



Rebecca Jones
416-865-3055
rjones@litigate.com



Jonathan McDaniel
416-865-9555
jmcdaniel@litigate.com

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The Trade and (E-)Commerce Power: Federal Court of Appeal Affirms the Constitutionality of Canada's Anti-Spam Legislation

The Federal Court of Appeal has affirmed the constitutionality of Canada's federal anti-spam legislation ("**CASL**") in *3510395 Canada Inc v Canada (Attorney General)*, on both federalism and *Charter* grounds.

In dismissing the appeal, Justice Nadon, writing for a unanimous court, reminded parties that describing the purpose of statutory provisions in a way that does not sufficiently engage with the statute's and the legislature's stated purposes is unlikely to be persuasive.

CASL Background and Facts

CASL, which came into force in 2014, regulates among other things the sending of commercial electronic messages ("**CEMs**", commonly referred to as spam). The legislation requires the sender to obtain the express or implied consent of the recipient, provide the ability to unsubscribe from the message, and that the message contain the sender's contact information.

The appellant, a business operating as CompuFinder, had sent CEMs as part of several marketing campaigns. In March 2015, CompuFinder was issued a notice of violation under CASL alleging that it had not obtained the recipients' consent to the CEMs and that the messages did not contain a functioning "unsubscribe" option. The notice of violation imposed a penalty of over \$1 million.

CompuFinder challenged the notice of violation before the Canadian Radio-Television and Telecommunications Commission ("**CRTC**"). CompuFinder argued that CASL was *ultra vires* Parliament and that it violated several sections of the *Charter*, most notably s 2(b) protection of freedom of expression. The CRTC dismissed CompuFinder's challenge and held that CASL fell within Parliament's general trade and commerce power, and that while the legislation did violate freedom of expression, it was saved under s 1 of the *Charter*. CompuFinder appealed the CRTC's decision directly to the

Federal Court of Appeal under s 27(1) of CASL.

Division of Powers

Before the Federal Court of Appeal, CompuFinder argued that CASL's CEM provisions fall within the ambit of the provinces' powers over municipalities, local matters, and/or property and civil rights, and are *ultra vires* Parliament. The Federal Court of Appeal disagreed.

The Court declined to view CASL as a single "regulatory scheme", as the CRTC had done. Instead, the Court held that the Act is made up of three separate regulatory schemes, and considered the constitutional validity of the portion of the legislation regulating CEMs alone (the "**CEM scheme**").

Applying the division of powers analysis laid out by the Supreme Court of Canada in *Reference re Securities Act*, the Federal Court of Appeal held that CASL's CEM provisions were a valid exercise of Parliament's general trade and commerce power.

In its pith and substance analysis the Court looked primarily to CASL's own purpose provisions to identify the CEM scheme's particular purpose. Hewing very closely to those purpose provisions, the Court stated that Parliament's intention in enacting the CEM scheme "was to create a scheme regulating the sending of CEMs in order to prevent impairment of the e-economy and costs to businesses and consumers, as well as to protect confidential information and Canadians' confidence in e-commerce." Later in its *Charter* analysis, the Court stated plainly that in this case, the CEM scheme's proper purpose or objective is the same as CASL's overall purpose laid out in s 3 of the Act.

The Court rejected CompuFinder's characterization of the CEM scheme's "true purpose" as being "to regulate unsolicited messages generally." CompuFinder had argued that this broad purpose took the CEM scheme beyond the realm of "trade and commerce" by catching messages with only a negligible commercial purpose, and purely local messages. The Court also rejected CompuFinder's "narrower" alternative formulation of the scheme's purpose: that the CEM scheme is to curb only "the most damaging and deceptive forms of spam".

The Court held, in response to CompuFinder's argument that the CEM scheme affects contractual rights in a manner that treads on the provinces' jurisdiction over property and civil rights, that the scheme does not affect the terms of contracts of sale between senders and recipients of CEMs. Nor does it address "any unfair business practices beyond the sending of unsolicited commercial messages". The scheme leaves it open

to the provinces to address any consumer protection or marketing aspects of CEMs.

Similarly, the Court noted that the scheme does not “regulate the contracts of any particular business or trade”, but “the exceedingly wide variety of businesses and trades that participate in e-commerce.” While the CEM scheme may have the effect of regulating certain CEMs that are only sent within a single province, the Court held that this incidental effect does not impact the validity of the legislation.

After isolating and characterizing the CEM scheme, the Court of Appeal held that it is a valid exercise of Parliament’s general trade and commerce power. The Court held that, as “e-commerce permeates Canada’s economy and is not confined to any specific industry or sector”, CASL is “concerned with trade as a whole”.

Further, the CEM scheme is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting, and the failure to include one or more provinces or localities in the CEM scheme would jeopardize the successful operation of the scheme in other parts of the country. As held by the Court, “[w]hen it comes to the genuinely national goals of safeguarding the digital economy from electronic threats that could easily emanate from, and visit their deleterious effects on, any place in the country, federal regulation is essential”. The indicia of valid general trade and commerce legislation were thus met.

The *Charter*: Is the CEM scheme’s violation of freedom of expression saved by s 1?

Having disposed of the federalism arguments, the Federal Court of Appeal turned to CompuFinder’s argument that the CEM scheme infringes freedom of expression in s 2(b) of the *Charter*. The government conceded that the CEM scheme infringes s 2(b), but argued that the infringement is justified under s 1.

In considering the application of s 1 of the *Charter*, the Court held that the legislation’s objective is pressing and substantial. Justice Nadon concluded that “there is no question ... that the objective of promoting the efficiency and adaptability of the Canadian economy by regulating CEMs, which may have the pernicious effects set out in paragraphs 3(a) through (d) [of CASL]”, such as compromising privacy and the security of confidential information, and undermining the confidence of Canadians in the use of electronic means of communication, is pressing and substantial.

Justice Nadon stressed that “[i]t is crucial to render an accurate

formulation of the relevant legislative objective at this stage”, and outlined why he was not persuaded by what he called the “broader” or “narrower” objectives offered by the appellant.

The Court held that the CEM scheme is not overbroad when its proper legislative objective is in focus, and that it is rationally connected to its objective. It noted that the CEM scheme does not create an “absolute prohibition” on all CEMs, but only “prescribes means of engaging in the regulated conduct” by obtaining recipients’ consent and including an unsubscribe function and the sender’s contact information. The CEM scheme is further tailored by several exclusions and exceptions, for example that it does not regulate the dissemination of safety or product recall information. The Court held that a “wide range of commercial messages” beyond those that are “the most damaging and deceptive” could undermine Parliament’s objectives and are thus properly caught by the CEM scheme.

Turning to the “minimal impairment” part of the analysis, the Court was not persuaded that possible alternative anti-spam schemes like those enacted in the United States and Australia would advance the objectives of the CEM scheme as found by the Court.

The Court held that an “opt out” anti-spam model (as in the U.S. legislation) “clearly fails to provide sufficient protection to more than one, if not all, of CASL’s objectives set out in section 3 [of the Act]” and CASL’s “underlying goal” of giving “businesses and consumers control over their inbox and over their computers”. While more impairing of freedom of expression than an “opt out” model, CASL’s requirement that recipients consent to “opt in” to receive CEMs advances these objectives where an opt out model would not.

Concluding the minimal impairment analysis, Justice Nadon noted that CompuFinder’s arguments that the CEM scheme is not minimally impairing could only be made persuasive by “understating CASL’s objectives”. CompuFinder argued that less impairing alternatives like the U.S. model would meet the objective of guarding against “the most damaging and deceptive forms of spam”, the “narrower” statutory objective which Justice Nadon had already rejected.

Finally, Justice Nadon held that there is proportionality between the CEM scheme’s benefits and its deleterious effects, providing a summary of the treatment of commercial expression relative to other types of expression in the freedom of expression case law.

The Court ultimately held that the CEM scheme was justified

under s 1 of the *Charter* despite its infringement of freedom of expression.

CompuFinder also made arguments that the CEM scheme violated ss 11(d), 7, and 8 of the *Charter*, none of which were successful.

Conclusion

CASL's anti-spam provisions are here to stay, demonstrating that the regulation of e-commerce activities can be a valid exercise of Parliament's general trade and commerce power and justified under s 1 of the *Charter*. This came as a surprise to some commentators who, given the breadth of Canada's CASL regime compared to regimes in other countries, felt that the Court might conclude that it is not minimally impairing of freedom of expression.

Ultimately, the constitutional portion of the case turned on the Court's characterization of the legislation's objectives. Reading Justice Nadon's Reasons is a good reminder that convincing the Court of the correctness of your characterization of a statute's objectives can be of fundamental importance to your ability to succeed in every remaining step in the constitutional analysis.