



**Ottawa, June 5, 2020** – Judgments were issued today by the Federal Court of Appeal (Nadon, Webb and Woods JJ.A.) in files A-382-17 and A-383-17: *3510395 Canada Inc. v. Attorney General of Canada et al.*, [2020 FCA 103](#).

*The following is an unofficial summary of the Court's reasons and judgments. The Court's reasons and judgments are authoritative.*

**Facts:** The appellant appeals two decisions by the CRTC upholding the constitutionality of Canada's anti-spam legislation (CASL) and finding the appellant in violation of CASL's requirements for commercial electronic messages (CEMs or spam). The appellant, a small business offering professional training courses, was found to have sent CEMs to recipients without consent and which contained faulty unsubscribe mechanisms. The CRTC reduced the \$1,100,000 administrative monetary penalty (AMP) to \$200,000.

**Issues:** In the first appeal, whether CASL is *ultra vires* Parliament, whether its violation of section 2(b) of the Charter is justified under section 1, and whether CASL violates sections 7, 8 or 11 of the Charter. In the second appeal, whether the CRTC erred in its application of CASL's consent exemptions and unsubscribe-mechanism requirements.

**Decision: The appeals are dismissed.** CASL is valid legislation under Parliament's general trade and commerce power. The purpose of the act's CEM scheme is to regulate unsolicited spam to protect Canadian e-commerce from threats associated with spam, including costs to businesses and individuals and undermining the public's confidence in, and ability to use, e-commerce. The scheme's effect is to establish three preconditions for sending CEMs: recipient consent, and the inclusion of the sender's identification and contact information as well as an unsubscribe mechanism. The scheme's pith and substance is to regulate the dissemination of unsolicited CEMs in order to guard against threats to Canada's e-economy.

CASL's CEM scheme meets the indicia of valid general trade and commerce legislation. It is a regulatory scheme under the oversight of a regulatory agency. It concerns trade as a whole, since it aims to protect e-commerce, which transcends industries, from the negative effects of spam. The provinces are unable to achieve the national aims of the federal scheme on a sustained basis. While the provinces, in concert, could enact a uniform regulatory framework similar to CASL, each province retains the ability to resile from any interprovincial scheme. Finally, failure to include one or more provinces would jeopardize the scheme, as spammers could arrange to disseminate CEMs from provinces with more lenient regulations.

CASL violates section 2(b) of the Charter by restricting the sending of CEMs but is saved under section 1. CASL is sufficiently precise to constitute a limit prescribed by law, as subsections 1(1) and 1(2) tell the public what to look for and where to look to identify offending messages. The objective of CASL's CEM scheme is to promote Canada's economy by regulating CEMs to

prevent spam's pernicious effects, which is sufficiently important to limit a Charter freedom. CASL's restrictions are rationally connected to its objective and are not overbroad. A wide range of commercial messages can impair the use of, or undermine Canadians' confidence in, e-commerce, and are legitimate targets of regulation. CASL's CEM scheme is not an absolute prohibition on commercial messages. It prescribes a means of compliance and a number of exceptions. The scheme is also minimally impairing. The alternative opt-out model to CASL's opt-in model for receiving spam would not satisfy CASL's objectives: recipient's would lose control of their inboxes, permitting entry to potentially harmful emails and placing the costs associated with spam on businesses and individuals. Alternative versions of the opt-in model are not sufficiently less impairing to remove CASL from the range of reasonable solutions. CASL's shielding of Canadians from spam that could impair Canada's digital economy outweighs its detrimental effects on free of expression. Commercial expression is not a core value of section 2(b), and CASL's effects are mitigated by a prescribed mode of compliance and exemptions.

CASL's AMP regime does not trigger section 11(d) as subject individuals are not charged with a criminal offense. Neither may corporations, like the appellant, avail themselves of section 7 protections outside penal proceedings. CASL's compelled production provisions do not permit unreasonable seizures contrary to section 8 because of the reduced expectation of privacy attaching to business documents produced in a regulatory context.

The CRTC did not misapply CASL's exemption for CEMs between organizations that have a relationship. The CRTC did not err in determining that evidence of one or two previous transactions is insufficient to establish a relationship. Because the appellant failed to make out relationships, it is not necessary to consider whether its CEMs concerned the recipient's activities. However, CEMs need not concern recipient's core business operations to meet the relevance requirement.

The CRTC did not err in finding the appellant could not rely on the conspicuous publication exemption because it gathered recipients' email addresses from third-party directory websites and sites with notices against spam. Nor did the CRTC err in holding that the appellant, by merely stating recipients' job titles, failed to establish its CEMs were relevant to recipients' functions or duties. Finally, the CRTC did not err in determining the inclusion of a second, non-functioning unsubscribe mechanism in a CEM violates CASL's requirements that unsubscribe mechanisms be set out clearly and prominently, and be able to be readily performed.