Order P19-02

COURTENAY-ALBERNI RIDING ASSOCIATION OF THE NEW DEMOCRATIC PARTY OF CANADA

Michael McEvoy
Information and Privacy Commissioner for British Columbia

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Summary: A complaint has been made under PIPA about the organization, which is an electoral district association registered under the *Canada Elections Act*. The organization argued on constitutional grounds that PIPA does not apply to its collection, use or disclosure of personal information. It contended that PIPA is outside the province's legislative authority to the extent that PIPA applies to the organization. It also argued that, under the constitutional paramountcy doctrine, the *Canada Elections Act* and other federal statutes prevail over PIPA. The Commissioner concludes that neither of these constitutional objections succeeds. A further hearing in this inquiry will be scheduled to consider the merits of the complainants' allegations.

Statutes Considered: *Personal Information Protection Act,* S.B.C. 2003, c. 63; *Canada Elections Act,* S.C. 2000, c. 9; *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5; *Canadian Charter of Rights and Freedoms*, ss. 1(b), 2(d) and 3, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Constitution Act, 1867* (UK) 30 & 31 Vict, c.3, s.41; *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, S.C. 2010, c. 23; *Telecommunications Act,* S.C. 1993, c. 38; *Reference re Firearms Act (Can.)*, 2000 SCC 31.

Authorities Considered:

Cases Considered: *Li v. Rao*, 2019 BCCA 265; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62 [*UFCW*]; *K. E. Gostlin Enterprises Ltd. (Re)*, 2005 CanLII 18156; *Law Society of British Columbia v. Mangat,* 2001 SCC 67; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town*), 2001 SCC 40; *Canadian Reform Conservative Alliance v. Western Union Insurance Corporation,* 2001 BCCA 274; *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877; *Opitz v. Wrzesnewskyj,* 2012 SCC 55; *Doré v. Barreau du Québec,* 2012 SCC 12*; MacKay v. Manitoba*, [1989] 2 S.C.R. 357;

INTRODUCTION

[1] This decision deals with whether the *Personal Information Protection Act*[1] (PIPA) is inapplicable, on constitutional grounds, to the collection, use and disclosure of personal information by the Courtenay-Alberni Riding Association of the New Democratic Party of Canada (organization). I conclude that, for reasons given below, PIPA is not inapplicable on constitutional grounds. Whether the organization's collection, use or disclosure of the complainants' personal information complied with PIPA remains to be determined on the merits.

[2] The organization is an "electoral district association" of the New Democratic Party of Canada (federal party), which is a political party registered under the *Canada Elections Act*.[2] The organization contends that PIPA does not apply to its activities. It advances this position on constitutional grounds. It also argues that federal private sector privacy legislation, the *Personal Information*

[1] S.B.C. 2003, c. 63.
[2] S.C. 2000, c. 9. July 4, 2019 affidavit of Jesse Calvert, para. 3.

Protection and Electronic Documents Act[3] (PIPEDA), applies to it, such that PIPA does not, by virtue of s. 3(2)(c) of PIPA.

[3] The background to this decision is somewhat involved so I will summarize only the most relevant procedural steps to this point.

[4] On February 21, 2018, the organization sent an email to the personal email addresses of two individuals, the complainants in this proceeding.[4] The email invited them to attend a "meet and greet" event with the leader of the federal party.

[5] One of the individuals subsequently wrote to the local NDP Member of Parliament, on February 24, 2018, copying the federal party in Ottawa. The letter expressed concern about how the organization obtained the personal email address belonging to that individual and his spouse. It also expressed concern about "how your organization came into possession of our personal information." The letter also sought the following information, citing s. 23(1) of PIPA:

> -exactly what information has your organization collected about myself and my wife?
>
> -when and how was our information obtained and where was it sourced?
>
> -who has our personal information been shared with?
>
> -who has had and will have access to this information?
>
> -how is that information currently being used by your organization, and how has it been used up to this point?

[6] On March 2, 2018, the local NDP Member of Parliament responded to the complainants, telling them that his constituency office had taken steps to reach out to the "NDP Party office" for follow-up.

[7] On April 15, 2018, having received no other response, one of the complainants wrote to this Office and asked for an investigation into the organization, alleging both individuals' privacy had been breached. (On October 23, 2018, the individuals clarified that they were complaining to this Office about the collection and use of both individuals' personal information.)

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[3] S.C. 2000, c. 5.

[4] One of the complainants later told this Office that, on February 26 and 27, 2018, the organization sent two further emails to them about the upcoming meet and greet event.

[8] In a November 7, 2018 letter to this Office, the federal party took the position that "PIPA does not apply to the activities of Canada's New Democrats", adding that the OIPC "does not have jurisdiction to investigate this matter." In a further letter, dated November 23, 2018, the organization took the position that "the activity of federal political parties can, in fact, be subject to" PIPEDA, which is federal private sector privacy legislation, adding "[i]t is therefore our position that, where PIPEDA applies, federal political parties fall under the exception laid out in PIPA at s. 3(2)(c)."[5]

[9] On December 18, 2018, the federal party sent a letter to each of the complainants. The letter stated that, although PIPA does not apply to "Canada's NDP and its electoral district associations…", "… we have chosen to respond to your request in this instance." The letter disclosed that the name, address, telephone number and email address of each of the complainants was held by "our organization". It also stated that "your household was contacted during the 2015 federal election as part of our voter outreach efforts and your response to that interaction is logged in our system."

[10] This Office issued a notice of hearing to the organization and the complainants on February 19, 2019.[6] That notice was also given to the federal party, to the BC Freedom of Information and Privacy Association (FIPA) and to Integrity BC.[7]

ISSUE

[11] The issue stated in the notice of hearing is "whether PIPA applies to the organization."[8] In its March 19, 2019 initial submission, the organization advanced three reasons why PIPA does not apply to it, the first of which repeated its earlier reliance on PIPEDA. The organization also argued that PIPA does not apply to it because it is subject to the *Canada Elections Act* and because the "provisions of *PIPA* represent unjustified limits on the right to vote

[5] Facts stated above are taken from the fact report that this Office sent to the parties on February 19, 2019.
[6] A letter to the Attorney General of British Columbia, copied to all parties dated March 25, 2019, confirmed the hearing was an inquiry under s. 50 of PIPA.
[7] This was done under s. 48 of PIPA. Notice was also given under that section to the Attorney General of British Columbia on March 20, 2019.
[8] The fact report issued to the participants also noted that, if PIPA is found to apply to the organization, "an inquiry to determine whether the organization was authorized under PIPA to collect and use the individuals' personal information in the above referenced circumstances will proceed."

and on the freedom of political expression guaranteed by the *Charter of Rights and Freedoms*."[9]

[12] In a March 20, 2019 letter to the provincial Ministry of Attorney General (Attorney General) and the federal Department of Justice, counsel to the organization said that the "constitutional questions raised in our submissions are the following":

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*, PIPEDA and other applicable federal laws are paramount?

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*?[10]

[13] For clarity, while the first and second questions refer to "federally registered political entities", the questions are answered here in relation to the organization, as an "electoral district association" registered under the *Canada Elections Act*.

[14] For reasons given below, it is not appropriate to deal with the third question.

DISCUSSION

[15] The complainants made a submission, as did FIPA and the Attorney General of British Columbia. The Attorney General of Canada and Integrity BC did not.

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[9] Organization's initial submission, March 19, 2019, para. 7.

[10] These grounds are quoted from the organization's March 20, 2019 notice, a copy of which is before me. According to the Attorney General, this was the third notice of constitutional question that the organization served on the Attorney General and the federal Attorney General. The first, dated March 11, 2019, stated that the organization intended to argue that the doctrine of paramountcy rendered PIPA inapplicable. The second, dated March 15, 2019, added grounds under ss. 1(b), 2(d) and 3 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Submission of the Attorney General, April 12, 2019, paras. 9 and 11.

[16] The complainants, who are self-represented, restricted their submission to the merits of their complaint about the collection and use of their personal information.

[17] Before dealing with the organization's constitutional arguments, I will address its contention, relying on the language of both statutes, that PIPEDA applies to the organization and therefore PIPA does not.

Does PIPEDA apply to the organization?

[18] PIPA applies to every "organization", a term that is defined as including "a person, an unincorporated association, a trade union, a trust or a not for profit organization."[11] The organization's evidence is that it is "an unincorporated, voluntary association of members established pursuant to" the federal party's constitution.[12] It is registered under the *Canada Elections Act* as an "electoral district association."[13] Section 1 of the *Canada Elections Act* defines "electoral district association" as "an association of the members of a political party in an electoral district."

[19] The organization's purpose is "to nominate an NDP candidate in the electoral district of Courtenay-Alberni in each federal election and to conduct a campaign to elect that candidate."[14] The organization "also supports and promotes the principles and policies of the NDP through political education and organizing, and provides a forum for members to participate in NDP policy development and party governance."[15] As an association of the members of the NDP in the Courtenay-Alberni electoral district active in the ways just described, it is clear that the organization is active at a local level, in British Columbia.

[20] As an "unincorporated association", the organization on the face of it falls within PIPA's definition of "organization." The fact that the organization is established under the constitution of a registered federal political party, and is active in federal politics, does not change this fact. It remains an "organization" for PIPA's purposes.

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[11] The definition excludes certain entities or bodies from the definition. These exclusions are not relevant here.
[12] Initial submission, para. 30, and para. 6 of the July 4, 2019 affidavit of Kevin Brown, who deposed that he is the organization's "President and Chief Executive Officer". Also see para. 3 of Jesse Calvert's affidavit.
[13] Para. 2 of the Kevin Brown's affidavit and para. 3 of Jesse Calvert's affidavit.
[14] Para. 6 of Kevin Brown's affidavit.
[15] *Ibid.*

[21] As noted previously, the organization took the position earlier in this process that PIPA does not apply to it because PIPEDA "can" apply.[16] In this inquiry, it has asserted that PIPEDA applies and therefore, by virtue of s. 3(2)(c) of PIPA, PIPA does not apply. It says that it falls within PIPEDA's definition of "organization," since it is an "association." It then argues that, through s. 4(1) of PIPEDA,

> Parliament has determined that *PIPEDA* will apply to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities. The effect of this section is not to remove a political party and its electoral district associations from the application of *PIPEDA.* Rather it is to remove activities other than commercial activities from the purview of *PIPEDA*.[17]

[22] It then says that PIPEDA applies to it, with the result that, by virtue of s. 3(2)(c) of PIPA, PIPA is "inapplicable to the Organization."[18]

[23] As I understand this argument, because it is an "organization" as defined in PIPEDA, PIPEDA applies to the organization and, the fact that s. 4(1) only excludes non-commercial activities of an organization from PIPEDA's application does not alter the fact that it still is an organization under PIPEDA.[19] Because PIPEDA applies to it, as an "organization", s. 3(2)(c) of PIPA operates to make PIPA inapplicable to the organization itself.

[24] It is not entirely clear from its argument whether the organization accepts that PIPEDA's personal information protection rules apply to it. One interpretation of its argument that PIPEDA "applies" is that it would accept that its activities inside British Columbia are governed by that statute's personal information protection rules. Another is that, even though PIPEDA "applies" to it, it had not collected, used or disclosed personal information in, to use the language of s. 4(1)(a) of PIPEDA, "the course of commercial activities", so PIPEDA's rules do not apply to its actions.

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[16] See footnote 1.
[17] Initial submission, para. 32.
[18] *Ibid.*, para. 33.
[19] Consistent with this, at para. 35 of its initial submission the organization says, "as discussed earlier, *PIPA* does not apply to organizations to which *PIPEDA* applies." Similarly, at para. 5 of its initial submission, the organization says that "[o]rganizations that are governed by the federal *Personal Information Protection and Electronic Documents Act ("PIPEDA")* are specifically exempted from application of *PIPA.*"

[25] Whether this is the true import of its position does not matter: applying the ordinary rules of statutory interpretation, the organization's argument that PIPEDA applies to it such that PIPA does not is not persuasive.[20]

[26] Its interpretation of s. 4 of PIPEDA seeks to divorce the opening words of s. 4(1) from the language of s. 4(1)(a). The opening text states that PIPEDA applies to every organization, but only, as s. 4(1)(a) then makes clear, to the limited extent expressly stated in that clause, *i.e.*, "in respect of" the organization's collection, use or disclosure of personal information in the course of a commercial activity. The opening language of s. 4(1) does not, in other words, 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.

[27] Nor does s. 3(2)(c) of PIPA advance the organization's position. It states that PIPA does not apply to the collection, use or disclosure of personal information "if the federal Act [PIPEDA] applies" to that "collection, use or disclosure". It does not say that, if PIPEDA applies to an organization, PIPA does not. Like PIPEDA's language, the language of s. 3(2)(c) focuses on activity; it 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".

[28] Moreover, assuming for discussion purposes only that the organization has, as alleged, collected and used the complainants' personal information, PIPEDA would only apply if the collection and use occurred "in the course of commercial activities", *i.e.*, in the course of a "transaction, act or conduct or any regular course of conduct that is of a commercial character".[21] If that activity on the organization's part was not of a commercial character, PIPEDA would not apply.

[29] As the party advancing the proposition that PIPEDA applies in these circumstances, and PIPA does not, the organization has, at the least, a

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[20] I refer here, of course, to the rule that the words of a statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See, for example, *Li v. Rao*, 2019 BCCA 265, at para. 37. The *Interpretation Act* contains a similar mandate.

[21] This language is from s. 2(1) of PIPEDA, which defines "commercial activity" as "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists."

practical burden to support its position with evidence. It has not done so. In the absence of evidence to establish whether the alleged activity was of a commercial character, I cannot conclude that PIPEDA would apply to the organization on the facts.[22]

[30] I will now deal with the constitutional issues that the organization has raised.

Authority to decide constitutional issues

[31] A preliminary issue is whether I have the authority in an inquiry to decide the constitutional questions. I conclude that I do. Section 50(1) of PIPA provides that "the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry." 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.[23] 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.[24]

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[22] Of course, this discussion also assumes that PIPEDA could validly apply within British Columbia, despite PIPA and PIPA's status as a law that is substantially similar to PIPEDA, if the organization's activity was of a commercial character.

[23] *Paul v. British Columbia (Forest Appeals Commission)* [*Paul*], 2003 SCC 55, at para. 40. Also see *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, where the Supreme Court of Canada said, at para. 36, that "an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision." This principle still holds. See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 69.

[24] I note here that, as indicated above, this is an inquiry under s. 50 of PIPA. This is a first-phase decision, however, necessitated by the organization's threshold jurisdictional challenge. The second phase of this inquiry will involve a hearing into the merits of the complainants' allegations and a decision on the merits, which will complete this inquiry and result in an appropriate order under s. 52.

Is PIPA within British Columbia's constitutional authority?

[32] The organization says that Parliament alone is competent to determine the rules that govern elections for Parliament or the activities of electoral district associations—there "is no space for the province to have any say whatsoever"—and "[p]rovincial legislation such as *PIPA* is *ultra vires* the province if it applies to the Organization."[25]

[33] It argues that federal elections legislation has developed over time in a way that has "moved the federal electoral system to a uniform one across the country. It does not matter whether you live in Quebec or in British Columbia; the rules for participating in the federal electoral process are the same."[26] It is subject, the organization says, to a comprehensive scheme of federal laws, including the *Canada Elections Act*—as amended earlier this summer by the *Elections Modernization Act*[27]—Canada's anti-spam legislation (*CASL*)[28] and the do-not-call provisions under the *Telecommunications Act*.[29]

[34] According to the organization, these federal laws show that Parliament "has struck a balance between individual privacy rights and the rights of Canadians to elect their Members of Parliament and participate meaningfully in the democratic process."[30] Through these laws, "Parliament envisions that political entities collect and use many types of information in a variety of forms and from many sources beyond the list of electors", and "it has not prohibited the collection and use of such information without the consent of the elector."[31] PIPA's application would, the organization contends, "represent a move backwards to differentiation in the country based on provincial legislation, contrary to the clear intentions of Parliament and the constitution."[32]

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[25] Initial submission, para. 66.
[26] *Ibid.*, para. 50.
[27] S.C. 2018, c. 31.
[28] That law, which inexplicably has no short title, is called *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*, S.C. 2010, c. 23.
[29] S.C. 1993, c. 38.
[30] *Ibid.*, para. 25.
[31] *Ibid.*, para 27.
[32] *Ibid.,* para 51.

[35] On the constitutional issue, the Attorney General correctly points out that PIPA is presumed to be within the legislative authority of the province and the burden is on the organization to rebut this presumption.[33]

[36] The organization says that s. 41 of *The Constitution Act, 1867*[34] "explicitly states that Parliament, and not the Provinces, has the authority to make rules for the conduct of federal elections."[35] Any provincial jurisdiction "over the conduct of federal elections ended when Parliament legislated", the organization says.

[37] Citing the distribution of powers in ss. 91 and 92 of the *Constitution Act, 1867*, the organization contends that, in "purporting to regulate activities of federal electoral organizations that operate in British Columbia, the Province is acting *ultra vires* the Constitution."[36] It suggests that PIPA is *ultra vires* because it can apply to the organization's activities in British Columbia even though the "political activities of Canada's NDP and the Organization are not matters of a merely local nature," adding that "Parliament governs the whole country, not only the territory within the province."[37]

[38] These arguments, which make assertions based on the allocation of legislative authority as between Parliament and the provincial Legislature, are insufficient to establish that PIPA is outside the Legislature's legislative authority. The proper approach to deciding that question is to identify the nature of the impugned legislation, *i.e.*, to identify what is known as its "pith and substance", or true nature.[38] As has been said, "Put another way, the question is 'What in fact

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[33] Attorney General's initial submission, para. 25, citing *Reference re Firearms Act (Can.)*, 2000 SCC 31, at para. 25: "The presumption of constitutionality means that… the party challenging the legislation" is "required to show that the Act does not fall within the jurisdiction of Parliament" or a province, as the case may be. Here, the burden is on the organization to show that PIPA is outside the jurisdiction of British Columbia's Legislature.

[34] (UK) 30 & 31 Vict, c.3, [*Constitution Act, 1867*].

[35] *Ibid.* Section 41 of the *Constitution Act, 1867* was clearly intended to be a transitional provision. It provided that, upon Confederation and until Parliament "otherwise provided" by legislating in respect of "Elections of Members to serve in the House of Commons", existing colonial election laws would apply to those elections. Section 41 also contemplates Parliament being competent to legislate in relation to elections for Parliament.

[36] *Ibid.*, para. 52.

[37] *Ibid.*, para. 56.

[38] This initial step is also necessary before a paramountcy analysis can be undertaken: *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 [*EMA Reference*], para. 89. (On June 14, 2019 the provincial government appealed this decision to the Supreme Court of Canada: *Attorney General of British Columbia v. Attorney General of Canada*, S.C.C. File No. 38682).

does the law do and why?'"[39] Once that analysis is done, it is necessary to decide whether the law is within the Legislature's legislative jurisdiction under the Constitution.[40] This analysis must be done keeping in mind the presumption that PIPA is constitutional, and that the organization bears the burden of rebutting that presumption.

[39] The organization suggests that PIPA has to do with the conduct of federal elections.[41] For reasons given below, the legislative purpose and the legal and practical effects of PIPA, clearly demonstrate that PIPA is at its heart a law in relation to the protection of personal information.

[40] The substance, or true nature, of a statute is to be ascertained by determining its legislative purpose, and its legal and practical effects;[42] internal evidence, or external evidence such as the Hansard record of legislative debates, may be useful in making this determination.[43] A "statement of legislative intent is often a useful tool" for identifying a law's purpose.[44] PIPA is a relatively rare example of a British Columbia statute that contains an explicit statement of purpose:

> **Purpose**
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> 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.

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[39] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], para. 17.
[40] This approach was recently affirmed in the *EMA Reference*, paras. 4 and 5.
[41] See, for example, paras. 6, 25, 51, 52 and 59 of its initial submission. Also see para. 9 of its reply submission.
[42] At para. 14 of the *EMA Reference*, drawing on well-established principles, the Court said this: "The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention. These effects may be legal ones such as effects on the rights or obligations of citizens; or practical ones, especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly." There is no basis in the material before me to suggest that the Legislature enacted PIPA in an attempt to do indirectly what it cannot do directly. The material, including the legislative debate records, makes this clear.
[43] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 [*Chatterjee*], at para. 16. Also see *EMA Reference*, at para. 13.
[44] *Chatterjee*, at para. 17.

[41] Keeping this purpose statement in mind, it is helpful to consider the remarks that the minister responsible made when he tabled PIPA in the Legislative Assembly for first reading, in a passage meriting full quotation:

> **Hon. S. Santori:** This government is committed to ensuring that the B.C. private sector is positioned to take full advantage of commercial opportunities, especially in electronic commerce. This government is also dedicated, in its strategic plan, to removing barriers to business.
>
> As part of those commitments and the province's leadership in protecting the personal information of British Columbians, I am pleased to introduce the Personal Information Protection Act. This bill is important for British Columbia for a number of important reasons, but certainly there is no reason more important to British Columbia business than providing a plain-language, easy-to-implement alternative to the confusing and cumbersome federal private sector privacy act that will cover British Columbia in January 2004 if the province does not pass its own legislation.
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> By retaining provincial jurisdiction over this important aspect of provincial commercial activity, this bill will reduce the regulatory burden for the B.C. private sector, fill in significant gaps left by the federal act and provide provincial oversight instead of oversight by a federal commissioner located in Ottawa.
>
> Polls and surveys have shown a consistently high level of concern over the use of personal information over the Internet, a concern that is recognized as having a stifling effect on the public's utilization of electronic commerce. This bill will help to reassure British Columbians that their personal information is protected when they participate in electronic transactions.
>
> This bill will also ensure that British Columbia is able to take advantage of international trade opportunities. The European Union, for example, may not allow trade with B.C. companies involving personal information if the province does not have its own act, because of the gaps in coverage left if B.C. is covered under the federal act.
>
> This bill also responds to 92 percent of British Columbians surveyed who want this legislation and is in keeping with the overwhelming consensus of the over 150 B.C. business organizations or groups consulted that do not want to be covered by the federal act. This bill minimizes the impact of privacy regulation on the B.C. private sector by creating less regulation and clearer regulation than the federal legislation — important for small and medium-sized provincial businesses.
>
> It ensures provincial control over this important aspect of the B.C. economy, avoiding both federal regulation and oversight. It promotes harmonization with other jurisdictions by providing a model provincial statute that other jurisdictions can copy. It provides an essential foundation

> for electronic commerce and international trade by ensuring that British Columbia is in compliance with international standards for data protection, and it represents the culmination of extensive consultations incorporating private sector input in striking a balance between the public's strong desire to protect its personal information and the need for business to use personal information for legitimate business purposes.[45]

[42] As for PIPA's legal and practical effects, the substance—or true nature and character—of PIPA is to regulate the collection, use and disclosure of personal information by organizations, not to regulate elections at any level. PIPA truly lives up to its name—it is about the protection of personal information, not elections. None of its provisions mention elections, whether local, provincial or federal.[46] They are clearly concerned only with personal information practices. A brief overview of PIPA illustrates this.[47]

[43] PIPA prohibits organizations from collecting, using or disclosing an individual's personal information unless the individual has given consent (whether implicit or express) or PIPA authorizes the collection, use or disclosure without the individual's consent.[48] Non-consensual collection, use and disclosure of personal information is authorized under several sections.[49] Section 12

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[45] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl, 4th Sess, Vol 14, No 12 (30 April 2003) at 6351 (Hon S Santori). The minister made similar remarks in opening second reading debate, including by describing PIPA as a "provincial personal information regime" that is "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", adding that it would implement "internationally recognized privacy standards in a way that smaller-sized businesses can understand and implement" (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl, 4th Sess, Vol 14, No 13 (6 May 2003) at 6415 and 6416 (Hon S Santori)).

[46] The word "election" is not mentioned; neither are terms like "voter", "voting", "electoral district association", "political party", and so on.

[47] It is convenient to note here that, in relation to Alberta's *Personal Information Protection Act*, which is substantially similar to PIPA, the Supreme Court of Canada recognized the personal information protection objectives of that law. See *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62 [*UFCW*], paras. 19-22.

[48] Section 6 requires consent as the default, while ss. 7, 8 and 9 lay down rules for the giving and withdrawal of consent. Section 11 limits the right of organizations to collect personal information by stipulating that personal information may only be collected "for purposes that a reasonable person would consider appropriate in the circumstances." Sections 14 and 15 similarly limit the right to use or disclose personal information to "purposes that a reasonable person would consider appropriate in the circumstances".

[49] Non-consensual collection is authorized under s. 12, non-consensual use under s. 15, and non-consensual disclosure under s. 18. In addition, non-consensual collection, use and disclosure of "employee personal information" is permitted under ss. 13, 16 and 19. The collection and disclosure of personal information as part of a "business transaction" is permitted

contains some thirteen separate heads of authority under which organizations may collect personal information without consent. For example, s. 12(1)(h) authorizes the collection of personal information without consent where "the collection is required or authorized by law." Consistent with this, ss. 15 and 18 each set out numerous situations in which organizations may, respectively, use or disclose personal information without consent. Sections 15(1)(h) and 18(1)(o), for example, permit the non-consensual use or disclosure of personal information where it "is required or authorized by law."

[44] PIPA's focus on personal information protection is further demonstrated by Part 7, which imposes transparency requirements—an organization must give an individual information about how it has used the individual's personal information and to whom it has been disclosed.[50] PIPA also gives individuals a right of access to their own personal information and to request correction of their personal information.[51] Consistent with these rights, organizations have duties relating to access and correction requests, such as time limits on responses to requests,[52] the ability to charge fees for access and so on.[53] Last, PIPA imposes a duty on organizations to make reasonable efforts to ensure that personal information they collect is accurate and complete,[54] and to make reasonable security arrangements to protect personal information from risks such as unauthorized disclosure or use.[55]

[45] This overview of PIPA demonstrates that in pith and substance it is about the regulation of the collection, use and disclosure of personal information by organizations. It is silent on the registration of political parties or associations, nomination of candidates, voting processes, campaign financing and a myriad of other election-related matters. It is not about the regulation of elections.

[46] The next step is to decide whether PIPA falls under one of the heads of provincial legislative authority in the *Constitution Act, 1867*. The organization concedes that provinces "have authority to enact privacy legislation within the province", citing ss. 92(13) and (16) of the *Constitution Act, 1867*.

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by s. 20. And disclosure for research or statistical purposes or disclosure for archival or historical purposes is permitted under ss. 21 and 22, respectively.

[50] Section 23(1).

[51] Respectively, ss. 23 and 24. Also see ss. 26 and 27.

[52] Sections 29 and 31.

[53] Section 32.

[54] Section 33.

[55] Section 34.

[47] The introductory text of s. 92 provides that "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated". The class of subject stated in s. 92(13) is "Property and Civil Rights in the Province"; the class stated in s. 92(16) is "Generally all Matters of merely local or private Nature in the Province".

[48] PIPA governs the collection, use and disclosure of individuals' personal information and is for that reason undoubtedly a privacy law, to use the organization's term for such a law, a term that is generally in use. As the Court said in *UFCW*, such a law "seeks to safeguard informational privacy",[56] recognizing that giving an individual a "measure of control over his or her personal information is intimately connected to individual autonomy, dignity and privacy".[57]

[49] Nor do I have any doubt that—consistent with its legislative objective—PIPA is in substance legislation in relation to property and civil rights in British Columbia. It regulates the private sector in the province in relation to the collection, use and disclosure of personal information in the course of business or not-for-profit activities.[58] PIPA has an impact on the relationship between customers, or clients, and the businesses with which they deal where the collection, use or disclosure of personal information is involved. Its requirements relating to appropriate purposes, consent and non-consensual collection, use or disclosure undoubtedly will affect those relationships.

[50] Put another way, PIPA inevitably affects contractual relations between consumers and businesses. There is, therefore, merit to the Attorney General's analogy between personal information protection and consumer protection laws, the latter having been found to be within provincial competence under both legislative heads of authority cited above.[59] That analogy is further supported by

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[56] *UFCW*, para. 22.
[57] *UFCW*, para. 24. Also see para. 19 of *UFCW*, where the Court affirmed that the "ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy."
[58] I note here that s. 3 of PIPA provides that PIPA does not apply to public sector personal information practices or to certain specified private activities involving collection, use or disclosure of personal information.
[59] Attorney General's submission, para. 41, citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927. Also see Michael Power, *The Law of Privacy* (Toronto: LexisNexis Canada, 2013) at pp. 11-16.

decisions of this Office under PIPA, which have made findings that affect how businesses collect, use or disclose the personal information of their customers.[60] The PIPA decisions of this Office illustrate how PIPA's application has legal effects "on the rights or obligations of citizens".[61]

[51] The organization, as noted earlier, argues that PIPA is *ultra vires* the province to the extent that it "purports to operate outside of the province or affect matters that are not of a 'merely local or private nature' in the province", adding that the "political activities" of the organization and "Canada's NDP" are "not matters of a merely local nature. Parliament governs the whole country, not only the territory within the province."[62] This does not advance the organization's case.

[52] Setting aside the fact that there is no evidence that PIPA "purports" to operate outside British Columbia, or "purports" to "affect" matters not of a merely local or private nature, this argument is not germane to the question of whether PIPA falls within provincial legislative competence under the *Constitution Act, 1867*.[63] It seems to me this argument confuses the first and second steps of the constitutional analysis with the issue of possible incidental effects on federal matters. Analysis of incidental effects should be kept distinct from assessment of whether a provincial statute is validly enacted under the *Constitution Act, 1867*. Otherwise, to adapt an observation made in *Chatterjee*, "there is a danger that the whole exercise will become blurred and overly oriented towards results."[64]

[54] In any case, it is well-established that a provincial law can have an incidental effect on a federal matter without affecting that law's validity under a head of provincial legislative competence. As the Court of Appeal recently put it, because "the heads of power are not watertight, the characterization of the pith and substance of legislation is not determined by the fact that it 'incidentally

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[60] For example, in *K. E. Gostlin Enterprises Ltd. (Re)*, 2005 CanLII 18156, Commissioner Loukidelis held that a business could require customers who were returning a product for a refund to provide identifying information but could not require them to do so for customer satisfaction follow-up, which had to be optional for the customer, not mandatory. This ruling undoubtedly had an impact on the commercial practices of the business, which operated a store that is part of a national chain of franchises.
[61] *EMA Reference*, para. 16.
[62] Initial submission, para. 56.
[63] PIPA's local objective and character are demonstrated by s. 3(2)(c), which provides that PIPA does not apply to the collection, use or disclosure of personal information if PIPEDA does. This strongly indicates that the province has not attempted to legislate other than in relation to local matters, matters within its legislative orbit.
[64] *Chatterjee*, para. 16.

affects' a matter allocated to the other level of government."[65] Even if one assumes for discussion purposes only that PIPA incidentally affects a federal matter, that does not undercut my finding, for the above reasons, that PIPA is a law validly enacted under ss. 92(13) and (16) of the *Constitution Act, 1867*.

Are federal laws paramount?

[55] This is not the end of the matter, however. The organization contends that application of the paramountcy doctrine leads to the conclusion that PIPA does not apply because it conflicts with the *Canada Elections Act*, *CASL* and the *Telecommunications Act*, and also on the basis that PIPA frustrates the purpose of the *Canada Elections Act*.[66]

[56] The organization first says that PIPA's provisions conflict with federal law, which therefore prevails. It refers to the *Canada Elections Act* and the federal do-not-call and anti-spam rules, arguing that an "organization that complies with the federal laws can find itself in violation of *PIPA*", and the "principle of federal paramountcy prohibits such an outcome."[67]

[57] Second, it argues that PIPA frustrates a federal purpose, *i.e.*, the goal of the *Canada Elections Act* of giving "effect to the broad right to vote" and ensuring "electoral fairness and govern the activities of registered political parties", purposes that "are pursued throughout the whole political process and not merely at election time."[68] The *Canada Elections Act*, it says, "establishes uniform rules that create a level playing field for candidates and for voters regardless of where in Canada they live" and PIPA's application to the organization would "create two sets of rules of engagement with electors: one for voters and political entities in British Columbia and another in the rest of Canada."[69] This, the organization suggests, would risk "skewing the outcome" of federal elections:

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[65] *EMA Reference*, para. 6. Also see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], paras. 22 and 23.

[66] It is convenient to note here that, apart from mentioning it in the constitutional question it stated, the organization made no submissions on whether PIPEDA prevails over PIPA by virtue of the paramountcy doctrine. The onus is on the organization to establish this but made no attempt to meet that burden. I therefore conclude that PIPEDA does not prevail over PIPA under the paramountcy doctrine.

[67] Initial submission, para. 58.

[68] *Ibid.*, para. 59.

[69] *Ibid.*, para. 60.

> Regional variations in the political support enjoyed by various parties has a large impact on determining the balance of power within Parliament and which party will form government. To disadvantage political organizations' capacity to will form government. [*sic*] To disadvantage political organizations' capacity to conduct campaigns in one region of Canada over another carries the risk of skewing the outcome of our Parliamentary elections.[70]

[58] The organization even suggests that PIPA's application to electoral district associations in British Columbia would take Canada back to the patchwork of election laws that existed before "the modern" *Canada Elections Act*.[71]

[59] For reasons given below, neither of the organization's paramountcy positions is supportable.

[60] Paramountcy of a federal law can, as the organization's submissions recognize, be established on either of two grounds. The first is where a validly enacted federal law and a validly enacted provincial law conflict; the second arises where a federal law's purpose is frustrated by a provincial law.[72] As the Court noted in the *EMA Reference*, "[i]n recent decades, the Supreme Court of Canada has viewed paramountcy with greater scrutiny than older authorities suggested and has encouraged "co-operative federalism" and a "flexible" approach to constitutional interpretation where possible consistent with the *Constitution Act*."[73] The Supreme Court has also recently said this:

> Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a "restrained approach", and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility.[74]

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[70] *Ibid.*, para. 61. The organization offered no particulars of its assertion that PIPA's application would have an impact on formation of federal administrations or risk "skewing" federal election outcomes.

[71] This is the logical extension of its claim, at para. 30 of its reply submission, that, if PIPA were to apply, there "can be no serious doubt that this would represent a step back from a uniform set of rules that govern the election of members of parliament toward a reversion to the patchwork that existed prior to the modern CEA."

[72] See, for example, *COPA*, para. 64. Also see the *EMA Reference*, para. 17.

[73] *Ibid.*

[74] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [*Lemare Lake Logging*], para. 21.

Operational conflict with federal laws

[61] It is well established that the necessary conflict between laws arises only where it is impossible to comply with both laws. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'".[75] In such cases, the provincial legislation is inoperative to the extent of the conflict or inconsistency.[76]

[62] As noted earlier, the organization contends that a "comprehensive scheme" of federal laws regulates its activities in relation to personal information. The components of this scheme, the organization says, are the *Canada Elections Act* (as amended by the *Elections Modernization Act*), *CASL* and the *Telecommunications Act*.[77] The organization argues that the necessary actual operational conflict between federal and provincial laws exists: "The CEA, and other applicable federal legislation, tell the Organization, "Yes, you can communicate with electors without their consent, "while PIPA tells them, "No." The Organization is being told to do inconsistent things."[78]

[63] According to the organization, the *Canada Elections Act* entitles political parties and electoral district associations to an electronic copy of the list of electors in their electoral district on an annual basis. It also entitles political parties to receive a list of electors and "other information"—the organization does not describe this "other information"—at the time of a general election. It notes that s. 110(1) permits political parties to use lists of electors "for communicating with electors, including using them for soliciting contributions and recruiting party members".[79] It notes that the *Canada Elections Act* does not contain any provision permitting "electors to consent to some but not other uses of their personal information in the federal political process."[80]

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[75] *COPA*, para. 64.
[76] *Lemare Lake Logging*, para. 16; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras. 128-130.
[77] S.C. 1993, c. 38.
[78] Initial submission, para. 18.
[79] Section 56(1)(e) and 111 create offences, which can be summarized as involving the knowing use of "personal information" obtained from the register of electors or list of electors other than "to enable registered parties, members or candidates to communicate with electors in accordance with s. 110".
[80] Initial submission, para. 19; reply submission, para. 28.

[64] The organization also contends that, although the list of electors does not contain electors' telephone numbers, the *Canada Elections Act* "envisions that registered political parties will collect the telephone number of electors", and there is no requirement under the legislation that electors consent to the collection, use or disclosure of their "personal telephone number."[81]

[65] The organization also cites the *Elections Modernization Act*, which has recently amended the *Canada Elections Act*. The recent amendments to s. 385, it says, show that Parliament "envisions that political entities collect and use many types of information in a variety of forms and from many sources beyond the list of electors", but "has not prohibited the collection and use of such information without the consent of the elector."[82]

[66] These amendments, the organization points out, require political parties to provide Elections Canada with, and publish, their policies relating to collection, use and disclosure of personal information. Under s. 385(2)(k), a party's application for registration with Elections Canada must include a copy "of the party's policy for the protection of personal information." That policy must include the following: a statement indicating the types of personal information the party collects and how it does so; a statement indicating how it protects personal information under its control; a statement indicating how it uses personal information and under what circumstances that personal information may be sold to any person or entity; a statement about training to be given to any party employee who might have access to personal information; a statement about the party's practices for collecting or using personal information created from online activity and about its use of cookies; and the name of a contact person who can deal with concerns about protection of personal information.

[67] As I will now explain, the organization has not established any actual, operational conflict between any provision of PIPA and s. 385 of the *Canada Elections Act*, or any other provision of the *Canada Elections Act*, the *Telecommunications Act* or *CASL*. The possibility, or potential, for a conflict between laws is not enough: there must be an actual, operational conflict. The organization has not met its burden of establishing that a federal law permits it to do something that PIPA prohibits.

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[81] *Ibid.*, para. 23.
[82] Ibid., para. 27.

[68] Before explaining this in relation to each of these statutes, a general observation about its overall position helps set the stage.

[69] At various places in its submissions the organization has treated PIPA as if it always requires individual consent to collection, use or disclosure of personal information. It then points to the fact that the three federal statutes do not require consent. If this is to suggest that, because PIPA requires consent and the three federal laws do not, there is an actual conflict—that it is impossible to comply with both federal and provincial laws—the difficulty is that, as discussed above, PIPA contains numerous exceptions to consent. It is merely a default requirement, not a rule applicable in all circumstances. Picking up an earlier example, PIPA authorizes the collection, use or disclosure of personal information without consent where it is "required or authorized by law". The organization has not pointed to any evidence to support its assertion that, in relation to the complainants' allegations, there is an actual conflict between any specific provisions of these federal statutes and any particular provision of PIPA.

[70] Turning to s. 385 of the *Canada Elections Act*, a key point is that it imposes no substantive requirements relating to the collection, use or disclosure of personal information or any of the other personal information-related matters it mentions. It imposes no legal obligations, for example, relating to individual consent to the collection, use or disclosure of personal information. It does not grant any legal right for individuals to seek access to their own personal information, and thus no corresponding duty for political parties to respond to such requests. And so on—at its heart, the requirement in s. 385 to provide and publish a privacy policy that discloses a party's policy on such issues (whatever that policy might say) is, for present purposes, in substance merely a transparency measure.[83] There is simply no basis for the proposition that there is an actual, operational conflict between any aspect of PIPA and s. 385.[84]

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[83] In the absence of any substantive *Canada Elections Act* requirements relating to personal information, the requirements of PIPA could shape policies contemplated by s. 385 and thus be reflected in those policies. In that case, there would be no conflict between PIPA's rules and the policies, and certainly no conflict with s. 385.

[84] Moreover, as the Attorney General notes, at para. 57 of its submission, the complaint in this case covers matters arising in February 2018, but the amendments to s. 385 only came into force earlier this year. It is therefore difficult to see how an actual conflict between s. 385 and PIPA could be established in any event, since the allegations relate to events occurring before the amendments came into force this year.

[71] Nor is there a demonstrated conflict between PIPA and the *Canada Elections Act* provisions that permit political parties and others to use personal information found in the register of electors and lists of electors for the purposes of communicating with electors, including to recruit party members or solicit contributions. The fact that, as the organization contends, the *Canada Elections Act* also "envisions" that parties will collect telephone numbers, and contains no requirement for consent, does not advance its position. The complainants' concern is about the collection and use of their email addresses, which are not part of the information available to political parties under the *Canada Elections Act*. Since the federal election law is silent about the collection and use of individuals' email addresses, I cannot see any actual conflict between that statute and any provision of PIPA.

[72] The same is true of its argument relating to the *Telecommunications Act*. The organization notes that s. 41.7(1) provides that any order made by the CRTC that imposes a prohibition or a requirement for the national do-not-call list does not apply to calls made by or on behalf of a political party registered under the *Canada Elections Act*, electoral district associations, or nomination and other specified contestants.[85] There is no evidence before me that the CRTC has made an order in this area, but even if I assume for discussion purposes that it has done so, it would be limited to telephone communications, not the complainants' email-related concerns.

[73] Nor is the organization on solid ground in relying on *CASL*, which deals with unwanted email, text messages or other forms of "commercial electronic message". The organization notes that the *CASL* prohibition against sending messages without a recipient's consent does not apply to messages sent on behalf of political parties or organizations, or candidates, at all levels, where the primary purpose of the message is to solicit a contribution.[86] As noted earlier, the complainants say that the emails they received invited them to a "meet and greet" event with the federal party leader. Yet the *CASL* exemption on which the organization relies is restricted to messages for the purpose of soliciting a contribution as defined in the *Canada Elections Act*, not invitations to political events. There is, therefore, no evidentiary basis before me to establish an actual conflict with *CASL*.

[85] *Ibid.*, paras. 24 and 25.
[86] *Ibid.*, para. 26.

[74] Even setting aside my finding that the organization has failed to establish, on the material before me, any actual, as opposed to potential, conflicts, the organization faces the problem that, as the Attorney General suggests, case law supports the view that there is no conflict simply because—even if I assume an actual conflict has been established—a provincial law is more restrictive than a permissive federal law.

[75] The organization takes the opposite view. It argues that the Supreme Court has rejected the notion that there is no conflict if it is possible to comply with provincial requirements that are stricter than federal requirements, relying on this passage from *Law Society of British Columbia v. Mangat*:[87]

> 72 In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal*, *supra*, dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts.

[76] *Mangat* does not assist the organization. As this passage indicates, the Court concluded that the provincial requirement would "go contrary to Parliament's purpose" in enacting the *Immigration Act* provisions in question, and that the provincial law "cannot be contrary to Parliament's purpose". Further, in the next paragraph of *Mangat*, the Court distinguished its decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town*)[88] on the basis that, in *Spraytech*, "it was possible to comply with the federal, provincial, and municipal statutes or regulations without defeating Parliament's purpose. As previously shown, in this case, it is impossible to comply with the provincial

[87] 2001 SCC 67 [*Mangat*].
[88] 2001 SCC 40 [*Spraytech*].

statute without frustrating Parliament's purpose." These passages from *Mangat* suggest that the Court was concerned with operational conflict that frustrated a federal purpose.

[77] I also note that the Supreme Court later distinguished *Mangat* in *COPA*, as follows:

> [69] The distinction between a federal purpose sufficient to attract the doctrine of federal paramountcy on the one hand, and absence of specific purpose on the other, is illustrated by a comparison of this Court's decisions in *Spraytech* and *Mangat*. In *Spraytech*, the federal pesticide legislation was permissive, allowing the manufacture and use of the pesticides. In this sense, the federal scheme resembled the *Aeronautics Act*, which permits the construction of aerodromes wherever their construction is not expressly restricted. The impugned municipal by-law prevented the use of pesticides that would have been permitted under the federal scheme. L'Heureux-Dubé J. held that the second branch of the doctrine of federal paramountcy was not engaged:
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> > Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". [para. 35]
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> [70] In *Mangat*, by contrast, federal legislation provided for "other counsel", who were not members of a provincial bar, to appear before the Immigration and Refugee Board ("IRB") for a fee. However, the provincial statute required agents appearing before the IRB to be members of a provincial bar association or else refrain from charging a fee. Though it was possible to comply with both the federal and provincial enactments (non-lawyers could appear without charging a fee), Gonthier J. concluded that the provincial law undermined the *purpose* of the federal legislation (para. 72). Parliament had specifically provided that non-lawyers could appear before the IRB. This express purpose prevailed over the Province's conflicting legislation.

[78] I consider both *COPA* and *Lemare Lake Logging* to be apposite here. In the latter, the Supreme Court held that there was no objectionable conflict between provincial and federal laws. It was possible for a creditor to observe a waiting period imposed by provincial law before making an application under a federal law, so the provincial restriction did not conflict with the permissive

federal law.[89] As the Court noted, at paragraph 25, such a state of affairs "has been regularly considered not to constitute an operational conflict."

[79] Here, the fact that the *Canada Elections Act* and the two other federal laws take a permissive approach to use of certain personal information of electors does not of itself establish a conflict with PIPA's requirements (even if one assumes, for discussion purposes only, that PIPA actually prohibits that which federal law permits).[90] In this case, "[n]o one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes."[91] It is possible to comply with both PIPA and the federal laws and *Mangat* does not, in my view, dictate as a matter of law that there is an actual, operational conflict in the sense required under *Lemare Lake Logging* and other authorities.

Frustration of a federal purpose

[80] Again, a provincial law will be ruled inapplicable only where it frustrates a federal purpose. As noted earlier, the burden of establishing this is on the party alleging it and the "burden is a high one".[92] In addition, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission."[93] Anyone who alleges that a federal purpose is frustrated first must establish the purpose of the federal statute—and clear proof is required—before also proving that the provincial legislation is incompatible with that purpose.[94] Moreover, the federal law's purpose ought not to be broadened artificially, beyond its intended scope, when assessing whether a provincial law frustrates the federal purpose.[95] One must also keep in mind the Supreme Court's oft-repeated admonition that "paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject.[96]

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[89] Para. 25.
[90] The same can be said of the *Telecommunications Act* and *CASL* provisions on which the organization relies.
[91] *Spraytech*, para. 35.
[92] *Lemare Lake Logging*, para. 26.
[93] *COPA*, para. 66. Also see *Lemare Lake Logging*, para. 26.
[94] *Lemare Lake Logging,* para. 26.
[95] *Lemare Lake Logging*, para. 23.
[96] *Lemare Lake Logging*, para. 27.

[81] In support of its contention that PIPA frustrates a federal purpose, the organization submits that the purpose of the *Canada Elections Act* "is to give effect to the broad right to vote and to ensure electoral fairness and govern the activities of registered political parties", adding that these purposes "are pursued throughout the whole political process and not merely at election time".[97]

[82] The organization cites a passage from *Rae v. Canada* in which the Federal Court of Canada said 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".[98] The Court's observation about the overall purpose of the *Canada Elections Act* as it then existed was followed by the Court's observation, specific to that case, that "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." These are the only observations I can find in *Rae* about the purpose of the *Canada Elections Act*. In any case, *Rae* was a judicial review case, not a case about constitutional validity of statutes, and is of no real assistance here.

[83] The same can be said of *Canadian Reform Conservative Alliance v. Western Union Insurance Corporation*,[99] on which the organization also relies. That case dealt with whether an allegedly defamatory statement constituted election advertising within the meaning of the *Canada Elections Act*. It was not a constitutional case and the passage cited by the organization in any case does not carry the organization across the threshold it must meet as to the statute's purpose. Nor is *Thomson Newspapers Co. v. Canada (Attorney General)*,[100] of assistance. It considered, for *Charter* purposes, the purpose of a single provision of the *Canada Elections Act* that related to the publication of polling results. The Court's comments about the statutory purpose of the relevant provisions do not establish the purpose of the statute as a whole.

[84] The organization also relies on *Opitz v. Wrzesnewskyj*,[101] in which the Supreme Court described the "central purposes" of the *Canada Elections Act*

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[97] Initial submission, para. 59.
[98] 2008 FCC 246 [*Rae*], para. 19.
[99] 2001 BCCA 274.
[100] [1998] 1 S.C.R. 877.
[101] 2012 SCC 55.

as enfranchising all persons who are entitled to vote, and to protect the integrity of the democratic process. *Opitz* was not a constitutional case. It was about whether voting irregularities in an election in a federal riding should invalidate the outcome. The statements on which the organization relies are also, in my view, arguably *obiter dicta* even for the purposes of that case.

[85] The organization also contends that it has met the high standard of clear proof of the purpose of the *Canada Elections Act*. It has done so, it argues, by providing evidence of legislative debates—notably about the *Elections Modernization Act*—and "reports of Elections Canada and the Chief Electoral Officer."[102] It says that these materials "show that the purpose of the CEA 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."[103]

[86] This is not persuasive. Setting aside the fact that reports of administrative agencies such as Elections Canada and the chief electoral officer are, in my view, not relevant to establishing Parliament's purpose in enacting the *Canada Elections Act*, the contention that the statute's purpose is to "create a comprehensive set of rules" for federal elections misses the mark. A statute may create a comprehensive set of rules—and the *Canada Elections Act* undoubtedly does that—but that is not evidence of its legislative purpose.

[87] The organization's characterization of the purpose of the federal statutes on which it relies has, as the Attorney General has argued, shifted somewhat over time. In essence, the organization contends that, alone or together, the federal laws form a comprehensive framework that has as its purpose the protection of personal information. This is clear from its arguments about the *Canada Elections Act*, the *Telecommunications Act* and *CASL* individually, and together. In my view, the organization crosses the line into what the Supreme Court has said is forbidden territory. It has artificially broadened the purpose of these laws—again, individually and together—beyond the intended scope.

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[102] Reply submission, para. 22.
[103] *Ibid.*

[88] Even assuming for discussion purposes only that the organization has accurately portrayed the purpose of the *Canada Elections Act,* the organization has not met the high burden it bears to demonstrate how PIPA frustrates that purpose. Nor has the organization done so under this branch of the paramountcy doctrine in relation to either the *Telecommunications Act* or *CASL*.

Charter issues are not decided here

[89] The organization's third constitutional question is as follows:

> 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*?

[90] In its initial submission, the organization advances general arguments about what it contends is PIPA's unconstitutional infringement of freedom of expression and the right to vote, guaranteed under ss. 2(b) and 3, respectively.

[91] The organization has cited case law in support of its *Charter* submissions but has not adduced evidence to support its assertion of constitutional infirmity. It would undoubtedly be an error of law for me to consider the *Charter* question in a factual vacuum and I decline to do so. As the Supreme Court of Canada has said:

> A factual foundation is of fundamental importance …. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.[104]

[92] The organization has, in its reply submission, said that any consideration of the *Charter* is properly undertaken "if the inquiry proceeds to the second stage," specifically, in accordance with the framework set out in *Doré v. Barreau du Québec*.[105] The organization says it reserves the right to make "submissions on *Charter* values at the second stage of the inquiry."[106] The applicability of the *Doré* approach will therefore be considered at the second

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[104] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, p. 366.
[105] 2012 SCC 12 [*Doré*]. Reply submission, para. 6: "We agree with the AGBC that *Doré v. Barreau du Quebec* is applicable and to that end we agree that the *Charter* values analysis is to be conducted if the inquiry proceeds to the second stage."
[106] Reply submission, para. 7.

stage of the inquiry, when the merits of the complainants' case is considered, not now.

CONCLUSION

[93] PIPA is within the legislative authority of the province under s. 92 of the *Constitution Act, 1867* and does not offend s. 41. The answer to the first constitutional question posed by the organization is therefore "no".

[94] PIPA is not rendered inapplicable to the organization on the basis that the *Canada Elections Act*, PIPEDA, the *Telecommunications Act* and *CASL* are paramount to PIPA. The answer to the second constitutional question is therefore also "no".

[95] As noted earlier, this is a first-phase decision in an inquiry under s. 50 of PIPA, a decision that solely addresses the organization's jurisdictional challenge to PIPA's application. Since I have decided that PIPA does apply to the organization, the inquiry will continue into the merits of the complainants' allegations. My Office will follow up with the parties shortly to schedule submissions in this regard.

August 28, 2019

ORIGINAL SIGNED BY

Michael McEvoy,
Information and Privacy Commissioner for British Columbia

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