



October 20, 2017

Standing Committee on Industry Science and Technology
House of Commons
Ottawa, ON K1A0A6

Dear Committee Members,

I am writing on behalf of Canada's universities to brief the committee on the concerns of the sector regarding Canada's Anti-Spam Legislation (the "Act"). Universities Canada is the national voice for 96 public and private not-for-profit universities. We are grateful for the opportunity to submit our comments to the Industry Committee as it completes a statutory review of the Act.

Universities Canada supports the stated intent of the Act, i.e. to regulate commercial conduct which impairs the efficiency of electronic commercial activities, compromises privacy and confidentiality and undermines the confidence of Canadians in electronic commercial activities. Canadian universities are concerned, however, that the law's blanket prohibition against sending commercial electronic messages without express or implied consent of the recipient could capture and inhibit electronic communications by universities which are part of their core educational activities, activities that are not the intended target of the legislation, which has resulted in new administrative burdens, and potential financial penalties, and damage to institutional reputations.

For these reasons, Universities Canada recommends that the Industry Committee report back to Parliament that the Act ought to be amended to exempt charities, including universities, from the requirement to have the express or implied consent of recipients prior to the sending of "commercial electronic messages."

Section 6 of the Act sets out a blanket prohibition against sending a "commercial electronic message" unless the person to whom the message is sent has consented to receiving it, whether the consent is express or implied, the message sets out prescribed information that identifies the sender of the message, and the message contains an "unsubscribe mechanism" that complies with subsection 11 of the Act. While the phrase "commercial electronic message" is not defined in the Act, the term "commercial activity" is defined very broadly to include any transaction, act or conduct that is "of a commercial character, whether or not the person who carries it out does so in the expectation of profit".

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Communications relating to core university activities, including the recruitment of students, the delivery of academic programs, and communications with alumni and potential donors are not activities of a commercial character that should be caught by anti-spam legislation. University education is one of Canada's most cherished and valued public assets. Universities serve the public interest by strengthening Canada's competitive advantage through learning and the advancement of knowledge that will enable individuals, communities, regions, and the country as whole to meet the evolving social and economic challenges of the future. University education is not a special interest or commercial enterprise.

However, the broad wording of the term "commercial activity" in the Act creates uncertainty about whether some electronic communications by universities in furtherance of educational objectives will be treated as "commercial activities" and spam.

Using student recruitment as an example, Canadian universities have made the recruitment of Indigenous students a high priority. Universities engage in outreach activities that may involve electronic communications to prospective Indigenous students and leaders containing information on academic programs designed for Indigenous students, as well as information about other resources that are available to them, such as financial assistance, housing, cultural activities, counselling, availability of Elders and mentoring. Given the uncertainty about whether the recruitment of students is a "commercial activity" for the purposes of the Act, and that the onus rests with the sender of a "commercial electronic message" to prove that consent existed at the time a message was sent, a university that wishes to take a prudent approach would be reluctant to send an electronic message to prospective Indigenous students or leaders without their prior consent or to send a message to obtain that consent since that message itself may constitute a violation of the Act. This could impede the recruitment of Indigenous students by universities.

The significant penalties that may apply to individuals and organizations that do not comply with the terms of the Act — up to \$1 million for an individual and up to \$10 million for an organization for each violation of the Act — are also of great concern. These concerns are magnified by the possibility of vicarious liability for the officers and directors of an organization for a violation of the Act, as well as the private right of action for individuals who receive commercial electronic messages without their consent, which could lead to a class action lawsuit by individuals receiving unsolicited "commercial electronic messages."

The Act provides that consent to receive commercial electronic messages may be implied where there is an existing business relationship or existing non-business relationship with a message recipient. There are, however, many circumstances in which the relationships the university has or wishes to establish may not qualify for implied consent because they do not meet the narrow conditions set out in the Act.

Under the Act, consent is implied where there is an "existing non-business relationship". Under section 10(13)(a) of the Act, a consent to communicate electronically for the purpose of soliciting charitable donations is implied only if the recipient of the message has donated to a charity within the two-year period preceding the date on which a charity sends the electronic message. Past donors may choose to defer making further charitable donations for extended periods of time when there are prolonged downturns in the financial markets and economy. The imposition of an arbitrary two-year window for communications with these past donors makes future contact more difficult and costly if organizations are required to turn to telephone solicitation or mail to reach them. Moreover, the "existing non-business relationship" exemption does not apply to individuals who have never donated to an organization in the past but may be open to doing so if contacted.

Legislation and regulations aimed at controlling spam in Canada are currently so overly broad in scope that they impede and make more costly the electronic communications of registered charities, including universities, for purposes such as fundraising. The Canadian Radio-television and Telecommunications Commission's Unsolicited Telecommunications Rules that are intended to control a related problem — telemarketing — reflect this principle by exempting from the application of the National Do Not Call List Rules any unsolicited telecommunications made by or on behalf of a registered charity.

If Canada were to exempt charities, including universities, it would bring itself into line with comparable Commonwealth countries such as Australia. Australian law and regulations recognize that electronic communications by charities are not spam. Schedule 1 to the Australian Spam Act 2003 explicitly exempts electronic messages sent by charities from the prohibition against sending “commercial electronic messages” without the prior consent of the recipient.

A blanket exemption for the charitable sector is the most efficient approach to ensuring that charities are not harmed by anti-spam legislation. The alternative would be to enumerate a detailed list of specific exemptions. The piecemeal approach will inevitably result in gaps in coverage. The Australian law cited above, for example, also exempts electronic messages sent by an educational institution to students and former students of the institution, or to members of their households, but this exemption is inadequate because it fails to cover electronic communications for core university activities such as student recruitment or fundraising.

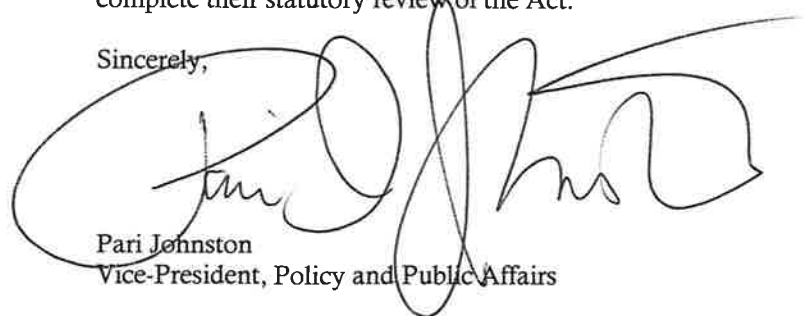
Universities Canada recommends that the Industry Committee recommend to Parliament that the Act be amended to exempt registered charities, including universities, from the requirement to have the express or implied consent of recipients prior to the sending of “commercial electronic messages.”

Should the committee decide not to support an exemption for charities, Universities Canada recommends that certain electronic communications by educational institutions be exempted from the requirement under the Act to have the prior consent of recipients so long as the recipient is:

- (i) a person who is, or has been, enrolled as a student in that institution;
- (ii) a member or former member of the household of a person who is, or has been, enrolled as a student in that institution;
- (iii) a person who is a prospective student of an educational institution; or
- (iv) a person from whom an educational institution solicits a charitable donation, or to whom an educational institution sends an invitation to participate in a fundraising event.

Thank you for taking Universities Canada's comments into consideration. If there is any further assistance I can offer the committee, please let me know. Further, I would welcome the opportunity to appear at committee in order to present these concerns in person, if the committee believes this would be helpful as they complete their statutory review of the Act.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Pari Johnston', is written over the typed name and title.

Pari Johnston
Vice-President, Policy and Public Affairs