



Compliance and Enforcement Decision CRTC 2017-367

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3510395 Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada’s Anti-Spam Legislation

The Commission dismisses the challenge regarding the constitutionality of Canada’s Anti-Spam Legislation (CASL) raised by 3510395 Canada Inc., operating as Compu.Finder (CompuFinder), in the context of a review of a notice of violation issued against the company under CASL.

In particular, the Commission determines that

- *it has the jurisdiction to answer the constitutional issues raised by CompuFinder, and there is a sufficient factual foundation to address these issues;*
- *CASL is intra vires the federal Parliament’s legislative powers to enact;*
- *the statutory regime prohibiting the sending of commercial electronic messages without consent, subject to certain exceptions and exemptions, violates section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter), but the infringement is justified under section 1;*
- *the impugned provisions of CASL do not, in themselves, result in the application of section 11 of the Charter to a person who has been issued and served with a notice of violation under CASL; and*
- *no violation of section 7 or 8 of the Charter has been established.*

Accordingly, CompuFinder’s constitutional challenge of CASL has not succeeded.

The Commission’s determinations in the notice of violation review proceeding regarding whether CompuFinder has committed the violations set out in the notice of violation, and with respect to the penalty set out therein, are contained in Compliance and Enforcement Decision 2017-368, also issued today.

Introduction

1. On 5 March 2015, a notice of violation was issued against 3510395 Canada Inc., operating as Compu.Finder (CompuFinder) pursuant to section 22 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, S.C. 2010, c. 23 (Canada's Anti-Spam Legislation [CASL] or the Act) by a person designated for that purpose under section 14 of the Act.¹

2. The notice of violation alleged that CompuFinder had committed violations of the Act by, for instance, sending commercial electronic messages (CEMs) without the consent of the recipients, and that contained an unsubscribe mechanism that did not function. The notice of violation set out an administrative monetary penalty (AMP) of \$1,100,000.
3. CompuFinder made representations to the Commission on 15 May 2015 pursuant to section 24 of CASL, seeking a review of the notice of violation. In these representations, CompuFinder raised a constitutional challenge to CASL on various grounds. Among other things, CompuFinder argued that CASL was not validly enacted as it is not *intra vires* the federal Parliament's (Parliament) legislative powers under the *Constitution Act, 1867*. It further argued that CASL contravenes the *Canadian Charter of Rights and Freedoms* (the Charter) by, among other things, infringing CompuFinder's freedom of expression and by allowing the Commission to impose penal sanctions without the necessary procedural safeguards.
4. In response to the constitutional questions raised by CompuFinder, additional process was established to allow CompuFinder to make further representations on the constitutional issues. CompuFinder filed these representations on 29 July 2015.
5. In accordance with section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, CompuFinder was required to serve notice of its constitutional challenge on the Attorney General of Canada and the attorneys general of each province. In response to this notice, the Attorney General of Canada (the Attorney General) chose to make representations to the Commission on the constitutional challenge. These representations were filed with the Commission on 4 February 2016.
6. CompuFinder filed reply comments to the Attorney General's representations on 4 March 2016.
7. The record of this proceeding with respect to the constitutional issues is extensive and includes the following:
 - the notice of violation issued and served upon CompuFinder on 5 March 2015 and the accompanying investigation report served on the same date;

¹ Section 14 of the Act provides that the Commission may designate persons to exercise various investigative powers and enforcement functions set out in sections 15 through 46. For example, persons may be designated to issue preservation demands and notices to produce, to apply for and execute warrants, and to enter into undertakings or issue notices of violation with respect to alleged violations of the Act.

- the representations filed by CompuFinder on 15 May and 29 July 2015 and the final reply filed on 4 March 2016, including 34 exhibits, 37 authorities, and 3 expert reports; and
 - the response to CompuFinder’s challenge filed by the Attorney General on 4 February 2016, including 78 exhibits, 33 authorities, and 3 expert reports.
8. In this decision, the Commission makes determinations on the issues raised by CompuFinder’s constitutional questions in the context of the notice of violation review proceeding. As explained in greater detail below, the Commission determines that CASL is not unconstitutional on any of the grounds raised by CompuFinder.
 9. Had CompuFinder’s constitutional challenge been successful, it would not have been necessary to resolve the issues with respect to whether CompuFinder committed the violations alleged in the notice of violation, as this would have involved the application to CompuFinder of a law that the Commission had found to be unconstitutional. In the circumstances, however, the Commission’s determinations with respect to the alleged violations and the AMP set out in the notice of violation are set out in *3510395 Canada Inc., operating as Compu.Finder – Violations of Canada’s Anti-Spam Legislation*, Compliance and Enforcement Decision CRTC 2017-368 (Compliance and Enforcement Decision 2017-368), also issued today.
 10. Further, CompuFinder challenged the amount of the AMP set out in the notice of violation, in part on constitutional grounds. That aspect of its constitutional challenge is also dealt with in Compliance and Enforcement Decision 2017-368.

Constitutional challenge

11. CompuFinder argued that the following provisions of CASL, and related regulations, are unconstitutional (the impugned provisions):
 - subsection 1(1) – the definition of “commercial activity”;
 - subsection 1(2) – the meaning of “commercial electronic message” (CEM);
 - subsection 1(3) – clarification of other electronic messages that will be considered CEMs;
 - section 3 – the purpose of the Act;
 - subsections 6(1), 6(5), and 6(6), as well as section 12 – provisions related to unsolicited CEM prohibitions;
 - subsections 10(1), 10(9), 10(10), and 10(13) – provisions related to express consent and implied consent, including the definitions of “existing business relationship” and “existing non-business relationship”;
 - section 17 – notices to produce;
 - sections 20, 22, and 25 – provisions related to notices of violation and AMPs;
 - section 30 – clarification that a violation of CASL is not an offence;

- sections 31 and 32 – extension of liability provisions;
 - the *Electronic Commerce Protection Regulations (CRTC)*, SOR/2012-36 (the CRTC regulations); and
 - the *Electronic Commerce Protection Regulations*, SOR/2013-221 (the Governor in Council regulations).
12. In its final reply, CompuFinder requested that the Commission find that the impugned provisions violate the Charter or are *ultra vires* Parliament’s legislative powers under the *Constitution Act, 1867* (or both), and are therefore unconstitutional. According to CompuFinder, it would then follow that the Commission would have to treat those provisions as having no force or effect, that CompuFinder could not be liable for any violation alleged by the notice of violation, and that the AMP set out in the notice of violation could not be imposed.

Issues

13. Based on its review of the record of the proceeding, the Commission considers that the following issues are relevant to the determination of the constitutional challenge:
- Can the Commission determine the constitutionality of the impugned provisions at issue in this proceeding?
 - Is CASL *intra vires* Parliament’s legislative powers?
 - Does CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter? If so, is any such violation justified under section 1?
 - Does CASL violate any of the rights of CompuFinder protected by section 11 of the Charter?
 - Does CASL violate the section 7 Charter protection against self-incrimination or the section 8 Charter right against unreasonable search and seizure?

Can the Commission determine the constitutionality of the impugned provisions at issue in this proceeding?

14. Before it can deal with the substance of CompuFinder’s constitutional challenge, the Commission must determine whether it would be appropriate to do so in the circumstances. This involves first determining whether it has the jurisdiction to resolve constitutional issues and then determining whether there is a sufficient factual foundation on the record of the proceeding upon which to address those issues.

15. In *Martin*,² the Supreme Court of Canada (Supreme Court) set out a three-part test to determine whether a statutory tribunal can determine a law's consistency with the Constitution:³
 - i. whether the constitutional issue to be determined arises in the context of a proceeding over which the tribunal is mandated to act and the determination of the issue will have some effect;
 - ii. whether the tribunal has the authority to determine questions of law; and
 - iii. whether there was a clear intention on the part of Parliament that the tribunal not have the authority to make the constitutional determination.
16. If the first two questions are answered in the affirmative, there will be a rebuttable presumption that the tribunal has the jurisdiction to make the determination. To rebut the presumption, a party must demonstrate that the third question is to be answered in the affirmative.
17. In the present case, both CompuFinder and the Attorney General submitted that the Commission has the authority to resolve the constitutional challenge.
18. The Commission agrees with these submissions. The constitutional issues arose in a proceeding under section 25 of CASL, pursuant to which the Commission must decide if a person issued and served with a notice of violation committed the violations in question. Moreover, in such a proceeding, subsection 34(1) of CASL grants the Commission the power to decide any question of law.
19. However, even though the Commission has the jurisdiction to resolve the constitutional issues, it must be satisfied that the record before it reveals a sufficient factual basis upon which to adjudicate these issues.⁴
20. In *Danson*,⁵ the Supreme Court confirmed that, in general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In that case, the Supreme Court dismissed the appeal on the basis that the appellant had not presented admissible evidence that the effects of the rules at issue actually violated his Charter rights.

² *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (confirmed in *R. v. Conway*, 2010 SCC 22).

³ While *Martin* only dealt with a question of constitutionality under the Charter, earlier cases, such as *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, had noted that administrative tribunals empowered to decide questions of law may likewise consider the constitutional division of powers between Parliament and provincial legislatures where this issue is properly raised before them.

⁴ *MacKay v. Manitoba*, [1989] 2 S.C.R. 357.

⁵ *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

21. In this case, CompuFinder argued that it adduced specific evidence of direct harm to it arising from the impairment of its rights and freedoms, including the substantial costs of compliance with CASL and the potential liability for an AMP of a size that represents an existential threat to its business.
22. The Attorney General submitted that CompuFinder did not adduce sufficient evidence to substantiate the deleterious effects of the impugned provisions of CASL on its Charter rights.
23. The Commission finds that CompuFinder adduced sufficient evidence of the alleged effects of the impugned provisions on its Charter rights and that, therefore, there is a proper factual foundation upon which to address the Charter challenge.
24. Many of the impugned provisions were applied to CompuFinder in this case. In addition, CompuFinder argued, at least in part, that one of the very purposes – rather than an effect – of CASL is to infringe freedom of expression. CompuFinder also provided detailed factual examples of the alleged effects that the impugned provisions have had on it. For instance, it removed thousands of emails from its database, modified its e-marketing practices to reduce the number of organizations to which it promotes its services, and eventually ceased sending any CEMs at all.
25. For these reasons, the Commission finds that it would be appropriate for it to determine the constitutionality of the impugned provisions at issue in this proceeding.

Is CASL *intra vires* Parliament's legislative powers?

26. Before it can resolve the issues surrounding the potential violation of rights and freedoms protected under the Charter, the Commission must determine whether the impugned provisions of CASL are constitutionally valid under a division of powers analysis – that is, whether they are *intra vires* Parliament.
27. Sections 91 and 92 of the *Constitution Act, 1867* divide legislative power between the federal and provincial levels of government. The present issue is whether CASL falls under the general trade and commerce power of Parliament under subsection 91(2), or within the provincial powers over property and civil rights in a province under subsection 92(13) or matters of a purely local nature under subsection 92(16). This question is resolved by analyzing the purpose and effects of the law to identify its pith and substance, and then by classifying CASL under a head of legislative power set out in section 91 or 92.
28. The Supreme Court confirmed the proper test to determine constitutional validity on a division of powers analysis in *Reference re Securities Act*:⁶

⁶ *Reference re Securities Act*, 2011 SCC 66, at paras. 63-65.

- i. First, the decision-maker must determine the main thrust of the law (the pith and substance analysis).
 - ii. Second, the decision-maker must determine whether the law falls under the head of power said to support it (the classification stage).
29. In this case, the Commission must identify the main thrust of CASL, having regard to its purpose and effects, and then ask whether or not the scheme falls under the general trade and commerce head of power. If the main thrust of the law is properly classified as falling under this head of power, it will be *intra vires* Parliament and valid. In applying this analysis, the Commission is mindful of the Supreme Court's guidance that the approach should be cooperative and flexible, while also recognizing that the constitutional boundaries that underlie the division of powers must be respected.⁷

Pith and substance analysis

Positions of parties

30. CompuFinder argued that CASL is invalid because its main thrust is to regulate not commerce, but the sending of commercial information within a province. It submitted that the law is consumer protection legislation in disguise, prescribing a set of rules that, in pith and substance, establish contractual formalities.
31. The company noted that CASL defines a CEM to include any message encouraging participation in a commercial activity, and that commercial activity encompasses any particular transaction, act, or conduct or any regular course of conduct that is of a commercial character, even if there is no expectation of profit. This means that many messages with only a very feeble connection to commerce are caught by CASL.
32. The company submitted that the effect of the legislation is to set out a regime governing what types of consent for the receipt of CEMs are valid and enforceable, what disclosures must be made in obtaining consent, and the specific formalities associated with unsubscribe mechanisms. This is consistent with its view that CASL is directed at regulating the day-to-day sending of commercial information within a province and prescribing contracting formalities.
33. According to the Attorney General, the Act's purpose, formally set out in section 3, 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 activities. By regulating "spam," mainly in the form of unwanted email,⁸ and providing related enforcement mechanisms, the main thrust of CASL's

⁷ *Ibid.* at paras. 61-62.

⁸ Relying on statements contained in the reports of several of its expert witnesses, the Attorney General defined the term "spam" as follows: "Spam is generally defined as any unsolicited commercial electronic message, whether in bulk or not, and regardless of who sends it." See also the report of John Levine (Levine Report) at para. 31 and the report of André Leduc (Leduc Report) at para. 17.

anti-spam provisions is to limit spam's negative effects and to protect and encourage the growth of the Canadian digital economy (or e-economy).

34. The Attorney General submitted that the immediate effect of CASL's anti-spam provisions is to restrict only those CEMs that do not fall within one of its exceptions or that fail to comply with certain related requirements, such as the unsubscribe requirements. The broader effect has been to precipitate a drop in spam rates in Canada and to improve Canadians' confidence in email marketing and the e-economy in general.

Commission's analysis and determinations

35. The pith and substance analysis seeks only to ascertain the main thrust of the law at issue, not to classify it as federal or provincial. The analysis is done by ascertaining the purpose and effects of the legislation as a single, comprehensive scheme.
36. The Commission may determine the purpose of CASL by considering factors such as purpose clauses within the Act and the general structure of the statute, or extrinsic factors such as Hansard or other accounts of the legislative process. The effects of CASL include the legal effect of the text and the practical consequences of the application of the Act.⁹
37. CompuFinder generally centred its pith and substance arguments around CASL's unsolicited CEM scheme and related provisions, rather than the Act's schemes relating to the alteration of transmission data or the installation of computer programs, which were not implicated in the notice of violation it had been issued. The Attorney General's submissions accordingly responded to these arguments with a similar focus. Nonetheless, 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.
38. Section 3 of CASL declares the purpose of CASL as follows:
 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 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

⁹ Reference re Securities Act, *supra* note 6, at para. 64.

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

39. CASL's definition of "commercial activity" at subsection 1(1) is also helpful in determining its purpose:

"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.

40. The Supreme Court has indicated that one way to determine the purpose of legislation is to look at the problem it is intended to address.¹⁰ CASL is aimed at regulating a number of electronic threats. One key threat, directly at issue in this case, is unsolicited CEMs, which can act as a vehicle for numerous other online threats, including phishing attacks (the use of spam to impersonate a trusted correspondent) and malware (software installed on a user's computer, typically without the user's knowledge and for malicious purposes).¹¹

41. It has been estimated that in 2007, prior to the enactment of CASL, the proportion of all email sent that was unsolicited was over 80%.¹² More recent data appears somewhat inconsistent, with one report stating that the percentage of abusive emails between 2012 and 2014 ranged between 87% and 90%¹³ and a different report stating that spam levels have fallen consistently from a peak of 85% in 2009 to 67% in 2014.¹⁴

42. The record clearly demonstrates that Parliament's intention when enacting CASL was to fight online threats in Canada, particularly unsolicited CEMs, with a view to protecting the e-economy. House of Commons debates regarding CASL reinforce this view of its purpose:

We need to take strong steps to protect the integrity of the electronic marketplace by reducing the harmful effects of threats to the online economy. The Internet has emerged as a significant medium for the

¹⁰ *Reference re Firearms Act (Can.)*, 2000 SCC 31, at para. 21.

¹¹ Levine Report, *supra* note 8, at para. 54; and *Stopping Spam – Creating a stronger, safer Internet*, Task Force on Spam, May 2005 (Canadian Task Force Report).

¹² *Email Metrics Program: The Network Operators' Perspective*, Messaging Anti-Abuse Working Group, Report #6, October 2007.

¹³ *Email Metrics Program: The Network Operators' Perspective*, Messaging, Malware and Mobile Anti-Abuse Working Group, Report #16, November 2014.

¹⁴ Nadezhda Demidova, Tatyana Shcherbakova, and Maria Vergelis, *Kaspersky Security Bulletin: Spam in 2014*, Kaspersky Lab, 12 March 2015.

conduct of commerce and communications, both in Canada and around the world. An efficient and dynamic electronic marketplace can boost the competitiveness of an economy.¹⁵

43. Based on the stated purpose and legislative history of the Act, the Commission disagrees with CompuFinder's assertion that the main thrust of CASL is to regulate the sending of commercial information. This takes too narrow a view of CASL. The purpose of the Act, when viewed as a whole scheme, deals with electronic commerce (e-commerce), with CEMs (and the information to be contained therein) being only one aspect thereof. CASL regulates not only unsolicited CEMs but also other online threats such as the altering of transmission data and the installation of computer programs.
44. As for the effects of CASL, the Commission must look not only at the direct effects of the legislation, but also at the follow-through effects that it may be expected to produce.¹⁶
45. In the Commission's view, the direct effect of CASL is the implementation of a national regulatory scheme focusing on certain specific aspects of the Canadian digital economy, including the sending of unsolicited CEMs (section 6), the alteration of transmission data in an electronic message in the course of a commercial activity, i.e. routing hacking (section 7), and the installation of unwanted computer programs in the course of a commercial activity (section 8).¹⁷
46. It appears from the record that this would generally not lead, as a follow-through effect, to the displacement of any existing provincial regulatory scheme. Prior to CASL, no Canadian province or territory had taken or had proposed to take legislative action in relation to the sending of unsolicited commercial messages and related online threats.¹⁸ CASL does not duplicate a legislative scheme enacted by provincial legislators exercising their jurisdiction over property and civil rights under subsection 92(13) of the *Constitution Act, 1867*.
47. Although one of the narrow effects of CASL is to regulate certain day-to-day transmissions of commercial information, some of which likely take place wholly within individual provinces, CASL's overall effect is to implement a scheme aimed at helping to ensure the viability of e-commerce throughout Canada, across all provincial and territorial boundaries.

¹⁵ *House of Commons Debates*, 40th Parl., 2d Sess., No. 53 (7 May 2009) at 3216 (Hon. Mike Lake, Parliamentary Secretary to the Minister of Industry).

¹⁶ *Reference re Securities Act*, *supra* note 6, at para. 98.

¹⁷ CASL also addresses the making of false or misleading representations in the promotion of business interests through online communications, though it does so by way of a consequential amendment to section 52.01 of the *Competition Act* (at section 75 of CASL). This provision is administered by the Competition Bureau rather than the Commission.

¹⁸ Leduc Report, *supra* note 8, at para. 94.

48. Given its purpose and effects, CASL's pith and substance is to implement a scheme to regulate certain conduct that could adversely affect the Canadian digital economy. The legislation filled a regulatory gap in this respect and proposed a national regulatory scheme that would have otherwise had to be incorporated in various existing federal statutes, such as the *Competition Act*, R.S.C. 1985, c. C-34, the *Criminal Code*, R.S.C. 1985, c. C-46, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA), and the *Telecommunications Act*, S.C. 1993, c. 38.¹⁹

Classification

Positions of parties

49. CompuFinder argued that CASL properly falls under the provincial heads of power relating to property and civil rights and matters of a local nature in a province rather than the federal general trade and commerce head of power.
50. CompuFinder submitted that the test established by the Supreme Court in *General Motors*²⁰ for federal competence over general matters of trade and commerce is not satisfied in this case. For instance, CASL does not address a matter of genuine national importance and its scope does not go to trade as a whole in a way that is distinct from provincial concerns.
51. The Attorney General agreed with CompuFinder with respect to the approach that ought to be followed when looking into whether a particular issue requires national rather than local regulation. It argued that the Commission should examine the legislative scheme through the lens of *General Motors* to determine whether, viewed in its entirety, the scheme addresses a matter of genuine national importance and scope. However, in the Attorney General's view, the pith and substance of CASL does fall under the general trade and commerce head of power.

Commission's analysis and determinations

52. Parliament's jurisdiction over trade and commerce under subsection 91(2) of the *Constitution Act, 1867* includes two branches: (i) interprovincial commerce, and (ii) the general trade and commerce head of power. The determination of whether CASL properly falls under the general trade and commerce head of power requires the Commission to analyze the importance of an activity to the national economy and whether an activity should be regulated by Parliament as opposed to the provinces.²¹ The Supreme Court, in *General Motors*,²² set out a non-exhaustive list of questions to guide this inquiry:

¹⁹ CASL does include consequential amendments to a number of other federal statutes, including the *Competition Act* and PIPEDA.

²⁰ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

²¹ *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65 at para. 16.

²² *General Motors*, *supra* note 20, at pp. 662-663.

- i. Is the law part of a general regulatory scheme?
 - ii. Is the scheme under the oversight of a regulatory agency?
 - iii. Is the law concerned with trade as a whole rather than with a particular industry?
 - iv. Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?
 - v. Would failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?
53. In the present case, the first two questions are answered in the affirmative. Indeed, CompuFinder conceded that CASL is part of a general regulatory scheme monitored by a regulatory agency. In addition, a plain reading of the Act clearly indicates that CASL instituted a general scheme that regulates a variety of online conduct such as sending unsolicited CEMs, installing computer programs without consent, and the unauthorized altering of transmission data. CASL also constitutes a regulatory scheme through its connections with other statutes, including PIPEDA and the *Competition Act*.²³ CASL is overseen by three distinct regulatory agencies: the Commission, the Competition Bureau, and the Office of the Privacy Commissioner of Canada.
54. The third question is whether CASL is directed at trade as a whole rather than at a particular industry. CompuFinder argued that, while CASL does not target a particular industry, it does target for regulation a specific commodity: information. It argued that CASL does not address a matter of genuine national importance and scope going to trade as a whole in a way that is distinct from provincial concerns. Rather, it regulates the day-to-day sending of information within provinces, no matter how faint the connection to commerce.
55. On the other hand, the Attorney General submitted that the e-economy is not restricted to any specific area of commerce or particular industry and that the nature of the Internet and the e-economy render provincial borders meaningless and remove the very notion of local. The Attorney General submitted substantial evidence of the extent and scope of the activities that are regulated by CASL and their importance to the national economy.
56. The record indicates that electronic commerce has become a key pillar of the Canadian digital economy. In 2010, Canadians placed about 114 million online orders, valued at roughly \$15.3 billion.²⁴ Estimates suggested that, in 2016,

²³ For example, paragraph 20(3)(c) of CASL provides that one of the factors to be considered in determining the quantum of an AMP is whether the person against whom an AMP is imposed has a history of reviewable conduct or contraventions under certain sections of the *Competition Act* or PIPEDA.

²⁴ *E-commerce in Canada: Pursuing the promise*, Standing Committee on Industry, Science and Technology, May 2012.

Canadian consumers would place orders worth about \$30 billion online from Canadian vendors, amounting to about 6% of total retail sales, and would place orders worth a similar amount with vendors from other countries. About 70% of Canadian Internet users make at least one online purchase per year.²⁵

57. Email is an integral part of e-commerce. Often, whenever a consumer places an order, the vendor will send transactional messages confirming the order and reporting its status, either manually or through an automated system. These emails may contain customer surveys or suggestions for follow-up orders. Others send marketing material, bills, or notices regarding the availability of products to customers via email.²⁶
58. Although sent primarily via email, unsolicited CEMs can be sent via other electronic means of communication, including text messaging, instant messaging, and various forms of social media.
59. In May 2004, the then-Minister of Industry announced the establishment of a public/private-sector Task Force on Spam (the Canadian Task Force) to investigate solutions to the increasing problem of spam email. In May 2005, the Canadian Task Force published a report in which it concluded that spam discourages the use of electronic messages as a viable means of communication and threatens the growth and acceptance of legitimate e-commerce.²⁷
60. In its 2006 final report, the OECD²⁸ Task Force on Spam (the OECD Task Force) also recognized that spam undermines consumer confidence:

For professional and business users, spam represents a loss of productivity and imposes direct costs by increasing the need for technical support and software solutions such as filters. Spam imposes more general societal costs by reducing the reliability of e-mail as a communication tool and threatening the security of a company's internal network.²⁹

61. Unsolicited CEMs are a common vehicle for electronic threats, such as phishing attacks, malware, botnets (malware that is controlled remotely), identity theft, and online scams. Because of these threats, the Commission agrees that unsolicited CEMs undermine consumer confidence in electronic transactions and e-commerce.

²⁵ Levine Report, *supra* note 8, at para. 27.

²⁶ *Ibid.* at paras. 29-30.

²⁷ Canadian Task Force Report, *supra* note 11.

²⁸ The Organisation for Economic Co-operation and Development

²⁹ *Anti-Spam Toolkit of Recommended Policies and Measures*, OECD Task Force on Spam, OECD Digital Economy Papers No. 114, April 2006.

62. Electronic threats, and unsolicited CEMs, which facilitate the spread of such threats, impair Canada's e-economy in other ways. There is a direct cost to small and large businesses, which includes investments in anti-spam technologies (filtering software), losses in user productivity, help desk costs, wasted storage, security solutions, and server capacities.³⁰
63. In *General Motors*,³¹ the Supreme Court indicated that federal legislation may have some effect on trade carried on solely within one province without this being fatal to the legislation's validity.
64. Based on the above, the Commission concludes that the matters dealt with in CASL are not issues of purely local concern but are rather of crucial importance to the national economy. Electronic threats are not confined to a set or group of participants in any economic sector, or to a specific location in Canada. CASL addresses a diffuse matter that permeates the economy as a whole with deleterious effects that transcend provincial boundaries.³²
65. The fourth question addresses the constitutional capacity of the provinces to enact a similar scheme acting in concert. While CompuFinder argued that the sending of CEMs could be regulated effectively by the provinces, the Attorney General submitted that any attempt by the provinces to regulate in this area would be ineffective given the borderless character of the Internet; a solution to the problem requires international cooperation, which is specifically provided for in CASL.
66. As noted above, the record of this proceeding indicates that prior to CASL, no Canadian province or territory had taken or had proposed to take legislative action in relation to the sending of unsolicited CEMs and related online threats.
67. Under the circumstances, the Commission does not consider that the provinces, acting in concert, could achieve the same goal as the federal scheme that has been put in place through CASL. The matters that are being regulated, as discussed above, clearly have national effects that implicate all commercial sectors operating within the Canadian digital economy.
68. International cooperation and enforcement are also key elements of the legislation. This is illustrated, for example, by section 60 of CASL, which allows for the sharing of certain information between the Government of Canada and foreign governments or international organizations under certain conditions.
69. Given the global and borderless nature of the Internet, effectively addressing unsolicited CEMs and other online threats requires the harmonization of anti-spam efforts and cooperation among different countries in enforcing anti-spam laws. Even

³⁰ Levine Report, *supra* note 8.

³¹ *General Motors*, *supra* note 20, at pp. 692-693.

³² *Reference re Securities Act*, *supra* note 6, at para. 87.

if the provinces had the constitutional capacity to enact uniform legislation addressing these issues, they would likely, as sub-national entities, be unable to participate in international cooperation and enforcement in a unified and effective manner.

70. Moreover, a province's inherent prerogative to resile from any interprovincial scheme further calls into question the constitutional capacity of the provinces to achieve and sustain the truly national goals of CASL.³³ There is no assurance that they could effectively address issues such as unsolicited CEMs or other related online threats on a sustained basis.
71. Based on the above, the Commission must conclude that any provincial or interprovincial approach could not result in the enactment of a scheme truly comparable to that established by CASL.
72. Under the fifth question of *General Motors*, the Commission must determine whether the absence of a province from a hypothetical scheme attempting to achieve the same ends as CASL would prevent its effective operation in other parts of the country.
73. Having already determined that CASL seeks to ensure the viability of e-commerce throughout Canada and that its effects extend beyond any provincial or territorial boundary, it is reasonable to conclude that the success of any attempt at a provincial scheme would require the participation of all the provinces. A province with no regulation or with weaker regulation than others would undermine the objective of supporting the e-economy by combatting online threats. In such a scenario, the effectiveness of the entire inter-provincial scheme would be considerably lowered, as opposed to the federal regime, which does not require any provincial regulatory action.

Conclusion

74. Based on the above, the Commission finds that CASL falls under the general federal trade and commerce head of power of subsection 91(2) of the *Constitution Act, 1867*; therefore, the law is *intra vires* Parliament.

Does CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter?

75. The Commission must determine whether the impugned provisions of CASL infringe CompuFinder's constitutionally protected freedom of expression. If so, the Commission must determine whether the infringement is prescribed by law and can be demonstrably justified in a free and democratic society.

³³ *Ibid.* at paras. 120-121.

Positions of parties

76. CompuFinder argued that the commercial expression of corporations is protected by section 2(b) of the Charter. In its view, CASL impacts a wide range of protected expression, extending to purely factual statements about a person that might promote that person's public image as being someone who engages in a commercial activity, and casual or trivial interactions, such as offering to mow a neighbour's lawn or promoting a child's lemonade stand. Further, it covers a wide range of media, including email, Short Message Service (SMS) text messages, instant messaging platforms, social media platforms, and (non-exempted) electronic portals.
77. The Attorney General accepted that CompuFinder's freedom of commercial expression is protected under section 2(b) of the Charter and that sending an unsolicited CEM falls within the scope of protected activity. It agreed that the purpose of section 6 of CASL is to impose restrictions and conditions on how unsolicited CEMs can be conveyed, which infringes the sender's freedom of expression.

Commission's analysis and determinations

78. In *Irwin Toy*,³⁴ the Supreme Court adopted a two-step inquiry to determine whether freedom of expression is infringed. The first step involves determining whether the activity in question falls within the sphere of conduct protected by freedom of expression. If it does, the second step is to determine whether the purpose or effect of the government action is to restrict the expressive activity.
79. However, in this case, the Attorney General conceded that section 6 of CASL, which prohibits the sending of unsolicited CEMs, infringes section 2(b) of the Charter. In the Commission's view, this concession is appropriate. Further, it is reasonable to conclude that the impugned provisions in the statute directly related to section 6 would likewise infringe section 2(b). It is clear that CEMs convey meaning and are, therefore, protected, and that the CASL prohibition against sending CEMs without consent and related provisions restrict, in purpose and effect, CompuFinder's ability to convey this meaning.

Is the violation justified under section 1 of the Charter?

80. The issue before the Commission is whether the infringement of CompuFinder's freedom of expression is justified under section 1 of the Charter. To establish such a justification, the onus is on the Attorney General to demonstrate, on a balance of probabilities, that
- the limit on the right or freedom is prescribed by law;
 - the legislative goal is pressing and substantial;

³⁴ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

- there is a rational connection between the limit and CASL’s objectives;
- the impairment of the right or freedom (or the degree of infringement) is minimal; and
- there is an overall proportionality between the salutary and deleterious effects of the limiting measure.³⁵

Is the limit prescribed by law?

81. A limit on a Charter right or freedom must be prescribed by law to be justified under section 1. This means that the limiting measure must be sufficiently clear to enable individuals to understand what the law is before they act.

Positions of parties

82. CompuFinder contended that CASL’s infringement of freedom of expression does not amount to a limit prescribed by law. The company submitted that the law fails to set an intelligible standard for the prohibition it imposes and fails to adequately delineate the zone of risk that Canadians face in sending electronic communications.

83. CompuFinder’s argument focused principally on the purported vagueness of certain concepts in the Act. For instance, it argued that the definition of “commercial electronic message” is so broad that the public cannot be certain when it applies. Any message that has the remotest possibility of creating an impression that it has an incidental commercial purpose could be caught. CompuFinder submitted that the Act provides that the analysis of the message depends on the purpose of the sender but provides no guidance on how to assess secondary or ancillary commercial purposes.

84. Further, the company argued that the definition of “electronic address” in CASL captures anything “similar” to an email account, a telephone account, or an instant messaging account. Similarity is an imprecise concept, providing little useful guidance as to what other communications platforms will be captured. CompuFinder also argued that certain other aspects of the Act are vague, including the exceptions to the unsolicited CEM prohibition.

85. According to CompuFinder, subsequent publications purporting to interpret these vague provisions published by the Commission or the Department of Industry tend to demonstrate the lack of clarity in the statute.

86. The Attorney General argued that, for a limit to be prescribed by law in the relevant sense, absolute precision is not required. Rather, the requirement is that it provide an intelligible legal standard that delineates a “zone of risk” capable of being the subject of legal debate, and capable of providing fair notice to citizens. The definition of “commercial electronic message,” for instance, although broad, sets out an

³⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103, as modified by *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

intelligible legal standard in that it puts individuals on notice that their intended message may fall within the type of message targeted by CASL.

Commission's analysis and determinations

87. The “doctrine of vagueness” is explained by the Supreme Court in *Nova Scotia Pharmaceutical Society*.³⁶ Under this doctrine, a measure that imposes a limit on a protected right or freedom will not be considered to be prescribed by law if it does not represent an intelligible principle, carry meaning, or have conceptual force. This principle is founded on the rule of law in general and on requiring fair notice to the citizen and limiting enforcement discretion in particular. The Supreme Court has determined that a law will be found unconstitutionally vague if it lacks in precision so as not to give sufficient guidance for legal debate. The threshold for finding a law vague is relatively high.

88. Pursuant to subsection 1(2) of CASL, “commercial electronic message” is defined as follows

[A]n 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

- (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- (b) offers to provide a business, investment or gaming opportunity;
- (c) advertises or promotes anything referred to in paragraph (a) or (b); or
- (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.

89. The Commission considers that, although broad, this definition is not vague in the relevant sense. It clearly focuses on the sending of electronic messages targeted towards the encouragement of participation in a commercial activity. The definition itself includes a list of examples that provide guidance as to its application. No definition in the Act can be considered in a vacuum. Each must be read within the entire context of the regulatory scheme of which it is a part.³⁷

³⁶ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

³⁷ *Ibid.* at pp. 647-648.

90. An enactment need not provide a level of guidance that would allow a person to predict the legal consequences of any given course of conduct in advance. As the Supreme Court stated in *Irwin Toy*:³⁸

Absolute 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. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.

91. Laws such as CASL are framed in general terms – rather than being detailed exhaustively – to suit the achievement of their objectives and to allow for the flexibility that such a purpose requires.
92. The clarity of the definition of “commercial electronic message” is reinforced by the fact that a number of the terms that appear in the definition have also been defined: “commercial activity” and “electronic message” have their own definitions in subsection 1(1) of the Act. The purpose of the Act, as set out in section 3, is also helpful in this regard as it is clearly aimed at regulating commercial conduct that discourages the use of electronic means to carry out commercial activities. Simply put, if someone sends an electronic message to an electronic address and that message is of a commercial character, there is a strong possibility that the message is a CEM and may be subject to CASL.
93. As stated by the Supreme Court in *Nova Scotia Pharmaceutical Society*, legal rules only provide a framework to guide behaviour. Certainty is reached only in specific cases, in the application of those legal rules by a competent authority. Meanwhile, conduct is guided by approximation that sometimes results in a narrow set of options, and sometimes in a broader set.³⁹
94. In light of the above, the Commission concludes that the definition of “commercial electronic message” provides an intelligible legal standard that delineates a risk zone capable of providing fair notice to citizens.
95. Pursuant to subsection 1(1) of CASL, “electronic address”⁴⁰ is defined as follows:

[A]n address used in connection with the transmission of an electronic message to

- (a) an electronic mail account;

³⁸ *Irwin Toy*, *supra* note 34, at p. 983; cited in *Nova Scotia Pharmaceutical Society*, *supra* note 36, at page 639.

³⁹ *Nova Scotia Pharmaceutical Society*, *supra* note 36, at pp. 638-639.

⁴⁰ A definition of “electronic address” also appears, in substantially similar form, in subsection 7.1(1) of PIPEDA, as a result of a consequential amendment to that Act contained in section 82 of CASL.

- (b) an instant messaging account;
- (c) a telephone account;
- (d) any similar account.

96. CompuFinder argued that “any similar account” is also too vague of a concept to be prescribed by law. However, only messages sent to email accounts are at issue in the present case, since all the CEMs that formed the basis of the violations set out in the notice of violation were emails. In this regard, CompuFinder is making an argument in the absence of applicable facts.
97. Nonetheless, despite the absence of specific facts to consider on this point, an ordinary reading of this definition, taken in its full and proper context, offers a sufficiently clear idea of what type of account is targeted by the Act. The interpretation of “any similar account” should take into consideration the accounts described in paragraphs (a), (b), and (c) of the definition. These examples of types of accounts provide interpretive assistance, limit enforcement discretion, and delineate an area of risk. The Commission therefore concludes that the definition of “electronic address” provides sufficient guidance for legal debate and is not impermissibly vague.
98. CompuFinder raised similar, albeit cursory, vagueness arguments with respect to other concepts and definitions in the Act, such as “commercial activity,” “implied consent,” “existing business relationship,” “relationship,” and “activity.” Many of these concepts are already defined in CASL and, in any case, must be interpreted by reference to the entire context of the Act and its purposes.
99. Further, it is true that subsequent interpretive documents published by the Commission or the Department of Industry⁴¹ are intended to provide additional guidance to facilitate compliance with the Act. However, the Commission rejects the notion that the mere existence of such documents should be interpreted as an indication that the Act itself is impermissibly vague.
100. Pursuant to section 62 of CASL, the Commission is responsible for the administration of sections 6 to 46 of the Act. The Commission considers that a key part of this mandate involves the promotion of public awareness and understanding of CASL and its requirements, including the publication of informational materials.
101. To reiterate, there is no requirement that CASL (or any law) provide enough guidance to predict, with certainty, the specific legal consequences of a given course of conduct in advance. In the Commission’s view, the Attorney General has demonstrated that the approach to the doctrine of vagueness set out in the Supreme

⁴¹ For instance, see the Commission’s [Frequently Asked Questions about Canada’s Anti-Spam Legislation](#) (FAQs). See also the Department of Industry’s Regulatory Impact Analysis Statement, prepared in conjunction with the promulgation of the Governor in Council regulations and intended, in part, to provide guidance on CASL’s purposes and application: (2013) C. Gaz. II 2912.

Court's jurisprudence does not support a finding of impermissible vagueness in the case of CASL. The impugned provisions provide, at a minimum, guidance constituting an intelligible standard to those who may be affected by them.

Is the legislative goal pressing and substantial?

102. At this stage, the government must establish that the limit was put in place in pursuit of an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.⁴²

Positions of parties

103. CompuFinder submitted that the objectives of CASL set out in section 3 are very broad and cannot be considered pressing and substantial in the context of a mere "annoyance" like spam. CompuFinder noted that the evidence on the record indicates that spam levels have fallen consistently from a peak of 85.2% of all emails sent in 2009 to 66.76% in 2014. Widely used contemporary filtering products are typically more than 99.9% effective at removing spam.

104. It also submitted that if there was a spam problem a decade ago, the Attorney General did not demonstrate that the problem was still pressing and substantial in 2014 when the CEM prohibitions came into effect. The company argued that the evidence adduced by the Attorney General relates to the U.S. or the entire world, rather than specifically to Canada, and is mostly a decade or more out of date.

105. The Attorney General submitted that the main objective of CASL, as stated in section 3, and the sub-objective of ensuring confidence in the Canadian online ecosystem by prohibiting certain acts that can be harmful to the economy as a whole, are pressing and substantial.

106. The Attorney General submitted that email is an integral part of e-commerce in Canada, but that spam harms it: through its volume (about 90% of all email sent) it (i) imposes costs on Internet service providers, businesses, and consumers (e.g. from higher Internet access prices); (ii) impairs the availability, reliability, and efficiency of networks; (iii) is used to distribute threats such as malware and phishing; or (iv) may be otherwise fraudulent.

107. Spam also discourages the use of e-commerce by undermining trust and confidence in this method of transacting business, reducing the frequency of online transactions and costing businesses millions of dollars in lost productivity, wasted storage, and the purchase of anti-spam technologies.

Commission's analysis and determinations

⁴² *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 142.

108. The government's objective in enacting CASL is revealed within the title of the 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...."
109. The Act is clearly focused on e-commerce in Canada as a whole. This is expanded on in the objective clause of the Act (section 3).⁴³
110. In the Commission's view, it is clear that the government's objective is pressing and substantial. The factual evidence put forward by the Attorney General is detailed and convincingly supports this conclusion. There is an abundance of literature, analyses, reports, and statistical evidence that demonstrate the existence of spam and other electronic threats, the impact that they have on Canadian businesses and consumers, and how countries around the world have been compelled to introduce legislation to address these threats.
111. In May 2004, the Canadian Task Force on Spam published its report⁴⁴ setting out background information, detailing its activities, and recommending action to address spam-related problems, including
- the need for a multi-faceted, multi-stakeholder approach: clear laws, new laws to fill gaps in existing law, strong penalties, and vigorous enforcement, all coordinated within an overarching legal framework that also facilitates the development of sound business practices, consumer awareness, public education, and international cooperation;
 - the importance of communication and coordination among different stakeholder groups involved in the fight against spam; and
 - the need to treat anti-spam efforts as part of a broader, comprehensive effort to proactively address threats to Internet-based communication and commerce.
112. Whether spam levels are today at 85%, 66%, or even 50% of all emails sent, this number is high enough to reflect a pressing and substantial concern.
113. According to Statistics Canada, in 2010, 51% of Internet users ordered goods or services for personal or household use. In total, Canadians placed nearly 114 million orders, valued at approximately \$15.3 billion. Of those who did not place an order, 19% cited security reasons, 63% reported having had a virus, and 37% said they had received emails requesting personal information from a fraudulent source as reasons for not ordering online.⁴⁵

⁴³ This section is quoted in its entirety in para. 38 of this decision.

⁴⁴ Canadian Task Force Report, *supra* note 11.

⁴⁵ *Individual Internet use and E-commerce*, Statistics Canada, 12 October 2011.

114. According to publicly-released statistics from the Commission-managed Spam Reporting Centre, the centre had received approximately 500,000 complaints as of February 2016, at a fairly steady rate of about 22,000 per month (5,000 to 6,000 per week).⁴⁶
115. The costs to businesses to protect themselves from unsolicited CEMs and other electronic threats are also well documented. A San Francisco consulting firm, Ferris Research Inc., estimated that spam would cost U.S. organizations more than \$42 billion in 2009 (\$130 billion worldwide) due to lost productivity, as well as additional equipment, software, and staff time needed to address the problem. A 2012 study⁴⁷ offered a more conservative estimate of roughly \$20 billion per year in the U.S., with the authors noting that this figure would be much higher if it were not for private investment by firms in anti-spam technology.
116. Although data specific to Canada is less readily available, Statistics Canada reports that enterprises used multiple tools to protect their data and digital technologies from unwanted access or attack in 2013. Just over three-quarters (76%) of enterprises used anti-virus or anti-spyware software, 62% used a firewall, and 53% used a spam filter to block unwanted email. The percentage of enterprises using these technologies may be higher than reported, since enterprises are not always aware that these features may be embedded in other software packages.⁴⁸
117. According to Professor Michael Geist,⁴⁹ the cost of spam extends far beyond the expense associated with filtering, transferring, downloading, and deleting it. There are additional costs that extend to all businesses, since spam undermines consumer confidence in CEMs more generally, making them less likely to be opened, believed, or acted upon. Spam filtering has become a necessity, but an unwanted effect is that it decreases the reliability of email, since false positives invariably lead to some legitimate messages ending up in the junk folder, which requires users to spend time reviewing the spam or senders to simply accept that some messages will not reach their intended destination.
118. Moreover, the Commission is not persuaded by CompuFinder's argument regarding the effectiveness of contemporary filtering products. Even if it were accepted that contemporary filtering products are generally effective, there is still evidence that the volume of unwanted emails that is being sent remains high. Further, there is a cost associated with such filtering products, and there is no guarantee that they will remain effective.

⁴⁶ Despite its name, the Spam Reporting Centre gathers intelligence to support all aspects of enforcement under CASL, not just those related to spam. See, for instance, Keith Rose, *CRTC CASL Compliance and Enforcement update*, 12 February 2016.

⁴⁷ Justin M. Rao and David H. Reiley, *The Economics of Spam*, *Journal of Economic Perspectives*, Vol. 26, No. 3, Summer 2012.

⁴⁸ *Digital technology and Internet use, 2013*, Statistics Canada 11 June 2014.

⁴⁹ Michael Geist, *In Defence of Canada's Anti-Spam Law, Part One*, 9 July 2014.

119. Based on the above, the Commission concludes that the Attorney General has established, on balance, that the objectives of the government in enacting the impugned provisions were pressing and substantial at the time of enactment and remain so now.

Is the limit rationally connected to the objectives?

120. The following stage of the analysis requires the government to establish that the limit is proportionate, an inquiry that has three sub-stages. The first of these examines whether there is a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective. This element of the test has been described by the Supreme Court as not particularly onerous.⁵⁰

Positions of parties

121. CompuFinder submitted that CASL's CEM prohibitions are not rationally connected to the law's stated objectives. Specifically, the law fails to target the commercial activity that, according to section 3 of the Act, discourages electronic commerce. Instead, it creates the very impairments to commercial activity that it purportedly intends to avoid.

122. Furthermore, the company argued that CASL can only be enforced against Canadians and Canadian organizations. Consequently, even a total prohibition on expression would not actually protect Canadians from harmful spam, which would continue to flow from abroad. CompuFinder disputed whether CASL was in line with international practices and argued that the evidence submitted by the Attorney General failed to demonstrate that CASL's broad CEM prohibition is not arbitrary.

123. The Attorney General submitted that CASL's limits on the sending of CEMs serve to reduce unwanted commercial emails, many of which are harmful to e-commerce. The fundamental principle enshrined in the impugned provisions of CASL is that certain types of CEMs can only be sent with the prior consent of the recipient.

124. The Attorney General argued that this opt-in consent model keeps users safe from electronic threats because it enables users to keep their electronic mailboxes free from the spam that could carry such threats in the first place. This model also keeps the cost of sending CEMs with the sender rather than with the Internet users who receive them. Moreover, it is informed by the recommendations of international groups, such as the OECD and the London Action Plan.⁵¹

⁵⁰ *Health Services and Support*, *supra* note 42, at para. 148.

⁵¹ The London Action Plan was founded in 2004 to promote international spam enforcement cooperation among governments, public agencies, and certain private sector actors, and to address spam-related problems, such as online fraud and deception, phishing, and dissemination of viruses. As of 2016, it has been known as the Unsolicited Communications Enforcement Network, or UCENet.

125. Further, there is clear evidence that CASL is effective and that Canadian spam levels are declining as a result of the law.

Commission's analysis and determinations

126. In *Hutterian Brethren*,⁵² the Supreme Court indicated that the rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. However, to satisfy this requirement, the Attorney General must show that it is reasonable to suppose that the limit may further the goal, not that it will do so. There must be a causal connection between the infringement and the benefit sought on the basis of reason or logic.

127. In *Thomson Newspapers Co.*,⁵³ the Supreme Court, citing Professor Peter Hogg, noted that because rational connection is often a difficult matter to establish by evidence, the Court has not always insisted on direct proof of the causal relationship.

128. For instance, in *Health Services and Support*,⁵⁴ the Supreme Court found that this requirement was satisfied, although the evidence did not conclusively establish that the means adopted by the law at issue achieved the government's objectives. In the circumstances, it was at least logical and reasonable to conclude that there was a rational connection.

129. In the present case, the Attorney General has demonstrated a rational connection between the limits imposed on the sending of CEMs and the objectives set out in section 3 of CASL. More specifically, it is logical and reasonable to conclude that the section 6 prohibition against sending unsolicited CEMs and related provisions (the main measures targeted by CompuFinder) would reduce spam and, consequently, its adverse effects on Canadian businesses and consumers. This, in turn, would have a causal connection to the achievement of the objective of promoting the efficiency and adaptability of the Canadian e-economy.

130. It is reasonable to consider that a prohibition against an activity that poses certain risks will curtail those risks.⁵⁵ There is evidence on the record that unsolicited CEMs can amount to security threats, impose costs on Canadians, and decrease confidence in the e-economy. Accordingly, it stands to reason that a prohibition on unsolicited CEMs will curtail these risks.

131. There is also evidence on the record indicating that CASL is already having an effect. An early 2015 report indicated that, while the total proportion of email composed of spam appears to have remained relatively stable, the total volume of spam originating in Canada every month since CASL was implemented has been

⁵² *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para. 48.

⁵³ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 39.

⁵⁴ *Health Services and Support*, *supra* note 42, at para. 149.

⁵⁵ *Carter v. Canada (Attorney General)*, 2015 SCC 5.

lower than the lowest month before the law went into effect, and Canadians have received less spam since the coming into force of CASL.⁵⁶

132. Another 2015 study concluded that CASL has been good for email marketing in Canada.⁵⁷ This study noted that marketers are now more aware of all the email that their companies are sending, that there is less inbox clutter, and that email benchmarks, such as the proportion of messages that are opened by recipients, are steady.
133. Even materials relied upon by CompuFinder appear to indicate that CASL meets a need and has been effective. For instance, Cyberimpact, a Canadian Web services company, concluded that the introduction of CASL has impeded the competitiveness of homegrown business, but identifies the cause as being not the law itself but a misunderstanding of it.⁵⁸
134. Given that the requirement at this stage is simply whether there is a rational, logical link between the infringing measures and the government's objectives, the record clearly demonstrates that it has been satisfied.

Is the impairment minimal?

135. At this stage of the analysis, the Commission must inquire into whether the impugned provisions of the law minimally impair the Charter right or freedom. The question is whether there are less harmful means of achieving the same legislative goal. A measure will generally meet this requirement so long as the limit it places on a right or freedom is reasonably tailored to the pressing and substantial legislative goal. The legislature is to be accorded a degree of deference in its choice between a range of alternatives where the measure deals with a complex social issue.⁵⁹

Positions of parties

136. CompuFinder maintained that CASL does not impair freedom of expression as little as reasonably possible. Rather, it considered CASL to be "maximally impairing," mainly due to the opt-in feature of requiring express consent except in a closed set of circumstances.
137. CompuFinder submitted that CASL also results in the limitation of legitimate and beneficial commercial expression through its definition of "commercial electronic

⁵⁶ 2015 Q1 Security Threat Report, Cloudmark, 2015. This report notes that the percentage of all email received by Canadians that was spam increased by 0.1% over the period in question.

⁵⁷ Geoff Linton and Matthew Vernhout, *The Marketing Landscape since CASL: One Year Later*, Inbox Marketer, 2015. According to this study, only 16% of all email sent is spam. However, this figure is based on Cloudmark's data, which calculates spam rates only after spam filters have already been applied.

⁵⁸ Patrick Tremblay, *Canada's Anti-Spam law is effective, but it's harming Canadian businesses*, Cyberimpact, June 2015 (Cyberimpact Report).

⁵⁹ *Hutterian Brethren*, *supra* note 52, at para. 53.

message,” which includes an electronic message in respect of which, as stated in subsection 1(2), it would be reasonable to conclude that it has as its purpose, or one of its purposes, to encourage participation in a commercial activity. This gives CASL an exceptionally broad reach and allows it to bring within its scope classes of messages that have nothing to do with the harms that the law is intended to address.

138. CompuFinder further submitted that CASL does not target only false, fraudulent, misleading, or malicious spam; it bans all CEMs, subject to consent, including CEMs seeking consent.
139. CompuFinder argued that CASL could have used an opt-out model, as is used in the United States, under the U.S. CAN-SPAM Act,⁶⁰ or an opt-in model plus an open definition of implied consent, as is used in the Australian Spam Act.⁶¹
140. The company also argued that there is no *de minimis* exemption to the requirements of CASL. The CEM prohibition applies even when commercial purpose is ancillary and even when the expectation of profit is absent.
141. It further argued that the exemptions and exclusions under the Act and Governor in Council regulations are vague, narrow, or both, and are difficult to apply. For instance,
 - family and personal relationships, as defined in section 2 of the Governor in Council regulations, are overly narrow (they do not include siblings or cousins);
 - the implied consent rule for existing business relationships is unavailable to vendors selling through intermediaries;
 - the implied consent rules for conspicuous publication and voluntary disclosure only apply to a person’s role in a business capacity;
 - the referral exemption in the Governor in Council regulations requires that the referrer have existing relationships with both the sender and receiver of the CEM;
 - what it referred to as the “business to business” exemption in the Governor in Council regulations is narrowed by vague limitations: the two businesses must have an undefined “relationship,” the CEM must relate to undefined “activities of the recipient organization,” and the exemption applies only to “organizations” (it does not include sole proprietorships); and
 - the fundraising exemption of the Governor in Council regulations applies only to registered charities (it does not include non-profit organizations).

⁶⁰ *Controlling the Assault of Non-Solicited Pornography and Marketing [CAN-SPAM] Act of 2003*, 15 U.S.C. 103.

⁶¹ The *Spam Act 2003* (Cth), Sch. 2, defines consent to mean either express consent or consent that can be reasonably inferred from the conduct and the business or other relationships of the persons concerned.

142. CompuFinder submitted that CASL's approach results in many collateral restrictions on freedom of expression for organizations not seeking profits, whose communications refer to commercial service providers, and for registered charities when those messages go beyond seeking donations.
143. The Attorney General replied that the consent and unsubscribe requirements minimally impair freedom of expression. The Commission should show deference here in the face of a complex regulatory solution to a pressing social problem. The issue is whether the measure falls within a range of reasonable alternatives. CASL does not totally prohibit CEMs; it comprises limited but focused regulation.
144. The Attorney General noted that CASL recognizes existing business relationships that pre-date its coming into force as implied consents. The effect of CASL's exceptions is to significantly narrow the concept of "commercial activity," and the measures were conceived of as means to limit any potential associated regulatory burden.
145. Moreover, the Attorney General submitted that the constitutional validity of an Act cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of the prohibition. The possibility of the Governor in Council enacting regulations providing for additional exclusion of CEMs under subsection 64(1) of CASL provides flexibility and should be taken into account in the context of section 1 of the Charter.
146. The Attorney General also submitted that the limitation on the sending of CEMs gives email recipients control over the dissemination of electronic advertising to them. The requirement for email marketers to obtain consent, identify themselves, and offer an unsubscribe mechanism in their advertising is a reasonable and carefully tailored imposition to protect and promote e-commerce in Canada. Opt-out consent models have failed to stem the steady flow of spam and put the onus on the user to open every email (some of which may contain electronic threats) to unsubscribe from similar messages in the future. Only the U.S. has adopted such a regime, which has been generally criticized as ineffective.

Commission's analysis and determinations

147. The oft-cited statement of the appropriate standard for minimal impairment comes from the Supreme Court's decision in *RJR-MacDonald*:⁶²

The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to

⁶² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160.

infringement...On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

148. In *Sharpe*, the Supreme Court described the government's onus as having to establish that the law is reasonably tailored to its objectives, and noted that there would be practical difficulties and conflicting tensions to be taken into account.⁶³

149. The Commission is also sensitive to the Supreme Court's direction in *Hutterian Brethren* that:⁶⁴

[I]n considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

150. In the present case, while CompuFinder has presented significant evidence that alternative means to pursue the government's objective, which would have a less drastic restriction on freedom of expression, are available, the Commission is nevertheless persuaded that these alternative measures would not be an equally effective means of achieving the government's pressing and substantial objective.

151. On balance, and in light of the complexity of the issue with which CASL deals – but keeping in mind the Supreme Court's guidance in *RJR-MacDonald*⁶⁵ and *Carter*.⁶⁶ that justification under section 1 of the Charter is a process of demonstration, not intuition or automatic deference to the government's assertion of risk – the Attorney General has satisfied the requirements of minimal impairment.

⁶³ *R. v. Sharpe*, 2001 SCC 2, at para. 96.

⁶⁴ *Hutterian Brethren*, *supra* note 52, at para. 55. This case considered the constitutionality of an Alberta law doing away with a previously available exemption, on religious grounds, to the requirement that all drivers' licences bear a photograph of the licence holder.

⁶⁵ *RJR-MacDonald*, *supra* note 62, at paras. 128 and 129.

⁶⁶ *Carter*, *supra* note 55, at para. 119.

152. CompuFinder's argument at this stage is essentially that CASL's CEM prohibition regime is overbroad, capturing more forms of expression than are necessary to achieve the statute's purpose.
153. The Attorney General did not directly respond to each specific allegation of the law's overreach. Instead, its main response to the overbreadth arguments raised by CompuFinder is that the Act does not impose a total ban on the sending of CEMs. Persons wishing to send commercial messages are not barred from using the Internet or email to advertise. In addition, the exceptions and exemptions to the general prohibition contained in section 6 of CASL act as levers that further limit the infringement of freedom of expression.
154. The Commission notes that, as indicated by the Supreme Court in *JTI-Macdonald Corp.*,⁶⁷ when interpreting these exceptions and exemptions, specific words should not be considered in isolation; rather, the interpretation must be guided by Parliament's objective and its global intention sought.
155. In the case of CASL, Parliament's concern was to combat a multitude of electronic threats that could have deleterious effects on Canada's e-economy, Canadian businesses, and Canadian Internet users. In pursuing its objectives, Parliament has deliberately narrowed, and empowered the Governor in Council to make regulations narrowing, the applicability of the Act to certain commercial activities (as defined in subsection 1(1) of the Act), and enacted a long series of exceptions, exclusions, and limitations to the application of prohibitions on the sending of CEMs.
156. Examples of these exceptions can be found in subsections 6(5) and 6(6) of CASL and in the provisions regarding excluded messages in section 3 of the Governor in Council regulations. As a result of these and other exceptions and exemptions, the prohibition in section 6 of CASL does not apply to numerous types of CEMs, including those sent by or on behalf of an individual who has a personal or family relationship with the recipient, those consisting of an inquiry relating to a commercial activity engaged in by the recipient, certain notice-giving or transactional messages, and certain intra-organizational and inter-organizational messages.
157. Further, given that, in cases of ambiguity, claims of overbreadth may be resolved by appropriate interpretation,⁶⁸ where the application of these exceptions and exclusions are potentially ambiguous, and such ambiguity could potentially lead to overbreadth of the provisions in question, they must be interpreted in the manner that would result in the least possible intrusion upon protected expression, while also respecting the intention of Parliament.

⁶⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, at paras. 80-81.

⁶⁸ *Sharpe*, *supra* note 63, at para. 32.

158. Accordingly, the Commission agrees with the Attorney General that the expression limited by CASL is substantially lessened as a result of its exceptions and exemptions. These exceptions, when taken as a whole, significantly narrow the application of section 6 and, as a result, on a balance of probabilities, the impugned provisions do not impair free expression more than necessary to achieve the objectives of CASL. In these circumstances, the limitations on the sending of CEMs, are not unreasonable in light of their legislative purpose.
159. However, the Commission does not agree that it should take into account the Governor in Council's ability to implement further exemptions in the future. In other words, only the exceptions and exemptions that actually existed at the time that CompuFinder sent the messages in respect of which it was issued the notice of violation should be relevant to minimal impairment, as CompuFinder could not have availed itself of any potential exceptions or exemptions beyond these.
160. While CompuFinder argued that less restrictive means were available to achieve CASL's goals, the Attorney General's evidence demonstrates why these measures would not be as effective at pursuing the government's goals. For example, unlike CASL, the U.S. CAN-SPAM Act⁶⁹ does not require express consent prior to the sending of commercial emails. The U.S. law requires that emails include a mechanism that recipients can use to opt out of subsequent messages, and requires senders to comply with these requests.
161. This model keeps commercial emails, including potentially harmful spam, in inboxes until recipients proactively remove them; it also places recipients in the position of having to access emails from potentially unknown senders in order to delete them. In fact, comments on U.S. spam legislation at the time CASL was being considered were already indicating the ineffectiveness of opt-out approaches that had been in place in foreign jurisdictions.⁷⁰
162. Like CASL, the Australian Spam Act requires either express consent or non-express consent (Australia's law refers to the latter as "inferred" consent whereas CASL uses the term "implied" consent). The main difference is that the Australian legislation enumerates fewer, and more general, indicia of how consent can be inferred. CASL, on the other hand, enumerates a greater number of more specific methods of implying consent. Both laws contain exceptions and exemptions to their CEM prohibitions. Given these similarities, it is not clear to the Commission that the Australian model represents an alternative that would materially impair freedom of expression less than the CASL model. At most, it represents one of several reasonable alternatives.

⁶⁹ U.S. CAN-SPAM Act, *supra* note 60.

⁷⁰ See, for example, Jack Loechner, *Unsolicited Email Legislation Ineffective in 2004*, Media Post, 21 January 2005; Carolyn Duffy Marsan, *CAN-SPAM: What went wrong*, Network World, 6 October 2008; and the Leduc Report and the Levine Report, both *supra* note 8.

163. Parliament chose to implement its unsolicited CEM prohibition through an opt-in regime as opposed to an opt-out regime. Each type of regime imposes various limitations on senders. In short, CASL's opt-in regime requires senders of CEMs to obtain the prior consent of the recipient unless the CEM meets one of the multiple exceptions or exemptions set out in the Act or the applicable regulations, or if consent can be implied according to the criteria set out in the legislation.⁷¹ For example, the sender of the message does not have to seek the consent of the recipient if it has an existing business relationship with the person.
164. An opt-out regime permits, in most cases, the sending of unsolicited commercial messages to anyone unless the recipient explicitly requests that the messages stop. However, the Attorney General has raised multiple valid reasons as to why an opt-out approach may be inappropriate. For instance, this approach transfers the burden of effort and cost to avoid unsolicited messages to the message recipient, who would also have to open a message in order to unsubscribe, which alone may be enough to compromise their online security, and the recipient would have to prove that they had opted out in the event of a conflict.
165. It is clear from the evidence filed by the Attorney General that at the time the government was investigating solutions to the increasing problem of unsolicited electronic messages, it considered various options. Amongst these options, the government could have amended existing legislation (PIPEDA, the *Criminal Code*, or the *Competition Act*), put in place one of multiple consent approaches (opt-in, double opt-in,⁷² opt-out, etc.), or put in place some or all of the recommendations of the Canadian Task Force⁷³ to set out a stand-alone, technology-neutral law that addresses spam and spam-related threats. This is what was done with CASL, which included an opt-in CEM model, with multiple exceptions and exemptions.
166. Given the above, and given that, for complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives,⁷⁴ the Commission concludes that the impugned provisions of CASL are reasonably tailored to the objective of dealing with electronic threats to the Canadian digital economy and are, therefore, minimally impairing as that term has been defined by the Supreme Court.

Is there an overall proportionality between the salutary and deleterious effects of the limiting measure?

⁷¹ Some exceptions and exemptions are set out at para. 156 of this decision. The criteria for implied consent are set out in subsections 10(9) to 10(14) of CASL.

⁷² A double opt-in approach imposes the further obligation for senders of CEMs to seek a follow-up confirmation of consent from recipients.

⁷³ Canadian Task Force Report, *supra* note 11.⁷⁴ *JTI-Macdonald Corp.*, *supra* note 67, at para. 43.

⁷⁴ *JTI-Macdonald Corp.*, *supra* note 67, at para. 43.

167. The final stage of the analysis regarding section 1 of the Charter concerns whether there is an overall proportionality between the deleterious effects of the measures that limit the right or freedom and their salutary effects. In other words, are the benefits of the impugned law worth the costs of the rights limitation?⁷⁵ This inquiry, in which the onus remains on the Attorney General, focuses on the practical impact of the law and weighs the attainment of the objectives against the impact on the protected right or freedom.⁷⁶

Positions of parties

168. CompuFinder submitted that CASL's restrictions on expression are out of proportion to the harms it purports to address, and that no other country has enacted comparable legislation. All of the previously identified overreaches provide examples of how CASL's impact on freedom of expression outweighs any benefits. CompuFinder contended that the Attorney General has identified no such benefits.

169. CompuFinder also submitted that while there is inherent value to the constitutionally protected expression that CASL suppresses, there is also a significant cost to the Canadian economy as a result of businesses attempting to come into compliance with CASL. CompuFinder contended that some individual companies have already spent upwards of \$10 million on compliance with CASL and that the total cost across the Canadian economy is in the hundreds of millions of dollars.

170. CompuFinder argued that the Attorney General has, at most, demonstrated that there was a problem a decade ago, which was mostly economic in nature, and linked to certain harmful forms of email. The evidence does not show that CASL has had any real effect on that problem. Instead, it shows that CASL has had a generalized chilling effect on electronic communication in Canada including, but not limited to, commercial expression. In short, CASL has as its purpose to promote the efficiency and adaptability of the Canadian economy, but it actually has the opposite effect.

171. The Attorney General argued that proportionality is weighted in favour of a salutary effect on the public good. CASL's measures are narrowly tailored to maintain confidence in using the Internet for commercial purposes and reasonably allocate the burden of ensuring a secure and workable Internet between commercial and private interests. Further, only deleterious effects in respect of Charter rights and freedoms should be considered at this stage, not costs measured in dollar terms.

172. CASL requires that an organization wishing to send an unsolicited CEM seek the recipient's consent before sending the message, include in any such message an unsubscribe mechanism, and properly identify the sender. The Attorney General argued that these requirements abridge freedom of expression in a minor way when

⁷⁵ *Hutterian Brethren*, *supra* note 52, at para 77.

⁷⁶ *JTI-Macdonald Corp.*, *supra* note 67, at para. 46.

weighed against the corresponding benefits such requirements have on the Canadian economy as a whole.

173. The Attorney General presented evidence that CASL has improved confidence in email marketing and that marketers are having more success with their CEMs since the coming into force of CASL. Canadian open rates, click rates, and click-to-open rates are all higher than before CASL came into force.⁷⁷ Email marketing continues to be one of the top two marketing channels for delivering return on investment.

Commission's analysis and determinations

174. The importance of the objectives of the impugned provisions has already been established. Moreover, Canadians are clearly aware of CASL's existence and appear to be willing to make use of it to formally complain when receiving unsolicited CEMs.⁷⁸

175. The Commission agrees with the Attorney General that this stage of the analysis is to take place principally through a Charter lens. As stated by the Supreme Court in *Thomson Newspaper Co.*, the question is whether the benefits that accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter right.⁷⁹

176. The CEMs that CASL targets are unsolicited messages that do not always originate from malicious senders but that always have an economic or commercial component. While CEMs are forms of commercial expression, and while the Supreme Court has recognized the substantial value of freedom of commercial expression,⁸⁰ this type of expression falls outside the core values of freedom of expression, as discussed by the Supreme Court.⁸¹

177. Put simply, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.⁸²

178. The record demonstrates that the coming into effect of CASL's unsolicited CEM provisions has had an impact on some commercial communications. CompuFinder characterizes this as a "chill" on legitimate commercial expression as a result of the "ban-all approach" taken by CASL to CEMs. For example, a report stated that 10%

⁷⁷ These metrics measure, respectively, the proportion of messages that are opened by recipients, the proportion of messages that have their contents clicked on by recipients, and the proportion of messages that are opened and then have their contents clicked on by recipients.

⁷⁸ See para. 114 of this decision.

⁷⁹ *Thomson Newspapers Co.*, *supra* note 53, at para. 125.

⁸⁰ *R. v. Guignard*, [2002] 1 S.C.R. 472; see also *Irwin Toy*, *supra* note 34, at pp. 967-971.

⁸¹ *R. v. Keegstra*, [1990] 3 S.C.R. at pp. 762-763.

⁸² *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at pp. 246-247, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

of survey respondents have stopped email marketing, 30% have curtailed marketing lists, and 48% believe they are no longer competitive with their U.S. counterparts.⁸³

179. However, individuals and businesses wishing to send commercial emails are not precluded by CASL from sending such CEMs. Even for those CEMs to which an exception or exemption does not apply, all that is required is the prior consent of the recipient, the proper identification of the sender, and an unsubscribe mechanism. This is far from a ban on commercial speech.
180. Further, another survey⁸⁴ indicated that spam originating from Canada has dropped 37% since CASL came into force, but that this drop has had little impact on businesses. There is also evidence that retail e-commerce sales in Canada rose in the year of CASL's coming into force, and that they will continue to do so for the immediate future.⁸⁵
181. It is logical and reasonable that those who would send messages to electronic addresses with a view to encouraging participation in commercial activity, and who are thereby likely to benefit from a strong Canadian e-economy, have this degree of responsibility placed on them to help achieve a robust and secure e-economy.
182. In essence, and as noted above, the impugned provisions of CASL prohibit the sending of CEMs only in certain circumstances – namely, when consent has not been received, when the CEM does not meet the necessary formal requirements, or when the CEM is not excepted or exempted from the prohibition. This does lead to detrimental effects on a protected freedom, namely commercial expression, which is an important aspect of freedom of expression, but does not constitute part of its core.
183. These effects, viewed through a Charter lens, involve certain individuals and businesses having to make adjustments to their online marketing strategies to exercise their freedom of commercial expression.
184. The Commission considers that, on balance, these deleterious effects are not so severe as to outweigh the benefits to the greater public good in this case. In particular, the evidence on the record shows lower spam rates in the wake of CASL, without an attendant material lessening of the effectiveness of electronic marketing. These effects are consistent with the government's objective in enacting CASL – namely, to benefit the economy as a whole by increasing confidence in using the Internet for commercial purposes.

⁸³ Cyberimpact Report, *supra* note 58.

⁸⁴ Tyler Orton, *CASL has no impact on email marketing practices at most companies: Survey*, Business in Vancouver, 1 June 2015.

⁸⁵ *Retail Ecommerce Sales in Canada to Near C\$30 Billion*, eMarketer, 15 January 2015. This article reported that retail e-commerce sales in Canada were at \$25.37 billion in 2014, and forecasted that by 2018, they would rise to \$43.95 billion.

185. In light of the above, the Attorney General has established that the salutary effects of the impugned provisions outweigh their deleterious effects.

Conclusion

186. In summary, the Commission has determined that the impugned provisions of CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter. However, the Commission determines that the Attorney General has demonstrated, on a balance of probabilities, that the infringement is justified under section 1 of the Charter.

Does CASL violate any of CompuFinder's rights protected by section 11 of the Charter?

187. Section 11 of the Charter guarantees any person charged with an offence with certain legal rights relating to proceedings in criminal and penal matters, including the right against self-incrimination and the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.⁸⁶

188. In *Guindon*,⁸⁷ the Supreme Court confirmed the two-part test for determining whether a statutory infraction will be considered an offence (and therefore whether section 11 of the Charter will apply): whether the proceeding leading to the imposition of a penalty is by its very nature a criminal proceeding and whether the sanction results in a true penal consequence. The “criminal in nature” test focuses on the process while the “true penal consequence” test focuses on its potential impact on the person subject to the proceeding.⁸⁸

189. The analysis set out below deals only with the impugned provisions themselves, and whether they would result in persons who have been served with notices of violation being “charged with an offence” in the relevant sense. The analysis of whether the

⁸⁶ Section 11 states the following: Any person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (e) not to be denied reasonable bail without just cause; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

⁸⁷ *Guindon v. Canada*, 2015 SCC 41.

⁸⁸ *Ibid.* at paras. 44 and 50.

particular AMP imposed on CompuFinder results in it being charged with an offence is set out in Compliance and Enforcement Decision 2017-368.

Positions of parties

190. CompuFinder alleged that CASL violates section 11 of the Charter because it allows for the imposition of true penal consequences without providing any of the constitutional protections guaranteed to those persons charged with an offence. CompuFinder argued that it was denied, for instance, the right to a fair hearing before an independent and impartial arbiter and the right to be presumed innocent until proven guilty.
191. CompuFinder argued that AMPs that may be imposed under CASL are of a potentially extraordinary magnitude, even to the point of being ruinous. The true purpose of such potential AMPs can only be to punish, and go far beyond what would be necessary for a regulatory purpose or for deterrence.
192. CompuFinder stated that the administrative regime under CASL affords less procedural protection than other regimes such as the one under the *Competition Act*, in which AMPs are recoverable only in a court of competent jurisdiction, or under the *Investment Canada Act*, where AMPs may be imposed only by order of a superior court. Further, the factors prescribed by the Act to be considered in determining the quantum of an AMP are not based on purely economic or mathematical considerations and appear to serve penal sentencing goals.
193. The Attorney General submitted that the legislative history and the nature of CASL's provisions reinforce the non-criminal nature of the statute. The process provided for does not involve the laying of a charge, an arrest, or a summons to appear before a court of criminal jurisdiction. A finding of responsibility does not lead to a criminal record. Nor does the statute use any of the words the Supreme Court has identified as being traditionally associated with a criminal process, such as "guilt," "acquittal," "indictment," "summary conviction," "prosecution," and "accused."
194. The Attorney General also submitted that the maximum penalty amounts set out in CASL are high to encourage compliance with CASL, to serve as an effective deterrent, and to ensure that AMPs do not simply become a cost of doing business. The mandatory factors that must be taken into account in determining the amount of the penalty give the Commission room to ensure that the penalty reflects the severity of the conduct.

Commission's analysis and determinations

The criminal in nature test

195. The question of whether proceedings are criminal in nature is concerned not with the nature of the act that gave rise to the proceedings but the nature of the proceedings

themselves.⁸⁹ The Supreme Court identified the following criteria as providing insight into the nature of the proceeding: the objectives of the legislation, the objectives of the sanction, and the process leading to the imposition of the sanction.⁹⁰

196. The first criterion concerns whether the objective of the proceedings, examined in their full legislative context, have a regulatory or a penal purpose. As has already been noted, the objective of CASL is set out in section 3 of the Act and states that CASL seeks to regulate specific conduct that could detract from the well-being of the e-economy.
197. The explanatory note to Order in Council P.C. 2013-1323 that fixed 1 July 2014 as the date upon which many of the impugned provisions would come into force noted that the objective of CASL was to deter spam and other damaging and deceptive electronic threats such as identity theft, phishing, and spyware from occurring in Canada and to help drive spammers out of Canada.⁹¹
198. Further, the Act's legislative history also indicates that the government favoured an administrative and regulatory solution as opposed to a criminal approach:

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.⁹²

199. Based on the above, the full legislative context is one that establishes an administrative regime to regulate a limited sphere of activity: namely, certain activities that take place within, and could damage, Canada's e-economy, and proceedings under this scheme have a regulatory, rather than a penal, purpose.

⁸⁹ *Ibid.* at para. 45.

⁹⁰ *Ibid.* at para. 52.

⁹¹ *Order Fixing Certain Dates as the Days on which Certain Provisions of the Act Come into Force*, SI/2013-127, (2013) C. Gaz. II 3087. The note is not part of the Order.

⁹² *House of Commons Debates*, 40th Parl., 2d Sess., No. 105 (2 November 2009) at 1535 (Hon. Mike Lake, Parliamentary Secretary to the Minister of Industry). This is an excerpt from a speech introducing Bill C-27 for third reading. The short title of that bill was the *Electronic Commerce Protection Act*. It died on the order paper when Parliament was prorogued on 30 December 2009. The bill was reintroduced, substantially unchanged, as Bill C-28 on 25 May 2010 and eventually became CASL, though the originally proposed short title was abandoned.

200. The inclusion of a private right of action⁹³ within the legislative context of CASL, which includes the possibility for a court to order compensation in an amount equal to the loss or damage suffered or expenses incurred, is also indicative, in the Commission's view, of a regulatory purpose as opposed to a criminal one.
201. As for the objectives of the sanction, the Supreme Court has found that, in the case of an AMP regime where this criterion must also be considered under the true penal consequence test, it may be unnecessarily repetitive to consider the criterion under the criminal in nature test as well.⁹⁴ Accordingly, consideration of this criterion appears in the next subsection of this decision.
202. With respect to the criterion to consider the process leading to the imposition of a sanction, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding.⁹⁵
203. Under CASL, the process leading to the imposition of a sanction is overseen by the Commission, a regulatory body, rather than by the criminal justice system. The Act does not make reference to words traditionally associated with a criminal process. Rather, the use of words such as "balance of probabilities," "due diligence," "penalty," "undertaking," or "representations" are indicative of the regulatory purpose of the Act.
204. In addition, the process leading to the penalty does not resemble a criminal proceeding in key respects. It does not involve the laying of a charge, an arrest, or a summons to appear before a court of criminal jurisdiction. A finding of responsibility does not result in a criminal record.
205. In all cases, when a notice of violation is issued, it is issued by a person who has been designated for that purpose pursuant to section 14 of the Act. The Commission itself is not involved in the process that leads to the issuance of a notice of violation but it may be called to decide review applications pursuant to section 25 of the Act.
206. The processes under CASL must be considered as designed to enhance public confidence in Canadian online commerce and, ultimately, to be administrative or regulatory in nature. This conclusion is further reinforced by section 30 of the Act, which states that a violation is not an offence and, accordingly, that section 126 of the *Criminal Code* does not apply.⁹⁶

⁹³ This scheme is set out in sections 47 to 51 and section 55 of CASL, though it is not in force as of the date of publication of this decision.

⁹⁴ *Guindon*, *supra* note 87, at para. 52.

⁹⁵ *Ibid.* at para. 63.

⁹⁶ Section 126 of the *Criminal Code* provides that every person who, without lawful excuse, wilfully contravenes an Act of Parliament is guilty of an indictable offence and liable to a term of imprisonment not exceeding two years (unless another punishment is expressly provided by law).

207. Based on the above, the impugned provisions of CASL do not prescribe proceedings that are criminal in nature.

The true penal consequence test

208. In *Wigglesworth*,⁹⁷ the Supreme Court stated that a true penal consequence is imprisonment in all cases or a fine in those cases where, by its magnitude, the fine would appear to be imposed for the purpose of redressing the wrong done to society at large rather than simply to secure compliance within a limited sphere of activity.

209. There is some authority for the proposition that, in determining whether an AMP represents a true penal consequence, the actual amount imposed is to be considered, rather than penalties that are theoretically possible.⁹⁸ However, in the more recent *Guindon* case, the Supreme Court considered both the statutory scheme and the particular penalty imposed in order to assess whether an AMP constituted a true penal consequence.⁹⁹

210. Therefore, in the analysis that follows, the Commission considers whether CASL itself allows for the imposition of true penal consequences. If CASL does allow it, and the statute did not also prescribe processes that protect the rights set out in section 11 of the Charter, CASL would be considered unconstitutional.¹⁰⁰

211. The Supreme Court has provided several factors to be considered in determining whether an AMP is a true penal consequence, such as the magnitude of the fine, to whom the fine is paid, whether its magnitude is determined by regulatory considerations (rather than principles of criminal sentencing), and whether stigma is associated with the penalty.¹⁰¹ Also relevant, as noted above, is the purpose of the penalty.

212. Subsection 20(4) of CASL provides for maximum AMPs of \$1 million in the case of an individual and \$10 million in the case of any other person, which includes corporations. These are large potential amounts; however, the size of an AMP on its own is only part of the analysis. There is no magic number above which an AMP, in the abstract, becomes penal.

213. The Supreme Court has said that an arbitrary upper limit on AMPs could undermine their goal: to deter actions that do not comply with the administrative regime.¹⁰² It has also cited with approval a decision of the Ontario Superior Court in which that

⁹⁷ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

⁹⁸ *Rowan v. Ontario Securities Commission*, 2012 ONCA 208 at para. 46.

⁹⁹ *Guindon*, *supra* note 87, at paras. 82-84.

¹⁰⁰ As noted, the analysis of the specific AMP at issue in this case is set out in Compliance and Enforcement Decision 2017-368.

¹⁰¹ *Guindon*, *supra* note 87, at paras. 76-77.

¹⁰² *Ibid.* at para. 79.

court found that the provision in the *Competition Act* for AMPs of up to \$10 million for deceptive marketing practices did not engage section 11 of the Charter.¹⁰³

214. While CASL provides for a higher maximum penalty per violation than some other AMP regimes (including the Unsolicited Telecommunications Rules and Voter Contact Registry regime, which the Commission also enforces),¹⁰⁴ the potential for higher penalties simply provides the Commission with further means to deal with more egregious conduct when it arises. The maximum is just that: an upper limit that need not be reached except in cases where circumstances warrant.

215. Further, CompuFinder correctly noted that there is not a purely mathematical or economic method of determining the quantum of an AMP. However, this does not mean that the quantum of an AMP is therefore determined by sentencing factors. Subsection 20(3) of CASL prescribes that the determination of the amount of the penalty must be based on the following factors:

- (a) the purpose of the penalty;
- (b) the nature and scope of the violation;
- (c) the person's previous history with respect to any previous violation under the Act, or any previous contravention of section 74.011 of the *Competition Act* or any previous contravention of section 5 of PIPEDA;
- (d) the person's history with respect to any previous undertaking entered into under subsection 21(1) of the Act, and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* relating to conduct reviewable under section 74.011 of that Act;
- (e) any financial benefit that the person obtained from the commission of the violation;
- (f) the person's ability to pay the penalty;
- (g) whether the person has voluntarily paid compensation to a person affected by the violation;
- (h) the factors established by the regulations; and
- (i) any other relevant factor.

216. The *Criminal Code* governs criminal sentencing in Canada. Part XXIII contains the sentencing provisions, including, at section 718, the purpose and principles of criminal sentencing. The stated purpose is to protect society and to contribute, along

¹⁰³ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, cited in *Guindon*, *supra* note 87, at para. 80.

¹⁰⁴ However, under those regimes, unlike under CASL, a violation continued on more than one day constitutes a separate violation in respect of each day during which it is continued (see section 72.03 of the *Telecommunications Act*).

with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. The objectives are as follows:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

217. There is little overlap between the factors set out in CASL and the objectives of criminal sentencing prescribed by the *Criminal Code*. The CASL factors are much more narrowly focused on the regulatory regime established by CASL and related Acts such as PIPEDA and the *Competition Act* than are the criminal sentencing objectives, which are aimed broadly at redressing harms to society.
218. Large AMPs may be seen to have a deterrent purpose, though this alone would not necessarily make them penal.¹⁰⁵ Even if deterrence were to be considered another relevant factor to take into consideration under section 20 of CASL, as long as this deterrence was understood to serve the promotion of compliance within a limited regulatory sphere, it would not indicate a penal intention.¹⁰⁶
219. Further, subsection 20(2) of CASL explicitly states that the purpose of the penalty is to promote compliance with the Act and not to punish. As the Commission has stated in previously published informational materials regarding its enforcement approach under CASL, the specific approach taken in a given case will be dictated by the specific circumstances of that case.¹⁰⁷ Any AMP imposed must depend on the factors set out in the Act, which is ultimately informed by the explicitly prescribed non-penal purpose of the AMP.
220. Regarding the remaining relevant inquiries of the true penal consequence analysis, an AMP under CASL is paid into the Consolidated Revenue Fund, which can be indicative that an AMP represents a true penal consequence, but is not dispositive.¹⁰⁸

¹⁰⁵ Rowan, *supra* note 98, at paras. 51 and 53.

¹⁰⁶ The Supreme Court has held that general deterrence is a valid consideration to take into account in imposing an administrative penalty in the public interest: *Cartaway Resources Corp. (Re)*, 2004 SCC 26. See also *Guindon*, *supra* note 87, at para. 83.

¹⁰⁷ See FAQs, *supra* note 41.

¹⁰⁸ *Guindon*, *supra* note 87, at para. 88.

221. Finally, CompuFinder has not argued, and there is no evidence, that an AMP that may be imposed under CASL would result in stigma comparable to that attached to a criminal conviction.¹⁰⁹

222. Given the above, CASL does not prescribe true penal consequences. While it does allow for large AMPs, it does not require them. It prescribes a set of considerations that must be taken into account in determining a quantum. These considerations may overlap to a limited degree with criminal sentencing factors, but are restricted to regulatory considerations related to the sphere of activity within the Canadian digital economy that CASL and related statutes govern. AMPs are paid into the Consolidated Revenue Fund, but the mere imposition of an AMP does not result in criminal stigma.

Conclusion

223. Based on the above, the impugned provisions of CASL, to the extent that they can be considered in the abstract, are not unconstitutional by reason of violating section 11 of the Charter. These provisions do not prescribe proceedings that are criminal in nature. Moreover, the mere possibility of large AMPs being imposed under CASL does not lead to the conclusion that the statute itself imposes penal sanctions. Accordingly, section 11 of the Charter is not engaged.

Does CASL violate the section 7 Charter protection against self-incrimination or the section 8 Charter right against unreasonable search and seizure?

Positions of parties

224. CompuFinder made some cursory arguments to the effect that CASL unjustifiably infringes on the right against self-incrimination under section 7 and the right against unreasonable search and seizure under section 8 of the Charter. These arguments were not pursued in its reply comments.

225. The Attorney General submitted that CASL is an administrative regime; therefore, Charter protections against self-incrimination do not apply. Further, as a result of the administrative nature of the regulatory scheme, section 8 of the Charter does not impose the requirement for judicial pre-authorization for searches that would be applicable in the criminal context.

Commission's analysis and determinations

226. CompuFinder's arguments on these issues are generally based on the premise that proceedings under CASL are penal or criminal rather than regulatory in nature. In addition to the rights enumerated in section 11, the Charter also affords individuals subject to penal proceedings certain rights under sections 7 and 8.

¹⁰⁹ *Ibid.* at para. 84.

227. Accordingly, the issue here also depends on whether the proceedings to which CompuFinder has been subject are properly characterized as administrative or penal.

228. For the reasons set out above, the Commission has determined that proceedings under CASL are administrative in nature. The predominant purpose of these proceedings is not the determination of penal liability – i.e. whether an offence has been committed – and it does not involve the pursuit of a criminal investigation. Therefore, Charter protections that are relevant in the criminal context do not apply.

229. Consequently, CompuFinder has not demonstrated a violation of section 7 or 8 of the Charter.

Conclusion

230. CompuFinder requested that the Commission find that the impugned provisions are unconstitutional and treat them as having no force or effect. This would mean that CompuFinder could not be held liable for any violation alleged by the notice of violation and that no AMP could be imposed.

231. However, the Commission has determined that CompuFinder's constitutional challenge has not succeeded.

232. Specifically, the Commission has determined that

- CASL is *intra vires* the legislative powers of Parliament, under the general trade and commerce head of power of subsection 91(2) of the *Constitution Act, 1867*;
- the impugned provisions of CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter, but this violation is justified under section 1;
- the impugned provisions of CASL do not, in themselves, result in the application of section 11 of the Charter to a person who has been issued and served with a notice of violation under CASL; and
- the purpose of proceedings under CASL is not the determination of penal liability, so no violation of section 7 or 8 of the Charter has been established.

233. Accordingly, the Commission dismisses the constitutional challenge raised by CompuFinder and **denies** its requested relief.

Secretary General