Submission to the
Standing Committee on Industry, Science and Technology
Review of Canada's Anti-Spam Law

I am making this submission as an individual and not on behalf of any other person, organization or business. While with the Department of Justice, I worked intensively on the anti-spam legislation, and have followed closely developments as the legislation was implemented.

I would observe that many of the concerns expressed by witnesses are a reflection of the enforcement practices of the CRTC, and do not necessarily point to problems with the legislative provisions.

My suggestions for changes to CASL are limited to a very select number of proposals and their rationale.

1. **Short title**

   The short title should be restored to the *Electronic Commerce Protection Act*. Protection of those engaged in electronic commerce, whether consumers or businesses, is the real objective of the legislation, and better reflects the federal government's basis for the legislation.

Anti-Spam

There is a legitimate concern for the extent to which ordinary commercial communication is caught up in the very broad sweep of CASL. **A single message from a single sender to a single recipient should never be subject to the CASL provisions**. Likewise, the sale of goods or services to sustain charities, not-for-profit entities, and socially beneficial organizations (such as home and school or amateur sport organizations) should be exempt from the requirements of CASL

2. **Definition of "commercial electronic message"**

   It would be an improvement to the legislation to provide a closed definition of a commercial electronic message. **The amendment proposed by ITAC in this regard would seem promising.**

3. **Section 6(6): Transactional and Informational Messages**

   6(6) should be amended to provide that subs. 6(1) does not apply to the messages described in that section. The repeal of this section would not be beneficial, as many of the messages described in it do have an explicitly commercial character. The proposed amendment would provide all the certainty necessary for transactional and informational messages.

4. **Charities, Political Parties and Non-for Profit Entities**

   The inclusion of commercial messages from charities and not for profit entities (such as fund raising dinners, rummage sales, etc.) has proved a distraction and has absorbed the energies and budgets of these entities to no discernable benefit. **Amend s.6 to exempt messages from charitable, political, not-for-profit entities and public educational institutions.**

5. **Inducements for Research Recruitment**

   Exempt from 6(1) messages that offer inducements to participate in programs of public opinion, social, behavioural and medical research.

Computer Programs

6. **Non-consensual Installation of Software**

   While there are arguments to be made for convenience, it is a bit early to say that non-consensual installation of software is either necessary or appropriate outside the limited circumstances permitted under the current regulations. There is no reason why an express consent cannot be obtained that covers future updates or add-ons that either enhance performance or the security of a computer system. It is only if there is a significant change that is made to the software that would cause it to perform in a manner unexpected by the owner or operator of the computer that a further specific and express consent is required.

Administrative Monetary Penalties

A number of parties have cited the maximum amounts of the administrative monetary penalties (AMPs) as being a defect of the legislation. A number of modifications have been proposed, none of which are really apt.

The purpose of AMPs is not to punish, but to ensure compliance. The CRTC and the courts have been given guidance by way of the factors that must be considered in levying any monetary penalty. When looked at objectively, it is hard to think of what further or other considerations one would suggest a decision maker take into account.

The complaints presented to the Committee suggest not a problem with the penalty provisions, but rather with the way in which the CRTC has proceeded in assessing penalties, and its seeming glee in extracting substantial penalties from honest errors and mistakes in otherwise serious compliance efforts. The complaints are focussed on opportunistic practices of the Commission when violators have self-reported an off-side, and the CRTC has negotiated a substantial penalty. We now have cases that have been appealed to the Commission and, in all cases so far, the reviewing panel has substantially reduced the amount of the AMP set out in the Notice of Violation.

One of the major deficiencies with the CRTC practice has been the obscurity of its reasoning and the lack of clear guidance on how penalties are assessed. **This deficiency could be remedied if the designated officer were required to provide reasons for the finding of violation and for the amount of any penalty imposed**. This would help discipline the responsible officers of the CRTC, and establish a body of reasoning that could serve as precedents and guidance for persons who face the prospect of dealing with the CRTC on an alleged violation. Reasoned decisions would be a valuable educational tool.

Private Right of Action

The Private Right of Action remains a critical part of the legislation. No one can expect that any public authority will have either the resources needed to deal with all violations, or determine it priorities so as to ensure that businesses and consumers are compensated for the losses incurred as a result of violations.

It is right that persons who suffer small losses, which would not merit the costs of seeking legal remedies, be able to bring collective actions where the risk and cost can be broadly shared.

Contrary to the assertions of ITAC, individuals and small businesses are the targets of malware, spyware and ransomware. They may, collectively, suffer harms that rival those of major businesses, and are less able to make investments in protecting their systems from harmful intrusion. The private right of action is critical to affording injured parties a real remedy.

It should be observed that Canadian courts have never been overly generous to plaintiffs, and will likely serve as a moderating influence on AMPs imposed by the CRTC.