

## New Anti-Spam Legislation – What Does it Mean for Sport Organizations?

Canada's Anti-Spam Law\* (CASL) was passed in December 2010 and is expected to come into force on July 1, 2014. Once in effect, the CASL is intended to protect Canadians from receiving unwanted communications while ensuring that businesses can continue to operate and compete in the marketplace.

### What is the intention of the CASL?

The new law prohibits, among other things, using false or misleading representations online in the promotion of products or services, installing software on a computer without the consent of the computer's owner, collecting personal information through accessing a computer system in violation of federal law, and collecting electronic addresses by the use of computer programs, or using such addresses without permission.

These prohibitions were put in place to protect Canadians from having our email inboxes overloaded with things normally associated with "spam" such as ads/promotions, false requests for personal information, and the promise of the "free trip to Bahamas" you just won. These particular prohibitions will not have much of an impact on sport organizations (which are not really in the promotions business), but what will have an impact is the rule that specifically prohibits anyone (individual or organization) from sending a "commercial electronic message" (CEM) unless:

- The person to whom the message is sent has consented to receiving it;
- The message sets out information that identifies the person who sent the message;
- The message sets out information enabling the person who received it to readily contact the sender; and
- The message provides an "unsubscribe" mechanism.

### What is a Commercial Electronic Message (CEM)?

The CASL defines a commercial electronic message (CEM) as "*any electronic message that encourages participation in a commercial activity, regardless of whether there is an expectation of profit*". CEMs therefore include advertisements promoting products, goods and services that are sent by email, on social networking websites (such as Facebook, LinkedIn and Twitter), and by text message.

What this means is that sport organizations that provide electronic newsletters, promote/sell equipment or advertise training camps or clinics through electronic messaging need to be aware of the CASL and take the necessary steps to ensure they are doing so in a way that complies with new law.

## **What happens if you don't comply?**

Failing to comply with CASL can have consequences. Penalties range from up to \$1 million (against individuals) to up to \$10 million (against organizations). The critical factor here is that the penalties are imposed for each violation and you may be penalized for each individual non-compliant email that you send.

There is also a reverse onus associated with the CASL, which means that the organization is presumed guilty unless they can show otherwise. Further, according to Section 31 of the Act, directors and officers of corporations may be found personally liable if they direct, authorize, or participate in an offence, regardless of whether the corporation is actually prosecuted.

Employees and agents acting on an organization's behalf are at risk as well. Under Section 32 of the Act, employers may be held vicariously liable for such violations, even if no action has been taken against the employee. Organizations must therefore ensure that all members of staff and of the Board of Directors are properly educated on the CASL.

## **Exceptions**

As with most pieces of legislation, there are exceptions to the rules. Sport organizations, particularly those with charitable status, will be happy to know that some of the exceptions apply to them. In summary, CASL does not apply to:

- non-commercial activity;
- political parties;
- charities that engage Canadians through email if these communications do not involve selling or promoting a product;
- charities that engage in commercial activities with people who have made a donation, volunteered or were a member of the organization in the last 18 months; and
- existing "Non-Business Relationships" between the recipient and the sender who have a membership relationship (within the two-year period immediately before the day on which the message was sent).

## **How will this affect sport organizations?**

Does CASL apply or is your organization exempt from the strict rules of commercial electronic messaging? It depends. Those organizations with RCAA status will be in a better position than those without RCAA status, and it is expected that most sport organizations will be able to establish the existence of a non-business relationship with their existing members and volunteers within the last two years, and therefore be allowed to continue sending CEMs without obtaining their express consent. But what about the organizations that require membership to be renewed on an annual basis? And how are new members handled?

Careful consideration and analysis of the sport organization and the possible exceptions will be required in order to determine what actions are permissible under the Act. .

## **Things you can do to help ensure you are in compliance with the Act**

The Government of Canada website sets out three questions that should be considered if you regularly send out communications as a marketing or promotional tool:

Who are you sending the messages to?

- Did they provide oral or written consent? (express consent)
- Do you have a record of this consent?
- Do you have an existing business or non-business relationship with them from the past two years? (implied consent)
- Did they publish contact info online or give you a business card? (implied consent)

What type of message are you sending?

- Is it being sent to an electronic address?
- Is it commercial or promotional in nature?
- Have you included false or misleading information?

What must be included in the message?

- Have you identified your name, business, and all relevant/current contact information?
- Have you included details for how the receiver can unsubscribe or avoid receiving further communication from you?

Whether or not your organization has RCAA status, we feel that these three questions should be considered and followed if and when you send out electronic communications that have a commercial purpose.

## **Other things that can be done to avoid penalty**

- Create consent forms to be signed by each new member as they register – these could be stand-alone forms, or could be provisions built into your standard registration documents.
- Update online registration forms to include an optional box that can be checked, indicating the registrant's consent to receive CEMs (but these forms must be specific about what members are agreeing to receive – i.e., newsletters, marketing emails, promotions, etc.)
- If you send a regular electronic newsletter, send everyone on the list a special email asking them to provide their consent to continue receiving it. This can be a simple 'reply' button following a brief explanation as to why you are seeking their consent. Be prepared, however, for your newsletter subscription list to shrink considerably.

- Once you have asked for consent, be sure that you are not continuing to send CEMs to those who have not consented!
- When requesting consent, be specific about what you intend to be distributing. For example, a law firm recently sent us a request for consent which asked us to check a box reading: “We consent to receive electronic messages from [FIRM], including invitations to accredited programs and events, as well as legal updates and other notifications”.
- We also recommend that you obtain consent BEFORE the law takes effect in July, because once in effect, your email requesting consent could be deemed to be an email that has been sent without consent!
- As a precaution, include a complete signature in all your emails (name, address, telephone and email) and be sure this also gets transmitted through your mobile devices such as smartphones and tablets.

Here at the Sport Law & Strategy Group we have had to go through this careful examination ourselves. Since part of our mission is to educate and advise, we provide our clients with a quarterly newsletter which highlights recent trends, case law and other interesting or important developments in the sport sector. But in order for us to continue sending our newsletter to you we will need to ask for your express consent. We will shortly be sending all our newsletter subscribers an email asking them to respond to indicate their consent to continue to receive communications from us. We hope that you will continue to be interested in receiving our free newsletter.

## **Need more information?**

There are many nuances to CASL that have not been discussed here, some of which are still unclear, and there are many other factors to consider when determining whether or not your organization is exempt from any of its requirements. We do recommend that you seek legal guidance when considering your options. For further information, please feel free to contact LeeAnn – LLC@sportlaw.ca, or Steve – SJI@sportlaw.ca.

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*\* The full and proper name of the legislation is: 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).*