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CANADA

# **CANADA'S ANTI-SPAM LEGISLATION: CLARIFICATIONS ARE IN ORDER**

**Report of the Standing Committee on Industry, Science  
and Technology**

**Dan Ruimy, Chair**

**DECEMBER 2017  
42<sup>nd</sup> PARLIAMENT, 1<sup>st</sup> SESSION**

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## **NOTICE TO READER**

### **Reports from committee presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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# **THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY**

has the honour to present its

## **TENTH REPORT**

Pursuant to the Order of Reference of Wednesday, June 14, 2017, the Committee has proceeded to the statutory review 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* and has agreed to report the following:





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## CHAIR'S FOREWORD

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In order to produce a good final product, there is always a remarkable team of individuals – collaborating and contributing – behind the scenes. As Chair of the House of Commons Standing Committee on Industry, Science and Technology, I would like to thank each individual who helped to ensure that our statutory review of Canada's Anti-Spam Legislation (CASL) was rigorous and comprehensive.

The statutory review of CASL took place between September 26 and December 12, 2017. Throughout that period, the Committee held 13 meetings, heard from 41 witnesses and received 29 briefs from a wide array of stakeholders and experts. The recommendations presented herein to the Government of Canada carefully reflect and acknowledge the evidence and concerns received by the Committee.

Ever since its enactment, CASL's main challenge remains to balance, on the one hand, restricting the transmission of unsolicited commercial electronic messages in order to limit the costs associated with such messages and protecting Canadians against spam, and, on the other, allowing individuals and organizations to promote their lawful activities. Meeting this challenge requires clear legislative action that does not lead to unintended consequences.

The recommendations made in this report also recognize that the Government of Canada should seize the opportunity to facilitate compliance with the legislation. While the Committee supports the principles and aims pursued by CASL, steps may be taken to ensure that the Act continues "to promote the efficiency and adaptability of the Canadian economy."

Dan Ruimy, M.P.  
Chair



## SUMMARY

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Since Canada's Anti-Spam Legislation (the Act) came into force in 2014, the amount of spam originating from Canada has decreased by more than a third. While critics of the Act claim that its prescriptive and often unclear provisions have a chilling effect on commercial electronic communications, others observe that the Act increases the effectiveness of electronic marketing, protects the autonomy and privacy of consumers, and reduces the costs associated with unsolicited commercial electronic messages.

The evidence presented during this statutory review reveals wide differences of opinion about how the Act should be interpreted. The Committee joins its voice to that of witnesses demanding clear, effective, accessible and regularly updated guidance materials from enforcement agencies. Such materials should be designed with their end users in mind and supported by their feedback.

While improving guidance and education should be a priority moving forward, it can only achieve so much. The Act and its regulations require clarifications to reduce the cost of compliance and better focus enforcement. Provisions defining "commercial electronic message," consent, and "business-to-business" messages, among others, warrant the attention of the Government of Canada. The Government will be in a better position to assess the impact of the coming into force of the private right of action once these clarifications are implemented.



## LIST OF RECOMMENDATIONS

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*As a result of their deliberations, committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*

### RECOMMENDATION 1

**The Committee recommends that the Government of Canada amend *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (the Act) in order to adopt “*Electronic Commerce Protection Act*” as its short title.**

### RECOMMENDATION 2

**The Committee recommends that the Government of Canada clarify the definition of “commercial electronic message” to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance. In particular, the status of administrative and transactional messages should be clarified.**

### RECOMMENDATION 3

**The Committee recommends that the Government of Canada clarify the provisions pertaining to “implied consent” and “express consent” to ensure that the provisions as enacted in the Act and its regulations are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance.**

### RECOMMENDATION 4

**The Committee recommends that the Government of Canada clarify the definition of “electronic address” to ensure that the provisions as enacted in the Act are clear and understandable for parties subject to the legislation and do not create unintended cost of compliance.**

#### **RECOMMENDATION 5**

The Committee recommends that the Government of Canada clarify whether business-to-business electronic messages fall under the definition of “commercial electronic message.”

#### **RECOMMENDATION 6**

The Committee recommends that the Government of Canada clarify whether electronic messages listed under section 6(6) of the Act fall under the definition of “commercial electronic message.”

#### **RECOMMENDATION 7**

The Committee recommends that the Government of Canada consider how to best incorporate messages sent on behalf of an authorized person with regards to section 6(2)(a) of the Act.

#### **RECOMMENDATION 8**

The Committee recommends that the Government of Canada clarify the application of the Act and its regulations to charities and non-profit organizations to ensure that the legislation is clear and understandable for these organizations and do not create unintended cost of compliance.

#### **RECOMMENDATION 9**

The Committee recommends that the Canadian Radio-television and Telecommunications Commission increase efforts to educate Canadians, especially small businesses, with the goal of improving awareness and understanding of the Act and its regulations as well as increasing awareness of the technological tools available to assist in complying with the legislation.

#### **RECOMMENDATION 10**

The Committee recommends that the Government of Canada further investigate the impact of implementing the private right of action, once changes and clarifications have been implemented to the Act and its regulations. At the same time, it could consider if an award of damages should be based on proof of tangible harm.



#### **RECOMMENDATION 11**

The Committee recommends that the Government of Canada consider how the Canadian Radio-television and Telecommunications Commission can share information relative to the enforcement of the Act with domestic law enforcement agencies, including the Royal Canadian Mounted Police, the Department of Public Safety, and cybersecurity partners.

#### **RECOMMENDATION 12**

The Committee recommends that the Government of Canada investigate with the Canadian Radio-television and Telecommunications Commission how to be more transparent in the methods, investigations, and determinations of penalties, as well as on the collection and dissemination of data on consumer complaints and spamming trends.

#### **RECOMMENDATION 13**

The Committee recommends that the Government of Canada, the Canadian Radio-television and Telecommunications Commission, the Competition Bureau and the Office of the Privacy Commissioner of Canada replace the phrase “Canada’s Anti-Spam Legislation” by the short title “*Electronic Commerce Protection Act*” and the acronym “CASL” by the acronym “ECPA” in all guidance and enforcement materials as well as other publications on every support, including [fightspam.gc.ca](https://www.fightspam.gc.ca).





## CANADA'S ANTI-SPAM LEGISLATION: CLARIFICATIONS ARE IN ORDER

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### BACKGROUND

In 2010, Parliament enacted *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (the Act).

More commonly known as Canada's Anti-Spam Legislation or CASL, the Act prohibits commercial conduct that would, notably, impair the reliability and optimal use of electronic means of carrying out commercial activities. The Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Bureau and the Office of the Privacy Commissioner of Canada (OPC) share the duty of enforcing the Act.

Most components of the Act came into force by order of council PC 2013-1323 in July 2014. The sections that have yet to come into force – sections 47 to 51 and 55 – pertain to the private right of action (PRA). The PRA provisions were scheduled to come into force on 1 July 2017, but the Governor in Council ordered the suspension of their commencement under the recommendation of the Minister of Innovation, Science and Economic Development.

On 14 June 2017, the House of Commons referred the Standing Committee on Industry, Science and Technology (the Committee) to review the provisions and operation of the Act in accordance with section 65 of the Act. This review consisted of thirteen meetings that took place between September 26 and November 9, 2017, and included 63 oral and written submissions.

### COMPLIANCE AND APPLICATION

#### A. Cost and effectiveness

Witnesses disagree on how the Act impacted electronic communications. Spam continues to be a key vector for the dissemination of malware and so far accounts for



more than 50% of all email communications in 2017.<sup>1</sup> Nevertheless, since the Act came into force in 2014, Innovation, Science and Economic Development Canada (ISED) observes that the amount of spam originating from Canada has decreased by more than a third. Moreover, while Canada figured among the top five spam-producing countries before the Act came into force, it now no longer appears among the top 10 or even top 20.<sup>2</sup>

Whether the Act effectively reduced spam originating from Canada is difficult to ascertain.<sup>3</sup> Some witnesses take it as evidence of the Act's effectiveness.<sup>4</sup> Others attribute most, if not all, the decrease to the increasing performance of anti-spam technologies,<sup>5</sup> while others still attribute it to a combination of technology and regulatory measures.<sup>6</sup> Although debatable, witnesses questioned the degree to which the Act affected malware, phishing and other cyber-threats, which they consider just as prevalent today as they were before the legislation came into force.<sup>7</sup>

The Committee observes that the legislation has given Canadian enforcement agencies the authority and means to collaborate with their international counterparts in order to

**“[W]hile Canada figured among the top five spam-producing countries before the Act came into force, it now no longer appears among the top 10 or even top 20.”**

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1 The House of Commons Standing Committee on Industry, Science and Technology (INDU), *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1105 \(Mark Schaan\)](#). See also Symantec, *Monthly Threat Report*, 2017 (Symantec Corporation, an American software security company, estimates the global spam rate reached 54.9% in October 2017); Symantec, *Internet Security Threat Report*, Mountain View, Symantec Corporation, 2017, p. 27-28.

2 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1105](#), [1130-1135](#), [1150 \(Mark Schaan\)](#).

3 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1235 \(David Elder\)](#).

4 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1200 \(John Lawford\)](#); 17 October 2017, [1155 \(Michael Geist\)](#); 26 October 2017, [1110 \(Philippe Le Roux\)](#).

5 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1100](#), [1145 \(Scott Smith\)](#); 5 October 2017, [1205 \(Natalie Brown\)](#); 17 October 2017, [1145 \(David Messer\)](#).

6 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2017, [1115 \(Christopher Padfield\)](#). See also 17 October 2017, [1145 \(Deborah Evans\)](#).

7 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1105 \(Michael Fekete\)](#); 17 October 2017, [1115 \(Wally Hill\)](#); 26 October 2017, [1105 \(William Michael Osborne\)](#).

tackle spam abroad,<sup>8</sup> addressing at least some concerns about the challenge of regulating activities occurring outside the jurisdiction of Canada. CRTC staff indicated that although the Act allows them to share information and coordinate enforcement with the Competition Bureau, the OPC and international partners, it does not allow them to do the same with domestic law enforcement and cybersecurity partners.<sup>9</sup>

The Executive Director and General Counsel of the Public Interest Advocacy Centre, John Lawford, advised amending the Act in order to require enforcement agencies to collect and publish data on spam. Such requirements would help inform policymakers on the effectiveness of the legislation:

If one thing has not been done right since CASL was introduced, it has been information gathering. Since CASL does not require spam volume to be reported by [Internet service providers], although they may report it to the CRTC, Competition Bureau, or Privacy Commissioner, nor by the spam reporting centre, and CASL does not require that any of this information be made public or provided to Parliament directly, we are today largely in the dark regarding evidence of the effect of CASL on spam and other electronic messaging. ... a more robust and public spam reporting mechanism ... would allow all parties and academic researchers to evaluate the effect of CASL upon objective evidence.<sup>10</sup>

According to some witnesses, the Act had a chilling effect on electronic messaging. Indeed, it was stated that – because of the cost of complying to such a prescriptive and, in many cases, unclear legislation – businesses and non-profit organizations would increasingly refrain from using this channel of communications to reach current and new customers and donors, and to communicate between themselves by fear of infringing the legislation or to avoid compliance costs.<sup>11</sup>

In contrast, others argued that the Act had a positive impact on electronic communications by reducing spam and encouraging effective marketing practices.<sup>12</sup> Between 2014 and 2017, the proportion of commercial electronic messages (CEMs)

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8 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1120](#), [1135 \(Mark Schaan\)](#); 17 October 2017, [1120 \(Michael Geist\)](#).

9 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1135](#), [1215 \(Steve Harroun\)](#); 24 October 2017, [1130 \(Daniel Therrien\)](#).

10 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1125 \(John Lawford\)](#). See also 17 October 2017, [1120 \(Michael Geist\)](#); 17 October 2017, [1215 \(Michael Fekete\)](#).

11 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1100-1105](#), [1215 \(Scott Smith\)](#); 19 October 2017, [1115 \(Wally Hill\)](#); 19 October 2017, [1135 \(James McLinton\)](#); 24 October 2017, [1210](#), [1230 \(Suzanne Morin\)](#); 7 November 2017, [1110 \(Kim Arsenaault\)](#); Canadian Federation of Independent Business (CFIB), [Brief to the Committee](#), 8 November 2017.

12 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1220 \(Matthew Vernhout\)](#).



reaching their designated recipient went from 79% to 90% in Canada, compared to 80% worldwide. The proportion of commercial emails opened and read also increased from 26% to 32%, compared to 21% in the United States.<sup>13</sup>

Witnesses expressed concern over the cost of complying with the Act. Many among them illustrated this point with its record-keeping requirements. Not only must senders of CEMs document consents and un-subscriptions, they must also keep track of the durations of different instances of implied consent, which can be either six months or two years. While some witnesses pointed to technological solutions that can reduce those costs,<sup>14</sup> Kim Arsenault, Senior Director at Inbox Marketing, argued for removing durations for implied consent:

[The] regulators should remove the confusion and requirement around six-months versus two-year implied consent. They should clearly define what express versus implied is and remove the time frame of six months and two years. It's a big challenge for many companies, both small and large, to properly maintain this level of detail that can be constantly changing and updating. Not all technology solutions out there are equipped to properly document this.<sup>15</sup>

Few witnesses could provide a precise assessment of the costs of complying with the Act.<sup>16</sup> Evidently, compliance costs vary depending on the size of an organization and the extent of its electronic communications.<sup>17</sup> The Committee nonetheless heard figures amounting to \$700 for individuals, and ranging between \$1,300 and \$25,000 for small and medium-sized businesses, \$25,000 and \$100,000 for large businesses, and reaching millions of dollars for the largest organizations.<sup>18</sup> One witness noted that some

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13 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 October 2017, [1115 \(Philippe Le Roux\)](#); 7 November 2017, [1110, 1130 \(Kim Arsenault\)](#).

14 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1235 \(Matthew Vernhout\)](#); CASL Cure, [Brief to the Committee](#), 23 October 2017; Coalition of Business and Technology Association (CBTA), [Brief to the Committee](#), 22 November 2017.

15 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 November 2017, [1115 \(Kim Arsenault\)](#). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1105 \(Scott Smith\)](#); 19 October 2017, [1120 \(Wally Hill\)](#); 19 October 2017, [1230 \(Andrew Schiestel\)](#); CFIB, [Brief to the Committee](#), 8 November 2017; Canadian Bankers Association, [Brief to the Committee](#), 15 November 2017; Canadian Life and Health Insurance Association (CLHIA), [Brief to the Committee](#), 15 November 2017.

16 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1240 \(Nathalie Brown\)](#); 17 October 2017, [1150 \(Deborah Evans\)](#); 19 October 2017, [1225 \(James McLinton\)](#); 26 October 2017, [1120 \(Bill Schaper\)](#); Ontario Nonprofit Network (ONN), [Brief to the Committee](#), 27 October 2017; CFIB, [Brief to the Committee](#), 8 November 2017.

17 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1155 \(Charles Taillefer\)](#).

18 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1225 \(Wally Hill\)](#); 26 October 2017, [1110 \(Philippe Le Roux\)](#); 7 November 2017, [1110, 1145 \(Kim Arsenault\)](#).

marketing companies offer inexpensive electronic communication services designed to be compliant with the Act.<sup>19</sup>

## B. Understanding of the Act and its requirements

The evidence provided to the Committee reveals that many Canadians engaging in commercial electronic messaging are not aware of the Act, let alone understand how to comply with its requirements. Businesses often fail to realise that the Act applies to them because their personnel do not think of their communications as “spam.”<sup>20</sup> By underlining spam rather than electronic commerce and communications, the name under which the Act is commonly known exacerbates this problem. Philip Palmer suggested restoring the Act’s short title – the “*Electronic Commerce Protection Act*” – to reflect the broader aim of the legislation.<sup>21</sup>

Most witnesses argued that key provisions of the Act lack clarity.<sup>22</sup> The definition of “commercial electronic message,” for example, leaves many puzzled:<sup>23</sup> does it extend to messages that, while they do not encourage the recipient to transact with the sender per se, do include the logo of an organization that engages in commercial activities? Does it extend to a newsletter? Or to an email offering monetary incentives to attract participants to a study? How does the definition of CEM apply to the diverse activities of charities or non-profit organizations? More generally, what sort of content would

**“[M]any Canadians engaging in commercial electronic messaging are not aware of the Act, let alone understand how to comply with its requirements.”**

19 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 November 2017, [1205 \(Chris Lewis\)](#).

20 CFIB, [Brief to the Committee](#), 8 November 2017.

21 Philip Palmer, [Brief to the Committee](#), 22 November 2017.

22 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1130 \(Barry Sookman\)](#); 17 October 2017, [1225 \(David Messer\)](#); Canadian Bar Association (CBA), [Brief to the Committee](#), 24 October 2017.

23 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1220 \(Barry Sookman\)](#); 5 October 2017, [1115 \(Aisha Fournier Diallo\)](#); 17 October 2017, [1135 \(Deborah Evans\)](#); 24 October 2017, [1210 \(Suzanne Morin\)](#); 24 October 2017, [1255 \(Matthew Vernhout\)](#); 26 October 2017, [1120 \(Bill Schaper\)](#); 7 November 2017, [1115 \(Kim Arsenault\)](#); Universities Canada (UC), [Brief to the Committee](#), 27 October 2017; Community Sector Council Newfoundland and Labrador (CSCNL), [Brief to the Committee](#), 30 October 2017; Marketing Research and Intelligence Association (MRIA), [Brief to the Committee](#), 6 November 2017; Canadian Wireless Telecommunications Association (CWTA), [Brief to the Committee](#), 17 November 2017.



support the conclusion that a message has as its purpose, or one of its purposes, to encourage participation in a commercial activity?

Witnesses admitted having difficulty understanding many other aspects of the Act, including its consent provisions, record-keeping requirements, the definitions of “electronic address” and “computer program,” and the determination of administrative monetary penalties (AMP), along with the application of the Act to the issues of fundraising, social media, the Internet of things, and loyalty programs.<sup>24</sup> The fact that so many witnesses requested to add provisions the legislation already includes is evidence enough of a lack of awareness of both the principle and specifics of the Act.

Aspects of the organization and promotion of the Act increase the difficulty of understanding it. The Act led to the enactment of not one, but two *Electronic Commerce Protection Regulations* (one from the Governor in Council and another from the CRTC).<sup>25</sup> Its main promotion tool – [fightspam.gc.ca](http://fightspam.gc.ca) – does not provide guidance pertaining to the interpretation of the legislation, but instead redirects visitors towards different enforcement and administrative agencies with their own sets of guidance materials.<sup>26</sup> Scott Smith, Director of the Canadian Chamber of Commerce, explains how the dispersion of information about the Act makes it more onerous for Canadians to understand its requirements and maintain compliance:

[You] have multiple layers of text that you need to be able to follow .The act is very prescriptive, so you need to follow it very closely. Then you need to follow the regulations that came through [ISED]. You need to pay attention to the CRTC regulations, to what the Competition Bureau has put out in guidance. You need to read the regulatory impact statement to get some understanding or context of why the law is there in the first place. Then you need to read the guidance from the CRTC, which in many cases hasn't been that helpful, because it doesn't give you a lot of guidance.<sup>27</sup>

As Steve Harroun, CRTC’s Chief Compliance and Enforcement Officer, noted, it is critical “that businesses are aware of the rules ... and understand what’s necessary with respect

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24 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1230 \(Michael Geist\)](#); 17 October 2017, [1135 \(Deborah Evans\)](#); 19 October 2017, [1130 \(Jason McLinton\)](#); 19 October 2017, [1150 \(Andrew Schiestel\)](#); 24 October 2017, [1230 \(Neil Schwartzman\)](#); 24 October 2017, [1255 \(Suzanne Morin\)](#); 26 October 2017, [1125 \(William Michael Osborne\)](#); 7 November 2017, [1115, 1215 \(Kim Arsenault\)](#); Canadian Real Estate Association (CREA), [Brief to the Committee](#), 6 November 2017.

25 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1220 \(Barry Sookman\)](#); 5 October 2017, [1240 \(Scott Smith\)](#); 24 October 2017, [1210 \(Suzanne Morin\)](#).

26 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2017, [1115 \(Christopher Padfield\)](#).

27 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1240 \(Scott Smith\)](#).



to following the rules.”<sup>28</sup> The CRTC has indeed published guidance documents on many elements on which witnesses expressed uncertainty.<sup>29</sup> The Commission also leads outreach activities to educate stakeholders on the content of the Act.<sup>30</sup>

However, the evidence submitted to the Committee suggests that there is much to improve, as illustrated by the testimony of Barry Sookman, partner at McCarthy Tétrault LLP and advisor to Lighten CASL Inc.:

I’ve been in rooms where businesses have tried to figure it all out ... You have 25 people in a room, including five lawyers, going through every kind of email that’s sent and trying to figure out if it’s a CEM, trying to figure out how you get consent, and trying to figure out if you have the right to unsubscribe. It takes that many people to try to figure it out, and you still can’t get it right. To impose that on a small business, where it’s not understandable ... it’s so complex that the average small business cannot figure out what they need to do.<sup>31</sup>

Proponents and opponents of the Act agree that the CRTC must review the sufficiency and effectiveness of their guidance materials and activities.<sup>32</sup> Suzanne Morin, Chair of the Privacy and Access Law Section of the Canadian Bar Association, spoke of available guidance in the following terms:

The limited guidance currently available to address the confusion and uncertainty in CASL increases the possibility ... of inadvertent non-compliance. The guidance that does exist is incomplete, out of date, inconsistent, and overly simplistic even at times. For example the guidelines on the interpretation of electronic commerce protection regulations read obligations into CASL that are not supported by the legislation itself. The guidelines state that consent must be sought separately from general terms of use or sale, but CASL speaks only to keeping ... consents separate. That’s an additional obligation not found in the act.<sup>33</sup>

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28 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1120 \(Steve Harroun\)](#).

29 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1105 \(Steve Harroun\)](#).

30 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1110 \(Steve Harroun\)](#); 31 October 2017, [1130 \(Christopher Padfield\)](#); 9 November 2017, [1105, 1130 \(Steve Harroun\)](#).

31 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1220 \(Barry Sookman\)](#). See also 24 October 2017, [1230 \(Suzanne Morin\)](#).

32 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1125 \(Michael Geist\)](#); 26 October 2017, [1140, 1220 \(Philippe Le Roux\)](#); Cyberimpact, [Brief to the Committee](#), 6 November 2017; CREA, [Brief to the Committee](#), 6 November 2017; MRIA, [Brief to the Committee](#), 6 November 2017; CFIB, [Brief to the Committee](#), 8 November 2017.

33 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1210 \(Suzanne Morin\)](#).



Access to guidance materials is also an area of concern. Philippe Le Roux, Executive Officer at Certimail, illustrated difficulties Canadians face in obtaining even existing guidance on key provisions of the Act:

In May 2014, the CRTC published a newsletter that outlined specific requirements that had to be met in order to be able to use the due diligence defence, as set out in subsection 33(1) of the [Act]. That provision stipulates that any business that establishes that they did what was necessary to comply with the legislation is safe from penalties in case of violation. In that newsletter, the CRTC specifies that, by “necessary measures,” it means a compliance program with eight requirement categories. The problem is that the newsletter was buried deep within the CRTC’s website. It took most lawyers who specialize in the area two years to discover it. Fightspam.ca, the website that explains the legislation, makes no mention of that newsletter, and neither do the CRTC’s public communications.<sup>34</sup>

Uncertainty makes it difficult to assess what is permissible under the legislation. Most witnesses agree that the lack of proper understanding of the Act raises compliance costs by increasing the risk of violation in some cases and prompting an overcautious approach in others.<sup>35</sup> Without denying the fact that every Canadian has a responsibility to know the law, the Act cannot realise its purpose without effective guidance from enforcement agencies.

**“Proponents and opponents of the Act agree that the CRTC must review the sufficiency and effectiveness of their guidance materials and outreach activities.”**

### C. Enforcement by the Canadian Radio-television and Telecommunications Commission

Most of the CRTC’s investigations are triggered by a complaint filed to the “spam reporting centre” (SRC), a centralized website. The SRC receives a weekly amount of approximately 4,000 complaints, and has collected more than a million complaints since

34 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 October 2017, [1150 \(Philippe Le Roux\)](#).

35 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1115 \(Aïsha Fournier Diallo\)](#); 17 October 2017, [1135 \(Deborah Evans\)](#); 17 October 2017, [1225 \(David Messer\)](#); 17 October 2017, [1250 \(Adam Kardash\)](#); 26 October 2017, [1135, 1155, 1215 \(Philippe Le Roux\)](#); 7 November 2017, [1110, 1200, 1215 \(Kim Arsenaault\)](#); CBA, [Brief to the Committee](#), 24 October 2017; Imagine Canada, [Brief to the Committee](#), 27 October 2017; Cyberimpact, [Brief to the Committee](#), 6 November 2017.

2014.<sup>36</sup> CRTC's intelligence analysts examine the information submitted through the SRC and, when possible, identify trends and relationships between complaints to identify which ones belong to the same sending campaigns. Enforcement officers review the analyses to identify viable cases and target potential violators.<sup>37</sup>

The Committee heard much testimony on how the CRTC selects cases it investigates and how it enforces the Act. Members of the CRTC enforcement staff testified that they select cases on the basis of the probability of establishing a violation to the Act and the potential to promote compliance.<sup>38</sup> The Act provides the CRTC with a broad suite of compliance and enforcement instruments, including warning letters, undertakings and AMPs. In a given case, the CRTC staff select enforcement instruments on the basis of the ones most likely to ensure compliance.<sup>39</sup>

In contrast, a number of witnesses claimed that the CRTC only targets legitimate businesses attempting to reach customers and prospects in good faith, as opposed to "real" spammers, and imposes disproportionately high AMPs on small enterprises for unintentional violations.

The CRTC conducted over 30 investigations under the Act since it came into force.<sup>40</sup> These investigations led to the delivery of 22 warning letters, the conclusion of five undertakings resulting in the payment of penalties amounting to \$468,000, and the issuance of three notices of violation. These three notices of violation led to as many decisions from the Commission. In two of these decisions, the CRTC reduced the AMP originally imposed from \$640,000 to \$50,000 and from \$1.1 million to \$200,000, while the third AMP stood at \$15,000. Canadians can consult the Commission's website to get information on the circumstances of each case and the violations involved.<sup>41</sup>

Some witnesses proposed to limit the discretion the CRTC enjoys over the selection of enforcement actions against offenders by adopting a mandatory scale. Such a scale

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36 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1205 \(Mark Schaan\)](#); 9 November 2017, [1150 \(Neil Barratt\)](#).

37 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1150 \(Neil Barratt\)](#).

38 Ibid.

39 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1120, 1135 \(Steve Harroun\)](#); 26 September 2017, [1150 \(Neil Barratt\)](#).

40 Ibid., 1140 (Neil Barratt).

41 Canadian Radio-television and Telecommunications Commission, "Citations, Penalties, Undertakings and Violations," [crtc.gc.ca](#), 12 September 2017. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1110 \(Neil Barratt\)](#).



would require the Commission to only issue a warning letter to first-time offenders, and progressively increase the severity of further measures for additional violations, including amounts of AMPs, in proportion with their gravity.<sup>42</sup> CRTC representatives replied that such a scale would reduce their capacity to adjust enforcement actions on a case-by-case basis, notably in order to promote compliance and discourage recidivism.<sup>43</sup>

The Committee takes note of testimony highlighting that the fact that the Commission has discretionary power does not prevent its staff from exercising it with transparency.<sup>44</sup> One witness suggested indeed that CRTC officers be required to provide reasons for the amount of any penalty imposed.<sup>45</sup>

The Committee further notes that, on two of three occasions, the CRTC significantly reduced the amount of AMPs recommended by its enforcement staff. The Committee also notes that these recommended amounts were still very far from the maximal sanctions available in these particular cases.

The Spamhaus Project's [Register of Known Spam Operations](#) (ROKSO) currently identifies over seventy of the world's largest spamming operations. When the Act came into force in 2014, Canada was home to seven of these operations.<sup>46</sup> The ROKSO list now shows that only two of them remain in our country.<sup>47</sup> Representatives of the CRTC's enforcement staff testified being aware of these two operations and "looking at how we can tackle those malicious actors."<sup>48</sup> The Committee looks forward to seeing progress on this front.

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42 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1140 \(Deborah Evans\)](#); 19 October 2017, [1140 \(Wally Hill\)](#); 26 October 2017, [1210 \(Philippe Le Roux\)](#); Shaw Communications Inc., [Brief to the Committee](#), 23 November 2017.

43 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1115-11120 \(Steve Harroun\)](#).

44 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1140 \(Wally Hill\)](#); Email Sender and Provider Coalition (ESPC), [Brief to the Committee](#), 18 October 2017; CREA, [Brief to the Committee](#), 6 November 2017.

45 MRIA, [Brief to the Committee](#), 6 November 2017.

46 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1125 \(Michael Geist\)](#).

47 Spamhaus Project, « [Register of Known Spam Operations](#) », 12 May 2017. INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1125 \(Michael Geist\)](#); 9 November 2017, [1115 \(Neil Barratt\)](#).

48 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1115 \(Neil Barratt\)](#).

## D. Private right of action

Should the Act's PRA come into force, any person "affected by an act or omission that constitutes a contravention of any of sections 6 to 9 of this Act,"<sup>49</sup> along with specific sections of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and the *Competition Act*, will be able to apply to a court of law and seek statutory and compensatory damages from the perpetrator.

Numerous witnesses expressed concerns over the PRA. According to Charles Taillefer, Director of the Privacy and Data Protection Policy Directorate, ISED, of particular concern is the fact that a demonstration of harm is not required and that "statutory damages could be awarded simply from having received a commercial electronic message that [a person] didn't consent to."<sup>50</sup> Other witnesses argued that the PRA is too onerous and ambiguous, fearing that businesses could be drawn into frivolous and class-action lawsuits even if they largely comply with the Act, for example if they experience information system errors.<sup>51</sup> According to the Canadian Bankers Association, fear of class-action lawsuits could potentially discourage some businesses from operating in Canada.<sup>52</sup>

Another concern raised by some witnesses pertains to the fact that charities and not-for-profit organizations might be targeted by the PRA. Because managers and directors could be held personally responsible if their organizations fail to have sufficient assets to pay for damages ordered under the PRA, these organizations might face difficulty in recruiting and keeping individuals willing to expose themselves to that level of liability.<sup>53</sup>

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49 *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, subsection 47(1).

50 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1210 \(Charles Taillefer\)](#).

51 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1150 \(Barry Sookman\)](#); 5 October 2017, [1100 \(Scott Smith\)](#); 17 October 2017, [1135 \(Deborah Evans\)](#); 19 October 2017, [1220 \(Wally Hill\)](#); 26 October 2017, [1105 \(William Michael Osborne\)](#); Rogers Communications, [Brief to the Committee](#), 16 October 2017; CREA, [Brief to the Committee](#), 6 November 2017.

52 Canadian Bankers Association, [Brief to the Committee](#), 15 November 2017.

53 Imagine Canada, [Brief to the Committee](#), 27 October 2017; Calgary Chamber of Voluntary Organizations (CCVO), [Brief to the Committee](#), 25 October 2017.



The fact that the Act's due diligence defence appears not to appease these concerns reveals yet another area where the legislation requires clarification.<sup>54</sup>

A few witnesses commented that the application of the PRA under false or misleading representation falls under the provisions of the *Competition Act* and noted, more specifically, that certain subsections of its section 74.011 contain no materiality thresholds, which could potentially lead to legal action over a trivial misrepresentation or inaccuracy found in CEMs.<sup>55</sup>

Conversely, several witnesses defended the PRA, advocating for its coming into force. Alysia Lau, External Counsel for the Public Interest Advocacy Centre, commented that suspending the PRA deprives consumers of an instrument to use against aggressive spammers. As a result, spammers “face little prospect of any significant AMPs or other sanctions.”<sup>56</sup> Some witnesses shared the view that fighting spammers requires tough anti-spam legislation that includes a PRA to supplement the efforts of enforcement agencies in protecting citizens against illegal practices. The PRA would also allow individuals who have been personally impacted by spam to obtain financial compensation.<sup>57</sup>

MapleGrow Capital Inc. representatives advocated for the inclusion of the PRA provision in anti-spam legislation because it “moves the majority of the cost, decision and risk of enforcement off the regulators and onto the free market.”<sup>58</sup> They added that in order to avoid being the target of class action litigation, companies will be motivated into compliance.<sup>59</sup> MapleGrow Capital representatives concluded that omitting the PRA from the legislation would render the latter “hollow and unfair” and “would only punish those

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54 *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, subsection 54(1).

55 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1210 \(Suzanne Morin\)](#); 26 October 2017, [1105 \(William Michael Osborne\)](#).

56 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1125 \(Alysia Lau\)](#).

57 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1235 \(Michael Geist\)](#); 24 October 2017, [1115 \(Daniel Therrien\)](#); 9 November 2017, [1200 \(Steven Harroun\)](#); 7 November 2017, [1130 \(Chris Lewis\)](#); Philip Palmer, [Brief to the Committee](#), 22 November 2017.

58 MapleGrow Capital Inc., [Brief to the Committee](#), 1 November 2017.

59 *Ibid.* See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 November 2017, [1135 \(Chris Lewis\)](#).

companies that in good faith incurred the costs of compliance while allowing scofflaws to continue with their breaches.”<sup>60</sup>

Several witnesses proposed instead to modify the Act’s PRA before its coming into force. For example, the Committee heard that suing under the disposition should be restricted to organizations directly impacted by spam, spyware and other online threats and suffer from damages to their networks, such as Internet services providers, similar to American legislation.<sup>61</sup>

Michael Fekete, partner at Osler, Hoskin & Harcourt LLP, suggested that “rather than having standing to sue left with anyone who receives a message that doesn't comply, [the legislation] should provide the companies that are in a position to go after the bad actors the opportunity to supplement the efforts of the CRTC and place standing to sue in their hands.”<sup>62</sup>

Other witnesses held the view that the PRA should only apply against “bad actors” – those who disseminate malware and false advertising, and harvest email addresses<sup>63</sup> – and cases of violations of the Act where proof of harm can be clearly demonstrated.<sup>64</sup> In the same line, some witnesses suggested eliminating statutory damages from the PRA.<sup>65</sup>

The Canadian Bankers Association encouraged the government to amend the relevant provisions to ensure that it is not used to penalize legitimate businesses who would have violated the Act unintentionally.<sup>66</sup> In order to avoid subjecting charities and not-for-profit organizations to high financial penalties, a few witnesses suggested that these organizations should not be liable to private seizure or personal liability, and that they should be exempted from the PRA.<sup>67</sup>

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60 MapleGrow Capital Inc., [Brief to the Committee](#), 1 November 2017.

61 See INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1245 \(David Messer\)](#); 19 October 2017, [1120 \(Wally Hill\)](#); 24 October 2017, [1230 \(Suzanne Morin\)](#). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1150 \(Charles Taillefer\)](#).

62 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1105 \(Michael Fekete\)](#).

63 *Ibid.*, [1235 \(Michael Fekete\)](#); 17 October 2017, [1200, 1235 \(Adam Kardash\)](#); 19 October 2017, [1220 \(Stephanie Provato\)](#).

64 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1115 \(Adam Kardash\)](#).

65 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1120 \(Wally Hill\)](#); CWTA, [Brief to the Committee](#), 17 November 2017; ESPC, [Brief to the Committee](#), 18 October 2017.

66 Canadian Bankers Association, [Brief to the Committee](#), 15 November 2017.

67 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 October 2017, [1120, 1205 \(Bill Schaper\)](#); ONN, [Brief to the Committee](#), 27 October 2017; CSCNL, [Brief to the Committee](#), 30 October 2017.



For other witnesses, maintaining the PRA would require even more extensive amendments. For example, Barry Sookman told the Committee that recalibrating the Act to only target cyber-threats would reduce concerns around the PRA.<sup>68</sup>

A number of witnesses suggested that the PRA be entirely eliminated from the legislation, noting that the PRA seemed superfluous considering three enforcement agencies already enforce the Act.<sup>69</sup> The Canadian Bar Association supported the suspension of the PRA until a thorough analysis of its appropriateness in the context of the Act as a whole.<sup>70</sup> The chief scientist of Spamhaus Technology Ltd., Chris Lewis, suggested rolling out the provision in stages.

Finally, numerous witnesses were of the opinion that the Act should be clarified or amended before enforcing the PRA. Mark Schaan, Director General, Marketplace Framework Policy Branch, ISED, explained that concerns over the PRA provisions are primarily related to the possibility of class action suits and legal liability that may arise from compliance. He added that the notion of consent would require clarification before they come into force.<sup>71</sup> A few witnesses agreed that, because of the complexity of the Act, the PRA could lead to heavy costs on businesses that unintentionally breach its requirements.<sup>72</sup>

## DEFINITIONS AND EXCEPTIONS

### A. Consent

The provisions of the Act regarding consent constituted an important matter of debate before the Committee. A number of witnesses suggested that an “opt-in” approach to the regulation of commercial electronic communications was too strict, and advocated in favour of reforming the Act under an “opt-out” approach supplemented by strict un-

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68 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1250 \(Barry Sookman\)](#).

69 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1110](#), [1225 \(Aïsha Fournier Diallo\)](#); 17 October 2017, [1135 \(David Messer\)](#); 17 October 2017, [1140 \(Deborah Evans\)](#); 19 October 2017, [1120 \(Wally Hill\)](#); 19 October 2017, [1130 \(James McLinton\)](#); ESPC, [Brief to the Committee](#), 18 October 2017; CREA, [Brief to the Committee](#), 6 November 2017; CLHIA, [Brief to the Committee](#), 15 November 2017; CWTA, [Brief to the Committee](#), 17 November 2017; Canadian Vehicle Manufacturer’s Association (CVMA), [Brief to the Committee](#), 22 November 2017; Shaw Communications Inc., [Brief to the Committee](#), 23 November 2017.

70 CBA, [Brief to the Committee](#), 24 October 2017. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1210 \(Suzanne Morin\)](#).

71 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1155 \(Mark Schaan\)](#).

72 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2017, [1125 \(Mark Schaan\)](#); 17 October 2017, [1250 \(Michael Fekete\)](#); CFIB, [Brief to the Committee](#), 8 November 2017; CLHIA, [Brief to the Committee](#), 15 November 2017.



subscription requirements. Under such a model, senders would be free to send unsolicited CEMs until their recipient unsubscribes. According to these witnesses, businesses would have an interest in limiting the number of messages they send in order to better serve current and prospective customers. An opt-out approach would also reduce compliance costs associated with managing express and implied consents, facilitate entry to the market for new businesses, and thus increase competition.<sup>73</sup>

Without urging for a redraft of the Act on the basis of an opt-out model, some witnesses asked for the simplification and easing of its consent provisions. They complained indeed that the consent provisions of the legislation are too strict.<sup>74</sup> Michael Fekete spoke to this point in the following terms:

The law tells you how you must request express consent.

...

You have to say this is my business name, and this is my mailing address and either my email address, my web address, or my telephone number. And it must say that you have the right to withdraw consent, or you can withhold your consent, or pull it back later.

If I don't ask it in that specific way, with that information, the consent is not valid ...

Another example is on implied consent. ... we need a strong consent regime, but there has to be a willingness to look at the circumstances and ask whether it makes sense for this small business to send a message to a customer based a prior relationship.

...

If I've made a purchase within the last two years, you can send me a message, but if I've subscribed for a free service – I didn't buy anything – maybe you can't send me a message. I say "maybe" because we're left scrambling to interpret the law. It's too prescriptive to make sense to business, let alone to the legal community who have to interpret it.<sup>75</sup>

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73 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1115 \(Aïsha Fournier Diallo\)](#); 5 October 2017, [1200, 1245 \(Scott Smith\)](#); 19 October 2017, [1230 \(James McLinton\)](#); 26 October 2017, [1105 \(William Michael Osborne\)](#).

74 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1110-1115 \(Adam Kardash\)](#); 17 October 2017, [1130-1135 \(David Messer\)](#); 19 October 2017, [1150 \(Wally Hill\)](#).

75 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1235-1240 \(Michael Fekete\)](#). See also also 5 October 2017, [1255 \(Scott Smith\)](#); 19 October 2017, [1200, 1230 \(James McLinton\)](#).



The Information Technology Association of Canada recommended to replace the notion of “implied consent” by the more flexible notion of “inferred consent,” as established under the Australian anti-spam legislation.<sup>76</sup>

Witnesses also cited PIPEDA as a source of inspiration to reform the consent provisions of the Act into a set of principles rather than prescriptive and technical requirements.<sup>77</sup> Wally Hill, Vice-President of the Canadian Marketing Association, argued: “CASL should have used the PIPEDA approach to consent, with express consent required in relation to sensitive matters of communication and backed up, forcefully, with the unsubscribe offer on every message.”<sup>78</sup>

Michael Geist, Professor at the Faculty of Law of the University of Ottawa as well a member of the Task Force on Spam that championed the adoption of the Act back in 2005, urged against redrafting the legislation on the basis of PIPEDA. Doing so, he argued, would not only prove ineffective, but would also contradict the very principle of the Act. Indeed, the provisions on implied consent would have been purposefully drafted in order to limit unsolicited CEMs and encourage senders to favour securing express consent over relying on implied consent:

I don’t doubt for a moment that Rogers, my carrier, is not a bad actor, but I will say that if you are sending me messages when you have not obtained my consent that is a bad act. I think we have to recognize that there are lots of legitimate businesses that may even still want to comply but that are, I would argue, misusing our personal information without obtaining appropriate consent. That’s a bad act, and that’s what the law’s designed to target. If we contemplate moving back to implied consent, then we’re right back to where we started from. The task force looked at whether or not PIPEDA was effective in dealing with spam, and the conclusion was that it was not. ... implied consent just doesn’t work in this context.<sup>79</sup>

Daniel Therrien, Privacy Commissioner of Canada, provided the following on the same matter:

PIPEDA allows for implicit consent and requires explicit consent based on criteria that generally makes sense. Does it work? It all depends on whether meaningful consent is obtained, and people do come to us frequently to say, “Maybe the law allows for implicit consent, but I never understood that I was giving implicit consent for this or that

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76 Information Technology Association of Canada (ITAC), [Brief to the Committee](#), 10 November 2017.

77 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1105 \(Michael Fekete\)](#); 17 October 2017, [1130-1135, 1210, 1235 \(David Messer\)](#); 26 October 2017, [1130 \(William Michael Osbourne\)](#); CLHIA, [Brief to the Committee](#), 15 November 2017.

78 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1115 \(Wally Hill\)](#).

79 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1215 \(Michael Geist\)](#).

conduct by the organization.” ...It’s a very open question, and I think many improvements would be required.

If I understand the question posed to me in terms of comparing CASL consent with PIPEDA consent, I concede that CASL consent is more onerous for organizations. Therefore, the PIPEDA consent regime could work if proper information was given to consumers, but in addition to that, I would suggest that you need to ask yourself, among other things, what expectation of consumers is in terms of receiving unsolicited communications from organizations? That's the first question.<sup>80</sup>

To the Commissioner’s last point, a number of witnesses have pleaded that the Act meets consumers’ expectations by granting them control over their electronic addresses and communications. Such control would not be achieved without a strong requirement of prior consent that can generate confidence among consumers that third parties will use their information appropriately and as agreed upon.<sup>81</sup>

## B. Commercial electronic message and other components

A number of witnesses proposed to reduce the scope of the Act by narrowing the definition of “CEM.” According to these witnesses, the current definition would cause the Act to cover messages that have even a modicum of commercial content.

The definition would therefore hinder the transmission of messages that could benefit their recipient, impose unsubscribe requirements that can prematurely terminate communications between parties, and divert enforcement resources away from harmful cyber-threats.<sup>82</sup>

Witnesses put forward a few ways to narrow the definition of CEM and other core components of the Act. These propositions include tailoring the definition to ensure the legislation only targets bulk message operations (and not one-time and two-way

**“[The] Act meets consumers’ expectations by granting them control over their electronic addresses and communications.”**

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80 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1135 \(Daniel Therrien\)](#).

81 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1205 \(John Lawford\)](#); 17 October 2017, [1120 \(Michael Geist\)](#); 24 October 2017, [1115 \(Neil Schwartzman\)](#); 26 October 2017, [1115 \(Philippe Le Roux\)](#).

82 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1100](#), [1245 \(Scott Smith\)](#); 5 October 2017, [1115](#), [1145](#), [1230 \(Aisha Diallo Fournier\)](#); 5 October 2017, [1130 \(Barry Sookman\)](#); CLHIA, [Brief to the Committee](#), 15 November 2017; CWTA, [Brief to the Committee](#), 17 November 2017.



communications), automated messages constituting harassment and, especially, harmful spam and malware.<sup>83</sup> In the words of David Messer, Vice-President of Information Technology Association of Canada:

[The] justification for CASL has been articulated as targeting damaging and deceptive spam, spyware, malicious code, and other threats. Amending CASL so that it targets only these harmful activities would go a long way to addressing CASL's unintended consequences. This can be accomplished by narrowing the definitions of three terms: computer program, commercial electronic message, and electronic address.<sup>84</sup>

In response, Michael Geist remained suspicious of claims that the definitions of the Act cause it to overstretch its scope. He suggested instead that this impression results from an overly restrictive interpretation of exceptions to the requirements of the Act.<sup>85</sup> He added that open-ended definitions are essential to maintain technological neutrality and ensure the Act applies to future developments.<sup>86</sup> Instead of major revisions, the optimal scope of the Act might depend more on providing better education on its provisions and on the sensible allocation of enforcement resources.<sup>87</sup>

If there is one area of near-consensus among witnesses, it is that purely administrative and transactional electronic messages should not fall under the definition of a CEM. Adam Kardash, Advertising Bureau of Canada, provided the following:

[Consider] that CASL doesn't just regulate marketing and promotional messages. Rather, the statute ... applies even to certain administrative or transactional messages that provide solely factual information about an account, a product recall, or even safety. Stunningly, CASL requires that such messages contain an unsubscribe or opt-out mechanism. This is totally confusing for consumers and businesses. Nobody would ever consider these messages to be spam, yet companies that don't offer an unsubscribe option for these types of administrative messages would be technically violating the statute.

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83 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1155 \(Scott Smith\)](#); 17 October 2017, [1105, 1205 \(Michael Fekete\)](#); 19 October 2017, [1215 \(Andrew Schiestel\)](#); 26 October 2017, [1105, 1130, 1225 \(William Michael Osborne\)](#); ITAC, [Brief to the Committee](#), November 10 2017.

84 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1130 \(David Messer\)](#). See also CBTA, [Brief to the Committee](#), 22 November 2017.

85 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1125 \(Michael Geist\)](#).

86 *Ibid.*, [1230 \(Michael Geist\)](#). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 November 2017, [1245 \(Chris Lewis\)](#).

87 *Ibid.*, [1135 \(Chris Lewis\)](#).

CASL definitely needs to be amended to expressly exclude these and other wholly legitimate types of electronic messages from the CASL regulatory regime.<sup>88</sup>

Several witnesses have therefore proposed amending the Act in order to exclude from the definition of CEM the electronic messages listed in its subsection 6(6), along with of similar regulatory provisions.<sup>89</sup> Kelly-Anne Smith, Senior Legal Counsel, CRTC, highlighted that subsection 6(6) illustrates areas of overlap between provisions of the Act and its regulations:

In the [Governor in Council] regulations, there's the exemption where, if you're a business and you have a relationship, you can send to another business. But then there's the existing business relationship exemption. If you're a business, you already likely fall under the existing business relationship exemption, so there's an overlap there. ...

I think there is likely an opportunity to clarify with respect to subsection 6(6).

Section 6(6) is a little bit of an oxymoron in that it says that these commercial electronic messages are exempt for consent purposes, but if you look at what those provisions are, a lot of them are not really commercial electronic messages by their very nature. We've heard a lot of confusion from people with respect to section 6(6) and we've tried to give them comfort, but we can't change the way the legislation is worded.<sup>90</sup>

Limiting the definition of CEMs to communications clearly or primarily intended to engage their recipient in a new commercial activity, as some witnesses suggested,<sup>91</sup> would also remove administrative and transactional messages from the scope of the Act.

The legislation provides numerous exceptions to its general requirements. The Act does not apply, for example, to electronic communications between people who share a

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88 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1110 \(Adam Kardash\)](#).

89 Ibid., [1210 \(Adam Kardash\)](#); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1135](#), [1205](#), [1215 \(Deborah Evans\)](#); 19 October 2017, [1115 \(Wally Hill\)](#); 26 October 2017, [1155 \(Philippe Le Roux\)](#); 26 October 2017, [1225 \(William Michael Osborne\)](#); 7 November 2017, [1115 \(Kim Arseneault\)](#); Rogers Communications Inc., [Brief to the Committee](#), 16 October 2017; ESPC, [Brief to the Committee](#), 18 October 2017; CREA, [Brief to the Committee](#), 6 November 2017; ITAC, [Brief to the Committee](#), 10 November 2017; Canadian Bankers Association, [Brief to the Committee](#), 15 November 2017; CLHIA, [Brief to the Committee](#), 15 November 2017; CWTA, [Brief to the Committee](#), 17 November 2017; CVMA, [Brief to the Committee](#), 22 November 2017; Philip Palmer, [Brief to the Committee](#), 22 November 2017; CBTA, [Brief to the Committee](#), 22 November 2017; Shaw Communications Inc., [Brief to the Committee](#), 23 November 2017.

90 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1140 \(Kelly-Anne Smith\)](#).

91 See for example INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1130 \(James McLinton\)](#); ITAC, [Brief to the Committee](#), 17 October 2017; Canadian Bankers Association, [Brief to the Committee](#), 15 November 2017; CVMA, [Brief to the Committee](#), 22 November 2017; CBTA, [Brief to the Committee](#), 22 November 2017.



familial or personal relationship. Neither do its requirements apply to a CEM sent to a person engaged in a commercial activity and consisting “solely of an inquiry or application related to that activity.”<sup>92</sup> Sections 3 and 4 of the Governor in Council’s *Electronic Commerce Protection Regulations* provide no less than fifteen additional exceptions.<sup>93</sup> These exceptions potentially apply to CEMs sent between the members of the same organization; from one business to another; to raise funds for a registered charity; to solicit a contribution to a political party, organization or candidate; or to follow up on a referral.

Despite current exceptions, a few witnesses argued that more communications should be excluded from the application of the Act, including general commercial communications,<sup>94</sup> all business-to-business communications,<sup>95</sup> and communications from politicians of all levels of government.<sup>96</sup>

Several witnesses also suggested exempting additional CEMs from the Act’s consent requirements. For example, Scott Smith argued that businesses should be given the opportunity to send potential customers an initial, unsolicited message, as long as they provide an option to unsubscribe or opt-out from further communications.<sup>97</sup> Representatives from the Canadian Federation of Independent Business argued that businesses that only send a few emails per year or month should be similarly exempted.<sup>98</sup>

Numerous witnesses advocated for charities and non-for-profit organizations to be exempted from complying with any of the electronic messaging provisions of the Act.<sup>99</sup>

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92 *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, subsection 6(5).

93 *Electronic Commerce Protection Regulations*, SOR/2013-221.

94 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1150 \(Barry Sookman\)](#); 19 October 2017, [1115 \(Wally Hill\)](#).

95 CFIB, [Brief to the Committee](#), 8 November 2017; CBTA, [Brief to the Committee](#), 22 November 2017

96 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1150 \(Barry Sookman\)](#).

97 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1155 \(Scott Smith\)](#).

98 CFIB, [Brief to the Committee](#), 8 November 2017.

99 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 October 2017, [1215, 1255 \(Suzanne Morin\)](#); 26 October 2017, [1120 \(Bill Schaper\)](#); ONN, [Brief to the Committee](#), 27 October 2017; UC, [Brief to the Committee](#), 27 October 2017; CCVO, [Brief to the Committee](#), 27 October 2017; CSCNL, [Brief to the Committee](#), 30 October 2017; Philip Palmer, [Brief to the Committee](#), 22 November 2017; CBTA, [Brief to the Committee](#), 22 November 2017.

More specifically, Universities Canada suggested that certain electronic communications by educational institutions be exempted from the consent requirement as long as the recipient meet certain criteria (e.g. being a student or a prospective student).<sup>100</sup> The Community Sector Council Newfoundland and Labrador also asked that no charity or non-profit organization should have to pay AMPs for violating the Act.<sup>101</sup> Other witnesses also suggested exempting legitimate research endeavours from consent requirements.<sup>102</sup>

Some witnesses criticized the existing exceptions under the Act. Stephanie Provato, associate at Buchli Goldstein LLP and advisor to Lighten CASL Inc.,<sup>103</sup> observed that the definitions of what constitutes family and personal relationships are too prescriptive. Barry Sookman requested that the same exceptions be broadened.<sup>104</sup> Scott Smith also indicated that most exceptions to the requirements of the Act are too vague.<sup>105</sup>

Michael Geist observed that the focus of many other witnesses on exceptions, as opposed to the principle of the Act, is misplaced:

Businesses rely on exceptions where they don't want to comply with the foundational obligation that is in the law: consent. The law is clear: if you get informed consent, there is no need to go searching for an exception to apply to your activities. When you hear complaints about narrow exceptions or calls for more, that complaint is fundamentally about the ability to use that personal information without informed consent by leveraging an exception. ... [T]hat's bad policy and bad for privacy.<sup>106</sup>

Regarding the creation of further exceptions, Steve Harroun warned that creating exceptions “for every situation, even when well-intentioned, would only make the legislation more difficult for businesses to understand, and for the CRTC and [its] partners to enforce.”<sup>107</sup>

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100 UC, [Brief to the Committee](#), 27 October 2017.

101 CSCNL, [Brief to the Committee](#), 30 October 2017.

102 MRIA, [Brief to the Committee](#), 6 November 2017; Philip Palmer, [Brief to the Committee](#), 22 November 2017.

103 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 October 2017, [1145 \(Stephanie Provato\)](#).

104 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1235 \(Barry Sookman\)](#).

105 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 October 2017, [1100 \(Scott Smith\)](#).

106 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, [1125 \(Michael Geist\)](#).

107 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 November 2017, [1105 \(Steven Harroun\)](#).



## CONCLUSION

The Committee acknowledges the importance of the Act, its aim and the principles that support it. All consumers, businesses and other organizations benefit from a decrease in many forms of unsolicited commercial electronic communications. Public trust towards these means of communications and those who use personal information for commercial ends is essential to the prosperity of the Canadian economy.

The Act under review is no ordinary legislation. It makes extensive changes to the conduct of electronic commerce in Canada by requiring that individuals and organizations alter longstanding practices. While not knowing the law does not, and will never, excuse its violation, the Act cannot reach its goal without providing further guidance about its substance and its application.

The evidence presented during this statutory review reveals wide differences of opinion on the Act should be interpreted. As a result, the Committee joins its voice to that of witnesses demanding clear, effective, accessible and regularly updated guidance materials from enforcement agencies. Such materials should be designed with their end users in mind and supported by their feedback.

While improving guidance and education should be a priority moving forward, it can only achieve so much. The Act and its regulations require clarifications to reduce the cost of compliance and better focus enforcement. Provisions defining CEM, consent, and “business-to-business” messages, among others, warrant the attention of the Government of Canada. The Government will be in a better position to assess the impact of the coming into force of the private right of action once these clarifications are implemented.



## APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p><b>Canadian Radio-television and Telecommunications Commission</b></p> <p>Neil Barratt, Director Compliance and Enforcement</p> <p>Steven Harroun, Chief Compliance and Enforcement Officer</p> <p>Kelly-Anne Smith, Senior Legal Counsel</p> <p><b>Department of Industry</b></p> <p>Mark Schaan, Director General Marketplace Framework Policy Branch, Strategy and Innovation Policy Sector</p> <p>Charles Taillefer, Director Privacy and Data Protection Policy Directorate, Digital Transformation Service Sector</p>	2017/09/26	72
<p><b>As an individual</b></p> <p>Barry Sookman, Partner McCarthy Tétrault</p> <p><b>Canadian Chamber of Commerce</b></p> <p>Scott Smith, Director Intellectual Property and Innovation Policy</p> <p><b>Desjardins Group</b></p> <p>Natalie Brown, Director</p> <p>Aïsha Fournier Diallo, Senior Legal Counsel</p> <p><b>Public Interest Advocacy Centre</b></p> <p>Alysia Lau, External Counsel Regulatory and Public Policy</p> <p>John Lawford, Executive Director and General Counsel</p>	2017/10/05	75

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<p><b>As individuals</b></p> <p>Michael Fekete, Partner Osler, Hoskin &amp; Harcourt LLP</p> <p>Michael Geist, Canada Research Chair in Internet and E-commerce Law Faculty of Law, University of Ottawa</p> <p>Adam Kardash, Counsel Interactive Advertising Bureau of Canada</p> <p><b>Information Technology Association of Canada</b></p> <p>David Messer, Vice-President Policy</p> <p><b>Rogers Communications Inc.</b></p> <p>Deborah Evans, Associate Chief Privacy Officer</p>	2017/10/17	76
<p><b>As an individual</b></p> <p>Stephanie Provato, Associate Buchli Goldstein LLP</p> <p><b>Canadian Marketing Association</b></p> <p>David Elder, Special Digital Privacy Counsel</p> <p>Wally Hill, Vice-President Government and Consumer Affairs</p> <p><b>Lighten CASL Inc.</b></p> <p>Andrew Schiestel, Founder</p> <p><b>Retail Council of Canada</b></p> <p>Jason McLinton, Vice-President Grocery Division and Regulatory Affairs</p>	2017/10/19	77
<p><b>Canadian Bar Association</b></p> <p>Gillian Carter, Lawyer Legislation and Law Reform</p> <p>Suzanne Morin, Chair Privacy and Access Law Section</p>	2017/10/24	78

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<p><b>Coalition Against Unsolicited Commercial Email</b></p> <p>Neil Schwartzman, Executive Director</p> <p>Matthew Vernhout, Director-at-large</p>	2017/10/24	78
<p><b>Office of the Privacy Commissioner of Canada</b></p> <p>Daniel Therrien, Privacy Commissioner of Canada</p> <p>Brent Homan, Director General</p> <p>Personal Information Protection and Electronic Documents Act</p> <p>Investigations</p> <p>Regan Morris, Legal Counsel</p>		
<p><b>As an individual</b></p> <p>William Michael Osborne, Partner</p> <p>Affleck Greene McMurtry LLP</p>	2017/10/26	79
<p><b>Certimail</b></p> <p>Philippe Le Roux, Executive Officer</p>		
<p><b>Imagine Canada</b></p> <p>Bill Schaper, Director</p> <p>Public Policy</p>		
<p><b>Department of Industry</b></p> <p>Josephine Palumbo, Deputy Commissioner</p> <p>Deceptive Marketing Practices Directorate, Competition Bureau</p> <p>Canada</p> <p>Morgan Currie, Associate Deputy Commissioner</p> <p>Deceptive Marketing Practices Directorate, Competition Bureau</p> <p>Canada</p> <p>Christopher Padfield, Director General</p> <p>Small Business Branch, Small Business, Tourism and</p> <p>Marketplace Services</p> <p>Mélanie Raymond, Director</p> <p>Office of Consumers Affairs</p>	2017/10/31	80
<p><b>Inbox Marketer</b></p> <p>Kim Arsenault, Senior Director</p> <p>Client Services</p>	2017/11/07	82

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>INTERPOL</b> Louis Lau, Digital Crime Officer Cybercrime Directorate	2017/11/07	82
<b>Spamhaus Technology Ltd.</b> Chris Lewis, Chief Scientist		
<b>Canadian Radio-television and Telecommunications Commission</b> Neil Barratt, Director Electronic Commerce Enforcement Steven Harroun, Chief Compliance and Enforcement Officer Kelly-Anne Smith, Senior Legal Counsel	2017/11/09	83

## **APPENDIX B LIST OF BRIEFS**

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### **Organizations and Individuals**

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**Calgary Chamber of Voluntary Organizations**

**Canadian Bankers Association**

**Canadian Bar Association**

**Canadian Federation of Independent Business**

**Canadian Life and Health Insurance Association**

**Canadian Marketing Association**

**Canadian Radio-television and Telecommunications Commission**

**Canadian Real Estate Association**

**Canadian Vehicle Manufacturers' Association**

**Canadian Wireless Telecommunications Association**

**CASL Cure**

**Certimail**

**Coalition of Business and Technology Associations**

**Community Sector Council Newfoundland and Labrador**

**Cyberimpact**

**Desjardins Group**

**Direct Marketing Association of Canada**

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## **Organizations and Individuals**

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**Eastlink**

**Email Sender and Provider Coalition**

**Imagine Canada**

**Information Technology Association of Canada**

**Maplegrow Capital Inc.**

**Marketing Research and Intelligence Association**

**Ontario Nonprofit Network**

**Palmer, Philip**

**Rogers Communications Inc.**

**Shaw Communications Inc.**

**Spamhaus Technology Ltd.**

**Universities Canada**

## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 72, 75 to 80, 82 to 84, and 88 to 90](#)) is tabled.

Respectfully submitted,

Dan Ruimy  
Chair





## NDP SUPPLEMENTARY OPINION

**Brian Masse M.P.**  
**Windsor West**  
**NDP Innovation, Science and Economic Development Critic**

### **Existing Canada Anti-Spam Legislation**

Canada's Anti-Spam Legislation (CASL) was initially developed to move Canada forward internationally in stopping unwanted spam for Canadian consumers and to curb Canada being one of the top origin destinations for international spam. Since the law was enforced in 2014, spam has decreased to Canadians' inboxes, yet it is unclear how much of this was a product of CASL or other anti-spam software.

Over the course of this CASL review, this committee heard witnesses testify on all aspects of the legislation. However, the most often heard complaint was frustration and confusion with the language, terminology, and definitions used within the existing legislation.

New Democrats do not believe that this is a reason to change the existing law. Instead, we view this as an opportunity to properly educate and train these businesses and organizations in order to better understand the existing law. Therefore, we support committee recommendation 9 for better training to businesses and organizations on the terminology that exists, while still ensuring that the current law remains intact.

Further, witnesses testified that without the government, internet service providers (ISPs) or the Canadian Radio-television and Telecommunications Commission (CRTC) having kept records on the actual statistics following the implementation of this law in 2014, it is hard to identify whether or not this law itself has had an impact for Canadian consumers.

We were told that it is unclear on all fronts whether the existing law is working because there is no reporting mechanism for ISPs, CRTC or from other forms of data collection. Yet, we heard that up to 5,000 consumer complaints are launched weekly with CRTC. Statistics on all fronts, including what is working and what is not, would illuminate whether or not the law is effective before we change it. We therefore also support recommendation 12 for the collection of the data to better understand if the existing law is working before any changes are made to the legislation.

Moreover, we do not support opening up the existing legislation to clarify, narrow, or change the existing definitions of "express consent," "implied consent," or "commercial electronic message (CEM)." This could have unintended consequences that would pose a significant setback for consumer privacy without even knowing whether the existing legislation is

effective. Any changes to the consent model at this point would create more confusion to the businesses and organizations affected by CASL.

The narrowing or changing the definition of CEM would also likely require a re-write of the legislation and potentially allow loopholes that change the way that CEMs can be sent. If the original intention of the legislation was to protect consumers, a change to the definition of CEMs could potentially open up consumers' emails to a world of exemptions that currently do not exist. New Democrats do not support creating new exemptions in this legislation.

### **Private Right of Action**

The NDP believes that the private right of action of this legislation should be enforced, as is, and not studied further. With the proper education and training on the existing legislation from the CRTC, we feel that businesses and organizations should be prepared and confident to send their CEMs and should not fear prosecution. We do support allowing consumers this option and would be comfortable with a grace period of one year or less to allow for the proper training, education and software implementation for businesses and organizations affected.

### **Three year review**

Finally, we recommend another three-year review, in order for the government, ISPs and CRTC to collect data on the effectiveness of this legislation and report back to committee.