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CASL Constitutional Challenge – An Overview

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Overview

- ¬ Freedom of Expression – Charter s. 2(b)
 - ¬ Justification under s. 1
 - ¬ No “intelligible standard” for the prohibition
 - ¬ No “pressing and substantial” objective
 - ¬ No “rational connection” between means and objective
 - ¬ Not minimally (or even reasonably) impairing
 - ¬ Disproportionate impact
 - ¬ Other issues:
 - ¬ Division of Powers; *Charter* s. 11

Core Principles

“No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.”

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 SCR 199, para 129

“A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect.”

Douglas/kwantlen Faculty Assn. v. Douglas College, [1990] 3 SCR 570

Caveats

- ¬ This discussion is limited to the provisions of CASL dealing with “Commercial Electronic Messages”
- ¬ This discussion is limited to legal argument – factual context is important to application

Freedom of Expression – *Charter* s. 2(b)

- ¬ CASL's prohibition on sending Commercial Electronic Messages without consent unquestionably restricts expression, both by purpose and effect.
- ¬ Commercial expression is protected expression.

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy

Ford v. Quebec (Attorney General), [1988] 2 SCR 712 at 767

- ¬ The only real question is whether the infringement is justifiable under s. 1.

Charter s. 1 – Oakes Test

- ¬ Prescribed by Law
- ¬ Pressing and Substantial Concern
- ¬ Proportionality
 - ¬ Rational Connection
 - ¬ Minimal Impairment
 - ¬ Proportionate Impact

Prescribed by Law

- ¬ Doctrines of Vagueness and Overbreadth are sometimes confused, but are conceptually separate.
- ¬ Vagueness deals with whether a provision is sufficiently clear to delineate a “zone of risk”. The law must give adequate notice of what is, or is not, permissible.
- ¬ Example: Nova Scotia’s “Cyberbullying” statute

In this regard, I find that the Act provides no intelligible standard according to which Justices of the Peace and the judiciary must do their work. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications. The Legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances. There is no "limit prescribed by law" and the impugned provisions of the Act cannot be justified under s. 1.

Crouch v. Snell, 2015 NSSC 340 , para. 137

CASL

- ¬ Definition of “Commercial Electronic Message” is broad and difficult to interpret.
 - ¬ Purpose test is subjective, based on perceived intention of sender
 - ¬ Not clear what kind of messages are covered
 - ¬ what is “similar” to telephone, email, or instant messaging?
 - ¬ What kind of “similarity” is relevant?
- ¬ Exceptions are equally difficult to interpret.
- ¬ CRTC “guidance” documents do little to answer basic questions about the contours of the prohibition (and lack force of law, in any event).

Pressing and Substantial Concern

- ¬ CASL is usually justified by reference to “harms” of “spam”, but its prohibition reaches beyond that
- ¬ Government cannot rely on a narrow salutary effect to justify a law which, in reality, has a different purpose
 - ¬ c.f. *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295
- ¬ Technical solutions to “spam” have progressed enormously in effectiveness since the era when CASL was drafted

Rational Connection

- ¬ The vast majority of “spam” (more than 98%, in 2013) comes from outside Canada, beyond the effective reach of Canadian enforcement
- ¬ CASL’s practical impact is primarily felt by legitimate Canadian businesses, who face substantial compliance obligations and invasive enforcement
- ¬ This burden on Canadian business has little or no impact on the harm it is intended to address

Minimal Impairment

While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567

- ¬ There are many less drastic options that could have been equally effective at addressing the harms of “spam”:
 - ¬ Opt-out consent, as in the US CAN-SPAM Act
 - ¬ Broad inferred consent and a closed definition of commercial electronic message, as in Australian Spam Act 2003
 - ¬ Implied consent, as in *PIPEDA*
 - ¬ Limiting prohibition to “bulk” messages
 - ¬ Limiting prohibition to messages which cause, or could cause, substantial harm

Proportionate Impact

The third branch requires proportionality between the effects of the measure limiting the freedoms in question and the objective, and also proportionality between the salutary and deleterious effects of that measure.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835 at 843

- ¬ CASL imposes an enormous burden on Canadian businesses
 - ¬ Direct costs of compliance
 - ¬ Lost value of forgone commercial expression
- ¬ CASL has had little, if any actual practical benefit to Canadians
 - ¬ No indication that Canadians are spending less on email filtering, for example
- ¬ c.f. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 25, (“The price PIPA exacts, however, is disproportionate to the benefits it promotes.”).

Division of Powers

- ¬ “Pith and Substance” analysis requires examination of a law’s purpose and effects.
- ¬ Stated purpose of CASL was to address damaging and deceptive “spam”, but actual effect is to regulate ordinary commercial conduct.
 - ¬ This falls within the provincial power of property and civil rights, or matters of a merely local or private nature, under s. 92 of the *Constitution Act*.
- ¬ Not covered by Federal Trade and Commerce power under s. 91(2).
 - ¬ Not limited to a “trade as a whole” or a matter of “genuine national importance”.
 - ¬ c.f. *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66
 - ¬ The fact that national rules may seem *convenient* does not make the subject one of national concern .

Charter s. 11

- ¬ Guarantees certain procedural rights, such as presumption of innocence
 - ¬ CASL imposes a **reverse onus** to prove consent
- ¬ Engaged (*inter alia*) where a law has “true penal consequences”

In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a **fine** which by its **magnitude** would appear to be imposed for the **purpose of redressing the wrong** done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

R. v. Wiggleworth, [1987] 2 SCR 541

CASL

- ¬ Applies a reverse onus – e.g. burden to prove consent
- ¬ Applies the civil standard of proof
- ¬ Requires the “accused” to provide all of the evidence through the Notice to Produce
- ¬ Magnitude of AMPs are determined not based on an economic or mathematical analysis, but by qualitative and morally-laden factors such as “nature and scope of violation”, and assessment of subject’s conduct.

Questions?

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