



Federal Court
of Appeal

Cour d'appel
fédérale

Federal Court of Appeal

[Home](#) > [Decisions](#) > [Federal Court of Appeal Decisions](#) > 3510395 Canada Inc. v. Canada (Attorney General)

Federal Court of Appeal Decisions

3510395 Canada Inc. v. Canada (Attorney General)

Court (s) Database: Federal Court of Appeal Decisions

Date: 2020-06-05

Neutral citation: 2020 FCA 103

File numbers: A-382-17, A-383-17

Date: 20200605

**Dockets: A-382-17
A-383-17**

Citation: 2020 FCA 103

**CORAM: NADON J.A.
WEBB J.A.
WOODS J.A.**

Docket: A-382-17

BETWEEN:

3510395 CANADA INC.

Appellant

and

**THE ATTORNEY GENERAL OF
CANADA**

Respondent

Docket: A-383-17

BETWEEN:

3510395 CANADA INC.

Appellant

and

**THE ATTORNEY GENERAL OF
CANADA**

Respondent

Heard at Toronto, Ontario, on April 29, 2019.

Judgment delivered at Ottawa, Ontario, on June 5, 2020.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

WEBB J.A.
WOODS J.A.

Date: 20200605

**Dockets: A-382-17
A-383-17**

Citation: 2020 FCA 103

**CORAM: NADON J.A.
WEBB J.A.
WOODS J.A.**

Docket:A-382-17

BETWEEN:

3510395 CANADA INC.

Appellant

and

**THE ATTORNEY GENERAL OF
CANADA**

Respondent

Docket: A-383-17

BETWEEN:

3510395 CANADA INC.

Appellant

and

**THE ATTORNEY GENERAL OF
CANADA**

Respondent

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us are two appeals by 3510395 Canada Inc., operating as CompuFinder (the appellant) in respect of two related compliance and enforcement decisions of the Canadian Radio-Television and Telecommunications Commission (the CRTC). In the first decision, the CRTC dismissed the appellant’s constitutional challenge to *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 (CASL or the Act). The CRTC determined that the Act is *intra vires* Parliament’s trade and commerce power under section 91(2) of the *Constitution Act, 1867* (the Constitution Act), and that its infringement of freedom of expression pursuant to section 2(b) of the *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the Charter) is justified under section 1. In the second decision, the CRTC

found that the appellant had committed four violations of CASL and imposed a \$200,000 administrative monetary penalty (AMP).

[2] The appellant appeals the CRTC's decisions pursuant to subsection 27(1) of CASL, which permits appeal to this Court of CRTC decisions made under CASL.

[3] For the reasons that follow, I would dismiss the appeals with costs.

II. Applicable Legislation

[4] A full list of CASL's provisions challenged by the appellant can be found in Appendix A. Key provisions are reproduced throughout the analysis section of these reasons.

III. Facts

[5] CASL was enacted by Parliament in 2010 and came into force in 2014. It provides for the regulation of certain forms of commercial conduct relating to electronic commerce (e-commerce), most notably the sending of commercial electronic messages (CEMs).

[6] The appellant was a small business located in Morin Heights, Québec. It began operations in 1998 and offered approximately 300 professional training courses in areas such as team management, administrative skills, budget planning and effective use of social media. E-mail marketing was the appellant's primary means of business

development.

[7] The appellant conducted three advertising campaigns between July and September 2014 during which it sent 317 CEMs to various recipients. These CEMs promoted the appellant's educational and training services and were sent primarily to individuals working in the province of Quebec. On March 5, 2015, following an investigation, the appellant was issued a Notice of Violation (NOV) pursuant to section 22 of CASL. The NOV alleged that the appellant had not obtained recipients' consent prior to sending the CEMs in question, contrary to paragraph 6(1)(a) of CASL. The NOV also alleged that some of the CEMs did not contain a functioning "unsubscribe" link, contrary to paragraph 6(2)(c) of CASL. The NOV imposed a \$1,100,000 AMP on the appellant.

[8] On May 15, 2015, the appellant made representations to the CRTC pursuant to section 24 of CASL. The appellant denied it had violated CASL, complained of bias in the investigation into its activities and argued that it had received inadequate disclosure in relation to the proceedings. The appellant also asserted that CASL is, in any event, unconstitutional. On October 19, 2017, the CRTC rendered a decision in the matter pursuant to subsection 25(1) of CASL. The CRTC bifurcated its decision into Compliance and Enforcement Decision CRTC 2017-367 (the Constitutional Decision) addressing CASL's constitutionality, and Compliance and Enforcement Decision CRTC 2017-368 (the Notice of Violation Decision) addressing the appellant's alleged violations of CASL.

IV. CRTC's Decisions

[9] In the Constitutional Decision, the CRTC determined that CASL is both valid and Charter compliant. The CRTC then found, in the Notice of Violation Decision, that the appellant had indeed violated CASL.

A. *Constitutional Decision*

(1) Jurisdiction

[10] The CRTC cited *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 and *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 in support of its jurisdiction to determine the division of powers and Charter issues respectively. The key requirement to ground a tribunal's jurisdiction over either type of constitutional question is that the tribunal must have the authority to determine questions of law. Subsection 34(1) of CASL grants the CRTC the ability to decide any question of law or fact in any proceeding under the Act. The parties agree that the CRTC had jurisdiction to address both constitutional questions.

(2) CASL is *Intra Vires* Parliament

[11] The CRTC found that CASL is *intra vires* Parliament after a two-step division of powers analysis, looking first at the Act's pith and substance and secondly at its proper classification under the heads of power enumerated in the Constitution Act.

[12] The CRTC found that the main thrust of the Act "deals with electronic commerce."

[12] The CRTC found that the main thrust of the Act “deals with electronic commerce” (Constitutional Decision at para. 43). In reaching this conclusion, the CRTC considered that CASL regulates other online threats besides CEMs. The CRTC determined that the direct effect of CASL is to regulate not just CEMs, but also the alteration of transmission data in electronic messages and the installation of unwanted computer programs in the course of commercial activities. The overall effect of CASL, according to the CRTC, is to implement a scheme to help ensure “the viability of e-commerce throughout Canada” (Constitutional Decision at para. 47).

[13] At the classification stage of its analysis, the CRTC considered the five *indicia* of valid general trade and commerce legislation set out in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [*General Motors*]. The CRTC determined that CASL is a general regulatory scheme under the oversight of a regulatory agency, and that it deals with issues of crucial importance to the national economy. Central to the latter conclusion was the CRTC’s finding that electronic threats are not confined to a set or group of participants in any economic sector or to a specific region in Canada. The CRTC also determined that the provinces would be unable to achieve the scheme’s goals for two reasons: first, because the matters regulated have national effects implicating all sectors of Canada’s digital economy, and, secondly, because of the provinces’ inherent prerogative to resile from any interprovincial scheme. Finally, the CRTC found that the absence of any province from a CASL-like scheme would jeopardize its successful operation.

[14] The CRTC ultimately concluded that CASL's pith and substance falls within Parliament's power over general trade and commerce pursuant to section 91(2) of the Constitution Act. The CRTC thus found CASL *intra vires* Parliament.

(3) CASL Violates Section 2(b) of the Charter, but Is Justified Under Section 1

[15] The Attorney General conceded that CASL's impugned provisions infringe section 2(b) of the Charter because they prohibit the sending of unsolicited CEMs that convey meaning. The CRTC accepted this concession.

[16] The CRTC conducted a section 1 analysis according to the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 and modified in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12.

[17] The CRTC first determined that CASL is a limit prescribed by law. The CRTC held that the definition of CEM, though broad, is not vague as it focuses on electronic messages that encourage participation in a commercial activity, provides a list of examples of targeted conduct and several of its key terms are defined in the Act. The CRTC found that the definition was sufficiently precise to limit enforcement discretion and delineate a zone of risk. The CRTC cited *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 for the proposition that certainty is not the applicable standard: "[a]bsolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work." (Constitutional Decision at para. 90). The CRTC answered this question in

the affirmative.

[18] The CRTC next determined that CASL's objective is sufficiently important to warrant limiting a Charter right. The CRTC located CASL's objective in the Act's title: "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..." The CRTC found this objective to be pressing and substantial based on evidence of the negative impacts that unsolicited commercial electronic messages (spam) and related electronic threats can have on e-commerce in Canada.

[19] At the first stage of the three-pronged proportionality analysis the CRTC found that CASL's limits on free expression are rationally connected to its objectives. The CRTC considered it logical and reasonable to conclude that a prohibition against unsolicited CEMs would reduce spam and therefore spam's adverse effects on Canadian businesses and consumers. The CRTC also noted that, based on the record, CASL appears to be having its intended effect.

[20] The CRTC next determined that CASL passes the minimal impairment test. The CRTC found the Act sufficiently tailored to impair Charter rights no more than necessary. Although less restrictive alternatives exist, the CRTC considered that these would not be equally effective at achieving the government's objective of preventing the negative effects associated with spam. According to the CRTC, CASL's various exceptions and exclusions substantially lessen its deleterious effects on section 2(b) and bring it within a

3510395 Canada Inc. v. Canada (Attorney General) - Federal Court of Appeal
EXCLUSIONS SUBSTANTIALLY LESSEN ITS DELETERIOUS EFFECTS ON SECTION 2(b) AND BRING IT WITHIN A
range of reasonable alternatives as per *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1.

[21] Finally, the CRTC found CASL's benefits proportional to its deleterious effects on free expression. The CRTC first noted that CASL's infringement relates specifically to commercial expression. The CRTC cited *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 [*Keegstra*] for the proposition that this type of expression lies outside the core values protected by section 2(b). The CRTC then considered that the record shows that CASL's negative effects include causing some businesses to adjust, curtail or even terminate their e-mail marketing practices, and creating a perception among some Canadian businesses that they can no longer compete with their American counterparts. However, the CRTC considered that the evidence also shows no material lessening of the effectiveness of electronic marketing and, at the same time, a 37% drop in spam originating from Canada. The CRTC furthermore observed that, while CASL does infringe freedom of expression, the targeted conduct is still permitted so long as the sender obtains recipient consent, identifies itself and includes an unsubscribe mechanism. Thus, CASL is far from a total ban on commercial speech in general or CEMs in particular.

[22] The CRTC found that the Attorney General had met its burden of showing that the deleterious effects of CASL's limits on free expression do not outweigh the limitations' benefits to the greater public good, which include increasing confidence in e-commerce and thereby benefitting the economy as a whole.

[23] The CRTC concluded that CASL's violation of freedom of expression guaranteed by section 2(b) of the Charter is justified under section 1.

(4) Impugned Provisions Do Not Trigger Section 11 of the Charter

[24] The CRTC held that the impugned provisions of CASL do not create an offence for the purposes of section 11 of the Charter. The CRTC applied the two-part test from *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 [*Guindon*] for determining whether a statutory infraction constitutes an offence within the meaning of section 11. First, the CRTC examined the objectives of the legislation and the process leading to the imposition of the sanction and concluded that the proceedings were not criminal in nature. According to the CRTC, the objectives of the proceedings, considered in their full legislative context, have a regulatory purpose namely deterring spam and other electronic threats. The purpose of the proceedings, in the CRTC's view, amounts to regulating a limited sphere of activity. The CRTC also found that the process leading to a sanction does not bear any of the hallmarks of a criminal proceeding. For instance, CASL does not use language typically associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", or "accused", but instead uses terms such as "balance of probabilities", "due diligence", "penalty", "undertaking", and "representations". Neither do proceedings under CASL involve arrest, the laying of charges, a summons to a criminal court nor the possibility of a criminal record. Finally, section 30 of CASL explicitly states that a violation of the Act is not an offence and that section 126 of the *Criminal Code* R.S.C. 1985, c. C-46 does not apply.

[25] Turning to the second prong of the *Guindon* test, the CRTC found that CASL does not prescribe a true penal consequence. The CRTC considered that, though the maximum quantum possible for an AMP under CASL is high, the jurisprudence has avoided placing an arbitrary upper limit on AMPs. Furthermore, the maximum need not be applied except where truly warranted. The CRTC pointed to case law where it was found that AMPs of similar magnitudes to those under CASL did not trigger section 11. The CRTC also observed that the quantum of an AMP under CASL is determined according to the factors set out in subsection 20(3), which, according to the CRTC, reflect regulatory considerations rather than principles of criminal sentencing. The CRTC further found that no stigma attaches to the imposition of an AMP under CASL. Finally, although AMPs are paid into the Consolidated Revenue Fund, which could suggest a true penal consequence, the CRTC found that this factor alone was not dispositive.

(5) CASL Does Not Violate Sections 7 and 8 of the Charter

[26] The CRTC found that, because CASL does not create an offence for the purposes of section 11 of the Charter, the rights provided by sections 7 and 8 to individuals subject to penal proceedings also do not apply. The CRTC therefore held that CASL does not violate sections 7 and 8 of the Charter.

B. Notice of Violation Decision

[27] In the second of its two decisions, the CRTC applied CASL to the facts set out in the NOV issued to the appellant and concluded that the appellant did, in fact, violate the Act. The CRTC considered 317 electronic messages sent by the appellant to various recipients between July and September 2014. These messages formed the basis of three alleged violations of paragraph 6(1)(a) of CASL for sending CEMs without the consent of recipients and one alleged violation of paragraph 6(2)(c) for sending CEMs without a functioning unsubscribe mechanism. The CRTC ultimately concluded that the appellant had committed all four violations.

(1) Preliminary Issues

(a) *Effect of Appellant's Bankruptcy Proceedings*

[28] The CRTC found that its review of the NOV was unaffected by the appellant having filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the Bankruptcy Act) on August 9, 2016. The appellant listed the CRTC as an unsecured creditor on November 28, 2016.

(b) *The Appellant Did Not Suffer Prejudice During or After the Investigation*

[29] The CRTC rejected the appellant's claim that it suffered prejudice at the investigation stage because it was not asked whether any exemptions applied to its circumstances. The CRTC also rejected the appellant's argument that the investigation report supporting the NOV failed to properly consider whether any exemptions applied. The CRTC recalled that the appellant was informed that it was free to submit information regarding potentially

applicable exemptions during the production stage of the investigation. The appellant was given another opportunity when making representations to the CRTC. The appellant took advantage of the latter opportunity and the CRTC considered its submissions on exemptions in its decisions. The CRTC therefore determined that the appellant was not prejudiced during the investigation or afterward.

(c) Evidence Supporting the Investigation Report

[30] The CRTC reduced the number of CEMs under consideration from the 451 identified in the investigation report to 317 based on, *inter alia*, evidentiary deficiencies in the investigation report and the fact that some CEMs appeared to fall outside the relevant time period set out in the NOV.

(2) Violations of CASL

[31] To decide whether the appellant committed the alleged violations, the CRTC first determined that none of CASL's exclusions applied to exempt the appellant's CEMs from the consent and content requirements set out in section 6. The CRTC then found that providing a non-functioning link in addition to a functioning link in a CEM violated CASL's requirements regarding unsubscribe mechanisms. Finally, the CRTC held that the appellant could not rely on the defense of due diligence.

(a) CEMs Did Not Qualify for Business-to-Business Exemption

[32] The CRTC held that the appellant failed to establish that the "business-to-business"

exemption applied to any CEMs under consideration. Subparagraph 3(a)(11) of the *Electronic Commerce Protection Regulations* S.O.R./2013-221 (Governor in Council Regulations) provides that section 6 of CASL does not apply to CEMs sent between members of organizations where those organizations have a relationship and the messages relate to the activities of the recipient organization. The CRTC found that the appellant's evidence that an organization had paid the appellant for a training course on behalf of one of its employees did not, on its own, establish a relationship that would allow the appellant to directly solicit every other employee in that organization. At most, such a transaction might be evidence of a business relationship between the appellant and the single employee for the purposes of implied consent pursuant to paragraph 10(9)(a) of CASL.

[33] The CRTC indicated that evidence of a relationship for the purposes of the business-to-business exemption might include evidence that the member of an organization with whom the appellant had dealings had the authority and intent to create such a relationship on behalf of the organization. The CRTC also indicated that a history of correspondence with an organization could, depending on its contents, support the existence of such a relationship. However, in the CRTC's view, the appellant failed to provide sufficient evidence of relationships with any of the organizations to which the appellant had sent CEMs.

(b) *Non-functioning Unsubscribe Mechanisms*

[34] The investigation into the appellant's activities revealed that 87 CEMs contained a non-functioning unsubscribe link, contrary to paragraph of 6(2)(c) of CASL. More

specifically, these CEMs contained two unsubscribe links: one that appeared to function properly and one that produced an error message when accessed.

[35] The CRTC found that the non-functioning links created confusion and frustration among recipients and made some believe that they were unable to unsubscribe. According to the CRTC, the 87 CEMs failed to meet the standards set out in subsections 3(1) and 3(2) of the *Electronic Commerce Protection Regulations (CRTC)* S.O.R./2012-36 (the CRTC Regulations), which respectively require that unsubscribe mechanisms be “set out clearly and prominently” and “must be able to be readily performed.” The CRTC therefore found that these CEMs violated paragraph 6(2)(c) of CASL, which requires that unsubscribe mechanisms “conform[] to the prescribed requirements” just mentioned.

(c) Implied Consent from Conspicuous Publication Not Established

[36] The CRTC rejected the appellant’s argument that 132 of the 317 messages under review were sent with the implied consent of recipients due to the conspicuous publication of the recipients’ email addresses. Paragraph 10(9)(b) of CASL states that consent is implied for the purposes of section 6 of the Act where the recipient “has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent, the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address and the message is relevant to the person’s business, role, functions, or duties in a business or official capacity”.

[37] The CRTC found that much of the evidence relied on by the appellant did not demonstrate that recipients had conspicuously published their electronic addresses within the meaning of paragraph 10(9)(b). The appellant obtained some addresses from third-party directory websites that gave no indication that listings were user-submitted. The appellant took other addresses from online directories comprised of user-submitted information, but which contained disclaimers stating that unsolicited CEMs were not to be sent to the listed addresses. In other cases, the CRTC found that the appellant merely assumed or speculated what the recipient organization or individual's role, functions or duties might be, without supporting evidence. In none of these situations, in the CRTC's view, were the requirements of the conspicuous publication exemption in paragraph 10(9)(b) of CASL met.

(d) Due Diligence Defence Not Applicable

[38] The CRTC rejected the appellant's alternative argument that, if it had violated CASL, it should not be found liable because it had exercised due diligence to prevent the violations. Steps taken by the appellant included hiring new employees expressly to obtain recipients' consent to receive CEMs; contacting the CRTC for guidance on the business-to-business exemption; achieving nearly perfect compliance with unsubscribe mechanisms; and hiring a consulting firm to develop a compliance program.

[39] The CRTC found some of these measures irrelevant to a due diligence defence because they were taken after the alleged violations. Other measures, in the CRTC's view,

demonstrated the appellant's awareness of CASL's requirements, but it was not clear that the measures had, or could have had, any impact on avoiding the violations at issue. The CRTC also found some of the appellant's claims unpersuasive, such as the claim to a nearly perfect compliance rate with unsubscribe mechanisms—the appellant was sending CEMs with non-functioning links so it is impossible to know how many unsubscribe requests never reached the appellant. The CRTC concluded that the appellant had taken some steps in preparation for the coming into force of CASL, but failed to show it had taken all reasonable steps during the relevant period to avoid the violations at issue. The CRTC therefore rejected the appellant's due diligence defence.

(3) Conclusions on Appellant's Violations

[40] The CRTC found that the appellant sent 317 CEMs to recipients without their prior consent contrary to paragraph 6(1)(a) of CASL. The CRTC determined that the business-to-business exemption in subparagraph 3(a)(ii) of the Governor in Council Regulations did not apply to these CEMs and that none of the recipients had conspicuously published their electronic addresses within the meaning of paragraph 10(9)(b) of CASL. The CRTC also held that 87 of the 317 messages contravened paragraph 6(2)(c) of CASL by containing a non-functioning unsubscribe mechanism. The CRTC held that the appellant could not rely on the defense of due diligence to excuse these violations. The CRTC therefore concluded that, on a balance of probabilities, the appellant had committed three violations of 6(1)(a) CASL and one violation of 6(2)(c) CASL, as set out in the NOV.

(4) CRTC Reduced AMP from \$1,100,000 to \$200,000

[41] The CRTC concluded that the appropriate amount for an AMP in this case is \$200,000 rather than the \$1,100,000 set out in the NOV. To reach this conclusion, the CRTC compared the appellant's conduct against the factors in subsection 20(3) of CASL for determining the amount of an AMP.

[42] The appellant had no history of violations or undertakings under CASL or associated acts. Neither had it obtained any financial benefit from committing the violations. However, there was no indication that the appellant had compensated any persons affected by its violations.

[43] The CRTC held that the purpose of CASL's AMP regime is to achieve compliance through deterrence. However, in the CRTC's view, the \$1,100,000 AMP proposed in the NOV over-emphasized general deterrence and was out of proportion to the amount necessary to promote the appellant's compliance specifically. The CRTC considered that a lower amount would be appropriate.

[44] The CRTC found that the nature and scope of the appellant's violations also suggested a lower penalty was appropriate. The CRTC acknowledged that the harm caused by the appellant's messages was not the worst type of harm that unsolicited CEMs can cause. However, the messages were generally disruptive and unwelcome, and the frustration they caused was compounded by recipients' inability to unsubscribe due to non-functioning links. The CRTC also noted that it had already circumscribed the range of messages under consideration from 451 to 317. In the CRTC's view, the appellant's

conduct still warranted a penalty, albeit in a lesser amount than suggested in the NOV.

[45] The CRTC next considered the appellant's ability to pay the proposed penalty, a factor that the CRTC found also favored a reduction from the initial \$1,100,000 AMP. The CRTC placed greater weight on the appellant's annual revenues than its profits as an indicator of the appellant's ability to pay as it considered the latter could be more easily manipulated to appear smaller. The CRTC found that the appellant's claims that the proposed penalty would have drastic impacts on its owners and on the company's continued viability lacked detailed support. In the CRTC's view, there were some indications that the appellant was able to pay the proposed penalty and others that it could not. The CRTC concluded that the appellant had some ability to pay, but the extent of this ability suggested a lower penalty was appropriate.

[46] The CRTC found that the appellant's non-cooperation with the investigation into its activities, as mentioned in the investigation report, should not be a significant factor in calculating the size of the AMP necessary to promote the appellant's compliance. The CRTC was cognizant that procedures under CASL were still very new when the appellant was attempting to navigate the investigation process, and the CRTC did not view the appellant as having attempted to frustrate or forestall the investigation.

[47] The CRTC considered that the appellant's efforts to improve compliance following the investigation into its conduct were positive indicators of self-correction. Although

these efforts did not negate the need for a penalty, in the CRTC's view, they supported imposition of a lower penalty than the one set out in the NOV.

[48] The final factor considered by the CRTC was the overall proportionality between the AMP's magnitude and the foregoing factors, as applied to the circumstances of the appellant's case. The CRTC concluded that the \$1,100,000 AMP set out in the NOV was out of proportion to what was required to promote the appellant's compliance and decided to lower the amount to \$200,000.

[49] Despite finding the initial \$1,100,000 AMP disproportionate to both the appellant's violations and the amount necessary to promote compliance, the CRTC rejected the appellant's argument that the AMP in this case constituted a true penal consequence and thereby triggered section 11 of the Charter. The CRTC based this conclusion on the same grounds on which it held, in the Constitutional Decision, that CASL, in general, does not prescribe true penal consequences.

[50] The CRTC concluded that the appropriate penalty, in light of all relevant circumstances, was an AMP of \$200,000.

V. Appellant's Submissions

A. Constitutional Decision

(1) CASL is *Ultra Vires* Parliament

[51] The appellant argues that the CRTC erred in finding CASL *intra vires* Parliament's trade and commerce power. According to the appellant, the CRTC's pith and substance analysis was flawed because it considered CASL as a whole rather than focusing on the specific provisions at issue. The CRTC began its analysis from too broad a starting point, and this error compromised the remainder of its analysis.

[52] The appellant argues that the pith and substance of CASL's "messaging portions"—the provisions at issue—go beyond trade and commerce. These provisions, according to the appellant, capture all messages that might have a minor commercial purpose, regulate purely local messaging and interfere with contractual terms. The pith and substance of CASL's messaging provisions is therefore, in the appellant's view, to regulate unsolicited messages generally. The impugned provisions thus fall squarely within provincial jurisdiction over municipalities, local matters and property and civil rights.

[53] The appellant argues that the impugned provisions cannot come under Parliament's general trade and commerce power merely because certain aspects of CEMs have a national dimension. The appellant points out that CASL's CEM provisions displace provincial regulation concerning consumer protection, privacy and marketing. The appellant also argues the provinces are capable of adopting laws addressing the concerns targeted by CASL.

(2) CASL Violates Section 2(b) and Is Not Saved Under Section 1

[54] The appellant argues that CASL's violation of section 2(b) of the Charter is not saved under section 1.

(a) *CASL Too Vague to Constitute "Limit Prescribed by Law"*

[55] The appellant argues that CASL's key definitions are too broad and open-ended to delineate a clear zone of risk. CASL's exemptions and regulations also cause confusion and make compliance difficult. The appellant says that, because content accessible via a link can convert a message into a CEM, CASL creates an "unknowable risk". The appellant also contends that CASL creates an unintelligible standard due to the absence of "factors helping the public or courts understand the ambit of risk" (Appellant's Constitutional Memorandum at para. 43). Finally, the appellant argues that the requirement that CEMs contain contact information for any person "on whose behalf" the message is sent is too vague.

(b) *Objective of Impugned Provisions Not Pressing and Substantial*

[56] The appellant asserts that the objective of the infringing measures is to eliminate unsolicited electronic messages with any arguable commercial element. The appellant says this is not a pressing and substantial objective. The CRTC is said to have erred by locating CASL's objective in the Act's title and its section 3 purpose clause. According to the appellant, the section 1 analysis is only concerned with the objective of the infringing measures, specifically.

[57] The infringing measures do not just guard against the most damaging and deceptive forms of spam, which, the appellant agrees, would constitute a pressing and substantial objective. Rather, the challenged provisions presumptively ban all messages with any arguable commercial content, including a variety of beneficial messages. The appellant argues that the objective of these measures cannot be to protect the economy, since they actually impede e-commerce.

(c) Impugned Provisions Not Rationally Connected to CASL's Objective

[58] The appellant argues that the CRTC erred in considering that a “rational, logical link between the infringing measures and the government’s objectives” was sufficient to pass the rational connection stage. The appellant says that the CRTC overlooked CASL’s many “arbitrary, unfair” and “irrational considerations” that should have caused the Act to founder at the rational connection stage (Appellant’s Constitutional Memorandum at para. 52). The appellant argues that CASL’s prohibition on unsolicited CEMs is overbroad and captures messages that are not detrimental to e-commerce, such as messages that send coupons or rally support for victims of natural disasters. The appellant provides a list of further examples of messages that it says would be captured by CASL’s prohibition and that demonstrate the arbitrary, unfair and irrational nature of the prohibition.

(d) CASL Not Minimally Impairing

[59] The appellant again relies on overbreadth arguments to support its position that CASL should fail the minimal impairment stage. The appellant asserts that the CRTC erred by failing to engage with each specific allegation of CASL’s overreach. The CRTC

thus failed to consider whether CASL truly represents the least drastic means of achieving the government's objectives. The appellant suggests that, instead of having an open-ended definition of "CEM" and a closed set of exemptions, CASL could have employed a closed definition of "CEM" and open-ended exemptions, similar to the approach taken in Australia. CASL also could have adopted an opt-out rather than an opt-in model for recipient consent. Other suggestions include, *inter alia*, excluding messages between individuals from the definition of CEM, exempting beneficial actors from the prohibition on unsolicited CEMs and excluding linked content from review in determining whether a message is a CEM. The appellant argues that any one of these suggestions represents a less drastic alternative to CASL. The Act is therefore not minimally impairing of section 2(b).

(e) *CASL's Deleterious Effects Not Proportionate to Benefits*

[60] The appellant argues that the CRTC erred in finding that CEMs fall outside the core of section 2(b) and are therefore less worthy of protection than other forms of expression. The appellant says that the CRTC also erred in failing to consider the many kinds of non-commercial speech negatively impacted by CASL's broad prohibition. The appellant analogizes CASL to Alberta's *Personal Information Protection Act*, S.A. 2003, c. P-6.5, which relied on a similar presumptive ban plus exemptions model and which failed the proportionality stage of the section 1 analysis in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733.

[61] The appellant argues that CASL curbs many forms of beneficial speech, including political and religious speech, charitable and public benefit endeavours and advertising by professionals. Conversely, it is not clear that CASL actually produces any benefits. The Act's severe impact on freedom of expression is therefore not justified.

(3) CASL Violates Sections 11, 7 and 8 of the Charter

[62] The appellant argues that CASL violates the right against self-incrimination in sections 11 and 7 of the Charter as well as the right against unreasonable search and seizure in section 8. The appellant claims that an AMP under CASL constitutes a "true penal consequence" and therefore triggers section 11 (Appellant's Constitutional Memorandum at para. 85). The appellant asserts that those subject to CASL proceedings are nevertheless denied various procedural safeguards guaranteed by section 11. The appellant also argues that the statutory powers of compulsion granted to designated persons under CASL violate the protection against self-incrimination provided by section 7 and the right to be free from unreasonable search and seizure under section 8. The appellant states that these violations result when designated persons compel production of documents from individuals and organizations and those documents are subsequently used against the same individuals and organizations in CASL's enforcement proceedings.

B. Notice of Violation Decision

(1) Application and Interpretation of the Bankruptcy Act

[63] The appellant argues that the CRTC erred in finding that the appellant's proposal to its creditors pursuant to the Bankruptcy Act had no effect on the NOV. The appellant asserts that the liabilities forming the basis of the NOV are unsecured claims that were compromised by the acceptance of the appellant's proposal by its creditors and the insolvency court. According to the appellant, there was therefore no legal basis for the CRTC to impose an AMP of \$200,000.

[64] The appellant argues that the CRTC failed to consider the proper legal test for determining whether the appellant's liability created by the NOV is a "claim provable" under the Bankruptcy Act. The appellant argues that the three-part test, set out in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, is met by the AMP contemplated in the NOV, which constitutes a liability to a creditor (the CRTC), was incurred before the appellant filed its notice of intention, and can be assigned a monetary value. Because its liabilities arising from the NOV were, in fact, provable claims, the appellant argues that it was released from them pursuant to its proposal proceedings under the Bankruptcy Act. The appellant asserts that the CRTC erred in imposing a \$200,000 penalty on the basis of liabilities that had been discharged by its proposal.

[65] Notably, the respondent concedes that the AMP is unenforceable against the appellant outside the insolvency process (Respondent's Notice of Violation Memorandum at paras. 22, 24, 26). Although the enforceability of the AMP is therefore not a contested issue as between the parties, the appellant nevertheless requests that this Court pronounce upon the

issue. The appellant points out that the CRTC's decision still states that the appellant's penalty was not compromised by its Bankruptcy Act proposal and that the AMP remains enforceable. The appellant acknowledges that steps could be taken in insolvency court to stay the enforcement of the AMP, and that the respondent has conceded its non-enforceability, but notes that such a concession does not carry the same weight as a judgement of this Court.

(2) CRTC's Treatment of the Business-to-Business Exemption

[66] The appellant argues that the CRTC erred in finding that none of the 317 CEMs under review qualified for the business-to-business exemption set out in subparagraph 3(a)(ii) of the Governor in Council Regulations. The appellant asserts that Parliament's intent in providing this exemption was to ensure that regular business communications were not unnecessarily regulated by CASL. The appellant states that, for 168 of the 317 CEMs at issue, it provided evidence that the messages were sent to employees of organizations with which the appellant had either a long history of correspondence or a contractual relationship based on payment for employee training courses. The CRTC erred in holding that such contractual relationships did not constitute relationships for the purposes of the business-to-business exemption.

[67] The appellant claims that the CRTC adopted such a restrictive approach to the exemption as to render it almost ineffectual. The CRTC's interpretation is said to be contrary to CASL's purpose as it actually discourages use of electronic means of carrying out commercial activities.

[68] The appellant also argues that the CRTC confused the proper legal test for identifying a “relationship” under the business-to-business exemption with the test for ascertaining an “existing business relationship” for the purposes of implied consent under subsection 10(9) of CASL. The appellant says that, logically, the former term should be given a “significantly broader meaning” than the latter, more “specific’ expression” (Appellant’s Notice of Violation Memorandum at para. 64), particularly as Parliament chose not to define the former term in the legislation.

[69] Further, the appellant argues, the CRTC’s interpretation of the relevance requirement for the business-to-business exemption was overly restrictive. The appellant asserts that its CEMs offered training services to help employees of recipient organizations develop their skills. The recipient organizations were legally required to offer their employees training programs “of the sort marketed and offered” by the appellant (Appellant’s Notice of Violation Memorandum at para. 68). According to the appellant, the exemption does not require that CEMs bear any more specific reference to the activities of recipient organizations.

[70] Finally, the appellant argues that the CRTC invented the requirement that relationships can only be formed with organizations through persons with sufficient authority to bind their organization. The appellant says that such a requirement goes against the text and spirit of the exemption.

(3) CRTC's Treatment of Implied Consent from Conspicuous Publication

[71] The appellant contends that the CRTC also erred in its interpretation and application of paragraph 10(9)(b) of CASL, which provides that consent for the receipt of CEMs can be implied where the recipient has conspicuously published its electronic address. The appellant provided the CRTC with a table setting out each email address it claims was conspicuously published, where it was published and the recipient's job title, where known. The appellant points to the table's inclusion of recipients' job titles as evidence that the CEMs in question were related to the recipient's business activities—a requirement of implied consent under paragraph 10(9)(b). The appellant also argues that the latter requirement was met because the CEMs related to courses “of general interest to employees.” (Appellant's Notice of Violation Memorandum at para. 78).

(4) CRTC's Treatment of the Unsubscribe Mechanism Requirements

[72] Finally, the appellant argues that the CRTC erred in its interpretation and application of section 3 of the CRTC Regulations, which requires that unsubscribe mechanisms be displayed “clearly and prominently” and “be able to be readily performed” (Appellant's Notice of Violation Memorandum at para. 82). According to the appellant, the fact that non-functioning links were included in some CEMs does not negate the fact that the functioning links also present in those CEMs complied with the express wording of the CRTC Regulations. The CRTC's findings to the contrary are, according to the appellant, a misinterpretation and misapplication of the requirements for unsubscribe mechanisms.

VI. The Issues

A. Constitutional Challenge

- 1) Is CASL *ultra vires* Parliament?
- 2) Is CASL's violation of section 2(b) of the Charter justified under section 1?
- 3) Does CASL violate section 11 of the Charter?
- 4) Does CASL violate sections 7 or 8 of the Charter?

B. Notice of Violation

- 1) Did the CRTC err in its interpretation and application of the business-to-business exemption?
- 2) Did the CRTC err in its interpretation and application of CASL's implied consent requirements regarding conspicuous publication?
- 3) Did the CRTC err in its interpretation and application of CASL's requirements regarding unsubscribe mechanisms?

VII. Standard of Review

[73] These are appeals from two CRTC decisions in respect of proceedings under section 25 of CASL. CRTC decisions under section 25 are subject to a statutory right of appeal to this Court (CASL, ss. 27(1)). The Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [Vavilov] stated that “where the

legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision.” (*Vavilov* at para. 37). The authority on appellate standards of review is *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*] according to which questions of law are reviewed on the standard of correctness and questions of fact and mixed fact and law are reviewed on the standard of palpable and overriding error.

[74] This Court’s review of the CRTC’s Constitutional Decision, concerning CASL’s validity and Charter compliance, will proceed on the standard of correctness. The Supreme Court explained the application of the correctness standard at paragraph 50 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190:

When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

Accordingly, this Court will perform its own division of powers and Charter analyses with respect to the impugned legislation to determine whether the Constitutional Decision will be allowed to stand or must instead be brought in line with the findings of this Court. Although the CRTC’s reasoning will be taken into account, “the reviewing court is ultimately empowered to come to its own conclusions” (*Vavilov* at para. 54).

[75] Conversely, this Court's review of the Notice of Violation Decision, concerning the application of CASL to the facts of this case, will be based on the standard of palpable and overriding error. This Court will only interfere with a determination of the CRTC in this regard if it discloses an error that is both obvious and goes to the very core of the case's outcome (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38).

VIII. The Constitutional Decision

A. Division of Powers Analysis: Validity under Subsection 91(2)

[76] The appellant challenges the CRTC's finding that CASL is *intra vires* Parliament. The CRTC determined that CASL is a valid exercise of Parliament's jurisdiction over trade and commerce pursuant to subsection 91(2) of the Constitution Act. More specifically, the CRTC held that the Act falls under the second branch of the federal trade and commerce power pertaining to general trade and commerce affecting Canada as a whole.

[77] To determine whether the impugned legislation properly falls within Parliament's legislative competence, a division of powers analysis is required. This analysis typically consists of two steps. At the initial stage, the legislation's pith and substance is determined by examining the law's purpose and effects. At the second stage of the analysis, the impugned legislation is classified by reference to the heads of power assigned to either Parliament or the provinces by the Constitution Act. If the law falls under a head of power

within the jurisdiction of the enacting level of government, the law is valid, or *intra vires* the enacting legislature. If, on the other hand, the law is properly classified under a head of power outside the competency of the enacting level of government it is *ultra vires* and must be struck down (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 at paras. 63–65 [*Securities Reference*]; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 15 [*Firearms Reference*]).

[78] Notably, however, where the inquiry specifically considers whether legislation is a valid exercise of Parliament’s power over general trade and commerce, the case law prescribes a particular method for conducting the division of powers analysis. A line of jurisprudence culminating in *General Motors* established five *indicia* of validity for matters falling under this branch of subsection 91(2). These *indicia* will be set out explicitly below, but the purport of the *General Motors* test is, where “the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope.” (*Securities Reference* at para. 83).

[79] The Supreme Court’s advisory opinion in the *Securities Reference* demonstrates one method of integrating the *General Motors* test into the division of powers analysis. In the *Securities Reference*, the Supreme Court first conducted a pith and substance analysis of the relevant legislation and then employed the *General Motors* test at the classification stage. These reasons will follow the Supreme Court’s approach. Accordingly “we must

stage. These reasons will refer to the Supreme Court's approach accordingly, "we must identify the main thrust of the proposed legislation having regard to its purpose and effects, and then ask whether the scheme, thus characterized, meets the *indicia* set out in *General Motors*." (*Securities Reference* at para. 92).

(1) Scope of the Legislation to be Considered

[80] The appellant's Notice of Appeal indicates that the appellant seeks a declaration of invalidity with respect to CASL in its entirety. Before the CRTC, however, the appellant challenged only certain provisions of CASL (Constitutional Decision at paras. 11–12). In particular, the appellant's validity arguments before the CRTC focused exclusively on the Act's CEM-related provisions (Constitutional Decision at para. 37). In its memorandum for this appeal as well, the appellant confined its validity arguments to "CASL's messaging portions" (Appellant's Constitutional Memorandum at para. 81). Accordingly, I will proceed on the basis that the appellant's challenge on validity relates solely to CASL's CEM provisions.

[81] The parties and the CRTC agree that CASL's CEM provisions are the principal provisions in issue (Constitutional Decision at para. 37). Nevertheless, there is disagreement over the scope of the Act that should be considered in the division of powers analysis. The appellant argues that the CEM provisions must be considered in isolation and therefore the CRTC erred in considering CASL as a whole. More particularly, the CRTC's pith and substance analysis took into account the purpose and effects of sections 7 and 8 which address the alteration of transmission data in electronic messages and the

unauthorized installation of computer programs, respectively (Constitutional Decision at paras. 37, 43, 45). The appellant argues that these provisions are not in issue and that the proper approach is to determine the main thrust of the impugned CEM provisions in isolation from the wider Act (Appellant's Constitutional Memorandum at para. 80). The respondent, for its part, defends the CRTC's method (Respondent's Constitutional Memorandum at para. 90) despite applying the appellant's approach of analyzing the CEM provisions specifically (Respondent's Constitutional Memorandum at paras. 92, 95, 96).

[82] To resolve this dispute, it is helpful to recall that the *General Motors* test assesses validity at the level of the regulatory scheme. As the Supreme Court stated in *General Motors*, though not an essential condition of validity, “[t]he presence of a scheme of legislation is one of the most basic characteristics” of valid trade and commerce legislation. Accordingly, “[m]ost provisions upheld under the second branch of s. 91(2) will be connected to a regulatory scheme.” (*General Motors* at 667). The existence of a regulatory scheme is not disputed in this case (Constitutional Decision at para. 53). There is a dispute, however, respecting the scope of the relevant scheme.

[83] A regulatory scheme can be contained in a single provision or a severable part of an act or it can comprehend an entire piece of legislation. The Supreme Court in *General Motors* identified three constituent components of a regulatory scheme: prohibited conduct, an investigatory procedure and a remedial mechanism (*General Motors* at 676).

[84] There are two ways of viewing CASL for the purpose of identifying the regulatory scheme relevant to the case at hand. First, the entire Act could be interpreted as comprehending a single regulatory scheme. This is the view taken by the CRTC (Constitutional Decision at paras. 37, 43, 45). On this approach, the prohibited conduct is, broadly stated, “commercial conduct that discourages the use of electronic means to carry out commercial activities” (CASL, s. 3). Sections 6–8 then describe three subsets of this broader category of proscribed conduct, namely, the sending of unsolicited CEMs, alteration of transmission data in electronic messages and unauthorized installation of computer programs. On this reading, if the impugned provisions relating to CEMs were found to intrude on the provinces’ legislative sphere, their validity could nevertheless be secured by virtue of their relationship to CASL’s wider regulatory scheme—that is, if it were determined that the wider scheme is valid and the provisions sufficiently integrated relative to the extent of their intrusion on provincial competency. This is the essence of the ancillary powers doctrine: “a finding that a provision standing alone, in its pith and substance, intrudes on provincial powers does not determine its ultimate constitutional validity [...] It is necessary to consider both the impugned provision and the Act as a whole when undertaking constitutional analysis.” (*Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 at para. 20 [*Kirkbi*]). This is perhaps what the CRTC had in mind when it stated, “to the extent that doing so is necessary to the pith and substance analysis, the Commission has considered the purpose and effects of CASL’s regulatory scheme as a whole.” (Constitutional Decision at para. 37).

[85] Interpreting CASL as a single regulatory scheme would therefore justify considering

the purpose and effects of sections 7 and 8 in the context of establishing the validity of CASL's overall scheme. However, even in this scenario, it would still be necessary to first determine the main thrust of the challenged sections on their own before turning to consider the wider scheme. As the Supreme Court has made clear, where only certain provisions of an act are challenged, "[t]he first stage of the analysis requires a characterization of the impugned provision in isolation from the rest of the statute." (*Kirkbi* at para. 23). The CRTC assessed CASL as a whole right from the outset of its pith and substance analysis, failing to consider the purpose and effects of the impugned CEM provisions on their own at any point in its decision.

[86] In any event, I do not believe that consideration of sections 7 and 8 has any proper place in the division of powers analysis called for in this case. The respondent has not raised the ancillary powers doctrine as a basis for the validity of the impugned CEM provisions. It is therefore not appropriate to embark on this path of justification.

[87] I find the second way of viewing CASL, which comports more closely with the appellant's approach, the preferable view. According to this approach, CASL contains three separate regulatory schemes, each centered on one of the distinct forms of prohibited conduct enumerated in sections 6, 7 and 8, respectively. On this reading, the impugned provisions constitute a distinct regulatory scheme relating to unsolicited CEMs, separate and apart from CASL's schemes targeting the alteration of transmission data and unauthorized installation of computer programs. There is then no basis for considering the purpose and effects of the latter two schemes in a constitutional analysis of the impugned

CEM scheme, which stands or falls on its own. The analysis must be confined to the impugned provisions, which cumulatively form the Act's CEM scheme, and "[t]he question is whether the sum of its particular provisions, read together, falls within the general trade and commerce power" (*Securities Reference* at para. 91). While provisions that appear invalid may take on a constitutional cast by integration into an otherwise valid scheme, an invalid scheme does not take on a constitutional cast by the presence of two other valid schemes in the same act.

[88] I note that the CRTC also appears to recognize the existence of multiple schemes within the framework of CASL, distinguishing, at paragraph 37 of its Constitutional Decision, between the Act's "unsolicited CEM scheme" and the "schemes relating to the alteration of transmission data or the installation of computer programs".

[89] For these reasons, the following division of powers analysis will first identify the main thrust of the impugned provisions, read together as an economic scheme regulating the sending of unsolicited CEMs, by considering their purpose and effects in isolation from the Act's other provisions, in particular, sections 7 and 8. Next, it will be determined whether the CEM scheme, thus characterized, meets the *General Motors* test and therefore qualifies as valid federal legislation pursuant to Parliament's jurisdiction over general trade and commerce (*Securities Reference* at paras. 91–92).

[90] Before moving on, I note that, on either reading of CASL described above, the Act's

regulatory scheme, or schemes, also meet the remaining two requirements of a regulatory

regulatory scheme, or schemes, also meet the remaining two requirements of a regulatory scheme: an investigatory procedure and a remedial mechanism (*General Motors* at 676). These criteria are satisfied by the investigatory and enforcement powers assigned to persons designated under section 14, as well as the CRTC, the Commissioner of Competition, the Privacy Commissioner and this Court, pursuant to various provisions of the Act. As previously stated, the existence of a regulatory scheme is not contested on this appeal (Constitutional Decision at para. 53). The preceding discussion was necessary only to identify the parameters of the regulatory scheme to be assessed in the sections that follow.

(2) Pith and Substance Analysis

[91] Having determined that the impugned CEM scheme, read in isolation, properly forms the subject of the pith and substance analysis, it is now necessary to consider that scheme's purpose and effects, or, in other words, what the scheme seeks to do and what it does (*Securities Reference* at para. 94).

(a) *Purpose of the CEM Scheme*

[92] The case law tells us that legislative purpose may be ascertained by reference to both intrinsic and extrinsic evidence. Intrinsic evidence, from within the "four corners" of the legislation, includes explicit statements of an act's purpose in the legislation itself, as well as an act's general structure. Relevant extrinsic material may include accounts of the legislative process, including Hansard, government publications and similar material (*Firearms Reference* at para. 31; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 157 N.R. 97 at

484 [*Morgentaler*]). Determining legislative purpose may also be aided by identifying the defect in the law a statute aims to correct, or, in other words, the mischief or evil Parliament sought to address through the legislation (*Firearms Reference* at para. 17; *Morgentaler* at 484).

[93] There is, of course, no purpose clause for CASL's CEM scheme in particular. However, the purpose clause for CASL as a whole, found at section 3 of the Act, is useful in discerning the purpose of the impugned scheme. Section 3 states that CASL's purpose is "to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages reliance on electronic means of carrying out commercial activities". The Act's title echoes this purpose. The reasons why Parliament sought to regulate commercial conduct of this description through CASL are enumerated in paragraphs 3(a) to (d), which speak to the evils the legislation aims to address. More specifically, the commercial conduct regulated by CASL is targeted because that conduct:

- (a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;
- (b) imposes additional costs on businesses and consumers;
- (c) compromises privacy and the security of confidential information; and
- (d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.

It is because certain commercial activities can give rise to these undesirable consequences that impact the economy that Parliament undertook to regulate those activities through

CASL.

[94] The commercial activities that CASL regulates are threefold: the alteration of transmission data in electronic messages, the unauthorized installation of computer programs and, most pertinently, the sending of unsolicited CEMs. Section 3 thus reveals that Parliament's intention in legislating the impugned provisions was to create a scheme regulating the sending of CEMs in order to prevent impairment of the e-economy and costs to businesses and consumers, as well as to protect confidential information and Canadians' confidence in e-commerce.

[95] Parliamentary debates consistently support the conclusion that the purpose of CASL's CEM scheme is to regulate unsolicited CEMs in order to combat spam and associated online threats in the interests of privacy and security in order to promote a healthy e-economy (see the Joint Appeal Book (JAB)):

The bill before us will reduce the burden of spam on Canadian businesses and the risks to individual Canadians. Our goal is to ensure continued confidence in electronic commerce by addressing the personal privacy and security concerns that surround Internet spam and related threats. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 053 (7 May 2009) at 3216 (Mike Lake); JAB at 1151).

Government has a responsibility to create the economic conditions that will help build the digital economy. One of the ways we are doing this is by creating the right framework laws to build trust and confidence in online transactions and communications. Rules that counter unsolicited email are critical to that framework. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 105 (2 November 2009) at 6495 (Mike Lake); JAB at 1135).

The legislation is about reducing spam and other computer-related threats that discourage the use of electronic commerce and undermine privacy. This legislation restores consumer confidence in online commerce by protecting both consumers and Canadian businesses from unwanted spam. Our goal is to ensure confidence in online commerce by addressing the privacy and personal security concerns that consumers associate with spam and related threats which deter consumers from participating in the online marketplace. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 106 (3 November 2009) at 6581 (Gordon Brown); JAB at 1144).

The origins of this bill, after all, go back to the work of the task force on spam. The task force recommended that strong action be taken against unsolicited commercial emails, as it recognized that spam was becoming more than just a nuisance. It has become the means by which viruses, trojans and worms are spread through the Internet and it undermines confidence in the digital economy. (*House of Commons Debates*, 40th Parl, 3rd Sess, No 101 (22 November 2010) at 6268 (Dave Van Kesteren); JAB at 1163).

[96] Finally, I note that the appellant faults the CRTC for its “heavy reliance on CASL’s ‘stated purpose’” (Appellant’s Constitutional Memorandum at para. 80). However, I also observe that the appellant, in discerning what it says is the “true purpose” of the CEM scheme, omits any consideration of the intrinsic and extrinsic evidentiary sources from which the case law tells us a law’s purpose is to be derived. The appellant seems rather to rely on what are, in its view, the scheme’s effects in order to arrive at its formulation of the scheme’s purpose (Appellant’s Constitutional Memorandum at para. 81).

(b) *Effects of the CEM Scheme*

[97] I turn now to consider the effects of CASL’s CEM scheme, which involves examining how the law sets out to achieve its purpose. Two types of effects are relevant to

this inquiry: first, the direct legal effects of the legislation on the rights and liabilities of those subject to its terms, and, secondly, the practical consequences of the scheme's application, looking beyond its strict legal operation. The legislation may have incidental effects that implicate heads of power outside of Parliament's jurisdiction—these effects can be discounted in the search for the main thrust of the legislation (*Securities Reference* at para. 63; see also *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 at para. 28 [*Canadian Western Bank*] and *General Motors* at 667).

(i) Direct Legal Effects

[98] The direct legal effect of the impugned provisions is the establishment of a federal regulatory scheme for unsolicited CEMs applicable to all provinces. Under this scheme, persons wishing to send electronic communications that can reasonably be considered to have as a purpose encouraging participation in a commercial activity may only do so where recipients have consented to receiving such messages and CASL's content requirements relating to unsubscribe mechanisms and sender contact information have been met. These legal constraints apply unless a message falls within one of the Act's exclusions or recipients' consent can be implied. Contravention of these regulations renders the sender liable to an AMP or a civil suit. These are the direct effects of the CEM scheme. The scheme's effect is not, contrary to the appellant's assertions, to "sweep in all messages that might have a minor commercial purpose" (Appellant's Constitutional Memorandum at para. 81, emphasis in original).

[99] What the CEM scheme does not regulate also suggests its operation is limited to its

stated purpose. In other words, the scheme's effects do not appear to diverge substantially from its stated aim, which might suggest colourability (*Firearms Reference* at para. 18). The impugned provisions target a particular type of electronic communication—commercial messaging—that is intimately tied to the scheme's purpose of protecting e-commerce. The scheme has no effect on the sending of electronic messages that cannot reasonably be considered to have as a purpose encouraging participation in a commercial activity. This belies the appellant's assertion that "CASL's 'true purpose' is to regulate **unsolicited messages generally.**" (Appellant's Constitutional Memorandum at para. 81, emphasis in original).

[100] More particularly still, the impugned scheme regulates only a narrow aspect of the targeted type of messaging. The scheme establishes three consent-related preconditions for the sending of CEMs: express or implied consent of the recipient; inclusion of an unsubscribe mechanism to allow recipients to withdraw consent; and inclusion of senders' identification and contact information so these individuals can be contacted directly and informed of recipients' withdrawal of consent, if necessary.

[101] CASL's CEM scheme does not seek to regulate any other aspect of commercial messaging. The impugned scheme in no way affects the terms of any contract of sale that might arise between senders and recipients of CEMs. It does not regulate the content of CEMs other than mandating the inclusion of an unsubscribe mechanism and senders' contact information; marketing and advertising-related content considerations are otherwise unaffected. The scheme does not protect consumers from any unfair business

practices beyond the sending of unsolicited commercial messages. Essentially, once recipient consent has been obtained and the few consent-related content requirements satisfied, as far as CASL is concerned, senders of CEMs are at liberty to offer, advertise or promote any form of transaction, act or conduct they wish, in any manner, according to whatever terms they see fit.

[102] Just as the Supreme Court observed of competition in *General Motors*, commercial electronic messaging is “not a single matter, any more than inflation or pollution.” (*General Motors* at 682). The provinces may deal with commercial messaging in the exercise of their jurisdiction over fields such as consumer protection and marketing. However, if regulation of the narrow aspect of commercial messaging targeted by the impugned provisions constitutes an objective that legitimately falls under federal jurisdiction, then Parliament also has the constitutional authority to legislate with respect to that aspect.

[103] According to the double aspect doctrine “the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence” (*Canadian Western Bank* at para. 30; *Securities Reference* at para. 66). The double aspect doctrine “recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various ‘aspects’ of the ‘matter’ in question.” (*Canadian Western Bank* at para. 30). I also note, in this regard, that the impugned scheme does not displace, nor

does it substantially duplicate, any existing provincial legislation.

[104] I wish to address, briefly, the appellant’s contention that the impugned scheme intrudes on provincial jurisdiction because its consent formalities “interfere[] with contractual terms” (Appellant’s Constitutional Memorandum at para. 81). The specific nature of CASL’s alleged contractual interference is not entirely clear, as the appellant provides no explanation or supporting analysis of its argument on this point. Instead, the appellant’s single-sentence assertion cites a letter addressed to Industry Canada, authored by one Philip Palmer, a lawyer with expertise on CASL who appeared as a witness before the Parliamentary Standing Committee on Industry, Science and Technology, the body tasked with reporting to Parliament on CASL (JAB at 13913–13914). Mr. Palmer’s letter specifically addresses CASL’s requirement that all CEMs contain an unsubscribe mechanism. The letter conjures a hypothetical situation where a contract stipulates that a creditor may only move to enforce its legal rights against a debtor after providing notice electronically. Since CASL requires that the creditor’s prior electronic messages to the debtor include an unsubscribe mechanism, should the debtor “strategically” utilize this mechanism before the creditor’s electronic notice is sent, the debtor “can certainly slow – if not arrest – the triggering of legal enforcement” (JAB at 13914). According to Mr. Palmer, this would result in the “frustration of contractual rights” (JAB at 13914).

[105] I reject the argument raised (or alluded to) by the appellant in this regard. *Parsons v. Citizens’ Insurance Co. of Canada* (1881) L.R. 7 App. Cas. 96, [8] A.C. 406 [*Parsons*], a foundational case on the scope of the federal trade and commerce power indeed

foundational case on the scope of the federal trade and commerce power, indeed

established that subsection 91(2) “does not comprehend the power to regulate by legislation the contracts of a particular business or trade” (*Parsons* at 113; see also *Securities Reference* at para. 75). However, it is clear that CASL’s CEM scheme does not regulate the contracts of any particular business or trade. The scheme’s effects apply to the exceedingly wide array of businesses and trades that participate in e-commerce. These effects, in any event, do not include, in any meaningful sense, the regulation of contracts nor the frustration of contractual rights.

[106] First, I observe that neither CASL’s unsubscribe mechanism requirements nor any other facet of CASL’s CEM scheme constrains parties’ freedom to stipulate in a contract whatever method of communication or notification they wish to take place between them. Secondly, frustration of a contract can only be caused “by something for which neither party was responsible” (*Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] 3 D.L.R. 12, [1935] A.C. 524 at 531 [*Maritime National Fish*]). In Mr. Palmer’s hypothetical, the debtor, by unsubscribing from the creditor’s messages and precluding notice in the contractually mandated form, created the conditions preventing enforcement of the creditor’s contractual rights. The debtor could not then “rely on their own default to excuse them from liability under the contract.” (*Maritime National Fish* at 531). The debtor remains liable and the creditor retains its legally enforceable rights under the contract. As Mr. Palmer rightly notes, at most, bad-faith use of the unsubscribed mechanism by a contracting party could delay enforcement of contractual rights—it cannot, however, frustrate contractual rights nor alter contractual terms. Accordingly, I am unpersuaded that CASL intrudes on provincial jurisdiction by interfering with contractual

unpersuaded that CASL intrudes on provincial jurisdiction by interfering with contractual terms.

(ii) Follow-through Effects

[107] One practical consequence or follow-through effect of the impugned CEM scheme is to regulate the transmission of some commercial information that takes place entirely within a province. Where this occurs, even the narrow aspect of commercial messaging targeted by CASL's CEM scheme may very well lie within provincial jurisdiction over property and civil rights or local and private matters. This is not, however, fatal to the legislation. Regulation of "purely local" messaging, as the appellant puts it at paragraph 81 of its Constitutional Memorandum, is merely an incidental or secondary effect of the impugned scheme.

[108] Incidental effects are "effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature" (*Canadian Western Bank* at para. 28 citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 28). Incidental intrusions on provincial jurisdiction are entirely consonant with the modern view of federalism and can be discounted in the division of powers analysis (*Canadian Western Bank* at para. 29). Indeed, "[t]he 'pith and substance' doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government" (*Canadian Western Bank* at para. 29). The dominant purpose or true nature of legislation, rather than

its secondary effects, is decisive.

[109] The impugned scheme's regulation of intraprovincial messaging is incidental to its primary aim of regulating CEMs that by nature do not respect provincial borders and can have a dramatic effect on the national economy. Pursuit of this primary aim made the scheme's regulation of some intraprovincial messaging unavoidable. The comments made in *General Motors*, at page 692, by Dickson C.J. with respect to section 31.1 of what was then the *Combines Investigation Act*, R.S.C. 1970, c. C-23 are equally applicable in this case in light of the practical necessities associated with creating a nation-wide CEM scheme:

In my view, the fact that federal legislation may have some ramifications on trade carried on solely within one province will not be fatal to the legislation's validity. Every general enactment will necessarily have some local impact and it would be absurd to strike down legislation for that reason alone. All of the provisions of the *Combines Investigation Act* are open to application on purely intraprovincial transactions. In fact, the *Combines Investigation Act* would not be effective competition legislation if it could not reach intraprovincial activities. The simple fact that s. 31.1 can be applied to transactions occurring entirely within a single province does not undermine the section's validity.

[110] Given the purpose and effects of CASL's CEM scheme set out above, the main thrust of the impugned scheme is to regulate the public's ability to send unsolicited CEMs in order to guard against the threats that such messages can pose to Canada's e-economy.

(3) Classification: *General Motors* Test

[111] Having determined the essential character of the impugned provisions, the CEM scheme must now be classified by reference to the heads of power enumerated in the Constitution Act. This Court must determine whether CASL's CEM scheme is, in particular, a valid exercise of Parliament's jurisdiction over general trade and commerce affecting Canada as a whole. This field of federal competency is particularly susceptible to expansive interpretation that could threaten the constitutional balance of power struck between Canada's federal and provincial governments. However, while an overly broad interpretation could allow Parliament to run roughshod over provincial powers with respect to property and civil rights as well as local matters, failure to give meaningful scope to Parliament's jurisdiction over trade and commerce would be equally detrimental to the integrity of the Constitution's institutional framework (*Securities Reference* at paras. 70–74).

[112] To maintain balance between federal and provincial powers, federal jurisdiction over general trade and commerce is confined to matters that are “genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local matters and property and civil rights.” (*Securities Reference* at para. 70). To distinguish such matters from those of a more local nature better suited to provincial regulation, the jurisprudence has developed a five-factor inquiry.

[113] The five *indicia* of valid general trade and commerce legislation were set out by the Supreme Court in *General Motors*. They are as follows: (i) the impugned legislation must be part of a regulatory scheme; (ii) the scheme must be monitored by the continuing

oversight of a regulatory agency; (iii) the legislation must be concerned with trade as a whole rather than with a particular industry; (iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and (v) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country (*Kirkbi* at para. 17 citing *General Motors* at 662).

[114] The five *General Motors indicia* are hallmarks of a valid exercise of Parliament's general trade and commerce power. However, the list of criteria is non-exhaustive, and failure to meet all five is not necessarily fatal to federal legislation (*Kirkbi* at para. 17). As the Supreme Court stated in *General Motors*, the five *indicia* simply offer a “principled way” of conducting the analysis, “a preliminary check-list of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power.” (*General Motors* at 662).

[115] The appellant concedes that the impugned CEM scheme meets the first two *indicia* regarding the existence of a regulatory scheme under the oversight of a regulatory agency (Constitutional Decision at para. 53). I therefore proceed to the third step of the test.

(a) *General Motors Test iii) Is the Legislation Concerned with Trade as a Whole?*

[116] The third *General Motors indicium* is the legislation must be concerned with trade as a whole rather than with a particular industry. I accept the CRTC's assessment, at

paragraphs 56–57 of its Constitutional Decision, that e-commerce has become a pillar of Canada’s national economy, one that transcends industries, sectors and categories of market participants as well as provincial borders. Email, which is similarly borderless, is integral to the functioning of the e-economy for the reasons stated at paragraph 57 of the Constitutional Decision.

[117] Unsolicited emails can carry a number of electronic threats, “such as phishing attacks, malware, botnets (malware that is controlled remotely), identity theft, and online scams.” (Constitutional Decision at para. 61). The record shows that the potential of CEMs to transmit such pernicious contents has both direct and indirect costs on businesses, necessitating investments in anti-spam filters and other security solutions, giving rise to help desk costs and causing lost productivity as well as wasted storage and server capacity. Realization of the threats that can accompany CEMs would also impair, in a far more drastic way, the ability of businesses or individuals—depending on the victim of the attack—to use electronic means to carry out commercial activities. Unsolicited CEMs, both because they are potential vehicles for electronic threats and because they are often unwanted and irritating, also undermine consumer confidence in e-commerce (Canada, Task Force on Spam, *Stopping Spam: Creating a stronger, safer Internet*, (Ottawa: Industry Canada, May 2005) [Task Force on Spam Report]; JAB at 11905; OECD, Directorate for Science, Technology and Industry, Committee on Consumer Policy and Committee for Information, Computer and Communications Policy, *Report of the OECD Task Force on Spam: Anti-Spam Toolkit of Recommended Policies and Measures*, OECD Digital Economy Papers No 114, DSTI/CP/ICCP/SPAM(2005)3/FINAL (April

2006); JAB at 12617).

[118] These deleterious effects associated with unsolicited CEMs threaten e-commerce in Canada. The impugned scheme regulates the sending of unsolicited CEMs to defend against these threats. Once it is accepted that e-commerce permeates Canada's economy and is not confined to any specific industry or sector—and I do not perceive the appellant as seriously contesting this proposition—it must follow that the impugned legislation is concerned with trade as a whole and thus satisfies the third *General Motors indicium*.

[119] The appellant, however, draws a parallel between CASL's CEM scheme and the federal securities scheme found to be *ultra vires* Parliament in the *Securities Reference*. Just as the latter act reached into “all aspects of contracts for securities within the provinces” and would have triggered the “wholesale displacement of provincial regulation”, CASL's CEM scheme, according to the appellant, “reaches into the day-to-day regulation of messaging, also regulated by provincial consumer protection, privacy and marketing laws.” (Appellant's Constitutional Memorandum at para. 82).

[120] The appellant's argument must be rejected, and the *Securities Reference* distinguished from the present case, on two grounds. First, unlike the abortive *Securities Act*, the impugned CEM scheme does not engage in the detailed regulation of an industry. Secondly, it is not clear that the CEM scheme displaces existing provincial legislation.

[121] The *Securities Act* fell outside Parliament’s constitutional purview over general trade and commerce because the legislation descended into the day-to-day regulation of a specific industry—the securities industry (*Securities Reference* at para. 123). The Supreme Court found that the act “would regulate *all* aspects of contracts for securities within the provinces, including *all* aspects of public protection and professional competence within the provinces.” (*Securities Reference* at para. 122, emphasis in original). The act was thus an “attempt to take over regulation of the entirety of the securities trade in Canada” (*Securities Reference* at para. 126).

[122] The appellant’s analogy between the *Securities Act* and CASL’s CEM scheme is ill suited in this regard. In the first place, the impugned CEM scheme does not regulate all messaging, but only one specific type—commercial messaging. It furthermore targets only a narrow aspect of this type of messaging, leaving ample room for provincial regulation of CEMs, including in the areas of consumer protection, privacy and marketing mentioned by the appellant. Further still, “messaging”, or, more properly, “commercial messaging”, is not a discrete economic industry in the same way as the trade in securities. E-commerce transcends industries and permeates the economy, meaning that CASL’s CEM scheme regulates a specific aspect of many industries, rather than all aspects of a specific industry, as with the *Securities Act*. The current inquiry centers on whether that specific aspect falls within the federal domain. The appellant’s strained analogy with the scuttled *Securities Act* does not support, let alone compel, a negative finding on this question.

[123] In contrast to CEM regulation and CASL, moreover, securities regulation was an

area in which the provinces had been deeply engaged for many years prior to the *Securities Act*. At the time of the *Securities Reference*, every province and territory already possessed its own securities laws and regulatory agency (*Securities Reference* at paras. 41, 101, 115). Provinces were required to suspend their own securities laws as a prerequisite to joining the federal regime. The effect of the *Securities Act* was therefore to “duplicate and displace the existing provincial and territorial securities regimes, replacing them with a new federal regulatory scheme.” (*Securities Reference* at para. 106). In contrast, as the CRTC noted at paragraphs 46 and 66 of its Constitutional Decision, no pre-CASL provincial legislation existed addressing the sending of unsolicited CEMs and related e-threats. Accordingly, displacement of provincial legislation is not a factor in the present case as it was in the *Securities Reference*. The appellant’s failure to point to any specific examples of displacement belies its attempt to analogize between the *Securities Act*’s “wholesale displacement of provincial regulation” and the effects of CASL (Appellant’s Constitutional Memorandum at para. 82).

(b) *General Motors Test iv) Are the Provinces Incapable of Enacting the Legislation?*

[124] The fourth *indicium* of valid general trade and commerce legislation is that the provinces, jointly or severally, would be constitutionally incapable of enacting it. I find CASL’s CEM scheme satisfies this *indicium* as well. It may be that the provinces, acting in concert, possess the constitutional capacity to enact uniform legislation regulating unsolicited CEMs. However, as the CRTC recognized at paragraph 70 of its Constitutional Decision, there can be no assurance that the provinces could address these issues on a

sustained basis because the provinces retain the unfettered ability of resiling from any interprovincial scheme. The Supreme Court’s rationale for the provinces’ inability to achieve the national aims of the federal securities scheme in the *Securities Reference* applies equally with respect to CASL: “[t]he provinces’ inherent prerogative to resile from an interprovincial scheme...limits their constitutional capacity to achieve the truly national goals of the proposed federal Act.” (*Securities Reference* at para. 120). The provinces’ sovereignty with respect to future legislative action makes CASL’s CEM scheme “qualitatively different from what the provinces, acting alone or in concert, could achieve.” (*Securities Reference* at para. 121).

(c) *General Motors Test v) Would a Province’s Failure to Join Jeopardize the Scheme?*

[125] The final *General Motors indicium* is that the failure to include one or more provinces in the legislative scheme would jeopardize its successful operation in other parts of the country. I am mindful, here, of the Supreme Court’s direction in the *Securities Reference* that this factor “should not be read as introducing an inquiry into what would be the best resolution in terms of policy” and “[t]he test is not which jurisdiction — federal or provincial — is thought to be best placed to legislate regarding the matter in question.” (*Securities Reference* at para. 90). Rather, the focus of the inquiry remains on determining whether the matters in question “are essential in the national interest, transcend provincial interests and are truly national in importance and scope.” (*Securities Reference* at para. 90). I find the regulation of unsolicited CEMs is such a matter.

[126] When it comes to the genuinely national goals of safeguarding the digital economy

[120] When it comes to the genuinely national goals of safeguarding the digital economy from electronic threats that could easily emanate from, and visit their deleterious effects on, any place in the country, federal regulation is essential. If one province were to have more lenient laws respecting unsolicited CEMs, spammers using cloud computing or other methods could easily arrange to disseminate their CEMs from servers located in that province (JAB at 11414). This would fundamentally handicap any interprovincial scheme aimed at guarding Canada's e-economy from the online threats associated with unsolicited CEMs. In this way, a federal regime, such as the impugned CEM scheme, is "qualitatively different from a voluntary interprovincial scheme." (*Securities Reference* at para. 123).

[127] The rationale for federal legislation on spam mirrors the justification for federal regulation of competition endorsed by the Supreme Court in *General Motors*. Any corporation "has the capacity to 'walk across' provincial boundaries in order to buy or sell, lend or borrow, hire or fire", meaning there is a virtual "absence of artificial impediments" with respect to competition. Consequently, "the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator." (*General Motors* at 679). The artificial impediments of provincial borders are similarly irrelevant when speaking of the internet, email, and the digital economy. In fact, relative to corporations, spammers may enjoy an even greater facility for transcending provincial borders in order to conduct their activities. In these circumstances, provincial legislation is simply inadequate to the task of regulating unsolicited CEMs.

[128] Finally, I wish to briefly address the appellant's assertion that "CASL's field of

regulation lacks the ‘singleness, distinctiveness and indivisibility that clearly distinguish it from matters of provincial concern’”, and the appellant’s criticism of the CRTC for bypassing this analysis (Appellant’s Constitutional Memorandum at para. 82, note 116). The test cited by the appellant is the test for assessing whether an issue qualifies as a matter of national concern under the national concern doctrine of Parliament’s peace, order and good government (POGG) power (*R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 at 184). Parliament’s POGG power is not the basis on which the respondent has argued the validity of CASL’s CEM scheme. In the context of Parliament’s power over general trade and commerce, the question of whether matters are “genuinely national in scope and qualitatively distinct from those falling under provincial heads of power” is assessed through the five *General Motors indicia* of validity—a test tailored to assess validity under this particular head of power (*General Motors* at 678, 680; *Kirkbi* at para. 16; *Securities Reference* at para. 109). The appellant’s allusion to the national concern test is misguided, and the CRTC did not err in eschewing this analysis.

[129] Based on the above, I find CASL’s CEM scheme is a valid exercise of Parliament’s power over general trade and commerce affecting Canada as a whole pursuant to the second branch of subsection 91(2) of the Constitution Act.

B. Is CASL’s Infringement of Section 2(b) of the Charter Justified under Section 1?

[130] In the normal course, a section 2(b) Charter analysis begins by determining whether the activity in question constitutes expression for the purposes of section 2(b) by either

conveying meaning or attempting to do so. It must then be determined whether the

conveying meaning or attempting to do so. It must then be determined whether the

impugned law restricts that expression (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at paras. 147–148 [*Sharpe*]). However, the respondent concedes that CEMs fall within the scope of activity protected under section 2(b), that the purpose of the impugned provisions is to restrict that activity and that the impugned provisions therefore infringe freedom of expression guaranteed by section 2(b) of the Charter (Respondent’s Constitutional Memorandum at paras. 34–35). This concession is reasonable given the well-established view that commercial expression warrants constitutional protection (see, for example, *Sharpe* at paras. 143–144; *R v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472 at para. 21 [*Guignard*]; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [*Ford*]; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 971 [*Irwin Toy*]). I therefore proceed straight to the section 1 analysis.

[131] As a preliminary matter, section 1 requires that a limit on a Charter right or freedom be “prescribed by law”. Next, it must be determined whether the objective of the impugned measures is pressing and substantial, or, in other words, sufficiently important to warrant limiting a Charter right. The three prongs of the proportionality analysis then require (1) a rational connection between the restricting measures and the measures’ objective; (2) that the impugned measures impair the right or freedom as little as possible; and (3) overall proportionality between the benefits of the impugned measures and the deleterious effects to which they give rise (*R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes*]; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R.

877, 150 D.L.R. (4th) 285 [1998] 1 S.C.R. 1009

(1) Is the Limit “Prescribed by Law”?

[132] The analysis of whether a limitation is “prescribed by law” has two elements: the limit must be a duly enacted “law”, and it must be “prescribed”, meaning the law must be sufficiently precise and accessible (*Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295 at para. 50 [Vancouver Transportation Authority]).

[133] The preceding division of powers analysis established that CASL was validly enacted by Parliament pursuant to the general trade and commerce power under subsection 91(2) of the Constitution Act. CASL is therefore duly enacted law.

[134] Next, it must be determined whether CASL is sufficiently precise to meet the “prescribed” requirement. The purpose of this requirement is twofold. First, it allows people subject to the law to know what the law prohibits so they can regulate their conduct accordingly. Secondly, precise laws provide guidance with respect to their enforcement and thereby limit arbitrary government action (*Vancouver Transportation Authority* at para. 50). The Charter-limiting measure must present an intelligible standard to both the public and those charged with applying the law.

[135] The case law makes clear that “a liberal approach to the precision requirement” is appropriate and “the standard is not an onerous one.” (*Vancouver Transportation Authority*

at para. 54; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 at 94–97 [*Osborne*]). An impugned law will not fail this stage unless it “is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.” (*Osborne* at 94).

[136] A corollary to the requirement that laws be sufficiently precise is that laws must not be impermissibly vague. The doctrine of vagueness was discussed by the Supreme Court in *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 [*Nova Scotia Pharmaceutical Society*]. The Court stated at paragraph 38 that only a law exhibiting “the most serious degree of vagueness” would fail the “limit prescribed by law” hurdle. The Court described an unconstitutionally vague law at paragraph 64 in the following terms:

A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard...

[137] With these principles in mind, I now turn to the impugned legislation. The appellant argues that CASL’s key definitions are open-ended and fail to delineate a legal zone of risk (Appellant’s Constitutional Memorandum at para. 40). The appellant implicates two of CASL’s defined terms in particular: “commercial activity” in subsection 1(1) and

“CEM” in subsection 1(2) (Appellant’s Constitutional Memorandum at paras. 39, 42).

These provisions are reproduced below:

1(1) The following definitions apply in this Act.

“commercial activity”

“commercial activity” means 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, other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada.

...

“electronic message”

“electronic message” means a message sent by any means of telecommunication, including a text, sound, voice or image message.

...

Meaning of commercial electronic message

1(2) For the purposes of this Act,

1(1) Les définitions qui suivent s’appliquent à la présente loi.

« activité commerciale »

« activité commerciale » Tout acte isolé ou activité régulière qui revêt un caractère commercial, que la personne qui l’accomplit le fasse ou non dans le but de réaliser un profit, à l’exception de tout acte ou activité accompli à des fins d’observation de la loi, de sécurité publique, de protection du Canada, de conduite des affaires internationales ou de défense du Canada.

[...]

« message électronique »

« message électronique » Message envoyé par tout moyen de télécommunication, notamment un message textuel, sonore, vocal ou visuel.

[...]

Message électronique commercial

1(2) Pour l’application de la

a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that	présente loi, est un message électronique commercial le message électronique dont il est raisonnable de conclure, vu son contenu, le contenu de tout site Web ou autre banque de données auquel il donne accès par hyperlien ou l'information qu'il donne sur la personne à contacter, qu'il a pour but, entre autres, d'encourager la participation à une activité commerciale et, notamment, tout message électronique qui, selon le cas:
(a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;	a) comporte une offre d'achat, de vente, de troc ou de louage d'un produit, bien, service, terrain ou droit ou intérêt foncier;
(b) offers to provide a business, investment or gaming opportunity;	b) offre une possibilité d'affaires, d'investissement ou de jeu;
(c) advertises or promotes anything referred to in paragraph (a) or (b); or	c) annonce ou fait la promotion d'une chose ou possibilité mentionnée aux alinéas a) ou b);
(d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.	d) fait la promotion d'une personne, y compris l'image de celle-ci auprès du public, comme étant une personne qui accomplit — ou a l'intention d'accomplir — un des actes mentionnés aux alinéas a) à c)

[138] I begin with the definition of CEM in subsection 1(2). The definition of CEM rests on two subconcepts. First, a CEM is an electronic message. Subsection 1(1) defines

electronic message as “a message sent by any means of telecommunication, including a text, sound, voice or image message.” This definition confirms what the average person would expect the term “electronic message” to include: email, text message and any other text, sound or voice-based message conveyed via any of the diverse social media and instant messaging platforms that function electronically. Subsection 6(8) clarifies that telephone calls and voicemail are not included in this definition. The appellant does not appear to take issue with this aspect of the definition of CEM.

[139] Cutting through the nuance of subsection 1(2), the second key component of a CEM is that it encourages participation in a commercial activity. Like “electronic message”, “commercial activity” is also defined in subsection 1(1). This definition indicates that “activity” includes any transaction, act or conduct. The definition also clarifies that “commercial” activities are not limited to activities where there is an expectation of profit. Although the definition does not shed additional light on the meaning of “commercial”, this does not render the definition of “commercial activity” or “CEM” impermissibly vague.

[140] “Commercial” is not a word unfamiliar to the average person. The Oxford English Dictionary defines the adjective “commercial” as “engaged in commerce; trading.” The noun “commerce” is, in turn, defined as follows:

1.a. Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, *esp.* as conducted on a large scale between different countries or districts, including the whole of

(SOURCE: Oxford English Dictionary, (last visited May 13, 2020) online:
www.oed.com)

[141] This definition captures the essential meaning that an average person would ascribe to “commerce”: exchange, trade, buying and selling. The term “commercial” is also given more concrete meaning by the descriptions of CEMs in paragraphs 1(2)(a) through (d), which refer to purchasing, selling, bartering and leasing, as well as business, investment and gaming opportunities.

[142] The appellant argues that removing an expectation of profit from the definition of commercial activity creates ambiguity. I disagree. While transactions, acts and conduct in the way of exchange, trade, buying and selling may typically aim at turning a profit, such activities could additionally, or alternatively, be carried out for other purposes, including political reasons or altruism, to name a few. These or other considerations could supplement, have a role equal to, or entirely overshadow profit in motivating activities that, in manner and form, and thus in the ordinary understanding of the average person, constitute commercial activities. I therefore agree with the respondent that removing an expectation of profit from the definition of “commercial activity” reduces rather than increases ambiguity by precluding desultory wrangling over the subjective expectations harbored by senders of CEMs.

[143] In my view, reading the definitions of “commercial activity” in subsection 1(1) and

“CEM” in subsection 1(2) together presents a sufficiently clear explanation of the meaning of “commercial activity” for the purposes of defining a CEM in subsection 1(2).

[144] What it means to “encourage participation” in a commercial activity is also reasonably clear from subsection 1(2). It includes making an offer to a person to engage in any transaction, act or conduct that involves purchasing, selling, bartering, leasing or any activity that would be judged similar to these according to an average person’s understanding of the term “commercial activity”. It also includes offering any type of opportunity listed in subsection 1(2) or reasonably similar opportunities. Finally, it includes advertising or promoting any of the foregoing.

[145] The last consideration is how one is to determine whether an electronic message has as its purpose, or one of its purposes, to encourage participation in a commercial activity. Subsection 1(2) directs that a reasonable conclusion on this question be drawn from the message’s content, hyperlinks and contact information.

[146] Thus, reading subsections 1(1) and 1(2) together identifies the medium targeted by CASL, tells the public both what to look for and where to look in order to identify the targeted conduct, and indicates that the standard for determining whether a particular electronic message is a CEM is the familiar legal standard of reasonableness.

[147] The appellant, however, contends that the zone of risk created by CASL is impermissibly vague because Parliament elected to use examples or descriptions rather

than factors to help define “CEM” (Appellant’s Constitutional Memorandum at para. 43). Suffice it to say there is no authority for the proposition that factors must guide a law’s application for the law to pass constitutional muster. Listing non-exhaustive examples or descriptions to help instruct citizens and direct law enforcement is also a common legislative technique and does not, on its own, render a law unconstitutionally vague.

[148] The appellant also contends that, because hyperlinked content can convert a message into a CEM, and the content accessible through a link can change at any time, the definition of CEM creates an “unknowable risk”. The inclusion of links undoubtedly raises the risk that an electronic message will be deemed a CEM by vastly increasing the quantity of information reviewable for the purpose determining whether the message can reasonably be considered to have as its purpose, or one of its purposes, encouraging participation in a commercial activity. This risk will be more or less depending on the nature of the linked sites: do the sites offer to purchase, sell, barter or lease a product, good, service or land? Do they offer business, investment or gaming opportunities? Do they advertise or promote any of the foregoing or promote a person for doing any of the foregoing? To what degree is any of the foregoing the primary function or purpose of the linked sites? Does the nature of the linked sites increase or decrease the likelihood that any of the foregoing, though not present on the sites at the time the links were included in an electronic message, will subsequently be added to the sites? The answers to these questions will assist in gauging the risk associated with including a link in an electronic message. It also behoves senders to recall that links are considered in conjunction with a message’s content and contact information in order that a reasonable conclusion may be

drawn as to whether a message's purpose, or one of its purposes, is to encourage participation in a commercial activity. A sender can never know with exactitude the risk incurred by including a link in an electronic message, but neither are they destitute of any idea or guidance in this regard.

[149] Finally, the appellant takes issue with the term "on whose behalf" in relation to the requirement in subsection 11(1) of CASL that CEMs include an unsubscribe mechanism enabling recipients to indicate their wish to no longer receive CEMs from either the sender or the person "on whose behalf" a message is sent. Sufficient guidance regarding who is included among those "on whose behalf" messages are sent can be found in CASL's Regulatory Impact Analysis Statement (RIAS) and on the "Frequently Asked Questions about Canada's Anti-Spam Legislation" page of the Government of Canada's website (online: Government of Canada/Canadian Radio-television and Telecommunications Commission <<https://crtc.gc.ca/eng/com500/faq500.htm>>). Both resources explain that "only the persons who play a material role in the content of the CEM and/or the choice of the recipients" qualify as persons "on behalf of whom" a message is sent (JAB at 13647).

[150] I cannot agree that the aspects of the impugned provisions highlighted by the appellant are "so obscure as to be incapable of interpretation with any degree of precision" (*Osborne* at 94) or exhibit "the most serious degree of vagueness" (*Nova Scotia Pharmaceutical Society* at 630). The following statement of Gonthier J. at page 639 of *Nova Scotia Pharmaceutical Society*, is apposite:

... Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

[151] CASL is sufficiently precise to delineate an area or zone of risk, which is all that can be realistically expected and all that is constitutionally required of legislation. The impugned provisions are intelligible, offer a grasp to the judiciary, and provide an adequate basis for legal debate and therefore do not bear the characteristics of vague legislation set out in *Nova Scotia Pharmaceutical Society*. I find that CASL more than meets the threshold for passing the “prescribed by law” stage of the section 1 analysis.

(2) Is the Object of the Infringing Measures Pressing and Substantial?

[152] The next stage of the section 1 analysis considers whether the legislative objective of the impugned measures is sufficiently important to justify limiting a Charter right or freedom. It is crucial to render an accurate formulation of the relevant legislative objective at this stage.

[153] The CRTC located CASL’s object in the Act’s title and in the purpose clause at section 3. The title declares that CASL seeks 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”. Section 3 repeats this object and

explains that CASL specifically regulates conduct that:

- (a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;
- (b) imposes additional costs on businesses and consumers;
- (c) compromises privacy and the security of confidential information; and
- (d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.

[154] The appellant, on the other hand, argues that the relevant objective is not the objective of CASL as a whole, but the objective of the impugned measures themselves. The approach advocated by the appellant is the correct one (see, for example, *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at para. 144 [*RJR-MacDonald*]; *Thomson Newspapers* 1998 at para. 125). However, as I explained at paragraphs [92] – [93] of these reasons, by simply replacing the words “regulating certain activities” in the title, and “regulating commercial conduct” in section 3, with “regulating CEMs”, the Act’s title and section 3 are essentially statements of the object of the impugned CEM scheme. The CRTC’s assessment was, therefore, not very far off the mark.

[155] The appellant offers both “broadly phrased” and “narrower” objectives for the impugned provisions (Appellant’s Constitutional Memorandum at para. 50). The appellant states the broadly phrased objective as “[e]liminating unsolicited electronic messages with

any arguable commercial element regardless of who sends them”, and the narrower objective as “curbing ‘the most damaging and deceptive forms of spam’” (Appellant’s Constitutional Memorandum at para. 50, emphasis in original). Both of the appellant’s formulations of the legislative objective must be dismissed.

[156] The appellant’s broad formulation of the scheme’s objective is nearly identical to its description of CASL’s function or effect, which the appellant repeats at paragraphs 1, 8, 15, 62, 63 and 75 of its Constitutional Memorandum.

[157] I make two observations of the appellant’s various statements in this regard. First, the statements are hyperbole. Contrary to the appellant’s claims, CASL does not ban all speech or expression with any possibility or semblance of commerciality, or that might be, may be or could be viewed as having a slight, faint, or minor commercial element, aspect, nature or purpose (Appellant’s Constitutional Memorandum at paras. 1, 8, 15, 46, 50, 62, 63 and 75). In reality, CASL’s prohibition captures electronic messages that it would be reasonable to conclude have—not could, might or may have—as their purpose, or one of their purposes, to encourage participation in a commercial activity. Furthermore, the prohibition only captures such messages where they have not been consented to or do not conform to the prescribed content requirements, and where none of the various exceptions for prescribed individuals and organizations applies. Secondly, the appellant conflates the CEM scheme’s objective with the approach it takes to achieve this objective. The Supreme Court warned against this practice at paragraph 23 of *Thomson Newspapers* 1998:

The Court must first assess the *objective* of the infringing legislative measure, as distinguished from the means chosen to implement it. The question is whether the *concern* which prompted the enactment of the impugned legislation is pressing and substantial and whether the *purpose* of the legislation is one of sufficient importance (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 987, Dickson C.J. and Lamer J. (as he then was) and Wilson J.). The distinction between “objective” and “means” is important...

[Emphasis in original].

[158] Thus, in *RJR-MacDonald*, the objective of the impugned advertising ban on tobacco was not simply to ban tobacco ads, but “to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products.” (*RJR-MacDonald* at para. 144). The objective of the proscriptive legislation was not the proscription itself, but preventing the negative effects of the proscribed conduct.

[159] Similarly, the objective of CASL’s prohibition on CEMs not meeting the Act’s consent and content requirements or otherwise falling under an exception is not simply to ban CEMs. Rather, CASL’s legislative objective is to stymie certain negative effects to which unsolicited CEMs give rise. These are set out in paragraphs 3(a) through (d) of the Act’s purpose clause.

[160] Nor is this too broad an objective. Section 3 sets out an overarching legislative objective (promoting the efficiency and adaptability of the Canadian economy) supported by sub-objectives enumerated in paragraphs (a) through (d). This is structurally similar to the objective accepted by the Supreme Court with respect to the *Health and Social*

Services Delivery Improvement Act, S.B.C. 2002, c. 2 in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*]. The Supreme Court wrote at paragraph 146 of that decision:

We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.

[161] The Supreme Court's reasoning applies equally with respect to CASL's objective as stated in section 3 of the Act. And there is no question, in my mind, that the objective of promoting the efficiency and adaptability of the Canadian economy by regulating CEMs, which may have the pernicious effects set out in paragraphs 3(a) through (d), is sufficiently important to warrant limiting a constitutionally-protected right or freedom.

[162] Before proceeding to the next stage of the section 1 analysis, a brief explanation is due for why the appellant's narrower formulation of CASL's objective must also be rejected. The appellant states this version of CASL's objective as "curbing 'the **most** damaging and deceptive forms of spam'" (Appellant's Constitutional Memorandum at para. 50, emphasis in original). The appellant cites this formulation of the legislative objective to an Industry Canada backgrounder on Bill C-28 (Appellant's Constitutional

Memorandum at note 28). It is questionable practice, to put it mildly, when considering the objective of legislation, to eschew analysis of, or even reference to, the legislation in question, and have recourse instead to supplementary informational documents. Further still, the appellant does not accurately portray the backgrounder's statement of the bill's goal. The document actually states that Bill C-28 is "designed to reduce the most damaging and deceptive forms of spam and other activities that discourage electronic commerce" (my emphasis). Of the legislation's purpose, more specifically, the backgrounder states "[t]he legislation aims to increase consumer confidence in online commerce by protecting both consumers and Canadian businesses from unwanted spam and related online threats." (JAB at 1394). The phrase "unwanted spam and related online threats" unquestionably comprehends a great deal more than only the most damaging and deceptive forms of spam. That Parliament intended for CASL to target more than only the most damaging and deceptive forms of spam is also evident in Hansard:

Malware represents some of the most harmful aspects of spam. But even in the apparently least harmful, the unsolicited email that gets dumped into our in-baskets urging us to buy mail order drugs, or show up at some New York City nightclub, even these nuisance messages exact a toll on the economy. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 053 (7 May 2009) at 3216; JAB at 1151)

[163] It is clear, in my view, that CASL's objective is not as restrictive as the appellant seeks to portray in its narrow formulation of the Act's purpose. The proper statement of CASL's objective as well as the objective of the impugned CEM scheme more specifically is found in section 3 of the Act.

(3) Are the Impugned Measures Rationally Connected to the Objective?

[164] At this stage of the section 1 analysis, the government must establish a rational connection between the law's objective and the means chosen to achieve it. This requires a "causal connection between the infringement and the benefit sought on the basis of reason or logic." (*RJR-MacDonald* at para. 153). Direct proof of the causal relationship is not always required; it need only be shown "that it is reasonable to suppose that the limit may further the goal, not that it will do so." (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 48 [*Hutterian*]). The Supreme Court has described this stage of the *Oakes* test as "not particularly onerous" (*Health Services* at para. 148, citing *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 228, also cited in *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835 at para. 34). The purpose of the rational connection requirement is to prevent arbitrary limits on Charter rights (*Hutterian* at para. 48). In this sense, the requirement gauges "how well the legislative garment has been tailored to suit its purpose." (*R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at para. 122).

[165] The appellant is correct that an overinclusive prohibition is not rationally connected to its legislative objective to the extent of its overinclusiveness. The appellant also points to two cases where the Supreme Court struck down legislation for being overbroad: *Vancouver Transportation Authority* and *Oakes* (Appellant's Constitutional Memorandum at paras. 53–54). However, the nuanced legislative scheme created by CASL can be

distinguished from the categorical, rigid approach taken by the impugned legislation in these cases. *Vancouver Transportation Authority* examined an absolute prohibition on political advertising on the sides of buses. *Oakes* was concerned with an automatic, mandatory presumption that possession of any quantity of narcotics—even a negligible amount—was possessed for the purpose of trafficking. The objective of each measure was, respectively, to create a safe and welcoming transit system and to facilitate the conviction of drug traffickers. The impugned measures in both cases were overbroad because neither the absolute prohibition created by the former, nor the inference mandated by the latter, logically or reasonably furthered their respective legislative objectives. Not all political advertisements are offensive, and possession of a small amount of drugs does not invariably support an inference of possession for the purpose of trafficking. Neither impugned measure exhibited any tailoring to achieve its objective—the prohibition was absolute and the presumption non-discretionary. The overbreadth of both laws, combined with their rigid, uncompromising frameworks, necessarily meant that they captured conduct not rationally connected to their respective objectives. The same cannot be said of CASL.

[166] CASL does not create an absolute prohibition on electronic messages that aim to encourage participation in commercial activity. The legislation prescribes means of engaging in the regulated conduct, namely, where recipients' consent has been obtained or can be implied and the Act's content and unsubscribe requirements have been met. Consent can be implied where a business or non-business relationship exists between sender and receiver, which covers a range of situations, as well as where the receiver has

conspicuously published its electronic address or disclosed it to the sender and certain other conditions have been met. CASL, and subsection 6(1) in particular, thus establish a partial, rather than absolute, prohibition on CEMs.

[167] There are also a number of exceptions and exclusions to this partial prohibition. For instance, the prohibition does not apply to quotes or estimates requested by the recipient; warranty, safety or product recall information; product or service updates or upgrades; information relating to an employment relationship; messages between employees of the same organization as well as different organizations where the organizations have a relationship; satisfaction, notification or enforcement of legal rights or obligations; CEMs sent to limited-access secure and confidential accounts by the account provider; CEMs sent by or on behalf of charities or political parties, organizations or candidates; or the first CEM sent to a recipient that has been referred to the sender by a person with a relationship with the recipient. The prohibition also does not apply where there is a personal or family relationship between sender and receiver. CASL thus establishes a complex legislative scheme that evinces a considerable degree of tailoring to achieve its objectives, far beyond any tailoring associated with the absolute prohibition in *Vancouver Transportation Authority* or the mandatory presumption at issue in *Oakes*.

[168] If the Act's objective were to prevent only "the most damaging and deceptive forms of spam", it would be possible to argue that CASL's central prohibition, even though partial and accompanied by numerous exceptions, is nevertheless overbroad and must fail the rational connection test. However, the Act's objective is not so narrow. The Act's

objective is to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that, *inter alia*, impairs the efficiency and optimal use of, or undermines Canadians' confidence in, electronic means of carrying out commercial activities. A wide range of commercial messages, far beyond what could be considered "the most damaging and deceptive forms of spam", could controvert these objectives and therefore be rationally and not arbitrarily captured by the prohibition in subsection 6(1).

[169] When the appellant states "[t]he Act veers far beyond harmful spam", the appellant simply does not have the right type of harm in mind. This is evident, for example, from the appellant's statement at paragraph 55 of its Constitutional Memorandum that "it is irrational to infer that sending a coupon to a consumer" contradicts the purpose of the Act. The proper question in this regard is not whether an email containing a coupon ranks among "the most harmful and misleading forms of online threats". Certainly, it does not. The more appropriate inquiry is whether an inundation of emails offering an array of coupons, which a recipient did not consent to, and which the recipient is powerless to bring to an end, can impair the efficiency or optimal use of, or undermine a recipient's confidence in, email as a means of carrying out commercial activities. Without a doubt, it can. A proper appreciation of CASL's objectives makes clear that the Act may validly restrict messages that may seem innocuous relative to "the most damaging and deceptive forms of spam" without being arbitrary or unfair.

[170] CASL's complex legislative scheme sufficiently tailors means to objectives to pass the rational connection stage of the section 1 inquiry. It is reasonable to conclude that the

Act's prohibition captures conduct that can reasonably be said to offend a purpose of the Act and accommodates conduct that cannot.

(4) Are the Impugned Measures Minimally Impairing?

[171] This stage of the section 1 analysis assesses whether “the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective.” (*RJR-MacDonald* at para. 160). While the law must be carefully tailored to minimize impairment of constitutionally protected rights, such tailoring “seldom admits of perfection and the courts must accord some leeway to the legislator.” What is required is that “[t]he law must be *reasonably* tailored to its objectives; it must impair the right no more than *reasonably* necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.” (*Sharpe* at para. 96, emphasis in original). Accordingly, to pass this stage, it is sufficient that “the means adopted fall within a range of reasonable solutions to the problem confronted.” (*Sharpe* at para. 96).

[172] A law may fail this stage where “the government fails to explain why a significantly less intrusive and equally effective measure was not chosen” (*RJR-MacDonald* at para. 160). As the Supreme Court made clear in *Hutterian*, “equally effective” measures, in this context, are not limited to alternatives that “satisfy the objective to *exactly* the same extent or degree as the impugned measure”, but include alternatives that offer “sufficient protection” to the government’s goals (*Hutterian* at para. 55, emphasis in original).

[173] The appellant faults the CRTC for rejecting its proposed alternatives despite acknowledging that these would impair section 2(b) less than CASL. According to the appellant, this shows that the CRTC “fails to recognize the necessity of asking if there are less harmful means of achieving the legislative goal and if the ‘least drastic means’ was selected.” (Appellant’s Constitutional Memorandum at para. 62). However, the appellant seems to misapprehend that the existence of less impairing alternatives cannot cause the impugned measures to fail the minimal impairment stage if those alternatives do not also provide sufficient protection to the government’s goals (*Hutterian* at para. 55). As the Supreme Court stated at paragraph 54 of *Hutterian*, “[l]ess drastic means which do not actually achieve the government’s objective are not considered at this stage.” Having determined that the appellant’s alternatives fail to provide adequate protection to CASL’s legislative objectives, the CRTC was correct to reject them (CRTC Decision at para. 150). What must now be determined is whether the CRTC’s assessment of the alternatives was correct.

[174] One alternative to CASL’s “opt-in” approach to recipient consent is the “opt-out” approach used in the American equivalent to CASL, *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 15 U.S.C. 103. This approach does not require recipients’ consent to commercial messages, but those messages must include an unsubscribe mechanism allowing recipients to opt-out of receiving further messages.

[175] While alternatives need not satisfy the legislature’s objectives to the exact same

extent as the impugned measures, the opt-out model clearly fails to provide sufficient protection to more than one, if not all, of CASL's objectives set out in section 3. If CEMs did not require consent from recipients, inboxes would be susceptible to inundation or, in colloquial parlance, being "blown up" by unsolicited commercial messages. This goes against the objective stated in paragraph 3(a) of preventing impairment of the efficiency and optimal use of electronic means to carry out commercial activities. It is also contrary to CASL's underlying goal of giving "businesses and consumers control over their inbox and over their computers" (*House of Commons Debates*, 40th Parl, 2nd Sess, No 106 (3 November 2009) at 6581 (Gordon Brown); JAB at 1143).

[176] The opt-out approach would also permit entrance of potentially harmful emails to inboxes where they might be mistakenly or innocently opened and their pernicious contents released. Surely, detailed explanation is not required to elucidate how this effectively compromises all of CASL's stated goals.

[177] Lastly, as the CRTC also indicated, the opt-out approach places the burden in terms of time, effort and, ultimately, cost, on recipients to avoid unsolicited messages, contrary to paragraph 3(b) of CASL, which aims to avoid additional costs to businesses and consumers. The fundamental issue with the opt-out model is that it permits spammers to continue sending spam. It is worth noting that the Government of Canada's 2005 Task Force on Spam specifically recommended that Canada adopt an opt-in approach in any future anti-spam legislation (Task Force on Spam Report at 3, 14, 15; JAB at 11907, 11917, 11918). The United States is, in fact, the only country in the G8 to use the opt-out

model (Respondent's Constitutional Memorandum at para. 13). The opt-out model can, in my view, be safely discarded as a viable alternative to CASL for the purposes of the minimal impairment analysis.

[178] A second alternative to CASL raised by the appellant and considered by the CRTC is Australia's *Spam Act 2003*. Similar to CASL, the Australian act also employs an opt-in model with various exceptions. The main differences between the two acts, for our purposes, are twofold. First, the Australian act employs a closed definition of CEM, as opposed to CASL's open-ended definition. Second, the Australian act has an open-ended definition of inferred consent, whereas CASL specifically prescribes the circumstances where consent may be implied. The CRTC's conclusion with respect to this alternative was that it did not clearly impair free expression less than CASL, a conclusion with which I must agree.

[179] Subsection 1(2) of CASL defines CEM as an electronic message that has, as one of its purposes, encouraging participation in a commercial activity. Paragraphs 1(2)(a) through (d) then provide a list of descriptions of messages that fall within, but do not exhaust, this definition. Conversely, section 6 of the Australian act restricts the definition of CEM to an electronic message that conforms to any of the enumerated descriptions in that provision, which closely mirror the descriptions in paragraphs 1(2)(a) through (d) of CASL.

[180] CASL's definition of CEM thus captures all expression captured in the Australian

act. The key difference between the two, with respect to impairing free expression, is the subset of electronic messages that would not conform to the descriptions in paragraphs 1(2)(a) through (d) of CASL, but would nevertheless be captured by CASL because they could reasonably be said to encourage participation in a commercial activity.

[181] It is my view that the enumerated descriptions of what constitutes a CEM in section 6 of the Australian act and paragraphs 1(2)(a) through (d) of CASL are quite comprehensive. I am therefore not persuaded that the range of electronic messages that would not conform to those descriptions, yet could reasonably be said to encourage participation in a commercial activity, is very considerable. The more general terms that underlie the definition of CEM in CASL merely afford flexibility to deal with borderline or ambiguous cases that cannot be anticipated in advance—certainly no such a case is raised on the facts now before us. This added measure of flexibility is not fatal to the legislation.

[182] The differential in expression captured by CASL relative to the Australian act is narrow enough, in my view, to find that both the open and closed approaches to defining CEM fall within the range of reasonable alternatives. This prevents CASL from foundering at the minimal impairment stage, since, as the Supreme Court has made clear, “to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted.” (*Sharpe* at para. 96).

[183] For similar reasons, I cannot agree that an open-ended approach to inferring consent, as in paragraph 2(b) of the Australian act, is significantly less intrusive of free expression than CASL’s implied consent model, which, as the CRTC stated, “enumerates a greater number of more specific methods of implying consent” relative to the Australian act (Constitutional Decision at para. 162).

[184] The appellant makes, with no supporting analysis, a number of additional suggestions that may well infringe free expression less than CASL but that would just as likely fail to provide sufficient protection to CASL’s objectives. These suggestions include: requiring that a CEM’s primary purpose, rather than only one of its purposes, be commercial; doing away with the unsubscribe requirement for “purely transactional messages or safety warnings”; limiting CEMs to bulk messages; not considering material available via hyperlinks in determining whether a message is a CEM; and not prohibiting messages that promote a person as being a person who sells a product or service (Appellant’s Constitutional Memorandum at paras. 64–65).

[185] The appellant states, at paragraph 65 of its Constitutional Memorandum, that “any of these alternative measures would have been ‘less drastic’ and would have achieved the government’s stated goals of curbing ‘the **most** damaging and deceptive forms of spam’ and curbing impediments to ecommerce.” (Emphasis in original). It is far from clear to me—perhaps not least because the appellant did not expatiate on these alternatives to any degree—that any of the appellant’s alternatives would be sufficiently less impairing than

CASL to take the latter outside the range of reasonable alternatives. The appellant is also only able to make its suggestions appear palatable by once again understating CASL's objectives. When the Act's objectives are properly considered, it is clear that the appellant's suggestions would not provide sufficient protection to render them viable alternatives for the purposes of the minimal impairment test.

[186] It should also be noted that more than one of the appellant's suggestions for reducing impairment are already incorporated in CASL's framework, including exemptions for beneficial actors (Governor in Council Regulations, s. 3(*g*)–(*h*)) and those with personal or family relationships (CASL, s. 6(5)(*a*)–(*b*)).

[187] Finally, the appellant states that the Parliamentary Standing Committee on Industry, Science and Technology (Committee) made “many recommendations that would reduce the chill and impact of CASL on legitimate expression.” The appellant claims that these recommendations, on their own, make it “impossible to sustain” the argument that CASL is minimally impairing (Appellant's Constitutional Memorandum at para. 66). However, none of the 13 recommendations made by the Committee in its report on CASL could be classified as an “alternative” for the purposes of the minimal impairment stage, nor do they suggest that CASL is not minimally impairing. The recommendations do no more than call for clarification on some of CASL's terms to ensure that the provisions “are clear and understandable for parties subject to the legislation and do not create unintended costs of compliance.” These recommendations do not support the appellant's argument that CASL limits free expression more than necessary to achieve its objectives.

(5) Is There Proportionality Between the Benefits and Deleterious Effects of the Impugned Measures?

[188] The final stage of the section 1 analysis asks of the infringing measures “whether the consequences of the violation are too great when measured against the benefits that may be achieved.” (*Thomson Newspapers* 1998 at para. 125). For the purposes of this inquiry, the law’s deleterious effects are “measured by the values underlying the *Charter*.” (*Thomson Newspapers* 1998 at para. 125). In other words, this stage examines whether the law is “productive of benefits that outweigh the detriment to freedom of expression” without considering other forms of detriment occasioned by the law (*Guignard* at para. 28). More specifically, costs in terms of dollar value are not relevant.

[189] CASL curtails free expression by presumptively prohibiting unsolicited CEMs. Messages that do not fall under an exception may only be sent if they meet the requirements prescribed by the Act, namely, recipients have consented, expressly or impliedly, to receive the message and the message contains an unsubscribe mechanism as well as the sender’s identification and contact information. The constitutionally protected expression implicated by CASL is therefore not banned, but regulated.

[190] The appellant argues that this regulation has a chilling effect on “legitimate and beneficial commercial speech as well as political and religious speech, outreach to disadvantaged communities, charitable and public benefit endeavors, [and] advertising by professionals” (Appellant’s Constitutional Memorandum at para. 73).

[191] With respect to the non-commercial forms of speech referred to by the appellant, CASL presents an obstacle only where such speech has a commercial purpose. The harm to these other forms of speech is therefore *de minimis* since CASL does not in any way impede their expression in non-commercial forms. CASL also contains exceptions for some of these forms of speech even when expressed for a commercial purpose. For instance, section 3 of the Governor in Council Regulations clarifies that CASL's prohibition does not extend to messages soliciting donations for registered charities within the meaning of subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.). A registered charity, for the purposes of the *Income Tax Act*, includes any organization whose purpose is the relief of poverty, advancement of education or religion, or is otherwise demonstrably beneficial to the public (*Vancouver Society of Women* at para. 42).

[192] The appellant describes “the legitimate and beneficial commercial speech” affected by CASL as messages that “foster or continue business relationships, communicate beneficial information to consumers, and provide consumers with economic choices.” (Appellant's Constitutional Memorandum at para. 75). I note that CASL's exceptions extend to existing business relationships (CASL, s. 10(9)(a), s. 10(10)) as well as circumstances where consumers are provided with a variety of beneficial information such as product warranty, safety, security or recall information, and information in furtherance of a prior transaction (CASL, s. 6(6)). Consumers also always have the option of consenting to receive CEMs about economic choices concerning which they desire more information.

[193] Based on the foregoing, I cannot accept the appellant's submission that CASL has any substantial deleterious effect on forms of expression other than commercial expression and find that the Act's impact on commercial expression is mitigated by numerous exceptions and a prescribed method of compliance.

[194] In assessing CASL's harm to freedom of expression, it must also be said that commercial expression is not as jealously guarded as some other forms of expression. The three fundamental values underlying section 2(b) of the Charter were set out by the Supreme Court in *Keegstra*. These were summarized at paragraph 72 of *RJR-MacDonald* as follows: "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process." It is well established that "not all expression is equally worthy of protection" (*Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 at 247 [*Rocket*], citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577). More particularly, "when the form of expression placed in jeopardy falls farther from the 'centre core of the spirit'... restrictions on such expression [are] less difficult to justify." (*RJR-MacDonald* at para. 72).

[195] The appellant argues that commercial expression lies close to the core values protected by section 2(b). At paragraph 69 of its Constitutional Memorandum, the

appellant says that the CRTC made "a fundamental error" in finding CEMs fall outside the

appellant says that the CRJC made a fundamental error in finding CEIS fall outside the core of section 2(b), contrary to “the clear findings of *Guignard*, *Irwin Toy*, *Ford* and other cases”. However, none of the cases cited by the appellant support its argument that commercial expression lies near the core of section 2(b). Both *Guignard* and *Irwin Toy* rely on *Ford* as authority for the proposition that commercial expression warrants constitutional protection. Both cases cite the same passage from page 618 of *Ford*:

Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*.

[196] Far from suggesting commercial expression lies at the core of section 2(b), *Ford*, *Guignard* and *Irwin Toy* all indicate commercial expression warrants constitutional protection only because Charter freedoms are to be given a “large and liberal interpretation”.

[197] In my view, the Supreme Court’s discussion of commercial expression in both *Keegstra* and *Rocket* leaves no doubt that this form of expression lies some distance from the core of section 2(b) and warrants a commensurately reduced level of protection. Pages 246 and 247 of *Rocket*, as I read them, could have no other meaning:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special

features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or the “marketplace of ideas”, or to realize one's spiritual or artistic self-fulfillment: see *Irwin Toy*, *supra*, at p. 976. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b).

[My emphasis].

[198] I understand the reference to this passage at paragraph 88 of *Keegstra* to impute the same meaning to it that I have: restrictions on commercial expression are more easily justifiable than limits on some other types of expression, like political expression, that lie closer to the core of the guarantee in section 2(b) (see also *Sharpe* at para. 23). This must be borne in mind when weighing the value of the expression infringed by CASL.

[199] Relative to CASL's deleterious effects on free expression, I consider its benefits to be considerable. Spam is a nuisance that has the potential, if left unregulated, to wreak the substantial and negative effects on Canada's economy that Parliament has sought to prevent through this legislation. The volume of spam CASL shields Canadian internet users from is enormous—there is evidence on the record that spam made up fully 90% of all email sent in 2014 (Respondent's Memorandum at para. 7, citing JAB at 12067).

CASL's benefits are not marginal.

[200] Nor are CASL's benefits speculative. Within one year of CASL coming into force, spam emanating from Canada dropped by 37%, removing Canada from among the world's top five spam-producing countries and placing it outside the top twenty (Respondent's Constitutional Memorandum at para. 19, citing JAB at 3625, 13968–14017). While these figures indicate that CASL has been effective in the practical matter of reducing spam, there is evidence that the benefits to Canada's e-economy that spam-reduction was meant to promote are also being realized. Statistics indicate an increase in the proportion of CEMs reaching their designated recipients as well as in the proportion of CEMs opened and read by recipients following CASL's enactment (Respondent's Constitutional Memorandum at para. 21, citing JAB at 13988–13989). Evidence furthermore suggests email marketing performance among Canadian companies increased by more than 20% over the same period while retail e-commerce sales in Canada also rose (Respondent's Constitutional Memorandum at para. 21, citing JAB at 14060; Constitutional Decision at para. 180).

[201] The appellant questions whether these benefits are actually attributable to CASL, highlighting the Committee's statement that "[w]hether the Act effectively reduced spam originating from Canada is difficult to ascertain." (Appellant's Constitutional Memorandum at para. 74; JAB at 13987). While the appellant seeks to infer that this is an indication that the Committee shares its view that CASL's benefits are illusory, it is telling that the Committee's report suggests no major overhauls and only minor clarifications to CASL so that it "continues 'to promote the efficiency and adaptability of the Canadian

economy” (JAB at 13978, my emphasis).

[202] In conclusion, I find that CASL’s benefits outweigh its detrimental effects on freedom of expression.

C. Does CASL Violate Section 11 of the Charter?

[203] The appellant also argues that CASL’s AMP regime violates section 11(d) of the Charter. Section 11 guarantees a number of procedural protections to “any person charged with an offense”. Proceedings resulting in administrative sanctions do not trigger section 11 protections (*Guindon* at para. 44). The appellant’s section 11 argument thus hinges on a finding that it has been charged with a criminal offense. A statutory infraction is a criminal offense for the purposes of section 11 where the process by which the penalty is imposed is criminal by its very nature or where a true penal consequence flows from the sanction (*Guindon* at paras. 44, 51).

(1) Is the AMP Proceeding “Criminal in Nature”?

[204] The Supreme Court highlighted three factors that guide the determination of whether proceedings are criminal or administrative in nature: the objectives of the legislation; the objectives of the sanction; and the process leading to the imposition of the sanction (*Guindon* at para. 52).

(a) Objectives of the Legislation

[205] This inquiry considers whether the objectives of the proceedings, examined in their full legislative context, have a regulatory or penal purpose (*Guindon* at para. 53). While penal proceedings typically aim to “bring the subject of the proceedings ‘to account to society’ for conduct ‘violating the public interest’”, administrative proceedings seek to maintain compliance or regulate conduct within a limited sphere of activity (*Guindon* at paras. 45, 53).

[206] As discussed, the impugned legislative scheme regulates the sending of unsolicited CEMs to prevent impairment of the e-economy and costs to businesses and consumers, as well as to protect confidential information and Canadians’ confidence in e-commerce. The scheme thus aims to regulate conduct in a limited sphere of activity—the sending of CEMs—to protect Canadians by regulating certain commercial conduct. CASL’s AMP proceedings are part of a regulatory framework for the protection of the public and are “generally not the sort of proceedings that engage s. 11.” (*Guindon* at para. 53, citing *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235).

[207] Hansard also suggests CASL’s AMP regime has a regulatory purpose:

One of the best ways to combat spam is through effective legislation. Bill C-27 puts in place important provisions that would protect Canadian consumers and businesses from the most damaging and deceptive forms of electronic harm. It provides a regulatory regime to promote compliance and protect the privacy and personal security of Canadians in the online environment. It provides a clear set of rules that will benefit all Canadians. It will encourage confidence in online communications and e-commerce.”

This bill combats spam and related online threats in two ways. It provides regulatory powers to administer monetary penalties and it gives individuals and businesses the right to sue spammers. Bill C-27 makes use of the federal trade and commerce power rather than the law enforcement authorities in the Criminal Code. A civil administrative regime such as that in the ECPA [i.e. the Electronic Commerce Protection Act] is consistent with the approach taken internationally. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 105 (2 November 2009) at 6459–6460 (Hon. Mike Lake); JAB at 1135–1136).

I find that the objectives of CASL’s AMP proceedings, examined in their full legislative context, have a regulatory purpose.

(b) *Objectives of the Sanction*

[208] Where the sanction at issue is an AMP, the objectives of the sanction are relevant at both this stage of the inquiry and the second stage considering whether the AMP is a true penal consequence. To avoid repetition, this factor will be analysed at the second stage only (*Guindon* at para. 52).

(c) *The Process*

[209] The focus here is the extent to which CASL’s AMP proceedings bear the traditional hallmarks of a criminal proceeding. The Supreme Court described some of the relevant considerations as follows: “whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record” (*Guindon* at para. 63). The use of words typically associated with the criminal process is also an indicator of whether a provision refers to a

criminal proceeding.

[210] AMP proceedings under CASL begin with the issuance of a NOV by a person designated by the CRTC under section 14 to any person believed on reasonable grounds to have contravened sections 6–9 of the Act (CASL, s. 22). The subject of an NOV may elect to pay the AMP set out therein, or, alternatively, make representations to the CRTC regarding the alleged violation or penalty amount (CASL, s. 24). If the person chooses to make representations, the CRTC decides on a balance of probabilities whether the person in fact committed the violation. The CRTC may then maintain, reduce or waive the initial penalty (CASL, s. 25(1)). Appeal from a decision by the CRTC lies with this Court (CASL, s. 27). Ultimately, a person served with an NOV may be subject to an AMP pursuant to subsection 20(1) and a restraining order directing the cessation of contravening conduct pursuant to subsection 26(1).

[211] The process associated with CASL’s AMP regime does not bear any of the hallmarks of a criminal proceeding, nor do the relevant provisions of CASL use any of the words traditionally associated with the criminal process. Instead, as the CRTC observed at paragraph 203 of its Constitutional Decision, “words such as ‘balance of probabilities,’ ‘due diligence,’ ‘penalty,’ ‘undertaking,’ or ‘representations’” appear throughout the Act’s AMP-related provisions.

[212] I conclude that CASL’s AMP proceedings are not criminal in nature.

(2) Does the Sanction Give Rise to a True Penal Consequence?

[213] A true penal consequence “is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance” (*Guindon* at para. 75). Whether a monetary fine meets this threshold depends on whether it is, in purpose or effect, punitive. This assessment considers factors including the magnitude of the fine, whether the fine’s magnitude is determined by regulatory considerations or principles of criminal sentencing, whether stigma is associated with the penalty and to whom the penalty is paid (*Guindon* at para. 76).

[214] CASL’s AMP-related provisions strongly suggest that the objective of the Act’s sanctions regime is to secure compliance with the Act’s regulatory requirements. Sections 15, 17 and 19, setting out designated persons’ investigatory powers, indicate that these powers may only be exercised to verify compliance with the Act, uncover contraventions of the Act or assist foreign investigations into conduct similar to that prohibited by the Act. Subsection 20(2) also explicitly states that the purpose of penalties administered under CASL “is to promote compliance with this Act and not to punish”. Finally, section 30 makes clear that violations are not offenses for the purposes of the *Criminal Code*. The purpose of CASL’s AMP regime is therefore to promote compliance with the Act’s regulatory scheme.

[215] The magnitude of fines levied under CASL may reach \$1,000,000 in the case of an individual and \$10 000 000 in the case of any other person including corporations

individual and \$10,000,000 in the case of any other person, including corporations

(CASL, s. 20(4)). Though considerable, these amounts do not necessarily signal that the sanction's purpose is to denounce or punish morally or socially reprehensible conduct.

The Supreme Court has acknowledged that “significant penalties” may be required to achieve the regulatory purpose of deterring non-compliance by ensuring AMPs do not become simply a cost of doing business. To require that penalties reflect regulatory objectives “is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes.” (*Guindon* at para. 77).

[216] As the CRTC pointed out, the Supreme Court in *Guindon* cited a case in which the Ontario Superior Court found that a \$10,000,000 AMP under the *Competition Act* did not trigger section 11 of the Charter (*Guindon* at para. 80). I am not prepared to hold that the possibility of similarly significant monetary penalties is not also necessary to deter non-compliance with CASL by large commercial entities that may anticipate considerable economic gain from indiscriminate email-marketing campaigns. I also reiterate the CRTC's observation at paragraph 214 of its Constitutional Decision that \$1,000,000 and \$10,000,000 are maximum amounts—upper limits that provide flexibility to ensure the regulatory objectives of promoting compliance and deterring non-compliance can be achieved when individuals or corporations with considerable resources commit particularly egregious violations.

[217] There is also little overlap between the considerations for determining the magnitude of an AMP, enumerated in subsection 20(3), and the principles of criminal

sentences found at section 718 of the Criminal Code. The phrase of a “summary

3510395 Canada Inc. v. Canada (Attorney General) - Federal Court of Appeal
sentencing round at section 118 of the *Criminal Code*. The absence of a “purely economic” or “mathematical” basis for determining penalties, which the appellant points to, does not compel the conclusion that criminal sentencing objectives rather than regulatory objectives determine the quantum of penalties under CASL.

[218] The appellant has not argued that stigma attaches to an AMP administered under CASL and I do not find that it does. Such penalties are imposed for violating economic regulations rather than for conduct that, by its very nature, warrants moral opprobrium. Accordingly, little, if any, stigma is associated with CASL’s sanctions, especially relative to criminal convictions.

[219] Finally, AMPs levied under CASL are payable to the Receiver General and so ultimately end up in the Consolidated Revenue Fund (CASL, s. 29(1)). While potentially indicative of a true penal consequence, this factor alone is not determinative, especially where the other relevant factors point in the opposite direction (*Guindon* at para. 88).

[220] Based on the above, I conclude that CASL does not prescribe proceedings that allow for the imposition of true penal consequences generally.

D. Does the AMP Applied in This Case Violate Section 11 of the Charter?

[221] Turning to the \$1,100,000 fine set out in the NOV, the question of whether this sanction amounted to a true penal consequence is a question of mixed fact and law. The

CRTC's findings on this question must therefore be reviewed on the highly deferential standard of palpable and overriding error, rather than correctness (*Housen* at para. 36). This standard of review only admits of interference with a first-instance decision where that decision contains an error that is both obvious and goes to the very core of the case's outcome (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38).

[222] The CRTC's reasons for finding that the appellant's fine was not a true penal consequence are set out at paragraphs 120–124 of its Notice of Violation Decision. The CRTC reached its conclusions following its application of the appropriate legal principles to the circumstances leading to the issuance of an NOV to the appellant.

[223] The CRTC assessed the appellant's \$1,100,000 fine against the factors for determining the amount of a penalty enumerated in subsection 20(3) of the Act. The CRTC found the AMP applied in this instance was "out of proportion to what is required to achieve regulatory purposes and to promote compliance with the Act going forward." (Notice of Violation Decision at para. 119). The CRTC properly acknowledged that where the quantum of a penalty is "out of proportion to the amount required to achieve regulatory purposes, this suggests that it is a true penal consequence." (Notice of Violation Decision at para. 122). However, the CRTC went on to explain that a fine's magnitude is just one of several factors in determining whether a monetary sanction is, in purpose or effect, punitive and therefore constitutes a true penal consequence. The other factors—to whom the penalty is paid, whether the quantum is determined by regulatory considerations or the principles of criminal sentencing and whether stigma attaches to the penalty—were

considered by the CRTC in its assessment of CASL's AMP proceedings generally at paragraphs 211–223 of the Constitutional Decision.

[224] The CRTC ultimately decided, on balance, that the relevant factors do not suggest a true penal consequence in this case (Notice of Violation Decision at para. 123). This is certainly not the only conclusion that could have been reached based on the CRTC's analysis. However, even if this Court could have reached a different conclusion, this would not justify interfering with the CRTC's decision on this point. As Stratas J.A., writing for this Court, stated at paragraph 70 of *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, 281 A.C.W.S. (3d) 297:

If an appellate court had a free hand, it might weigh the evidence differently and come to a different result. It might be inclined to draw different inferences or see different factual implications from the evidence. But these things, without more, do not rise to the level of palpable and overriding error.

[225] The CRTC's determination that the appellant's fine did not constitute a true penal consequence, and its legal reasoning supporting that conclusion, do not evince the type of obvious error going to the core of a case required to justify judicial intervention on the palpable and overriding error standard.

E. Does CASL Violate Section 7 of the Charter?

[226] The appellant briefly refers to CASL's violation of both section 7 and section 8 of

the Charter (Appellant's Constitutional Memorandum at paras. 84(a), 87).

[227] The appellant's section 7 argument must fail because, as the preceding sections of these reasons make clear, the appellant does not face penal proceedings. The appellant, as a corporation, therefore has no standing to bring a claim under section 7 of the Charter.

[228] It is well established that "everyone", as that term appears in section 7, "exclude[s] corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include[s] only human beings." (*Irwin Toy* at 1004; see also *Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, 68 D.L.R. (4th) 147 at 709 [*Dywidag Systems*]). A corporation cannot, as a general principle, avail itself of the protections provided by section 7.

[229] The exception to this rule is that a corporation charged with a penal provision may challenge that provision on the basis that it violates a human being's section 7 rights. This exception was first articulated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 and has been reaffirmed by the Supreme Court on several occasions (see, for example, *Irwin Toy* at 1004; *Dywidag Systems* at 709; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 at 179 [*Wholesale Travel*]). In light of my finding that the appellant corporation is not defending against a criminal charge, "[t]here are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved." (*Irwin Toy* at 1004). The appellant thus remains constrained by the general principle that corporations may not avail themselves of the protections

offered by section 7 of the Charter. The appellant's section 7 claim must therefore fail.

F. Does CASL Violate Section 8 of the Charter?

[230] Section 8 of the Charter, unlike section 7, does find application in the present circumstances. However, in my view, no unreasonable seizure arises on the facts of this case. The appellant's section 8 claim pertains to the notice to produce issued to it pursuant to section 17 of CASL. The notice sought information regarding the appellant's practices for recording and tracking consent of individuals on the appellant's contact list of potential email recipients.

[231] The case law makes clear that the exercise of statutory powers of compelled production may constitute a seizure for the purposes of section 8 even where such powers are regulatory in nature (*R. v. McKinlay Transport Ltd.* [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568 at 640–642). However, Charter interpretation is contextual and a right or freedom may have a different meaning depending on the context in which it is asserted (*Wholesale Travel* at 225–226). More specifically, “a Charter right may have different scope and implications in a regulatory context than in a truly criminal one.” (*Wholesale Travel* at 226). In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 [*Thomson Newspapers* 1990], which considered statutory orders to produce pursuant to section 17 of what was then the *Combines Investigation Act*, R.S.C. 1970, c. C-23, the parameters of a reasonable search and seizure were heavily influenced by the regulatory

character of the legislation. I find the reasons of La Forest J. in that decision persuasive. He explained that, in modern society, “regulation must necessarily involve the inspection of private premises or documents by agents of the state”. Consequently,

It follows that there can be only a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.

(*Thompson Newspaper* 1990 at 507)

[232] Subsequent jurisprudence leaves no doubt that records and documents produced in the ordinary course of a business’s regulated activities attract a diminished expectation of privacy (see, for example, *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 at para. 72; *R. v. Fitzpatrick* [1995] 4 S.C.R. 154, 129 D.L.R. (4th) 129 at para. 50; *Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, 48 A.C.W.S. (3d) 64 at 377). It is precisely this species of record or document that the appellant was ordered to produce.

[233] It is also important to note that section 17 of CASL only grants authority for compelling production of documents rather than physical searches of premises—the former being a far less intrusive power than the latter. In *Thomson Newspapers* 1990, as in this case, the relevant contextual factors were “the limited scope of the power to order the production of documents, together with the limited privacy interests that can be said to

production of documents, together with the limited privacy interests that can be said to reside in the records and documents that can be lawfully demanded” (*Thomson Newspapers* 1990 at 522). In that case, La Forest J. found that the safeguards required for a reasonable seizure were “less strenuous and more flexible” than the “stringent standards of reasonableness usually applicable in criminal investigations” (*Thomson Newspapers* 1990 at 506, 520). More particularly, La Forest J. held that the appropriate constitutional limit on the regulatory order to produce was simply that “[t]he material sought must be relevant to the inquiry in progress.” (*Thomson Newspapers* 1990 at 530). Given the similarities between that case and the one now before us in these appeals, and that the appellant has provided not a modicum of argument on the proper scope of section 8 in the specific circumstances of this case, I find that the standard articulated by La Forest J. in *Thomson Newspapers* 1990 is also the appropriate standard for a reasonable seizure under section 17 of CASL. I find that the notice to produce issued to the appellant meets this modest standard and I therefore reject the appellant’s section 8 claim.

IX. Notice of Violation Decision

A. Preliminary issue: Application of the Bankruptcy Act

[234] In view of the respondent’s concession that the AMP imposed on the appellant in the NOV is unenforceable outside the insolvency process, this Court need not address the CRTC’s allusions as to whether or not the AMP was compromised by the appellant’s proposal under the Bankruptcy Act. The respondent is the party that would stand to benefit from the AMP’s ongoing enforceability. It is also the entity that would go about

enforcing it, if this were possible. The respondent has conceded this is not possible. It is not necessary for this Court to say more. Both parties agree that the appellant's Bankruptcy Act proceedings did not otherwise affect the CRTC's ability to conduct the review proceedings at issue. I agree (see Bankruptcy Act subsection 69.6(2)).

B. Did the CRTC Err in Its Interpretation and Application of the Business-to-Business Exemption?

[235] The CRTC rejected the appellant's argument that a number of its emails were exempt from the consent and content requirements of section 6 of CASL by virtue of the "business-to-business" exemption set out in subparagraph 3(a)(ii) of the Governor in Council Regulations:

3 Section 6 of the Act does not apply to a commercial electronic message

(a) that is sent by an employee, representative, consultant or franchisee of an Organization

...

(ii) to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the organization to which the

3 L'article 6 de la Loi ne s'applique pas au message électronique commercial :

a) envoyé par l'employé, le représentant, le consultant ou le franchisé d'une organisation, selon le cas :

[...]

(ii) à l'employé, au représentant, au consultant ou au franchisé d'une autre organisation si leurs organisations respectives entretiennent des rapports et que le message concerne les activités de l'organisation à qui

message is sent.

le message est envoyé;

This exemption applies where three conditions are met: (i) a CEM is sent by an employee of one organization to an employee of another organization; (ii) those organizations have a relationship; and (iii) the CEM concerns the activities of the receiving organization. The CRTC determined the appellant's emails met neither the second nor third requirements for the exemption.

(1) The Relationship Requirement

[236] The appellant argues the CRTC erred in refusing to recognize that it had a relationship with each recipient organization because each organization had previously purchased the appellant's courses, thereby creating a contractual relationship. The appellant points out that this type of contractual relationship would be sufficient to establish an "existing business relationship" for the purposes of implying an individual's consent pursuant to paragraph 10(9)(a) of CASL. The appellant says that since "existing business relationship" in paragraph 10(9)(a) is defined in the legislation, while "relationship" in the context of the business-to-business exemption is not defined, the latter must be given a "significantly broader" meaning than the former (Appellant's Notice of Violation Memorandum at para. 64). Consequently, because an "existing business relationship" between the appellant and an individual would arise from that individual having purchased a course from the appellant, then, *a fortiori*, a "relationship" between the appellant and an organization must result from that organization having purchased a course from the appellant.

[237] In my view, the CRTC committed no palpable and overriding error in its application of the business-to-business exemption to the facts before it. Whether or not a “contractual relationship” arises between the appellant and an organization that has paid for a course on behalf of one of its employees is not determinative of whether this creates a relationship for the purposes of CASL’s business-to-business exemption. Nor did the CRTC suggest that a contractual relationship could never constitute a relationship for the purposes of the exemption. The CRTC simply found that the specific contractual relationships disclosed by the appellant’s evidence do not constitute relationships for the purposes of the exemption. The CRTC observed that, for each organization, the appellant submitted proofs of payment from the organization to the appellant for a single training session for one or two of the organization’s employees. I see nothing clearly wrong with the CRTC’s determination that contractual relationships comprehending a very limited number of transactions affecting very few employees do not constitute relationships for the purposes of the business-to-business exemption.

[238] I also do not agree that merely because “existing business relationship” is a defined term and “relationship” is not, the latter must have a broader scope, or, in other words, must be easier to make out, than the former. In assessing the threshold for establishing each type of relationship, consideration must be given to the relative effects, in the context of CASL’s objectives, attendant upon a finding that each type of relationship exists.

Finding an existing business relationship in the present case would permit the appellant to send CEMs to a person—an individual—who had paid the appellant for a course within

send CEMs to a person — an individual — who has paid the appellant for a course within

the preceding two years. Finding a relationship for the purposes of the business-to-business exemption, on the other hand, would allow the appellant to send CEMs to not only the individual who took the course, or the individual who paid for the course, but to every other employee of the organization to which those individuals belong—and organizations can be very large indeed. The latter finding would expose a great many more people to the potentially harmful conduct that it is CASL's *raison d'être* to regulate. This suggests, contrary to the appellant's argument, that the evidentiary requirements for establishing a relationship for the purposes of the business-to-business exemption should in fact be more demanding than for an existing business relationship.

[239] The appellant also argues that the CRTC confused the legal test for demonstrating a relationship for the purposes of the business-to-business exemption with the test for showing an existing business relationship pursuant to paragraph 10(9)(a) of CASL. A careful reading of paragraphs 43 to 46 of the CRTC's Notice of Violation Decision shows the CRTC did no such thing. The CRTC merely remarked that, although the appellant's evidence is insufficient to demonstrate the first type of relationship, it could possibly support the existence of the second type of relationship as between the appellant and the specific employee who took the appellant's course. While it may have been preferable had the CRTC refrained from such speculation, it is clear that the CRTC did not conflate the two concepts.

[240] The appellant also argues that the CRTC inappropriately read into the business-to-

business exemption a requirement that relationships can be established only through employees with authority to bind their organizations. I do not perceive the CRTC as having done so. After determining that the appellant failed to demonstrate relationships with organizations based on the appellant's scant evidence of past transactions, the CRTC mentioned other types of information the appellant might have submitted to support its claims. Such information might have included evidence of authority, on the part of either the purchasing employees or the employees who took the appellant's courses, to create a relationship on behalf of the organization. The CRTC did not indicate evidence of such authority was required *per se*, only that it might have helped the appellant reach the evidentiary threshold for establishing relationships, which the appellant's evidence of past transactions failed to meet on its own.

(2) The Relevance Requirement

[241] The appellant argues that its CEMs concerned the activities of receiving organizations because they promoted employee-training services and the recipient organizations are legally required to invest in employee training as per Québec's *Act to promote workforce skills development and recognition*, CQLR c D-8.3 and the *Regulation respecting the determination of total payroll*, RLRQ, c. D-8.3, r. 4, s. 1. The respondent, on the other hand, argues that the "activities" of an organization for the purposes of the relevance requirement do not include all the activities an organization carries out to comply with its many legal obligations. If this were the case, the respondent says, an accounting firm could send CEMs promoting its services to any corporation simply because corporations are legally required to file annual tax returns (Respondent's Notice

of Violation Memorandum at para. 52).

[242] The appellant's argument raises the issue of what constitutes an "activity" of an organization for the purposes of the relevance requirement. The respondent seems to suggest a recipient organization's "activities" with which a CEM must be concerned should not extend beyond the organization's core business operations. I do not agree that the word "activities" in the text of the exemption should be interpreted so narrowly. The dictionary definition of "activity" supports a much broader meaning. The Oxford English Dictionary defines "activity" as, *inter alia*, any "project, task, or exercise". Furthermore, the restrictive interpretation proposed by the respondent runs counter to the exemption's purpose of ensuring "regular business communications are not unnecessarily regulated" by CASL (RIAS, in JAB at 13648).

[243] Organizations engage in many activities that are not directly related to their core business operations and maintain relationships with other organizations to facilitate those supplementary activities. A communication pursuant to such a relationship is in no meaningful sense less of a "regular business communication" than if the communication bore more directly on an organization's core business operations. I find nothing in the text, context or purpose of the exemption that justifies reading-in qualifiers to circumscribe the vast universe of an organization's potential business activities into a shortlist of "activities" to which CEMs from partner organizations must relate in order for the business-to-business exemption to apply.

[244] I am therefore of the view that, where an organization pays for employee training courses—whether or not it is legally obligated to do so—the activities of that organization can include the purchase of employee training courses. A second organization that provides training courses, and has a relationship with the first organization based on providing it with such courses, could thus send the first organization CEMs under the auspices of the business-to-business exemption.

[245] Turning to the present case, I note that the CEMs sent by the appellant promoted employee-training courses in areas such as team management, administrative skills, budget planning and increasing productivity. These CEMs would satisfy the relevance requirement if the appellant were able to show that the recipient organizations purchased similar courses in the past or planned to do so in future. The required connection between a good or service promoted in a CEM and the activities of the recipient organization will often be established simply by virtue of the relationship between the CEM-sending and receiving organizations, which will typically be based on the provision of that same good or service by the former to the latter. However, the appellant failed to demonstrate relationships with the recipient organizations. Ultimately, this renders academic the question of whether the Québec act relied on by the appellant is itself sufficient to establish that each organization's activities includes purchasing employee training courses of the sort promoted in the appellant's CEMs. However, I will note that the act applies only to organizations that are both based in Québec and have a payroll expenditure above a minimum threshold set out in the regulations. Not all recipients of the appellant's CEMs reside in Québec, nor, for the ones that do, does the appellant provide any evidence that

their payroll expenditures meet the threshold triggering the act's application. Furthermore, the appellant does not demonstrate that the act requires subject organizations to invest exclusively in the type of training courses offered by the appellant. If organizations can and do choose to invest in employee-training courses substantially different from those offered by the appellant, then it is not clear that the appellant's CEMs would concern the activities of those organizations.

C. Did the CRTC Err in Its Interpretation and Application of CASL's Implied Consent Requirements regarding Conspicuous Publication?

[246] The CRTC also rejected the appellant's claims that a number of the CEMs in question were exempt from the consent and content requirements of section 6 of CASL because recipients' consent could be implied pursuant to paragraph 10(9)(b) of CASL. That provision reads as follows:

Implied consent — section 6

10(9) Consent is implied for the purpose of section 6 only if

...

(b) the person to whom the message is sent has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent, the

Consentement tacite : article 6

10(9) Pour l'application de l'article 6, il n'y a consentement tacite que dans l'un ou l'autre des cas suivants :

[...]

b) la personne à qui le message est envoyé a publié bien en vue, ou a ainsi fait publier, l'adresse électronique à laquelle il a été envoyé, la publication ne comporte aucune mention

publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address and the message is relevant to the person's business, role, functions or duties in a business or official capacity;

précisant qu'elle ne veut recevoir aucun message électronique commercial non sollicité à cette adresse et le message a un lien soit avec l'exercice des attributions de la personne, soit avec son entreprise commerciale ou les fonctions qu'elle exerce au sein d'une telle entreprise;

Paragraph 10(9)(b) thus permits the sending of CEMs where the following three conditions are met:

1. The recipient has conspicuously published or caused to be conspicuously published their electronic address;
2. The publication is not accompanied by a statement that the recipient does not wish to receive CEMs; and
3. The CEM is relevant to the business, role, functions or duties of the recipient individual or organization.

[247] The appellant submitted a table setting out the email address of each recipient for which it claims consent can be implied under this provision. This table also contains additional information that the appellant says shows the provision's conspicuous publication and relevance requirements (the first and third conditions set out above) have been met in each case.

[248] The appellant argues its table shows that the conspicuous publication requirement—the first condition set out above—has been met in each case because the table provides, beside each email address, a link to the site where the address can be found. However, the CRTC determined that some email addresses in the table were taken from third-party directory websites that did not indicate whether the site’s content was user-submitted. In other words, for these email addresses, the appellant failed to show that recipients themselves had “conspicuously published or caused to be conspicuously published” their email addresses. The CRTC found that other email addresses had been gathered from sites containing disclaimers to the effect that unsolicited CEMs are not to be sent to the addresses found therein. In these cases, the CRTC determined the second of the three conditions listed above for implying consent under paragraph 10(9)(b) of CASL was not met.

[249] The appellant’s submissions on appeal do not demonstrate that the CRTC committed any palpable and overriding error in making these findings. Indeed, the appellant makes no reply whatsoever to the CRTC’s findings in this regard. I note the appellant complains that the phrase “conspicuous publication” is not defined in the legislation and that “at no time did the CRTC clarify the provision or provide any guidance” (Appellant’s Notice of Violation Memorandum at paras. 78–79). However, the CRTC’s determinations rely on the explicit wording of paragraph 10(9)(b) of CASL. I fail to see how the text of that provision does not support the CRTC’s findings or how the text could reasonably fail to alert the appellant that the provision would not countenance the mining of email addresses from third-party directory websites or sites containing notices against unsolicited emails. I

find no fault with the CRTC's findings.

[250] With respect to the relevance requirement in paragraph 10(9)(b)—the third condition listed above—the appellant claims this requirement is met by the inclusion in its table of recipients' job titles, where this information was known to the appellant. The appellant's argument on this point is that, by providing a recipient's job title, the appellant also identified “the role of the recipient in the relevant organization, which served as a means of demonstrating that the CEM related to the recipient's activities in that organization.” (Appellant's Notice of Violation Memorandum at para. 77).

[251] On this point, again, the appellant makes on appeal the very same argument it made before the CRTC: rather than pointing to any error in the CRTC's reasoning, the appellant has simply repeated its argument before this Court.

[252] The CRTC found that the appellant merely speculated, from recipients' job titles, what their functions might be, and then assumed that CEMs sent to them were relevant to those functions (Notice of Violation Decision at para. 70). The CRTC refers to a recipient whose job title is listed in the table as “professor”, but the site to which the appellant provides a link gives no indication of the professor's responsibilities. The CRTC also refers to recipient organizations listed in the table for which no job title is provided, perhaps understandably, yet the result is that the table does not include any information whatsoever with respect to the business or functions of these organizations. The CRTC thus found itself unable to determine whether the CEMs in question were relevant to the

business, roles, functions or duties of many recipient individuals and organizations.

[253] The CRTC noted that, pursuant to section 13 of CASL, the burden was on the appellant to establish that the preconditions for implying consent under paragraph 10(9)(b) were met. With respect to that provision's relevance requirement, the CRTC concluded that the appellant "did not provide supporting explanations or evidence to demonstrate how this requirement was met in these cases." (Notice of Violation Decision at para. 72).

[254] I see no palpable and overriding error in the CRTC's reasoning or conclusions. I would only add that I do not believe the CRTC stated in strong enough terms just how far short of satisfying the relevance requirement the appellant fell in this case by merely providing (some) recipients' job titles. A recipient's job title is plainly not the same as a recipient's official business, role, functions or duties. In simply stating each recipient's job title, the appellant—contrary to the charitable phrasing of the CRTC—did not even condescend to speculate as to the functions and duties of the titleholder. The dubious task of engaging in such speculation was left entirely to the CRTC and to this Court, as was the subsequent task of surmising how exactly the CEMs sent to each recipient related to that recipient's conjectured functions and duties.

[255] I will not definitively say that no job title could ever, in and of itself, sufficiently convey the business, role, functions or duties performed by the titleholder, nor that the subject of a CEM could never clearly, on its face, relate to that business or role, or to those functions or duties. This can only be assessed on a case-by-case basis. However, I am

functions or duties. This can only be assessed on a case by case basis. However, I am

satisfied that these circumstances do not exist in the present case. Even if they did, moreover, it may still not have been a palpable and overriding error for the CRTC to have expected that the speculative legwork would be performed by the party on whom the burden fell to demonstrate that the preconditions for implying consent had been met. In any event, organizations seeking to rely on paragraph 10(9)(b) of CASL would do well to be prepared to state explicitly the “business, role, functions or duties” of recipient individuals or organizations—I do not believe the terms in quotations require further definition—at least insofar as it relates to the subject matter of the CEM in question. The organization should then be prepared to elucidate, equally explicitly, the relevance of the CEM to the recipient’s business, role, functions or duties thus stated. The express terms of paragraph 10(9)(b) of CASL, in my view, require no less.

D. Did the CRTC Err in Its interpretation and Application of CASL’s Requirements regarding Unsubscribe Mechanisms?

[256] 87 CEMs sent by the appellant were found to contain two unsubscribe links or mechanisms: one that functioned properly and another that produced an error message when accessed. The CRTC determined that these CEMs violated subsection 6(2) of CASL which requires that CEMs set out an unsubscribe mechanism that conforms to the prescribed requirements. Specifically, the CRTC found that CEMs containing a second non-functioning mechanism do not conform to subsections 3(1) and 3(3) of the CRTC Regulations. Respectively, these two provisions require that unsubscribe mechanisms be set out clearly and prominently, and that the mechanism be able to be readily performed.

[257] I am not persuaded that the CRTC’s findings exhibit any reviewable error. While the appellant asserts “[t]here is no indication that the valid unsubscribe mechanism was set out any less clearly or prominently” than the non-functioning mechanism, I note that the converse is also true. Furthermore, even if the appellant had demonstrated—which it has not—that by reason of, for instance, superior font size, the functioning mechanism in each CEM was “prominent” in the sense of being “distinguished above others of the same kind” (Oxford English Dictionary), it may yet not have been set out “clearly”. According to the Oxford English Dictionary, “clear” means, *inter alia*, “[e]asy to understand, fully intelligible, free from obscurity of sense” and “[d]istinct, unclouded, free from confusion.” The mere presence in a CEM of a second unsubscribe mechanism, regardless of its prominence relative to the first, gives rise to obscurity and creates confusion—why the second link? Which should the recipient choose in order to unsubscribe? In my view, the CRTC was not clearly wrong in determining that CEMs containing a second non-functioning unsubscribe mechanism fail to conform to the requirement in subsection 3(1) of the CRTC Regulations that unsubscribe mechanisms be set out clearly and prominently.

[258] With respect to the requirement in subsection 3(3) of the CRTC Regulations that unsubscribe mechanisms must be able to be readily performed, the appellant argues that there is no indication that the functioning mechanism in each CEM functioned less effectively due to the presence of the faulty mechanism. The respondent, for its part, points to the CRTC’s statement in its “Guidelines on the interpretation of the Electronic Commerce Protection Regulations” (Compliance and Enforcement Information Bulletin

(CRTC 2012-548)) that “for an unsubscribe mechanism to be ‘readily performed,’ it must be accessed without difficulty or delay, and should be simple, quick, and easy for the consumer to use.”

[259] In my view, the undiminished efficacy of the functioning mechanism emphasized by the appellant only means that it could perhaps be said of the functioning mechanism that it can be readily performed after it has been selected from between the two competing links. However, prior to selecting the functioning link, recipients are confronted with two alternatives with no clear indication as to which is the correct one to select. This, in itself, can cause delay and compromise the ease with which the mechanism is supposed to be accessible. These issues are compounded if the wrong mechanism is selected on the first attempt and recipients encounter an error message. It is not necessary to speculate whether this could create confusion and frustration among recipients—written statements from consumers seen by the CRTC confirm that it can, and has. Consequently, I see no error in the CRTC’s finding that the CEMs in question failed to conform to the requirement in subsection 3(3) of the CRTC Regulations that unsubscribe mechanisms must be able to be readily performed.

X. Conclusion

[260] For these reasons, I would dismiss the appeals with costs.

"M. Nadon"

J.A.

“I agree.”

Wyman W. Webb J.A.”

“I agree.

Judith Woods J.A.”

APPENDIX A

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

1(1) The following definitions apply in this Act.

“commercial activity”

“commercial activity” means 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, other than any transaction, act or conduct that is carried out for the purposes of law

Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la loi sur la concurrence, la loi sur la protection des renseignements personnels et les documents électroniques et la loi sur les télécommunications, L.C. 2010, c 23

1(1) Les définitions qui suivent s'appliquent à la présente loi.

« activité commerciale »

« activité commerciale » Tout acte isolé ou activité régulière qui revêt un caractère commercial, que la personne qui l'accomplit le fasse ou non dans le but de réaliser un profit, à l'exception de tout acte ou activité accompli à des fins d'observation de la loi, de sécurité publique, de protection du Canada, de conduite des affaires internationales ou de défense du Canada.

enforcement, public safety,
the protection of Canada, the
conduct of international
affairs or the defence of
Canada.

...

[...]

“electronic message”

« message électronique »

“electronic message” means
a message sent by any
means of
telecommunication,
including a text, sound,
voice or image message.

« message électronique » Message
envoyé par tout moyen de
télécommunication, notamment un
message textuel, sonore, vocal ou visuel.

...

[...]

**Meaning of commercial
electronic message**

Message électronique commercial

1(2) For the purposes of this
Act, a commercial electronic
message is an electronic
message that, having regard
to the content of the
message, the hyperlinks in
the message to content on a
website or other database, or
the contact information
contained in the message, it
would be reasonable to
conclude has as its purpose,
or one of its purposes, to
encourage participation in a
commercial activity,
including an electronic
message that

1(2) Pour l’application de la présente loi,
est un message électronique commercial
le message électronique dont il est
raisonnable de conclure, vu son contenu,
le contenu de tout site Web ou autre
banque de données auquel il donne accès
par hyperlien ou l’information qu’il
donne sur la personne à contacter, qu’il a
pour but, entre autres, d’encourager la
participation à une activité commerciale
et, notamment, tout message électronique
qui, selon le cas:

(a) offers to purchase, sell,
barter or lease a product.

a) comporte une offre d’achat, de vente,
de troc ou de louage d’un produit, bien.

goods, a service, land or an interest or right in land;

service, terrain ou droit ou intérêt foncier;

(b) offers to provide a business, investment or gaming opportunity;

b) offre une possibilité d'affaires, d'investissement ou de jeu;

(c) advertises or promotes anything referred to in paragraph (a) or (b); or

c) annonce ou fait la promotion d'une chose ou possibilité mentionnée aux alinéas a) ou b);

(d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.

d) fait la promotion d'une personne, y compris l'image de celle-ci auprès du public, comme étant une personne qui accomplit — ou a l'intention d'accomplir — un des actes mentionnés aux alinéas a) à c)

Other commercial electronic message

1(3) An electronic message that contains a request for consent to send a message described in subsection (2) is also considered to be a commercial electronic message.

...

Purpose of Act

3 The purpose of this Act is to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial

Assimilation

1(3) Le message électronique comportant une demande de consentement en vue de la transmission d'un message visé au paragraphe (2) est aussi considéré comme un message électronique commercial.

[...]

Objet de la loi

3 La présente loi a pour objet de promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation des pratiques commerciales qui découragent l'exercice des activités commerciales par voie électronique pour les raisons suivantes :

activities, because that
conduct

(a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;

(b) imposes additional costs on businesses and consumers;

(c) compromises privacy and the security of confidential information; and

(d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.

...

Unsolicited electronic messages

6(1) It is prohibited to send or cause or permit to be sent to an electronic address a commercial electronic message unless

(a) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and

a) elles nuisent à l'accessibilité, à la fiabilité, à l'efficience et à l'utilisation optimale des moyens de communication électronique dans le cadre des activités commerciales;

b) elles entraînent des coûts supplémentaires pour les entreprises et les consommateurs;

c) elles compromettent la protection de la vie privée et la sécurité des renseignements confidentiels;

d) elles minent la confiance des Canadiens quant à l'utilisation des moyens de communication électronique pour l'exercice de leurs activités commerciales au Canada et à l'étranger.

[...]

Messages électroniques non sollicités

6(1) Il est interdit d'envoyer à une adresse électronique un message électronique commercial, de l'y faire envoyer ou de permettre qu'il y soit envoyé, sauf si :

a) la personne à qui le message est envoyé a consenti expressément ou tacitement à le recevoir;

(b) the message complies with subsection (2).

b) le message est conforme au paragraphe (2).

...

[...]

Exception

Exception

6(5) This section does not apply to a commercial electronic message

6(5) Le présent article ne s'applique pas aux messages électroniques commerciaux suivants :

(a) that is sent by or on behalf of an individual to another individual with whom they have a personal or family relationship, as defined in the regulations;

a) les messages qui sont envoyés par une personne physique ou au nom de celle-ci à une autre, si ces personnes ont entre elles des liens familiaux ou personnels, au sens des règlements;

(b) that is sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity; or

b) les messages qui sont envoyés à une personne qui exerce des activités commerciales et qui constituent uniquement une demande — notamment une demande de renseignements — portant sur ces activités;

(c) that is of a class, or is sent in circumstances, specified in the regulations.

c) les messages qui font partie d'une catégorie réglementaire ou qui sont envoyés dans les circonstances précisées par règlements.

6(6) Paragraph (1)(a) does not apply to a commercial electronic message that solely

6(6) L'alinéa (1)a) ne s'applique pas aux messages électroniques commerciaux qui sont uniquement, selon le cas :

(a) provides a quote or estimate for the supply of a product, goods, a service, land or an interest or right in land, if the quote or

a) des messages qui donnent, à la demande des personnes qui les reçoivent, un prix ou une estimation pour la fourniture de biens, produits, services, terrains ou droits ou intérêts

estimate was requested by the person to whom the message is sent;

fonciers;

(b) facilitates, completes or confirms a commercial transaction that the person to whom the message is sent previously agreed to enter into with the person who sent the message or the person — if different — on whose behalf it is sent;

b) des messages qui facilitent, complètent ou confirment la réalisation d'une opération commerciale que les personnes qui les reçoivent ont au préalable accepté de conclure avec les personnes qui les ont envoyés ou, le cas échéant, celles au nom de qui ils ont été envoyés;

(c) provides warranty information, product recall information or safety or security information about a product, goods or a service that the person to whom the message is sent uses, has used or has purchased;

c) des messages qui donnent des renseignements en matière de garantie, de rappel ou de sécurité à l'égard de biens ou produits utilisés ou achetés par les personnes qui reçoivent ces messages ou de services obtenus par celles-ci;

(d) provides notification of factual information about

d) des messages qui donnent des éléments d'information factuels aux personnes qui les reçoivent à l'égard:

(i) the ongoing use or ongoing purchase by the person to whom the message is sent of a product, goods or a service offered under a subscription, membership, account, loan or similar relationship by the person who sent the message or the person — if different — on whose behalf it is

(i) soit de l'utilisation ou de l'achat par ces personnes, pendant une certaine période, de biens, produits ou services offerts par les personnes qui ont envoyé ces messages ou, le cas échéant, celles au nom de qui ils ont été envoyés au titre d'un abonnement, d'une adhésion, d'un compte, d'un prêt ou de toute autre relation semblable,

— ON WHOSE BEHALF IT IS

sent, or

(ii) the ongoing subscription, membership, account, loan or similar relationship of the person to whom the message is sent;

(ii) soit de cet abonnement, cette adhésion, ce compte, ce prêt ou cette autre relation;

(e) provides information directly related to an employment relationship or related benefit plan in which the person to whom the message is sent is currently involved, is currently participating or is currently enrolled;

e) des messages qui fournissent des renseignements directement liés au statut d'employé des personnes qui les reçoivent ou à tout régime de prestations auquel elles participent ou dont elles tirent des avantages;

(f) delivers a product, goods or a service, including product updates or upgrades, that the person to whom the message is sent is entitled to receive under the terms of a transaction that they have previously entered into with the person who sent the message or the person — if different — on whose behalf it is sent; or

f) des messages au moyen desquels sont livrés des biens, produits ou services, y compris des mises à jour ou des améliorations à l'égard de ceux-ci, auxquels les personnes qui reçoivent ces messages ont droit au titre d'une opération déjà conclue avec les personnes qui les ont envoyés ou, le cas échéant, celles au nom de qui ils ont été envoyés;

(g) communicates for a purpose specified in the regulations.

g) des messages envoyés à l'une des fins prévues par les règlements.

...

[...]

Express consent — sections

Consentement exprès : articles 6 à 8

6 to 8

10(1) A person who seeks express consent for the doing of an act described in any of sections 6 to 8 must, when requesting consent, set out clearly and simply the following information:

(a) the purpose or purposes for which the consent is being sought;

(b) prescribed information that identifies the person seeking consent and, if the person is seeking consent on behalf of another person, prescribed information that identifies that other person; and

(c) any other prescribed information.

...

Implied consent — section 6

10(9) Consent is implied for the purpose of section 6 only if

(a) the person who sends the message, the person who causes it to be sent or the person who permits it to be sent has an existing business relationship or an existing non-business

10(1) Quiconque entend obtenir le consentement exprès d'une personne pour accomplir un acte visé à l'un des articles 6 à 8 doit, lorsqu'il demande le consentement, énoncer en termes simples et clairs, les renseignements suivants :

a) les fins auxquelles le consentement est sollicité;

b) les renseignements réglementaires permettant d'identifier la personne qui sollicite le consentement et, s'il est sollicité au nom d'une autre personne, les renseignements réglementaires permettant d'identifier celle-ci;

c) tout autre renseignement précisé par règlement.

[...]

Consentement tacite : article 6

10(9) Pour l'application de l'article 6, il n'y a consentement tacite que dans l'un ou l'autre des cas suivants :

a) la personne qui envoie le message, le fait envoyer ou en permet l'envoi a, avec la personne qui le reçoit, des relations d'affaires en cours ou des relations privées en cours;

relationship with the person to whom it is sent;

(b) the person to whom the message is sent has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent, the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address and the message is relevant to the person's business, role, functions or duties in a business or official capacity;

(c) the person to whom the message is sent has disclosed, to the person who sends the message, the person who causes it to be sent or the person who permits it to be sent, the electronic address to which the message is sent without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address, and the message is relevant to the person's business, role, functions or duties in a business or official capacity; or

b) la personne à qui le message est envoyé a publié bien en vue, ou a ainsi fait publier, l'adresse électronique à laquelle il a été envoyé, la publication ne comporte aucune mention précisant qu'elle ne veut recevoir aucun message électronique commercial non sollicité à cette adresse et le message a un lien soit avec l'exercice des attributions de la personne, soit avec son entreprise commerciale ou les fonctions qu'elle exerce au sein d'une telle entreprise;

c) la personne à qui le message est envoyé a communiqué l'adresse électronique à laquelle il est envoyé à la personne qui envoie le message, le fait envoyer ou en permet l'envoi, sans aucune mention précisant qu'elle ne veut recevoir aucun message électronique commercial non sollicité à cette adresse et le message a un lien soit avec l'exercice des attributions de la personne, soit avec son entreprise commerciale ou les fonctions qu'elle exerce au sein d'une telle entreprise;

(d) the message is sent in the circumstances set out in the regulations.

d) le message est envoyé dans les autres circonstances prévues par règlement.

Definition of “existing business relationship”

Définition de relations d'affaires en cours

10(10) In subsection (9), “existing business relationship” means a business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

10(10) Pour l'application du paragraphe (9), relations d'affaires en cours s'entend des relations d'affaires entre la personne qui envoie le message, le fait envoyer ou en permet l'envoi et la personne qui le reçoit, découlant, selon le cas :

(a) the purchase or lease of a product, goods, a service, land or an interest or right in land, within the two-year period immediately before the day on which the message was sent, by the person to whom the message is sent from any of those other persons;

a) de l'achat ou du louage par la seconde personne, au cours des deux ans précédant la date d'envoi du message, d'un bien, produit, service, terrain ou droit ou intérêt foncier de la première personne;

(b) the acceptance by the person to whom the message is sent, within the period referred to in paragraph (a), of a business, investment or gaming opportunity offered by any of those other persons;

b) de l'acceptation par la seconde personne, au cours de cette période, d'une possibilité d'affaires, d'investissement ou de jeu offerte par la première personne;

(c) the bartering of anything mentioned in paragraph (a) between the person to whom the message is sent and any of those other persons within the period referred to in that paragraph;

c) du troc d'une chose mentionnée à l'alinéa a) intervenu entre elles au cours de cette période;

(d) a written contract entered into between the person to whom the message is sent and any of those other persons in respect of a matter not referred to in any of paragraphs (a) to (c), if the contract is currently in existence or expired within the period referred to in paragraph (a); or

d) de tout contrat — toujours en vigueur ou venu à échéance au cours de cette période — conclu par écrit entre elles au sujet d'une chose non mentionnée aux alinéas a) à c);

(e) an inquiry or application, within the six-month period immediately before the day on which the message was sent, made by the person to whom the message is sent to any of those other persons, in respect of anything mentioned in any of paragraphs (a) to (c).

e) d'une demande — notamment une demande de renseignements — présentée par la seconde personne à la première, au cours des six mois précédant la date d'envoi du message, relativement à une chose ou à une possibilité mentionnée aux alinéas a) ou c).

...

[...]

Definition of “existing non-business relationship”

Définition de relations privées en cours

10(13) In subsection (9), “existing non-business relationship” means a non-

10(13) Pour l'application du paragraphe (9), relations privées en cours s'entend des relations entre la personne qui envoie

business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

(a) a donation or gift made by the person to whom the message is sent to any of those other persons within the two-year period immediately before the day on which the message was sent, where that other person is a registered charity as defined in subsection 248(1) of the *Income Tax Act*, a political party or organization, or a person who is a candidate — as defined in an Act of Parliament or of the legislature of a province — for publicly elected office;

(b) volunteer work performed by the person to whom the message is sent for any of those other persons, or attendance at a meeting organized by that other person, within the two-year period immediately before the day on which the message was sent, where that other person is a registered

le message, le fait envoyer ou en permet l'envoi et la personne qui le reçoit, qui ne sont pas des relations d'affaires et qui découlent, selon le cas :

a) d'un don ou d'un cadeau offert par la seconde personne à la première au cours des deux ans précédant la date d'envoi du message, dans le cas où cette première personne est un organisme de bienfaisance enregistré au sens du paragraphe 248(1) de la *Loi de l'impôt sur le revenu*, une organisation ou un parti politiques ou un candidat — au sens de toute loi fédérale ou provinciale — à une charge publique élective;

b) du travail effectué à titre de bénévole par la seconde personne pour la première au cours des deux ans précédant la date d'envoi du message, dans le cas où cette première personne est un organisme de bienfaisance enregistré au sens du paragraphe 248(1) de la *Loi de l'impôt sur le revenu*, une organisation ou un parti politiques ou un candidat — au sens de toute loi fédérale ou provinciale — à une charge publique élective;

charity as defined in subsection 248(1) of the *Income Tax Act*, a political party or organization or a person who is a candidate — as defined in an Act of Parliament or of the legislature of a province — for publicly elected office; or

(c) membership, as defined in the regulations, by the person to whom the message is sent, in any of those other persons, within the two-year period immediately before the day on which the message was sent, where that other person is a club, association or voluntary organization, as defined in the regulations.

c) d'une adhésion, au sens des règlements, de la seconde personne auprès de la première au cours des deux ans précédant la date d'envoi du message, dans le cas où cette première personne est un club, une association ou un organisme bénévole, au sens des règlements.

...

[...]

Contravention of section 6

12(1) A person contravenes section 6 only if a computer system located in Canada is used to send or access the electronic message.

Contravention à l'article 6

12(1) Il n'y a contravention à l'article 6 que si un ordinateur situé au Canada est utilisé pour envoyer ou récupérer le message électronique.

Contravention of section 7

12(2) A person contravenes section 7 only if a computer system located in Canada is used to send, route or access the electronic message.

Contravention à l'article 7

12(2) Il n'y a contravention à l'article 7 que si un ordinateur situé au Canada est utilisé pour envoyer, acheminer ou récupérer le message électronique.

...

[...]

Notice for production

17(1) A person who is designated for the purpose of this section may cause a notice to be served on a person requiring them to produce a copy of a document that is in their possession or control, or to prepare a document based on data, information or documents that are in their possession or control and to produce that document.

Purpose of notice

17(2) The designated person may issue the notice only for the purpose of one or more of the following:

(a) verifying compliance with this Act;

(b) determining whether any of sections 6 to 9 has been contravened; and

(c) assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

Avis de communication

17(1) La personne désignée pour l'application du présent article peut faire signifier à toute personne un avis pour l'obliger à communiquer la copie de tout document qui est en sa possession ou sous sa responsabilité ou à établir tout document à partir de données, renseignements ou documents qui sont en sa possession ou sous sa responsabilité et à le communiquer.

But de l'avis

17(2) Elle ne peut établir l'avis qu'à l'une ou l'autre des fins suivantes :

a) vérifier le respect de la présente loi;

b) décider si une contravention à l'un des articles 6 à 9 a été commise;

c) faciliter une enquête, instance ou poursuite relative à une contravention à une loi d'un État étranger visant des comportements essentiellement semblables à ceux interdits par l'un des articles 6 à 9.

Particulars of notice

17(3) The notice must require the document to be produced to a person named in the notice within the time, at the place and in the form specified in the notice.

Conditions

17(4) The designated person may impose conditions in the notice to prevent the disclosure of some or all of its contents or its existence if they have reasonable grounds to believe that the disclosure **would jeopardize the conduct of**

(a) an investigation under this Act; or

(b) an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

Expiry and revocation of conditions

17(5) A condition imposed to prevent disclosure expires six months after the day on which the notice is served on the person unless, before

Contenu de l'avis

17(3) L'avis précise le lieu et la forme de la communication, le délai dans lequel elle doit être faite ainsi que le nom de la personne à qui elle doit l'être.

Conditions

17(4) La personne désignée peut assortir l'avis de conditions visant à empêcher la divulgation de tout ou partie de son contenu, ou de son existence si elle a des motifs raisonnables de croire que cette divulgation compromettrait le déroulement :

(a) soit d'une enquête menée au titre de la présente loi;

(b) soit d'une enquête, instance ou poursuite relative à une contravention à une loi d'un État étranger visant des comportements essentiellement semblables à ceux interdits par l'un des articles 6 à 9.

Expiration et annulation des conditions

17(5) Les conditions visant à empêcher la divulgation expirent six mois après la signification de l'avis, à moins qu'avant l'expiration de celles-ci un avis les renouvelant — pour une période

its expiry, a notice extending the condition for an additional period of six months is served on them. A condition may not be extended more than once and a notice revoking the condition may be served on the person at any time.

additionnelle de six mois — n'ait été signifié à la personne en question. L'avis renouvelant les conditions ne peut être signifié qu'une seule fois et un avis les annulant peut l'être à tout moment.

Return of documents not required

17(6) Documents and copies of documents that are produced under this section need not be returned to the person who produced them.

...

Violations

20(1) Every person who contravenes any of sections 6 to 9 commits a violation for which they are liable to an administrative monetary penalty.

Purpose of penalty

20(2) The purpose of a penalty is to promote compliance with this Act and not to punish.

Factors for penalty

20(3) The following factors must be taken into account

Aucune restitution

17(6) Il n'est pas nécessaire de retourner à la personne les documents ou copies de documents qu'elle a communiqués en application du présent article.

[...]

Violations

20(1) Toute contravention à l'un des articles 6 à 9 constitue une violation exposant son auteur à une sanction administrative pécuniaire.

But de la sanction

20(2) L'imposition de la sanction vise non pas à punir, mais plutôt à favoriser le respect de la présente loi.

Détermination du montant de la sanction

20(3) Pour la détermination du montant de la sanction, il est tenu compte des

when determining the
amount of a penalty:

éléments suivants :

(a) the purpose of the
penalty;

a) le but de la sanction;

(b) the nature and scope of
the violation;

b) la nature et la portée de la violation;

(c) the person's history
with respect to any
previous violation under
this Act, any previous
conduct that is reviewable
under section 74.011 of the
Competition Act and any
previous contravention of
section 5 of the *Personal
Information Protection and
Electronic Documents Act*
that relates to a collection
or use described in
subsection 7.1(2) or (3) of
that Act;

c) les antécédents de l'auteur de la
violation, à savoir violation à la
présente loi, comportement susceptible
d'examen visé à l'article 74.011 de la
Loi sur la concurrence et contravention
à l'article 5 de la *Loi sur la protection
des renseignements personnels et les
documents électroniques* qui met en
cause une collecte ou une utilisation
visée aux paragraphes 7.1(2) ou (3) de
cette loi;

(d) the person's history
with respect to any
previous undertaking
entered into under
subsection 21(1) and any
previous consent
agreement signed under
subsection 74.12(1) of the
Competition Act that
relates to acts or omissions
that constitute conduct that
is reviewable under section
74.011 of that Act;

d) ses antécédents au regard des
engagements contractés en vertu du
paragraphe 21(1) et des consentements
signés en vertu du paragraphe 74.12(1)
de la *Loi sur la concurrence* concernant
des actes ou omissions qui constituent
des comportements susceptibles
d'examen visés à l'article 74.011 de
cette loi;

(e) any financial benefit
that the person obtained
from the commission of

e) tout avantage financier qu'il a retiré
de la commission de la violation;

the violation;

(f) the person's ability to pay the penalty;

f) sa capacité de payer le montant de la sanction;

(g) whether the person has voluntarily paid compensation to a person affected by the violation;

g) tout versement d'une somme qu'il a fait volontairement, à titre de dédommagement, à toute personne touchée par la violation;

(h) the factors established by the regulations; and

h) tout critère prévu par règlement;

(i) any other relevant factor.

i) tout autre élément pertinent.

Maximum penalties

Plafond de la sanction

20(4) The maximum penalty for a violation is \$1,000,000 in the case of an individual, and \$10,000,000 in the case of any other person.

20(4) Le montant maximal de la sanction pour une violation est de 1 000 000 \$, dans le cas où l'auteur est une personne physique, et de 10 000 000 \$ dans le cas de toute autre personne.

Regulations

Pouvoir réglementaire

20(5) The Governor in Council may make regulations

20(5) Le gouverneur en conseil peut, par règlement :

(a) designating provisions whose contravention constitutes a separate violation in respect of each day during which it continues; and

a) désigner les dispositions dont la contravention constitue une violation distincte pour chacun des jours au cours desquels la contravention se continue;

(b) establishing factors for the purposes of

b) prévoir les

paragraph (3)(h).

critères pour
l'application de
l'alinéa (3)h).

...

[...]

Notice of violation

Procès-verbal de violation

22(1) A person who is designated for the purpose of this section may issue a notice of violation and cause it to be served on a person if they believe on reasonable grounds that the person has committed a violation.

22(1) Si elle a des motifs raisonnables de croire qu'une violation a été commise, la personne désignée pour l'application du présent article peut dresser un procès-verbal qu'elle fait signifier à l'auteur présumé de la violation.

Contents of notice

Contenu du procès-verbal

22(2) The notice of violation must

22(2) Le procès-verbal mentionne :

(a) name the person believed to have committed the violation;

a) le nom de l'auteur présumé de la violation;

(b) identify every act or omission for which the notice is served and every provision at issue;

b) les actes ou omissions pour lesquels le procès-verbal est signifié et les dispositions en cause;

(c) set out the administrative monetary penalty that the person is liable to pay and the time and manner of payment;

c) le montant de la sanction à payer, ainsi que le délai et les modalités de paiement;

(d) inform the person that they may make representations to the Commission within 30

d) la faculté de présenter des observations au Conseil dans les trente jours suivant la signification du procès-verbal ou dans le délai plus long précisé

days after the day on which the notice is served or any longer period set out in the notice, and set out the manner for making the representations;

dans celui-ci, et les modalités à respecter pour ce faire;

(e) inform the person that, if they do not pay the penalty or make representations in accordance with the notice, they will be deemed to have committed the violation and that the penalty set out in the notice will be imposed; and

e) le fait que le défaut de paiement du montant de la sanction ou l'omission de présenter des observations conformément au procès-verbal vaut déclaration de responsabilité et entraîne l'imposition de la sanction prévue dans celui-ci;

(f) inform the person that if they are found or are deemed to have committed a violation they may be made the subject of an order requiring them to do what this Act requires them to do, or forbidding them to do what this Act prohibits them from doing, and that the order can be enforced as an order of a court of competent jurisdiction.

f) le fait que, en cas de déclaration de responsabilité, il peut être rendu à l'endroit de la personne en cause une ordonnance lui enjoignant d'accomplir tout acte ou de s'en abstenir pour se conformer à la présente loi, et que l'ordonnance est exécutoire comme si elle avait été rendue par un tribunal compétent.

...

[...]

Representations

25(1) If a person makes representations in accordance with the notice, the Commission must

Observations

25(1) Si la personne présente des observations selon les modalités qui sont prévues dans le procès-verbal, le Conseil décide, selon la prépondérance des

decide, on a balance of probabilities, whether the person committed the violation and, if so, may impose the penalty set out in the notice of violation, may reduce or waive the penalty, or may suspend payment of the penalty subject to any conditions that the Commission considers necessary to ensure compliance with this Act.

probabilités, de sa responsabilité à l'égard de la violation et, le cas échéant, il peut imposer la sanction prévue dans le procès-verbal, en réduire le montant, y renoncer ou encore en suspendre le paiement aux conditions qu'il estime nécessaires pour l'observation de la présente loi.

Notice of decision

Signification de la révision

25(2) The Commission must cause a copy of its decision to be served on the person together with a notice of their right to appeal.

25(2) Le Conseil fait signifier à la personne en question copie de sa décision et l'avise par la même occasion de son droit d'interjeter appel.

...

[...]

For greater certainty

Précision

30 For greater certainty, a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply.

30 Il est entendu que les violations ne sont pas des infractions; en conséquence, nul ne peut être poursuivi à ce titre sur le fondement de l'article 126 du *Code criminel*.

Directors, officers, etc., of corporations

Administrateurs, dirigeants, etc.

31 An officer, director, agent or mandatary of a corporation that commits a violation is liable for the violation if they directed, authorized, assented to, acquiesced in or participated

31 En cas de commission par une personne morale d'une violation, ceux de ses dirigeants, administrateurs ou mandataires qui l'ont ordonnée ou autorisée, ou qui y ont consenti ou participé, sont responsables de la violation, que la personne morale fasse

in the commission of the violation, whether or not the corporation is proceeded against.

ou non l'objet de procédures en violation.

Various liability

Responsabilité indirecte

32 A person is liable for a violation that is committed by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee, agent or mandatary is identified or proceeded against.

32 L'employeur ou le mandant est responsable de la violation commise par son employé ou son mandataire dans le cadre de son emploi ou du mandat, que celui-ci soit ou non connu ou fasse ou non l'objet de procédures en violation.

Electronic Commerce Protection Regulations (CRTC), S.O.R./2012-36

Règlement sur la protection du commerce électronique (CRTC) D.O.R.S./2012-36

Definition

Définition

1 In these Regulations, Act means *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.*

1 Dans le présent règlement, Loi s'entend de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents*

*personnels et les documents
électroniques et la Loi sur les
télécommunications.*

Information to Be Included in Commercial Electronic Messages

2(1) For the purposes of subsection 6(2) of the Act, the following information must be set out in any commercial electronic message:

(a) the name by which the person sending the message carries on business, if different from their name, if not, the name of the person;

(b) if the message is sent on behalf of another person, the name by which the person on whose behalf the message is sent carries on business, if different from their name, if not, the name of the person on whose behalf the message is sent;

(c) if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent; and

(d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the

Renseignements à inclure dans les messages électroniques commerciaux

2(1) Pour l'application du paragraphe 6(2) de la Loi, le message électronique commercial comporte les renseignements suivants :

a) le nom sous lequel la personne qui envoie le message exerce ses activités commerciales, s'il diffère du sien, ou, à défaut, son nom;

b) si le message est envoyé au nom d'une autre personne, le nom sous lequel celle-ci exerce ses activités commerciales, s'il diffère du sien, ou, à défaut, son nom;

c) si le message est envoyé au nom d'une autre personne, une mention indiquant le nom de la personne qui envoie le message et celui au nom de qui il est envoyé;

d) l'adresse postale et soit le numéro de téléphone donnant accès à un agent de service ou à un service de messagerie vocale, soit l'adresse de courriel ou du site Web de la personne qui

message or, if different, the person on whose behalf the message is sent.

envoie le message ou, le cas échéant, de celle au nom de qui il est envoyé.

2(2) If it is not practicable to include the information referred to in subsection (1) and the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act in a commercial electronic message, that information may be posted on a page on the World Wide Web that is readily accessible by the person to whom the message is sent at no cost to them by means of a link that is clearly and prominently set out in the message.

2(2) S'il est pratiquement impossible d'inclure les renseignements mentionnés au paragraphe (1) et le mécanisme d'exclusion visé à l'alinéa 6(2)c) de la Loi dans le message électronique commercial, ils peuvent être affichés sur une page Web facilement accessible sans frais par le destinataire au moyen d'un lien indiqué dans le message en termes clairs et facilement lisibles.

Form of Commercial Electronic Messages

Forme des messages électroniques commerciaux

3(1) The information referred to in section 2 and the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be set out clearly and prominently.

3(1) Les renseignements visés à l'article 2 et le mécanisme d'exclusion visé à l'alinéa 6(2)c) de la Loi doivent être énoncés en termes clairs et facilement lisibles.

3(2) The unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be able to be readily performed.

3(2) Le mécanisme d'exclusion visé à l'alinéa 6(2)c) de la Loi doit pouvoir s'exécuter facilement.

Information to Be Included in a Request for Consent

Renseignements à inclure dans les demandes de consentement

4 For the purposes of subsections 10(1) and (3) of the Act, a request for consent may be obtained orally or in writing and must be sought separately for each act described in sections 6 to 8 of the Act and

4 Pour l'application des paragraphes 10(1) et (3) de la Loi, la demande de consentement est faite oralement ou par écrit et séparément pour chacun des actes visés aux articles 6 à 8 de la Loi et

must include

comporte les renseignements
suivants :

(a) the name by which the person seeking consent carries on business, if different from their name, if not, the name of the person seeking consent;

a) le nom sous lequel la personne qui sollicite le consentement exerce ses activités commerciales, s'il diffère du sien, ou, à défaut, son nom;

(b) if the consent is sought on behalf of another person, the name by which the person on whose behalf consent is sought carries on business, if different from their name, if not, the name of the person on whose behalf consent is sought;

b) si le consentement est sollicité au nom d'une autre personne, le nom sous lequel celle-ci exerce ses activités commerciales, s'il diffère du sien, ou, à défaut, son nom;

(c) if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought; and

c) si le consentement est sollicité au nom d'une autre personne, une mention indiquant le nom de la personne qui sollicite le consentement et celui au nom de qui il est sollicité;

(d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and

d) l'adresse postale et soit le numéro de téléphone donnant accès à un agent de service ou à un service de messagerie vocale, soit l'adresse de courriel ou du site Web de la personne qui sollicite le consentement ou, le cas échéant, de celle au nom de qui il est sollicité;

(e) a statement indicating that the person whose consent is sought can withdraw their consent.

e) un énoncé portant que la personne auprès de qui le consentement est sollicité peut retirer son consentement.

Specified Functions of

Programme d'ordinateur

Computer Programs

5 A computer program's material elements that perform one or more of the functions listed in subsection 10(5) of the Act must be brought to the attention of the person from whom consent is being sought separately from any other information provided in a request for consent and the person seeking consent must obtain an acknowledgement in writing from the person from whom consent is being sought that they understand and agree that the program performs the specified functions.

Coming into Force

6(1) These Regulations, except section 5, come into force on the day on which sections 6, 7 and 9 to 11 and subsection 64(2) of *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*, chapter 23 of the Statutes of

effectuant des fonctions spécifiques

5 Les éléments d'un programme d'ordinateur qui effectuent l'une ou l'autre des fonctions mentionnées au paragraphe 10(5) de la Loi sont portés à l'attention de la personne auprès de qui le consentement est sollicité séparément des autres renseignements fournis dans la demande de consentement et la personne qui sollicite le consentement doit obtenir de cette personne une confirmation écrite attestant qu'elle comprend et accepte que le programme effectue les fonctions mentionnées.

Entrée en vigueur

6(1) Le présent règlement, à l'exception de l'article 5, entre en vigueur à la date d'entrée en vigueur des articles 6, 7 et 9 à 11 et du paragraphe 64(2) de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements*

Canada, 2010, come into force, but if they are registered after that day, they come into force on the day on which they are registered.

personnels et les documents électroniques et la Loi sur les télécommunications, chapitre 23 des Lois du Canada (2010) ou, si elle est postérieure, à la date de son enregistrement.

5(2) Section 5 comes into force on the day on which section 8 of the Act, referred to in subsection (1), comes into force.

5(2) L'article 5 entre en vigueur à la date d'entrée en vigueur de l'article 8 de la loi visée au paragraphe (1).

Electronic Commerce Protection Regulations, S.O.R./2013-221

Règlement sur la protection du commerce électronique, DORS/2013-221

Definition

Définition

Definition of Act

Définition de *Loi*

1 In these Regulations, Act means *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.*

1 Dans le présent règlement, *Loi* s'entend de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications.*

Family Relationship and Personal Relationship

Liens familiaux et liens personnels

Family and personal relationships

2 For the purposes of paragraph 6(5)(a) of the Act,

(a) family relationship means the relationship between an individual who sends a message and the individual to whom the message is sent if those individuals are related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication; and

(b) personal relationship means the relationship between an individual who sends a message and the individual to whom the message is sent, if those individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

Liens familiaux et personnels

2 Pour l'application de l'alinéa 6(5)a) de la Loi :

a) des personnes physiques sont unies par des liens familiaux si la personne qui envoie le message et la personne à qui le message est envoyé sont unies par les liens de mariage ou d'union de fait ou de filiation et ont eu entre elles des communications volontaires, directes et bidirectionnelles;

b) des personnes physiques sont unies par des liens personnels si la personne qui envoie le message et la personne à qui le message est envoyé ont eu entre elles des communications volontaires, directes et bidirectionnelles permettant raisonnablement de conclure à l'existence de tels liens, compte tenu des facteurs pertinents, notamment, le partage d'intérêts, d'expériences, d'opinions et d'informations, comme en témoignent leurs communications et la fréquence de celles-ci, le temps écoulé depuis la dernière communication et le fait que les parties se sont rencontrées ou non en personne.

Excluded Commercial Electronic Messages

Excluded messages — Section 6 of Act

3 Section 6 of the Act does not apply to a commercial electronic message

(a) that is sent by an employee, representative, consultant or franchisee of an organization

(i) to another employee, representative, consultant or franchisee of the organization and the message concerns the activities of the organization, or

(ii) to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the organization to which the message is sent;

(b) that is sent in response to a request, inquiry or complaint or is otherwise solicited by the person to whom the message is sent;

(c) that is sent to a person

Messages électroniques commerciaux exemptés

Article 6 de la Loi- messages exemptés

3 L'article 6 de la Loi ne s'applique pas au message électronique commercial :

a) envoyé par l'employé, le représentant, le consultant ou le franchisé d'une organisation, selon le cas :

(i) à un autre employé, un représentant, un consultant ou un franchisé au sein de la même organisation, si le message concerne les activités de l'organisation,

(ii) à l'employé, au représentant, au consultant ou au franchisé d'une autre organisation si leurs organisations respectives entretiennent des rapports et que le message concerne les activités de l'organisation à qui le message est envoyé;

b) envoyé en réponse à une demande — notamment une demande de renseignements — ou par suite d'une plainte, ou sollicité de quelque façon que ce soit par la personne à qui le message est envoyé;

c) envoyé :

(i) to satisfy a legal or juridical obligation,

(ii) to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff,

(iii) to enforce a right, legal or juridical obligation, court order, judgment or tariff, or

(iv) to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state;

(d) that is sent and received on an electronic messaging service if the information and unsubscribe mechanism that are required under subsection 6(2) of the Act are conspicuously published and readily available on the user interface through which the message is accessed, and the person to whom the message is sent consents to receive it either expressly or by implication;

(e) that is sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the

(i) pour satisfaire à une obligation juridique,

(ii) pour donner avis d'un droit, d'une obligation juridique, d'une ordonnance d'un tribunal, d'un jugement ou d'un tarif existants ou à venir,

(iii) pour faire valoir un droit ou exécuter une obligation juridique, une ordonnance judiciaire, un jugement ou un tarif,

(iv) pour faire valoir un droit découlant d'une règle de droit fédérale, provinciale, municipale ou étrangère;

d) envoyé et reçu par l'entremise d'un service de messagerie électronique, si les renseignements et le mécanisme d'exclusion requis en application du paragraphe 6(2) de la Loi sont publiés de façon à être visibles et facilement accessibles sur l'interface utilisateur au moyen de laquelle le message sera récupéré et que la personne à qui le message est envoyé a consenti expressément ou tacitement à le recevoir;

e) envoyé à un compte sécuritaire et confidentiel à accès restreint, auquel les messages ne peuvent être envoyés que par la personne qui a fourni le compte à la personne qui reçoit le

message;

(f) if the person who sends the message or causes or permits it to be sent reasonably believes the message will be accessed in a foreign state that is listed in the schedule and the message conforms to the law of the foreign state that addresses conduct that is substantially similar to conduct prohibited under section 6 of the Act;

(g) that is sent by or on behalf of a registered charity as defined in subsection 248(1) of the *Income Tax Act* and the message has as its primary purpose raising funds for the charity; or

(h) that is sent by or on behalf of a political party or organization, or a person who is a candidate — as defined in an Act of Parliament or the legislature of a province — for publicly elected office and the message has as its primary purpose soliciting a contribution as defined in subsection 2(1) of the *Canada Elections Act*.

Excluded messages — Paragraph 6(1)(a) of Act

4(1) Paragraph 6(1)(a) of the Act does not apply to the first commercial electronic message that is sent by a person for the

message;

f) si la personne qui l'envoie, le fait envoyer ou en permet l'envoi a des motifs raisonnables de croire qu'il sera récupéré dans un État étranger mentionné à l'annexe et qu'il sera conforme à une loi de cet État régissant les comportements essentiellement similaires à ceux interdits par l'article 6 de la Loi;

g) envoyé par un organisme de bienfaisance enregistré au sens du paragraphe 248(1) de la *Loi de l'impôt sur le revenu* ou en son nom si le principal objet du message est de lever des fonds pour les activités de bienfaisance de l'organisme en cause;

h) envoyé par une organisation ou un parti politiques ou un candidat — au sens de toute loi fédérale ou provinciale — à une charge publique élective ou pour le compte de ceux-ci si le principal objet du message est de demander des contributions au sens du paragraphe 2(1) de la *Loi électorale du Canada*.

Alinéa 6(1)a) — messages exemptés

4(1) L'alinéa 6(1)a) de la Loi ne s'applique pas au premier message électronique commercial qui, d'une part, est envoyé par une

purpose of contacting the individual to whom the message is sent following a referral by any individual who has an existing business relationship, an existing non-business relationship, a family relationship or a personal relationship with the person who sends the message as well as any of those relationships with the individual to whom the message is sent and that discloses the full name of the individual or individuals who made the referral and states that the message is sent as a result of the referral.

Existing business or non-business relationship

4(2) An existing business relationship or an existing non-business relationship has the same meaning as in subsection 10(10) or (13) of the Act, respectively.

Conditions for Use of Consent

Person whose identity is unknown

5(1) For the purposes of paragraph 10(2)(b) of the Act, a person who obtained express consent on behalf of a person whose identity was unknown may authorize any person to use the consent on the condition that the person who obtained it ensures that, in any commercial electronic message sent to the person from whom

personne à une personne physique en vue d'entrer en contact avec elle par suite d'une recommandation d'une ou de plusieurs personnes physiques ayant, avec l'expéditeur du message et avec son destinataire des relations d'affaires en cours, des relations privées en cours ou des liens familiaux ou personnels et si, d'autre part, ce message révèle le nom au complet de la ou des personnes physiques ayant fait la recommandation et comporte la mention qu'il est envoyé par suite d'une telle recommandation.

Relations d'affaires en cours ou relations privées en cours

4(2) Des relations d'affaires en cours ou des relations privées en cours s'entendent au sens des paragraphes 10(10) et (13) de la Loi, respectivement.

Conditions d'utilisation du consentement

Obligations — personne dont l'identité est inconnue

5(1) Pour l'application de l'alinéa 10(2)b) de la Loi, la personne qui a obtenu le consentement exprès au nom d'une autre personne dont l'identité était inconnue peut autoriser toute personne à utiliser le consentement à condition de veiller à ce que, dans tout message électronique commercial envoyé à la personne qui a donné le

sent to the person from whom
consent was obtained,

la personne qui a donné le
consentement :

(a) the person who obtained
consent is identified; and

a) son identité soit établie à titre
de personne ayant obtenu le
consentement;

(b) the authorized person
provides an unsubscribe
mechanism that, in addition to
meeting the requirements set out
in section 11 of the Act, allows
the person from whom consent
was obtained to withdraw their
consent from the person who
obtained consent or any other
person who is authorized to use
it.

b) la personne autorisée
fournisse un mécanisme
d'exclusion qui, en plus d'être
conforme aux exigences de
l'article 11 de la Loi, permet à la
personne ayant donné le
consentement de le retirer à la
personne qui l'a obtenu ou à
toute autre personne autorisée à
l'utiliser.

Person who obtained consent

Personne qui a obtenu le consentement

5(2) The person who obtained
consent must ensure that, on
receipt of an indication of
withdrawal of consent by the
authorized person who sent the
commercial electronic message,
the authorized person notifies the
person who obtained consent that
consent has been withdrawn from,
as the case may be,

5(2) La personne qui a obtenu le
consentement veille à ce que la
personne autorisée qui a envoyé le
message l'avise dès qu'elle est
informée que le consentement a
été retiré à l'une des personnes
suivantes :

(a) the person who obtained
consent;

a) la personne qui a obtenu le
consentement;

(b) the authorized person who
sent the commercial electronic
message; or

b) la personne autorisée qui a
envoyé le message;

(c) any other person who is
authorized to use the consent

c) toute autre personne autorisée
à utiliser le consentement

Notification of other authorized person

5(3) The person who obtained consent must without delay inform a person referred to in paragraph (2)(c) of the withdrawal of consent on receipt of a notification of withdrawal of consent from the person referred to in that paragraph.

Give effect to withdrawal of consent

5(4) The person who obtained consent must give effect to a withdrawal of consent in accordance with subsection 11(3) of the Act, and, if applicable, ensure that a person referred to in paragraph (2)(c) also gives effect to the withdrawal in accordance with that subsection.

Specified Computer Programs**Specified programs**

6 The following programs are specified for the purposes of subparagraph 10(8)(a)(vi) of the Act:

(a) a program that is installed by or on behalf of a telecommunications service provider solely to protect the security of all or part of its network from a current and identifiable threat to the

Avis de retrait aux autres personnes autorisées

5(3) Sur réception d'un avis de retrait du consentement concernant la personne visée à l'alinéa (2)c), la personne qui a obtenu le consentement avise sans délai l'intéressé.

Donner suite au retrait de consentement

5(4) La personne qui a obtenu le consentement donne suite au retrait du consentement conformément au paragraphe 11(3) de la Loi et veille à ce que la personne visée à l'alinéa (2)c) fasse de même, le cas échéant.

Programmes d'ordinateur**Programmes précisés**

6 Les programmes visés pour l'application du sous-alinéa 10(8)a)(vi) de la Loi sont les suivants:

a) le programme qui est installé par le télécommunicateur ou en son nom uniquement pour protéger la sécurité de la totalité ou d'une partie de son réseau d'une menace actuelle et identifiable à l'accessibilité à la

availability, reliability, efficiency or optimal use of its network;

(b) a program that is installed, for the purpose of updating or upgrading the network, by or on behalf of the telecommunications service provider who owns or operates the network on the computer systems that constitute all or part of the network; and

(c) a program that is necessary to correct a failure in the operation of the computer system or a program installed on it and is installed solely for that purpose.

Membership, Club, Association and Voluntary Organization

Membership

7(1) For the purposes of paragraph 10(13)(c) of the Act, membership is the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.

Club, association or voluntary organization

7(2) For the purposes of paragraph 10(13)(c) of the Act, a club,

fiabilité, à l'efficacité ou à l'utilisation optimale du réseau;

b) le programme qui est installé par le télécommunicateur qui possède ou exploite le réseau, ou en son nom, sur tous les ordinateurs faisant partie du réseau pour la mise à jour ou à niveau de ce réseau;

c) le programme qui est nécessaire à la correction d'une défaillance dans le fonctionnement de l'ordinateur ou d'un de ses programmes et qui est installé uniquement à cette fin.

Adhésion, club, association et organisme bénévole

Adhésion

7(1) Pour l'application de l'alinéa 10(13)c) de la Loi, l'adhésion est le fait d'être accepté comme membre d'un club, d'une association ou d'un organisme bénévole conformément aux exigences d'appartenance de l'un ou l'autre.

Club, association ou organisme bénévole

7(2) Pour l'application de l'alinéa 10(13)c) de la Loi, un club, une

association or voluntary organization is a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada.

association ou un organisme bénévole est une organisation sans but lucratif constituée et administrée uniquement pour l'exercice d'activités non lucratives, notamment des activités liées au bien-être social, aux améliorations locales et aux loisirs ou divertissements, et dont aucun revenu n'est versé à un propriétaire, membre ou actionnaire — ou ne peut par ailleurs servir à son profit personnel — sauf si le propriétaire, membre ou actionnaire est une organisation dont le but premier est de promouvoir le sport amateur au Canada.

Coming into Force

8(1) These Regulations, except section 6, come into force on the day on which sections 6, 7, 9 to 11 and subsection 64(1) of *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* (“the Act”), chapter 23 of the Statutes of Canada, come into force, but if

Entrée en vigueur

8(1) Le présent règlement, à l'exception de l'article 6, entre en vigueur à la date d'entrée en vigueur des articles 6, 7 et 9 à 11 et du paragraphe 64(1) de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents*

they are registered after that day, they come into force on the day on which they are registered.	<i>électroniques et la Loi sur les télécommunications</i> , chapitre 23 des Lois du Canada (2010), ou, si elle est postérieure, à la date de son enregistrement.
---	---

Section 6**Article 6**

8(2) Section 6 comes into force on the day on which section 8 of the Act, referred to in subsection (1), comes into force.

8(2) L'article 6 entre en vigueur à la date d'entrée en vigueur de l'article 8 de la loi visée au paragraphe (1).

-

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD****DOCKETS:**

A-382-17
A-383-17

STYLE OF CAUSE:

3510395
CANADA
INC. v. THE
ATTORNEY
GENERAL
OF
CANADA

PLACE OF HEARING:

TORONTO,
ONTARIO

DATE OF HEARING:

APRIL 29,
2019

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

WEBB J.A.
WOODS

DATED:

JUNE 5,
2020

APPEARANCES:

Barry B. Sookman
Noah Zucker
Charles S. Morgan
Daniel G.C. Glover

FOR THE APPELLANT
3510395 CANADA INC.

Lynn Marchildon
Craig Collins-Williams
Joanie Roy

FOR THE RESPONDENT
THE ATTORNEY GENERAL
OF CANADA

SOLICITORS OF RECORD:

McCarthy Tétrault LLP
Montréal, Quebec

FOR THE APPELLANT
3510395 CANADA INC.

Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT
THE ATTORNEY GENERAL OF
CANADA

