

BILL C-26: AN ACT RESPECTING CYBER SECURITY

**SUBMISSION TO THE HOUSE OF COMMONS
STANDING COMMITTEE ON PUBLIC SAFETY
AND NATIONAL SECURITY**

CANADIAN TELECOMMUNICATIONS ASSOCIATION

February 9 2024

Executive Summary

The Canadian Telecommunications Association and its members share the Government of Canada's objective of protecting critical infrastructure, including telecommunications systems, from cyberattacks and other threats. However, Bill C-26, in its current form, raises significant concerns.

Some of these concerns include:

- very broad order making powers without the appropriate checks and balances;
- no proportionality requirement for orders;
- lack of transparency and procedural fairness;
- insufficient protections for confidential and personal information;
- absence of a due diligence defence for telecommunications providers; and
- lack of discretion to award compensation for financial losses.

To address these concerns our submission makes specific recommendations that will preserve the important policy objectives of Bill C-26 while ensuring transparency and accountability and protecting the rights of Canadians.

Introduction

The Canadian Telecommunications Association is pleased to provide its comments regarding Bill -C26, *An Act respecting cyber security, amending the Telecommunications Act and making consequential amendments to other Acts* (Bill C-26) to the House of Commons Standing Committee on Public Safety and National Security.

The Canadian Telecommunications Association is an industry association dedicated to building a better future for Canadians through connectivity. Our members include service providers, equipment manufacturers, and other organizations in the telecommunications ecosystem, that invest in, build, maintain and operate Canada's world-class telecommunications and broadcasting networks.

Through our advocacy initiatives, research, and events, we work to promote the importance of telecommunications to Canada's economic growth and social development, and advocate for policies that foster investment, innovation, and positive outcomes for Canadians who rely on telecommunications and related services. Accordingly, the Association and its members have considerable interest in the subject matter of Bill C-26.

To the extent that any comments in this submission conflict with a comment of an Association member, the comment of the member shall prevail with respect to that member.

General Comments

The security of Canada's telecommunications system is of the utmost importance. Our members recognize that their services are critical to the social and economic well-being, as well as the security and safety of Canadians. Accordingly, our telecommunication service provider (TSP) members invest significant resources to safeguard their systems and infrastructure from cyber attacks and other threats.

Our TSP members also actively participate in the Canadian Security Telecommunications Advisory Committee (“CSTAC”), which facilitates the exchange of information between the private and public sectors as well as strategic collaboration on current and evolving issues that may affect telecommunications systems, including cyber security threats.

While the Association and its members are committed to the security of the Canadian telecommunication system, Bill C-26, in its current form, raises significant concerns, some of which have also been noted by other stakeholders.¹

First, the very broad powers to issue orders with respect to perceived and real threats to the security of the Canadian telecommunications system lack definition and checks and balances. For example, concepts such as “*securing* the Canadian Telecommunications System” are not defined. With respect to checks and balances, at a minimum, orders should be in consultation with and on the advice of experts, including those at whom they are directed, to ensure that orders are proportionate to the risks posed, have a limited impact on service availability, and are economically and operationally feasible for affected TSPs.

Second, in considering the making of orders, it is important that potential negative impacts of the order be thoroughly examined, and the order be carefully tailored to mitigate against such impacts. For example, it is essential to balance the objectives of Bill C-26 with the need to maintain the right to privacy of individuals and protect commercially sensitive information. Bill C-26 allows the Governor in Council and Minister of Industry to disclose information, which could include confidential information and personal information, to other branches of the government and “any other prescribed person or entity”, including a foreign state or entity. Yet Bill C-26 does not provide for adequate safeguards for the protection of such information.

Third, transparency is crucial to the promotion of trust in government, as well as Canadians’ trust in telecommunication systems and TSPs. For example, as Bill C-26 provides that an order can include provisions prohibiting the disclosure of its existence, one can foresee scenarios where an order abruptly disrupts affected TSP services, and the TSP is unable to explain to its customers or other public officials the reason for such disruption. Similarly, complying with orders could result in a TSP breaching its contractual obligations to other parties, and a prohibition on disclosing the existence of the order will impair the TSPs ability to defend itself from any claims arising from such breach. Accordingly, secrecy should be the exception rather than the norm in connection with the imposition of orders.

Lastly, in the interests of ensuring fairness to all stakeholders and avoiding unnecessary limits on discretion, the amendments to the *Telecommunications Act* should include a due diligence defence and should enable parties subject to the Act to be compensated for costs and other financial losses resulting from compliance with an order.

¹ See for example, Christopher Parsons, “Cybersecurity Will Not Thrive in Darkness: A Critical Analysis of Proposed Amendments in Bill C-26 to the *Telecommunications Act*,” Citizen Lab Research Report No. 158, University of Toronto, October 18, 2022.

Recommendations

Below are more specific comments and recommendations regarding specific aspects of Bill C-26. While some comments are limited to Part 1 of Bill C-26, the provisions which amend the Telecommunications Act, Part 2 of Bill C-26 contains provisions which address similar concerns.

1. The Governor in Council's and Minister's order-making powers should be both proportional to the risks posed and tempered by the requirement to obtain expert advice.

a. Bill C-26 authorizes the Governor in Council and the Minister of Industry to direct TSPs to do or refrain from doing anything that is "necessary to secure the Canadian telecommunications system, including against the threat of interference, manipulation, or disruption".² As drafted, the powers of the Governor in Council and Minister are not limited to issuing orders to address threats of interference, manipulation or disruption, and can include other circumstances including minor security risks.

Given the potentially significant impact of orders issued by the Governor in Council and the Minister on TSPs and related services subject to such orders, the power to issue orders in Section 2 of Bill C-26 should be limited to issuing orders that address potentially serious security risks that are specifically listed in the Act.

Recommendation: The word "including" should be deleted from the phrase "including against the threat of interference, manipulation or disruption" in proposed new subsections 15.1(1), 15.2(1), 15.2(2), 15.5(3)(c) and 15.7(1) to the *Telecommunications Act*, as set out in Section 2 of Bill C-26.

Current Wording	Proposed Wording
15.1(1): If, in the opinion of the Governor in Council, it is necessary to do so to secure the Canadian telecommunications system, <u>including</u> against the threat of interference, manipulation or disruption, the Governor in Council may, by order, ...	15.1(1) If, in the opinion of the Governor in Council, it is necessary to do so to secure the Canadian telecommunications system, including against the threat of interference, manipulation or disruption, the Governor in Council may, by order, ...

² Section 2 of Bill C-26, specifically the proposed new subsections 15.1(1) and 15.2(1) of the *Telecommunications Act*.

<p>15.2(1): If, in the Minister's opinion, it is necessary to do so to secure the Canadian telecommunications system, <u>including</u> against the threat of interference, manipulation or disruption, the Minister may, by order and after consultation with the Minister of Public Safety and Emergency Preparedness, ...</p>	<p>15.2(1) If, in the Minister's opinion, it is necessary to do so to secure the Canadian telecommunications system, including against the threat of interference, manipulation or disruption, the Minister may, by order and after consultation with the Minister of Public Safety and Emergency Preparedness, ...</p>
<p>15.2(2): The Minister may, by order, direct a telecommunications service provider to do anything or refrain from doing anything — other than a thing specified in subsection (1) or 15.1(1) — that is specified in the order and that is, in the Minister's opinion, necessary to secure the Canadian telecommunications system, <u>including</u> against the threat of interference, manipulation or disruption. In the order, the Minister may, among other things, ...</p>	<p>15.2(2): The Minister may, by order, direct a telecommunications service provider to do anything or refrain from doing anything — other than a thing specified in subsection (1) or 15.1(1) — that is specified in the order and that is, in the Minister's opinion, necessary to secure the Canadian telecommunications system, including against the threat of interference, manipulation or disruption. In the order, the Minister may, among other things, ...</p>
<p>15.5(3)(c): the disclosure is necessary, in the Minister's opinion, to secure the Canadian telecommunications system, <u>including</u> against the threat of interference, manipulation or disruption.</p>	<p>15.5(3)(c) the disclosure is necessary, in the Minister's opinion, to secure the Canadian telecommunications system including against the threat of interference, manipulation or disruption.</p>
<p>15.7(1): Any information collected or obtained under this Act, other than information designated as confidential under subsection 15.5(1), may be disclosed by the Minister under an agreement, a memorandum of understanding or an arrangement in writing between the Government of Canada and the government of a province or of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, if the Minister believes that the information may be relevant to securing the Canadian telecommunications system or the telecommunications system of a foreign state, including against the threat of interference, manipulation or disruption.</p>	<p>15.7(1): Any information collected or obtained under this Act, other than information designated as confidential under subsection 15.5(1), may be disclosed by the Minister under an agreement, a memorandum of understanding or an arrangement in writing between the Government of Canada and the government of a province or of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, if the Minister believes that the information may be relevant to securing the Canadian</p>

	telecommunications system or the telecommunications system of a foreign state, including against the threat of interference, manipulation or disruption.
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b. As referenced in Dr. Parsons report cited above (recommendations 24 and 25 of the report), it is not clear how the envisioned threats of interference, manipulation and disruption compare to threats referenced in other legislation such the *Communications Security Establishment Act* (CSE Act) (“mischief, unauthorized use or disruption”) and whether the acts referenced in the amendments to the Telecommunications Act are intended to address the same or a different scope of acts as those in the CSE Act. As such, Bill-56 should be amended to provide definitions of the terms “interference”, “manipulation” and “disruption”.

Recommendation: Bill C-26 should be amended to include definitions for the terms “interference”, “manipulation” and “disruption” as they are used in the proposed new subsections to Section 15 of the Telecommunications Act.

c. Pursuant to the current draft of Bill C-26, that which is deemed “necessary” by the Governor in Council or Minister, is completely subjective. Given the extremely broad scope and potential impact of these powers (even if the safeguards described above are implemented), the proposed legislation should be amended to impose conditions surrounding the circumstances under which the Governor in Council or Minister can exercise its powers. Specifically, orders should not only be “necessary” but should be “reasonably necessary” – i.e. proportionate to potential harm of the security risk and reasonable in the circumstances.

Potential orders would also benefit from the informed opinion of industry leaders and expert bodies, such as the Communications Security Establishment, the Canadian Security Telecommunications Advisory Committee or one of its subcommittees or similar bodies of cybersecurity and industry experts, who are well-qualified to evaluate risks and advise the Governor in Council or Minister on orders under consideration, including recommending potentially less disruptive measures and identifying potential unintended and deleterious consequences of proposed orders.

Such consultations, and any resulting orders, should also consider and be sensitive to the relevant circumstances of each affected TSP (e.g., ability to comply with proposed orders within proposed timelines, including differences in size and available resources; differences in impact of the proposed order on each TSP).

Recommendation: The proposed new subsections 15.1(1), 15.2(1) and 15.2(2) to the *Telecommunications Act* should be amended to require the Governor in Council and Minister to consult with relevant prior to the issuance of any order.

Current Wording	Proposed Wording
<p>For both subsections 15.1(1) & 15.2(1):</p> <p>If in the opinion of the Governor in Council/Minister, it is necessary to secure the Canadian telecommunications system...the Governor in Council/Minister may by order...</p>	<p>For both subsections 15.1(1) & 15.2(1):</p> <p>If, <u>after consulting with and on the advice of a prescribed body of industry experts</u>, in the opinion of it is the Governor in Council/Minister's <u>reasonable opinion</u> it is necessary to secure the Canadian telecommunications system...</p>
<p>15.2(2): The Minister may, by order, direct a telecommunications service provider to do anything or refrain from doing anything — other than a thing specified in subsection (1) or 15.1(1) — that is specified in the order and that is, in the Minister's opinion, necessary to secure the Canadian telecommunications system, including against the threat of interference, manipulation or disruption. In the order, the Minister may, among other things,</p>	<p>The Minister may, by order, direct a telecommunications service provider to do anything or refrain from doing anything — other than a thing specified in subsection (1) or 15.1(1) — that is specified in the order and that <u>after consulting with and on the advice of a prescribed body of industry experts</u> is, in the Minister's <u>reasonable</u> opinion, necessary to secure the Canadian telecommunications system, including against the threat of interference, manipulation or disruption. In the order, the Minister may, among other things,</p>

Recommendation: In addition, Bill C-26 should be amended to expressly state that any orders made pursuant to subsections 15.1 or 15.2 must be proportionate and reasonable in the circumstances.

2. Orders should be made public whenever possible to promote and enhance transparency

a. Bill C-26 allows the government to include a provision in any order prohibiting the disclosure of its existence, or some or all its contents, by any person. These provisions have led some to describe the draft legislation as containing “extensive and overly onerous secrecy and confidentiality requirements.”³

³ Ibid

While we acknowledge that some degree of secrecy and confidentiality may be necessary to ensure security, an appropriate balance must be struck between transparency and security. In our view, that balance is best achieved by requiring the Governor in Council or Minister to obtain an order from the Federal Court prohibiting the disclosure of the existence of an order by the Governor in Council or Minister, or some or all its contents. This requirement would provide a necessary check and balance against abuse of the secrecy provisions.

Recommendation: The proposed new subsections 15.1(2) and 15.2(3) of the Telecommunications Act be amended to permit the Governor in Council and Minister to apply to the Federal Court for an order prohibiting the disclosure of the existence of an order made under Section 15, or any or all of its contents.

Currenting Wording	Proposed Wording
<p>15.1(2) The order may also include a provision prohibiting the disclosure of its existence, or some or all of its contents, by any person.</p>	<p>15.1(2) The order may also include a provision prohibiting the disclosure of its existence, or some or all of its contents, by any person. The Governor in Council may bring an application to the Federal Court for an order prohibiting the disclosure of the existence or some or all of the contents of the order issued under subsection (1). In making such an order the Federal Court must be satisfied that there are reasonable grounds to believe that the disclosure of the existence or some or all the contents of the order would be injurious to international relations, national defence or national security or endanger the safety of any person.</p>
<p>15.2(3) An order made under subsection (1) or (2) may also include a provision prohibiting the disclosure of its existence, or some or all of its contents, by any person.</p>	<p>15.2(3) An order made under subsection (1) or (2) may also include a provision prohibiting the disclosure of its existence, or some or all of its contents, by any person. The Minister may bring an application to the Federal Court for an order prohibiting the disclosure of the existence or some or all of the contents of the order issued under subsection (1) or (2). In making such an order the Federal Court must be satisfied that there are reasonable grounds to believe that the disclosure of the existence or some or all the contents of the order would be injurious to international relations, national defence or national security or endanger the safety of any person.</p>

b. Similarly, Bill C-26 provides that either the Governor in Council or Minister, as applicable, may direct that orders not be published in the Canada Gazette.

Recommendation: The proposed new subsections 15.1(4) and 15.2(5) of the *Telecommunications Act* should be amended to require the publication of any order made under subsection 15.1(1) or 15.2(1) in the Canada Gazette, unless there is an order issued by the Federal Court (as per the condition proposed above) prohibiting the disclosure of such order, and only with respect to the portions of the order to which the Federal Court applies.

Current Wording	Proposed Wording
15.1(4): Any order made under subsection (1) must be published in the Canada Gazette, unless the Governor in Council directs otherwise in the order.	15.1(4) Any order made under subsection (1) must be published in the Canada Gazette, <u>unless the Governor in Council has obtained an order from the Federal Court that prohibits the disclosure of the existence or some of all contents of the order pursuant to subsection 15.1(2).</u>
15.2(5): Any order made under subsection (1) or (2) must be published in the Canada Gazette, unless the Minister directs otherwise in the order.	15.2(5): Any order made under subsection (1) or (2) must be published in the Canada Gazette, <u>unless the Governor in Council has obtained an order from the Federal Court that prohibits the disclosure of the existence or some of all contents of the order pursuant to subsection 15.2(3).</u>

c. The proposed new subsection 15.2(6) of the Telecommunications Act provides that in the event of any inconsistency between a decision of the Canadian Radio-television and Telecommunications Commission (CRTC) and an order of the Minister under subsections 15.2(1) and 15.2(2), the Minister’s order shall prevail to the extent of the inconsistency. In such situations, especially where some or all the contents of an order under subsection 15.2 have not been publicly disclosed, parties impacted by the CRTC decision, as well as the general public, are unlikely to be aware that some or all of the CRTC decision has been overridden and ineffective in the face of the Minister’s order under subsection 15.2.

Recommendation: The proposed new subsections 15.2(6) and 15.8(2) to the Telecommunications Act should be amended to require the CRTC to clearly notify the public when a decision it has made has been affected by an order of the Minister.

Current Wording	Proposed Wording
15.2(6) In the event of any inconsistency between an order made under subsection (1) or (2) and a decision of the Commission made under this Act or another order made, or any authorization issued, by the Minister under this Act or the <i>Radiocommunication Act</i> , the	15.2(6) In the event of any inconsistency between an order made under subsection (1) or (2) and a decision of the Commission made under this Act or another order made, or any authorization issued, by the

<p>order made under subsection (1) or (2), as the case may be, prevails to the extent of the inconsistency.</p>	<p>Minister under this Act or the <i>Radiocommunication Act</i>, the order made under subsection (1) or (2), as the case may be, prevails to the extent of the inconsistency. <u>The Commission shall attach to any decision(s) affected by the inconsistency a notice advising of such inconsistency.</u></p>
<p>15.8(2) In the event of any inconsistency between a regulation made under paragraph (1)(a) and a decision of the Commission made under this Act or an order made or an authorization issued by the Minister under this Act or the <i>Radiocommunication Act</i>, the regulation prevails to the extent of the inconsistency.</p>	<p>15.8(2) In the event of any inconsistency between a regulation made under paragraph (1)(a) and a decision of the Commission made under this Act or an order made or an authorization issued by the Minister under this Act or the <i>Radiocommunication Act</i>, the regulation prevails to the extent of the inconsistency. <u>The Commission shall attach to any decision(s) affected by the inconsistency a notice advising of such inconsistency.</u></p>

3. Applicants in judicial review should be afforded procedural fairness

Although the proposed new subsection 15.9(1) to the Telecommunications Act provides that orders made under the new provisions of Bill C-26 are subject to judicial review, the proposed new subsection would restrict the applicant’s access to evidence and allow the judge to make decisions without the applicant having the opportunity to challenge the evidence.

This process makes no effort to provide for alternate means of testing the government’s evidence, including disclosure of evidence to counsel with the appropriate level of security clearance.

Recommendation: The proposed new subsection 15.9(1) to the Telecommunications Act should be amended to require the judge to make all reasonable efforts to protect the interests of the applicant when access to a hearing or to evidence or other information is denied to the applicant. This could be accomplished by granting access to applicant’s representatives with appropriate security clearances or to independent counsel with the appropriate security clearance.

We note that proposals in keeping with the above recommendation have been made by Dr. Parsons in the report cited above (Recommendation 12) and in the joint submission to the Standing Committee by the Canadian Civil Liberties Association and the other entities named in its joint submission.⁴

4. Due diligence defence should be available

Bill C-26 does not include a due diligence defence for alleged violations of orders made pursuant to the proposed new subsections 15.1 and 15.2, of *Telecommunications Act*, or

⁴ <https://ccla.org/privacy/cclas-submission-on-bill-c-26-regarding-privacy-concerns-in-federal-cybersecurity-legislation/>

regulations under the proposed new paragraph 15.8(1)(a), even though a defence of due diligence is available for other violations of the *Telecommunications Act*⁵, as well violations of the proposed *Critical Cyber Systems Protection Act* (“CCSPA”) and the *Radiocommunication Act*.⁶ The absence of a due diligence defence is all the more striking given that the draft legislation introduces significant potential administrative monetary penalties (“AMPs”) for alleged violations.

TSPs should have the right to avail themselves of a due diligence defence in appropriate circumstances by demonstrating that they took all reasonable care in the circumstances to avoid the alleged violation(s). To penalize TSPs who have acted diligently but who cannot rely on a due diligence defence is unfair and ultimately targets a party that has not acted unreasonably in the circumstances. It is also inconsistent with the availability of such a defence for alleged violations of the CCSPA, the *Radiocommunication Act*, and violations of other provisions of the *Telecommunications Act*.

Recommendation: The proposed new subsection 72.15(1), replacing the current section 72.15(1) of the *Telecommunications Act*, should be deleted and the current section 72.15(1) should remain in effect.

Current Wording	Proposed Wording
72.15(1) It is a defence for a person in a proceeding in relation to a violation, other than a violation under section 72.131, to establish the person exercised due diligence to prevent the violation”.	Keep existing language of 72.15: It is a defence for a person in a proceeding in relation to a violation, other than a violation under section 72.131, to establish the person exercised due diligence to prevent the violation.”

5. Compensation for losses should be at the discretion of the Governor in Council/Minister

The proposed new subsections 15.1(6) and 15.2(7) of the *Telecommunications Act* provides that “no one is **entitled** to any compensation from Her Majesty in right of Canada for any financial losses resulting from the making of an order...”⁷ It is our understanding that the use of “entitled” is intended to mean that no one has a right to compensation, but that the Governor in Council and the Minister, as applicable, are not prohibited from ordering compensation in appropriate cases.

Even if this is the intent, the current wording is ambiguous, and the relevant provisions should be amended to make clear that compensation may be awarded at the discretion of the Governor in Council and the Minister, as applicable. In addition, Bill C-26 should be amended to include a mechanism for TSPs to provide submissions on why compensation is appropriate in any case.

⁵ s.72.15

⁶ s.10(2.5) and s.15.17(1)

⁷ s.2 of Bill C-26, specifically the proposed new sections 15.1(6) and 15.2(7) of the *Telecommunications Act*.

Recommendation: The proposed new Sections 15.1(6) and 15.2(7) of the *Telecommunications Act* should be amended to make clear that compensation for financial losses resulting from an order may be ordered by the Governor in Council or the Minister, as applicable.

Current Wording	Proposed Wording
15.1(6) No one is entitled to any compensation from Her Majesty in right of Canada for any financial losses resulting from the making of an order...”	15.1(6) An order may provide for compensation for financial losses and other costs, if in the circumstances, the Governor in Council considers it reasonable to so provide.
15.2(7) No one is entitled to any compensation from Her Majesty in right of Canada for any financial losses resulting from the making of an order...”	15.2(7) An order may provide for compensation for financial losses and other costs, if in the circumstances, the Governor in Council considers it reasonable to so provide.

In addition, Bill C-26 should include a mechanism that allows TSPs to request compensation for financial losses resulting from an order.

6. Confidential and personal information must be afforded greater protections

The proposed new subsections 15.4 to 15.7 to the Telecommunications Act allows government to obtain information of any kind from telecommunication providers and disclose it to any person or foreign entity, including confidential information and personal information. It does not require the government to protect the privacy of individuals, nor does it require government to inform private organizations that their information has been shared with a foreign entity. The bill also does not require the government to dispose of the information when it is no longer needed for the purpose for which it was required. Any protections afforded such information in Bill C-26 can be overridden by the Minister if the Minister is of the opinion that the disclosure is necessary.

Recommendation: Bill C-26 should be amended to afford greater protections regarding the collection, use, and disclosure of confidential and personal information. These protections should include:

- (a) Information collected by government should only be retained for as long as necessary to make, amend, or revoke an order or to verify compliance with an order;
- (b) If the government wishes to disclose confidential information to any person, it should be required to obtain an order authorizing such disclosure from the Federal Court, and the organization that provided such information to government must be afforded the opportunity to oppose such disclosure in such proceeding;
- (c) If sharing information with a foreign entity, government must be required to first enter into an agreement with the foreign entity that places limits on the use, disclosure and retention of the information for the limited purpose set out in the court order and must an obligation to delete such information once it is no longer required for the purpose;

- (d) Government should be required to advise private organisations whose information is shared by government with foreign entities what information has been shared, when it was shared and to whom it has been shared; and**
- (e) Personally-identifiable and de-identified information should be afforded the same protections as confidential information.**

Conclusion

We appreciate the opportunity to provide comments and recommendations on Bill C-26. We share the government's desire to promote and ensure the security of Canada's telecommunications system, and the recommendations provided herein seek to enhance that important policy objective by refining Bill C-26 to operate as effectively and efficiently as possible while providing appropriate accountability and transparency.

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