



February 4, 2013

Mr. Bruce Wallace
Director, Security and Privacy Policy
Digital Policy Branch, Department of Industry
Jean Edmonds Tower North, 18th Floor, Room 1891D
300 Slater Street
Ottawa, ON K1A 0C8

Dear Mr. Wallace:

We are writing to you regarding the proposed **Electronic Commerce Protection Regulations** as published in Part I of the *Canada Gazette* on January 5, 2013 (the “regulations”).

The Ontario Nonprofit Network (ONN) is the sector leader for the 46,000 nonprofit organizations across the province, connecting charities and nonprofit organizations with a public benefit focus. ONN has a 6,000 strong network and a reach of 42,000 individuals committed to vibrant, resilient communities. We are the convener, communication broker and coordinator for nonprofits, bringing the sector’s voices to government, foundations and segments of the for-profit sector.

The anti-spam legislation has, in its attempt to control commercial spam, inadvertently caught our sector’s community-building activities in the legislation and regulations, which will have serious repercussions for the sector and has the potential to discourage and constrain how Canadians engage in their communities.

The Ontario Nonprofit Network submits that Industry Canada should exempt from the consent and content requirements, electronic communications sent by, or on behalf of, registered charities and registered nonprofit organizations.

Community nonprofits (which include charities and public benefit nonprofits) in Ontario employ over 600,000 Ontarians and attract the time and energy of more than 7.8 million volunteers. These small and mid-size public benefit organizations operate in every community, building and sustaining the province’s civil society, and providing important programs and services. Social services, community development, arts and culture, sports and recreation, newcomer settlement, housing, employment training, mental health, research, environment, and other nonprofit organizations work to build strong, resilient communities.



They operate, for the most part, on shoestring budgets. Half of these 46,000 organizations have no paid staff, 42% have budgets under \$30,000, only 12% have budgets over \$500,000 and 99% have budgets under 10 million.¹

Our communities rely on, and trust, these nonprofit organizations to bring them together to build welcoming, creative, inclusive communities and to ensure that the most vulnerable community members receive the support they need.

The nonprofit sector is not in the business of promoting or engaging in spam, nor are we engaged in commercial activities except to fund our nonprofit activities in communities. We are however, in the business of reaching out to community members to engage them in the life of their communities as civic participants.

Registered charities and nonprofits *build community, not commerce* and should be exempt from Electronic Commerce Protection Regulations.

Should this exemption not be given, we have attached Submissions I and II outlining:

Submission I: Specific reasons why nonprofit organizations should be exempted from the legislation.

Submission II: The detailed and extensive changes to the regulations that would be necessary for nonprofit organizations to comply with the legislation.

Please also find included a backgrounder of ONN for your information.

We appreciate this opportunity to present our submission and would be pleased to provide further information or clarifications. Our Executive Director Cathy Taylor can be reached at (416)-642-5786 or cathy@theonnc.ca.

We look forward to your response and to further discussion with the sector regarding our serious concerns about the impact regulations will have on the operations of nonprofits in Ontario and as a result, on the quality of life in all of our local communities.

Yours sincerely,

Jini Stolk
Chair, Ontario Nonprofit Network

¹ Imagine Canada- 2003 National Survey of Nonprofit and Voluntary Organizations

Submission I

Canada's Anti-Spam Legislation (CASL): Amend Regulations to Exempt Charities and Nonprofit Organizations

- *The Ontario Nonprofit Network submits that Industry Canada should exempt from the consent and content requirements of electronic communications sent by, or on behalf of, registered charities and nonprofit organizations*.*

This can be accomplished using the regulatory powers granted in section 6(5)(c) of the Act to provide exceptions for electronic communication “that is of a class, or is sent in circumstances, specified in the regulations,”

*Definition of nonprofit organizations as in the legislation¹:

“Non-profit organizations who are organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than profit, if no part of their income is payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder of the organization unless the proprietor, etc. is an organization whose primary purpose is the promotion of amateur athletics in Canada. “

Our submission is based on the following grounds:

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| 1. The regulations as presented do not support or accommodate the organizational structures and community building work of the thousands of small and mid-size charitable and nonprofit organizations providing public benefit in communities. |
| 2. Small and mid-size charitable and nonprofit organizations cannot comply with CASL and its regulations <i>and</i> undertake their day-to-day work. There is a fundamental conflict that will either impede their work in communities or, as non-compliant, leave them vulnerable to potentially prohibitive fines and private actions. |

¹ Proposed definition of club, association, or voluntary organization as set out in S.7 of the Regulations

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| 3. The legislation and regulation will place undue financial and administrative burden on those nonprofit organizations which attempt to comply. |
| 4. The prohibitive costs and risks associated with requiring that charities and nonprofit organizations manage and maintain express and implied consent records across their complex databases and ever-changing community connections and relationships is not justified given their negligible participation in the generation of spam. |

Barriers for Charities and Nonprofit Organizations to Fully Abide by CASL and its Regulations

- **CASL and its Regulations address charities and nonprofit organizations and their non-business relationships, but neither the legislation nor the regulations provide enabling conditions for the sector to comply and continue its important work.**

- I. **Not-for-Profit Activities regarded as Commercial Activities:** The activities of nonprofit organizations are often self-funded and use small fees to cover essential expenses. This brings their activities under the definition of “commercial activity”² even if the fee is nominal and the purpose is not-for-profit.

⁴ *Example: A children’s soccer program sets a nominal participation fee to pay for team shirts for each child, a local referee, league soccer balls and nets, field permits, etc.*

- II. **Informal Organizational Structures:** Charities and nonprofit organizations often have dispersed and delegated structures. In particular, organizations dependent on volunteers tend to be informally networked. Various volunteers take on different responsibilities and communicate with a range of people and organizations as needed for their roles to keep programs and activities operating. They may communicate with other volunteers, participating families, community members and local businesses. These communications are not always personal, nor are they only sent to active identified volunteers, members or participants. Often volunteers reach out to the community at large to communicate and network the resources needed for activities and programs.

² Commercial activity “is defined to include any commercial transaction whether for-profit or not-for profit”

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Example: Parents of children in community soccer programs volunteer to be coaches. To help organize teams, they forward league registration information to their community contacts, who in turn pass the information to their own local contacts so new families can learn about it. This is a common example of how local engagement in communities works.

- III. **Limited or No Infrastructure Creates Difficulty or Failure to Comply:** The informal structures of many public benefit nonprofit organizations means there are minimal or no central databases, and therefore no tools or capacity to ask for and track express and implied consents, or update databases. Community networks are grassroots and ever-changing, and information is widely dispersed among volunteers and supporters. There is no practical way to assure that nonprofit communications have the required implied or express consents.

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Example: An online women's collective organizes clothing drives for women's shelters. Each volunteer sends information to friends and colleagues who then pass on to their networks.

- IV. **Broad Community Engagement:** Nonprofits are caught in the “commercial activity” definition, yet the nonprofit sector is about *building community not commerce*. The very purpose of nonprofit communications and forwarding of information is to attract new people outside formal databases to the community activity. This includes larger, more structured organizations with infrastructure and staff which has day-to-day activities that require them to broadly engage their community members.

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Example: A casting call by a community theatre is sent around by volunteers, supporters and staff to their informal networks to find new talent in the area.

- V. **Severe Liabilities and Risk:** The more than 50% of charities and nonprofit organizations in Ontario (approximately 26,000) which are volunteer-run or have minimal staffing will not be able to comply and will thereby have to:
- 1) cease operations, or
 - 2) operate in noncompliance with CASL and Regulations and face the threat of punitive fines and expose their voluntary Boards of Directors to personal liability.

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Example: A local soccer program run by volunteers will not be able to manage consent mechanisms and will therefore face liabilities of their assets. The program's volunteer president could risk losing his own assets, such as his home.

Example: A children's mental health agency unable to comply with consent and content requirements will risk liabilities of its assets, including private as well as government.

- VI. **Prohibitive Costs:** It is likely that nonprofit organizations with annual revenues in excess of \$100,000 (37% of the sector) will attempt to comply with CASL express consent requirements, given that at this revenue level they probably have some regular part-time staff. Yet even organizations with only one staff will have multiple databases and stakeholders to manage including donors, volunteers, program participants, other community non-profit organizations, government staff, local businesses and consultants, active members and so on. In the absence of an exemption for their day-to-day non-business relationships, express consents will be required for virtually all their activity. This will require extensive time and energy to develop and manage databases, subscribe and unsubscribe recipients, and establish systems to track and monitor the electronic messaging of their staff, volunteers and members.

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Example: An organization supporting children with developmental disabilities is run by a small staff, along with partner organizations, local health service providers, volunteer committees and children's parents and guardians. To manage the required databases and contact all stakeholders for consent, they will have to dedicate one staff member's time and spend money and resources to build and maintain an extensive database.

VII. **Malicious Actions:** Despite their best efforts, most community organizations regardless of their size will not be fully successful in obtaining timely express consents, tracking implied consents, editing and updating their data bases or obtaining permission to reach out to vulnerable community members. They will be vulnerable to potentially malicious actions and fines for noncompliance with CASL and the Regulations. For some organizations, malicious actions are a real possibility especially if they work in areas of contentious services or with difficult-to-serve participants.

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Example: Organizations that deal with child welfare, young offenders or reproductive health rights and/or nonprofits with significant assets would be at greater risk for targeted prosecution by disgruntled individuals or groups, or those with opposing ideologies or financially-motivated intentions.

Submission II

List of Changes to *Electronic Commerce Protection Regulations*

Essential Changes required for CASL Regulations to reflect charitable and nonprofit non-business relationships and to ensure complying with CASL does not prevent small and mid-size charities and nonprofits from undertaking their public benefit work.

We strongly believe a regulation exempting charities and non-profits from the content and consent requirements of CASL and the Regulations is the preferred course of action.

However, in the event this exemption is not granted, we have compiled a list of the amendments necessary to assist at least some of our communities' charities and nonprofits to comply with CASL and the regulations. Even with these amendments, we believe many organizations given their size, organizational structure, resources and purpose will be unable to comply. These organizations will face impossible choices, as outlined in Submission I.

1. CEMs include emails, tweets, text messages, website interactions, other electronic communications (including voice) and include requests for consent

- CEM content requirements (section 6(2)):
 - (i) Sender contact information;
 - (ii) Unsubscribe mechanism.

1.1 Organizations operated largely by volunteers generally do not have a central database. They should be exempted from the content requirements since they will not be able to unsubscribe recipients across the many volunteers acting independently.

1.2 Organizations with budgets in excess of \$500,000 may be able to handle unsubscribe mechanisms if the time for implementing them was lengthened to three months and permitted simplified contact information (restricted to corporate names). For example, the sender ID and the nonprofit organization's ID will often be different, as people multi-task their volunteer work on their work and home computers. It will not be practicable, nor realistic to get compliance from unpaid volunteers to provide the full contact information in email, texts, tweets and other messages.

2. Consent, content and unsubscribe requirements do not apply to CEMs:
a) sent within family or personal relationships
b) that make an inquiry or application sent to a business, or
c) other categories as may be prescribed

2.1 *Broaden the definition of family or personal relationship to include friends of friends and acquaintances with affiliation.* For example, parents at a child’s school; business acquaintances

2.2 *Include charities and nonprofits as well as businesses* to be able to make and receive an inquiry or application and include them for purposes of implied consent under the “existing non-business relationship” category.

3. Existing Non-business Relationships

3.1 *The definition of “existing non-business relationship” must be expanded to reflect the full scope of charities’ and nonprofits’ activities (see below).*

3.2 *The referral category is too narrow and must include referrals from a third party, to any third party.* For example, children’s case managers need to be able to network to secure services and resources for their clients. In addition, legislation and best practices for children’s services have specific reporting and referral requirements where case managers must communicate with third parties in cases of harm to self or others, suspected abuse, etc.

4. Equivalency of Business-to-Business Exemption

4.1 *Charities and nonprofits require an exemption that covers their day-to-day activities.* They need to be able to communicate:

- between themselves if they have common interests
- with community members and businesses in the course of carrying out their programs, and between and among staff, volunteers, members, funders, consultants, guardians, past, actual and potential program participants.

- 4.1b *Create a category of non-business relationship between charities and nonprofits and volunteers, program participants including children’s guardians, donors, subscribers, members, community businesses and institutions, government, inquiries and referrals, and exempt these interactions from consent, content and unsubscribe requirements.*

5. Implied Consent

- 5.1 *The existing non-business relationship criteria for implied consent are too narrow and incomplete. They must include program participants and potential program participants, parents and guardians of such, and those groups referenced under the business-to-business relationships mentioned in 4.1.*
- 5.2 *The two-year time period for establishing an existing non-business relationship under the implied consent rules is too short for the kinds of episodic contact that many organizations have with participants and audiences. Five years would be a more realistic timeframe if nonprofit networks are not to drastically shrink their reach into communities.*
Example: In the areas of arts and culture and sports and recreation, participants engage sporadically.
- 5.3 *Add inquiries and applications to charities and nonprofits as a qualifying circumstance within the existing non-business category.*

6. Penalties, liabilities

- 6.1 *Exempt charities and nonprofits from private right of action. Charities and nonprofits have voluntary boards of directors who under this legislation are personally liable. We have established that many such organizations, despite all efforts and due diligence, will be unable to ensure compliance with the onerous administrative compliance and tracking requirements that are associated with this legislation. By exempting the sector from private right of action, Board members will be less likely to resign or close their organization. The risk of malicious prosecutions will be significantly decreased, and substantial charitable and government assets will be protected from opportunistic class action lawsuits.*

6.2 *Egregious noncompliance among charities and nonprofits can be dealt with by the CRTC through administrative monetary penalties.* Charities and nonprofits are very conscientious regarding their legislative and regulatory obligations in so far as they are able. Moreover, their day-to-day work requires they be supported and respected by their communities. We do not anticipate any egregious noncompliance with the underlying purpose of the legislation.

CONCLUSION

Notwithstanding the substantial amendments identified in this submission, many small and mid-size charitable and nonprofit organizations will have great difficulty complying with CASL.

The main problem is a fundamental conflict in approach. The purpose and focus of civil society organizations – these small and mid-size charitable and public benefit nonprofit organizations - is to actively reach out to community members and engage them in community activities. Whether it is getting them to attend their first community theatre production, reaching out to the newly unemployed, newcomer or person with mental illness, drawing parents in to volunteer with their children’s local sports teams, or giving teenagers their first job coaching and refereeing, in so many different ways charities and nonprofit organizations knit communities together.

The underlying premise of the Canadian Anti-Spam legislation unfortunately will have the opposite effect if there is no exemption. Based on a notion of selling, the legislation has prohibited “unwanted” electronic communications from commercial businesses. The current definition of commercial business catches up charities and nonprofits that charge fees or raise donations to cover their public benefit activities.

The only effective remedy recommended by the sector is to *exempt nonprofit organizations and charities engaged in public benefit work from this legislation.*

BACKGROUND:

The Ontario Nonprofit Network (ONN) – Key Partner in Change

The Ontario Nonprofit Network (ONN) was organized in May 2007. Since that time, sector support for the nonprofit network has continued to grow and ONN has emerged as a nonpartisan convener of sector voices, communication broker and coordinator for nonprofits in Ontario. ONN has increased collaborations with government, foundations and segments of the for-profit sector to support its mandate.

ONN's current network exceeds 6,000, with an estimated reach of 42,000 individuals who are committed to the sector in Ontario. Within the last year alone, the network has grown by more than 50%, which is a strong indication of interest, credibility and commitment to ONN's work with and for the nonprofit sector.

The ONN played an important role in the development of the Government of Ontario's Partnership Project Report, released March 2011. It submitted various sector-driven papers and participated in the launch of the Partnership Project Office. ONN continues to work effectively with the Ministry of Citizenship and Immigration to advance the Report's recommendations.

Other concrete examples of ONN's collaborative efforts with the Government of Ontario include:

- Continued work with Infrastructure Ontario (IO) to disseminate knowledge to the sector on the IO Loan program (eligibility requirements, criteria, loan terms and conditions) and how it may benefit nonprofit organizations' capital needs.
- Ensuring the implementation and reporting of reforms through the Open for Business process, which includes recommendations such as:
 - Ensuring that surplus government lands remain in the public domain for purchase by not-for-profit organizations at fair market rates;
 - Making it easier for organizations to understand police records checks procedures when screening staff and volunteers.
- Ongoing advisory support to the Ministry of Consumer Services on the new Ontario Not-for-Profit Corporations Act (Bill 65), and dissemination of clear language information on the Act to the sector.

In addition to engaging the provincial government, the ONN works collaboratively with the sector partners to promote greater understanding of the nonprofit sector's role in communities, and on specific sector-wide topics such as social enterprise, strengthening sector capacity, and labour force issues. More about the breadth of ONN's activities can be found on our website: www.theonn.ca.

The Nonprofit Sector in Ontario

The nonprofit sector in Ontario is an essential element in building and sustaining the province's civil society. It is a cornerstone of communities, providing important public-benefit programs and services. Organizations in the sector – from environment, to arts and culture, sports and recreation, community development, newcomer settlement, housing, social services, education, research, faith groups and more – affect almost all Ontarians, creating the community wealth that makes our province a healthy, desirable place to live, work, and raise families.

The nonprofit sector builds solutions, resulting in:

- Innovation and collaboration on the ground, creating transformations in service delivery
- Improved community conditions and strong community stewardship
- Retention of publicly-financed assets for the long-term benefit of local communities
- Economic growth and job creation

The broad nonprofit sector in Ontario:

- Represents 7.1% of Ontario's GDP (equivalent to the auto and construction sectors' combined share of GDP)
- Mobilizes over 5 million provincial volunteers
- Provides over 1 million Ontarians with employment
- Includes 46,000 registered charities and nonprofits operating for the public benefit

The community nonprofit sector (not including hospitals and universities) in Ontario:

- Represents 2.6% of Ontario's GDP
- Obtains 43% of revenue through earned income (e.g. fee for service and sales) supplemented by government funding (36%), and donations (17%)
- Generates \$20 in donations and volunteer resources for every \$10 invested by government
- Supports over 600,000 Ontarians with employment