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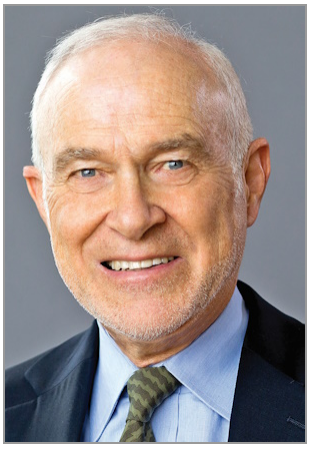
B.C. court: Comprehensive privacy rules apply to federal political parties

By **David Young**



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Law360 Canada (June 5, 2024, 10:18 AM EDT) -- In *Liberal Party of Canada v. The Complainants*, 2024 BCSC 814, handed down May 14, the B.C. Supreme Court ruled that the findings of David Loukidelis, the provincial information and privacy commissioner's delegated adjudicator, confirming the application of the province's *Personal Information Protection Act* (PIPA) to federal political parties (FPPs) were correct.

The judicial review ruling has significance beyond the confines of the province. PIPA's privacy compliance framework is equivalent to the federal law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which, to date has not been extended expressly to the FPPs. The FPPs that brought the court application (Liberals, PCs, NDP) had sought to quash the former commissioner's findings, in part by arguing that the privacy regime applicable to them under the *Canada Elections Act* (CEA) was not only sufficient but that, in exercise of the federal power to regulate elections, it conflicted with and therefore preempted any application of PIPA to the FPPs. Alternatively, they argued that the PIPA regime was unconstitutional.

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The court's decision, if not reversed in an appeal, means that, while the FPPs will be required to comply with PIPEDA-like rules within B.C., its practical effect will be that they will adopt PIPEDA-compliant procedures *in all provinces and territories* — because they will not want to be perceived as providing privacy rights in one part of the country that more extensively than elsewhere.

The court concurred with the constitutional analysis set forth by the adjudicator. The constitutional arguments before the court were that the federal law, the CEA, was paramount or, alternatively, that by the doctrine of "inter-jurisdictional immunity," it represents a "core" power of the federal government to regulate national elections that is impaired by PIPA.

Applying the doctrine of federal paramountcy, the court determined that there was no operational conflict between the minimal privacy provisions of the CEA — essentially a requirement for the FPPs to have privacy policies and a limited oversight role for the chief electoral officer — and the

comprehensive privacy regime set forth in PIPA.

It further determined that there was no frustration of a federal purpose because the CEA did not represent a clear federal purpose to establish a regime to govern the collection and use of personal information by federal political parties. While acknowledging Parliament's authority to establish a comprehensive, and exclusive, regime in respect of the collection and use of personal information by FPPs, the court determined that the relevant current CEA provisions cannot be read to support the creation of such a regime.

Specifically, it found that the limited privacy-related provisions of the CEA — primarily addressing the contents of the FPPs' privacy policies — do not conflict with the comprehensive privacy regime set forth in PIPA. The provisions of the CEA do not establish a comprehensive privacy protection regime as would oust the application of PIPA.

Applying, alternatively, the doctrine of inter-jurisdictional immunity, the FPPs sought to establish the proposition that Parliament has exclusive jurisdiction in regard to legislating with respect to federal elections. Specifically, they argued that the right of citizens to freedom of speech in federal elections is a protected core power that is impaired by PIPA. The court disagreed, stating that requiring FPPs to disclose to citizens, on request, what personal information they have about the citizen, together with how it has been used and to whom it has been disclosed has no impact on the core federal elections power. It does not destroy the right of British Columbians to engage in federal election activity.

In 2023, subsequent to the OIPC adjudicator's ruling, the federal government tabled amendments to the CEA seeking to establish a comprehensive privacy regime such as would be impaired by the PIPA provisions.

However, in testimony before the Senate Standing Committee on Legal and Constitutional Affairs, both the Chief Electoral Officer and the federal Privacy Commissioner stated that the added provisions were inadequate to establish such a comprehensive privacy regime, in particular noting the lack of minimum standards and substantive rights, and the limited oversight/enforcement role that would be provided by the Chief Electoral Officer.

Sensing that the 2023 amendments would be inadequate to establish the constitutional exclusivity of the CEA, the government tried again to tweak the legislation with a further amending bill, introduced in March 2024, that would expand the categories of items that must be included in a party's privacy policy and add a more express oversight power in the chief electoral officer.

The court declined to consider either the 2023 amendments, indicating that they did not have a retrospective effect or the further amending bill indicating that, having received only first reading, it does not have any legal effect.

It is clear from the court's decision that the federal government has the constitutional power to regulate all aspects of privacy in connection with federal elections, including as applicable to the federal political parties. Exercise of such power pursuant to a comprehensive privacy law would preempt the application of a provincial privacy law, such as PIPA, to the FPPs. However, the provisions of the CEA, as in force at the time of the Office of the Information and Privacy Commissioner (OIPC) adjudicator's ruling, do not accomplish such a result. Whether the subsequent amendments and proposed amendments to the CEA would accomplish this result was not addressed by the court.

It is mystifying why the federal parties are fighting so hard to oppose oversight through comprehensive privacy laws such as PIPA and PIPEDA. The FPPs argue that the application of a comprehensive privacy regime to them such as would be provided by those laws is not required and not appropriate. However, the practical effect of the court's decision, if not reversed in any appeal or subsequent consideration of the amendments and proposed amendments to the CEA, means that the FPPs will be subject to PIPEDA-like rules within B.C. and, most likely, will be compelled to adopt such procedures across Canada.

David Young is principal at David Young Law, a privacy and regulatory counsel practice in Toronto.

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