Supreme Court Securities Act Constitutionality Ruling Throws Digital Laws into Doubt

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The Supreme Court of Canada this morning ruled that the federal government's plan to create a single securities regulator is unconstitutional since it stretches the federal trade and commerce clause too far into provincial jurisdiction. The ruling is a wake-up call on the limits of federal powers, even where many may agree that the policy rationale for federal intervention is a good one. The court ruled that most of the securities regulatory activities deal with day-to-day contractual regulation within the provinces and that "these matters remain essentially provincial concerns falling within property and civil rights in the provinces and are not related to trade as a whole."

While the immediate implications are obviously focused on the securities industry, there are significant implications for several of Canada's digital-focused laws including PIPEDA (the private sector privacy law), the new anti-spam legislation, and the digital lock rules found in Bill C-11. The privacy and anti-spam laws are particularly vulnerable since both rely on the same trade and commerce provision that the court just addressed. There have been questions about the constitutionality of PIPEDA since its inception (Quebec launched a challenge that is now dormant, State Farm recently revived the issue) and today's decision will certainly stoke the fires for a constitutional challenge, particularly given the Privacy Commissioner's call for stronger enforcement powers. The anti-spam legislation, which awaits final regulations before taking effect, faces similar questions since it too relies heavily on the trade and commerce clause.

The constitutional questions of Bill C-11 do not arise from the trade and commerce clause, but do involve similar questions about encroachment into provincial jurisdiction over property and civil rights. As I wrote earlier this fall, the government's own analysis of the bill confirms that the digital lock rules envision potential violations of copyright even when there is no copyright infringement. By removing the link to actual copyright infringement (breach of the digital lock rules may occur without a copyright infringement and without regard for traditional copyright defences), the law ventures into property and civil rights. Several scholars have argued that the approach is fundamentally about contractual rights, not copyright, and thus falls within provincial jurisdiction. Today's Supreme Court of Canada decision serves as a reminder that there are limits on federal powers and that the C-11 digital lock approach may be more constitutionally vulnerable than its supporters are willing to admit.