

### Canada's New Anti-Spam Law – Compliance Primer for Charities and Nonprofits

David Young

April 2014

The federal government's anti-spam law ("Canada's Anti-Spam Legislation" or "CASL") will come into force on July 1, 2014. The new law has significant application to charities and nonprofits and will impact the way they conduct their donor and member communications.

While communications that have no "commercial" purpose will be outside the Act's scope, many charities and nonprofits will not be able to isolate such communications and therefore will need to comply with the legislation.

While the law appears daunting, a few simple action items can help organizations master CASL's requirements with an approach that focusses on the key rules and allows them to make full use of the three-year transitional period.

#### Compliance Requirements

CASL's key requirements are the following:

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

Items (i) and (ii) are the content requirements. Details regarding the form and particulars for these requirements are spelled out in the Act and the regulations.

With respect to consent, certain exemptions apply (see below). Additionally, provision is made for implied consent, a defined term that has application to nonprofits.

#### Application to Nonprofits

An email sent by a charity or a nonprofit qualifies as a "CEM" if it seeks to promote a commercial activity; a commercial activity is anything that involves a payment of money or an exchange of something of value. It is possible that a simple donation request may qualify, although fundraising by charities has a special exemption (see below). Certainly, if a donation request refers to the use of a web service facility which charges a fee, such as PayPal or Canada Helps, then the criterion of CEM likely

would be met. Even a charitable donation request that would otherwise be exempt may be caught if it is contained in an email that primarily promotes a product purchase or a service (e.g. articles of clothing, or a theatre subscription). The challenge for non-profit organizations wanting to avoid the application of the law entirely will be to isolate those communications that have no "commercial" purpose from those which do.

As with for-profit organizations facing the challenge of fitting within CASL's patchwork quilt of exemptions and exceptions, most non-profit organizations likely will need to pursue a strategy of obtaining express consent to send emails, in order to be able to be confident that their stakeholder communications comply with the Act's requirements.

## **Exemptions**

There are several exemptions from CASL's requirements that will be helpful to charities and nonprofits.

## **Fundraising**

Emails sent by registered charities with the primary purpose of seeking donations are exempt from CASL's consent and content requirements. The challenge for such organizations will be to ensure that the excepted communications meet the criterion. Fundraising likely extends to selling tickets for dinners and other galas. However it is not clear, for example, whether the sale of merchandise constitutes fundraising. Emails sent by many charities, such as theatre subscription solicitations, clearly will not be exempted.

## **Day-to Day Communications**

Electronic communications between employees or representatives of two or more organizations that have a "relationship" will be exempt from the consent requirements. This exemption should facilitate many day-to-day communications among charities and nonprofits.

## **Inquiries**

An exception will enable organizations to reply to inquiries from individuals or other organizations. However, the scope of the exemption is quite limited – essentially a reply to a specific inquiry.

## **Grandfathering of PIPEDA Consents**

There will be no blanket "grandfathering" of consents obtained under the federal private sector privacy law (*Personal Information Protection and Electronic Documents Act* or "PIPEDA"). PIPEDA permits both implied and express consent; however under CASL implied consent is limited to certain specifically-defined categories. On the other hand, PIPEDA-compliant express consents that include as a purpose sending emails *will* be recognized under CASL. This may be a significant area for charities and other nonprofits to focus on. If they can confirm a prior express consent (e.g. providing an email address or

“Please subscribe me for your e-bulletin and other updates”), they may be able to qualify a large part of their existing email databases. There is no time limitation on any such consents.

## Implied Consent

CASL facilitates existing relationships for which express consent is not required through its rules regarding "implied consent". It should be noted that under CASL implied consent is not an open-ended concept but has a specific and limited meaning. Essentially, it is either an "existing business relationship" or an "existing non-business relationship" – both defined terms – or, alternatively, a situation where the recipient has published their email address without stating that they do not wish to receive emails.

An existing business relationship means a specifically-defined commercial relationship, such as one involving sales of products or services, existing within the previous two years (example – registration for a soccer league) as well as a recent (within the previous six months) inquiry or application regarding such matters. By contrast, the term "existing non-business relationship" – which will have particular application to charities and nonprofits – is more narrow in scope, focusing on contributions, whether monetary or otherwise (such as volunteer work), and memberships, again occurring within the previous two years. Qualifying circumstances do not extend to any other relationships – such as with persons who receive financial support or otherwise benefit from an organization's operations. However it should be understood that many of the defined “existing business relationships” will have application to the day-to-day activities of charities and nonprofits (e.g. sale of theatre tickets).

Under both of these categories, the relationship must be currently existing, or no greater than two years old. For example, a ticket purchase from a registered charity qualifies to establish an existing non-business relationship if the ticket was purchased within the two-year period immediately preceding the date on which an email is sent, but not otherwise.

The challenge for organizations in seeking to qualify their email contacts under an implied consent basis will be whether they are confident that they qualify under one or more of the identified criteria. This means, for example, that charities may need to "scrub" their lists on an ongoing basis to remove donors who have not given within the preceding two years.

## Obtaining Express Consent

If a charity or other nonprofit cannot qualify a relationship within the defined exempt or implied consent categories, including the required maximum two-year period, then it must obtain express consent. 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.

Therefore organizations will need to consider strategies for obtaining express consent in order to be able to continue to communicate electronically with their stakeholders. The transitional rule under CASL provides a three-year period during which such consents can be sought.

A further advantage of express consent is that it is not time-limited: it remains valid until withdrawn.

## Transitional Rule

CASL provides a significant transitional period of three years. Essentially, if a person in a database 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 person for the next three years, on the basis of implied consent. This transitional rule will be of assistance in enabling organizations that have a relationship with a person to continue to seek their express consent for the three-year period following the CASL in-force date. The provision should be of great assistance to nonprofits. However, the onus is on them to prove that the relationship (donor, volunteer, member) existed at some time in the past through appropriate records.

## The CASL Regulations

CASL contemplates two sets of regulations, one from Industry Canada and another from the CRTC. The [CRTC Regulations](#) specify the required form and content of CASL-compliant emails as well as the form and content for requests for consent. The Industry Canada Regulations ([Electronic Commerce Protection Regulations](#)) are intended to address potential exclusions and exceptions from the law, by either providing definitions for exemption categories or supplementing them with additional categories. In addition, the regulations set out certain definitions and procedural conditions.

## Penalties for Non-Compliance

The penalties for non-compliance with CASL's requirements are potentially severe. Administrative monetary penalties 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 email. This private right of action will not come into force until July 1, 2017. 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, against both the sender organization and any directors or officers who authorized or acquiesced in sending the email. This right is available for class action lawsuits, which could result in multimillion dollar judgments.

## In Summary

CASL has potentially significant impacts on the way charities and other nonprofits conduct their operations. Of particular relevance will be the need to have consent from donors and other

stakeholders, in order to be able to continue to communicate with them electronically. However the Act also contains exemptions and provisions for implied consent that should be of assistance.

It is recommended that strategies for capturing express consent be activated as soon as possible. Under CASL, even a request for consent must comply and therefore must be permitted either by 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 must be provided on a positive response, opt-in basis (pre-checked boxes are not acceptable). Therefore it is likely that in order to increase the response rate, repeated requests will be required.

While obtaining consents should be initiated prior to the Act's July 1 in-force date, the transitional period, which only commences on that date, permits organizations to continue to seek consent for an additional three years.

For more information please contact:

David Young                      416-968-6286                      david@davidyounglaw.ca

Note: The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned that for application to specific situations, legal advice should be obtained.

© David Young Law 2014