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Canada's Anti-Spam Legislation (CASL) for Canadian Registered Charities and Non-profit Organizations

By Mark Blumberg¹ and Yi-Mei Ting (July 2014)

Commercial Electronic Messages

As of July 1, 2014, Canada's Anti-Spam Legislation ("CASL") prohibits commercial electronic messages ("CEM") from being sent to an electronic address unless the sender has consent and the message meets the requirements set out in the Act. It is a complicated piece of legislation that applies to CEM that are either sent from, or accessed on, a computer system in Canada, unless an exemption applies.

A CEM is an electronic message that encourages participation in a commercial activity, including:

- a) offers to purchase, sell, barter or lease goods or services;
- b) offers to provide a business, investment or gaming opportunity;
- c) advertises or promotes the activities in (a) and (b); and
- d) promotes a person as doing or intending to do any of the activities in (a) to (c).

An electronic message includes messages sent by any means of telecommunication such as text, sound, voice or image.

An electronic address includes email, telephone and instant messaging accounts and any other similar account. A similar account could include a social media account depending on how that account is used. For example, posting on LinkedIn, Facebook or Twitter walls would not likely be caught by CASL, whereas sending messages through the instant messaging systems of these websites would likely be subject to the provisions of CASL.

Commercial activity captures any transaction, act or conduct that has a commercial character, whether or not the person who carries it out does so in the expectation of profit. Therefore, an

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exchange between a registered charity or non-profit organization and a person involving goods, services or business, investment or gaming opportunities could be considered commercial. Some examples of commercial activity that a registered charity or non-profit organization may engage in are:

1. Selling goods such as chocolate, cookies, hats, t-shirts or books;
2. Selling tickets to a gala dinner;
3. Selling services such as child care or performances; and
4. Selling lottery or raffle tickets.

The definition of commercial activity is quite broad and since it is irrelevant whether profit is expected or not, CASL applies to registered charities and non-profit organizations, with the exception of a narrow carve out for registered charities.

Registered Charity Exemption

CASL exempts CEM sent by registered charities if the primary purpose of the CEM is to raise funds for the registered charity. The exemption does not apply to non-profit organizations or registered amateur athletic associations. The CRTC defines “primary purpose” as the “main reason or main purpose of the CEM”. A secondary or additional purpose to the message is also permitted as long as the principal purpose of the CEM is to raise funds for the charity. Although some examples are provided by the CRTC to assist with the understanding of “primary purpose”, it is still unclear how CEM sent by registered charities will be evaluated according to this definition.

CASL Compliance

Before registered charities and non-profit organizations get caught up in the complexities of CASL, it is important to remember that CASL does not apply to messages that are not CEM. Therefore registered charities and non-profit organizations can continue to send emails requesting donations, seeking volunteers or containing newsletters that provide information and updates on the registered charity or non-profit organization provided there is no commercial element to the emails or newsletters.

However, when a registered charity or non-profit organization sends CEM and in the case of a registered charity, CEM that are NOT for the primary purpose of raising funds for the registered charity, the provisions of CASL will apply. CASL requires that senders obtain consent to send CEM and that the CEM contain specific information about the sender in addition to an unsubscribe mechanism.

Consent

Consent under CASL is a key element to complying with CASL. Consent can either be explicit or implicit. Explicit consent is considered to be the gold standard under CASL as the consent is valid until a recipient withdraws it. In the absence of explicit consent, registered charities and non-profit organizations can rely on implicit consent, which is more complicated and requires ongoing monitoring.

Explicit Consent

If a registered charity or non-profit organization had explicit consent from recipients prior to July 1, 2014, it is presumed that the consent will be grandfathered under CASL, unless the recipient informs the sender that they no longer wish to receive CEM. Registered charities and non-profit organizations wishing to rely on a previous explicit consent obtained must remember that under CASL, the onus is on the sender to prove that consent was obtained. Therefore, unless a registered charity or non-profit organization can prove that they obtained explicit consent from the recipient, the prior explicit consent may not be acceptable under CASL.

As of July 1, 2014, several requirements must be met to obtain explicit consent, including:

- a) the recipient must opt-in;
- b) the request must provide the purpose for consent;
- c) the request must provide the name of the sender;
- d) the request must provide the contact information of the sender; and
- e) the request must inform the recipient that consent can be withdrawn.

Opting-in requires that a recipient take positive action to give their consent such as checking off a box or signing up an email address. Pre-checked boxes on the other hand, would not be a valid method to obtain explicit consent.

Where a request for consent is being sent on behalf of a registered charity or non-profit organization, the request must include the name of the sender and the registered charity or non-profit organization on whose behalf the request for consent is being sent, in addition to a statement indicating which party is the sender and which party is the registered charity or non-profit organization on whose behalf the consent is sought.

The contact information that must be included in a request is the mailing address of the sender or the registered charity or non-profit organization requesting consent, in addition to a telephone number where messages can be left, an email address or a website.

It is important to note that electronic messages cannot be sent to recipients seeking explicit consent unless there is implied consent. Instead, requests for explicit consent should be made by paper or orally.

Implicit Consent

Implicit consent can arise when there is a business or non-business relationship. With respect to charities and non-profit organizations, a non-business relationship includes:

- a) a donation or gift to a registered charity, a political party or organization or a person who is a candidate for publicly elected office for a two-year period following the donation or gift;
- b) volunteer work performed for a registered charity, a political party or organization or a person who is a candidate for publicly elected office for a two-year period following termination; and
- c) membership in a club, association or voluntary organization, as defined in the Regulations, for a two-year period following termination.

CASL provides a transitional period for implied consent for a period of 36 months beginning July 1, 2014. During the transitional period, the definition of existing non-business relationship is not subject to the limitation period of two years mentioned above. Nonetheless, implied consent during the transitional period will end if the recipient indicates that they no longer consent to receiving CEM.

Consent may also be implied if a recipient provided or conspicuously published their electronic address and does not state that they do not wish to receive unsolicited CEM and the message relates to the recipient's employment or official capacity.

Information to be Included in CEM

Once consent has been obtained, registered charities and non-profit organizations must ensure that all CEM sent, to which CASL applies, contain the following information:

- a) the name of the sender;
- b) the contact information of the sender; and
- c) an unsubscribe mechanism.

Where a CEM is being sent on behalf of a registered charity or non-profit organization, the CEM must include the name of the sender and the registered charity or non-profit organization on whose

behalf the CEM is being sent, in addition to a statement indicating which party is the sender and which party is the registered charity or non-profit organization on whose behalf the CEM is being sent.

The contact information that must be included in all CEM is the mailing address of the sender or the registered charity or non-profit organization on whose behalf the CEM is being sent, in addition to a telephone number where messages can be left, an email address or a website.

Unsubscribe Mechanism

The unsubscribe mechanism in a CEM must enable a recipient to inform the registered charity or non-profit organization that they no longer wish to receive CEM at no cost to the recipient. The recipient should also be able to access the unsubscribe mechanism on the same electronic means that the CEM is sent by or if that is not practicable, then any other electronic means.

The unsubscribe mechanism must be set out clearly and prominently and must also specify an electronic address or link to a web page where the recipient can direct their request to and must be able to be readily performed. The link to the web page must be valid for a minimum of 60 days after the message is sent. The sender or the registered charity or non-profit organization on whose behalf the CEM is sent must also ensure that the recipient's unsubscribe request is acted on without delay and no later than 10 business days after the request is received.

If it is not practicable to include the sender's information details and the unsubscribe mechanism in a CEM, that information may be posted on a web page that is readily accessible by the recipient at no cost to them by means of a link that is clearly and prominently set out in the message.

Suggestions

Despite the complexity of CASL, some of the requirements of the legislation are considered to be good practice when sending emails. In particular, unsubscribe mechanisms that are easy and work should be included in all emails sent to recipients. Recipients that have already decided they want to unsubscribe from an email list will only be frustrated and annoyed by registered charities and non-profit organizations that make them jump through hoops to unsubscribe. In addition to easy unsubscribe mechanisms, some other ideas that registered charities and non-profit organizations should consider when planning and implementing their communication strategy are:

1. If there is any concern over whether their electronic messages are subject to CASL, a registered charity or non-profit organization should consider obtaining express consent

from all their recipients. This is the gold standard and will make compliance with CASL easier.

2. In order to attract more recipients for an email list, a registered charity or non-profit organization should consider making sign up links on their websites more prominent.
3. When using website sign up links, charities and non-profit organizations should consider using a double opt-in method. This involves sending an email to an individual who signed up to an email list to confirm whether the individual really intended to sign up. While this is neither express consent nor required for the purposes of CASL, it does allow the charity or non-profit organization to confirm the validity of the email address entered and/or the individual's intent to sign up.
4. Registered charities and non-profit organizations should review their email lists and take a more segmented and directed approach to the use of emails. Making an effort to send emails that relate to the interests of the recipients and also align with the desired frequency of receiving emails will result in a better relationship between registered charities and non-profit organizations and their supporters.
5. It is important to be aware of what others are sending on the registered charity or non-profit organization's behalf. You do not want your extensive CASL compliance framework to be undermined by a well-meaning volunteer.
6. Encourage staff people and volunteers to have a personal address as well as an organizational address to avoid the perception that an email is being sent by the organization when it is sent in a personal capacity. With the focus on registered charities and political activities it is even more important to ensure a separation between a registered charity's activities and personal or private activities.

For more information on CASL, its application and its requirements, please refer to the Government of Canada's website *Canada's Anti-Spam Legislation* at <http://fightspam.gc.ca>.

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