

Canada's new anti-spam law – implications for charities and nonprofits

The federal government has enacted an anti-spam law ("Canada's Anti-Spam Legislation" or "CASL") which is expected to come into force sometime in 2013. Unlike the federal privacy law, the *Personal Information Protection and Electronic Documents Act* or "PIPEDA", which for the most part does not apply to charities and nonprofits, the new law will apply to such organizations and will have a significant impact on the way they conduct their donor and member communications.

The most significant, and potentially challenging, aspect of CASL is the consent requirement. In essence, all organizations will be required to obtain positive, "opt-in", recipient consent to be able to send "commercial electronic messages" ("CEMs") to their customers, donors, members and others unless they have a relationship with the contact that is exempt from the law or can establish implied consent under one of CASL's specifically defined categories. Due to the difficulties in managing email contact lists to fit within these exceptions (see further below), it is likely that most nonprofits will opt to obtain express consent from their donors, past members and other contacts, to ensure compliance.

In addition to the consent requirement, the new law also stipulates certain minimum content requirements for all CEMs, including those requesting consent.

CASL was conceived initially as a weapon to fight "spam". However, its application extends to all businesses and non-profit organizations and all of their electronic marketing and relationship communications including those conducted under established and consensual relationships. The implications for such organizations are significant: they will be required to undertake an extensive and potentially costly requalification of their contact lists – firstly, to identify (and maintain, on a rolling basis over time) the information needed to qualify contacts under the implied consent categories, and secondly, for those contacts for whom they cannot rely on implied consent (potentially a large proportion), to undertake strategies for capturing express consent.

CASL was passed in December 2010. However, it will not come into force until regulations are finalized and the Act is proclaimed, likely to occur sometime in 2013.

One set of regulations, issued by the CRTC, address content requirements for all CEMs, including requests for consent (the "CRTC Regulations"). These regulations were finalized in March 2012. A second set of regulations, to be issued by Industry Canada and addressing the application of the law and potential exemptions, were published in draft in mid-2011 (the "Industry Canada Regulations"). Following significant comments in response to the draft, including many voicing concern about the potential impact of CASL on organizations small and large, Industry Canada advised that it would issue a revised draft for further comment prior to finalizing. This revised draft, expected Fall 2012, has not yet been released. It is anticipated that proclamation of the law will only occur following issuance of the final Industry Canada Regulations, plus a 6-9 month transitional period.

Industry Canada's delay in releasing these revised regulations may provide an opportunity for charities and other nonprofits to have their concerns respecting the new law addressed, as noted below.

application to nonprofits

The focus of CASL and the exceptions to its obligatory provisions is on businesses and for-profit organizations. However, it clearly is intended to apply to charities and other nonprofits. The definition of "commercial activity" (the criterion for qualifying a CEM within CASL's application) refers to activities of a commercial nature, whether or not carried out for profit. Furthermore, the Act contains within its implied consent rule a definition of "Existing Non-Business Relationship" which refers specifically to donor and member relationships. While CASL therefore applies to not-for-profit organizations, its focus on *for profit* business activities results in an incomplete treatment of situations that charities and other nonprofits may believe should be exempted from its obligatory requirements. For example, few of the types of communications stipulated as exceptions to the consent requirement address activities that a charity or nonprofit would undertake in the normal course in relation to its members or donors.¹ However, the list of exceptions can be expanded by regulation. Organizations therefore may wish to consider making representations to Industry Canada to extend the exempt categories to other circumstances more appropriate to the not-for-

¹ The consent requirement does not apply to CEMs solely:

- (i) providing a quote or estimate requested by the recipient;
- (ii) facilitating or completing a transaction previously agreed upon;
- (iii) providing warranty, product recall or safety/security information about products or services used or purchased by the recipient;
- (iv) providing on-going product or service use information under a subscription, membership or similar relationship, or information about the relationship;
- (v) providing employment or related benefits information to an affected individual; or
- (vi) delivering a product or service (such as computer software) or upgrades under the terms of an existing transaction/agreement.

profit field, for which consent should not be required (an example might be communications with persons receiving a service from the organization).

key compliance rules

As noted, CASL applies to both for-profit and non-profit organizations with respect to all of their electronic communications. Subject only to certain limited exceptions,² the Act's key requirements applicable to such communications are the following:

- (i) disclosure in every CEM of the identity and readily-accessible contact information of the sender;
- (ii) provision within each CEM of a readily-accessible unsubscribe mechanism; and
- (iii) prior consent of the recipient to receive the CEM.

Items (i) and (ii) are considered the CEM content requirements. Elaboration of the form and detailed particulars for these requirements is found in the Act together with the CRTC Regulations.

Item (iii), consent to receive electronic communications, is the key precondition to the sending of any CEM. Certain broad exceptions to this requirement apply.³³ However, as noted, few of the stipulated exceptions have particular application to donor/member communications by nonprofits. Consent may either be implied (a defined category – see below) or express. The definition of *implied consent* contains provisions that will apply to non-profits.

² The Act stipulates that certain situations are exempted from the content and consent requirements, specifically "personal" and "family" relationships (both defined terms) and inquiries or applications sent to organizations related to their commercial activities. These categories may be expanded by regulation.

³ See note 1, above.

implied consent

CASL's attempt to facilitate existing on-going relationships without requiring express consent is found in the rules respecting "implied consent". Whereas under general privacy laws (such as the federal private sector Act, PIPEDA) implied consent is an open-ended concept determined by the circumstances as well as by the generic definition of the term, under CASL it has a very specific and limited meaning. Essentially, implied consent means a circumstance where the recipient and sender have either an "existing business relationship" or an "existing non-business relationship" – both defined terms – or, alternatively, where the recipient has published his or her email address without any indication that they do not wish to receive messages.

An existing *business* relationship encompasses a wide range of contractual circumstances including purchases of products or services as well as recent inquiries or applications to the sender. By contrast, the term "existing *non-business* relationship" – the more likely to have application to charities and non-profits – is quite narrow in scope, focussing on contributions, either of a monetary value or in kind (including volunteer work), and memberships. Qualifying circumstances do not extend to any other relationships – such as with persons who may benefit from an organization's operations (e.g. athletes who receive financial support). Furthermore, there is no category that qualifies recent inquiries to a non-profit as the basis of implied consent. Under both implied consent categories, the relationship must be currently existing, or no greater than two years old. For example, a donation to a registered charity qualifies to establish an existing non-business relationship if the donation was made within the two-year period immediately preceding the date on which an electronic message is sent, but not otherwise.

The challenge for organizations in seeking to qualify their email contacts under an implied consent basis will be to be confident that they qualify under one or more of the identified criteria. This

means, for example, that charities will need to "scrub" their lists on an on-going basis to remove donors who have not given within the preceding two years. Charities and other nonprofits may determine that the two-year period, while appropriate for business transactions, is not appropriate in the context of their less formal arrangements with donors, members, volunteers and others with whom they work. If this is the case, representations could be made to Industry Canada to extend this period to a more appropriate time-frame.

obtain express consent now

If an organization cannot, confidently, qualify a relationship with a contact within the strictures of the defined categories, including the required maximum two-year period (and assuming that the relationship does not fall within an exception to the consent requirement), then it must obtain the recipient's express consent. In reality, it is very likely that express consent will be the rule, rather than the exception, due to the difficulty of maintaining up-to-date contact lists that accurately reflect information required to qualify for implied consent. Furthermore, even if such systems can be put in place, organizations' lists will contain many individuals who do not qualify under the implied consent rule because their connection with the organization (donation, volunteer work, membership) predates the two-year qualifying period (or more likely – on a rolling basis going forward – currently active contacts will become inactive and drop off the end of the period thereby cancelling their implied consent).

In sum therefore, organizations will need to obtain express consent from substantially all of their contacts in order to be able to continue to communicate electronically with them.

Understanding this dictate, organizations will need to initiate strategies for capturing express consent. These strategies should be activated *as soon as possible*, notwithstanding that no CASL in-force date has been announced. The reasons for this urgency are the following. Firstly and most importantly, prior to the in force

date, CASL's rules do not apply. Under CASL, if the consent-capturing strategies involve electronic communications, even a request for consent must qualify (i.e. must be permitted under either an exception to the consent requirement or by implied consent). However, prior to CASL's coming into force, such consent request communications are not restricted by any CASL-related rule.

A second reason for initiating a consent-capturing campaign immediately is the reality of low response rates. While user friendly techniques can be utilized, any consent, to be effective, must be provided on an opt-in, not opt-out, basis (pre-checked boxes are not acceptable). Therefore it is likely that in order to increase the response rate, repeated requests will be required.

transitional rule

CASL does provide a transitional rule to enable organizations a longer lead-time to solicit and obtain consents than under the general two-year implied consent time-frame. Essentially, if a contact qualifies under an existing (business or non-business) relationship at the date CASL comes into force without regard to the otherwise stipulated time period and the relationship involves electronic communications, then the organization may continue to communicate with the contact for the next three years, on the basis of implied consent. This transitional rule will be of assistance in enabling organizations that have a *provable* relationship with a contact to continue to seek their express consent for the three-year period following the CASL in-force date, thereby improving response rates. The provision should be of great assistance to nonprofits. However, it must be understood that the onus is on them to prove through appropriate records that a particular contact qualified (donor, volunteer, member) at some time in the past. CASL states that an organization that alleges it has consent to send an electronic communication must be able to prove that fact.

Relying on the transitional period will require organizations to review their records and utilize that information as a further input into scrubbing contact lists.

penalties for non-compliance

The penalties for non-compliance with CASL's requirements are potentially severe. Administrative monetary penalties (the new replacement for criminal "fines") of up to \$10,000,000 for *each* violation committed by an organization may be imposed. The sending of a single email to a single individual constitutes a violation. Directors and officers of organizations may be liable if they authorized or acquiesced in the commission of a violation.

In addition to these potentially significant regulatory penalties, a right of private action is established for the benefit of any person receiving a non-compliant electronic communication. Under this private action right, individuals may recover any loss or damages suffered (such as purchases or donations made in response to a non-compliant email) plus an amount (unrelated to any actual damages suffered) of up to \$200 for each violation, not to exceed \$1,000,000 per day. It is not clear whether contraventions may include all non-compliant communications sent on a given day, or just those received by the individuals seeking compensation. In any case, it is clear that the private right of action is ripe for class action lawsuits, which could lead to multimillion dollar judgements.

summary and conclusions

As can be seen, CASL has potentially significant impacts on the way charities and other nonprofits conduct their operations. Of particular relevance will be the need to obtain express, opt-in, consent from donors and other supporters, in order to be able to continue to communicate with them electronically. For this reason, it is recommended that organizations initiate *immediately* strategies for capturing consents. Such strategies may include

user-friendly techniques for response emails, website click-throughs and offline, hard copy techniques such as donation slips and membership applications.

Nonprofits may determine that application of the law, as currently written, is inappropriate and unduly burdensome, if not prohibitive, for their activities. Consequently, initiatives could be undertaken to orient CASL more appropriately to enable their established mode of operations.

Finally, it must be stated that because the law involves potentially devastating penalties for organizations small and large, they can ignore it only at their peril. While adjustments to facilitate charitable and not-for-profit operations may be achieved, it behoves all affected organizations to adopt policies and procedures directed to ensuring compliance.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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