

Business-to-Business Electronic Communication in Canada: Reforming Canada's Anti-Spam Legislation

M A R Y I A K U Z U R A *

I. INTRODUCTION

The rise of email technology has led to significant improvements in the efficiency of commercial communication, but also cluttered the inboxes of many Canadians with unsolicited messages, commonly known as “spam.” To address the growing issue of spam, the Government of Canada enacted Canada’s Anti-Spam Legislation (“CASL”).¹ CASL provides a broad framework for controlling spam but fails to adequately distinguish between various forms of commercial electronic messages (“CEMs”), in particular, business-to-business (“B2B”) CEMs. Although Section 3(a)(ii) of the *Electronic Commerce Protection Regulations* (“*Regulations*”), known as the “B2B Exemption”, attempts to limit CASL’s application to certain B2B CEMs, its language lacks clarity to provide meaningful guidance to B2B organizations operating in Canada.² The Standing Committee on Industry, Science and Technology (“INDU”) recognized this issue and recommended the Government of Canada clarify whether B2B electronic messages fall under the definition of CEM.³ This

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¹ 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 [CASL].

² *Electronic Commerce Protection Regulations*, SOR/2013-221, s 3(a)(ii) [Regulations].

³ House of Commons, Standing Committee on Industry, Science and Technology, *Canada’s Anti-Spam Legislation: Clarifications Are in Order* (December 2017) (Chair: Dan Ruimy) at 4

paper provides a critical analysis of the B2B Exemption, and argues that the B2B Exemption is inadequate in its current form and unduly restricts B2B organizations. To address this issue, this paper outlines and evaluates various options available to the Government of Canada to improve the regulation of B2B CEMs and fulfill the objectives of CASL.

II. OVERVIEW OF CASL

CASL was passed in 2010, but the majority of its provisions came into force on July 1, 2014.⁴ It is arguably one of the most stringent anti-spam laws in the world.⁵ Generally, CASL prohibits sending CEMs to an electronic address unless the person who receives the CEM has consented to receiving it, and the CEM complies with the prescribed content requirements.⁶

A. Purpose

The purpose of CASL is to “promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities.”⁷ The Government of Canada identified unsolicited CEMs as a form of conduct that requires regulation. At the same time, the Canadian Radio-television and Telecommunications Commission (“CRTC”), as the primary enforcer of CASL, noted that CASL’s main purpose is not to regulate the transmission of commercial information.⁸ Rather, CASL deals with electronic commerce, with CEMs “being only one aspect thereof.”⁹ Notably, unsolicited CEMs threaten

[*INDU Report*].

⁴ Innovation, Science and Economic Development Canada, “Canada’s Anti-spam legislation (CASL) - Performance measurement report 2017-2018” (1 April 2019), online: *Government of Canada* <www.fightspam.gc.ca> [perma.cc/R676-5F8K].

⁵ Emir Crowne & Stephanie Provato, “Canada’s Anti-Spam Legislation: A Constitutional Analysis” (2014) 31:1 *John Marshall J Computer & Info L* 1 at 2.

⁶ CASL, *supra* note 1, s 6(1).

⁷ *Ibid*, s 3.

⁸ 3510395 *Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada’s Anti-Spam Legislation* (October 2017), 2017-367 at para 43, online: *CRTC* <www.crtc.gc.ca> [perma.cc/5HZ9-PZBA] [*Constitutionality*].

⁹ *Ibid*.

electronic commerce by acting as a vehicle for various online threats, such as phishing attacks and malware.¹⁰

B. Scope

The stringency of CASL is evident in its broad scope and application. A CEM is any electronic message that has as its purpose, or one of its purposes, to encourage participation in a commercial activity.¹¹ This broad definition means that CASL covers not only emails, but also text and multi-media messages, social media messages, and other electronic communication. Overall, CASL applies where a computer system located in Canada is used to send or access CEMs.¹²

C. Consent

CASL contemplates two types of consent – express and implied. Express consent means that the recipient has clearly agreed to receive CEMs from a particular sender, whether by checking off a box on a website to consent to receiving communication, by email, orally, or by other means of acceptance.¹³ To be valid, a person seeking express consent must set out clearly and simply: (a) the purpose of the consent; (b) prescribed information that identifies the person seeking consent and, where applicable, another person on whose behalf consent is being sought; and (c) any other prescribed information.¹⁴

Alternatively, consent may be implied where, without limitation, (a) the sender has an existing business relationship with the recipient based on a previous commercial or contractual relationship; (b) the recipient has a non-business relationship with the sender, for example, as a part of a club or a charity; (c) a person discloses the email address to which the message is sent to a sender without indicating a wish not to receive unsolicited CEMs to such address; or (d) a person conspicuously publishes their email address on the

¹⁰ *Ibid* at para 40.

¹¹ CASL, *supra* note 1, s 1(2).

¹² Canadian Radio-television and Telecommunications Commission (CRTC), “Frequently Asked Questions about Canada’s Anti-Spam Legislation” (12 September 2017), online: CRTC <www.crtc.gc.ca> [perma.cc/DZB4-F38X].

¹³ Canadian Radio-television and Telecommunications Commission (CRTC), “From Canada’s Anti-Spam Legislation (CASL) Guidance on Implied Consent” (4 September 2015), online: CRTC <www.crtc.gc.ca> [perma.cc/5279-92KT] [*Implied Consent Guidance*].

¹⁴ CASL, *supra* note 1, s 10(1).

Internet, and the publication is not accompanied by a statement that the person does not wish to receive CEMs.¹⁵

D. Contents

CASL also stipulates that all CEMs must set out: (a) prescribed information that identifies the person who sent the CEM or, where applicable, a person on whose behalf it is sent; (b) information enabling the recipient of the CEM to contact the sender; and (c) an unsubscribe mechanism.¹⁶

E. Exemptions

The consent and contents requirements of CASL are subject to a multitude of exemptions. Some exemptions are clearly intended to prevent the encroachment of CASL into personal communication. For example, CEMs between people with a personal or family relationship are exempt from CASL.¹⁷ Other exemptions are meant to prevent disruptions to ordinary commercial communication. For example, CEMs that provide warranty, product recall, safety information, product updates or upgrades under the terms of a transaction are also exempt.¹⁸ The latter group of exemptions also includes the B2B Exemption. The exemptions ensure that CASL operates within its intended limits, but their unfortunate side effect is that they make CASL overly complex and difficult to navigate.

F. Penalties

CASL carries significant penalties for non-compliance. A contravention to any of sections 6 to 9 of CASL is deemed to be a “violation,” subject to “administrative monetary penalty.”¹⁹ Penalties are steep, with potential liability of up to \$1,000,000 for individuals and \$10,000,000 for businesses.²⁰ There is no “purely mathematical or economic method of determining the quantum” of penalties under CASL.²¹ However, Section 20(3) of CASL provides a non-exhaustive list of factors that must be taken into account when determining

¹⁵ *Ibid*, s 10(9)-(10), (13).

¹⁶ *Ibid*, s 6(2).

¹⁷ *Ibid*, s 6(5).

¹⁸ *Ibid*, s 6(6)(c)(f).

¹⁹ *Ibid*, s 20(1).

²⁰ *Ibid*, s 20(4).

²¹ *Constitutionality*, *supra* note 8 at para 215.

the amount of a penalty, including, but not limited to, the nature and scope of the violation, the person's history with respect to any previous violation of CASL, the ability to pay the penalty, and other relevant factors.²²

In addition, an officer, director, agent or mandatary of a corporation that commits a violation of CASL may be held personally liable, if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation.²³ For example, the CRTC recently upheld a penalty in the amount of \$100,000 to the chief executive officer of nCrowd, Inc., who acquiesced in the commission of two violations of CASL.²⁴ This decision illustrates that personal penalties for contravening CASL may be significant, and that the same factors outlined in section 20(3) apply in determining the amount of a penalty to a business, as well as its officers, directors, agents and mandataries.²⁵

III. B2B EXEMPTION

The B2B Exemption was not included in the original draft of CASL, which was passed in 2010, but rather was added as a part of the Regulations passed in 2013. Therefore, it is evident that the Government of Canada ultimately recognized that B2B CEMs should be treated differently than business-to-consumer ("B2C") CEMs, and that such differential treatment was not adequately reflected in the provisions of CASL.

The complete language of the B2B Exemption is as follows:

3 Section 6 of the Act does not apply to a commercial electronic message
(a) that is sent by an employee, representative, consultant or franchisee of an organization [...]
(ii) to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the organization to which the message is sent.²⁶
[Emphasis added]

The Regulations do not define the words "relationship" and the "activities of the organization," making it challenging for B2B marketers to rely on the B2B

²² CASL, *supra* note 1, s 20(3).

²³ *Ibid*, s 31.

²⁴ Brian Conley – *Liability for violations of Canada's Anti-Spam Legislation committed by nCrowd, Inc.* (April 2019), 2019-111 at para 47, online: CRTC <www.crtc.gc.ca> [perma.cc/V9M8-WANP].

²⁵ *Ibid*, para 49.

²⁶ *Regulations, supra* note 2, s 3(a)(ii).

Exemption in practice, particularly when faced with significant monetary penalties in the event of non-compliance. In response to this gap, the CRTC released a much-needed clarification of the B2B Exemption in its Compliance and Enforcement Decision pursuant to 3510395 Canada Inc., operating as *Compu.Finder* (“*Compu.Finder* Decision”).²⁷ In this leading decision on the B2B Exemption, the CRTC noted that it would be “highly unusual for someone who was not an employee, or a representative of some other sort, to have an email address associated with the organization.”²⁸ Thus, demonstrating that the CEM was sent from an email domain belonging to one organization to an email domain belonging to another organization would typically satisfy the employee-to-employee requirement of the B2B Exemption.²⁹ In terms of the “relationship” requirement, the CRTC noted that the relationship must be such that “the organization had, or intended to create, a relationship that would allow for a complete exemption from section 6 of the Act.”³⁰ An organization seeking to rely on the B2B Exemption would be required to produce evidence to support that such relationship existed.³¹ The relationship must also be between the two organizations rather than between their individual employee(s) or representative(s).³² Finally, with respect to the “activities of the organization”, CEMs sent pursuant to the B2B Exemption must “discuss or make reference to the activities of the recipient organizations.”³³

²⁷ 3510395 Canada Inc., operating as *Compu.Finder* – Violations of Canada’s Anti-Spam Legislation (October 2017), 2017-368, online: CRTC <www.crtc.gc.ca> [<https://perma.cc/52N6-T9PL>] [*Compu.Finder*].

²⁸ *Ibid* at para 41.

²⁹ Daniel Fabiano, Alex Cameron & Andrew S Nunes, “New CASL Ruling: CRTC Provides Guidance on B2B Messaging and the Due Diligence Defence” (1 November 2017), online: *Fasken* <www.fasken.com> [perma.cc/SP3D-EYWN].

³⁰ *Compu.Finder*, *supra* note 27 at 45.

³¹ *Ibid* at para 52.

³² *Ibid* at para 46.

³³ *Ibid* at para 52.

IV. THE IMPORTANCE OF DIFFERENTIATING B2B AND B2C CEMs

It is clear that the B2B Exemption was added to the Regulations to give additional flexibility to B2B marketers in conducting electronic communication with their clients and to prevent the encroachment of CASL into legitimate business communication. This assertion is supported by the Regulatory Impact Analysis Statement, which states that the Regulations provide certain exclusions “to ensure [regular] business communications are not [unnecessarily] regulated under the Act.”³⁴

From a policy perspective, the need for differentiation between B2B and B2C CEMs is supported by the distinctiveness of B2B and B2C transactions, in the course of which CEMs may be exchanged. B2B products are typically highly specialized and more complex compared to B2C products, and as a result, they require more customer support.³⁵ Accordingly, B2B transactions typically involve direct sales with extensive negotiations.³⁶ Due to high specialization, B2B products also have significantly smaller target markets, meaning that companies with business customers often rely on long-term deals and focus on significantly fewer, repeat customers with large-unit transactions.³⁷ Business customers are also more knowledgeable about products, often have detailed specifications to outline their requirements and rely on quantifiable criteria around price and performance in making purchasing decisions.³⁸ Finally, since business customers purchase products for company use, electronic communication between a B2B purchaser and a seller is typically conducted using a business email. In contrast, B2C electronic communication is usually directed at the customer's personal email, social media, or using text messaging.

³⁴ Regulatory Impact Analysis Statement, *Electronic Commerce Protection Regulations*, SOR/2013-221 (5 January 2013) C Gaz I, Vol 147, No 1 at 30, online: <www.gazette.gc.ca> [perma.cc/A8JJ-6PYW].

³⁵ Innovation, Science and Economic Development Canada, “B2B marketing” (18 July 2016), online: *Government of Canada* <www.canadabusiness.ca> [perma.cc/GCE4-6GB4].

³⁶ Rajdeep Grewal & Gary L Lilien, “Business-to-business marketing: looking back, looking forward” in Gary L Lilien & Rajdeep Grewal eds, *Handbook of Business-to-Business Marketing* (Cheltenham: Edward Elgar Publishing Limited, 2012) 3 at 3.

³⁷ *Ibid.*

³⁸ Eric Almquist, Jamie Cleghorn & Lori Sherer, “The B2B Elements of Value” (March 2018), online: *Harvard Business Review* <www.hbr.org> [perma.cc/778X-GK8V].

Taking into account these unique aspects of B2B transactions, it is not surprising that direct customer interaction is the most influential B2B marketing communication channel to influence a purchasing decision.³⁹ Traditional forms of advertising and customer engagement, such as billboards, print magazines, commercials and online advertisements, may be still used as communication tools to reach business customers. However, one-on-one interaction with business customers is an essential aspect of a B2B communication strategy. As such, organizations heavily rely on email to facilitate B2B transactions. For example, in a survey by the Content Marketing Institute, 74% of B2B marketers who participated in the survey stated that email was one of their three most effective formats at helping their organization achieve specific objectives.⁴⁰ Further, 93% of B2B marketers used email to distribute marketing content.⁴¹

Another distinguishing feature of B2B CEMs is that they do not engage the consumer protection aspect of anti-spam legislation, particularly with respect to consumer privacy. The use of business email for B2B transactions reduces privacy concerns, since business emails are owned by employers rather than individual employees. There is no doubt that other harmful effects of spam apply not only to consumers, but businesses as well. For example, spam results in direct costs to businesses, such as investment in anti-spam technologies, losses in productivity, help desk costs, wasted storage, security solutions, and server capacities.⁴² It is arguable, however, that large businesses would still invest in sophisticated security solutions, anti-spam technology, storage and other IT solutions even if the prevalence of spam decreased. With respect to small businesses, the addition of built-in security protections to off-the-shelf email services, such as Gmail, means that small businesses do not need to expend significant resources in order to be adequately protected from spam.⁴³ As such, the reliance on business email and sophisticated spam filters

³⁹ Frank V Cespedes & Tiffani Bova, “What Salespeople Need to Know About the New B2B Landscape” (5 August 2018), online: *Harvard Business Review* <www.hbr.org> [perma.cc/S4SN-GQ9J].

⁴⁰ Lisa Murton Beets & Ann Handley, “B2B Content Marketing 2018: Benchmarks, Budgets, and Trends—North America” (27 September 2017), online: *Content Marketing Institute* <www.contentmarketinginstitute.com> [perma.cc/689R-V2UD].

⁴¹ *Ibid.*

⁴² *Constitutionality*, *supra* note 8 at para 62.

⁴³ Neil Kumaran, “Spam does not bring us joy—ridding Gmail of 100 million more spam messages with TensorFlow” (6 February 2019), online: *Google Cloud*

means that the loss of productivity for organizations engaging in B2B marketing is reduced, as spam is filtered before it reaches a business inbox. Finally, B2B marketers deal with a significantly smaller customer base, making it easier to distinguish spam from legitimate business communication.

Given the importance of one-on-one electronic communication for B2B commerce, it is essential that CASL does not unduly restrict legitimate B2B electronic communication, as it would significantly hamper economic activity in this sector. It is clear that the Government of Canada recognized that applying the same consent and contents requirements to B2B as to B2C CEMs unnecessarily restricts B2B electronic communication and, thus, hinders, rather than promotes, the efficiency of Canadian economy. The complexities of B2B transactions in contrast to B2C transactions, combined with the essential nature of one-on-one electronic communication for B2B commerce, suggest that businesses require more flexibility in sending B2B CEMs. This additional flexibility does not jeopardize the consumer protection objectives of anti-spam legislation and is unlikely to increase business costs associated with spam, which are appear overstated. Consequently, all of foregoing factors warrant a clear differentiation between B2B and B2C CEMs and justify the addition of the B2B Exemption.

V. OTHER JURISDICTIONS

Despite the existence of the B2B Exemption in Canada, a review of anti-spam laws in other jurisdictions indicates that differentiation between B2B and B2C CEMs remains relatively uncommon. However, this may be explained by the fact that the spam laws in other jurisdictions are significantly less restrictive than CASL and do not pose the same risk of stifling legitimate business activity, particularly in the field of B2B commerce.

In the United States, the *Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003* ("CAN-SPAM Act") applies to B2B CEMs to the same extent as to B2C CEMs.⁴⁴ However, unlike CASL, which prohibits transmission of CEMs unless a recipient consented to receiving a CEM (opt-in model), the CAN-SPAM Act permits senders to transmit CEMs unless the recipient requests not to receive some or any CEMs from the sender (opt-out

<www.cloud.google.com> [perma.cc/78Y4-YWVY].

⁴⁴ *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 15 USC §§ 7701-7713 (2003) [CAN-SPAM].

model).⁴⁵ Other anti-spam legislations that follow the opt-out model are the *Spam Control Act* of Singapore, which requires senders of unsolicited commercial electronic messages in bulk to comply with the prescribed contents requirements, and the *Electronic Communications and Transactions Act, 2002* of South Africa.⁴⁶ Similarly to the CAN-SPAM Act, the *Spam Control Act* and the *Electronic Communications and Transactions Act, 2002* do not contain a B2B exemption. Some commentators note that the effect of opt-out spam legislation, and specifically the CAN-SPAM Act, is not to reduce the amount of spam received, but rather make it more identifiable and easier to filter.⁴⁷ Such legislation does little to control spam, but rather sets out guidelines on how to spam legally.⁴⁸ Given that opt-out spam laws are significantly less restrictive compared to CASL, they are less likely to encroach into legitimate business communication, thus making the need for a B2B exemption not as pressing.

In Europe, the *Directive on Privacy and Electronic Communications* of the European Union (“*Directive*”) provides general rules for controlling spam to the European Union (“EU”) member states, which may then adopt these rules in their respective national spam legislations.⁴⁹ The *Directive* establishes an opt-in model similar to CASL.⁵⁰ Although the *Directive* does not contain a B2B exemption, it permits a natural or legal person who obtains electronic contact details from customers in the context of the sale of a product or service to use these electronic contact details for direct marketing of similar products or services, provided that customers have the opportunity to reject communication when contact details were initially collected and subsequently on the occasion of each message.⁵¹ Therefore, the *Directive* gives businesses

⁴⁵ *Ibid*, §7704(a)(4)(A).

⁴⁶ Spam Control Act (Cap 311A, 2008 Rev Ed Sing), s 11; Electronic Communications and Transactions Act, 2002, No 25 of 2002, s 45.

⁴⁷ Perry Cheung, “A Call for Action: The Need for Canadian Spam Legislation” (2007) 7 *Asper Rev of Intl Bus & Trade L* 227 at 239.

⁴⁸ Lily Zhang, “The CAN-SPAM Act: An Insufficient Response to the Growing Spare Problem” (2005) 20 *Berkeley Technology LJ* 301 at 319.

⁴⁹ EC, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), [2002] OJ, L 201/37.

⁵⁰ *Ibid*, art 13.1.

⁵¹ *Ibid*, art 13.2.

more flexibility than CASL in sending marketing CEMs, despite not having a B2B exemption.

This flexibility is also reflected national spam legislations of the EU member states. For example, *The Privacy and Electronic Communications Regulations* of the United Kingdom only prohibit the transmission of unsolicited emails to individual subscribers, who are living individuals and unincorporated bodies of such individuals.⁵² Therefore, emails for the purposes of direct marketing sent to corporate email addresses do not require consent. Effectively, this constitutes a partial B2B exemption, but one that does not cover emails sent to sole proprietorships. Similarly, *The Marketing Act* of Sweden regulates use of electronic mail in the course of marketing to natural persons rather than legal persons.⁵³ Even Germany, which is known for one of the strictest email marketing regulations in Europe, waives a double-opt-in consent requirement, where marketing emails relate to the same products or services as previously purchased from the sender.⁵⁴

The Australian *Spam Act 2003* (“*Spam Act*”) most closely resembles CASL compared to other anti-spam legislations outlined in this paper.⁵⁵ The *Spam Act* adopts an opt-in policy and, similarly to CASL, does not contain a B2B exemption.⁵⁶ Although it does not offer the same flexibility in sending marketing CEMs as anti-spam laws in the EU, the *Spam Act* does not prescribe strict time restrictions on using inferred consent. CASL, on the other hand, limits the validity of implied consent from 6 to 24 months depending on whether an existing business relationship with the recipient is based on an inquiry or application, a purchase or signing of a contract.⁵⁷

⁵² The Privacy and Electronic Communications (EC Directive) *Regulations* 2003, SI 2003/2426.

⁵³ Sweden, Marknadsföringslagen, SFS 2008:486, § 19.

⁵⁴ Germany, Gesetz gegen den unlauteren Wettbewerb (UWG), v 3.3.2010, BGBl. I S. 254, § 7; Gareth Morris, “Which EU Countries accept B2B Emails post-GDPR [Map]” (3 October 2018), online: Leadiro <www.leadiro.com> [perma.cc/R2CH-J96V].

⁵⁵ *Spam Act 2003* (Cth).

⁵⁶ *Ibid*, Schedule 2, s 2.

⁵⁷ CASL, *supra* note 1, s 10(10).

VI. EVALUATION OF THE B2B EXEMPTION TEST

Is the B2B Exemption in its current state effective in preventing the encroachment of CASL into legitimate B2B communication and fulfilling the overall purpose of CASL? The answer to this question requires an in-depth analysis of the three key elements of the B2B Exemption test, which are clearly enumerated in the *Compu.Finder* Decision:

1. A CEM must be sent by an employee, representative, consultant or franchisee of an organization to an employee, representative, consultant or franchisee of another organization;
2. The organizations in question must have a relationship; and
3. A CEM must concern the activities of the organization to which the CEM is sent.⁵⁸

Although the elements are enumerated clearly, their interpretation poses significant challenges. Only the first element can be satisfied definitively by showing that a CEM was sent from one email address associated with an organization to another email address associated with a different organization.⁵⁹

With respect to the second element, the burden of proof with respect to the fact that “the organization had, or intended to create, a relationship that would allow for a complete exemption from section 6 of the Act” is difficult to meet.⁶⁰ Although the CRTC made it clear that a single transaction, such as a single training session or a single invoice, will not be sufficient to prove such relationship, it failed to give insight into what criteria it would use to determine whether a threshold of a “relationship” is met. The CRTC also noted that a single invoice “might be considered evidence of an existing business relationship with the specific employee”, and “such a relationship could create implied consent to send CEMs to that employee.”⁶¹ Such relationship, however, would be insufficient to meet the threshold of a “relationship” under the B2B Exemption.⁶² This remark raises further questions into whether the CRTC could be looking into the utility of a transaction, and specifically whether it was for the benefit of the individual

⁵⁸ *Regulations, supra* note 2.

⁵⁹ *Compu.Finder, supra* note 27 at para 41.

⁶⁰ *Ibid* at para 45.

⁶¹ *Ibid* at para 46.

⁶² *Ibid.*

employee or the organization as a whole, regardless of who made a payment pursuant to the transaction. Finally, the CRTC does not appear to contemplate that small- and medium-sized businesses (“SMBs”), including start-ups and sole proprietorships, may in many cases not have existing relationships to rely on.⁶³

The third element of the B2B Exemption requires that a CEM discusses or makes reference to the activities of the recipient organization.⁶⁴ In the *Compu.Finder* Decision, the CRTC remarks that this determination would depend on the “contents of the correspondence” but provides little guidance as to the threshold that must be met in order to satisfy this requirement.⁶⁵ While the CRTC makes it clear that the CEM must be relevant to the activities of the recipient organization, and not the employee who received the CEM, this guidance is open-ended and could be interpreted with varying degrees of scrutiny.⁶⁶ For example, one may say that a CEM about features of a software tool, sent to a receiving organization that has been a long-term user of that tool, concerns the activities of such organization, because the organization relies on the tool in its business activities. A more critical interpretation of this element, however, may require the CEM to mention *specific* activities of the recipient organization, such as, for example, specific projects that the recipient organization is working on with the help of the software tool. Further, the CRTC contemplates two vastly different degrees to which activities of the organization may appear in a CEM. For example, the CRTC mentions that a CEM may “discuss” or “make reference to” the activities of the recipient organization.⁶⁷ It is, therefore, unclear whether the primary subject of a CEM must be pursuant to the activities of the recipient organization, or whether a cursory reference to the activities may be sufficient to comply with this element of the B2B Exemption. Overall, the requirement to analyze the contents of every single CEM is not only burdensome but also impractical for employees who routinely send CEMs, yet lack the legal background to engage in this complex contextual analysis.

The foregoing analysis shows that the CRTC’s guidance in the *Compu.Finder* Decision falls short of clarifying two out of three key elements of

⁶³ Crowne & Provato, *supra* note 5 at 19.

⁶⁴ *Compu.Finder*, *supra* note 27 at para 52.

⁶⁵ *Ibid* at para 55

⁶⁶ *Ibid* at para 54.

⁶⁷ *Ibid* at para 52.

the B2B Exemption. This lack of clarity ultimately prevents B2B marketers from confidently relying on the B2B Exemption in making their business decisions. Although laws are typically written with a degree of generalization to allow flexibility in their application, the resulting uncertainty is troubling when it jeopardizes the very purpose for which such laws were enacted. The purpose of the B2B Exemption is to provide additional flexibility in sending B2B CEMs and prevent CASL from restricting legitimate B2B communication. However, in its current state, the B2B Exemption requires businesses to engage in a highly subjective analysis of whether the “relationship” and “activities of the organization” elements of the B2B Exemptions are met. In the absence of a robust body of case law and without knowing the criteria that the CRTC would use in determining whether organizations meet the threshold of a “relationship”, and whether the CEMs in question meet the contents requirement with respect to the “activities of the organization,” B2B marketers are left with an increased evidentiary burden, but little to no guidance in terms of how to meet it.

Businesses may also be unable to receive timely legal advice with respect to CASL compliance, either because they do not have in-house counsel or due to rising legal fees for external legal advice, which are difficult to justify for routine matters, such as email communication. *Canadian Lawyer's* 2019 legal fees survey revealed that none of the lawyers or firms participating in the survey anticipated legal fee reductions, with nearly half expecting to introduce an increase in 2019.⁶⁸ Notably, only one in ten small business owners had a law firm on retainer in 2015.⁶⁹

Faced with substantial fines for non-compliance, CASL effectively leaves B2B marketers little choice but to rely on express and implied consent, or hope that their interpretations of the “relationship” and “activities of the organization” elements of the B2B Exemptions are in fact correct.⁷⁰ Since directors and officers may be personally liable for non-compliance, many will be inclined to err on the side of caution and refrain from relying on the B2B Exemption.⁷¹ Businesses are also forced to expend significant resources on

⁶⁸ Marg. Bruineman, “Steady optimism - 2019 Legal Fees Survey” (8 April 2019), online: *Canadian Lawyer* <www.canadianlawyermag.com> [perma.cc/99AS-BZD5].

⁶⁹ DAS Canada, “Small Business Owners and The Canadian Legal System” (May 2015), online: *DAS Canada* <www.das.ca> [perma.cc/WV3H-D6AW].

⁷⁰ CASL, *supra* note 1, s 20(4).

⁷¹ *Ibid.*, s 31.

compliance, including developing new internal procedures and investing into tools to keep track of consents. Appearing before the INDU, Aisha Diallo, Senior Legal Counsel for the Desjardins Group, noted that “there is no room for error under CASL”, and businesses are “missing opportunities to communicate with the clients for legitimate reasons, particularly in the one-on-one context.”⁷² As such, the B2B Exemption fails to make CASL more flexible for businesses, restricts legitimate B2B communication, and hinders, rather than promotes, the use of electronic means to carry out commercial activities.

Evidently, the INDU recognized that CASL “...and its regulations require clarifications to reduce the cost of compliance and better focus enforcement.”⁷³ The INDU also acknowledged that B2B electronic messages require more clarity, and recommended to clarify whether B2B electronic messages fall under the definition of CEM in CASL.⁷⁴

VII. CASL'S CONSENT FRAMEWORK AND B2B CEMs

Dr. Michael Geist, a law professor at the University of Ottawa and a holder of the Canada Research Chair in Internet and E-commerce Law, noted that “businesses rely on exceptions where they do not want to comply with the foundational obligation that is in the law: consent.”⁷⁵ Therefore, it is important to examine whether the consent framework set out in CASL permits B2B marketers to effectively use CEMs for marketing purposes without relying on the B2B Exemption.

B2B marketers may send CEMs indefinitely by obtaining express consents to receive CEMs from individual employees of the recipient organization, provided that such employees do not subsequently withdraw their consent.⁷⁶ This approach is available but arguably not practical or attuned to the realities of B2B commerce. A B2B transaction takes place between two

⁷² Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 075 (5 October 2017) at 1110 and 1115 [Oct 5 Submissions].

⁷³ *INDU Report*, *supra* note 3 at 1.

⁷⁴ *Ibid* at 4.

⁷⁵ Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 076 (17 October 2017) at 1125.

⁷⁶ CASL, *supra* note 1, s 11(1).

organizations and not their employees. Moreover, employees act not on their personal behalf but as agents of their employers. The current express consent framework under CASL fails to appreciate these unique aspects of B2B commerce compared to B2C commerce, because CASL implies that consents must be obtained from the recipient employees and not the recipient organization. A useful analogy would be to imagine two parties willing to engage in a dialog, but instead of requesting consents from the parties themselves, consents are requested from their agents. Where a consent from either of the agents is not available, there is a breakdown in communication, even though the parties themselves were willing to engage. Combined with the fact that businesses often experience employee turnover, the express consent framework is not a viable alternative for B2B marketers.

The drafters of CASL contemplated the fact that parties may wish to continue exchanging CEMs even in the absence of express consent. Therefore, in certain cases, parties may rely on implied consent. One of these cases occurs when a person who sends or permits a CEM to be sent (“Sender”) has an existing business relationship with a person to whom a CEM is sent (“Recipient”).⁷⁷ An existing business relationship arises when the Recipient has made a purchase or lease, accepted a business or investment opportunity, bartered, or entered into a written contract with the Sender within the two-year period immediately before the day on which a CEM was sent.⁷⁸ In addition, a relationship arises from an inquiry or application by the Recipient to the Sender with respect to a purchase, business opportunity or barter within the six-month period immediately before the day on which the CEM was sent.⁷⁹ However, B2B marketers may face interpretational difficulties with respect to the foregoing provisions, because the Recipient, an employee of one organization, is not a party who engages in a purchase, business opportunity or contract with a Sender, an employee of another organization. In reality, the two organizations, and not their individual employees, form a business relationship. The same is true about inquiries or applications pursuant to a purchase, business opportunity or barter, because effectively employees are communicating pursuant to the activities of their employers.

It is also interesting to note that CASL defines a “person” as “an individual, partnership, corporation, organization, association, trustee,

⁷⁷ *Ibid*, s 10(9)(a).

⁷⁸ *Ibid*, s 10(10)(a)-(d).

⁷⁹ *Ibid*, s 10(10)(e).

administrator, executor, liquidator of a succession, receiver or legal representative.”⁸⁰ Section 10(10) states that an “existing business relationship” is a business relationship between “the *person* to whom the message is sent” and “any *person* who sent or caused or permitted the message to be sent”.⁸¹ Thus, could an existing business relationship arise between the organizations and not individuals who act on their behalf in receiving and sending CEMs? If the answer is affirmative, it becomes unclear whether implied consent extends to all employees of these organizations, a subset of employees or only those individuals who exchange CEMs. The first two options appear to be inconsistent with the notion that consent is required for each individual recipient of a CEM, as it implies a blanket consent for a group of people solely based on their employment. The latter option, however, implies a business relationship between two individuals and not organizations. Notably, the CRTC contemplated that a relationship may arise between two organizations:

If a representative of the employer, with authority to bind the business, purchases training for one or more employees of the business, then the existing business relationship would most likely be seen to be between the training company (the sender of the CEMs) and the business (the employer). If this is clearly the case, you may also be able to rely on the business to business exemption set out in the GIC Regulations at section 3(a)(ii).⁸²

The CRTC does not clarify the boundaries of existing business relationship for implied consent, but rather directs business to rely on the B2B Exemption, which in itself is deficient. Without proper clarifications on the boundaries of implied consent for B2B CEMs, implied consent becomes particularly difficult for large organizations, where a transaction may have been negotiated by one employee, but many other employees use the product or service and may be interested in receiving CEMs. Further, for organizations with many departments and office locations, it is difficult to ascertain the boundaries of the existing business relationship. However, even if the boundaries were clarified, the utility of implied consent for B2B CEMs is illusory. The maximum implied consent period is 24 months, which is

⁸⁰ *Ibid*, s 1(1).

⁸¹ *Ibid*, s 10(10).

⁸² *Implied Consent Guidance*, *supra* note 13.

extremely low in light of long purchasing cycles and reliance on repeat, long-term customers by B2B organizations.⁸³

In B2C commerce, the boundaries are clear. When an individual makes a purchase or submits an inquiry to an organization, a relationship arises between that individual and the organization. For example, if an individual buys a vehicle from a dealership and negotiates with a specific salesperson, the dealership, and not the salesperson, has implied consent to send CEMs. Further, the dealership does not lose implied consent if the salesperson leaves the dealership. Implied consent based on an existing business relationship does not have the same degree of clarity when it comes to B2B marketing.

VIII. OPTIONS FOR IMPROVEMENT

The following options are available to the Government of Canada to improve how CASL regulates B2B CEMs.

A. Option 1: Exclude B2B Electronic Messages from the Definition of CEM

The first option is a complete exclusion of B2B electronic messages from the definition of CEM. Appearing before the INDU, Scott Smith, Director, Intellectual Property and Innovation Policy of the Canadian Chamber of Commerce, noted that the INDU's focus should be on narrowing "the scope of what exactly a CEM is" and that "business-to-business communication really needs to be pulled out of it."⁸⁴ However, a complete exclusion of B2B electronic messages from anti-spam laws is rare, and even laws that contain one, such as the *Privacy and Electronic Communications Regulations* of the United Kingdom, are not all encompassing. Nonetheless, commentators suggest that a less restrictive opt-out system in the CAN-SPAM Act was adopted "to assist in the advancement of legitimate e-mail marketing."⁸⁵ Thus, protection of legitimate commercial electronic communication was not lost on the drafters of other anti-spam laws.

A complete exclusion of B2B electronic messages from the definition of CEM would create a bright-line test for businesses, which would

⁸³ CASL, *supra* note 1, s 10(10).

⁸⁴ Oct 5 Submissions, *supra* note 72 at 1210.

⁸⁵ Dave Lorentz, "The Effectiveness of Litigation under the CAN-SPAM Act" (2011) 30:3 Rev Litig 559 at 564.

undoubtedly eliminate interpretive issues surrounding the B2B Exemption and the consent framework under CASL. It would also allow B2B marketers to rely on their customer lists in perpetuity and use electronic means to conduct business development, which would particularly benefit SMBs. Since a sole proprietorship is a “business”, sole proprietors would also benefit, as long as they send electronic messages to another business. Thus, this option has major economic advantages.

However, the key question is whether such economic benefits are outweighed by the increased cost of spam that B2B businesses will undoubtedly receive. One possible solution to limiting spam is to retain content requirement for B2B electronic messages in accordance with section 6(2) of CASL. As such, recipients of B2B electronic messages would retain the ability to opt out of receiving unwanted messages any time. The use of spam filters by businesses would also lead to a reduction in spam emails reaching business inboxes, thereby limiting the cost of spam.

At the same time, SMBs that do not have means to implement sophisticated IT infrastructure and software are highly vulnerable to online threats, such as phishing and malware.⁸⁶ As of December 2015, the Canadian economy had 1.14 million (97.9%) small businesses with 1-99 employees, 21,415 (1.8%) medium-sized businesses with 100 to 499 employees, and 2,933 (0.3%) large businesses with over 500 employees.⁸⁷ Therefore, protection of SMBs is of paramount importance to the efficient functioning of the Canadian economy. A recent study by Ponemon Institute LLC highlighted a 27.4% increase in the average number of security breaches in 2017.⁸⁸ With online threats on the rise, a complete exclusion of B2B electronic messages from the definition of CEM will undoubtedly place a disproportionately heavy burden on SMBs to manage online threats arising from spam.

It is difficult to ascertain whether a heavy security burden placed on SMBs would outweigh the positive economic effects if businesses had more flexibility in B2B electronic messages. Nonetheless, only 0.02% of spam sent globally is

⁸⁶ US, Federal Trade Commission, *Scams and Your Small Business* (May 2018), online: *Federal Trade Commission* <www.ftc.gov> [perma.cc/MPC2-L7LP].

⁸⁷ Innovation, Science and Economic Development Canada, *Key Small Business Statistics - June 2016* (report), (Ottawa: Innovation, Science and Economic Development Canada, 2016) at VI.

⁸⁸ Ponemon Institute LLC & Accenture LLP, “2017 Cost of Cyber Crime Study” (2017), online: *Accenture* <www.accenture.com> [perma.cc/A7KN-PG25].

opened, hence the security risk is already low.⁸⁹ Further, 80% of spam received by users in North America and Europe comes from approximately 100 known spam operations, most of which are established in jurisdictions with weak or non-existent anti-spam laws.⁹⁰ Given that most spam comes from outside of Canada, and inter-jurisdictional enforcement of CASL has not been attempted to date, SMBs already face substantial security threats from spammers from the United States, China and Russia.⁹¹ The lack of a “homogeneous (and effective) legislation landscape” to fighting spam, as exhibited by many differences between anti-spam laws in various countries, means that CASL is only effective in reducing spam that originates in Canada.⁹² As noted by Mr. Barry Sookman, a senior partner with McCarthy Tétrault and an adjunct professor at Osgoode Hall Law School, CASL has had little to no impact on the spreaders of spam, spyware, malware, and other network threats; rather, the burdens of CASL fall on legitimate businesses that expend significant resources to comply.⁹³

Thus, by including B2B messages in the definition of CEM, the Government of Canada does not make Canadian SMBs immune to spam. It is hard to estimate with certainty how much more spam SMBs would receive if B2B electronic messages were excluded from the definition of CEM. What is certain, however, is that CASL currently puts a huge roadblock in front of Canadian businesses trying to engage in business development, and hinders innovation, efficiency and growth of the Canadian economy.

B. Option 2: Clarify Interpretation of Express and Implied Consent Provisions to B2B Commerce

Another option available to the Government of Canada is to clarify numerous interpretive issues with express and implied consent provisions in CASL and adapt them to the realities of B2B commerce. Since B2B

⁸⁹ Rob Smith, “40 years on from the first spam email, what have we learned? Here are 5 things you should know about junk mail” (04 May 2018), online: *World Economic Forum* <www.weforum.org> [perma.cc/B2BH-V4XJ].

⁹⁰ The Spamhaus Project Ltd., “The ROKSO LIST” (19 November 2018), online: *The Spamhaus Project* <www.spamhaus.org> [perma.cc/D67Y-AQC6]; The Spamhaus Project Ltd., “The World’s Worst Spam Enabling Countries” (16 November 2018), online: *The Spamhaus Project* <www.spamhaus.org> [perma.cc/2A54-CHKL].

⁹¹ *Ibid.*

⁹² Guido Schryen, “Anti-Spam Legislation: An Analysis of Laws and Their Effectiveness” (2007) 16:1 *Inf & Comm Tech L* 17 at 28.

⁹³ *Oct 5 Submissions, supra* note 72 at 1135.

transactions take place between two businesses and not their employees, it is logical that an authorized representative of a business should be permitted to give express consent to another business to contact some or all its employees. Allowing organizations, as legal entities, to give consents would significantly reduce a burden of tracking consents. Since B2B electronic communication is typically conducted using business email, and businesses, rather than employees, retain ownership of business emails, the rights of individual employees would not be infringed.

The same principle could also apply to implied consent. Given the nature of B2B commerce, it is logical that the existing business relationship would arise between the organizations, and not their respective employees. As such, one of the options available to the Government of Canada is to clarify that the existing relationship could arise between two organizations. The boundaries of B2B consent, however, may be difficult to ascertain because there could be a multitude of users pursuant to a B2B transaction, from one to multiple individuals, departments, office locations or affiliates. Therefore, a single policy to set the boundaries of implied consent for B2B relationships is impractical and not reasonably enforceable. One possible solution to deal with this issue is to adopt an opt-out model for B2B implied consent. Accordingly, implied consent would arise between two organizations, as legal entities, in accordance with the principles outlined in Section 10(10)(a)-(d) of CASL, and would permit exchange of CEMs between all employees of these organizations, provided that each employee can opt-out at any time. Each organization could also opt-out on behalf of one, few or all of its employees at any time. Finally, two organizations could also outline a specific duration of implied consent in a contract.

Given the reliance of B2B organizations on repeat, long-term business, the time restriction on implied consent should be removed. The removal is possible because various opt-out mechanisms and the ability to set a time limit on implied consent contractually would give a sufficient degree of control to all parties as to whether electronic communication should continue or is no longer welcome. However, with respect to inquiries or applications pursuant to Section 10(10)(d) of CASL, it is appropriate to limit the scope of implied consent to the individual who submitted an inquiry or application, but extend implied consent to 2 years in line with the language of Section 10(10)(a)-(d) of CASL. A different approach to inquiries and applications is appropriate because businesses are not necessarily entering into a transaction or signing a contract pursuant to an inquiry or application. As a result, a relationship does

not have the same longevity and finality as that pursuant to Section 10(10)(a)-(d).

The foregoing implied consent framework would give B2B marketers more flexibility than the existing B2B Exemption, because it does not require a CEM to discuss or refer to the activities of the recipient organization. Therefore, this framework would undoubtedly allow B2B organizations a greater flexibility in marketing new products or services that may be of interest to their existing customer base. However, this option still requires two B2B organizations to have a relationship based on a past transaction, a business opportunity or a contract. Thus, B2B marketers would still find it difficult to use electronic means to engage in marketing and business development in pursuit of new clients.

C. Option 3: Clarify Interpretive Issues Associated with the B2B Exemption

The third option is to clarify various interpretive issues associated with the B2B Exemption. Specifically, B2B marketers would benefit from knowing the criteria that the CRTC would use in determining whether the organizations meet the threshold of a “relationship”, and whether the CEMs in question meet the contents requirement with respect to the “activities of the organization.” The major benefit of this option is that it does not require legislative amendment; rather, the CRTC could simply issue a Compliance and Enforcement Information Bulletin with the necessary clarifications. At the same time, this option presents a significant challenge in that it requires the CRTC to strike an appropriate balance between effective enforcement and practical utility. The more rigid and specific the criteria are, the more difficult it will be for B2B marketers to rely on the B2B Exemption and track compliance. At the same time, broad and ambiguous criteria present little practical use to B2B marketers in determining if they meet the “relationship” threshold and the contents requirement.

To balance clarity with flexibility in the B2B Exemption, the CRTC would be required to review each situation on a case-by-case basis and determine whether it is *reasonable* to conclude that the two organizations have a relationship that is sufficient to justify an exemption of CEMs from CASL. In making this decision, the CRTC could use a number of clear criteria outlined in a bulletin. Such criteria could include the duration of commercial dealings between the organizations, the frequency of transactions, size and structure of the two organizations, the nature of CEMs being sent and to whom they are

sent. This contextual analysis is necessary due to the vast differences in the size and structures of various businesses operating in the field of B2B commerce, and the variety of forms that B2B transactions may take. For example, where a B2B supplier has many transactions with a medium-sized, highly integrated organization, and the supplier's product/service is applicable to multiple departments of such organization, there may be a sufficient relationship between the organizations. However, if such B2B supplier attempts to send CEMs to all employees of a large, decentralized organization with unaffiliated departments, and only one of these departments previously made a purchase from that supplier, it would be unreasonable to conclude that the organizations have a relationship sufficient to permit CEMs to all employees.

The same principles apply when one asks whether it is reasonable to conclude that a CEM discusses or refers to the activities of the recipient organization. The CRTC could outline a list of criteria that it would rely on in a bulletin. Such criteria could include the nature of activities that the recipient organization is involved in, the nature of previous communication between the organizations, the intent of a CEM and the nexus between activities of the recipient organization and a CEM (for example, whether a CEM discusses specific activities of the recipient organization or makes a general reference to a broad class of activities). The final determination of whether a CEM meet the reasonableness threshold would depend on the contextual analysis and balancing of the enumerated criteria.

The major disadvantage of this option is that it requires businesses to perform a contextual analysis in every instance they wish to send B2B CEMs. While businesses could rely on the CRTC's specific criteria, such contextual analysis would nevertheless be burdensome for businesses, as well as for the CRTC in evaluating compliance. As with any contextual analysis, it leaves room for interpretation, and thus prevents businesses from having certainty that they comply with CASL. It is possible to provide more certainty by enforcing highly specific criteria, but any additional specificity would only elevate the threshold that business would have to meet to rely on the B2B Exemption. Given the importance of one-on-one electronic communication for B2B commerce, the burden of contextual analysis would likely fall on employees who routinely send CEMs, yet lack the legal background to engage in this complex analysis. Educating these employees with respect to proper CASL compliance would be tremendously challenging and undoubtedly burdensome for businesses, many of which already struggle to do the same under the B2B Exemption.

Another drawback is that senders of CEMs would still need to prove that the two organizations have a relationship. Thus, B2B marketers would continue to face difficulties in using electronic means to engage in marketing and business development to pursue new clients.

D. Evaluation of Options

	<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
Scope	Any B2B electronic message (including messages from and to sole proprietorships)	Any CEM to a business that gave express consent or with which there is existing business relationship	Any CEM that meets: 1) Sender requirement 2) Relationship requirement 3) Content requirement
Limitations	Opt-out by the recipient	1) Requires a relationship 2) Opt-out by the recipient 3) Opt-out by recipient's employer 4) Contractual limit on implied consent	1) Opt-out by the recipient 2) Requires a relationship 3) Requires that a message concerns activities of the recipient organization
Advantages	1) Flexibility in marketing & business development 2) No tracking of consents 3) No time limits 4) Applies to sole proprietorships	1) Easier to track consent 2) No time limits, unless contractually stipulated 3) No contextual analysis	1) No need to track consent 2) No legislative amendments

	5) No contextual analysis		
Disadvantages	1) Increase in spam 2) Growing security risk for SMBs	Inability to engage in marketing & business development to pursue new clients with whom there is no relationship	1) Burdensome contextual analysis 2) Inability to engage in marketing & business development to pursue new clients with whom there is no relationship

It is evident that Option 1 has the broadest scope and significant economic benefits due to the ability of B2B marketers to engage in more business development. However, these benefits are curtailed by a potential reduction in CASL's effectiveness to control spam. Option 3 presents the narrowest scope, significant limitations and a high cost of compliance due to burdensome contextual analysis, which makes it the least attractive option in terms of the efficiency of the Canadian economy and effective regulation of B2B electronic messages. Option 2 represents the middle ground, whereby economic benefits are balanced with reasonably effective regulation of B2B CEMs. Option 2, however, prevents B2B marketers from engaging in business development to pursue new clients with whom they have no existing business relationship, which substantially reduces its economic value.

The choice between Option 1 and 2 depends on whether the Government of Canada is ready to tolerate potential increase in the security risk associated with spam in pursuit of economic efficiency. It is important to remember that the inclusion of B2B electronic messages in the definition of CEM does not make Canadian businesses immune to spam. A relative increase in the security risk, particularly to SMBs, can be reduced by educational campaigns and raising awareness of potential threats. This approach was adopted by the United Kingdom government, which acknowledged that "for online fraud, the traditional law enforcement response of tackling crime by pursuing criminals

is not effective.”⁹⁴ Thus, Option 1 offers the most efficient economic solution for regulating electronic commerce, with any arising risks subject to control and mitigation through educational campaigns and raising awareness of potential threats.

IX. CONCLUSION

To encourage the use of electronic commerce by B2B marketers and promote the efficiency of the Canadian economy, CASL needs an effective differential treatment of B2B electronic messages. The B2B Exemption and the consent framework in CASL currently do not address this need. Instead, the B2B Exemption fails to make CASL more flexible for businesses, restricts legitimate B2B communication, and hinders, rather than promotes, the use of electronic means to carry out commercial activities.

Option 1 outlined in this paper delivers the most effective and practical solution to improve the regulation of B2B CEMs under CASL. This option provides clarity by creating a bright-line test through a complete exclusion of B2B electronic messages from the definition of CEM. It promotes B2B commerce by eliminating burdensome contextual analysis, allowing B2B marketers to rely on customer lists in perpetuity and benefiting sole proprietorships. The major risk of this option lies in a potential for more spam and increased security risks. However, any arising risks can be effectively controlled and mitigated through educational campaigns and raising awareness of potential threats.

⁹⁴ UK, National Audit Office, *Online Fraud* (report) (London: National Audit Office, 2017) at 35.