

PIPEDA: A CONSTITUTIONAL ANALYSIS

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Part 1 of the Personal Information Protection and Electronic Documents Act (PIPEDA) purports to govern both federally- and provincially-regulated private sector organizations, and it establishes rules for the collection, use, and disclosure of personal information used in the course of commercial activities. Currently, Part 1 is being challenged by Quebec on the grounds that the federal legislation unduly affects matters traditionally within provincial jurisdiction. The author investigates the nature of PIPEDA, the scope of Quebec's challenge, and the probable arguments which will be advanced before the court. Ultimately, the author concludes that Quebec should fail in its constitutional challenge.

La Partie 1 de la Loi sur la protection des renseignements personnels et les documents électroniques (LPRPDE) tente de réglementer les organismes du secteur privé de législations fédérale et provinciale en plus d'établir les règles de la collecte, de l'utilisation et de la divulgation des renseignements personnels dans le cadre d'activités commerciales. Présentement, la Partie 1 est remise en question par le gouvernement du Québec aux motifs que la législation fédérale a des répercussions excessives sur les affaires des tribunaux provinciaux. L'auteur examine la nature de la LPRPDE, l'étendue de la contestation de la part du gouvernement du Québec et les arguments probables qui seront entendus devant le tribunal. En dernier lieu, l'auteur conclut que le gouvernement du Québec devrait parvenir à un échec dans cette contestation aux termes de la Constitution.

1. Introduction

The federal *Personal Information Protection and Electronic Documents Act*, (PIPEDA),¹ came fully into force on January 1, 2004. Part 1 of the Act purports to govern both federally- and provincially-regulated private sector organizations, and establishes rules for the collection, use and disclosure of personal information used in the course of commercial activities. In creating this national regulatory framework, the federal government has effectively brought Canada's privacy legislation into conformity with the European Union's *Directive on Data Protection*.²

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¹ S.C. 2000, c. 5.

² 95/46/EC (1995) [*Directive*].

While *PIPEDA* is only in its infant years, Part 1 of the legislation is already being challenged by Quebec as *ultra vires* Parliament.³

The main issue before the court will be whether the regulation of the commercial collection, use and disclosure of personal information under Part 1 of the Act exceeds the legislative competence conferred on Parliament under the *Constitution Act, 1867*.⁴ The federal government will likely seek to justify *PIPEDA* as valid legislation under its trade and commerce power.⁵ Quebec, on the other hand, will contend that *PIPEDA* is *ultra vires* Parliament's jurisdiction because it legislates in areas of exclusive provincial authority, such as "property and civil rights"⁶ and health as a local or private matter.⁷ Despite *PIPEDA*'s obvious impact on provincial matters, an extensive constitutional analysis indicates that Part 1 of the Act will likely be upheld under the broad trade and commerce authority of Parliament. Nevertheless, a successful challenge by Quebec would have broad extraprovincial implications for Canadian private-sector organizations. Specifically, a holding that Part 1 of *PIPEDA* is *ultra vires* might dislocate provincial privacy standards and compromise electronic commerce with the European Union.

2. *The European Union Directive on Data Protection*

In order to place *PIPEDA* within its proper legislative context, it is necessary to first consider the European Union's *Directive on Data Protection*. The *Directive* became effective in 1998, and required each Member State of the European Union to adopt or revise privacy legislation to accord with the privacy standards set out in the *Directive*.

A. *Scope and Obligations under the Directive*

The *Directive* aims to protect the privacy rights and freedoms of natural persons with respect to the processing of personal data.⁸ "Processing" encompasses a host of operations, and includes collecting, recording, organizing, and storing personal data.⁹ "Personal data" is defined as any

³ On December 17, 2003, the Quebec Government referred the matter to the Quebec Court of Appeal. The Court of Appeal is expecting a date of hearing in spring or fall 2007, as indicated in an e-mail from Lysanne P. Legault (28 Feb. 2006) Legal Coordinator of the Quebec Court of Appeal.

⁴ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

⁵ *Ibid.* s. 91(2).

⁶ *Ibid.* s. 92(13), which affords the province broad jurisdiction over intraprovincial trade, and professions and trades within the province.

⁷ *Ibid.* s. 92(16).

⁸ *Supra* note 2, Art. 1(1).

⁹ *Ibid.* Art 2. The *Directive* also identifies "processing" as adapting, altering,

information “relating to an identified or identifiable natural person” (a “data subject”).¹⁰

The *Directive* applies to the processing of personal data, either wholly or partly, by automatic means.¹¹ It sets out general rules on the processing of data, and imposes obligations with respect to data quality,¹² the legitimizing of data processing,¹³ the rights of data subjects to information about¹⁴ and access to data,¹⁵ confidentiality and security in processing,¹⁶ and notification.¹⁷ The *Directive* also states that it is the responsibility of the “controller” to ensure compliance with these obligations. The controller is the “natural or legal person, public authority, agency or any other body [which determines] the purposes and means of the processing of personal data.”¹⁸

B. Transfer of Personal Data to Third Countries

The *Directive* states that European Union Member States are not to trade personal data with countries that do not ensure an “adequate level” of privacy protection.¹⁹ On the basis of Article 25(6), the European Commission has the power to determine whether a “third country” which is a non-Member State ensures an adequate level of data protection “by reason of its domestic law or of the international commitments it has entered into.”²⁰ Where the Commission finds that a third country does *not* guarantee an adequate level of data protection, Member States must take stated measures to prevent the transfer of data to the country in question.²¹

retrieving, consulting, using, disclosing by transmission, disseminating, aligning or combining, blocking, erasing, or destroying personal data.

¹⁰ *Ibid.* The Article goes on to define an “identifiable person” as “one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity.”

¹¹ *Ibid.* Art. 3(1).

¹² *Ibid.* Art. 6.

¹³ *Ibid.* Art. 7.

¹⁴ *Ibid.* Arts. 10 and 11.

¹⁵ *Ibid.* Art. 12.

¹⁶ *Ibid.* Arts. 16 and 17.

¹⁷ *Ibid.* Arts. 18-21.

¹⁸ *Ibid.* Art. 2. For example, “a medical practitioner would usually be the controller of the data processed on his clients, while a company would be the controller of the data processed on its clients and employees.” E-mail from Rosa Barcelo (9 December 2004) of the Data Protection Unit of the European Commission.

¹⁹ *Ibid.* Art. 25(1).

²⁰ *Ibid.* Art. 25(6).

²¹ *Ibid.* Art. 25(4).

The “adequacy” of the level of protection afforded by a third country is assessed in light “of all the circumstances surrounding a data transfer operation or set of data transfer operations.”²² Particular consideration is given to the nature of the data; the purpose and duration of the proposed processing operation or operations; the country of origin and final destination; and the laws, professional rules, and security measures that are in force within the third country.

The *Directive* also allows for “derogations” from the transfer requirements to third countries in certain circumstances. Under Article 26, Member States may transfer personal data to a third country which does *not* ensure an adequate level of protection if, among other reasons enumerated in the section, the data subject has given unambiguous consent to the proposed transfer, the transfer is necessary on public interest grounds, or the transfer is necessary for the performance of a contract between the data subject and the controller or between the controller and a third party.²³ Furthermore, under Article 26(2), data may be transferred if the controller adduces adequate safeguards (usually in the form of contractual clauses) with respect to the protection of the privacy and fundamental rights and freedoms of individuals. Even where safeguards have been adduced by the controller, however, the third-party transfer is reviewable upon the objection of the European Commission or of any Member State.²⁴

C. Significance of the Directive to PIPEDA

Canada has been approved by the European Commission as having adequate data protection under *PIPEDA* specifically, and can freely trade personal information with the European Union. As the Commission’s decision is binding on all Member States, States are significantly limited in their ability to suspend data flows to Canada on the basis that the country does not ensure adequate privacy protection.²⁵

The fact that the *Directive* restricts data transfer to third parties on a *nation-by-nation* basis is significant to the issue of *PIPEDA*’s constitutionality, and in particular, raises the question whether a

²² *Ibid.* Art. 25(2).

²³ *Ibid.* Art. 26(1).

²⁴ *Ibid.* Art. 26(3). Specifically, an objection may be made “on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals.” The procedure for review of the proposed safeguards is set out in Art. 31(2) of the *Directive*.

²⁵ T. Ling, M. Miasek, and A. Gates, “EU Says Canada Privacy Law ‘Adequate’” (January 2002), online: Baker & McKenzie Publications <http://www.bakernet.com/ecommerce/cnda_publ_euad_020101.pdf>.

successful constitutional challenge by Quebec will jeopardize Canada's ability to trade personal information with European Union countries. The direct impact of the "third country" restriction will be addressed below in relation to the federal trade and commerce power.

3. *The Personal Information Protection and Electronic Documents Act*

PIPEDA was enacted by Parliament in 2000, and was implemented in stages before fully coming into force on January 1, 2004. Parts 2 through 5 of the *Act* deal primarily with the use of electronic records in court, the electronic proliferation of federal publications, and doing business with the federal government electronically. These parts are not constitutionally suspect, and are therefore beyond the scope of Quebec's challenge to the legislation. This challenge is limited exclusively to Part 1 of the *Act*.

A. *The Scope of Part 1 of the Act*

Subject to a limited number of exceptions, Part 1 applies to all organizations that collect, use or disclose personal information "in the course of commercial activities."²⁶ It also applies to personal information about employees of organizations that collect, use or disclose such information in connection with the operation of a federal work, undertaking or business.²⁷ Part 1 thus does not apply to personal employee information that is collected, used or disclosed by a provincially-regulated employer. Neither does it apply to government institutions such as government departments or Crown Corporations that are governed by the federal *Privacy Act*;²⁸ to any individual that collects, uses or discloses personal information purely for personal or domestic purposes; or to any organization that collects, uses or discloses personal information exclusively for journalistic, artistic, or literary purposes.²⁹

"Personal information" is defined under Part 1 as any information about an "identifiable individual," except employee information such as the name, title, business address, or telephone number of an employee of an organization.³⁰ Similarly, personal information includes "personal

²⁶ *PIPEDA*, *supra* note 1, s. 4(1)(a).

²⁷ *Ibid.* s. 4(1)(b). This provision would apply to employees carrying out federally-regulated activities, such as banking, telecommunications, aeronautics, marine shipping, broadcasting, and interprovincial transportation; *ibid.* s. 2(1).

²⁸ R.S. 1985, c. P. 21.

²⁹ *Supra* note 1, s. 4(2).

³⁰ *Ibid.* s. 2(1).

health information,” which encompasses any information concerning an individual’s physical or mental health, treatment or care records, tissue or organ donations, and incidental information collected in the course of providing health care services.³¹

The *Act* defines a commercial activity as “any particular transaction, act or conduct, or any regular course of conduct that is of a commercial character, including the selling, bartering, or leasing of donor, membership, or other fundraising lists.”³² The issue of what constitutes a commercial activity within the meaning of *PIPEDA* has been of particular concern to the “MUSH” sector—municipalities, universities, public schools, and hospitals—as these entities occasionally provide services on a fee basis and fall within the legislation’s broad and inclusive definition of “organization.”³³

The Office of the Privacy Commissioner of Canada has taken the view that *PIPEDA* does *not* apply to the “core activities” of municipalities, universities, schools, and hospitals.³⁴ These organizations “are not, on the whole, engaged in trade and commerce as contemplated by the Canadian Constitution,” and are “largely dependent on municipally or provincially levied taxes and provincial grants.”³⁵ Instead, these organizations are regulated by provincial public sector legislation, typically in the form of a *Freedom of Information and Protection of Privacy Act*.³⁶ If a municipality, university, school, or hospital engages in a non-core commercial activity, however, the organization risks falling subject to *PIPEDA* vis-à-vis that particular activity unless “substantially similar” provincial legislation applies.³⁷

³¹ *Ibid.*

³² *Ibid.*

³³ Under s. 2(1), *ibid.*, “organization” is defined as including “an association, a partnership, a person and a trade union.”

³⁴ The Office of the Privacy Commissioner defines “core activities” as “those activities that are central to the mandate and responsibilities of these institutions” (The Office of the Privacy Commissioner of Canada, “Fact Sheet: Municipalities, Universities, Schools, and Hospitals,” online: http://www.privcom.gc.ca/fs-fi/02_05_d_25_e.asp) [“Fact Sheet”]. In the hospital setting, for example, patient care, accommodation, and treatment constitute core activities. This should be contrasted with pharmacies that lease space in hospitals to conduct business, or health care providers that engage in private practice (Spectrum, Information Technologies and Communication, *PIPEDA Awareness Raising Tools (PARTs) Initiative for the Health Sector. Questions and Answers: Third Series*, online: Industry Canada <<http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/gv00235e.html>> [“PARTs”]).

³⁵ “Fact Sheet,” *ibid.*

³⁶ *Ibid.*

³⁷ Providing a service for a fee will not necessarily trigger the application of the *Act*,

The issue of substantial similarity will be addressed below.

B. Obligations under Schedule 1 of the Act

PIPEDA's substantive privacy obligations are found mainly in Schedule 1, which expressly adopts the *Model Code for the Protection of Personal Information* of the Canadian Standards Association (C.S.A.).³⁸ Part 1 of PIPEDA requires all affected organizations to comply with Schedule 1, and sets out the means of enforcing compliance, the consequences of a breach, and various transition provisions.

C. Complaints and Enforcement

Under Schedule 1, an organization must establish a user-friendly internal process which allows individuals to make complaints and inquiries about the personal information policies and practices of the organization.³⁹ Individuals who make inquiries or lodge complaints must also be informed about the organization's complaint procedures.⁴⁰ Moreover, an organization must investigate all complaints and, if the complaint is justified, take appropriate measures to remedy its policies and practices.⁴¹

If an individual believes that an organization has contravened its obligations under the Act, he or she may complain in writing to the federal Privacy Commissioner. In addition, the Commissioner may independently initiate a complaint if he or she is satisfied that there are reasonable grounds to investigate a matter.⁴² The Commissioner is given broad investigative powers to examine every complaint, and may attempt

provided the service is part of the organization's core activities. For example, a hospital can charge a private room fee or a municipality can charge a per-bag garbage collection fee without becoming subject to the *Act*, as these services fall within the core activities of the respective entities. However, PIPEDA would apply to a university that sold or bartered an alumni list, or to personal information collected by a university or a hospital in the course of operating a parking garage. The Office of the Privacy Commissioner has suggested that these would likely be considered non-core commercial activities; see "Fact Sheet," *ibid*.

³⁸ CSA-Q830-96 [C.S.A. *Model Code*]. Schedule 1 identifies the 10 internationally recognized data protection principles upon which PIPEDA is built, those being: (i) Accountability, (ii) Identifying Purposes, (iii) Consent, (iv) Limiting Collection, (v) Limiting Use, Disclosure, and Retention, (vi) Accuracy, (vii) Safeguards, (viii) Openness, (ix) Individual Access, and (x) Challenging Compliance.

³⁹ *Supra* note 1, Sch. 1, cl. 4.10.2.

⁴⁰ *Ibid*. Sch. 1, cl. 4.10.3.

⁴¹ *Ibid*. Sch. 1, cl. 4.10.4.

⁴² *Ibid*. Part 1, s. 11(1) and (2).

to resolve a complaint by means of mediation, conciliation, or other dispute resolution mechanisms.⁴³ In the event that the Commissioner is unable to resolve a dispute, the matter may be taken to the Federal Court for resolution.⁴⁴

D. The Issue of Substantial Similarity

While *PIPEDA* applies to federally- and provincially-regulated organizations alike, it does not extend to the provinces unconditionally. If the federal government is satisfied that a province⁴⁵ has enacted “substantially similar” legislation to *PIPEDA*, then the relevant organizations, activities and classes will be exempt from Part 1 with respect to the collection, use and disclosure of personal information that occurs within that province.⁴⁶ However, even where provincial privacy legislation is deemed “substantially similar,” *PIPEDA* will continue to apply to the extraprovincial collection, use and disclosure of personal information in the course of commercial activities, as well as to any organization that collects, uses or discloses personal information in connection with the operation of a federal work, undertaking, or business. In short, only non-federal *intraprovincial* activities will be exempt from *PIPEDA*, although they will remain subject to the substantially similar provincial legislation.⁴⁷

To date, the Quebec *Act Respecting the Protection of Personal Information in the Private Sector*,⁴⁸ the Alberta *Personal Information Protection Act*,⁴⁹ and the British Columbia *Personal Information*

⁴³ *Ibid.* s. 12(1) and (2).

⁴⁴ *Ibid.* s. 14(1).

⁴⁵ Or territory. While similar considerations apply in respect of provincial and territorial privacy legislation, both entities will be referred to as “provinces” for purposes of discussing substantial similarity.

⁴⁶ *Supra* note 1, s. 26(2)(b).

⁴⁷ It should be noted that *PIPEDA* provides no explicit guidance as to the determination of substantial similarity. Industry Canada has announced that in order to be substantially similar, provincial or territorial laws must: (a) incorporate the ten principles in Schedule 1 of *PIPEDA*; (b) provide for an independent and effective oversight and redress mechanism with powers to investigate; and (c) restrict the collection, use and disclosure of personal information to purposes that are appropriate or legitimate. These criteria have been adopted by current Privacy Commissioner Jennifer Stoddart; see Privacy Commissioner of Canada, *Annual Report to Parliament 2005 – Report on the Personal Information Protection and Electronic Documents Act* (May 2006), online: <http://www.privcom.gc.ca/information/ar/200506/2005_pipeda_e.asp>.

⁴⁸ R.S.Q., c. P-39.1.

⁴⁹ S.A. 2003, c. P-6.5.

*Protection Act*⁵⁰ have been declared substantially similar to *PIPEDA*. Most recently, Ontario's *Personal Health Information Protection Act*⁵¹ has also been declared substantially similar.⁵² This declaration exempts health information custodians and their agents⁵³ from the application of *PIPEDA* in respect of the collection, use and disclosure of personal health information within Ontario.

E. Conclusion

Part 1 of *PIPEDA* satisfies the requirements of the European Union *Directive* with respect to the transfer and protection of personal information, in addition to the implementation of appropriate safeguards under Schedule 1. While the *Directive* is focused on the "processing" of personal information, *PIPEDA* regulates its "collection, use, and disclosure." The difference is nominal, as both *PIPEDA* and the *Directive* seek to achieve similar results in protecting personal information (although Part 1 of *PIPEDA* is more narrowly focused on the commercial trade of this information). The European Commission's acceptance of *PIPEDA* as providing "adequate" data protection relative to the *Directive* gives unequivocal evidence of *PIPEDA*'s compliance.

The issue turns to the domestic implications of *PIPEDA*. Quebec's *Act Respecting the Protection of Privacy in the Private Sector* has been deemed substantially similar to *PIPEDA*, and Quebec is thus exempt from *PIPEDA* to the extent that the federal legislation applies within the province. Nevertheless, Quebec is still governed intraprovincially by legislation that depended upon the federal Parliament's *review and approval*. Quebec is therefore challenging Part 1 of as *ultra vires* the federal government's legislative competence under the *Constitution Act, 1867* on the grounds that *PIPEDA* authorizes intrusion by Parliament into the province's legislative jurisdiction.

4. Introduction to Constitutional Analysis

It is clear from the foregoing that *PIPEDA* has broad implications for private sector organizations. Accordingly, the legislation interacts with various constitutional heads of power. The Parliament of Canada has constitutional authority to legislate in the area of "trade and commerce" under section 91(2) of the *Constitution Act, 1867*, while the provinces

⁵⁰ S.B.C. 2003, c. 63 [*PIPA*].

⁵¹ S.O. 2004, c. 3 [*PHIPA*].

⁵² By order of the Governor in Council, published in the *Canada Gazette* on December 14, 2005.

⁵³ As defined in *PHIPA*, *supra* note 51, ss. 2 and 3.

have expansive jurisdiction over “property and civil rights” under section 92(13) and health as a local or private matter under section 92(16). These federal and provincial powers inevitably overlap, and the constitutionality of *PIPEDA* hinges upon whether the legislation may be successfully categorized as falling within Parliament’s constitutional jurisdiction over trade and commerce. This will not necessarily preclude similar provincial legislation from being applicable to a number of organizations and activities, however, as “subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91.”⁵⁴ This is known as the “double aspect doctrine.”

As Professor Peter Hogg indicates, the courts have not explained fully when it is appropriate to apply the double aspect doctrine, and when it is necessary to make a choice between the federal and provincial features of a challenged law.⁵⁵ The best explanation, he claims, is that the double aspect doctrine is applicable when “the contrast between the relative importance of the two features is not so sharp.”⁵⁶ As *PIPEDA* possesses both federal and provincial characteristics, the legislation will likely fall within the double aspect doctrine. Therefore, it must be determined whether *both* Parliament and the provinces are competent to legislate in the area of personal information. In order to reach a conclusion on this issue, it is necessary to consider the scope of the provincial and federal powers and determine the extent to which *PIPEDA* legislates on matters within the jurisdiction of the respective levels of government.

5. *Provincial Authority under the Constitution Act, 1867*

PIPEDA interacts principally with three provincial heads of power: health, matters of a local or private nature, and property and civil rights within the province. Each will be addressed in order to illustrate the full range of *PIPEDA*’s impact on provincial matters.

A. Provincial Jurisdiction over Health as a Local or Private Matter

The issue of “health” is not specifically dealt with under the *Constitution Act, 1867*, although the courts have consistently indicated that it is

⁵⁴ *Hodge v. The Queen* (1883), 9 App. Cas. 117 at 130 (J.C.P.C.) [*Hodge*].

⁵⁵ P. Hogg, *Constitutional Law of Canada*, 2006 student ed. (Toronto: Carswell, 2006) at 389.

⁵⁶ *Ibid.* at 390, citing W. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 244.

primarily a matter of provincial jurisdiction.⁵⁷ Section 92(7) of the *Constitution Act, 1867* expressly grants the provinces authority over the establishment, maintenance and management of hospitals; and the provinces also have constitutional authority over the medical profession and the practice of medicine by virtue of sections 92(13) and (16).⁵⁸ Furthermore, section 92(16) has been interpreted by the Supreme Court of Canada as giving the provinces general jurisdiction over health matters within the province.⁵⁹ The Supreme Court unanimously agreed in *R. v. Morgentaler* that this residual power over general health matters includes jurisdiction over cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.⁶⁰

Personal health *information* is also a matter of provincial jurisdiction, and is governed in Ontario by numerous provincial statutes including *PHIPA*,⁶¹ which came into force on November 1, 2004. *PHIPA* has created a very complex set of rules governing among other things the collection, use and disclosure of personal health information; an individual's right to access and seek correction of personal health information; the mandatory creation of health information policies and practices; and the safeguarding of personal health information. As noted earlier, *PHIPA* has recently been declared substantially similar to *PIPEDA*.

It is clear that the regulation of personal health information falls within the jurisdiction of the provinces over health and matters of a local nature. Part 1 of *PIPEDA* has wide implications for organizations that collect, use or disclose personal information in the course of commercial activities, which invariably affects health, counselling, and care providers and facilities. These matters squarely fall within provincial constitutional authority under sections 92(7) and (16) of the *Constitution Act, 1867*.

⁵⁷ As in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 [*Labatt Breweries*]; *Schneider v. The Queen*, [1982] 2 SCR 112 [*Schneider*]; *Bell Canada v. Québec (C.S.S.T.)*, [1988] 1 S.C.R. 749 [*Bell Canada*]; *Eldridge v. British Columbia (A. G.)*, [1997] 3 S.C.R. 624. However, the federal government has jurisdiction over certain health-related matters that are tied to federal powers. For example, the federal criminal law power authorizes the punishment of conduct that is dangerous to public health.

⁵⁸ *R. v. Morgentaler* [1993] 3 S.C.R. 463 at 479 [*Morgentaler*].

⁵⁹ *Schneider*, *supra* note 57.

⁶⁰ *Supra* note 58 at 480.

⁶¹ *Supra* note 51.

B. Property and Civil Rights within the Province

The early leading case of *Citizens' Insurance Co. v. Parsons*⁶² distinguished between the federal power over trade and commerce and provincial jurisdiction over property and civil rights. In that case, the Judicial Committee of the Privy Council considered whether provincial legislation securing uniform conditions in fire insurance policies within the province was *ultra vires* the Ontario legislature. The court held that the federal trade and commerce power does not extend to regulating the contracts of a particular business or trade *within* a province.

The *Parsons* decision, while significant, did not identify when trade and commerce became sufficiently interprovincial or international so as to fall within the federal power under s. 91(2). Consequently, there has been significant overlap between the federal and provincial powers in the area of trade and commerce. In order to rectify this uncertainty, the courts have employed the “mutual modification” doctrine in an attempt to narrow the two classes of subjects and establish exclusive spheres of influence.⁶³

Since *Parsons*, the courts have characterized and reaffirmed “property and civil rights” as encompassing, *inter alia*, contracts of a local nature;⁶⁴ intraprovincial trade and commerce;⁶⁵ employment in non-federally-regulated undertakings,⁶⁶ professions and trades within the province;⁶⁷ and business within the province in general.⁶⁸ Furthermore, as mentioned above, section 92(13) affords the provinces jurisdiction over the medical profession.⁶⁹

Based on the foregoing, it is evident that *PIPEDA* affects matters falling within provincial jurisdiction over property and civil rights. Part 1 expressly regulates the operation of provincial organizations, trades and professions, including those related to health care and the health industry. Furthermore, *PIPEDA*'s focus on the commercial exchange of information clearly impacts intraprovincial trade and commerce, which is a matter of provincial jurisdiction under section 92(13). Finally, the legislation imposes various privacy imperatives on organizations under Schedule 1. Thus, Part 1 not only regulates the trade of personal

⁶² (1881), 7 App. Cas. 96 (P.C.) [*Parsons*].

⁶³ Hogg, *supra* note 55 at 522.

⁶⁴ *Parsons*, *supra* note 62.

⁶⁵ *A.G. Quebec v. Kellogg's Co. et al.*, [1978] 2 S.C.R. 211.

⁶⁶ *Bell Canada*, *supra* note 57.

⁶⁷ *Global Securities v. B.C. (Sec Com)*, [2000] 1 S.C.R. 494.

⁶⁸ *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.

⁶⁹ *Morgentaler*, *supra* note 58.

information within the province, but it also enforces obligations on organizations to examine and modify their policies and practices. In short, *PIPEDA*'s effect on property and civil rights appears wide-ranging.

C. Conclusion

It is clear from the above that Part 1 of *PIPEDA* broadly affects health, as well as property and civil rights within the province. The analysis must now turn to Parliament's authority over trade and commerce in order to justify this considerable impact on matters traditionally within provincial jurisdiction.

6. Federal Authority under the Constitution Act, 1867

The *Parsons* case, referred to above, is also significant as it represents the first judicial enunciation of what have been accepted as the "two branches" of the federal trade and commerce power. One branch enables Parliament to legislate in the area of general trade and commerce affecting the Dominion, while the other affords the federal government jurisdiction over interprovincial and international trade and commerce. As Part 1 has a broad purpose that addresses domestic and international concerns, both branches will be analyzed in turn.

The chief issue that will be resolved is whether Part 1 of *PIPEDA* may be successfully categorized as falling within the federal trade and commerce power, or whether it is *ultra vires* for unduly affecting provincial matters. Ultimately, *PIPEDA* will be demonstrated to legislate in areas of provincial and federal competence. As a result, the double aspect doctrine will be considered in light of the relevant constitutional issues.

A. General Trade and Commerce Affecting the Dominion

While conceived by the Privy Council in the *Parsons* case, the general trade branch of s. 91(2) of the *Constitution Act, 1867* was not effectively addressed nor developed by the courts until relatively recently.⁷⁰ Building upon its prior decisions, the Supreme Court established the

⁷⁰ The branch developed and evolved through the cases *MacDonald v. Vapor Canada*, [1977] 2 S.C.R. 134; *Labatt Breweries*, *supra* note 57; and *Canada (Attorney General) v. Canada National Transportation Ltd.*, [1983] 2 S.C.R. 206. Most recently, the Supreme Court reaffirmed the scope of the general trade and commerce branch in *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 [*Kirkbi*].

current test for the general branch of the trade and commerce power in *General Motors of Canada Ltd. v. City National Leasing*.⁷¹

In *General Motors*, the Supreme Court unanimously recognized the following indicia to determine whether a statute will be valid under the general trade and commerce branch of section 91(2): (a) the legislation must contain a “general regulatory scheme;” (b) the scheme must be monitored by the continual oversight of a regulatory agency; (c) the legislation is concerned with trade *in general* – affecting the Dominion - and not with a particular industry; (d) the legislation should be of such a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (e) the failure to include one or more provinces would jeopardize successful operation in other parts of Canada.⁷² It is significant to note, however, that these indicia do not represent an exhaustive list of traits, and the presence or absence of any of them is not necessarily determinative of constitutionality.⁷³ In summary, therefore, the courts tend to examine whether the legislation meets *most* of the criteria when they are reaching a conclusion on its constitutionality.⁷⁴

Provided the *General Motors* test is satisfied, the general trade and commerce branch authorizes the regulation of both intraprovincial and extraprovincial trade. This constitutional power recognizes that there are certain areas over which Parliament should have authority to exercise control on a national basis. It is thus prudent to consider the general trade and commerce branch in light of s. 121 of the *Constitution Act, 1867*, which secures a “national market” and establishes Canada as an economic union.⁷⁵ Section 121 embraces the free movement of people, goods, and capital among the provinces, and this concept of unimpeded trade is especially relevant to the matters governed by Part 1 of *PIPEDA*. Given that personal electronic information is transferred instantaneously across provincial and international borders, the regulation of the commercial use of “personal information” likely requires a national legislative approach.

⁷¹ [1989] 1 S.C.R. 641 [*General Motors*]. This test was applied recently by the Supreme Court in *Kirkbi, ibid.*, where the majority upheld s. 7(b) of the federal *Trade-marks Act* as *intra vires* Parliament’s s. 91(2) jurisdiction.

⁷² *Ibid.* at 661-62.

⁷³ *Ibid.* at 662.

⁷⁴ Additionally, the courts may establish other criteria if warranted under the circumstances.

⁷⁵ *Supra* note 4; section 121 states: “All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

As the federal government will almost certainly seek to justify Part 1 of *PIPEDA* under the general trade and commerce branch, the legislation must be considered in light of the *General Motors* indicia in order to establish its constitutionality. Each criterion will be addressed in turn.

a) The Presence of a General Regulatory Scheme

It is clear from the legislation that *PIPEDA* imposes a regulatory scheme for the protection of personal information. As stated, Part 1 requires organizations to implement policies and practices that give effect to the obligations imposed by Schedule 1. These obligations have been adopted from the ten principles set out in the C.S.A. *Model Code for the Protection of Personal Information*,⁷⁶ and include implementing procedures to protect personal information; establishing procedures to receive and respond to complaints; training staff concerning the organization's policies and practices; and developing information to explain the organization's policies and practices.⁷⁷ Based on the foregoing, Part 1 of *PIPEDA* satisfies the first *General Motors* criterion.

b) The Continual Oversight of a Regulatory Agency

There is no question that *PIPEDA* operates "under the watchful gaze of a regulatory agency," as the requirements under Part 1 are overseen by the federal Privacy Commissioner.⁷⁸ Schedule 1 provides for the Privacy Commissioner to receive or initiate complaints concerning contraventions of obligations under the Act.⁷⁹ The Commissioner may conduct investigations into the personal information procedures of organizations, and attempt to resolve complaints through various dispute resolution mechanisms.⁸⁰ Where the Commissioner is unable to resolve the dispute, the complainant may initiate a hearing before the Federal Court.⁸¹ In addition to any remedy that may be awarded, the court may require the organization to amend its policies and practices.⁸²

It is evident that the regulation of personal information under *PIPEDA* is supervised by an administrative body. As the federal Privacy Commissioner is statutorily empowered and obligated to oversee the

⁷⁶ *Supra* note 38.

⁷⁷ *Supra* note 1, Sch. 1, cl. 4.1.4.

⁷⁸ *General Motors*, *supra* note 71 at 677.

⁷⁹ *Supra* note 1, s. 11(1) and (2).

⁸⁰ *Ibid.* s. 12(1) and (2).

⁸¹ *Ibid.* s. 14(1).

⁸² *Ibid.* s. 16.

requirements under the legislation, Part 1 satisfies the second requirement of the *General Motors* test.

c) The Legislation is Concerned with Trade in General

Part 1 of *PIPEDA* only regulates the *general* trade of personal information and does not do so on an industry-by-industry basis. The requirements under Part 1 relate to the collection, use and disclosure of personal information by *both* federally- and provincially-regulated private sector organizations. The legislation does not discriminate between organizations or industries on any level, and applies sweeping regulations with respect to the commercial transfer of personal information. Bearing these factors in mind, Part 1 of *PIPEDA* readily satisfies the third criterion of the test.

d) The Provinces Jointly or Severally Would be Constitutionally Incapable of Enacting the Legislation

It will likely be submitted that the trade of personal information should be regulated nationally by Parliament, in part because the provinces would be constitutionally incapable of enacting similar privacy legislation on their own. This line of reasoning takes into account domestic and international considerations.

Domestically, there could be significant gaps in a scheme to protect privacy which depends on provincial collaboration or concurrency, especially considering that interprovincial transactions and federal works, undertakings and businesses would be exempt.⁸³ *PIPEDA* acknowledges this potential for legislative dissonance across provinces that enact independent legislation, and thus requires all federally- and provincially-regulated private sector organizations to meet the minimal privacy standards enunciated within Schedule 1. Where the federal government deems provincial privacy legislation to be “substantially similar” to Part 1 of *PIPEDA*, provincial organizations and intraprovincial trade are exempt from the federal legislation to the extent that the Act applies within the province. However, the province must still maintain *PIPEDA*’s minimum standards. This is necessary to establish a seamless regulatory scheme and to ensure the strength of Canada’s national market.

Internationally, it might appear that the provinces would be constitutionally incapable of enacting this legislation for similar reasons.

⁸³ Bryan Schwartz, “Lessons from Experience: Improving the Agreement on Internal Trade” (2002) *Asper Rev. of Int’l Bus. and Trade Law* 301 at 317, footnote 31.

The European Union *Directive* states that Member States may only transfer personal data to a third country when the national legislation adopted by that country is consistent with the other provisions of the *Directive*, and the country ensures an adequate level of protection.⁸⁴ While third-country data transfer will be dealt with more closely below, this issue is still relevant under this stage of the *General Motors* test as it contemplates the need for a nationally-regulated market to ensure standardized data protection practices.

Despite the foregoing analysis, Part 1 of *PIPEDA* fails to satisfy the fourth requirement of the *General Motors* test as the provinces are “constitutionally capable” of enacting harmonious privacy legislation on a local, intraprovincial basis.⁸⁵ There are no constitutional impediments preventing the provincial legislatures from concurrently implementing similar schemes that maintain privacy standards with respect to the collection, use, and disclosure of personal information that is used in the course of commercial activities. Furthermore, when one considers that Part 1 of *PIPEDA* only seeks to establish a *minimum* standard of data protection, it is unlikely that the provinces would seriously derogate from the scheme by enacting varying degrees of “soft” laws. The requirements under *PIPEDA* are also consistent with generally-recognized privacy standards such as those contained within the European Union *Directive* and the C.S.A. *Model Code for the Protection of Personal Information*, which evidences *PIPEDA*’s conformance with accepted business practice. As such, it would be unreasonable for the provinces to enact incongruous privacy provisions that might obstruct the free flow of trade and complicate business transactions. Taking these factors into consideration, any suggestion that the provinces would enact grossly disparate privacy requirements fails to consider the provinces’ interest in commercial efficacy and privacy protection. In short, Part 1 of *PIPEDA* does not satisfy the fourth *General Motors* criterion.

e) The Failure to Include Provinces Would Jeopardize Successful Operation of the Legislation in Other Parts of Canada

As addressed above, *PIPEDA* must be analyzed according to both its domestic and international purposes. If one or more provinces had less stringent privacy laws, it would “frustrate the underlying goals of

⁸⁴ *Supra* note 2, Art. 25(1).

⁸⁵ Again, Quebec is only challenging *PIPEDA* to the extent that it impacts provincial matters. *PIPEDA*’s regulation of federal undertakings and the extraprovincial flow of personal information is clearly within Parliament’s constitutional authority, and beyond the scope of Quebec’s challenge.

PIPEDA in several respects.”⁸⁶ *PIPEDA* recognizes that Canada is an economic union, and it seeks to ensure a comprehensive privacy code for personal information used in the course of commercial activities. The private and personal nature of the information also requires a reasonable standard of regulatory compliance across the country. While it is certainly unlikely that a single province would enact such lenient privacy legislation that it would entirely prevent successful operation of *PIPEDA* in other parts of Canada, the effectiveness of the Act would be seriously compromised if one or more provinces were to derogate from *PIPEDA*’s standards. Though a patchwork of disparate provincial legislation may be improbable, any significant variation in standards would jeopardize the successful operation of *PIPEDA* in Canada.

This potential for impeding the successful operation of *PIPEDA* is most evident when considering the international purposes and goals of the legislation. *PIPEDA* was drafted in part to accord with the European Union *Directive on Data Protection*, and *PIPEDA* allows for the cross-border trade of personal information. As mentioned earlier, the *Directive* states that European Union countries are not to trade personal data with countries that do not ensure an “adequate level” of data protection.⁸⁷ Part 1 of *PIPEDA* satisfies the *Directive*’s compliance requirements and Canada has been accepted by the European Union as a country providing adequate data protection.

Once again, it is imperative to note that the *Directive* only mentions “countries,” and not provinces, states or territories. Where the European Commission finds that a “third country” does not ensure an adequate level of protection, Member States are to take stated measures to prevent any transfer of data of the same type to the country in question.⁸⁸ On its face, this would appear fatal to a claim by any province that the failure to include one or more provinces would *not* jeopardize successful operation in other parts of Canada, as the *Directive* only contemplates trade with *countries* such as Canada that have enacted appropriate legislation. However, this answer becomes less straightforward when the *Directive* is considered in its entirety. Article 26 of the *Directive*, “Derogations,” cites a number of instances where data may still be transferred to a third country which does not ensure the necessary level of protection. These exceptions include consent on the part of the data subject, the fulfillment of contractual obligations, and necessity on public interest grounds.⁸⁹ Data may also be transferred to a country with

⁸⁶ Schwartz, *supra* note 83 at 317, footnote 31.

⁸⁷ *Supra* note 2, Art. 25(1).

⁸⁸ *Ibid.* Art. 25(4).

⁸⁹ *Ibid.* Art. 26(1).

“inadequate” data protection if the controller adduces adequate safeguards (usually in the form of contractual clauses) with respect to the protection of the privacy and fundamental rights and freedoms of individuals.

Ultimately, it is unlikely that the possibility of derogations from the *Directive* would negate the requirement for federal privacy legislation as a means of ensuring effective trade and commerce internationally. While the *Directive* would still allow for the transfer of data between the European Union and Canada in the absence of the requirements in *PIPEDA*, this trade would be contingent upon the satisfaction of specific criteria. Even in the instance where the controller of a Member State adduces adequate safeguards in order to trade with a third country, the safeguards are reviewable upon the objection of the European Commission or any Member State.⁹⁰ Considering the *Directive*’s purpose, goals and requirements as a whole, it is evident that the derogations cited in Article 26 are merely in place to facilitate trade in *exceptional* circumstances rather than to provide a means for circumventing the *Directive*’s general requirements. For a country such as Canada to rely on these derogations to conduct international trade with the European Union generally would be burdensome, impractical and completely inefficient. As this is no realistic way to carry on business, the failure of one or more provinces to be included in the legislation would seriously jeopardize *PIPEDA*’s successful operation in other parts of Canada. If Part 1 of *PIPEDA* were to be successfully challenged by Quebec (to the extent that the legislation applies within the provinces), then this could precipitate a review by the European Commission of the data protection laws of other provinces and place Canada’s privacy laws at serious risk of being deemed inadequate.

Based on the foregoing, it appears that the federal government would likely be able to justify Part 1 of *PIPEDA* under the general trade and commerce branch of section 91(2). While Part 1 does not satisfy all of the indicia enunciated in *General Motors*, they are not meant to be exhaustive or decisive of constitutionality. On balance, Part 1 of *PIPEDA* should be found constitutional as it clearly satisfies four of the five enumerated indicia.

B. International and Interprovincial Trade and Commerce

In the unlikely event that the court holds Part 1 unconstitutional under the general trade branch, the federal government will seek to justify the

⁹⁰ *Ibid.* Art. 26(3). The procedure for review of the proposed safeguards is set out in Art. 31(2) of the *Directive*.

legislation under the alternative branch of section 91(2): interprovincial and international trade and commerce. The Supreme Court established in *Carnation Co. Ltd. v. Quebec (Agricultural Marketing Board)*⁹¹ that the proper way to characterize legislation under the interprovincial or international branch of the federal trade and commerce power is to consider its “pith and substance,” which is to be determined on a case-by-case basis. As indicated by the Supreme Court in *Morgentaler*, there is no “single test” for determining the pith and substance of a law, and the approach must be flexible rather than technical or formalistic.⁹² While the purpose and effect of the impugned legislation are significant, it is often the legislation’s dominant purpose or aim that is the “key” to its constitutional validity.⁹³

In the *Reference Re Employment Insurance Act (Can.), ss. 22 and 23*,⁹⁴ the Supreme Court stated that the purpose of a provision or statute “may be identified from its context or be set out in the enactment itself.”⁹⁵ *PIPEDA* explicitly characterizes itself in its title as “an Act to support and promote electronic commerce by protecting personal information.” Additionally, the explanatory notes to *PIPEDA* identify Part 1 as establishing “a right to the protection of personal information collected, used or disclosed in the course of commercial activities, in connection with the operation of a federal work, undertaking or business, or *interprovincially* or *internationally*.”⁹⁶ Thus, the purpose of Part 1 is twofold: it aims to regulate the commercial flow of personal information (a) by federal undertakings, and also (b) extraprovincially.⁹⁷

Beyond discerning the federal purpose of Part 1, it is necessary to consider the effects of the legislation. As stated, Part 1 of *PIPEDA* regulates the collection, use, and disclosure of personal information in the course of commercial activities, and this primarily addresses extraprovincial trade and commerce. Part 1 also applies to personal information about employees of organizations that collect, use or disclose such information in connection with the operation of a federal work or undertaking. Had the legislation been limited to the regulation of

⁹¹ [1968] S.C.R. 238 [*Carnation*].

⁹² *Supra* note 58 at 481-82, citing P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) vol. 1 at 15-13.

⁹³ *Ibid.*

⁹⁴ [2005] 2 S.C.R. 669 [*Employment Insurance Reference*].

⁹⁵ *Ibid.* at 679.

⁹⁶ Introductory “Summary” to *PIPEDA*, online: <http://www.privcom.gc.ca/legislation/02_06_01_01_e.asp> [emphasis added].

⁹⁷ As similar considerations arise in relation to both international and interprovincial trade and commerce, they will be addressed together under the designation of “extraprovincial trade and commerce.”

federal undertakings and the extraprovincial flow of personal information, as its purpose might suggest, Part 1 would unequivocally fall within the federal government's broad trade and commerce authority. However, the legislation extends beyond federal matters and affects various provincial organizations, undertakings, professions, and activities. Having established that Part 1 impacts provincial matters, the predominant constitutional issue is whether this entire Part of *PIPEDA* may be categorized as operating *in relation to* extraprovincial trade or whether portions of the legislation must be severed as invalid.

A close reading of *PIPEDA* and an appreciation for its legislative context reveal that the provincial matters affected within Part 1 are necessary to *PIPEDA*'s purpose of establishing uniform safeguards for the commercial trade of personal information. As we have seen, the federal government was prompted to enact Part 1, in part, by the European Union *Directive on Data Protection*. The *Directive* required Member States to enact legislation restricting the transmission of personal information to non-European Union countries that lacked comparable privacy protection. As a result of the national privacy standards imposed by *PIPEDA*, Canada has been approved by as a country that provides adequate safeguards with respect to the transfer of personal information and is at liberty to trade data freely with any European Union Member State.

While the relationship between Part 1 and the *Directive* is not determinative of *PIPEDA*'s constitutionality, it may validate *PIPEDA*'s impact on provincial matters in respect of the commercial trade of personal information. If a province were to derogate from *PIPEDA*'s requirements to the extent that it affects provincial matters, this could be of concern to any European Union Member State that trades data with Canada, and in particular *into* Canada. While *PIPEDA* would ensure minimum safeguards with respect to the international transfer of data into Canada as well as to any interprovincial transactions among the Canadian provinces, the required protective measures would no longer safeguard the information once it entered a specific province. Thus, it appears that the national coverage ensured by Part 1 of *PIPEDA* is necessary to satisfy the federal government's extraprovincial trade and commerce purpose.

This approach to the interpretation and application of the federal trade and commerce power accords with the Supreme Court of Canada's reasoning in the *Employment Insurance Reference*. Here, the Supreme Court stated that a "progressive approach" must be taken to identify the relevant head of power "to ensure that Confederation can be adapted to

new social realities.”⁹⁸ In doing so, the Court must consider the “essential elements” of the power and “ascertain whether the impugned measure is consistent with [its] *natural evolution*.”⁹⁹ The Supreme Court has thus reinforced the metaphor of the Constitution as a “living tree” which must grow and adapt to social, political, and technological evolution. In light of this approach, one can argue that *PIPEDA* recognizes the technological reality that electronic information knows no borders, and that it will be most effective to regulate such information federally in order to ensure minimum standards and compliance nationally. Professor Hogg states that whenever markets for a product are national or international in size, there is “a strong argument that effective regulation of the markets can only be national” and thus fall within the federal trade and commerce power.¹⁰⁰ The need to regulate this personal information market lends support for *PIPEDA* as a valid exercise of the federal trade and commerce authority, and this is consistent with the natural evolution of the federal power to accommodate globalization and technological advancements in trade.

PIPEDA’s regulation of the personal information “market” is analogous to the oil market discussed in *Caloil Inc. v. Canada (Attorney General)*.¹⁰¹ In *Caloil*, the Supreme Court unanimously held that a federal regulatory scheme with intraprovincial effects can still be constitutionally valid, provided these effects are *necessarily incidental* to the legislation which is in pith and substance extraprovincial. In this case, the appellant company challenged the validity of federal regulation that prohibited the distribution of oil to points west of the Ontario-Quebec border. While the purpose of the prohibition was to protect and develop the domestic industry in Western Canada against cheaper overseas imports, the legislation necessarily extended to intraprovincial transactions. The Supreme Court stated that “the existence and extent of provincial regulatory authority over specific trades within the province is not the *sole criterion* to be considered in deciding whether a federal regulation affecting such a trade is invalid.”¹⁰² Rather, provincial matters may be regulated when the impugned enactment “is an integral part of a scheme for the regulation of international or interprovincial trade.”¹⁰³ The Court held that the policy sought to foster the development and utilization of Canadian oil resources, and that the “true character” of the regulation was “an incident in the administration of an extraprovincial

⁹⁸ *Supra* note 94 at 677.

⁹⁹ *Ibid.* at 691 [emphasis added].

¹⁰⁰ *Supra* note 55 at 499.

¹⁰¹ [1971] S.C.R. 543 [*Caloil*].

¹⁰² *Ibid.* at 550.

¹⁰³ *Ibid.*

marketing scheme.”¹⁰⁴ As such, the federal regulation was upheld even though it extended to local trade.

The Supreme Court¹⁰⁵ has thus indicated that the proper way to determine whether legislation falls under the federal power over extraprovincial trade and commerce is to first establish its pith and substance, and then determine whether any interference with a provincial head of power may be categorized as necessarily incidental to the federal legislative purpose. Part 1 of *PIPEDA* is ultimately concerned with regulating the commercial *exploitation* of personal information, and any effects on provincial matters are subsidiary to this federal objective. Thus, the impact on provincial matters should be upheld as a necessary incident of the exercise of the federal government’s extraprovincial trade and commerce authority. While one may argue that the commercial trade of personal information is critically important to various provincial private and “MUSH” sector organizations, *PIPEDA* does not affect many of these subjects in any major way. A review of *PIPEDA*’s obligations under Schedule 1 reveals that the legislation only imposes basic requirements in accordance with the C.S.A. *Model Code*, which many organizations voluntarily complied with before the enactment of *PIPEDA*.

In respect of health care, for example, *PIPEDA* should only minimally affect most health professionals and organizations. As *PIPEDA* is meant to regulate the commercial use by health organizations of patients’ personal health information, it will apply, for instance, to publicly-funded hospitals or clinics that receive fees for providing identifiable patient information to pharmaceutical companies that are attempting to target their marketing efforts.¹⁰⁶ Similarly, health delivery providers in private practice such as dentists, chiropractors and physicians fall within the purview of *PIPEDA* in respect of the collection, use, and disclosure of personal health information, unless substantially-similar provincial legislation applies.¹⁰⁷

Despite these effects, *PIPEDA* deliberately limits its impact on local matters. *PIPEDA*’s regulation of personal health information has little or no effect on the “frontline” provision of health services, counselling, and

¹⁰⁴ *Ibid.* at 551.

¹⁰⁵ See also *Carnation*, *supra* note 91; *A.G. v. Manitoba Egg & Poultry Association*, [1971] S.C.R. 689; *Caloil*, *supra* note 101; and, more recently, *R. v. Bryan* (1999), 170 D.L.R. (4th) 487 (Man. C.A.).

¹⁰⁶ *PIPEDA* makes specific reference to a number of commercial uses for personal health information, including the transfer of patients’ personal information to a company selling health care products; see, for example, *supra* note 1, Sch. 1, cl. 4.3.5.

¹⁰⁷ As they are engaged in commercial activity.

care by publicly-funded health professionals and organizations, as these are not, at their core, “commercial” enterprises.¹⁰⁸ Based on this, Part 1 does not apply to routine referrals, checkups, consultations, or similar activities that focus on the ongoing health and well-being of patients by public health care providers. While *PIPEDA* does impact private health delivery providers and the non-core transactions of public health care organizations, the Act should not have a significant impact on health professionals generally. *PIPEDA*’s requirements are far less rigorous than the confidentiality, disclosure, and consent provisions typically found in various provincial personal health information,¹⁰⁹ mental health, and public hospitals legislation.¹¹⁰ Moreover, most professionals in the health care sector are already governed by stringent regulatory provisions in addition to well-established common law principles. Thus, *PIPEDA*’s principles should not significantly differ from those existing in the public and private health care sectors.

As the foregoing illustrates, the overall operation of provincial subjects is only marginally affected by *PIPEDA* and these effects are ultimately incidental to the legislation’s extraprovincial trade and commerce purpose. This conclusion is supported by *PIPEDA*’s purpose, its effects, and the prevailing provincial considerations of business efficacy and institutional autonomy. Part 1 of *PIPEDA* seeks to serve a legitimate trade interest and does not appear to be a colourable attempt on the part of Parliament to regulate local provincial matters. As a result, the legislation will likely be upheld under the federal trade and commerce power.

¹⁰⁸ Specifically, Industry Canada has stated that *PIPEDA* does not impact the *non-commercial* aspect of publicly-funded hospitals or long-term care facilities. “Hospitals are beyond the constitutional scope of the Act as their core activities are not commercial in nature.” For example, “a hospital charging for a fibreglass cast would not bring a hospital within the scope of the Act because the transaction is part of the hospital’s core activities, i.e. providing health care services.” Thus, it is only the commercial trade of personal information that falls within the purview of *PIPEDA*, and these commercial activities are not related to the general provision of health care services; see “PARTs,” *supra* note 34.

¹⁰⁹ Such as *PHIPA*, *supra* note 51; *PIPA*, *supra* note 50; *Health Information Protection Act*, S.S. 1999, c. H-0.021 [*HIPA*]; *Personal Health Information Act*, C.C.S.M. c. P33.5 [*PHIA*]; *Health Information Act*, R.S.A. 2000, c. H-5 [*HIA*]; and *An Act Respecting the Protection of Personal Information in the Private Sector*, *supra* note 48. Manitoba’s *PHIA* and Saskatchewan’s *HIPA* establish comprehensive safeguards for the protection of personal health information in the public and private sectors. To date, neither province has moved to introduce general privacy legislation covering the private sector (as Ontario, B.C., Quebec, and Alberta have). For this reason, neither *PHIA* nor *HIPA* have been declared substantially similar to *PIPEDA*.

¹¹⁰ For example, *PIPEDA* does *not* change current practices for substitute decision

C. “Peace, Order, and Good Government”

Having addressed both branches of the federal trade and commerce power,¹¹¹ it would be prudent to briefly consider Parliament’s residual power to make laws for the “peace, order, and good government of Canada” and whether the regulation of the commercial use of personal information may qualify as a “matter” coming within the national concern branch of this federal power.

Applying the factors developed by the Supreme Court of Canada in the *Reference re Anti-Inflation Act (Canada)*¹¹² and *R. v. Crown Zellerbach Canada Ltd.*,¹¹³ there appears to be a plausible argument that Part 1 of *PIPEDA* is justifiable under the national concern branch of the federal government’s peace, order and good government power. First, “personal information” is arguably a conceptually new matter which did not exist at the time of Confederation. Second, personal information likely satisfies the “provincial inability test”¹¹⁴ of the national concern branch as one province’s failure to enact minimal standards dealing with privacy comparable to the requirements of *PIPEDA* could cause a fissure in Canada’s national market and compromise extraprovincial ventures in trade and commerce. Finally, at least from a theoretical perspective, personal information has the quality of a distinct matter that “clearly distinguishes it from matters of provincial concern.”¹¹⁵ Whereas a majority of the Supreme Court in the *Anti-Inflation Reference* considered inflation to be too general and diffuse to qualify as such a matter, personal information appears more amenable to possessing “a sufficient consistence to retain the bounds of form.”¹¹⁶

While there is some logical appeal to an argument based on peace, order and good government, it nevertheless raises serious concerns. Primarily, the categorization of personal information as a conceptually new and distinct matter could have dire implications not only for various provincially-regulated organizations, but for federalism as well. Personal information is sufficiently singular and cohesive in a theoretical sense,

makers who can exercise the right of the individual with respect to access to information and other rights related to collection, use and disclosure of the individual’s health information; see “PARTs,” *supra* note 34.

¹¹¹ Which will certainly be the federal government’s chief line of argumentation.

¹¹² [1976] 2 S.C.R. 373 [*Anti-Inflation Reference*].

¹¹³ [1988] 1 S.C.R. 401 [*Crown Zellerbach*].

¹¹⁴ Which requires that “a provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests;” *ibid.* at 434.

¹¹⁵ *Ibid.* at 456.

¹¹⁶ *Supra* note 112 at 458.

yet it interacts with a gamut of federal and provincial matters on a fundamental organizational level. While the regulation and control of aeronautics¹¹⁷ and radio¹¹⁸ have been regarded as “clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92,”¹¹⁹ personal information does not possess “an identity which [makes] it distinct from provincial matters.”¹²⁰ As such, personal information may be more appropriately regarded as “an aggregate of several subjects[,] some of which form a substantial part of provincial jurisdiction,” rather than an autonomous constitutional matter on its own.¹²¹

If a court were to regard personal information as a new and distinct matter, it could critically compromise the division of powers in Canada. As Justice Beetz stated in the *Anti-Inflation Reference*, “[I]f Parliament has exclusive authority in relation to the ‘containment and reduction of inflation’ ... [as being of national concern] a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear.”¹²² Similarly, if the federal Parliament were to have exclusive jurisdiction over the commercial trade of personal information, it would create an enclave wholly beyond the reach of the provincial legislatures. As personal information is entwined in the basic operations of a great number of provincially-regulated organizations, exclusive federal jurisdiction over this “matter” could cripple the ability of the provincial legislatures to regulate their own industries and trade. It is clear that if *PIPEDA* were to be justified under the federal peace, order and good government power, the “scale of impact on provincial jurisdiction... [would be irreconcilable] with the fundamental distribution of legislative power under the Constitution.”¹²³ Bearing these factors in mind, concurrent jurisdiction is certainly the more feasible approach. It is also one which Part 1 of *PIPEDA* readily accepts.

7. Conclusion

Part 1 of *PIPEDA* has both federal and provincial characteristics, which is a necessary incident of its design to regulate the flow of personal information nationally and internationally. While the legislation is

¹¹⁷ See *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.

¹¹⁸ See *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.).

¹¹⁹ *Supra* note 112 at 457.

¹²⁰ *Ibid.* at 458.

¹²¹ *Ibid.*

¹²² *Ibid.* at 445.

¹²³ *Supra* note 113 at 432.

broadly directed towards federal trade and commerce, it clearly impacts a number of provincial matters including local trade and provincially-regulated organizations, professions and activities.

Part 1 operates on the assumption there may be both valid federal and provincial legislation in the area of personal information, and it accommodates this by allowing for substantially similar provincial legislation. In doing so, *PIPEDA* not only integrates the double aspect doctrine into its legislative scheme, but it precludes the possibility of conflict between federal and provincial legislation in the area of commercially-traded personal information. Ultimately, *PIPEDA* successfully ensures a national privacy standard, and it does so in part by *accommodating* provincial legislative independence. *PIPEDA* expressly provides room for the provinces to legislate on the trade of personal information; however, only to the extent that there is no legislative inconsistency with *PIPEDA*. When one considers that any conflict between *PIPEDA* and provincial legislation would render the provincial Act inoperative, substantial similarity appears a wholly reasonable proposition.

As *PIPEDA* appears justifiable under both branches of the federal trade and commerce power, Quebec will likely fail in its challenge. The long-term impact of *PIPEDA* remains to be seen, however, as the legislation may be increasingly displaced by substantially similar provincial legislation. Over time, the direct application of Part 1 may be limited to the federal private sector and to extraprovincial trade and commerce, as provincial legislation will be enacted to regulate the intraprovincial organizational and trade matters formerly governed by *PIPEDA*. Even if this proves to be the case, *PIPEDA*'s legacy should endure in the form of a minimum national privacy standard for commercially-traded personal information.