Order P22-02

CONSERVATIVE PARTY OF CANADA
GREEN PARTY OF CANADA
LIBERAL PARTY OF CANADA
NEW DEMOCRATIC PARTY OF CANADA

David Loukidelis QC

March 1, 2022

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Summary: Three British Columbia residents asked the four respondent organizations, which are registered political parties under the federal *Canada Elections Act*, for information about what personal information they possessed about them, how it was used and to whom it had been disclosed. All four organizations responded. The individuals complained to the OIPC, which opened complaint files. The organizations objected that, because they are subject to rules in the *Canada Elections Act* and other federal statutes relating to collection, use and disclosure of personal information, British Columbia's *Personal Information Protection Act* does not apply to their personal information practices. The *Personal Information Protection Act* is a constitutionally valid law in respect of property and civil rights and matters of a local nature. It is not constitutionally inapplicable to the organizations because of the constitutional doctrines of paramountcy or interjurisdictional immunity.

Statutes Considered: *Canada Elections Act*, SC 2000, c 9; *Personal Information Protection Act*, SBC 2003, c 63; *The Constitution Act, 1867*, 30 & 31 Vict, c 3*; Constitutional Question Act*, SBC; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5; ; *Canada Not-for-profit Corporations Act*, SC 2009, c 23*; Elections Modernization Act*, SC 2018, c 31*; Telecommunications Act,* SC 1993, c 38*; 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*, SC 2010, c 23; *Electronic Commerce Protection Regulations,* SOR/2013-221; *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982,* 1982, c 11 (UK)*; Personal Information Protection Act*, SA 2003, c P-6.5.

Authorities Considered: *Courtenay-Alberni Riding Association of the New Democratic Party of Canada (Re)*, 2019 BCIPC 34; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146, 2002 SCC 31; *OPSEU v.*

Ontario (Attorney General), [1987] 2 SCR 2, 1987 CanLII 71; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *MacKay v. Manitoba*, [1989] 2 SCR 357, 1989 CanLII 26; *McKay et al v. The Queen,* [1965] SCR 798, 1965 CanLII 3; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.,* 2019 SCC 58 (CanLII); *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 354; *British Columbia (Constituency Office of a Federal Member of Parliament) (Re),* 2007 CanLII 52750; *Weatherley v. Canada (Attorney General)*, 2021 FCA 158; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181; *Reference re Environmental Management Act*, 2020 SCC 1; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 35; *Canadian Western Bank v. Alberta,* [2007] 2 SCR 3, 2007 SCC 22; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62; British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 4th Sess. Vol. 14, No. 13 (May 1, 2003); *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927, 1998 CanLII 829; *Ontario (Attorney General) v. OPSEU,* [1987] 2 SCR 2, 1987 CanLII 71 (SCC); *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 SCR 419, 2015 SCC 53; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, 1982 CanLII 55 (SCC); *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453, 2010 SCC 38; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 356, 2010 SCC 39; *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 SCR 877, 1998 CanLII 829; *Canadian Reform Conservative Alliance v. Western Union Insurance Corporation,* 2001 BCCA 274; *Rae v. Canada (Chief Electoral Officer),* 2008 FC 246; ; *Frank v. Canada (Attorney General),* 2019 SCC 1; *Rae v. Canada (Chief Electoral Officer),* 2008 FC 246; *Opitz v. Wrzesnewskyj,* 2012 SCC 55; *Nelson v. Telus Communications Inc.*, 2021 ONSC 22, affirmed 2021 ONCA 751; *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113, 2001 SCC 67; *British Columbia (Attorney General) v. Lafarge Canada Inc,* 2007 SCC 23; *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re,* 2020 Carswell BC 1398

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INTRODUCTION

[1] No one can doubt that political parties are deeply integrated into our modern form of democratic representative government, notably at the provincial and federal levels. They establish policy platforms, elect leaders, nominate election candidates and campaign for office.

[2] The four parties involved in this proceeding are active nationally and in the past they each have fielded federal election candidates in one or more British Columbia electoral districts, including in the federal election held last autumn.

Each of the four is a "registered party" under the *Canada Elections Act* (CEA).[1] This decision deals with whether British Columbia's *Personal Information Protection Act*[2] (PIPA) is constitutionally applicable to their collection, use and disclosure of personal information in the province.

[3] By way of background, in an August 26, 2019, letter three residents of British Columbia (the complainants) sought access, under PIPA, to their personal information held by the Liberal Party of Canada (Liberal Party), Conservative Party of Canada (Conservative Party), New Democratic Party of Canada (NDP), and Green Party of Canada (Green Party).[3] The complainants also sought information on the ways in which their personal information had been and was being used, how their personal information was being used in profiling them, and to whom their information had been disclosed.[4] These requests were said to be made "pursuant to our rights under applicable Canadian privacy law".[5]

[4] The four parties each responded in the autumn of 2019, disclosing information about what personal information they held about the complainants.[6] In a December 3, 2019, letter to the Office of the Information and Privacy Commissioner for British Columbia (OIPC) from their legal counsel, the complainants sought an investigation under PIPA into the privacy protection policies and practices of the four parties. The letter said that the political parties' responses were "inadequate" and did not satisfy their obligations under section 23(1) of PIPA. The letter gave details about this allegation and enclosed individual responses from each of the complainants, elaborating on their concerns.[7]

[5] It is apparent that the political parties have consistently taken the position with the OIPC that PIPA does not, for constitutional reasons, apply to them, leaving the OIPC with no jurisdiction to investigate them in response to these complaints. Given this, the OIPC issued a notice of hearing on July 26, 2021, the objective of which was to enable the parties' positions on PIPA's applicability to be addressed. This decision, which flows from that hearing, is entirely concerned

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[1] SC 2000, c 9.
[2] SBC 2003, c 63.
[3] As noted later, this request was also made to other federal political parties, but they are not involved in this proceeding.
[4] Complainants' initial submission, paragraph 4; stated facts, paragraphs 1-3. A copy of the letter forms Exhibit 34 of the affidavit sworn by one of the complainants ("complainant affidavit"), which forms part of the complainants' submissions here.
[5] The letter also referred to "the common contractual promises" the political parties were alleged to have made through their privacy policies.
[6] The political parties' responses are found in Exhibits 35-47 of the complainant affidavit.
[7] The complaint letter indicated that the complainants had also made requests to the Bloc Québécois and the People's Party of Canada but explicitly left open the question of whether an investigation should be opened respecting those two parties. The OIPC has not opened an investigation file for either of those political parties and they are not implicated in this decision.

with whether PIPA can, constitutionally speaking, validly apply to these four political parties.

[6] As is explained below, in constitutional terms, PIPA's true substance is as a law in respect of property and civil rights and in relation to local matters. It is validly enacted under the *Constitution Act, 1867*.[8] Nor is PIPA's application to these four political parties ousted by the constitutional doctrines of interjurisdictional immunity or paramountcy.

[7] It follows that an OIPC investigation of the complaints about the respondent parties can proceed.

ISSUES

[8] It appears that early in the OIPC's investigation at least some of the political parties took the position that PIPA does not apply to them and that the OIPC has no jurisdiction to investigate the complainants' allegations. To bring their objections into focus and address them, I stated an issue to be decided, doing so in as neutral a fashion as I could while being aware that the objections to PIPA's application could only be constitutional in nature:

> With respect to each of the Liberal Party of Canada, the Conservative Party of Canada, the New Democratic Party of Canada and the Green Party of Canada, on the basis that each of them is an "organization" as defined in the *Personal Information Protection Act* (British Columbia) (PIPA), does PIPA apply to that political party's collection, use or disclosure of personal information, including through its registered agent appointed under the *Canada Elections Act* (Canada), through electoral district associations associated with it under the *Canada Elections Act*, or through other representatives of that political party?[9]

[9] The Liberal Party suggested in response that the participants should be given an opportunity to make submissions on the issues to be determined and, to the extent determination of the issues required that notice be given to others, notice should be given.[10] The Conservative Party agreed.[11] The NDP did not comment on the stated issue but said "there must an appropriate process to

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[8] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

[9] July 26, 2021, letter to all participants. In framing this issue, I wanted to be careful not to preclude anyone from making submissions on other grounds. In *Courtenay-Alberni Riding Association of the New Democratic Party of Canada (Re)*, 2019 BCIPC 34 [*Courtenay-Alberni*], for example, the respondent NDP-affiliated organization argued—as is argued here—that the federal *Personal Information Protection and Electronic Documents Act* applied to it because it was an "organization" as defined in PIPEDA.

[10] August 10, 2021, letter from counsel to the Liberal Party.

[11] August 16, 2021, letter from counsel to the Conservative Party.

resolve any controverted facts prior to proceeding."[12] The complainants merely submitted that the stated issue, and the process for submissions, need not be changed.

[10] The Conservative Party proposed amendments to the issue to be decided.[13] It proposed expanding the above question to include all federal political parties, not just the four political parties subject to this proceeding. It also proposed changing the issue to state that each federal party is an "organization" within the meaning of both PIPA and the *Personal Information Protection and Electronic Documents Act*[14] (PIPEDA). The Conservative Party also proposed to explicitly ask whether PIPA is "ousted by the operation of a comprehensive federal regulatory scheme applicable to the activities of political parties, which includes PIPEDA, the *Canada Elections Act* (Canada), and other legislation". Last, it would have removed reference to a political party acting through others, i.e., by removing the words "including through its registered agent appointed under the *Canada Elections Act* (Canada), through electoral district associations associated with it under the *Canada Elections Act*, or through other representatives of that political party?"

[11] In the end, the NDP, the Liberal Party, and the Conservative Party served notices under the *Constitutional Question Act*[15] on the Attorney General of Canada and the AGBC.[16]

[12] The NDP gave notice of these questions to the AGBC and the Attorney General of Canada:

1. To the extent that PIPA purports to apply to federally registered political entities, is it ultra vires the Province by operation of s. 41 of the Constitution Act of 1867?

2. Is PIPA inapplicable to federally registered political entities because the Canada Elections Act, the *Personal Information Protection and Electronic Documents Act* and other applicable federal laws are paramount?

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[12] August 10, 2021, letter from counsel to the NDP. The NDP has not, including in its submissions and affidavit evidence, identified any "controverted facts", disputed any of the stated facts, or disputed the evidence adduced by the complainants, the Liberal Party or the Conservative Party.
[13] August 16, 2021, letter from counsel to the Conservative Party.
[14] SC
[15] RSBC 1996, c 68.
[16] In an October 22, 2021, letter, the Liberal Party's counsel interpreted my decision not to invite the parties to comment on the issue "to mean that the parties are to serve our notices of constitutional question on the Attorneys General with our submissions and affidavit on October 29". The Conservative Party, in an October 25, 2021, letter from its counsel, said that it understood my decision the same way, i.e., "that the parties are to serve their notices of constitutional question on the Attorneys General with our submissions and affidavit evidence on October 29." Both parties did so.

3. To the extent that PIPA purports to apply to federally registered political parties, do its provisions amount to unjustified limits on the right to vote and the freedom of expression guaranteed by the *Charter*?[17]

[13] In addition, the Liberal Party has argued that PIPA is not an "organization" within the meaning of PIPA. The NDP also argues that, because PIPEDA applies to it, PIPA does not apply to it by virtue of section 3(2)(c) of PIPA.[18]

[14] The Conservative Party's notice of constitutional question raised the question of whether, to the extent PIPA purports to apply to federally registered political entities, it is outside British Columbia's legislative competence by operation of section 41 of the *Constitution Act, 1867*. It also stated the question of whether PIPA is inapplicable to such entities because the CEA, PIPEDA "and other applicable federal laws are paramount".[19]

[15] The Liberal Party's notice of constitutional question stated the questions as whether PIPA is "inoperative with respect to federal political parties by reason of federal paramountcy" and, in the alternative, whether "PIPA is inapplicable to federal political parties based on the doctrine of interjurisdictional immunity."[20] The Liberal Party also submits that it is not an "organization" subject to PIPA.

[16] The issues discussed below were therefore known to the parties before they made their submissions, and they have been able to respond to each others' arguments. In the end, while I did not invite the participants to comment on the issue as I stated it, all participants have had the opportunity to state their issues—and there is considerable commonality there—to make their case, with evidence and legal argument, and to respond to each other and the AGBC.[21] No one has sought, since the completion of submissions, to raise other issues or to be heard further.

[17] The issues considered below are as follows:

1. Is a federal political party an "organization" within the meaning of that term in PIPA, such that PIPA purports to apply to a federal political party? If so, does section 3(2)(c) of PIPA oust its application?

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[17] October 15, 2021, letter from NDP counsel.
[18] NDP reply, paragraph 5.
[19] October 29, 2021, letter from counsel to the Conservative Party to the Attorney General of Canada and AGBC.
[20] October 29, 2021, letter from counsel to the Liberal Party to the Attorney General of Canada and AGBC.
[21] In an August 17, 2021, letter to the participants I underscored that they would have an opportunity to reply to the others' submissions and evidence, while providing their own evidence.[21]

2. Is PIPA validly enacted under a provincial head of legislative authority under the *Constitution Act, 1867*?

3. If it is validly enacted, is PIPA inapplicable to the participating federal political parties by virtue of the constitutional doctrine of paramountcy?

4. If it is validly enacted, is PIPA inapplicable to the participating federal political parties by virtue of the constitutional doctrine of interjurisdictional immunity?

5. Does PIPA unconstitutionally infringe the right to vote, or the freedom of political expression, as guaranteed by the *Charter*?

DISCUSSION

Preliminary Matters

[18] Some preliminary matters are addressed below.

Green Party did not make submissions

[19] Although the OIPC gave the Green Party notice of this process over the course of several months, the Green Party did not engage and has not made submissions or provided evidence.

Request that others be invited to participate

[20] The Conservative Party asked that the Chief Electoral Officer of Canada and the Privacy Commissioner of Canada be invited to provide submissions given, the Conservative Party says, the importance of the issues for matters within the scope of their responsibilities.[22] The Conservative Party also said it "is concerned that the limited range of participants is not reflective of the spectrum of interests (in particular, national interests) that are affected by any decision".[23] It noted that, of the 22 federally registered political parties, only four are respondents in this proceeding.[24] The Liberal Party echoed this concern, asserting that, because this decision "affects all federally registered parties", notice ought to have been given to all federal political parties.[25]

[21] The Conservative Party later elaborated that

> … the CPC is of the view that both the Privacy Commissioner of Canada and the Chief Electoral Officer of Canada should be provided with notice of

[22] This is noted at paragraph 22 of the Conservative Party's initial submission.
[23] Conservative Party's initial submission, paragraph 12.
[24] Ibid., paragraph 11.
[25] Liberal Party's reply, paragraph 40.

> this hearing and be given an opportunity to make their views known. The privacy issues the current process proposes to impact in this matter arise in the context of the Canadian democratic process and cannot be divorced from it; it is therefore essential that representatives from these offices be given the opportunity to participate.[26]

[22] As the Conservative Party has acknowledged, whether a person is to be given notice under PIPA turns on whether the Information and Privacy Commissioner (Commissioner) considers it appropriate to do so.[27] Only the four parties named above are the subject of the complaint files that the OIPC has opened. Other federal political parties, even those that might collect, use, or disclose personal information in British Columbia, are not to my knowledge the subjects of those files.

[23] This decision is solely concerned with the participating parties' threshold objection—in response to a complaint about them, not about other political parties—that PIPA is constitutionally inapplicable to them, such that the OIPC cannot investigate the allegations against them. Their challenge crystallizes around a well-defined set of constitutional issues and the participating parties have provided extensive legal argument, and evidence, about whether they are subject to PIPA, as have the complainants. The participating parties have each notified the Attorney General of British Columbia (AGBC) and the Attorney General of Canada, as required by the *Constitutional Question Act*, and the AGBC has participated.

[24] In these circumstances, I did not consider it appropriate to invite all other federally registered political parties to make submissions on the question of whether PIPA is constitutionally inapplicable to the complaint respondents, the Conservative Party, the Liberal Party, the NDP and the Green Party. Nor did I consider it appropriate, given the opportunity for the two attorneys general to participate on the constitutional issues, to, as suggested, invite two federal regulatory agencies, the Privacy Commissioner of Canada and the Chief Electoral Officer of Canada, to make submissions on whether PIPA is constitutionally inapplicable to these particular parties.

Authority to decide constitutional questions

[25] The political parties have said that the OIPC has no jurisdiction to investigate them. They have not taken issue with the jurisdiction to decide the constitutional issues, while the AGBC submits that "the Commissioner has jurisdiction to decide the constitutional issues."[28]

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[26] October 25, 2021, email from counsel to the Conservative Party.
[27] PIPA, section 48(1)(a).
[28] AGBC submission, paragraph 14.

[26] The Commissioner has delegated to me the "powers, duties and functions contained in sections 36 through 39 and 45 through 52 of PIPA."[29] Under section 50, that authority extends to deciding "decide all questions of fact and law". This raises the presumption that the Commissioner has the authority to decide constitutional issues. As Commissioner McEvoy noted in a case that involved similar constitutional questions about PIPA's application:

> [31] … The Supreme Court of Canada has held that, in deciding whether a tribunal has the authority to decide constitutional issues, the "essential question" is whether its "empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide" a constitutional question. Section 50 authorizes me to decide all questions of law arising in the course of an inquiry. I am satisfied that this authority extends to my deciding the organization's jurisdictional, or threshold, challenge to PIPA's application and thus that I have the jurisdiction to decide the constitutional questions the organization has raised.[30]

[27] While it is true the authorities that the Commissioner cited relate to the jurisdiction to decide issues related to the *Canadian Charter of Rights and Freedoms*[31] (*Charter*), having considered the decisions cited in *Courtenay-Alberni*, I agree with his conclusion that PIPA confers authority on the Commissioner, and therefore a delegate of the Commissioner, to decide the constitutional questions addressed here.

Attorney General of Canada chose not to participate

[28] The Attorney General of Canada declined the opportunity to be heard on the constitutional questions, as was also the case in *Courtenay-Alberni*. As the Supreme Court of Canada has said, courts (and of course statutory adjudicators) "should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity".[32] This is, of course, very far from determinative, but this does, as the Supreme Court said, "invite the Court to

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[29] June 25, 2021, delegation instrument.
[30] *Courtenay-Alberni Riding Association of the New Democratic Party of Canada (Re)*, 2019 BCIPC 34 [*Courtenay-Alberni*], footnotes omitted. In reaching this conclusion, Commissioner McEvoy cited *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 SCR 585, 2003 SCC 55; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54; and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43.
[31] *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982,* 1982, c 11 (UK).
[32] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146, 2002 SCC 31 [*Kitkatla Band*], at paragraph 72.

exercise caution before it finds that the impugned provisions" of a statute "are ultra vires the province."[33]

Status of the Courtenay-Alberni decision

[29] As will be seen later, the participants have variously relied on or criticized the Commissioner's decision in *Courtenay-Alberni* and it is appropriate to comment on this here. Administrative tribunals are not strictly speaking bound by their earlier decisions. It is equally true, however, that consistency in tribunal decisions is highly desirable and earlier decisions should not be departed from lightly.[34] While I have had appropriate regard for the helpful reasons of Commissioner McEvoy in *Courtenay-Alberni*, I have for my own reasons, based on the arguments and evidence at hand, decided that PIPA is applicable to these political parties.

Outline of the Evidence and Facts

[30] This section sets out key facts on which this decision relies.[35]

Complainants

[31] The complainants' initial request to the political parties, which has led to this decision, discloses that they each reside in British Columbia.[36] As already noted, their request was for access to their personal information in the possession of leading federal political parties, as well as information about the

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[33] Ibid., at paragraph 73. Also see *OPSEU v. Ontario (Attorney General)*, [1987] 2 SCR 2, 1987 CanLII 71, at pages 19-20.

[34] As the Supreme Court of Canada said in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 131: "Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable" (original emphasis).

[35] The facts set out below in relation to the complainants and each of the political parties are drawn from the evidence they submitted, and, in only the instances expressly noted below, from stated facts. As for stated facts, the July 26, 2021, hearing notice to the participants set out proposed stated facts and invited submissions on them. The Liberal Party offered some changes, as did the complainants and the Conservative Party. Again, in an August 17, 2021, letter to the complainants and the political parties, I assured them that they could provide other evidence as part of their submissions, and they have all done so. Their evidence underpins this decision and, in the end, unless a fact set out below is expressly described as a stated fact, the facts stated in the July 26, 2021, hearing notice form no part of this decision.

[36] This is a reasonable inference based on the complainant affidavit, which indicates that each of the three complainants resides in British Columbia. Specifically, page 3 of Exhibit "34" to the complainant affidavit, which is found at page 460 of that affidavit, is a copy of the complainants' August 26, 2019, letter to the parties. It bears the names of each of the complainants and British Columbia civic addresses for each of them are set out.

ways in which that information was being used, and to whom it had been disclosed.[37]

Liberal Party

[32] The Liberal Party is an unincorporated association of registered members and is a registered party under the CEA.[38] Its chief agent under the CEA is The Federal Liberal Agency, a corporation incorporated under the *Canada Not-for-profit Corporations Act*[39] and is registered in each territory and province where that is required.[40] The Liberal Party also has electoral district associations in each riding across Canada and these are registered under the CEA.[41] The Liberal Party fielded candidates in each British Columbia electoral district during the 2021 federal election.[42]

[33] The Liberal Party relies on volunteers across the country, who are represented on volunteer advisory boards—which it says are not legal entities—from each territory and province.[43]

[34] Like all eligible federal political parties, the Liberal Party receives copies of the list of electors as provided in the CEA.[44] It follows Elections Canada's guidelines on use of the personal information in those lists.[45]

[35] The Liberal Party says it uses personal information to engage with voters, understand their interests and priorities and "mobilize democratic participation."[46] Its collection, use and disclosure of personal information is for "political purposes that are central to the Liberal Party's roles as set out in its Constitution", and is essential to achieving the "primary purpose of electing candidates to the House of Commons".[47]

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[37] Complainant affidavit, paragraph 58, and Exhibit "34".
[38] Paragraph 2 of the October 28, 2021, affidavit of Jessica Cardill (Cardill affidavit). The Liberal Party also noted that it is not affiliated with the BC Liberal Party, which is separate and distinct: paragraphs 12-14 of the Cardill affidavit.
[39] SC 2009, c 23. Paragraphs 8-10 of the Cardill affidavit confirm that The Federal Liberal Agency is the Liberal Party's chief agent under the CEA.
[40] This entity is registered in British Columbia under the *Societies Act*, SBC 2015, c 18. Stated facts, paragraph 6. This is not disputed by the Liberal Party in its evidence or argument.
[41] Cardill affidavit, paragraphs 5 and 6.
[42] October 28, 2021, affidavit sworn by one of the complainants (complainant affidavit), paragraph 10.
[43] Cardill affidavit, paragraphs 8 and 9.
[44] Ibid., paragraph 15.
[45] Ibid., paragraphs 16 and 17.
[46] Cardill affidavit, paragraph 24.
[47] Ibid., paragraph 24.

[36] As the CEA requires, the Liberal Party has a privacy policy, which has been filed with Chief Electoral Officer under the CEA.[48]

[37] In letters to each of the complainants dated October 1, 2019, the Liberal Party advised them of the personal information that the Liberal Party possessed. In response to the complainants' December 3, 2019, letter to the OIPC asking for an investigation, the Liberal Party, in undated letters sent to counsel to the complainants on October 2, 2020, provided them with copies of their personal information. On December 23, 2020, the Liberal Party told the OIPC that the personal information provided in these letters was all the personal information of the complainants held in Liberal Party databases.[49]

Conservative Party

[38] The Conservative Party is an unincorporated association of its members and is a registered political party under the CEA.[50] The Conservative Fund Canada, a corporation incorporated or continued under the *Canada Not-for-profit Corporations Act*, is the registered agent of the Conservative Party under the CEA.[51] The Conservative Party has registered electoral district associations throughout Canada, including in each British Columbia electoral district.[52] The Liberal Party fielded candidates in each British Columbia electoral district during the 2021 federal election.[53]

[39] By way of September 30, 2019, letters to the complainants, the Conservative Party provided copies of their personal information in its database.[54] It also provided information about how their personal information was used and to whom it was disclosed, which the Conservative Party says it did voluntarily, as it is "not bound by privacy statutes" and "the matter should have ended there."[55]

[40] The Conservative Party says it complies with the CEA's provisions for sharing of lists of voters, and restrictions on use of that information.[56] The Conservative Party also says that federal political parties and candidates are entitled to receive information disclosing which individuals voted, which enables

[48] Liberal Party initial submission, paragraph 40.
[49] Stated facts, paragraphs 8 and 9. This is not disputed by the Liberal Party in its evidence or argument.
[50] Conservative Party's initial submission, paragraph 7.
[51] Ibid.
[52] Conservative Party's submission, paragraph 9; also see the complainant affidavit, paragraph 21.
[53] Ibid., paragraph 25.
[54] Conservative Party's initial submission, paragraph 14.
[55] Ibid., paragraph 14.
[56] Paragraph 15 of the October 29, 2021, affidavit of Trevor Bailey, the Conservative Party's Director of Membership (Bailey affidavit).

parties to identify who did not vote in each riding, enabling parties to encourage voters who have not yet voted to do so.[57]

[41] The Conservative Party has a privacy policy that it has filed under the CEA.[58]

[42] Regarding oversight of its privacy practices, the Conservative Party says that "the Chief Electoral Officer has the ability to enforce compliance with the CEA, including levying penalties and deregistering parties. These sanctions are applicable to the privacy provisions in the CEA."[59]

NDP

[43] As the NDP's constitution suggests, the NDP is an unincorporated association of members of the NDP.[60] The New Democrats of Canada Association, a federal not-for-profit corporation, is the NDP's registered agent under the CEA.[61]

[44] The NDP is a registered political party under the CEA and has registered electoral district associations in every province and territory,[62] including in each of British Columbia's electoral districts.[63] The NDP fielded candidates in all British Columbia electoral districts in the 2021 federal election.[64]

[45] The NDP conducts voter outreach, including by in-person voter canvassing, phone calls, text messaging and "using issues to solicit members of the public to join our contact lists."[65] These and other activities—such as maintaining party membership and fundraising—include use of the electoral list under the CEA, "as well as collecting personal information directly from potential voters."[66] The NDP notes that Elections Canada gives federal political parties copies of the list of electors, which includes names and addresses.

[46] On July 17, 2020, the NDP sent responses to the complainants, describing what personal information the NDP possessed for each of them, and referred them to its privacy policy. The NDP says that it has developed

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[57] Conservative Party's submission, paragraph 31, and paragraph 11 of the Bailey affidavit.
[58] Bailey affidavit, paragraph 12.
[59] Ibid., paragraph 14.
[60] NDP constitution: https://xfer.ndp.ca/2016/documents/NDP-CONSTITUTION-EN.pdf (accessed July 22, 2021). Stated facts, paragraph 15. This is not disputed by the NDP in its evidence or argument.
[61] Stated facts, paragraph 17. This is not disputed by the NDP in its evidence or argument.
[62] NDP's initial submission, paragraph 7.
[63] Complainant affidavit, paragraph 31.
[64] Complainant affidavit, paragraph 33.
[65] Affidavit of Jesse Strean Calvert (Calvert affidavit), paragraph 3.
[66] Ibid.

"significant internal protections" for personal information.[67] Its privacy policy states that it "is in strict compliance with Canadian privacy principles" and obligations under the CEA.[68]

Green Party of Canada

[47] The Green Party is an unincorporated association of members of the Green Party. It is a registered political party under the CEA.[69] The Green Party of Canada Fund, a corporation incorporated or continued under the *Canada Not-for-profit Corporations Act*, is the registered agent of the Green Party under the CEA.[70]

[48] The Green Party has 37 electoral district associations in British Columbia.[71] During the 2021 federal election, the Green Party fielded candidates in 35 of British Columbia's electoral districts.[72]

[49] On September 16, 2019, the Green Party advised the complainants of their personal information in its databases.[73]

Facts relating to all respondent political parties

[50] Each of the political parties provides funding to at least some of its electoral district associations in British Columbia.[74]

[51] Elections Canada provides the political parties with access to personal information through copies of the list of electors.[75]

[52] Each of the parties involved has, as the CEA requires, submitted to the Chief Electoral Officer of Canada the party's policy for the protection of personal information, and has published their policies on an Internet site, as the CEA requires.[76]

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[67] Ibid., paragraphs 3-6.
[68] Exhibit 1 to the Calvert affidavit.
[69] Stated facts, paragraph 21, and complainant affidavit.
[70] Again, this is a stated fact, noting that the complainant affidavit also provides relevant evidence.
[71] Complainant affidavit, paragraph 36.
[72] Ibid., paragraph 40.
[73] Ibid., paragraph 59.
[74] Complainants' initial submission, paragraph 13, and Appendix "A", citing the complainant affidavit, paragraph 44.
[75] Complainant affidavit, paragraphs 43(a), (b) and (c), complainants' initial submission, paragraph 12. This is also attested to in the political parties' evidence.
[76] NDP: paragraph 4 of the Calvert affidavit. Liberal Party: paragraphs 19 and 21 of the Cardill affidavit (and paragraph 26 of the stated facts as to Internet publication). Conservative Party: paragraphs 3 and 12 of the Bailey affidavit (and paragraph 26 of the stated facts as to Internet

[53] Each of them conducts canvassing of electors in British Columbia during a federal election period, including through door-to-door or telephone canvassing.[77]

[54] To sum up, each of the political parties involved in this proceeding is an unincorporated association, they each have affiliated organizations that are active in British Columbia on its behalf, they each collect personal information from Elections Canada that is about residents of British Columbia, and they each conduct canvassing activities in British Columbia. Further, each of the parties is registered with Elections Canada and each of them has a privacy policy filed in compliance with the CEA.

Discussion of the issues

NDP's contention that PIPA violates the Charter

[55] As noted earlier, the NDP contends that PIPA violates the *Charter*. It submits that "the provisions of PIPA represent unjustified limits on the right to vote and freedom of political expression guaranteed by the" *Charter*.[78]

[56] In its reply, however, the NDP agrees with the AGBC that the *Charter* issues would be better considered later and reserves the right to make submissions at a later stage.[79] The AGBC submits that the NDP's *Charter* claim should be dismissed because the NDP lacks standing. The AGBC argues in the alternative that the framework in *Doré v. Barreau du Québec*[80] should apply, meaning that the appropriate time to carry out that analysis is later, when the merits of the complaints are considered.[81]

[57] The complainants engage on the merits of some *Charter* issues but also suggest that the NDP's *Charter* claims merit rejection because the NDP has not offered an evidentiary foundation and because the NDP lacks standing.[82] The complainants concede that *Charter* issues must not be decided in a factual vacuum.[83]

[58] I respectfully agree with Commissioner McEvoy's statement in *Courtenay-Alberni* that it "would undoubtedly be an error of law" to consider the *Charter*

publication). Green Party: stated facts, paragraph 26. No one has disputed paragraph 26 of the stated facts.

[77] Stated facts, paragraph 28. None of the political parties disputed this stated fact.

[78] NDP's initial submission, paragraph 6.

[79] NDP reply, paragraph 56.

[80] 2012 SCC 12.

[81] AGBC submission, paragraph 105.

[82] Complainant's reply, paragraph 82.

[83] Ibid., paragraph 83.

question "in a factual vacuum" and, like him, I decline to do so.[84] The issue of whether the NDP has standing to raise *Charter* issues, and the question of evidentiary sufficiency, will remain to be determined, if necessary, at a later stage.[85]

Are the participating political parties organizations as defined in PIPA?

[59] The Liberal Party says that neither it nor its registered agent, The Federal Liberal Agency of Canada, is an "organization" as defined by PIPA.[86] The Liberal Party acknowledges that, in *Courtenay-Alberni*, Commissioner McEvoy concluded that the association involved in that case was an "organization" even though it was constituted for federal electoral purposes and was active in that arena. Taking issue with this, the Liberal Party contends that PIPA must be interpreted in a way that is "presumptively constitutional", and to decide that a federal political party is an "organization" under PIPA would be "an unconstitutional interpretation".[87]

[60] The Liberal Party says that "PIPA should be interpreted as not extending to federal elections matters".[88] It says the relevant question is whether the inclusion in PIPA's definition of "organization" of the further term "unincorporated association" should be read to include federal political parties.[89] It argues that the required constitutional interpretation leads to the conclusion that these parties are not organizations as defined in PIPA. The Liberal Party argues that, while PIPA is applicable to the "B.C. private sector", it cannot constitutionally extend to federal political parties,[90] and PIPA's definition of "organization" must constitutionally exclude federal political parties because only Parliament can regulate federal elections.[91]

[61] In taking this position, the Liberal Party relies on *McKay et al v. The Queen*,[92] a 1965 decision in which the Supreme Court of Canada decided that a municipal sign bylaw should not be interpreted as applying to federal election signs. The Supreme Court said that "if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted."[93] Applying this

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[84] *Courtenay-Alberni*, paragraph 91 (citing *MacKay v. Manitoba*, [1989] 2 SCR 357, 1989 CanLII 26, at page 366.
[85] This is consistent with *Courtenay-Alberni*, in which Commissioner McEvoy declined, at paragraphs 89-92, to decide *Charter* issues in the context of his jurisdictional ruling that PIPA applied to the organization.
[86] Liberal Party's initial submission, paragraph 56.
[87] Ibid., paragraphs 58-59.
[88] Ibid., paragraph 61.
[89] Liberal Party's reply, paragraphs 14-17.
[90] Ibid.
[91] Liberal Party's initial submission, paragraphs 60-61.
[92] [1965] SCR 798, 1965 CanLII 3 [*McKay*].
[93] *McKay*, at page 804.

approach, the Supreme Court's majority concluded that it could not have been the municipal council's intention to enact a bylaw that extended to federal election signs.

[62] The AGBC responds that this is not the proper approach.[94] A statute of general application is not ultra vires a province's legislative competence because it allegedly applies in a constitutionally invalid manner. The proper first step, rather, is to decide whether the law is within the legislative authority of the province, i.e., to decide if the statute is constitutionally valid. If it is, the next step is to assess, using the principles of interjurisdictional immunity and paramountcy, whether the law can validly apply in the circumstances. This submission is persuasive.

[63] It bears mention that, in his majority reasons, Taschereau C.J. was careful to say that the validity of the bylaw or of the enabling provincial legislation was not challenged, and added this:

> The discussion of the extent to which provincial legislation may affect the carrying on of a political activity in the federal field was raised by counsel and has been pursued in these reasons merely to assist in arriving at the true construction of the by-law. That question of construction is in turn confined to ascertaining whether the general words used, which in their natural meaning do not merely regulate but forbid the display of signs at all times, were intended to have effect so as to forbid during the actual period of an election to Parliament the display of a sign of the sort described in the charge on which the appellants were convicted.[95]

[64] In his forthright dissenting reasons, Martland J. observed for himself and three other justices that the "essential feature of the by-law in question here is that it is of general application and, admittedly, valid."[96] He was not persuaded by the view that, "even though Parliament has not legislated on this subject, the field of proceedings at federal elections is one of federal jurisdiction and cannot be affected by provincial legislation, even though it is so affected only incidentally."[97]

[65] More recently, in joint reasons, Gascon, Côté and Rowe JJ., commented, in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, that "if the text of the legislation is capable of bearing a meaning that is constitutionally valid, then the courts will give it that meaning".[98] As the British Columbia Court of Appeal recently put it, citing *Desgagnés* and *McKay*, "Where multiple interpretations of a

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[94] AGBC's submission, paragraph 20.
[95] Ibid., page 807.
[96] Ibid., page 812.
[97] Ibid., page 810.
[98] 2019 SCC 58 (CanLII) [*Desgagnés*], at paragraph 28. These concurring reasons were on behalf of six members of the Court.

statute are possible, it is presumed the legislature intended the law to be read in a manner that is consistent with its legislative authority, which is to say, in a manner that is consistent with its constitutional authority."[99]

[66] The Supreme Court of Canada has for years underscored that the proper approach to statutory interpretation involves "reading the words of the statute in their entire context, in their grammatical and ordinary sense, harmonious with the scheme and object of the statute".[100] Applying this approach, I conclude the Legislature did not intend to exclude these unincorporated associations from PIPA's definition of "organization", which provides that an "unincorporated association" is an "organization". The plain meaning of those terms applies to these political parties—which are, as I have found, active in the province and collect personal information of residents—and I see no plausible reason to think that the Legislature intended any other meaning. PIPA's legislative purposes do not support another interpretation.[101] Nor does the language of the rest of the statute. I arrive at the same conclusion respecting section 3(1) of PIPA, which provides that, "[s]ubject to this section", PIPA "applies to every organization".

[67] I also do not accept that the fact an unincorporated association is constituted for, and active in, federal elections and related activities requires one to read down the definition of "organization". In my view, interpreting the term "organization" to apply to these unincorporated associations is consistent with the Legislature's legislative authority and its intention in enacting PIPA. Of course, as the AGBC's submission on this issue suggests, it remains to be seen whether PIPA is constitutionally applicable to these organizations.

The NDP's argument that it is subject to PIPEDA, not PIPA

[68] The next issue is whether the NDP is right to say that PIPEDA applies to it, and to its electoral district associations, such that they are "exempt from the application of PIPA under section 3(2)(c)" of PIPA.[102] The NDP submits that section 3(2)(c) of PIPA excludes federal political parties from PIPA's scope because PIPEDA applies to federal political parties.[103] It also says that PIPA relies on PIPEDA's provisions "to exclude organizations under federal jurisdiction"—i.e., "federal works, undertakings or businesses"—from PIPA's application, and federal political parties are "federal works, undertakings or businesses".[104]

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[99] *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal*, 2022 BCCA 20 (CanLII).
[100] For a recent affirmation of this principle, see *R. v. Khill*, 2021 SCC 37, paragraph 77.
[101] The legislative objectives of PIPA are outlined below. I have considered them in addressing this interpretive issue.
[102] NDP's initial submission, paragraph 5.
[103] Ibid., paragraph 43.
[104] Ibid., paragraph 44.

[69] The NDP begins with the proposition that "the objectives and the context of other relevant legislation must be considered" in interpreting PIPA, adding that "legislation cannot be interpreted to override other legitimate legislative objectives or the context to which one seeks to apply it."[105] As I understand it, the NDP is suggesting that the CEA and the other federal statutes it cites are relevant to PIPA's interpretation, i.e., that the "objectives and the context" of those federal laws must be considered in the interpretive exercise.

[70] The NDP appeals to what it says were "extensive amendments" to the CEA in 2018, through the *Elections Modernization Act*,[106] which it says are "relevant to the issues at hand."[107] It also refers to provisions of the *Telecommunications Act*[108] and what is commonly known as *Canada's Anti-Spam Legislation*,[109] laws that, respectively, regulate telephone and electronic communications with individuals. The NDP argues that this federal legislative framework reflects "Canada's balanced approach" to addressing individuals' privacy in relation to the activities of federal political parties, and that PIPA runs afoul of this approach.[110]

[71] As noted earlier, section 3(1) provides that PIPA "applies to every organization", but it does so in relation to types of personal information or respecting an organization's personal information practices. Section 3(2) excludes certain types of collection, use or disclosure of personal information and specified types of personal information from PIPA's application.[111] An example of the latter is section 3(2)(e), which excludes from PIPA's application "personal information in…a court document" or "a document of a judge of the Court of Appeal, Supreme Court or Provincial Court, or a document relating to support services provided to a judge of those courts". An example of the first type of exclusion is section 3(2)(b), which provides that PIPA does not apply to "the collection, use or disclosure of personal information, if the collection, use or

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[105] NDP's initial submission, paragraph 10, citing *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 354.
[106] SC 2018, c 31.
[107] Ibid., paragraph 11.
[108] SC 1993, c 38.
[109] *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*, SC 2010, c 23.
[110] NDP's initial submission, paragraph 28. PIPA came into force in 2004, long before enactment of the 2018 CEA amendments, as well as the *Telecommunications Act* and *Canada's Anti-Spam Legislation* provisions, that the NDP says are relevant in discerning the legislative intention underlying section 3(2)(c). I do not accept that these more recent federal laws have any relevance to interpretation of what the Legislature intended when it enacted PIPA.
[111] For example, section 3(2)(d) provides that PIPA does not apply to "personal information" to which the *Freedom of Information and Protection of Privacy Act* applies to it. Another example is section 3(2)(e), which excludes personal information in court documents or judicial administration records.

disclosure is for journalistic, artistic or literary purposes and for no other purpose". None of the section 3(2) exclusions, which deal with certain types of information or information practices, excludes types of organizations per se.

[72] Consistent with this, section 3(2)(c), cited by the NDP, focuses on the collection, use or disclosure of personal information to which PIPEDA applies. It says that PIPA "does not apply to…the collection, use or disclosure of personal information, if the federal Act [PIPEDA] applies to the collection, use or disclosure". The NDP relies on this to argue that, because it is a "federal work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces" as defined in section 2(1) of PIPEDA, PIPA does not apply to it.

[73] It argues that the business of federal political parties and their electoral district associations is clearly within Parliament's legislative authority, "and outside the exclusive legislative authority" of the provinces.[112] The Governor in Council has, using its authority under PIPIEDA, exempted organizations in British Columbia from PIPEDA's application to them, but expressly did not exclude federal works, undertakings or businesses from PIPEDA's application in British Columbia.[113] Therefore, the NDP says, PIPEDA "applies to federal political parties" as they are federal works, undertakings or businesses. In turn, section 3(2)(c) ousts PIPA's application to the NDP.[114] As the NDP puts it, "Parliament and the Governor in Council clearly did not intend to subject organizations under federal jurisdiction to BC's PIPA".[115] It adds this:

> It is true that section 4(1) of *PIPEDA* targets personal information that organizations collect, use, or disclose in the course of commercial activities. However, the effect of this section is not to remove a political party from the application of *PIPEDA*. Rather, Parliament has made a legislative decision to not subject non-commercial activities to Part 1 of *PIPEDA*. The fact that non-commercial activities of political parties might not be regulated by Part 1 at this time does not erase the fact that Parliament clearly intended for FWUBs, such as political parties, to be subject to *PIPEDA*.

[74] The NDP's argument is not persuasive. It requires one to accept that PIPEDA applies to federal works, undertakings or businesses full stop,

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[112] Ibid., paragraph 33.
[113] Section 26(2)(b) of PIPEDA provides that the Governor in Council may, by order, "if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province". As the NDP notes, the so-called exclusion order for British Columbia provides that the exemption from PIPEDA's application in British Columbia does not extend to a federal work, undertaking or business.
[114] Ibid., paragraphs 34-40.
[115] Ibid., paragraph 36.

regardless of whether they collect, use or disclose personal information in the course of a commercial activity or in relation to employment of individuals.

[75] As the NDP puts it above, the effect of PIPEDA's section 4(1) allegedly "is not to remove a political party from the application of PIPEDA." The NDP points to no provisions in PIPEDA that expressly subject federal works, undertakings or businesses to PIPEDA full stop, regardless of whether they collect personal information in the course of a commercial activity. Sections 4(1)(b) and 7.3 of PIPEDA contain rules about an organization's collection, use or disclosure of what could conveniently be called employment-related information where that is done in connection with the operation of a federal work, undertaking or business. Apart from PIPEDA's definition of "federal work, undertaking or business" these two provisions contain the only mentions of that term in the statute. Nowhere does PIPEDA say that it applies to federal works, undertakings or businesses in the manner the NDP suggests.[116]

[76] Rather, PIPEDA's stated purpose is to establish **"**rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances."[117] Like PIPA, PIPEDA is about personal information practices and the suggestion that it applies to the NDP as an "organization" that is also a "federal work, undertaking or business", but does not apply to its personal information practices, flies in the case of the purpose and text of PIPEDA.[118]

[77] Even if the NDP's argument on this point were correct, I would in the alternative find that Parliament's authority to legislate in respect of elections to

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[116] In its reply, the NDP cites a 2021 decision of the Privacy Commissioner of Canada, entitled "Letter regarding complaint against federal political parties", March 25, 2021 (a copy forms Exhibit "1" to the complainant affidavit). The NDP suggests, at paragraph 13 of its submission, that this "solidifies" its argument "that Parliament clearly intended" that a federal work, undertaking or business" be regulated under PIPEDA. That may be true as regards such an entity's collection, use and disclosure of personal information in the course of a commercial activity, but the decision does not support the NDP's argument here.

[117] PIPEDA, section 3.

[118] Commissioner McEvoy dealt with this question in *Courtenay-Alberni*. The respondent constituency association argued that PIPEDA applied to it because it is an "organization" as defined in that statute, such that, by virtue of section 3(2)(c), PIPA did not apply to it. Regarding section 4(1), he concluded, at paragraph 26, that the "opening language of s. 4(1) does not mean that PIPEDA applies to every unincorporated association across the country simply because they qualify as organizations within the meaning of PIPEDA's definition of that term." He also noted, at paragraph 27, that section 3(2)(c) of PIPA focuses on activity—the collection, use and disclosure of personal information by an organization—and section 4(1) of PIPEDA similarly "targets circumstances in which PIPEDA applies to a particular collection, use or disclosure of personal information, not whether an entity falls within PIPEDA's definition of 'organization'".

the House of Commons does not mean that a federal political party is on that basis a "federal work, undertaking or business" as defined in PIPEDA.

[78] PIPEDA defines the term "federal work, undertaking or business" as meaning "any work, undertaking or business that is within the legislative authority of Parliament" and goes on to state that this includes familiar things, such as "a railway, canal, telegraph or other work or undertaking that connects a province with another province", a "line of ships that connects a province with another province, or that extends beyond the limits of a province", "aerodromes, aircraft or a line of air transportation", "radio broadcasting", and "banks".

[79] The NDP's argument fastens on section 2(1)(i), which includes as a "federal work, undertaking or business" any "federal work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces". This requires one to accept that a federal political party is a "work", an "undertaking" or a "business" within PIPEDA's meaning. It also requires one to accept that a federal political party is not "within the exclusive legislative authority" of a provincial legislature. The NDP cites no authority to support its interpretation of this definition of "federal work, undertaking or business".

[80] An unincorporated association that is a federal political party is an "organization" but is not a "work", an "undertaking" or a "business" within the meaning of PIPEDA. I am therefore not persuaded by the NDP's argument that it is such a creature, the result being that section 3(2)(c) of PIPA excludes federal political parties from PIPA's scope.

[81] Moreover, the definition on which the NDP relies also requires that such an entity be within "the legislative authority of Parliament" and "outside the exclusive legislative authority of the legislatures of the provinces". The reference to "exclusive" authority reflects the language of the *Constitution Act, 1867*, whose text uses that term in relation to both federal and provincial heads of authority.[119] The PIPEDA definition, to the extent it requires exclusivity of provincial legislative authority, failing which any "work", "undertaking" or "business" would be a "federal work, undertaking or business", does not sit easily with constitutional jurisprudence as it has developed since PIPEDA's enactment in 2000.

[82] At all events, I am not persuaded that this aspect of the definition makes the NDP or any other federal political party a federal work, undertaking or business for present purposes.

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[119] As seen later, PIPA is a valid exercise of the Legislature's authority, under section 92(13), to legislate in respect of property and civil rights in the province. The opening words of section 92 provide that, "[i]n each Province the Legislature may *exclusively* make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated", which includes "Property and Civil Rights in the Province" (emphasis added).

[83] The NDP also cites *British Columbia (Constituency Office of a Federal Member of Parliament) (Re)*[120] in support of its contention that Parliament intended federal works, undertakings or businesses "such as political parties" to be subject to PIPEDA. *Constituency Office*, which is also discussed later, does not advance that claim.[121]

[84] A decision of the OIPC, *Constituency Office* dealt with the question of whether PIPA applies to the constituency office of a Member of Parliament. It did not deal with federal political parties. The adjudicator did say that "the privacy obligations of federal works, undertakings and businesses are regulated by federal legislation" but that was a passing comment and not part of her finding that the offices of Members of Parliament "are subject to federal jurisdiction in this area".[122]

[85] As I see it, at its heart the adjudicator's decision turned on section 18 of the *Constitution Act, 1867*, which gives Parliament exclusive authority over the "privileges, immunities and powers to be held, enjoyed and exercised" by members of the House of Commons". On that basis, she concluded that "jurisdiction to legislate to affect the manner in which an MP's office operates in its assistance of constituents lies with the federal government", and that "federal legislators are not subject to provincial jurisdiction in that regard."[123] The adjudicator did go on to discuss paramountcy and interjurisdictional immunity—this part of the decision is discussed below—but *Constituency Office* does not stand for the proposition that a federal political party is a "federal work, undertaking or business" under PIPEDA and is thus not subject to PIPA. The adjudicator's passing comment about regulation of the privacy practices of federal works, undertakings or businesses does not assist the NDP's argument.

[86] For the above reasons, I conclude that a federal political party such as the NDP is an "organization" within the meaning of PIPA, it is not a federal work, undertaking or business as defined in PIPEDA, and it is not excluded from PIPA's application by section 3(2)(c) of PIPA. Even if a federal political party were a "federal work, undertaking or business" as defined in PIPEDA, PIPEDA would not apply on that basis alone.

Overview of federal legislation in issue

[87] Because the participants' constitutional arguments refer to provisions of the CEA and other federal laws it is useful to offer a brief overview of them here.

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[120] 2007 CanLII 52750 [*Constituency Office*].
[121] NDP's initial submission, paragraph 40.
[122] Ibid., paragraph 18.
[123] Ibid., paragraph 17.

[88] Section 45(1) of the CEA provides for disclosure to federal political parties and Members of Parliament of an electronic copy of the list of electors, which contains "each elector's surname, given names, civic address and mailing address, and the identifier that is assigned to the elector".[124]

[89] Section 110 authorizes federal political parties, Members of Parliament and election candidates to use the lists "for communicating with electors", including "for soliciting contributions and recruiting party members." As the NDP notes, the CEA allows people to ask not to be included in the list of electors but, failing that, a voter's consent is not relevant—a party may contact a voter without consent.[125]

[90] Section 385(1) of the CEA requires a political party that applies for registration under the CEA to include in its application, as section 385(2)(k) stipulates, "the party's policy for the protection of personal information". That section prescribes the elements that must be included in a privacy policy: a statement describing the types of personal information a party collects; a statement indicating how it uses personal information and may sell it; a statement indicating how it protects personal information; a statement about employee training; and a statement about its practices relating to collection and use of personal information created from online activity and its use of cookies. A policy also must include contact information of someone to whom concerns can be addressed. Section 385(4) requires a political party to publish its privacy policy on the party's internet site before it submits its registration application. Section 385(2)(l) requires an applicant political party to include in its application "the address of the page — accessible to the public — on the party's Internet site where its policy for the protection of personal information is published" (and section 385.1(1) extends this requirement to registered federal political parties).

[91] Section 385.1 required registered federal political parties to file their privacy policies with the Chief Electoral Officer within three months after that section came into force. There is a comparable requirement for applicant political parties.

[92] If a registered federal political party has failed to comply, section 385.1(2) provides that the Chief Electoral Officer "shall implement the procedure for non-voluntary deregistration" set out in the CEA and provides that an applicant party that has not complied cannot be registered.

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[124] These other CEA provisions also provide for lists of electors, including preliminary lists, to be made available: sections 45, 93(1.1), 104.2, 107(4) and 109.

[125] NDP's initial submission, paragraphs 20-23. It is, as the NDP also observes, an offence to "knowingly use personal information in a list of electors for purpose other than those listed in section 111 of the CEA.

[93] Two other federal statutes are cited.

[94] The first is the *Telecommunications Act*, which enables the Canadian Radio-television and Telecommunications Commission to make orders relating to the national do-not-call list. Section 41.7(1)(c) exempts from any such order a "telecommunication…made by or on behalf of a political party that is a registered party as defined in subsection 2(1) of the *Canada Elections Act* or that is registered under provincial law for the purposes of a provincial or municipal election".

[95] The other federal law relied on is *Canada's Anti-Spam Legislation*, section 6(1) of which prohibits the sending of "commercial electronic messages" without consent unless a consent exemption applies, including under the *Electronic Commerce Protection Regulations*.[126] Section 3(h) of those regulations exempts any message "that is sent by or on behalf of a political party or organization, or a person who is a candidate – as defined in an Act of Parliament or the legislature of a province – for publicly elected office and the message has as its primary purpose soliciting a contribution as defined in subsection 2(1) of the *Canada Elections Act*".

Constitutional Analysis

[96] Before dealing with the constitutional arguments, it is necessary to deal with the complainants' argument that there is an insufficient factual foundation on which to assess the constitutional issues that the political parties have raised. The complainants contend that the political parties' submissions are "glaringly lacking in evidence" and "do not rise above conclusory statements and unfounded assertions."[127] They suggest that the evidentiary deficit leaves only "the unsupported hypotheses of enthusiastic counsel," such that the political parties' constitutional challenge should fail on that basis alone.[128]

[97] It is true that, as Stratas J.A. has put it, "Decades of unbroken Supreme Court case law forbids courts from getting around that evidentiary requirement through judicial notice, assumptions or guesswork".[129] The complainants' position is, however, not persuasive. The available evidence offers a sufficient basis for adjudication of the constitutional issues at hand. There is evidence that each of the political parties involved is active in British Columbia. The evidence suggests that their activities here include the canvassing of voters, which, the evidence also indicates, can involve the collection of personal information. It is also clear that the political parties have collected personal information of the complainants.

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[126] SOR/2013-221.
[127] Complainants' reply, paragraph 12.
[128] Ibid., paragraph 15.
[129] *Weatherley v. Canada (Attorney General)*, 2021 FCA 158, at paragraph 43. Cited by the complainants at paragraph 13 of their reply.

There is, in other words, a sufficient factual basis for me to consider whether PIPA is validly enacted and, if it is, whether it is nonetheless constitutionally inapplicable to these four political parties.

[98] Turning to those central questions, it is helpful to note here what the Supreme Court of Canada has said this about the appropriate analytical approach:

> A court must conduct the pith and substance analysis before inquiring into the application of the doctrines of interjurisdictional immunity and federal paramountcy, both of which are predicated on the constitutional validity of the impugned statute or measure. If the doctrine of interjurisdictional immunity applies, the impugned measure remains valid but has no application with regard to the core of the power of the other level of government that it impairs: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 58. Similarly, where the doctrine of federal paramountcy applies, the impugned provincial measure is rendered inoperative to the extent of its incompatibility with the federal legislation: *Canadian Western Bank*, at para. 69; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 74.[130]

[99] In approaching the constitutional issues, it is necessary to "take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels".[131] As the British Columbia Court of Appeal has observed, although the constitution cannot be separated from the normal constraints of interpretation, "it is trite but true to note that Canadian constitutional law is a 'living tree' that reflects society and its changing concerns over time", and the "formerly inflexible approach to the division of powers has given way to a ready acceptance of overlapping and often 'mutually modifying' jurisdictions."[132]

[100] It is also the case, however, that, although co-operative federalism offers "flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of powers itself" and cannot "support a finding that an otherwise unconstitutional law is valid."[133]

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[130] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 [*Rogers Communications*], at paragraph 35.
[131] Ibid., paragraph 38.
[132] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, at paragraph 19. Appeal dismissed: *Reference re Environmental Management Act*, 2020 SCC 1.
[133] Ibid., paragraph 39.

Is PIPA within the legislative authority of the British Columbia Legislature?

[101] The NDP argues that PIPA is beyond the legislative authority of the Legislature because Parliament has exclusive authority to legislate with respect to the election of members of the House of Commons. It suggests that, because Parliament has legislated in respect of federal elections, British Columbia cannot, through PIPA, validly regulate "activities of federal electoral organizations that operate in British Columbia".[134] It also argues that the "political activities" of the NDP "are not matters of a merely local nature", and privacy legislation that purports to operate outside a province, or that affects matters that are not of a "merely local or private nature" in the province, is beyond the province's capacity.[135]

[102] The Conservative Party does not engage on the question of whether PIPA is validly enacted under a provincial head of legislative authority. It argues, rather, that PIPA cannot properly apply to federal political parties. Similarly, the Liberal Party acknowledges that PIPA is "valid provincial legislation as it regulates the collection, use and disclosure of personal information in the private sector in British Columbia."[136]

[103] The AGBC argues that, as Commissioner McEvoy concluded in *Courtenay-Alberni*, the pith and substance of PIPA is the regulation of the collection, use and disclosure of personal information by organizations. The AGBC contends that PIPA falls within British Columbia's authority to legislate under the provincial heads of legislative authority in respect of property and civil rights and matters of a local or private nature in the *Constitution Act, 1867*.

[104] The complainants contend that PIPA is validly enacted. They argue that PIPA is at its heart about regulating organizations' collection, use and disclosure of personal information. They say that any division of powers analysis must recognize that some degree of interplay and overlap will exist in regulating a matter. A federal or provincial law may incidentally affect provincial or federal matters, but so long as the law is within the enacting jurisdiction's authority, it is valid.

Principles that apply in assessing a statute's validity

[105] The first step requires a decisionmaker to identify what has traditionally been called the "pith and substance"—or the essential, true subject—of the statute under scrutiny. The second step requires a decisionmaker to decide if the "pith and substance" of the law falls under a provincial or a federal head of

[134] NDP's initial submission, paragraphs 51 and following.
[135] Ibid., paragraph 56.
[136] Liberal Party's initial submission, paragraph 54.

legislative competence in the *Constitution Act, 1867*.[137]

[106] The first stage involves considering the purpose and effects of the challenged statute to identify its true subject matter, i.e., its "main thrust, or dominant or most important characteristic".[138] This can involve both "intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees".[139]

[107] Regarding the statute's effects, both its "legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the 'side' effects that flow from the application of the statute" are considered.[140] It is clear that "incidental effects that are corollary or secondary to the dominant purpose of the law will not render the law constitutionally invalid", i.e., "[i]ncidental intrusions into another jurisdiction's mandate are to be expected" and the statute's dominant purpose remains decisive.[141]

[108] Incidental effects "may be of significant practical importance but are collateral or secondary to the mandate of the enacting legislature".[142] As the Supreme Court of Canada recently said, a "law's legal effects are discerned from its provisions by asking 'how the legislation as a whole affects the rights and liabilities of those subject to its terms'".[143] In turn, the law's practical effects—the side effects flowing from its application—must be assessed on the available evidence.[144]

[109] The Supreme Court has underscored this many times. In *Canadian Western Bank v. Alberta*, for example, it concluded that Alberta's *Insurance Act* is "about the regulation of the insurance industry within the province".[145] Although that Act applied "to all persons providing or promoting insurance services, including banks", it was a valid exercise of provincial authority over property and civil rights.[146] The fact that it could have "incidental effects on banks and, by implication, on the federal banking power", did not mean it was unconstitutional, as "such overlap is generally permissible and should not disturb the constitutionality of an otherwise *intra vires* statute".[147]

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[137] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Greenhouse Gas Reference*], paragraph 51.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 35 [*Jim Pattison Enterprises*], at paragraph 77.
[142] *Canadian Western Bank*, paragraph 28.
[143] *Greenhouse Gas Reference*, paragraph 70 (citation omitted).
[144] Ibid., paragraph 77.
[145] [2007] 2 SCR 3, 2007 SCC 22 [*Canadian Western Bank*], paragraph 116.
[146] Ibid.
[147] Ibid., citing *Kitkatla Band*, at paragraph 54.

[110] It is important to keep assessment of the statute's true subject, of its pith and substance, separate from the second step, i.e., the division of powers analysis. As the Supreme Court recently reminded us, failure to keep the two stages separate risks blurring the exercise and tilting it towards results.[148]

What is PIPA's true nature, or essence?

[111] What does the intrinsic and extrinsic evidence reveal about PIPA's true subject matter?

[112] As a general observation, the Supreme Court of Canada has acknowledged that Alberta's *Personal Information Protection Act*—which is closely aligned with PIPA in substance—aims to give individuals some measure of control over their personal information. This control over one's personal information is "intimately connected to their individual autonomy, dignity and privacy", which "are fundamental values that lie at the heart of a democracy."[149] For this reason, "legislation which aims to protect control over personal information should be characterized as 'quasi-constitutional' because of the fundamental role privacy plays in the preservation of a free and democratic society".[150]

[113] Like Alberta's statute, PIPA's title suggests that it is concerned with personal information protection.[151] This is echoed by the statement of legislative purpose in section 2:

> The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[152]

[114] Supplementing this intrinsic evidence, during the legislative debate leading to PIPA's enactment, the minister responsible had this to say:

> This bill accomplishes the key objectives of giving British Columbians protection for their personal information held by the private sector and allowing businesses and non-profit organizations to collect, use or disclose

[148] Ibid., paragraph 56.
[149] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62, at paragraph 19.
[150] Ibid.
[151] A statute's title is intrinsic evidence of its nature and purpose: *Greenhouse Gas Reference*, paragraphs 58-61.
[152] Statutory preambles and statements of legislative purpose are valid forms of intrinsic evidence: *Greenhouse Gas Reference*, at paragraphs 58-61, and *Jim Pattison Enterprises*, at paragraph 63.

> personal information for reasonable purposes. By striking this balance, this bill enhances B.C.'s competitive position while safeguarding British Columbians' personal information.
>
> …
>
> It strikes the appropriate balance between the strong desire of British Columbians to protect their personal information held by the private sector and ensures that B.C. for-profit and non-profit organizations are able to use the information they need for legitimate business activities. Under this bill, British Columbians can feel confident that their personal information is safe, even when using the Internet, and businesses can operate under a reasonable and understandable set of privacy rules that they helped create.[153]

[115] The minister added these observations:

> The provisions of this bill are intended to enhance the protection of personal information and at the same time provide a framework and structure that will allow organizations to take advantage of e-commerce and international trade opportunities. The provisions are designed to apply to all sizes of business and, for those organizations that already abide by the ethical information practices, to be implemented with as little disruption as possible. Those consulted have described this bill's provisions as a backstop for good business practices.[154]

[116] PIPA's provisions also offer substantive evidence about its true purpose and character.

[117] The default approach under PIPA is to require organizations seeking to collect, use and disclose personal information to obtain the knowledgeable consent of individuals (section 6(1)). This is not a universal rule under PIPA, however, since there are several exceptions to consent. These exceptions create guardrails within which organizations may collect, use and disclose personal information without consent.[155] One example is the authority for organizations to collect, use or disclose personal information without consent where "required or authorized by law".[156] As discussed later, this consent exception would authorize federal political parties to collect, use and disclose personal information in the list of electors as permitted under the CEA.

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[153] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 4th Sess. Vol. 14, No. 13 (May 1, 2003), page 6415.
[154] Ibid., page 6416.
[155] The consent exceptions, of which there are over a dozen, are found in sections 6(2) 15, 18 and 20-22.
[156] Sections 12(1)(h) (collection), 15(1)h) (use) and 18(1)(o) (disclosure).

[118] PIPA also imposes a degree of transparency and accountability for organizations' personal information practices. It requires organizations to give individuals access to their own personal information (there are exceptions to this), to tell people what they have used their information for, and to whom they have disclosed it (section 23). It imposes a duty for organizations to take reasonable steps to ensure they have complete, and accurate, information about people and to at least entertain individuals' requests for correction of their personal information (sections 33 and 24). This helps ensure that organizations use accurate and up-to-date information when they make decisions that affect people. Organizations are also required to implement reasonable security arrangements to protect personal information from what are commonly called privacy breaches (section 34).

[119] The approach to oversight under PIPA is what might conveniently be labelled remedial in nature.[157] The Commissioner is empowered to oversee compliance through investigation of complaints, own-motion investigations, and adjudicative processes. The Commissioner may, for example, order compliance by an organization, confirm or vary an organization's decision, or order destruction of improperly collected personal information. PIPA does create some offences, such as using deception or coercion to collect personal information and obstructing the Commissioner.[158]

[120] As this overview suggests, the true purpose, and the substance, of PIPA's provisions accords with the stated legislative purpose and with the minister's remarks about legislative intention. That is, PIPA's true concern and subject is, as a law of general application, the regulation of organizations' personal information practices.

PIPA's legal and practical effects

[121] This remains the case even accepting that PIPA may incidentally affect other areas of activity, either legally or practically. As noted earlier, the courts have made it very clear that the fact that a law of general application may incidentally affect matters, or activities, in other jurisdictional spheres does not mean the statute is beyond the enacting jurisdiction's constitutional authority.

[122] In terms of legal effects, PIPA affects the legal rights of organizations respecting their collection, use or disclosure of personal information.[159] It is equally plain that its intended and actual legal effect is not to regulate elections, whether at the federal, provincial or local levels. It does not mention elections

[157] This summary is of selected key oversight provisions in Part 11 of PIPA.
[158] Section 56. These would, obviously, have to be investigated and then prosecuted in the courts, through the usual prosecutorial channels.
[159] Commissioner McEvoy also concluded, at paragraph 42 of *Courtenay-Alberni*, that the substance of PIPA's legal effects is "to regulate the collection, use and disclosure of personal information by organizations."

and is devoid of any provisions that could reasonably be expected to be found in an election law such as the CEA (or, as another example, British Columbia's *Election Act*).[160] There are no provisions dealing with things like the qualification of voters, qualification or nomination of election candidates, registration of political parties, or the regulation of contributions to political parties, campaign financing, election advertising or sponsorship.[161] The fact that PIPA regulates personal information practices does not mean that PIPA's legal effect is to regulate elections or election matters, federal or otherwise.

[123] Nor does the evidence at hand support the contention that PIPA has impermissible practical effects. I have considered the political parties' evidence and submissions about PIPA's alleged impact on federal elections and their activities, e.g., their contention that PIPA's application risks skewing election outcomes, creating unfairness in elections, leading to inconsistency of rules, and more. As discussed below, they have failed to establish how these harms would arise if PIPA were to apply to them.

[124] Moreover, PIPA permits organizations to collect, use or disclose personal information without consent where another law permits it. The CEA does so in relation voter information disclosed under the CEA and federal political parties can otherwise collect more personal information with voters' consent, or under other PIPA consent exceptions, without falling afoul of PIPA. PIPA does not, either legally or practically, prevent this from happening.

[125] I conclude that PIPA's purpose, its pith and substance, is regulation of the collection, use and disclosure of personal information and that any practical or legal effects are incidental, or secondary, to this.

Does PIPA fall under provincial or federal legislative authority?

[126] After identifying the pith and substance of a statute, the next step in assessing constitutional validity is to decide how to classify it under the heads of legislative authority in the *Constitution Act, 1867*. Here, the question is whether PIPA's core, or essence—the regulation of organizations' collection, use and disclosure of personal information—falls under a provincial or federal head of authority.

[127] As the above summary indicates, PIPA regulates the conduct of private relations, i.e., it regulates dealings between individuals and organizations as they relate to individuals' personal information. In its application to transactions between businesses and individuals it could be seen as a kind of consumer

[160] RSBC 1996, c 106.
[161] It hardly needs saying, but the fact that the CEA has since 2018 included requirements for political party privacy policies of course does not mean that PIPA is somehow concerned with elections.

protection law, as Commissioner McEvoy noted in *Courtenay-Alberni*.[162] In that context, certainly, PIPA bears some similarity to the advertising rules at issue in *Irwin Toy Ltd. v. Quebec (Attorney General)*.[163] Whether an organization is for-profit or not-for-profit, I conclude that its regulation of organizations' personal information practices is concerned with property and civil rights under section 92(13). I conclude that PIPA is a law respecting property and civil rights and thus falls under the provincial legislative authority conferred by section 92(13) of the *Constitution Act, 1867*.

[128] I further conclude that PIPA is within provincial authority over matters of a local or private nature, under section 92(16) of the *Constitution Act, 1867*. The NDP accepts that provinces have the authority, under section 92(16), to enact privacy legislation within the province.[164] It says, however, that its activities "are not matters of a merely local nature", and Parliament governs the whole country, not only the territory within a province", with federal elections affecting "national and international politics and interests."[165] It adds that privacy legislation "that purports to operate outside of the Province or affect matters that are not of a 'merely local or private nature' in the province are [sic] ultra vires the Province."[166]

[129] The fact that an organization is active outside British Columbia, such that its activities are not "of a merely local nature", is by no means determinative on this point. The idiosyncrasies of a given organization's operations, whether they happen to be local, national, or international, do not drive the constitutional analysis. The focus must be on the legislation itself, i.e., on what the statute is about in terms of the heads of legislative authority.

[130] Moreover, I see no evidence that PIPA purports to operate outside British Columbia, and there is no basis in its provisions for such a conclusion. As already noted, the fact that PIPA may, through its application to an organization's activities in British Columbia, have an incidental effect on that organization in another sphere is not sufficient to render the law invalid.[167]

[131] As noted earlier, the Liberal Party cites *McKay* for the proposition that, where a law under review "is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall

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[162] Paragraph 50. I adopt Commissioner McEvoy's comments in that paragraph.
[163] [1989] 1 SCR 927, 1998 CanLII 829. It is worth noting here that. while the provincial law affected federal broadcast undertakings, it was within the province's authority under sections 92(1) and 92(16).
[164] NDP's initial submission, paragraphs 53 and 54.
[165] Ibid., paragraph 55.
[166] Ibid., paragraph 56.
[167] The riding association involved in *Courtenay-Alberni* appears to have made essentially the same argument and I find Commissioner McEvoy's analysis of the issue of assistance here.

be interpreted accordingly."[168] According to the Liberal Party, this means that, where federal election law permits them to contact electors, that is a federal right about which only Parliament can legislate, so PIPA should be interpreted as not extending to federal matters.[169]

[132] The AGBC responds that, while *McKay* continues to be sound authority for the principle that an interpretation of a statute that makes it constitutional is preferable to an interpretation that renders it unconstitutional, it has, at least since *Ontario (Attorney General) v. OPSEU*,[170] been superseded in other respects. In *Canadian Western Bank*, for example, the Supreme Court of Canada appears to have viewed *McKay* as a case about interjurisdictional immunity.[171]

[133] I agree and do not accept that *McKay* is good authority for the proposition that a law is constitutionally invalid solely because of its incidental effects.[172] Incidental effects come into play, rather, when considering the interjurisdictional immunity or paramountcy doctrines.

[134] To sum up, PIPA is, for the reasons given above, validly enacted legislation, falling under the provincial heads of authority in section 92(13) and also section 92(16) of the *Constitution Act, 1867*.[173]

[135] I will now consider the political parties' contention that PIPA is constitutionally inapplicable to their collection, use and disclosure of personal information by operation of the interjurisdictional immunity and paramountcy doctrines.

Does paramountcy oust PIPA's application?

[136] The paramountcy doctrine has two branches. The first holds that, where a valid provincial statute creates an operational conflict with a federal statute, the provincial law is inoperative to the extent of the conflict. An operational conflict arises only where "one enactment says 'yes' and the other says 'no', such that

[168] *McKay*, at pages 803-804.
[169] Liberal Party's initial submission, paragraph 61.
[170] [1987] 2 SCR 2, 1987 CanLII 71 (SCC).
[171] *Canadian Western Bank*, paragraph 41. In its reply, the Liberal Party says it does not argue that PIPA "is entirely invalid in pith and substance", making the AGBC's view of *McKay* beside the point. To my mind, *McKay* should be seen as a case about interjurisdictional immunity.
[172] As noted earlier, Taschereau C.J.C. made it clear that the constitutional validity of the bylaw had not been challenged.
[173] It follows that I reject the argument that PIPA is ultra vires the British Columbia Legislature because it is legislation in respect of federal elections, a head of authority the NDP argues, at paragraphs 46-51 of its initial submission, is reserved to Parliament under section 41 of the *Constitution Act, 1867*. In neither substance nor in its effects is PIPA legislation in respect of elections, federal or otherwise.

'compliance with one is defiance of the other'".[174] The second branch renders a provincial law inoperative to the extent that it frustrates the purpose of a federal statute.[175]

[137] In paramountcy cases, the Supreme Court of Canada has cautioned, "[t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject".[176] The "fundamental rule of constitutional interpretation", therefore, is that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes."[177] Bearing in mind the principle of cooperative federalism, "paramountcy must be narrowly construed", and courts must take a "restrained approach", one favouring "harmonious interpretations of federal and provincial legislation…over interpretations that result in incompatibility".[178]

[138] As regards the first branch of paramountcy, cooperative federalism "allows for some interplay, and indeed overlap, between both federal and provincial legislation",[179] and thus "normally favours—except where there is an actual conflict—the application of valid rules adopted by governments at both levels as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces".[180]

[139] Respecting the second branch of the doctrine, "absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation". That is, "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose", meaning "that the purpose of federal legislation should not be artificially broadened beyond its intended scope":

> … To improperly broaden the intended purpose of a federal enactment is inconsistent with the principle of cooperative federalism. At some point in the future, it may be argued that the two branches of the paramountcy test

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[174] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 SCR 419, 2015 SCC 53 [*Lemare Lake*], at paragraph 18, quoting from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, 1982 CanLII 55 (SCC), at page 191.
[175] *Lemare Lake*, at paragraph 19, and *Canadian Western Bank*, at paragraph 73.
[176] *Canadian Western Bank*, at paragraph 74.
[177] Ibid., paragraph 75.
[178] *Lemare Lake*, paragraph 21.
[179] Ibid., paragraph 22.
[180] *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453, 2010 SCC 38, at paragraph 118, per Deschamps J. (dissenting), quoted with approval in *Lemare Lake*, paragraph 22.

> are no longer analytically necessary or useful, but that is a question for another day."[181]

[140] Regarding this version of paramountcy, a party alleging that provincial legislation frustrates the purpose of a federal enactment "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose"; the burden "a party faces in successfully invoking paramountcy is accordingly a high one".[182]

> *Has the "operational conflict" branch of paramountcy been shown to apply?*

[141] Turning to the participants' arguments on the first branch of paramountcy—i.e., whether there is an operational conflict between PIPA and the CEA—the AGBC says the political parties "have not given even a single example of a situation in which it would be impossible to comply with both simultaneously."[183] The complainants say there is no operational conflict, and note that no operational conflict arises where a provincial law is more restrictive than a permissive federal law.[184] The Conservative Party concedes that there is no operational conflict between PIPA and federal law,[185] while the Liberal Party and the NDP argue there is.

[142] The Liberal Party argues that federal political parties "must follow the rules set out for them by Parliament, and Parliament has given the Chief Electoral Officer final say on all matters related to federal elections, including privacy", adding that the "B.C. OIPC cannot deprive the Chief Electoral Officer of that final decisional authority."[186]

[143] The Liberal Party also says that PIPA imposes "different requirements" for the collection, use and disclosure of personal information than the CEA does.[187] It alludes to the CEA's restrictions on use of personal information obtained from the list of electors and says, without elaborating, that a court would reach a

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[181] *Lemare Lake*, paragraph 23 (citations omitted).
[182] Ibid., paragraph 26 (citations omitted).
[183] AGBC submission, paragraph 64.
[184] Complainants' initial submission, paragraph 80.
[185] Conservative Party's initial submission, paragraph 55.
[186] Liberal Party's initial submission, paragraph 82, Liberal Party reply, paragraph 31. The Liberal Party does not elaborate on its reference to the Chief Electoral Officer having "final say" or "final decisional authority" in relation to privacy. Under the CEA, the Chief Electoral Officer's "final say" or "final decisional authority" could relate to compliance with section 110, i.e., at least in terms of investigations, though not prosecutions. Where a registered party fails to file a privacy policy, the CEA does not give the Chief Electoral Officer any real "say" or "decisional authority", since section 385.1(2)(c) provides that the Chief Electoral Officer in such a case "*shall* implement the procedure for non-voluntary deregistration set out in sections 415, 416 and 418" (added emphasis).
[187] Liberal Party's initial submission, paragraph 82.

different answer about application of a "specific privacy principle" depending on whether the CEA or PIPA were to apply.[188] Application of the "general PIPA obligations", it adds, would hinder the Liberal Party's collection and use of personal information of British Columbia voters, "to the detriment of the rights of Canadian voters to participate in democracy.[189]

[144] The Liberal Party says that, because the federal government has not subjected federal political parties to federal privacy laws, it is not open to British Columbia to subject them to privacy legislation.[190] Extending PIPA to federal political parties would, it argues, "create an operational conflict" because federal political parties "would be told to do inconsistent things."[191] The Liberal Party refers to the CEA's personal information provisions as "specifically tailored to the unique role of federal political parties" and says that, apart from those provisions, "other personal information can be collected, used and disclosed without the same restrictions".[192]

[145] As noted earlier, the CEA gives parties access to personal information that enables them to communicate with voters, authorizes them to use that information to communicate with voters, and prohibits other uses of information in the list of electors. PIPA explicitly permits collection, use and disclosure of personal information, without consent, where authorized by law, and the CEA is such a law. Far from creating an operational conflict with the CEA, PIPA dovetails with it on this point.

[146] Nor is the CEA's requirement that federal political parties must adopt, file and publish privacy policies problematic in terms of political party's ability to comply with PIPA's provisions. Section 385(2) of the CEA stipulates what elements a privacy policy must contain but is silent about the merits, or substance, of such a policy. So long as a policy contains the required "statements" there is no basis in the CEA for anyone, including the Chief Electoral Officer, to say anything about the substance of those "statements".[193] In

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[188] Similarly, it argues that, if the Commissioner were to "second guess whether a federal political parties' collection and use of personal information for federal election purposes was reasonable" under PIPA, there would be an operational conflict, presumably between PIPA and the CEA. As best I can understand this point, it suggests that any decision under PIPA about reasonableness necessarily would create an operational conflict. This is unpersuasive.

[189] Liberal Party's initial submission, paragraph 85.

[190] Liberal Party's initial submission, paragraph 83. The Liberal Party relies here on *Constituency Office*, which I discuss further below. It does not support the Liberal Party's position on operational conflict.

[191] Ibid., paragraph 83.

[192] Ibid., paragraph 82.

[193] I acknowledge the guidance jointly issued by the Chief Electoral Officer and the Privacy Commissioner of Canada, cited by the Liberal Party at paragraph 73 of its initial submission. It argues that this guidance supports the view that "Parliament intends that Elections Canada be the final decision-making authority'. It notes that the guidance suggests that anyone with privacy concerns may contact the party's privacy officer, "and/or Elections Canada if they have concerns

any case, PIPA, like the CEA, requires organizations to have policies relating to their information practices. Section 5 requires them to "develop and follow policies and practices" necessary to comply with their PIPA obligations, to develop a process for responding to complaints, and make information about these things available on request. While the CEA and PIPA policy requirements are not framed identically, I am not persuaded that an organization cannot fashion a policy that complies with both statutes. There is no operational conflict here.

[147] Application of PIPA's provisions where the CEA is silent would not create an operational conflict. As the Supreme Court of Canada has repeatedly affirmed, where a federal law is permissive and the provincial law is more restrictive, "[t]his has been regularly considered not to constitute an operational conflict."[194] This surely means that, where a federal law contains no rule on a matter, there can be no operational conflict with a provincial rule on that matter. There is no conflict between a regulation on the one hand and the absence of a regulation on the other.

[148] The NDP submits that Part 16.1 of the CEA "contains extensive provisions that regulate voter contact by telephone", but does not require individual consent to the collection, use or disclosure of a voter's "personal telephone number".[195] This is true, but it is equally true that Part 16.1 says nothing about collection, use and disclosure of telephone numbers or other personal information.[196] Sections 348.16 and 348.18 require the keeping of lists of telephone numbers called during an election period, but have nothing to say about how telephone numbers are acquired—Part 16.1 is, in other words, silent about collection, use or disclosure of personal information. There is no operational conflict between Part 16.1 of the CEA and PIPA.

[149] The NDP also contends that PIPA's provisions conflict with "express exemptions" in the *Telecommunications Act* and under *Canada's Anti-Spam Law*. In its reply, the NDP asserts that there "is an actual operational conflict" because the CEA, and other federal laws, say that it may communicate with electors without their consent, "while PIPA tells them 'No'", meaning that the NDP is "being told two inconsistent things".[197]

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about the accuracy of a party's policies", with the Chief Electoral Officer possibly consulting the Office of the Privacy Commissioner of Canada. Guidance from these two regulators is not a sound basis for the suggestion that Parliament intends Elections Canada to have final decision-making authority on privacy matters.

[194] *Lemare Lake*, paragraphs 24 and 25. Commissioner McEvoy made the same point at paragraph 74 of *Courtenay-Alberni*.

[195] NDP's initial submission, paragraph 25.

[196] Part 16.1 is entitled "Provision of Voter Contact Calling Services". It regulates political parties' use of voter calling service providers, regulates those service providers in certain respects, and requires certain disclosures of information to be made.

[197] NDP's reply, paragraph 41.

[150] The NDP points to section 41.7 of the *Telecommunications Act*, which exempts political parties from CRTC prohibitions against certain telecommunications.[198] The NDP submits that, unlike PIPA, the *Telecommunications Act* "specifically balances freedom of expression and personal privacy", and the "application of *PIPA* to Canada's NDP runs afoul of this approach." The NDP also points to section 3(1)(h) of *Canada's Anti-Spam Legislation*, which exempts federal political parties from the prohibition against sending a "commercial electronic message"—such as email or text messages—to someone without their consent.[199]

[151] The NDP has not pointed to any PIPA provisions that would preclude a party from communicating with voters without their consent. To the contrary, PIPA explicitly permits organizations to collect, use or disclose personal information where that is permitted by law. So, where a federal political party uses an individual's contact information obtained under the CEA, or obtained lawfully in another manner, to communicate with that person by electronic message or telephone, PIPA permits it. The NDP has not shown how there is, in this respect, an operational conflict between PIPA and the CEA or the other two federal statutes just mentioned (which also offer federal political parties exemptions from federal rules).

[152] Moreover, even if PIPA were to prohibit a federal political party from calling someone or from sending them an electronic message, as the AGBC points out it has long been accepted that there is no operational conflict between a provincial law that is more restrictive than a federal law.[200]

[153] To sum up, the Liberal Party and the NDP have not identified provisions of PIPA and the CEA that are in operational conflict, i.e., they have not shown that it is impossible to comply with both statutes. The same holds for any alleged operational conflict between PIPA and the *Telecommunications Act* or between PIPA and *Canada's Anti-Spam Legislation*. These two political parties have not established that the operational conflict branch of the paramountcy doctrine ousts PIPA's application.

> *Has the "frustration of purpose" branch of paramountcy been shown to apply?*

[154] A party alleging that provincial legislation frustrates the purpose of a federal enactment is required to establish the purpose of the federal law and to show that the provincial legislation is incompatible with that purpose. The burden is high.[201]

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[198] NDP's initial submission, paragraph 26.
[199] Ibid.
[200] AGBC's submission, paragraph 74; also see *Lemare Lake*, paragraph 25.
[201] *Lemare Lake*, paragraph 45.

[155] What is the CEA's purpose? The political parties each frame the CEA's purpose somewhat differently, though there are elements of consistency among their arguments.

[156] The NDP says the CEA's purpose is to create "uniform rules across the country so that there is a level playing field for candidates and voters", while PIPA's application would create two sets of rules, one set in British Columbia and another elsewhere in the country.[202] PIPA's application to federal political parties would, it says, be "a move backwards to differentiation in the country based on provincial legislation".[203] The NDP contends, without offering details, that to "disadvantage political organizations' capacity to conduct campaigns in one region of Canada over another carries the risk of skewing" election outcomes.[204]

[157] The Liberal Party submits that Parliament's exclusive authority over the federal electoral process exists to ensure that "federal political parties are regulated consistently across Canada", and this "national scheme is frustrated if the rules regarding personal information…vary across the provinces."[205] PIPA's application would interfere with achievement of "federal election objectives" by "altering the balance that Parliament has struck".[206] Contrary to Commissioner McEvoy's decision in *Courtenay-Alberni*, the Liberal Party suggests, PIPA's application "would frustrate Parliament's intent that the personal information practices" of federal political parties "be governed by the tailored provisions in the *Canada Elections Act* and not general federal or provincial privacy laws."[207]

[158] Like the NDP, the Conservative Party suggests that applying PIPA "to the conduct of federal electoral organizations would represent a move backwards to once again differentiating electoral participation in the country based on provincial legislation, contrary to the clear intentions of Parliament and section 41 of the *Constitution Act, 1867*.[208] If PIPA were to apply, the Conservative Party suggests, "[e]lectoral communications and activities permissible elsewhere in Canada would be off limits in British Columbia", as "different restrictions" would apply.[209]

[159] The Conservative Party also suggests that PIPA would frustrate federal political parties' "ability to campaign and provide all voters with an equal opportunity to participate in federal elections".[210] It would "significantly restrict their ability to communicate with voters", "add cost and delay", and mean that the

[202] NDP's initial submission, paragraph 65.
[203] Ibid., paragraph 50.
[204] Ibid.
[205] Liberal Party's initial submission, paragraph 74.
[206] Ibid.
[207] Ibid., paragraph 79.
[208] Conservative Party's submission, paragraph 43.
[209] Ibid., paragraph 61.
[210] Ibid.

information of certain voters would not be available to federal political parties for federal election purposes."[211]

[160] The Supreme Court of Canada has underscored that "clear proof" of a statute's purpose is required to establish that a federal law is paramount on the basis of frustration of federal purpose.[212] Secondary sources and case law can assist in identifying a federal purpose, but sufficient evidence is still required.[213]

[161] The political parties cite excerpts from parliamentary debates, committee reports and other reports.[214] The NDP says these sources establish that the CEA's purpose "is to create a 'comprehensive set of rules' for the election of Members of Parliament, including rules that facilitate communication with electors and specific rules regarding the protection of privacy of electors."[215] The goal of most if not all statutes is to create "a set of comprehensive rules" about their subject matter. This is not a sufficiently articulated or grounded "federal purpose".

[162] The political parties' reliance on various cases to establish a federal purpose is also not persuasive. To support its argument that the CEA's purpose is to "ensure electoral fairness", and "govern the activities of registered political parties", the NDP cites *Thomson Newspapers Co. v. Canada (Attorney General)*[216] and *Canadian Reform Conservative Alliance v. Western Union Insurance Corporation*.[217]

[163] *Thomson Newspapers* involved a *Charter* challenge to a single section of the CEA. It was not about paramountcy or other division of powers issues. The majority's view about the purpose of section 322.1 of the CEA—which banned publication of opinion survey information in the latter days of federal campaigns—does not support the NDP's characterization of the CEA's purpose overall, a characterization that is, in my view, overly general for the purposes of paramountcy analysis.

[164] In *Canadian Reform Conservative Alliance*, the issue was whether an insurance contract required the insurer to defend a defamation claim. The British Columbia Court of Appeal referred to the purpose of section 259 of the CEA, which regulated advertising expenditures, as governing political parties' activities during an election. This passing reference to the purpose of a single statutory

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[211] Ibid.
[212] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 356, 2010 SCC 39 [*COPA*], at paragraph 68. Also see *Lemare Lake*, paragraph 45.
[213] Ibid.
[214] These include Elections Canada reports, which in my view are not a proper source of evidence for Parliament's purpose in enacting the CEA.
[215] NDP's reply submission, paragraph 48.
[216] [1998] 1 SCR 877, 1998 CanLII 829 [*Thomson Newspapers*].
[217] 2001 BCCA 274 [*Canadian Reform Conservative Alliance*].

provision, in a case that did not involve the paramountcy doctrine, also does not really assist the NDP's position on the federal purpose of the CEA as a whole.

[165] The Conservative Party relies on *Rae v. Canada (Chief Electoral Officer)*[218] and the Liberal Party cites *Opitz v. Wrzesnewskyj*.[219] In *Rae*, the Federal Court had to consider what standard of review should apply to a decision by the Chief Electoral Officer about a refund of the entry fee that the applicant and other leadership contestants had paid to the party. In deciding what standard to apply, Harrington J. said this:

> [19] The overall purpose of the *Canada Elections Act* is to ensure that the democratic right of adult Canadians to vote is properly respected and that the whole process from riding nominations, to leadership conventions, to by-elections and general elections, unfolds on a level playing field. More particularly, the provisions relating to leadership campaign expenses are intended to be transparent, to limit the amount of contributions an individual may make and to prevent party apparatchiks from financially favouring one leadership contestant over another.

[166] As with the other decisions discussed above, *Rae* was not a constitutional case and, in any case, the Court's comment that the CEA seeks to ensure that the federal election process "unfolds on a level playing field" is not of much assistance in establishing the CEA's federal purpose.

[167] *Wrzesnewskyj* had to do with a failed federal election candidate's effort to disqualify votes. The Supreme Court of Canada stated that it "is well accepted in the contested election jurisprudence that the purpose of the Act is to enfranchise all persons entitled to vote and to allow them to express their democratic preferences" and added that those courts "considering a denial of voting rights have applied a stringent justification standard."[220] As with *Thomson Newspapers* and *Canadian Reform Conservative Alliance*, this general observation, in a decision that did not deal with paramountcy, is not determinative in establishing a federal purpose for constitutional purposes.

[168] In its reply, the NDP cites a passage from *Frank v. Canada (Attorney General)* in which the CEA is described as "a comprehensive statute which regulates federal elections in Canada", whose "central purposes are to enfranchise all persons who are entitled to vote, and to protect the integrity of the democratic process".[221] This passage, which cites *Wrzesnewskyj*, goes on to say that the CEA "establishes specific rules with respect to qualification as an elector and to voting entitlements, as well as voting mechanisms, in pursuit of its broad enfranchising purpose." *Frank* was a *Charter* case, not a paramountcy case.

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[218] 2008 FC 246 [*Rae*].
[219] 2012 SCC 55 [*Wrzesnewskyj*].
[220] *Wrzesnewskyj*, paragraph 35.
[221] 2019 SCC 1 [*Frank*], paragraph 11.

[169] The political parties have characterized the CEA's purpose in terms such as "fairness", "uniformity", avoidance of "differentiation" in rules, ensuring a "level playing field", and "consistency of regulation" of "federal electoral purposes". They contend that compliance with PIPA would be a backward step, would result in application of different rules in British Columbia than elsewhere, would render the playing field uneven, could skew election outcomes, would harm candidates and voters, and could possibly disenfranchise voters.

[170] These are, as hinted above, very general, broad assertions of both statutory purpose and harm, amounting to pretty dire predictions for the impact on elections if PIPA were constitutionally applicable to these political parties. Setting aside the absence of details in the political parties' submissions or evidence to support these predictions, it is reasonable to suggest that the purposes claimed for the CEA—"fairness", "uniformity", avoidance of "differentiation" in rules, ensuring a "level playing field", and "consistency of regulation—are goals common to all statutes.

[171] Again, the Supreme Court of Canada has made it clear that the purpose of federal legislation "should not be artificially broadened".[222] Viewed in light of that caution, and in light of guidance in other cases, I am not persuaded that that these legislative objectives are proper "federal" purposes for a frustration-of-federal-purpose analysis.

[172] Despite this, it is appropriate to continue the analysis given the statements about the CEA's purpose in *Rae*, *Wrzesnewskyj* and the other cited cases. *Rae* suggests the CEA's purposes are to respect the right to vote and that elections unfold on a level playing field. *Wrzesnewskyj* speaks of enfranchising those who are entitled to vote and allowing them to express their democratic preferences. Even if I were to accept that these are the CEA's "federal purposes", the political parties have not established how PIPA's application would frustrate a federal purpose.

[173] Again, they argue that, because PIPA's application would mean that the personal information-related rules in British Columbia differ from those elsewhere, there will be an uneven playing field, inconsistency, unfairness, harm to British Columbia voters' participation in democracy, and even the skewing of election outcomes. Yet, as with other aspects of their challenges to PIPA's application, they have not offered details of how PIPA would prevent them from engaging voters in British Columbia so that voters can engage in the democratic electoral process. Nor have they substantiated their arguments about how PIPA's

[222] *Lemare Lake*, paragraph 23.

application would risk skewing electoral outcomes or result in the other harms they assert could arise.[223]

[174] It is not enough to simply say that PIPA's application would introduce rules about political parties' collection, use or disclosure of voters' personal information. As the Supreme Court of Canada has said, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission."[224]

[175] PIPA is a law of general application in the province, validly enacted under provincial heads of authority, and arguments that Parliament intended there to be no role for a provincial law are not persuasive.[225] As the AGBC and the complainants observe, it is open to Parliament to legislate in respect of federal political parties' collection, use and disclosure of personal information in a manner that creates uniform rules for all parties and unequivocally ousts provincial legislation. But this possibility is not a basis for a finding that, under the paramountcy doctrine, PIPA's application would frustrate a federal purpose.

[176] Nor does *Constituency Office* establish that PIPA's application would frustrate a federal purpose. Again, the adjudicator in that case decided that section 18 of the *Constitution Act, 1867* gives "the federal government" jurisdiction to "legislate to affect the manner in which an MP's office operates in its assistance of constituents".[226] She went on to add the following observations:

> [18] It is well recognized that the labour relations and human rights obligations of federally regulated entities are matters of exclusive federal jurisdiction. Similarly, the privacy obligations of federal works, undertakings and businesses are regulated by federal legislation. The offices of MPs are also subject to federal jurisdiction in this area.

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[223] Nor is the political parties' affidavit evidence persuasive. It essentially mirrors their submissions, outlined above, and largely consists of the personal opinions of party officials about the supposed consequences of PIPA's application to their parties.
[224] *COPA*, paragraph 66. For a recent application of this principle, see *Nelson v. Telus Communications Inc.*, 2021 ONSC 22, affirmed 2021 ONCA 751 [*Nelson*], where the Court cautioned that "more restrictive provincial legislation in an area in which the Federal Government has legislated without more will not establish that a federal purpose has been frustrated." Nor does *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113, 2001 SCC 67, drive to a different outcome. The Court concluded that, while it was possible to comply with both the provincial and the federal provisions, "[w]here there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose" (at paragraph 72). The Court then added that "in this case, it is impossible to comply with the provincial statute without frustrating Parliament's purpose" (paragraph 73). It does not follow from this, however, that either impossibility of dual compliance or frustration of federal purposes exists here, noting—as did Commissioner McEvoy at paragraph 77 of *Courtenay-Alberni*—that the Court later distinguished *Mangat* in *COPA*.
[225] In this respect, the AGBC's reliance on *Nelson* is well placed.
[226] *Constituency Office*, paragraph 17.

> [19] It is significant that the federal government has not extended the *Privacy Act* or PIPEDA to cover MPs. Where the federal government has declined to impose privacy obligations on federal MPs, it is not open to provincial legislation to do so. The fact that both FIPPA and PIPA exclude the activities of MLAs from their scope confirms that a legislature may indeed decide to exclude legislators from the scope of privacy legislation. The fact that MPs are not explicitly excluded from the provincial legislation simply reflects the fact that federal legislators are not subject to provincial jurisdiction in that regard.
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> [20] The result is the same whether obtained by the application of the doctrine of interjurisdictional immunity or the doctrine of federal paramountcy. With respect to the former, I find that the activities of an MP's office in obtaining and managing information are integral to the MP's ability to carry out her or his activities in assisting constituents. With respect to the latter doctrine, I find that the fact that Parliament has enacted legislation addressing the privacy obligations of federal governmental bodies and has not included MPs in the operation of that legislation means that the provincial legislation cannot operate to frustrate the federal purpose in that regard.

[177] These comments were not, in my view, a necessary basis for the decision, which focused on section 18 of the *Constitution Act, 1867*. In any case, the entirety of the adjudicator's analysis of interjurisdictional immunity and paramountcy is found in the last paragraph quoted above and, with deference, that analysis is not persuasive.

[178] Respecting her conclusion that the paramountcy principle ousts PIPA's application, she observed that Parliament had enacted privacy legislation applying to "federal governmental bodies", observed that Parliament had not extended the legislation to Members of Parliament, and stated that this "means that the provincial legislation cannot operate to frustrate the federal purpose in that regard."

[179] The adjudicator did not identify the "federal purpose" of the laws she mentioned and, in any case, did not explain the basis for her conclusion that PIPA's application to a Member of Parliament would frustrate that purpose.[227] She mentioned no PIPA provisions, or federal legislation, for example, in concluding that PIPA would frustrate a federal purpose. *Constituency Office* is not persuasive in the circumstances at hand and I decline to apply it.To conclude, the political parties have not established that application of PIPA's rules would, even if they are more restrictive than the federal legislation, frustrate a federal purpose.

[227] This comment clearly calls on the second branch of the paramountcy doctrine, frustration of purpose, not the first, operational conflict, branch.

Does the interjurisdictional immunity doctrine apply?

[180] The interjurisdictional immunity doctrine supports allocation under the *Constitution Act, 1867* of areas of legislative authority for Parliament and for the provincial legislatures. It does so by preventing an otherwise valid law from applying to a federal or provincial matter where that would impair a core power of the other legislature.[228]

[181] The first step in the interjurisdictional immunity analysis is to decide whether the law in question, in this case PIPA, affects the core of a head of legislative authority assigned to the other level of government. If it does, the next step is to assess whether it impairs the exercise of the core legislative competence of the other government[229] or impairs that which is "absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction."[230] It is clear from the cases that impairment requires something more than the mere application of a law—its application must impair, not just affect, exercise of the core legislative competence of the other government.

[182] The Supreme Court of Canada has emphasized that interjurisdictional immunity is a doctrine of limited application and is generally reserved for situations already covered by precedent, although this is not a hard and fast rule.[231] The Supreme Court has indicated that "If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*."[232]

[183] The AGBC accepts that, for present purposes, the federal political parties' ability to communicate with voters lies within the core of Parliament's jurisdiction over elections to Parliament[233] but contends that the political parties have not shown that PIPA's application would impair that core power. The AGBC points out that the political parties have not linked their arguments about impairment to any specific PIPA section (and that some of their submissions appear to misinterpret PIPA).[234]

[184] The complainants cite the absence of case law applying interjurisdictional immunity in this context, adding that this generally justifies proceeding straight to the paramountcy analysis. They add that, in any event, PIPA does not impair an aspect of federal power that "has been absolutely indispensable or necessary to

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[228] *Canadian Western Bank*, at paragraphs 33 & 34.
[229] *COPA*, at paragraph 43.
[230] *Canadian Western Bank*, paragraph 77.
[231] Ibid., paragraphs 77 and 78.
[232] Ibid.
[233] AGBC submission, paragraph 49.
[234] AGBC's submission, paragraphs 58 and 59.

enable Parliament…to achieve the purpose for which exclusive legislative jurisdiction was conferred."[235] The complainants submit that PIPA "has nothing to do with regulating elections" or federal political parties' participation in them; they suggest that PIPA is, as the Commissioner concluded in *Courtenay-Alberni*, solely concerned with regulating personal information practices.[236]

[185] As regards the complainants' point that interjurisdictional immunity has not been applied in a similar case, I take that point but set it aside because the political parties' arguments on the merits are in any event not persuasive.

[186] The Liberal Party says that, in *Canadian Western Bank*, the Supreme Court of Canada referred to *McKay* "as a precedent for interjurisdictional immunity being applied with respect to federal elections".[237] The Supreme Court did refer to *McKay* but did so in discussing the risk that interjurisdictional immunity could potentially apply to all "activities" within Parliament's jurisdiction. The Supreme Court's reference to *McKay* must be viewed in the light of its observation that a

> … broad application of the doctrine to 'activities' creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote....It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. [238]

[187] It is also worth noting this word of caution:

> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from

[235] Complainants' initial submission, paragraph 76, quoting from *Canadian Western Bank*, paragraph 77.
[236] Complainants' initial submission, paragraph 77.
[237] Ibid., paragraph 93.
[238] *Canadian Western Bank*, paragraph 42.

> trying to define the possible scope of such powers in advance and for all time….[239]

[188] At all events, the reference in *Canadian Western Bank* to *McKay* does not mean that *McKay* is a precedent the application of which ousts PIPA's application on the basis of interjurisdictional immunity.

[189] As for how PIPA's application would impair the core of a federal power, the Liberal Party says that PIPA "impairs a vital part of federal elections law: access to the electorate." [240] It elaborates as follows:

> To encourage participation in the Canadian electoral system, federal political parties require access to Canadians via the use of their personal information. Political parties' needs for personal information are unique. They must be able to access and use personal information in order to communicate messages, which is vital to the successful functioning of Canadian democracy. The Liberal Party uses personal information to engage with voters, and it is better placed to mobilize democratic participation if it can understand and speak to the interests and priorities that matter most to the voters. Further, there must be uniform and equal treatment of all members of the Canadian electorate.[241]

[190] The Liberal Party adds this:

> Federal political parties are subject to the tailored privacy requirements[242] under the *Canada Elections Act*. Subjecting them to PIPA would be an impermissible application of an otherwise valid provincial law to a federal matter. Forcing federal political parties to submit to PIPA's collection, use and disclosure requirements would impair federal political parties from properly accessing Canadian voters.[243]

[191] The Liberal Party does not offer details to support its contention that PIPA's application would impair the ability of federal political parties to "properly" access Canadian voters (noting again that PIPA would authorize them to collect, use and disclose voters' contact information to communicate with them in accordance with the CEA).

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[239] Ibid., paragraph 43.
[240] Liberal Party's initial submission, paragraph 92.
[241] Ibid., citations omitted.
[242] Respecting the CEA's "tailored privacy requirements", as underscored above the CEA permits federal political parties to use voters' information to communicate with them and, while it also requires the filing of privacy policies containing "statements", it imposes no substantive requirements on federal political parties' privacy practices.
[243] Ibid., paragraph 95.

[192] The Liberal Party's appeal to Bastarache J.'s concurring reasons in *British Columbia (Attorney General) v. Lafarge Canada Inc.*,[244] as authority for the proposition "that a provincial law cannot fill a gap left by the absence of federal legislation or action", is also unpersuasive.[245] Bastarache J. did refer to a provincial law not being able to fill a "gap", but did so in a sentence that begins by making it clear that this is the case only for provincial laws that have been "found inapplicable to a federal undertaking or matter by reason of interjurisdictional immunity".[246] This is further emphasized by the preceding paragraph of his reasons, where he had this to say about the nature of interjurisdictional immunity:

> Because of this focus on jurisdiction rather than action, there need not be any federal legislation or executive action "occupying the field" for federal immunity to be triggered with respect to an area of federal legislative authority. This is one of the key facets of the immunity doctrine; the mere fact that a provincial law or municipal by-law affects a vital part of an area of exclusive federal jurisdiction is enough to render it inapplicable with respect to a federal undertaking, regardless of whether or not Parliament has itself enacted any laws or taken any specific action with respect to the jurisdictional area or the undertaking.[247]

[193] Nor do I find persuasive the Liberal Party's reliance on *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*,[248] a decision of the British Columbia Environmental Appeal Board. That case dealt with application of a provincial environmental rule to interprovincial railways whose trains carried oil, which federal law prevented them from refusing to do.[249] The railways were also subject to what the Board characterized as "a federal regime of legislation governing all aspects of their operations including rail safety, security, liability and insurance, dangerous goods requirements, and emergency response plans and preparedness".[250] The comprehensive federal legislative scheme included the *Canada Transportation Act*, the *Railway Safety Act*, the *Transportation of Dangerous Goods Act, 1992*, and regulations, protective directions, and rules issued under those statutes.

[194] Against this backdrop, orders made under British Columbia's *Environmental Management Act* would have required the railways to provide information at regular intervals about the nature of their shipments of crude oil in British Columbia, including location-specific information and volumes, information that the orders indicated the provincial government intended to publish.[251] The

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[244] 2007 SCC 23 [*Lafarge*].
[245] Liberal Party's initial submission, paragraph 97.
[246] *Lafarge*, paragraph 111.
[247] Ibid., paragraph 110.
[248] 2020 Carswell BC 1398 [*CNR*].
[249] *CNR*, paragraph 20.
[250] Ibid., paragraph 21.
[251] Ibid., paragraphs 2-4.

orders would also have permitted the government to request changes in shipments.

[195] The Liberal Party submits that the Board "concluded that operational planning for a railway crossing provincial boundaries should not have to be modified and adjusted every time the railway crossed provincial borders" and submits that "[f]ederal political parties should also not be subjected to modified and adjusted privacy legislation in each province."[252]

[196] It is true that the Board found that interjurisdictional immunity applied, but it did so in the alternative to its main finding, which was that the provincial provisions were invalid based on a pith and substance analysis. It is also the case that the Board applied the interjurisdictional immunity doctrine on the basis that there were several precedents that supported its application.

[197] Moreover, it is also reasonable to think that the Board was alive to this observation in *Canadian Western Bank*, which was cited to the Board:

> While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined.[253]

[198] The decision in *CNR*, which involved railways—a classic example of a federal undertaking—of course turns on its facts. It certainly does not follow from *CNR* that PIPA's application to federal political parties would result in "modified and adjusted privacy legislation in each province" in a manner contrary to the interjurisdictional immunity doctrine.

[199] The Conservative Party submits that Parliament has exclusive power over federal elections and therefore federal political parties, and their activities in collecting, using and disclosing personal information, are "integral to the functioning of federal elections."[254] It submits that PIPA, as provincial legislation, cannot frustrate the CEA's purpose "by undermining federal political parties' ability to use voter information for the purposes of a federal election".[255] The Conservative Party does not particularize how PIPA would undermine its ability to use voter information for federal elections.

[200] The NDP argues that "[c]reating restrictive rules for federal political parties and their communications with electors impairs Parliament's ability to create and

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[252] Liberal Party's initial submission, paragraph 96.
[253] *Canadian Western Bank*, paragraph 42. The Board quoted this passage, which the respondents had cited.
[254] Ibid., paragraph 65.
[255] Ibid.

administer a national electoral system", and PIPA's application "impairs the constitutional and legislative objective of a uniform system for federal elections across Canada."[256] It adds that PIPA's restrictions "impair Parliament's ability to legislate and strike a balance between individual privacy rights and rights of Canadian voters to meaningfully participate in the democratic process."[257] The NDP does not offer details in support of these claims.

[201] All three parties rely on *Constituency Office* in support of their interjurisdictional immunity arguments. As noted earlier, the adjudicator in *Constituency Office* observed that the paramountcy and interjurisdictional immunity doctrines would lead to the same outcome as her finding about section 18 of the *Constitution Act, 1867*. Regarding interjurisdictional immunity, she found that the activities of a constituency office are integral to a Member of Parliament's ability to carry out her or his activities in assisting constituents and stopped there.

[202] The required first step in the analysis, however, is to assess whether the law in question intrudes on the core of a federal head of legislative authority. The adjudicator said that the activities of a Member of Parliament's office "in obtaining and managing information are integral" to the ability to assist constituents. Although she did not say so, perhaps she considered these activities to be at the core of a federal head of legislative authority. Even assuming this was her intent, however, she did not go on, as required, to consider whether the effect of PIPA's application would be such that it impaired, in the meaningful sense required by the cases, the exercise of the core federal power.[258] With deference, the adjudicator's interjurisdictional immunity analysis—which applied, of course, to Members of Parliament and not federal political parties under the CEA—is not persuasive, and I decline to apply it here.

[203] Again, PIPA is devoid of any reference to elections or anything to do with them. It is concerned with regulating the collection, use and disclosure of personal information. It enables collection, use and disclosure of personal information as permitted by the CEA. It enables organizations' collection, use and disclosure of personal information in other ways, including with consent. Its privacy policy requirements are by no means inconsistent with those in the CEA. Without more, I do not see how PIPA's application would affect that which "is

[256] NDP's initial submission, paragraph 58.
[257] Ibid.
[258] The adjudicator cited *Canadian Western Bank*, which was decided earlier the same year, but did not discuss it. She also cited *Lafarge* but did not discuss it either. As the AGBC fairly notes, the adjudicator did not have the benefit, writing in 2007, of the Supreme Court of Canada's view, in *COPA* (at paragraph 66) and in *Lemare Lake* (at paragraph 48), that application of provincial restrictions in an area where federal legislation is permissive is not enough to establish frustration of a federal purpose.

absolutely indispensable or necessary" to enable a federal political party to carry out its mandate "in what makes it specifically of federal… jurisdiction."[259]

[204] Even assuming PIPA did have such an affect, I am not persuaded that it would in the required sense impair the exercise of the core legislative competence of Parliament. This is so even in the light of the Supreme Court of Canada's acknowledgement that there will be cases where application of a provincial statute would in effect frustrate the purpose of a federal law even if it did not result in a direct violation of the federal statute's provisions, where Parliament's intention is relevant.[260]

[205] As the Supreme Court observed in *Canadian Western Bank*, it has never signalled an intention to revive the "occupied field" concept it rejected more than 60 years ago: the "fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject."[261]

[206] I am not persuaded that PIPA's application would "impair" the exercise of Parliament's authority as regards 2018 amendments to the CEA. Nor am I persuaded that PIPA's application would frustrate Parliament's purpose, Parliament's its intent, in enacting the CEA, including in the light of the Parliamentary and other debates surrounding the 2018 amendments. The political parties have not, in the upshot, persuaded me that PIPA's application would impair the exercise of a core federal legislative power.

[207] For the above reasons, the political parties have not met their burden to establish that PIPA's application to federal political parties is ousted by the interjurisdictional immunity doctrine.

CONCLUSION

[208] To summarize for convenience, for the above reasons I find as follows in respect of each of the named organizations:

1. Each is an "organization" within the meaning of PIPA.

2. Section 3(2)(c) of PIPA does not oust PIPA's application.

3. The pith and substance of PIPA is regulation of the collection, use and disclosure of personal information, and PIPA is a valid exercise of the provincial head of legislative authority respecting property and civil rights

[259] *Canadian Western Bank*, paragraph 77.
[260] Ibid., paragraph 73.
[261] Ibid., paragraph 74.

under section 92(13) of the *Constitution Act, 1867* and, as a matter of a local or private nature, under section 92(1) of the *Constitution Act, 1867*.

4. PIPA is not inapplicable to the named organizations by reason of the constitutional doctrine of paramountcy.

5. PIPA is not inapplicable to the named organizations by reason of the constitutional doctrine of interjurisdictional immunity.

6. The question of whether PIPA unconstitutionally infringes the right to vote, or the freedom of expression, as guaranteed by the *Charter* is not addressed, as it would be inappropriate to do so based on the material at hand.

[209] This decision is undoubtedly lengthy. This flows from my desire to appropriately engage with the thorough, thoughtful, and very able submissions of all five participants, for which I am sincerely grateful.

March 1, 2022

ORIGINAL SIGNED BY

David Loukidelis QC

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