Bill Clause No.	Section No.	Topic
1	(1)	**“commercial activity”**

PROPOSED WORDING

“commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit, other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada.

EXPLANATION

This term appears in sections 3, 5(5), 6, and 7, and is relevant to the definition of “commercial electronic message”. The Act applies to “commercial activity”, which includes any activity that may be commercial in nature but does not include acts or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defense of Canada.

RATIONALE

The term “commercial activity” is fundamental to defining the application of the Act. The constitutional basis for the Act is the federal General Trade and Commerce Power, and, as such, the Bill falls within this power given that it applies to commercial activity. This definition will provide clarity should the Act be interpreted by tribunals, the Federal Court other courts of competent jurisdiction.

There may be some confusion about what is in fact commercial, particularly in relation to activities carried out by professional services, charitable or political organizations. It is important to recognize that the Act applies to “commercial activities” rather than “commercial organizations”, and, as such, any organization may be subject to the Act based on the nature of a given activity. Registered charities, political organizations or not-for-profit organizations, when they engage in commercial activity, such as the sale of T-shirts or tickets to a dinner, are covered by the Bill. These groups must follow the requirements of the Act when contacting consumers or Canadians via telecommunications for commercial purposes. Normal fundraising activities and other non-commercial activities (conduct of surveys for example) are not covered by the Bill by virtue of the definition of commercial activity.

BACKGROUND

The definition is necessary to distinguish between commercial and non-commercial activities. It should be noted that the Bill applies to any person or organization when they engage in commercial activity. For registered charities, political organizations and candidates for publicly

elected office, there are further exemptions as per the “existing non-business relationship”, see subsection 10(13).

Bill Clause No.	Section No.	Topic
1	(1)	**"Commission"**

PROPOSED WORDING

"Commission" means the Canadian Radio-television and Telecommunications Commission.

EXPLANATION

This term is used throughout the Bill to identify the Canadian Radio-television and Telecommunications Commission.

RATIONALE

Where specified in the Bill, oversight and enforcement is the responsibility of the Canadian Radio-television and Telecommunications Commission. In addition, the Commission is granted new responsibilities and investigatory powers in order to enable the enforcement of the Bill.

It is important to note that the role of the Canadian Radio-television and Telecommunications Commission differs under this Bill when compared to the *Broadcasting Act* and the *Telecommunications Act.* With respect to Broadcasting and Telecommunications, the Commission is tasked with interpretation, policy recommendations, rule-making and decision-making. Under this Bill, the Commission is solely responsible for investigating and adjudicating violations of sections 6 to 9, and is responsible for related provisions.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**"Commissioner of Competition"**

PROPOSED WORDING

"Commissioner of Competition" means the Commissioner of Competition appointed under subsection 7(1) of the *Competition Act*.

EXPLANATION

This term is used throughout the Bill to identify the Commissioner of Competition.

RATIONALE

The legislation provides that in those sections when referenced, oversight and enforcement is the responsibility of the Commissioner of Competition. The Commissioner of Competition will utilize many of their current powers under the *Competition Act* and they are being granted new responsibilities and investigatory powers as provided for in amendments to the *Competition Act* for the enforcement of the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“computer program”**

PROPOSED WORDING

“computer program” has the same meaning as in subsection 342.1(2) of the *Criminal Code.*

Definition found in subsection 342.1(2) of the *Criminal Code*:

> "computer program" means data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function.

EXPLANATION

This term appears in sections 8, 10 and 11 and includes data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function. A computer program is therefore any data that can be read by a computer that causes the computer to perform a task or function.

RATIONALE

It is necessary to define “computer program” for the purposes of the Bill in order to address the unauthorized installation and use of spyware and malware, which are malicious forms of computer programs.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“computer system”**

PROPOSED WORDING

“computer system” has the same meaning as in subsection 342.1(2) of the *Criminal Code*.

Definition found in subsection 342.1(2) of the *Criminal Code*:

> "computer system" means a device that, or a group of interconnected or related devices one or more of which,
>
> (a) contains computer programs or other data, and
>
> (b) pursuant to computer programs,
>
> (i) performs logic and control, and
>
> (ii) may perform any other function.

EXPLANATION

This term is used in sections 8, 12 and 19 and is used to describe any machine that is capable of understanding computer programs.

RATIONALE

It is necessary to define computer system for the purposes of the Bill in order to address the unauthorized installation of computer programs which include spyware and malware (malicious computer programs) on any computer system. Computer system as defined would include for example, desktop computers and laptops, PDAs, digital telephones, servers and routers, etc…

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“court of competent jurisdiction”**

PROPOSED WORDING

“court of competent jurisdiction” means the Federal Court or a superior court of a province.

EXPLANATION

This term is used in sections 22, 40, 41 and 47 of the Bill.

RATIONALE

The Bill confers jurisdiction on these courts (Federal Court or a superior court of a province) to hear certain matters.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“data”**

PROPOSED WORDING

“data” means signs, signals, symbols or concepts that are being prepared or have been prepared in a form suitable for use in a computer system.

EXPLANATION

This term is used in sections 7, 15, 16, 17 and 19 of the Bill. Data is anything in a form suitable for use with a computer. Data includes anything (signs, signals, symbols or concepts) that is read or recorded by a computer system.

RATIONALE

Although this term is defined in the *Criminal Code*, ”data” is slightly broader for the purposes of this Bill in order to include portions of data that are not necessarily complete for use in a computer system.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“document”**

PROPOSED WORDING

“document” has the same meaning as in section 487.011 of the *Criminal Code*.

Definition found in section 487.011 of the *Criminal Code:*

> “document”
>
> “document” means any medium on which is recorded or marked anything that is capable of being read or understood by a person or a computer system or other device.

EXPLANATION

The term is used in sections 15, 17, 18, 19, 21, 23, 35 and 37 of the bill. A document is any medium of information whether it can be understood by a person, a computer system or another device.

RATIONALE

The concept of a document is important to the sections of the bill dealing with preservation of documents, production orders, and examination of documents. The term is defined for the same purposes in the *Criminal Code*. For the same reasons that it is defined there, for the purposes of these provisions it is necessary to define the term so it applies equally to any recorded information regardless of the medium.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**"electronic address"**

PROPOSED WORDING

"electronic address" means an address used in connection with the transmission of an electronic message to

(*a*) an electronic mail account;

(*b*) an instant messaging account;

(*c*) a telephone account; or

(*d*) any similar account.

EXPLANATION

This term appears in sections 6 and 11 of the Bill. Electronic address is intended to capture any identifiable address that could be linked via telecommunications. It is used to specify a source or destination of an electronic message and includes an electronic mail address, instant messaging account name, telephone number (including cellular numbers) and facsimile number. The electronic address can be set out in numerical, alphabetical or alphanumerical form.

RATIONALE

The definition of an electronic address is fundamental to section 6, which is the "anti-spam" provision of the Bill. It is important to note that the term "spam" appears nowhere in the Bill. Rather, the term "electronic address" is defined as a non-exhaustive list that refers to the most common types of electronic messages that currently exist, and remains open-ended to capture other types of electronic addresses that may be used (and abused by spammers) in the future. Therefore, the Act will address unsolicited commercial email (*i.e.*, "spam"), "text message spam", "instant messaging spam", and other forms of unsolicited electronic messages that may emerge. In this sense, the Bill is *technologically neutral*.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“electronic message”**

PROPOSED WORDING

“electronic message” means a message sent by any means of telecommunication, including a text, sound, voice or image message.

EXPLANATION

This term appears in sections 6, 7, 8, 11 and 12 of the Bill. Electronic message is any message over telecommunications that uses text (alphabetical, numerical, etc…), sound (music, recorded voice, etc.), voice or image (pictorial representation) that could be in a form understandable to humans or computers.

RATIONALE

This definition is intended to cover every medium of communications so that every type of message that can be understood by an individual or a computer is captured.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“person”**

PROPOSED WORDING

“person” means an individual, partnership, corporation, organization, association, trustee, administrator, executor, liquidator of a succession, receiver or legal representative.

EXPLANATION

This term appears extensively throughout the legislation to broadly describe the entities which are subject to the Bill. It is meant to describe any person or business entity.

RATIONALE

This is meant to be an exhaustive definition which would include any individual, including legal persons or business, but the definition also includes associations, partnerships, corporations, organizations, trustees, administrators, executors, liquidators of a succession, receivers or legal representatives. It is intended to capture any person/organization that might engage in commercial activity via telecommunications.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**"Privacy Commissioner"**

PROPOSED WORDING

"Privacy Commissioner" means the Privacy Commissioner appointed under section 53 of the *Privacy Act*.

EXPLANATION

This term is used throughout the Bill to identify the Privacy Commissioner of Canada.

RATIONALE

The legislation provides that in those sections when referenced, oversight and enforcement is the responsibility of the Privacy Commissioner. The Privacy Commissioner will utilize her current powers under the *Personal Information Protection and Electronic Documents Act*.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“telecommunications facility”**

PROPOSED WORDING

“telecommunications facility” means any facility, apparatus or other thing that is used for telecommunications or for any operation directly connected with telecommunications.

EXPLANATION

This term is defined to provide greater certainty to the definition of telecommunications service. It is used to broadly describe what telecommunications hardware (facilities) is understood as being part of a telecommunications service.

RATIONALE

This term includes any facility, apparatus, or other thing (including any wire, cable, radio, optical, or other electromagnetic system, or any similar technical system or any part thereof) that is used or is capable of being used for telecommunications. This is a very broad definition that includes a wide range of facilities from satellites and earth stations, to telephones and wireless handsets. The consequence of its application is that even a simple Local Area Network connector jack can be considered to be a telecommunications facility in Canada, for the purposes of this Bill. This definition is broader than the definition of a telecommunications facility that appears in the *Telecommunications Act*.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**“telecommunications service”**

PROPOSED WORDING

“telecommunications service” means a service, or a feature of a service, that is provided by means of telecommunications facilities, whether the telecommunications service provider owns, leases or has any other interest in or right respecting the telecommunications facilities and any related equipment used to provide the service.

EXPLANATION

This term defines the nature of a telecommunications service, which, for the purposes of this Bill, is necessary to defining a Telecommunications Service Provider (TSP).

RATIONALE

This definition is somewhat broader than the definition of telecommunications service that appears in the *Telecommunications Act* in order to capture a wider range of services, including Internet access as well as other communications services (*e.g.*, network security, etc.).

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**"telecommunications service provider"**

PROPOSED WORDING

"telecommunications service provider" means a person who, independently or as part of a group or association, provides telecommunications services.

EXPLANATION

This term is used throughout the Bill to identify any person who provides telecommunication services.

RATIONALE

For the purposes of this Bill, a telecommunications service provider ("TSP") includes any person who independently or part of a group or association offers a telecommunications service as defined in the Bill. A TSP is a type of communications service provider that has traditionally provided wireless or wireline; telephone, Internet, television and similar services.

For the purposes of the *Telecommunications Act*, a TSP only includes those that provide "basic telecommunications services" (a term that does not appear in this Bill). For the purposes of this Bill, the definition of a TSP is necessarily broad in order to capture those that provide "communications services" such as network management, security, etc. in addition to those that provide more basic services such as Internet access and telephone service.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(1)	**"transmission data"**

PROPOSED WORDING

"transmission data" means data that

(*a*) relates to the telecommunications functions of dialling, routing, addressing or signalling;

(*b*) either is transmitted to identify, activate or configure an apparatus or device, including a computer program, in order to establish or maintain a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and

(*c*) does not reveal the substance, meaning or purpose of the communication.

EXPLANATION

This term appears in sections 7, 15 and 16 of the Bill. It defines the types of data used in the signaling and routing of telecommunications and also includes computer networking language or computer communication applications and networking protocols, for the routing of, switching of and signaling of process-to-process communications. In essence, it includes all data related to and required for the transmission or transport of a telecommunication.

As an example, the transmission data of an e-mail would include the electronic address of both the sender and recipient of an e-mail message, the time at which the e-mail was sent and received, the size (in kilobytes) of the file and the number of attachments (if any).

RATIONALE

The term "transmission data" is central to section 7, which prohibits the alteration of transmission data without consent. In addition, the collection of transmission data is also important for the purposes of investigation and enforcement under the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(2)	**"Meaning of commercial electronic message"**

PROPOSED WORDING

(2) For the purposes of this Act, 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.

EXPLANATION

This section defines the concept of a commercial electronic message broadly with a non-exhaustive list that captures most types of unsolicited electronic messages. This term appears in section 6 of the bill, which prohibits the sending of a commercial electronic message without consent.

RATIONALE

It is necessary to define the types of electronic messages captured by section 6 of the bill. Section 6 addresses "commercial" electronic messages given that the Bill applies to commercial activity.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(3)	**“Other commercial electronic message”**

PROPOSED WORDING

(3) An electronic message that contains a request for consent to send a message described in subsection (2) is also considered to be a commercial electronic message.

EXPLANATION

This term clarifies that an electronic message sent for the purposes of obtaining consent is also subject to the limitations and requirements established in section 6 of the bill.

RATIONALE

This clarification is important in order to ensure that unsolicited messages cannot be sent for the purposes of obtaining consent.

Bill Clause No.	Section No.	Topic
1	(4)	**“Exclusion”**

PROPOSED WORDING

(4) An electronic message described in subsection (2) or (3) that is sent for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada is not considered to be a commercial electronic message.

EXPLANATION

This section notes that commercial electronic messages sent for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada are not considered commercial messages for the purpose of this Bill. It is intended to provide that, regardless of form, electronic messages sent within the context of law enforcement, public safety, the protection and defense of Canada and the conduct of international affairs are not commercial electronic messages.

RATIONALE

This provision is interpretive in nature and is added for greater certainty.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
1	(5)	**"Person to whom a message is sent"**

PROPOSED WORDING

(5) For the purposes of this Act, a reference to the person to whom an electronic message is sent means the holder of the account associated with the electronic address to which the message is sent, as well as any person who it is reasonable to believe is or might be authorized by the account holder to use the electronic address.

EXPLANATION

The clause clarifies who is protected by the prohibition against sending unsolicited commercial messages. It covers the situation of multiple users in a household of an account or the use by an employee of the employer's account. The phrase occurs in clauses 6, 7, 10, and 11.

RATIONALE

This provision is interpretive in nature and is added to avoid unnecessary repetition.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
2	2	**"Precedence of this Act"**

PROPOSED WORDING

2. In the event of a conflict between a provision of this Act and a provision of Part 1 of the *Personal Information Protection and Electronic Documents Act*, the provision of this Act operates despite the provision of that Part, to the extent of the conflict.

EXPLANATION

This provision ensures that in the event of a conflict between a provision of BILL C-28 and a provision of Part 1 of the *Personal Information Protection and Electronic Documents Act*, the provision in BILL C-28 takes precedence.

RATIONALE

PIPEDA currently contains a primacy clause that ensures PIPEDA takes precedence over other Acts, including subsequently enacted Acts, when dealing with personal information or consent. As BILL C-28 has stricter rules regarding consent when dealing with personal information respecting e-mail addresses and consent to the receipt of commercial messages, this coordinating amendment is required.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
3	3	**"Purpose of Act"**

PROPOSED WORDING

3. The purpose of this Act 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, because that conduct

(*a*) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;

(*b*) imposes additional costs on businesses and consumers;

(*c*) compromises privacy and the security of confidential information; and

(*d*) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.

EXPLANATION

The purpose of the Bill is to ensure that businesses and consumers have confidence that electronic means (*e.g.*, Internet, e-commerce, etc.) are safe and reliable for the conduct of commercial activity. This Bill will aid in promoting the efficiency and adaptability of the Canadian economy by discouraging negative activity through rules that are flexible and easy for businesses to understand.

RATIONALE

Fundamental to the arguments of Internet Service Providers (ISPs), businesses, and consumer organizations who have advocated for this legislation, is the notion that anti-spam regulation and e-commerce protection should be enshrined in law. This legislation will accomplish this objective by prohibiting: the sending of unsolicited commercial messages without consent; installation of computer programs on users' computers without consent; the unauthorized altering of transmission data; false or misleading representations through online communications; the collection personal information from computer systems without consent; and, the creation or supply of unauthorized lists of electronic addresses.

As well, the legislation would establish a private right of action for businesses, network providers and individuals to take civil action against those who violate the act, and create extended liability (follow the money) for certain violations under the Bill. The legislation will

allow the Commission and the Competition Bureau to impose administrative monetary penalties on those who violate the act. The bill will also allow for international sharing of information and evidence to help pursue perpetrators outside of Canada with our global partners.

BACKGROUND

In May 2005, the Task Force on Spam, which brought together governments, law enforcement, industry, consumers and academic experts, released a report which provided recommendations on how to address spam and related on-line threats. These recommendations concluded that the federal government should establish in law a clear set of rules to prohibit spam and other emerging threats to the safety and security of the Internet by enacting new legislation and amending existing legislation as required.

In developing this Bill the government has considered legislative models in a number of other countries and developed a focused plan based on these models to address spam and related threats in Canada.

Bill Clause No.	Section No.	Topic
4	4	**"Act binding on certain agents"**

PROPOSED WORDING

4. This Act is binding on any corporation that is expressly declared by or under any Act of Parliament or of the legislature of a province to be an agent of Her Majesty, when the corporation is acting as such in the course of any commercial activity.

EXPLANATION

This section provides that federal and provincial Crown corporations, when acting in their commercial capacity, are subject to the same rules as private sector participants in electronic commerce.

RATIONALE

In the absence of this provision it could be argued that the activities of Crown corporations would not be covered by the Bill. This would result in an unfair playing filed as different rules would apply to Crown corporations when participating in the same commercial activities as private corporations.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
5	5	**“broadcasting excluded”**

PROPOSED WORDING

5. This Act does not apply in respect of broadcasting by a broadcasting undertaking, as those terms are defined in subsection 2(1) of the *Broadcasting Act*.

EXPLANATION

This provision ensures that advertising activities by a broadcasting undertaking (as defined in the *Broadcasting Act*) are not unintentionally captured by the Bill.

RATIONALE

Due to the proliferation of delivery systems for broadcasting, including over the Internet and by telephony, it is necessary to create a specific exclusion for broadcasting under the Bill. Broadcasting will continue to be governed by the *Broadcasting Act*, which provides for the regulation of advertising in that context.

BACKGROUND

This exclusion is modeled after the same exception found in the *Telecommunications Act.*

Bill Clause No.	Section No.	Topic
6	(1)	**"unsolicited electronic messages"**

PROPOSED WORDING

6. (1) No person shall send or cause or permit to be sent to an electronic address a commercial electronic message unless

(*a*) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and

(*b*) the message complies with subsection (2).

EXPLANATION

Section 6 is the "anti-spam" provision of the Bill. This clause establishes that it is not permissible for anyone to send, aid in sending through giving authority or allowing the message to be sent, or to cause to send a commercial electronic message to a recipient without consent. A commercial electronic message can be sent if the recipient has given express or implied consent.

RATIONALE

This clause is intended to hold all parties responsible for the sending of unsolicited commercial electronic messages. Consent can be either express or implied. Express consent can be established where an individual takes positive action agreeing to receive a commercial electronic message (opt-in). Implied consent is defined in section 10 ("existing business relationships" and "existing non-business relationships"). Subsection 64(1)(i) will provide for further definition and description of permitted implied consent in regulations. Section 11 establishes the parameters for the unsubscribe mechanism required pursuant to subsection 6(2)(c).

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(2)	**contents of message**

PROPOSED WORDING

(2) The message must be in a form that conforms to the prescribed requirements and must

(*a*) set out prescribed information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;

(*b*) set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (*a*); and

(*c*) set out an unsubscribe mechanism in accordance with subsection 11(1).

EXPLANATION

This clause states that all commercial electronic messages must comply with the following standards; all contact information identifying the person or business sending the message must be provided; if the message is sent on behalf of another party it must disclose who the other party is; the email must contain contact information for the sender; all recipients must be able to unsubscribe from receiving further electronic commercial messages pursuant to section 11 of the bill.

RATIONALE

This clause is necessary to establish a basic set of requirements for the sending of commercial electronic messages. Recipients need to be given accurate information with regards to who the original message was sent from, and who else has seen the message through its transmittal. This is necessary to allow the recipient to determine whether or not the electronic commercial message that was sent is permissible under the Bill. In addition, a recipient should be able to unsubscribe from receiving further electronic commercial messages at any time, in a simple manner.

It provides organizations with legitimate advertising interests with a simple set of guidelines for how to comply with the Bill.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(3)	**Period of validity of contact information**

PROPOSED WORDING

(3) The person who sends the commercial electronic message and the person — if different — on whose behalf the commercial electronic message is sent shall ensure that the contact information referred to in paragraph (2)(*b*) is valid for a minimum of 60 days after the message has been sent.

EXPLANATION

This clause stipulates that contact information of all parties involved with the transmission of the commercial message must be valid for a minimum of 60 days after the message has been sent.

RATIONALE

This clause is important as reasonable time must be given for a person to decide they do not want to receive commercial electronic messages from that specific sender and unsubscribe to those messages. As well, if electronic commercial messages are being sent to recipients who have not given consent, or given reasonable cause for sending the message as set out in paragraph 6(1), the recipient is able to report the message. Therefore, the contact information needs to be valid for a minimum of 60 days to ensure the recipient has enough time to report the electronic commercial message, in addition to allowing the relevant enforcement agency to review the claim. Section 11 establishes the parameters for the unsubscribe mechanism required pursuant to section 6.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(4)	**Interpretation**

PROPOSED WORDING

(4) For the purposes of subsection (1)

(*a*) an electronic message is considered to have been sent once its transmission has been initiated; and

(*b*) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

EXPLANATION

This clause clarifies that an electronic message is considered to have been sent as soon as the sender has initiated the sending of the message, and not when it has been received. As such, for the purposes of section 6, once a commercial electronic message is sent it is immaterial whether the message actually reaches the intended recipient, or even whether the address to which it is sent is valid.

RATIONALE

It is important that the Bill addresses the act of sending a commercial electronic message to an unwilling recipient, because, in many cases, spammers use computer derived email lists that include valid as well as non-existent email addresses. Therefore, this clause makes the sender liable for all addresses to which the commercial electronic message was directed.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(5)	**Exception**

PROPOSED WORDING

(5) This section does not apply to a commercial electronic message

(*a*) that is sent by or on behalf of an individual to another individual with whom they have a personal or family relationship, as defined in the regulations;

(*b*) that is sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity; or

(*c*) that is of a class, or is sent in circumstances, specified in the regulations.

EXPLANATION

This clause states that the legislation does not apply in cases where: the individual has an existing personal or family relationship with the sender; the individual is involved in a commercial activity that requires information to be sent between the two parties; or where it is of a class specified in the regulations.

RATIONALE

Clause 6(5) ensures that the sending of electronic messages is not captured by the Act in certain circumstances. This clause recognizes that commercial electronic messages (as defined in the bill) that are sent in a personal and family capacity (*e.g.*, an individual may offer an item for sale to a family member) are not subject to the bill. It also provides greater certainty that individuals who seek commercial information from business are not subject to the bill, as many businesses offer electronic messaging as a means to be contacted by the public. This paragraph recognizes that there are many instances where an unsolicited commercial message may be welcomed by the recipient.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(6)	**Exception**

PROPOSED WORDING

(6) Paragraph (1)(*a*) does not apply to a commercial electronic message that solely

(*a*) provides a quote or estimate for the supply of a product, goods, a service, land or an interest or right in land, if the quote or estimate was requested by the person to whom the message is sent;

(*b*) facilitates, completes or confirms a commercial transaction that the person to whom the message is sent previously agreed to enter into with the person who sent the message or the person — if different — on whose behalf it is sent;

(*c*) provides warranty information, product recall information or safety or security information about a product, goods or a service that the person to whom the message is sent uses, has used or has purchased;

(*d*) provides notification of factual information about

(i) the ongoing use or ongoing purchase by the person to whom the message is sent of a product, goods or a service offered under a subscription, membership, account, loan or similar relationship by the person who sent the message or the person — if different — on whose behalf it is sent, or

(ii) the ongoing subscription, membership, account, loan or similar relationship of the person to whom the message is sent;

(*e*) provides information directly related to an employment relationship or related benefit plan in which the person to whom the message is sent is currently involved, is currently participating or is currently enrolled;

(*f*) delivers a product, goods or a service, including product updates or upgrades, that the person to whom the message is sent is entitled to receive under the terms of a transaction that they have previously entered into with the person who sent the message or the person — if different — on whose behalf it is sent; or

(*g*) communicates for a purpose specified in the regulations.

EXPLANATION

This clause provides for a number of commonly occurring situations in which consent is not required to send a commercial electronic message. Some of these situations involve a special relationship between the sender and the recipient. The sender is only exempted from paragraph 6(1)(a) (consent), while the rest of section 6 still applies (i.e.., contents of message). The circumstances in which such communications may be made can be expanded by regulation for similar meritorious situations.

RATIONALE

Clause 6(6) was added in response to concerns expressed to the Committee that stakeholders would be captured under the Act when contacting individuals for legitimate purposes, as for instance, emailing to alert consumers to product defects. This clause clarifies that the Act does not prevent any of these legitimate communications from taking place. However, the requirements of 6(2) and 6(3) still apply to these messages notably the requirement to clearly identify the sender of the message and to include in each message an unsubscribe mechanism.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(7)	**Exception**

PROPOSED WORDING

(7) This section does not apply to a telecommunications service provider merely because the service provider provides a telecommunications service that enables the transmission of the message.

EXPLANATION

This clause stipulates that TSPs are not liable for commercial messages that are sent through their network lines.

RATIONALE

As it is unreasonable to impose liability on a TSP simply because, for example, spam is sent through their network, this exemption is necessary as paragraph 6(1) imposes liability on anyone who causes the transmission of the commercial electronic message. Therefore, this paragraph exempts TSPs from being liable for the transmission of a message from the sender to the recipient.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
6	(8)	**Exception**

PROPOSED WORDING

(8) This section does not apply to a commercial electronic message

(*a*) that is, in whole or in part, an interactive two-way voice communication between individuals;

(*b*) that is sent by means of a facsimile to a telephone account; or

(*c*) that is a voice recording sent to a telephone account.

EXPLANATION

This clause states that a commercial electronic message that is: shared live between two parties in any way; sent by fax to a telephone account; or, is a recorded voice sent to a telephone account is not covered under this act.

RATIONALE

It is not necessary to address voice communications in this Bill, as s. 41 of the *Telecommunications Act* ("Do Not Call") already addresses commercial messages that are: two-way voice communications; sent by facsimile to a telephone account; or, that is a voice recording sent to a telephone account.

If the government determines that it is preferable to bring all commercial electronic messaging under one same rules and administration, especially as the distinctions between kinds of messages dissolve, then the government can do so through an Order in Council, pursuant to sections 68 and 90 of this Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
7	(1)	**Altering transmission data**

PROPOSED WORDING

7. (1) No person shall, in the course of a commercial activity, alter or cause to be altered the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender, unless

(*a*) the alteration is made with the express consent of the sender or the person to whom the message is sent, and the person altering or causing to be altered the data complies with subsection 11(4); or

(*b*) the alteration is made in accordance with a court order.

EXPLANATION

Under this clause it is prohibited to, in the course of commercial activity, change the transmission of any message causing the message to be delivered to a destination other than or in addition to that requested by the sender, unless the alteration is made with the express consent of the sender or the intended recipient, or in accordance with a court order.

RATIONALE

This clause is intended to prohibit persons from accessing networks in order to alter transmission data. This addresses, among other things, the issue of “pharming” whereby violators intentionally alter transmission data to redirect unsuspecting Internet users to false websites.

Where a user consents to the alteration of transmission data, subsection 11(4) establishes requirements in terms of ensuring that users are later able to withdraw such consent. This is a common occurrence where the recipient authorizes a carrier or Internet service provider to apply spam filters to incoming messages. For example, an individual who engages the services of a spam filter the person receiving the message has consented to the alteration of transmission data by way of the intercept of the message by the spam filter.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
7	(2)	**Exception**

PROPOSED WORDING

(2) Subsection (1) does not apply if the alteration is made by a telecommunications service provider for the purposes of network management.

EXPLANATION

This clause states that it is not prohibited for TSPs to alter transmission data for the purposes of network management.

RATIONALE

TSPs undertake a number of legitimate practices for the purpose of network management (*e.g.*, improving efficiency and security of the network) that involve the altering of transmission data. As such it is necessary to exempt such legitimate activity from the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
8	(1)	**Installation of Computer Program**

PROPOSED WORDING

8. (1) No person shall, in the course of a commercial activity, install or cause to be installed a computer program on any other person's computer system or, having so installed or caused to be installed a computer program, cause an electronic message to be sent from that computer system, unless

(*a*) the person has obtained the express consent of the owner or an authorized user of the computer system and complies with subsection 11(5); or

(*b*) the person is acting in accordance with a court order.

EXPLANATION

This clause states that it is prohibited to, in the course of commercial activity, install or cause to be installed a computer program on a computer without the consent of the computer user. It further prohibits the use of a program installed without consent to send out electronic messages from that computer. This prohibition does not apply where there is either express consent or a court order for the installation of a computer program.

RATIONALE

This clause is designed to address the installation of computer programs without consent as these programs are often a precursor to more malicious online activity. It is intended to prohibit persons from, in the course of a commercial activity, installing computer programs (which includes; malicious software, viruses and spyware) without consent onto a computer. The clause also prohibits the further use of the computer program installed to send out electronic messages without consent, as a computer infected with a virus can be remotely controlled (the majority of spam is currently sent through virus-infected computers). Another issue addressed by this provision is the "denial of service attack" (see glossary), which is also conducted through remotely controlled computers.

Where a person consents to the installation of software, subsection 11(5) establishes requirements to ensure that such consent is later able to be withdrawn.

It is also important to note that spam continues to be a major factor in the proliferation of malicious code.

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BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
8	(2)	**Application**

PROPOSED WORDING

(2) A person contravenes subsection (1) only if the computer system is located in Canada at the relevant time or if the person either is in Canada at the relevant time or is acting under the direction of a person who is in Canada at the time when they give the directions.

EXPLANATION

This clause states that section 8 only applies if the computer system on which the program is installed is located in Canada at the time of installation, or the person installing or causing the program to be installed is located in Canada at the time of the installation.

RATIONALE

This clause is intended to clarify the application of section 8 by requiring that there be a Canadian link to either the computer or the person responsible for installing the computer program or causing the installation to take place. If none of the three stipulations to 8(2) is met, this prohibition does not apply.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
9	9	**Contravention of 6 to 8**

PROPOSED WORDING

9. No person shall procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.

EXPLANATION

This clause states that it is a contravention of sections 6 to 8 if any person procures or causes to be procured an activity that would lead to a contravention of the Act.

RATIONALE

This clause is intended to clarify that those who invest in or procure the services of anyone who contravenes the Act are also liable. This extended liability is intended to allow authorities to "follow the money" to those who would benefit financially from any action conducted in violation of the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(1)	**Express consent -- sections 6 to 8**

PROPOSED WORDING

10. (1) A person who seeks express consent for the doing of an act described in any of sections 6 to 8 must, when requesting consent, set out clearly and simply the following information:

(*a*) the purpose or purposes for which the consent is being sought;

(*b*) prescribed information that identifies the person seeking consent and, if the person is seeking consent on behalf of another person, prescribed information that identifies that other person; and

(*c*) any other prescribed information.

EXPLANATION

This clause establishes the types of information that must be disclosed in order to obtain express consent for any of the activities addressed in sections 6-8 (sending of a commercial electronic message, alteration of transmission data, installation of a computer program).

RATIONALE

The basis for this clause is that an individual must be adequately informed in order to provide express consent.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(2)	**Exception**

PROPOSED WORDING

(2) Despite paragraph (1)(*b*), for the purposes of section 6, if a person is seeking express consent on behalf of a person whose identity is not known,

(*a*) the only information that is required to be provided under that paragraph is prescribed information that identifies the person seeking consent; and

(*b*) the person seeking consent must comply with the regulations in respect of the use that may be made of the consent and the conditions on which the consent may be used.

EXPLANATION

This clause addresses the situation where an organization may now seek express consent on behalf of a person who is not known.

RATIONALE

It is commonplace for organizations, such as marketing companies, to compile a list of electronic addresses that may be sent commercial electronic messages on behalf of yet unknown clients. For example, an individual may be asked if they would like to receive information about certain types of products from different retailers. So long as the recipient knows what use will be made of their consent, the decision is in the customer's hands.

EXAMPLE

As a member of a points program, consent to share your electronic address with trusted partners over the course of your membership even though they may not yet know who these partners may be sought. (e.g., they may not know that ABC Car Rental will be a trusted partner down the road, but seek your consent to all the points company to share your address with this future trusted partner so you can receive an email offering 20% discount off your next car rental)

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(3)	**Additional requirement — section 8**

PROPOSED WORDING

(3) A person who seeks express consent for the doing of any act described in section 8 must, when requesting consent, also, in addition to setting out any other prescribed information, clearly and simply describe, in general terms, the function and purpose of the computer program that is to be installed if the consent is given.

EXPLANATION

This clause provides that a person seeking consent for the installation of a computer program as required by section 8, must clearly and simply describe the function and purpose of every computer program that is to be installed.

RATIONALE

In order to provide informed, express consent to the installation of a computer program an individual must be able to understand what the program is, its purpose, and the consequences of installing the program.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(4)	**Additional requirements associated with certain functions**

PROPOSED WORDING

(4) In addition to the requirements set out in subsections (1) and (3), if the computer program that is to be installed performs one or more of the functions described in subsection (5), the person who seeks express consent must, when requesting consent, clearly and prominently, and separately and apart from the licence agreement,

(*a*) describe the program's material elements that perform the function or functions, including the nature and purpose of those elements and their reasonably foreseeable impact on the operation of the computer system; and

(*b*) bring those elements to the attention of the person from whom consent is being sought in the prescribed manner.

EXPLANATION

This clause is linked to sections 10(5), 10(6) and 10(7). This clause requires a person seeking consent for the installation of a computer program as required by section 8 where the computer program has elements included in the list in section 10(5), to do so apart from the license agreement or EULA (end-user license agreement).

RATIONALE

In order to provide informed, express consent to the installation of a computer program that may do any of the things listed in section 10(5) (e.g., collecting personal information, changing or interfering with settings, etc.) an individual must be able to understand what the program is, its purpose, and the consequences of installing the program (e.g., collection of personal information, impacts on computer performance, etc.) clearly and conspicuously without having to search for it in a license agreement.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(5)	**Description of functions**

PROPOSED WORDING

(5) A function referred to in subsection (4) is any of the following functions that the person who seeks express consent knows and intends will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the owner or an authorized user of the computer system:

(*a*) collecting personal information stored on the computer system;

(*b*) interfering with the owner's or an authorized user's control of the computer system;

(*c*) changing or interfering with settings, preferences or commands already installed or stored on the computer system without the knowledge of the owner or an authorized user of the computer system;

(*d*) changing or interfering with data that is stored on the computer system in a manner that obstructs, interrupts or interferes with lawful access to or use of that data by the owner or an authorized user of the computer system;

(*e*) causing the computer system to communicate with another computer system, or other device, without the authorization of the owner or an authorized user of the computer system;

(*f*) installing a computer program that may be activated by a third party without the knowledge of the owner or an authorized user of the computer system; and

(*g*) performing any other function specified in the regulations.

EXPLANATION

This clause requires a person seeking consent for the installation of a computer program as required by section 8, to specifically note, apart from the license agreement, anything referred to in the list above.

RATIONALE

In order to provide informed, express consent to the installation of a computer program an individual must be able to understand what the program is, its purpose, and the consequences of

installing the program (*e.g.*, collection of personal information, impacts on computer performance, etc.) clearly and conspicuously without having to search for it in a license agreement especially in the cases referred to in the list above.

EXAMPLE

An example is when a botnet is used to send out spam emails. The owner/user of the computer is unaware that it has been comprised and is being controlled by an outside party to send spam electronic messages, or the like.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(6)	**Exception**

PROPOSED WORDING

(6) Subsection (4) does not apply in respect of a computer program that performs a function described in subsection (5) if that function only collects, uses or communicates transmission data or performs an operation specified in the regulations.

EXPLANATION

This clause notes that the additional requirements associated with subsection (4) do not apply when the program performs a function described in subsection (5) and it is only being done to transmit a telecommunications or in operations specified in regulations.

RATIONALE

They are circumstances where in order transmit telecommunications some of the functions in subsection (5) are completed in order to transmit the message.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(7)	**Updates and upgrades**

PROPOSED WORDING

(7) Subsections (1) and (3) do not apply in respect of the installation of an update or upgrade to a computer program the installation or use of which was expressly consented to in accordance with subsections (1) and (3) if the person who gave the consent is entitled to receive the update or upgrade under the terms of the express consent and the update or upgrade is installed in accordance with those terms.

EXPLANATION

This clause provides that a person is not required to seek subsequent express consents for each and every update or upgrade to a computer program that has already been installed, as long as the installation is authorized under the original express consent.

RATIONALE

In order to allow for automatic updates and program upgrades to be installed without requiring the installer of the computer program to seek express consent for each subsequent installation.

EXAMPLE

Allows for daily or weekly updates to anti-virus, anti-spam and other regular updates to computer programs as long as they fall within the original express consent when the program was originally installed. These would not require express consent each and every time the updates are being downloaded.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(8)	**Person considered to expressly consent**

PROPOSED WORDING

(8) A person is considered to expressly consent to the installation of a computer program if

(*a*) the program is

(i) a cookie,

(ii) HTML code,

(iii) Java Scripts,

(iv) an operating system,

(v) any other program that is executable only through the use of another computer program whose installation or use the person has previously expressly consented to, or

(vi) any other program specified in the regulations; and

(*b*) the person's conduct is such that it is reasonable to believe that they consent to the program's installation.

EXPLANATION

This clause allows for the running of a program (e.g., Java or Flash) or the application of cookies on a computer system where the installation of the original program was expressly consented to and it is reasonable to believe from the conduct of the person that they would want the program to run on their computer (e.g., by seeking to view a video clip on a website).

RATIONALE

In order to allow for the automatic running of Java, Flash and other applet-based programs, this clause permits those programs to run on the computer as long as the program is reasonably operating within the limits of the expressly consented to installation (i.e., you cannot add viruses and other malware in applets).

EXAMPLE

For programs such as Java and Flash to run off of websites, the content must be downloaded to a user's computer. Many websites such as: TSN.ca run Flash and Java off the main page. The content is automatically downloaded to a user's computer when they already have Flash and Java programs on their computer. This clause also limits use of such programs to the reasonably expected use of such a program. That is, you cannot hide malware in Java and Flash type programs.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(9)	**Implied consent — section 6**

PROPOSED WORDING

(3) Consent is implied for the purpose of section 6 only if

(*a*) the person who sends the message, the person who causes it to be sent or the person who permits it to be sent has an existing business relationship or an existing non-business relationship with the person to whom it is sent;

(*b*) the person to whom the message is sent has conspicuously published, or has caused to be conspicuously published, the electronic address to which the message is sent, the publication is not accompanied by a statement that the person does not wish to receive unsolicited commercial electronic messages at the electronic address and the message is relevant to the person's business, role, functions or duties in a business or official capacity;

(*c*) the person to whom the message is sent has disclosed, to the person who sends the message, the person who causes it to be sent or the person who permits it to be sent, the electronic address to which the message is sent without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address, and the message is relevant to the person's business, role, functions or duties in a business or official capacity; or

(*d*) the message is sent in the circumstances set out in the regulations.

EXPLANATION

This clause establishes that consent for the sending of an unsolicited electronic message may be implied where there is either an existing business or non-business relationship between the sender and the recipient (business and non-business relationships are defined in subsection 10(10)). Additional circumstances where consent can be implied may also be prescribed in regulation.

Paragraph (b) allows for businesses to contact other businesses or officials where the contact information that has been "conspicuously published" (e.g., posted on a website), the publication is not accompanied by a statement that the person does not wish to receive unsolicited electronic messages, and the message is relevant to the person's business. Paragraph (c) permits the sending of a commercial electronic message to a person who has disclosed their electronic address in a context where it is reasonable to believe a consent had been given (e.g., provision of a business card at a business meeting or networking function).

RATIONALE

It is reasonable to expect that a person who has a relationship with the sender (either a business or non-business relationship) would consent to receiving a commercial electronic message. It is important to note that the sender of the message must still comply with the requirements in subsection 6(2) pertaining to identification of the sender and the ability to unsubscribe. Moreover, the scope of pre-existing business and non-business relationships is limited to those parameters defined in subsection 10(10). The regulation-making power in relation to this subsection also provides the government with the flexibility to establish other circumstances where implied may be appropriate.

EXAMPLE

Part (b): When a dentist publishes his/her e-address to a website, companies involved in providing products (like CREST or ORAL-B) or services (life insurance for dentists) can contact members of the dental industry. This is true for any industry as long as it relates to the person's business, role, functions or duties in a business or official capacity,

Part (c): Same as above but for situations where the dentist provides the company his/her business card or a letter with letter head where the e-address is published.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(10)	**Definition of "existing business relationship"**

PROPOSED WORDING

(10) In subsection (9), "existing business relationship" means a business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

(*a*) the purchase or lease of a product, goods, a service, land or an interest or right in land, within the two-year period immediately preceding the day on which the message was sent, by the person to whom the message is sent from any of those other persons;

(*b*) the acceptance by the person to whom the message is sent, within the period referred to in paragraph (*a*), of a business, investment or gaming opportunity offered by any of those other persons;

(*c*) the bartering of anything mentioned in paragraph (*a*) between the person to whom the message is sent and any of those other persons within the period referred to in that paragraph;

(*d*) a written contract entered into between the person to whom the message is sent and any of those other persons in respect of a matter not referred to in any of paragraphs (*a*) to (*c*), if the contract is currently in existence or expired within the period referred to in paragraph (*a*); or

(*e*) an inquiry or application, within the six-month period immediately preceding the day on which the message was sent, made by the person to whom the message is sent to any of those other persons, in respect of anything mentioned in any of paragraphs (*a*) to (*c*).

EXPLANATION

This clause describes the circumstances where an "existing business relationship" can be found to exist for the purposes of defining implied consent under subsection 10(9).

RATIONALE

An "existing business relationship" is broadly but exhaustively defined in order to establish limits and avoid uncertainty and ambiguity regarding the meaning of this term. This is necessary

to prevent potential spammers from exploiting this concept in order to send electronic messages without consent.

Bill Clause No.	Section No.	Topic
10	(11)	Clarification

PROPOSED WORDING

(11) For the purposes of subsection (10), the following organizations are considered to be businesses:

(*a*) a cooperative as defined in subsection 2(1) of the *Canada Cooperatives Act*;

(*b*) a cooperative corporation as defined in section 2 of the *Cooperative Credit Associations Act*; and

(*c*) any similar organization incorporated under an Act of Parliament or the legislature of a province.

EXPLANATION

This clause defines the meaning of a "business" for the purposes of subsection 10(10).

RATIONALE

Despite the broad definition of "commercial activity", in order to avoid any ambiguity and misinterpretation, this clause clarifies that a cooperative corporation, or any similar organization, is deemed to be a business in the context of establishing an existing business relationship.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(12)	**Clarification**

PROPOSED WORDING

(12) If a person has an existing business relationship with another person in accordance with subsection (10), and the business is sold, the person who purchases the business is considered to have, in respect of that business, an existing business relationship with that other person.

EXPLANATION

This clause establishes that in the event of the sale of a business, the purchaser inherits the existing business relationships that were evident as part of the business.

RATIONALE

It is reasonable to expect that when a person who has an existing business relationship sells a business, he is also selling the business relationships.

EXAMPLE

When a dental practice is purchased, the purchaser inherits the right to contact all of the clients that the practice had. That is, if a young dentist purchases a dental practice from a senior colleague, he is allowed to send out commercial electronic messages to the clients of the practice. He may send out such messages either until the client expressly opts out of receiving further messages (under section 11(1)) or until the existing business relationship expires, under section 10(10), two years after any good or service was last provided.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
10	(13)	**Definition of "existing non-business relationship"**

PROPOSED WORDING

(13) In subsection (9), "existing non-business relationship" means a non-business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

(*a*) a donation or gift made by the person to whom the message is sent to any of those other persons within the two-year period immediately preceding the day on which the message was sent, where that other person is a registered charity as defined in subsection 248(1) of the *Income Tax Act*, a political party or organization, or a person who is a candidate — as defined in an Act of Parliament or of the legislature of a province — for publicly elected office;

(*b*) volunteer work performed by the person to whom the message is sent for any of those other persons, or attendance at a meeting organized by that other person, within the two-year period immediately preceding the day on which the message was sent, where that other person is a registered charity as defined in subsection 248(1) of the *Income Tax Act*, a political party or organization or a person who is a candidate — as defined in an Act of Parliament or of the legislature of a province — for publicly elected office; or

(*c*) membership, as defined in the regulations, by the person to whom the message is sent, in any of those other persons, within the two-year period immediately preceding the day on which the message was sent, where that other person is a club, association or voluntary organization, as defined in the regulations.

EXPLANATION

This clause describes the circumstances where an "existing non-business relationship" can be found to exist for the purposes of defining implied consent under subsection 10(9).

RATIONALE

An "existing non-business relationship" is defined to include relationships where it is reasonable to expect that a person would consent to receiving an unsolicited commercial electronic message (*e.g.*, where there is a relationship to a charity, political organization, club, association or voluntary organization). As in the definition of an existing business relationship, an existing non-business relationship is exhaustively defined in order to establish limits and avoid uncertainty

and ambiguity regarding the meaning of this term. This is necessary to prevent potential spammers from exploiting this concept in order to send electronic messages without consent.

Bill Clause No.	Section No.	Topic
10	(14)	**Clarification**

PROPOSED WORDING

(14) Where a period is specified in subsection (10) or (13) in relation to the purchase or lease of a product, goods, a service, land or an interest or right in land, or in relation to a donation, gift or membership,

(*a*) in the case of a purchase, lease, donation or gift, if it involves an ongoing use or ongoing purchase under a subscription, account, loan or similar relationship, the period is considered to commence on the day that the subscription, account, loan or other relationship terminates; and

(*b*) in the case of a membership, the period is considered to commence on the day that the membership terminates.

EXPLANATION

This clause specifies that for an ongoing "existing business relationship" the two year period begins at the termination of the contract or agreement.

RATIONALE

The clause is important as many types of subscriptions, warranties, etc. have a longer period than two years.

EXAMPLE

This clause would allow for a magazine company to contact a customer who has a three year subscription, to renew their membership at the end of the three year period.

Bill Clause No.	Section No.	Topic
11	(1)	**Unsubscribe mechanism — section 6**

PROPOSED WORDING

11. (1) The unsubscribe mechanism referred to in paragraph 6(2)(*c*) must

(*a*) enable the person to whom the commercial electronic message is sent to indicate, at no cost to them, the wish to no longer receive any commercial electronic messages, or any specified class of such messages, from the person who sent the message or the person — if different — on whose behalf the message is sent, using

(i) the same electronic means by which the message was sent, or

(ii) if using those means is not practicable, any other electronic means that will enable the person to indicate the wish; and

(*b*) specify an electronic address, or link to a page on the World Wide Web that can be accessed through a web browser, to which the indication may be sent.

EXPLANATION

Clause 11(1) establishes the general requirements with respect to the unsubscribe mechanism that must be included in every commercial electronic message pursuant to subsection 6(2)(c). It requires every commercial electronic message that is sent in Canada, and that has a Canadian link, to include a functional unsubscribe facility (using the same electronic means by which the message was sent) that allows the recipient of the message to instruct the sender of a commercial electronic message that no further commercial electronic messages, or any specified class of such messages for which the recipient has given their prior consent should be sent to the recipient's electronic address.

The unsubscribe mechanism must specify an electronic address to which an individual may communicate the withdrawal of their consent.

The clause clarifies the obligations to ensure that the recipient of a commercial electronic message can easily and conveniently unsubscribe from receiving further messages at no cost. This is linked to section 11(4).

In addition, the removal of the term "hyperlink" is intended to ensure technological neutrality and that organizations have flexibility in terms of how they implement the unsubscribe

requirement. Some technologies cannot facilitate a self-contained unsubscribe facility. In those cases, alternate electronic means must be provided, at no cost to the recipient, to exercise the unsubscribe facility.

RATIONALE

This clause is necessary in order to ensure that an unsubscribe mechanism meets certain basic functional requirements.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
11	(2)	**Period of validity of contact information**

PROPOSED WORDING

(2) The person who sends the commercial electronic message and the person — if different — on whose behalf it is sent shall ensure that the electronic address or World Wide Web page referred to in paragraph (1)(*b*) is valid for a minimum of 60 days after the message has been sent.

EXPLANATION

The electronic message or hyperlink provided in an unsubscribe mechanism must be valid for at least 60 days after the message is sent. This clause makes both the sender and the person on whose behalf the message is sent (if different from the sender) liable for ensuring that the address or hyperlink remains valid.

RATIONALE

A period of sixty days addresses the need to ensure that recipients of commercial email are provided with sufficient time to opt-out, while not being overly burdensome on business.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
11	(3)	**Additional requirement**

PROPOSED WORDING

(3) The person who sent the commercial electronic message and the person — if different — on whose behalf the message was sent shall ensure that effect is given to an indication sent in accordance with paragraph (1)(*b*) without delay, and in any event no later than 10 business days after the indication has been sent, without any further action being required on the part of the person who so indicated.

EXPLANATION

Section 6 prohibits the sending of a commercial electronic message to any person who has unsubscribed from receiving such a message. This clause requires the unsubscribe request to be given effect "without delay", with a maximum of 10 business days after the request has been made.

As consent is a *sine qua non* condition of sending commercial electronic message, there is a prohibition on sending further messages as soon as the consent is withdrawn.

RATIONALE

A request to unsubscribe must be taken seriously and be given effect as soon as possible, recognizing that the sender must be given sufficient time to act on the request.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
11	(4)	**Withdrawal of consent — section 7**

PROPOSED WORDING

(4) A person who has the express consent of the sender or the person to whom a message is sent to do any act described in section 7 shall

(*a*) for the period covered by the consent, ensure that the person who gave their consent is provided with an electronic address to which they may send notice of the withdrawal of their consent; and

(*b*) ensure that effect is given to a notice of withdrawal of consent sent in accordance with paragraph (*a*) without delay, but in any event no later than 10 business days after receiving it.

EXPLANATION

It is a contravention of section 7 to alter the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender if the alteration is made with the express consent of the sender or the person to whom the message is sent, or in accordance with a court order.

Clause 11(4) provides that, for the period covered by the consent, a person who has the express consent of the sender or the person to whom the message is sent to alter the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender must ensure that the sender or the person to whom the message is sent is provided with an electronic address to which they can send notice of the withdrawal of their consent.

In addition, this clause requires that the notice of withdrawal of consent be given effect “without delay”, with a maximum of 10 business days after the notice has been received the request.

RATIONALE

The purpose of this clause is to ensure that any person who has consented to the alteration of their transmission data has the ability to withdrawal such consent.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
11	(5)	**Withdrawal of consent — section 8**

PROPOSED WORDING

(5) A person who has the express consent of an owner or authorized user to do any act described in section 8 shall

(*a*) for a period of one year after any computer program that performs one or more of the functions described in subsection 10(5) but not referred to in subsection 10(6) is installed under the consent, ensure that the person who gave their consent is provided with an electronic address to which they may, if they believe that the function, purpose or impact of the computer program installed under the consent was not accurately described when consent was requested, send a request to remove or disable that computer program; and

(*b*) if the consent was based on an inaccurate description of the material elements of the function or functions described in subsection 10(5) of the computer program, on receipt within that one-year period of a request to remove or disable that computer program, without cost to the person who gave consent, assist that person in removing or disabling the computer program as soon as feasible.

EXPLANATION

In general terms, section 8 prohibits the installation of a computer program onto a computer system without consent.

Clause 11(5) provides that, for a one-year period after a computer program is installed with the consent of a computer user, the person who installs a computer program must remove or disable the computer program at the request of the computer user where the user believes that the function, purpose or impact of the computer program installed was not accurately described when consent was requested. The person who installs the computer program must provide an electronic address where they can be contacted by the computer user.

RATIONALE

This clause recognizes that consent obtained based on inaccurate information is not in fact consent. As such, the purpose of this provision is to ensure that a person who provides consent based on inaccurate information is able to have the computer program removed.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
12	(1)	**Contravention of section 6**

PROPOSED WORDING

12. (1) A person contravenes section 6 only if a computer system located in Canada is used to send or access the electronic message.

EXPLANATION

The provision clarifies that Canadian authorities will assume jurisdiction in reference to a commercial electronic message:

1. sent from anywhere in the world and received in Canada;

2. sent from Canada to anywhere else in the world.

RATIONALE

The provision is necessary to provide Canadian authorities with the jurisdiction to proceed against Canadians whose targets are abroad, or where Canadians are the targets of persons acting from abroad.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
12	(2)	**Contravention of section 7**

PROPOSED WORDING

(2) A person contravenes section 7 only if a computer system located in Canada is used to send, route or access the electronic message.

EXPLANATION

The provision clarifies that Canadian authorities will assume jurisdiction in reference to the alteration of transmission data when an electronic message is:

1. sent from anywhere in the world and received in Canada;

2. sent from Canada to anywhere else in the world;

3. routed through a Canadian network to an address abroad.

RATIONALE

The provision is necessary to provide Canadian authorities with the jurisdiction to proceed against Canadians whose targets are abroad, or where Canadians are the targets of persons acting from abroad.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
13	13	**Burden of proof**

PROPOSED WORDING

13. A person who alleges that they have consent to do an act that would otherwise be prohibited under any of sections 6 to 8 has the onus of proving it.

EXPLANATION

This provision ensures that persons who claim that they have the consent to send a commercial electronic message must demonstrate that they have obtained such consent.

RATIONALE

The absence of consent cannot easily be proved. Neither affected consumers nor businesses, nor the CRTC should be required to prove the absence of consent.

Consent is a prerequisite for the conduct of activity otherwise prohibited under sections 6-8. Therefore, it is reasonable to require persons claiming to have consent to maintain records demonstrating that they have received the necessary consent.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
14	14	**Designated persons**

PROPOSED WORDING

14. For the purposes of any of sections 15 to 46, the Commission may designate persons or classes of persons appointed under section 8 of the *Canadian Radio-television and Telecommunications Commission Act* to exercise powers in relation to any matter referred to in the designation.

EXPLANATION

This provision gives the Commission the power to designate persons or classes of persons appointed for the proper conduct of the Commission in accordance with the *Public Service Employment Act*, to exercise powers in relation to any matter referred to in the designation that pertains to the exercise of investigation and enforcement powers described in any of sections 15 to 46.

RATIONALE

The CRTC will take on new responsibilities for the administration of the administrative monetary penalty regime set out in the bill. This regime creates powers for the purpose of conducting investigations relating to violations which are intended to be exercised by public servants designated by the Commission. The powers exercised by designated persons may be distinguished from adjudicative powers conferred on the Commission (which will act as a panel of members of the Commission – see section 36) for the purposes of reviewing certain acts performed or documents issued by such designated persons.

BACKGROUND

The Commission already holds similar powers by virtue of section 72.06 of the *Telecommunications Act.*

Bill Clause No.	Section No.	Topic
15	(1)	**Preservation demand**

PROPOSED WORDING

15. (1) A person who is designated for the purpose of this section may cause a demand to be served on a telecommunications service provider requiring it to preserve transmission data that is in, or comes into, its possession or control.

EXPLANATION

This provision confers on the person designated for the purposes of this section the power to require a TSP to maintain transmission data that is in, or comes into, its possession or control.

RATIONALE

This power is an important feature of the investigative process as it allows the designated person to prevent a TSP from deleting or destroying transmission data that may be useful in order to determine whether or not there are reasonable grounds to believe that a violation has occurred.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
15	(2)	**Expiry and revocation**

PROPOSED WORDING

(2) Subject to subsection (5), the demand expires 21 days after the day on which it is served unless, before its expiry, a notice extending the demand for an additional period of 21 days is served on the telecommunications service provider. A demand may not be extended more than once and a notice revoking the demand may be served on the telecommunications service provider at any time.

EXPLANATION

This subsection deals with the duration of the preservation demand and extensions of time. As a general rule, a preservation demand expires 21 days after the day on which it is served, meaning that a TSP served with such a demand must keep transmission data that is in its possession or control as of the day on which it is served and that comes in its possession or control over the subsequent 21 days. If a notice extending the demand is served on the TSP, it must keep that transmission data and incoming data, but only for another period of 21 days. The preservation demand may be revoked at any time by way of notice served on the TSP.

RATIONALE

It is important that the preservation demand be valid for enough time to allow for the gathering of a significant sample of transmission data in order to support the investigation while at the same time not unduly restraining the TSP's activities and data management.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
15	(3)	**Purpose of demand**

PROPOSED WORDING

(3) A person who is designated for the purpose of this section may make or extend a demand only for the purpose of

(*a*) verifying compliance with this Act;

(*b*) determining whether any of sections 6 to 9 has been contravened; or

(*c*) assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

EXPLANATION

This subsection makes the issuing or extending of a demand conditional on the purpose of verifying compliance or determining whether any of sections 6 to 9 have been contravened.

Paragraph (c) allows the CRTC to exercise this power on behalf of a foreign enforcement agency enforcing a law that contains prohibitions substantially similar to those found in BILL C-28. This is linked to section 15(4) which addresses the conditions under which information can be shared.

RATIONALE

This provision serves as a safeguard for the benefit of TSPs to prevent disruption of the provider's activities and data management due to matters that are unrelated to investigations in respect of violations of the Act. It also ensures that the demand is not used to gather evidence for the purposes of other domestic statutes.

The clause facilitates international cooperation that is fundamental to combating conduct that is detrimental to electronic commerce.

The clause also addresses concerns raised by Konrad Von Finckenstein (Chair CRTC) that the CRTC be able to use its investigatory powers [preservation orders (section 15), production orders (section 17) & warrants (section 19)] on behalf of a foreign jurisdiction and initiate an investigation upon request.

The CRTC and Competition Bureau could only initiate the investigation if the violation in the other jurisdiction is substantially similar to a violation in BILL C-28 and there would be an arrangement regarding reciprocity.

EXAMPLE

Japan's Communications Authority approaches the CRTC regarding a Canadian who has been sending commercial e-mail solely to Japan. As long as there is an arrangement ensuring reciprocity, (or a pre-existing agreement or arrangement) the CRTC would be able to initiate the investigation on behalf of Japan solely for the purpose of providing our Japanese counterparts with the information they require.

Bill Clause No.	Section No.	Topic
15	(4)	**Conditions to prevent disclosure**

PROPOSED WORDING

(4) The designated person causing a demand to be served may impose conditions in the demand to prevent the disclosure of some or all of its contents or its existence if they have reasonable grounds to believe that the disclosure would jeopardize the conduct of

(*a*) an investigation under this Act; or

(*b*) an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

EXPLANATION

This subsection permits the investigating officer to impose a condition of confidentiality on a person who is subject to a preservation demand. The condition protects the integrity of an investigation to verify compliance or determine whether any of sections 6 to 9 have been contravened.

Paragraph (b) is added to allow the CRTC to impose such conditions to protect the integrity of an investigation conducted on behalf of a foreign state. This clause is linked to 15(3) and (4), 17(2) and (4), and 19(1).

RATIONALE

This provision serves as a safeguard for the benefit of TSPs to prevent disruption of the provider's activities and data management due to matters that are unrelated to investigations in respect of violations of the Act. It also ensures that the demand is not used to gather evidence for the purposes of other domestic statutes.

The clause facilitates international cooperation that is fundamental to combating conduct that is detrimental to electronic commerce.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
15	(5)	**Expiry and revocation of conditions**

PROPOSED WORDING

(5) A condition imposed to prevent disclosure expires six months after the day on which the demand is served on the telecommunications service provider unless, before its expiry, a notice extending the condition for an additional period of six months is served on the telecommunications service provider. A condition may not be extended more than once and a notice revoking the condition may be served on the telecommunications service provider at any time.

EXPLANATION

This subsection deals with the duration and extension of conditions imposed on preservation demands. It provides that a non-disclosure condition in a preservation demand expires six months after it was served. The condition can be extended once for six months by serving a notice on the TSP. The non-disclosure condition may be revoked at any time by serving a notice on the TSP.

RATIONALE

As it is unclear how long an investigation may take in respect of a given violation, this provision ensures that the non-disclosure condition remains in force and that the investigation is protected beyond the duration of the preservation demand, *i.e.*, for six months or up to a year if the condition is extended.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
15	(6)	**Preservation and destruction of transmission data**

PROPOSED WORDING

(6) A telecommunications service provider that is served with a demand shall

(*a*) subject to subsections 16(2) and (3), preserve the data until the demand expires or is revoked; and

(*b*) destroy the data that would not be retained in the normal course of business and any document that is prepared for the purpose of preserving data under this section as soon as the demand expires or is revoked, unless a notice requiring the production of a document based on that data has been served on it under section 17.

EXPLANATION

This subsection sets out the two obligations imposed on the TSP as a result of the preservation demand. Once the TSP receives a preservation demand, it must preserve the data until the demand expires or is revoked, subject to the decision of the Commission on a review application under subsections 16(2) or (3), and it must destroy the data that would not usually be kept or any document that is prepared for the purpose of preserving data when the demand expires or is revoked. The obligation to destroy such a document does not apply when a notice of production of a document has been served by virtue of section 17.

RATIONALE

It is necessary for the Bill to clearly identify the duties that the TSPs must fulfill once they have received a preservation demand and what they must do with the relevant data or documents once the demand has expired or has been revoked, to foster cooperation from TSPs and better support the investigative process.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
16	(1)	**Application for review**

PROPOSED WORDING

16. (1) Within five business days after the day on which a demand is served, a telecommunications service provider may apply in writing to the Commission either for a review of the demand on the grounds that preservation of some or all of the data would place an undue burden on it or for a review of the conditions imposed to prevent disclosure.

EXPLANATION

This subsection provides the TSP with the opportunity to apply to the Commission for a review of a preservation demand on the grounds that it places an undue burden on it, or to have any non-disclosure conditions reviewed. This application must be made within five business days after the demand has been served.

RATIONALE

This clause is intended to provide an opportunity to appeal to the Commission where it believes that a preservation demand is overly burdensome. Therefore, this clause provides a balance between the evidentiary needs of the Commission and the business realities of TSPs.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
16	(2)	**Powers of Commission**

PROPOSED WORDING

(2) After considering any representations made by the telecommunications service pro- vider and by the person designated for the purposes of section 15, the Commission may

(a) allow the application;

(b) deny the application; or

(c) vary, in any manner that the Commission considers reasonable in the circumstances,

(i) the requirement to preserve transmission data, or

(ii) any condition imposed in the demand.

EXPLANATION

This subsection circumscribes the powers of the Commission in terms of the decisions it may take when seized of a review application. If the Commission is satisfied that the requirement resulting from a preservation demand would place an undue burden on the TSP, it may set aside the demand. If the Commission is satisfied, based on evidence submitted by the designated person, that there are reasonable grounds to believe that disclosure of the existence of, or some or parts of the demand would jeopardize the investigation, it may maintain the condition. The clause clarifies that the CRTC can also vary the original demand to ensure that necessary information is preserved, and that information that is in excess to requirements is not required to be kept.

RATIONALE

It is important to define with certainty the powers of the Commission and provide it with guidance in respect of review applications with respect to preservation orders. The provision also clarifies, in cases involving non-disclosure conditions, that the Commission may satisfy itself that disclosure would jeopardize the investigation to the extent that the designated person has submitted evidence.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
16	(3)	**No obligation to preserve new data**

PROPOSED WORDING

(3) If a telecommunications service provider applies for review on the grounds that preservation of some or all of the data would place an undue burden on it and the Commission does not make a decision in respect of that matter within five business days after the day on which the application was made, the telecommunications service provider is not required to preserve any data to which the application relates that comes into the telecommunications service provider's possession or control after the expiry of the five days.

EXPLANATION

This subsection partially relieves the TSP from preserving the data to which the application for review for undue burden relates if the Commission does not make a decision in respect of the application within five (5) business days of the date of the application. The TSP is only relieved from preserving data coming into its possession or control after the expiry of those five days, and must therefore keep the data accumulated until then.

RATIONALE

This subsection encourages the Commission to process review applications of preservation demands expeditiously to better support the investigative process.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
16	(4)	**Notice of decision**

PROPOSED WORDING

(4) The Commission must cause a copy of its decision to be served on the telecommunications service provider together with a notice of their right to appeal.

EXPLANATION

This subsection ensures that a copy of the Commission's decision in respect of a review application is served to the TSP making the application.

RATIONALE

This subsection seeks to ensure that the TSP that applied for a review of the demand is directly notified of the Commission's decision so that it knows whether or not to continue preserving the required data.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
17	(1)	**Notice for Production**

PROPOSED WORDING

17. (1) A person who is designated for the purpose of this section may cause a notice to be served on a person requiring them to produce a copy of a document that is in their possession or control, or to prepare a document based on data, information or documents that are in their possession or control and to produce that document.

EXPLANATION

This provision confers on the person designated for the purposes of this section the power to require a TSP to produce documents that are in, or comes into, its possession or control.

RATIONALE

This power is an important feature of the investigation process as it allows the designated person to require a person to produce documents that may be useful to the investigation for evidentiary purposes, in order to determine whether or not there are reasonable grounds to believe that a violation has occurred.

Bill Clause No.	Section No.	Topic
17	(2)	**Purpose of notice**

PROPOSED WORDING

(2) The designated person may issue the notice only for the purpose of

(*a*) verifying compliance with this Act;

(*b*) determining whether any of sections 6 to 9 has been contravened; or

(*c*) assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

EXPLANATION

This subsection makes the issuing of a production notice conditional on the purpose of verifying compliance or determining whether any of sections 6 to 9 have been contravened. Paragraph (c) allows the CRTC to exercise this power on behalf of a foreign enforcement agency enforcing a law that contains prohibitions substantially similar to those found in BILL C-28. This clause is also linked to sections 15(3) and (4), 17(2) and (4), and 19(1).

RATIONALE

This provision provides a safeguard for TSP and other persons who may receive a production notice to prevent disruption of their ordinary activities and data management for matters unrelated to investigations in respect of violations of the Act. It also ensures that the demand is not used to gather evidence for the purposes of other statutes.

BACKGROUND

N/A

EXAMPLE

Same as section 15 (Japan example, but for production orders)

Bill Clause No.	Section No.	Topic
17	(3)	**Particulars of notice**

PROPOSED WORDING

(3) The notice must require the document to be produced to a person named in the notice within the time, at the place and in the form specified in the notice.

EXPLANATION

This subsection sets out the mandatory contents of a production notice so as to provide the recipient with instructions in terms of time, place and form for the production of the required documents, and the designated person to whom they are to be sent.

RATIONALE

Specificity as to the contents of the notice allows the recipient to know how to respond to the production notice.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
17	(4)	**Conditions**

PROPOSED WORDING

(4) The designated person may impose conditions in the notice to prevent the disclosure of some or all of its contents or its existence if they have reasonable grounds to believe that the disclosure would jeopardize the conduct of

(*a*) an investigation under this Act; or

(*b*) an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

EXPLANATION

This subsection permits the investigating officer to impose a condition of confidentiality on a person who is subject to a production order. The condition protects the integrity of an investigation to verify compliance or determine whether any of sections 6 to 9 have been contravened.

Paragraph (b) allows the CRTC to impose such conditions to protect the integrity of an investigation conducted on behalf of a foreign state. This clause is linked to Section 15(3), 17(2), 19(1).

RATIONALE

This provision serves as a safeguard for the benefit of TSPs to prevent disruption of the provider's activities and data management due to matters that are unrelated to investigations in respect of violations of the Act. It also ensures that the demand is not used to gather evidence for the purposes of other domestic statutes.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
17	(5)	**Expiry and revocation of conditions**

PROPOSED WORDING

(5) A condition imposed to prevent disclosure expires six months after the day on which the notice is served on the person unless, before its expiry, a notice extending the condition for an additional period of six months is served on them. A condition may not be extended more than once and a notice revoking the condition may be served on the person at any time.

EXPLANATION

This subsection deals with the duration and extension of a non-disclosure condition in a production notice. It provides that a non-disclosure condition in a production notice expires six months after the notice was served. The condition can be extended once for an additional six months by serving a notice on the person who received the production notice originally. The non-disclosure condition may be revoked at any time by serving a notice.

RATIONALE

As it is unclear how long an investigation may take in respect of a given violation, this provision ensures that the non-disclosure condition remains in force and that the investigation is protected for at least six months, or up to a year if the condition is extended by way of notice.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
17	(6)	**Return of documents not required**

PROPOSED WORDING

(6) Documents and copies of documents that are produced under this section need not be returned to the person who produced them.

EXPLANATION

This subsection specifies that the designated person does not have to return the documents and copies that are produced as a result of a production notice. Implicitly, the designated person could return them anyway.

RATIONALE

This provision adds certainty as to what the designated person can do with the documents and copies that are produced as a result of a production notice once they are no longer required for the purposes of the investigation.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
18	(1)	**Application for review**

PROPOSED WORDING

18. (1) At any time before they are required to produce a document, a person may apply in writing to the Commission either for a review of the notice on the grounds that the requirement to prepare or produce a document is unreasonable in the circumstances or that the production would disclose privileged information or for a review of the conditions imposed to prevent disclosure.

EXPLANATION

This subsection provides a person who receives a production notice with the opportunity to have the notice reviewed by the Commission on the grounds that the requirement to prepare or produce a document is unreasonable or would disclose information protected under solicitor-client privilege, or to have the non-disclosure conditions reviewed. This application can be submitted at any time before they are required to produce a document.

RATIONALE

A production notice imposes obligations of preparation and production of copies or documents and restricts what persons may do with respect to the communication of information and documents in their possession or control. This clause is intended to provide an opportunity to appeal to the Commission where a person believes that the production notice they have received is overly burdensome. Therefore, this clause provides a balance between the evidentiary needs of the Commission and the business realities of TSPs and other persons contributing to the investigation.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
18	(2)	**No obligation to produce**

PROPOSED WORDING

(2) If a person applies for review on the grounds that the requirement to prepare or produce a document is unreasonable in the circumstances, they are not required to prepare or produce the document.

EXPLANATION

This subsection clarifies that where a person applies for a review under subsection 18(1) on the ground that the requirement is unreasonable, they are not required to prepare or produce a document, pending the outcome of the review.

RATIONALE

The automatic suspension of the preparation or production requirement is needed to allow for the review process to take place. If the person were still required to prepare or produce the requisite documents, it would defeat the purpose of the review.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
18	(3)	**Powers of Commission**

PROPOSED WORDING

(3) After considering any representations made by the applicant and by the person designated for the purposes of section 17, the Commission may

(*a*) allow the application;

(*b*) deny the application; or

(*c*) vary, in any manner that the Commission considers reasonable in the circumstances,

(i) the requirement to produce, or prepare and produce, a document, or

(ii) any condition imposed in the notice.

EXPLANATION

This subsection sets out the powers of the Commission in terms of the decisions it may take when seized of a review application. If the Commission is satisfied that the requirement resulting from a production notice or confidentiality order would be unreasonable, or require the production of privileged information it may set aside or vary the demand.

The clause clarifies that the CRTC can not only approve or reject the appeal, but also vary the original demand to ensure that necessary information is preserved, and that information that is in excess to requirements is not required to be kept. This clause is similar to that of Section 16(2).

RATIONALE

It is necessary to define the powers of the Commission and provide criteria to apply in respect of the review applications concerning production notices. The provision also clarifies, in cases involving non-disclosure conditions, that the onus is on the designated person to satisfy the Commission that disclosure would jeopardize the investigation.

Bill Clause No.	Section No.	Topic
18	(4)	**Particulars**

PROPOSED WORDING

(4) If the Commission decides to confirm the requirement to produce a document, it shall specify in its decision that the document be produced to a person named in the decision within the time, at the place and in the form set out in the decision.

EXPLANATION

This subsection sets out the mandatory contents of a decision of the Commission to confirm the requirement to produce a document, so as to provide the applicant with instructions in terms of the designated person to whom it should be sent, as well as the time, place and form for the production of the required documents.

RATIONALE

Specificity as to the contents of the notice allows the applicant to know exactly how to respond to the production notice.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
18	(5)	**Notice of decision**

PROPOSED WORDING

(5) The Commission shall cause a copy of its decision to be served on the person together with a notice of their right to appeal.

EXPLANATION

This subsection ensures that a copy of the Commission's decision in respect of a review application is served to the person who applied for the review.

This clause clarifies that the Commission must inform organizations that they have a right to appeal its decision. This clause is consistent with Section 16(4).

RATIONALE

This subsection seeks to ensure that the person who applied for a review of the production notice is directly notified of the Commission's decision so that they know whether or not to prepare or produce the requisite copies or documents.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(1)	**Warrant**

PROPOSED WORDING

19. (1) On an *ex parte* application, a justice of the peace may issue a warrant authorizing a person who is designated for the purpose of this section and who is named in the warrant to enter a place if the justice is satisfied by information on oath that

(*a*) entry to the place is necessary to

(i) verify compliance with this Act,

(ii) determine whether any of sections 6 to 9 has been contravened, or

(iii) assist an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9; and

(*b*) if the place is a dwelling-house, entry has been refused or there are reasonable grounds to believe that entry will be refused or that consent to entry cannot be obtained from the occupant.

EXPLANATION

This subsection allows for an application to be made to a justice of the peace for a warrant authorizing a designated person to enter a place. The power to issue a warrant can only be exercised if the justice is satisfied based on information provided on oath that entry is necessary for the purposes of an investigation to verify compliance with the Act and in the case of a residence, entry has been refused or there are reasonable grounds to believe that entry will be refused or consent cannot be obtained. Subparagraph (iii) is intended allow the CRTC to use this power on behalf of a foreign state. This clause is linked to sections 15(3) and (4), 17(2) and (4), and 19(1).

RATIONALE

It is necessary to provide a designated person with the opportunity to obtain a warrant to enter a place where they believe there is information relevant to an investigation, and entry is necessary, especially where there are concerns that the evidence could be destroyed compromised.

EXAMPLE

Same as section 15 (Japan example, but for warrants)

Bill Clause No.	Section No.	Topic
19	(2)	**Conditions in warrant**

PROPOSED WORDING

(2) The warrant may contain any conditions that the justice considers appropriate, including conditions to protect privileged information.

EXPLANATION

This subsection provides the justice of the peace with the power to add any conditions he or she considers appropriate in the warrant, including in conditions to protect information that is subject to solicitor-client privilege.

RATIONALE

As the justice of the peace has the benefit of considering the particular circumstances of each application, he or she is best placed to appreciate whether conditions should be imposed on the warrant and which are appropriate in the circumstances.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(3)	**Powers in execution of warrant**

PROPOSED WORDING

(3) Subject to the conditions specified in the warrant, in executing the warrant, the designated person may, for any purpose set out in subparagraphs (1)(*a*)(i) to (iii),

(*a*) examine anything that is found in the place;

(*b*) use any means of communication found in the place or cause it to be used;

(*c*) use any computer system found in the place — or cause it to be used — to examine data contained in, or available to, the system;

(*d*) prepare a document — or cause it to be prepared — based on the data;

(*e*) use any copying equipment — or cause it to be used — to make copies of documents;

(*f*) remove anything found in the place for examination or copying; and

(*g*) prohibit or limit access to all or part of the place.

EXPLANATION

This subsection grants to the designated person the following powers in executing the warrant: examining anything found in the place; using any means of communication; using any computer system to examine data contained therein; preparing a document based on the data; using any copying equipment; removing anything found in the place for examination or copying; and prohibiting or limiting access to the place. These powers are subject to conditions imposed in the warrant.

RATIONALE

It is essential to establish the scope of actions that the designated person is authorized to take in execution of the warrant, to provide a balance between the needs of the investigation and the rights of the place owner or user.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(4)	**Assistance to designated persons**

PROPOSED WORDING

(4) The owner of the place, the person in charge of the place and every person found in the place shall give all assistance that is reasonably required to enable the designated person to execute the warrant and shall provide any documents, data and information — including information establishing their identity — that are reasonably required for that purpose.

EXPLANATION

This subsection imposes a positive obligation on the owner of the place identified in the warrant, the person in charge of the place and every person found in the place to provide assistance to the designated person. It contains a further obligation for these persons to provide any documents, data and information that are reasonably required to verify compliance with the Act.

RATIONALE

It is necessary to clarify the obligations of an owner of the place, the person in charge of the place and every person found in the place in terms of assisting in the gathering of evidence.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(5)	**Execution of warrant**

PROPOSED WORDING

(5) A warrant must be executed between six o'clock in the morning and nine o'clock in the evening unless the justice authorizes its execution at another time.

EXPLANATION

This subsection sets out the period within which the warrant may be executed on any given day. The justice of the peace may also authorize its execution outside of this period.

RATIONALE

This provision seeks to ensure that a warrant is executed at a reasonable time during the day or evening.

BACKGROUND

This type of provision is typically found in other federal statutes containing warrant provisions.

Bill Clause No.	Section No.	Topic
19	(6)	**Entry onto private property**

PROPOSED WORDING

(6) For the purpose of gaining entry to the place referred to in the warrant issued under subsection (1), the designated person may enter private property and pass through it, and is not liable for doing so. For greater certainty, no person has the right to object to that use of the property and no warrant is required for entry onto the property, other than for entry to a dwelling-house.

EXPLANATION

This subsection provides the designated person with the power to enter private property in order to have access to the place referred to in the warrant, and shields them from liability for doing so. It also clarifies that the designated person's entry onto private property cannot be objected to and that no warrant is required for that purpose, unless the private property in question is a residence.

RATIONALE

This provision ensure that the designated person is not liable for trespassing should he or she be required to enter private property in order to enter the place referred to in the warrant. It supports the overall efficiency of the warrant.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(7)	**Persons accompanying designated person**

PROPOSED WORDING

(7) A person may, at the designated person's request, accompany the designated person to assist the designated person to gain entry to the place referred to in the warrant and is not liable for doing so.

EXPLANATION

This subsection provides the authority for a person to accompany the designated person for the purpose of executing the warrant and exempts this person from liability for entering into the place referred to in the warrant (as this person would not be authorized to enter the place by the warrant).

RATIONALE

This subsection ensures that the designated person may be accompanied for safety purposes, and that the accompanying person is not liable for trespassing.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
19	(8)	**Use of force**

PROPOSED WORDING

(8) In executing a warrant, a designated person shall not use force unless they are accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

EXPLANATION

This subsection deals with the use of force in the execution of warrants. It indicates as a general rule that the use of force is prohibited except where there is express authorization in the warrant and a peace officer is present.

RATIONALE

In principle, the execution of warrants under BILL C-28 is not expected to give rise to situations requiring the use of force, especially given the obligation to provide assistance under subsection (4), which is why force is generally prohibited. However, where the use of force is anticipated, in order for the exception allowing for the use of force to apply, the designated person must ensure that he or she is accompanied by a peace officer and that the use of force is specifically authorized in the warrant issued by the justice of peace.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
20	(1)	**Violations**

PROPOSED WORDING

20. (1) Every person who contravenes any of sections 6 to 9 commits a violation for which they are liable to an administrative monetary penalty.

EXPLANATION

This subsection creates violations and makes any person who contravenes section 6, 7, 8 or 9 liable to pay an administrative monetary penalty.

RATIONALE

It is essential for Canadians to understand exactly which acts or omissions constitute a violation of the Act, so as to establish boundaries between permissible and non-permissible conduct or practices, and to define the ensuing consequences of such violations.

BACKGROUND

Administrative monetary penalties are to be distinguished from a fine. They are provided for in legislation to encourage compliance with regulatory norms or requirements to prevent and deter future harm.

Bill Clause No.	Section No.	Topic
20	(2)	**Purpose of penalty**

PROPOSED WORDING

(2) The purpose of a penalty is to promote compliance with this Act and not to punish.

EXPLANATION

This subsection makes clear that the underlying objective of administrative monetary penalties is to encourage compliance with the regulatory parameters of the Act. Such penalties are not intended to serve as a punishment.

RATIONALE

This subsection seeks to highlight the regulatory nature of the Act and to distinguish it from a criminal framework, which is used to punish behaviour that causes a wrong to society as a whole.

BACKGROUND

Administrative monetary penalties are to be distinguished from a fine. They are provided for in legislation to encourage compliance with regulatory norms or requirements to prevent and deter future harm.

Bill Clause No.	Section No.	Topic
20	(3)	**Factors for penalty**

PROPOSED WORDING

(3) The following factors must be taken into account when determining the amount of a penalty:

(*a*) the purpose of the penalty;

(*b*) the nature and scope of the violation;

(*c*) the person's history with respect to any previous violation under this Act, any previous conduct that is reviewable under section 74.011 of the *Competition Act* and any previous contravention of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act;

(*d*) the person's history with respect to any previous undertaking entered into under subsection 21(1) and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* that relates to acts or omissions that constitute conduct that is reviewable under section 74.011 of that Act;

(*e*) any financial benefit that the person obtained from the commission of the violation;

(*f*) the person's ability to pay the penalty;

(*g*) whether the person has voluntarily paid compensation to a person affected by the violation;

(*h*) the factors established by the regulations; and

(*i*) any other relevant factor.

EXPLANATION

This subsection imposes a duty on the designated person to take into account the enumerated factors listed above when determining the amount that a person is liable to pay for a violation of the Act.

RATIONALE

As the designated person enjoys broad discretion in determining an appropriate penalty relative to the violation committed and as the range of applicable penalty amounts is wide, this provision is intended to establish a mandatory guideline that must be taken into account when deciding the penalty to be imposed.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
20	(4)	**Maximum penalties**

PROPOSED WORDING

(4) The maximum penalty for a violation is $1,000,000 in the case of an individual, and $10,000,000 in the case of any other person.

EXPLANATION

This subsection sets out the maximum penalty amounts which may be imposed by a designated person.

RATIONALE

The maximum penalty amounts are high to encourage compliance with the Act and to serve as an effective deterrent. There is a correlation between the maximum amount of the penalty and the ability to pay of spammers. The maximum penalty must be high enough to ensure that the payment of penalties does not become a mere cost of business for spammers.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
20	(5)	**Regulations**

PROPOSED WORDING

(5) The Governor in Council may make regulations

(*a*) designating provisions whose contravention constitutes a separate violation in respect of each day during which it continues; and

(*b*) establishing factors for the purposes of paragraph (3)(*h*).

EXPLANATION

This subsection provides the legal authority for the Governor in Council to make regulations respecting violations for two specific purposes: 1) to designate provisions for which the ongoing contravention constitutes a separate violation with each day during which it continues; 2) to establish new factors to be taken into account when determining the amount of a penalty.

RATIONALE

This provides the flexibility to add a further deterrent by deeming continuing violations to be new and separate with each day they are committed, and to identify further relevant factors to be taken into account for the purpose of determining the amount of a penalty at a later date.

BACKGROUND

Section 72.03 of the *Telecommunications Act* provides that “A violation that is continued on more than one day constitutes a separate violation in respect of each day during which it is continued”.

Bill Clause No.	Section No.	Topic
21	(1)	**Entry into undertaking**

PROPOSED WORDING

21. (1) A person may enter into an undertaking at any time.

EXPLANATION

This subsection allows for a person who is alleged to have violated the Act to enter into an undertaking with a designated person before or after a proceeding is commenced against them.

RATIONALE

This provision establishes a mechanism that allows a person who is alleged to have violated the Act to avoid a notice of violation and proceedings by settling matters directly with a designated person. It is meant to encourage compliance with the Act and is a low-cost mechanism to deal with an alleged violation, whether this violation constitutes an honest mistake or not. It is anticipated that persons who inadvertently violate the Act will be more likely to enter into undertakings.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
21	(2)	**Contents**

PROPOSED WORDING

(2) An undertaking

(*a*) must be accepted by a person who is designated for the purpose of this section;

(*b*) must identify every act or omission committed that constitutes a contravention of any of sections 6 to 9 and that is covered by the undertaking;

(*c*) must identify every provision at issue;

(*d*) may contain any conditions that the designated person considers appropriate; and

(*e*) may include a requirement to pay a specified amount.

EXPLANATION

This subsection sets out three required elements that must be included in an undertaking, namely: that a designated person must accept the undertaking; every act or omission constituting a contravention of sections 6-9, covered by the undertaking; and, the specific provisions to which it relates be identified. This subsection also provides that a designated person can include in the undertaking any conditions that he or she considers appropriate in the circumstances and a requirement to pay a specified amount.

RATIONALE

This provision establishes a basic framework for the drafting of undertakings by designated persons. It makes clear that the undertaking not only binds the person who enters it to avoid a notice of violation, but also the designated person who accepts it.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
21	(3)	**Undertaking before notice of violation**

PROPOSED WORDING

(3) If a person enters into an undertaking, no notice of violation may be served on them in connection with an act or omission referred to in the undertaking.

EXPLANATION

This subsection bars the issuance of notices of violation in respect of the contraventions referred to in an undertaking.

RATIONALE

In order to foster the objective of encouraging compliance and provide an incentive for persons who have violated the Act to cooperate by entering into an undertaking, the Act must provide assurances that no further proceedings will be taken against them in respect of the violation committed.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
21	(4)	**Undertaking after notice of violation**

PROPOSED WORDING

(4) If a person enters into an undertaking after a notice of violation is served on them, the proceeding commenced by the notice of violation is ended in respect of that person in connection with any act or omission referred to in the undertaking.

EXPLANATION

This subsection establishes that where an undertaking is entered into, the proceeding commenced under the notice of violation (see subsection 22(1)) ends in respect of acts or omissions referred to in the undertaking.

RATIONALE

The cessation of a proceeding is the *quid pro quo* required to foster the objective of encouraging compliance with the Act.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
22	(1)	**Notice of violation**

PROPOSED WORDING

22. (1) A person who is designated for the purpose of this section may issue a notice of violation and cause it to be served on a person if they believe on reasonable grounds that the person has committed a violation.

EXPLANATION

This subsection empowers a designated person to issue and cause to be served a notice of violation, once they believe on reasonable grounds that a violation of the Act has been committed.

RATIONALE

This provision introduces notices of violations, which constitute the main enforcement tool of the Act. It marks the commencement of regulatory enforcement proceedings under the Act, once the designated person has reached a stage, as a result of the investigation, where they believe on reasonable grounds that a violation has occurred.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
22	(2)	**Contents of notice**

PROPOSED WORDING

(2) The notice of violation must

(*a*) name the person believed to have committed the violation;

(*b*) identify every act or omission for which the notice is served and every provision at issue;

(*c*) set out the administrative monetary penalty that the person is liable to pay and the time and manner of payment;

(*d*) inform the person that they may make representations to the Commission within 30 days after the day on which the notice is served or any longer period set out in the notice, and set out the manner for making the representations;

(*e*) inform the person that, if they do not pay the penalty or make representations in accordance with the notice, they will be deemed to have committed the violation and that the penalty set out in the notice will be imposed; and

(*f*) inform the person that if they are found or are deemed to have committed a violation they may be made the subject of an order requiring them to do what this Act requires them to do, or forbidding them to do what this Act prohibits them from doing, and that the order can be enforced as an order of a court of competent jurisdiction.

EXPLANATION

This subsection enumerates the information that must be contained in a notice of violation. Paragraphs a) to c) require the identification of the person believed to have committed the violation, the contraventions at issue and administrative monetary penalty imposed. Paragraphs d) to f) relate to information regarding the rights and obligations of the person served with the notice of violation. Specifically, they highlight the right to make representations to challenge the notice of violation, and the consequence of failing to pay the administrative monetary penalty or make representations, namely that the penalty will be imposed and that a cease order may be issued by the Commission against them.

RATIONALE

It is necessary to ensure that a person who is believed to have committed a violation under the Act is completely aware of the case against them and their rights and obligations in terms of responding to the allegations.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
23	(1)	**Limitation period**

PROPOSED WORDING

23. (1) No proceeding in respect of a violation may be commenced later than three years after the day on which the subject matter of the proceeding became known to a person designated under section 14.

EXPLANATION

This subsection provides for a limitation period on proceedings relating to violations. It provides that once a person designated under section 14 (*i.e.*, the designated person who first undertakes an investigation) becomes aware of the subject matter of the violation, proceedings in this respect must be commenced within three years by issuing a notice of violation.

RATIONALE

Limitation periods on the commencement of proceedings related to statutory violations are standard and are intended to foster procedural fairness and safeguard parties against dilatory proceedings.

BACKGROUND

The language in this subsection is consistent with similar limitation provisions in other federal statutes.

Bill Clause No.	Section No.	Topic
23	(2)	**Certificate**

PROPOSED WORDING

(2) A document that appears to have been issued by the secretary to the Commission, certifying the day on which the subject matter of any proceeding became known to a person designated under section 14, is admissible in evidence without proof of the signature or official character of the person who appears to have signed the document and is proof of the matter asserted in it in the absence of evidence to the contrary.

EXPLANATION

This subsection provides for a rule of evidence in respect of documents certifying the day on which the subject matter of any proceeding became known to the person designated under section 14 (*i.e.*, the designated person who first undertakes an investigation) . Such documents are admissible in evidence without further proof required of its author and is evidence of its contents, unless the contrary is shown.

RATIONALE

In the event that a proceeding commenced by the issuance of a notice of violation is challenged on the basis that the three-year limitation period referred to in subsection (1) has elapsed, the person designated under section 14 should be able to provide documentary evidence issued by the secretary to the Commission certifying the day on which the subject matter of any proceeding became known to them and have it considered admissible, without having to corroborate this evidence with additional proof of the signature or official character of the person who signed it, as would otherwise be required under general rules of evidence.

BACKGROUND

This provision dispenses with the requirement in the law of evidence to prove the authenticity of a document. It is common to find statutory provisions exempting proof of genuineness of official seals, signatures and publications emanating from a government agency.

Bill Clause No.	Section No.	Topic
24	(1)	**Determination of responsibility - options**

PROPOSED WORDING

24. (1) A person who is served with a notice of violation shall, in accordance with the notice, pay the penalty set out in the notice or make representations with respect to the amount of the penalty or the acts or omissions that constitute the alleged violation.

EXPLANATION

This subsection imposes an obligation on the person who is the subject of a notice of violation to either pay the penalty amount set out therein or make representations to the Commission, with a view to challenging the notice of violation in respect of the amount of the penalty or the designated person's decision that they committed the alleged violation.

RATIONALE

This provision ensures that persons served with a notice of violation are legally required to pay the administrative monetary penalty indicated therein, unless they challenge the issuance of a notice of violation, and the designated person's decision that they have committed a violation.

BACKGROUND

This subsection is modeled after section 72.09 of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
24	(2)	**Deemed violation**

PROPOSED WORDING

(2) A person is deemed to have committed the violation if they either pay the penalty in accordance with the notice of violation or do not pay the penalty and do not make representations, in accordance with the notice of violation.

EXPLANATION

This subsection creates a legal presumption. It deems a person on whom a notice of violation was served to have committed the violation in three cases: where they pay the penalty imposed on them; where they fail to pay the penalty; and where they fail to make representations challenging the notice of violation.

RATIONALE

This subsection is needed to establish with clarity the circumstances where a person is found liable for having committed the violation referred to in the notice of violation served on them, and to address the circumstances where a person on whom a notice of violation was served does not respond.

BACKGROUND

This subsection is modeled after section 72.08 of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
25	(1)	**Representations**

PROPOSED WORDING

25. (1) If a person makes representations in accordance with the notice, the Commission shall decide, on a balance of probabilities, whether the person committed the violation and, if so, may impose the penalty set out in the notice of violation, may reduce or waive the penalty, or may suspend payment of the penalty subject to any conditions that the Commission considers necessary to ensure compliance with this Act.

EXPLANATION

This subsection empowers the Commission, when seized of representations made by the person challenging the notice of violation, to make a decision on a balance of probabilities on the question whether the person committed the violation. If the Commission concludes that a violation has been committed, it has the authority to either impose, reduce or waive the penalty previously set out in the notice of violation.

RATIONALE

This provision is needed to establish with certainty the powers of the Commission when making a determination of responsibility and the amount of a penalty to be paid in respect of a person challenging the notice of violation through representations.

BACKGROUND

This subsection is modeled after section 72.08 of the *Telecommunications Act*.

EXAMPLE

This provision will allow the CRTC to suspend a penalty for a period of time noting that the violator has agreed to comply with the Act over that time period. At the end of the time period, the CRTC can then waive the penalty. However, should that same violator subsequently violate the Act, the suspension can be lifted and the violator is required to pay the original penalty. i.e., the CRTC can hold the penalty over a company to encourage compliance prior to waiving the penalty.

Bill Clause No.	Section No.	Topic
25	(2)	**Notice of decision**

PROPOSED WORDING

(2) The Commission shall cause a copy of its decision to be served on the person together with a notice of their right to appeal.

EXPLANATION

This subsection provides that a copy of the Commission's decision in respect of a review application is to be delivered to the person who made representations challenging the notice of application.

RATIONALE

This subsection seeks to ensure that the person who made representations challenging the notice of application is directly notified of the Commission's decision and of the right of appeal so that he or she may take steps to comply with the decision or appeal it.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
26	(1)	**Restraining orders**

PROPOSED WORDING

26. (1) If a person is deemed under subsection 24(2) to have committed a violation or has been found under subsection 25(1) to have committed a violation, the Commission may make an order directing the person to cease contravening the provision to which the violation relates.

EXPLANATION

This subsection grants the Commission the power to make an order directing a person who is deemed to have committed a violation or who has been found by the Commission to have done so to cease contravening the provision relevant to the violation. It effectively prohibits the further commission of that violation in the future.

RATIONALE

This power to order the ceasing of a violation is another deterring enforcement tool which supplements the imposition of administrative monetary penalties and encourages compliance with the Act. Restraining orders may be enforced by application of subsection 40(1).

BACKGROUND

The Commission also has order-making powers under s. 51 of the *Telecommunications Act*, which allow the Commission to make orders "to do anything the person is required to do under this Act or any special Act, and may forbid a person to do anything that the person is prohibited from doing under this Act or any special Act." This provision is more specific in nature and reflects other similar provisions found in federal statutes.

Bill Clause No.	Section No.	Topic
26	(2)	**Notice of decision**

PROPOSED WORDING

(2) The Commission shall cause a copy of its order to be served on the person together with a notice of their right to appeal.

EXPLANATION

This subsection ensures that a copy of the Commission's decision in respect of a restraining order is served to the affected person along with information on the right to appeal.

RATIONALE

This clause ensures that the person who is subject to a restraining order is directly notified of the Commission's decision and of appeal rights.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
27	(1)	**Appeal to the Federal Court of Appeal**

PROPOSED WORDING

27. (1) Subject to subsection (2), an appeal may be brought in the Federal Court of Appeal from a decision made under section 16, 18 or 25 or an order made under section 26 within 29 days after the day on which the decision or order, as the case may be, is made.

EXPLANATION

This subsection provides a right to appeal a decision from the Commission made in relation to a review of a preservation demand under section 16, a review of a production notice under section 18, a determination of responsibility under section 25, and a right to appeal an order of the Commission under section 26, to the Federal Court of Appeal.

RATIONALE

Any right of appeal to the Federal Court of Appeal must be explicitly provided for in legislation.

In order to allow for a fair and expedient process, appeals of decisions made by the Commission should be allowed to proceed to the Federal Court of Appeal. It is also important that the appeal process internal to the Commission be exhausted before proceeding to the Court of Appeal.

BACKGROUND

The decisions of the Commission may be appealed directly to the Federal Court of Appeal under the *Telecommunications Act* and the *Broadcasting Act*. For consistency with these statutes, decisions and orders of the Commission are reviewable by the Federal Court of Appeal.

Bill Clause No.	Section No.	Topic
27	(2)	**Appeal on question of fact**

PROPOSED WORDING

(2) An appeal on a question of fact from a decision made under section 16, 18 or 25 or an order made under section 26 may be brought only with the leave of the Federal Court of Appeal, an application for which must be made within 30 days after the day on which the decision or order, as the case may be, is made. The appeal may not be brought later than 30 days after the day on which leave to appeal is granted.

EXPLANATION

This subsection distinguishes between appeals on a question of fact and appeals on a question of law. It clarifies that in respect of appeals on a question of fact of a decision or order of the Commission, leave to appeal must be obtained from the Federal Court of Appeal. Implicitly, it follows that appeals on a question of law may be brought without leave.

RATIONALE

The distinction between questions of law and questions of fact accounts for the deference that appellate Courts typically demonstrate towards decisions emanating from regulatory bodies due to their expertise in a particular area. Furthermore, appellate courts do not generally re-hear questions fact unless certain circumstances are present. Allowing the Federal Court of Appeal to determine when it will hear an appeal on a question of fact ensures that the Court’s time is not unnecessarily consumed by such appeals.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
28	(1)	**Debts due to Her Majesty**

PROPOSED WORDING

28. (1) The following amounts are debts due to Her Majesty in right of Canada that may be recovered in the Federal Court:

(*a*) the amount payable under an undertaking entered into under subsection 21(1) beginning on the day specified in the undertaking or, if no day is specified, beginning on the day on which the undertaking is entered into;

(*b*) the amount of the penalty set out in a notice of violation, beginning on the day on which it is required to be paid in accordance with the notice, unless representations are made in accordance with the notice;

(*c*) if representations are made, either the amount of the penalty that is imposed by the Commission or on appeal, as the case may be, beginning on the day specified by the Commission or the court or, if no day is specified, beginning on the day on which the decision is made; and

(*d*) the amount of any reasonable expenses incurred in attempting to recover an amount referred to in any of paragraphs (*a*) to (*c*).

EXPLANATION

This subsection provides that an amount agreed to be paid under an undertaking, the penalty amount imposed in a notice of violation, and the penalty amount determined by a decision of the Commission or a decision on appeal thereof are all debts which must be paid to Her Majesty and which may be recovered in Federal Court upon default. The subsection indicates specifically for each case the time at which the debt is due. The reasonable expenses incurred by the Crown to recover such payments also constitute a recoverable debt.

RATIONALE

It is essential to clearly set out a mechanism allowing for the recovery of amounts payable under an undertaking or penalties, so that in the event the person who entered under the undertaking or a person deemed or found to have committed the violation fails to pay such amounts, the Crown will be entitled under this subsection to commence proceedings in Federal Court for recovery of the amount owing.

BACKGROUND Similar provisions are typically found in other administrative monetary penalty regimes; *e.g.*, subsection 72.09 (1) of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
28	(2)	**Limitation period - prescription**

PROPOSED WORDING

(2) A proceeding to recover such a debt may not be commenced later than five years after the day on which the debt becomes payable.

EXPLANATION

This subsection imposes a time limit of five (5) years for Her Majesty to take action to recover a debt due in the circumstances described in subsection (1).

RATIONALE

Limitation periods are standard where debts are due to Her Majesty and are intended to foster procedural fairness and safeguard parties against dilatory proceedings.

BACKGROUND

The language in this subsection is consistent with similar limitation provisions found in other federal regulatory schemes, such as section 72.09 of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
28	(3)	**Receiver General**

PROPOSED WORDING

(3) The debt is payable to the Receiver General.

EXPLANATION

This subsection indicates that any debt due to Her Majesty in the circumstances described in subsection (1) is to be paid in the name of the Receiver General.

RATIONALE

The subsection makes clear for those who are required to pay an amount pursuant to an undertaking or to a penalty that the payment is be made to the Receiver General, and not to the Commission. It also indicates implicitly that payments of such debts will go to the consolidated revenue fund.

BACKGROUND

Similar provisions can be found in other administrative monetary penalty regimes, such as section 72.09 of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
29	(1)	**Certificate of default**

PROPOSED WORDING

29. (1) The Commission may issue a certificate certifying the unpaid amount of any debt referred to in subsection 28(1).

EXPLANATION

This clause empowers the Commission to issue a certificate certifying that amounts payable under an undertaking or a penalty, or recovery expenses are unpaid.

RATIONALE

This section is necessary to allow the Commission to evidence that debts have been defaulted on, in order to facilitate their recovery.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
29	(2)	**Effect of registration**

PROPOSED WORDING

(2) Registration of a certificate in the Federal Court has the same effect as a judgment of that Court for a debt of the amount set out in the certificate and all related registration costs.

EXPLANATION

This clause notes that once a certificate by the Commission has been registered with the Federal Court, the registration operates as a judgment of by the Federal Court in relation to the debt owing referred to in the certificate.

RATIONALE

This subsection is necessary to facilitate the recovery of the debt and avoid the need to prove Her Majesty's right in the debt and to obtain judgment for its execution.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
30	30	**For greater certainty**

PROPOSED WORDING

30. For greater certainty, a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply.

EXPLANATION

This clause notes that violations under the Bill are not offences but rather a contravention of an administrative regime. Section 126 of the *Criminal Code*, which states that

> Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

does not apply and indictable offences are not linked to the violations.

RATIONALE

This clause is needed to make explicit that section 126 of the *Criminal Code* does not apply in respect of contraventions of this Act. It reinforces the notion that the violations of this Act are regulatory in nature, and as a result, they should not indirectly become offences by operation of section 126.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
31	31	**Directors, officers, etc., of corporations**

PROPOSED WORDING

31. An officer, director, agent or mandatary of a corporation that commits a violation is liable for the violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against.

EXPLANATION

This clause notes that any person who directs, represents or is authorized to act on behalf of a corporation that commits a violation is liable for that violation regardless of whether the corporation itself is proceeded against, if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation.

RATIONALE

Persons acting for and making decisions on behalf of corporations that commit violations should be liable as well since they direct the corporations' actions, and should not be shielded by the corporation.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
32	32	**Vicarious liability**

PROPOSED WORDING

32. A person is liable for a violation that is committed by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee, agent or mandatary is identified or proceeded against.

EXPLANATION

This clause is a form of strict, secondary liability that arises under the Bill that notes that any person who employs a person who commits a violation while acting within the scope of their duties or requirements, is liable for that violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, regardless of whether the employee, agent or mandatary is proceeded against. It notes that the superior is responsible for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator.

RATIONALE

Employers are generally vicariously liable for negligent acts or omissions by their employees in the course of employment. For an act to be considered within the course of employment it must either be authorized or be so connected with an authorized act that it can be considered a means, though an improper means of performing the authorized act. This provision included here to ensure that any person who violates the act will be liable and not shielded just because the violation was actually committed by the employee.

Bill Clause No.	Section No.	Topic
33	(1)	**Defence**

PROPOSED WORDING

33. (1) A person shall not be found to be liable for a violation if they establish that they exercised due diligence to prevent the commission of the violation.

EXPLANATION

Persons may be absolved from liability if they can demonstrate that they have acted with due diligence. Due diligence typically refers to a certain standard of care in the performance of an act.

RATIONALE

Persons should not be held liable where they can demonstrate that they acted with a certain level of responsibility and care and did not knowingly intend or allow a violation of the Act to occur.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
33	(2)	**Common law principles**

PROPOSED WORDING

(2) Every rule and principle of the common law that makes any circumstance a justification or excuse in relation to a charge for an offence applies in respect of a violation to the extent that it is not inconsistent with this Act.

EXPLANATION

This clause denotes that the principles of common law apply to the Bill as long as they are not inconsistent with the violations as provided in the Bill.

RATIONALE

It is important not to unintentionally interfere with the wide body of common law; rather, the common law should only be invalidated when inconsistent with the objectives of a given act. Besides the defence of due diligence, other common law defences that may be raised in relation to an offence should be made available to a person who receives a notice of violation and wishes to make representations to the Commission to be absolved from liability.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
34	(1)	**Questions of law and fact**

PROPOSED WORDING

34. (1) The Commission may decide any question of law or of fact in a proceeding under this Act.

EXPLANATION

This provision makes clear that the Commission has the authority to decide questions of fact and questions of law when considering applications for a review under section 16 (preservation demand), section 19 (applications for a review of a production notice), and section 23 (whether a violation has been committed under the Act and, where a violation has been made out, and the amount of the penalty that should be imposed).

RATIONALE

The Commission requires the power to determine questions of fact in order to properly adjudicate applications for relief from preservation demands and production notices, to determine whether a violation of the Act has occurred, and to set an appropriate penalty for a violation.

With respect to questions of law, the Commission requires this power in order to deal with questions of law that may arise in proceedings under sections 15, 18 and 22. Questions of law could arise, for instance, if there is a challenge to the Commission's jurisdiction under the Bill, or the scope of the violations. Granting this power to the Commission prevents a party from having to go to court in order to obtain a determination on a question of law.

While a court could find that the Commission's power to decide any question of law or fact to be implied given the nature of the decision-making functions that are being accorded to the Commission under the Bill, subsection 34(1) makes this clear.

BACKGROUND

Pursuant to section 27, the Commission's determinations on questions of law can be appealed to the Federal Court of Appeal and questions of fact can be appealed with leave of that court.

The Commission has a similar power to determine questions of law and fact under section 52(1) the *Telecommunications Act* and section 17 of the *Broadcasting Act*.

Bill Clause No.	Section No.	Topic
34	(2)	**Factual findings of court**

PROPOSED WORDING

(2) In deciding a question of fact, the Commission is not bound by the finding or judgment of a court. However, the finding or judgment of a court is admissible in proceedings of the Commission.

EXPLANATION

This provision provides that in considering a question of fact in a proceeding under section 16 (reviews of preservation demands), section 18 (reviews of production notices) or section 25 (determinations of responsibility), the Commission may consider a finding by a court with respect to that question but it is not bound by it.

RATIONALE

This provision is necessary in light of the private right of action provided for in section 47. It is possible that in a proceeding before the Commission a question of fact may arise that has already been determined by a court in the course of a private right of action. While the court's judgment will likely be persuasive, there may be new evidence brought before the Commission that was not available to the court at the time it made the relevant decision. Subsection 34(2) allows the Commission to consider the court's finding but also to weigh any new evidence that may be presented in making its determination.

BACKGROUND

A similar provision exists with respect to decisions by the Commission on questions of fact under subsection 52(2) of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
34	(3)	**Pending proceedings**

PROPOSED WORDING

(3) The power of the Commission to decide a question of fact is not affected by proceedings pending before a court in which the question is in issue.

EXPLANATION

This provision provides that where there are ongoing proceedings before the Commission and a court, the Commission may nevertheless decide a question of fact that has also been raised in the judicial proceedings.

RATIONALE

This provision is necessary as a result of the private right of action provided for in section 46. It is possible to have a private right of action seeking an order for compensation under section 51(1)(a) ongoing at the same time as a proceeding before the Commission. Since similar facts may be at issue in both proceedings, this clause ensures that the Commission does not have to wait until the conclusion of the judicial proceeding in order to make a determination.

BACKGROUND

A similar provision can be found in the subsection 52(3) of the *Telecommunications Act*.

Bill Clause No.	Section No.	Topic
35	35	**Judicial powers**

PROPOSED WORDING

35. In a proceeding under this Act, the Commission has the powers of a superior court with respect to the attendance and examination of witnesses and the production and examination of documents or things.

EXPLANATION

This provision empowers the Commission, during a proceeding under section 16 (reviews of preservation demands), section 18 (reviews of production notices) or section 25 (determinations of responsibility), to require the attendance of witnesses, to provide that witnesses be questioned under oath, and to require that documentary or material evidence be produced to the Commission.

RATIONALE

During the course of a proceeding the Commission may discover that a material piece of evidence is not on the record. Section 35 ensures that the Commission can obtain all of the evidence required to properly to carry out its adjudicative responsibilities under the Bill by requiring the attendance and examination of witnesses and the production and examination of documents or things.

BACKGROUND

The Commission has similar powers under section 55 of the *Telecommunications Act*, and section 16 of the *Broadcasting Act*. Other adjudicative tribunals also have the powers of a superior court with respect to the attendance of witnesses and the production of documents or things; see, for example, subsection 8(2) of the *Competition Tribunal Act*.

Bill Clause No.	Section No.	Topic
36	(1)	**Panels of Commission**

PROPOSED WORDING

36. (1) The Chairperson of the Commission may establish panels to decide any matter on behalf of the Commission in a proceeding under this Act.

EXPLANATION

This provision allows the Chairperson of the Commission to appoint one or more Commissioners to consider applications under section 16 (reviews of preservation demands), section 18 (reviews of production notices) and section 25 (determinations of responsibility), and to decide the matter on behalf of the Commission.

RATIONALE

This provision provides flexibility with respect to the number of Commissioners that are required to adjudicate under the Bill. Absent clause 36, the quorum requirement in s. 10(3) of the *Canadian Radio-television and Telecommunications Commission Act* would apply, and a majority of full-time members would be needed in order for the Commission to make a decision. Section 36(1) allows the Chairperson of the Commission to appoint smaller panels of Commissioners to decide matters, which will allow for more efficient decision-making under the Act. That is, it will not be necessary to convene a majority of full-time members of the Commission in order to decide a matter.

It is important that the Commission be able to decide a matter quickly and efficiently under BILL C-28. This is especially true, for instance, with respect to reviews of preservation demands where if the Commission does not make a decision within 5 business days the obligation to preserve the data ceases to apply on a going forward basis (section 16(3)).

BACKGROUND

Clause 36(1) is modeled on subsection 20(1) of the *Broadcasting Act*.

The Commission may consist of a maximum of 13 full-time members and 6 part-time members (see *CRTC Act*, s. 3(1)). Clause 70 of the bill would amend the *CRTC Act* to provide that only full-time members of the Commission are responsible for exercising the powers and performing the duties of the Commission under BILL C-28. Currently, the Commission consists of 13 full-time members and no part-time members.

The Chairperson of the Commission is the chief executive officer of the Commission and is responsible for supervising and directing the work of the Commission (see the *CRTC Act*, s. 6(2)).

Bill Clause No.	Section No.	Topic
36	(2)	**Presiding member**

PROPOSED WORDING

(2) If a panel consists of more than one member, the Chairperson shall designate one of the members to preside over the panel.

EXPLANATION

Where the Chairperson establishes panels pursuant to section 36(1), he or she is required to designate one of the members of the panel to be the presiding member. The presiding member is responsible for directing the conduct of the proceeding for which the panel is responsible.

RATIONALE

It is necessary to designate a member of a panel as a presiding member in order to ensure that someone is responsible for the conduct of the proceeding. While the appointment of a presiding member would occur in any event as a matter of practice, subsection 36(2) makes this an express requirement.

BACKGROUND

The Chairperson of the Commission is the chief executive officer of the Commission and is responsible for supervising and directing the work of the Commission and for presiding at meetings of the Commission (see subsection 6(2) of the *Canadian Radio-television and Telecommunications Commission Act*).

A similar provision can be found in other statutes relating to the conduct of adjudicative proceedings: see, for example, subsection 10(2) of the *Competition Tribunal Act*.

Bill Clause No.	Section No.	Topic
36	(3)	**Decision**

PROPOSED WORDING

(3) A decision of a majority of the members of a panel is a decision of the panel.

EXPLANATION

This provision makes clear that where a panel consists of more than one member, the panel does not have to be unanimous in order to a render a decision. A decision by a majority of the members of a panel will be sufficient.

RATIONALE

This provision simply provides clarity as to how decisions of a panel may be made. It is in accordance with s. 22(1) of the *Interpretation Act*, which provides that where an enactment authorizes more than two persons to do something, such as make a decision, a majority of them may do it.

BACKGROUND

Subsection 36(3) is modeled on subsection 20(3) of the *Broadcasting Act*.

Bill Clause No.	Section No.	Topic
36	(4)	**Acting after expiry of appointment**

PROPOSED WORDING

(4) A member whose appointment expires may, with the approval of the Chairperson, conclude any proceeding that the member has begun.

EXPLANATION

This provision allows, with the approval of the Chairperson, a member of the Commission who is part of a panel that has been struck to consider applications under section 16 (review of preservation demand), section 18 (review of production notice) or section 25 (determination of responsibility), to continue to participate in the proceeding despite the fact that the member's appointment to the Commission has expired.

RATIONALE

Without this provision, a member whose appointment has expired would not be able to continue to participate in a proceeding for which the panel is responsible. In certain circumstances, this might require that a new panel be constituted, which would result in delays and inefficiency in the decision-making process. By allowing the member's appointment to continue for the limited purpose of concluding the proceeding, the proceeding can continue unhindered.

BACKGROUND

Members of the Commission may be appointed for terms no longer than 5 years: see subsection 3(2) of the *Canadian Radio-television and Telecommunications Commission Act* ("*CRTC Act*").

The Chairperson of the Commission is the chief executive officer of the Commission and is responsible for supervising and directing the work of the Commission (see *CRTC Act*, s. 6(2)). Pursuant to subsection 36(1), the Chairperson is responsible for appointing panels to consider matters for which the Commission is responsible for under BILL C-28.

Similar provisions can be found in other statutes regarding administrative decision-makers: see for example, section 154 of the *Immigration and Refugee Protection Act*.

Bill Clause No.	Section No.	Topic
36	(5)	**Powers of panel**

PROPOSED WORDING

(5) A panel may exercise the powers and perform the duties and functions of the Commission under this Act in relation to any matter before the panel.

EXPLANATION

This provision makes clear that a panel constituted pursuant to subsection 36(1) to decide a matter on behalf of the Commission has all the powers and responsibilities of the Commission provided for in the Act. These powers include powers specific to the proceeding in question, such as the power to set aside the requirement to preserve transmission data in a preservation demand (subsection 16(2)(a)), the power to confirm or set aside the requirement to prepare or produce a document (subsection 18(3)(a)), the power to set aside a non-disclosure condition (subsection 16(2)(b), 18(3)(b)), the power to impose a penalty set out in a notice of violation or to reduce or waive it (subsection 25(1)), and the power to make an order under section 26. The Act also gives the Commission more general powers in relation to all proceedings, including the power to decide questions of law or questions of fact (subsection 34(1)), and the powers of superior court with respect to the attendance of witnesses and the production of documents or things (section 35).

RATIONALE

Given that a panel is constituted to decide a matter on behalf of the Commission (subsection 36(1)), it is necessary to attribute to the panel all of the powers and duties that the Act ascribes to the Commission in order for proceedings to function properly.

BACKGROUND

Subsection 36(5) is modeled on subsection 20(2) of the *Broadcasting Act*.

Bill Clause No.	Section No.	Topic
37	(1)	**Rules of Procedure**

PROPOSED WORDING

37. (1) The Commission may make rules respecting the making of applications and representations to the Commission, and the conduct of proceedings held by it, under this Act.

EXPLANATION

This provision allows the Commission to make rules governing the procedure to be followed when the Commission is asked to review the appropriateness of preservation demands, notices to produce documents, and notices of violations.

RATIONALE

Rules are required to ensure an efficient, transparent and fair review regime. It is appropriate that the Commission be given the authority to make such rules as it is best placed to determine which rules will work best. Further, this provision confirms the legal principle that administrative tribunals, such as the Commission, are responsible for their own procedure.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
37	(2)	**Forms and content of demands and notices**

PROPOSED WORDING

(2) The Commission may establish the form and content of demands under section 15, notices to prepare or produce documents under section 17 and notices of violation under section 22.

EXPLANATION

This provision allows the Commission to ensure that the documents that trigger preservation demands and notice to produce as well as notices of violations are appropriately drafted, both in terms of content and as to form.

RATIONALE

This provision is necessary to make it clear that the Commission has the legal authority to establish the form and content of documents that constitute the primary tools available to the Commission to promote compliance with the requirements of the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
38	38	**Evidence**

PROPOSED WORDING

38. A preservation demand under section 15, a notice to prepare or produce documents under section 17, a notice of violation under section 22, a copy of a decision under section 16, 18 or 25 or an order of the Commission under section 26, that appears to have been served is admissible in evidence in a proceeding without proof of the signature or official character of the person who appears to have signed it.

EXPLANATION

This clause is a rule of evidence which provides that documents issued by a designated person and copies of the Commission's decisions are admissible as evidence in a proceeding regarding a violation of the Bill. The proof of the signature or official character of the person who appears to have signed the documents requesting production is not required.

RATIONALE

This provision is necessary to ensure that documents gathered under the powers provided to and in the course of an investigation by the Commission can be directly admitted as evidence for any proceeding. This provision dispenses with the requirement in the law of evidence to prove the authenticity of a document.

BACKGROUND

It is common to find statutory provisions exempting proof of genuineness of official seals, signatures and publications emanating from a government agency.

Bill Clause No.	Section No.	Topic
39	(a)	**Information may be made public**

PROPOSED WORDING

39. The Commission may make public

(*a*) the name of a person who enters into an undertaking, the nature of the undertaking including the acts or omissions and provisions at issue, the conditions included in the undertaking and the amount payable under it, if any; or

EXPLANATION

This subsection allows the Commission to publicly release information about a person who has violated the Act once they have entered into an undertaking with the Commission. For example, information may be released on the Commission's web site or in a press release. This information can include information about the violator, the violation and/or the terms of the undertaking.

RATIONALE

Publicly releasing information about violations serves three purposes:

First, individuals or businesses that send commercial electronic messages will be clearly made aware of the negative consequences of violating the Act. This awareness will help encourage individuals and businesses to voluntarily comply with the requirements, reducing the need for future investigations and enforcement activity.

Second, the information will provide a level of public accountability and awareness. Canadians will be able to understand what enforcement actions were pursued and against which individuals or businesses. Further, Canadians will be able to adapt their behaviour based on this information, *e.g.*, they may choose to be more cautious in their relationships with certain individuals or businesses.

Finally, publishing this information provides a readily accessible source of information for people who are considering a private right of action. Subsection 48(1)(a) states that the court may not consider an application for a private right of action for statutory damages if the person has entered into an undertaking. Therefore, providing upfront information about undertakings will serve to notify potential applicants that statutory damages are not available in respect of the acts or omissions identified in the undertaking.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
39	(b)	**Information may be made public**

PROPOSED WORDING

39. The Commission may make public

(*b*) the name of a person who is deemed, or is found by the Commission or on appeal, to have committed a violation, the acts or omissions and provisions at issue and the amount payable as a result, if any.

EXPLANATION

This subsection allows the Commission to publicly release information about a person who is deemed to have violated the Act (*i.e.*, by either paying the penalty set out in a notice of violation or failing to pay or make representations) or who is determined by the Commission, after considering representations made by the person, to have committed the violation and the person has had an opportunity to appeal. For example, information may be released on the Commission's web site or in a press release. This information can include information about the violator, the violation and/or the amount payable.

RATIONALE

Publicly releasing information about violations serves three purposes:

First, individuals or businesses that send commercial electronic messages will be clearly made aware of the negative consequences of violating the Act. This awareness will help encourage individuals and businesses to voluntarily comply with the requirements, reducing the need for future investigations and enforcement activity.

Second, the information will provide a level of public accountability and awareness. Canadians will be able to understand what enforcement actions were pursued and against which individuals or businesses. Further, Canadians will be able to adapt their behaviour based on this information, e.g., they may choose to be more cautious in their relationships with certain individuals or businesses.

Finally, publishing this information provides a readily accessible source of information for people who are considering a private right of action. Clause 48(1)(a) states that the court may not consider an application for a private right of action for statutory damages if the person has been served with a notice of violation. Therefore, providing upfront information about people

who have been found or are deemed to have committed a violation will serve to notify potential applicants that statutory damages are not available in respect of the acts or omissions identified in the notice of violation.

Bill Clause No.	Section No.	Topic
40	(1)	**Enforcement**

PROPOSED WORDING

40. (1) A demand served under section 15, a notice served under section 18, an undertaking entered into under section 21 and an order of the Commission made under section 26 may be made an order of a court of competent jurisdiction and may be enforced in the same manner as an order of that court as if it had been an order of that court on the date it was served, in the case of a demand, notice or order, or entered into, in the case of an undertaking.

EXPLANATION

This subsection provides that a preservation demand, a production notice, an undertaking and an order of the Commission to cease committing a violation based on a finding of liability can be made an order of a court of competent jurisdiction and can be enforced as a court order on the date the demand or notice was served, the undertaking was entered into, or the order was made. The procedure for doing so is described in subsection (2).

RATIONALE

This provision is intended to make a preservation demand, a production notice or an undertaking made by a designated person and restraining orders issued by the Commission enforceable as if they had been issued by a court of competent jurisdiction, so as to encourage compliance and facilitate the enforcement of the demand, notice, undertaking or restraining order, as the case may be. It is anticipated that TSPs that receive preservation demands, persons who receive production notices and those who enter into undertakings will comply because it is in their interest to do so.

BACKGROUND

The act of disobeying a court order is subject to federal and provincial procedural court rules respecting contempt of court.

Bill Clause No.	Section No.	Topic
40	(2)	**Procedure**

PROPOSED WORDING

(2) The demand, notice, undertaking or order may be made an order of a court of competent jurisdiction by the filing with the registrar of the court of

(*a*) a copy of the demand certified by a person designated for the purpose of section 15;

(*b*) a copy of the notice certified by a person designated for the purpose of section 17;

(*c*) a copy of the undertaking certified by a person designated for the purpose of section 21; or

(*d*) a copy of the order certified by the secretary to the Commission.

EXPLANATION

This subsection specifies that in order for a demand, notice, undertaking or cease order to become an order of a court of competent jurisdiction, a certified copy of the same must be filed with the registrar of the court of competent jurisdiction.

RATIONALE

This subsection is necessary to set out the procedure through which a demand, notice, undertaking or restraining order can be made an order of a court of competent jurisdiction pursuant to subsection (1).

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
40	(3)	**Rescission or variation**

PROPOSED WORDING

(3) On application by a person designated for the purpose of section 21 and a person who has entered into an undertaking that has been filed in a court of competent jurisdiction, that court shall rescind or vary the undertaking if it finds that another undertaking in relation to the same acts or omissions has been entered into by the person.

EXPLANATION

This subsection deals with the rescission and variation of undertakings. It imposes a duty on the court to rescind or vary an undertaking that has been filed in a court of competent jurisdiction on application of both parties to the undertaking, if it finds that another undertaking in relation to the same acts or omissions covered by the undertaking has been entered into by the alleged contravener.

RATIONALE

This provision is meant to address circumstances where changes are made to an undertaking that has already been filed in court and seeks to ensure that whatever changes are made are reflected in the undertaking filed in court, or that the original undertaking filed in court is revoked, so as to allow for the filing of the new one.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
41	(1)	**Injunction**

PROPOSED WORDING

41. (1) If, on the application of a person designated for the purpose of this section, a court of competent jurisdiction is satisfied that a person is about to do or is likely to do anything that constitutes or is directed toward the contravention of any of sections 6 to 9, the court may issue an injunction ordering any person named in the application

(*a*) to refrain from doing anything that, in the opinion of the court, constitutes or is directed toward the contravention of that section; or

(*b*) to do anything that, in the opinion of the court, may prevent the contravention of that section.

EXPLANATION

This subsection deals with interim and interlocutory injunctions. It empowers the court of competent jurisdiction, where it is satisfied on application by a designated person that a person is about to do or is likely to do anything that constitutes or is directed toward a contravention of the Act, to issue an injunction ordering the person to either refrain from doing anything that constitutes or is directed toward the contravention in the opinion of the court, or to do anything that may prevent the contravention in the opinion of the court.

RATIONALE

This provision provides the legal authority for a designated person to take urgent action and apply to court for an injunction in order to stop potentially violating acts or omissions during the course of an investigation, before a notice of violation is issued. This provision may particularly be useful in cases where a designated person becomes aware of, for example, the unauthorized installation of software on computers. Fast interim injunctive relief pending the investigation would ensure that the potential violator is enjoined from installing the software until a decision is made as to whether a notice of violation will be issued or until such time as the court determines.

BACKGROUND

The court will be guided by applicable procedural rules relating to interlocutory and interim injunctions (for instance, *Federal Court Rules* 373 and 374) as well as common law principles.

Bill Clause No.	Section No.	Topic
41	(2)	**Notice**

PROPOSED WORDING

(2) No injunction may be issued unless 48 hours' notice is given to every person named in the application or the urgency of the situation is such that service of the notice would not be in the public interest.

EXPLANATION

This subsection provides that 48 hours' notice must be given to every person named in the application for an interlocutory injunction. The notice requirement is waived in the case of an application for interim injunction, where the application is made *ex parte* because the urgency of the situation is such that service of the notice would not be in the public interest.

RATIONALE

This provision imposes a procedural fairness requirement to notify persons who are the subject of an application for interlocutory injunction to make them aware of the proceedings undertaken against them so as to allow them to make representations to challenge the application. It also ensures, on the other hand, that in cases of great urgency a designated person can obtain an interim injunction on an *ex parte* basis. Interim injunctions are exceptionally ordered, typically for a short period of time (*e.g.*, no more than 14 days as per s. 374 of the *Federal Court Rules*) and are often followed by applications for interlocutory injunctions at which time the person named in the application would be given notice and the opportunity to be heard.

BACKGROUND

This procedural rule is common in statutes containing interim and interlocutory injunction provisions.

Bill Clause No.	Section No.	Topic
42	42	**Non-compliance**

PROPOSED WORDING

42. Every person who refuses or fails to comply with a demand made under section 15 or a notice issued under section 17 or who contravenes subsection 19(4) commits an offence.

EXPLANATION

This section creates an offence for the act of refusing or failing to comply with a preservation demand or a production notice issued by a designated person. It also creates an offence for failing to give all assistance that is reasonably required and any documents, data and information required in the execution of a warrant by a designated person.

RATIONALE

This provision is intended to indicate that a refusal or failure to comply with a preservation demand, a production notice or the obligation to assist in the execution of a warrant constitutes behaviour that seriously undermines the enforcement of the Act, and should be therefore be an offence under BILL C-28.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
43	43	**Obstruction and false information**

PROPOSED WORDING

43. Every person who obstructs or hinders, or knowingly makes a false or misleading statement or provides false or misleading information to, a designated person who is carrying out their duties and functions under this Act commits an offence.

EXPLANATION

This section creates an offence for obstructing or hindering a designated person in carrying out their duties under the Act, and for knowingly making a false or misleading statement or providing false or misleading information to the designated person.

RATIONALE

This provision is intended to indicate that obstructing or hindering a designated person in carrying out their duties under the Act, or knowingly making a false or misleading statement or providing false or misleading information to a designated person constitutes behaviour that seriously undermines the enforcement of the Act, and should be therefore be an offence under BILL C-28.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
44	44	**Directors and officers of corporations**

PROPOSED WORDING

44. An officer, director, agent or mandatary of a corporation that commits an offence is a party to and liable for the offence if they directed, authorized, assented to, acquiesced in or participated in the commission of the offence, whether or not the corporation is proceeded against.

EXPLANATION

This section provides that an officer, director, agent or mandatary of a corporation that commits an offence under s. 42 for non-compliance or s. 43 for obstruction or false information, is a party to and is liable for the offence to the extent that they directed, authorized, assented to, acquiesced in or participated in the commission of the offence, regardless if the corporation itself is the subject of prosecution for the offence.

RATIONALE

This section is intended to ensure that corporate leaders and representatives cannot avoid responsibility and liability for the actions of their organizations.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
45	45	**Vicarious liability**

PROPOSED WORDING

45. A person is liable for an offence that is committed by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee, agent or mandatary is identified or proceeded against.

EXPLANATION

This section is a form of strict, secondary liability provision which establishes that an employer is liable for an offence committed under section 42 for non-compliance or section 43 for obstruction or false information by their employee while acting within the scope of their employment, or by their agent or mandatary while acting within the scope of their authority, regardless if the employee, agent or mandatary is the subject of prosecution.

RATIONALE

It is a recognized principle in common law and civil law that employers are vicariously liable for negligent acts or omissions made by their employees in the course of employment. This principle is extended for the purposes of the offences set out in sections 42 and 43. This provision ensures that the employer responsible for any person who commits an offence under these sections in the course of their employment is accountable for the offence committed under their supervision and control.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
46	(1)	**Offence**

PROPOSED WORDING

46. (1) Every person who commits an offence under section 42 or 43 is guilty of an offence punishable on summary conviction and is liable

(*a*) to a fine of not more than $10,000 for a first offence or $25,000 for a subsequent offence, in the case of an individual; or

(*b*) to a fine of not more than $100,000 for a first offence or $250,000 for a subsequent offence, in the case of any other person.

EXPLANATION

This subsection establishes that persons who commit an offence under sections 42 or 43 are guilty of an offence punishable on summary conviction and establishes maximum fines that such persons are liable to pay for a violation of sections 42 or 43. It distinguishes between fines that may be imposed on individuals and on any other persons and between first and subsequent offences.

RATIONALE

This provision is necessary to establish sanctions that should be applied against those who commit offences under sections 42 and 43 that undermine the investigation process and effectiveness of the Act. The penal offenses established in this provision (in conjunction with sections 42 and 43) are to be distinguished from the regulatory violations that exist elsewhere in the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
46	(2)	**Defence**

PROPOSED WORDING

(2) A person shall not be convicted of an offence under section 42 if they establish that they exercised due diligence to prevent the commission of the offence.

EXPLANATION

This provision seeks to ensure that a person who is able to demonstrate that they have taken reasonable care in the circumstances to avoid the commission of the offence described in section 42 is not liable under this section.

RATIONALE

This provision seeks to ensure that a persons who can demonstrated that they have acted with a certain level of care are not liable under the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
47	(1)	**Application**

PROPOSED WORDING

47. (1) A person who alleges that they are affected by an act or omission that constitutes a contravention of any of sections 6 to 9 of this Act or of section 4 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act — or that constitutes conduct that is reviewable under section 74.011 of the *Competition Act* — may apply to a court of competent jurisdiction for an order under section 51 against one or more persons who they allege have committed the act or omission, who they allege are liable for the contravention by reason of section 52 or 53 or who they allege have engaged in the reviewable conduct.

EXPLANATION

The Bill creates two distinct enforcement mechanisms. The first is related to the Commission's ability to investigate and impose administrative monetary penalties. The second mechanism, the private right of action, allows individuals to pursue remedies against persons that violate the Bill.

The private right of action allows anyone who is affected by an act or omission of sections 6 to 9 of the Act (or relevant provisions under the *Personal Information Protection and Electronic Documents Act* and the *Competition Act*), to bring an application before a competent court. Apart from actual loss or damage suffered or expenses incurred by that individual or that corporation, statutory damages can also be granted to that individual or corporation.

Note that statutory damages cannot be awarded in respect of a violation where administrative monetary penalties have already been imposed.

RATIONALE

A private right of action provides an effective enforcement mechanism that allows affected individuals to pursue remedies against violators of the Act. This serves two main objectives. First, it provides an opportunity for affected individuals to be compensated for losses resulting from violations of the Act. Second, it provides an alternative enforcement mechanism where state agencies are unable to pursue all violations of the Act.

BACKGROUND

This remedy has been found to be effective in anti-spam legislation in various jurisdictions in the United States.

Bill Clause No.	Section No.	Topic
47	(2)	**Limitation period**

PROPOSED WORDING

(2) Unless the court decides otherwise, no application may be brought later than three years after the day on which the subject matter of the proceeding became known to the applicant.

EXPLANATION

The limit time for bringing an application is three year after the day on which the subject matter of the proceeding became known to the applicant unless the court decides otherwise.

RATIONALE

Three years is a reasonable period to bring a private right of action.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
47	(3)	**Affidavit to accompany application**

PROPOSED WORDING

(3) The application must be accompanied by an affidavit that identifies the alleged contravention or reviewable conduct, sets out every provision, act or omission at issue and any other facts in support of the application and, if the applicant claims that they have suffered an actual loss or damage, or have incurred expenses, as a result of the alleged contravention or reviewable conduct, states the nature and amount of the loss, damage or expenses.

EXPLANATION

This provision establishes certain information that must be included in an affidavit accompanying an application respecting the private right of action.

RATIONALE

This subsection ensures that applications to court contain all relevant and required information in terms of facts, alleged contraventions and damages, which will assist the court in making a decision.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
47	(4)	**Notice**

PROPOSED WORDING

(4) The applicant shall, without delay, serve a copy of the application on every person against whom an order is sought, on the Commission if the application identifies a contravention of this Act, on the Commissioner of Competition if the application identifies conduct that is reviewable under section 74.011 of the *Competition Act* and on the Privacy Commissioner if the application identifies a contravention of the *Personal Information Protection and Electronic Documents Act*.

EXPLANATION

This subsection imposes a duty on the applicant which will ensure that all relevant parties are notified of the application.

RATIONALE

It is necessary for parties to an action to be notified of the application and provided with enough information to allow them to participate in the proceeding, and to notify the appropriate enforcement agency of the existence of a civil action seeking statutory damages under paragraph 51(1)(b), which would prevent the issuance of notice of violations or undertakings as per subsection 48(3). With notification, the relevant agency will be able to make a decision as to whether or not it seeks to intervene.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
48	(1)	**Limitation**

PROPOSED WORDING

49. (1) The court may not consider an application for an order against a person under paragraph 51(1)(*b*) that alleges a contravention of any of sections 6 to 9

(*a*) if the person has entered into an undertaking under subsection 21(1), or has been served with a notice of violation under subsection 22(1), in connection with the act or omission referred to in the application; or

(*b*) if the person is liable for the contravention by virtue of section 52 or 53 and the corporation, employee, agent or mandatary, as the case may be, who committed the contravention has entered into an undertaking under subsection 21(1), or has been served with a notice of violation under subsection 22(1), in connection with the act or omission referred to in the application.

EXPLANATION

The court may not consider an application to impose statutory damages pursuant to subsection 51(1)(b) if the person who has presumably committed violations in relation with sections 6 to 9 – or a person who is liable as Directors, Officers or vicarious liability – has entered into an undertaking or has been served with a notice of violation in connection with the act or omission referred to in the application.

RATIONALE

A court may not impose statutory damages against a person who has already paid administrative monetary penalties or has entered into an undertaking with reference to the same violations.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
48	(2)	**Certification by Commission**

PROPOSED WORDING

(2) At the written request of a person against whom an order under paragraph 51(1)(*b*) is sought, the Commission must, within 10 business days after the day on which the request is made, if it is so satisfied, certify in writing to the court that the person is liable for the contravention by virtue of section 52 or 53 and that an undertaking has been entered into, or a notice of violation has been served, in connection with the act or omission referred to in the application for the order. If such a certification is given, the court may not consider the application.

EXPLANATION

Where a person is, by application of sections 52 or 53 in their capacity as directors or officers of a corporation or by vicarious liability, the subject of a civil action seeking statutory damages under paragraph 51(1)(b), and that the corporation, employee, agent or mandatory, as the case may be, who committed the contravention has entered into an undertaking or has been served a notice of violation in relation to an act or omission with respect to sections 6 to 9, the Commission must provide, at the written request of that person, certification of such to a court so that the application be set aside in relation to the same act or omission.

RATIONALE

It is necessary that the CRTC provide such certification in order to ensure that a person is not unfairly required to defend themselves in the context of a private action.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
48	(3)	**Effect of application**

PROPOSED WORDING

(3) If the court determines that it may consider an application for an order against a person under paragraph 51(1)(*b*), then, unless the application is discontinued in respect of that person,

(*a*) no undertaking by the person may be entered into under subsection 21(1), and no notice of violation may be issued to them under subsection 22(1), in connection with an act or omission referred to in an application; and

(*b*) no undertaking by the corporation, employee, agent or mandatary who committed the contravention may be entered into under subsection 21(1), and no notice of violation may be issued to that corporation, employee, agent or mandatary under subsection 22(1), in connection with an act or omission referred to in an application.

EXPLANATION

Once a court determines that it may consider an application for an order against a person to pay statutory damages, then, unless the application is discontinued in respect of that person, no undertaking by the person, or if applicable the corporation, employee, agent, mandatory, may be entered into.

RATIONALE

Whereas subsection 48(1) states that an application for statutory damages cannot be considered against a person who has entered into an undertaking or received a notice of violation, the purpose of this provision is to ensure that a person cannot avoid being the subject of an application for statutory damages by entering into an undertaking after a private right of action has been commenced in respect of the same acts or omissions.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
49	49	**Notice of discontinuance**

PROPOSED WORDING

49. If an application for an order under paragraph 51(1)(*b*) is discontinued in respect of a person, the applicant shall, without delay, notify everyone who was served with a copy of the application under subsection 47(4) of the discontinuance.

EXPLANATION

This subsection imposes a duty on the applicant to immediately notify everyone who was served with a copy of the application of the discontinuance of the application.

RATIONALE

Every person to whom a copy of the application was served pursuant to subsection 47(4) should be made aware without delay that such an application is discontinued.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
50	50	**Right to intervene**

PROPOSED WORDING

50. The following may intervene in any proceedings in connection with an application under subsection 47(1) for an order under paragraph 51(1)(*b*) and in any related proceedings:

(*a*) the Commission, if the application identifies a contravention of this Act;

(*b*) the Commissioner of Competition, if the application identifies conduct that is reviewable under the *Competition Act*; and

(*c*) the Privacy Commissioner, if the application identifies a contravention of the *Personal Information Protection and Electronic Documents Act*.

EXPLANATION

The CRTC (if the application identifies a contravention of this Bill), the Commissioner of Competition (if the application identifies conduct that is reviewable under the *Competition Act*) and the Privacy Commissioner (if the application identifies a contravention of the *Personal Information Protection and Electronic Documents Act*) may intervene in any proceeding in connection with a private right of action seeking statutory damages.

RATIONALE

Clause 50 ensures that the CRTC, the Commissioner of Competition or the Privacy Commissioner are allowed to intervene in civil proceedings seeking statutory damages and make representations in particular as to whether administrative monetary penalties have already been imposed by them.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
51	(1)	**Order**

PROPOSED WORDING

51. (1) If, after hearing the application, the court is satisfied that one or more persons have contravened any of the provisions referred to in the application or engaged in conduct referred to in it that is reviewable under section 74.011 of the *Competition Act*, the court may order the person or persons, as the case may be, to pay the applicant

(*a*) compensation in an amount equal to the actual loss or damage suffered or expenses incurred by the applicant; and

(*b*) a maximum of

(i) in the case of a contravention of section 6, $200 for each contravention of that provision, not exceeding $1,000,000 for each day on which a contravention occurred,

(ii) in the case of a contravention of section 7 or 8, $1,000,000 for each day on which a contravention occurred,

(iii) subject to subparagraphs (iv) and (v), in the case of a contravention of section 10, $1,000,000 for each contravention of that provision,

(iv) in the case of a contravention of section 9 resulting from procuring, or causing to be procured, the doing of an act contrary to section 6, and if a contravention of section 6 has resulted, $200 for each such contravention of section 6, not exceeding $1,000,000 for each day on which a contravention of section 6 occurred,

(v) in the case of a contravention of section 9 resulting from procuring, or causing to be procured, the doing of an act contrary to section 7 or 8, and if a contravention of either of those sections has resulted, $1,000,000 for each day on which a contravention of section 7 or 8, as the case may be, occurred,

(vi) in the case of a contravention of section 5 of the *Personal Information Protection and Electronic Documents Act*, $1,000,000 for each day on which a contravention occurred, and

(vii) in the case of conduct that is reviewable under section 74.011 of the *Competition Act*, $200 for each occurrence of the conduct, not exceeding $1,000,000 for each day on which the conduct occurred.

EXPLANATION

Clause 51 provides two forms of remedies that can be awarded to an application: (1) compensation in an amount equal to the actual loss or damage suffered or expenses incurred by the applicant; and, (2) in most cases, damages ranging from a maximum of $200 for each contravention to $1,000,000 for each contravention or for each day on which the contravention occurred.

RATIONALE

Persons affected by a contravention of the Act or related contraventions in the *Competition Act* and PIPEDA should be given the legal means to apply to court in order to obtain compensation for the loss or damage they have suffered as a result of a contravention. However, statutory damages are an effective deterring remedy, especially where loss cannot easily be proven.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
51	(2)	**Purpose of order**

PROPOSED WORDING

(2) The purpose of an order under paragraph (1)(*b*) is to promote compliance with this Act, the *Personal Information Protection and Electronic Documents Act* or the *Competition Act*, as the case may be, and not to punish.

EXPLANATION

This subsection makes clear that the underlying objective of awarding damages in private actions is to encourage compliance with the regulatory parameters of the BILL C-28, PIPEDA and the *Competition Act*. Such penalties are not intended to serve as a punishment.

RATIONALE

This subsection seeks to highlight the regulatory nature of the Act and to distinguish it from a criminal framework, which is used to punish behaviour that causes a wrong to society as a whole.

BACKGROUND

Damages awarded in civil litigation are to be distinguished from fines. They are provided for to encourage compliance with regulatory norms.

Bill Clause No.	Section No.	Topic
51	(3)	**Factors to be considered**

PROPOSED WORDING

(3) The court shall consider the following factors when it determines the amount payable under paragraph (1)(*b*) for each contravention or each occurrence of the reviewable conduct:

(*a*) the purpose of the order;

(*b*) the nature and scope of the contravention or reviewable conduct;

(*c*) the person's history, or each person's history, as the case may be, with respect to any previous contravention of this Act and of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act and of conduct that is reviewable under section 74.011 of the *Competition Act*;

(*d*) the person's history, or each person's history, as the case may be, with respect to any previous undertaking entered into under subsection 21(1) and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* that relates to acts or omissions that constitute conduct that is reviewable under section 74.011 of that Act;

(*e*) any financial benefit that the person or persons obtained from the commission of the contravention or from engaging in the reviewable conduct;

(*f*) the person's or persons' ability to pay the total amount payable;

(*g*) whether the applicant has received compensation in connection with the contravention or the reviewable conduct;

(*h*) the factors established by the regulations; and

(*i*) any other relevant factor.

EXPLANATION

This subsection establishes a number of factors to be considered by the court when determining an amount payable as a statutory damage.

RATIONALE

The criteria in this subsection provide necessary guidance to ensure consistency and fairness in the awarding of statutory damages.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
52	52	**Directors and officers of corporations**

PROPOSED WORDING

52. An officer, director, agent or mandatary of a corporation that commits a contravention of any of sections 6 to 9 of this Act or of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or that engages in conduct that is reviewable under section 74.011 of the *Competition Act*, is a party to and liable for the contravention if they directed, authorized, assented to, acquiesced in or participated in the commission of the contravention, or is deemed to have engaged in the conduct if they directed, authorized, assented to, acquiesced in or participated in the conduct, whether or not the corporation is proceeded against.

EXPLANATION

This clause provides that any officer, director, agent or mandatory of a corporation that participates in the contravention of the BILL C-28 or relevant portions of the *Personal Information Protection and Electronic Documents Act* or the *Competition Act* is liable for that violation regardless of whether an order is sought against the corporation.

RATIONALE

This section acts as a deterrent against violations of the Bill as it holds that directors, employees and agents of a corporation will not be able to hide behind the corporate veil and will be liable if they have assisted the corporation in committing the contravention. Additionally, the clause facilitates private actions as it expands the parties against whom a private litigant may seek an order.

Persons acting for and making decisions on behalf of corporations that commit contraventions should be liable since they direct the corporations' actions, and should not be shielded by the corporation.

BACKGROUND

Clause 52 does not alter proceedings by the Commissioner of Competition under the *Competition Act*. The Commissioner of Competition may proceed against an officer, director, agent or mandatory of a corporation that engages in conduct that is reviewable under s. 74.011 of the *Competition Act*, regardless of the omission of clause similar to clause 52 in that Act, as per the common law.

Bill Clause No.	Section No.	Topic
53	53	**Vicarious Liability**

PROPOSED WORDING

53. A person is liable for a contravention of any of sections 6 to 9 of this Act or of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or for conduct that is reviewable under section 74.011 of the *Competition Act*, that is committed or engaged in, as the case may be, by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee, agent or mandatary is identified or proceeded against.

EXPLANATION

This section provides for a form of strict, secondary liability for any person who employs a person who commits a violation while acting within the scope of their duties or requirements, is liable for that violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, regardless of whether the employee, agent or mandatary is proceeded against. It notes that the superior is responsible for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator.

RATIONALE

Employers are generally vicariously liable for negligent acts or omissions by their employees in the course of employment. For an act to be considered within the course of employment it must either be authorized or be so connected with an authorized act that it can be considered a means, though an improper means of performing the authorized act. This provision is included here to ensure that any person who violates the act will be liable and not immune just because the violation was actually committed by the employee.

BACKGROUND

Clause 53 does not alter proceedings by the Commissioner of Competition under the *Competition Act*. Employers remain vicariously liable for the acts or omissions of their employees who engage in conduct that is reviewable under s. 74.011 the *Competition Act*, regardless of the omission of a clause similar to clause 53 in that Act, as per the common law.

Bill Clause No.	Section No.	Topic
54	(1)	**Defence**

PROPOSED WORDING

54. (1) A person shall not be found to have committed a contravention of any of sections 6 to 9 of this Act or of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or to have engaged in conduct that is reviewable under section 74.011 of the *Competition Act*, if they establish that they exercised due diligence to prevent the contravention or conduct, as the case may be.

EXPLANATION

This clause provides a defence to a private action where a person has acted with due diligence.

RATIONALE

The clause protects legitimate electronic commerce by ensuring that persons that have acted with a reasonable level of responsibility and care should not be considered to have contravened the Bill in the context of a private action. It will also provide an incentive to exercise reasonable care.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
54	(2)	**Common law principles**

PROPOSED WORDING

(2) Every rule and principle of the common law that makes any circumstance a justification or excuse in relation to a charge for an offence applies in respect of a contravention of any of sections 6 to 9 of this Act or of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or in respect of conduct that is reviewable under section 74.011 of the *Competition Act*, to the extent that it is not inconsistent with this Act or the *Personal Information Protection and Electronic Documents Act* or the *Competition Act*, as the case may be.

EXPLANATION

This subsection provides that persons may be absolved from liability based on defences that exist at common law.

RATIONALE

The clause protects legitimate electronic commerce by ensuring that a person whose actions are excused or justified by a common law rule or principle should not be considered to have contravened the bill in the context of a private action.

It is important not to unintentionally interfere with the wide body of common law; rather, the common law should only be invalidated when inconsistent with the objectives of a given act. Besides the defence of due diligence, other common law defences that may be raised in relation to an offence should be made available to a defendant to a private action.

BACKGROUND

The omission of a clause similar to clause 54(2) from the *Competition Act* does not alter the availability of common law defences in proceedings under that Act.

Bill Clause No.	Section No.	Topic
55	55	**Liability**

PROPOSED WORDING

55. If more than one person is determined by the court under subsection 51(1) to have contravened any of the provisions referred to in an application under subsection 47(1) or to have engaged in conduct referred to in an application under subsection 47(1) that is reviewable under section 74.011 of the *Competition Act*, those persons are jointly and severally, or solidarily, liable for the payment of the amounts ordered to be paid under subsection 51(1) in respect of the contravention or reviewable conduct.

EXPLANATION

Clause 55 ensures that potential defendants to a private action under the Act in respect of a given act or omission are jointly and severally, or solidarily, liable.

RATIONALE

As commonly found in general rules of civil procedure, this provision ensures that a plaintiff need only apply for an order to execute their damage award against a single defendant for the entire amount owing to that plaintiff, even if multiple defendants were held liable for the contravention which gave rise to the award. Apportionment of liability is left to the defendants.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
56	56	**Disclosure by an organization**

PROPOSED WORDING

56. Despite subsection 7(3) of the *Personal Information Protection and Electronic Documents Act*, any organization to which Part 1 of that Act applies may on its own initiative disclose to the Commission, the Commissioner of Competition or the Privacy Commissioner any information in its possession that it believes relates to

(*a*) a contravention of

(i) any of sections 6 to 9,

(ii) section 52.01 of the *Competition Act* or, in respect of conduct carried out by electronic means, section 52, 52.1, 53, 55 or 55.1 of that Act,

(iii) section 5 of the *Personal Information Protection and Electronic Documents Act*, which contravention relates to a collection or use described in subsection 7.1(2) or (3) of that Act, or

(iv) any prohibition or requirement of the Commission, in respect of conduct carried out by electronic means, under section 41 of the *Telecommunications Act*; or

(*b*) conduct that is reviewable under section 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, under section 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act.

EXPLANATION

Clause 56 permits an organization to disclose information to the CRTC, the Commissioner of Competition, or the Privacy Commissioner if the organization believes the information relates to a contravention of BILL C-28 or the related provisions in the *Competition Act,* the *Personal Information Protection and Electronic Documents Act* (PIPEDA), or the *Telecommunications Act*.

RATIONALE

This clause encourages organizations to disclose information to the CRTC, the Commissioner of Competition, and the Privacy Commissioner by providing transparent rules as to when information may be disclosed. Absent this provision, an organization would be subject to the disclosure regime in PIPEDA or in provincial privacy laws.

Bill Clause No.	Section No.	Topic
57	57	**Consultation**

PROPOSED WORDING

57. The Commission, the Commissioner of Competition and the Privacy Commissioner shall consult with each other to the extent that they consider appropriate to ensure the effective regulation, under this Act, the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* and the *Telecommunications Act*, of commercial conduct that discourages the use of electronic means to carry out commercial activities, and to coordinate their activities under those Acts as they relate to the regulation of that type of conduct.

EXPLANATION

Clause 57 states that the CRTC, the Commissioner of Competition and the Privacy Commissioner are required to consult with each other and also coordinate their activities, to the extent each agency deems appropriate, in order to ensure effective regulation of electronic communications under BILL C-28 and related amendments to the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and the *Telecommunications Act*.

RATIONALE

This clause provides a transparent code for consultation and coordination among the three agencies responsible for administering and enforcing BILL C-28 and the related provisions of the *Competition Act*, the PIPEDA and the *Telecommunications Act*. This, in turn, allows for more efficient investigations and enforcement actions arising as a result of their concurrent jurisdiction over those related subject matters.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
58	(1)	**Disclosure by Commission**

PROPOSED WORDING

58. (1) The Commission may disclose information obtained by it in the performance or exercise of its duties or powers related to any of sections 6 to 9 of this Act and, in respect of conduct carried out by electronic means, to section 41 of the *Telecommunications Act*,

(*a*) to the Privacy Commissioner, if the Commission believes that the information relates to the performance or exercise of the Privacy Commissioner's duties or powers under Part 1 of the *Personal Information Protection and Electronic Documents Act* in respect of a collection or use described in subsection 7.1(2) or (3) of that Act; and

(*b*) to the Commissioner of Competition, if the Commission believes that the information relates to the performance or exercise of the Commissioner of Competition's duties or powers related to section 52.01 or 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, to section 52, 52.1, 53, 55, 55.1, 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act.

EXPLANATION

Clause 58 provides discretionary authority for the sharing of information obtained by the CRTC, gathered with respect to the prohibitions under BILL C-28 (ss. 6-9) and s. 41 of the *Telecommunications Act*, to the Commissioner of Competition or the Privacy Commissioner respectfully.

Information may be disclosed to the Commissioner of Competition if the CRTC believes that it relates to the Commissioner of Competition's powers or duties with respect to the new false or misleading online representation provisions of the *Competition Act* or in respect of false or misleading representations carried out by electronic means.

Information may be disclosed to the Privacy Commissioner if the CRTC believes that it relates to the Privacy Commissioner's powers or duties under Part 1 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) in respect of: (i) the collection or use of an individual's electronic address by an address harvesting computer program; or (ii) the unauthorized collection or use of personal information by a computer system.

RATIONALE

The clause provides a transparent code for sharing information among the three agencies responsible for administering and enforcing the Act (BILL C-28) and the related provisions of the *Competition Act*, the PIPEDA and the *Telecommunications Act* – the CRTC, Competition Bureau, and the Office of the Privacy Commissioner. Information sharing allows for greater cooperation and efficiency regarding coordinated investigations and enforcement actions.

BACKGROUND

This provision is related to the new s. 39(5.1) of the *Telecommunications Act* that would be added pursuant to section 88 of the Bill. If not for this new provision, the CRTC would be prohibited under section 38 of that Act from disclosing certain information obtained in the exercise of its duties and powers under the BILL C-28.

Bill Clause No.	Section No.	Topic
58	(2)	**Disclosure by Commissioner of Competition**

PROPOSED WORDING

(2) Despite section 29 of the *Competition Act*, the Commissioner of Competition may disclose information obtained by him or her in the performance or exercise of his or her duties or powers related to section 52.01 or 74.011 of that Act or, in respect of conduct carried out by electronic means, to section 52, 52.1, 53, 55, 55.1, 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act,

(*a*) to the Privacy Commissioner, if the Commissioner of Competition believes that the information relates to the performance or exercise of the Privacy Commissioner's duties or powers under Part 1 of the *Personal Information Protection and Electronic Documents Act* in respect of a collection or use described in subsection 7.1(2) or (3) of that Act; and

(*b*) to the Commission, if the Commissioner of Competition believes that the information relates to the administration of any of sections 6 to 9 of this Act or, in respect of conduct carried out by electronic means, of section 40 of the *Telecommunications Act*.

EXPLANATION

Clause 58 provides discretionary authority for the sharing of information obtained by the Commissioner of Competition, gathered with respect to the new false or misleading online representation provisions of the *Competition Act* or in respect of false or misleading representations carried out by electronic means, to the CRTC or the Privacy Commissioner respectfully.

Information may be disclosed to the Privacy Commissioner if the Commissioner of Competition believes that it relates to the Privacy Commissioner's powers or duties under Part 1 of PIPEDA in respect of: (i) the collection or use of an individual's electronic address by an address harvesting computer program; or (ii) the unauthorized collection or use of personal information by a computer system.

Information may be disclosed to the CRTC if the Commissioner of Competition believes that it relates to the CRTC's powers or duties with respect to the prohibitions under the BILL C-28 (ss. 6-9 LEDUCA2 Page 191 10/10/2012) or as it relates to conduct carried out by electronic means under s. 41 of the *Telecommunication Act.*

RATIONALE

The clause provides a transparent code for sharing information among the three agencies responsible for administering and enforcing the BILL C-28 and the related provisions of the *Competition Act,* the PIPEDA and the *Telecommunications Act* – the CRTC, Competition Bureau, and the Office of the Privacy Commissioner. Information sharing allows for greater cooperation and efficiency in coordinated investigations and enforcement actions.

BACKGROUND

The Commissioner of Competition is prohibited under s. 29 of the *Competition Act* from disclosing information obtained during the course of exercising her powers and duties under the deceptive marketing practices provisions of that Act except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of that Act. This provision would authorize the Commissioner of Competition to disclose such information to the Privacy Commissioner for the purposes of the exercise of the duties and powers of the Privacy Commissioner under PIPEDA.

Bill Clause No.	Section No.	Topic
58	(3)	**Disclosure by Privacy Commissioner**

PROPOSED WORDING

(3) The Privacy Commissioner may disclose information obtained by him or her in the performance or exercise of his or her duties or powers under Part 1 of the *Personal Information Protection and Electronic Documents Act* if the information relates to a collection or use described in subsection 7.1(2) or (3) of that Act or to an act alleged in a complaint in respect of which the Privacy Commissioner decides, under subsection 12(2) or 12.2(2) of that Act, to not conduct an investigation or to discontinue an investigation,

(*a*) to the Commissioner of Competition, if the Privacy Commissioner believes that the information relates to the performance or exercise of the Commissioner of Competition's duties or powers related to section 52.01 or 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, to section 52, 52.1, 53, 55, 55.1, 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act; and

(*b*) to the Commission, if the Privacy Commissioner believes that the information relates to the administration of any of sections 6 to 9 of this Act or, in respect of conduct carried out by electronic means, of section 41 of the *Telecommunications Act*.

EXPLANATION

Clause 58 provides discretionary authority for the sharing of information obtained by the Privacy Commissioner relating to address harvesting or the unauthorized collection of personal information by a computer system, to the CRTC or the Commissioner of Competition respectfully.

Information may be disclosed to the Commissioner of Competition if the Privacy Commissioner believes that it relates to the Commissioner of Competition's powers or duties with respect to the new false or misleading online representation provisions of the *Competition Act* or in respect of false or misleading representations carried out by electronic means.

Information may be disclosed to the CRTC if the Privacy Commissioner believes that it relates to the CRTC's powers or duties with respect to the prohibitions under the BILL C-28 (ss. 6-9) or to conduct carried out by electronic means under s. 41 of the *Telecommunications Act.*

RATIONALE

The clause provides a complete and transparent code for sharing information among the three agencies responsible for administering and enforcing the BILL C-28 and the related provisions of the *Competition Act*, the PIPEDA and the *Telecommunications Act* – the CRTC, Competition Bureau, and the Office of the Privacy Commissioner. Information sharing allows for greater cooperation and efficiency regarding coordinated investigations and enforcement actions. It is also related to the new section 20(6) of PIPEDA, proposed to be added by subclause 86(2).

BACKGROUND

In the absence of this provision the Privacy Commissioner would be prohibited under section 20 of PIPEDA from disclosing any information that obtained in the exercise of her powers and duties under that Act.

Bill Clause No.	Section No.	Topic
59	(1)	**Use of information by Commission**

PROPOSED WORDING

59. (1) The Commission may use the information that is disclosed to it under paragraph 58(2)(*b*) or (3)(*b*) only for the purpose of the administration of any of sections 6 to 9 of this Act or, in respect of conduct carried out by electronic means, of section 41 of the *Telecommunications Act*.

EXPLANATION

This subsection limits the use that the CRTC can make of information disclosed to it under paragraphs 58(2)(*b*) or 58(3)(b). It can be used only for the administration of the substantive provisions of BILL C-28, or section 41 of the *Telecommunications Act* as it relates to electronic commerce.

RATIONALE

The provision is designed to ensure that the information sharing regime set out in section 58, for the purposes of the effective and coordinated administration and enforcement of BILL C-28 and related provisions under the *Competition Act*, the *Personal Information and Protection of Electronic Documents Act* (PIPEDA*)* and the *Telecommunications Act* is used in a manner that is fair.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
59	(2)	**Use of information by Commissioner of Competition**

PROPOSED WORDING

(2) The Commissioner of Competition may use the information that is disclosed to him or her under paragraph 58(1)(*b*) or (3)(*a*) only for the purpose of the performance or exercise of the Commissioner's duties or powers related to section 52.01 or 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, to section 52, 52.1, 53, 55, 55.1, 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act.

EXPLANATION

This subsection limits the use that the Commissioner of Competition can make of information disclosed to him or her under paragraphs 58(1)(*b*) or 58(3)(*a*). It can be used only for performing or exercising the duties and powers under the new provisions of the *Competition Act* proposed by this bill or specific provisions of the *Competition Act* where the conduct relates to electronic commerce.

RATIONALE

The provision is designed to ensure that the information sharing regime set out in section 58, for the purposes of the effective and coordinated administration and enforcement of BILL C-28 and related provisions under the *Competition Act*, the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) and the *Telecommunications Act* is used in a manner that is fair.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
59	(3)	**Use of information by Privacy Commissioner**

PROPOSED WORDING

(3) The Privacy Commissioner may use the information that is disclosed to him or her under paragraph 58(1)(*a*) or (2)(*a*) only for the purpose of performing or exercising his or her duties or powers under Part 1 of the *Personal Information Protection and Electronic Documents Act* in respect of a collection or use described in subsection 7.1(2) or (3) of that Act.

EXPLANATION

This subsection limits the use that the Privacy Commissioner can make of information disclosed to him or her under paragraphs 58(1)(*a*) or 59(2)(*a*). It can be used only for performing or exercising the duties and powers of the electronic commerce-related provisions of PIPEDA.

RATIONALE

The provision is designed to ensure that the information sharing regime set out in section 58, for the purposes of the effective and coordinated administration and enforcement of BILL C-28 and related provisions under the *Competition Act*, the *Personal Information and Protection of Electronic Documents Act* (PIPEDA*)* and the *Telecommunications Act* is used in a manner that is fair.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
60	(1)	**Information shared with the government of a foreign state, etc.**

PROPOSED WORDING

60. (1) Information may be disclosed under an agreement or arrangement in writing between the Government of Canada, the Commission, the Commissioner of Competition or the Privacy Commissioner and the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, if the person responsible for disclosing the information believes that

(*a*) the information may be relevant to an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to

(i) conduct prohibited

(A) under any of sections 6 to 9, or

(B) under section 52.01 of the *Competition Act* or, in respect of conduct carried out by electronic means, under section 52, 52.1, 53, 55 or 55.1 of that Act,

(ii) conduct that contravenes section 5 of the *Personal Information Protection and Electronic Documents Act* and that relates to a collection or use described in subsection 7.1(2) or (3) of that Act,

(iii) conduct that is reviewable under section 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, under section 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act, or

(iv) conduct that contravenes any prohibition or requirement of the Commission, in respect of conduct carried out by electronic means, under section 41 of the *Telecommunications Act*; or

(*b*) the disclosure is necessary in order to obtain from that foreign state, organization or institution information that may be relevant for any of the following purposes and no more information will be disclosed than is required for that purpose:

(i) the administration of any of sections 6 to 9,

(ii) the performance or exercise by the Commissioner of Competition of his or her duties or powers related to section 52.01 or 74.011 of the *Competition Act* or, in respect of conduct carried out by electronic means, to section 52, 52.1, 53, 55, 55.1, 74.01, 74.02, 74.04, 74.05 or 74.06 of that Act,

(iii) the performance or exercise by the Privacy Commissioner of his or her duties or powers under Part 1 of the *Personal Information Protection and Electronic Documents Act* in respect of a collection or use described in subsection 7.1(2) or (3) of that Act, or

(iv) the administration, in respect of conduct carried out by electronic means, of section 41 of the *Telecommunications Act*.

EXPLANATION

This provision authorizes the Commissioner of Competition, the CRTC, and the Privacy Commissioner to share information with foreign states or international organizations who have responsibilities relating to the protection of electronic commerce similar to those under BILL C-28 and related amendments to the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and the *Telecommunications Act*.

Information may be disclosed by the Commissioner of Competition, the CRTC, and the Privacy Commissioner, as the case may be, to a foreign state or organization in two circumstances:

- Where the information may be relevant to a foreign investigation or proceeding involving conduct that is similar to that prohibited by the BILL C-28 or the related amendments to the *Competition Act*, the PIPEDA and the *Telecommunications Act.*
- Where the information is needed in order to obtain from the foreign state or organization relevant information related to the administration or enforcement of BILL C-28 or the related amendments to the *Competition Act*, the PIPEDA and the *Telecommunications Act***.**

RATIONALE

The investigation of online threats often requires international cooperation. The sharing of information with foreign governments and organizations is an essential mechanism to ensure effective international cooperative actions against violators of BILL C-28. Subsection 60(1) compliments the domestic prohibitions in BILL C-28, and the related amendments to the *Competition Act*, the PIPEDA and the *Telecommunications Act***,** by providing a mechanism by which information may be shared with foreign states and organizations in order to enables more effective international cooperation.

BACKGROUND

This provision is consistent with the following recommendations of the 2005 Task Force on Spam, which recognized the global dimensions of the spam problem:

- The federal government, in coordination with the provinces and territories, should conclude and implement cooperative agreements with other countries. These efforts should include examining and amending existing legislative provisions as required to allow for seamless international cooperative investigation and enforcement action.
- The federal government should continue to pursue bilateral agreements on anti-spam policies and strategies with foreign governments.
- The federal government, in consultation, collaboration and partnership with other stakeholders as appropriate, should actively promote and assist the coordinated international implementation of anti-spam policies, laws, regulations and enforcement measures; industry standards and practices; and public education and awareness initiatives.

As a general rule, information obtained by a governmental body or institution cannot be shared with another institution of a foreign state or international organization without either following the procedure set out in legislation respecting mutual legal assistance or other specific statutory authority.

Bill Clause No.	Section No.	Topic
60	(2)	**Restriction on use**

PROPOSED WORDING

(2) An agreement or arrangement referred to in subsection (1) must

(*a*) restrict the use of the information to purposes relevant to an investigation or proceeding in respect of a contravention of the laws of the foreign state that address conduct referred to in any of subparagraphs (1)(*a*)(i) to (iv); and

(*b*) stipulate that the information be treated in a confidential manner and not be further disclosed without the express consent of the person responsible for disclosing the information.

EXPLANATION

This subsection mandates that an agreement under which information may be disclosed to a foreign government or organization under BILL C-28 must contain provisions restricting the use and manner of use of such information. Namely, the agreement must stipulate that the information be used to administer electronic commerce laws substantially similar to those introduced by BILL C-28, and that it be treated confidentially and not further disclosed without consent.

RATIONALE

The provision is intended to ensure that the information sharing regime under agreements or arrangements with foreign governments and organizations are not used for purposes beyond those provided for in the Bill.

BACKGROUND

As a general rule, information obtained by a governmental body or institution cannot be shared with another institution of a foreign state or international organization without either following the procedure set out in legislation respecting mutual legal assistance or other specific statutory authority.

Bill Clause No.	Section No.	Topic
60	(3)	**Restriction arrangements**

PROPOSED WORDING

(3) An arrangement referred to in subsection (1) entered into by the Commission or the Privacy Commissioner may be in respect only of contraventions of the laws of a foreign state that have consequences that would not be considered penal under Canadian law.

EXPLANATION

This subsection ensures that information that is destined to support criminal proceedings are not disclosed under BILL C-28 that provides for lower standards of evidence gathering than would be the case in a criminal investigation in Canada.

RATIONALE

The provision is intended to ensure that the information sharing regime under agreements or arrangements with foreign governments and organizations are not used in situations to which higher Charter of Rights standards apply. It is also an important safeguard in order to protect Canadians and Canadian businesses information. This clause is related to those in Sections 15, 17 and 19.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
60	(4)	**Limitation**

PROPOSED WORDING

(4) The only information that may be disclosed under subsection (1) is information

(*a*) obtained in the course of assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct referred to in any of subparagraphs (1)(*a*)(i) to (iv); or

(*b*) obtained in the course of the activities described in any of subparagraphs (1)(*b*)(i) to (iv).

EXPLANATION

This subsection further narrows the scope of information subject to the international disclosure provision by specifying that only information collected through the administration of the substantive provisions of BILL C-28, and related amendments to other statutes, is eligible for disclosure under this section.

RATIONALE

The provision is intended to ensure that the information sharing regime under agreements or arrangements with foreign governments and organizations are not used for purposes beyond those provided for in the Bill.

BACKGROUND

As a general rule, information obtained by a governmental body or institution cannot be shared with another institution of a foreign state or international organization without either following the procedure set out in legislation respecting mutual legal assistance or other specific statutory authority.

Bill Clause No.	Section No.	Topic
60	(5)	**Clarification**

PROPOSED WORDING

(5) For the purposes of this section, an arrangement may be created by the acceptance, by the Government of Canada, the Commission, the Commissioner of Competition or the Privacy Commissioner, of a written request for assistance from the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, if the request is accompanied by a declaration that the party making the request will provide assistance to the party to whom the request is made on a reciprocal basis.

EXPLANATION

This subsection clarifies the minimum requirements that constitute an arrangement for purposes of international cooperation.

RATIONALE

The provision is intended to ensure that that Canada can benefit from simplified and expeditious information sharing arrangements with foreign governments and organizations on a reciprocal basis.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
61	61	**Reports to Minister of Industry**

PROPOSED WORDING

61. The Commission, the Commissioner of Competition and the Privacy Commissioner shall provide the Minister of Industry with any reports that he or she requests for the purpose of coordinating the implementation of sections 6 to 9 of this Act, sections 52.01 and 74.011 of the *Competition Act* and section 7.1 of the *Personal Information Protection and Electronic Documents Act*.

EXPLANATION

This subsection provides the Minister with the power to request information from the three enforcement agencies regarding the enforcement of the provisions in this act or provisions to other acts which are amended under this act.

RATIONALE

The provision is intended to ensure that the Minister of Industry has access to information from the enforcement agencies in order to ensure effective policy oversight for the act, monitor and report on the efficacy of the legislation, support international cooperation, coordinate activities with the private sector and manage the anti-spam reporting centre.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
62	62	**Mandate**

PROPOSED WORDING

62. The Commission is responsible for the administration of sections 6 to 46.

EXPLANATION

This section clarifies that the Commission is responsible for administrating sections 6 to 46 of BILL C-28.

RATIONALE

It is necessary to describe the responsibilities of the Commission under BILL C-28.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
63	(1)	**Appointment of experts, etc.**

PROPOSED WORDING

63. (1) The Commission may, with the approval of the Governor in Council, engage experts or other persons to assist the Commission in any matter.

EXPLANATION

This provision allows the Commission to engage experts outside of the public service to assist in any of its duties under the Bill. The Commission may engage such persons only to the extent that an Order in Council is approved to that effect.

RATIONALE

Given of the subject-matter of the legislation, expertise not typically available in the public service will be needed, on occasion, to provide assistance and guidance to the Commission in discharging its responsibilities. This provision will allow the Commission to engage persons at short notice and, thereby, provides the Commission with an important degree of flexibility in carrying out its functions.

BACKGROUND

This provision is based on sections 25 and 26 of the *Competition Act.*

Bill Clause No.	Section No.	Topic
63	(2)	**Remuneration**

PROPOSED WORDING

(2) The experts and other persons engaged by the Commission shall be paid the remuneration, and are entitled to be paid the travel and living expenses incurred in providing assistance to the Commission, as may be fixed by the Governor in Council.

EXPLANATION

This provision allows the Commission to pay experts and other persons rates that the Governor in Council considers to be appropriate.

RATIONALE

Given of the specialized nature of the work, it is sometimes necessary to pay experts rates that are higher than the standard public service rates. This provision will give the Commission the ability to hire appropriate persons that would not otherwise be available to undertake the specialized tasks necessary to assist the Commission in carrying out its mandate.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
63	(3)	**Remuneration and expenses payable out of appropriations**

PROPOSED WORDING

(3) The remuneration and expenses of the experts and other persons engaged by the Commission shall be paid out of money appropriated by Parliament to defray the cost of administering this Act.

EXPLANATION

This provision makes it clear that the fees and expenses of the persons hired by the Commission under the authority of the Order in Council are to be paid from money approved by Parliament for the carrying out of the Commission's duties and responsibilities under the Bill.

RATIONALE

This provision makes it clear that the Commission may not draw on money attributable to the telecommunications or broadcasting fees when hiring experts to assist the Commission under the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
64	(1)	**Regulations — Governor in Council**

PROPOSED WORDING

64. (1) The Governor in Council may make regulations

(*a*) specifying the circumstances in which consent is deemed to have been withdrawn for the purposes of section 6;

(*b*) defining "personal relationship" and "family relationship" for the purposes of paragraph 6(5)(*a*);

(*c*) specifying classes of commercial electronic messages, or circumstances in which such messages are sent, for the purposes of paragraph 6(5)(*c*);

(*d*) specifying purposes of electronic messages for the purposes of paragraph 6(6)(*g*);

(*e*) specifying the use that may be made of a consent and the conditions on which a consent may be used for the purposes of paragraph 10(2)(*b*);

(*f*) specifying functions for the purposes of paragraph 10(5)(*g*);

(*g*) specifying operations for the purposes of subsection 10(6);

(*h*) specifying programs for the purposes of subparagraph 10(8)(*a*)(vi);

(*i*) specifying the circumstances mentioned in subsection 10(9) in which consent may be implied;

(*j*) defining "membership", "club", "association" and "voluntary organization" for the purposes of subsection 10(13);

(*k*) designating provisions whose contravention constitutes a separate contravention in respect of each day during which it continues;

(*l*) establishing additional factors to be taken into account in determining the amount payable under paragraph 51(1)(*b*); and

(*m*) generally, for carrying out the purposes and provisions of this Act.

EXPLANATION

This subsection empowers the Governor in Council to make regulations regarding a number of matters under the Act.

RATIONALE

The purpose of this subsection is to provide the government with the flexibility to clarify certain concepts as necessary.

BACKGROUND

While it is necessary for the Governor in Council to have powers to enact regulations for each of the matters listed in this section, there is a more pressing need for some regulations than others. It is expected that only regulations under the following subsections will be enacted at the time the BILL C-28 comes into force:

> (*b*) defining “personal relationship” and “family relationship” for the purposes of paragraph 6(5)(*a*);
>
> (*e*) specifying the use that may be made of a consent and the conditions on which a consent may be used for the purposes of paragraph 10(2)(*b*);
>
> (*j*) defining “membership”, “club”, “association” and “voluntary organization” for the purposes of subsection 10(13);

Bill Clause No.	Section No.	Topic
64	(2)	**Regulations - Commission**

PROPOSED WORDING

(2) The Commission may make regulations

(*a*) respecting the form of a request for consent for the purposes of subsections 10(1) and (3);

(*b*) respecting undertakings under subsection 21(1);

(*c*) respecting the service of documents required or authorized to be served under this Act including the manner and proof of service and the circumstances under which documents are to be considered to be served; and

(*d*) prescribing anything that is to be prescribed under this Act.

EXPLANATION

This subsection empowers the Commission to make regulations regarding certain aspects of the Act. In general, these aspects focus on form or procedural requirements. They are to be distinguished from some of the more substantive regulation-making powers accorded to the Governor in Council in subsection 64(1), which relate to the scope of application of the prohibitions and requirements in section 6, statutory damages available in private actions, and a residual regulation-making power.

Specifically, under subsection 64(2) the Commission can make regulations regarding:

(a) The format required by an individual or business to request consent. For example, the Commission could make regulations to define what minimum font sizes must be used and where important information should be placed in requests for consent made to consumers.
(b) The procedure and circumstances in which undertaking may be entered into. For example, the Commission could make regulations to define how the process flows from start to finish and who is involved at each stage.
(c) The process that will be followed to serve documents that are required to be served by the Act. The Act requires that notices of violation (subsection 22(1) and decisions of the Commission be served (subsections 16(4), 18(5), 25(2)).
(d) A variety of information and form requirements in relation to commercial electronic messages and requests for consent. Regulations made by the Commission could detail the form of commercial electronic messages (subsection 6(2)), what identification

information the sender of a commercial electronic message (6(2)) or a person seeking express consent to send such a message must include (subsection 10(1)(b)), and any other information that must be included in a request for express consent (subsection 10(1)(c), 11(3)).

RATIONALE

Subsection 64(2)(a) is necessary in order to enable the Commission to make regulations to ensure that all requests for express consent are clear and can be easily understood by consumers. It is important that consumers know what they are consenting to. Without specific regulations setting out form requirements, there is a risk that requests for consent will not disclose information in a clear and simple manner to consumers.

Subsection 64(2)(b) is necessary in light of the fact that there is little process set out in section 21 of the Act regarding how and when undertakings may be entered into. This provision allows the Commission to set rules of general application regarding these matters.

Subsection 64(3)(c) is necessary given that the Act is silent on how service of a document that is required or authorized to be served under the Act must be accomplished. Service requirements are technical and detailed and therefore are appropriately defined in regulations.

Subsection 64(2)(d) is necessary for a variety of reasons. It ensure the Commission can make regulations to require that a sender of a commercial electronic message provides sufficient information to properly identify themselves to the consumer. The guiding principle is that a consumer should know the identity of the sender of a commercial electronic message in the event that they want to withdraw their consent or report a violation of the Act. The regulation-making power is also needed in the event that regulations are required to ensure that the form of commercial electronic messages complies with the purpose of the Act. For instance, regulations may be required to provide that unsubscribe mechanisms are displayed prominently and clearly in commercial electronic messages so that consumers can withdraw their consent to receive such messages easily.

Similar principles apply with respect to requests for consent. The Commission may need to specify the information that should be included in requests, including information relating to the identity of the person on whose behalf consent is being sought, so that the consumer may make a fully-informed decision with respect to whether to give consent.

BACKGROUND

The Commission has extensive experience making regulations under the section 57 of the *Telecommunications Act*, and sections 10-11 of the *Broadcasting Act*.

Under section 41 of the *Telecommunications Act*, the Commission also has experience making rules relating to the information and form requirements applicable to telemarketers making unsolicited telecommunications to consumers.

Bill Clause No.	Section No.	Topic
65	65	**Review of Act by Parliamentary committee**

PROPOSED WORDING

65. Three years after this Act comes into force, a review of the provisions and operation of this Act shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose.

EXPLANATION

This subsection stipulates that after a period of the 3 years the Act shall be reviewed by one or both Houses of Parliament

RATIONALE

The purpose of this subsection is to provide the Parliament the ability to review the Act after a period of three years.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
66	66	**Existing business or Non-business relationship**

PROPOSED WORDING

TRANSITIONAL PROVISIONS

66. A person's consent to receiving commercial electronic messages from another person is implied until the person gives notification that they no longer consent to receiving such messages from that other person or until three years after the day on which section 6 comes into force, whichever is earlier, if, when that section comes into force,

(*a*) those persons have an existing business relationship or an existing non-business relationship, as defined in subsection 10(10) or (13), respectively, without regard to the period mentioned in that subsection; and

(*b*) the relationship includes the communication between them of commercial electronic messages.

EXPLANATION

This "grandfather clause" provides that if communication by means of commercial electronic messages was part of a business or non-business relationship that came into existence prior to the Act coming into force then the parties to the relationship have 3 years to obtain express consent for the continued sending of commercial electronic messages.

RATIONALE

The purpose of this section is to provide a transitional period to permit businesses and non-business organizations a window of time to update their electronic systems and policies to become compliant with the Act.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
67	67	**Software updates and upgrades**

PROPOSED WORDING

TRANSITIONAL PROVISION

67. If a computer program was installed on a person's computer before section 8 comes into force, the person's consent to the installation of an update or upgrade to the program is implied until the person gives notification that they no longer consent to receiving such an installation or until three years after the day on which section 8 comes into force, whichever is earlier.

EXPLANATION

This "grandfather clause" provides that if a computer program was installed on a person's computer prior to the Act coming into force then the party responsible for installing that software has 3 years to obtain express consent for the continued updating and upgrading of that software..

RATIONALE

The purpose of this section is to provide a transitional period to permit businesses and non-business organizations a window of time to update their electronic systems and policies to become compliant with the Act.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
68	68	**Amendment this Act**

PROPOSED WORDING

68. Subsection 6(8) of this Act is repealed.

EXPLANATION

This section creates a mechanism whereby, at a future time, the Governor in Council can remove the exclusions for live and voice telemarketing and fax telemarketing currently found in the Bill. Absent the exclusion found in subsection 6(8), those activities would be commercial electronic messages subject to BILL C-28. This section, which can be proclaimed at a time decided by the Governor in Council, would have the effect of bringing those activities within the BILL C-28 regime, and subject to the same rules respecting consent as are other commercial electronic messages.

Sections 88, 89, 90 and 91 are related provisions.

RATIONALE

Live and recorded voice as well as fax telemarketing are governed by rules created by the CRTC under section 41 of the *Telecommunications Act*, and are part of the Do Not Call regime. Under that regime, a business or individual must add their numbers to a list of persons who do not wish to receive telemarketing calls. Under BILL C-28, a marketer cannot send an electronic message unless the intended recipient has consented to receive that message.

It may be advisable to bring all electronic marketing under the same rules and administration, especially as the distinctions between kinds of messages dissolve. This provision permits the Governor in Council to bring all commercial electronic messages within BILL C-28 if determined to be desirable. However, should such consolidation not be necessary for either policy or technological reasons, then the Governor in Council need not proclaim this provision into force.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
69	69	**Telecommunications**

PROPOSED WORDING

69. Subsection 12(2) of the *Canadian Radio-television and Telecommunications Commission Act* is replaced by the following:

(2) The full-time members of the Commission and the Chairperson shall exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively, by the *Telecommunications Act* or any special Act, as defined in subsection 2(1) of that Act, or by *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*.

EXPLANATION

This provision amends the *Canadian Radio-television and Telecommunications Act* to provide legal authority for full-time members of the Commission to carry out their duties under the Bill.

RATIONALE

This provision is necessary to provide the legal authority for the full-time members of the Commission to carry out their duties under the Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
70	(1)	**“record”**

PROPOSED WORDING

70. (1) The definition “record” in subsection 2(1) of the *Competition Act* is replaced by the following:

> “record” means any information that is recorded on any medium and that is capable of being understood by a person or read by a computer system or other device;

EXPLANATION

Clause 70 amends the definition of “record” in subsection 2(1).

The new definition replaces the list of materials (books, film, videotape, etc.) that could constitute a “record” with a broader definition that refers simply to “any information that is recorded on any medium and that is capable of being understood by a person or read by a computer system or other device”.

RATIONALE

The new definition is defined in broader terms than the original in order to make the new definition technology neutral. This change is important, because it allows the definition of “record” (and those provisions that rely on that definition) to remain relevant despite technological advancements/developments.

BACKGROUND

The current definition of "record" was introduced in 1986 by Bill C-91 and has not been amended since. The definition was part of an attempt to modernize the *Competition Act* in response to changes in business and technology at the time. However, subsequent changes in technology have had the result that the current definition is not adequate to capture all types of records that are relevant to a Bureau investigation. The new definition is meant to resolve uncertainty and ensure that the current definition is sufficiently broad to remain relevant despite technological advancements/developments.

The clause is consistent with the Task Force on Spam’s Working Group on Legislation and Enforcement conclusions: “A stand-alone, technology-neutral law that clearly addresses spam and related offences is required. Amendments to existing laws may also be required.”

Bill Clause No.	Section No.	Topic
70	(2)	**“computer system”**

PROPOSED WORDING

(2) Subsection 2(1) of the Act is amended by adding the following in alphabetical order:

“computer system” has the same meaning as in subsection 342.1(2) of the *Criminal Code*;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for “computer system”.

The new definition for “computer system” is identical to the definition that currently exists at subsection 16(6) of the *Competition Act* and that is being repealed by clause 71.

RATIONALE

The clause is necessary because the use of the term “computer system” in the *Competition Act* is no longer restricted to section 16 of the *Competition Act*.

BACKGROUND

The original definition for “computer system” under subsection 15(6) was introduced in 1986 (under section 13). Section 342.1(2) of the *Criminal Code* currently defines “computer system” to mean:

"computer system" means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data, and
(b) pursuant to computer programs,
    (i) performs logic and control, and
    (ii) may perform any other function;

Bill Clause No.	Section No.	Topic
70	(2)	**“data”**

PROPOSED WORDING

> “data”, other than in Part III, means signs, signals, symbols or concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for “data”.

The original definition for data in subsection 16(6) of the *Competition Act* is being repealed by clause 71. Unlike the old definition under subsection 16(6), which was limited to that section, the new definition for “data” will apply to all parts of the *Competition Act* other than Part III (Mutual Legal Assistance).

RATIONALE

The new definition of “data” is sufficiently broad to be as technology neutral as possible.

The new definition defines “data” at a more fundamental level than the definition that is currently used in the *Criminal Code* in order to make the definition of “data” more technology neutral. This change is important, because it allows the definition of “data” (and those provisions that rely on that definition) to remain relevant despite technological advancements/developments.

The clause is also necessary as the current definition of “data” is restricted to section 16 rather than the entire *Competition Act*.

BACKGROUND

The clause is consistent with the Task Force on Spam’s Working Group on Legislation and Enforcement conclusions: “A stand-alone, technology-neutral law that clearly addresses spam and related offences is required. Amendments to existing laws may also be required.”

The original definition for “data” under subsection 15(6) was introduced in 1986 (under section 13). Section 342.1(2) of the *Criminal Code* currently defines “data” to mean:

> "data" means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

Part III of the Act already contains a definition of “data” that is specific to that Part.

Bill Clause No.	Section No.	Topic
70	(2)	**“electronic message”**

PROPOSED WORDING

“electronic message” means a message sent by any means of telecommunication, including a text, sound, voice or image message;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for “electronic message”.

RATIONALE

The new definition provides an understanding of what “electronic message” means in the *Competition Act*, including the new civil and criminal false or misleading online representation provisions at clauses 75 and 77.

The definition is broad in order to include various forms of telecommunications, so as to ensure the electronic commerce provisions are as technology neutral as possible.

BACKGROUND

The amendment is consistent with the Task Force on Spam’s Working Group on Legislation and Enforcement conclusions: “A stand-alone, technology-neutral law that clearly addresses spam and related offences is required. Amendments to existing laws may also be required.”

Bill Clause No.	Section No.	Topic
70	(2)	**"information"**

PROPOSED WORDING

"information" includes data;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for "information".

RATIONALE

The new definition clarifies that "data" is included in the understanding of what "information" means in the *Competition Act.*

The amendment ensures those sections of the *Competition Act* which use the term "information", such as section 28 of the Act, include within their scope the new technology neutral definition of "data".

BACKGROUND

The amendment is consistent with the Task Force on Spam's Working Group on Legislation and Enforcement conclusions: "A stand-alone, technology-neutral law that clearly addresses spam and related offences is required. Amendments to existing laws may also be required."

Bill Clause No.	Section No.	Topic
70	(2)	**"locator"**

PROPOSED WORDING

"locator" means a name or information used to identify a source of data on a computer system, and includes a URL;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for "locator".

RATIONALE

The new definition provides an understanding of what "locator" means in the *Competition Act*, including the new civil and criminal false or misleading online representation provisions at clauses 75 and 77.

BACKGROUND

A "locator" is information that identifies the source of data on a computer system. Examples of locators include, but are not limited to: uniform resource locators ("URLs", commonly referred to as website addresses), such as www.competitionbureau.gc.ca, or Internet Protocol ("IP") addresses, such as 172.10.10.1.

The amendment is consistent with the Task Force on Spam's recommendations: "...the following email activities and practices should be made offences in spam-specific legislation...the construction of false or misleading headers or subject lines..."

Bill Clause No.	Section No.	Topic
70	(2)	**“sender information”**

PROPOSED WORDING

> “sender information” means the part of an electronic message — including the data relating to source, routing, addressing or signalling — that identifies or purports to identify the sender or the origin of the message;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for “sender information”.

RATIONALE

The new definition provides an understanding of what “sender information” means in the *Competition Act*, including the new civil and criminal false or misleading online representation provisions at clauses 75 and 77.

BACKGROUND

“Sender information” is information that identifies the source of an email. For example, sender information could be person’s name in the “from” field of an email (*e.g.*, John Doe).

The amendment is consistent with the Task Force on Spam’s recommendations: “...the following email activities and practices should be made offences in spam-specific legislation...the construction of false or misleading headers or subject lines...”

Bill Clause No.	Section No.	Topic
70	(2)	**"subject matter information"**

PROPOSED WORDING

"subject matter information" means the part of an electronic message that purports to summarize the contents of the message or to give an indication of them;

EXPLANATION

Clause 70 adds a new definition to subsection 1(1) for "subject matter information".

RATIONALE

The new definition provides an understanding of what "subject matter information" means in the *Competition Act*, including the new civil and criminal false or misleading online representation provisions at clauses 75 and 77.

BACKGROUND

"Subject matter information" is information that summarizes the contents of an email. For example, information in the "subject line" of an email would be considered subject matter information.

The amendment is consistent with the Task Force on Spam's recommendations: "...the following email activities and practices should be made offences in spam-specific legislation...the construction of false or misleading headers or subject lines..."

Bill Clause No.	Section No.	Topic
71	71	**Definitions**

PROPOSED WORDING

71. Subsection 16(6) of the Act is repealed.

EXPLANATION

Subsection 16(6) provides that the definitions for “computer system” and “data” in section 16 have the same meanings as those set out in section 342.1(1) of the *Criminal Code*.

Clause 71 repeals subsection 16(6).

RATIONALE

The repeal of this section is consequential to the new definitions of “computer system” and “data” at clause 70.

BACKGROUND

The definitions for “computer system” and “data” were introduced in 1986 to clarify that the meanings of “computer system” and “data” in section 13 (now section 15) have the same meanings as those set out in section 301.2(2) (now section 342.1(1)) of the *Criminal Code*. The relevant *Criminal Code* definitions for “computer system” and “data” are:

"computer system" means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data, and
(b) pursuant to computer programs,

(i) performs logic and control, and

(ii) may perform any other function;

"data" means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

Bill Clause No.	Section No.	Topic
72	72	**Copies**

PROPOSED WORDING

72. Subsection 20(2) of the Act is replaced by the following:

(2) Copies of any records referred to in subsection (1), made by any process of reproduction, on proof orally or by affidavit that they are true copies, are admissible in evidence in any proceedings under this Act and have the same probative force as the original.

EXPLANATION

Subsection 20(2) makes it permissible to use copies as evidence in proceedings under the Act, provided they are proven to be true copies either orally or by affidavit.

Clause 72 amends subsection 20(2) by replacing the reference to “photographic reproductions” with “reproductions”.

RATIONALE

Subsection 20(2) is outdated; copying technology is no longer limited to “photographic” reproductions. The amendment makes subsection 20(2) technology neutral by generalizing the manner in which copies may be produced.

BACKGROUND

Subsection 20(2), and in particular the phrase “photographic reproduction”, was introduced by Bill 306 in 1952 (as subsection 11(2) in the *Combines Investigation Act*). Although the subsection was simplified in 1986, the language of “photographic reproduction” has never been modernized.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(1) - Interim Injunction**

PROPOSED WORDING

73. Subsections 33(1) to (7) of the Act are replaced by the following:

32. (1) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court could constitute or be directed toward the commission of an offence under Part VI — other than an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53 — or under section 66, pending the commencement or completion of a proceeding under subsection 34(2) or a prosecution against the person, if it appears to the court that

(*a*) the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence; and

(*b*) if the offence is committed or continued,

(i) injury to competition that cannot adequately be remedied under any other provision of this Act will result, or

(ii) serious harm is likely to ensue unless the injunction is issued and the balance of convenience favours issuing the injunction.

EXPLANATION

Subsection 33(1) provides for the issuance by a Court of an interim injunction for an offence. The current subsection is divided between: (*a*) contraventions of an offence under Part VI or section 66; and (*b*) contraventions of sections 52.1 and 53.

Clause 73 reorganizes and modernizes the language of subsection 33(1). Behaviour that was formerly dealt with under paragraph 33(1)(*b*) will now be caught by subsection 33(1.1).

RATIONALE

Owing to the nature of the electronic marketplace and the ability of deceptive or misleading commercial electronic messages to reach countless consumers almost instantaneously, it is

necessary to create an effective interim injunction provision that can allow the courts to quickly stop the spread of such messages. While paragraph 33(1)(*b*) currently allows the courts to order an interim injunction, that remedy, with a test designed for differing circumstances, would likely be ineffective for addressing such threats. Neither the Attorney General of Canada nor the attorney general of a province, has ever been successful in an application for an injunction under subsection 33(1). A new provision, subsection 33(1.1), has been created, which strikes a balance between the rights of consumers/businesses affected by deceptive marketing practices in the electronic marketplace, and the rights of parties who are subject to the injunction. The new provision deals with behaviour covered by the current paragraph 33(1)(*b*), contraventions of section 52 involving the use of any means of telecommunication, and the new offences created in section 52.01 of the *Competition Act*.

Subsection 33(1) has therefore been redrafted to reflect this change and to make it consistent with the new subsection 33(1.1).

The language of "likely to suffer damage...substantially greater than any damage that persons named in the application are likely to suffer from an injunction..." dates back to 1976 and has been updated with modern language that reflects more recent Supreme Court jurisprudence.

Consequential amendments have also been made to reflect clause 75.

BACKGROUND

The Federal Court held in *Canada v. IPSCO Recycling Inc.*, 2003 F.C. 1518 that when an injunction is authorized by statute, an applicant will not need to prove that damages cannot be adequately compensated or that irreparable harm will result. Accordingly, that part of the current paragraph 33(1) has been removed.

The leading case on injunctions in Canada is *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1 S.C.R. 311. In that case, the Supreme Court of Canada identified "the balance of convenience between the parties" as being one of the elements that should be examined by a court before it grants an injunction. The "balance of convenience" is essentially the same standard as "one or more persons are likely to suffer damage...substantially greater than any damage that persons named in the application are likely to suffer from an injunction...". Accordingly, the more modern language has been adopted in the new subsection.

Subsection 33(1) was introduced by Bill C-2, in 1976 (as subsection 29.1(1) of the *Combines Investigation Act*). The language of the subsection was modernized in 1993 and by Bill C-20 in 1999; however the old terminology of " "a person is likely to suffer damage...substantially greater than any damage that a person named in the application is likely to suffer from an injunction..." has never been updated.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(1.1) - Interim injunction - offences involving telecommunication**

PROPOSED WORDING

(1.1) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an injunction forbidding any person named in the application from doing any act or thing that it appears to the court could constitute or be directed toward the commission of an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53, if it appears to the court that

(*a*) the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence;

(*b*) if the offence is committed or continued, serious harm is likely to ensue unless the injunction is issued; and

(*c*) the balance of convenience favours issuing the injunction.

EXPLANATION

Subsection 33(1)(b) provides for the issuance by a Court of an injunction for an offence involving telecommunications under the *Competition Act* (sections 52, 52.1 and 53).

New subsection 33(1.1) extends the scope of the existing subsection 33(1)(b) to include the new criminal offence proposed by clause 75.

RATIONALE

Owing to the nature of the electronic marketplace and the ability of deceptive or misleading commercial electronic messages to reach countless consumers almost instantaneously, it is necessary to create an effective interim injunction provision which can allow the courts to quickly stop the spread of such messages. While paragraph 33(1)(*b*)currently allows the courts to order an interim injunction, that remedy would likely be ineffective for addressing such threats. A new provision, subsection 33(1.1), has been created, which strikes a balance between the rights of consumers/businesses affected by deceptive marketing practices in the electronic marketplace, and the rights of parties who are subject to the injunction. The new provision deals with behaviour covered by the current paragraph 33(1)(*b*), contraventions of section 52 involving the use of any means of telecommunication, and the new offences created in section 52.01 of the *Competition Act*.

The new subsection 33(1.1) modernizes the language of the former paragraph 33(1)(*b*), to make it consistent with the new subsection 74.11. The "injury to competition" requirement has been removed as the Attorney General of Canada (or the attorney general of a province) does not need to show "injury to competition" in order to prove a contravention of sections 52, 52.01, 52.1 and 53 of the *Competition Act*. Accordingly, it does not make sense to require "injury to competition" when seeking an injunction to restrain this type of behaviour.

The language of "one or more persons are likely to suffer damage...substantially greater than any damage that persons named in the application are likely to suffer from an injunction..." dates back to 1976 and has been updated with modern language that reflects more recent Supreme Court jurisprudence.

BACKGROUND

The leading case on injunctions in Canada is *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1 S.C.R. 311. In that case, the Supreme Court of Canada identified "serious harm" and "the balance of convenience between the parties" as being two of the elements that should be examined by a court before it grants an injunction. The "balance of convenience" is essentially the same standard as "one or more persons are likely to suffer damage...substantially greater than any damage that persons named in the application are likely to suffer from an injunction...". Accordingly, the more modern language has been adopted in the new subsection.

Paragraph 33(1)(*b*) was introduced by Bill C-20 in 1999 and amended slightly by Bill C-23 in 2002. However, the language of paragraph 33(1)(*b*) was modelled on Bill C-2, which dates back to 1976.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(1.2) - Injunction against third parties — offences involving telecommunication**

PROPOSED WORDING

(1.2) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an injunction ordering any person named in the application to refrain from supplying to another person a product that it appears to the court is or is likely to be used to commit or continue an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53, or to do any act or thing that it appears to the court could prevent the commission or continuation of such an offence, if it appears to the court that

(*a*) a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence;

(*b*) if the offence is committed or continued, serious harm is likely to ensue unless the injunction is issued; and

(*c*) the balance of convenience favours issuing the injunction.

EXPLANATION

Clause 73 reorganizes subsection 33(1.1). Behaviour that was formerly dealt with under subsection 33(1.1) will now be caught by subsection 33(1.2).

New subsection 33(1.2) authorizes a court to issue an injunction to prevent a supplier from supplying a product to a person in circumstances where it is likely that the product will be used by the person to violate a criminal prohibition under the *Competition Act* relating to electronic commerce (s. 52, 52.01, 52.1, 53). The injunction may be granted where it appears to the court that the balance of convenience favours issuing the order, and where, unless the order is issued, serious harm is likely to ensue. The new subsection 33(1.2) removes the requirement in the old subsection 33(1.1) that the person being supplied is a repeat offender.

RATIONALE

The new subsection provides the Attorney General of Canada, and the attorney general of a province, with an extra tool with which it can cut off false or misleading online

misrepresentations, such as spam, at an early stage. The Bureau expects that, on most occasions, TSPs will act responsibly to shut down spammers as spamming (and other illegal activity) generally violates the terms of service contracts spammers have with their service providers. However, in those rare instances where a telecommunication service provider is unwilling or unable to stop supplying a product to a spammer, the new subsection will provide the Bureau with an additional tool.

The old requirement that injunctions should only be available against third parties when the person they are supplying is a repeat offender has been repealed as it is overly narrow. Spammers and other online miscreants operate in jurisdictions around the world and are unlikely to have been prosecuted repeatedly under the criminal false or misleading representations provisions of the *Competition Act*.

BACKGROUND

The amendment is consistent with the Task Force on Spam's recommendations which stated "Responsibility should also rest with other third-party beneficiaries of spam."

Subsection 33(1.1) was introduced in Bill C-20 in 1999 and was modified slightly by Bill C-23 in 2002. Subsection 33(1.1) was meant to facilitate action against repeat telemarketer offenders whom the Bureau considered were the most egregious deceptive telemarketers. During consultations for Bill C-20, none of those key stakeholders, who were also potential third party product suppliers of telemarketers, raised any serious objections to the type of remedy being proposed under subsection 33(1.l), for use against such suppliers.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(2) - Notice of application**

PROPOSED WORDING

(2) Subject to subsection (3), at least 48 hours' notice of an application for an injunction under subsection (1), (1.1) or (1.2) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, to each person against whom the injunction is sought.

EXPLANATION

Subsection 33(2) requires the Attorney General of Canada, or the attorney general of a province, to provide at least 48 hours' notice when seeking an injunction. Notice must be given to everyone against whom the injunction is sought.

Clause 73 amends subsection 33(2) by adding a new reference to subsections "(1.1) or (1.2)".

Clause 73 also replaces the word "forty-eight" with the number "48".

RATIONALE

The new reference to subsection (1.1) and (1.2) is consequential to the new subsections 33(1.1) and 33(1.2).

The amendment to replace the term "forty-eight" modernizes the language of the *Competition Act* and ensures consistency with other injunction provisions in the *Competition Act*.

BACKGROUND

Subsection 33(2) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(2) of the *Combines Investigation Act*). It has not been substantively amended since that time.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(3) - *Ex parte* application**

PROPOSED WORDING

(3) If a court to which an application is made under subsection (1), (1.1) or (1.2) is satisfied that subsection (2) cannot reasonably be complied with, or that the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest, it may proceed with the application *ex parte* but any injunction issued under subsection (1), (1.1) or (1.2) by the court on *ex parte* application has effect only for the period, not exceeding 10 days, that is specified in the order.

EXPLANATION

Subsection 33(3) sets out the terms and conditions on which a Court may grant an *ex parte* injunction (an injunction without notice to or argument from the other party) pursuant to s. 33(1).

Clause 73 retains the general structure of subsection 33(3) while reorganizing the layout of the current subsection.

Clause 73 adds three new references to subsections “(1.1) or (1.2)”.

Clause 73 also replaces the word “ten” with the number “10".

RATIONALE

The reorganization of subsection 33(3) improves the clarity and readability of the current subsection.

The new references to subsection (1.1) and (1.2) are consequential to the new subsections 33(1.1) and 33(1.2).

The amendment to replace the term “ten” modernizes the language of the *Competition Act* and ensures consistency with other injunction provisions in the *Competition Act*.

BACKGROUND

Subsection 33(3) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(3) of the *Combines Investigation Act*). It has not been substantively amended since that time.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(4) - Terms of injunction**

PROPOSED WORDING

(4) An injunction issued under subsection (1), (1.1) or (1.2)

(*a*) shall be in the terms that the court that issues it considers necessary and sufficient to meet the circumstances of the case; and

(*b*) subject to subsection (3), has effect for the period that is specified in the order.

EXPLANATION

Subsection 33(4) provides the courts with a general power to define the terms and duration of an injunction granted pursuant to subsection 33(1).

Clause 73 retains the structure of subsection 33(4) while changing the tense of some of the words used in the current subsection as well as replacing some of the language used in the current subsection.

Clause 73 also adds a new reference to subsections “(1.1) or (1.2)”.

RATIONALE

The clauses changing the language of subsection 33(4) modernize the language of the subsection.

The new reference to subsection (1.1) and (1.2) is consequential to the new subsections 33(1.1) and 33(1.2).

BACKGROUND

Subsection 33(4) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(4) of the *Combines Investigation Act*). It has not been substantively amended since that time.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(5) - Extension or cancellation of injunction**

PROPOSED WORDING

(5) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, on at least 48 hours' notice of the application to all other parties to the injunction, a court that issues an injunction under subsection (1), (1.1) or (1.2) may, by order,

(*a*) despite subsections (3) and (4), continue the injunction, with or without modification, for any definite period that is specified in the order; or

(*b*) revoke the injunction.

EXPLANATION

Subsection 33(5) sets out the terms and conditions on which a Court may grant an extension or cancellation of an injunction granted pursuant to subsection 33(1).

Clause 73 retains the structure of subsection 33(5) while changing some of the general wording of the current subsection.

Clause 73 clarifies that the notice period of at least 48 hours must be given to all other parties to the injunction.

Clause 73 also adds new references to subsections "(1.1) or (1.2)".

RATIONALE

The clauses changing the general language of subsection 33(5) modernize the language of the subsection.

The new 48-hour notice period is meant to ensure fairness for all parties affected by the extension or cancellation of an injunction by providing them with sufficient advance notice of the application for extension or cancellation of the injunction.

The new reference to subsection (1.1) and (1.2) is consequential to the new subsections 33(1.1) and 33(1.2).

BACKGROUND

The proposed 48 hour notice period is consistent with the period currently provided for in the *Competition Act* when an application for an injunction is sought under subsection 33(2) and with the period for an injunction or extension under subsection 74.11(2).

Subsection 33(5) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(5) of the *Combines Investigation Act*). It has not been substantively amended since that time.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(6) - Duty of applicant**

PROPOSED WORDING

(6) If an injunction is issued under subsection (1), (1.1) or (1.2), the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude any prosecution or proceedings arising out of the acts or things on the basis of which the injunction was issued.

EXPLANATION

Subsection 33(6) places a duty on the Attorney General of Canada, or the attorney general of a province, to proceed as quickly as possible to commence proceedings if they successfully obtain an injunction under subsection 33(1).

Clause 73 replaces the word “actions” in subsection 33(6) with the phrase “acts or things”.

Clause 73 also adds a new reference to subsections “(1.1) or (1.2)”.

RATIONALE

The clause to replace the word “actions” with “acts or things” is meant to clarify that the current provision is not referring to a particular type of legal proceedings known as an “action”; rather, it refers to the “actions” that a person does in everyday life.

The new reference to subsection (1.1) and (1.2) is consequential to the new subsections 33(1.1) and 33(1.2).

BACKGROUND

Subsection 33(6) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(6) of the *Combines Investigation Act*). It has not been substantively amended since that time.

Bill Clause No.	Section No.	Topic
73	73	**Subsection 33(7) - Punishment for disobedience**

PROPOSED WORDING

(7) A court may punish any person who contravenes an injunction issued by it under subsection (1), (1.1) or (1.2) by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

EXPLANATION

Subsection 33(7) defines the powers of the courts to punish someone for contravening an injunction issued under subsection 32(1).

Clause 73 amends subsection 33(7) by adding a new reference to subsections “(1.1) or (1.2)”.

RATIONALE

The new reference to subsection (1.1) and (1.2) is consequential to the new subsections 33(1.1) and 321.2).

BACKGROUND

Subsection 327) was introduced by Bill C-2, which came into force in 1976 (as subsection 29.1(7) of the *Combines Investigation Act*). The language of subsection 327) was modernized by Bill C-20 in 1999.

Bill Clause No.	Section No.	Topic
74	(1)	**Subsection 52(1.2) - Permitted representations**

PROPOSED WORDING

74. (1) Subsection 52(1.2) of the Act is replaced by the following:

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

EXPLANATION

The current subsection 52(1.2) ensures that the persons who are responsible for the making of a representation, as well as the persons actually making the representation, are captured by the general false or misleading representation provisions of the *Competition Act* (sections 52, 52.1, 74.01 and 74.02.)

Subclause 74(1) expands subsection 52(1.2) to cover both the “sending” and “making” of a representation.

RATIONALE

The clause ensures that new the false or misleading representation provisions will capture all those responsible for the making or sending of a representation including spammers, beneficiaries of spam, and negligent telecommunication service providers who permit spam to be sent through their networks.

BACKGROUND

As with more traditional forms of false or misleading representations, innocent parties will not be caught by this provision. With respect to criminal false or misleading representations, only persons who knowingly or recklessly cause false or misleading representations to be sent or made will be caught. Similarly, only parties who negligently permit false or misleading representations to be sent or made will be subject to the civil provision.

Subsection 52(1.2) was introduced by Bill C-20 in 1999.

Bill Clause No.	Section No.	Topic
74	(2)	**Paragraph 52(2)(*d*) - Representations accompanying products**

PROPOSED WORDING

(2) Paragraph 52(2)(*d*) of the Act is replaced by the following:

(*d*) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

EXPLANATION

Subsection 52(2) is meant to protect middlemen, who act without knowledge of a false or misleading misrepresentation, by assigning liability for the representation to the person who caused the representation to be expressed, made, or contained. Middlemen are only protected with respect to those representations listed at paragraphs 52(2)(*a*)-(*e*). The representations currently listed at paragraphs 52(2)(*d*) are: "in-store, door-to-door or telephone selling to a person as ultimate user".

Subclause 74(2) replaces the reference to "telephone selling" in paragraph 52(2)(*d*) with the more technology neutral language of "communicating orally by any means of telecommunication."

RATIONALE

Oral telecommunication is no longer restricted to telephony and now occurs using alternative means of telecommunication (such as Voice Over IP). The clause responds to this development by making paragraph 52(2)(*d*) technology neutral. This ensures that innocent middlemen continue to be protected from liability in situations analogous to those envisioned by the original subsection.

BACKGROUND

Paragraph 52(2)(*d*) was introduced by Bill C-2 (as paragraph 36(2)(*d*)) and came into force in 1976. The paragraph has not been amended since that time.

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(1) - False or misleading representation — sender or subject matter information**

PROPOSED WORDING

75. The Act is amended by adding the following after section 52:

52.01 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

EXPLANATION

This subsection creates an offence in relation to the sending of a false or misleading representation in the sender information or subject matter information (*i.e.*, the "header") of an electronic message, when done for commercial purposes. It covers both direct and indirect conduct by those who behave knowingly or recklessly, as well as both senders and those who cause such representations to be sent.

RATIONALE

A common tactic among those who use unsolicited electronic messages – *i.e.*, "spam" or "junk e-mail" – is often to disguise the intent of their message or the identity of the sender using subject lines or originating e-mail addresses that imply the sender is a personal acquaintance of the recipient, is offering a different product or service from that which is actually being offered, or is taking interest in the recipient for any reason other than the true commercial purpose of the communication.

This provision criminalizes the sending of an electronic message where it is done knowingly or recklessly for a commercial purpose, irrespective of whether the electronic message is unsolicited (and therefore also falls under the portions of the BILL C-28 administered by the CRTC).

Representations in the header may, in some circumstances, already be caught under section 52 of the *Competition Act* (or its civil counterpart in section 74.01). In contrast to section 52, however, it is not necessary in section 52.01 to prove that the false or misleading representation in the header is material. Materiality has been interpreted as meaning that the representations are important, pertinent or of much consequence, or would influence an ordinary citizen to decide to

buy the product being offered. The new provisions have been drafted without reference to materiality for false or misleading representations in sender, subject matter or locator information because this information is almost always material to the decisions of Internet users to, at a minimum, review a message or search result.

To ensure more effective and timely enforcement of investigations involving the sender, subject matter or locator information, the provisions dispense with the need to prove materiality where evidence can show that these forms of representations are deceptive. Second, the proposed provision is sufficiently narrow to remain within the scope and purpose of the *Competition Act* without including materiality as an essential element of the offence, owing to the requirement that the representation be made for the purpose of promoting a product or business interest.

This also reflects the goal behind the BILL C-28 – to create a complete framework for anti-spam enforcement that ensures that false or misleading representations in the electronic marketplace (such as sender or subject line information which may not necessarily be caught by existing provisions) are captured under the *Competition Act*, and that this framework remains sufficiently broad to be adaptive to technological change.

BACKGROUND

The amendment is consistent with the Task Force on Spam's recommendations: "...the following email activities and practices should be made offences in spam-specific legislation...the construction of false or misleading headers or subject lines (i.e., false transmission information)..."

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(2) - False or misleading representation — electronic message**

PROPOSED WORDING

(2) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent in an electronic message a representation that is false or misleading in a material respect.

EXPLANATION

This subsection creates an offence in relation to the sending of a materially false or misleading representation in the content of an electronic message, when done for commercial purposes. It covers both direct and indirect conduct by those who behave knowingly or recklessly, as well as both senders and those who cause such representations to be sent.

RATIONALE

This provision deters egregious conduct where the sending of electronic false or misleading representations is done knowingly or recklessly, irrespective of whether an electronic message is unsolicited (and therefore also falls under the portions of the BILL C-28 administered by the CRTC). The goal is to protect electronic commerce by enhancing the reliability of electronic communications, much in the way that the *Competition Act*'s general deceptive marketing provisions are designed to strengthen confidence in the market.

Materially false or misleading representations may already be caught under section 52 of the *Competition Act* (or its civil counterpart in section 74.01). However, the goal behind the BILL C-28 is to create a complete framework for anti-spam enforcement.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(3) - False or misleading representation — locator**

PROPOSED WORDING

(3) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly make or cause to be made a false or misleading representation in a locator.

EXPLANATION

This subsection creates an offence in relation to the making of a false or misleading representation, when done for commercial purposes, in the locator information that directs Internet users to a given website (including URLs or "web addresses", as well as HTML tags indicating subject matter or relevant search terms for Internet search engines). It covers both direct and indirect conduct by those who behave knowingly or recklessly, as well as both those who make such representations, and those who cause them to be made.

RATIONALE

When searching for information online, Internet users will enter key words into a Internet search engine to find websites pertaining to those words. Advertisers can embed these words into the URL and the coding of their websites, attracting traffic and prioritizing their sites in search results. These types of locator information may not be visible to the Internet user.

A person can set up a commercial website whose locator information is false or misleading, and in so doing draw a potentially unlimited number of Internet users to that site. The creation of this provision would deter such a practice, and prevent unscrupulous Canadian dealers from preying on the vulnerability or inexperience of many Internet users, such as those searching for affordable treatment of a disease.

Representations in the locator information may, in some circumstances, already be caught under section 52 of the *Competition Act* (or its civil counterpart in section 74.01). In contrast to section 52, however, it is not necessary in section 52.01 to prove that the false or misleading representation in the locator is material. Materiality has been interpreted as meaning that the representations are important, pertinent or of much consequence, or would influence an ordinary citizen to decide to buy the product being offered. The new provisions have been drafted without reference to materiality for false or misleading representations in sender, subject matter or locator information because this information is almost always material to the decisions of Internet users to, at a minimum, review a message or search result.

To ensure more effective and timely enforcement of investigations involving the sender, subject matter or locator information, the provisions dispense with the need to prove materiality where evidence can show that these forms of representations are deceptive. Second, the proposed provision is sufficiently narrow to remain within the scope and purpose of the *Competition Act* without including materiality as an essential element of the offence, due to the requirement that the representation be made for the purpose of promoting a product or business interest.

This also reflects the goal behind Bill C-28 – to create a complete framework for anti-spam enforcement that ensures that false or misleading representations in the electronic marketplace (such as URLs and other locator information which may not necessarily be caught by existing provisions) are captured under the *Competition Act*, and that this framework remains sufficiently broad to be adaptive to technological change.

BACKGROUND

The amendment is consistent with the 2005 Task Force on Spam's Working Group on Legislation and Enforcement which concluded that amendments to the *Competition Act* are necessary to fill gaps in the Act that hamper the Competition Bureau's ability to pursue spammers.

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(4) - Proof of deception not required**

PROPOSED WORDING

(4) For greater certainty, in establishing that any of subsections (1) to (3) was contravened, it is not necessary to prove that any person was deceived or misled.

EXPLANATION

This subsection clarifies that the Crown need not prove that a person was deceived or misled by an electronic message in order for one of the offences in section 52.01 to have been proven.

RATIONALE

As in paragraph 52(1.1)(*a*) of the *Competition Act*, this provision clarifies that a false or misleading representation need not necessarily be effective in having deceived or misled, in order for the elements of the offence in question to exist. It is designed to avoid the possibility that an alleged offender might escape prosecution because of a benign outcome, even though his or her actions were sufficient to constitute a violation.

BACKGROUND

In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court noted that it was not necessary to establish that any person was actually misled by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(5) - General impression to be considered**

PROPOSED WORDING

(5) In a prosecution for a contravention of any of subsections (1) to (3), the general impression conveyed by a representation as well as its literal meaning are to be taken into account.

EXPLANATION

The subsection states that the court is to consider both the general impression of a representation as well as its literal meaning in any prosecution for one of the offences in section 52.01.

RATIONALE

The inclusion of this provision mirrors the deceptive marketing provisions elsewhere in the *Competition Act*, to ensure that the parliamentary intent to curb deceptive marketing practices is not circumvented by an extremely narrow reading of the offence provisions. As such, it takes a consumer-perspective approach by including the general impression of a representation, as well as its literal meaning.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(6) - Offence and punishment**

PROPOSED WORDING

(6) Any person who contravenes any of subsections (1) to (3) is guilty of an offence and

(*a*) liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(*b*) liable on summary conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

EXPLANATION

This subsection lays out the penalties for a violation of the offence provisions, on summary conviction and on indictment.

RATIONALE

The penalty amounts mirror those in section 52 of the *Competition Act*.

BACKGROUND

The current penalties for section 52 were set by Bill C-10 in 2009.

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(7) - Reviewable conduct**

PROPOSED WORDING

(7) Nothing in Part VII.1 is to be read as 15 excluding the application of this section to the making of a representation that constitutes reviewable conduct within the meaning of that Part.

EXPLANATION

This subsection indicates that the potential application of Part VII.1 to certain facts does not preclude the application of the criminal offence.

RATIONALE

Given the existence of a parallel civil enforcement regime, it is clarified in the statute that the fact that given behaviour could fall within the civil provisions does not shield it from criminal enforcement. This mirrors the existing subsection 52(6).

BACKGROUND

When subsection 52(6) was enacted by Bill C-20 in 1999, the clause-by-clause explanation noted that, “Amendments in the area of misleading advertising and deceptive marketing practices provide a wider range of enforcement mechanisms that will allow more appropriate and effective responses to the variety of conduct in the marketplace. Subsection 52(6) clarifies that both the criminal and reviewable matters provisions may apply to a given set of facts.”

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(8) - Where application made under Part VII.1**

PROPOSED WORDING

(8) No proceedings may be commenced under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought under Part VII.1.

EXPLANATION

This provision prevents simultaneous criminal and civil enforcement by the Commissioner of Competition with regard to substantially the same set of facts.

RATIONALE

If the Commissioner has already decided to seek a civil order under Part VII.1, then it would be unfair to refer substantially the same matter to the Public Prosecution Service of Canada for criminal prosecution. Note that one enforcement track does not preclude the other until proceedings are commenced.

BACKGROUND

Numerous similar provisions exist in the *Competition Act*, including section 45.1, subsection 49(4) and subsection 52(7).

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.01(9) – Interpretation**

PROPOSED WORDING

(9) For the purposes of this section,

(*a*) an electronic message is considered to have been sent once its transmission has been initiated; and

(*b*) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

EXPLANATION

This subsection stipulates that, for the purposes of section 52.01, initiating the transmission of an electronic message is equivalent to sending it, and that nothing hinges on the successful delivery of that message to a working electronic address.

RATIONALE

This subsection renders irrelevant the ultimate fate of an electronic message after it has been initiated, if the actions that led to its initiation otherwise fit within the proscribed conduct in the section. As such, a person will not evade prosecution on the basis of either the failure of technology or its efficacy (in the case of filtering techniques), an outdated recipient address, or because of any other element of chance divorced from his or her culpable actions.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.02(1) – Assisting foreign states**

PROPOSED WORDING

52.02 (1) The Commissioner may, for the purpose of assisting an investigation or proceeding in respect of the laws of a foreign state, an international organization of states or an international organization established by the governments of states that address conduct that is substantially similar to conduct prohibited under section 52, 52.01, 52.1, 53, 55 or 55.1,

(*a*) conduct any investigation that the Commissioner considers necessary to collect relevant information, using any powers that the Commissioner may use under this Act or the *Criminal Code* to investigate an offence under any of those sections; and

(*b*) disclose the information to the government of the foreign state or to the international organization, or to any institution of any such government or organization responsible for conducting investigations or initiating proceedings in respect of the laws in respect of which the assistance is being provided, if the government, organization or institution declares in writing that

(i) the use of the information will be restricted to purposes relevant to the investigation or proceeding, and

(ii) the information will be treated in a confidential manner and, except for the purposes mentioned in subparagraph (i), will not be further disclosed without the Commissioner's express consent.

EXPLANATION

The amendment provides the Commissioner of Competition with the power to provide investigative assistance to a foreign government, international organization, or any relevant institution of such government or organization, for the purpose of assisting a foreign investigation or proceeding. The foreign investigation or proceeding must relate to conduct similar to that covered by the criminal false or misleading representation provisions of the *Competition Act* (specifically, sections 52, 52.01, 52.1, 53, 55 and 55.1).

The Commissioner may use any investigative powers in the *Competition Act* or *Criminal Code* that would be available to her if she were investigating an offence under sections 52, 52.01, 52.1, 53, 55 and 55.1 of the *Competition Act*.

The Commissioner may disclose information obtained pursuant to her investigation, but only if the foreign recipient declares in writing that it will respect two conditions: first, it will restrict the use of the information to purposes relevant to the foreign investigation or proceeding; second, it will treat the information as confidential.

RATIONALE

Online threats do not respect international boundaries; providing the Commissioner of Competition with the power to provide investigative assistance to its foreign partners with respect to deceptive marketing practices will allow for and encourage effective international cooperation to combat cross border spammers and perpetrators of false or misleading representations.

The restrictions on disclosure help ensure that information provided to the foreign recipient will not be used for purposes beyond those provided for in the Bill and will be treated in a confidential manner.

EXAMPLE

If a telemarketer or spammer is located in Mexico and targets victims in the United States but routes the communication through a telecommunications service provider in Canada the offence could be prosecuted in Mexico or the United States. There is likely not a sufficient nexus to Canada to prosecute the spammer in Canada as the spammer is located in Mexico, the victims are in the United States, and the Canadian service provider is probably not aware of the offence. In order to proceed in the United States or Mexico the foreign authorities need the information held by the Canadian service provider in order to establish that the communication originated with the Mexican spammer and eventually went to the US victim. There would not be grounds to commence an inquiry under the *Competition Act* or to get a warrant or production order to collect the information from the Canadian service provider as no offence was committed in Canada. Under the proposed amendment, either the Mexican or US authorities could ask the Competition Bureau for assistance and to use its investigative powers under the *Competition Act* or *Criminal Code* to obtain the routing information from the Canadian telecommunications service provider.

BACKGROUND

As a general rule, information, for which there is a reasonable expectation of privacy, obtained by a governmental body or institution cannot be shared with an institution of a foreign state or international organization without either following the procedure set out in legislation respecting mutual legal assistance or other specific statutory authority that complies with the *Charter*.

The *U.S. Safe Web Act,* 15 U.S.C. § 46 (j), provides the U.S. Federal Trade Commission with a similar power.

The amendment is based on a proposal tabled by the Chairman of the Canadian Radio-television Telecommunications Commission ("CRTC") to the Standing Committee on Industry, Science and Technology ("INDU Committee") on June 18, 2009.

Bill Clause No.	Section No.	Topic
75	75	**Subsection 52.02(2) – Mutual assistance**

PROPOSED WORDING

(2) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

EXPLANATION

The amendment requires the Commissioner of Competition to consider, when deciding whether or not to provide investigative assistance pursuant to subsection 52.02(1), whether the foreign recipient agrees to provide similar assistance to her.

RATIONALE

The amendment encourages foreign governments, international organizations and institutions to provide reciprocal assistance to the Commissioner of Competition.

BACKGROUND

The Amendment mirrors the *U.S. Safe Web Act*, 15 U.S.C. § 46 (j)(3)(A).

Bill Clause No.	Section No.	Topic
76	(1)	**Subsection 52.1(1) - Definition of "telemarketing"**

PROPOSED WORDING

76. (1) Subsection 52.1(1) of the Act is replaced by the following:

52.1 (1) In this section, "telemarketing" means the practice of communicating orally by any means of telecommunication for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product.

EXPLANATION

Section 52.1 defines the criminal, strict liability offence of deceptive telemarketing and describes conduct that is prohibited by those engaging in telemarketing.

Subsection 52.1(1) currently defines the type of conduct to which the provision applies -- telephone communications that have an interactive character and that are undertaken for certain defined purposes.

Subclause 76(1) replaces the language of "using interactive telephone communications" in subsection 52.1(1) with the more technology neutral phrase "communicating orally by any means of telecommunication".

RATIONALE

Telemarketing is no longer restricted to person-to-person telephony and now occurs using alternative means of telecommunication (such as Voice Over IP, voicemail, etc.). The clause responds to this change by making subsection 52.1(1) technology neutral. The clause will ensure that the deceptive telemarketing provision is sufficiently flexible to capture oral communication as new types of telecommunication arise.

BACKGROUND

Subsection 52.1(1) was introduced by Bill C-20 and came into force in 1999.

Bill Clause No.	Section No.	Topic
76	(2)	**Paragraph 52.1(2)(*a*) - Required disclosures**

PROPOSED WORDING

(2) Paragraph 52.1(2)(*a*) of the Act is replaced by the following:

(*a*) disclosure is made, in a fair and reasonable manner at the beginning of each communication, of the identity of the person on behalf of whom the communication is made, the nature of the business interest or product being promoted and the purposes of the communication;

EXPLANATION

Subsection 52.1(2) specifies three classes of information that must be provided by those engaging in telemarketing. It is an offence to fail to provide such information in the manner prescribed.

Paragraph 52.1(2)(*a*) requires the following disclosures at the outset of each communication - the identity of the person on behalf of whom the call is made; the nature of the product or business interest being promoted; and the purpose of the call.

The affirmative disclosure requirements are intended to benefit consumers in two ways – by assisting them in the early identification of potentially deceptive communication and by facilitating, from an evidentiary standpoint, prosecutions of alleged deceptive telemarketers.

Subclause 76(2) removes the word “telephone” from paragraph 52.1(2)(*a*).

RATIONALE

Oral telecommunication is no longer restricted to telephony and now occurs using alternative means of telecommunication (such as Voice Over IP, voicemail, etc.). The clause responds to this change by making paragraph 52.1(2)(*a*) technology neutral. The clause will also ensure that paragraph 52.1(2)(a) is sufficiently flexible to capture oral communication as new types of telecommunication arise.

BACKGROUND

Paragraph 52.1(2)(*a*) was introduced by Bill C-20 and came into force in 1999.

Bill Clause No.	Section No.	Topic
76	(3)	**Subsection 52.1(5) - Time of disclosure**

PROPOSED WORDING

(3) Subsection 52.1(5) of the Act is replaced by the following:

(5) The disclosure of information referred to in paragraph (2)(*b*) or (*c*) or (3)(*b*) or (*c*) must be made during the course of a communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the communication.

EXPLANATION

Subsection 52.1(5) provides an exception to the timely disclosure requirements established under paragraphs 52.1(2)(*b*) or (*c*), or (3)(*b*) or (*c*). Disclosure during the course of the

communication is unnecessary where a telemarketer can establish that the required information has been disclosed within a reasonable time before the communication, by any means, and that

the information was not requested during the telephone communication.

Subclause 76(3) removes the word “telephone” from subsection 52.1(5).

RATIONALE

Oral telecommunication is no longer restricted to telephony and now occurs using alternative means of telecommunication (such as Voice Over IP, voicemail, etc.). The clause responds to this change by making subsection 52.1(5) technology neutral. The clause will also ensure that subsection 52.1(5) is sufficiently flexible to capture oral communication as new types of telecommunication arise.

BACKGROUND

Subsection 52.1(5) was introduced by Bill C-20 and came into force in 1999.

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.011(1) - False or misleading representation — sender or subject matter information**

PROPOSED WORDING

77. The Act is amended by adding the following after section 74.01:

74.011 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

EXPLANATION

This subsection makes civilly reviewable conduct the sending of a false or misleading representation in the sender information or subject matter information (*i.e.*, the "header") of an electronic message, when done for commercial purposes. It covers both direct and indirect conduct, as well as both senders and those who cause such representations to be sent.

RATIONALE

A common tactic among those who use unsolicited electronic messages – *i.e.*, "spam" or "junk e-mail" – is often to disguise the intent of their message or the identity of the sender using subject lines or originating e-mail addresses that imply the sender is a personal acquaintance of the recipient, is offering a different product or service from that which is actually being offered, or is taking interest in the recipient for any reason other than the true commercial purpose of the communication.

This provision makes reviewable the sending of such a message irrespective of whether an electronic message is unsolicited (and therefore would also fall under the portions of the BILL C-28 administered by the CRTC).

Representations in the header may, in some circumstances, already be caught under section 74.01 of the *Competition Act* (or its criminal counterpart in section 52). In contrast to section 74.01, however, it is not necessary in section 74.011 to prove that the false or misleading representation in the header is material. Materiality has been interpreted as meaning that the representations are important, pertinent or of much consequence, or would influence an ordinary citizen to decide to buy the product being offered. The new provisions have been drafted without reference to materiality for false or misleading representations in sender, subject matter or locator information because this information is almost always material to the decisions of Internet users to, at a minimum, review a message or search result.

To ensure more effective and timely enforcement of investigations involving the sender, subject matter or locator information, the provisions dispense with the need to prove materiality where evidence can show that these forms of representations are deceptive. Second, the proposed provision is sufficiently narrow to remain within the scope and purpose of the *Competition Act* without including materiality as an essential element of the offence, due to the requirement that the representation be made for the purpose of promoting a product or business interest.

This also reflects the goal behind the BILL C-28 – to create a complete framework for anti-spam enforcement that ensures that false or misleading representations in the electronic marketplace (such as sender or subject line information which may not necessarily be caught by existing provisions) are captured under the *Competition Act*, and that this framework remains sufficiently broad to be adaptive to technological change. Moreover, the BILL C-28 also includes a right to private enforcement of the anti-spam provisions, including statutory damages, which is not available in relation to other parts of the *Competition Act*.

BACKGROUND

The clause is consistent with the Task Force on Spam's recommendations: "...the following email activities and practices should be made offences in spam-specific legislation...the construction of false or misleading headers or subject lines (i.e., false transmission information)..."

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.011(2) - False or misleading representation — electronic message**

PROPOSED WORDING

(2) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent in an electronic message a representation that is false or misleading in a material respect.

EXPLANATION

This subsection makes civilly reviewable conduct the sending of a materially false or misleading representation in the content of an electronic message, when done for commercial purposes. It covers both direct and indirect conduct, as well as both senders and those who cause such representations to be sent.

RATIONALE

This provision deters the sending of electronic false or misleading representations, irrespective of whether an electronic message is unsolicited (and therefore also falls under the portions of the BILL C-28 administered by the CRTC). The goal is to protect electronic commerce by enhancing the reliability of electronic communications, much in the way that the *Competition Act*'s general deceptive marketing provisions are designed to strengthen confidence in the market.

Materially false or misleading representations are already caught under section 74.01 of the *Competition Act* (or its criminal counterpart in section 52). However, the goal behind the BILL C-28 is to create a complete framework for anti-spam enforcement. Without this provision, the right to private enforcement including statutory damages would not be available in relation to the contents of a message, as this right is not available in relation to other parts of the *Competition Act*.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.011(3) - False or misleading representation — locator**

PROPOSED WORDING

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, makes or causes to be made a false or misleading representation in a locator.

EXPLANATION

This subsection makes civilly reviewable conduct the making of a false or misleading representation, when done for commercial purposes, in the locator information that directs Internet users to a given website (including URLs or "web addresses", as well as HTML tags indicating subject matter or relevant search terms for Internet search engines). It covers both direct and indirect conduct, as well as both those who make such representations, and those who cause them to be made.

RATIONALE

When searching for information online, Internet users will enter key words into a Internet search engine to find websites pertaining to those words. Advertisers can embed these words into the URL and the coding of their websites, attracting traffic and prioritizing their sites in search results. These types of locator information may not be visible to the Internet user.

A person can set up a commercial website whose locator information is false or misleading, and in so doing draw a potentially unlimited number of Internet users to that site. The creation of this provision would deter such a practice, and prevent unscrupulous Canadian dealers from preying on the vulnerability or inexperience of many Internet users, such as those searching for affordable treatment of a disease, or other rare opportunities.

Representations in the locator information may, in some circumstances, already be caught under section 74.01 of the *Competition Act* (or its criminal counterpart in section 52). In contrast to section 74.01, however, it is not necessary in section 74.011 to prove that the false or misleading representation in the locator is material. Materiality has been interpreted as meaning that the representations are important, pertinent or of much consequence, or would influence an ordinary citizen to decide to buy the product being offered. The new provisions have been drafted without reference to materiality for false or misleading representations in sender, subject matter or locator information because this information is almost always material to the decisions of Internet users to, at a minimum, review a message or search result.

To ensure more effective and timely enforcement of investigations involving the sender, subject matter or locator information, the provisions dispense with the need to prove materiality where evidence can show that these forms of representations are deceptive. Second, the proposed provision is sufficiently narrow to remain within the scope and purpose of the *Competition Act* without including materiality as an essential element of the offence, due to the requirement that the representation be made for the purpose of promoting a product or business interest.

This reflects the goal behind Bill C-28 (BILL C-28) – to create a complete framework for anti-spam enforcement that ensures that false or misleading representations in the electronic marketplace (such as URLs and other locator information which may not necessarily be caught by existing provisions) are captured under the *Competition Act*, and that this framework remains sufficiently broad to be adaptive to technological change. Moreover, the BILL C-28 also includes a right to private enforcement of the anti-spam provisions, including statutory damages, which is not available in relation to other parts of the *Competition Act*.

BACKGROUND

The amendment is consistent with the 2005 Task Force on Spam's Working Group on Legislation and Enforcement which concluded that amendments to the *Competition Act* are necessary to fill gaps in the Act that hamper the Competition Bureau's ability to pursue spammers.

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.011(4) - General impression to be considered**

PROPOSED WORDING

(4) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

EXPLANATION

The subsection states that the Competition Tribunal or court is to consider both the general impression of a representation as well as its literal meaning in any proceeding with respect to the reviewable conduct described in section 74.011.

RATIONALE

The inclusion of this provision mirrors the deceptive marketing provisions elsewhere in the *Competition Act*, to ensure that the parliamentary intent to curb deceptive marketing practices is not circumvented by an extremely narrow reading of the reviewable conduct provisions. As such, it takes a consumer-perspective approach by including the general impression of a representation, as well as its literal meaning.

BACKGROUND

In 1999, Bill C-20 broadened the general impression test from the criminal provision section 52 to the civil section 74.01. In 2009, Bill C-10 expanded its application from false and misleading representations to all civil deceptive marketing practices in sections 74.01 and 74.02, including the making of performance claims and the use of testimonials.

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.011(5) – Interpretation**

PROPOSED WORDING

(5) For the purposes of this section,

(*a*) an electronic message is considered to have been sent once its transmission has been initiated; and

(*b*) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

EXPLANATION

This subsection stipulates that, for the purposes of section 74.011, initiating the transmission of an electronic message is equivalent to sending it, and that nothing hinges on the successful delivery of that message to a working electronic address.

RATIONALE

This subsection renders irrelevant the ultimate fate of an electronic message after it has been initiated, if the actions that led to its initiation otherwise fit within the reviewable conduct in the section. As such, a person will not evade review on the basis of either the failure of technology or its efficacy (in the case of filtering techniques), an outdated recipient address, or because of any other element of chance divorced from his or her reviewable actions.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.012(1) – Assisting foreign states**

PROPOSED WORDING

74.012 (1) The Commissioner may, for the purpose of assisting an investigation or proceeding in respect of the laws of a foreign state, an international organization of states or an international organization established by the governments of states that address conduct that is substantially similar to conduct that is reviewable under section 74.01, 74.011, 74.02, 74.04, 74.05 or 74.06,

(*a*) conduct any investigation that the Commissioner considers necessary to collect relevant information, using any powers that the Commissioner may use under this Act to investigate conduct that is reviewable under any of those sections; and

(*b*) disclose the information to the government of the foreign state or to the international organization, or to any institution of any such government or organization responsible for conducting investigations or initiating proceedings in respect of the laws in respect of which the assistance is being provided, if the government, organization or institution declares in writing that

(i) the use of the information will be restricted to purposes relevant to the investigation or proceeding, and

(ii) the information will be treated in a confidential manner and, except for the purposes mentioned in subparagraph (i), will not be further disclosed without the Commissioner's express consent.

EXPLANATION

The amendment provides the Commissioner of Competition with the power to provide investigative assistance to a foreign government, international organization, or any relevant institution of such government or organization, for the purpose of assisting a foreign investigation or proceeding. The foreign investigation or proceeding must relate to conduct similar to that covered by the deceptive marketing provisions of the *Competition Act* (specifically, sections 74.01, 74.011, 74.02, 74.04, 74.05, 74.06).

The Commissioner may use any investigative powers in the *Competition Act* that would be available to her if she were investigating conduct that is reviewable under sections 74.01, 74.011, 74.02, 74.04, 74.05, 74.06 of the *Competition Act*.

The Commissioner may disclose information obtained pursuant to her investigation, but only if the foreign recipient declares in writing that it will respect two conditions: first, it will restrict the use of the information to purposes relevant to the foreign investigation or proceeding; second, it will treat the information as confidential.

RATIONALE

Online threats do not respect international boundaries; providing the Commissioner of Competition with the power to provide investigative assistance to its foreign partners with respect to deceptive marketing practices will allow for and encourage effective international cooperation to combat cross border spammers and perpetrators of false or misleading representations.

The restrictions on disclosure help ensure that information provided to the foreign recipient will not be used for purposes beyond those provided for in the Bill and will be treated in a confidential manner.

Example:

If a telemarketer or spammer is located in Mexico and targets victims in the United States but routes the communication through a telecommunications service provider in Canada the offence could be prosecuted in Mexico or the United States. There is likely not a sufficient nexus to Canada to pursue the spammer in Canada as the spammer is located in Mexico, the victims are in the United States, and the Canadian service provider is probably not aware of the offence. In order to proceed in the United States or Mexico the foreign authorities need the information held by the Canadian service provider in order to establish that the communication originated with the Mexican spammer and eventually went to the US victim. There would not be grounds to commence an inquiry under the *Competition Act* and use the investigative powers available under the Act to collect the information from the Canadian service provider as no reviewable conduct was committed in Canada. Under the proposed amendment, either the Mexican or US authorities could ask the Competition Bureau for assistance and to use its investigative powers under the *Competition Act* to obtain the routing information from the Canadian telecommunications service provider.

BACKGROUND

As a general rule, information, for which there is a reasonable expectation of privacy, obtained by a governmental body or institution cannot be shared with an institution of a foreign state or international organization without either following the procedure set out in legislation respecting mutual legal assistance or other specific statutory authority that complies with the *Charter*.

The *U.S. Safe Web Act,* 15 U.S.C. § 46 (j), provides the U.S. Federal Trade Commission with a similar power.

The amendment is based on a proposal tabled by the Chairman of the Canadian Radio-television Telecommunications Commission ("CRTC") to the Standing Committee on Industry, Science and Technology ("INDU Committee") on June 18, 2009.

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.012(2) – Limitation**

PROPOSED WORDING

(2) Subsection (1) does not apply if the contravention of the laws of the foreign state has consequences that would be considered penal under Canadian law.

EXPLANATION

The amendment prevents investigative assistance being provided pursuant to s. 74.012(1) if the contravention of the foreign laws to which the assistance pertains, would be considered penal in Canada.

RATIONALE

The amendment forecloses the possibility that the Commissioner of Competition will share information obtained at a civil standard in Canada for use in a foreign criminal proceeding; such sharing has the potential to violate section 8 of the *Charter*. However, the Commissioner of Competition could provide assistance in such a case pursuant to clause 75.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
77	77	**Subsection 74.012(3) – Assisting foreign states**

PROPOSED WORDING

(3) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

EXPLANATION

The amendment requires the Commissioner of Competition to consider, when deciding whether or not to provide investigative assistance pursuant to subsection 52.02(1), whether the foreign recipient agrees to provide similar assistance to her.

RATIONALE

The amendment encourages foreign governments, international organizations and institutions to provide reciprocal assistance to the Commissioner of Competition.

BACKGROUND

The Amendment mirrors the *U.S. Safe Web Act,* 15 U.S.C. § 46 (j)(3)(A).

Bill Clause No.	Section No.	Topic
78	78	**Paragraph 74.03(1)(*d*) - Representations accompanying products**

PROPOSED WORDING

78. Paragraph 74.03(1)(*d*) of the Act is replaced by the following:

(*d*) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

EXPLANATION

Subsection 74.03(1) is meant to protect middlemen, who act without knowledge of

a false or misleading misrepresentation, by assigning liability for the representation to the person who caused the representation to be expressed, made, or contained. Middlemen are only protected with respect to those representations listed at paragraphs 74.03(1)(*a*)-(*e*). The representations currently listed at paragraph 74.03(1)(*d*) are: “in-store, door-to-door or telephone selling to a person as ultimate user”.

Clause 78 replaces the reference to “telephone selling” in paragraph 74.03(1)(*d*) with the more technology neutral language of “communicating orally by any means of telecommunication”.

RATIONALE

Oral telecommunication is no longer restricted to telephony and now occurs using alternative means of telecommunication (such as Voice over IP). The amendment responds to this development by making paragraph 74.03(1)(*d*) technology neutral. This ensures that innocent middlemen continue to be protected from liability in situations analogous to those envisioned by the original subsection.

BACKGROUND

Paragraph 74.03(1)(*d*) was introduced by Bill C-20 and came into force in 1999. The language of paragraph 74.03(1)(*d*) was copied from paragraph 52(2)(*d*) that was introduced by Bill C-2 and came into force in 1976.

Bill Clause No.	Section No.	Topic
79	79	**Section 74.101(1) - Deduction from administrative monetary penalty**

PROPOSED WORDING

79. The Act is amended by adding the following after section 74.1:

74.101 (1) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under section 74.011 and orders the person to pay an administrative monetary penalty under paragraph 74.1(1)(*c*), then the court shall deduct from the amount of the penalty that it determines any amount that the person

(*a*) has been ordered to pay under paragraph 51(1)(*b*) of Bill C-28 in respect of the same conduct; or

(*b*) has agreed in a settlement agreement to pay on account of amounts referred to in paragraph 51(1)(*b*) of that Act in respect of the same conduct.

EXPLANATION

When a court is assessing the amount of an administrative monetary penalty (AMP) that should be ordered in respect of reviewable conduct under section 74.011, this section requires the court to take into consideration any amounts already paid by a defendant as statutory damages under Bill C-28 (BILL C-28), or as a settlement in lieu of such damages, by deducting the amount ordered or agreed upon from the total of the AMP that the court would otherwise order to be paid.

RATIONALE

The private action scheme in the BILL C-28 is designed to serve as a substitute for public enforcement of the unsolicited electronic message provisions in that Act, as well as the new deceptive electronic message provisions in the *Competition Act*. The ability to obtain statutory damages under paragraph 51(1)(*b*) of the BILL C-28, independently from any actual loss suffered, is meant to provide an incentive for private litigants to bring claims against those engaging in reviewable conduct, thereby ensuring compliance with the law even in the absence of personal loss. As such, the paragraph 51(1)(*b*) statutory damages serve a function analogous to AMPs under the *Competition Act*. Therefore, taking these into consideration will ensure that duplicative or excessive penalties are not ordered.

Though there are statutory bars in place in Bill C-28 to prevent simultaneous proceedings by both private litigants and the Canadian Radio-television and Telecommunications Commission,

no such structure exists with respect to the *Competition Act* provisions and the Commissioner of Competition. As a result, a provision such as this one is necessary to ensure that a other amounts paid or payable are considered.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
79	79	**Section 74.101(2) – Restitution and interim injunction**

PROPOSED WORDING

(2) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under subsection 74.011(2), it may order the person to pay an amount under paragraph 74.1(1)(*d*), and may issue an interim injunction under section 74.111, as if the conduct were conduct that is reviewable under paragraph 74.01(1)(*a*).

EXPLANATION

The clause provides the court with the power to order a person to pay restitution when it determines that a person is sending electronic messages that are false or misleading in a material respect (s. 74.011(2)).

The clause also provides the court with the power to issue an interim freezing order in such circumstances.

RATIONALE

Under recent amendments in Bill C-10, the *Competition Act* gives courts the power to order restitution and issue interim freezing orders if a person has engaged in false or misleading conduct (s. 74.01). The proposed amendment maintains the courts' ability to make such orders when a person has engaged in conduct that violates s. 74.011(2), the new false or misleading electronic commerce content provision.

An order for restitution is designed to increase compliance with the false and misleading representations provisions of the *Competition Act*, by including an additional incentive to refrain from engaging in such conduct. Investigations conducted to date reveal that reviewable conduct (on and offline) frequently results in millions of dollars in sales for those who engage in it, with concurrent losses to consumers. Often, these sales are of products that do not perform as claimed, and provide no value to consumers. Adding the ability of the court to order restitution to online purchasers of these products is expected to increase compliance with the new false and misleading representation provision, by motivating advertisers to exercise due diligence to ensure that their advertisements are not false or misleading to consumers in the electronic marketplace. This amendment would clarify that the Commissioner can ask for restitution in an appropriate case, whether on or offline, without the necessity of taking online cases under the general false and misleading content provision, (which is still available for all such cases,

including online). Moreover, there is little rationale for distinguishing in this regard between online and offline commerce.

Although, private right of action compensatory damages are available to claimants, restitution would be limited to the amount paid for the product, and would not extend to damages caused by the faulty product, as could be claimed under the Private Right of Action (PRA). If the Commissioner took a case under s. 74.011(2) first, the amount of restitution awarded to claimants by the Tribunal under the CA, would be deducted under a PRA under BILL C-28, as a relevant factor under para. 51(2)(i). If the PRA was taken first and compensatory damages awarded to claimants, that amount would be deducted under 74.1(7) when the Tribunal determines the amount to be paid in restitution.

The interim freezing order is a necessary part of the restitution regime under the *Competition Act*. The amendment ensures that the court has the ability to stop someone who has engaged in false or misleading representations in the electronic marketplace from disposing of their property, so as to ensure the preservation of property pending the determination of whether restitution will be granted.

Restitution has been confined to s. 74.011(2) as this subsection involves cases where the Commissioner can demonstrate to a relatively high standard that, not only was there a representation of the kind prohibited in Part VII.1 of the Act, but also that the misrepresentation was material. This approach strikes a good balance to ensure that the restitution remedy be limited to cases which go beyond mere technical breaches of the Act - that there was a clear element of detrimental reliance on the deceptive representation before restitution could be contemplated.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
80	80	**Subsection 74.11(1) - Temporary order**

PROPOSED WORDING

80. Subsections 74.11(1) to (4) of the Act are replaced by the following:

74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that

(*a*) serious harm is likely to ensue unless the order is issued; and

(*b*) the balance of convenience favours issuing the order.

EXPLANATION

Subsection 74.11(1) authorizes a court to make a temporary order to prevent a person from engaging in reviewable conduct under Part VII.1 of the Competition Act. The order may be granted where it appears to the court that a person is engaging in reviewable conduct, where the balance of convenience favours issuing the order, and where, unless the order is issued, serious harm is likely to ensue.

Clause 80 changes the burden to obtain the temporary order from "strong *prima facie case*" to "it appears to the court".

RATIONALE

Owing to the nature of the electronic marketplace and the ability of deceptive or misleading commercial electronic messages to reach countless consumers almost instantaneously, it is necessary to create an effective interim injunction provision which can allow the courts to quickly stop the spread of such messages. While the Act currently has a provision for the making of a temporary order, that remedy would likely be ineffective for addressing such threats. Accordingly the provision has been modernized and updated to reflect the case law to make it more suitable for this purpose. The test set out strikes a better balance between the rights of consumers/businesses affected by deceptive marketing practices and the rights of parties who are subject to the injunction.

The other changes to subsection 74.11(1) which have been made are of a minor nature and are

meant to modernize the language of the subsection and make it consistent with the new wording in subsection 33(1.1).

BACKGROUND

Subsection 74.11(1) was introduced by Bill C-20 and came into force in 1999. The current test authorizes a court to make a temporary order in circumstances where there is a strong *prima facie* case that a person is engaging in reviewable conduct under Part VII.1, where the court is satisfied that the balance of convenience favours issuing the order, and where, unless the order is issued, serious harm is likely to ensue.

In *RJR-MacDonald*, the Supreme Court of Canada approved an approach, which moved away from satisfying the court of a strong *prima facie* case to one that focuses on whether there is a serious question to be tried, as judged by a lower threshold.

Bill Clause No.	Section No.	Topic
80	80	**Subsection 74.11(1.1) - Temporary order — supply of a product**

PROPOSED WORDING

(1.1) On application by the Commissioner, a court may order any person named in the application to refrain from supplying to another person a product that it appears to the court is or is likely to be used to engage in conduct that is reviewable under this Part, or to do any act or thing that it appears to the court could prevent a person from engaging in such conduct, if it appears to the court that

(*a*) serious harm is likely to ensue unless the order is issued; and

(*b*) the balance of convenience favours issuing the order.

EXPLANATION

The new subsection authorizes a court to make a temporary order to prevent a supplier from supplying a product to a person in circumstances where it appears to the court that it is likely that the product will be used by the person to engage in reviewable conduct under Part VII.1 of the *Competition Act*. The order may be granted where the court is satisfied that the balance of convenience favours issuing the order, and where, unless the order is issued, serious harm is likely to ensue.

RATIONALE

The new subsection provides the Competition Bureau with an extra tool which it can use to cut off false or misleading online misrepresentations, such as spam, at an early stage. The Bureau expects that, on most occasions, TSPs will act responsibly to shut down spammers as spamming (and other illegal activity) generally violates the terms of service contracts spammers have with their service providers. However, in those rare instances where a TSP is unwilling or unable to stop supplying a product to a spammer, the new subsection will provide the Bureau with an additional tool.

BACKGROUND

The amendment is consistent with the Task Force on Spam’s recommendations which stated “Responsibility should also rest with other third-party beneficiaries of spam.”

Although the *Competition Act* does not currently contain a civil injunctive power against third party suppliers to false or misleading advertisers, the *Competition Act* does contain a criminal injunction provision against third party suppliers (subsection 33(1.1)). Subsection 33(1.1) was introduced in Bill C-20 in 1999. It was meant to facilitate action against repeat telemarketer offenders. During consultations for Bill C-20, none of those key stakeholders, who were also potential third party product suppliers of telemarketers, raised any serious objections to the type of remedy being proposed under subsection 33(1.l), for use against such suppliers.

Bill Clause No.	Section No.	Topic
80	80	**Subsection 74.11(2) – Duration**

PROPOSED WORDING

(2) Subject to subsection (5), an order made under subsection (1) or (1.1) has effect, or may be extended on application by the Commissioner, for any period that the court considers sufficient to meet the circumstances of the case.

EXPLANATION

Subsection 74.11(2) provides for the duration or extension of a temporary order issued pursuant to subsection 74.11(1). The duration or extension may be set for any period that the court considers necessary and sufficient in the circumstances.

Clause 80 adds a new reference to subsections "(1) or (1.1)" and makes other changes in the language of subsection 74.11(2) to reflect this.

RATIONALE

The amendments are consequential to new subsection 74.11(1.1).

BACKGROUND

Subsection 74.11(2) was first introduced by Bill C-20, which came into force in 1999. However, the current language of the subsection was introduced by Bill C-23 in 2002 which provided that the court should have the discretion to set whatever time period for an order that it considers most appropriate in the circumstances.

Bill Clause No.	Section No.	Topic
80	80	**Subsection 74.11(3) - Notice of application**

PROPOSED WORDING

(3) Subject to subsection (4), at least 48 hours' notice of an application referred to in subsection (1), (1.1) or (2) shall be given by or on behalf of the Commissioner to the person in respect of whom the order or extension is sought.

EXPLANATION

Subsection 74.11(3) requires the Commissioner of Competition to provide at least 48 hours' notice when seeking an injunction or extension of an injunction. Notice must be given to everyone against whom the injunction or extension is sought.

Clause 80 adds two new references to "(1.1)" in subsection 74.11(3). Clause 80 also replaces the word "forty-eight" with the number "48".

RATIONALE

The new references to subsection "(1.1)" are consequential to the amendments at subsection 74.11(1.1).

The amendment to replace the term "forty-eight" modernizes the language of the *Competition Act* and ensures consistency with other injunction provisions in the *Competition Act*.

BACKGROUND

Subsection 74.11(3) was introduced by Bill C-20, which came into force in 1999.

Bill Clause No.	Section No.	Topic
80	80	**Subsection 74.11(4) - *Ex parte* application**

PROPOSED WORDING

(4) The court may proceed *ex parte* with an application made under subsection (1) or (1.1) if it is satisfied that subsection (3) cannot reasonably be complied with or that the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest.

EXPLANATION

Subsection 74.11(4) sets out the terms and conditions on which a Court may grant an *ex parte* injunction (an injunction without notice to or argument from the other party) pursuant to s. 74.11(1).

Clause 80 amends the current subsection by replacing the word “where” with the word “if”.

Clause 80 also adds a new reference to subsections “(1.1)”.

RATIONALE

The amendment to replace the word “where” with “if” modernizes the language of subsection 74.11(4).

The new reference to “(1.1)” is consequential to the amendments to subsection 74.11(1.1).

BACKGROUND

Subsection 74.11(4) was introduced by Bill C-20, which came into force in 1999.

Bill Clause No.	Section No.	Topic
81	81	**Section 74.16 - Where proceedings commenced under section 52 or 52.01**

PROPOSED WORDING

81. Section 74.16 of the Act is replaced by the following:

74.16 No application may be made under this Part against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which proceedings have been commenced against that person under section 52 or 52.01.

EXPLANATION

Section 74.16 prevents duplication of proceedings by providing that no application may be made under this Part where proceedings have been commenced under section 52 on the basis of the same or substantially the same facts.

Clause 81 updates section 74.16 to refer to section 52.01.

RATIONALE

The amendment is consequential to clause 75. The language of the section has also been simplified.

BACKGROUND

Section 74.16 was introduced by Bill C-20 and came into force in 1999.

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(1) – Definitions; "access"**

PROPOSED WORDING

82. The *Personal Information Protection and Electronic Documents Act* is amended by adding the following after section 7:

7.1 (1) The following definitions apply in this section.

"access" means to program, to execute programs on, to communicate with, to store data in, to retrieve data from, or to otherwise make use of any resources, including data or programs on a computer system or a computer network.

EXPLANATION

This definition is intended to address all forms of accessing a computer to make the computer perform any function. It includes accessing the computer remotely via telecommunications and also includes linked computer systems and computer networks.

RATIONALE

This definition provides the framework for the additional contravention to PIPEDA as amended by section 82 with the additions of 7.1 (2) and (3) to PIPEDA.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(1) - "computer program"**

PROPOSED WORDING

"computer program" has the same meaning as in subsection 342.1(2) of the *Criminal Code*.

Criminal Code definition:

"computer program" means data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function.

EXPLANATION

This term is used to describe computer programs which are data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function. A computer program is therefore any data that can be read by a computer that causes the computer to perform a task or function. Computer program includes computer software or computer language (data) that is machine readable and will cause the computer to perform a task.

RATIONALE

It is necessary to define computer program for the purposes of the amendments as it attempts to address the unauthorized installation of computer programs to access personal information, which includes spyware. (Spyware is defined in the glossary)

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(1) - "Computer system"**

PROPOSED WORDING

"computer system" has the same meaning as in subsection 342.1(2) of the *Criminal Code*.

Definition found in subsection 342.1(2) of the *Criminal Code*:

> "computer system" means a device that, or a group of interconnected or related devices one or more of which,
>
> (*a*) contains computer programs or other data, and
>
> (*b*) pursuant to computer programs,
>
> (i) performs logic and control, and
>
> (ii) may perform any other function;

EXPLANATION

This term is used to describe any machine that is capable of understanding computer programs.

RATIONALE

It is necessary to define computer system for the purposes of the amendments intended to address the unauthorized access to computer systems to collect personal information.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(1) - "electronic address"**

PROPOSED WORDING

"electronic address" means an address used in connection with

(*a*) an electronic mail account;

(*b*) an instant messaging account; or

(*c*) any similar account.

EXPLANATION

An electronic address is defined as any identifiable address that could be linked via telecommunications. It is used to specify a source or destination of an electronic message and includes an electronic mail address, instant messaging account name, telephone number and facsimile number. The electronic address can be set out in numerical, alphabetical or alphanumerical form.

RATIONALE

For the purposes of these amendments, and more specifically the unauthorized collection of electronic addresses provisions, it is important to define the types of addresses are transmitted to and from. This definition is intended to cover every form communications medium so that every type of message that can be understood by a person or a computer is captured.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(2) – Collection of electronic addresses, etc.**

PROPOSED WORDING

(2) Paragraphs 7(1)(*a*), (*c*) and (*d*) and (2)(*a*) to (*c.1*) and the exception set out in clause 4.3 of Schedule 1 do not apply in respect of

(*a*) the collection of an individual's electron- ic address, if the address is collected by the use of a computer program that is designed or marketed primarily for use in generating or searching for, and collecting, electronic addresses; or

(*b*) the use of an individual's electronic address, if the address is collected by the use of a computer program described in paragraph (*a*).

EXPLANATION

This clause amends PIPEDA to specify that the exceptions from the need to obtain consent for the collection, use and disclosure of personal information under PIPEDA do not apply to the use of a computer program that is designed or marketed to generate or search for electronic addresses for the purpose of collecting those addresses. Subsection (b) further stipulates that, regardless whether a certain person actually used the program, the exceptions under PIPEDA do not apply to the use of an individual's electronic addresses collected via this type of program.

RATIONALE

This clause is intended to address what are commonly referred to as a "dictionary attacks" and "address harvesting". Address harvesting is the collection of lists of email addresses by automated means from websites or other online sources. A dictionary attack is an email-address guessing technique where the collector attempts to deliver email to a large number of made-up addresses, using either words out of a dictionary or letter combinations such as aaaa@example.ca, aaab@example.ca or zzzz@example.ca, and then is able to collect the list of addresses that are determined to be valid and functional.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
82	82	**Subsection 7.1(3) – Accessing a computer system to collect personal information, etc..**

PROPOSED WORDING

(3) Paragraphs 7(1)(*a*) to (*d*) and (2)(*a*) to (*c.1*) and the exception set out in clause 4.3 of Schedule 1 do not apply in respect of

(*a*) the collection of personal information, through any means of telecommunication, if the collection is made by accessing a computer system or causing a computer system to be accessed in contravention of an Act of Parliament; or

(*b*) the use of personal information that is collected in a manner described in paragraph (*a*).

EXPLANATION

This clause amends PIPEDA to specify that the exceptions from the need to obtain consent for the collection, use and disclosure of personal information under PIPEDA do not apply where a computer system is accessed in contravention of an Act of Parliament.

RATIONALE

This clause is intended to address the collection of personal information without the user's knowledge or consent via a computer system.

While section 8 of the bill addresses the unauthorized installation of computer programs, this subsection addresses the subsequent use of such software to collect personal information about a computer user (*e.g.*, passwords, Internet surfing habits, etc.).

Of particular note, private investigations can continue to collect personal information without consent in some circumstances, but they become subject to the BILL C-28 if they access computer systems in contravention of an Act of Parliament. In contrast, common online processes may access publicly available personal information without express authorization but, as long as that access does not violate Federal legislation, it continues to be permitted under the express consent exemptions in section 7 of PIPEDA.

Bill C-28 Clause by Clause

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12(1) - Examination of complaint by Commissioner**

PROPOSED WORDING

83. Section 12 of the Act is replaced by the following:

12. (1) The Commissioner shall conduct an investigation in respect of a complaint, unless the Commissioner is of the opinion that

(*a*) the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;

(*b*) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; or

(*c*) the complaint was not filed within a reasonable period from the date when the subject matter of the complaint arose.

EXPLANATION

This subsection amends section 12(1) of PIPEDA by moving the investigative powers of the Privacy Commissioner of Canada to subsection 12.1 and by providing exceptions to the Privacy Commissioner's obligation to investigate a complaint. As a result, the Commissioner is not obligated to investigate a complaint when she is of the opinion that: 1) the complaint ought first to be dealt with by a grievance or other review procedure; 2) it would be more appropriate for the complaint to be dealt with by a procedure under another federal or provincial law or; 3) too much time has passed between the time of the complaint and the time at which the subject matter of the complaint arose.

RATIONALE

These modifications provide the Privacy Commissioner of Canada with the ability to encourage individuals to resolve their information-handling conflicts directly with the organization or through other dispute resolution mechanisms such as those provided by an industry oversight body or through other remedies available under federal or provincial law. Furthermore, if too much time has passed between the time at which the situation that is the object of the complaint took place and the time at which the complaint was lodged, an investigation of the facts by the Commissioner may no longer be useful. These exceptions will allow the Commissioner to allocate her investigative resources to address more pressing privacy issues and challenges.

BACKGROUND

In a January 8, 2008 letter to Industry Canada in response to consultations held by the Department on the implementation of the October 17, 2007 Government Response to the Report on the statutory review of PIPEDA by the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI), the Commissioner asked that PIPEDA be modified to provide her with increased discretion at the front-end to refuse complaints and/or discontinue their investigation if it would serve no useful purpose thereby allowing her to focus her investigative resources on those privacy issues that are of broader systemic interest. In her correspondence, the Commissioner noted that the *Canadian Human Rights Act*, the *Public Servants Disclosure Protection Act* and the *Accountability Act* as well as Quebec's *An Act Respecting the Protection of Personal Information in the Private Sector* allow the respective Commissioners to refuse or cease to examine a matter in certain circumstances.

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12(2) - Exception**

PROPOSED WORDING

(2) Despite subsection (1), the Commissioner is not required to conduct an investigation in respect of an act alleged in a complaint if the Commissioner is of the opinion that the act, if proved, would constitute a contravention of any of sections 6 to 9 of Bill C-28 or section 52.01 of the *Competition Act* or would constitute conduct that is reviewable under section 74.011 of that Act.

EXPLANATION

This subsection clarifies that the Office of the Privacy Commissioner is not required to investigate a complaint if they can prove that they believe it is a violation of sections 6 to 9 of BILL C-28 or sections 52.01 0r 74.011 of the *Competition Act*.

RATIONALE

The Office of the Privacy Commissioner is provided with this ability because such complaints are better addressed by the CRTC and/or the Competition Bureau.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12(3) – Notification**

PROPOSED WORDING

(3) The Commissioner shall notify the complainant and the organization that the Commissioner will not investigate the complaint or any act alleged in the complaint and give reasons.

EXPLANATION

This subsection establishes that, in the event that a decision is made by the Commissioner not to investigate a complaint, the Commissioner is required to advise the complainant and the organization of her decision, and provide reasons supporting her decision.

RATIONALE

This ensures that the complainant and the organization are informed of a decision by the Commissioner not to investigate and are also provided with an explanation of the decision. This notice and explanation provides the complainant with the opportunity to either seek redress elsewhere or to provide the Commissioner with further details and information in the event that they decide to request the Commissioner to reconsider her decision.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12(4) – Compelling Reasons**

PROPOSED WORDING

(4) The Commissioner may reconsider a decision not to investigate under subsection (1), if the Commissioner is satisfied that the complainant has established that there are compelling reasons to investigate.

EXPLANATION

This subsection allows the Commissioner to reconsider her decision not to investigate a complaint, should she be satisfied that a complainant has provided her with compelling reason to reopen the investigation.

RATIONALE

This ensures that, in the event that a complainant has successfully argued that an investigation should take place, the Commissioner is able to reconsider her decision not to investigate. For example, a complainant may argue that they have already attempted other redress mechanisms without success, or that such a mechanism may prove prejudicial to them, for example in respect of a complaint against an employer.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.1(1) – Powers of Commissioner**

PROPOSED WORDING

12.1 (1) In the conduct of an investigation of a complaint, the Commissioner may

(*a*) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

(*b*) administer oaths;

(*c*) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

(*d*) at any reasonable time, enter any prem- ises, other than a dwelling-house, occupied by an organization on satisfying any security requirements of the organization relating to the premises;

(*e*) converse in private with any person in any premises entered under paragraph (*d*) and otherwise carry out in those premises any inquiries that the Commissioner sees fit; and

(*f*) examine or obtain copies of or extracts from records found in any premises entered under paragraph (*d*) that contain any matter relevant to the investigation.

EXPLANATION

This new subsection includes the provisions that were removed from section 12(1), respecting the powers of the Commissioner to conduct investigations.

RATIONALE

The creation of this new subsection provides a clearer separation between the obligation of the Commissioner to investigate (and related exceptions) which are now under section 12 and the powers she needs to conduct these investigations which are now under section 12.1.

BACKGROUND

The Commissioner has these same powers under the *Privacy Act*.

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.1(2) - Dispute resolution mechanisms**

PROPOSED WORDING

(2) The Commissioner may attempt to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation.

EXPLANATION

The content of this subsection is unchanged, but was moved from 12(2) to 12.1(2). This clause provides that, in attempting to resolve a complaint, the Commissioner may use dispute resolution methods.

RATIONALE

The powers that the Commissioner needs to conduct investigations are now all found under section 12.1.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.1(3) - Delegation**

PROPOSED WORDING

(3) The Commissioner may delegate any of the powers set out in subsection (1) or (2).

EXPLANATION

The content of this subsection remains unchanged, but is moved from 12(3) to 12.1(3). This subsection provides that, the Commissioner may delegate his or her powers to conduct an investigation.

RATIONALE

The powers that the Commissioner needs to conduct investigations are now all under section.12.1.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.1(4) - Return of records**

PROPOSED WORDING

(4) The Commissioner or the delegate shall return to a person or an organization any record or thing that they produced under this section within 10 days after they make a request to the Commissioner or the delegate, but nothing precludes the Commissioner or the delegate from again requiring that the record or thing be produced.

EXPLANATION

Then content of this subsection remains unchanged, but is moved from 12(4) to 12.1(4). It provides that the Commissioner shall, within ten days, return any record that he or she took from an organization in the course of investigating a complaint.

RATIONALE

The powers that the Commissioner needs to conduct investigations, and related obligations, are now all found under section 12.1.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.1(5) – Certificate of Delegation**

PROPOSED WORDING

(5) Any person to whom powers set out in subsection (1) are delegated shall be given a certificate of the delegation and the delegate shall produce the certificate, on request, to the person in charge of any premises to be entered under paragraph (1)(*d*).

EXPLANATION

This subsection remains unchanged, but is moved from 12(5) to 12.1(5). This clause provides that when the Commissioner delegates her powers, she must give the person to whom he or she has delegated her powers a certificate of delegation. Upon request, the Commissioner's delegate must show this certificate before entering any premises to conduct an investigation.

RATIONALE

The powers that the Commissioner needs to conduct investigations, and related obligations, are now all found under section 12.1.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.2(1) - Reasons**

PROPOSED WORDING

12.2 (1) The Commissioner may discontinue the investigation of a complaint if the Commissioner is of the opinion that

(*a*) there is insufficient evidence to pursue the investigation;

(*b*) the complaint is trivial, frivolous or vexatious or is made in bad faith;

(*c*) the organization has provided a fair and reasonable response to the complaint;

(*d*) the matter is already the object of an ongoing investigation under this Part;

(*e*) the matter has already been the subject of a report by the Commissioner;

(*f*) any of the circumstances mentioned in paragraph 12(1)(*a*), (*b*) or (*c*) apply; or

(*g*) the matter is being or has already been addressed under a procedure referred to in paragraph 12(1)(*a*) or (*b*).

EXPLANATION

This clause replaces subsection 13(2) which previously set out the circumstances under which the Commissioner was not required to issue a report about a complaint. The new provision gives the Commissioner the ability to discontinue an investigation under an expanded set of circumstances. These circumstances are as follows: 1) there is insufficient evidence to pursue the investigation; 2) the complaint is trivial, frivolous, vexatious or is made in bad faith; 3) the organization that is the object of the complaint has provided a fair and reasonable response to the complaint; 4) the matter is already the object of an ongoing investigation under PIPEDA; 5) the matter has already been the subject of a report by the Commissioner; 6) any of the circumstance mentioned in paragraph 12(1)(a), (b) or (c) apply; or 7) the matter is being or has already been addressed under a procedure referred to under paragraph 12(1)(a) or (b).

RATIONALE

It is necessary to remove the provision setting out the circumstances in which the Commissioner was not required to not issue a report of findings and replace it with the flexibility to discontinue an investigation, in certain situations. This new provision will allow the Commissioner to

discontinue an investigation in certain circumstances, after a preliminary assessment of the facts, where a full investigation and accompanying report would serve no useful purpose. In the past, the Commissioner was obligated to engage in a full investigation of a complaint even in situations where a report was found not to be required.

BACKGROUND

In a January 8, 2008 letter to Industry Canada in response to consultations held by the Department on the implementation of the October 17, 2007 Government Response to the Report on the statutory review of PIPEDA by the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI), the Privacy Commissioner asked that PIPEDA be modified to provide her with increased discretion in handling complaints. In her correspondence, the Commissioner noted that the *Canadian Human Rights Act*, the *Public Servants Disclosure Protection Act* and the *Accountability Act* as well as Quebec's *An Act Respecting the Protection of Personal Information in the Private Sector* allow Commissioners to refuse or cease to examine a matter if the application is frivolous, made in bad faith, could be better dealt with in another forum or where further investigation would clearly serve no purpose. The Commissioner asked the government to consider granting her Office a similar degree of flexibility, more specifically asking for greater discretion at the front-end to refuse complaints and or discontinue complaints, thereby allowing her to focus her investigative resources on those privacy issues that are of broader systemic interest.

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.2(2) – Other reason**

PROPOSED WORDING

(2) The Commissioner may discontinue an investigation in respect of an act alleged in a complaint if the Commissioner is of the opinion that the act, if proved, would constitute a contravention of any of sections 6 to 9 of Bill C-28 or section 52.01 of the *Competition Act* or would constitute conduct that is reviewable under section 74.011 of that Act.

EXPLANATION

This subsection clarifies that the Office of the Privacy Commissioner may discontinue an investigation of a complaint if they believe it is a violation of sections 6 to 9 of BILL C-28 or sections 52.01 0r 74.01 of the *Competition Act*.

RATIONALE

The Office of the Privacy Commissioner is provided with this ability because such complaints are better addressed by the CRTC and/or the Competition Bureau.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
83	83	**Subsection 12.2(3) – Notification**

PROPOSED WORDING

(3) The Commissioner shall notify the complainant and the organization that the investigation has been discontinued and give reasons.

EXPLANATION

This clause requires the Commissioner to notify the complainant and the organization when she decides to discontinue her investigation into a complaint, and requires her to provide reasons in support of her decision.

RATIONALE

It is important that complainants and organizations be informed when an investigation is discontinued and that they be provided with an explanation. This information will allow both to take appropriate steps in response. The individual could, for example, choose to seek recourse elsewhere or resubmit their complaint with additional facts and information, to illustrate, for example how their own complaint would differ from that which would have already been the subject of a report by the Privacy Commissioner under 12.2(1)(e).

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
84	84	**Repeal of subsection 13(2)**

PROPOSED WORDING

84. Subsection 13(2) of the Act is repealed.

EXPLANATION

This clause repeals subsection 13(2) of the Act. The power of the Commissioner to not issue a report of findings is replaced by the ability to refuse to investigate under subsection 12(1) and the ability to discontinue an investigation under subsection 12.2(1).

RATIONALE

This subsection is no longer necessary, given that the provision granting the Commissioner the discretion to not issue a report of findings under certain circumstances is replaced by the power to refuse to investigate or to discontinue an investigation in specific circumstances.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
85	85	**Subsection 14(1) – Application**

PROPOSED WORDING

85. Subsections 14(1) and (2) of the Act are replaced by the following:

14. (1) A complainant may, after receiving the Commissioner's report or being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in subsection 5(3) or 8(6) or (7) or in section 10.

EXPLANATION

This clause modifies subsection 14(1) by adding to the existing circumstances under which a complainant may apply to the Federal Court for a hearing. The additional provisions state that a complainant may now also apply to the Federal Court for a hearing after being notified that an investigation into a complaint has been discontinued. Subsection 14(1) already provides that complainants may apply to the Federal Court for a hearing after receiving the Commissioner's report of findings into a complaint.

RATIONALE

Without this modification, the only recourse available to individuals in the event that a complaint has been discontinued would have been a judicial review, a more costly, onerous and lengthy process than a statutory right of review.

Bill Clause No.	Section No.	Topic
85	85	**Subsection 14(2) - Time of application**

PROPOSED WORDING

(2) A complainant must make an application within 45 days after the report or notification is sent or within any further time that the Court may, either before or after the expiry of those 45 days, allow.

EXPLANATION

Subsection 14(2) is modified by specifying that, in addition to requiring that individuals apply to the Federal Court for a hearing within 45 days of the Commissioner's report of findings being sent, they are also subject to the same timelines after the notification of a discontinued investigation has been sent.

RATIONALE

This provision gives a dissatisfied individual the ability to avail themselves of the next step in the complaint-handling process. It is important that identical time requirements be established for an application for a hearing in Federal Court, whether it be in response to a notice of discontinued investigation or to a report of findings into an investigation of a complaint.

BACKGROUND

Individuals also have the ability to request a hearing before the Federal Court under the *Privacy Act*. However, the grounds for a review under the *Privacy Act* only pertain to a refusal of access, whereas the PIPEDA grounds cover all of the fundamental protections of the Act.

Bill Clause No.	Section No.	Topic
86	(1)	**Subsection 20(1) – Confidentiality**

PROPOSED WORDING

86. (1) Subsection 20(1) of the Act is replaced by the following:

20. (1) Subject to subsections (2) to (6), 12(3), 12.2(3), 13(3), 19(1), 23(3) and 23.1(1) and section 25, the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part.

EXPLANATION

Clause 86 modifies subsection 20(1), which requires the Privacy Commissioner to maintain the confidentiality of information that comes to her knowledge, and which also provides for exceptions to that rule. Clause 86 adds new exceptions to the confidentiality obligation. These new exceptions allow the Commissioner to engage in the following activities: 1) notify a complainant and the organization that is the object of a complaint that the Commissioner will not investigate a complaint or any act alleged in the complaint, and give reasons; 2) notify a complainant and the organization that is the object of a complaint that the investigation has been discontinued and give reasons; 3) share information with provincial counterparts if the information could be relevant to an ongoing or potential investigation under the Act or a provincial privacy law or could assist the Commissioner or his or her provincial counterpart in the exercise of their function s and duties with respect to the protection of personal information; 4) share information, subject to specific confidentiality restrictions, with foreign counterparts if the information is relevant to an ongoing or potential investigation or proceeding in respect of a contravention of a foreign privacy law or information the disclosure of which is necessary to obtain information that may be useful to an ongoing or potential investigation under PIPEDA; 5) table an annual report to Parliament on the application of PIPEDA and engage in consultations with provinces as necessary to report on personal information that is collected, used or disclosed inter-provincially or internationally.

RATIONALE

It is critical that individuals and organizations continue to have confidence in the Privacy Commissioner's ability to maintain the confidentiality of information she receives or collects while carrying out her duties. The exceptions to the confidentiality rule, including the additional exceptions, are as limited and specific as possible. The additional exceptions are necessary for the Commissioner to collaborate with her provincial and international counterparts in the

investigation of privacy-related complaints, as threats to personal privacy increasingly have a cross-border dimension. Without the ability to share information with her counterparts, the Commissioner would be unable to effectively engage in combating these threats.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
86	(2)	**Subsection 20(6) - Disclosure under Bill C-28**

PROPOSED WORDING

(2) Section 20 of the Act is amended by adding the following after subsection (5):

(6) The Commissioner may disclose information, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information, in the course of proceedings in which the Commissioner has intervened under paragraph 50(*c*) of Bill C-28 or in accordance with subsection 58(3) or 60(1) of that Act.

EXPLANATION

This subsection clarifies that the Privacy Commissioner may disclose information to the CRTC, the Commissioner of Competition and with her foreign counterparts, pursuant to subsections 58(3) or 60(1) of BILL C-28.

RATIONALE

This section is necessary to ensure that PIPEDA is consistent with the provisions allowing the Privacy Commissioner to disclose information under BILL C-28.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23(1) - Consultations with provinces**

PROPOSED WORDING

87. Section 23 of the Act is replaced by the following:

23. (1) If the Commissioner considers it appropriate to do so, or on the request of an interested person, the Commissioner may, in order to ensure that personal information is protected in as consistent a manner as possible, consult with any person who, under provincial legislation, has functions and duties similar to those of the Commissioner with respect to the protection of such information.

EXPLANATION

Section 84 modifies subsection 23(1) to add further specifications respecting the persons with whom the Privacy Commissioner may consult provincially in order to ensure that personal information is protected in as consistent a manner as possible throughout Canada. The modifications specify that such persons must have "functions and duties similar to those of the Commissioner in respect of the protection of personal information". This modification replaces the previous requirement that persons in provinces have, "powers and duties similar to those of the Commissioner" under substantially similar provincial legislation.

RATIONALE

It is important that the Commissioner be able to collaborate with all her provincial counterparts, as opposed to only those who oversee private sector provincial laws that are substantially similar to PIPEDA. To be effective, the development of joint priorities, strategies, initiatives and resolutions require the participation of all federal and provincial Commissioners.

BACKGROUND

In its May 2, 2007 Report on the Review of PIPEDA, the House of Commons Standing Committee on Access to Information, Privacy and Ethics, (ETHI) recommended that the Commissioner be granted the authority under PIPEDA to share information and cooperate in investigations with international and all domestic data protection authorities (including those responsible legislation that is not substantially similar to PIPEDA. In its October 17, 2007 Response to the Report, the government of Canada agreed to this recommendation.

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23(2) - Agreements or arrangements with provinces**

PROPOSED WORDING

(2) The Commissioner may enter into agreements or arrangements with any person referred to in subsection (1) in order to

(*a*) coordinate the activities of their offices and the office of the Commissioner, including to provide for mechanisms for the handling of any complaint in which they are mutually interested;

(*b*) undertake and publish research or develop and publish guidelines or other instruments related to the protection of personal information;

(*c*) develop model contracts or other instruments for the protection of personal information that is collected, used or disclosed interprovincially or internationally; and

(*d*) develop procedures for sharing information referred to in subsection (3).

EXPLANATION

Section 87 modifies subsection 23(2) to allow the Commissioner to enter into arrangements with her provincial counterparts. While the Commissioner was already permitted to enter into agreements with her provincial counterparts, these modifications expand the number of purposes for which the agreements or arrangements can be entered into. The additional purposes are as follows: 1) the development and publication of guidelines or other instruments related to the protection of personal information; 2) the development of instruments for the protection of personal information that is collected, used or disclosed interprovincially or internationally and; 3) the development of procedures for sharing information related to the investigation of complaints or that could assist in the exercise of the Commissioner's or her counterparts' functions and duties with respect to the protection of personal information.

RATIONALE

The Privacy Commissioner's collaborative efforts often involve the development of less formal arrangements, in addition to more formal agreements. There are a wide variety of collaborative initiatives in which the Commissioner is involved which may require arrangements or

agreements. It is important that the Act recognize and accommodate this wide range of activity.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23(3) - Sharing of information with provinces**

PROPOSED WORDING

(3) The Commissioner may, in accordance with any procedure established under paragraph (2)(*d*), share information with any person referred to in subsection (1), if the information

(*a*) could be relevant to an ongoing or potential investigation of a complaint or audit under this Part or provincial legislation that has objectives that are similar to this Part; or

(*b*) could assist the Commissioner or that person in the exercise of their functions and duties with respect to the protection of personal information.

EXPLANATION

This subsection allows the Commissioner to share information with her provincial counterparts if the information 1) could be relevant to an investigation or audit under PIPEDA or a provincial privacy law or; 2) could assist the Commissioner or her counterpart in the exercise of their functions and duties with respect to the protection of personal information. This amendment specifies that the sharing of information must be undertaken in accordance with procedures developed through arrangements or agreements with her provincial counterparts.

RATIONALE

It is important that the Commissioner be able to exchange information with her provincial counterparts to as required to conduct investigations or to assist in fulfilling their responsibilities with respect to the protection of personal information in general. Information flows freely throughout Canada, with little regard for provincial boundaries, as organizations often have operations in more than one province or often exchange information with business partners in other provinces. As such, privacy violations may involve more than one jurisdiction and as such, may require the involvement of more than one Privacy Commissioner to address.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23(4) - Purpose and confidentiality**

PROPOSED WORDING

(4) The procedures referred to in paragraph (2)(*d*) shall

(*a*) restrict the use of the information to the purpose for which it was originally shared; and

(*b*) stipulate that the information be treated in a confidential manner and not be further disclosed without the express consent of the Commissioner.

EXPLANATION

This subsection sets out the confidentiality requirements that must be contained in the procedures governing the sharing of information between the Privacy Commissioner and her provincial counterparts. These procedures are required to: 1) restrict the use of the information to the purpose for which it was originally shared and; 2) stipulate that the information is to be treated in a confidential manner and not be further disclosed without the express consent of the Privacy Commissioner.

RATIONALE

Although the purposes for which information can be shared between the federal Commissioner and her provincial counterparts are specific and limited, it is important to specify and establish limits to what can be done with this information, given the federal Commissioner's obligation to maintain the confidentiality of the information she receives or comes across in the course of exercising her duties and functions.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23.1(1) - Disclosure of information to foreign state**

PROPOSED WORDING

23.1 (1) Subject to subsection (3), the Commissioner may, in accordance with any procedure established under paragraph (4)(*b*), disclose information referred to in subsection (2) that has come to the Commissioner's knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part to any person or body who, under the legislation of a foreign state, has

(*a*) functions and duties similar to those of the Commissioner with respect to the protection of personal information; or

(*b*) responsibilities that relate to conduct that is substantially similar to conduct that would be in contravention of this Part.

EXPLANATION

This subsection allows the Privacy Commissioner to disclose certain information to her foreign counterparts provided that these counterparts have, under the laws of a foreign state, 1) functions and duties similar to those of the Privacy Commissioner in respect of the protection of personal information and 2) responsibilities with respect to addressing conduct that would be considered to contravene PIPEDA.

RATIONALE

The increase in international flows of personal information have elevated the risks and challenges related to the protection of personal privacy. Authorities charged with enforcing privacy laws often encounter difficulties in pursuing complaints related to organizations located outside their borders. As such, it is necessary that such authorities be able to collaborate with their foreign counterparts to exchange information and carry out investigations.

The Privacy Commissioner has led the development of international initiatives to promote and enable collaboration for the enforcement of privacy laws. Given her leadership role in these initiatives, it is important that she be given the power to engage in enforcement collaboration with her foreign counterparts.

It is important, however, to limit the persons with whom the Commissioner may exchange

information internationally and to maintain the confidentiality of the information that comes to the knowledge of the Commissioner as a result of the performance of her duties. To this end, it is necessary that the Commissioner is only able to share information with those regulators who have similar responsibilities with respect to the protection of personal information.

BACKGROUND

The Privacy Commissioner of Canada led an OECD working group which developed a recommendation to promote cooperation between Member countries on the enforcement of laws protecting privacy. This recommendation, "*Recommendation on Cross-Border Co-Operation in the Enforcement of Laws Protecting Privacy"* was adopted by the OECD in 2007. The Office of the Privacy Commissioner has also been a leading participant in the development of similar collaborative arrangements and procedures within the Asia-Pacific region.

In its May 2, 2007 Report on the Review of PIPEDA, the House of Commons Standing Committee on Access to Information, Privacy and Ethics, (ETHI) recommended that the Commissioner be granted the authority under PIPEDA to share information and cooperate in investigations with international and domestic data protection authorities. In its October 17, 2007 Response to the Report, the government of Canada agreed to this recommendation.

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23.1(2) - Information that can be shared**

PROPOSED WORDING

(2) The information that the Commissioner is authorized to disclose under subsection (1) is information that the Commissioner believes

(*a*) would be relevant to an ongoing or potential investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct that would be in contravention of this Part; or

(*b*) is necessary to disclose in order to obtain from the person or body information that may be useful to an ongoing or potential investigation or audit under this Part.

EXPLANATION

This subsection specifies the type of information that the Privacy Commissioner may share with her foreign counterparts. This information must be: 1) relevant to an ongoing or potential investigation of a contravention of the foreign law, provided that the conduct being investigated is substantially similar to that which would be in contravention of PIPEDA or; 2) necessary to disclose in order for the Commissioner to obtain from her foreign counterpart information that would be useful to an investigation or audit under PIPEDA.

RATIONALE

It is important to specify the types of information that can be shared by the Privacy Commissioner with her foreign counterparts, to ensure that this information is limited to that which is relevant to investigations related to violations of privacy laws only.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23.1(3) - Written arrangements**

PROPOSED WORDING

(3) The Commissioner may only disclose information to the person or body referred to in subsection (1) if the Commissioner has entered into a written arrangement with that person or body that

(*a*) limits the information to be disclosed to that which is necessary for the purpose set out in paragraph (2)(*a*) or (*b*);

(*b*) restricts the use of the information to the purpose for which it was originally shared; and

(*c*) stipulates that the information be treated in a confidential manner and not be further disclosed without the express consent of the Commissioner.

EXPLANATION

This subsection specifies that the Privacy Commissioner can only disclose information to her foreign counterparts if she has entered into a written arrangement. The subsection also sets out the required elements of these arrangements. They are to specify that: 1) the information disclosed is to be limited to that which is relevant or useful to an investigation under the foreign law or under PIPEDA; 2) the information is only to be used for the purpose for which it was originally shared; 3) the information is to be treated confidentially and not disclosed further without the express consent of the Privacy Commissioner.

RATIONALE

These limits are necessary to ensure that information that is disclosed to foreign entities is only used for the purpose of investigating contraventions of laws that protect personal information. This is essential to maintaining trust in the Commissioner and to ensure that individuals and organizations can remain confident that any information they disclose to the Commissioner will be treated confidentially.

BACKGROUND

In its Report on the statutory Review of PIPEDA, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) recommended that, in addition to

recommending that the Commissioner be granted the authority to share information and cooperate in investigations with international data protection authorities, any extra-jurisdictional information sharing be protected from disclosures to a foreign court or other government authority for purposes other than those for which it was shared.

In its October 17, 2007 response to the ETHI Report, the Government of Canada agreed and stated that any agreements to share information with foreign authorities should include appropriate constraints to stipulate that information only be used in fulfilment of the purposes for which it is shared.

Bill Clause No.	Section No.	Topic
87	87	**Subsection 23.1(4) – Arrangements**

PROPOSED WORDING

(4) The Commissioner may enter into arrangements with one or more persons or bodies referred to in subsection (1) in order to

(*a*) provide for cooperation with respect to the enforcement of laws protecting personal information, including the sharing of information referred to in subsection (2) and the provision of mechanisms for the handling of any complaint in which they are mutually interested;

(*b*) establish procedures for sharing information referred to in subsection (2);

(*c*) develop recommendations, resolutions, rules, standards or other instruments with respect to the protection of personal information;

(*d*) undertake and publish research related to the protection of personal information;

(*e*) share knowledge and expertise by different means, including through staff exchanges; or

(*f*) identify issues of mutual interest and determine priorities pertaining to the protection of personal information.

EXPLANATION

This subsection sets out the purposes for which the Privacy Commissioner may enter into arrangements with her foreign counterparts. These purposes are as follows: 1) cooperation with respect to the enforcement of laws related to the protection of personal information, including the sharing of information and the provision of mechanisms related to the handling of complaints in which they might both be interested; 2) establish procedures for sharing information related to the conduct of investigations; 3) develop recommendations, resolutions, rules or other instruments related to the protection of personal information; 4) undertake and publish research; 5) share knowledge and expertise, perform staff exchanges; and 6) identify issues of mutual interest and determine priorities in respect of the protection of personal information.

RATIONALE

This subsection is necessary in order to provide the Privacy Commissioner with guidance as to the circumstances under which it is appropriate to enter into arrangements with foreign counterparts.

The *Telecommunications Act*

Bill Clause No.	Section No.	Topic
88	(1)	**Subsection 39(2) - Information not to be disclosed**

PROPOSED WORDING

88. (1) Subsection 39(2) of the *Telecommunications Act* is replaced by the following:

(2) Subject to subsections (4), (5), (5.1) and (6), where a person designates information as confidential and the designation is not withdrawn by that person, no person described in subsection (3) shall knowingly disclose the information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any person who may benefit from the information or use the information to the detriment of any person to whose business or affairs the information relates.

EXPLANATION

This amendment is a consequential amendment to the amendment to section 88(2), below. Since section 88(2) adds subsection (5.1) to the *Telecommunications Act*, it is necessary to add a reference to that subsection to the list of exceptions in section 39(2).

RATIONALE

N/A

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
88	(2)	**Subsection 39(5.1) - Disclosure authorized by *Bill C-28***

PROPOSED WORDING

(2) Section 39 of the Act is amended by adding the following after subsection (5):

(5.1) Le Conseil peut communiquer des renseignements désignés comme confidentiels qu'il a obtenus dans l'exercice de ses attributions relatives à l'article 41 à l'égard de toutes activités exercées par voie électronique, si la communication est conforme aux paragraphes 58(1) ou 60(1) de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications*.

EXPLANATION

This section provides the authority under the *Telecommunications Act* for the Commission to disclose information pursuant to section 58(1) (to the Privacy Commission, Commissioner of Competition) and 60(1) (to foreign agencies) of BILL C-28.

RATIONALE

Section 39 of the *Telecommunications Act* establishes a general rule that prohibits the Commission from disclosing confidential information that comes into its possession. Section 39 also describes a number of exceptions to this rule. This provision establishes a further exception to ensure that disclosures made in accordance with BILL C-28 are not contrary to the *Telecommunications Act*.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
89	(1)	**Subsection 41(2) - Exception** ***Bill C-28***

PROPOSED WORDING

89. (1) Section 41 of the Act is renumbered as subsection 41(1) and is amended by adding the following:

(2) Despite subsection (1), the Commission may not prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications, if the telecommunication is

(a) a commercial electronic message to which section 6 of An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act applies; or

(b) a commercial electronic message referred to in subsection 6(5) of that Act, except to the extent that it is one referred to in subsection 6(8) of that Act.

EXPLANATION

This provision amends the *Telecommunications Act* to clarify that while live and recorded voice and fax telemarketing continues to be regulated under the *Telecommunications Act*, the Commission may not regulate under that Act any commercial electronic message governed by BILL C-28, or exempted from BILL C-28 under subsection 6(5) (sent by a family member, for purposes of a commercial inquiry, or as may be defined in regulations).

RATIONALE

This provision is the counterpart to subsection 6(8) of BILL C-28, which provides that BILL C-28 does not apply to live and recorded voice as well as fax telemarketing, which are currently governed by rules created by the CRTC under section 41 of the *Telecommunications Act*, and are part of the Do Not Call regime. This subsection is necessary, in conjunction with subsection 6(8), to clearly define the boundaries between the commercial electronic messaging regime under BILL C-28, and the regulation of telemarketing the *Telecommunications Act*.

BACKGROUND

Sections 41 to 41.7 of the *Telecommunications Act* have been adopted to create, among other things, the Do Not Call regime.

Section 41 provides that:

> The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

Bill Clause No.	Section No.	Topic
89	(2)	**Subsection 41(2) - Exception *– Bill C-28***

PROPOSED WORDING

(2) Subsection 41(2) of the Act, as enacted by subsection (1), is replaced by the following:

(2) The Commissioner may discontinue an investigation in respect of an act alleged in a complaint if the Commissioner is of the opinion that the act, if proved, would constitute a contravention of any of sections 6 to 9 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* or section 52.01 of the *Competition Act* or would constitute conduct that is reviewable under section 74.011 of that Act.

EXPLANATION

This provision provides an alternative version of subsection 41(2), which would be declared into force at the same time as sections 68 and 90 of the Bill, and would amend section 41 of the *Telecommunications Act* to clarify that the Commission would retain certain powers to regulate certain aspects of live and recorded voice as well as fax telemarketing under that Act despite the elimination of the Do Not Call regime.

RATIONALE

Sections 68 and 90 of the Bill, to be declared into force by Order in Council at a time to be chosen by the government, would eliminate the Do Not Call regime and bring live and recorded and fax telemarketing within the application of BILL C-28. In the absence of the Do Not Call regime, the purpose of this amendment is to ensure that the Commission retains the ability to regulate certain aspects of telemarketing under the *Telecommunications Act* that are not addressed under BILL C-28 (*e.g.*, hours of day when telemarketing can occur, contact information to be provided, calls that interfere with emergency services, and, auto-dialing). Refer to section 90.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
89	(3)	**Subsection 41(3) – Regulation – Bill C-28**

PROPOSED WORDING

(3) For the purposes of subsection (2), the Commission may regulate, with respect to the types of telecommunications described in subsection (4),

(*a*) the hours during which the telecommunications facilities of a Canadian carrier may be used by any person;

(*b*) the contact information to be provided by a person referred to in subsection (2) and the circumstances in which and persons to whom it must be provided;

(*c*) telecommunications made to medical or emergency services; and

(*d*) telecommunications where a live operator is not immediately available when the recipient of the telecommunication connects to it.

EXPLANATION

This subsection empowers the Commission to make regulations regarding certain aspects of the telemarketing and telecommunications provisions in BILL C-28 should they be enacted. In general, these aspects focus on form or procedural requirements.

Specifically, under subsection 89(3) the Commission can make regulations regarding:

(a) the hours during which the telecommunications facilities of a Canadian carrier may be used by any person for the purposes of making a telemarketing call.
(b) the contact information to be provided by a person referred to in subsection (2) and the circumstances in which and persons to whom it must be provided. Identifying who the caller is and if different on whose behalf they may be calling.
(c) telecommunications made to medical or emergency services, to regulate the 911 calling system.
(d) telecommunications where a live operator is not immediately available when the recipient of the telecommunication connects to it.

RATIONALE

Subsection 89(3) is necessary in order to enable the Commission to make regulations to ensure that currently available telecommunications regulations are kept for the CRTC. Without specific

regulations setting out telecommunications requirements, there is a risk that the CRTC would lose it's regulation making power, should the telephony and telemarketing provisions currently excluded from BILL C-28 be imported at a future date.

BACKGROUND

The Commission has extensive experience making regulations under section 57 of the *Telecommunications Act*, and sections 10-11 of the *Broadcasting Act*.

Under section 41 of the *Telecommunications Act*, the Commission also has experience making rules relating to the information and form requirements applicable to telemarketers making unsolicited telecommunications to consumers.

Bill Clause No.	Section No.	Topic
89	(4)	**Subsection 41(4) – Types of telecommunications**

PROPOSED WORDING

(4) For the purposes of subsection (3), the types of telecommunications are those that are

(*a*) in whole or in part, interactive two-way voice communications between individuals;

(*b*) sent by means of a facsimile to a telephone account; or

(*c*) voice recordings sent to a telephone account.

EXPLANATION

This clause states that the regulation making powers set out in subsection 89(3) are referring to live telecommunications between two parties in any way; sent by fax to a telephone account; or, is a recorded voice sent to a telephone account is not covered under this act.

RATIONALE

Should the Do-Not-Call exemptions set out in section 6(8) provisions be repealed and telemarketing is migrated into BILL C-28 it will be necessary to address voice communications in this Bill. As such the regulations regarding s. 41 of the *Telecommunications Act* ("Do Not Call") regarding: two-way voice communications; sent by facsimile to a telephone account; or, that is a voice recording sent to a telephone account will need to be updated and imported into this Act.

If the government determines that it is preferable to bring all commercial electronic messaging under one same rules and administration, especially as the distinctions between kinds of messages dissolve, then the government can do so through an Order in Council, pursuant to sections 68 and 90 of this Bill.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
90	90	**Repeal of sections 41.1 to 41.7**

PROPOSED WORDING

90. Sections 41.1 to 41.7 of the Act are repealed.

EXPLANATION

This is a "dormant clause" that allows for the government to repeal the sections of the *Telecommunications Act* that establish the Do Not Call List by Order in Council at a time to be decided by an Order in Council.

RATIONALE

Live and recorded voice as well as fax telemarketing are currently governed by rules created by the CRTC under section 41 of the *Telecommunications Act*, and are part of the Do Not Call regime. Under that regime, a business or individual must add their numbers to a list of persons who do not wish to receive telemarketing calls. Under BILL C-28, a marketer cannot send an electronic message unless the intended recipient has consented to receive that message.

It may be advisable to bring all forms of electronic marketing under the same rules and administration, especially as the distinctions between different types of messaging disappear. This provision permits the government to bring all commercial electronic messages (including voice and fax) within BILL C-28 if determined to be desirable, through an Order in Council pursuant to section 91. However, should such consolidation not be necessary for either policy or technological reasons, then the government need not proclaim this provision into force.

This particular provision would eliminate the Do Not Call regime from the *Telecommunications Act*, which would necessarily be declared into force at the same time as section 68 of the Bill, which would repeal subsection 6(8) of BILL C-28 so that live voice and fax messaging are no longer exempted from the Act.

BACKGROUND

N/A

Bill Clause No.	Section No.	Topic
91	91	**Order in council**

PROPOSED WORDING

91. The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council.

EXPLANATION

Section 91 provides that the date(s) for the coming into force of the Act, will be fixed by order of the Governor in Council.

RATIONALE

This provision allows for the coming into force of various provisions on different dates, as determined to be required. For example, sections 90 and 91, which would eliminate the Do Not Call regime under the *Telecommunications Act*, may be declared into force (if at all) at a later date than the substantive provisions of BILL C-28.

BACKGROUND

N/A