

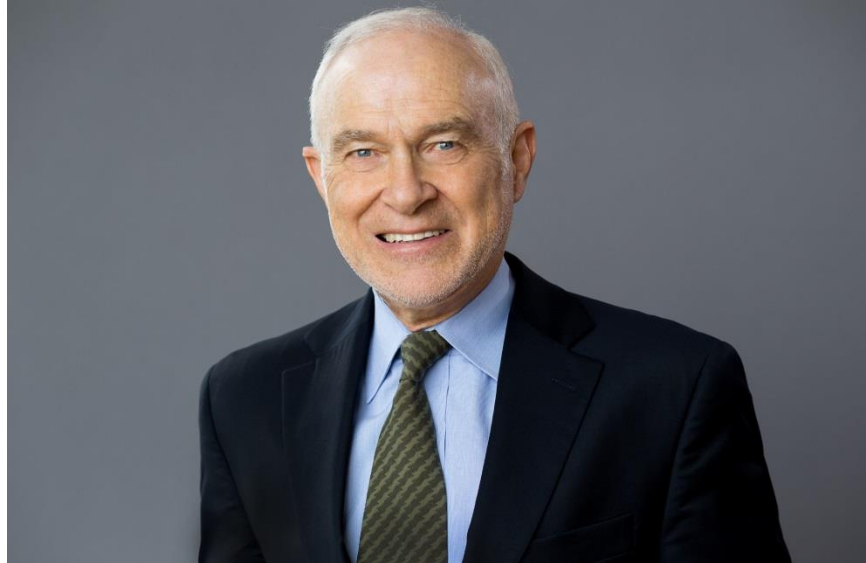
**CANADA'S ANTI-SPAM LEGISLATION (CASL):
WHAT YOUR CHARITY NEEDS TO DO BEFORE
JULY 1ST**

CANADAHELPS WEBINAR

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DAVID YOUNG BIO



David is Principal at David Young Law, a privacy and regulatory law counsel practice. David focuses on regulatory compliance with an emphasis on privacy, security, product compliance and digital marketing. He has been advising clients on marketing and related regulatory matters since the 1980's and on privacy issues since prior to the enactment of Canada's private sector privacy laws.

David's practice also has included advising charities and other not-for-profit organizations on a diverse range of issues including corporate compliance and contracting.

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OVERVIEW

- **What is CASL and to whom does it apply?**
- **What is happening July 1?**
- **Implications for charities and not-for-profits**
- **CASL's key provisions**
- **What is implied consent and the transitional period?**
- **Regulatory penalties**
- **What is the PRA?**
- **Compliance programs – due diligence**
- **Record keeping**
- **Top ten actions for charities and NFPs before July 1**

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WHAT IS CASL AND TO WHOM DOES IT APPLY?

- **CASL is legislation that prohibits unsolicited, misleading or fraudulent commercial electronic messages (CEMs) as well as unauthorized downloads of computer programs and apps, sent by any person in Canada including charities and not-for-profits**
- **Is characterized by a “ban all – but make exceptions” approach**
- **Provides for significant financial penalties for non-compliance including potentially through class actions**
- **Financial liabilities extend to directors and officers who participate in, authorize or acquiesce in non-compliant activities**

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WHAT IS A COMMERCIAL ELECTRONIC MESSAGE (CEM)?

A CEM is an electronic message that, having regard to its content, links, or the contact information provided, would reasonably be determined to have as a purpose encouraging participation *in a commercial activity*

Commercial activity is defined to include any commercial transaction whether or not for profit

Will apply to many activities carried on by charities/not for profits (e.g. sale of tickets, services, merchandise, memberships)

CEMs include emails, tweets, text messages, website interactions, other electronic communications sent to an electronic address in connection with a commercial activity *and include requests for consent*. Social media postings are not CEMs unless addressed to a person or address

Information posted on a website for general viewing is not caught

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WHAT IS HAPPENING JULY 1?

- **CASL's transition period for implied consents is ending – means more rigorous compliance will be required**
- **A private right of action (PRA) against persons who send non-compliant electronic commercial messages (CEMs) was scheduled to into force – would create added risk for all senders of CEMs including charities and not-for-profits**
- **These circumstances focus the importance of having internal compliance programs – such programs address due diligence and provide a defence to penalties for non-compliance and the PRA**

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ISSUES FOR CHARITIES AND NOT-FOR-PROFITS

Do you send CEMs?

Is at least one of the purposes of the message promotion of a commercial activity (e.g. sale of tickets, merchandise)?

Is the main purpose fundraising? CEMs that are sent by charities with the main purpose of fundraising are excluded from both the consent and content requirements

Do your CEMs qualify for implied consent? - applies to (defined) existing business and existing non-business relationships

Do your CEMs qualify under a specific exception?

CASL – KEY PROVISIONS

- **CEM content requirements:**
 - (i) **Sender contact information**
 - (ii) **Unsubscribe mechanism**
- **Consent requirement: must be express - or “implied” (for defined categories for business and non-business relationships)**
- **Requests for consent – must comply with form and content requirements**
- **Certain exceptions/exemptions apply to**
 - (i) **all requirements**
 - (ii) **consent requirements**
- **Significant exposure to potential penalties, liabilities including, ultimately, under the new private right of action**

SENDER CONTACT INFORMATION

All CEMs must clearly and prominently disclose:

- Identity of sender

Contact information for sender:

- (i) mailing address, and
- (ii) one of:
 - telephone number with active response voicemail
 - email address
 - web address



If “not practicable” to include in CEM, may provide the information on a web page via a readily accessible, no-cost link within the CEM

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UNSUBSCRIBE

- **Must enable recipient to request removal from CEM list, as sent by sender, and be able to be “readily performed”**
- **Using the same or, if that is not practical, other equivalent electronic media**
- **Must provide electronic address or a link to a web page, to which unsubscribe message may be sent**
- **Address/web page must be valid for 60 days**
- **Sender must give effect to unsubscribe request within 10 business days**

CEM TEMPLATE

Must include:

- **Sender's name and any other name under which sender carries on business**
- **If CEM is sent on behalf another person, that person's name and any business name and a statement of the nature of the relationship**
- **Mailing address and an email address, web address or telephone number for the sender or of the person on whose behalf the message is sent, if different**
- **An unsubscribe mechanism**

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

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EXEMPTIONS FROM ALL CEM REQUIREMENTS

Consent, contact and unsubscribe requirements do not apply to CEMs sent:

- **Within family or personal relationships**
- **That make an inquiry or application regarding a commercial activity**
- **By charities if the CEM has as its primary purpose fundraising**
- **Entity to entity – CEMs within an organization or between organizations that have a “relationship” – by and to an employee or a “representative” of the organization concerning its “activities”**
- **In response to inquiries, complaints**
- **Pursuant to legal obligations (e.g. notices, warranty information)**

EXCEPTIONS TO THE CONSENT REQUIREMENT

Consent is not required if:

- a) Solely providing a quote or estimate requested by the recipient;
- b) Confirming a commercial transaction among the parties;
- c) Providing warranty, recall, safety or security information;
- d) Notifying of factual information relating to the ongoing use or purchase of a product, good or service under an established relationship;
- e) Providing information relating to an employment relationship, including a benefit plan;
- f) Delivering a product, goods or service including product updates/upgrades; or
- g) Following up on a referral

IMPLIED CONSENT

- Specifically defined (i.e. is not open-ended)
- Exists only: If sender and recipient have ***an existing business relationship*** or an ***existing non-business relationship***;
or: if recipient has published conspicuously the email address to which a message may be sent, or has disclosed the address to the sender, without stating that it does not want to receive emails
- “Existing business relationship” is a commercial (i.e. contractual) relationship not more than 2 years old, or a response to an inquiry within the last 6 months

EXISTING NON-BUSINESS RELATIONSHIP

- **Donation or gift made by the recipient within the previous 2 years to a registered charity, political party or candidate**
- **Volunteer work or attendance at a meeting of a registered charity, political party or candidate by the recipient within the previous 2 years**
- **Membership in a club, association or voluntary organization (defined: any non-profit purpose) within the previous 2 years**

IMPLIED CONSENT – IMPLICATIONS OF THE END OF THE TRANSITIONAL RULE

- Existing or prior business and non-business relationships as of July 1, 2014 have had implied consent for 3 years from the CASL in-force date (i.e. to July 1, 2017), without regard to the 2-year/6 month period, if the relationships included sending CEMs
- Significance: the normal rule for implied consent (2-year/6 month period) does not apply – any relationship in existence or prior to July 1, 2014 qualifies
- Represents a significantly more flexible rule for implied consent than will be available after July 1 – will now require more rigorous record-keeping to qualify
- Senders who have relied on the transitional rule should revisit obtaining express consent and use the remaining time prior to July 1 to consider doing so
- The risks posed by the PRA which was to come into force July 1 will dictate an increased emphasis on compliance programs and due diligence

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REGULATORY PENALTIES

- **Administrative monetary penalties (AMPs) of up to \$1,000,000 (individuals); \$10,000,000 (other persons) per violation**
- **Violations can be addressed via an undertaking**
- **Directors and officers liable for violations if they directed, authorized, assented to, acquiesced or participated**
- **Employers are responsible for acts of their employees**
- **Due diligence defence applies**
- **Factors to be taken into account in setting any penalty: the purpose of the penalty (i.e. compliance), nature of the violation, prior violations or undertakings, any financial benefit received, ability to pay, whether any compensation has been paid to affected persons, and “any other relevant factor”**

WHAT IS THE PRIVATE RIGHT OF ACTION?

- Was scheduled to come into force on July 1, 2017. Now suspended pending review by a Parliamentary Committee. Is a right for private parties to obtain statutory damages for breach of CASL's anti-spam and computer download prohibitions, the email harvesting provisions under PIPEDA and the false or misleading email prohibitions under the Competition Act
- The potential remedies are significant – in addition to actual losses or expenses, complainants may recover, without any proof of loss, monetary amounts of up to \$200 for each contravention to a maximum of \$1,000,000 per day for each day that a contravention occurs or continues
- Protection against liability if prior to an application being heard an undertaking to comply with CASL has been entered into or a notice of violation has been served
- Liability extends to officers and directors
- Amount of any award is determined by the same factors as AMPs
- Due diligence defence applies

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COMPLIANCE PROGRAM

- Facilitates compliance and addresses risk management
- Helps establish due diligence in the event of any non-compliance
- Requires senior management commitment
- Key document: CASL Compliance Policy
- Record keeping
- Training program
- Auditing and monitoring
- Complaint handling system
- Corrective action

Refer to: *CRTC Compliance and Enforcement Bulletin CRTC
2014-326* – Guidelines to help businesses develop
compliance programs

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PURPOSE AND FUNCTIONS OF A CASL COMPLIANCE POLICY

- Provides evidence of the organization's CASL-readiness and compliance
- Constitutes a statement of policy regarding CASL compliance
- Provides a framework for and summary description of the organization's CASL compliance program
- Serves as a key guideline and reference for staff training and ongoing compliance activity
- Needs to have a tone that reflects a balance between detail and overview/principles with sufficient substantive information so that the reader understands the top-line CASL compliance elements and also is pointed to the operational procedures
- Should be able to be made available publicly, as required

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RECORD KEEPING - WHY

- Due diligence defences (ss. 33, 46(2), 54(1))
- Onus on sender to prove consent (s. 13)
- Good record-keeping practices may help organizations (i) identify potential non-compliance issues, (ii) investigate and respond to consumer complaints, (iii) respond to questions about the business's practices and procedures, (iv) monitor their corporate compliance program, (v) identify the need for corrective actions and demonstrate that these actions were implemented, and (vi) establish a due diligence defence in the event of any allegation of non-compliance

CRTC Compliance and Enforcement Bulletin 2014-326 – Guidelines to help businesses develop compliance programs

CRTC Enforcement Advisory - Notice for businesses and individuals on how to keep records of consent (July 27, 2016)

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WHAT RECORDS

- CEM templates
- All unsubscribe requests and actions
- Records of actioning of unsubscribe requests
- All templates used for requests for consent
- Records and any relevant evidence of express consent (audio recordings or forms)
- CEM recipient consent logs
- Records establishing existing business/non-business relationships
- CASL policies and procedures
- Records of complaints and their disposition
- Internal audit/monitoring reports
- Records of corrective actions taken as a result of internal audits, complaints

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THE TOP TEN THINGS THAT CHARITIES AND NFPS SHOULD DO BEFORE JULY 1 TO BE CASL COMPLIANT

1. Review all communications categories for CASL compliance requirements (email template; consent; exceptions/exemptions)
2. For communications requiring consent, identify databases that are relying on implied consent under the transitional rule
3. Determine compliance strategy for communications relying on the transitional rule – whether can rely on standard implied consent, or should obtain express consent, or discontinue
4. Review and as required update express consent request template
5. Review and as required update CASL Compliance Policy
6. Review communications procedures/documents/templates
7. Review and as required adjust record-keeping procedures
8. Review and as required update CASL compliance training
9. Review CASL Compliance Program / accountability framework
10. Take any other corrective actions resulting from this review

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QUESTIONS?

THANK YOU

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