

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

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 2014. 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 their electronic marketing and relationship communications including those conducted under established and consensual relationships. While communications that have no "commercial" purpose will be outside the Act's scope, most organizations will not be able effectively to isolate such communications so as to ensure that they do not run afoul of the legislation. 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 either late in 2013 or early in 2014.

One set of regulations, issued by the CRTC, addresses 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, was published in initial draft form 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 has issued a revised draft for further comment. This revised draft was issued at the beginning of January 2013, with a short (30-day) comment period. Proclamation of the law will only occur following issuance of the final Industry Canada Regulations, plus an extended (e.g. 9-12 months) transitional period. This extended transitional period provides an additional 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.

An electronic message qualifies as a CEM if any of its purposes encourage participation in a commercial activity. While a simple donation request likely would not qualify, if that request is accompanied by an offer to sell a product or a service (e.g. an article of clothing, or a ticket to a fund-raiser), then the email will qualify as a CEM. Furthermore, 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 commercial purpose criterion likely would be met. The challenge for non-profit organizations wanting to avoid the application of the law will be to isolate those communications that have no "commercial" purpose from those which do and therefore must comply with CASL. 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 CEMs, in order to be able to be confident that their electronic communications with stakeholders comply with the Act's requirements.

While CASL clearly 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.² 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-profit field, for which consent should not be required (an example might be communications with persons receiving a service from the organization).³

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, the

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.

² The revised draft Industry Canada Regulations propose an additional category of exemption – the first CEM sent by an individual in response to a referral received from another individual who has an existing business or non-business relationship or a personal or family relationship with both the sender and the recipient.

³ In response to the recent draft revised Industry Canada Regulations, several charity and non-profit sector industry associations have proposed, in addition to a blanket exemption from CASL's consent requirements, specific exemptions for requests for donations and promotions of charitable activities that could be considered commercial (e.g. fund-raising dinners). See submissions by *Imagine Canada* and *Ontario Nonprofit Network*.

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.⁴ 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.

proposed new exemptions

The revised draft Industry Canada regulations contain proposed additional exemptions from certain requirements of the Act.

Firstly, electronic communications between employees or representatives of two or more organizations that have a business relationship will be exempt from the consent requirements. However, the wording of the proposed exemption is limited to "business relationships" which in the context of the Act's "implied consent" rules (see below), has a very specific meaning, focussed

⁴ See note 1, above.

on commercial transactions. While the proposed exemption may not be intended to have such a narrow scope, use of the same term as is defined specifically elsewhere in the Act raises the question of whether it will in fact apply to many day-to-day communications among charities and nonprofits.⁵

Secondly, an exception will enable such organizations to reply to inquiries from individuals or other organizations without requiring any consent from the person making the inquiry. This exception, which may seem to make only common sense, was not available under the proposed rules as previously stated. However, the scope is still quite limited – essentially a reply to a specific inquiry. Furthermore, clarification may be needed to determine whether a request for express consent to future communications (see below) can be included within the immediate reply.

implied consent

CASL's attempt to facilitate existing ongoing 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

⁵ *Imagine Canada* and *Ontario Nonprofit Network* in their recent submissions to Industry Canada requested that this exemption be broadened to clearly apply to electronic communications among charities and non-profit organizations as well as to clearly apply to communications between volunteers acting on behalf of such organizations.

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). 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 ongoing 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.⁶

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

⁶ *Imagine Canada's* submission to Industry Canada proposes that the time-frame for existing non-business relationships be extended to five years and that the definition be extended to include communications with persons who receive services from the organization.

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. In response to Industry Canada's revised draft regulations, a number of charity and non-profit sector organizations have made submissions directed at orienting CASL more appropriately to enable their or their members' established modes of operations.⁷

⁷ See for example submissions by *Imagine Canada* and *Ontario Nonprofit Network* which, in addition to seeking an exemption from the law's consent requirements entirely, propose specific changes in the event that such an exemption is not granted.

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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