

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

B E T W E E N :

**3510395 CANADA INC.**

Applicant  
(Appellant)

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent  
(Respondent)

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**MEMORANDUM OF ARGUMENT OF THE APPLICANT,  
3510395 CANADA INC. (operating as COMPUFINDER)**

(Pursuant to Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25(1) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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## PART I—OVERVIEW

### 1. Issues of public importance

1. Canada’s anti-spam legislation (“CASL”)<sup>1</sup> represents a comprehensive foray by Parliament into the realm of e-commerce regulation. It creates a single scheme governing commercial electronic messages (“CEMs”) throughout Canada subject to the oversight of a single national regulator, the Canadian Radio-television and Telecommunications Commission (the “CRTC”).<sup>2</sup> It regulates the content of CEMs,<sup>3</sup> which are an indispensable part of participating in economic, social, and political activity online — particularly during a pandemic. And it imposes the threat of significant penalties for violations, up to \$1,000,000 for an individual (such as a political candidate), and up to \$10,000,000 for any other person (such as a corporation, charity, or political party).<sup>4</sup>

2. The proposed appeals present three questions of public importance. First, is the ubiquity of online commerce a “constitutionally significant transformation”<sup>5</sup> that brings the regulation of all CEMs (and “e-commerce” generally) within Parliament’s general trade and commerce power under section 91(2) of the *Constitution Act, 1867*? Second, what makes Internet speech “commercial” for the purposes of the freedom of expression guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms*? Third, if CASL’s CEM provisions are constitutionally valid, what is the proper scope of the exceptions to CASL’s prohibition of CEMs sent without consent?

3. In the *Securities Act Reference*, this Court conceded that “the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do”, yet concluded that, “as important as the preservation of capital markets and the maintenance of Canada’s financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry”.<sup>6</sup> The proposed appeals offer this Court an opportunity to apply these federalism principles to Internet regulation for the first time.

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<sup>1</sup> *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, [S.C. 2010, c. 23](#) [“CASL”].

<sup>2</sup> **See:** *Reference re Securities Act*, 2011 SCC 66, at para. [2](#).

<sup>3</sup> CASL, [s. 6](#).

<sup>4</sup> CASL, [s. 20\(4\)](#).

<sup>5</sup> *Reference re Securities Act*, 2011 SCC 66, at para. [115](#).

<sup>6</sup> *Reference re Securities Act*, 2011 SCC 66, at para. [128](#) (emphasis added).

4. As this Court has recognized, “the Internet allows for instantaneous cross-border consumer transactions”, and “remain[ing] ‘offline’ may not be a real choice in the Internet era”.<sup>7</sup> This is as true for businesses and non-profit organizations as it is for individuals. For the Federal Court of Appeal, it was dispositive; in holding that CASL’s CEM provisions were validly enacted under Parliament’s general trade and commerce power, Nadon J.A. emphasised that “e-commerce has become a pillar of Canada’s national economy, one that transcends industries, sectors and categories of market participants as well as provincial borders”.<sup>8</sup> This is true, and it will only become more so. Yet, rather than justify the broadening of Parliament’s jurisdiction under section 91(2), the growth of Internet communication and commerce demands the recognition of principled constraints on the federal government’s power to regulate online activity. Without such constraints, the Internet’s increasingly borderless world will mean increasingly borderless federal power.

5. The Internet’s ubiquity and the particular characteristics of online communication also demand caution in characterizing Internet speech as “commercial expression” which “lies some distance from the core of section 2(b) [of the *Charter*] and warrants a commensurately reduced level of protection”.<sup>9</sup> In *Rocket*, this Court explained that, in assessing limits on “commercial expression”, courts should be mindful that the “motive” for such expression “is, in most cases, primarily economic”, and that the loss to the speaker the results from such limits “is merely loss of profit, and not loss of opportunity to participate in the political process or the ‘marketplace of ideas’”.<sup>10</sup> CASL’s CEM provisions prohibit a far broader range of expression than fits that description; as Nadon J.A. acknowledged, Parliament specifically excluded “the expectation of profit” as a requirement in CASL’s definition of “commercial activity” and included significant speech with no commercial attributes.<sup>11</sup> Yet, Nadon J.A. determined that the expression that the impugned provisions captures is sufficiently “commercial” to be entitled to less assiduous constitutional protection.<sup>12</sup>

6. This is a dangerous conclusion. The vast volume of information that individuals and

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<sup>7</sup> *Douez v. Facebook, Inc.*, 2017 SCC 33, at paras. [36](#) and [56](#), per Karakatsanis, Wagner and Gascon JJ.

<sup>8</sup> *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103 [“**FCA Reasons**”], at para. [116](#) (Application Record [“**AR**”], Vol. I, Tab 2C, p. 124).

<sup>9</sup> *FCA Reasons*, at para. [197](#) (AR, Vol. I, Tab 2C, pp. 159-160), citing *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, at [246-247](#).

<sup>10</sup> *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, at [247](#).

<sup>11</sup> **See:** CASL, [ss. 1\(1\) and 1\(2\)](#); *FCA Reasons*, at para. [142](#) (AR, Vol. I, Tab 2C, p. 137).

<sup>12</sup> *FCA Reasons*, at para. [198](#) (AR, Vol. I, Tab 2C, p. 160).

organizations share online is often poorly differentiated. If a nexus with profit seeking is not a definitional requirement of “commercial” expression under section 2(b) of the *Charter*, then (in Nadon J.A.’s words) Internet expression “for other purposes, including political reasons or altruism”<sup>13</sup> will be inappropriately subject to restriction by the state. Unless this Court provides guidance on what makes Internet expression “commercial” under section 2(b) of the *Charter*, the degree of constitutional protection for online speech will be uncertain, if not unduly circumscribed.

7. Finally, even if CASL is constitutional, its CEM provisions — including the exemptions from CASL’s blanket prohibition of unsolicited CEMs — must not be construed in a manner that undermines CASL’s stated purpose of promoting “the efficiency and adaptability of the Canadian economy”.<sup>14</sup> Here, the Federal Court of Appeal unduly narrowed the scope of the business-to-business (“**B2B**”) exemption, while providing little guidance on what would suffice to satisfy it. The proper scope of CASL’s exemptions, particularly the B2B exemption on which CompuFinder sought to rely in the proceedings below, is central to CASL’s practical impact on Canadian businesses.

8. These are questions of significant public importance. The Federal Court of Appeal should not have the last word on whether a law that is so pervasive, that affects how individuals and organizations of all kinds communicate online, and that imposes an enormous compliance burden, is constitutionally sound — and, if it is, on the scope of its prohibitions. Leave should be granted.

## 2. Facts

### A. CompuFinder and these proceedings

9. CompuFinder operated a small business in Morin Heights, Quebec, since 1998.<sup>15</sup> It offered some 300 professional training courses to employees of its client companies, on topics such as modernizing management methods, increasing productivity, and promoting talent development.<sup>16</sup>

10. Long before CASL came into effect, CompuFinder marketed its professional training courses by sending electronic messages to recipients, including existing and former clients. With CASL’s

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<sup>13</sup> FCA Reasons, at para. [142](#) (AR, Vol. I, Tab 2C, p. 137).

<sup>14</sup> CASL, [s. 3](#).

<sup>15</sup> Affidavit of Sylvie Pagé, sworn December 11, 2014, Exhibit “A” to the Affidavit of Sonia Atwell, sworn November 9, 2020 (“**Atwell Affidavit**”) (AR, Vol. II, Tab 5A, p. 77).

<sup>16</sup> Partial List of CompuFinder’s Clients, Exhibit “B” to the Atwell Affidavit (AR, Vol. II, Tab 5B, p. 81); CompuFinder’s Course Catalogue, Exhibit “C” to Atwell Affidavit (AR, Vol. II, Tab 5C, p. 101).

enactment, CompuFinder implemented measures to comply. This was burdensome for a small business.<sup>17</sup> In December 2014, CompuFinder estimated that the internal reorganization required to demonstrate its compliance with CASL would demand an additional year or more of work.<sup>18</sup>

11. On March 5, 2015, the CRTC's Chief Compliance and Enforcement Officer issued a Notice of Violation to CompuFinder that identified three messaging campaigns CompuFinder had conducted in a two-month period.<sup>19</sup> The Notice alleged that CompuFinder had violated CASL by sending CEMs without the consent of the recipients, and by sending certain CEMs with a non-functioning unsubscribe link.<sup>20</sup> It imposed an administrative monetary penalty (“AMP”) of \$1,100,000.<sup>21</sup>

12. CompuFinder made representations to the CRTC on May 15, 2015.<sup>22</sup> It filed further representations challenging the constitutionality of CASL's CEM provisions on July 29, 2015.<sup>23</sup>

13. The enforcement of CASL's CEM provisions caused considerable financial hardship to CompuFinder. Its annual gross revenues fell dramatically, from about \$1.5 million in each of 2013 and 2014 to only about \$230,000 in the first half of 2015. It had to lay off most of its employees, shrinking its workforce from 35 employees in April 2015 to only six employees by February 2016.<sup>24</sup>

14. On August 9, 2016, CompuFinder's financial position became such that it instituted proceedings under the *Bankruptcy and Insolvency Act*. On November 28, 2016, CompuFinder filed a

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<sup>17</sup> Letter from Charles Morgan to John Traversy, dated December 11, 2014, Exhibit “D” to the Atwell Affidavit (AR, Vol. II, Tab 5D, p. 111).

<sup>18</sup> Letter from Charles Morgan to John Traversy, dated December 11, 2014, Exhibit “D” to the Atwell Affidavit (AR, Vol. II, Tab 5D, p. 111).

<sup>19</sup> *3510395 Canada Inc., operating as Compu.Finder – Violations of Canada's Anti-Spam Legislation* (19 October 2017), 2017-368 (CRTC) [“**CRTC Violations Decision**”], at para. [36](#) (AR, Vol. I, Tab 2B, p. 56).

<sup>20</sup> CRTC Violations Decision, at para. [2](#) (AR, Vol. I, Tab 2B, pp. 49-50).

<sup>21</sup> Notice of Violation, dated March 5, 2015, Exhibit “E” to the Atwell Affidavit (AR, Vol. II, Tab 5E, p. 118). **See also:** CRTC Violations Decision, at para. [4](#) (AR, Vol. II, Tab 2B, p. 50).

<sup>22</sup> *3510395 Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada's Anti-Spam Legislation* (19 October 2017), 2017-367 (CRTC) [“**CRTC Constitutional Decision**”], at para. [3](#) (AR, Vol. I, Tab 2A, p. 6).

<sup>23</sup> CRTC Constitutional Decision, at paras. [3-4](#) (AR, Vol. I, Tab 2A, p. 6).

<sup>24</sup> Letter from Sylvie Pagé to Charles Morgan, dated March 3, 2016, Exhibit “F” to the Atwell Affidavit (AR, Vol. II, Tab 5F, p. 121); CompuFinder's Unaudited Financial Statements for 2014, Exhibit “G” to the Atwell Affidavit, AR, Vol. II, Tab 5G, p. 129).

proposal to its creditors,<sup>25</sup> listing the CRTC as an unsecured creditor.<sup>26</sup>

15. The CRTC rendered two decisions on October 19, 2017: **(i)** it dismissed CompuFinder’s constitutional challenge;<sup>27</sup> and **(ii)** it concluded that CompuFinder had violated CASL in respect of 317 CEMs, and imposed a total AMP of \$200,000.<sup>28</sup>

16. CompuFinder appealed to the Federal Court of Appeal under section 27 of CASL.<sup>29</sup> Its appeals were dismissed, after a 13-month reserve, on June 5, 2020. The Federal Court of Appeal: **(i)** upheld the constitutionality of CASL’s CEM provisions, both as a valid exercise of federal power and under the *Charter*; and **(ii)** upheld the CRTC’s decision with respect to the Notice.<sup>30</sup>

17. CompuFinder seeks leave to appeal from the Federal Court of Appeal’s judgment. It files this Memorandum of Argument in support of its leave application.

## **B. CASL’s CEM provisions**

18. Parliament enacted CASL in 2010, and the Act came into force on July 1, 2014.<sup>31</sup> In introducing the legislation, the government promised that it would “deter the most damaging and deceptive forms of spam from occurring in Canada and [...] help to drive spammers out of Canada”.<sup>32</sup> CASL attempts to do so by “prohibit[ing] commercial conduct that would [...] impair the reliability and optimal use of electronic means of carrying out commercial activities”.<sup>33</sup> Most notably, and in the provisions at issue in the proposed appeals, CASL prohibits sending CEMs

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<sup>25</sup> Letter from Daniel Girouard, enclosing CompuFinder’s Notice to Creditors and Notice of Intention, dated August 9, 2016, Exhibit “H” to the Atwell Affidavit (AR, Vol. II, Tab 5H, p. 139); Proposal to Creditors, dated November 28, 2016, Exhibit “I” to the Atwell Affidavit (AR, Vol. II, Tab 5I, p. 148).

<sup>26</sup> CRTC Violations Decision, at para. [13](#) (AR, Vol. I, Tab 2B, p. 51).

<sup>27</sup> CRTC Constitutional Decision, at paras. [230-233](#) (AR, Vol. I, Tab 2A, p. 48).

<sup>28</sup> CRTC Violations Decision, at para. [125](#) (AR, Vol. I, Tab 2B, p. 72).

<sup>29</sup> CASL, [s. 27](#).

<sup>30</sup> FCA Reasons, at paras. [1-3](#) (AR, Vol. I, Tab 2C, pp. 77-78).

<sup>31</sup> FCA Reasons, at para. [5](#) (AR, Vol. I, Tab 2C, p. 78).

<sup>32</sup> Canada, Library of Parliament, *Legislative Summary of Bill C-27*, by A. Davies, Publication No. LS-645E (November 13, 2009), at 2, Exhibit “J” to the Atwell Affidavit (AR, Vol. II, Tab 5J, p. 157), quoting Industry Canada, “Government of Canada Introduces the *Electronic Commerce Protection Act*” (April 24, 2009). **See also:** FCA Reasons, at para. [162](#) (AR, Vol. I, Tab 2C, pp. 145-146).

<sup>33</sup> House of Commons, *Canada’s Anti-Spam Legislation: Clarifications Are In Order: Report of the Standing Committee on Industry, Science and Technology* (December 2017) [“**INDU Report**”], at [7](#), Exhibit “K” to the Atwell Affidavit (AR, Vol. II, Tab 5K, p. 199).

without prior consent, even where they are wanted or desirable.<sup>34</sup>

19. Section 1(2) of CASL defines CEMs:

[A] commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

(a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;

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

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

(d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.<sup>35</sup>

20. This definition captures all electronic messages that “it would be reasonable to conclude” have a “commercial” purpose, even if this is not the primary purpose and even if only because of the inclusion of hyperlinks, including from senders who have no “expectation of profit”.<sup>36</sup> Vast swaths of digital communications are swept into CASL’s purview because one of their purposes, however slight, “might be construed as having a hint of commercialism”.<sup>37</sup> This includes messages from non-profit organizations,<sup>38</sup> schools,<sup>39</sup> politicians,<sup>40</sup> professionals,<sup>41</sup> individuals,<sup>42</sup> and other persons

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<sup>34</sup> FCA Reasons, at para. 94 (AR, Vol. I, Tab 2C, p. 114).

<sup>35</sup> CASL, s. 1(2) (emphasis added).

<sup>36</sup> CASL, ss. 1(1) (“commercial activity”, “electronic message”), 1(2).

<sup>37</sup> Statement of David T.S. Fraser [“**Fraser Statement**”], at para. 26, Exhibit “CC” to the Atwell Affidavit (AR, Vol. IV, Tab 5CC, p. 26). **See also:** Reply to the Attorney General’s Response to CompuFinder’s Hypothetical Scenarios [“**Hypothetical Scenarios Chart**”], Exhibit “WW” to the Atwell Affidavit (AR, Vol. IV, Tab 5WW, p. 207); Brief of Submissions of the Canadian Real Estate Association to INDU dated October 2017, Exhibit “M” to the Atwell Affidavit (AR, Vol. III, Tab 5M, p. 61).

<sup>38</sup> **See:** Statement of Scott Smith (Canadian Chamber of Commerce) dated July 27, 2015 [“**Smith Statement**”], at para. 3, Exhibit “DD” to the Atwell Affidavit (AR, Vol. IV, Tab 5DD, p. 41); Letter from the Canadian Bar Association to Bruce Wallace (Department of Industry (“**ISED**”)), dated February 5, 2013 [“**CBA Letter**”], at 4-5, Exhibit “FF” to the Atwell Affidavit (AR, Vol. IV, Tab 5FF, p. 63).

<sup>39</sup> **See:** Fraser Statement, at para. 33 (AR, Vol. IV, Tab 5CC, p. 27); Report of Dr. Emir Crowne dated March 3, 2016 [“**Crowne Report**”], at para. 14, Exhibit “L” to the Atwell Affidavit (AR, Vol. III, Tab 5L, pp. 6-8); Letter from the Association of Universities and Colleges of Canada to ISED, dated February 4, 2013 [“**AUCC Letter**”], Exhibit “S” to the Atwell Affidavit (AR,

engaging in valuable expression. CASL's requirements apply no less to e-mails advertising a neighbourhood lemonade sale<sup>43</sup> than they do to malicious bulk messages seeking to defraud Canadians or concealing spyware. Whether the CEM provisions must impair the freedom of expression to this extent to further Parliament's objective has been an issue throughout this litigation.

### C. CASL's widespread impact

21. Few federal laws rival CASL's importance to the everyday operations of Canadian businesses and other organizations. During a statutory review by Parliament's Standing Committee on Industry, Science and Technology ("INDU") in 2017, as well as in the proceedings below, numerous organizations and experts flagged CASL's severe and largely unintended consequences. Though it was intended to target harmful and invasive electronic communications, CASL is, in practice, "omni-regulating".<sup>44</sup> The law permeates the daily activities of Canadian organizations because it regulates what, how, and to whom they may communicate online.<sup>45</sup>

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Vol. III, Tab 5S, p. 97); Brief of Submissions of Universities Canada to the Standing Committee on Industry, Science and Technology ["INDU"] dated October 20, 2017 ["**Universities Canada INDU Submissions**"], Exhibit "II" to Atwell Affidavit (AR, Vol. IV, Tab 5II, p. 102);

<sup>40</sup> **See:** House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 42-1, No. 75 (October 5, 2017) ["**INDU Evidence (October 5, 2017)**"], at 1150 (B. Sookman), Exhibit "Z" to the Atwell Affidavit (AR, Vol. III, Tab 5Z, pp. 158-159).

<sup>41</sup> **See:** CBA Letter (AR, Vol. IV, Tab 5FF, p. 63); Brief of Submissions of the Canadian Bar Association to INDU, dated October 23, 2017 ["**CBA INDU Submissions**"], Exhibit "KK" to the Atwell Affidavit (AR, Vol. IV, Tab 5KK, p. 112); Letter from the Federation of Law Societies to ISED, dated February 4, 2013 ["**FLS Letter**"], Exhibit "PP" to the Atwell Affidavit (AR, Vol. IV, Tab 5PP, p. 144); Fraser Statement, at para. 24 (AR, Vol. IV, Tab 5CC, p. 26).

<sup>42</sup> **See:** CASL, [s. 1\(1\)](#) ("person"); Fraser Statement, at paras. 53-56 (AR, Vol. IV, Tab 5CC, pp. 33-34); House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 42-1, No. 77 (10 October 2017) at 1145 (S. Provato), Exhibit "AA" to the Atwell Affidavit (AR, Vol. III, Tab 5AA, p. 185); House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 41-2, No. 83 (9 November 2017), at 1155 (K.-A. Smith), Exhibit "BB" to the Atwell Affidavit (AR, Vol. IV, Tab 5BB, p. 14).

<sup>43</sup> **See:** Fraser Statement, at para. 55 (AR, Vol. IV, Tab 5CC, p. 34); INDU Evidence (October 5, 2017), at 1135, 1230 (B. Sookman) (AR, Vol. III, Tab 5Z, pp. 156, 164-165).

<sup>44</sup> Crowne Report, at para. 14 (AR, Vol. III, Tab 5L, pp. 6-8). **See also:** Brief of Submission of the Canadian Life and Health Insurance Association to INDU, dated November 9, 2017, Exhibit "P" to the Atwell Affidavit (AR, Vol. III, Tab 5P, p. 80).

<sup>45</sup> Brief of Submissions of Rogers Communications to INDU dated October 17, 2017, Exhibit "N" to the Atwell Affidavit (AR, Vol. III, Tab 5N, p. 67); Brief of Submissions of the Information Technology Association of Canada to INDU, dated November 7, 2017, Exhibit "O" to the Atwell Affidavit (AR, Vol. III, Tab 5O, p. 75); Brief of Submissions of the Canadian Wireless Telecommunications Association to INDU, dated November 9, 2017, Exhibit "Q" to the Atwell

22. CASL is “perhaps the most stringent anti-spam legislation in the world”.<sup>46</sup> It imposes a difficult trade-off for the diverse individuals and organizations caught within its scope: stop using electronic communications to send messages that CASL considers “commercial”, incur substantial compliance costs, or risk severe penalties, even for technical breaches. After hearing evidence from dozens of stakeholders, the INDU concluded that “[t]he Act and its regulations require clarifications to reduce the cost of compliance and better focus enforcement. Provisions defining CEM, consent, and ‘business-to-business’ messages, among others, warrant the attention of the Government of Canada”.<sup>47</sup> No such “clarifications” have been forthcoming, however.

23. CompuFinder’s encounter with CASL enforcement, and its efforts to demonstrate its compliance with the legislation, ultimately destroyed its business. The prohibitive compliance burden that CompuFinder faced is not unique.<sup>48</sup> CASL is “operationally and structurally [...] a very difficult law to apply”,<sup>49</sup> and businesses across Canada have struggled with implementing it; instead of investing in innovation, hiring, and expansion, Canadian businesses “spend[] a disproportionate amount of money on legal consulting, operational processes, staff training, and human resources to fully implement the legislation”.<sup>50</sup> According to the Canadian Federation of Independent Businesses (“**CFIB**”), which represents more than 109,000 small- and medium-sized businesses across Canada:

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Affidavit (AR, Vol. III, Tab 5Q, p. 85); Brief of Submissions of Shaw Communications to INDU, dated November 9, 2017, Exhibit “R” to the Atwell Affidavit (AR, Vol. III, Tab 5R, p. 91); Brief of Submissions of Eastlink to INDU, dated November 9, 2017, Exhibit “UU” to the Atwell Affidavit (AR, Vol. IV, Tab 5UU, p. 177).

<sup>46</sup> **See:** Appendix B to the Crowne Report (AR, Vol. III, Tab 5L, p. 35).

<sup>47</sup> INDU Report, at [28](#) (AR, Vol. II, Tab 5K, p. 220). **See also:** Reply Statement of Scott Smith (Canadian Chamber of Commerce), at paras. 17-18, Exhibit “OO” to the Atwell Affidavit (AR, Vol. IV, Tab 5OO, pp. 140-141).

<sup>48</sup> **See:** Affidavit of Christine van Geyn, sworn October 30, 2020 [“**van Geyn Affidavit**”], at paras. 9-10 (AR, Vol. II, Tab 4, pp. 3-4); Smith Statement, at para. 6 (AR, Vol. IV, Tab 5DD, pp. 42-43); Brief of Submissions of Desjardins Group to INDU, dated November 9, 2017, Exhibit “NN” to the Atwell Affidavit (AR, Vol. IV, Tab 5NN, p. 128); House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 42-1, No. 76 (17 October 2017), at 1110 (A. Kardash), Exhibit “HH” to the Atwell Affidavit (AR, Vol. IV, Tab 5HH, pp. 80-81); Brief of Submissions of the Canadian Federation of Independent Business to INDU, dated November 6, 2017, Exhibit “MM” to the Atwell Affidavit (AR, Vol. IV, Tab 5MM, p. 122).

<sup>49</sup> Fraser Statement, at para. 14 (AR, Vol. IV, Tab 5CC, p. 23).

<sup>50</sup> Smith Statement, at paras. 21, 23 (AR, Vol. IV, Tab 5DD, pp. 47-48). **See also:** Brief of Submissions of the Canadian Bankers Association to INDU, dated November 9, 2017, at 1, Exhibit “SS” to the Atwell Affidavit (AR, Vol. IV, Tab 5SS, p. 165); Brief of Submissions of the Canadian Vehicle Manufacturers’ Association to INDU, dated November 9, 2017, at 1, Exhibit “TT” to the Atwell Affidavit (AR, Vol. IV, Tab 5TT, p. 171).

CASL [...] impacts everyone, unnecessarily. [...] CASL was supposed to [...] free up time and resources that would allow businesses to be more innovative and productive. However, in practice, CASL has the potential to prevent businesses from using email marketing for fear of committing a violation. The result has been that businesses have gone back to marketing via mail, telephone, and fax; all of which are more invasive and more difficult to opt-out of than an email.<sup>51</sup>

24. CASL's importance is borne out by the wide range of entities it affects on a daily or near-daily basis. These include local businesses and non-commercial actors like charities, not-for-profit entities, law societies, unions, and universities. Many have complained that CASL sweeps well beyond the harmful spam it chiefly seeks to prevent.<sup>52</sup> CASL governs how charities, non-profits, and public-benefit organizations communicate with potential donors and volunteers.<sup>53</sup> It imposes significant administrative costs "at a time when these organizations are using novel techniques, mostly fueled by technology, to minimize these costs".<sup>54</sup> Universities have noted that CASL's "blanket prohibition" may "capture and inhibit electronic communications by universities which are part of

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<sup>51</sup> Statement of Louis-Martin Parent (Canadian Federation of Independent Business), dated July 27, 2015 [**"Parent Statement"**], at para. 7, Exhibit "RR" to the Atwell Affidavit (AR, Vol. IV, Tab 5RR, p. 157. **See also:** Fraser Statement, at paras. 11, 14 (AR, Vol. IV, Tab 5CC, pp. 22-23); Smith Statement, at paras. 21, 24 (AR, Vol. IV, Tab 5DD, pp. 47-48).

<sup>52</sup> **See, e.g.:** Letter from Imagine Canada to ISED, dated February 4, 2013 [**"Imagine Canada Letter"**], at 2-3, Exhibit "T" to the Atwell Affidavit (AR, Vol. III, Tab 5T, pp. 104-105); Letter from the Canadian Council of Christian Charities to ISED, dated February 1, 2013, at 1-2, Exhibit "EE" to the Atwell Affidavit (AR, Vol. IV, Tab 5EE, pp. 58-59); Letter from the Ontario Nonprofit Network ("**ONN**") to ISED, dated February 4, 2013, at 3-7, Exhibit "V" to the Atwell Affidavit (AR, Vol. III, Tab 5V, pp. 121-125); Brief of Submissions of the Calgary Chamber of Voluntary Organizations to INDU, dated October 25, 2017, Exhibit "Y" to the Atwell Affidavit (AR, Vol. III, Tab 5Y, p. 145); Brief of Submissions of ONN to INDU dated October 23, 2017, at 3, Exhibit "JJ" to the Atwell Affidavit (AR, Vol. IV, Tab 5JJ, p. 109); CBA INDU Submissions, at 1-2 (AR, Vol. IV, Tab 5KK, pp. 112-113).

<sup>53</sup> Letter from the Heart and Stroke Foundation to ISED, dated February 6, 2013, Exhibit "QQ" to the Atwell Affidavit (AR, Vol. IV, Tab 5QQ, p. 150); Brief of Submissions of Imagine Canada to INDU, dated October 2017 [**"Imagine Canada INDU Submissions"**] at 1-2, Exhibit "W" to the Atwell Affidavit (AR, Vol. III, Tab 5W, pp. 135-136); Letter from the Canadian Society of Association Executives to ISED, dated February 1, 2013, Exhibit "U" to the Atwell Affidavit (AR, Vol. III, Tab 5U, p. 115).

<sup>54</sup> Letter from the Association of Fundraising Professionals to ISED, dated 6 February 2013, at 3, Exhibit "GG" to the Atwell Affidavit (AR, Vol. IV, Tab 5GG, p. 72). **See also:** CBA Letter, at 5 (AR, Vol. IV, Tab 5FF, p. 67); Brief of Submissions of Mr. Philip Palmer to INDU, Exhibit "X" to the Atwell Affidavit (AR, Vol. III, Tab 5X, p. 140); Brief of Submissions of the Community Sector Council of Newfoundland and Labrador to INDU dated 26 October 2017 at 1, Exhibit "LL" to the Atwell Affidavit (AR, Vol. IV, Tab 5LL, p. 118).

their core educational activities”.<sup>55</sup> For law societies, CASL affects how they communicate with licensees about continuing professional development, even though the primary purpose of such communications is regulatory, not commercial.<sup>56</sup>

25. In sum, no Canadian law goes further, or has ever gone further, in regulating electronic expressive activity. As CompuFinder’s experience illustrates, CASL imposes a heavy compliance burden, backed by high-stakes enforcement. It does so for a broad spectrum of organizations and individuals across Canadian society, at a time when, due to public health measures, Canadians’ interactions increasingly occur online.

## PART II—STATEMENT OF QUESTIONS IN ISSUE

26. The issue in this application is whether any of the following is a question of public importance under s. 40(1) of the *Supreme Court Act*.<sup>57</sup> The Applicant submits that they all are.

- (a) Is the ubiquity of online commerce a “constitutionally significant transformation”<sup>58</sup> that brings the regulation of all CEMs within Parliament’s general trade and commerce power under s. 91(2) of the *Constitution Act, 1867*?
- (b) What makes Internet speech “commercial” for the purposes of the freedom of expression guaranteed in section 2(b) of the *Charter*?
- (c) If CASL’s CEM provisions are constitutionally valid, what is the proper scope of the exceptions to CASL’s prohibition of CEMs sent without prior consent?

## PART III—STATEMENT OF ARGUMENT

### 1. The proposed appeals raise issues of public importance

27. Regulating online activity is a considerable public policy challenge. Determining the constitutional bounds of such regulation is a matter of considerable public importance. The proposed appeals, arising as they do out of Parliament’s creation (and the CRTC’s enforcement) of a prohibition of online expressive activity, offer this Court a timely opportunity to develop the law in a manner that will shape how Canadians interact with the state — and each other — on a daily basis.

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<sup>55</sup> Universities Canada INDU Submission (AR, Vol. IV, Tab 5II, p. 102); AUCC Letter (AR, Vol. III, Tab 5S, p. 97).

<sup>56</sup> FLS Letter at 3 (AR, Vol. IV, Tab 5PP, p. 146).

<sup>57</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, [s. 40\(1\)](#).

<sup>58</sup> *Reference re Securities Act*, 2011 SCC 66, at para. [115](#).

28. This Court has never considered how, if at all, “the global reach of the Internet”<sup>59</sup> affects the division of powers analysis under the *Constitution Act, 1867*,<sup>60</sup> or how the *Charter*’s guarantee of the freedom of expression operates in relation to Internet regulation. It came close to doing so in *Equustek*, but it ultimately did not need to consider the freedom-of-expression implications of the search engine de-indexing order at issue in that case.<sup>61</sup> The Court has, however, acknowledged the transformative implications of electronic communications for Canadian law.<sup>62</sup> As Justice Bastarache, speaking extrajudicially, put it more than two decades ago:

Does [...] the delicate balancing required under the *Charter* apply with equal force to all forms of speech on the Internet, even though that speech and the opportunity for response, rebuttal, control, and tuning-out are greater than in any other ‘public’ forum? [...] Searching for the right metaphors which relate cyberspace to conventional law is a huge challenge precisely because there are no precise analogies to cyberspace in the real world. [...] The borders of cyberspace do not map onto the borders of real space, which poses a fundamental problem for courts whose jurisdiction is based on geography. New tools and new doctrines will need to be developed, and perhaps certain doctrines that have been developed heretofore [...] will need to be revisited.<sup>63</sup>

29. The proposed appeals turn on these questions. The Federal Court of Appeal used the Internet’s indifference to jurisdictional boundaries to expand federal authority into areas of exclusive provincial power. And it applied pre-Internet doctrine on “commercial expression” under section 2(b) of the *Charter* in a manner that will sweep a vast quantity of online speech into the ambit of federal regulation. It therefore held that CASL, a law that imposes an enormous and omnipresent compliance burden on Canadian businesses and non-profit organizations, is constitutional. Whether this should be the result in Canada is a matter of pressing public importance.

**A. Issue #1: Parliament does not have jurisdiction to regulate CEMs merely because they cross borders**

30. Both the CRTC and the Federal Court of Appeal grounded CASL’s constitutional validity in the borderlessness of Internet activity. In Nadon J.A.’s words: “Once it is accepted that e-commerce

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<sup>59</sup> *Haaretz.com v. Goldhar*, 2018 SCC 28, at para. 110, per Abella J.

<sup>60</sup> **Cf.:** *South Dakota v. Wayfair Inc.* (2018), 585 U.S. \_\_\_\_ (U.S. Sup. Ct.), at 15 (slip op.).

<sup>61</sup> **See:** *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, at paras. 45-49.

<sup>62</sup> **See:** *R. v. Marakah*, 2017 SCC 59, at para. 28; *Haaretz.com v. Goldhar*, 2018 SCC 28, at para. 40, per Côté J. **See also:** *ibid.*, at para. 99, per Karakatsanis J.; *ibid.*, at paras. 127-131, per Abella J.; *ibid.*, at para. 149, per Wagner J.

<sup>63</sup> M. Bastarache, “The Challenge of Law in the New Millennium” (1997), 25 Man. L.J. 411, at 415-16 (emphasis added) (AR, Vol. V, Tab 7, pp. 45-46).





















