While Canada’s new anti-spam legislation\(^1\) received Royal Assent on December 15, 2010, the law is expected to come into full force in 2013 with the promulgation of a Governor in Council order. When it does, businesses operating in Canada will be governed by what many regard as one of the toughest anti-spam laws in the world. Two regulations will assist in interpreting and effecting this new law.\(^2\)

The new law is intended to tightly regulate spammers and mailing list companies and, in doing so, regulate the way businesses market to prospective customers via email and online. In short, CASL will, in most cases, require a business to obtain consent from the recipient before it sends out commercial electronic messages (“CEMs”). This could include messages sent via social media, text messaging, instant messaging, sound or video as well as emails.

The proposed law has been widely criticized, and recent events have amplified an additional concern about the law’s constitutionality.\(^3\) Concerns about the constitutionality of CASL initially focused on two factors:

1. the multiple approaches the federal government took in buttressing its position that the federal Personal Information Protection and Electronic Documents Act\(^4\) was validly promulgated under the federal trade and commerce power; and

2. the fact that those approaches were notably not utilized to support the promulgation of CASL.

Those constitutional concerns recently heightened when the Supreme Court of Canada (“S.C.C.”) held that the proposed Canadian Securities Act was not supportable under s. 91(2) of the Constitution.
Framework for Evaluating s. 91(2) against s. 92(13)—General Motors

In the case of General Motors of Canada Limited v. City National Leasing, one of the two constitutional questions the S.C.C. was required to consider was whether the Combines Investigation Act, either in whole or in part, was ultraviolent the federal Parliament under s. 91(2) of the Constitution, in particular under the “second branch” of its power over “general” trade and commerce.

Leaving aside issues regarding the portion of the analysis having to do with assessing the constitutionality of a particular impugned provision, in reviewing legislation for compliance with the second branch of s. 91(2), the S.C.C. advanced the following five tests of validity:

a. whether the impugned legislation is part of a general regulatory scheme;

b. whether the scheme will be monitored by the continuing oversight of a regulatory agency;

c. whether the legislation is concerned with trade as a whole, rather than with a particular industry;

d. whether the legislation is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and

e. whether the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

In General Motors, the S.C.C. concluded that the foregoing hallmarks, incidental to the second branch of the trade and commerce power, were met and that, accordingly, the Combines Investigation Act was valid federal legislation.
**PIPEDA**

The stated purpose of *PIPEDA* is to establish national rules governing the collection, use, and disclosure of personal information regarding identifiable individuals. However, at the time the federal government implemented *PIPEDA*, there were questions raised about its ability to legislate in this field, given the perceived limitations on the scope of the federal jurisdiction under s. 91(2) of the Constitution in light of the provincial powers granted under s. 92(13).

The federal government attempted to solve this federalism problem by, among other things, including subs. 26(2)(b) in *PIPEDA*. This section permits the federal Governor in Council to determine that legislation in a province is “substantially similar” to *PIPEDA* and to then exempt from *PIPEDA* legislation those organizations and activities that are subject to that substantially similar provincial legislation.

Nevertheless, the concerns about constitutionality ultimately resulted in a formal court challenge initiated by the government of Quebec. The challenge, based in Order-in-Council 1368-2003-12-30, asked the following question:

*Does Part 1 of [PIPEDA] exceed the legislative competence that the Constitution Act, 1867 confers to the Parliament of Canada?*

While this reference case would allow and direct the courts to address the federalism question, it has been in suspension since 2006.

Presumably, from Quebec’s perspective, much of the urgency in resolving the litigation was eased when the federal government declared that Quebec’s *Act respecting the protection of personal information in the private sector* met the test of substantial similarity.

Private individuals or organizations can also launch a challenge to *PIPEDA*’s constitutionality. The federal government’s decision to provide for only a modest exposure to liability for damages, however, has presumably reduced the likelihood of such challengers stepping forward. Nevertheless, in response to a finding by the federal Privacy Commissioner relating to video surveillance that attempted to compel access to information covered by the litigation privilege doctrine, State Farm Mutual Automobile Insurance Company (“State Farm”) did raise, as an alternate ground in its litigation before the Federal Court, the argument that *PIPEDA* is not sufficiently concerned with “trade” as a whole, to be protected under s. 91(2) of the Constitution, but rather was concerned with the regulation of “information.” In State Farm’s view, this focus on a specific commodity or “property,” meant that regulation by the provinces under s. 92(13) of the Constitution was required. In support of its position, State Farm also noted that provinces had the capacity to legislate in the areas of privacy and personal information and pointed to the various provincial statutes in this field. In State Farm’s view, even if Part 2 of *PIPEDA* dealing with electronic documents was valid federal legislation, Part 1 (regarding the protection of personal information) went far beyond what could be considered a legitimate regulation of electronic commerce under the federal trade and commerce power. The Federal Court upheld State Farm’s complaint but, in so doing, declined to address the constitutional question.

**Securities Reference**

In evaluating the constitutionality of the proposed Canadian *Securities Act* under the second branch of s. 91(2), the S.C.C. applied the test from *General Motors*.9

First, the S.C.C. reviewed the “pith and substance” of the Canadian *Securities Act* and determined that the intention of the legislation was
to regulate trade and commerce. Specifically, the intention of the Canadian Securities Act was to regulate, exclusively, all aspects of the trading of securities anywhere in Canada, including the trades and occupations relating to this industry. If compliant with the Constitution, the Canadian Securities Act would duplicate and displace provincial securities legislation.

Next, the S.C.C. reviewed the five tests for validity as articulated in General Motors:

a. whether the impugned legislation is part of a general regulatory scheme;

b. whether the scheme will be monitored by the continuing oversight of a regulatory agency;

c. whether the legislation is concerned with trade as a whole, rather than with a particular industry;

d. whether the legislation is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting;

e. whether the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

The S.C.C. then reviewed “whether the [Federal Securities] Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.” The court concluded that the primary effect of the Canadian Securities Act was to regulate contracts and property within each of Canada’s provinces and territories, in addition to taking control of the Canadian securities market. While the S.C.C. found that a federal approach based on something beyond what the court called the “intra-provincial regulation of property and civil rights” would fall within the s. 91(2) power—perhaps suggesting a road map to the federal Parliament as to what might pass constitutional muster—the Canadian Securities Act as a whole could not be found constitutional by virtue of these acceptable provisions alone. Effectively, the S.C.C. determined that the acceptable parts of the Canadian Securities Act did not outweigh the unacceptable parts. The regulation of all trading in securities and the conduct of everyone in this industry in the federal sphere could not, in the S.C.C.’s view, “be described as a matter that is truly national in importance and scope” and different than provincial concerns. While “the preservation of capital markets and the maintenance of Canada’s financial stability are [important] … they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the [Canadian Securities Act].”

The S.C.C. noted that the main purpose of the legislation was to protect investors and ensure fairness of Canada’s financial markets through the regulation of financial market participants. However, in the Court’s view, because the power to regulate for that purpose fell most clearly within the power of the provinces to regulate property and civil rights, the proposed Canadian Securities Act was judged outside the legislative power of the federal government.

Anti-Spam Legislation

CASL is broadly drafted and provides for the levying of significant administrative monetary penalties (“AMPs”)—a maximum penalty of $1,000,000 for a violation in the case of an individual and $10,000,000 in the case of any other person. Furthermore, the narrow issue of spam could arguably be addressed via a modest adjustment to the tort of trespass to chattels, which
lends further credibility to the argument that legitimate jurisdiction to regulate the dissemination of spam is to be found under the provincial s. 92(13) power. In addition, various electronic commerce statutes have been promulgated in various provinces and territories, suggesting that the field of electronic commerce generally is one that is largely provincial—leaving aside the federal government’s proper role in regulating matters such as electronic bills of exchange, as well as over certain types of institutions such as banks.

Looking at the decision in the *Securities Reference*, two factors that seemed to have affected the outcome are: (1) the extensive and longstanding “legacy” regulatory regime, which included harmonization efforts among the provinces; and (2) the fact that, in the court’s view, other than reducing inefficiencies and costs and presenting a “national face” to international stakeholders, the federal government was not bringing much new into the mix. Effectively, the court seemed to perceive that the *Securities Reference* was largely about keeping a similar regime as the current provincially regulated one, but with an office governed federally, under federal legislation.

It is also clear that in constitutional cases, politics matter. In the *Securities Reference* case the court was essentially being asked to use a “living tree” approach to constitutional analysis to justify a wholesale transfer of jurisdiction of a power that had previously been thought to be provincial. Clearly the S.C.C. was unwilling to effect that transfer with the support of only one province, Ontario—the province that arguably stood to gain the most from any such transfer. While the S.C.C. voiced its support for “cooperative and flexible federalism,” it emphasized that this sort of approach can only work within the framework of the Constitution’s division of powers.

Accordingly, there are good reasons to believe that the outcome in the *Securities Reference* case will not necessarily be repeated in each instance where the federal government takes an aggressive approach to legislating under its s. 91(2) power. In the case of CASL, while the constitutionality of the regime is somewhat questionable, the various provincial governments do not seem interested in opposing its promulgation, perhaps out of fear of appearing to be aiding spammers.

The large AMPs provided for under CASL, however, make it very likely that anyone facing the possibility of a large fine will elect to launch a constitutional challenge to CASL. If such a challenge is launched, the question of compliance with the test as set out in *General Motors* may well be addressed in the following manner:

a) The “pith and substance” of CASL is to regulate certain telecommunications in Canada in order to remove unwanted commercial messages from the electronic communications stream. A court would likely consider that this intention is within the powers of the federal Parliament under s. 91(2) of the Constitution.

b) The five tests would be evaluated as follows:

i. Is the impugned legislation part of a general regulatory scheme? A court should not have much difficulty reaching a conclusion in favour of the federal government’s approach.

ii. Is the scheme to be monitored by the continuing oversight of a regulatory agency? Three federal government
agencies are made responsible for the enforcement of CASL. One of them is the Canadian Radio-television and Telecommunications Commission, which already has oversight over aspects of telecommunications. Once again, the federal government should be able to meet the requirements of this portion of the test.

iii. Whether the legislation is concerned with trade as a whole. Again, given the large number and different types of businesses in the online advertising “ecosystem,” it is hard to see a court finding against the federal government on this part of the test and holding that the legislation is concerned primarily with regulation of a particular industry.

iv. It is unclear if a court would determine that the legislation is of a nature that the provinces, together or separately, would be constitutionally incapable of enacting. No province has attempted to regulate spam-like messages in a targeted way. Should one attempt to do so by building upon the existing provincial scope to enact private sector privacy legislation, that province would face the practical hurdle that the federal Parliament has authority to pass laws relating to both telecommunications and inter-provincial trade. On the other hand, the federal government’s failure to provide for a PIPEDA-like “out” for a province wishing to regulate communications within the province via substantially similar provincial legislation may prove problematic to the federal government’s claim of meeting this hallmark.

v. The federal government likely would successfully argue that the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. If all provinces except for one were to pass CASL-like legislation, commercial electronic messages would probably be distributed from entities in the holdout province to people and organizations located in the banning provinces. While any Canada-based anti-spam legal regime may ultimately prove ineffective against spammers who are located offshore, this does not negate the point that, for such a regime to stand a chance of being effective, it must be in place throughout the country. That being said, as is the case with (iv) above, the federal government’s failure to provide a spur to the enactment of substantially similar provincial legislation may also prove problematic to the success of a claim by the federal government that it had satisfied this hallmark of validity.

Conclusion

Canadian federalism jurisprudence suggests that the federal government is not on completely firm ground in enacting the CASL regime, a situation made all the more clear by the recent decision of the S.C.C. in the Securities Reference case. Unlike PIPEDA, CASL creates
the potential for significant AMPs being levied and an express PIPEDA-like concession to federalism, permitting substantially similar intra-provincial legislation to prevail is absent from CASL.

An organization faced with the risk of being penalized with a hefty AMP is very likely to challenge the legislation on constitutional grounds. While the outcome in the Securities Reference case may be successfully firewalled off by the federal government, it is by no means clear that a constitutional challenge to CASL is bound to fail.

[Editor’s note: Ravi Shukla is a Partner at Cassels Brock & Blackwell LLP and member of the firm’s Business Law Group. His practice focuses on information technology and Internet law with an emphasis on intellectual property issues. Mr. Shukla gratefully acknowledges the assistance of Sara Lefton, Student-at-Law at Cassels Brock & Blackwell LLP, in preparing this article.]

1 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, S.C. 2010, c. 23 [CASL].


3 Many believe that CASL may not be valid under the Constitution Act, 1982, as “The Regulation of Trade and Commerce” (s. 91(2)) is a federal power under the Constitution, and “Property and Civil Rights in the Province” (s. 92(13)) is a provincial power.

4 S.C. 2000, c. 5 [PIPEDA].


6 PIPEDA, supra note 4, s. 3.


10 Ibid at para. 124.

11 Ibid at para. 125.

12 Ibid.

13 Ibid. at para. 128.

14 Ibid. at paras. 128–130.

15 Such as, in Ontario, the Electronic Commerce Act, 2000, S.O. 2000, c. 17.

16 Securities Reference, supra note 9 at para. 62.
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