

CASL Update for Charities and Other Not-for-Profits: Coming into Force July 1, 2014

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Introduction

On December 4, 2013, the federal government released the final regulations to implement *Canada's Anti-Spam Legislation* ("CASL")² and announced that most of its provisions would come into force on July 1, 2014. The newly released regulations (the "*IC Regulations*")³ supplement regulations that had been issued in 2012,⁴ provide important definitions and clarify a number of issues that had remained unclear since CASL was originally enacted back in 2010. Of crucial importance to charities, one of the exceptions contained in the *IC Regulations* will, in certain circumstances, relieve registered charities from the obligation to obtain prior consent before sending "commercial electronic messages" ("CEMs"). Charities and their associations had been very concerned that CASL as originally drafted would prevent them from sending fund-raising e-mails to donors and potential donors, which could have had significant detrimental effect on charitable fund-raising in Canada.

Background

As stated in the government's December 2013 Regulatory Impact Analysis Statement (the "RIAS")⁵ the purpose of CASL is to limit the inconvenience and damage to electronic commerce that can result from unsolicited CEMs or "spam". On December 15, 2010, Parliament passed Bill C-28, now referred to as CASL, to tackle spam by prohibiting, subject to limited exceptions, the sending of CEMs unless the recipient had provided his/her prior consent to receive such messages from the sender, and the CEM satisfied certain requirements as to form and content, including an easy to use "unsubscribe" mechanism.

CASL is one of the world's toughest anti-spam laws. Individuals can be fined up to \$1M for contravention of the legislation and businesses, charities and other

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² The full text of CASL is available at: <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>.

³ The *IC Regulations* are posted on the government's Fight Spam web site at: <http://fightspam.gc.ca/eic/site/030.nsf/eng/00273.html>.

⁴ The "Electronic Commerce Protection Regulations (CRTC)" are posted on the CRTC's web site at: <http://www.crtc.gc.ca/eng/archive/2012/2012-183.htm>.

⁵ The RIAS is posted on the government's "Fight Spam" web site at <http://fightspam.gc.ca/eic/site/030.nsf/eng/00271.html>.

not-for-profits (“NFPs”) can be fined up to \$10M. CASL’s comprehensive scope raised concerns amongst stakeholders, especially in light of its harsh penalties. The government responded to some of these concerns by including additional definitions and clarifying, and in some cases expanding upon, exceptions that had been unclear in CASL itself.

Exception for Charities

The *IC Regulations* specify a number of categories of CEMs to which the prohibitions and requirements of s. 6 of CASL will not apply. Subsection 6(1)(a) prohibits sending, or causing to be sent, a CEM to any person unless that person has previously consented (either expressly or by implication, as specified) to receive it. Subsection 6(1)(b) and related provisions require that all CEMs comply with certain form and content requirements. However, there has always been a recognition that certain types of CEMs should not be subject to these requirements. Exceptions were specifically provided for in s. 6(5)(c) of CASL which states that s. 6 does not apply to a CEM “that is of a class, or is sent in circumstances, specified in the regulations”. Those classes and circumstances remained to be set out in the *IC Regulations*.

Subsections 3(a) to (g) of the new *IC Regulations* set out a series of eight important exceptions. The most important, for the purposes of charities, is s. 3(g), which provides that s. 6 does not apply to CEMs that:

- (1) “are sent by or on behalf of a **registered charity** as defined in subsection 248(1) of *the Income Tax Act* [“*ITA*”]; and
- (2) the “message has as its **primary purpose raising funds** for that charity.” [Emphasis added.]

The limitations that are built into this exception must be carefully noted. The exception is not automatically available to all not-for-profits (“NFPs”) and charities. It is only available to *ITA*-registered charities. Further, not all CEMs sent by registered charities benefit from the exception. The message’s primary purpose must be to raise funds for that charity. Although the message may contain other contents, care must be taken to ensure that the CEM’s “primary purpose” is fund-raising for the charity that is sending the message, or on whose behalf the message is being sent by a third party. So long as these two elements are in place, the charity may send (or cause to be sent) fund-raising CEMs to individuals, even without that person’s prior consent, and even if the CASL’s “form and content” requirements have not been met.

Other Exceptions and Implied Consent

Since they may also be relevant to NFPs and charities, the other exceptions included in s. 3 of the *IC Regulations*, which provide relief from both the prior consent and the form and content requirements of CASL, are for:

- (a) **business to business** CEMs, that are sent within an organization or between organizations that “have a relationship”;
- (b) CEMs sent in **response to a request, inquiry or complaint** or are otherwise solicited by the person to whom the message is sent;
- (c) CEMs that are sent in connection with **legal rights**, such as to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff, or to enforce a right, legal or juridical obligation, court order, judgment or tariff;
- (d) CEMs sent via **instant messaging and similar platforms**, sent and received on an electronic messaging service if the required information and unsubscribe mechanism are both conspicuously published and readily available on the user interface, and the person to whom the message is sent consents to receive it either expressly or by implication;
- (e) CEMs sent through **secure online portals, such as banking web sites**, sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the message;
- (f) where the person who sends the message or causes or permits it to be sent reasonably believes the message will be **accessed in a foreign state** that is listed in the schedule and the message conforms to the “anti-spam” law of that foreign state; and
- (h) CEMs sent by or on behalf of a political party or organization, or a person who is a candidate for publicly elected office and the message has as its primary purpose soliciting a contribution as defined in the *Canada Elections Act*.

These new exceptions in the *IC Regulations* supplement the exceptions that were set out in CASL itself. For example, s. 6(5)(a) provides that none of the s. 6 requirements apply to CEMs that are sent “by or on behalf of another individual with whom they have a **personal or family relationship**”. These terms have now been defined in the *IC Regulations*.

Further, CASL sets out a number of circumstances in which consent to receive CEMs may be implied. For example, s. 10(9)(a) states that consent will be implied where there is an “existing business relationship” or an “existing non-business relationship” with the recipient. These terms are defined in s. 10(10) and s. 10(13) and each can be shown to exist in a variety of ways. For example, an “**existing business relationship**” can arise from the purchase or lease of a product or service within the two-year period before the CEM was sent or from an inquiry or application made within a period of six months before the CEM was sent. Under s. 10(13)(a) and (b), an “**existing non-business relationship**” can

arise from a donation or gift made to, or volunteer work performed for, an *ITA*-registered charity within the two-year period before the CEM was sent. Under s. 10(13)(c), an “existing non-business relationship” can also arise from “membership” in a club, association or voluntary organization, during the two-year period before the CEM was sent. The *IC Regulations*, at s. 7, define these terms: “membership” is the status of “having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements;” and a “club, association or voluntary organization” is defined, as it is in the *ITA*, as a “non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada”.

Where an exception or an implied consent is relied upon, it will be important to retain the relevant records, including records relating to the applicable time frame. CASL’s s. 13 provides that the organization sending the CEM has the burden of proving that consent has been provided or that an exception or implied consent exists.

Implications for Charities and NFPs

Within the next few months, charities and NFPs should review their existing procedures relating to the e-mail communications they send to donors and other recipients to ensure that where CEMs are sent, they benefit from the new exception for charities. Where the new exception cannot be used, either because the organization is not an *ITA*-registered charity or because the message’s “primary purpose” is not fund-raising for the registered charity, a more detailed examination should be undertaken to ensure that another exception is available (such as where the CEM is responding to a request, inquiry or complaint), that consent may be implied (such as where a donation has been made to an *ITA*-registered charity in the previous 2 years), or that the necessary consent has been obtained as provided for by CASL.

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