

# CANADIAN ANTI-SPAM LEGISLATION WORKSHOP FOR CHARITIES AND NOT- FOR-PROFIT ORGANIZATIONS

**Edmonton Chamber of Voluntary Organizations  
Co-presented with Bill Schaper of Imagine Canada**

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# Overview

1. Overview of Canada's Anti-Spam Legislation (CEMs)
2. Issues specific for Charities/NPOs
3. How do I prepare my organization for these changes?
4. Other CASL requirements

# What is Canada's Anti-Spam Law (“CASL”)?

- “An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian *Radio-television and Telecommunications Commission Act*, the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* and the *Telecommunications Act*” (S.C. 2010, c. 23)
- Unofficially called “Canada’s Anti-Spam Legislation” or “CASL”

# CASL – Background and History

- Regulates a broad range of activities including:
  - i) Unsolicited electronic messages (emails, texts, etc.)
  - ii) Hacking, malware and spyware
  - iii) Phishing, fraudulent or misleading practices
  - iv) Privacy invasion via your computer
  - v) Collecting email addresses without consent (email harvesting)
- CRTC Website : [www.fightspam.gc.ca](http://www.fightspam.gc.ca)

# CASL - Fundamental Underlying Principles

- All of the regulated activities may only be carried out with informed consent
- “Opt-In” Regime
- Forms part of our G20 commitments

# CASL - Fundamental Underlying Principles (Cont'd)

- According to Industry Canada –  
  
“ **The general purpose of CASL is to encourage the growth of electronic commerce by ensuring confidence and trust in the online marketplace.**”

# When will CASL be in force?

- **Three important dates:**
  - **July 1, 2014:** requirements respecting CEMs
  - **January 1, 2015:** requirements respecting computer programs
  - **July 1, 2017:**
    - End of transition period for implied consent
    - private rights of action
- **Important dates for charities/NPOs:**
  - **July 1, 2014:** date after which consent for CEMs must be obtained
  - **July 1, 2017:** end of transition period for implied consent

# Significant Consequences for Non-Compliance

- Administrative monetary penalties:
  - Individuals – fines up to **\$1 million per violation**
  - Corporations – fines up to **\$10 million per violation**
- Private rights of action:
  - \$1,000,000 in damages per individual
  - potential for class actions of massive proportions
- Vicarious liability:
  - vicarious liability of corporation for employees
  - officers and directors liable for wrongful acts of corporation
- Sweeping investigative powers (search and seizure orders)
- Injunctions (“cease and desist” orders)



# Regulating Bodies

- 3 Federal government bodies have been tasked with regulating and enforcing CASL:
  1. **CRTC** – CEMs and installation of computer programs
  2. **Privacy Commissioner** – collection of personal information and address harvesting
  3. **Competition Bureau** – misleading online advertising and marketing practices

# Commercial Electronic Messages (“CEM”s)

- General prohibition against transmitting / sending a “Commercial Electronic Message” to an electronic address unless:
  1. The receiver has already consented to the receipt of the CEM; and
  2. The CEM contains certain prescribed information
- Subject to limited exclusions / exemptions
- **July 1, 2014 – Compliance Date**

# What is a CEM?

- CEM is a message sent by **any electronic means** (i.e., email, text, instant message, tweet) that has, as its purpose, or one of its purposes, to encourage participation in a “commercial activity”
- A “commercial activity” is:
  - “any particular transaction, act or conduct that is of a commercial character **whether or not the person who carries it out does so in the expectation of profit**”
- Examples include:
  - offer to purchase, sell or lease goods or services
  - offer to provide a business, sell or lease investment, or gaming opportunity
  - Advertising or promotion of these activities

# Do Charities / NPOs Transmit CEMs?

- Most likely yes!
- The broad definition of CEMs, and particularly the requirement that the purpose not be “for profit”, suggests that charities and NPOs will be captured by this definition
  - Examples:
    - Emails seeking donations
    - Emails seeking volunteers / members
    - Emails selling tickets to a charity event / lottery
    - Emails promoting a charitable event / activity
    - Electronic newsletters
    - Emails promoting the organization’s work

# CEM Consent Requirements

- **CEMs may only be sent with recipient's express or implied consent**
- Onus of proving consent rests with sender
- An electronic message requesting express consent is a CEM and is therefore prohibited (post July 1, 2014)

# Express Consent (CEM)

- Request for express consent may be obtained **orally or in writing**
- Request for consent must include:
  - The purpose for which consent is being sought (“clearly and simply”)
  - You may rely on consent obtained previously (for example, under privacy legislation) but only if it was for the same stated purpose

# Express Consent (CEM) (cont'd)

- Request for express consent must also include:
  - Sender's identifying information and/or on whose behalf consent is being sought
  - Sender's contact information
  - Statement that receiver can withdraw their consent

# Implied Consent

- Consent may be implied in specific circumstances:
  1. “existing business relationship”
  2. “existing non-business relationship”
  3. the recipient has:
    - a. “conspicuously published” his/her electronic address (on a website for example)
    - b. has not indicated a desire to not receive unsolicited CEMs; and
    - c. the message is relevant to recipient’s business role, duties or functions
  4. the recipient has:
    - a. disclosed his/her electronic address to sender without indicating a wish not to receive unsolicited CEMs (e.g., business card); and
    - b. message is relevant to person’s role or duties in business or official capacity



# Implied Consent (cont'd) – “Existing Business Relationship”

- In the two years prior to the sending of the CEM, the recipient had:
  - purchased or leased or bartered a product, good, service, land or an interest or right in land from the sender;
  - accepted a business, investment or gaming opportunity offered by the sender; or
  - a written contract is created between the recipient and the sender for a matter not listed above
- Or - Six months before the message is sent, the sender received from the recipient an inquiry or application about one of the items above.

# Implied Consent (cont'd) – “Non-Business Relationship”

- Applies to charities and NPOs
- Consent to sending of CEM is implied where there is an “existing non-business relationship” -
  - Sender is registered charity and recipient made donation or performed volunteer work in **preceding two years**
  - Sender is a non-profit organization (defined as in the ITA) and recipient has been a member in the **preceding two years**

# Implied Consent (Cont'd)

## Transitional Period -

- CASL provides for a **three-year transition period** after being declared in force, during which time there will be implied consent for parties who are already in an existing business or existing non-business relationship without regard to the two-year period
- This means that charities and NPOs have until **July 1, 2017** to obtain express consents from their donors, volunteers and members

# Information Requirements for CEMs

- Requirement for all CEMs (whether by express or implied consent):
  - CEMs must include identifying information of sender or person on whose behalf the message is sent
  - Must set out a means by which to contact the sender (to be effective for at least sixty days)
  - Must give the recipient a method to “unsubscribe”, from receiving messages
  - When not practical to include in CEM, the information must be posted on a website and the CEM must include a link to that website, which is clearly and prominently set out in message and is readily accessible

# Requirements for “Unsubscribe” Mechanism:

- Must allow recipient to advise sender to stop sending messages
- Must set out electronic address or link to an “unsubscribe” page
- Must be effective for 60 days
- Must be given effect within 10 days following receipt
- Must be at no cost to person

# Exemptions from CEM Requirements

- **Registered Charities Exemption:**

CEMs sent by or on behalf of a registered charity (as defined in ss. 248(1)) of *ITA*) and “the message has as its primary purpose raising funds for the charity”

- If CEM meets this exemption - **no need to obtain consent or to include prescribed information**

# Charities Exemption

- Emphasis is on “**primary purpose**” of message
  - what will be considered “primary purpose?”
  - Would it be interpreted from the viewpoint of the sender or the receiver?  
Examples:
    - Email that provides information about the charity’s work and contains one sentence at the bottom asking for donations - is it for the primary purpose of raising funds? → probably not
    - Email that sells tickets to a charitable event – is it for the primary purpose of raising funds? → probably yes
- What does “raising funds” mean?
  - Is it different than “fundraising”, as is interpreted by the CRA (under the ITA)?
- CRTC likely to focus less on the intended use of the funds and more on the content of the message

# Other CEM Exemptions

1. CEMs between individuals who have a “personal” or “family” relationship - requires a history of direct, voluntary, two-way communications
2. A CEM sent to a person engaged in a commercial activity and consists solely of an **inquiry or application** related to that activity
3. Solicited CEMs - sent in response to a request, inquiry or complaint, or otherwise solicited by the person to whom the message is sent
4. Internal CEMs – sent within an organization / business and concerns the activities of that organization / business
5. CEMs between organizations / business – if the businesses / organizations “have a relationship” and the CEM concerns activities of the receiver business / organization



# CEM Exemptions (cont'd)

6. CEMs sent to enforce a legal right
7. CEMs sent within an electronic platform where “unsubscribe” and identifying information is conspicuously published and readily available (e.g., within a social network)
8. CEM sent within a limited-access secure account by the person who provides that account (e.g., banking portals)
9. CEM sent by a political party for the primary purpose of soliciting contributions
10. CEMs sent to a foreign jurisdiction (but must comply with foreign anti-spam laws)
11. Two way voice communications
12. Faxes and voicemail messages sent to telephone accounts

# Exemptions that must contain info and “unsubscribe”

- In limited circumstances, there is no need to obtain consent but must still include prescribed information (identifying info + unsubscribe):
  1. Third party referral - the first CEM sent to a person based on a referral from a third party, after which consent will be needed for added CEMs →
    - Identifying information required for the person sending the CEM and the person who has made the referral
    - Unsubscribe option available through person sending CEM and person making the referral
  2. Provision of quote or estimate in response to a request
  3. Warranty, recall or product safety information
  4. CEM that delivers a product or service, including updates and upgrades
  5. CEM that facilitates or confirms transactions
  6. **CEM that provides factual information about:**
    - **Ongoing subscription, membership**, accounts, loans
    - Ongoing use or ongoing purchases
    - Employment relations or benefit plans for employees

# Issues Specific To Charities / NPOS

1. Does your organization send CEMs?
2. Is consent required?
3. Is consent implied?
4. Forms of express consent
5. Do you need to include prescribed information in CEM?

# ISSUE # 1: Does Your Organization Send CEMs?

- Most likely your organization will send CEMs (due to broad definition)
- To definitively answer this question, you should conduct an audit of all your electronic communications:
  1. What forms of electronic communications does the organization use to communicate with internal and external parties? (e.g., email, instant messaging, text messaging/SMS, social networks (e.g., Facebook®, LinkedIn®, Twitter®), other electronic services (e.g., portals or web-forums))
  2. On behalf of which entities does the organization send out electronic communications? (e.g., primary organization, related or affiliated organizations)
  3. To whom does the organization send external electronic communications? (e.g., donors, potential donors, volunteers, other charitable and not-for-profit organizations, landlords, tenants and/or subtenants, government/quasi-government bodies, suppliers, clients/customers, potential clients/customers, others)

# ISSUE # 2: Is Consent Required?

- NPOs -: most likely yes (unless meets one of the listed exemptions)
- Registered charities:
  - You will not be required to obtain consent or to include prescribed information, **if CEM is for primary purpose of raising funds for the charity**
  - **If, from its content, a CEM is not for the primary purpose of raising funds for the charity**, you must have consent and include prescribed info
  - Recommended: to err on the side of caution and include prescribed information in all CEMs and obtain consent (express or implied)
- Does CEM meet other exemptions? - in limited circumstances

## ISSUE # 3: Is Consent Implied?

- Charities and Not-for-Profit Organizations have the benefit of **2 years implied consent for all registered donors, volunteers and/or members**
- Beyond 2 years (with exception of transition period) – you must obtain express consent
- If you are going to rely on implied consent - you must keep track of the 2 year period for all donors, members and volunteers

# Recommended Risk Management Practice

- **BEFORE JULY 1, 2014** – SEEK EXPRESS CONSENT FROM ALL NEW AND EXISTING DONORS, POTENTIAL DONORS, VOLUNTEERS, MEMBERS, CONTACTS, SUPPLIES, LANDLORDS / TENANTS, AND ANYONE ELSE ON YOUR CONTACT SHEET
- **AFTER JULY 1, 2014** –
  - Seek express consent in a prescribed manner from all recipients of CEMs (not in the form of a CEM); and
  - For donors / volunteers / members only - if no express consent given - maintain a “tickler system” and seek express consent a few months before two years is up

## ISSUE # 4: Forms of Express Consent

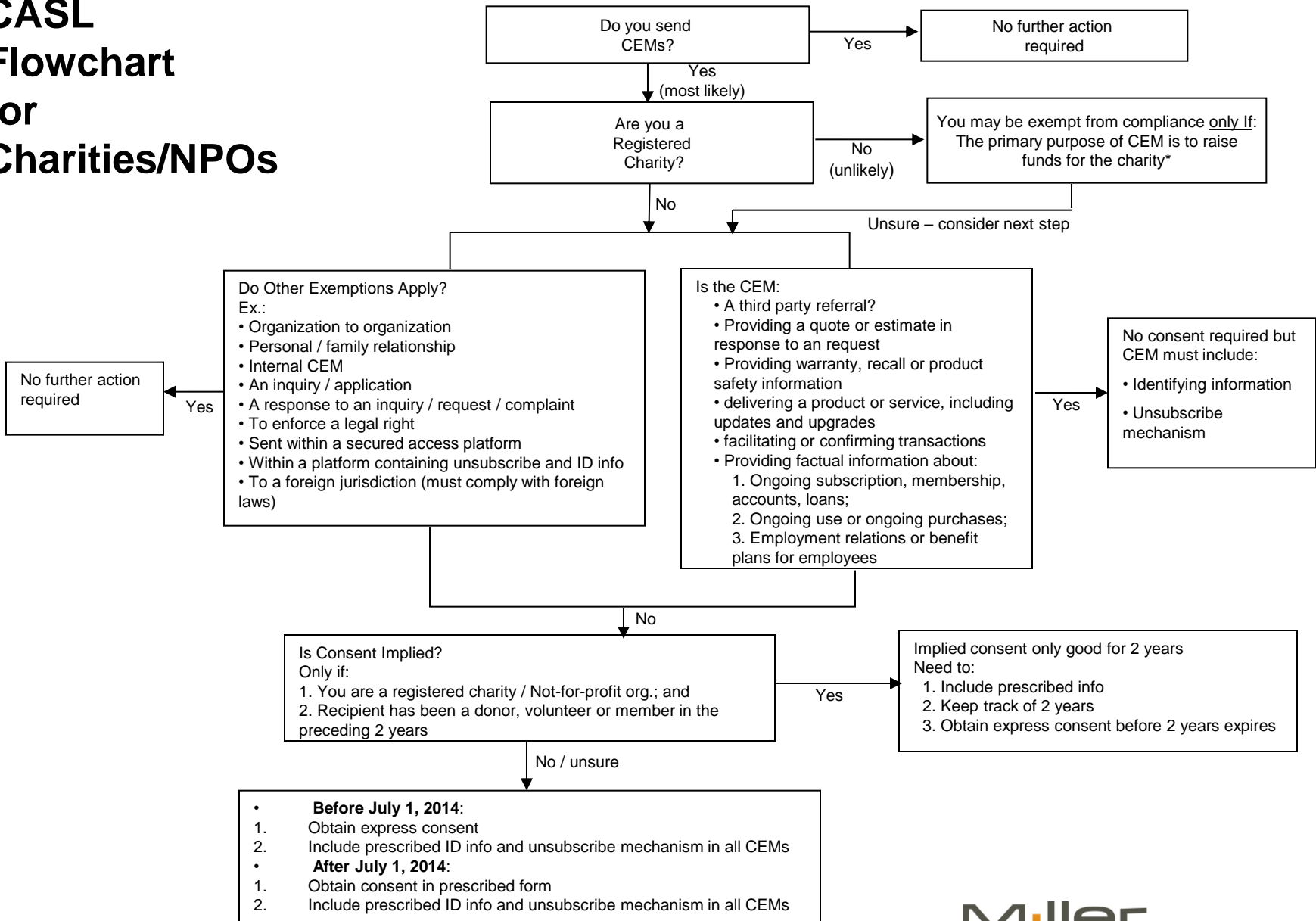
- If you are seeking express consent – ensure that it complies with consent form requirements
- Proper form of express consent include:
  - Paper form
  - Electronically, not in a form of a CEM, and:
    - cannot include a “pre-checked box”
    - must set out clearly for what purpose you are seeking the consent (e.g., “for the purposes of receiving all future commercial electronic messages”)



# ISSUE #5: Do I need to include Prescribed Info in CEM?

- Prescribed information requirements:
  - Charities exemption applies:
    - No need for prescribed information
    - But - consider erring on the side of caution and including it anyway
  - All others:
    - Ensure that all electronic communications from your organization contain the prescribed identification
    - Ensure that all electronic communications from your organization contain “unsubscribe” function
    - Ensure you keep track of all those who have “unsubscribed” - need to maintain a database
    - If you cannot / do not have the resources to include these requirements in your electronic messages - create a webpage with these functions and including a conspicuous link to that website in all electronic messages

# CASL Flowchart for Charities/NPOs



# GENERAL TIPS FOR PREPARING FOR CEM REQUIREMENTS

# TIPS

- **BEFORE JULY 1, 2014 -**
  - Develop forms for CASL compliant communications containing the required unsubscribe mechanism
  - Develop the required unsubscribe mechanism
  - Develop an implementation and training program
  - Develop policies and procedures for CASL compliance (Due Diligence defence)
  - Train and educate management, staff and volunteers

# TIPS (cont'd)

- What process will you have in place to address “opt-out” requests by reply message, phone or to individual employees?
- What third parties have been retained to send CEMs on your organization’s behalf?
  - Develop a policy to ensure their CEMs are CASL compliant
- Review your contracts with third parties – require CASL compliance
- Consider buying insurance for CASL

# TIPS (cont'd)

- Much of the preparation is IT dependant
- Review IT systems and implement:
  - manner to obtain express consents;
  - record whether consents have been obtained for each contact;
  - if you intend to rely on implied consent –
    - Maintain up-to-date records of all donors / volunteers / members
    - Record when donor / volunteer/ member first donated / joined – that is when the 2 year timeframe for implied consent begins to run
    - implement “tickler system”

## TIPS – IT Systems (cont'd)

- ensure all electronic messages are sent in the prescribed format
- ensure all electronic messages are sent only to persons who have provided express consent or for whom consent is implied
- provide an unsubscribe mechanism in accordance with prescribed requirements
- ensure the unsubscribes are implemented in your system within 10 business days. This needs to be implemented in all your databases.

# Other CASL Requirements (non CEM)

1. Installation of computer programs
2. Unauthorized electronic collection of personal information
3. Email address harvesting
4. Prohibition against misleading marketing / advertising in electronic format



# Computer Programs

- It is prohibited to install a computer program (e.g., software, applications etc.) on a computer or device (phone, tablet etc.) in Canada unless express consent is provided by owner
- This requirement applies to upgrade and updates of the computer program
- Express consent is assumed if:
  - Consent was provided at the time the program was installed
  - For telecommunication service providers
  - To address a failure in the system's software or hardware
  - For specific types of programs (cookies, HTML code etc.)
- Coming into force – January 1, 2015

# Computer Programs (cont'd)

- Does this requirement apply to your organization?
  - Does your organization have an app for mobile devices?
  - Does your organization provide services through a computer program? (e.g., instructional video games)
  - Does your organization provide a program for its employees, members, donors etc. to be used to internally communicate with the organization (e.g., remote access)
- If the answer is yes - you must seek consent for the installation, updates and upgrades of the program

# Computer Programs (cont'd)

- Also - does your program:
  - Collect personal information?
  - Interfere with owner's ability to control their device?
  - Change settings or preferences without the owner's knowledge?
  - Interfere with data, preventing the owner from accessing it?
  - Cause the device to communicate with another without the knowledge of the owner?
  - Install any software that can be activated remotely by a third party?
- If YES to any of the above - make this information clear when requesting consent

# Electronic Collection / Use Of Personal Information and Address Harvesting

- CASL prohibits anyone from using electronic systems to collect and use personal information and email addresses without the express consent of the person whose information is collected / used
- Review your online marketing strategy - does it perform any of these functions?
- If yes - consider eliminating the practice altogether or obtaining consent

# Misleading Online Marketing / Advertising

- Requirements already exist for marketing / advertising in traditional formats
- Updated to specifically prohibit the practice online

# CASL Online Resources

- <http://millerthomson.com/en/our-services/anti-spam-casl>
- <http://www.crtc.gc.ca/eng/casl-lcap.htm>
- <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html>

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