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Chair

The Honourable Michael Chong

Standing Committee on Industry, Science and Technology

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● (1530)

[*English*]

The Chair (Hon. Michael Chong (Wellington—Halton Hills, CPC)): Good afternoon to members of the committee. I hope you all had good weeks in your constituency.

Welcome to the 34th meeting of the Standing Committee on Industry, Science and Technology. We are meeting today pursuant to the order of reference of Friday, May 8, 2009, to study C-27, 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.

Welcome to our three groups of witnesses on our first panel, which will meet until 5 p.m. We have Mr. Yves Morency, vice-president, government relations; Mr. Bernard Brun, senior counsel, commerce and technology, Desjardins sécurité financière; and Yvan-Pierre Grimard, government relations adviser. All three are with Mouvement des caisses Desjardins.

We also have with us today Mr. Frank Zinatelli, vice-president of legal services and associate general counsel; and Mr. Peter Goldthorpe, general director of marketplace regulations issues. Both are with the Canadian Life and Health Insurance Association Inc.

Finally, in our third group of witnesses on our first panel we have Ms. Joanne De Laurentiis, president and chief executive officer; and Mr. Paul Vaillancourt, independent financial adviser. They are with the Independent Funds Institute of Canada.

Welcome to all three groups. We will begin with the Mouvement des caisses Desjardins and an opening statement of five minutes.

[*Translation*]

Mr. Yves Morency (Vice-President, Government Relations, Mouvement des caisses Desjardins): Thank you, Mr. Chairman.

Good afternoon, members of the committee. The Desjardins Group thanks you for giving it this opportunity to share its views on bill C-27 with you today.

First of all, allow me to briefly introduce the organization we represent. Desjardins Group is ranked 26th among the 50 most reliable financial institutions in the world, according to the list entitled "World's 50 Safest Banks 2009". With total assets of approximately $160 billion, it is the largest cooperative financial group in Canada and the 9th largest in the world. Supported by its network of caisses in Quebec and Ontario, as well as the contributions of its subsidiaries, several of which are active across Canada, it offers a complete line of financial products and services to its 5.8 million individual and business members and clients.

Desjardins Group is also a hub of expertise in wealth management, life and health insurance, property and casualty insurance, services for businesses large and small, securities, asset management, venture capital and cutting-edge technology, all within an integrated service model that is one of a kind in Canada.

It must be noted that Desjardins Group has been concerned for quite some time about the problems caused by spam proliferation. The bill is without a doubt an initiative that targets more reliable, safe and secure electronic commerce. However, Desjardins Group believes that some of the bill's provisions will do more to restrict legitimate electronic commerce than to dispel the efforts of ill-intentioned users of this technology.

Bill C-27 needs to be adjusted in such a way as to slow down the proliferation of spam while allowing for the development of electronic commerce and the competitiveness of the Canadian economy. As regards consent, section 2 of the bill is excessively limiting and poses a threat to legitimate electronic commerce. Under the bill, it would be prohibited to send an electronic message requesting consent to receive commercial electronic messages. Desjardins Group believes that it is unrealistic to think that Canadians will give express consent to receive commercial electronic messages on their own initiative. Being far too restrictive, the prohibition of electronic messages requesting consent should be stricken from the bill.

As well, the bill should recognize that certain commercial practices do not constitute unsolicited commercial electronic messages. For example, a company should be able to solicit a client if it has first received a referral. It should be able to do the same if it holds an individual's email address as part of a prior business relationship, where the individual has not withdrawn his or her consent for solicitation purposes, or when a potential client contacts a company to obtain information and does not withdraw his or her consent. Electronic communications following referrals are common practice, they are legitimate and appreciated by clients. As such, the recognition of implied consent should be added to the bill with the possibility of such consent being regulated thereafter.

Another major source of concern not only for Desjardins Group, but for all Canadian companies are the clauses related to the Do Not Call List. We understand that the government does not plan to implement those clauses at this time, but their mere presence within the bill is worrisome. In this respect, it is important to remember that those subject to the act and their partners in government worked for three years on establishing effective regulations for this tool and significant financial and labour resources have gone into achieving compliance. It is therefore quite astonishing that the longevity of the Do Not Call List could be jeopardized just one year after coming into effect. Given these considerations, Desjardins Group recommends that a detailed study and public consultations be carried out before making any modifications to the DNCL.

In conclusion, in Desjardins Group's view, the current text of the EPCA will threaten legitimate electronic commerce.

● (1535)

Quite honestly, the bill seems more geared to protecting service provider bandwidth than electronic commerce itself. With this in mind, we believe that it is essential for certain parameters to be readjusted and for more flexibility to be added to the ECPA in order for it to achieve its intended objectives without discouraging growth in the Canadian economy.

Thank you for your attention.

My colleagues and I would be happy to answer your questions.

The Chair: Thank you, Mr. Morency.

During the next five minutes, we will hear from the representatives of the Canadian Life and Health Insurance Association Inc.

[*English*]

Mr. Frank Zinatelli (Vice-President, Legal Services and Associate General Counsel, Canadian Life and Health Insurance Association Inc.): Thank you, Mr. Chairman and members of the committee. I would like to thank the committee very much for giving us this opportunity to contribute to your review of Bill C-27, the Electronic Commerce Protection Act.

My name is Frank Zinatelli, and I am vice-president of legal services and associate general counsel of the Canadian Life and Health Insurance Association. I am accompanied today by my colleague Peter Goldthorpe, who is the CLHIA's director of marketplace regulations issues. We welcome this opportunity to make constructive contributions to the committee as you seek to develop your report to Parliament on this important bill.

By way of background, the Canadian Life and Health Insurance Association represents life and health insurance companies accounting for 99% of the life and health insurance in force across Canada. The industry protects 26 million Canadians and some 20 million people internationally.

With your permission, Mr. Chairman, we would like to make a few introductory comments.

In August, we submitted written comments to the committee. Several of the matters were technical in nature and involved providing greater clarity and certainty to the language of the bill. We trust that these are relatively free of controversy and will be addressed by the committee.

This afternoon we would like to focus our remarks on a broader issue. The issue is the proposed restrictions on obtaining consent by electronic means, and my colleague Peter Goldthorpe will now address this.

Mr. Peter Goldthorpe (General Director, Marketplace Regulations Issues, Canadian Life and Health Insurance Association Inc.): Thank you, Frank.

Mr. Chair, the stated purpose of the bill is to regulate the commercial conduct that discourages the use of electronic means to carry out commercial activities. Everyone, I think, agrees that this is an important objective, so it is equally important that we avoid restrictions that would have the effect of discouraging or making impossible exactly what the bill seeks to protect.

Our contention is that within an opt-in framework contemplated by Bill C-27, greater flexibility can and in fact should be provided as it relates to the means of obtaining consent. As we noted in our written comments that were circulated earlier in the summer, the proposed restrictions threaten to undermine the viability of commercial communication by electronic means. The problem is that in a great many instances people will simply not use one medium to give consent to communicate in another medium.

In the life and health insurance industry, and I think more generally in the financial services industry, many contacts are developed through referrals. By and large, the referral process is an informal process, and that sets up an important disconnect. The person being referred may be quite happy to be contacted by e-mail, but it is extremely unlikely that many will be willing to take the time and effort to write out express consent or take the initiative to contact an adviser.

We appreciate that there is a concern that e-mails intended to obtain consent could be misused. But it is important to keep in mind that e-mails following up on a referral need to clearly identify the person who is sending them. Our suggestion is that e-mails to obtain consent be permitted if they clearly state the purpose and do nothing else to promote the sender's services or products.

It's important to keep in mind that an e-mail that's doing this must clearly identify the sender who is using the e-mail for these purposes. So if there is any misconduct, if they're deviating from any of the restrictions you care to put in place, their identification is all over the e-mail. This fact should be more than enough to discourage misuse.

Mr. Chair, the use of electronic communication has important economic and environmental advantages. It would be unfortunate if the restrictions in Bill C-27 had the effect of forcing businesses to rely on more costly and less environmentally friendly ways of communicating with prospective customers. An important step in avoiding this outcome is to permit e-mails intended to obtain consent.

The industry greatly appreciates this opportunity to contribute to the committee's review of Bill C-27. I would like to thank you for your attention. We'd be happy to answer any questions you might have.

● (1540)

The Chair: Thank you very much.

Now we'll go to the Investment Funds Institute of Canada.

Ms. Joanne De Laurentiis (President and Chief Executive Officer, Investment Funds Institute of Canada): Thank you, Mr. Chair. We appreciate the opportunity to speak with you today.

My name is Joanne De Laurentiis. I'm president and CEO of the Investment Funds Institute of Canada. I'm joined by Paul Vaillancourt, who is an independent financial consultant who runs his own successful business here in Ottawa. We will share our comments this afternoon.

The Investment Funds Institute of Canada is the national association of the Canadian investment funds industry. Like Paul, individuals representing our members work in almost every town and city across Canada. IFIC's mutual fund manager members manage over $560 billion in mutual fund assets, and 70% of these assets are held in retirement saving vehicles and are helping Canadians build their wealth.

We believe the clauses in Bill C-27 that combat and punish illegal and harmful activities and that damage the trust surrounding electronic commerce are necessary. We support the recommendations in clauses 7 and 8 regarding the prohibition of the altering of transmission data and the unauthorized installation of computer programs on another's computer. We also support the proposed amendments to the Competition Act to prohibit misleading commercial e-mails and amendments to PIPEDA regarding the use of e-mails collected through selected computer programs.

We are here to encourage you to better balance the protection of individuals and businesses from unwanted e-mails while still allowing responsible communications by legitimate businesses to their potential clients and customers. We think this can be accomplished with several simple amendments.

Mr. Paul Vaillancourt (Independant Financial Advisor, Investment Funds Institute of Canada): *Bonjour.* My name is Paul Vaillancourt.

The proposed clause 6 prohibits one-to-one e-mails of specifically directed marketing communications, which are not by their nature intrusive in the lives of recipients and do not create economic harm. My clients are my best sources of new business. A financial adviser like me regularly sends e-mails as a follow-up to a referral from an existing client to a friend or a family member who is looking for a financial adviser. In fact, such referrals are crucial to my business.

E-mails are an efficient means of contacting potential new customers based on referrals without being a nuisance to the recipient. In years past, we used the postal service to follow up on referrals. E-mail has replaced the old technology of writing letters, but it is essentially the same thing. In addition to being less expensive, less intrusive, and more environmentally friendly, it is an accepted, indeed an expected, form of introduction. Individuals are able to access the information at their convenience and have complete control to respond or not.

Clause 6 should be limited to those who target individuals or entities through mass e-mails, where there is no reasonable identifiable relationship between the recipient and the sender. Where the recipient has been referred to the sender, there should be a specific exemption allowing the sender to contact the referred individual or entity. Regulations pursuant to this legislation could be developed to prevent abuse of this exemption and to ensure there was indeed a referral.

● (1545)

[*Translation*]

Subsection 10(4) of Bill C-27 defines “existing business relationship”. That definition may be sufficient for relationships based only on contract dates or specific sales operations, but it is ill-suited to a consultant service relationship where the consultant has a fiduciary responsibility to contact and inform his client. This type of relationship should be viewed differently.

In many cases, our relationship with the client is linked to an investment made by the client that is followed by none of the operations targeted in subsection 10(4). Consequently, we recommend that in the case of persons who have a fiduciary relationship with the client, the 18-month period targeting subsequent communications begin when the professional relationship or the consultancy relationship ends.

[*English*]

Canadians are world leaders in the use of social networking sites such as Facebook, Twitter, LinkedIn, clubs, and associations. The proposed legislation does not contemplate the popularity and widespread use of these social networking groups or the fact that these groups already effectively govern the boundaries of the communications. The definition of “existing non-business relationship” in subclause 10(6) should be expanded to include members of established electronic social networks to better reflect this emerging reality.

Ms. Joanne De Laurentiis: We believe the anti-spam provisions are too broad as they relate to business-to-business communications. Where a business makes its e-mail address public and the address is not accompanied by a statement that commercial messages are not welcome, Bill C-27 should treat this as implied consent by the business.

Electronic communications have evolved to be a convenient, quick, and cost-effective way to communicate employment opportunities. One way our members grow is by recruiting new financial advisers through electronic communications. We propose that clause 6 be amended to include an exemption for electronic communication that has as its sole purpose information regarding legitimate employment opportunities.

IFIC supports the proposed penalties. The maximum penalty for a violation is $1 million in the case of an individual and $10 million in the case of any other persons. For violations of clauses 7 and 8, where prohibited actions have the potential to result in large-scale system damage or fraud, these are at the right level.

In the case of clause 6, we believe the penalties are excessive and out of scale to the potential harm caused by a breach. The penalties for contravening clause 6 should be different from the penalties applicable to a contravention of clauses 7 and 8. Within clause 6, we would also propose much smaller deterrent penalties for those businesses that are simply using electronic means as a supplement to their business efforts and where individual violations are not harmful.

IFIC supports the right of public action for violations of clauses 7 and 8 where prohibited actions have the potential to result in large-scale system damage or fraud, but for clause 6, the right of public action seems unnecessary, excessive, and potentially open to abuse. We propose that the right to a public action be limited to violations under clauses 7 and 8.

As noted earlier, the investment industry has rules in place governing communications with the public. The Mutual Fund Dealers Association and the Investment Industry Regulatory Organization of Canada require that all sales communications from their members to the public must first be approved by an officer of the member company. We believe these requirements, together with the provisions of Bill C-27, provide the necessary protection to the public on matters of content as well as the need for sanctions. Accordingly, we recommend an exemption to clause 6 for industries where existing regulatory structures are in place.

We all recognize that technology has changed the way we interact, both on a personal and a business level. Whereas in the past we would have met friends and made new personal or business contacts through dinners, meetings, and other gatherings, today we are doing it through technology. Cyberspace has redefined how we communicate and interact.

Our concerns about the overly broad application of this legislation could be corrected by very simple amendments, primarily in clauses 6 and 10, to provide exemptions and safe harbours for referral business, ongoing fiduciary relationships, business-to-business communications, employment opportunities, and established social networking relationships, together with a refinement of the penalties and private right of action to target the actual wrongdoing in cyberspace.

Thank you for listening. We look forward to your questions.

● (1550)

[*Translation*]

The Chair: Thank you very much.

During the next 75 minutes, the members of the committee will ask their questions.

We shall begin with Mr. Garneau.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, Mr. Chairman.

First of all I want to thank all of the witnesses who came to submit their views to us today on this bill, which, in order to be well drafted, practically requires the wisdom of Solomon.

On the one hand, of course, we want to get rid of spam as it is very harmful, as everyone agrees, but on the other hand, we don't want to prohibit legitimate electronic commerce communication. For a bill to make good sense, I think that two different philosophical approaches can be adopted. In one case, we impose all sorts of restrictions, but in the final analysis, these may be excessive and this could hinder electronic commerce. Consequently, those who use electronic means to do business are forced to prove that some important exceptions have been forgotten.

On the other hand, we can choose a much more open approach, with few restrictions, and then realize over time that a great deal of spam is still getting through and that the bill has to be applied in a much stricter manner. In short, this isn't easy.

Today, I have the impression that you have found arguments to prove that the bill should be amended because it will interfere with commerce and legitimate communication on the Internet. That is clearly what your presentation led me to conclude.

I would like to put a question to Mr. Morency or to another representative of the Desjardins Group.

You took issue with clause 2 in particular. You mentioned that Bill C-27 affected electronic commerce and needed to be readjusted. I understood your arguments.

Do you have any concrete suggestions to make to us in order to bring about this balance and allow you to continue to do your work in a legitimate fashion?

Mr. Yves Morency: I am going to give the floor to my colleague Mr. Brun.

Mr. Bernard Brun (Senior Counsel, Commerce and Technology, Desjardins Sécurité financière, Mouvement des caisses Desjardins): Thank you.

I believe you have defined the concerns very well, Mr. Garneau. Industry and all of the stakeholders in the business arena share these concerns. Everyone advocates legislative intervention but would like to see a better balance. In our opinion, that balance is mainly related to the matter of consent. In this case, it is much more restrictive. In order not to be penalized in comparison with international businesses in particular, all of the business community would need a much more flexible notion of consent.

In fact, several of our comments converge. We feel that business relationships are in a separate category. When a business decides to release its email address, people should be able to contact it for legitimate commercial purposes. Moreover, the concern with regard to referrals was raised in particular by the IFIC representatives. This reality affects all of industry. We think that amendments allowing businesses to contact clients after a referral would facilitate things greatly.

Finally, the possibility of obtaining consent through electronic means may be the most important factor. When we use a medium, we want to be able to obtain consent through that same medium, i.e. through electronic means. It is very clear that everyone is in favour of a legal intervention and agrees that consent would normally be required, in order to be able to communicate. The way in which that consent is obtained is mostly what needs to be amended in order to attain a good balance.

● (1555)

Mr. Marc Garneau: Very well. Thank you very much.

[*English*]

Perhaps I could ask a question of the Canadian Life and Health Insurance Association. I think one of the primary arguments you brought forward, which has just been referred to, is the issue of getting consent to interact, to communicate. If I understood you correctly, if one has to go and ask for that consent by some other means of communication than an e-mail saying, "Can we communicate, can we establish a relationship?", you said that doesn't work very often and that it would be more practical, more environmentally safe, to be able to communicate directly initially by following certain rules.

I don't know if there have been any studies on this, but do you have any evidence to support the fact that requests for consent, let's say by written letter or other means, don't really work, as opposed to being able to do it directly through e-mail?

Mr. Frank Zinatelli: Thank you, Mr. Garneau.

We base our comment on the fact that there are different types of clients. Some clients want to be communicated with in an oral fashion, and some prefer being contacted by mail or telephone. But a growing number of people are making use of electronic means and want to be communicated with electronically. If they get a letter, there's more likelihood that they will ignore it than if they receive an e-mail, which they're familiar with and know how to address. They know how to scan their e-mail and choose what they want to pay attention to and what they want to delete. People who use electronic means are very savvy about the use of this technology, and I think they expect to be communicated with in that way.

The Chair: Thank you, Mr. Zinatelli.

[*Translation*]

Mr. Bouchard, you have the floor.

Mr. Robert Bouchard (Chicoutimi—Le Fjord, BQ): Thank you very much for your testimony. What you have come to tell us this afternoon will help to improve Bill C-27.

My first question is for Mr. Morency, from the Mouvement des caisses Desjardins.

You talked about an implementation delay of one year, and among other things, you said that consultations should be held. I would like to hear more about this from you.

Who should we consult and who should do the consulting in order to arrive at a time period that would seem fair and equitable to you?

Mr. Bernard Brun: Thank you. If I understood your question correctly, you are referring to the transition period, the consultations...

Mr. Robert Bouchard: ... yes, for the implementation of Bill C-27. You referred to a one-year transition period before its implementation.

Mr. Bernard Brun: Before the implementation of this bill.

Mr. Robert Bouchard: In any case, you spoke of a one-year period before its implementation. Then you mentioned that there should be consultations before the bill is passed, if I am not mistaken.

● (1600)

Mr. Bernard Brun: The consultations we referred to concerned the possible abolition of the Do Not Call List. That exclusion list is now a reality, but it was brought in quite recently. This bill, although it does not apply to telephone communications, could conceivably be extended to all telephone communications by a simple order in council.

We feel, quite humbly, that if we wanted to go forward and abolish all of this infrastructure, given all of the technological developments that businesses have to keep up with, they should at least be consulted first so that we have some idea of the impact of the abolition of that list and of the adoption of a different system, the one set out in this bill.

Mr. Robert Bouchard: Mr. Brun, unless I'm mistaken, you see two types of clients to whom emails may be sent. There are emails between businesses—that is one of your categories—and then emails sent by a business to consumers.

Would you like to see these two categories of clients expressly set out in Bill C-27?

Mr. Bernard Brun: Yes, absolutely. Indeed, to our way of thinking, an business-to-business relationship for the development of business relations... We know that most businesses in fact publish their electronic address precisely so that people can communicate with them. This to our mind is a different category. We think that in the bill, we should allow this communication with other businesses with whom we may eventually conduct business.

Currently, in the bill, it says that businesses may communicate but strictly to request information on activities. We feel that this is not sufficient; businesses should be allowed to communicate to set up business relations.

We understand that there needs to be a tighter framework where individuals are concerned because this bill aims to protect consumers and individuals.

Mr. Robert Bouchard: My question is for Mr. Paul Vaillancourt.

I don't know if you are talking about the same thing, but I thought I understood that you wanted a clarification on the matter of mass emailing.

I thought I understood that you were talking about the clients of a business when you talked about fiduciaries. I presume that you were talking about the clients of a business. You are establishing a distinction.

You also said that there had to be an 18-month waiting period after the end of a business relationship. Once again, I presume you are referring to the business relationship with the clients, those who had a connection to the business.

Could you elaborate a little?

Mr. Paul Vaillancourt: Thank you, Mr. Bouchard. If I understood correctly, there were two questions.

The first concerns mass emailing. I am an entrepreneur and I have a clientele. I do financial planning with about 500 families. If a client does me the honour of referring a potential client, I send an email to that potential client. And so, if you were my client and if you referred your brother to me, I would send an email to your brother. I wouldn't send 50,000 emails to all of the Bouchards in Quebec, just one. That is the exception I hope to obtain. I'm not talking about sending mass emails, but I simply want the opportunity of being able to respond to the invitation of a client who wishes to introduce a third party to me, someone who does not know me yet.

To respond to your second point, in our commercial area, we have clients who make one or several investments with us. If, for instance, a person made an investment in 2006 and has not made any others since, that person continues to be my client. And so we are simply asking that the 18-month period begin when that person for instance removes his or her investment with us and is no longer our client. However, as long as he is with us, he remains our client. Consequently, the 18-month period would not apply in that case but only when the business relationship has ended.

I hope I have answered your questions.

● (1605)

The Chair: Thank you, Mr. Bouchard.

Thank you, Mr. Vaillancourt.

Mr. Lake, you have the floor.

[*English*]

Mr. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): I have a question for Monsieur Morency.

Looking at my notes, I think you mentioned that you should be allowed to request consent. I want to clarify what that means. I'm particularly interested in the definition of who you would be allowed to request consent from, with the change you propose here. Would you have to know this person? Is there a definition you would attach to that?

[*Translation*]

Mr. Bernard Brun: We discussed that matter a little earlier. It concerns the possibility of obtaining consent by email, through electronic means. We would like to see the bill amended to make that possible.

[*English*]

Mr. Mike Lake: So in this case you're not even talking about a referral.

Mr. Bernard Brun: Exactly. We're saying we should be allowed to get consent through electronic communication, because that's the way the consumer wants to get the communication.

Referral for us is something totally different. When we get a reference from a third party, we want to be able to contact that person.

Mr. Mike Lake: So the pharmaceutical companies we all receive many e-mails from should be allowed to send out e-mails to anyone in this room, or a big list of people, saying they want to contact us to tell us all about their great product. Is that okay with the changes you'd make?

Mr. Bernard Brun: What we're talking about is really a one-time shot. It's really to get your consent through electronic means to offer you service. But you could put it into a law that if we don't get an answer within a certain time we don't have any kind of consent, so we should get out.

Mr. Mike Lake: So you can only send it once to each address?

Mr. Bernard Brun: Yes. That would be our position.

Mr. Mike Lake: Joanne, you talked quite a bit about referrals. There was obviously a sort of theme today in terms of the discussion, but I'm wondering if you could define "referral". How well does a person have to be known to be a referral?

Ms. Joanne De Laurentiis: As my colleague Paul Vaillancourt pointed out, it will be in the course of your relationship with customers. They may say that they really like the job you're doing for them and they think so-and-so would benefit, so why don't we give them a call? Usually it's that, so we're talking about a very directed e-mail.

We're not talking about mass e-mail. I would just like to make that point. We've come here with some of our concerns, but generally we're very supportive of this legislation, so we could make an amendment that says that if it is a directed e-mail to an individual and that individual doesn't respond, it's the end of the contact, as opposed to the mass e-mail approach, which is a concern we all share.

Mr. Mike Lake: Would you say that the person has to be known to the person who's referring?

Ms. Joanne De Laurentiis: Well, not necessarily. Maybe known to someone.... If that person is known to your client, they won't be known to you until you make contact.

Mr. Mike Lake: Right, but known to the client, so if a client of yours gave you a list of 14 million e-mail addresses, all of which belonged to individuals, and said that he really thought you should give these 14 million people a call, would that be allowed under the change you're talking about making? It sounds like it would.

Ms. Joanne De Laurentiis: I think we could probably find language that would prevent that, because that clearly would not be in the spirit of a directed referral, absolutely not.

Mr. Mike Lake: Okay. I guess the question I would have is where the line gets drawn. Maybe you could define your concept of mass.... I have to say that I actually have some sympathy for this. Having worked in a sales environment myself in the past, I have some sympathy for some of the points you're bringing up, but I also think that if we loosen up the bill it winds up letting everybody through and not actually stopping the kind of thing we're trying to stop.

● (1610)

Ms. Joanne De Laurentiis: We would be happy to file some recommendations for language changes, but I think we could narrow it so that we're talking about a very specific, narrow, directed e-mail. When we talk about mass e-mail, if I've been referred, that e-mail is not coming to me with really clear information about who that person is and about the fact that if I'm not interested I am able to ask them to take me off their list. I think we can target that communication in a way that allows us to use technology the way it's meant to be used.

I mean, we're all very excited about this technology, and it seems to us that this legislation just overreaches to the point where it would close off that opportunity. That's what we're looking for: the balance. We would be very interested in working with you on the specific language.

Mr. Mike Lake: In terms of identifying exactly where these suggestions would be going, though, if you're talking about specifically directed e-mails, are you talking about one to one, or could someone send out an e-mail to four people who have all been referred at the same time?

Ms. Joanne De Laurentiis: Generally, they'd be one to one. It's an e-mail to that individual. So even if I am talking to four people, I would have to be addressing the individuals.

Mr. Mike Lake: Now, technology, of course, exists that would allow someone to send out 10,000 e-mails that all come one to one with names attached, just through a simple merge, just like you would do with mail. I would imagine that each of your clients probably uses mail merges to send letters by mail that look like they're one to one. There would be technology to do the same thing by e-mail, I would think, which you would use.

Ms. Joanne De Laurentiis: Probably.

Mr. Mike Lake: Probably, so you can kind of see where I'm going with this. Again, you could send to 10,000 or 10 million people one to one if you had their names and their e-mail addresses provided to you, and a lot of organizations could provide those lists.

Ms. Joanne De Laurentiis: I'd like to point out one other thing that I think is unique, certainly in the investment funds business, and it is that individuals like Paul are highly regulated as to what they can send out from a sales perspective. There is a fairly robust set of rules in the Mutual Fund Dealers Association as well as the investment industry association, and those are all part of the Canadian securities set of rules.

I think we could perhaps find language that would clearly point out that those who are subject to another set of rules.... In a sense, we have double jeopardy here. We have a very highly regulated group of people for whom the sending out of messages says that this is how you do it, and then on the other hand we have this, the prospect of a closed door, in doing something that we think would be quite legitimately beneficial to the business. So it's about finding that balance.

The Chair: Thank you, Mr. Lake.

Thank you, Madame De Laurentiis.

If you have specific wording to suggest to the committee, please send it to the clerk and I'll ensure that it gets distributed to all members of the committee. Thank you very much for that offer of help.

Mr. Masse.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair, and thank you to all the witnesses who are here.

Maybe I'll do a go-around. I'd like to hear from you about the issues that have been raised on the amendments and the language changes you're talking about. If those are not accepted and the bill passes in its current form, how much of a problem will this be with your respective organizations? I think we should have that put in front of the table here.

We'll go right around.

[*Translation*]

Mr. Bernard Brun: The Desjardins Group, or any other similar business, sees the complete and total restriction of the development of electronic commerce as a problem for one simple reason. The prohibition of communications coupled with the penalties will mean that no manager—who can, for that matter, be identified directly—will agree to make this type of issue a priority. They will simply shift their focus to other kinds of projects and totally abandon the development of electronic commerce.

[*English*]

Mr. Paul Vaillancourt: I might not be able to help you with the wording of legislation. I'm just a financial planner, not a lawyer. However, in our business a referral is a very precious thing. We work hard to be able to ask our clients to provide us with referrals. The preferred method of communicating with this new client is through e-mail. Letters are fine, the telephone is fine, but e-mail is more and more the way to go.

If this law passes along, coming up with new clients will become a rather creative affair and we'll have to resort to strategies from a generation or two ago. In other words, I think there'll be a resurgence in Rotary Clubs, Lions Clubs, and social networking groups that rely on face-to-face meetings and rubber chicken dinners, as opposed to meeting online, which is how a lot of people work these days.

I simply suggest that banning all e-mails to a third party that is unknown might be pushing it a bit too far, but a one-on-one referral—as opposed to a client who has 14 million contacts—might be a bit further. In our business, and as it relates to my own business as a self-employed person with five people on staff, we treasure referrals. We want to be able to get to these people any way possible. E-mail is becoming more and more the preferred method of choice by both us and the people who are being referred. We'd be grateful if we could keep using that method.

● (1615)

Mr. Peter Goldthorpe: I'll echo Mr. Vaillancourt's comments that the impact of this bill, as it is currently drafted, would be to send us back to the marketing techniques of the last generation. Arguably, you might think that the Rotary Club is a good thing and that we should be having more face-to-face meetings at Rotary Clubs, but that's just one of the devices. We'd be back to the junk mail that arrives in your mailbox, the use of paper, and the environmental and economic costs that attend to that—plus the reduced effectiveness of those marketing methods. We have a generation now that doesn't even use the telephone, much less read written material that arrives in the mailbox.

If you take away electronic means of communication, you're really taking away means of communication with the emerging generation.

Mr. Brian Masse: Thank you.

I noted with interest one of the subjects we haven't discussed here—it is in the Desjardins notes—and that's unsubscription, which is quite important in this part of the bill. If you give consent to something, you obviously need to be able to reverse that and take yourself off a subscription list, especially if there has been a poor relationship with the business, or what not. It gives you control of your digital information.

I notice you have difficulty with the 10 days for unsubscription. Maybe you can highlight the reasons for that. You suggest 31 days, which I think is really long, especially if it's supposed to be a business working relationship with someone. If they can't get unsubscribed for 31 days that's a long time.

Would it be more reasonable to have 10 business days to unsubscribe? You're contacting somebody's home through e-mail to their computer. I find it hard to believe that it would take a full month to get unsubscribed. Maybe you can provide some detail on why the 10 days is difficult for you to achieve.

[*Translation*]

Mr. Bernard Brun: A 10-day unsubscription period can be difficult to achieve, depending on the time of year. Having a 31-day period would bring it in line with the current unsubscription period set out under the do-not-call list.

Considering the potential penalties, obviously, a slightly longer deadline simply allows us to make sure that the person was unsubscribed. With a much shorter deadline, it may take a few extra days, which would open the company up to unnecessary risks, when all is said and done. The idea is to remove these people as soon as possible and to have enough time to ensure that....

[*English*]

Mr. Brian Masse: What I'm a little bit concerned about, though, is that 31 days is a long time. I'm sure when you send out a request to subscribe to someone, they're not going to get in your system 31 days later. You're going to activate them as a customer immediately, probably within days, if not hours. Why 31 days? Is it just a matter that you don't want to put resources on for people to unsubscribe? Is it technically difficult within the 10 days? Is it a matter of resources, or if there's a technical problem with unsubscribing people, I'd like to know. It's a big issue to me because, once again, if you're giving out your information and your consent, then you should always have the right to take that back, and within a reasonable period of time. If you get on the do-not-call list, it doesn't take that long, 31 days.

So that's what I want to know: is it technical, or are resources why you can't meet the 10-day limit?

● (1620)

[*Translation*]

Mr. Bernard Brun: The purpose was to bring the unsubscription period in line with the do-not-call list. I do not see that as a technical difficulty, per se. What needs to be understood is that we do not send out emails daily. These lists are used, but we do not inundate our partners or our customers with emails. We send them sporadically, from time to time, and these lists are managed by businesses associated with us. It may be difficult on a technical level for a large financial group to handle an unsubscribe request and to be certain that it was completed. As I said, that coupled with stiff penalties.... The less time there is, the more it makes us a little nervous. But the person will be removed as quickly as possible.

The Chair: Thank you, Mr. Brun.

Thank you, Mr. Masse.

Ms. Coady.

[*English*]

Ms. Siobhan Coady (St. John's South—Mount Pearl, Lib.): Thank you very much.

Thank you very much to each of you for appearing today and commenting on this very important piece of legislation.

I did understand from you that your general consensus is that this is an important piece of legislation and that while it is something we should be moving towards, you do have some concerns. I'd like to address some of those concerns today by asking a couple of questions. I'll just ask a general question, and feel free, anyone who wishes, to speak to this issue.

I think I heard from each of you that the definition is simply too broad. Would you generally agree that we should be directly targeting only those who conduct themselves in a way that results in abusive communications rather than the other way around, that is, rather than introducing an entirely new set of regulations on the regime for communications? Right now I think I'm hearing from you that we're simply too broad. Should we be narrowing that field down and having the legislation change its view? Am I hearing that correctly from each of you?

Mr. Peter Goldthorpe: Yes, I would say that's what you're hearing.

I think it's also important that what you're hearing from all of us is that this isn't really addressing the problems.There was a suggestion or a question, I guess, about how to define mass mailing. How many are too many? I don't think the problem is really that 14 million e-mails are going out; it's what's in those e-mails. I think you should address the issue of what is in the e-mail that's going out, and our suggestion was that an e-mail to obtain consent be just that, an e-mail to obtain consent. If it's an e-mail that is clearly intended to solicit business and promote and build awareness of products and services, that's not an e-mail to obtain consent.

So by addressing the problem, I think you'll have a more effective piece of legislation.

Ms. Siobhan Coady: Does no one else care to comment on that?

Ms. Joanne De Laurentiis: I would just add the point that I think some of us made earlier. Our concern is that when it is so broad, yes, we would like to narrow it somewhat. When it is so broad it does also capture legitimate business. We need to find language that allows the legitimate business to get through without the bad stuff, and that's the challenge.

Ms. Siobhan Coady: Knowing it's a little too broad now, I think we also heard that the consent was too narrow, too restrictive.

I don't think I heard from you, but I've heard from other witnesses that they're also concerned that there is an issue around conflicting or overlapping regulations. The do-not-call list, for example, has different consent provisions. PIPEDA has different consent provisions. Would you care to comment on the differences?

Mr. Frank Zinatelli: I can start, but I see that Joanne wanted to jump in there.

The do-not-call list is obviously a different model that I think will prove itself over time. That's why it's important to give it the time necessary to work out.

As far as this bill and PIPEDA are concerned, I would say there's a lot of consistency in the approach. The definitions certainly would seem to mesh. I think the two pieces of legislation have been well thought out in the area of consistency.

As far as this legislation and your previous question about the philosophical approach to this is concerned, again, it was either go this way or that way, but I think the ultimate objective is the same. I think a lot of thought has gone into this bill, but it needs some important tweaking to make it workable.

I hearken back also to what I believe Mr. Garneau said earlier. Do you want to put in a piece of legislation that's really tough and stops everything, or do you want to put in something that goes some way and see how it works?

I'm for the "go some way and see how it works" approach, because you can always go back and put more rules in place if it's not working out.

● (1625)

The Chair: Thank you very much, Mr. Zinatelli.

Thank you, Madame Coady.

Mr. Wallace.

Mr. Mike Wallace (Burlington, CPC): Thank you, Mr. Chair.

I want to thank our guests for being here today. I appreciate it. I saw some of them earlier.

To follow up a little on what the chair said, I have the actual wording of the bill in front of me. We're not going to wordsmith here, to be perfectly frank with you, but in the next week or so we are going to be going through it line by line.

We need actual legalese wording that reflects this, whether we agree or not. It would give an opportunity to the staff from the department to look at that wording to give us a reasonable answer on whether it's feasible or not, or what the consequences would be. So if you can get it to us, that would be great.

To our friends from the life insurance organization, I'm a little concerned about sending out e-mails for consent. Are you telling me those e-mails would not have a referral name attached to them? Would the e-mail say, "Mr. Wallace, we got your name from Joe Blow and we'd be interested in talking to you about your life insurance needs. Do we have consent to call you?" Would Joe Blow's name be attached to that, or would it be just an e-mail directed to me?

Mr. Peter Goldthorpe: I'm not sure how much use would be served by prescribing that you identify the person who made the referral. As a matter of fact—

Mr. Mike Wallace: Sorry, I have only five minutes.

So it would be a mass e-mail. Let's say you got the list of everybody who lived in Burlington. You could e-mail everybody in Burlington, asking whether they're interested in life insurance, yes or no, and whether a life insurance agent could contact them.

Mr. Peter Goldthorpe: There are two points. First, that's theoretically possible, but it's highly unlikely because it's inefficient and the industry does not generally work on that sort of cold-calling model. Secondly, as I mentioned earlier, that's not the problem; the problem is what's in the e-mail, sir.

Mr. Mike Wallace: Other industries do work on that cold-calling model. I used to be a cold-caller myself. In a previous career, I would just go through the phone book and phone people. I'd still probably do it in this career, but in a different way and hopefully not too soon.

I want to be frank with you folks who are here today. I'm in favour of what's in this bill. I'm in favour of reduction, and I think I've heard generally that you're in favour of reduction. I think there has been a bit of overstatement that if Mike Wallace refers you to my financial agent, I have to keep track of that referral. I think we're stretching it a little on that.

I have two other questions that relate somewhat to that.

I think Joanne made the comment that the penalties were kind of stiff. It's up to a maximum of $1 million and up to a maximum of $10 million. If those aren't the right maximums, what are you recommending?

Ms. Joanne De Laurentiis: They are too high as maximums for clause 6.

I do want to mention one thing here with regard to some of this being probable but not necessarily possible. We live in a really very compliance-oriented world. Everything we do goes through a compliance filter. So if the rule says that this is possible, or that is possible, or that may not be allowed, what we get is that we tend to interpret things very conservatively.

So that's the issue. That's the concern.

Mr. Mike Wallace: And you think the maximums are too high.

The next question I have for you is on the 18-month issue, that you have to contact me within 18 months of my last e-mail, in a sense, to even consider myself having a business relationship with you.

Are you saying that is too long, too short, or that it should be defined differently?

● (1630)

Ms. Joanne De Laurentiis: It may be too short. It should really be defined by the advisory relationship between the individuals, not whether there has been a communication or not.

Again, it looks like there had to have been a communication.

Mr. Mike Wallace: And what that would be varies from industry to industry?

Ms. Joanne De Laurentiis: It does.

Mr. Mike Wallace: Would that make it more difficult in terms of legislation—that we have to cut it off somewhere?

Ms. Joanne De Laurentiis: Again, I think it's a case of tweaking. We could reference the relationship without a number, without a timeframe, and I think it would get at exactly what you're trying to get at.

Mr. Mike Wallace: Thank you.

The Chair: Thank you very much, Mr. Wallace.

Now we'll go to Monsieur Vincent.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Thank you, Mr. Chair.

And thank you for being here today.

From the start, we have been talking about consent and bulk email, but we are also talking about businesses. Indeed, you all have a business or you work for a business. We want to pass Bill C-27, which covers Quebec and Canada, and targets the mass distribution of email and spam.

But what about the other countries where these messages can originate? What kind of competition does that mean for you, since they are not regulated? Here, it will be regulated, but not abroad.

You raise the following problem: others will be allowed to distribute email in bulk, but not you. How could we adjust things in a suitable manner, so that we could obtain consent without sending out a mass email to 14 million people? We want to make it law and stop this. Consumers' inboxes are being flooded with spam. There are four or five companies here today, but there are many more all over Canada. We need to follow some kind of logic.

First, I would like to hear your thoughts on that and what your idea of business consent would be. What would you consider a reasonable distribution of email that would allow you to stay in business?

Mr. Bernard Brun: Thank you. I think your concerns are very relevant. What the bill says indeed has an impact on competition, especially international competition.

The current bill, as it stands, would put us at a disadvantage in relation to any international competitor. That is why we are asking for some concessions with respect to consent. We believe that the bill must target the distribution of spam. When spammers send emails, they are not looking to obtain your consent; they are just looking to flood your inbox.

Under reasonable business practices, we are not asking for the right to send emails without consent, but we are asking for permission to obtain that consent electronically.

Mr. Robert Vincent: Obtaining consent on what scale? You are talking about permission to obtain consent, but there are 30 million Canadians. Am I going to send out 30 million emails to find out who consents to doing business with me? We are managing problems, because if every business sent out 30 million emails, people would be inundated.

What would a reasonable limit be? We have to be reasonable here, because if we look at this the same way, we will not make any changes to the legislation. That would mean keeping the *status quo* and sending out emails at will. Business would have only to ask for consent, and they would send out just as many emails. That is what we are trying to limit; fewer emails have to be sent. What can we do to be reasonable about this?

That question is for everyone.

[*English*]

Ms. Joanne De Laurentiis: We agree. That's the challenge. I guess what we are saying to you is that we could tweak the rule to prevent the spam that none of us like but also ensure the legitimate communications directed to an individual where the firms are identifying themselves, and where there is also probably a hyperlink that would allow them to say, “I'm not interested”.

I think we can create that. We can tweak the rule in order to be very clear about what we allow and what we don't allow. I don't disagree with you, but we just need to find the ability to let the legitimate communication take place.

● (1635)

Mr. Frank Zinatelli: Certainly, I think the bill as it is written will prevent a lot of e-mails that would otherwise be sent, but no longer will be sent, by legitimate businesses. What I think those businesses that do carry on legitimate activities want, as Joanne was saying, is some tweaking of the wording to allow some of the activities that are current valid activities now. One example I've heard repeatedly today is that of the situation with referrals, which is key, certainly for the industries at this table today. That at least will maintain some of the legitimate activities if that particular tweaking is dealt with.

[*Translation*]

The Chair: Thank you, Mr. Vincent.

Thank you, Mr. Zinatelli.

Mr. Van Kesteren, you have the floor.

[*English*]

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Thank you, Mr. Chair.

Thank you, witnesses, for appearing before us.

I have to confess that I guess I'm one of these guys who kind of watches from the outside. I'll ask my wife if she'll possibly check a price if we're going to take a vacation or something. I walk away really fast. I get frustrated when I look at the thing and this pops up and that pops up.

Speaking from that angle, have you thought about other alternatives? I'm suggesting possibly that.... Mr. Wallace was talking about his former life, and my former life too, when we would have to find our contacts. Is there a plan B that you have in place should this legislation move forward? Is this an insurmountable mountain that you can't get over? I really need to know that. Is there not another way that you can go around this problem if this legislation becomes a reality?

Ms. Joanne De Laurentiis: The question we would put back to you is this: why do we want to go backwards?

I'm like you. I get frustrated when too many things are popping up, but my children communicate only through text messages and through researching on the web. Younger advisers who join the business and investment advisers today will communicate with each other through websites that will create web discussions. That's the way things are moving.

Even in disseminating information, we are working today with the securities administrators across the country to create a new “short fund fact” so that people don't have to read the complex prospectus. We're going to send that through e-mail. We are moving in the direction of communicating with each other through technology. So if this legislation is passed, I would put to you that you would be limiting the industry in a very significant way.

And there is no plan B.

Mr. Dave Van Kesteren: Somebody mentioned Twitter or one of the others. If you're in the financial business, couldn't you have a web page or something that would attract people to that and then you can make your contacts? I mean, you must be thinking about these things. Frankly, I suppose that if I spent most of the day looking at my stock portfolio, if I was engaged in that, I'd want all the information I could have. But if that's not my area of expertise or interest, I don't want that stuff coming at me.

Isn't there something that you could possibly move towards that would...? I, at least, have found in life that every time there's an obstacle, it's just human ingenuity to bypass it and come up with something else that manages it. Maybe somebody else wants to—

[*Translation*]

The Chair: I think Mr. Morency has something to say.

Mr. Yves Morency: I just wanted to mention that the original intent of the legislation was very commendable. We are also consumers, even if we work in financial institutions. The bill aims to protect electronic commerce, not reduce it to nothing. Where things stand now, it is one of the tools available to businesses, organizations and individuals, to the extent that the alternative would be to go back to the methods of communication we used in the past such as newspapers and the telephone. We are trying to find a balance here.

I think you understand what we are getting at. It is not a matter of not protecting consumers against spam, but we must not throw the baby out with the bathwater. It may not be easy to strike a balance, but we should not be subjected to these competitive conditions. Today's channels of communication are not limited to Canada. If our main competitors do not pass similar legislation, we will be at a competitive disadvantage, something I am sure you do not want. That is the point we came here to make.

● (1640)

The Chair: Thank you, Mr. Morency.

[*English*]

Thank you, Mr. Van Kesteren.

Mr. Masse.

Mr. Brian Masse: Thank you, Mr. Chair.

I am just wondering if any of your suggestions could be done through regulation instead of amendments, because I'm thinking that regardless of what we come out with in this bill, things are going to change.

Let me give you an example of something I consider spam, which is really irritating in the banking system right now. I go online to access my bank, using my own computer and my own time and paying for the Internet service. I've paid for all of that, but when I go into my account, before I can do anything else, I have to answer a question from my bank about once or twice a month. The bank is basically trying to solicit information from me for other products and services. I have to do that before I can actually go into my own account.

As a customer, I consider that an abuse. As well, it takes my time and it's something I'm not interested in. Even if I respond with, no thanks, what they're doing is testing me all the time on different products and services I might be interested in before I can do my own banking.

So I want to see stuff like that taken care of as well, because you should have the right, if you're going into your own account, not to have to do a survey every single time, especially as you're paying for your computer, you're paying for your time on the Internet, and you're doing the bank's job.

So is there anything right now or any change in what you suggested that could go through regulation as opposed to amendments?

Mr. Peter Goldthorpe: Certainly I think the issue of an e-mail to obtain consent is a prime example. You would need a legislative amendment, because you have the blanket prohibition in the legislation right now. But if you took that blanket prohibition out and then you developed a definition of an e-mail intended to obtain consent, if it turned out that it were being subject to flagrant abuse or there were millions of mass e-mails being sent out under the guise of referrals to specific individuals, then you could tighten up that regulation fairly quickly and easily.

Mr. Brian Masse: Mr. Chair, I want to move on quickly to what was suggested by the Canadian Life and Health Insurance Association. They've suggested that we use the Australian model here with regards to business-to-business relationships, so that if an e-mail were actually published it would be providing consent. Australian anti-spam legislation has this feature.

Is that the position of the other organizations as well?

[*Translation*]

Mr. Yves Morency: Yes.

[*English*]

Ms. Joanne De Laurentiis: In our case, the business-to-business case, we would say yes, that makes sense. That is an implied consent.

Mr. Frank Zinatelli: I just wanted to note that our comment was indeed with respect to business to business.

Mr. Brian Masse: Okay, thank you.

The Chair: Thank you, Mr. Masse.

Mr. Lake.

Mr. Mike Lake: Thank you, Mr. Chair.

Again, thank you to our witnesses.

I have a few comments and then a couple of questions. As I've listened, I've heard you bring up concerns that, again, I have sympathy for, and yet in terms of the legislation actually meaning anything at the end of the day when we're done with it, I struggle to see where we would accommodate it by taking some of the steps that at this point have been suggested by each of your organizations.

To my colleague Mr. Wallace's point, it would be nice if after the meeting you were to go back and brainstorm a little more and maybe find some other ways around some of these things. We'd welcome the suggestions, that's for sure.

One of the things I note is in the brief by the Life and Health Insurance Association. It says: "Properly constructed, an introductory electronic communication could be quickly and easily identified by the recipient who, with a minimum of inconvenience, could then decide to respond to the message or delete it." I can't imagine any e-mail I receive that I could delete faster than some of the pharmaceutical and bank e-mails that I get already and that are properly constructed, too, I would say.

I think it was Mr. Brun who made the comment about all these companies that send us mass e-mails and how all they want to do is inundate us with e-mails, but I actually disagree. I think they want to make money. I think they just know that if they send out 30 million e-mails and 10 people respond, they actually make money, and that's what's wrong with the system right now. It's at the point right now where we get so much e-mail.... Even going back to my previous life in sales, it got to the point where an e-mail didn't mean anything anymore, because we got so much junk that it was too hard to find the ones that actually meant something. The amount of junk we got slowed us down so much that it was hard to find the ones that were actually meaningful, those from clients that we had relationships with.

To my question now, in terms of the legislation as it goes forward, if it were to go forward and not change some of the things regarding consent, I'm curious to know how your members would get around some of these pieces of the legislation. You must have considered that, saying, "Wow, if this passes, how are our members going to conduct their business?" I'd like to hear some of the creative ways that business would maybe change a little bit as your members try to get around the rules.

● (1645)

Ms. Joanne De Laurentiis: We obviously—

A voice: Comply with the rules.

Mr. Mike Lake: Yes. I mean comply, not get around. Sorry.

Voices: Oh, oh!

Mr. Mike Lake: Thank you.

Ms. Joanne De Laurentiis: We honestly haven't looked at that. I guess we were confident that when we put our case to you about some of the legitimate businesses this would stop, you would be sympathetic, but certainly, as Paul said, he's going to have to go back to some of the old-fashioned ways of getting referrals, and it likely will mean that he's going to be somewhat less competitive. It's really that simple.

Mr. Paul Vaillancourt: Yes. Essentially, we're in sales, so we're adaptive and we're creative. There's no doubt about it. The question becomes why we should need to become creative when we have a solution here, e-mail, which is rather useful.

Just looking around the table, I see half of you looking down at a BlackBerry or an iPhone or what not while we're chatting. It's a way of doing business today. People can get this e-mail and you can look at it at 6 in the morning or 11 o'clock at night as opposed to the standard business hours of 9 to 5 when people are working. What I find so wonderful with e-mail is that clients can send me an e-mail at 10 o'clock at night and I can reply to them at 6 in the morning. That's a perfectly legitimate way of doing business. Why not be able to communicate with prospective clients that way?

Mr. Mike Lake: If I could interject for just one second to your point, I've looked at my BlackBerry a couple of times because I'm communicating with somebody in regard to the hearings we're conducting today. If in the meantime I got 10 e-mails asking me for consent, I wouldn't be able to use the e-mail for what I'm trying to use it for today.

Mr. Paul Vaillancourt: For my very limited use of Internet, I'm one business owner and I'm not spamming a whole bunch of people. I'm simply trying to get a communication going with somebody who was referred to me. The way this legislation is set up right now, it would be illegal for me to have my client ask me to get in touch with his brother. It would be illegal for me to get in touch with his brother via e-mail. I would have to go to calls. If this person is on a "do not call" list, I'm stymied there too, and I would have to go to regular mail.

Mr. Mike Lake: Could you send your client an e-mail asking him to forward it to his brother?

Mr. Paul Vaillancourt: No doubt, and if the legislation is passed the way it is, I'll have to say to my client, "Wonderful, I would love to get in touch with your brother. Have him e-mail me." That's a delightful way of doing business if he gets to me, but I have to convince my client to sell me to his brother, rather than my selling myself to his brother.

The Chair: Thank you very much, Mr. Vaillancourt.

Mr. Brun.

[*Translation*]

Mr. Bernard Brun: I want to clarify that it is prohibited not only to send a message, but also to have it sent. Even if you wanted to get around the legislation, you would not be able to, as it stands right now.

● (1650)

[*English*]

The Chair: *Merci*, Monsieur Brun.

Thank you, Mr. Lake.

Before we go to Mr. Rota, I recall hearing testimony earlier from our witnesses that 85% of all e-mail traffic in Canada is spam. I think that's one of the reasons this is of such interest to the committee. That's an astounding number, when you think about it, and one of the reasons why the government is taking a look at this legislation.

Mr. Rota.

[*Translation*]

Mr. Anthony Rota (Nipissing—Timiskaming, Lib.): Thank you, Mr. Chair.

I want to ask Mr. Morency and Mr. Brun a question. People who do business in Canada often say that we impose very high standards on our businesses. But then we go and buy products from foreign companies because they are cheaper, because those businesses can be more competitive than ours.

In terms of financial products, could foreign companies send their emails from another country and compete with you without having to follow the rules or face any consequences?

Mr. Yves Morency: To answer your question, I will give you an example. My son regularly buys products that are made and sold in the United States. There are no restrictions on those products here. The same goes for financial services. Internationalization, globalization, the opening up of borders and free trade are realities that we are constantly dealing with. In addition, the modern tools of electronic transfer make borders invisible, to a certain extent.

If we are subject to stricter limitations than our competitors, it will be our companies that suffer and our jobs that are lost. We even run the risk that our companies will consider it easier to operate in other countries, unless we sign international agreements to harmonize legislation. That is the danger we are facing.

You say that spam makes up 85% of emails, but that leaves 15% that are legitimate transactions and that we must not lose.

Mr. Anthony Rota: In your opinion, our companies will have their hands tied. They are at risk because of this legislation.

Mr. Yves Morency: We do have to qualify things a bit. The bill could reduce the ability of our companies to compete, but I do not think that any of the witnesses came here to tell you not to pass legislation. We agree that it is needed, but we have to strike the right balance to get rid of spam while maintaining electronic commerce, a growing modern tool. We admit that it is not easy to find the right wording to express this in the legislation.

[*English*]

Mr. Anthony Rota: *Merci beaucoup.*

To the people who are in sales, how much of your business is referral business? What percentage of that is through direct e-mail when you're asking someone...?

To Mr. Zinatelli, maybe you can give me some wording or look at the legislation and suggest something here. If someone is sending an e-mail to a referral, would it be appropriate to force the person sending that e-mail to include the name of the referring person? That might be a legal matter, but maybe it's a way of getting around this.

I understand what the government is looking for; they want to avoid millions of e-mails going out at the push of a button. On the other hand, if you identify who has referred you to that person, would that resolve much of the trouble we have there?

Mr. Paul Vaillancourt: To answer your first question, essentially 25% to 30% of my new business every year comes from people I did not know on January 1.

All of my new clients come from referrals. I've been in business for twenty years, and I've built the business where I look after my clients to the best of my abilities. With that comes referrals. In terms of people, that represents about 20 to 25 new clients a year.

● (1655)

Ms. Joanne De Laurentiis: In terms of the percentage of referrals that are done by e-mail, I don't have that for you, but I am told by our members that it's the fastest-growing medium through which to make that initial contact.

The Chair: Thank you very much.

Go ahead, Mr. Zinatelli.

Mr. Frank Zinatelli: Just very briefly, we don't have any numbers offhand. I'm not sure if those are available at this time.

I will certainly take under advisement your question about naming the individual.

The key point is that we're all talking about referrals. The message that we want to get to the committee is that this is something that can be addressed by defining that term or by putting rules around it; but at the end of the day, it can be addressed by permitting something that is really legitimate for all these industries.

The Chair: Thank you very much.

We're going to suspend for five minutes to allow our witnesses to depart before our new witnesses appear.

Mr. Wallace, you have a last question. Be very brief, please.

Mr. Mike Wallace: I just want to follow up with Mr. Zinatelli.

In the clause that defines implied consent, it actually says that additional circumstances where consent can be implied may also be prescribed in regulation.

If we did it in regulation, would you be satisfied with that over it being in actual legislation?

Mr. Frank Zinatelli: I would be totally fine with it being done in regulation, sir.

Mr. Mike Wallace: Thank you.

The Chair: Thank you very much for that clarification.

We have a point of order.

Go ahead, Mr. Vincent.

[*Translation*]

Mr. Robert Vincent: I have a question that I did not have time to ask earlier. I would like to ask it now.

[*English*]

The Chair: If it's a very brief one, go ahead.

[*Translation*]

Mr. Robert Vincent: Would you be able to indicate in writing—so that we have something to write or to think about—how we should proceed, where business consent stands and how many emails can be sent? I would like you to send the committee your opinion on the amendment of section 6 or 7 of the bill. That would be appreciated.

The Chair: Thank you for that suggestion, Mr. Vincent. That is a good idea.

[*English*]

If you could direct your suggested amendments to the clerk, I'll make sure they're distributed to all committee members.

[*Translation*]

I would like to thank the witnesses.

[*English*]

Thank you very much.

● _____ (Pause) _____ ●

● (1700)

The Chair: Good afternoon.

Welcome to our 34th meeting of the Standing Committee on Industry, Science and Technology.

We're here pursuant to the order of reference of Friday, May 8, 2009, to study Bill C-27, 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.

We have in front of us, on our second panel today, witnesses from three different organizations: first, Mr. David Fewer and Mr. Tamir Israel from the Canadian Internet Policy and Public Interest Clinic; we have also with us Mr. David Fraser, Mr. Kim Alexander-Cook, as well as Tamra Thomson, from the Canadian Bar Association; and finally, we have Mr. John Lawford here, and Madam Janet Lo, from the Public Interest Advocacy Centre.

Welcome to you all.

We'll begin with five minutes of opening statements from each organization, beginning with the Canadian Internet Policy and Public Interest Clinic.

Mr. David Fewer (Acting Director, Canadian Internet Policy and Public Interest Clinic): Thank you for providing CIPPIC with this opportunity to offer you our submissions.

We're a technology law clinic at the Faculty of Law at the University of Ottawa. Our mandate is to ensure balance in policy and law-making processes by representing under-represented interests and perspectives on issues that arise at the intersection of law and technology, so you might guess why this legislation interests us.

We were established in the fall of 2003, and since that time we've advocated for a legislative regime that addresses spam, phishing, spyware and malware. Our advocacy has included making contributions to the Task Force on Spam, offering submissions to Senate and House committees on identity theft, and participating as a member of the Anti-Spyware Coalition, a coalition of business and consumer advocates working together to address the challenges of potentially unwanted technologies such as spyware. All of this is very pertinent to the work this committee is doing and the bill before you.

We have a lot to say about this bill. I'm going to try to reduce it four areas, though I'd be happy to take questions about anything you have on your minds about this legislation.

First, I want to talk about the purpose of the legislation. Second, I want to talk about challenges to the consent principle. Third, I want to address the central importance of the private right of action. And finally, I want to talk about something I haven't heard a great deal of discussion of before the committee, namely, some fundamental changes to PIPEDA's central investigatory power.

First, on the purpose of the legislation, many of the criticisms we've heard of this legislation suggest that it goes too far and that it's not tailored to reducing harm. With respect, these challenges misstate the objective of the legislation. The objective is to establish accountability for sending unsolicited commercial e-mail.

E-mail is directed at more than just fraud and deception. This legislation is about more than phishing and Viagra ads, right? It's also about promoting commerce. It's about the cost imposed by spam on all Canadians, Canadian consumers, and Canadian businesses. Even commercial e-mail imposes efficiency and productivity drains on us. After all, we call such e-mail, when unwanted, spam. At bottom, it's about enhancing the ability of telecommunications tools to promote efficiency within the Canadian economy more broadly, or to enhance productivity within Canadian businesses more broadly. That's the focus. Keep that in mind. That's the harm we're trying to avoid.

This committee heard earlier from the Coalition Against Unsolicited Commercial Email about the costs of spam, estimated to be about $300 per employee in lost productivity. That's the focus. This legislation aims at establishing accountability for spam; it's aimed at reclaiming control over the inbox and restoring the utility of e-mail and other electronic communications as productive tools that promote commerce.

Second, on challenges to the consent principle, we've seen claims that the nature of the consent required by the bill is too vague. Frankly, we don't see any merit in those claims. Our experience with PIPEDA, our federal privacy legislation, suggests that businesses can work with opt-in mechanism. The circumstances under which explicit consent may be done away with are clear, in our view. To the extent we need to address these things, we can address them by regulation.

And finally, we argue that the availability of a due diligence defence further assists businesses in addressing consent issues.

On the central importance of the private right of action, having mentioned PIPEDA, I need to stress that PIPEDA alone is insufficient to address the behaviour targeted by this legislation. In particular, the private right of action is essential to the functioning of this law. The harms associated with spam and spyware are cumulative. The harms here are many small ones, repeated often. The ability of consumers to band together and businesses to band together to address noxious behaviour is essential to address these kinds of cumulative harms. Gutting the private right of action guts the bill. This tortious behaviour is not something that a serious harm standard advanced by some can address.

And finally, there is the issue of changes to PIPEDA's central investigatory power. Frankly, we're greatly alarmed by the sweeping revisions to the framework of PIPEDA proposed in this bill. This legislative change has nothing to do with spam or spyware; it's a fundamental revision of the complaints-based framework of PIPEDA itself. And there are many problems with PIPEDA from a consumer perspective, but the mandatory nature of investigations of complaints by the Office of the Privacy Commissioner is not one of them.

● (1705)

We'd ask that this section be removed from this bill and placed in other legislation, along with other amendments of PIPEDA that are pending further to the five-year review of the statute. That's where that kind of framework amendment belongs, not in this bill, not tailing along in this bill. The fact that you've heard so little about this suggests the merit of that claim.

If this provision is left in, we would suggest that you limit it to granting the discretion the Privacy Commissioner seeks in respect only of the subject matter otherwise addressed in this bill: spam, malware, etc. And if it is to be left in, and of general application, we would suggest that it needs to be narrowly tailored to address the specific concerns raised by the Office of the Privacy Commissioner of Canada, such as frivolous and vexatious complaints.

With respect, our view is that the discretion being granted is just too broad.

Thank you. We'd be happy to address any questions you might have.

The Chair: Thank you very much.

Now we'll hear five minutes of opening remarks from the Canadian Bar Association.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair.

I will start and then my colleagues will continue on.

I think you are all familiar with the Canadian Bar Association as a national association representing over 37,000 jurists across Canada. Amongst our objectives are the improvement of the law and the improvement of the administration of justice. It's with that optic that we have studied the bill in front of us today and we make the comments.

I should point out that both our privacy and access law section as well as our competition law section have analyzed the bill.

Mr. Fraser will address the general parts of the bill and then Mr. Alexander-Cook will look at the Competition Act aspects.

● (1710)

Mr. David Fraser (Chair, Privacy and Access Law Section, Canadian Bar Association): Thank you very much.

As a preface to all of our comments, we'd like to emphasize for the benefit of the committee that we agree wholeheartedly with the intent of the legislation. I think there's general consensus that spam wastes time, energy, and significant resources, is a source of fraud, and makes it difficult for legitimate business to be conducted online. Notwithstanding that, we do have some serious concerns about Bill C-27 and exactly how it's implemented. I'll briefly delve into each of them, but we will of course be available for questions.

First of all, we think the legislation is a little too broad. What it does is take all commercial electronic messages and outlaw them subject to some hard-to-manage exceptions that are simply based on explicit consent, which can be altered significantly in regulations; personal or family relationships, which also are defined in the regulations that we haven't seen; and implied consent, which doesn't quite accord with what you would think implied consent means—it means simply an existing business relationship.

We're also concerned that the legislation itself is inconsistent with related regimes and other statutes that it actually seeks to amend. “Existing business relationship” is a concept that's entrenched in the national “do not call” list, but it's treated differently for the purposes of this statute. “Commercial activity” is also a term that is central to the Personal Information Protection and Electronic Documents Act but is defined differently in this statute for purposes that aren't necessarily clear on their face as to why one needs to have different definitions of the same term.

Consent, which is obviously a concept that's central to the privacy provisions in PIPEDA and is central to this piece of legislation, is radically different from one to the other. We think this presents problems because many of the businesses that are going to have to deal with compliance with the Electronic Commerce Protection Act, PIPEDA, and the Competition Act are the same people who are going to be using the exact same terms, but for very different purposes or with different meanings, which makes it difficult to manage.

Otherwise, the statute is also a bit hard to follow, and we're concerned that too much of it has actually been left to the regulations. This is a statute of general application. It's going to apply to pretty well every business and it's designed to be for the benefit of every single consumer. In our view, businesses should be able to pick up the statute and have a very strong understanding of exactly what it is they have to do and what it is they can't do. Likewise, consumers should have the ability to pick up the statute and understand what their rights are and what their remedies are.

It's our feeling that too many important provisions are being left to the regulations, which may be sensible in the sense that this is a rapidly moving area. There are some central concepts that could be and should be entrenched in the statute, with regulations being left to deal with issues that come up and to deal with loopholes that might not have been foreseen.

We're also concerned that the statute may in fact actually, on its face, violate the charter, simply based on a violation of the freedom of expression provisions contained in paragraph 2(b) of the charter for anything that regulates communication that conveys expression. You may not think that most of the spam that arrives in your inbox actually conveys meaning, but the courts would find otherwise. In order to be justified, it has to meet a strict test under section 1 of the charter, the most important provision of which is that it has to be minimally impairing, so it has to be very finely tuned legislation.

We're concerned that the way it's drafted so broadly may mean that it actually might not survive a charter challenge. While we agree wholeheartedly with the intent of the legislation, we don't want to be back here in a couple of years because it has been struck down as being unconstitutional. In our view, it needs to be fine-tuned in that regard.

A number of fixes could be proposed, which we'd be happy to talk about at greater length. The most important one would be not to limit implied consent. I think you've probably heard this from others. Consent is a concept that we've been dealing with under privacy legislation for quite some time. People have a pretty good idea of it. You've been dealing with it in the medical context as well. A reasonableness standard can be put in place.

Before I run out of time—and I apologize for being a bit long-winded—I'm going to hand it over to my colleague Mr. Alexander-Cook.

● (1715)

The Chair: Go ahead, Mr. Alexander-Cook.

Mr. Kim Alexander-Cook (Vice-Chair, Marketing Practices Committee, Competition Law Section, Canadian Bar Association): Thank you.

In addition to the concerns raised by Mr. Fraser, we have two concerns that relate specifically to the way in which Bill C-27 proposes to amend the Competition Act.

The first concern is, in essence, a concern about a single word, or at least a single phrase. It's only a single phrase, but we think you will agree that it's a very important one.

At clause 71 of the bill, added to the Competition Act is a new proposed section that provides for a criminal false and misleading representation offence that applies specifically to electronic messages. There's already a general false and misleading advertising provision in the Competition Act. This provides a very specific one.

This new proposed section would specifically prohibit sending an electronic message knowingly and recklessly with one or more of the following three features: either misleading or false header information, that is sender or subject matter information; content within the message that is false or misleading; or locator information that's false or misleading.

Our concern is that only in respect of one of those features is the important phrase “in a material respect” included. In all other prohibitions for false and misleading representations in the Competition Act, there is a qualifier.

The false or misleading representation has to be in a material respect. There is an important reason for that. We all make mistakes, and in fact, many people in business make what are actually false representations but which ought not to be pursued for false or misleading representations under the Competition Act. I can give you a very simple example.

Last week I sat on an expert panel at a conference where we considered environmental product marketing claims, including the following claim: “Save the planet, use our biodegradable shampoo”. We talked at length about this claim. One of the issues that were not raised was that “save the planet”, although it's obviously false in respect of the shampoo, was problematic under the Competition Act. It's considered playful puffery or hyperbole. Is it false? Yes, you're not going to save the planet by using this shampoo. Is it actionable under the Competition Act as a criminal or civilly reviewable offence? Not under the general provision. Would it be if it were included in the header of an e-mail? Under Bill C-27, arguably it would be. That's our first issue.

The second issue concerns the proposed lowering of the threshold that must be met under the Competition Act for a temporary order to be issued by a court in respect of any allegedly reviewable conduct under the act. That includes not just misleading advertising, but it includes tied selling, exclusive dealing, and a number of other pieces of conduct that businesses may or may not be engaged in.

Bill C-27, perhaps unaware to many on the committee, makes a fundamental change to the standard that must be observed by a judge in deciding whether to issue a temporary order to stop a representation from being made. It will not only apply to electronic message representations, but it will apply in respect of all of the conduct under the Competition Act to which it currently speaks. This is an over-breadth that, in our view, defies any real rational connection to this legislation.

Thanks very much.

The Chair: Thank you very much.

We'll now hear from our third group of witnesses today, from the Public Interest Advocacy Centre, with a five-minute opening statement.

Mr. John Lawford (Counsel, Public Interest Advocacy Centre): Thank you, Mr. Chair.

My name is John Lawford. I am counsel with the Public Interest Advocacy Centre. With me is Janet Lo, also counsel.

PIAC has been deeply involved for many years with the efforts to regulate commercial electronic messages—that is, spam—and the Personal Information Protection and Electronic Documents Act from a consumer perspective. We therefore are here to give you that perspective on Bill C-27.

Make no mistake about it, Bill C-27, the Electronic Commerce Protection Act, is intended to empower consumers, to empower them to take control of their electronic mail and to take control of their computers. In this way, it is hoped that spam and spyware, fraud such as phishing and the like that is delivered with this manner, can be greatly curtailed. And under this bill, with this focus on consumer empowerment, it can.

Based on this underlying belief in the legislation, we wish to make three basic points to the committee and mention three possible amendments to the bill.

The first basic point is that under the ECPA as drafted, an individual's personal consent, explicit in most cases and implicit only for limited exceptions, is required before an organization or individual can send them a commercial e-mail. This is the only effective way to stem the tide of spam. Exceptions from this requirement for certain senders or an enlargement of the implied consent standard should be strongly resisted by the committee.

Some of the presenters to the committee have expressed concerns that the requirement for explicit consent to receive commercial e-mail is too onerous or would be unworkable. PIAC cautions that the general requirement of explicit consent underpins the entire structure of the bill. It is only by clearly—that is, explicitly and with solid proof—requiring a person's verifiable consent to receive commercial e-mail that the tide of unwanted commercial messages can ever be truly controlled.

Marketers gain advantage from assuming consent, which is possible under an implicit consent model, as their only goal is to simply deliver the messages, leaving the work and time invested in sorting out what is relevant or what is spam to the individual. As we all know, it is the incessant time-wasting triage of e-mails from hundreds and thousands of uncoordinated marketers using this lazy technique that creates the problem of spam.

The existing business relationship exemption for implicit consent allows a wide scope for commercial contact with consumers by e-mail. Every customer of every business is deemed to consent to receiving e-mail from that business unless they go to the trouble of unsubscribing. This exemption provides businesses numerous opportunities to seek and obtain explicit consent and provides for a long tail of 18 months after dealings with that customer to again obtain explicit consent for future e-mail solicitations. We know that this time period is equal to that allowed under the national “do not call” list for the same purpose.

The second basic point is that as drafted under this bill, there is no business-to-business exemption from the explicit consent requirement, it is true, unless the e-mail otherwise falls within that existing business relationship implied consent exemption. That is, businesses under this bill may not seek out new business by sending unsolicited commercial e-mail to other businesses or consumers that they do not actively do business with, period. This practice may well be the norm in the business world and in certain industries, especially banking or insurance, which may rely on referrals, where the recipient has no relationship with the sender, but that is not permitted at the moment. We believe that is as it should be. These are, in our view, unsolicited commercial e-mails that are just as annoying and productivity-killing for people in the workplace environment as they are for consumers at home.

We note here that under the national “do not call” list, referrals are also not allowed.

Should this committee absolutely want to have a business-to-business exemption for prospecting for new business or for referrals, we recommend that the business-to-business exempted e-mails also be required to follow the same rules as are laid out in subclause 6(2). That is, the e-mail must have information on the sender and the unsubscribing mechanism.

The third point is the private right of action. We feel that the private right of action must be maintained in order to protect consumers intended to be empowered by this legislation. The private right of action will only be used in egregious cases. We note that if the company is fined or is complying with an undertaking, consumers cannot bring an action for statutory damages. Therefore, this provision likely will only be used in cases where consumers suffer actual loss or damage, which they normally would be able to sue for anyway, or when there's a serious matter of interpretation of the legislation and the CRTC has refused to issue a notice of violation.

Courts are best placed to determine the interpretation of the act and whether actual loss has occurred. However, what is missing in that private right of action, we note, is a provision that protects companies from being able to contract out of this right.

● (1720)

We therefore recommend to the committee that they consider a provision modelled on sections 6 to 8 of the Ontario Consumer Protection Act, 2002, which does that as well. I have three possible amendments for the committee.

The first one is that we do believe the penalities involved in the bill on the e-mail side may be too high. We've heard that today. We suggest that they be brought into line with those for the national “do not call” legislation. They do not need to be terrorizingly high; they just need to be effective.

The second amendment is that the installation of software when there is implicit or explicit consent requires a transparency section that is parallel to that for e-mail, which is now found in subclause 6 (2). There is subclause10(2) of the present bill, which requires the software supplier for spyware to describe clearly and simply the function, purpose, and impact of every computer program that is installed. However, that's not parallel to subclause 6(2). It doesn't tell you which company, and it doesn't tell you how to contact them. As well, it doesn't give you information about how to unsubscribe, and in this context that would be how to get off of automatic updates in the future. PIAC studied spyware in 2006 and issued a report at that time. We have further recommendations for the legislation that could go into the regulations with regard to more spyware requirements.

Our last amendment is to repeal the bill's potential to remove the national "do not call" list. Therefore, we agree with the Canadian Marketing Association that clauses 64 and 86 would be removed from this bill. We agree with them because we feel that the national "do not call" list needs time, and that the Electronic Commerce Protection Act approach is necessary for spam but will not work for telemarketing and vice versa.

Those are our comments. *Merci.*

● (1725)

The Chair: Thank you very much for that opening round of statements.

We'll now have about one hour of questions and comments for members of this committee, beginning with Mr. Rota.

Mr. Anthony Rota: Thank you, Mr. Chair, and thank you to all of you for coming out this afternoon.

As for my questions, I'm going to start off with Mr. Fraser, Mr. Alexander-Cook, and Ms. Thomson.

In the brief that you submitted to the clerk and the chair of the committee, you raised some of the most important and pressing issues and concerns of your members regarding Bill C-27. You also provide different approaches to address these concerns. Regarding your first recommendation that rather than ban all electronic communications and rely on exceptions and regulations, as the current drafting of the bill is written, we should amend it, I quote, by "targeting only that conduct that results in abusive communications", this recommendation was also brought forward by Barry Sookman, who was representing the Canadian Chamber of Commerce, as well as many other associations that have submitted briefs to our committee. He recommended that Canada look at the Australian model, which is considered to be the best model as far as this type of legislation goes.

Have your members had the chance to review and compare legislation that exists in Australia concerning anti-spam? Other countries that are mentioned are New Zealand, Hong Kong, and Singapore. How do they compare, and what are the big differences between them, and what can you suggest that we do differently?

Mr. David Fraser: At the time of our review, we didn't do a finely tuned comparison of the different legislative regimes in different jurisdictions, so I wouldn't be able to answer that question in sufficient detail.

Mr. Anthony Rota: Okay. Very good.

There are some changes that you've recommended for the bill, and one of the concerns I keep hearing is the fact that it is too broad and it stops everything. By sending out such a large net, you basically block all communication back and forth.

What areas would you take out, if you had to take the legislation and look at specific areas to get rid of, so that you can allow some communications out? Earlier, we had people who sold financial products. They can't get hold of someone as far as a referral goes. There was some questioning on how you would word the legislation to allow that to happen, whether it was to name the person who referred or just to allow the person to refer directly. One of the concerns was that somebody gets a name and says that he or she has been referred to you. Where do they go from there, since they could send it out to millions of people with the push of a button? How do you stop that?

Mr. David Fraser: Fundamentally, the challenge we're dealing with is that we have a piece of legislation that starts with a very broad prohibition and then has exceptions. Those exceptions are really quite firm, although they do have the possibility of being altered significantly in regulation.

The issue is that for most pieces of legislation where they're looking to curtail particular behaviour, they name exactly what the harmful behaviour is and outlaw that. They leave other behaviour that doesn't meet the threshold of needing to be outlawed to still exist.

Now, I recognize that a number of people have argued that there's a cumulative effect of all of this. You can have one piece of unsolicited commercial e-mail that's not, on its face, particularly offensive, but when you get dozens and dozens, or thousands and thousands, appearing in your inbox, cumulatively they have a very significant impact.

The challenge is trying to make sure that this piece of legislation is sufficiently tailored so that it does deal with what is seen as being the harm, which is that huge number of e-mail messages that people do not want, and at the same time tries to address a circumstance where there are e-mail messages that many people, and maybe the preponderance of people, would say would be reasonable in the circumstances. Making sure that the two fit together; that's what this legislative scheme has to allow to take place.

What is reasonable is going to differ from one individual to another. It's a very difficult task that this committee has and that everybody who's appeared before this committee has had to deal with. But given the way the scheme is in this piece of legislation, it appears to be consent based. If you have the person's explicit consent in the manner prescribed, you can send them commercial e-mail messages. If you have implied consent—implied consent is very narrowly limited to within this existing business relationship, fundamentally—you can send them messages. But there's a possibility, a chance, that there are kinds of communications that are not particularly offensive and that in fact in some cases may be welcomed that would inadvertently be caught within this very broad net.

To give one example, let's say I'm an accountant and I would really like to volunteer for your next campaign. I'd really like to help you and offer accounting services to your campaign. I could not send you that message by e-mail. I could not tell you that. That would be outlawed. Even if it's to completely volunteer, one element within that would be a smidgen of self-promotion, which is enough to taint that entire e-mail message and make it unlawful.

Referrals are obviously something that you've heard about. There's even the change of address notification to your professional contacts. They may not have been customers, they may not be your family and friends, they may not be people you've done business with; they're members of associations. That sort of e-mail message, which a lot of people would say is reasonable, would probably be caught within that net.

I think the challenge is to try to tailor the legislation so that the bad stuff is caught and the inoffensive stuff is not necessarily caught.

● (1730)

Mr. Anthony Rota: From a legal perspective, how effective would this legislation be? It sounds like there would be this massive outcrop of complaints: “I don't like what I'm getting, I don't like what I'm hearing”. I mean, it sounds like it would possibly shut down some of our Canadian industry, just based on legal costs.

Mr. David Fraser: Obviously we didn't do a full economic analysis of what the full impact of the legislation would be, but I'm not sure—

Mr. Anthony Rota: It would be a nuisance to the company who's trying to do business in Canada.

Mr. David Fraser: What it does is impose a compliance cost, in the same way as dealing with spam imposes a cost of having to deal with that spam. I'm not sure where exactly the balance lies between those two aspects.

Certainly it will make people think—hopefully it will make people think twice—before hitting send on any e-mail message to any large number of people, or even an individual message. And that may in fact be the intent of it.

The Chair: Thank you, Mr. Fraser.

Thank you, Mr. Rota.

Monsieur Bouchard.

[*Translation*]

Mr. Robert Bouchard: Thank you, Mr. Chair.

I also want to thank each and every one of you for being here this afternoon.

My first question is not for anyone in particular. I would like to know if you considered the four entities that will administer this bill. I am talking about the CRTC, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act.

I am wondering whether you have any thoughts on the subject and, if so, whether you foresee any harmonization difficulties for these four entities. Do you have any recommendations to ensure that Bill C-27 is implemented properly?

Mr. John Lawford: On our end, we do not foresee any conflicts between the people who will be administering this legislation. The CRTC is responsible for fines. The Commissioner of Competition gets involved only when there is an email or spam message having to do with competition issues.

As for the Privacy Commissioner, normally, she should not have much to do. For instance, if I were to make a complaint about a spam message, I do not see the point of doing so under the Personal Information Protection and Electronic Documents Act. We do not foresee any cost or double jeopardy issues.

● (1735)

Mr. Robert Bouchard: Does anyone have anything to add?

[*English*]

Mr. Kim Alexander-Cook: I'd like to answer briefly from the Competition Act point of view.

I've mentioned this is my opening comments, but in terms of consistency it's a real concern to us that the commissioner of competition will be enforcing one standard on header or URL information—locator information—with respect to the Competition Act and claims of false or misleading representations, and a different standard on the content of an e-mail or any other advertising or marketing communications. It makes no sense to us. I think it's confusing to consumers and businesses that they can make certain statements in some media and not in other media when they are equally false or not false, or misleading or not misleading. That's a fundamental concern of ours about the way this legislation tracks into the Competition Act.

It's a very small change. It's just adding a phrase, “in a material respect”, in four places.

The Chair: Thank you, Mr. Alexander-Cook.

[*Translation*]

I think Mr. Vincent has some questions.

Go ahead.

Mr. Robert Vincent: You were here earlier when the business representatives testified. There is a question I am dying to ask. I heard them ask their questions and say that, in order to send out emails, there had to be a pre-existing business relationship or they had to have already obtained consent, otherwise there could be no communications or emails sent out. Under the bill as it is drafted, businesses cannot do anything.

How can they operate with this chain around their necks while we open the door to foreign companies to do business here? We are telling our businesses not to send anymore emails here, not to do any more marketing or things of that nature, but we are allowing people in other countries to do it in their place.

To come back to what you were saying, Mr. Alexander-Cook, what do we do about that foreign shampoo company that wants to save the planet and sends its products here and that is allowed to market them here because, as a foreign company, it is not subject to the bill? We let it happen? I am not saying that we should leave the door wide open, but I think we need to find a compromise so that everyone can do something. How can we also give our businesses a chance to operate normally in terms of email?

Mr. John Lawford: I think that financial companies, for example, need to be here in order to offer their services. Otherwise, we also have laws. Internationally, we are the only G8 country without any spam legislation. If we have agreements with those countries, I do not think that our businesses will be at a disadvantage.

As for people trying to contact their customers, I have heard that it is difficult. But if I am not allowed to contact the brother of one of my customers, why would I not ask my customer to ask his brother to send me an email directly?

Yes, it takes away a tool that is currently legal, but it is still the buildup of these spam messages that is causing the problem. Overall, it really has a negative impact on electronic commerce, as Mr. Fewer said.

● (1740)

The Chair: Thank you, Mr. Vincent.

Thank you, Mr. Lawford.

Mr. Wallace.

[*English*]

Mr. Mike Wallace: Thank you, Mr. Chair.

I'm going to ask Mr. Alexander-Cook a question.

If he wants to respond to what was just said, I'd be happy to have that.

I just want to clarify what you said in terms of the three words you used, "a material consequence" or something like that. I forget the exact wording.

Mr. Kim Alexander-Cook: It was "in a material respect".

Mr. Mike Wallace: Okay, four words: "in a material respect".

You've identified where those words could go. I'd appreciate it if you'd let us know exactly where they would go.

So let's say someone phishes me as a TD customer and they send me something that says I had better call them at TD, something's wrong with my account and they need my numbers. It looks like a Toronto-Dominion e-mail, but I know it's BS; I know it's false. That would be covered under this legislation we have in front of us. That would be disallowed. Is that not correct?

Mr. Kim Alexander-Cook: That's correct.

Mr. Mike Wallace: But you're worried that without those other four little words, the more colloquial sayings—"Let's save the world" or whatever phrase you used—would also be caught on an e-mail, or could technically be caught in an e-mail. Is that correct?

Mr. Kim Alexander-Cook: That's correct.

Perhaps I can give you an example that's closer to your TD example. It's technical, and I'm not speaking to the probability of it being pursued, but if a subsidiary of TD who's not actually TD sends the message and says it's TD sending the message, is that false? Arguably, it is. Is it false in a material respect? I think I'd rather be on the side of saying no. If we don't have "in a material respect" there, there's an argument that it's simply false, and that's a problem.

Mr. Mike Wallace: I was thinking about what you were saying about your first point, and I missed your second point, to be honest with you. Could you tell me again what your second point was?

Mr. Kim Alexander-Cook: In my earlier comments?

Mr. Mike Wallace: That's right, yes.

Mr. Kim Alexander-Cook: The second point concerns the standard that is applied under the Competition Act for a temporary order issued by a court to stop certain conduct that is allegedly reviewable conduct, alleged by the commissioner of competition—

Mr. Mike Wallace: You do something, and the court tells you to stop until it has gone through the system. And what's missing in this legislation?

Mr. Kim Alexander-Cook: To be specific, currently under the relevant section in the Competition Act, subsection 74.11(1), to issue one of these orders, a court must find "a strong prima facie case" of reviewable conduct and then be satisfied that serious harm would otherwise result—and some other factors—so that the balance of convenience favours the issuing of the order. This bill would change that standard. A court may order a person who, it appears to the court, is engaging in reviewable conduct, as opposed to a strong prima facie case.

I know it sounds as though it's maybe a small difference—

Mr. Mike Wallace: It's legalese for you guys, all of you.

Mr. Kim Alexander-Cook: —but the standard that a judge must look to in evidence really matters when the judge is considering whether an order will issue or not issue.

Mr. Mike Wallace: I appreciate that. Now I understand that better.

To my friend Mr. Lawford, who is here on occasion and we've met a number of times before, I'm a little surprised that you don't like the $1 million maximum penalty for an individual. Can you tell me why you don't like the maximum being $1 million?

Mr. John Lawford: Sure. We view commercial electronic messages, as part of clause 6 rather than just the spyware part, as being sort of a bulk offence, if you will. What is the CRTC going to do? They're going to investigate complaints where they've found 1,000 e-mails, 10,000 e-mails, 100,000 e-mails. Hmm, let's work that out: 100,000 times $1 million, or times $10 million. I don't see how people will have respect for this law if the potential fine is $10 million.

However, with the national "do not call" list working just fine and on the same sort of principle, you have up to, as you said before, for a corporation, $15,000 per violation. If I'm Joe's Dry Cleaning and I have a list that's out of date—

● (1745)

Mr. Mike Wallace: Remind me, does it say "per violation" in this legislation, or "up to $1 million"?

Mr. John Lawford: The way we read the legislation, there is a violation per each violation of clause 6, and the way I read it, one e-mail could violate clause 6. I then go to clause 20, which says how much per violation. It could be up to $1 million per offence. To me, if you send 1,000 e-mails, it's 1,000 times $1 million.

Perhaps the maximum was meant to be $1 million, and $10 million a hard cap. I don't know. That was our concern. The way it's written, it's high.

Mr. Mike Wallace: Your other concern is the clauses that exempt, at this point, the "do not call" list. You would like to see them completely removed from the legislation.

Mr. John Lawford: Yes. We want the "do not call" list to continue. It's just starting.

Mr. Mike Wallace: This legislation doesn't say it's discontinuing, though.

Mr. John Lawford: No.

Mr. Mike Wallace: Would you agree with that?

Mr. John Lawford: I agree with that; however, it does have the potential, with a proclamation, to suddenly wipe it out. The hope would be that, by then, the proposed Electronic Commerce Protection Act would cover it.

Mr. Mike Wallace: Are you saying why it's there, though? The electronic system is changing so much that, where you can now do banking on your phone in other parts of the world and that's the only communication device they have, portable phones, that gave the government of the day, whichever it happened to be, an opportunity to look at how things have evolved, and that's why it's there.

Do you understand that?

Mr. John Lawford: We do.

The concern, though, would be that we move to taking the "do not call" list away too soon, when the infrastructure is not ready at the CRTC to receive perhaps many complaints under this legislation, and that it might not work.

Mr. Mike Wallace: My final question—and I'm sorry I'm picking on you—is about the 18 months. I asked the previous panel about the 18 months. They liked it defined differently. Are you satisfied with how it's defined in this legislation?

Mr. John Lawford: Yes, we are, because it parallels the "do not call" list. Just think about it: On the last day of your 18 months, you can always send another e-mail, and if you get a reply, you get a further 18 months to deal with somebody.

The Chair: Thank you very much, Mr. Wallace and Mr. Lawford.

Mr. Masse.

Mr. Brian Masse: Thank you, Mr. Chair.

The first question is to Mr. Cook. I understand the argument about the Competition Act and having different media treated differently in terms of that. I want you to walk us through again.

When you gave the example of saving the planet in the header, I consider that advertisement actually a lie, so I was actually happy to hear that would stop, because it's a lie. Whether we get a chance to regulate that through the Internet—maybe you can still make that claim outside on TV or radio, and I understand the argument there, that there isn't consistency—why not have an opportunity to stop a lie when we can stop it?

Maybe you can walk us through again, though, if there's another part of the scenario that I'm not quite catching that could have other unintended consequences.

Mr. Kim Alexander-Cook: I think you're catching it. You don't like my example, so I'll have to come up with a better one. I picked that one because it's an example of what some, but not all, people would regard to be playful hyperbole, puffery. We see it in ads all the time. We think it's cute, interesting.

First of all, it's not misleading. It doesn't mislead us. That's fundamentally the issue.

To the extent you think "save the planet" might mislead someone, I agree with you. If it is a matter of fact that it would mislead people, then I agree with you. Often these things are context dependent.

In the example, in fact, that I brought up the other day, if it were to say "save the Ottawa River", or "save our waters" or "save our lake", something that people might think is relevant and they're going to buy that product, then I think you're into a question of, well, will this really save the lakes? When you say "save the planet" or something that is equally distant from reality in connection with the product, which is all I'm saying, it would be, strictly speaking, false. Nobody would believe it was meant to be anything but false, yet technically it would be still be caught under this legislation.

If someone comes up with a better example, I'm happy, but that is the one that came to mind today.

Mr. Brian Masse: And I understand your point too; I just wanted to make sure I had that right. It is something to think about, but I still see that somewhat as a benefit, at the end of the day, because it stops information.

Now, I guess it will be up to the CRTC and others to decide what those thresholds are. They'll probably set some interpretations about them as well through regulations.

● (1750)

Mr. Kim Alexander-Cook: Another way of putting it is that because in the Competition Act it has always been the case that the concern has been about representations that are false or misleading in a material respect, as soon as you put in a provision that no longer requires in a material respect, then it says that they can be false or misleading in a completely immaterial respect. I'm saying that this opens up all sorts of problems. It's completely immaterial, but it's false or misleading.

I often act for companies that make complaints or receive complaints about the behaviour of other companies. I can guarantee you that if you give them the opportunity to raise complaints about false or misleading claims that are completely immaterial, they may still do that. I'm not sure that's something we want to see result.

Mr. Brian Masse: Okay. Very good.

I want to ask everybody here, as I asked the previous group, about the 10 days to unsubscribe.

I think what happened today—as sometimes happens in debate—is that some of those in the business community who use this mode of information and technology have it upside down. You know, really, you're privileged to be able to send an e-mail to my computer, which I pay for, with the service that I pay for so that I actually get the capacity to send that information, whether it be high-speed or whatever it might be. It's your privilege, then, to actually put something on my communications systems.

I think that's where I come across, from a consumer's perspective; there's a sense of responsibility there. If I'm going to give you access to my system, through my service that I'm paying for, and if I decide later to unsubscribe....

We heard 31 days, but I have a hard time believing that you can't get off the list for 31 days. There's also the 10 days.

Maybe I can hear from everybody briefly in terms of what you think is reasonable.

Mr. John Lawford: Perhaps I can start, Mr. Masse.

From PIAC's point of view, we believe that the speed of unsubscribing should be equal to the speed of subscribing. That was a submission we made in the PIPEDA five-year review.

I think the 31 days is being mentioned because the e-mail instantly gets sent out to other channels of marketing. Specifically in telemarketing, under the “do not call” list, you do have to give the telemarketers 31 days to clear the list. So I think they're trying to line it up with that.

But from our point of view, we take the same position: if I subscribe instantly, and I start getting e-mails right away, I should be able to unsubscribe in a similar time period. We're doing it by the same mode. I'm allowed to unsubscribe by e-mail, so why not by the same amount of time?

Mr. David Fewer: We'd share that view. It should be an effective time period that's realistic, and I haven't heard a compelling argument that 10 days is not a realistic and useful timeframe.

I'm somewhat mindful of the small businesses where maybe someone's on vacation or something like that, but that doesn't seem to be what's being promoted here. What seems to be being promoted is something different. It just says we have a slower business process. It's not a very compelling response.

Mr. David Fraser: The CBA didn't explicitly address this in our brief, so this will be more of a personal opinion.

It would make sense that it would take place as rapidly as reasonably possible in the circumstances, to a maximum of whatever would be reasonable, be it 10 days or 31 days. The onus should be on the organization to take them off. If they do have the technology to add you to the list instantly, they should be able to take you off it instantly. But there are probably still e-mail lists, if you can think of it, that are manually managed by somebody cutting and pasting e-mail addresses. You need to account for that.

Mr. Brian Masse: Thank you very much.

The Chair: Thank you, Mr. Masse.

Madam Coady.

Ms. Siobhan Coady: Thank you very much.

Allow me to add my appreciation to each of you for having taken the time to come here today, but as importantly, for having taken the time to go very diligently through the legislation and give us some very good suggestions and recommendations.

My first comment has to do with the philosophy of the bill. I think all of us agree—I don't think there's a person who hasn't agreed—that this is a required piece of legislation, but there's a philosophy differential. I'm hearing especially in today's group two different schools of thought, as it were. There are those who think this should be a bill directed just towards what I'm going to call abusive communications, and there are those who really think that it should be very broad, that it should really talk about accountability of electronic communications. I think “accountability” is the word you used.

So there are two kinds of philosophies here, and I would like to talk about that for a moment, because I'm going to use an example. I think that in your submission you actually say that concerns are “largely unfounded”, yet we've heard concerns around the scope of the bill being too narrow, concerns around how clearer definitions are required, and concerns about what is not permitted. We've also heard implied versus express consent concerns. I can go on.

There are these two different philosophies. One is saying that we just need to fix the problems we're having with these abusive communications. Then there are those who say that we should decidedly keep it broad.

I'm going to go to the international community. As I understand it, the bill we currently have before us assumes that all electronic communications are basically unwanted spam, and it really prohibits commercial electronic messages. If I look at, for example, the U.S. legislation, it applies to e-mails that are sent in violation of an individual's opt-out request and are fraudulent, false, and misleading. If I look at Australia's, as I think my colleague mentioned, it applies to a defined list of commercial electronic messages that relate to direct marketing. The words “direct marketing” again show up in the Singapore spam act. Could each of you talk about this?

Perhaps we'll start with Mr. Fewer, because I think you were on the side of it being broader, and then perhaps Mr. Fraser and Mr. Lawford can talk about a philosophical view. What we don't want to do is penalize legitimate commercial communications here in this country. We don't want to have the situation where those outside of our country have access to people inside of our country with e-mails, access that we don't legitimately have.

Mr. Fewer, could you perhaps comment? And then we'll move on to others.

● (1755)

Mr. David Fewer: Absolutely. This is something that I've heard come up a few times, particularly the international competitive situation—not the legal comparatives, but the international competitive situation—so I want to try to unwrap some of that.

First, this bill does not outlaw electronic communications. It outlaws unsolicited electronic communications where there's no business relationship, where there's no consent to the communication, so let's not overstate the impact of this bill. What it tries to do is bring back control over electronic communications to the hands of the user, whether that's a consumer or a business. Let's not lose sight of the productivity gains that this legislation promises Canadian businesses. That's something that I just don't think is coming up in these discussions and that we really need to keep our eye on.

Second, on the international comparative on the legal front, I just want to say that I think this bill is a significant improvement over the U.S. legislation, the CAN-SPAM legislation, which, frankly, is a "do not hesitate to spam" bill or law.

Voices: Oh, oh!

Mr. David Fewer: It is not an anti-spam law. So if we were to move in that direction, I think we'd be really going.... This legislation is almost informed by the failure of the anti-spam legislation in the United States, so let's not lose sight of that. This bill is good. Let's keep that.

On the comparative front, from a competitive perspective, there are two points. One, nothing in this bill says it doesn't apply to foreign spammers where there's a real and substantial connection to Canada. We had this fight over our privacy legislation some time ago, and we've seen, just this past summer, the Canadian Privacy Commissioner flexing her muscles and bringing social networking under control, out of the wild west into the era of civilized privacy behaviour. With respect, I think this bill will have a similar impact. Through this bill, we can control foreign nations, foreign competitors, and foreign businesses that are spamming Canadians.

Second, this bill will provide Canadian businesses with a competitive advantage in the use of electronic communication tools that other nations haven't seen fit to give their businesses. When we talk about whether we are disadvantaging Canadian business, the real question is, are we advantaging Canadian businesses? I would submit that we are. We don't want to throw that out in responding to some of the legitimate concerns expressed by businesses that will be subject to this legislation

The Chair: Thank you, Mr. Fewer.

Madame Coady.

Ms. Siobhan Coady: I would like to hear from Mr. Fraser.

The Chair: Go ahead, Mr. Fraser.

Mr. David Fraser: Thank you very much.

I'm not sure that we have such a radically different philosophy or approach to it. I think there is a concern that if you're going to sanction administrative monetary penalities, civil damages, and things like that, you go after the appropriate targets. There is a distinction between unsolicited e-mail messages and unwanted e-mail messages. Having a categorical prohibition with exceptions that are extremely narrow and may not accord with what would necessarily be everybody's reasonable expectation can be problematic.

I agree absolutely with the interpretation of Mr. Fewer on foreign spammers. If there is a real and substantial connection to Canada, there's no reason why this piece of legislation could not apply theoretically. Whether or not one could sue in Canada and then enforce that judgment in another country would be a completely separate matter.

We also need to be mindful that we shouldn't fool ourselves; this isn't going to stop spam. Most of the spam that lands in your inbox originates from outside of Canada, and you have no way of identifying who it's coming from. This piece of legislation and the objectives that underlie it are very important, and I think we have broad consensus on that.

● (1800)

The Chair: Thank you very much, Mr. Fraser.

Thank you, Madam Coady.

Mr. Van Kesteren.

Mr. Dave Van Kesteren: Thank you, Mr. Chair.

Thank you for appearing before us.

One of the questions I wanted to ask—it was answered by the Bar Association—is whether or not this legislation could be challenged by the charter. You've answered that question, or at least given us your interpretation. So I want to give the floor to Mr. Fewer and Mr. Israel.

You're both lawyers as well. Are they right? Can this be challenged in the courts? Will it be challenged in the courts, or will it stand?

Mr. David Fewer: It's an interesting debate. We're getting into paragraph 2(b) of constitutional law. I should highlight a change in our position, at least to a certain extent, around the appropriate scope of exceptions.

In our submission to the committee clerk earlier this summer, we suggested that we should carve out an exception for political speech, charities, non-profits, and those kinds of things. That was driven by a concern of one of our partners—with whom we were talking about partnering on some advocacy around this bill—who has a much stronger view of the scope we have to give freedom of expression from a United States first amendment perspective and not a Canadian perspective.

In the end, we decided to go our separate ways, at least to a certain extent, with respect to the advocacy we're going to do on this bill. Our view is that we wouldn't want to have an exception for political speech, charities, and non-profits, for the simple reason that communications from those organizations are in unsolicited e-mails when they have a commercial component. If they don't have a commercial component, then they're not captured by the legislation and can go through.

Our view is that the way the legislation is drafted, it is sufficiently tailored to survive a paragraph 2(b) challenge. We do view the legislation as proportional, and we don't think it will fail a minimal impairment challenge.

Mr. Dave Van Kesteren: So in layman's terms, do you think this will stand up in a court of law?

Mr. David Fewer: Yes, we feel the ducks got beaten and it will walk through fine.

Mr. Dave Van Kesteren: I confess I'm probably not up to the same speed as some of my colleagues when it comes to the Internet and use of the Internet. But somebody in the last group of witnesses suggested to me that the problems can lie with the company. Is there truth in that? Somebody else mentioned something about software and the fact that we have to give full disclosure on software. Is that part of the problem too? If you compare some of the companies—I'm going to say Microsoft and Apple—does one allows spam and not the other? Is that true?

Mr. David Fewer: I can't speak to the specific practices of those individual companies, but I want to make sure we understand that this legislation applies to all companies, and even the good companies that we like and are customers of will do bad things from time to time.

Mr. Dave Van Kesteren: I'm not talking about sending the spam. I don't quite understand, but when we were talking about spam somebody said to get an Apple. I'm not advocating any one product over another. Do certain products have filters for spam whereas others don't?

Mr. David Fewer: I think that's a market effect. Windows operating system is the biggest operating system in the world, and if you're a spyware or a malware developer, you're going to target that operating system because you get more bang for your buck. Apple and Linux are smaller market share and are less attractive to malware coders.

Mr. Dave Van Kesteren: Finally, we hear a lot of the companies that would be affected by this saying it would adversely affect their business. Are there other methods? Are there other things that can be done if this legislation is enacted that could compensate for the inconvenience or possibly a change in business? Are there other methods that these companies can be using that nobody is really talking about, possibly using some other search engine or something so that you can log on to something and then become automatic subscribers?

● (1805)

Mr. David Fewer: I want to respond to this.

On something that we haven't heard a lot about or haven't heard come up, especially in the referral conversation, because I'm sensitive to that, my view is that there are other tools available to respond to referrals. When you get a referral, there's a customer out there who's giving you a referral. Nobody has said, “Well, can you ask your friend to e-mail me or send that to my website?” Nobody has talked about their website. You can have a sign-up form on your website. There are lots of mechanisms available to get consent. You can pick up the phone and call.

Somebody talked about going back to the world of Rotary meetings and what not; we don't have to go that far. But referrals did occur before the Internet and before e-mail. They'll go on.

The Chair: Thank you very much, Mr. Van Kesteren.

Mr. Vincent.

[*Translation*]

Mr. Robert Vincent: Thank you, Mr. Chair.

Mr. Fewer, earlier you said that most spam originates from abroad. The majority does not originate from Canada, but outside Canada. You said that if we eliminate spam, productivity will go up.

What do you think about companies that decide to send all of their communications by mail? They have to be able to market their products. Do you think that our productivity will go up by sending letters? Everyone is going to do the same. How are we going to manage all of those letters? How will recycling centres, which will receive more and more paper, manage the situation?

We can answer the question displayed on the computer screen, we can delete the unwanted email and that is it; it is gone for good. But paper leaves from somewhere, is transported by someone, arrives in homes, is sent to recycling centres and is sent back for treatment.

Do you think that improves productivity? I would like to hear your thoughts on the matter. How will companies advertise?

[*English*]

Mr. David Fewer: One of the things I like about mail is that there is a barrier to sending it. There's a cost to sending it. What that does instantly is make sure that Nigerian scammers and businesses that are relying upon the economics of mass e-mail now have to—

[*Translation*]

Mr. Robert Vincent: I have to stop you there. You mentioned cost, but have you considered how much this will cost companies or what they will have to do to stay in business if we add costs to their products?

[*English*]

Mr. David Fewer: If the unsolicited solicitation is worth making, then it's worth making on paper. It's worth making using mail. It's worth making using other traditional mechanisms of marketing. If the solicitation is so invaluable that the additional cost of going from hitting “send” to a million people to sending out flyers puts you off it, I'm not sure that the economy is hurt in a sufficient way, in a significant manner.

One of the things I like as well about junk mail—real junk mail as opposed to junk spam—is that I can set up systems within my office to make sure that it doesn't get to me or to make sure that it gets filtered before it gets to me. Only things that my administrative assistant, for instance, knows I'd be interested in make it up to me or my colleagues. With spam I don't have that option. I have to deal with each one that makes it through and decide if I care about it, if I've already contacted these people, why they are bothering me. How much time do I lose per day dealing with those kinds of unsolicited communications? It's not a huge amount, but it adds up over time, and it's multiplied across the economy.

● (1810)

Mr. Kim Alexander-Cook: Mr. Vincent, I beg to differ, first of all, with respect to Mr. Fewer's comments. I don't think there's any evidence whatsoever that you could point to that would suggest that business would not be harmed by the increased costs that would accompany being forced to revert back to using letter mail, if that's in fact what the result is.

To me, this really has the potential of throwing out the proverbial baby with the proverbial bathwater. Think of small businesses, so often cited as the major engine in our economy; we do not want them faced with very difficult competition where a large business may be able to afford to market where they can't.

The technology we have with electronic messaging or other aspects of our electronic life is something that I know Mr. Fewer takes seriously, but it should be seen as a very positive thing, and we should be very careful not to be doing harm when we are trying to do good. I think a lot of members here have been very sensitive to that in their questions.

If I may, I'd like to link back to a comment that Mr. Fraser made about the difference between unsolicited and unwanted e-mail. It's a challenge, it's fair to say, given what various stakeholders have been saying here, for the committee to be able to fashion a bill that does not, in a sense, throw out the baby with the bathwater.

By way of one example, if the bill doesn't get refashioned in such a way as to define bad conduct as that which is targeted, as opposed to all conduct with some exceptions, one possibility that I know we have discussed internally here has been to look at the implied consent, and instead of saying in the regulations that we'll define what else implied consent might be, let implied consent stand on its own. It's a strong concept. There really has to be implied consent.

Use regulations if necessary to say, for example, the existence of one or more of the following does not by itself establish implied consent, if you are concerned about that sort of thing. But implied consent can live on its own. I think the business community and the business culture will work out, along with the courts, what that really means.

The Chair: Thank you very much.

Mr. Lake.

Mr. Mike Lake: Thank you, Mr. Chair.

Again, thank you to the witnesses for coming today.

As we work through this legislation, I think it's important to distinguish between the types of witness testimony or concerns we've heard brought forward, between ones of a technical nature, many of which have been brought up today and we'll come back when we meet with the industry officials and ask them to go through and give some feedback on those, versus the big philosophical question. I think we've heard a lot today about the philosophical question, the broadness of the legislation, and it seems there are very divergent viewpoints on that. I think from Mr. Fewer and Mr. Alexander-Cook we've had two very different views of what we should do with that, and it reflects testimony we heard previously.

Rather than just reiterating the points of view you've already brought forward, maybe you could comment on and describe how the legislation might move or be changed to accommodate the other person's view a little bit. How could the legislation be changed to move towards the other person's point of view without violating the principle you're trying to protect?

Mr. David Fewer: That competition amendment sounds reasonable.

Mr. Mike Lake: Thank you.

Mr. David Fewer: I would to a certain extent reiterate the point made by Mr. Fraser that perhaps we're overemphasizing the difference between our views, in terms of how substantial a difference actually exists.

My sense is that as soon as you start opening the door on "unwanted", you get into difficulty, because if I'm an e-mail sender, how do I know what you want? The best way is to get the consent, to find out. That's why I like the bright-line rule that the bill draws that says to go and get consent.

The inbox belongs to the business. If you have a pre-existing business relationship, they are your customer. If you have a contract with them, if you're engaged in business with them, you're clean; you're fine. The implied consent rule takes over there.

We start getting into problems of obtaining consent, really, not only when the relationship is over, but when it has been over for a year and a half. That's a pretty long time we're talking about here. I can't imagine a responsible business that takes a year and a half to follow up on a previous customer.

● (1815)

Mr. Mike Lake: But, Mr. Fewer, just to that point, if you're a new business you don't have that existing customer base and you have to try to go out and get that base.

Mr. David Fewer: What I like about the bill is that it says you can't do it by spamming. You go out and build business the old-fashioned way, or by using new technologies. You take advantage of those new technologies. You get your Facebook set. You build your website. You twitter what you're up to. Those tools are great.

I heard somebody say earlier that those social networking tools don't live well within this legislation. I disagree. I think they're wonderful, because it's so easy to obtain consent. People sign up to you. You don't go around and force people to be your Facebook friends, right? That's not how it works. They agree to be your friends. The tools are set up well.

My response is that if there are perceived problems, targeted problems, let's look at those. We've heard a lot about referrals. We can talk more about those, but opening the door to my knowing what you want is very problematic. Let's stick to the clarity that consent provides us.

The Chair: Mr. Fraser, do you have a comment?

Mr. David Fraser: Yes. If I could just add to that, I think the door is already open, because you could have a categorical outline of unsolicited commercial e-mail messages unless you have the explicit consent of the supposed recipient. The door has opened by opening up this existing business relationship exemption, because really, whether I have a commercial relationship with an organization doesn't tell you anything about whether I actually want an e-mail from them. So there already is an assumption being made, and at least in my own personal view, I don't want to receive the e-mails that I don't want to receive, and I want to receive all the other ones.

Try to legislate that. That's the problem. If you put it in a position of being about empowering consumers to be able to make choices about what goes into their inbox, and assuming that the consumers are reasonable people, maybe you need to fine-tune it so that you actually throw out the existing business relationship provision, because that doesn't necessarily tell you whether they want it, and you base it on a principle of consent, like we have in PIPEDA and other statutes.

You can say that they have your explicit consent to send you an e-mail, so they can go ahead. They can do that and you get to fine-tune it. They can send you e-mail messages about insurance services, but you can tell them not to send anything about mortgages. That gives the consumer even more control. There can be implied consent, and implied consent is always going to be determined by the circumstances, and it is going to be held to a reasonable standard, not a reasonable marketer's standard, not a "reasonable otherwise" standard, but what would be considered reasonable in society generally. That may be the middle ground. That's certainly not the position that's been put forward by the CBA, but there is hopefully some food for thought there.

The Chair: Mr. Lawford, do you have something to add to this?

Mr. John Lawford: I'll go back to my initial point: implicit consent is a door that everyone will try to walk through. The only way to close that door is to say it's explicit consent. You've already opened it so wide with existing business relationships. Everybody I do business with is automatically deemed to be allowed to send me e-mails, whether it is allowed under PIPEDA or not. Whether they have proved implicit consent or not, it's deemed that it's happened. It is all extremely wide, and yes, this bill is a huge shift. Make no mistake: we're shifting from companies being able to e-mail you now at any time they like, about anything, to no, they can't. Yes, it's a huge shift.

Do I think it's going to cause problems and changes in business plans? Yes, absolutely. Do I think it's the only way to actually stop spam? Yes.

The Chair: Thank you, Mr. Lawford.

Thank you, Mr. Lake.

Mr. Masse.

Mr. Brian Masse: I have no further questions.

Thanks to the witnesses.

The Chair: Are there any other members of the committee who have questions they want to ask before we adjourn the meeting?

Go ahead, Mr. Wallace.

● (1820)

Mr. Mike Wallace: Mr. Fewer, to help my understanding, I've seen these organizations before, but not yours. Can you tell me a little bit about your organization, who you represent, and how it's formulated?

Mr. David Fewer: Sure. We're at the Faculty of Law at the University of Ottawa. We are a public interest technology clinic.

How do we work?

Mr. Mike Wallace: Who funds you?

Mr. David Fewer: Who funds us?

Mr. Mike Wallace: Are you students or are you already lawyers?

Mr. David Fewer: Tamir and I are lawyers, but students work at the clinic for credit in the summer, basically as interns.

Mr. Mike Wallace: Does the law school fund the program?

Mr. David Fewer: Partially, but most of our funding comes from external sources, through our participation in administrative proceedings or court cases where we get costs or through foundations that fund the kind of work we do in technology settings.

Mr. Mike Wallace: Thank you.

The Chair: Thank you, Mr. Wallace.

Mr. Dryden, I believe, had some questions or comments.

Hon. Ken Dryden (York Centre, Lib.): I'm not a member of this committee but am just filling in at this time, so I'm only going on what I've heard and from many years of living with and receiving this kind of material.

I don't understand the distinction between "unwanted" and "unsolicited". To me, if it is unsolicited it is unwanted. I really don't understand how you can find a way of making that distinction. I don't want to receive anything I haven't invited others to send me.

Tell me why I am wrong.

Mr. David Fraser: Could I address that, because I talked about the distinction between "unsolicited" and "unwanted".

There are going to be instances, at least in my own experience—and yours may differ substantially—where I'm not going to seek something out, but information about it would be welcome. For example, I don't have a commercial or an association relationship with a professional peer, but I do have contact with him on a regular basis, and when this individual changes firms he sends out e-mail to his mailing list to let people know that he no longer is with firm X but is with firm Y. I would never actively go through my Rolodex asking people to keep me up to date on their addresses, but if he did that, it is not necessarily unwanted and not something I solicited. That would be caught under the legislation as it is now, because that e-mail message would be to promote that individual as a person who offers goods and service, and so it would be a commercial e-mail message. We're getting into some pretty fine distinctions between these sorts of messages.

I don't mind if, from time to time, I get contacted in my professional capacity about something I may not seek out; but it is not necessarily something that is unwelcome. If somebody wants to put forward a business proposal where they are not looking to sell me something or to buy something from me but are looking at an opportunity for us to collaborate as business people, that is captured within the definition of a commercial message under the legislation. I don't know who to seek out to give them my consent to contact me in that way, but it may be something that would ultimately be welcome. That's where we get into these distinctions, and it is a little bit of a challenge to come up with general rules that would encompass them all.

The Chair: Thank you, Mr. Fraser.

Mr. Dryden, go ahead.

Hon. Ken Dryden: I'm not quite sure. I understand your example about the change of address. I would suggest that it would represent one millionth of the problem, and I would certainly not like to see that being used as an opportunity to drive through the other million e-mails that would come my way.

Regarding the second example, again it may well be the case that I find an e-mail that I received but had not invited interesting. But that's still not the issue to me. It's accidental and something I haven't invited, and in the great, great majority of instances, it is not something I would find interesting and worthy.

Mr. Alexander-Cook drew a distinction several times between “unwanted” and “unsolicited”, and I don't quite know what the difference is. To me, if it is unsolicited it is unwanted.

● (1825)

The Chair: We'll finish with Mr. Alexander-Cook.

Mr. Kim Alexander-Cook: I won't add to what Mr. Fraser said; I certainly agree with his comments. I would just turn it the other way to say that we would agree that the fact it was solicited may not mean it was wanted in the end, because you're not quite sure what is going to come from any particular company in the next 18 months. It may be that for certain people, anything they have not specifically asked for is unwanted, but it's not clear that's the case for many people, including Mr. Fraser in some respects.

The Chair: Thank you very much, Mr. Dryden.

Thank you, Mr. Alexander-Cook and Mr. Fraser.

Before we adjourn our meeting, I want members of the committee to know that this afternoon the procedure and House affairs committee tabled their report to the House, and that report has been or will be concurred in this afternoon. Therefore, this committee ceases to exist at 6:30.

By Wednesday, you will receive a notice of meeting so that this committee may be reconstituted. We need to elect a new chair, which will obviously be at the discretion of the committee members, but I'd ask that you also keep your calendars free for that 3:30 to 5:30 time slot on Wednesday, because the clerk has been asked to still call the witnesses for Wednesday's meetings. Keep that time blocked off even though the notice of meeting you will receive is simply for the election of a chair.

Keep that timeframe blocked off so that, hopefully, we can elect a chair, committee members willing, and hopefully, committee members willing, start the meeting with more witnesses on Bill C-27.

Without further ado, this meeting is adjourned.

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