David Young Law
Compliance Bulletin

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Federal political parties appeal the BC Commissioner's privacy ruling

At the end of last month three federal political parties (Liberals, Conservatives, NDP) filed notice of judicial review of a ruling handed down by David Loukidelis, delegate for BC Information and Privacy Commissioner Michael McEvoy, determining that the parties are subject to the province's *Personal Information Protection Act* (PIPA).

In his March 1 Order, Mr. Loukidelis, a former commissioner, ruled that the Commissioner has jurisdiction over the activities of the federal political parties (FPPs) in that province, and that such jurisdiction is not ousted by any existing federal law, such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA) or the *Canada Elections Act* (CEA), or by the constitution.[1] The ruling will require the FPPs to comply with PIPA in respect of all of their collection, uses and disclosures of personal information of BC voters and, arguably, compel the parties to provide equivalent protections to voters across Canada.

The background

The FPPs argued that BC PIPA does not, or cannot, apply to them, citing variously, the potential application of PIPEDA, a necessary limiting of scope of PIPA within the federal context, the existing application of the CEA, and several grounds of non-constitutionality.

Currently, the federal private sector privacy law, PIPEDA, does not expressly apply to the parties, which are subject to certain, limited, privacy rules under the CEA.[2] Two provincial privacy laws do expressly address such application. Alberta's *Personal Information Protection Act* excludes application to political parties. The Québec *Election Act,* with the Bill 64 amendments, now expressly extends certain provisions of that province's *Private Sector Law* to the collection of the voters' personal information by provincial parties.[3]

By its statutory language, BC PIPA applies without restriction to "organizations". Organizations are defined by the statutory language to include a person, an unincorporated association, a trade union, a trust or a not-for-profit organization, but not an individual acting in a personal, domestic or employment capacity, or any public body or court.

The OIPC's ruling determined that for purposes of PIPA, organizations include the FPPs.[4] Consistent with this ruling, an earlier decision of the BC Commissioner determined that PIPA applies to the riding associations of the federal parties.[5]

The March 1 ruling was made in response to the parties' challenge of the OIPC's investigation of a complaint by three BC residents who had sought, and failed, to obtain full disclosure of the parties' collection, use and disclosure of their

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[1] Order P22-02, *Conservative Party of Canada, Green Party of Canada, Liberal Party of Canada, New Democratic Party of Canada.*
[2] Section 385, *Application for Registration* (of a political party).
[3] Sections 127.22-127.24 (Title III.1 *Protection of the personal information of electors),* in force September 22, 2023.
[4] See below, "Are the parties "organizations" subject to PIPA?"
[5] Order P-19-02 ,*Courtenay-Alberni Riding Association of the New Democratic Party of Canada (Re)*

personal information. The complaint was supported by the Centre for Digital Rights, a not-for-profit organization that promotes the protection of civic values in the digital economy.

Constitutional grounds

The arguments advanced by the parties can be considered a veritable compendium of potential challenges to application of the law to the FPPs. Three of the bases for challenge centered on constitutional grounds, specifically:

(i) is PIPA validly enacted under a provincial head of legislative authority under the *Constitution Act, 1867*?
(ii) if it is validly enacted, is PIPA inapplicable to the participating federal political parties by virtue of the constitutional doctrine of paramountcy vis-a-vis existing federal legislation such as the CEA?
(iii) if it is validly enacted, is PIPA inapplicable to the participating federal political parties by virtue of the constitutional doctrine of interjurisdictional immunity, meaning does PIPA impair a core federal power such as is exercised under the CEA?

Mr. Loukidelis examined each of these bases and determined that not only is PIPA validly enacted but it is not ousted by either paramountcy or interjurisdictional immunity. His discussion of the issues involves analyses of constitutional law including reference to relevant cases.

A further basis for challenge was that the PIPA provisions infringe the right to vote, or the freedom of political expression, as guaranteed by the *Canadian Charter of Rights and Freedoms*. Mr. Loukidelis determined that it was not appropriate for him to rule on this ground in light of the lack relevant material submitted by the parties to support it.

Are the parties "organizations" subject to PIPA?

The constitutional arguments, while interesting, mostly involve a discussion of the sometimes esoteric principles of federal versus provincial legislative validity. However the arguments advanced by certain of the parties to the effect that PIPA, by its statutory language, does not apply, go the heart of the legal status of the parties, and by extension whether they are, or should be, governed by any provincial law addressing privacy.

This issue was stated by Mr. Loukidelis as follows.

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 – addressing conflict with PIPEDA – oust its application?

It can be noted that all of the political parties are "unincorporated associations", meaning that technically they are not legal entities in the sense that individuals, corporations and trusts are. They are properly understood as *groups* of legal persons (which are typically individuals or corporations) working together for a specific reason under a constitution or charter setting out rules of operation. Financial resources typically are maintained for them by a legal person. In the case of the political parties, their financial matters are managed by a "registered agent", which is an incorporated entity.

While not recognized as legal entities *per se*, unincorporated associations commonly are made subject to statute laws and, under PIPA, as well as PIPEDA, are specifically included within the definition of an "organization". Notwithstanding

the unqualified inclusion of such entities within the statutory definition, two of the FPPs (Liberals, NDP) sought to establish that PIPA was not intended to include them within the defined term.

The Liberal Party argued that PIPA is not intended to extend to matters of clear federal elections governance, such as evidenced by the application of the CEA to matters of voters' personal information. Therefore the unqualified term "unincorporated association" within the definition of "organization" should be interpreted or "read down" to exclude them. Mr. Loukidelis disagreed, finding no authority to support this interpretation as well as finding that the PIPA provision was valid provincial legislation not ousted by constitutional grounds. In sum, he stated:

> 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". Applying this approach, I conclude the Legislature did not intend to exclude these unincorporated associations from PIPA's definition of "organization" …. The plain meaning of those terms applies to these political parties …. and I see no plausible reason to think that the Legislature intended any other meaning. …. 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".

Are the parties "federal works"?

The NDP submitted that the parties are "federal works, undertakings or businesses" (FWUBs) - which constitutionally are governed exclusively by federal legislation - and further contended that PIPEDA applies to the parties, even though it has no express provision to this effect. The NDP pointed to s. 3(2)(c) of PIPA, which stipulates that if PIPEDA applies, PIPA does not, as the key reason for PIPA's non-application.

Like the Liberal Party's argument for "reading down" the definition of organization, the NDP sought to characterize the parties as outside the scope of the law, arguing that "the objectives and the context of other relevant legislation must be considered" in interpreting PIPA. The NDP submitted that the CEA and the other federal statutes such as the *Telecommunications Act* and CASL, which include express provisions limiting application to political parties, are relevant to PIPA's interpretation in that the "objectives and the context" of those federal laws must be considered in determining that PIPA should be read with a limited scope.

The NDP's contention that the parties are FWUBs is an interesting characterization – seeking to put them in the same category as interprovincial enterprises such as railways, telcos and banks.[6] Contending that an unincorporated political party falls within this category seems to be a stretch and Mr. Loukidelis declined to adopt it or the argument that PIPEDA applies to such organizations even without mention in the statute.

Why are the parties opposing privacy oversight?

[6] As noted by Mr. Loukidelis, 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".

It is somewhat mystifying why the federal parties are fighting so hard to oppose oversight through comprehensive privacy laws such as PIPA. Further, notwithstanding the urging of the federal Privacy Commissioner and a parliamentary committee to extend the application of PIPEDA's protections to political parties,[7] the current government has declined to do so. It may be noted that if PIPEDA governance were in place the PIPA challenge would be moot since its application would be excluded by s. 3(2)(c).

Both PIPEDA and PIPA provide a sophisticated privacy code and enforcement mechanism. This code includes the right of individuals to be informed of all their information held by an organization and how that information is collected. As well, organizations must disclose through appropriate communications a comprehensive description of their practices relating to the use and sharing of such information. Consent to collection of an individual's information is required unless the law provides otherwise.

The apparent underlying basis for the parties' opposition to application of private sector privacy laws – PIPEDA or PIPA – is that such laws are intended for private sector entities, whether commercial or not, and that their application to the full gamut of activities carried on by political parties would be inappropriate and potentially harmful to the participatory role of parties in our democracy. However in a February 2019 study conducted by the BC Commissioner, it was noted that the parties carry on many activities similar to commercial entities – such as social media advertising. Furthermore, the clear premise of the Commissioner's study is that the application of PIPA to such activities is entirely appropriate notwithstanding the concurrent but more limited application of the BC *Election Act*.[8]

The ruling will have implications beyond the province's borders. It means that internationally accepted privacy rights, as found in PIPEDA and PIPA, may be available to voters across the country. If the ruling is upheld on judicial review, the federal parties will be required to comply with such rules in BC. Can we imagine a situation where BC voters will have more privacy rights vis-a-vis the parties than voters elsewhere in Canada?

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[7] *Appearance before Standing Committee on Procedure and House Affairs on the study about Bill C-76, Elections Modernization Act,* June 15, 2018; *Democracy Under Threat: Risks and Solutions In the Era of Disinformation and Data Monopoly, Report of the Standing Committee on Access to Information, Privacy and Ethics*, December 2018.

[8] Investigation Report P19-01, *Full Disclosure: Political parties, campaign data, and voter consent, BC OIPC,* February 6, 2019.