IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liberal Party of Canada v. The Complainants,* 2024 BCSC 814

Date: 20240514
Docket: S223033
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

The Liberal Party of Canada

Petitioner

And:

The Complainants

Respondents

- and -

Docket: S223065
Registry: Vancouver

Between:

The New Democratic Party of Canada

Petitioner

And:

The Complainants

Respondents

- and -

Docket: S223104
Registry: Vancouver

Between:

The Conservative Party of Canada

Petitioner

And:

The Complainants

Respondents

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Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

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Counsel for The Attorney General of Canada:	A. Copithorne V. Broughton
Place and Dates of Hearing:	Vancouver, B.C. April 22–26, 29–30, and May 1, 2024
Place and Date of Judgment:	Vancouver, B.C. May 14, 2024

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Introduction

[1] The ability of an individual to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These fundamental values lie at the heart of democracy. The Supreme Court of Canada has, on many occasions, emphasized the importance of privacy, and its role in protecting one's physical and moral autonomy. The harm that may flow from incursions into a person's privacy interests should not go without a remedy. Legislation which aims to protect control over personal information plays an important role in the preservation of a free and democratic society: *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para. 19; *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 59, citing *Lavigne v. Canada (Office of the Commissioner of Official Languages*, 2002 SCC 53 at paras. 24–25.

[2] These proceedings concern the collection and use of the personal information of Canada's citizens by Canada's federal political parties ("FPPs"). The rapid advancement of technological tools allowing for the harvesting of private information for the purpose of profiling and micro-targeting voters has created risks of misuse of personal information that could result in the erosion of trust in our political system.

[3] The Parliament of Canada has not yet taken any significant action. The Legislature of British Columbia has.

[4] On March 1, 2022, the Office of the Information and Privacy Commissioner for British Columbia ("OIPC") issued its Order P22-02 (2022 BCIPC 13) ("Decision"). It determined that British Columbia's *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*] is constitutionally applicable to the collection, use and disclosure of personal information in British Columbia by FPPs registered under the *Canada Elections Act*, S.C. 2000, c. 9 [*CEA*].

[5] The petitioners, namely the Liberal Party of Canada, the New Democratic Party of Canada, and the Conservative Party of Canada (collectively, the 'petitioners"), seek, by way of judicial review, orders quashing the Decision. The petitioners also seek declarations that *PIPA* does not apply to FPPs and that the

OIPC does not have jurisdiction over them. In the alternative, the petitioners apply for an order remitting the Decision back to the OIPC for reconsideration on several bases, including the lack of procedural fairness.

[6] At issue is whether valid provincial privacy law of general application is applicable to FPPs. The application of the principle of co-operative federalism is at play. This is the first time that a Canadian Superior Court has considered the constitutional applicability of provincial privacy legislation to FPPs.

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Background

The *Personal Information Protection and Electronic Documents Act*

[7] In 2000, Parliament enacted the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*] for the purpose of establishing a regime governing the collection, use and disclosure of personal information by organizations whose work, undertaking or business is within the legislative authority of the federal government. The regime is regulated by the federal Privacy Commissioner. It applies to those organizations whose work, undertaking or business is within the legislative authority of the federal government and "collects, uses or discloses in the course of commercial activities or is about an employee of or an applicant for employment with the organization […]".

[8] It is conceded by all parties that *PIPEDA* does not apply to FPPs because they are not an "undertaking" or a "business" within the meaning of *PIPEDA*.

The *PIPA*

[9] *PIPA* was enacted in January 2004. It purports to apply to any "organization" that collects, uses, or discloses personal information about individuals in British Columbia.

[10] *PIPA* provides, in relevant part, as follows:

> **Purpose**
>
> 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.

Application

[…]

3(2) This Act does not apply to the following:

[…]

(c) the collection, use or disclosure of personal information, if federal [*PIPEDA*] applies to the collection, use or disclosure of the personal information.

[…]

[…]

Collection of personal information without consent

12(1) An organization may collection personal information about an individual without consent or from a source other than the individual, if

[…]

(h) the collection is required or authorized by law,

[…]

[…]

Use of personal information without consent

15(1) An organization may use personal information about an individual without the consent of the individual if

[…]

(h) the use is required or authorized by law,

[…]

[…]

Disclosure of personal information without consent

18(1) An organization may only disclose personal information about an individual without the consent of the individual, if

[…]

(o) the disclosure is required or authorized by law,

[…]

[…]

Access to personal information

23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:

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> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.
>
> […]
>
> **Duty to assist individual**
>
> 28. An organization must make a reasonable effort
>
> (a) to assist each applicant,
>
> (b) to respond to each applicant as accurately and completely as reasonably possible, and
>
> (c) unless section 23 (3), (3.1) or (4) applies, to provide each applicant with
>
> (i) the requested personal information, or
>
> (ii) if the requested personal information cannot be reasonably provided, with a reasonable opportunity to examine the personal information.

[11] *PIPA* defines “organization” as including “person” and an “unincorporated association”.

[12] When a complaint has been received by the OIPC, the Commissioner has the power under *PIPA* to initiate an investigation (s. 36(1)(a)) and, if the complaint is not settled, “conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry” (s. 50(1)). On completing an inquiry, the commissioner must dispose of the issues by making an order (s. 52(1)). If a party who feels aggrieved in respect of an order brings an application for judicial review within 30 days, the order is stayed until the court orders otherwise (s. 53).

The *CEA*

[13] There is no doubt that Parliament has exclusive constitutional jurisdiction over federal elections and federal political parties pursuant to its power “to make Laws for the Peace, Order and good Government of Canada”: *Constitution Act*, 1867, R.S.C. 1985, App II, No 5 [*Constitution Act*], ss. 41 and 91.

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[14] Federal elections are governed by the *CEA*. Its purpose is to enfranchise all persons entitled to vote in federal elections and to allow them to express their democratic preferences. It provides a comprehensive framework for the constitution and operation of Canada's FPPs: *Quebec v. Montreal (City)*, 2016 QCCS 11007 at para. 38. Parliament enacted the *CEA* to establish a national approach to federal elections. The *CEA* is administered by Elections Canada. The Chief Electoral Officer is appointed by resolution of the House of Commons to hold office during good behaviour for a non-renewable term of ten years. The Chief Electoral Officer reports directly to Parliament and is independent of the government of the day and of all political parties. The Chief Electoral Officer has exclusive oversight over FPPs. This oversight includes regulating the privacy practices of FPPs in a manner that is consistent with the *CEA* and with the FPPs' roles in encouraging voters to participate in democracy and to vote in federal elections.

Elections Canada

[15] Elections Canada is authorized to collect personal information under the *CEA*, the *Privacy Act*, R.S.C. 1985, c. P-21 [*Privacy Act*] and the *Financial Administration Act*, R.S.C. 1985, c. F-11 for the purposes of facilitating elections.

[16] The *CEA* defines personal information by incorporating the definition set out in s. 3 of the *Privacy Act*.

[17] Pursuant to the *CEA*, Elections Canada is authorized to share personal information, including voter lists, with Members of Parliament, FPPs and candidates. Elections Canada has published guidelines regarding how this information may be used and how it must be safeguarded. It is a criminal offence for anyone to use this information in an unauthorized manner.

[18] The *CEA* provides an elector (voter) or future elector (future voter) with a right of access to all of the information in the Chief Electoral Officer's possession relating to him or her: *CEA*, s. 54.

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Privacy Policy Requirements of FPPs

[19] Parliament has, on many occasions, considered whether specific policies should be put in place for the protection of personal information in the possession of FPPs, including making its general federal privacy legislation, *PIPEDA*, applicable to FPPs, as had been recommended by the Chief Electoral Officer and others. For example, in its 2016 review of the *Privacy Act*, the Office of the Privacy Commissioner recommended to Parliament that it extend *PIPEDA* to the personal information held by FPPs. The House of Commons Committee on Ethics, Access to Information and Privacy also recommended that Parliament subject FPPs to *PIPEDA.* Other examples are:

- Colin J. Bennett, *Data-Driven Elections and Political Parties in Canada: Privacy Implications, Privacy Policies and Privacy Obligations*, Canadian Journal of Law and Technology (12 April 2018) at p. 5;
- Kelly Egan, *MP Must Explain Her Use of Voters' Private Data: Constituents Wonder How Gallant Obtained Their Dates of Birth,* Ottawa Citizen (4 January 2006);
- Colin J. Bennett and Robin M. Bayley, *Canadian Federal Political Parties and Personal Privacy Protection: A Comparative Analysis*, Commissioned by the Office of the Privacy Commissioner of Canada (March 2012);
- *Issues Arising From Improper Communications with Electors*, Round Table Report (March 2013);
- Elections Canada, *Preventing Deceptive Communications with Electors – Recommendations from the Chief Electoral Officer of Canada following the 41st General Election*, (Chief Electoral Officer of Canada, March 2013);
- Bill C-23, *An Act to Amend the Canada Elections Act and other Acts*, 2nd Sess., 41st Parl., 2013; and
- Elections Canada's *Proposed Amendments to Bill C-23* (8 April 2014).

[20] Over the years, Parliament declined to follow these recommendations, recognizing the special role of FPPs in federal elections. Ultimately, in December 2018, Parliament enacted Bill C-76, the *Elections Modernization Act*, S.C. 2018, c. 31, which amended the *CEA*.

[21] As a result of the 2018 amendments, FPPs were required to provide their respective privacy policies to and have them approved by the Chief Electoral Officer (s. 385.1). Failing to do so would result in them not being eligible for registration or continued registration. The privacy policy must be published and kept up-to-date to reflect any changes. Misrepresenting the privacy policy to the Chief Electoral Officer carries significant consequences. The Chief Electoral Officer has a general oversight role under s. 16 of the *CEA*. In particular, the Chief Electoral Officer has the express authority to issue "guidelines and interpretation notes on the application of the *CEA* to FPPs: *Callaghan v. Canada (Chief Electoral Officer)*, 2011 FCA 74 at para. 59.

[22] In this way, the Chief Electoral Officer can provide guidance to FPPs about the application of the various *CEA* provisions concerning privacy policies which, in turn, can assist FPPs in fulfilling their obligations under *CEA* to have, publish and update their privacy policies.

[23] To date, this is the only federal privacy legislation that applies to FPPs. There is no requirement for FPPs to disclose how it has used personal information or who it has been disclosed to. There is no right of access to personal information held by FPPs.

The Parties

[24] Each of the petitioners is a Canadian FPP registered as such pursuant to the provisions of the *CEA*. Each has developed a privacy policy for the collection, use and disclosure of personal information that has been submitted to and approved by Elections Canada pursuant to the provisions of the *CEA*.

[25] Each of the petitioners concedes it is an unincorporated association of its members.

[26] Each of the petitioners has collected personal information directly from Elections Canada, from publicly available data sources and through voter outreach activities, such as door-to-door canvassing, voter contact phone calls and text messaging. The collection, use and disclosure of personal information is carried out

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for political purposes central to the petitioners' respective roles as FPPs, namely to engage with voters, to understand their interests and priorities in order to speak to the issues that matter most to them and, in turn, to mobilize democratic participation.

[27] The respondent Complainants in these three proceedings (collectively, the "Complainants") are three residents of British Columbia who are concerned that the FPPs are collecting personal information without first getting the consent of the persons involved and using that information to create voter profiles, score them as party supporters/friends or otherwise, and either sending them "micro-targeted" political advertising or avoiding communications with them altogether. In particular, they are concerned that:

> […] When political communicators have the advantage of deep and detailed knowledge about the public and when they leverage that information to develop and deliver political messages designed to persuade specific individuals based on what is known about their demographics, personality, attitudes, beliefs, etc., and when those messages take advantage of persuasive principles drawn from the empirical literature in order to exploit a predictable interaction between individual and message, the result is an unfair system that undermines voter autonomy.

See: Expert Opinion of Professor Colin J. Bennett, September 4, 2020, p. 19.

Proceedings Before the OIPC

[28] On August 26, 2019, the Complainants sought access under *PIPA* to their personal information that FPPs had collected. They also sought information on how the FPPs were using that information and to whom the FPPs had disclosed it.

[29] The FPPs' responses to the Complainants' information requests described the personal information they held regarding each of the Complainants and directed them to their respective privacy policies under the *CEA*.

[30] On December 3, 2019, the Complainants wrote to the OIPC requesting an investigation under *PIPA* into the FPPs' privacy protection policies and practices and their compliance with ss. 23 and 28 of *PIPA* (the "Complaints").

[31] On March 3, 2020, the OIPC formally notified the FPPs of the Complaints.

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[32] On April 29, 2020, the OIPC advised the FPPs that it would be conducting an investigation into the Complaints. The FPPs objected to the investigation on constitutional grounds, namely, that they are federal organizations regulated solely under the provisions of the *CEA*.

[33] On June 25, 2021, the Information and Privacy Commissioner for British Columbia advised the FPPs and the Complainants that preliminary determination of the constitutional issue raised by the FPPs had been delegated to an outside adjudicator, David Loukidelis, K.C. (the "Delegate").

[34] On July 26, 2021, the Delegate provided the FPPs and the Complainants with a Notice of Hearing, inviting them to submit written argument and evidence. The Notice of Hearing included the following:

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

[35] Immediately following the "Issue to be Decided" was a lengthy "Statement of Facts" that included reference to the petitioners' respective agent corporations and that the petitioners were actively engaged in canvassing, nominating candidates for election, collecting personal information, and other election-related activities in British Columbia.

[36] The Delegate was requested by the petitioners to consider amendments to the Issue to be Decided and Statement of Facts, as drafted, as well as a more orderly and fair process for the hearing. In this regard, counsel for the Conservative Party of Canada wrote:

> […]

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> We respectfully submit that the issue, as currently framed, does not address the core of the disagreement. Neither does it address the fact that the core issue – the jurisdiction of the BC OIPC in respect of federal political parties – ought to be framed in respect of *all* federal political parties. We propose the Issue to be amended as per below:
>
> > With respect to each of the federal political parties, on the basis that each of them is an "organization" as defined in the *Personal Information Protection Act* (British Columbia) (PIPA) and in the Personal Information Protection and Electronic Documents Act (PIPEDA), does PIPA apply to that political party's collection, use or disclosure of personal information or is it ousted by the operation of a comprehensive federal regulatory scheme applicable to the activities of political parties, which includes PIPEDA, the *Canada Elections Act* (Canada), and other legislation? ~~including through its registered agent appointed under the Canada Elections Act (Canada), through electoral district associations associated with it under the Canada Elections Act, or through other representatives of that political party?~~

[37] On August 17, 2021, the Delegate responded as follows:

> The stated issue will not be amended as […] proposed, and I will not invite submissions, as proposed […] on how to frame the issue to be decided. The issue remains as stated in the hearing notice.
>
> Nor will I […] change the process set out in the hearing notice. That process involves each party being heard on the jurisdictional question of whether PIPA applies to the named organizations, and each party having the opportunity to respond to what the others have said. […]
>
> […] the statement of facts provided for comment is intended to establish key relevant facts, but this obviously does not preclude the parties from establishing, through evidence accompanying their submissions, other facts they believe to be relevant to the stated issue […]. The statement of facts, however, remains as circulated.

[38] In October, 2021, each of the petitioners served a Notice of Constitutional Question on the OIPC, raising the constitutionality of *PIPA*'s purported jurisdiction over FPPs.

The Decision

[39] On March 1, 2022, after receiving submissions from the petitioners and others, the Delegate issued the Decision. The Decision considered five main issues:

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a) is a FPP an "organization" within the meaning of that term in *PIPA*, such that *PIPA* purports to apply to a FPP? If so, does s. (2)(c) of *PIPA* oust its application?

b) is *PIPA* validly enacted under a provincial head of legislative authority under the *Constitution Act*?

c) if it is validly enacted, is *PIPA* inapplicable to the participating FPPs by virtue of the constitutional doctrine of paramountcy?

d) if it is validly enacted, is *PIPA* inapplicable to the participating FPPs by virtue of the constitutional doctrine of interjurisdictional immunity? and

e) does *PIPA* unconstitutionally infringe on the right to vote, or the freedom of political expression as guaranteed by the *Canadian Charter of Rights and Freedoms*?

[40] No issue was or is raised by the petitioners regarding *PIPA* being validly enacted under provincial legislative authority.

[41] Regarding the other issues to be decided, the Delegate held that the plain meaning of the terms "organization" and "unincorporated association" included FPPs which collect personal information from British Columbia residents and held that *PIPA* is constitutionally applicable to them.

[42] The Delegate held that neither branch of the doctrine of paramountcy (frustration of federal purpose nor operational conflict) applied, ruling that there was insufficient evidence before him regarding the federal purpose of the *CEA* and that there is no operational conflict between *PIPA* and the *CEA* because a privacy policy could be fashioned that complies with both enactments. He held that the doctrine of interjurisdictional immunity did not apply because he was not satisfied that *PIPA*'s application would impair the exercise of Parliament's authority regarding the enactment of the *CEA*.

[43] In rejecting the petitioners' argument that *PIPA* was inoperative because it conflicted with the *CEA*, the Delegate found that the *CEA* was "[…] silent about collection, use or disclosure of personal information". He noted that while Parliament could "legislate in respect of federal political parties' collection, use and disclosure of

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personal information in a manner that creates uniform rules for all parties and unequivocally outs provincial jurisdiction", this "possibility" was "not a basis for a finding that, under the paramountcy doctrine, *PIPA*'s application would frustrate a federal purpose". The Delegate concluded that the petitioners had "not established that application of PIPA's rules would, even if they were more restrictive than the federal legislation, frustrate a federal purpose".

Events After the Decision

[44] In early April 2022, the petitioners filed separate petitions in this court seeking judicial review of the Decision.

[45] On April 29, 2022, the OIPC determined that the investigation before it would be "held in abeyance" pending the outcome of these judicial review applications.

[46] On May 2, 2022, sealing orders were issued by this court regarding the names of the Complainants. Shortly thereafter, this court ordered that the three judicial review applications be heard at the same time.

[47] By a letter dated May 6, 2022, counsel for the Complainants wrote to the OIPC taking the position that the Decision was merely a "preliminary ruling" and did not constitute an "order" within the meaning of s. 52(2) of *PIPA*, therefore, the OIPC could not stay the investigation until after completion of the inquiry. Counsel requested that the OIPC's investigation proceed without delay and not be held in abeyance pending the outcome of the judicial review applications.

[48] By a letter dated May 19, 2022, the OIPC responded to counsel's May 6, 2022 letter declining to reconsider its decision to hold the investigation in abeyance, advising that its jurisdiction to investigate the substantive matters of the Complainant's files turned on whether the Decision was upheld, and that it was not an efficient use of OIPC's resources or processes to consider the merits until the court had determined whether the OIPC had jurisdiction to consider them. The Complainants did not seek judicial review of that decision.

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The June 2023 *CEA* Amendments

[49] The following year, the Parliament of Canada responded to the Decision by tabling the following amendments the *CEA* through Bill C-47:

> **Amendment to the Act**
>
> **680 The *Canada Elections Act* is amended by adding the following after section 385.1**:
>
> **Definition of personal information**
>
> 385.2 (1) Despite the definition personal information in subsection 2(1), for the purposes of this section, personal information means information about an identifiable individual.
>
> **Collection, use, disclosure, retention and disposal**
>
> (2) In order to participate in public affairs by endorsing one or more of its members as candidates and supporting their election, any registered party or eligible party, as well as any person or organization acting on the party's behalf, including the party's candidates, electoral district associations, officers, agents, employees, volunteers and representatives, may, subject to this Act and any other applicable federal Act, collect, use, disclose, retain and dispose of personal information in accordance with the party's privacy policy.
>
> **Purpose**
>
> (3) The purpose of this section is to provide for a national, uniform, exclusive and complete regime applicable to registered parties and eligible parties respecting their collection, use, disclosure, retention and disposal of personal information.
>
> **Application of Amendment**
>
> **Election within six months**
>
> 681 Despite subsection 554(1) of the *Canada Elections Act*, the amendment to that Act made by section 680 applies in an election for which the writ is issued within six months after the day on which this Act receives royal assent.

(the "2023 *CEA* Amendments").

[50] In April 2023, all of the parties participating in these judicial review applications agreed to adjourn the hearing of the applications in order to ensure that the 2023 *CEA* Amendments would be before the court.

[51] On May 3, 2023, the Senate Standing Committee on Legal and Constitutional Affairs ("Senate Standing Committee") met to consider the 2023 *CEA* Amendments.

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The Chief Electoral Officer and the federal Privacy Commissioner attended as witnesses. Both witnesses advised the Senate Standing Committee that they were not at all content with the extent of the 2023 *CEA* Amendments. The Chief Electoral Officer stated that:

> […] the amendments before you do not alter the rights and obligations contained under the *Canada Elections Act* nor do they have an impact on Elections Canada's ability to administer the act. In that sense, the presence of these amendments in the context of this particular bill is not so problematic. This is not to say they don't have an impact on the privacy rights of Canadians. For that reason, I welcome the committee's interest in the proposed amendments.
>
> I believe that having better rules in place to ensure safeguards around the use of personal information by political parties would assist in preserving the trust of electors in the electoral process. Political parties have, by law, access to basic voter data through the voters' list. This allows them to reach out to voters. They also have, by law, access to records of votes cast, commonly referred to as bingo sheets, which, at the end of each day at advance polls and at regular intervals on polling day, tells them who has voted. This allow them to get out the vote as is commonly spoken of.
>
> […]
>
> B-C-76 amended the *Canada Elections Act* in 2018 to require parties to publish their own privacy policy, which must include statements indicating the type of information collected and how it is protected and used, under what circumstances information may be sold, how the party collects and used personal information created from online activity, and the name and contact information of a person to whom privacy concerns may be addressed.
>
> While these new amendments increase transparency about the handling of personal information by political parties, there are no minimum standards in the act that parties must follow. Nor is there any oversight mechanism to monitor whether parties abide by the contents of their policies, or any sanctions in case of non-compliance. In my 2022 recommendations report following the 43rd and 44th general elections, I recommended that the privacy principles enumerated in Schedule 1 of the Personal Information and Protection of *Electronic Documents Act* should apply to registered and eligible parties, with oversight by the Office of the Privacy Commissioner of Canada.
>
> In the absence of full application of these principles, I recommended certain minimal requirements, namely that Canadians have the right to opt out of receiving communications – or certain types of communications – from political parties; that they have the ability to request access to, and correct, inaccurate personal information held by political parties; and finally that political parties be required to indicate in their policies how electors' personal information may be shared, in addition to how it is collected, used and sold – which is already a policy requirement in the current act.
>
> […]

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> […] these amendments are meant to override the provincial and territorial privacy regimes so that parties are subject only to the *Canada Elections Act* rules. That is my understanding of the purpose of this measure.
>
> […]
>
> […] I made a set of recommendations that address more than just privacy. For a variety of reasons, the House of Commons parliamentary committees have not yet had an opportunity to examine them. Nevertheless this bill does not improve privacy protections for Canadians.
>
> […]
>
> I would look forward to having legislation that looks into my recommendations, but this is not such legislation.
>
> […]
>
> […] We know the B.C. Information and Privacy Commissioner has taken the position that provincial privacy rules in B.C. apply to federal parties operating in British Columbia. That is a disputed matter. It changes the law to the extent that the Privacy Commissioner is correct. But there is a judicial review of that matter that is ongoing.
>
> […]
>
> In terms of consultations, I have had discussions with the government and every party in the House regarding my recommendations, including my position on the privacy improvements. I was aware that this could be coming in this legislation, but I was not consulted on it.
>
> […]
>
> There are very limited provisions in the *Canada Elections Act* that have actual sanctions. If a party used personal information obtained from the list of electors- that is very narrow – for a purpose that is not permitted under the act, there are offences and that is enforced by the Elections Commissioner.
>
> When we distribute the lists of electors, we provide guidelines that are not mandatory- they are best practices – for the protection of persona information. The regime now since 2018 requires parties to have policies in order to be registered, so they have policies. I have to enforce those, but their policies are up to them. There is no minimum standard in those policies that they must abide by. Their policies could be very lax in terms of the protection of personal information.
>
> Senator Dupuis: However, as I understand it, the provision being introduced does nothing to guarantee a “national, uniform, exclusive and complete regime.” Do I have that right?
>
> [Chief Electoral Officer]: Not a satisfactory regime, if I’m being perfectly honest.
>
> […]
>
> There have to be some minimum standards. There have to be some enforcement mechanisms with sanctions for non-compliance. We can have an open discussion as to what the standards should be, how far they can go and whether parties and candidates should be subject to the rules and

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> requirements, but I don't think the complete absence of enforceable standards is adequate to reassure Canadians regarding the protection of their personal information.

[52] On June 2, 2023, the Senate Standing Committee published a report on the 2023 *CEA* Amendments, stating in part:

> The committee recognizes that all federal political parties must have robust safeguards in place to protect Canadian electors' personal information. These safeguards, or the lack thereof, can impact Canadians' trust in political parties and, by extension, the electoral process in general.
>
> This section amends the *Canada Elections Act* to "provide for a national, uniform, exclusive, and complete regime" for the collection, use, disclosure, retention, and disposal of personal information by federal registered or eligible political parties. The amendment creates a framework for a potential future regime. It does not actually establish any such regime.
>
> The committee urges the establishment of a national, uniform regime in relation to federal political parties' use, collection, disclosure, and retention of electors' personal information.
>
> The committee again emphasizes that amendments to the *Canada Elections Act* should be introduced in a separate bill to allow for thorough study. Such amendments to the *Canada Elections Act* should be undertaken only after consultation with the Chief Electoral Officer and the Privacy Commissioner of Canada, which was not the case with this bill.

[53] Nevertheless, on June, 7, 2023, the following explanation for the 2023 *CEA* Amendments was provided to the House of Commons during its third reading:

> The changes that this bill makes to the *Canada Elections Act* confirm that Parliament has always intended that the *Canada Elections Act* should regulate uniformly, exclusively and comprehensively the federal political parties with respect to privacy.
>
> Parliament has already established a set of exclusive, comprehensive and uniform rules for the collection, use and disclosure of personal information by federal political parties, requiring political parties to establish and comply with privacy policies governed by the *Canada Elections Act*.
>
> Some provincial privacy commissioners have questioned this interpretation, and this piece of legislation before us confirms that the intention of the Canada Elections Act has always been that voters across Canada benefit from that same set of privacy rules during federal elections.
>
> Communication with voters is at the very heart of politics, and the collection, use and disclosure of information is essential to that communication. This legislative measure will provide important certainty. MPs, federal political parties, candidates, campaigns, party officials and volunteers will be subject to a single, comprehensive and uniform set of federal rules for the collection, use and disclosure of information, and no province will be able to separately

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> regulate or restrict the ability of MPs, federal political parties, candidates, campaigns, party officials and volunteers to communicate with voters or to collect and use their information.

See: House of Commons Debates, 44th Parl., 1st Sess., Vol. 1551, No. 208 (7 June 2023) at 1950 (Rachel Bendayan).

[54] The 2023 *CEA* Amendments passed third reading in the House of Commons and the Bill went to the Senate for debate, during which the Senate had this to say about the 2023 *CEA* Amendments:

> The last division I wish to address is Division 39, which proposes to establish a uniform national regime in relation to the use, collection, disclosure and retention of personal information of federal political parties by amending the *Canada Elections Act*. It's worth noting that political parties already have privacy policies in place that include six specific elements.
>
> When the Chief electoral Officer appeared before the Legal committee, he indicated that these new requirements improve transparency about the handling of personal information held by political parties, but the legislation does not impose any minimum standards, no does it provide any oversight mechanisms to verify whether parties are complying with their policies or any sanctions for non-compliance.
>
> […]
>
> When I read this, however, a couple of thoughts came to mind […]Two, given that there is actually no national, uniform and complete privacy regime governing how federal political parties currently collect, use, disclose, retain and dispose of personal information, what's going on?
>
> You may recall that we passed the *Elections Modernization Act* in December 2018. It allowed political parties to self-regulate their collection and use of personal information linked to Canadian voters as long as they published their privacy policies. This is what the Privacy Commissioner was referring to when he spoke to our Legal Committee – that is was a good first step that they publish those privacy policies, but that those policies don't live up to the 10 principles under *PIPEDA*. He also stated that he has no jurisdiction in which to investigate or comment on those privacy policies.
>
> These voluntary policies are not uniform and they are not complete, especially when compared to any reasonable international norms. These voluntary policies don't reflect the privacy protections that corporations or governments must follow, particularly as it relates to the areas of consent, transparency and accountability. Looking back, I was a bit naïve to think any group should be entirely free to regulate their privacy policies, but that's where we are; no uniform and complete privacy policies govern federal political parties at this time.
>
> […]

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> These federal political parties have ignored more than a decade of recommendations from the two officers of Parliament responsible for these issues. They've ignored the House Ethics Committee's carefully researched recommendations. And when B.C. decided enough was enough, the Liberal, Conservative and NDP parties challenged that decision in B.C. Supreme Court. In these hyper-partisan time, I have to say it's truly remarkable that this is the one issue that Conservative, NDP and Liberals all agree on.
>
> […]
>
> Regardless, the three political parties continue to defiantly ignore the repeated recommendations that they begin to adhere to international privacy standards and third party oversight; to obtain content [sic] prior to collecting personal information; and to inform citizens of a personal information breach that might cause them significant harm.
>
> […]
>
> […] The leadership, executive and boards of the New Democratic Party, Liberal Party and Conservative Party have consistently ignored the will and advice of the two officers of Parliament responsible for privacy and elections. They have ignored the House of Commons Ethics Committee, and they have refused to voluntarily adopt privacy policies that align with global norms.
>
> Instead of heeding this advice, the government is now including—in the budget implementation act of all places – a Band-Aid clause that allows the three parties to maintain the status quo. Perhaps we should invite the presidents of these federal political parties to explain the reasons and evidence behind their inaction. Maybe they have evidence that, somehow, democracy in Europe has been undermined by the General Data Protection Regulation's voter privacy protections.

[55] Despite the explicit and unambiguous concerns expressed by the Chief Electoral Officer and various Senators that the 2023 *CEA* Amendments did not create "a satisfactory regime", Bill C-47 passed second reading in the Senate on June 13, 2023 with 59 votes for it and 19 votes against it.

[56] Bill C-47 was before that Senate on June 21, 2023 for third reading. A motion was made to amend the Bill to add a "sunset clause" that would repeal s. 385.2 in two years, allowing time for the passing of legislation that would put in place a "satisfactory regime". The proposed amendment was defeated and Bill C-47 was passed by the Senate. As one Senator put it:

> I have made it a habit of supporting government budgets. They're elected; they're there. I will continue to do that no matter which government is in power and no matter whether I agree with the spending or not.

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[57] Bill C-47 received royal assent on June 22, 2023. Section 385.2 of the *CEA* is now in force.

Events Following the 2023 *CEA* Amendments

[58] On August 28, 2023, the petitioners filed amended petitions, raising s. 385.2 as further legal basis for their submissions that the *PIPA* is inoperative as against FPPs because the *PIPA* conflicts with the *CEA*.

[59] On September 22, 2023, the Complainants served a Notice of Constitutional Question on the Attorney General of British Columbia ("AGBC") and the Attorney General of Canada ("AGC"). The Complainants challenge the constitutional validity or applicability of s. 385.2 of the *CEA* on two bases:

a) it is *ultra vires* and intrudes into provincial jurisdiction; and

b) it unjustifiably infringes s. 3 of the *Canadian Charter or Rights and Freedoms* s 7, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*]:

> s. 3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[60] On March 20, 2024, the federal government introduced Bill C-65, which, if enacted, would further amend the *CEA* by, *inter alia*, repealing s. 385.2 and replacing it with the following:

> **Purpose**
>
> 444.1 The purpose of this subdivision is to provide for a national, uniform, exclusive and complete regime applicable to registered parties and eligible parties respecting their collection, use, disclosure, retention and disposal of personal information.
>
> **Collection, use disclosure, retention and disposal**
>
> 444.2 In order to participate in public affairs by endorsing one or more of its members as candidates and supporting their election, any registered party or eligible party, as well as any person or entity acting on the party's behalf, including the party's candidates, electoral district associations, officers, agents, employees, volunteers and representatives, may, subject to this Act and any other applicable federal Act, collect, use, disclose, retain and dispose of personal information in accordance with the party's policy for the protection of personal information.

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(the "2024 Proposed *CEA* Amendments"]

[61] This language is virtually the same as that in the current s. 385.2.

[62] The 2024 Proposed *CEA* Amendments are, I am told, intended to address the Complainants' submissions regarding the 2023 *CEA* Amendments, including enforcement powers of the Chief Electoral Officer with respect to the privacy provisions of the *CEA*.

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Preliminary Issues

Bill C-65

[63] As mentioned above, Bill C-65 was introduced by the federal government in the House of Commons on March 20, 2024. It has not yet moved beyond First Reading. It is merely proposed legislation. It may never become law, in its present form or at all, and this Court cannot presume that it ever will: *UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan (Minister of Education)*, 2024 SKKB 23, at paras. 74–78.

[64] I agree with counsel for the respondents that Bill C-65 is irrelevant to the issues before me. I also agree that it would be an error of law for the Court to consider it as further evidence of exclusive federal purpose, frustration of federal purpose or of operational conflict. I decline to do so.

Prematurity of these Judicial Review Applications

[65] The Complainants and the AGC submit that judicial review of the Decision is premature both because:

i. the Decision was preliminary, made in the context of an ongoing proceeding, not a final order of the OIPC under s. 50 of *PIPA*, and

ii. the OIPC has not yet had an opportunity to reconsider the Decision in light of the subsequent 2023 *CEA* Amendments.

i. Not a Final Order

[66] In general, a court should not hear a judicial review petition before a tribunal has rendered a final decision—to avoid, amongst other things, fragmentation of issues resulting in cost and delay. In addition, where a tribunal has special expertise, it is often helpful for the court to have an evidentiary record together with the tribunal's analysis of the dispute: *British Columbia Teachers' Association v. Neufeld*, 2023 BCSC 1460 [*Neufeld*] at para. 31. Courts should be reluctant to intervene during an administrative process to avoid "short-circuiting the decision-making role of the tribunal process, particularly when asked to review a preliminary screening decision": *Neufeld*, at para. 32, citing *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364 at para. 36.

[67] However, intervention by way of judicial review is appropriate where the decision in question is constitutional validity. If it is not premature for the tribunal to decide the constitutionality issue, it cannot be premature for the court to review the decision for error: *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 27 at para. 55.

[68] The review of an interim decision by an administrative tribunal is a discretionary decision for the court to make. The court is justified in exercising its discretion to proceed with the judicial review in exceptional circumstances, such as where failing to do so will result in hardship or prejudice, a waste of resources, delay, fragmentation of proceedings, the strength of the case and the statutory context. The analysis is flexible and does not turn on a single factor: *Independent School Authority v. Parent*, 2022 BCSC 570 at para. 52; *Neufeld*, at para. 35; *Golden Eagle Blueberry Farm v. Gatica*, 2022 BCSC 304 at paras. 31 and 32.

[69] During his submissions, counsel for the Complainants commented more than once that the circumstances of the delegation to the Delegate and the circumstances of this case were "extraordinary".

[70] There is no hard and fast rule that requires the court to decline to hear a judicial review before a tribunal has made its final decision: *Goddard v. Dixon*, 2012

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BCSC 161 at para. 53. Early judicial intervention is appropriate to address a question of whether the tribunal erred in interpreting a legal test that is extricable from the tribunal's exercise of discretion and is potentially determinative. As was stated in *Gibraltar Mines ltd. v. Harvey*, 2022 BCSC 385, at para. 34:

> [I]f the tribunal is found to have erred, the time and expense of proceeding to a full hearing [at the tribunal] would be saved. Weighing all of these considerations, I am satisfied that early judicial intervention to address the question is more appropriate than Ms. Harvey's family status complaint proceeding before the Tribunal.

[71] The question to be decided is whether, in the circumstances of this case, it would be beneficial to remit the matter back to the OIPC to allow it to continue its inquiry.

[72] In my view, the answer is no. If the judicial review petitions were dismissed and the matter was remitted back to the OIPC to continue its inquiry, the FPPs would be prejudiced by being forced to spend time and resources responding to the inquiry despite having raised an important challenge to the applicability of *PIPA* and the jurisdiction of the OIPC over FPPs. It would be inefficient and a clear waste of resources for FPPs and the OIPC to proceed through a full investigative process if, at the end of the day, the court determines that *PIPA* has no application to the FPPs.

[73] Moreover, the OIPC exercised its discretion to defer the continuation of its inquiry in favour of an approach it considered was better suited to the unique circumstances of this case, namely for its inquiry to be held in abeyance pending the outcome of these judicial review applications. On May 19, 2022, it issued a decision denying the Complainants' request for re-consideration of the abeyance decision. The fact that Parliament subsequently took steps to clarify its intentions as set out in the *CEA* does not, in my view, warrant the extraordinary step of dismissing the petitions and remitting the matter back to the OIPC to give it an opportunity to reconsider its decision.

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ii. The OIPC has not had an Opportunity to Consider the 2023 *CEA* Amendments

[74] Judicial review is inherently a review of the record before an administrative tribunal, not an appeal or a hearing *de novo*. The reviewing court should proceed on the basis of a record containing the necessary adjudicative and legislative facts created before the tribunal and should have the benefit of an informed view and insight of the specialized and expert administrative adjudicator. As a general rule, issues raised for the first time on judicial review, including constitutional issues, risks circumventing the legislative intent to grant the tribunal the jurisdiction to hear and consider the issue in the first instance: *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 at paras. 37 and 51.

[75] I do not accept the submissions that continuing with the judicial review process in this case would result in an "end run" around the OIPC's duty to reconsider the Decision in light of the 2023 *CEA* Amendments. Although the mere allegation that an administrative tribunal has exceeded its jurisdiction will not, on its own, constitute an exceptional circumstance (see: *Thielmann v. The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 at paras. 32 and 41), the circumstances of this case are extraordinary and, as far as I am aware, unprecedented. The initial complaint to the OIPC was made in 2019. The petitioners and the Complainants each filed evidence and lengthy written submissions with the Delegate in 2021. The Decision was rendered in March 2022, over two years ago. The 2023 *CEA* Amendments followed over a year later.

[76] The petitioners say that the Decision is flawed constitutionally regardless of the 2023 *CEA* Amendments, which themselves were enacted as a direct result of the Decision. This is not a case where the administrative tribunal has not had an opportunity to determine that constitutional issue at first instance. It did so.

[77] Nor do the petitioners agree that proceeding with the judicial review process would be tantamount to the Court embarking on a *de novo* hearing. Rather, the Court is hearing the judicial review applications that are properly before it pursuant

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to the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The Tribunal itself has acknowledged the necessity of the judicial review process proceeding and has stayed its inquiry pending the outcome. The record before me is adequate to allow me to consider the issues that have been raised regarding the 2023 *CEA* Amendments, all of which have been the subject of extensive written submissions and have been thoroughly argued.

[78] I agree with the petitioners and the AGBC that, in this case, judicial review is appropriate to address the question of whether the Delegate erred in his interpretation of the law as it existed at the time of the Decision and whether the OIPC properly interpreted its jurisdiction based upon that law.

[79] Regardless, even if that question can only be determined after a consideration of the 2023 *CEA* Amendments, an order that the matter be remitted back to the Delegate for reconsideration on the basis of those amendments would likely result in renewed judicial review applications in any event, which would be a review on the correctness standard.

[80] Moreover, the OIPC has had ample opportunity since the 2023 *CEA* Amendments were enacted to exercise its discretion to set aside the abeyance of its Decision and reconsider it in light of the 2023 *CEA* Amendments. When asked, counsel for the OPIC explained that:

i. there was a concern that the Delegate would be seen as “backfilling” or “bootstrapping” the Decision;

ii. none of the parties asked him to do so;

iii. by the time of the 2023 *CEA* Amendments, it had become clear that the issue was before the court; and

iv. it was considered to be inappropriate in the circumstances for the Delegate to reconsider the Decision on his own motion.

I agree with those concerns.

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[81] In my view, it would serve no useful purpose to simply remit the matter back to the OIPC for reconsideration. There comes a point in time in every dispute process that a final determination is warranted to the extent such a determination is appropriate in the circumstances.

Admissibility of New Evidence

[82] The Complainants object to the admissibility of Exhibits "J", "K", and "L" from Affidavit#2 of Jessica Cardill, Senior Director, Legal Affairs & Party Services for the Liberal Party of Canada ("LPC"). The affidavit was sworn on September 12, 2022 in support of the LPC's judicial review application.

[83] The LPC wishes to use the impugned evidence to demonstrate that the Chief Electoral Officer maintains a supervisory role over the LPC's privacy policy under the *CEA*. It says that it is a proper response to the positions taken by the AGBC and the OIPC that the Chief Electoral Officer "does not have 'decisional authority' over the LPC's privacy policy" and does not impose any requirements in respect of FPPs privacy policies.

[84] The exhibits comprise correspondence in 2019 between the LPC and the Chief Electoral Officer's office regarding suggested improvements that could be made in the LPC's privacy policy. At best, this evidence demonstrates nothing more than a single incident where the LPC was encouraged to improve its privacy policy.

[85] The LPC provided no evidence as to why this evidence could not have been put before the Delegate. The LPC could and should have adduced this evidence before the Delegate: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para. 20; *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2015 BCSC 1663, at para. 46; *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775.

[86] I agree with the submissions of the Complainants and the AGBC that this evidence is inadmissible on this judicial review.

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Procedural Fairness

[87] The petitioners allege breaches of the Delegate's duty of procedural fairness in three ways:

a) by assuming some facts, including the connections between the petitioners and the province of British Columbia, while putting the petitioners to the task of demonstrating more controversial facts, the Delegate's approach gave rise to an apprehension of bias;

b) the petitioners were unaware that the Delegate had prepared the Statement of Facts for the hearing he conducted using documents the petitioners were unaware of and because they were not provided with a "Fact Report" pursuant to the OIPC's hearing Guidelines; and

c) the Delegate unfairly pre-determined that FPP's were "organizations" under *PIPA* and refused the petitioners' requests to have the Issue to be Decided reframed, again creating an appearance of bias.

The Law

[88] Procedural fairness is integral to the administrative decision-making process. The duty of procedural fairness is triggered when there is a decision that is "administrative and affects 'the rights, privileges or interests of an individual'": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20, relying on *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 653.

[89] The duty of procedural fairness is both flexible and variable, and the extent of its content will depend on the specific context of each case, and on the specific legal context and factual nexus: *Baker* at para. 22. The Supreme Court of Canada in *Baker* iterated, at para. 28, the two basic principles underlying the duty of procedural fairness: *audi alteram partem* [the right of the parties to be heard, including the right to know the case to meet and have a full and fair chance to respond] and *nemo judex in sua causa* [the right to an impartial and independent decision-maker].

[90] For the *audi alteram partem* rule to apply, the possibility or likelihood of prejudice must be shown: *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 [*Taseko*] at para. 52. Ultimately, the Federal Court of Appeal determines "whether the information at issue was prejudicial to the [party], and by extension,

whether it was new or different from what was presented at the hearing": *Taseko* at para. 53.

[91] The Federal Court of Appeal in *Canadian National Railway Co. v. Canada (Transportation Agency)*, 2021 FCA 173, at para. 40, recently reiterated that the standard of review for reviewing an alleged breach of procedural fairness is "fairness". The court determines whether the decision-making procedure was fair, having considered all the circumstances: *Lindelauf v. British Columbia (Assistant Regional Water Manager)*, 2018 BCCA 183 at para. 22; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66.

[92] The burden of establishing a breach of the duty of procedural fairness is on the party invoking that breach: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at para. 49.

The Alleged Breaches

[93] I am not persuaded that there was any breach of the duty of procedural fairness in this case. A plain reading of the Decision demonstrates that the Delegate did not pre-determine any of the issues.

[94] The undisclosed materials comprised a chronology prepared by the OIPC's investigator that summarized the correspondence, the respective positions taken by the parties, and a summary of corporate searches, as well as some information obtained from the petitioners' respective websites. There is no suggestion that any of the "facts" contained in the undisclosed materials were inaccurate. I accept that, in the context of the two impugned documents, there was a heightened duty of procedural fairness owed to the FPPs, but I have no difficulty concluding that the Delegate fulfilled his duty by inviting all of the parties to make full submissions on all of the issues that were raised. He permitted them to put before him all of the evidence and make all of the submissions they wished. The Delegate admitted all of it. The parties were heard and were given an opportunity to fully address all of the issues that were before the Delegate.

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[95] There is no evidence that the Delegate's consideration of any of the evidence, facts or law differed from what the petitioners expected him to consider. He addressed all of the petitioners' concerns. The petitioners have not demonstrated that they were prejudiced in any way. Mere apprehension of a breach of the duty of fairness is not sufficient to invoke either the *audi alteram partem* or the *nemo judex in sua causa* doctrine: *Taseko*, para. 61.

[96] I find that a consideration of the circumstances as a whole demonstrates that the Delegate's decision-making procedure was fair. There was no breach of the duty of procedural fairness by the Delegate.

Standard of Review

[97] The parties agree that the appropriate standard of review on all constitutional issues that have been raised is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paras. 53 and 64. The standard of review for issues related to procedural fairness is fairness.

[98] The Complainants submit that, with respect to the issue relating to statutory interpretation (whether the FPPs are an "organization" as defined in *PIPA*) the standard of review is reasonableness. They rely on the following passage from *Vavilov* at para. 115:

> [115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard…

[99] For the purpose of my analysis, I am prepared to accept that the standard of review in respect of the Delegate's interpretation of the word "organization" is reasonableness. In this regard, the question to be determined is either (i) whether there was a failure of rationality internal to the reasoning process or (ii) the Decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov* at paras. 101 and 106.

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Alleged Errors on the Part of the Delegate

[100] The petitioners submit that the Delegate made the following errors in the Decision:

a) "organization" within the meaning of *PIPA* should have been interpreted in a manner that was within provincial constitutional authority and not as extending to FPPs;

b) in the first branch of his paramountcy analysis, misconstruing the federal regime governing FPPs and failing to find a federal purpose that was being frustrated;

c) in the second branch of his paramountcy analysis, failing to find an operational conflict; and

d) he failed to properly consider the doctrine of interjurisdictional immunity.

[101] If the petitioners succeed on any one of these submissions, the Decision must be quashed.

Analysis

[102] There is no need to consider whether *PIPA* is constitutionally valid provincial legislation. All of the parties concede that it is.

Does *PIPA* Extend to FPPs?

[103] The petitioners submit that, given the language the Delegate used to formulate the issue he was to decide, his analysis first assumed that FPPs were "organizations" within the meaning of *PIPA* and he then went on to conclude that they were at para. 66 of the Decision. The Delegate wrote:

> 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", which provide that and "unincorporated association" is an "organization". The plain meaning of those terms applies to these political parties – which are, as I have found, active in the province and collect personal information of residents – and I see no plausible reason to think that the Legislature intended any other meaning. PIPA's legislative purposes do not support another interpretation. Nor does

> the language of the rest of the statute. I arrive at the same conclusion respecting section 3(1) of PIPA, which provides that, "[s]ubject to this section", PIPA "applies to every organization".
>
> [Emphasis added.]

[104] The petitioners submit that, regardless of whether the statute is within the legislative authority of the province, and regardless of whether there is ambiguity, it must be interpreted in a way that is presumptively constitutional, even if that interpretation is inconsistent with the "plain meaning" of the statute: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 15; *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 at para. 72. Where multiple interpretations of a statute are possible, it is presumed the legislature intended the law to be read in a manner that is consistent with its constitutional authority: *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal*, 2022 BCCA 20 [*Brown Bros.*] at paras. 12–15.

[105] The petitioners rely on the decision of the Supreme Court of Canada in *McKay et al. v. The Queen*, [1965] S.C.R. 798 [*McKay*] at 803 where the Supreme Court of Canada stated in the context of a municipal sign law prohibiting the display of federal election signs:

> […] if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted. […]
>
> [Emphasis added.]

[106] The petitioners submit that the Delegate used the concept of "cooperative federalism" to force a consistent interpretation between the privacy requirements set out in *CEA* and those set out in *PIPA*. However, they submit that cooperative federalism "can neither override nor modify the division of powers itself: *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para. 6,

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aff'd 2020 SCC 1. In *Reference re Securities Act*, 2011 SCC 66, the Supreme Court of Canada held:

> [62] […], notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

[107] The petitioners say that the right of FPPs to seek by means permitted by federal elections law to contact electors and encourage them to vote or to support a candidate is a federal right with respect to which only Parliament can legislate and therefore *PIPA* must be interpreted accordingly. They submit that it could not have been the intention of the B.C. Legislature to extend *PIPA* to FPPs, and that doing so effectively alters the distribution of power between the federal and provincial governments over federal elections and their processes. It opens the door to a multiplicity of different interpretations and approaches, varying from province to province, to the privacy rights of federal voters and obligations of FPPs.

[108] The Complainants respond that it is only where the language of a statute creates a genuine ambiguity that it is appropriate for a court to prefer an interpretation that is presumptively constitutional. In *College of Midwives of British Columbia v. MaryMoon*, 2020 BCCA 224, the Court of Appeal held:

> [64] […] On the issue of the presumption of constitutionality, without at this stage deciding the question, I would note the following words of Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42:
>
> > [62] Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" ([Cite to R. *Sullivan*, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

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> [Emphasis in original.]

[109] The Complainants submit that there is no ambiguity in the word "organization".

[110] The Complainants say that the Delegate properly considered the question of whether *PIPA*'s definition of "organization" could constitutionally extend to FPPs and was persuaded by the submissions of the AGBC that the correct approach was to first determine whether *PIPA* was within the province's legislative authority and, if so, assess whether *PIPA* could validly apply to FPPs:

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

See: Decision at para. 62.

[111] I agree with the submissions of the Complainants. The presumption of constitutionality is not applicable to circumvent a full constitutional analysis in the absence of a "genuine ambiguity".

[112] The petitioners argue that the word "organization" is ambiguous because the OIPC itself has interpreted it in two different ways. They point first to the finding of an OIPC Adjudicator in *British Columbia (Constituency Office of a Federal Member of Parliament (Re)*, 2007 CanLII 52750 (BC IPC) that *PIPA* does not apply to the British Columbia offices of federal members of Parliament ("MPs") on the basis that the privacy obligations of MPs, while not explicitly excluded from *PIPA*, "simply reflects that fact that federal legislators are not subject to provincial jurisdiction in that regard" (at paras. 18–20). They also point to the later decision of the OIPC in *Courtenay-Alberni Riding Association of the New Democratic Party of Canada (Re)*, 2019 BCIPC 34 (CanLII) in which the Commissioner himself determined that the privacy information provisions of *PIPA* applied to FPPs.

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[113] In my view, the Delegate correctly dealt with this obvious conflict. He determined, not that there was ambiguity in the word "organization", but that the Adjudicator in the earlier case was simply wrong to exclude MPs from the provisions of *PIPA*. At para. 177, the Delegate stated:

> These comments [in the *Constituency Office* case] were not, in my view, a necessary basis for the decision, which focused on section 18 of the *Constitution Act, 1867*. In any case, […] and, with deference, [the adjudicator's analysis of the applicability of *PIPA* to federal MPs] is not persuasive.

[114] I agree with the Complainants that there is no ambiguity in the word "organization". It is not "fairly susceptible of two constructions". Its plain meaning applies to FPPs. The Delegate read the words of *PIPA* "in their entire context, in their grammatical and ordinary sense, harmonious with the scheme and object of the statute", and concluded that the "Legislature did not intend to exclude [FPPs] from *PIPA*'s definition of 'organization'[…]": Decision at para. 66.

[115] A high degree of deference is afforded to the Delegate on the question of statutory interpretation. The court must defer to him unless his findings of fact or law were "clearly irrational" or "evidently not in accordance with reason": *Brown Bros.* at para. 35. Neither is the case here. The Delegate's interpretation does not interfere with FPPs ability at law to contact electors or encourage them to vote or to support a candidate. It does not alter the distribution of power between the federal and provincial governments over federal elections and their processes. It simply results in the word "organization" as defined by *PIPA* encompassing FPPs. Whether or not the substantive provisions of *PIPA* are inoperative as against FPPs will be determined by the paramountcy and interjurisdictional immunity analyses set out below.

[116] In my view, it was reasonable for the Delegate to extend the definition of "organization" to FPPs.

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Did the Delegate Err in his Paramountcy Analysis by Misconstruing the Federal Regime Governing Federal Political Parties?

[117] The doctrine of federal paramountcy renders provincial law inoperative to the extent of its incompatibility with the federal legislation. This incompatibility can result from either:

a) an operational conflict between the provincial law and a federal law (impossibility of dual compliance). The operational conflict arises where "one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other"; or

b) the provincial law frustrating the purpose of the federal law.

See: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., 2015 SCC 53 [*Lemare Lake*] at paras. 15–21, 73; *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 [*Orphan Well*] at para. 65.

[118] The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. The cardinal rule of constitutional interpretation where the legislative subject matter has a double aspect is that, when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes: *Lemare Lake*, at para. 20.

[119] The principle of cooperative federalism may be invoked to "facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action". It is now the core principle underlying the modern division of powers jurisprudence: *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at paras. 17–19; *Reference re Impact Assessment Act*, 2023 SCC 23 at paras. 116, 122, and 216. Cooperative federalism favours, where possible, the concurrent operation of statutes enacted by the federal and provincial levels of government: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 38.

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[120] Improperly broadening the intended purpose of a federal enactment is inconsistent with this principle: *Lemare Lake* at para. 23.

[121] 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 analysis, courts must take a "restrained approach" and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility: *Lemare Lake* at para. 21. Judicial restraint is particularly required where the effect of applying either branch of the federal paramountcy doctrine may have the effect of depriving citizens of their quasi-constitutional rights under provincial legislations: *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 at para. 84.

[122] The burden of proof that rests on the party alleging an operational conflict or a frustrated federal purpose is a high one: *Murray-Hall* at para. 85.

i. Operational Conflict

[123] The petitioners submit that the doctrine of operational conflict is not limited to situations where it is impossible for a party to comply with both laws. They point to *British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23 [*Lafarge*] as an example. In that case, the municipal law imposed a 30-foot height limit on a structure that had been approved at a much higher height under federal law. Lafarge could have complied with both laws by building only to the lower, municipal height. Another example is the Supreme Court of Canada's decision in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [*Moloney*] where the province refused to reinstate a driver's licence until an individual paid a debt to the province that had been discharged through the federal *Bankruptcy and Insolvency Act,* R.S.C 1985, c. B-3. In both cases the provincial legislation was found to be in operational conflict with the federal law despite it being possible for the party to comply with both laws.

[124] Based on this analysis, the petitioners submit that although it may be possible for there be compliance with both *CEA* and *PIPA,* if each provincial privacy commissioner interprets and enforces the *CEA* differently, FPPs would be subject to

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complaints, investigations, access requests and enforcement under differing interpretations across the country. They submit that the provisions of *CEA* and *PIPA* are in possible conflict regarding how personal information is to be dealt with by FPPs. They submit that, although *PIPA* imposes different requirements on the collection, use and disclosure of personal information than is required of FPPs under *CEA*, an operational conflict arises because *PIPA* provides individuals with a right of access to the personal information whereas, in contrast, "privacy obligations have been tailored specifically by Parliament for [FPPs] to address their unique role and needs for access to the Canadian electorate" and the *CEA* grants a right of access to personal information held by the Chief Electoral Officer (s. 54) but not FPPs.

[125] The petitioners also rely on *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60 where the Supreme Court of Canada held:

> [32] […] If Parliament has created two separate procedures, one of which is subject to provincial law while the other is not, it must be understood to have intended the second procedure to be independent of provincial law.

[126] The Complainants say that the decisions in *Lafarge* and *Moloney* do not stand for the proposition that an operational conflict can be found in situations where, as here, it is possible to comply with both the federal (*CEA*) and the provincial (*PIPA*) law. They point out that, although dual compliance was technically possible in those cases, an operational conflict was found because, in both cases, it was only possible to comply with both laws if a specific right or benefit that had already been granted under federal law was given up.

[127] I disagree with the submissions of the petitioners that impossibility of compliance with both the federal and provincial laws is not required for an operational conflict to arise. The Supreme Courts of Canada's decision in *Lemare Lake* postdated its decision in *Lafarge* by nine years and was pronounced at the same time as *Moloney*. The Court in those and other cases made it clear that an operation conflict arises only when "one enactment says 'yes' and the other says 'no' such that 'compliance with one is defiance of the other'": *Lemare Lake* at paras. 17–

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18; *Moloney* at para. 63; *Orphan Well* at para. 65. This statement of the law was again reiterated recently by the Supreme Court of Canada in *Murray-Hall* at para. 84:

> [84] […] the operational conflict means that it is impossible to comply with both laws simultaneously, such as "where one enactment says 'yes' and the other says 'no'" […]
>
> [Emphasis added.]

[128] Accordingly, for an operational conflict to be found, it must be shown that there is "actual conflict" between the laws such that the "same citizens are being told to do inconsistent things" and compliance with both is impossible.

[129] I agree with the following description of *PIPA*'s net effect as was articulated by the Delegate, at para. 118 of the Decision:

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

[130] In my view, compliance with the provisions of *PIPA* would not result in an operational conflict with any of the provisions of *CEA*. Although *PIPA* says "yes", *CEA* is silent. I agree with the submissions of the Complainants and the AGBC that it is possible for FPPs to comply with both *PIPA* and *CEA* without a person giving up any "right or benefit" granted under the *CEA*. *PIPA* authorizes the collection, use and disclosure of personal information without consent if authorized by law. The *CEA* is such a law. The FPPs are free to collect personal information for their purposes.

[131] Indeed, a review of the petitioners' respective privacy policies, all of which have been approved by the Chief Electoral Officer as required by the provisions of *CEA*, shows that their provisions are aligned with the rights of British Columbians

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under s. 24 of *PIPA* to request a correction of an error or omission in their own personal information held by the FPPs. There is no barrier to FPPs complying with both *CEA* and *PIPA*.

[132] The theoretical possibility that a conflict might arise is insufficient to show that an operational conflict exists: *Orphan Well* at para. 105.

[133] As the Delegate correctly stated, at para. 152 of the Decision:

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

[134] The Delegate determined that, because *PIPA* explicitly permits collection, use and disclosure of information without consent "where authorized by law" and the *CEA* is such a law, the two statutes are harmonious as opposed to in conflict. I agree with his analysis. The petitioners have not discharged the high burden upon them to demonstrate that an operational conflict exists.

[135] In my view, the Delegate's finding that the doctrine of operational conflict did not operate to oust the jurisdiction of the OIPC over FPPs was correct.

ii. Frustration of a federal purpose

[136] Provincial legislation will be found to be inoperative when it frustrates the purpose of a federal law: *Lemare Lake* at para. 26.

[137] The party alleging frustration of federal purpose bears the burden of establishing (i) the clear and valid purpose of the relevant federal statute and (ii) that the provincial legislation is incompatible with this purpose. Again, the standard of proof is high: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*] at paras. 66 and 68; *The Corporation of the City of Victoria v. Zimmerman*, 2018 BCSC 321 at para. 81.

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a) Proof of Federal Purpose

[138] To identify a law's purpose, the court considers intrinsic evidence (the actual text of the law including it preamble and purpose clauses) as well as extrinsic evidence (such as parliamentary debates and minutes of parliamentary committees): *Murray-Hall* at para. 25. As was stated by the Supreme Court of Canada in *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 34:

> To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications [citation omitted.]

[139] Intrinsic evidence is generally afforded greater weight than is extrinsic evidence because, in the final analysis, "it is the substance of the legislation that needs to be characterized, not speeches in Parliament or utterances in the press": *Murray-Hall* at para. 26.

[140] Consideration of the federal purpose should include the context of the broader statutory scheme. The relationship of a challenged provision to that scheme may be a central consideration in determining its purpose and effects: *Reference re Securities Act* at para. 64; *Murray-Hall* at paras. 24–26; *R. v. Sharma*, 2022 SCC 39 at para. 88.

[141] Regardless, clear proof of a federal statute's purpose is required, as was emphasized by the Supreme Court of Canada in *Lemare Lake*:

> [45] This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

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[142] This statement of the law was recognized by the Delegate at para. 160 of the Decision:

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

[143] The Delegate referenced the decisions of the Supreme Court of Canada in *COPA* and *Lemare Lake* in support of this statement of the law. However, the petitioners submit that the evidence of federal purpose before the court in *Lemare Lake* and *COPA* was far from clear, whereas the evidence of federal purpose before the Delegate was very clear. In *Lemare Lake*, the amicus had cited no parliamentary debates or reports and instead relied on cases and secondary sources that related primarily to a different issue, a report issued 20 years before the amendment in issue, and a book that did not mention the purpose sought to be established. The "proof" of federal purpose fell far short of "clear": *Lemare Lake* at paras. 41–43. The examination of intrinsic and extrinsic evidence for proof of purpose in *COPA* was limited to the Regulations attached to the Federal Scheme (see paras. 67, 72–73). Moreover, the Supreme Court of Canada determined that the doctrine of interjurisdictional immunity, not federal paramountcy, applied to the facts of the case, and that "the interjurisdictional immunity analysis presumes the validity of a law": *COPA* para. 57.

[144] The petitioners submit that, in contrast to the lack of evidence that was before the tribunals in *Lemare Lake* and *COPA*, the petitioners provided the Delegate with a long legislative history of decisions of Parliament declining to extend general privacy laws to FPPs, leading ultimately to the December 2018 amendments to *CEA*.

[145] I accept that Parliament's purpose in enacting *CEA* was "to enfranchise all persons entitled to vote and to allow them to express their democratic preferences while protecting the integrity of the democratic process": *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para. 35. I also accept that the election process relies on the FPPs' ability to engage participation from the Canadian electorate and that the FPPs'

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collection and use personal information to carry out political purposes may well be essential to our democracy. It allows FPPs to better reach their supporter base.

[146] However, neither the intrinsic nor extrinsic evidence put before the Delegate by the petitioners demonstrates a clear purpose on the part of Parliament to establish a regime in respect of the collection and use of personal information by FPPs. Nor does it demonstrate that the clear purpose of *CEA*'s provisions regarding privacy policies required of the FPPs was to enhance, protect and foster the FPPs' effective participation in the electoral process. Rather, the *CEA* simply requires that FPPs have and make public a policy for the protection of personal information that is approved by the Chief Electoral Officer (ss. 385 and 385.1).

[147] As the Delegate noted at para. 161 of the Decision:

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

[148] The Delegate found that there was no evidence to support the petitioners' "broad assertions of both statutory purpose and harm, amounting to pretty dire predictions for the impact on elections if *PIPA* were constitutionally applicable" to them: Decision para. 170. He adopted the Supreme Court of Canada's caution that federal legislation should not be artificially broadened: *Lemare Lake* at para. 23. He concluded that the petitioners had not demonstrated a clear and valid purpose for *CEA*'s provisions related to FPPs' privacy policies.

[149] I agree with the Delegate that the evidence provided by the petitioners does not satisfy the high burden upon them to demonstrate a clear federal purpose of those provisions. I conclude that the Delegate's determination in this regard was correct.

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b) Frustration of Federal Purpose

[150] Nevertheless, an analysis of whether a clear and valid federal purpose is frustrated by *PIPA* is warranted.

[151] There are three circumstances in which a court will find frustration of federal purpose:

a) where the federal legislation is interpreted as intending the federal decision maker to have the final say: *Lafarge* at para. 75;

b) when the federal statute was intended to be a complete and comprehensive code: *Moloney* at para. 79; and

c) when a provincial law prevents the realization of objectives that a federal statute aimed at achieving: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67 at para. 72.

[152] The petitioners submit that all three of these circumstances are present in this case.

[153] The petitioners submit first that the Delegate failed to consider Parliament's intent that the Chief Electoral Officer have final decisional authority over FPPs and federal elections. They point out that Parliament rejected multiple recommendations to extend its general privacy legislation, *PIPEDA*, to FPPs, deciding instead to expand the Chief Electoral Officer's mandate under *CEA* to include the personal information policies and practices of FPPs. They say it is clear that Parliament intended the final decision-making authority in this regard to come from Elections Canada. They say that when, as here, a federal legislative regime is intended to give a federal decision maker "final decisional authority", paramountcy precludes overlapping provincial regulation: *Lafarge* at para. 75. They submit that the Decision has the effect of giving the OIPC the ability to investigate whether a FPP's privacy policy complies with *PIPA*, and to enforce *PIPA* against the FPP despite the privacy policy having been accepted by the Chief Electoral Officer under *CEA*. They submit that by subjecting FPPs to oversight of the OIPC in addition to the Chief Electoral Officer, the Delegate has opened the door to a multiplicity of legal regimes, varying

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from province to province, to regulate the conduct of FPPs. If these regimes vary for FPPs across the country, the national legislative regime is frustrated.

[154] The petitioners submit further that *CEA* was intended by Parliament to be a compete and comprehensive code over the conduct of FPPs, including their collection, use and disclosure of personal information. They contend that this "regime" has been in place since 2018 and sets out Parliament's policy regarding personal information collected by FPPs for electoral purposes. They say that this, together with the language of *CEA* and the overarching purpose of enfranchising Canadians, establishes that Parliament specifically intended the Chief Electoral Officer, and not provincial privacy commissioners, to oversee the personal information practices of FPPs. They submit that the mere fact that the level of oversight is not considered by the OIPC and the Complainants to be in keeping with the regime set out in *PIPA* does not entitle it to fill the perceived lacuna.

[155] The petitioners point out that jurisdiction over federal elections was allocated exclusively to Parliament pursuant to it jurisdiction over "peace, order and good government" as set out in the preamble to s. 91 of the *Constitution Act*. They say that Parliament made the Chief Electoral Officer the single regulator to consider interests and concerns of Canadian voters and that Parliament, in its wisdom, determined that federal elections would be stymied by the necessity to comply with the level of personal information privacy protection provided for in provincial legislation such as *PIPA*. They submit that Parliament's exemption of the FPPs from having to comply with *PIPEDA* and, instead, be free to fashion their own privacy policies does not entitle the provinces to impose their privacy legislation on them.

[156] I do not find the submissions that the provisions of *PIPA* frustrate the valid purpose of *CEA* to be persuasive.

[157] As I have already indicated, in my view the provisions of *CEA* relating to the protection of personal information cannot be read as indicating that Parliament intended to create an exclusive regime in respect of the collection and use of personal information by FPPs. *CEA* does not give the Chief Electoral Officer

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decisional authority to do anything regarding the collection of personal information by FPPs other than to ensure they have a privacy policy in place. The Chief Electoral Officer has no powers akin to those of the Commissioner under *PIPA*. If Parliament had intended such a regime, it would have done so: *Moloney* at para. 79.

[158] However, to the extent that a valid purpose for *CEA*'s provisions relating to privacy policies has been demonstrated, in my view *PIPA* is in complete alignment with that purpose.

[159] *CEA* addresses private information from the perspective of FPPs and their need communicate with voters. It requires that the FPPs have and publish on its website a policy for the protection of personal information, including:

> i. a statement indicating the types of personal information that the party collects and how it collects that information;
>
> ii. a statement indicating how the party protects personal information under its control;
>
> iii. a statement indicating how the party uses personal information under its control and under what circumstances that personal information may be sold to any person or entity;
>
> iv. a statement indicating the training concerning the collection and use of personal information to be given to any employee of the party who could have access to personal information under the party's control;
>
> v. a statement indicating the party's practices concerning
>
> (1) the collection and use of personal information created from online activity, and
>
> (2) its use of cookies, and
>
> vi. the name and contact information of a person to whom concerns regarding the party's policy for the protection of personal information can be addressed.

There are no provisions in *CEA* regarding a citizen's access to their private information collected or used by FPPs. It merely requires that the FPPs publish the name and contact information of a person who can contacted by a citizen who has concerns about it.

[160] In contrast, *PIPA* addresses private information from the perspective of the need to protect the privacy of British Columbians. It requires disclosure to the citizen

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of the personal information that is held, how it has been used and to whom it has been disclosed.

[161] Neither *CEA* nor *PIPA* encroaches on the other. Rather, they are a "textbook case for the application of the double aspect doctrine" which reflects the contemporary view of federalism and constitutional interpretation that overlapping powers are unavoidable. According to this doctrine, Parliament and the provincial legislatures may make laws in relation to matters that, by their very nature, have both a federal aspect and a provincial aspect. The doctrine applies where each level of government has a "compelling" interest in enacting legislation on different aspects of the same activity or matter. It allows for "the concurrent application of both federal and provincial legislation": *Murray-Hall* at paras. 76–77.

[162] There is no question that the federal election process relies on access to and participation from Canadian voters. The process allows FPPs the ability to collect and use personal information to, *inter alia*, understand voters' interests and priorities and to mobilize democratic participation, all in accordance with the provisions of the *CEA*. However, I disagree with the submission of the petitioners that the Delegate "failed to give effect to the constitutional boundaries that underlie the division of powers in Canada" and that by finding that the provisions of *PIPA* apply to FPPs, the Decision overrides and modifies the division of powers.

[163] Rather, the interplay between *PIPA* and *CEA* is a perfect illustration of cooperative federalism. The Delegate correctly stated the principle in the Decision:

> 99. In approaching the constitutional issues, it is necessary to "take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels". As the British Columbia Court of Appeal has observed, although the constitution cannot be separated from the normal constraints of interpretation, "it is trite but true to note that Canadian constitutional law is a 'living tree' that reflects society and its changing concerns over time", and the "formerly inflexible approach to the division of powers has given way to a ready acceptance of overlapping and often 'mutually modifying' jurisdictions."
>
> 100. It is also the case, however, that, although co-operative federalism offers "flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of

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> powers itself" and cannot "support a finding that an otherwise unconstitutional law is valid".

[164] In determining that the provisions of *PIPA* applied to the petitioners, the Delegate found that *CEA* was "[…] silent about collection, use or disclosure of personal information" and noted that while Parliament could "legislate in respect of federal political parties' collection, use and disclosure of personal information in a manner that creates uniform rules for all parties and unequivocally ousts provincial jurisdiction", it had not done so. He concluded that this "possibility" was "not a basis for a finding that, under the paramountcy doctrine, *PIPA*'s application would frustrate a federal purpose". The Delegate concluded at para. 154 that the petitioners had "not established that application of *PIPA*'s rules would, even if they were more restrictive than the federal legislation, frustrate a federal purpose":

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

[165] I agree. The provisions of *PIPA* neither stifle FPPs' ability to engage people in politics nor frustrate any valid federal purpose in that regard. Any practices authorized under *CEA* are not impacted by *PIPA*. The FPPs are free to collect and use personal information as they have been. The Chief Electoral Officer has no discretionary or "decisional authority" under the *CEA*'s privacy policy provisions although, notably, he does have discretionary authority over other election-related matters: see for example *CEA,* s. 17.

[166] The petitioners' argument are based entirely on hypothetical scenarios. As the Delegate stated at para. 174:

> It is not enough to simply say that *PIPA*'s application would introduce rules about political parties' collection, use or disclosure of voters' personal information. As the Supreme Court of Canada has said [in *COPA*, at para. 66]: "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission".

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[167] I conclude that the Delegate's finding that extending the provisions of *PIPA* to FPPs did not frustrate a federal purpose was correct.

The Doctrine of Interjurisdictional Immunity

[168] The doctrine of interjurisdictional immunity protects the "core" of a legislative head of power from being impaired by a government at the other level. Its application involves two steps:

a) a determination of whether a statute enacted or measure adopted by a government at one level intrudes on the "core" of a power of the other level of government;

b) if so, a determination of whether the effect of the intrusion is sufficiently serious that it amounts to an impairment of the protected core power.

See: *Rogers Communications v. Châteauguay*, 2016 SCC 23 at paras. 59–60.

[169] As was stated by the Supreme Court of Canada in *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 48–49:

> [48] […] It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.
>
> [49] […] in the absence of impairment, interjurisdictional immunity does not apply.

[170] "Impairment" requires that an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In the modern era of cooperative federalism, the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power: *COPA* at para. 45.

[171] The doctrine of interjurisdictional immunity is premised on the concept that each head of power in ss. 91 and 92 of the *Constitution Act* has a "basic, minimum and unassailable content" that must be protected from impairment by the other level of government in order to make the power effective for the purpose for which it was

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conferred: *Regional Municipality of Halton v. Canadian National Railway Company*, 2022 ONSC 4644 [*Halton*] at para. 33 (appeal to the Ontario Court of Appeal dismissed, see: *Halton (Regional Municipality v. Canadian National Railway Company*, 2024 ONCA 174)), at para. 33.

[172] The doctrine applies even if there is no conflict in the two applicable statutes. "The mere fact that a provincial law […] affects a vital part of an area of exclusive federal jurisdiction is enough to render it inapplicable with respect to a federal undertaking, regardless of whether or not Parliament has enacted any laws or taken any specific action with respect to the jurisdictional area of the undertaking: *Lafarge* at para. 110.

[173] The doctrine is generally reserved to situations in which prior case law has already found it to apply: *Rogers Communications* at para. 61. Specifically, it is reserved for situations where precedent has already identified that what is alleged to be "impaired" is part of a recognizable "core", which is necessarily narrower than the head of power itself: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 at paras. 93–95.

[174] In this case, the petitioners submit that Parliament has granted to the Chief Electoral Officer the "final decisional authority" on what the *CEA* requires regarding the collection, use and dissemination of personal information. They say that the Delegate failed to consider Parliament's exclusive jurisdiction over federal elections and FPPs. They say the fact that *PIPA* may not be inconsistent with the *CEA* is irrelevant to the interjurisdictional immunity analysis, as is the fact that *PIPA* is "devoid of any reference to elections or anything to do with them": Decision at para. 203. The petitioners say that *PIPA* cannot extend to the core federal power over federal elections regardless of whether it explicitly mentions federal elections.

[175] The petitioners submit further that just as was the case with interprovincial trucking (*Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897), railways (*Canadian National Railway Co. v. Courtois*), [1988] 1 S.C.R. 868), and telecommunications (*Bell Canada v. Quebec (Commission de la*

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Santé et de la Sécurité du Travail), [1988] 1 S.C.R. 749), where the Supreme Court of Canada held that provincial legislation relating to working conditions, labour relations and occupational health and safety could not constitutionally apply to a federal undertaking, so too is the case here—*PIPA* cannot constitutionally apply to the manner in which FPPs carry out their central political roles in the federal elections process, including how they self-regulate the collection, use and disclosure of personal information. They say that the overarching and central purpose of the collection, use and disclosure of personal information by the petitioners is the participation in the federal election process. Indeed, much of the personal information comprises what the FPPs are entitled by law to receive from Elections Canada.

[176] The petitioners say that, if it were otherwise, *PIPA* would impair and impede Parliament's exclusive jurisdiction over elections and undermine the Chief Electoral Officer's role as the single comprehensive regulator of federal elections. There would be a hodgepodge of rules, regulations and procedures across the country to which the FPPs would be required to follow. They say that, as a result, they could be exposed to significant meddling by mischief-makers during a federal election and be inundated with potentially illegitimate requests under *PIPA* (or its equivalent in other provinces) made for the purpose of tying up resources that would otherwise be focused on the campaign and subverting the federal election process. They suggest as well that it will be "highly disruptive" for the FPPs to have to deal with multiple provincial privacy commissioners.

[177] The petitioners rely on the following passage from *McKay* for the proposition that a law affecting any political activity in any way related to or associated with a federal election can only be enacted by Parliament (at 804):

> In the case at bar the learned Justice of the Peace and the Court of Appeal have given effect to the by-law as if it provided:
>
> > During an election to Parliament no owner of property in an R2 zone in Etobicoke shall display on his property any sign soliciting votes for a candidate at such election.
>
> I cannot think that it was the intention of the Council to so enact or that it was the intention of the Legislature to empower it to do so. Such an enactment

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> would, in my opinion, be *ultra vires* of the provincial legislature. The power of the legislature to enact such a law, if it exists, must be found in s. 92 of the British North America Act. It is argued for the respondent that it falls within head 13, "Property and Civil Rights in the Province." Whether or not the right of an elector at a federal election to seek by lawful means to influence his fellow electors to vote for the candidate of his choice is aptly described as a civil right need not be discussed; it is clearly not a civil right in the province. It is a right enjoyed by the elector not as a resident of Ontario but as a citizen of Canada.
>
> A political activity in the federal field which has theretofore been lawful can, in my opinion be prohibited only by Parliament.
>
> [Emphasis added.]

[178] The petitioners say that *McKay* confirms that the right of British Columbians to enjoy the freedom of speech in federal elections is a protected core federal power that is impaired by *PIPA*.

[179] The decision in *McKay* is dated. It was rendered almost 60 years ago. Modern jurisprudence has made it clear that interjurisdictional immunity is less essential and of more limited value in our system of co-operative federalism. Provincial laws are not rendered constitutionally inapplicable whenever they place some limitations on the operation of vital and essential aspects of a federal law: *Halton* at para. 33.

[180] Moreover, a close examination of *McKay*, read together with *COPA* and *Rogers Communications*, reveals a significant distinction between the provincial legislation in issue in those cases and *PIPA*. In each of *McKay*, *COPA* and *Rogers Communications*, the provincial legislation constituted an absolute prohibition on an activity that was found to be a right protected by a core federal power. Applying the provincial laws would have forced Parliament to pass legislation to countermand them. That is not the case with *PIPA* which merely requires the provision of the person's personal information under the control of an organization together with information about how it has been used and to whom it has been disclosed to British Columbia citizens who request it .

[181] An example of this very principle circumstance is the Supreme Court of Canada's decision in *Bank of Montreal v. Marcotte*, 2014 SCC 55 [*Marcotte*]. A class

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action was launched by consumers to seek repayment of conversion charges imposed by banks on credit card purchases made in foreign currencies without sufficient disclosure of what the charges would be. They alleged that the charges violated Quebec's *Consumer Protection Act, C.Q.L.R. c. P-40.1* [*CPA*]. The banks argued, *inter alia*, that the impugned provisions of the *CPA* impaired a core federal power, namely banking. The Supreme Court of Canada rejected the argument, stating:

> [66] […] While lending, broadly defined, is central to banking and has been recognized as such by this Court in previous decisions, it cannot plausibly be said that a disclosure requirement for certain charges ancillary to one type of consumer credit "impairs" or "significantly trammels" the manner in which Parliament's legislative jurisdiction over bank lending can be exercised. […] Requiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks' abilities to dictate the terms of that relationship or otherwise limit their activities. […]
>
> […]
>
> [68] […] Banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion. […] this is not enough to trigger interjurisdictional immunity. The provisions of the *CPA* do not prevent banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers.

[182] The foregoing reasoning is equally apposite in this case. Requiring FPPs to disclose to British Columbia citizens, on request, the personal information they have about the citizen, together with information as to how it has been used and to whom it has been disclosed has no impact on the core federal elections power. It does not "significantly trammel" the ability of Canadian citizens to seek by lawful means to influence fellow electors, as was found to have been the case in *McKay*. It does not destroy the right of British Columbians to engage in federal election activity. At most, it may have a minimal impact on the administration of FPPs. This impact is not enough to trigger interjurisdictional immunity. All legislation carries with it some burden of compliance. The petitioners have not shown that this burden is so onerous as to impair them from engaging with voters.

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[183] If the protected core power asserted by the petitioners is the ability of FPPs to communicate with voters, they have not identified a precedent that has recognized such a core power.

[184] In my view, the doctrine of interjurisdictional immunity does not apply to oust the application of *PIPA* to FPPs. The Delegate's finding was correct.

The 2023 *CEA* Amendments - s. 385.2

Retroactive or Prospective Effect?

[185] The Complainants contend that the 2023 *CEA* Amendments, although declaratory, do not have retroactive effect. They rely on the decision of the Supreme Court of Canada in *Marcotte*. In that case, the federal government amended the preamble to the *Bank Act,* S.C. 1991, c. 46 *[Bank Act]* shortly before the Court of Appeal rendered its decision in respect of whether the bank's foreign currency conversions on credit card purchases violated the *CPA*. Like the 2023 *CEA* Amendments, the amendment in *Marcotte* asserted that the purpose of the *Bank Act* was to provide for "clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks". The Supreme Court of Canada stated that the proposition that the amendment could be used retroactively as an interpretive aid was "dubious": *Marcotte* at para. 78.

[186] There is no question that Parliament can correct errors in interpretation of its statutes by declaring how they are to be interpreted. That is what it has done in the case of the 2023 *CEA* Amendments. Such declaratory provisions have immediate effect on pending cases, such as these judicial review applications: *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 [*Canada Bread*] at paras. 26–28; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 65.

[187] The question is: "Do the 2023 *CEA* Amendments also have retroactive effect"?

[188] The Complainants say that, by virtue of s. 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, the 2023 *CEA A*mendments "shall not be deemed to be or to

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involve any declaration as to the previous state of the law". They point to the decision of the Supreme Court of Canada in *R. v. Breault*, 2023 SCC 9 [*Breault*] in which the Court, in the context of s. 45(3) stated, at para. 42:

> [42] […] the amendments made to the version of a provision in force at the relevant time, "can cast no light on the intention of the enacting Parliament or Legislature" with respect to that version predating the amendments [citations omitted] "[t]he repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law." In the same vein, s. 45(4) of the Interpretation Act adds that "[a] re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language".
>
> [Emphasis added.]

[189] The petitioners counter that s. 45(3) merely provides that an amendment shall not be deemed to be or involve a declaration as to the previous state of the law. They point out that *Breault* was not a case dealing with a declaratory provision, whereas s. 385.2 expressly declares Parliament's intent. I agree with counsel for the petitioners that s. 45(3) is an interpretive tool that does not apply because the 2023 *CEA* Amendments, in s. 385.2(3), expressly declare the purpose of them.

[190] The amendment at issue in *Canada Bread* was similarly expressly "declaratory". However, it was also expressly intended to have retrospective effect: *Canada Bread* at para. 2. However, the court held that such an amendment can only stretch back in time "to the date when the legislation it purports to interpret first came into force": *Canada Bread* at para. 28.

[191] The 2023 *CEA* Amendments, although expressly declaratory, do not purport to be retroactive. Section 385.2(3) stipulates that:

> **Purpose**
>
> (3) The purpose of this section is to provide for a national, uniform, exclusive and complete regime applicable to registered parties and eligible parties respecting their collection, use, disclosure, retention and disposal of personal information.
>
> [Emphasis added.]

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The 2023 *CEA* Amendments can only stretch back in time "to the date when the legislation it purports to interpret first came into force". The legislation that the declaratory section, s. 385.2(3) purports to interpret is "this section", namely s. 385.2. Section 385.2 came into force on June 22, 2023. Accordingly, the 2023 *CEA* Amendments do not have, or even purport to have, retroactive effect.

[192] Moreover, Bill C-47 (the Bill that passed through Parliament enacting the 2023 *CEA* Amendments) expressly provided that s. 385.2 "applies in an election for which the writ is issued within six months after the day on which this *Act* receives royal assent".

[193] I agree with counsel for the Complainant that Parliament could easily have added language to Bill C-47 that would have given s. 385.2 retroactive effect. Instead, it used only prospective language.

[194] In my view, the 2023 *CEA* Amendments do not have retroactive or retrospective effect.

Constitutional Validity

[195] As mentioned above, on September 22, 2023, the Complainants served a Notice of Constitutional Question on the AGBC and the AGC. The Complainants challenged the constitutional validity or applicability of s. 385.2 of the *CEA* on two bases:

a) it is *ultra vires* and intrudes into provincial jurisdiction; and

b) it unjustifiably infringes s. 3 of the *Canadian Charter or Rights and Freedoms*:

> s. 3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[196] With respect to the first challenge, the Complainants argue that s. 385.2 trenches on the provincial power over privacy and personal information within the province.

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[197] The Complainants did not argue the second of those challenges during these judicial review applications. Whether or not they are entitled to do so in the future is unnecessary for me to decide.

[198] Given my determination that the Delegate's determination that the provisions of *PIPA* apply to the FPPs and that the 2023 *CEA* Amendments do not have retroactive effect, it is not necessary for me to decide the constitutionality of the amendments. They were not before the Delegate and were not considered by him. As a general rule, courts should avoid deciding constitutional issues when it is unnecessary to do so. This rule is consistent with the principle of restraint in constitutional cases: *R. v. Lloyd*, 2014 BCCA 224 at para. 42; *Taseko* at para. 105; *Brown Bros.* at para. 14.

[199] I agree with counsel for the AGBC and the AGC that judicial restraint regarding a foray into such an analysis is necessary and appropriate in this case, particularly where, as here, there is another Bill before Parliament to further amend the *CEA* in respect of privacy policies.

[200] Accordingly, I decline to decide the constitutionality of the 2023 *CEA* Amendments.

Conclusion

[201] *PIPA* is designed to protect the quasi-constitutional privacy rights of British Columbians. The law has been designed to dovetail with federal laws, to exclude its application to organizations that Parliament has chosen to make subject to *PIPEDA* and to specifically allow for the non-consensual collection, use and disclosure of personal information where authorized by valid federal laws such as *CEA*.

[202] *PIPA* does not target FPPs. When applied to them, *PIPA* complements both the transparency objective underlying the privacy policy provisions of *CEA*, as well as the measures that the petitioners have chosen to include in their respective privacy policies under *CEA*.

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[203] At the same time, *PIPA* provides a measure of accountability for FPPs' privacy practices, a matter on which *CEA* is silent.

[204] None of these features of *PIPA* results in an operational conflict with *CEA* or frustrates a valid federal purpose. Nor do they impair the protected "core" of Parliament's jurisdiction to protect electors' freedom of political speech in federal elections.

[205] The Delegate's Decision was correct.

[206] The petitions are dismissed, with costs against the petitioners in favour of the Complainants only. The Complainants do not seek costs as against the AGC, the AGBC, or the OIPC and no costs are awarded against them.

[207] Neither of the Attorneys General seek costs against the petitioners.

"G.C. Weatherill J."

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