Amended pursuant to Rules 16-1(19)(b)(ii)
Original pleading filed on April 11, 2022

No. S-223033
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
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

AMENDED PETITION TO THE COURT

ON NOTICE TO:

Office of the Information and Privacy Commissioner for British Columbia
PO Box 9038 Stn. Prov. Govt.
Victoria, BC V8W 9A4
Attn: Michael McEvoy, Information and Privacy Commissioner for BC

Conservative Party of Canada
c/o Dentons Canada LLP
77 King Street West, Suite 400
Toronto, ON M5K 0A1
Attn: Arthur Hamilton, Kirsten Thompson

New Democratic Party of Canada
c/o Allevato Quail & Roy
1943 East Hastings Street
Vancouver, BC V5L 1T5
Attn: Carmela Allevato

Green Party of Canada
116 Albert Street, Suite 812
Ottawa, ON K1P 5G3

Attorney General of Canada
British Columbia Regional Office
Department of Justice Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9

Attorney General of British Columbia
Legal Services Branch
3rd Floor – 1001 Douglas Street
Victoria, BC
Attn: Trevor Bant

This proceeding is brought for the relief set out in Part 1 below by,

The Liberal Party of Canada (the Petitioner)

If you intend to respond to this petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named Registry of this Court within the time for Response to Petition described below, and

(b) serve on the Petitioner(s)

(i) 2 copies of the filed Response to Petition, and

(ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for Response To Petition

A Response to Petition must be filed and served on the Petitioner(s),

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, BC
(2)	The ADDRESS FOR SERVICE of the Petitioner is: Blake, Cassels & Graydon LLP Barristers & Solicitors 1133 Melville Street Suite 3500, The Stack Vancouver, BC V6E 4E5 Attention: Catherine Beagan Flood / Wendy Mee / Jenna Green
	Fax number address for service (if any) of the Petitioner: N/A
	E-mail address for service of the Petitioner: Vancouver.service@blakes.com cathy.beaganflood@blakes.com wendy.mee@blakes.com

	jenna.green@blakes.com
(3)	The name and office address of the Petitioner's lawyer is: Blake, Cassels & Graydon LLP Barristers & Solicitors 1133 Melville Street Suite 3500, The Stack Vancouver, BC V6E 4E5 Attention: Catherine Beagan Flood / Wendy Mee / Jenna Green

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The Petitioner applies for Orders:

   (a) quashing or setting aside Order P22-02 of the Office of the Information and Privacy Commissioner for British Columbia issued on March 1, 2022 by delegate David Loukidelis;

   (b) a declaration that

      (i) the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("**PIPA**") is not, and never was, applicable to the federal Liberal Party of Canada; and

      (ii) the Office of the Information and Privacy Commission for British Columbia does not have, and never had, jurisdiction over the federal Liberal Party of Canada; and

   (c) such other relief as this Honourable Court deems just.

2. In the alternative, the Petitioner applies for an Order remitting Order P22-02 back to the Office of the Information and Privacy Commissioner for British Columbia for re-adjudication.

Part 2: FACTUAL BASIS

A. Overview

3. The federal Liberal Party of Canada ("**Liberal Party**") applies for judicial review of Order P22-02 issued March 1, 2022[1] (the "**Decision**") of the Office of the Information and Privacy Commissioner for British Columbia ("**OIPC**"), issued by delegate David Loukidelis (the "**Delegate**"). In the Decision, the Delegate held that PIPA applies to federal political parties and therefore the OIPC can proceed with an investigation into the policies and practices of the Liberal Party and other federal political parties. The Delegate rejected the Liberal Party's submissions that PIPA is constitutionally inapplicable and inoperative with respect to federal political parties by reason of interjurisdictional immunity and paramountcy.

[1] Order P22-02, 2002 BCIPC 13 (the "**Decision**").

4. The federal political parties' collection, use and disclosure of personal information of voters and potential voters is governed by the *Canada Elections Act*, S.C. 2000, c. 9 ("**CEA**"), which establishes a national approach to federal elections. Parliament gave Canada's Chief Electoral Officer exclusive oversight of federal political parties, which includes regulating their privacy practices in a manner that is consistent with the CEA and with their role in encouraging voters to vote in federal elections and participate in democracy.

5. The Liberal Party submits that the Delegate erred in the Decision by misinterpreting PIPA as having been intended to extend to federal political parties, and misconstruing the constitutional doctrines of paramountcy and interjurisdictional immunity ("**IJI**").

6. The Decision places no limits on provinces' regulation of federal political parties, treating them like any other unincorporated association. The Decision creates an impractical patchwork of rules, regimes and regulations in which the rights of voters and obligations of federal political parties are determined by a different privacy regulator in each province or territory.

7. The OIPC does not have jurisdiction over the privacy policies and practices of the Liberal Party, because Parliament has exclusive jurisdiction over federal elections and federal political parties. The rules governing the conduct of federal political parties are set out in the CEA, which establishes a national approach to federal elections. Parliament made Canada's Chief Electoral Officer the exclusive regulator of federal political parties, which includes regulating their privacy practices.

8. Parliament has considered the privacy rules governing federal political parties several times over the past two decades and has consistently chosen *not* to subject them to more general privacy legislation, having recognized that federal political parties perform an essential role in Canada's democracy and their special needs regarding access to the electorate. Instead, the collection, use and disclosure of personal information by federal political parties is legislated as an elections matter, giving the Chief Electoral Officer exclusive jurisdiction to interpret and apply the CEA's privacy provisions to federal political parties.

9. The Liberal Party acknowledges that British Columbia has constitutional jurisdiction to enact general privacy legislation such as PIPA, and that PIPA has an important and valid role in protecting privacy in provincial businesses and provincial workplaces. However, PIPA was not intended to, and cannot constitutionally, extend to federal political parties.

10. If PIPA is interpreted as applying to federal political parties, it infringes on Parliament's exclusive federal authority over federal elections, and is therefore inoperative due to federal paramountcy, as it frustrates Parliament's federal purposes and creates an operational conflict with elections legislation. PIPA also trenches on a core federal power -- power over federal elections -- and PIPA is therefore inapplicable to federal political parties under the constitutional doctrine of IJI.

11. Following the Decision, Parliament amended the CEA to explicitly state that one national, uniform, exclusive and complete privacy regime applies to federal political parties.[2]

[2] Parliament introduced the amendments to the *Canada Elections Act*, S.C. 2000, c. 9 ("**CEA**") in April 2023. The amendments received royal asset in June 2023 and are now in force.

The amendments to the CEA resulted from the Delegate's misinterpretation of Parliament's intent, They further confirm Parliament's intent that the collection, use and disclosure of personal information by federal political parties be exclusively governed by federal law. They provide additional evidence of exclusive federal purpose, frustration of federal purpose and operational conflict. Parliament has spoken. Its intent is clear and the Decision should be quashed.

B. Proceedings before the OIPC

12. The Decision addressed a threshold question of whether PIPA applies to federal political parties, such that the OIPC has jurisdiction to proceed with an investigation. The investigation arose from complaints made under PIPA by three B.C. residents (the "**Complainants**").

i. Complainants and the Liberal Party

13. On August 26, 2019, the Complainants sought access under PIPA to their personal information held by several federal political parties, including the Liberal Party. The Liberal Party sent separate letters dated October 1, 2019, to each of the Complainants. The letters advised each Complainant of any personal information pertaining to that individual in the Liberal Party's records, referred each of them to the Liberal Party's Privacy Policy, which explains how Canadians' personal information is used by the party, and noted that the Liberal Party does not sell personal information in any circumstance.

14. Counsel for the Complainants filed a complaint with the OIPC on December 3, 2019, requesting an investigation into the responses of Canada's six largest federal political parties to their requests: the Liberal Party, the Conservative Party of Canada, the New Democratic Party of Canada, the Green Party, the Bloc Québécois and the People's Party of Canada.

15. The OIPC informed the Liberal Party on March 3, 2020, that the OIPC had received a complaint (from the Complainants) against the Liberal Party for: (i) failing to provide a proper explanation for how personal information was used or to whom it was disclosed (PIPA, section 23); and (ii) failing to provide an accurate and complete response to a request for personal information (PIPA, section 28). The OIPC opened file No. P-19-82112 and assigned investigator Shannon Hodge to the file.

16. On June 24, 2020, Ms. Hodge emailed the Liberal Party, requesting that it amend its responses to the Complainants' personal information requests. The Liberal Party objected that PIPA is not constitutionally applicable to its collection, use and disclosure of personal information. However, on October 2, 2020, the Liberal Party sent a letter to counsel for the Complainants attaching copies of the Complainants' respective personal information; referring to the Liberal Party's Privacy Policy regarding how personal information is used; and noting that the Liberal Party only transfers personal information to third party service providers for processing purposes; and does not sell personal information in any circumstance.

17. The Complainants, through the OIPC, alleged that the response was incomplete, but did not provide any evidence or particulars to support that allegation.

18. On December 22, 2020, the Liberal Party confirmed to the OIPC that the personal information provided in the letters to the Complainants dated October 1, 2019, and the letter to the Complainants' counsel dated October 2, 2020, was all of the Complainants' personal

information in the Liberal Party databases. That personal information was primarily information that had been shared with the Liberal Party by Elections Canada, pursuant to the CEA and Elections Canada's Guidelines for Use of the Lists of Electors.

19. Since the Liberal Party and the other federal political parties had objected that PIPA was not constitutionally applicable to their collection, use and disclosure of personal information of B.C. residents, the OIPC delegated this matter to an adjudicator currently outside of the OIPC — David Loukidelis, Q.C., a former Information and Privacy Commissioner for British Columbia.

ii. Notice of Hearing

20. On July 26, 2021, the Delegate issued a Notice of Hearing stating that the Delegate would "hold a hearing in writing, and issue a decision, on the issue stated below... ." The issue was stated by the Delegate as being:

> "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?"

21. The federal political parties had not been invited to make submissions on the jurisdictional issues to be determined by the Delegate. Rather, the Delegate directed a question that assumes the federal political parties are "organizations" under PIPA, and makes no reference to the relevant constitutional questions.

22. The parties were advised in the Notice of Hearing: "Your opportunity to be heard is governed by the deadlines and rules set out below." Despite the fact that the federal political parties had not yet been given an opportunity to file evidence with respect to the issue set out by the Delegate, the Notice of Hearing attached a "statement of facts" "drawn from the OIPC investigation files ... or publicly available sources." The statement of facts focussed on the complaints of the Complainants and connections between the federal political parties and British Columbia. The Notice of Hearing provided a deadline for "comments" on the Delegate's statement of facts, but also stated that the Delegate's statement of facts set out in the Notice of Hearing "forms the factual basis for the hearing." The purpose of the hearing was described as being that it is "desirable to resolve the following issue in relation to each of those parties, on the basis of the statement of facts below."

23. All parties were directed to provide "comments on the above statement of facts" by August 10, 2021, "submissions on the above issue" by September 8, 2021, and reply submissions by September 15, 2021.

24. The Liberal Party, in a letter to the Delegate dated August 10, 2021, proposed changes to the statement of facts, and asked for an opportunity to make submissions on the issues to be decided. To the extent that determination of the issues required notice be given to others, the Liberal Party asked that notice be given. The Liberal Party also proposed the following process to address matters fairly: the Complainants be given an opportunity to submit affidavit or other

evidence, followed by the respondents; and the Complainants file their written submissions, followed by the respondents.

25. The Delegate on August 17, 2021, held that he would not amend the stated facts. He directed that the statement of facts remain as circulated, but indicated the parties could establish, through evidence, additional facts. The Delegate held that he would not amend the stated issue, nor would he invite submissions on it. He concluded: "The issue remains as stated in the hearing notice." He also refused to accept any of the procedures sought by any of the parties. The decision made no reference to the fact that two days earlier, on August 15, a federal election had been called for September 30, 2021.

iii. Federal election

26. The federal political parties sought an extension to the hearing schedule due to the federal election. The Delegate extended the deadline for initial submissions to October 29, 2021, and reply submissions to November 12, 2021.

27. The Liberal Party filed its submissions on October 29, 2021. As those submissions addressed the constitutional applicability of PIPA to federal political parties, the Liberal Party also served a Notice of Constitutional Question on the Attorney General of British Columbia ("**AGBC**") and the Attorney General of Canada. The AGBC decided to participate, requesting until November 12, 2021, to provide its initial submissions. The Delegate agreed and extended the date for reply to November 26, 2021.

28. The Liberal Party submitted its reply submissions on November 26, 2021.

C. OIPC Decision

29. The Decision considered five main issues:

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

(ii) Is PIPA validly enacted under a provincial head of legislative authority under the *Constitution Act, 1867*?

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

(iv) If it is validly enacted, is PIPA inapplicable to the participating federal political parties by virtue of the constitutional doctrine of IJI? and

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

30. The Delegate held that the plain meaning of the terms "organization" and "unincorporated association" apply to federal political parties which collect personal information from B.C. residents. The Delegate was not persuaded that a federal political party was a work, undertaking,

or business as defined in the federal act[3] and therefore federal political parties are not exempt from PIPA pursuant to section 3(2)(c). The Delegate held that PIPA is validly enacted by the B.C. Legislature, and PIPA is constitutionally applicable to the participating federal political parties. The Delegate declined to consider the Charter violation argument at this stage, determining it would be better considered along with the merits of the complaints.

31. With respect to the constitutional arguments in particular, the Delegate held that neither branch of paramountcy, frustration of federal purpose or operational conflict, applied. Despite being prepared to assume connections to the province in the unilaterally-directed statement of facts, the Delegate held the federal political parties to a high evidentiary standard with respect to all facts relating to federal jurisdiction. He declined to apply paramountcy on the basis that the political parties failed to provide clear proof and sufficient evidence of the federal purpose of the CEA.

32. The Delegate held that there was no operational conflict between PIPA and the CEA, because one could fashion a privacy policy that complies with both. The Delegate incorrectly concluded that, as a rule, there is no operational conflict between a provincial law that is more restrictive than a federal law.

33. The Delegate held that IJI did not apply, because he did not see how PIPA's application affected a core federal power. Even if he found an affected core power, he held that he was not persuaded that PIPA's application would impair the exercise of Parliament's authority as regards to enacting the CEA or the 2018 amendments to the CEA.

D. Parliament's Exclusive Authority over Federal Elections

34. Parliament has exclusive authority over federal elections and federal political parties pursuant to its power "to make Laws for the Peace, Order and good Government of Canada."[4] Parliament's exclusive authority over federal elections also comes from section 41 of the *Constitution Act, 1867*, which provides for the continuance of existing election laws until Parliament otherwise provides.

35. Federal elections are governed by the CEA, which provides an exhaustive framework for the constitution and operation of Canada's federal political parties.[5] The CEA is administered by Elections Canada, an independent agency.

36. Pursuant to section 13 of the CEA, 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 10 years. He or she may be removed only for cause, by the Governor General on address of the Senate and House of Commons. The Chief Electoral Officer reports directly to Parliament and is completely independent of the government of the day and all political parties.

i. 2023 amendments to the CEA

37. On April 20, 2023, the federal government introduced amendments to the CEA:

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[3] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("**PIPEDA**").
[4] *Constitution Act, 1867,* R.S.C. 1985, App II, No 5, s. 91.
[5] *Quebec v. Montreal (City),* 2016 QCCS 11007 at para. 38.

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*,[6] 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.[7]

The proposed amendments expressly confirmed Parliament's intent that the collection, use, disclosure, retention and disposal of personal information by federal parties be governed exclusively by federal law.

38. On May 3, 2023, the Senate Standing Committee on Legal and Constitutional Affairs met to study the proposed amendments, inviting Chief Electoral Officer Stéphane Perrault and Privacy Commissioner of Canada Philippe Dufresne to attend as witnesses.[8] Both witnesses confirmed that the proposed amendments made it clear that federal political parties are subject to the privacy rules set out in the CEA exclusively. This judicial review was specifically raised. The Chief Electoral Officer described the amendments as changing the law if the Decision had otherwise been correct.

39. When the proposed amendments were tabled in the House of Commons for third reading, Member of Parliament Rachel Bendayan explained that the changes were intended to correct any

[6] Pursuant to subsection 554(1) of the *Canada Elections Act*, amendments to the CEA do not typically apply in an election for which the writ is issued within six months after the passing of the amendment.
[7] Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023, 1st Sess.*, 44th Parl. (first reading 20 April 2023), ss. 680-681.
[8] Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs Evidence, *Minutes of Proceedings and Evidence*, 44th Parl. 1st Sess., No. 54 (3 May 2023).

misapprehension by provincial privacy commissioners as to Parliament's purpose of ensuring that federal political parties are governed by an exclusive and uniform federal privacy regime:

> "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 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."[9]

40. The amendments passed third reading and received royal assent on June 22, 2023. Section 385.2 of the CEA is now in force as follows:

> 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.
>
> (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.
>
> (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[10]

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[9] House of Commons Debates, 44th Parl., 1st Sess., Vol. 151, No. 208 (7 June 2023) at 1950 (Rachel Bendayan).
[10] CEA, s. 385.2.

(the "**2023 Amendments**").

ii. Elections Canada and Voter Lists

41. The CEA defines personal information by incorporating the definition set out in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 ("***Privacy Act***").[11]

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

43. Pursuant to the CEA, Elections Canada is authorized to share personal information with members of Parliament, federal political parties and candidates. For example, Elections Canada provides voter lists (containing names, addresses and unique identifiers) ("**Voter Lists**") to members of Parliament, registered and eligible political parties, and candidates.

44. Elections Canada has published Guidelines on Use of the Lists of Electors ("**Guidelines**") that explain what information is shared with members of Parliament, political parties, and candidates; when it is shared; how they are authorized to use it; and their responsibility to safeguard this information:

(a) Registered parties are authorized, pursuant to section 110(1) of the CEA to use the Voter Lists to communicate with electors, including for the purposes of soliciting contributions and recruiting party members;

(b) Members of Parliament ("**MP**") are authorized, pursuant to section 110(2) of the CEA, to use the Voter Lists to communicate with their electors. This includes soliciting contributions for their campaign. If an MP is a member of a registered party, they may also use the lists of electors to solicit contributions for that party and to recruit party members within their electoral district;

(c) Candidates are authorized, pursuant to section 110(3) of the CEA, to use the Voter Lists to communicate with electors during an election period, including for the purposes of soliciting contributions and campaigning.

45. The Guidelines expressly state that:

(a) "Authorized recipients of the lists of electors are not regulated by the *Privacy Act*, although the CEA requires registered and eligible political parties to adopt and publish their own policies for the protection of personal information;" and

(b) "Respecting electors' privacy is an important element of protecting electors' trust in the democratic institutions of the country. While Elections Canada and political entities (members of Parliament, political parties and candidates) are not subject to the same regulations with respect to personal information, there is nonetheless a shared responsibility for protecting electors' personal information – and in doing

[11] The 2023 Amendments define personal information as information about an identifiable individual for the purposes of section 385.2, which applies to federal political parties.

so encouraging participation in our democratic processes and fostering the integrity of those processes."

46. It is a criminal offence under the CEA to use personal information contained in the Voter Lists in an unauthorized manner. Any recipient who makes unauthorized use of personal information recorded in the Voter Lists is liable to a fine of up to $10,000, imprisonment for up to one year or both.[12] Parties, members or candidates from other levels of government may not use federal Voter Lists for their own political purposes. The Voter Lists may be used only by the federal political entity for communicating with their electors or for a federal election, by-election or referendum.

47. The CEA provides an elector or future elector with a right of access to all of the information in the Chief Electoral Officer's possession relating to him or her.[13]

iii. Privacy requirements of federal political parties

48. In 2018, Parliament amended the CEA to require that all registered federal political parties submit with the Chief Electoral Officer and post online a policy for the protection of personal information, that includes:

(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 (a) the collection and use of personal information created from online activity, and (b) 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.

49. In response to the Decision, the 2023 Amendments were enacted to confirm that federal political parties are permitted to collect, use, disclose, retain and dispose of personal information

[12] CEA, ss. 111(f), 487(1)(b), 500(3).
[13] CEA, s. 54.

(identifiable information about an individual) in accordance with that party's privacy policy, in accordance with the CEA "and any other applicable federal Act."[14]

50. No other privacy legislation applies to federal political parties. Parliament has considered this issue several times and has continuously chosen not to subject federal political parties to privacy legislation other than the rules in the CEA, such as the generally applicable federal public sector *Privacy Act* or the generally applicable private sector *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("**PIPEDA**"). This issue was revisited in the 2023 Amendments, and Parliament specifically declared its intent "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."[15]

51. The CEA does not require federal political parties to obtain consent from voters or potential voters to their collection of the Voter List. Similar to the federal public-sector *Privacy Act*, which is not a consent-based privacy regime, collection of personal information by federal political parties under the CEA is based on public purposes and authorization that is overseen by an independent officer of Parliament, rather than individual consent. The CEA also does not provide a general right of access to personal information from federal political parties.

iv. General privacy legislation has never applied to federal political parties

52. Parliament first enacted the *Privacy Act* and PIPEDA, in 1983 and 2001, respectively.

53. Despite attention from parliamentary committees, the federal and provincial privacy commissioners, electoral regulatory bodies and the media,[16] Parliament has chosen time and again to acknowledge the special role of federal political parties by treating their collection, use and disclosure of personal information as an election matter, rather than making general privacy legislation applicable to them.

54. In 2006, recipients of birthday cards from a federal MP complained to the Office of the Privacy Commissioner of Canada ("**OPC**"), over the use of their personal information. The OPC determined it was unable to proceed with an investigation because it does not have jurisdiction over MPs or over political parties, since neither is subject to the *Privacy Act* nor PIPEDA.[17]

55. In 2007, the OPC began an investigation into complaints over unsolicited Rosh Hashanah greeting cards. The OPC dropped the investigation in early 2008 when it determined that it has no jurisdiction.[18] In a news article, the OPC indicated that it would launch a broader examination of potential reforms to the *Privacy Act*.

56. In 2012, the OPC commissioned a research paper with respect to federal political parties. The research paper noted that federal political parties are not subject to the general personal information regimes that apply to government and commercial organizations in Canada. The

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[14] CEA, s. 385.2(1)-(2).
[15] CEA, s. 385.2(3).
[16] Colin J. Bennett, "Data-Driven Elections and Political Parties in Canada: Privacy Implications, Privacy Policies and Privacy Obligations," Cdn J. of Law and Technology (12 April 2018) at p. 5.
[17] 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).
[18] Bruce Cheadle, "Commission drops probe of Rosh Hashanah cards", The Globe and Mail (6 March 2008).

paper indicated that political parties' needs for personal information are special and recognized that public interest in promoting widespread participation in democratic institutions requires parties to have access to and use of personal information.[19]

57. At a December 2012 round table organized by the Institute for Research on Public Policy and Elections Canada, participants discussed the challenges of reconciling valid interests of political actors and the voting public.[20] The participants did not recommend subjecting federal political parties to existing private sector legislation. They agreed that it would not be appropriate to place the same types of restrictions on political parties that are placed on commercial organizations. It was recognized that the political system "has placed a premium on the ability of parties to engage the individual". The round table made several privacy-related recommendations to the Chief Electoral Officer.

58. The Chief Electoral Officer also published a report titled, "Preventing Deceptive Communications with Electors—Recommendations from the Chief Electoral Officer Following the 41st General Election."[21]

59. Following the tabling of the Elections Canada report, the then Assistant Privacy Commissioner of Canada, Chantal Bernier, issued a statement acknowledging:

(a) the gap in coverage under federal privacy legislation;

(b) the OPC "does not have jurisdiction over political parties and members of Parliament are not covered by privacy legislation"; and

(c) the OPC "has highlighted the gap in coverage under federal privacy legislation in the past. We commissioned an external research paper to examine this issue. We published it on our website last year in the hope that it would help inform public discussion regarding issues relating to the protection of personal information by political parties. Ultimately, however, it is up to Parliamentarians to determine how these issues could be best addressed moving forward."[22]

60. The first formal legislative proposal made to apply privacy regulation to federal political parties was in 2013, when Parliament reviewed Bill C-23.[23] During a clause-by-clause review at

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[19] 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).

[20] A Institute for Research on Public Policy report summarized the round table proceedings: "Issues Arising From Improper Communications with Electors: Round Table Report" (March 2013).

[21] 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).

[22] Chantal Bernier, Statement from the Office of the Privacy Commissioner of Canada Regarding a Report by Elections Canada (27 March 2013) online: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2013/nr-c_130327/.

[23] Dana Lithwick, "Privacy and Politics: Federal Political Parties' Adherence to Recognized Fair Information Principles" Thomson Reuters Canada (March 2016) *10 J. Parliamentary & Pol. L. 39* at page 34; Chief Electoral Officer, "Elections Canada's Proposed Amendments to Bill C-23: 1. Key Amendments to C-23 Recommended by the CEO" Elections Canada (8 April 2014) online: https://www.elections.ca/content.aspx?section=med&dir=spe&document=c23&lang=e.

the House of Commons Standing Committee, Green Party leader Elizabeth May introduced an amendment to the bill that would have made the 10 privacy principles found in Schedule 1 of PIPEDA applicable to federal political parties.[24] The proposed amendment was defeated and the *Fair Elections Act*, S.C. 2014 c. 12 was enacted in 2014 without such a requirement.

61. In the OPC's 2016 review of the *Privacy Act*, the Privacy Commissioner of Canada, Daniel Therrien, advised Parliament to consider extending legislation to the personal information held by political parties.[25] The House of Commons Committee on Ethics, Access to Information and Privacy began looking into how political parties use data in 2017/2018.[26]

62. In December 2018, Parliament decided that political parties must develop privacy policies, enacting Bill C-76, the *Elections Modernization Act*, which amended the CEA to require federal political parties to: (a) develop privacy policies to protect personal information, (b) submit those privacy policies to Elections Canada, and (c) publish those privacy policies online.[27]

63. To help assist federal political parties in complying with their legal obligations relating to privacy policies, the Chief Electoral Officer and the OPC prepared "Guidance for federal political parties on protecting personal information" ("**Guidance**"), including the following:

(a) Individuals with privacy-related concerns are encouraged to first contact the listed privacy officer of the political party in question and/or Elections Canada, at which point the Chief Electoral Officer may consult the OPC as required.

(b) The OPC has no oversight role with respect to the obligations imposed by Bill C-76. The OPC is therefore not in a position to receive or investigate complaints with respect to matters covered in this Guidance that do not otherwise fall within its jurisdiction under *the Personal Information Protection and Electronic Documents Act* or the *Privacy Act*. [28]

64. Federal political parties are exempt from certain privacy-related obligations in both the *Telecommunications Act*, S.C. 1993, c. 38 (the "***TCA***") and in Canada's Anti Spam Legislation ("***CASL***")[29] federal legislation. The *TCA* expressly exempts federal political parties from the

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[24] Canada, Parliament, Standing Committee on Procedure and House Affairs, *Minutes of Proceedings and Evidence*, 41st Parl., 2nd Sess., No. 36 (30 April 2014).

[25] Privacy Commissioner of Canada, Appearance before the Standing Committee on Access to Information, Privacy and Ethics on Reform of the Privacy Act (10 March 2016) online: https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2016/parl_20160310/.

[26] House of Commons, Report of the Standing Committee on Access to Information, Privacy and Ethics, "Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly, 42nd Parl. 1 sess. (December 2018) online: https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP10242267/ethirp17/ethirp17-e.pdf.

[27] CEA, s. 385(2), (4).

[28] Office of the Privacy Commissioner of Canada, "Guidance for federal political parties on protecting personal information" (1 April 2019) online: https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/gd_pp_201904/ ("**Guidance**"); Cardill Affidavit at para. 20, Ex. H.

[29] *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* SC 2010, c 23.

National Do Not Call List provisions, which means they are not prohibited from unsolicited communications.[30] *CASL*, which prohibits the sending of commercial electronic messages unless the recipient has consented to receipt, does not apply to commercial electronic messages sent by, or on behalf of, federal political parties or candidates, if the messages are to solicit donations.[31]

65. Provincial privacy statutes also do not apply to federal parties. Alberta's *Personal Information Protection Act*, S.A. 2003, c P-6.5 expressly excludes political parties from its application.[32] B.C. PIPA was enacted in 2004. It does not expressly exclude political parties. PIPA does not apply to the collection, use or disclosure of personal information if PIPEDA applies to the collection, use and disclosure of the personal information.[33] PIPA also does not apply if the *Freedom of Information and Protection of Privacy Act*, which governs the provincial public sector (and which, like federal public sector privacy legislation, is not consent-based), applies to the personal information.

66. In contrast with the CEA, PIPA is a consent-based regime. PIPA defines personal information much more generally than the CEA and the federal *Privacy Act*, as information about an identifiable individual and includes employee personal information but does not include (a) contact information, or (b) work product information. PIPA, unlike the CEA, gives individuals the right to request access to or correct personal information.

67. The 2023 Amendments provide that no province can separately regulate or restrict the ability of federal political parties to communicate with voters or to collect and use voter information. Federal political parties are permitted to collect, use, disclose, retain and dispose of personal information in accordance with the party's privacy policy. The changes to the CEA confirmed that Parliament has always intended the CEA to regulate federal political parties with respect to privacy.[34]

E. The Liberal Party of Canada

68. The Liberal Party is a registered political party pursuant to the CEA. Its fundamental purpose is to participate in public affairs by endorsing candidates for election and supporting their election.

69. The Liberal Party uses personal information 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 mobilize democratic participation. The collection, use and disclosure of personal information is carried out for political purposes that are central to the Liberal Party's role as set out in the Liberal Party Constitution. Such collection, use and disclosure is essential to the achievement of the Liberal Party's primary purpose of electing candidates to the House of Commons to participate in the democratic conduct of public affairs.

70. The Liberal Party has a Privacy Policy that governs the collection, use and disclosure of personal information. The Privacy Policy was approved by the Chief Electoral Officer on July 3,

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[30] *Telecommunications Act*, S.C. 1993, c. 38, ss. 41.1, 41.7.
[31] *Electronic Commerce Protection Regulations*, SOR/2013-221, s. 3(h).
[32] *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 4(1)(m),(n).
[33] *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("PIPA"), s. 3(2)(c).
[34] CEA, s. 385.2; House of Commons Debates, 44th Parl., 1st Sess., Vol. 151, No. 208 (7 June 2023) at 1950 (Rachel Bendayan).

2019. The Liberal Party submitted a further revised Privacy Policy to the Office of the Chief Electoral Officer on August 11, 2021, to reflect operational modifications pertaining to text messaging and sharing with law enforcement. The Office of the Chief Electoral Officer did not have any follow-up questions or concerns.

71. The Liberal Party will not, without consent, use personal information for any purpose other than described in its Privacy Policy, except where permitted or required by applicable legislation, for example, under the CEA. The Liberal Party does not sell, barter, trade, or lease its donor or supporter lists. Donor and supporter lists are accessible to the officers and authorized users of the federal Liberal Party electoral district association in which the donor or supporter is located and may only be used for the purposes of communicating with voters, to understand their interests and priorities and encourage participation in democracy, or for fundraising purposes.

Part 3: LEGAL BASIS

72. The reasoning of the Delegate confuses constitutional law in a manner that could have wide-ranging implications on the exercise of Parliament's exclusive legislative authority with respect to federal elections.

A. 2023 Amendments

73. The Decision misinterpreted Parliament's intent. In direct response, Parliament amended the CEA to make its intent plainly clear: Parliament has always intended for one uniform, national privacy regime to apply to federal political parties, as set out exclusively and comprehensively in the CEA.

74. It is well-established that Parliament can correct errors in interpretation of its statutes by declaring how the law should be interpreted. Such declaratory provisions have an immediate effect on pending cases, such as this judicial review. As the Supreme Court of Canada explained in *Régie des rentes du Québec v. Canada Bread Company Ltd.*:[35]

> "It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation: L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at pp. 81-82. As this Court acknowledged in Western Minerals Ltd. v. Gaumont, 1953 CanLII 70 (SCC), [1953] 1 S.C.R. 345, such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.
>
> In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.

[35] *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 at paras. 26-28.

> It is also settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 682-83."

75. Peter Hogg has described this type of exchange as a "dialogue" between the courts (in this case the OIPC) and legislatures.[36] A dialogue commonly occurs following a constitutional determination that misinterprets Parliament's intent. Parliament gave consideration to the Delegate's reasoning, disagreed with it, and responded directly to the Decision with the 2023 Amendments.

76. The 2023 Amendments are directly relevant to this judicial review. They effectively overrule the Decision, making it clear that the Decision was incorrect with respect to Parliament's intent. The Decision should be quashed on this basis. The 2023 Amendments reinforce both the paramountcy and IJI arguments, as they further evidence frustration of federal purpose, operational conflict and how the OIPC trenched on Parliament's exclusive jurisdiction over federal elections.

B. Standard of Review

77. The common law provides that the standard of review with respect to questions of procedural fairness is simply "fairness".[37]

78. For constitutional questions, general questions of law of central importance to the legal system, and questions regarding the jurisdictional boundaries between two or more administrative bodies, the SCC in *Canada (Citizenship and Immigration) v. Vavilov*[38] held that the applicable standard of review is correctness:

> "The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinative answer is necessary."[39]

79. The rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. Members of the public must know where to turn in order to resolve a complaint. The application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.[40]

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[36] Peter W. Hogg, Allison A. Bushell Thorton & Wade K. Wright, *Charter Dialogue Revisited: Or "Much Ado About Metaphors,"* Osgoode Hall Law Journal 45.1 (2007): 1-65; Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, Osgoode Hall Law Journal 35.1 (1997): 75-124.
[37] *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52.
[38] *Canada (Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*").
[39] *Vavilov* at para. 53.
[40] *Vavilov* at para. 64.

C. Procedural Fairness

80. In *Baker v. Canada*, the SCC set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affects; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself.[41] Administrative decisions must be made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[42]

81. The Liberal Party submits that the choice of procedure made by the Delegate was procedurally unfair. The Delegate directed that the hearing be limited to an issue that assumed the federal political parties are "organizations" under PIPA. While he ultimately considered some of the constitutional issues raised by the political parties, they could not know whether that would be the case when they made their submissions.

82. Moreover, the Delegate's unilateral statement of facts is asymmetrically tilted toward connections with the province. Facts favouring the Complainants' position and the jurisdiction of the OIPC were assumed; whereas the federal political parties were required to satisfy a "high" evidentiary burden with respect to facts that support exclusive federal jurisdiction.

83. The procedure chosen by the Delegate both appeared to be and was unfair to the federal political parties. It created at the very least a perception that it had been pre-determined that PIPA is intended to extend to federal political parties, when that was one of the threshold issues to be determined by the Delegate. The "statement of facts" are findings of fact made by the Delegate *before the hearing*, and unevenly in favour of the OIPC's jurisdiction, in breach of the duty of fairness.

84. The Delegate also refused to provide notice to other federal political parties, whose rights are now affected by this Decision. Eighteen of the 22 federal political parties did not have an opportunity to put forward their views and evidence.

D. Errors of the Delegate

85. The Delegate made several errors in the Decision, failing to properly consider both Parliament's exclusive authority over federal elections and Parliament's intent. Parliament has chosen *not* to make federal political parties subject to general privacy legislation or the jurisdiction of federal or provincial privacy commissioners, and has instead given the Chief Electoral Officer exclusive authority with respect to collection, use and disclosure of personal information by federal political parties. The Delegate misinterpreted *Lemare Lake* and cooperative federalism to force a "harmonious" interpretation of the CEA and PIPA, altering the distribution of power between federal and provincial governments over federal elections. The Decision has opened the door to a multiplicity of different interpretations and approaches, varying from province to province, to the

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[41] *Baker* at paras. 23-27.
[42] *Baker* at para. 22

privacy rights of federal voters and obligations of federal political parties. Avoiding such differences in federal election matters is precisely the reason that they are exclusively federal.

i. PIPA Should be Interpreted as not Extending to Federal Political Parties

86. As the British Columbia Court of Appeal recently held in *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal*:[43]

> "There is a two-step framework for the judicial review of an administrative decision where the constitutional applicability of the decision maker's enabling statute is at issue: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at paras. 15, 40.
>
> First, the decision maker determines whether the statute applies on the facts of the case (a question of statutory interpretation). If the statute applies, the decision maker then considers whether the statute is constitutionally applicable.
>
> If the statute does not apply on the facts, the decision maker does not go on to consider the constitutional question. This is consistent with the principle of restraint in constitutional cases: *Phillips v. Nova Scotia (Commission of Inquiry into Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at 112–113.
>
> However, constitutional considerations are not confined to the second question (the constitutional applicability of the Act). 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 legislative authority, which is to say, in a manner that is consistent with its constitutional authority: *Desgagnés Transport Inc. v. Wärtsilä*, 2019 SCC 58 at para. 28, citing *McKay et al. v. The Queen*, [1965] S.C.R. 798 at 803–804 [*McKay*]. Thus, despite the two-step framework, constitutional considerations are relevant to questions of both statutory interpretation and constitutional applicability."[44]

87. Federal political parties, including the Liberal Party and its registered agent, the Federal Liberal Agency of Canada, are not "organizations" as defined by PIPA, which "includes a person, an unincorporated association, a trade union, a trust or a not for profit."[45]

88. Having already assumed in the issue to be decided that federal political parties are organizations within the meaning of PIPA, in the Decision, the Delegate held that federal political parties in B.C. are "organizations" under PIPA. He held that there is no plausible reason to think

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[43] *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal*, 2022 BCCA 20 at paras. 12-15. The Court of Appeal upheld a decision of the Workers' Compensation Appeal Tribunal concluding that non-resident members of a flight crew who were in British Columbia for a mandatory overnight layover—were not "workers in British Columbia" within the meaning of the *Workers Compensation Act*.

[44] See also P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Canada: Thomson Reuters, 2021) (looseleaf) chs. 15-12, 15-13, 15-15; R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Canada, LexisNexis, 2014), ch. 16.

[45] PIPA, s. 1.

that the B.C. Legislature did not intend to include federal political parties within the plain meanings of the terms "organization" and "unincorporated association" in PIPA.[46]

89. However, just because a federal political party is an unincorporated association, does not mean that it must fall within the definition of organization under PIPA. PIPA must be interpreted in a way that is presumptively constitutional, even if that is inconsistent with the "plain meaning" of the statute.[47] Here, the presumption of constitutionality favours the interpretation that federal political parties are not organizations pursuant to PIPA.

90. For example, in *McKay et al. v. The Queen* ("***McKay***") the Supreme Court of Canada interpreted a municipal sign law as not extending to federal election signs, holding:

> "... 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. ...
>
> > 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 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."[48]

91. Similarly, the right of federal political parties 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

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[46] Decision at para. 66.

[47] *Ontario v Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 15 (Lamer C.J., concurring); *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 at para. 72.

[48] *McKay et al. v. The Queen*, [1965] SCR 798 at pp. 803-804.

right with respect to which only Parliament can legislate. Like the general by-law in *McKay*, PIPA should be interpreted as not extending to federal elections matters.

ii. The Delegate erred in his paramountcy analysis by misconstruing the comprehensive federal regime governing federal political parties

92. The Decision fundamentally undermines Parliament's choice to make the Chief Electoral Officer the final decisional authority with respect to federal political parties and their personal information requirements. Applying PIPA, and giving the OIPC jurisdiction over federal political parties, prevents the realization of Parliament's objectives. Further, the requirements for collection, use and disclosure of personal information under PIPA operationally conflict with the CEA's personal information requirements.

93. As a starting point, the Delegate erred in his interpretation of cooperative federalism, using it to force an interpretation that the CEA's privacy requirements are consistent with PIPA. Cooperative federalism "can neither override nor modify the division of powers itself."[49] In *Reference re Securities Act*, the SCC held that "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."[50]

a. *The Delegate erred in failing to find a federal purpose*

94. The Liberal Party submitted that the purpose of the CEA is "to enfranchise all persons entitled to vote and to allow them to express their democratic preferences"[51] while protecting the integrity of the democratic process.[52] The integrity of the process relies on access to and participation from the Canadian electorate. The Liberal Party collects and uses personal information to carry out political purposes that are central to democracy. For example, it collects and uses personal information to engage with voters, to understand voters' interests and priorities and to mobilize democratic participation.

95. The Delegate erred by requiring the federal political parties to establish a unique and distinct federal purpose of the CEA specifically for the frustration-of-federal-purpose analysis. To establish this high burden and special purpose, the Delegate refused to accept the evidence provided by the federal political parties, including excerpts from parliamentary debates, committee reports and other reports.[53] He also refused to accept the case law provided that commented on the federal purpose of the CEA, distinguishing all cases as not being about paramountcy.

96. The Delegate erred by placing too high an evidentiary burden on the federal political parties to establish the purpose of the CEA and its assignment of oversight of federal parties' use of personal information to the Chief Electoral Officer. There is only one civil standard of proof: the balance of probabilities.[54] The situation in *Lemare Lake* is easily distinguishable. There, the party that failed to establish a particular federal purpose cited no parliamentary debates or reports, and instead relied on cases and secondary sources that related primarily to a different issue, a

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[49] Decision, para 100, citing *Reference re Environmental Management Act*, 2019 BCCA 181 ("*Re EMA*") at para. 6.
[50] *Re EMA* at para. 6, citing *Reference re Securities Act*, 2011 SCC 66 at para 62.
[51] *Wrzesnewskyj v. Canada (Attorney General)*, 2012 SCC 55 ("*Wrzesnewskyj*") at para. 35.
[52] *Wrzesnewskyj* at para. 38.
[53] Decision at para. 161.
[54] *F.H. v. McDougall*, 2008 SCC 53 at paras. 40, 49.

report issued 20 years before the amendment in issue, and a book that did not mention the purpose sought to be established.[55] In contrast, the Liberal Party's submission that Parliament specifically intended the Chief Electoral Officer — and not general privacy commissioners — to oversee the personal information practices of federal political parties is supported by a long legislative history of decisions by Parliament to decline to extend general privacy laws to federal political parties, by the legislative history to the 2018 amendments to the CEA, by the language of the CEA and its overarching purpose of enfranchising Canadians.

97. Parliament reaffirmed its intent by enacting the 2023 Amendments, which expressly declares its purpose: "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."[56]

b. The Delegate erred in failing to find frustration of federal purpose

98. There are three circumstances in which a court will find frustration of federal purpose:

(i) where the federal legislation is interpreted as intending the federal decision maker to have the final say;[57]

(ii) when the federal statute was intended to be a complete and comprehensive code;[58] and

(iii) when a provincial law prevents the realization of objectives that a federal statute aimed at achieving.[59]

99. For example, in *British Columbia (A.G.) v. Lafarge* ("***Lafarge***"), the Supreme Court of Canada held that a municipal zoning bylaw would "flout the federal purpose" of the *Canada Marine Act*, S.C. 1998, c. 10 by depriving a federal port authority of its final decisional authority on the development of the port, in respect of matters which fall within the legislative authority of Parliament.[60] In *Canada Post Corp. v. Hamilton (City)*, the Ontario Court of Appeal held that a municipal bylaw purporting to regulate the location of community mailboxes was inoperative because it conflicted with a federal legislative purpose that gave "Canada Post the power to place mail receptacles on municipal roads." The Ontario Court of Appeal found that installing community mailboxes was a complex process that required coordination with many stakeholders and the municipality could not assert a supervisory jurisdiction over the decision making of Canada Post, "displacing one discretionary authority with another."[61]

100. The Liberal Party submits that all three of the circumstances listed above are present here.

101. The Delegate erred by failing to consider Parliament's intent for the Chief Electoral Officer to have final decisional authority over federal political parties and federal elections. Parliament rejected multiple invitations to extend general privacy legislation to federal political parties,

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[55] *Saskatchewan (Attorney General) v. Lemare Lake*, 2015 SCC 53 ("*Lemare Lake*") at paras. 40-44.
[56] CEA, s. 385.2(3).
[57] *British Columbia (A.G.) v. Lafarge Canada Inc.*, 2007 SCC 23 ("*Lafarge*") at para. 75.
[58] *Moloney* at para. 79.
[59] *Mangat* at para. 72.
[60] *Lafarge* at para. 75.
[61] *Canada Post Corp. v. Hamilton (City)*, 2016 ONCA 767 at paras. 79-83.

choosing instead to expand the Chief Electoral Officer's mandate under the CEA to include the personal information policies and practices of federal political parties. The collection and use of personal information is central to democracy, since political parties need it to engage with voters, understand their interests and to encourage participation.

102. The joint Guidance authored by Elections Canada and the OPC indicates that "Individuals with [privacy] specific concerns should first contact the listed privacy officer of the political party in question (as outlined in their policy) and/or Elections Canada if they have concerns about the accuracy of a party's policies. The [Chief Electoral Officer] may consult the OPC as required."[62] As in *Lafarge*, Parliament intended the final decision-making authority to come from Elections Canada, not OIPC. When a federal legislative regime is intended to give a federal decision maker "final decisional authority", paramountcy precludes overlapping provincial regulation.[63] Federal jurisdiction "allow[s] a single regulator to consider interests and concerns beyond those of the individual province(s)."[64]

103. The Decision denies the Chief Electoral Officer that final decisional authority. It gives the OIPC the ability to investigate whether a federal political party's privacy policy complies with PIPA, and enforce PIPA against the party, even if the Chief Electoral Officer has accepted the policy under the CEA. This denial of final decisional authority prompted the 2023 Amendments, which further confirmed Parliament's intent that the federal Chief Electoral Officer has final say.

104. By subjecting federal political parties 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 from province to province, to regulate the conduct of federal political parties. The national legislative regime is frustrated if the rules regarding personal information vary for federal political parties across the country. It would be duplicative and problematic to require registered political parties to submit to a second, and at times contradictory regulatory regime. To apply PIPA in B.C. would interfere by altering the balance that Parliament has struck to enable federal political parties to access electors and facilitate and encourage participation in the democratic systems, while protecting electors' privacy. Having to create a separate privacy policy and rules for B.C. residents creates administrative difficulties for federal political parties that need to comply with multiple regimes, and potentially expands provincial jurisdiction in relation to federal elections. It is a barrier to entry for smaller federal political parties and creates a risk that some parties avoid voters in B.C. entirely. It is also unfair for Canadian voters to be treated differently across Canada with respect to federal elections and federal political parties.

105. In *Reference re Environmental Management Act*, the B.C. Court of Appeal held that notwithstanding the contention that there is "nothing wrong with a patchwork", "it is simply not practical – or appropriate in terms of constitutional law – for different laws and regulations to apply" to an interprovincial pipeline every time it crosses a border. Paraphrasing the majority in *Consolidated Fastfrate (2009)*, the B.C. Court of Appeal held that "the interprovincial pipeline would be 'stymied' by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidentally release of oil.[65] Jurisdiction over federal elections, which touch all provinces, was allocated exclusively to Parliament and Parliament made the Chief Electoral Officer the single regulator to

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[62] Guidance.
[63] *Lafarge* at para. 75.
[64] *Re EMA* at para. 101.
[65] *Re EMA* at para. 101.

consider interests and concerns of Canadian voters. Federal elections would be stymied by the necessity to comply with different conditions in each province.

106. The CEA was always intended to be a complete and comprehensive code over the collection, use and disclosure of personal information by federal political parties. The 2023 Amendments now state this expressly. No province can undermine this purpose by purporting to require compliance with a provincial privacy regime.

c. The Delegate erred in failing to find an operational conflict

107. Operational conflict occurs if one law says "yes" and the other says "no": when the same citizens are being told to do inconsistent things.[66] In *Lafarge*, the Supreme Court found operational conflict where a municipal bylaw imposed a 30-foot height limit on a structure approved at a taller height under federal law. The Court reasoned that, had the city sought an injunction to stop the project, the judge "could not have given effect both to the federal law (which would have led to a dismissal of the application) and the municipal law (which would have led to the granted of an injunction).[67]

108. The Delegate held that there was no operational conflict between PIPA and the CEA.[68]

109. PIPA imposes different requirements on the collection, use and disclosure of personal information than required of federal political parties under the CEA. All of PIPA is in operational conflict with the CEA, the exclusive authority over federal political parties and federal elections, as chosen by Parliament. PIPA imposes a consent-based privacy regime with specific requirements on the collection, use and disclosure of personal information in a variety of circumstances. This regime is different than what is required of federal political parties under the CEA, where privacy obligations have been tailored specifically by Parliament for federal political parties to address their unique role and needs for access to the Canadian electorate. The Delegate failed to consider Parliament's choice *not* to subject federal political parties to general privacy legislation over the past two decades.[69]

110. According to the Delegate, because PIPA explicitly permits collection, use and disclosure of information without consent where authorized by law, and the CEA is such a law, this means that CEA and PIPA dovetail, as opposed to creating an operational conflict. This is incorrect. Parliament has chosen to make the Chief Electoral Officer the final decisional authority as to what the CEA requires (subject of course to judicial review). Under the Delegate's approach, each provincial privacy commissioner could interpret and enforce the CEA differently, and federal

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[66] *Lafarge* at paras. 75, 81-82.
[67] *Lafarge* at paras. 75, 81-82.
[68] Decision at para. 153.
[69] As evidenced in paragraphs 52 to 66. It is notable that pursuant to s. 26(2)(b) of PIPEDA, the Governor in Council "if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province" (see e.g. Organizations in the Province of British Columbia Exemption Order, SOR/2004-220); whereas there is no similar exemption in the CEA. As the Supreme Court of Canada held in *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60 at para. 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."

political parties would be subject to complaints, investigations, access requests, and enforcement under differing interpretations across the country.

111. The 2023 Amendments create further operational conflict between the CEA and PIPA. Section 385.2 of the CEA addresses that federal political parties may collect, use, disclose, retain and dispose of personal information, in accordance with a party's privacy policy, subject to the CEA "and any other applicable *federal* Act," not PIPA or any other provincial privacy law. Section 385.2 also declares its purpose. Parliament enacted the section to provide for a national, uniform, exclusive and complete regime. Any application of PIPA to federal political parties would be in direct conflict with that purpose.

112. The 2023 Amendments are directly responsive to the Complainants' and the AGBC's operational conflict submissions that silence is not intent. The Complainants, in their Written Submissions dated October 3, 2022, stated the following:

> "Silence is not intent. Contrary to the FPPs' contentions, the absence of legislation or regulation does not betoken Parliament's intention that the FPPs should have unfettered access to electors' personal information, with no regulation or oversight by anyone anywhere. Only an express legislative statement would achieve such an absolutist restriction.
>
> Parliament elected to make no such statement in the CEA or elsewhere. Its silence does not oust B.C.'s jurisdiction to apply *PIPA* ... ;"[70] and
>
> "Parliament's silence is not a legislative choice. A simple statement in the CEA would be evidence of such as choice. Parliament made – chose to make – no such statement."[71]

Following the Decision, Parliament chose to make a statement in the CEA, ousting B.C.'s jurisdiction to apply PIPA to federal political parties.

113. Similarly, the AGBC, in its Written Submissions dated October 3, 2022, stated:

> "It is difficult to draw inferences about legislative intent from the absence of a statutory prohibition. Where federal law expressly authorizes something, Parliament clearly intends for persons to be able to do that thing. Where federal law merely refrains from prohibiting something, it could be because Parliament intends for persons to be able to do that thing, but it could also be because Parliament has not formed a view on the matter. Inaction is equivocal. For this reason the Supreme Court of Canada has cautioned against inferring that Parliament intended to rule out provincial action on a matter in the absence of clear language to that effect.
>
> The *Canada Elections Act* does not contain express language providing that political parties may collect, use, and disclose personal information as needed for the purpose of engaging with voters. While Parliament could enact such a

[70] Complainants' Written Submissions dated October 3, 2022, paras. 11-12.
[71] Complainants' Written Submissions dated October 3, 2022, para. 292.

provision, which could then be paramount over PIPA, Parliament has not done so."[72]

Parliament has now been even clearer in enacting such a provision, which is paramount over PIPA, as conceded by the AGBC.

iii. The Delegate erred in his analysis of IJI

114. IJI prevents valid provincial laws from improperly trenching on the protected cores of exclusive federal jurisdictional. The doctrine of IJI recognizes that the *Constitution Act, 1867* is based on an allocation of *exclusive* powers to the two levels of government.[73] Since Parliament's legislative authority is "exclusive", it must sometimes be protected from "intrusions, even incidental ones" by provincial legislatures.[74]

115. There are two steps to the IJI analysis. First, the court considers whether a provincial law trenches on the protected "core" of a federal head of power: the "basic, minimum and unassailable content" necessary "to make the power effective for the purpose for which it was conferred." Second, the court considers whether the provincial law's effect on the core federal power is sufficiently serious. The law must "impair" (but need not "sterilize" or "paralyze") the exercise of the core federal power.[75]

116. IJI is different from the paramountcy doctrine in that it 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."[76]

117. The Delegate erred by failing to consider Parliament's exclusive jurisdiction over federal elections and federal political parties, including with respect to their personal information requirements to ensure a proper functioning democracy. The fact that the Delegate believes PIPA is consistent with CEA is of no consequence to the IJI analysis. Further, it does not matter that PIPA does not reference elections — PIPA cannot extend to the core federal power over federal elections regardless of whether it explicitly mentions federal elections.

118. In *Quebec (Attorney General) v. Canadian Owners and Pilots Association* (***"COPA"***), an aerodrome was situated on land within a designated agricultural region under the federal *Aeronautics Act*. A provincial commission ordered the owners of the aerodrome to return the land to its original state, since according to the provincial legislation the land could be used only for agriculture. The Supreme Court of Canada found that the provincial legislation prohibiting uses conflicted with the purpose of the federal statute regulating aerodromes. The Court held that the

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[72] Written Submissions of the Attorney General of British Columbia dated October 3, 2022, paras. 30-31.
[73] *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re,* 2020 CarswellBC 1398 (B.C. Environmental Appeal Board) ("*Canadian National Railway*").
[74] *Canadian Western Bank v. Alberta*, 2007 SCC 22 ("*Canadian Western Bank*") at paras. 32-34; *Lafarge* at para. 41.
[75] *COPA* at paras. 27, 35, 41; *Canadian Western Bank* at paras. 48, 50.
[76] *Lafarge* at para. 110 (Bastarache J. concurring).

doctrine of IJI protected the core federal power over aeronautics and the impairment that would result by the provincial legislation.[77]

119. In *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act)*,[78] IJI rendered provincial environmental legislation that would impair core federal power over railways inapplicable to those railways. The B.C. Environmental Appeal Board concluded that operational planning for a railway crossing provincial boundaries should not have to be modified and adjusted every time the railway crossed provincial borders. Federal political parties should also not be subjected to modified and adjusted privacy legislation in each province.

120. The Delegate referred to an observation in *Canadian Western Bank*: "While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined."[79] There is no such practical problem here; the issue relates specifically to collection, use and disclosure of personal information by federal political parties. The scope of the immunity from provincial legislative jurisdiction is readily defined.

121. The Delegate's reasoning betrays a fundamental misunderstanding of IJI and the purpose of federal exclusivity which, if upheld, could significantly undermine the Chief Electoral Officer's role as the comprehensive regulator of federal elections. IJI places core aspects of federal undertakings within exclusive federal power so that Parliament, or federal regulators like Chief Electoral Officer is free to determine whether and to what extent those core aspects should be regulated. IJI preserves the federal freedom to regulate, delay regulating or forbear from regulating entirely, without concern that overlapping provincial law with frustrate the federal choice.[80] If a province perceives a federal legislative choice as creating a regulatory gap within the federal core, the province cannot fill the perceived gap. The Delegate's reasoning potentially expands provincial jurisdiction in relation to federal elections.

122. In *Lafarge*, Justice Bastarache held that a provincial law cannot fill a gap left by the absence of federal legislation or action.[81] Therefore, to the extent that Parliament has chosen to leave what may be perceived as a "gap" in privacy requirements under the CEA, PIPA cannot add further obligations.

123. The 2023 Amendments eliminated any perceived gap in privacy requirements. PIPA cannot intrude on Parliament's exclusive authority to regulate federal elections, including the privacy requirements for federal political parties as set out in the CEA. PIPA is therefore inapplicable to federal political parties.

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[77] *COPA*.
[78] *Canadian National Railway*.
[79] Decision at para. 197, citing *Canadian Western Bank* at para. 42.
[80] *COPA* at paras. 48, 52-53, 62.
[81] *COPA* at para. 43; *Lafarge* at para. 111 (Bastarache J., concurring).

E. Remedies

124. The court has the power to grant a "declaration... in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power".[82] When applying the correctness standard, the reviewing court may substitute its own view for that of the administrative decisionmaker. The reviewing court is ultimately empowered to come to its own conclusions on the question.[83] The SCC has held that questions regarding the division of powers between Parliament and the provinces is a matter that requires a final and determinate answer from the courts.[84]

125. The Liberal Party asks this Court to quash the Decision and issue a declaration that PIPA does not apply to the Liberal Party and all other federal political parties and that the OIPC does not have jurisdiction over the Liberal Party and all other federal political parties, as this is a matter that requires a final and determinate answer.

Part 4: MATERIALS TO BE RELIED ON

126. Affidavit #1 of Jessica Cardill made October 28, 2021;

127. Affidavit #1 of Andrew Clement made October 28, 2021;

128. Affidavit #1 of Trevor Bailey made October 29, 2021;

129. Affidavit #1 of Jesse Strean Calvert made October 29, 2021;

130. Affidavit #1 of Lisa Kung made April 11, 2022;

131. Written Submissions of the Liberal Party dated October 29, 2022;

132. Reply Submissions of the Liberal Party dated November 26, 2022.

133. Affidavit #1 of Andrea Wong made September 12, 2022;

134. Affidavit #2 of Jessica Cardill made September 12, 2022;

135. Written Submissions of the Liberal Party dated September 12, 2022;

136. Written Submissions of the Complainants dated October 3, 2022;

137. Written Submissions of the AGBC dated October 3, 2022;

138. Written Submissions of the OIPC dated October 3, 2022; and

139. Reply Submissions of the Liberal Party dated October 10, 2022.

The Petitioner estimates that the hearing of the Petition will take two days.

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[82] JRPA, s. 2(2).
[83] *Vavilov* at para 54, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 50.
[84] *Vavilov* at para. 55, citing *Dunsmuir* at para 58.

Date: August 28, 2023

Signature of lawyer for Petitioner
Cathy Beagan Flood / Wendy Mee /
Jenna Green

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this petition
[ ] with the following variations and additional terms:
.....
.....
.....

Date: ....[*dd/mmm/yyyy*]..... .....
Signature of [ ] Judge [ ] Master