business or existing non-business relationship without regard to the two-year period in the definition if the relationship includes the communication between them of commercial electronic messages (Section 66)

## ii) Information Requirements for CEMs

- CEMs must include identifying information for sender or person on whose behalf the message is sent (as prescribed by regulation)
- Must set out a means by which to contact the sender (to be effective for at least sixty days)
- Must give the recipient a method to “opt out”, or to “unsubscribe”, from receiving messages
- (Sections 6(2), 6(3))

### iii) Requirements for “unsubscribe mechanism:

- Must allow recipient to advise sender to stop sending messages
- Must set out electronic address or link to an “unsubscribe” page
- Must be effective for 60 days
- Must be given effect within 10 days following receipt
- Must be at no cost to person
- (Section 11)
- When not practical to include in message, CRTC Regulations allow unsubscribe mechanism to be by way of link to a web site but link must be clearly and prominently set out in message and must be able to be readily performed

# 1(d) Who is Exempt?

- CEMs between individuals who have a “personal” or “family” relationship (defined in draft Industry Canada regulations)
  - An inquiry or application sent to a business, where message relates to the activities of the business
  - Other types of CEMs prescribed by regulations
- The draft Industry Canada regulations set out additional exemptions
- Third party referral exemption: the first CEM sent to a person based on a referral from a third party, after which consent will be needed for added CEMs

# 1(e) What Penalties Apply If I Don't Comply?

- High level of potential liability:
- Administrative monetary penalties (“AMPS”):
  - Individuals – fines up to \$1 million/violation
  - Corporations – fines up to \$10 million/violation
- Private rights of action by anyone affected by a prohibited act, including right to statutory damages to a maximum of \$1,000,000 (\$200 for each electronic message sent) per day
- Extended liability – officers or directors liable for wrongful acts of corporation / vicarious liability of corporation for employees
- Risk of class actions

## 2. Issues for Charities

- Issue 1: Which of your activities and electronic messages does CASL apply to?
- Anti-spam provisions apply only to “commercial electronic messages”
- Determine which activities and electronic messages concern commercial activity
- Likely will include buying and selling of products and services and gaming opportunities, such as lotteries

## 2. Issues for Charities (cont'd.)

- Issue 2: Decision Point – make all electronic correspondence CASL compliant or only commercial electronic messages?
- Consent requirements are different under privacy law and CASL
- If all consents are not CASL compliant, the distinction between privacy consents and CASL consents will need to be made in contact databases and there must be ability to send CEMs only to contacts for which CASL compliant consent has been obtained

## 2. Issues for Charities (cont'd.)

- Issue 3: Will you rely on the implied consent available for “existing non-business relationships”?
- Because the definition depends on a two-year contact time frame your database will need to be able to track this in order to identify whether there is implied consent



## 2. Issues for Charities (cont'd.)

- Issue 4: How will you deal with your existing contact database?
- When CASL comes into force, will you have the express or implied consent required under CASL for all contacts?
- Recommended: Before CASL, turn your implied consent into express consent

### 3. How do I Prepare my Organization for these Changes?

- Conduct an electronic message audit of your business – what CEMs are sent, to whom and by whom
- Develop consent mechanisms – establish opt-in consent and consent renewal mechanisms
- Develop forms for CASL compliant communications containing the required unsubscribe mechanism
- Develop the required unsubscribe mechanism
- Develop an implementation and training program

# How do I Prepare my Organization?

- What process will you have in place to address opt-out requests by reply message, phone or to individual employees?
- What third parties have been retained to send CEMs on your organization's behalf?
- Review your contracts with third parties – require CASL compliance
- Internal due diligence – establish procedures to monitor compliance and internal ongoing education of employees
- Consider buying insurance

# How do I Prepare my Organization?

- Much of the preparation is IT dependant
- Review systems requirements – you need systems in place to:
  - obtain express consents;
  - assess whether implied consent exists if you propose to rely on that;
  - record in your systems whether consents have been obtained for each contact;
  - if you rely on implied consent based on an existing non-business relationship you will need systems to assess and record when that implied consent comes to an end;
  - record evidence of express consent obtained;

# How do I Prepare my Organization?

- System Requirements (Cont.)
  - ensure all commercial emails are sent in the prescribed format;
  - ensure commercial emails are sent only to persons who have provided express consent or for whom consent is implied;
  - provide an unsubscribe mechanism in accordance with prescribed requirements; and
  - ensure the unsubscribes are implemented in your systems within 10 business days. This needs to be implemented in all your databases.

# How do I Prepare my Organization – How much time do I have?

- Likely 6 – 12 months before CASL is in force
- There is a transition provision but it is limited
- After CASL is in force, it is a violation to send an electronic message to request consent unless you have express or implied consent – such a request is considered a CEM
- **START NOW**

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