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ARTICLES

CANADA'S ANTI-SPAM LEGISLATION: A CONSTITUTIONAL ANALYSIS

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ABSTRACT

On December 15th, 2010, the Government of Canada agreed to Bill C-28, the *Fighting Internet and Wireless Spam Act*, with the intent to “deter the most damaging and deceptive forms of spam... from occurring in Canada and to help to drive out spammers.” Canada’s Anti-Spam Legislation (“CASL”) was born. Although CASL has only been in force since July 1st, 2014, we argue that the Act may not survive constitutional scrutiny as it unduly restricts freedom of speech.

CANADA'S ANTI-SPAM LEGISLATION: AN OVERVIEW

On December 15, 2010, the Government of Canada agreed to Bill C-28, giving rise to Canada’s Anti-Spam Legislation (“CASL”). In force as of July 1st, 2014, it aims to establish a regulatory framework to protect E-commerce, address issues of unsolicited commercial electronic mail (or “spam”), and increase confidence in online transactions.¹ While a

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1. Its full title being: 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, SC 2010, c 23. [hereinafter An Act to Promote Efficiency and Adaptability of the Canadian

statutory response to spam is welcome, *CASL* has taken a “ban-all” approach to the problem, and is perhaps the most stringent anti-spam legislations in the world. Its restrictive nature has led us to question its constitutional validity. In particular, *CASL*’s encroachment on freedom of speech (a constitutionally enshrined right under the *Canadian Charter of Rights and Freedoms*²) is, in our view, not justified as required under section 1 of the *Charter*.

SPAM AS AN ELECTRONIC THREAT

While neither a uniform nor internationally agreed-upon definition of “spam” exists, Industry Canada has indicated that spam includes: “any electronic commercial message sent without the express consent of the recipient(s).”³ This unsolicited contact and online behavior has become an increasingly significant social and economic issue, negatively impacting the commercial and personal productivity of Canadians.⁴ No longer just a nuisance, spam has evolved into more than unsolicited commercial messages; it has become a vehicle for the delivery of other harmful electronic threats such as spyware, viruses, privacy intrusions, scams, and fraudulent or misleading trade and commercial activity.⁵ The volume of spam and other electronic threats has become well recognized, and its growth has been significant:

In the year 2000...spam amounted to about 10% of the total volume of electronic mail. By 2002, the percentage had climbed to 30%. In early 2003...the amount of electronic unsolicited commercial e-mail had surpassed that of legitimate communications. By the end of 2004, it [was] predicted that spam [would] constitute as much as 70% of global e-mail.⁶

Industry Canada has estimated that spam now represents more than 80% of all e-mail traffic.⁷

Possessing and managing spam creates a number of burdens on individuals and businesses. For businesses that use electronic communications or utilize the Internet to provide corporate and commercial

Economy] (Its verbosity is indeed ironic for an Act designed to promote efficiency).

2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

3. *Government of Canada Introduces Anti-Spam Legislation (CASL)*, INDUSTRY CANADA, <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html#q1> (last modified Feb. 15, 2013).

4. *Id.* at q4.

5. *Id.* at q1.

6. Industry Canada, *An Anti-Spam Action Plan for Canada 1* (May 2004), available at [https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/vwapj/Anti-Spam_Action_Plan.pdf/\\$file/Anti-Spam_Action_Plan.pdf](https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/vwapj/Anti-Spam_Action_Plan.pdf/$file/Anti-Spam_Action_Plan.pdf).

7. *Online Threats*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00524.html> (last modified Dec. 13, 2012).

services, the prevalence and growth of spam is recognized as a cost of doing business. Businesses, including Internet network service providers, are forced to invest ever-increasing resources to prevent spam from entering their networks and negatively affecting their operations and credibility. This cost is paid for by the organizations and businesses themselves, and also through service charges paid by personal Internet users.⁸ For individuals, the costs associated with purchasing and installing additional programs to manage, filter, and protect against such electronic threats is a cost of online participation.

In addition to imposing cost burdens, the negative effects of spam can lead to reduced confidence levels in the eyes of end users, regarding the safety and security of the Internet. Spam can lead to the collection and theft of personal information through illicit access to computer systems, it can lure users to counterfeit and harmful websites commonly referred to as phishing, and it can lead to false or misleading representations in the online marketplace.⁹ As a result, spam and unsolicited contact can have the effect of undermining the reliability of online communication networks for both business users and individuals. This subsequently threatens consumer confidence in the E-commerce marketplace, and the willingness of Canadians to participate in the digital economy by conducting commerce online. "Because of this, the potential of information and communications technology to buttress productivity, and the ability of E-commerce to attract investment, create jobs, and enrich our lives, is now constrained by torrents of spam."¹⁰

Spam, as an electronic threat, disrupts online commerce and reduces business and consumer confidence in the online marketplace. It congests networks; imposes costs on individuals, businesses, and network operators; threatens network reliability and security; and undermines personal privacy.

THE PRE-CASL STATE OF THE LAW IN CANADA

In Canada, organizations such as the Canadian Radio-television and Telecommunications Commission ("CRTC"), the Competition Bureau, the Office of the Privacy Commissioner, and the Special Task Force on Spam have all addressed concerns regarding spam and electronic threats.¹¹ These concerns include the collection of personal information online, and the sending and receiving of unsolicited commer-

8. An Anti-Spam Action Plan for Canada, *supra* note 6.

9. *Government of Canada Introduces Anti-Spam Legislation*, *supra* note 1.

10. An Anti-Spam Action Plan for Canada, *supra* note 6.

11. The Competition Bureau Canada, *The Little Black Book of Scams: Your Guide to Protection Against Fraud*, Jan. 11, 2013, available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03074.html>.

cial electronic messages.¹² As a federal statute, the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) sets out rules and regulations governing the “collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of private sector organizations to collect, use or disclose personal information.”¹³

Most initiatives aimed at controlling the rising volume of unsolicited commercial e-mails have focused on a combination of filtering technologies, and the “use of ‘blacklists’ of servers and domains that have been identified as sources of spam.”¹⁴

While legislative initiatives and organizations in Canada have provided guidance and remedies regarding spam and the collection of personal information online, they have not extended far enough. Concerns related to spam required specific legislative intervention. For example, the *Competition Act* contains provisions dealing with deceptive and misleading representations in traditional media and online advertising. However, Industry Canada has stated that, “[t]he application of the [Competition] Act to misleading claims made in e-mail solicitations is an area that merits examination.”¹⁵

Perhaps unsurprisingly, the Competition Act examines the issue of spam through the lens of competition and unfair practices, which, while relevant to spam and electronic threats, does not get at the root of the problem. The objectives of the Competition Act stems from a different context: one that is not dedicated to spam in its entirety. It also provides a more reactive response, rather than proactive measures. A more uniform and targeted approach, specifically dedicated to spam and its resulting effects and concerns was needed.

Recent Canadian cases outline the concerns of Internet users, highlighting some of the difficulties and inefficiencies of the then available responses to address issues of spam.

The Ontario Superior Court in *1267623 Ontario Inc. v Nexx Online Inc.*¹⁶ addressed the issue of unsolicited bulk e-mails. The Defendant, an Internet service provider, contracted with the Plaintiff to host its website. The Plaintiff sent out unsolicited bulk e-mail messages in an attempt to promote their products and encourage potential customers to visit their site.¹⁷ The Defendant deactivated the Plaintiff’s website af-

12. *Id.* at 8-9.

13. MAGGIE CAVALLIN, CLARK WILSON LLP, CANADA’S NEW ANTI-SPAM LEGISLATION 12 (2013), available at <http://www.cwilson.com/publications/anti-spam-legislation.pdf>.

14. AN ANTI-SPAM ACTION PLAN FOR CANADA, *supra* note 6.

15. *Id.*

16. *1267623 Ontario Inc. v. Nexx Online Inc.* (1999), 45 O.R.3d 40 (Can. Ont. Sup. Ct. J.).

17. *Id.*

ter the Plaintiff refused Defendant's requests to refrain from sending unsolicited bulk e-mail. Ruling in favor of the Defendant, the court held that unless an Internet service provider contractually permits the distribution of unsolicited commercial bulk e-mail, this type of online activity is contrary to the service provider's activities, as service contracts were founded on the principles of 'Netiquette' and to be interpreted accordingly.¹⁸

This case illustrates that this type of online behavior was primarily dealt with as a breach of contract. Contracts were "governed by the rules of 'Netiquette' which was defined as the growing body of acceptable, though largely unwritten, etiquette with respect to conduct by users on the Internet."¹⁹ The Plaintiff argued that there were no clauses in the contract that stated that this behavior was covered by the policy, nor outlining what the Netiquette policy even included. The Plaintiff disagreed with the fact that the court inferred that the sending of bulk e-mails for the purpose of commercial activity offended the Netiquette policy, absent any language permitting such a conclusion to be made. The Plaintiff also argued there were no Canadian cases defining the rules of Netiquette with respect to unsolicited bulk e-mail. As a result of this case, it appears that a code of online conduct was evolving based on good neighbor principles for the orderly development of the Internet and to prevent potential Internet abuse.

Case Summary #297 (2004)²⁰ outlined the Office of the Privacy Commissioner's investigation into privacy complaints concerning unsolicited e-mail for marketing purposes. In this case, the business e-mail address of the Complainant was collected by a company without his consent, and he received spam e-mails as a result. It was concluded that this was contrary to Principle 4.3 of *PIPEDA*.²¹ This case highlighted the 'opt-out' policy currently in force and supported by *PIPEDA*, which governs the practices of unsolicited communication and spam regulation. Under the 'opt-out' policy, organizations can send commercial electronic messages based on express or implied consent, as long as the recipient has the option to opt-out or unsubscribe.²² In this case, even after the Complainant opted-out, the company proceeded to obtain his e-mail from other sources and continued to use this information to send him unsolicited marketing material. The Complainant expressed

18. *Id.*

19. *Id.* at para. 2.

20. Unsolicited e-mail for marketing purposes, *PIPEDA Case Summary #297* (Dec. 1, 2004), https://www.priv.gc.ca/cf-dc/2005/297_050331_01_e.asp.

21. *Id.*

22. *Managing the message: Canada's new anti-spam law sets a high bar*, DELOITTE 3, http://www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/ERS/ca_en_ers_spr-CanadaAntiSpam_120712.pdf (last visited July 17, 2014).

his dissatisfaction with a policy that allowed for uncertainties and grey areas when obtaining and retracting consent for the collection of personal information and receiving of bulk marketing messages. This case highlighted the frustrations of the ‘opt-out’ policy, one that takes a reactive rather than a proactive approach to managing and combating spam.

In the Privacy Commissioner’s *Case Summary #319 (2005)*,²³ a Complainant argued that his Internet service provider did not have the authority to block him from sending bulk e-mail messages for commercial and advertising purposes. The Internet service provider argued that blocking e-mails of this nature was in keeping with Industry Canada’s Spam Task Force’s *Recommended Best Practices for Canadian ISPs and Other Network Operators*.²⁴ It was held that the Complainant agreed to the acceptable use policy under the provider’s Terms of Service, which prohibited customers from engaging in “any activity that violates applicable policies ... including the transmitting of spam.”²⁵ The Complainant took issue with the absence of a law prohibiting such activities; he argued that he should be able to send messages classified as spam, as there was no law prohibiting it, only the aforementioned best practices.

These cases outline various concerns of Internet users in Canada, while highlighting some of the difficulties, frustrations and inefficiencies of the then current responses to spam. It was apparent that a more concrete framework specifically targeted at these concerns and the regulating of spam, would benefit Internet users. Rather than relying on ambiguous concepts like “Netiquette” and “best practices” techniques, a structured and codified legislative response was needed. As a result, Bill C-28, Canada’s Anti-Spam Legislation was introduced and passed.

CANADA’S ANTI-SPAM LEGISLATION

On December 15, 2010 the Government of Canada assented to Bill C-28, the Fighting Internet and Wireless Spam Act, with the intent to “deter the most damaging and deceptive forms of spam... from occurring in Canada and to help to drive out spammers.”²⁶ And thus Canada’s Anti-Spam Legislation was created. In force as of July 1st, 2014 *CASL* aimed to establish a regulatory framework to protect electronic commerce in Canada and address the issue of unsolicited electronic mail. Indeed, the full title of the Act, as cumbersome as it may be, is in-

23. ISP Anti-Span Measures Questioned, PIPEDA Case Summary #319 (Nov. 8, 2005), https://www.priv.gc.ca/cf-dc/2005/319_20051103_e.asp.

24. *Id.*

25. *Id.*

26. *Bill C-28: Canada’s Anti-Spam Legislation*, INDUSTRY CANADA, http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h_gv00567.html (last modified June 26, 2014).

dicative of its ends and means:

An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act.²⁷

CASL will therefore be enforced by three government agencies: the Canadian Radio-television and Telecommunications Commission, the Competition Bureau, and the Office of the Privacy Commissioner.²⁸ The Act promotes the efficiency and adaptability of the Canadian economy by discouraging the damaging and deceptive forms of spam from being disseminated. It aims to create a more secure online environment by regulating commercial conduct that discourages the use of electronic-mail to carry out commercial activities, because such conduct:

(a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities; (b) imposes additional costs on businesses and consumers; (c) compromises privacy and the security of confidential information; and (d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.²⁹

According to *CASL*, a commercial e-mail (“CEM”), is an electronic message, which includes any text, sound, voice, or image,³⁰ sent to an electronic address (i.e. an e-mail, instant message, or phone), that’s purposes is to encourage participation in a commercial activity.³¹ Commercial activity refers to a transaction, act, or conduct of a commercial character, regardless of an expectation of profit.³² These CEMs are messages that advertise or offer “to purchase, sell, barter or lease a product, goods [or] service...offers to provide a business, investment or gaming opportunity” or to promote a person or product.³³ *CASL* regulates sending CEMs through an express consent-based regime, applying to a range of electronic messages.

27. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23 (Can.).

28. *Summary: Canada’s Anti-Spam Legislation*, INDUSTRY CANADA <http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00568.html> (last modified Jan. 25, 2011).

29. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, §3 (Can.).

30. *Id.* at §1(1).

31. *Id.*

32. *Id.*

33. *Id.* at §1(2).

CONSENT

The element of consent is a key feature of *CASL*. The strict provisions concerning consent help explain *CASL*'s notoriety in terms of being one of the most stringent anti-spam regimes in the world.³⁴ According to which, "Canadian and global organizations that send CEMs within, from or to Canada need the permission of their recipients to send those messages, with very limited exceptions."³⁵ *CASL* goes against existing trends in other countries and legislation, and creates an 'opt-in' regime with regard to consent. In fact, a Compliance and Enforcement Information Bulletin produced by the CRTC states that "in order to comply with the express consent provisions under the Act, a positive or explicit indication of consent is required. Accordingly, express consent cannot be obtained through opt-out consent mechanisms."³⁶

Recipients must therefore agree, through express or implied consent, to have a message sent to them *before* it is sent or received.³⁷ Prior to *CASL*, a CEM could be sent based on express or implied consent, as long as the recipient had the option to opt-out. Also, requests for consent for multiple activities could be bundled into a single consent request, or included within general terms and conditions of use. According to *CASL*, express consent cannot be bundled; it must be obtained separately for each individual act regulated by *CASL*, including: "sending a CEM, altering transmission data in CEMs, or installing a computer program on another person's computer."³⁸ This applies regardless of whether or not a program is installed for a malicious purpose.

In seeking express consent, *CASL* and the CRTC's own Information Bulletins require CEMs to comply with specific form and content requirements.³⁹ As a result, CEMs must include the purpose for which consent is being sought, information that identifies the person sending

34. *Task Force on Spam*, INDUSTRY CANADA, http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h_gv00248.html (last visited Oct. 11, 2013).

35. *Managing the message*, *supra* note 22, at 1.

36. CAN. RADIO-TELEVISION AND TELECOMM. COMM'N, *Guidelines on the use of Toggling as a means of Obtaining Express Consent under Canada's Anti-Spam Legislation*, COMPLIANCE & ENFORCEMENT INFO. BULL. CRTC 2012-549, 3 (Oct. 10, 2012), available at <http://www.crtc.gc.ca/eng/archive/2012/2012-549.pdf>.

37. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6(a) (Can.).

38. *Managing the message*, *supra* note 22, at 3.

39. CAN. RADIO-TELEVISION AND TELECOMM. COMM'N, *Guidelines on the interpretation of the Electronic Commerce Protection Regulations*, COMPLIANCE & ENFORCEMENT INFO. BULL. CRTC 2012-548 (Oct. 10, 2012), available at <http://www.crtc.gc.ca/eng/archive/2012/2012-548.pdf>; COMPLIANCE & ENFORCEMENT INFO. BULL. CRTC 2012-549, *supra* note 36.

the message, as well as their contact information.⁴⁰ CEMs must include an unsubscribe mechanism, which “enables the person to whom the CEM is sent to indicate, at no cost to them, the wish to no longer receive any commercial electronic messages from the sender.”⁴¹

Unique to *CASL* is the fact that an electronic message requesting a recipient's consent to receive further CEMs *is itself* a CEM and, therefore, cannot be sent without the consent of the recipient.⁴² This highlights the restrictive nature of the new legislation in regulating and deterring spam and other electronic threats.

Implied consent and exceptions to *CASL*'s consent regulations will be considered to exist in a limited number of circumstances. *CASL* Regulations⁴³, not yet in force⁴⁴, indicate that the consent, form and content requirements do not apply if a person sending a CEM has a “personal relationship” or “family relationship” with the recipient, or if an “existing business relationship” exists between the parties.⁴⁵ Exceptions also apply to certain “business-to-business” messages, and to CEMs between persons engaged in commercial activity if the message is merely an inquiry or application related to that commerce activity.⁴⁶ These concepts and exceptions will be discussed below. Messages sent from outside of Canada are also included in *CASL*'s exemptions, which include messages sent by foreign businesses (provided that the sender could not reasonably know the message would be received in Canada), and internationally based Canadian organizations.⁴⁷

CASL does not provide exemptions for communications in which prior consent was already communicated or obtained (i.e. grandfathering of *PIPEDA*-compliant consents). As a result of this new regulatory regime, individuals may find that organizations that they had previously given consent to, must seek re-consent in order to comply with the new, stricter laws.

These requirements and prohibitions with regard to consent, and the shift from an “opt-out” to an “opt-in” structure, demonstrates that

40. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 2(a)(b) (Can.); An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 10(1)(a) (Can.).

41. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, § 11(1).

42. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6(a) (Can.).

43. Electronic Commerce Protection Regulations, SOR/2013-221 (Can.), available at <http://laws-lois.justice.gc.ca/PDF/SOR-2013-221.pdf>.

44. *Id.*

45. *Id.*

46. *Id.*

47. Miyo Yamashita & Sylvia Kingsmill, *Canada's Anti-Spam Law: Key Exemptions*, DELOITTE, http://www.deloitte.com/view/en_CA/ca/insights/ideas/CASL-Key_exemptions_you_need_to_know_about/index.htm (last visited June 28, 2014).

CASL takes a proactive rather than reactive approach to regulating and deterring spam and other electronic threats.

CASL AMENDING EXISTING LEGISLATIONS

CASL Bill C-28 amends existing statutes including the Canadian Radio-television and Telecommunications Commission Act, *PIPEDA*, and the Telecommunications Act.

CASL amends *PIPEDA*, preventing the unauthorized collection and use of electronic addresses or personal information obtained using computer programs designed to collect such information. *PIPEDA* sets out exceptions under which organizations may collect, use, or disclose personal information without the knowledge or consent of an individual, which includes when the information is publicly available or is for journalistic purposes.⁴⁸ *CASL*'s amendment adds Section 7.1 to *PIPEDA*. It provides that such consent exceptions "do not apply in respect of the collection or use of an individual's electronic address, if the address is collected by the use of a computer program" designed for searching for and collecting, electronic addresses.⁴⁹

CASL also adds Section 52.01 to the Competition Act, which creates three separate criminal offences to address the sending of a false or misleading representation.⁵⁰ *CASL* also amends the Competition Act, prohibiting any person from "knowingly or recklessly sending...an electronic message that is false or misleading in a material respect, if the direct or indirect purpose...is to promote any business interest or supply or use of a product."⁵¹ These new provisions prohibit the use of false or misleading representations in sender and subject matter information.

PENALTIES FOR VIOLATING *CASL*

Failure to meet the requirements set out in *CASL* may lead to significant penalties. A single violation by a corporation could be subject to an administrative penalty as high as ten million dollars, with a one million dollar penalty for individuals.⁵² The Act also includes the possibility of statutory damages of up to one million dollars per day.⁵³ *CASL*

48. Bill C-28: Canada's Anti-Spam Legislation, *supra* note 26.

49. CAVALLIN, *supra* note 13.

50. *Id.*

51. *Id.*

52. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 20(4) (Can.).

53. Michael Fekete et al., *CASL's Computer Program Rules Cover Much More than Spyware*, OSLER, HOSKIN & HARCOURT LLP 1 (Jan. 2004), http://www.osler.com/uploadedFiles/Expertise/Areas_of_Expertise/Areas_Of_Practice/Privacy_Law/CASL-Computer-Program-Rules.pdf.

also provides for a private right of action that will allow any person who believes that they have been affected by a breach of the Act to petition the court to seek redress. Civil damages may also be sought via class action.

With spam increasing in prevalence as an electronic threat, affecting individuals and businesses both on and offline, *CASL* provides a uniform response to growing concerns. The current state of the Canadian online economy and concerns regarding the safety and security of participating online necessitates regulation and a codified government response. As sweeping, new legislation, *CASL* seeks to create a more secure online environment, increase consumer confidence in E-commerce, and regulate the efficient use of e-mail for personal and business communications in efforts to combat spam. However, *CASL* is not immune from criticism. We argue that it is constitutionally invalid as an impermissible encroachment on free speech. The remainder of this article will examine that encroachment.

CONSTITUTIONALITY OF *CASL*

As one of the most stringent anti-spam regimes in the world, *CASL* has been criticized for providing particularly onerous standards for businesses and individuals, creating more problems than it seeks to resolve. Implementation concerns aside, this article argues that the Act is unconstitutional, specifically, violating the fundamental right to freedom of expression, protected by Section 2(b) of the *Canadian Charter of Rights and Freedoms*.⁵⁴

The *Charter* guarantees and protects rights and freedoms, subject only to such “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵⁵ We argue that the restrictive and onerous regulations set out in Canada’s new anti-spam legislation results in the undue restriction of the fundamental right to freedom of speech, as protected by the *Charter*.

Subjecting *CASL* to a *Charter* analysis, CEMs qualify as ‘commercial expression’ within the meaning of Section 2(b) of the *Charter*. The manner in which *CASL* restricts and regulates CEMs constitutes a breach of the fundamental right to freedom of speech that is not justified under a Section 1 of the *Charter*.

FREEDOM OF EXPRESSION – SECTION 2(B) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Section 2(b) of the *Canadian Charter of Rights and Freedoms* guar-

54. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act § 2(b), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

55. *Id.*

antees the fundamental right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”⁵⁶ In *Irwin Toy Ltd. v Quebec*,⁵⁷ the Supreme Court of Canada laid out the interpretive framework for Section 2(b). The Court set out the applicable test to determine whether an activity (which extends to both speech and conduct), is a protected form of expression under the *Charter*, the necessary steps to determine whether there has been a breach of Section 2(b), and how to determine whether this restriction on freedom of speech is justified under a Section 1.

At the first stage of a Section 2(b) analysis, it must be determined whether the conduct at issue qualifies as “expression” under the *Charter*. The test from *Irwin Toy* requires that for conduct to qualify as “expression” protected under Section 2(b) of the *Charter*, it must convey, or attempt to convey, a meaning or message, and must not be violent in form.⁵⁸ The activity of sending CEMs falls within this definition. CEMs attempt to convey a meaning and message to their online audience, and have expressive content in “offering to purchase, sell, barter to lease a product, good or service...offer to provide a business...advertise or promote anything...or promote a person.”⁵⁹ *CASL* has categorized commercial electronic messages as a form of commercial activity, which may or may not be carried out with an expectation to gain a profit.⁶⁰

In *Ford v. Quebec*⁶¹ the Supreme Court of Canada addressed whether commercial expression falls within the scope of “expression” protected in Section 2(b) of the *Charter*. It was argued that commercial expression might possess less value in the context of what qualifies as expression; due to the fact that commercial expression is profit-motivated, it may be difficult to evaluate how commercial expression advances the necessary values that underlie the commitment of freedom of expression, which include advancing democracy, truth, and self-realization.⁶² It is worth noting that in defining CEMs, *CASL* also includes commercial activity that may or may not be carried out in the expectation of a profit.⁶³ The fact that CEMs qualify as commercial expression may impact its Section 1 analysis, especially due to the fact that CEMs can also include deceptive, fraudulent spam, consisting of manipulative messages and intents. Hence, as per what the Court

56. *Id.*

57. *Irwin Toy Ltd. v. Quebec (Att’y Gen.)* (1989), 58 D.L.R. 4th 577 (Can.).

58. *Id.*

59. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 2(a)-(d) (Can.).

60. *Id.* at § 1(1).

61. *Ford v. Quebec (Att’y Gen.)* (1988), 54 D.L.R. 4th 577 (Can.).

62. *Id.*

63. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 1(1) (Can.).

adopted in *Ford*, the analysis must take a contextual approach, by looking at the facts of the case and the degree and weight attached to the competing interests.

A contextual approach impacts the Section 1 analysis; some forms of expression may have more weight than others during this stage of the justification analysis when evaluating its merit in the context of advancing the values of truth, democracy, and self-autonomy. In discussing the contextual approach, the Court in *Rocket v. Royal College of Dental Surgeons of Ontario*⁶⁴ stated that courts will interpret Section 2(b) broadly to accept almost anything as a message and form of expression; however, when the Court reaches the final stage of its Section 1 analysis, some expression may be viewed as more valuable than others.⁶⁵ Courts may therefore apply the Section 1 analysis in a more or less rigorous way, depending on how the expression is classified and given weight in light of the values above.

However, in the context of whether CEMs qualify as a form of protected “expression,” it can be concluded that “commercial expression and commercial advertising falls within the scope of Section 2(b).”⁶⁶ It can be viewed as advancing the values that underlie the commitment of freedom of expression, which include advancing democracy, truth, and self-realization.

Advancing the value of truth includes communicating to audiences with the promotion of a business and sharing of interests. It is only through such exchange and open freedom of expression that individuals will understand truth or knowledge, and experience growth.⁶⁷ Exposure to various commercial messages, expressions, and interests is critical to one’s self; being able to make judgments, debate, and navigate the online marketplace and community.

With regard to advancing democracy, the free exchange of views of political order and artistic expression is necessary for democratic systems of government to operate.⁶⁸ The sending of CEMs allows individuals to participate in the democratic and economic marketplace. It also constitutes participation in advertising and competition, which are necessary and valued in the democratic, Canadian marketplace. Individuals can communicate and express intentions and objectives through CEMs. As a result, individuals have the option to evaluate, accept, commit to, and compare the content of these messages.

In terms of advancing the value of self-realization, expression (commercial or otherwise) is valued “...for its own sake. On this view,

64. *Rocket v. Royal Coll. of Dental Surgeons of Ont.*, [1990] 2 S.C.R. 232 (Can.).

65. *Id.*

66. *Ford*, 54 D.L.R. 4th at para. 59.

67. *Id.*

68. *Id.*

expression is seen as an aspect of individual autonomy. Expression is to be protected because it is essential to personal growth and self-realization.”⁶⁹ Preventing people from communicating through CEMs shields people from what others may have to say and is a form of state interference with personal autonomy.

The final question of the test set out in *Irwin Toy*, is with regard to the nature of the restriction placed on the freedom of expression. Since the activity of sending out CEMs falls within the scope of freedom of expression, it must be determined whether the purpose or effect of *CASL* is to limit the protected form of expression.⁷⁰

The purpose and intent of *CASL* is, in fact, to restrict and regulate certain types of messages, speech, and CEMs. Having this as its purpose thus qualifies as an automatic breach of Section 2(b). “Any law that prohibits e-mail from being sent without prior (or deemed) recipient consent necessarily restricts the ability to communicate messages to recipients.”⁷¹ It may be counter-argued that the purpose of *CASL* is rather to promote the efficiency of the Canadian economy by regulating these types of messages, which as a result has the effect of restricting freedom of speech. However, the Act operates by prohibiting, restricting, and singling out particular meanings or messages that may not be conveyed. For example, the Act restricts against CEMs that have not obtained prior consent of the recipient.⁷² More specifically, the Act restricts forms of expression by regulating the content of messages; indicating what certain messages must include in their text, and the form to which they must adhere. According to Section 6(2) of *CASL*, messages must set out information that identifies the person who sent the message, provide information that enables the recipient to readily contact the sender, and include an unsubscribe mechanism.⁷³ This evidence leads to the conclusion that the Act meets the characteristics of a restriction that has, as its purpose the limitation of expression, thus resulting in an automatic breach of Section 2(b) of the *Charter*.

SECTION 1 ANALYSIS – THE OAKES TEST

While freedom of expression is protected under the *Charter*, Section 1 of that very document states that those rights are subject “to such reasonable limits prescribed by law as can be demonstrably justified in

69. *Id.* at para. 56 (citing Sharpe, Robert J. “Commercial Expression and the Charter” (1987), 37 U. OF T.L.J. 229).

70. *Irwin Toy Ltd. V. Quebec (Att’y Gen.)* (1989), 58 D.L.R. 4th 577 (Can.).

71. Karen Ng, *Spam Legislation in Canada: Federalism, Freedom of Expression and the Regulation of the Internet*, 2 OTTAWA L. & TECH. J. 1 (2005).

72. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6 (Can.).

73. *Id.* at § 2(a)-(c).

a free and democratic society.”⁷⁴ It must be determined whether the restriction by *CASL* on the fundamental right to freedom of expression is constitutionally justified under Section 1 of the *Charter*. The test for analyzing the constitutionality of a law under Section 1 was laid down by the Supreme Court of Canada in the *Oakes* case, hence, the “Oakes Test”.⁷⁵

How the Oakes Test is applied may vary depending on the particular right at issue. Nevertheless, there are four essential elements of the test. These elements impose standards of justification when determining the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society. If one of the elements of the Oakes Test is not met, then the restriction is not justified and thus rendered unconstitutional. The elements of the Section 1 analysis are: (1) whether the law is of a pressing and substantial purpose; (2) whether there is a rational connection between the purpose of the law and its objective; (3) whether the law is minimally impairing in advancing its purpose; and (4) a consideration of the overall proportionality between the objective and effects of the law.⁷⁶

a) Pressing and Substantial Purpose

First, it must be determined whether the objective of the law relates to concerns that are pressing and substantial in a free and democratic society and thus, sufficient to warrant overriding the *Charter* right to freedom of expression. The objective of *CASL* is to promote the efficiency of the Canadian economy by regulating commercial conduct and CEMs that discourage the use of electronic means to carry out commercial activities that:

- (a) impair the efficacy of electronic means to carry out commercial activities; (b) impose additional costs on businesses and consumers; (c) compromise privacy and the security of confidential information; and (d) undermine the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities.⁷⁷

It is apparent that *CASL*'s purpose is the protection of individuals, businesses, and the Canadian online economy and marketplace. Spam and electronic threats are recognized as prevalent and growing issues in Canada. Other countries internationally have taken the initiative to implement anti-spam regulations and policies, including, *CAN-SPAM* in

74. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

75. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

76. *Id.*

77. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 3(a)-(d) (Can.).

the United States, and *The Spam Act* (2003), in Australia.⁷⁸ With regard to the concerns outlined in *CASL* above, it is likely that a court would find that *CASL* as a “proposed spam regime model has a ‘pressing and substantial’ objective.”⁷⁹

b) Rational Connection

With a pressing and substantial purpose present, a three-part proportionality analysis is applied. It begins with determining whether there is a rational connection between the law in question and its legislative objective. *CASL* must be rationally connected to the pressing and substantial purpose; it cannot be arbitrary or irrational.⁸⁰ It can be argued that by regulating CEMs, providing guidelines for obtaining consent for receiving electronic messages, *CASL* rationally advances the pressing and substantial purpose for which it was enacted, namely, protecting individuals, businesses, and the Canadian online economy and marketplace from the harmful consequences of unsolicited messages or spam as an electronic threat. The Act is rationally connected to its legislative objective, and this prong of the test is likely satisfied.⁸¹

c) Minimal Impairment

The next step in the proportionality analysis is determining whether *CASL* limits freedom of expression to no greater an extent than necessary to accomplish the government’s objective. This being one of the core elements of the overall proportionality review, Chief Justice Dickson stated that the test requires “the government to establish that its law limits the freedom at issue as little as is reasonably possible.”⁸² It is questionable whether *CASL* impairs freedom of speech as minimally as possible.

CASL restricts freedom of speech in three significant ways, thus failing the Oakes Test at the minimal impairment step. These includes familial and personal relationships; small and medium-sized businesses; and the *CASL*’s overbroad, vague, and onerous nature.

Restricting Valid Communication within Familial and Personal Relationships

Section 6 of *CASL*, which prohibits sending a CEM unless the per-

78. Margot Patterson, *CASL vs. CAN-SPAM – Canada’s Anti-Spam Law*, SLIDESHARE (Jan. 1, 2013), <http://www.slideshare.net/fmclaw/casl-vs-canspam-canadas-antispam-law>.

79. Karen Ng, *supra* note 72.

80. Oakes, 1 S.C.R. at para. 70.

81. Karen Ng, *supra* note 72.

82. R v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713 (Can.).

son has first consented to receiving it,⁸³ makes an exception for personal or family relationships. Section 6(5) of *CASL* indicates that prior consent does not apply to a CEM that is sent “to another individual with whom they have a personal or family relationship, as defined in the regulations.”⁸⁴

The proposed Regulations⁸⁵ define “family relationship” as persons “related to one another through a marriage, common-law partnership or any legal parent-child relationship.”⁸⁶ The definition is extremely limited. Indeed, anyone beyond a first cousin is essentially a stranger under the Act. Sending messages to them without prior consent is now illegal. Nor could it be envisioned having to include in every CEM to any such family member, the form and content requirements necessitated by *CASL*. These include the stated purpose for sending the message,⁸⁷ an address and other contact information, and an unsubscribe mechanism.⁸⁸

Messages sent to relatives who are more distant than lineal descendants are unlikely to be the electronic ‘threats’ that the legislation was intended to target. “Under the proposed Regulation, sending an e-mail to your second cousin offering to sell a snow blower or a used baby crib would become illegal.”⁸⁹ Indeed, in restricting the freedom of speech between family members, it is difficult to fathom how this narrow definition of family relationship “could be characterized as reasonable, justified and proportionate so as to pass a *Charter* challenge.”⁹⁰

It may be suggested that the narrow definition of family relationship would be remedied by the Regulations’ definition of “personal relationship,” which is defined as:

[T]he relationship between an individual who sends a message and the individual to whom the message is sent, if those individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications,

83. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6 (Can.).

84. *Id.* at § 6(5)(a).

85. Electronic Commerce Protection Regulations, SOR/2013-221 (Can.), available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-221/index.html>.

86. *Id.*

87. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6(5)(a) (Can.).

88. *Id.* at § 10(1)(a).

89. Barry Sookman, *Evaluating the Industry Canada CASL Regulations: Family Relationships and Personal Relationships*, BARRY SOOKMAN (Jan. 18, 2013), <http://www.barrysookman.com/2013/01/18/evaluating-the-industry-canada-casl-regulations-family-relationships-and-personal-relationships/>.

90. *Id.*

the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.⁹¹

This definition is imprecise. It relies on a vague appeal to reasonableness and a series of non-limiting factors that appear to restrict “personal relationships” to only close friends. Thus, under CASL, many friends, colleagues, and acquaintances will not fit within the definition of acceptable recipients of communication. “For example, the definition might well exclude personal relationships where individuals know each other from working closely in a business or professional setting, or from interacting in a club or sporting activity, or where the relationship is new or old, but have not stayed in constant touch.”⁹² While CASL is intended to be technologically neutral, the factor that examines whether the parties have met in person is evidence that it still favors traditional relationships over virtual ones. Thus, CASL has the negative effect of restricting and hindering harmless communications potentially stunting social networking.

A broader definition of personal relationship would not significantly undermine CASL’s goal of deterring and protecting individuals from deceptive forms of spam, electronic threats, and other such communications. “A restrictive definition is more likely to discourage and impair reliance on electronic means of communicating between individuals... complying would impose additional and unnecessary restraints on ordinary individuals.”⁹³ Thus, it is difficult to justify how the restrictive definitions of personal and family relationships could be considered reasonable, justified, and proportionate so as to pass a *Charter* challenge. Therefore, it is unlikely that the restriction on freedom of speech meets the minimal impairment component of the Section 1 analysis, due to the negative and hindering effects it has on the average citizen, with respect to ordinary communication and relationships.

Negative and Hindering Effect on Small and Medium-Sized Businesses

Section 6 of CASL prohibits sending a CEM unless the person has first consented to receiving it, whether the consent is express or implied.⁹⁴ Section 10(9)(a) of CASL outlines an exception, stating that consent is implied for the purpose of Section 6 if the person who sends the message has an “existing business relationship or an existing non-business relationship with the person to whom it is sent.”⁹⁵ CASL indi-

91. Electronic Commerce Protection Regulations, SOR/2013-221 (Can.), available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-221/index.html>.

92. Sookman, *supra* note 90.

93. *Id.*

94. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 6 (Can.).

95. *Id.* at § 10(9)(a).

cates that a “business relationship” arises from the purchase or lease of a product or service, the acceptance of a “business, investment, or gaming opportunity,” an inquiry with regard to any of these opportunities, or a written contract between the parties.⁹⁶ A “non-existing business relationship” arises from a donation or gift; volunteer work; or membership to a club, association, or voluntary organization.⁹⁷

Industry Canada has acknowledged that in this sense, *CASL* broadly applies to a variety of CEMs. As a result, Industry Canada published regulations that stated that the consequences of such overbroad and overreaching results in the legislation captures business-to-business communications, which are “not the types of threats that were intended to be captured within the scope of the Act.”⁹⁸ In order to ensure that these innocent communications are not regulated under the Act, the Regulations outline exemptions. These exemptions include CEMs that are sent within a business or sent between businesses that have a relationship. On either basis, the message must concern “the activities of the organization.”⁹⁹

The exemptions may appear formally neutral. But their substantive impact on some small-and medium-sized enterprises (“SME”) may be significant. In its submission to the Industry Canada regulatory consultations, the Canadian Federation of Independent Business warned the government that “the proposed regulatory regime may make it more difficult for smaller businesses to start up and grow and may even hinder some small-and medium-sized enterprise members from providing better and more customized products for their clients.”¹⁰⁰ The restrictions *CASL* places on freedom of speech, in this sense, create enormous red tape, negatively affecting small and medium sized businesses. The exceptions created in the Regulations do not remedy, nor take this into account. SMEs will not be able to rely on the existing business relationship exception because, unlike established companies, SMEs and start-up companies do not have existing or ongoing business relationships to leverage allowing for implied consent to send CEMs. Arguably, this restriction on speech has the negative effect of hindering the ability of businesses to be able to compete and participate in the marketplace. The stated purpose of *CASL* is to promote the efficiency and adaptability of the Canadian economy, however it will have the opposite effect on SMEs, which make up a significant portion of the Canadian economy.¹⁰¹ It will result in hindering and damaging

96. *Id.* at § 10(10)(a)-(e).

97. *Id.* at § 10 (13)(a)-(c).

98. Electronic Commerce Protection Regulations, SOR/2013-221 (Can.), available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-221/index.html>.

99. *Id.*

100. Sookman, *supra* note 90.

101. An Act to Promote the Efficiency and Adaptability of the Canadian Economy,

legitimate organizations like SMEs by restricting and discouraging the use of electronic communication to carry out commercial activities for legitimate purposes.

The particular impacts of *CASL* on SMEs raises the question as to whether the restraints on SME's commercial freedom of speech rights would be found reasonable and justified, to minimally impair the right, and be proportionate to the harm that is being targeted by *CASL*'s prohibitions so as to withstand a *Charter of Rights and Freedoms* challenge.¹⁰²

Therefore, it is unlikely that the restriction on freedom of speech meets the minimal impairment component of the Section 1 analysis, due to the negative and hindering effects, it has on small and medium sized businesses.

CASL as Over Broad, Vague, Onerous, and Too Restrictive

Section 1(2) of *CASL* defines CEM, which includes an electronic message sent by any means of telecommunication, including text, sound, voice, or image message¹⁰³ that has, as its purpose, to encourage participation in a commercial activity.¹⁰⁴ This includes an electronic message that: "(a) offers to purchase, sell, barter or lease a product, good, service or an interest or right in land; (b) offers to provide a business, investment or gaming opportunity;" (iii) advertises any of these previously mentioned; (iv) or promotes a person.¹⁰⁵ This definition is very broad and unclear as to what it intends to catch, and what it does not. This results in the risk of prohibiting valid non-spam speech and commercial practices, restricting avenues and opportunities for communication, and subjecting non-CEMs to *CASL*'s opt-in and formality requirements.

By the current definition, the term CEM is very vague, broad, and all encompassing. It could easily be accused of failing to provide fair notice to citizens, as to which conduct is the subject of legal restrictions. This is a problem that is often raised in *Charter* challenges.¹⁰⁶ The broader the sweep, the less the restrictions can be justified; "The legitimacy of the broad prohibitions fall away, especially when tested against Charter values that require minimum impairment when speech is in-

S.C. 2010, c. 23, §3 (Can.).

102. Sookman, *supra* note 90.

103. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 1(1) (Can.).

104. *Id.* at § 1(2).

105. An Act to Promote the Efficiency and Adaptability of the Canadian Economy, S.C. 2010, c. 23, § 1(2) (Can.).

106. *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (Can.).

volved.”¹⁰⁷

The boundaries surrounding what is acceptable behavior are difficult to navigate, vague, and overly broad. This is especially problematic because one of the structural components of Section 1 of the *Charter* is the notion that a restrictive law must provide intelligible standards, which delineate the risk zone, allowing for legal guidance and accountability.¹⁰⁸ It is questionable whether the broad definition of CEMs and the vague delineation constituting acceptable practices is a reasonable approach meeting the minimal impairment standard and requirement.

CASL has been criticized as taking a “ban-all”¹⁰⁹ approach first, and later adjusting and prescribing exceptions with regard to regulating CEMs. This method “starts from an approach that says commercial speech is illegal in this country, rather than from an approach that says ‘let’s try and identify harmful speech.’”¹¹⁰ Due to the negative effects stemming from a law that is overreaching, broad, and vague, many individuals and businesses may find themselves barred and restricted from communicating electronically with others also many legitimate marketing and communication practices would be rendered illegal.

In its regulations, Industry Canada admitted that, “since it applies broadly to commercial electronic messages, the Act captures some regular business communications that are not the types of threats that were intended to be captured within the scope of the Act.”¹¹¹ This is problematic because an effective law is an efficient law. A wide regulatory sweep impinges on legitimate and beneficial commercial speech, which conflicts with the *Charter’s* analysis of whether the law is minimally impairing. As a result, in its broad, overly vague, and all-encompassing nature, it is unlikely that *CASL* can be justified as meeting the minimal impairment component of the Section 1 analysis.

d) Overall Proportionality

The final step of the Oakes Test is determining whether proportionality exists between the government objective and the deleterious effects of the law. Since the previous branch of the Oakes Test was not met, it is unnecessary to proceed to this step.

107. Sookman, *supra* note 86.

108. Karen Ng, *supra* note 72.

109. Rebecca Harris, *The Hidden Costs of Canada’s Anti-Spam Law*, *MARKETING* (Feb. 21, 2013), <http://www.marketingmag.ca/news/marketer-news/the-hidden-costs-of-canadas-anti-spam-law-72468>.

110. *Id.*

111. *Electronic Commerce Protection Regulations*, C. GAZ. (Jan. 5, 2013), <http://www.gazette.gc.ca/rp-pr/p1/2013/2013-01-05/html/reg1-eng.html>.

SUMMARY

CASL is unconstitutional. It encroaches upon constitutionally protected speech, and it does so in a non-minimally impairing way.

First, *CASL*'s exemptions for family and personal relationships restrict valid, effective, and harmless communications and interactions between innocent parties. Second, *CASL* has negative and hindering effects on small and medium-sized business. Third, *CASL*'s definition of CEMs is vague, broad, and all encompassing, casting a wide net, which catches many valid commercial activities. Lastly, *CASL* is too onerous to comply with, and fails to delineate the boundaries of prohibited behavior.

CASL is therefore a disproportionate response to the growing problem of spam and electronic threats, and it may have the reverse effect on its goal of increasing confidence in the use of the Internet to communicate and conduct business.

Although the Supreme Court of Canada has held that deference should be given to Parliament if it has chosen a reasonable solution to a complex social problem.¹¹² This is not one of such occasions. *CASL* cannot be saved by its exemptions because they do not offer an efficient response to the concerns and constitutional issues that the legislation faces. The proposed exemptions and regulations do not provide clear guidance and impose onerous standards for compliance with the legislation; they create more questions and concerns than they seek to resolve, while contributing to the broad and burdensome consequences of its application. While some restrictions are justified, *CASL* is overbroad and resembles too closely to a complete ban. *RJR MacDonald Inc. v. Canada (Attorney General)*¹¹³ supports the position that overbroad restrictions, limiting more expression than is required to advance a pressing and substantial purpose, cannot be justified, and thus the goal should be advanced with a narrower law.

112. *Canada (Att'y Gen.) v. JTI-MacDonald Corp.*, [2007] 2 S.C.R. 610 (Can.).

113. *RJR-MacDonald Inc. v. Canada (Att'y Gen.)*, [1995] 3 S.C.R. 199 (Can.).