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## MEMORANDUM 14:21

**TO:** Presidents and Administrative Officers  
Local, Federated and Provincial Associations

**FROM:** David Robinson, Executive Director

**RE:** **Canada's Anti-Spam Legislation**

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Effective July 1<sup>st</sup>, new legislation regulating, among other things, the sending of electronic messages has been in force. "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, SC 2010, c 23" is also known as Canada's Anti-Spam Legislation (CASL). It is lengthy and complex, and contains broad and vague definitions as well as exceptions and exemptions. The CRTC website<sup>1</sup> and other sources provide general information about the intention and purpose of the law and further guidance about its anticipated interpretation.

The CASL may apply to *some* communications sent by academic staff associations. This memo is intended to provide your association with general information about the scope of the law and its requirements. It is not a detailed or exhaustive analysis. The question of how a particular type of communication should be dealt with will depend on the facts of that situation. Please review the questions listed below and refer to the provisions of the CASL, the Regulations and the government's information bulletins for further guidance.

We have attached to this document a schematic diagram which contains some of the key elements of the law. It is not intended to be comprehensive, but it highlights the relationship among the main requirements of CASL, and identifies some of the exceptions and qualifications to those requirements.

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<sup>1</sup> <http://www.crtc.gc.ca/eng/casl-lcap.htm>

## 1. ARE YOU SENDING A “COMMERCIAL ELECTRONIC MESSAGE” (CEM)?

The purpose of the law is in part to ensure that certain electronic communications take place only with the consent of the recipient. Specifically, the CASL establishes certain restrictions and rules on the sending of a commercial electronic message (CEM), defined as any message which as one of its purposes is the encouragement of participation in a “commercial activity,” (s. 1(2)).

A “commercial activity” is defined as “any particular transaction, act or conduct or any regular course of conduct **that is of a commercial character**, whether or not the person who carries it out does so in the expectation of profit.” Consequently, the CASL expressly includes activities not done for profit, such as fundraising events and activities, and promotion of certain services and products.

Unions and employee associations have a recognized statutory and other obligations to their members. In order to fulfill their aims and duties, unions and associations must be able to send electronic communications without restrictions. Many messages sent by academic staff associations will likely not have to comply with all of the requirements of the CASL, either because they do not involve commercial activity, or because even if they do involve commercial activity they are exempt from the full scope of the CASL. However, the definition of what constitutes a CEM may be broadly interpreted to cover at least some of the communications that academic staff associations send to their members.

Because of the broad definition of CEMs and the various exceptions and exemptions, determining whether the CASL applies in a particular case will involve careful consideration of the content of the message and also the audience to whom it is delivered. However, it does appear that the following messages are not likely covered by the CASL:

- communication to members of a bargaining unit represented by an academic staff association about workplace issues (including collective agreement administration and collective bargaining);
- communication to members of a bargaining unit about an on-campus event which does not involve fundraising or payment of fees; and,
- any communication sent to full members of the academic staff association (and not bargaining unit members who pay dues but are not members of the association) about internal association matters.

## 2. IF A MESSAGE IS A CEM, THEN what are your obligations?

You must not send a CEM unless:

- a) the recipient of the message has provided express or implied consent to receiving the message; and
- b) the message includes the following content:
  - (i) the sender of the message is identified;
  - (ii) the contact information of the sender is clearly set out; and
  - (iii) a clear unsubscribe mechanism is provided.

A message which encourages a bargaining unit member and/or students to support a cause or pay for a service or product and which is not covered by an exemption is a CEM which must comply with the Act. An example of this would be an e-mail request sent to faculty and students on campus by an academic staff association to raise funds for a student who requires financial support. It does not fall within the exemption for fundraising for registered charities. Assuming also that the students have not provided their e-mail addresses directly to the association, the communication would not likely be covered by implied consent. Even with respect to faculty members, some may be covered by the “association membership” exemption, but others may not be.

3. Are there cases where a CEM sent by an academic staff association would be exempt from the Act?

The CASL expressly provides for the following exceptions:

- (i) communication is sent by an employee/representative of an organization to another employee/representative of the same organization or to a related organization, and the message concerns the activities of the recipient organization;
- (ii) communication is sent to a recipient in response to a request for information;
- (iii) communication is sent to satisfy a legal obligation, to provide notice of a legal obligation or to enforce a legal right; and,
- (iv) communication is sent by or on behalf of a registered charity or a political party for the purpose of raising funds.<sup>2</sup>

Consequently, an e-mail from an academic staff association to raise funds for a political party or the United Way would be exempt from the consent and notice/unsubscribe requirements.

The exemption for “communication to satisfy a legal or juridical obligation” may provide a broad exclusion for academic staff associations. Associations are bound by the duty of fair representation to communicate with members of the bargaining unit they represent in connection with the administration of the collective agreement and, in some jurisdictions, the negotiation of collective agreements.

However, it is unclear whether other types of communication would be exempt. For instance, it is uncertain if a request sent by an academic staff association to another academic staff association for support and contributions during a strike would be covered by the exemption for communication from one organization to another. If it could be demonstrated that a request for strike support “concerns the activities” of the recipient organization, then the communication would be exempt. Whether this is so may depend on the particular facts of the case, including whether the strike or the issues in dispute could affect the recipient association.

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<sup>2</sup> Further details about these exceptions are found in s. 6(5)(c) of the Act, and s. 3 of Regulation 2013/221 to the Act.

In some cases, an association may not be party to an agreement that provides for automatic dues deduction and remittance by the employer. In this case, it is likely -- although not certain -- that an e-mail which provides information to non-members about the association and which encourages them to join and pay dues would be characterized as a CEM. However, if it is a CEM it would likely be exempt from the consent requirement (although not the notice and unsubscribe requirement) under the provision which excludes information directly related to an employment relationship.

4. Are there cases where you do not have to have consent to send a CEM but still need to provide unsubscribe information?

You do not need consent but have to provide information on how to unsubscribe from future communications where the sole purpose of the CEM is to:

- a) provide notification/information about a service offered to members; and
- b) provide information directly related to an employment relationship or related benefit plan in which the recipient is participating.<sup>3</sup>

The first exception from obtaining consent could arise when an association communicates with bargaining unit members about the services it provides.

The exemption for communication that provides information "directly related" to an employment relationship would appear to cover much of the communication between an academic staff association and members of the bargaining unit represented by it, and would include information related to the negotiation or administration of collective agreements. This exemption is similar in scope to the legal duty exemption, although the two exemptions will not necessarily overlap in all circumstances.

5. IF THE CEM IS NOT OTHERWISE EXEMPT FROM THE CASL, THEN what are your obligations?

If not exempt, a CEM cannot be sent unless the sender has the express or implied consent of the recipient. Generally speaking, the requirement for obtaining express consent includes the following:

- a) the sender must seek consent for every action where consent is required (eg. consent to receive CEMs must be separate from consent necessary to provide a computer program for downloading by the recipient), and the request for consent must set out the purpose for which consent is sought;
- b) consent may be granted orally, electronically or in hard copy. If it is provided electronically, it cannot be provided through e-mail, and the consent must be provided by "opting in" and not by an "opt out" model;
- c) the request for consent must identify the person seeking consent and must contain contact information for that person;
- d) the request for consent must inform the recipient of his/her right to revoke his/her consent; and,

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<sup>3</sup> In addition, Regulation 2013/221 provides that consent is not required for sending the first CEM sent following a referral by an individual who is an existing member, in certain circumstances.

- e) the party obtaining consent should keep a record of the consent given, because if there is a dispute about the existence of consent, the burden is on the party that received the consent to prove that consent was given.

The most effective way to avoid the expense and uncertainty of litigation about the scope of the CASL is to obtain express consent for receipt of CEMs.

The CASL also allows for cases in which IMPLIED CONSENT will be deemed to have been given, thus eliminating the need for express consent. The key provisions which govern implied consent and which may apply in the case of academic staff associations are the following:

- a) where the sender and recipient have an existing business or non-business relationship;  
or
- b) where the recipient has disclosed his/her e-mail address to the sender (or has conspicuously published his/her e-mail), and did not indicate s/he did not wish to receive CEMs and the message is relevant to the recipient's official role.

The CASL defines the term "non-business relationship" to include a relationship arising from membership of the recipient in the sending organization within two years before the date on which the message was sent. "Membership" in a voluntary organization means membership in accordance with the organization's membership requirements.

In applying the "non-business relationship" exemption, the CASL treats members of the association differently from employees of a university who are part of the association's bargaining unit and who pay dues, but who have not become members of the association. The former are covered by the exemption, but the dues payers who have not joined are not covered, although communication to them may be covered by other exemptions.

It is not clear what the legislative purpose is behind the requirement that for consent to be implied the CEM must be sent to the recipient in the recipient's official role. However, the language invites the conclusion that a person's "role" could include his or her status as a member of the organization.

#### 6. What other provisions of the CASL should you be aware of?

The CASL contains many other important provisions. For instance, the CASL provides for a transitional period until July 1, 2017 during which implied consent is assumed where a recipient of a CEM has an existing "non-business" relationship with the sender. This implied consent can be terminated by the recipient on notice.

The CASL also provides for significant penalties for violations: fines of up to \$1 million for individuals and \$10 million for organizations. The purpose is not punitive but is to promote compliance, suggesting that until the limits of the law are clarified there is a basis to argue restraint in the imposition of penalties.

The Act grants the CRTC and others authority to require preservation of metadata by telecommunication providers; demand production of or preparation of documents; and to enter a location for the purposes of verifying compliance.

Finally, the CASL also provides for individuals, independent of the CRTC's authority, to undertake private action against those whom they allege have violated the CASL.

## Conclusion

The CASL is a complex and ambiguous piece of legislation. The full scope and effect of the legislation remain to be determined as its provisions are interpreted by tribunals and the courts. CAUT will monitor the enforcement of the CASL, and will provide members with any relevant updates as these decisions may provide further clarity about what the law means for academic staff associations. It is possible, for instance, that issues may arise in connection with communication sent by associations and their members that raise unique matters of academic freedom and freedom of speech on campus.

**Is your communication a Commercial Electronic Message? (CEM) s. 1(2)**

**NO, CASL does not apply**

**YES, CASL applies – CONSENT and NOTICE are required [s. 6(1) and s. 6(2)]**

**Is it exempt from some or all of the requirements of the CASL?**

**s. 6(5) and s. 6(8) lists CONSENT and NOTICE exemptions**

**s. 6(6) lists CONSENT exemptions**

**YES, exempted: you can send CEM to recipient who has not consented [s. 6(1)] and without required notifications [s. 6(2)]**

**NO, not exempted**

**YES, you can send CEM to recipient who has not consented, but notifications must be included in message**

**Has the recipient given express or implied consent?**

**s. 10(1) - Rules for EXPRESSED consent  
s. 10(9) - When IMPLIED consent exists  
(and express consent is not required)**

**NO, if you do not have express or implied consent, sending a CEM is prohibited by the CASL**

**YES, if you have express or implied consent, you can send your CEM**