

Submission to the House of Commons
Standing Committee on Industry, Science and Technology
Review of Canada's Anti-Spam Law
October 2017

RECOMMENDATIONS

- 1. Exempt all electronic communications sent by or on behalf of a registered charity (as defined in subsection 248(1) of the *Income Tax Act*) from the consent provisions of CASL.**
- 2. Exempt all electronic communications sent by or on behalf of public-benefit nonprofit organizations from the consent provisions of CASL.**
- 3. Exempt registered charities and public-benefit nonprofit organizations from the Private Right of Action provisions of CASL.**

Background

There are approximately 86,000 registered charities in Canada, and it is estimated that there are a similar number of nonprofit corporations. (Statistics Canada does not currently collect information allowing for an accurate count of nonprofit corporations that are not registered charities.) According to the most recent information available – and factoring out hospitals, universities, and colleges – more than half of the resources charities and nonprofits generate to carry out their missions comes from neither donations nor government grants.

Registered charities are strictly regulated by the Charities Directorate within the Canada Revenue Agency. In order to receive registered charity status, an organization must demonstrate that it is fulfilling a charitable purpose (as defined by statute, judicial interpretation, and CRA guidance), that its activities generate public good, and that no undue private benefit results from its activities. Registered charities must file detailed financial information with the CRA on an annual basis, and are subject to audit.

Nonprofit corporations that are not registered charities include “public-benefit” organizations such as public housing corporations, community development corporations, and social service agencies. Public-benefit nonprofits have four fundamental characteristics: (i) a public purpose and mission; (ii) they operate for the public good, not personal gain; (iii) they reinvest any excess revenue in their public mission; and (iv), they retain their assets in the public domain for the public good.

Charities and public benefit nonprofits rely on a variety of methods to generate the income they need to continue delivering services in their communities. They use a wide variety of means to communicate with the public and to offer their services, including electronic communications.

The current regulations associated with Canada’s Anti-Spam Law provide an exemption for commercial electronic messages sent “by or on behalf of a registered charity” when “the message has as its primary purpose raising funds for the charity.” There is no exemption for commercial electronic messages sent by public-benefit nonprofits.

We recommend an exemption for registered charities

As noted above, the current regulations provide a limited exemption for certain commercial electronic messages sent by or on behalf of registered charities. Prior to the regulations being Gazetted in 2014, Imagine Canada sought clarification from Industry Canada as to the intent of the exemption. The CRA produces guidance to registered charities on the issue of fundraising, and describes activities that the CRA deems to be fundraising. Industry Canada (as it was known at the time) confirmed in writing their intent for the exemption to apply to all activities included in the CRA guidance, as well as to a number of other activities in which charities engage to raise funds. When Imagine Canada shared this information with its stakeholders, the CRTC intervened to indicate it had a different understanding of the exemption. While the CRTC has produced some information and FAQs particular to registered charities, it remains unclear whether the CRTC accepts the definition of the exemption as confirmed by Industry Canada.

The uncertainty over the existing exemption means that charities may be incurring compliance costs, despite the government’s intent that virtually all of their CEMs be exempt. A survey conducted by Imagine Canada and the Ontario Nonprofit Network found that:

- most organizations report difficulties with CASL, with “confusion about the rules” most commonly cited;
- 68% of organizations report sending CEMs;
- half of those who send CEMs have incurred compliance costs; and,
- almost one-third of organizations that do not send CEMs have nonetheless incurred costs in the belief that they must comply with CASL.

As noted above, registered charities are strictly regulated and monitored by the CRA. They must act solely for the public benefit and are not allowed to generate an undue private benefit for anybody. Uncertainty over the extent to which they must comply with CASL has led them to incur costs.

Comparator jurisdictions such as Australia and the United States either exempt charities from spam law requirements, or do not rely on express consent. We also note that the Do Not Call regulations enforced by the CRTC provide an exemption for registered charities – for a much more intrusive form of communication. Given this, we believe that a clear exemption from the consent requirements of CASL is reasonable.

We do not seek an exemption from CASL requirements regarding unsubscribe mechanisms, sender identification, or the provision of contact information by the sender. Indeed, all of these requirements are in line with charity accreditation standards put in place through Imagine Canada’s Standards Program that pre-date CASL.

We recommend an exemption for public-benefit nonprofit corporations

There are a wide variety of nonprofit corporations in Canada. Some, such as condominium boards, golf clubs, and professional associations, primarily provide services and benefits to a select group of individuals. Others, such as public housing corporations and many social service agencies, provide community services and benefits.

Precedent exists to define such public-benefit nonprofits in law. Indeed, the current CASL regulations identify certain nonprofits, organized for purposes including social welfare and civic improvement, and where no part of their income is payable to or otherwise available for the personal benefit of any member, for the purposes of defining “membership.” In Alberta, lobbying legislation has defined (and exempted) public-benefit nonprofits.

Public-benefit nonprofits provide many of the same vital community services as registered charities. We recommend that public-benefit nonprofits be defined as such and exempted from the consent requirements in CASL.

Private Right of Action

While the CRTC has indicated that its enforcement efforts “will focus on messages sent by those attempting to circumvent the rules under the guise of a registered charity,” neither the Department nor the CRTC can ensure that charities and nonprofits will not be subject to private actions related to CASL. The legislation provides for damages of up to \$1 million per day for infractions of CASL – regardless of whether the infraction resulted in any actual damages to the recipient of a CEM, or any benefit to the sender.

Directors may be held personally liable, should an organization not have sufficient assets to pay damages awarded through a private action. Directors of charities and public benefit nonprofits are volunteers, drawn by the opportunity to serve their communities. According to our survey, 55% of charities and nonprofits are concerned that CASL’s private right of action provisions will make it difficult for them to recruit board members.

CASL includes significant administrative penalties for violations of the law. We believe that these penalties are sufficient to deter any egregious violations on the part of charities and nonprofits. Therefore, we recommend an exemption from CASL’s private right of action provisions for registered charities and public-benefit nonprofits.