

# FASKEN

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## MEMORANDUM

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**To:** Jason Woywada, BC Freedom of Privacy Association  
**From:** Sam Delechantos, Fasken Martineau DuMoulin LLP  
**Date:** September 17, 2024  
**Re:** Privacy consideration regarding personal information by provincial political parties.

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Regarding the merger between BC United and the BC Conservative political parties, there are several privacy laws that must be referenced regarding the data transfer, collection and use of personal information of individuals. The relevant provincial privacy legislation and regulations, caselaw regarding political parties and privacy, practical considerations will be discussed.

### 1. Application of privacy laws to political parties

In British Columbia (“BC”), political parties are still subject to privacy laws regarding the collection, disclosure of and use of personal information. The following BC statutes intersect political party and privacy considerations:

- *Election Act*, RSBC 1996, c 106
- *Personal Information Protection Act*, SBC 2003, c 63 (“PIPA”)

The regulation *Electoral Purposes for Access to and Use of Personal Information Regulation*, BC Reg 206/2015 supplements the *Election Act* and provides further restrictions on use of personal information for provincial, municipal, or federal electoral purposes.

### 2. Application of privacy laws to political parties

*Liberal Party of Canada v The Complainants*, 2024 BCSC 814 is a critical case that confirmed the application of BC privacy laws to federal political parties. This case considered the collection, disclosure, and use of personal information individuals by federal political parties. The Office of the Information and Privacy Commissioner (“OIPC”) for BC issued an order determining that BC’s PIPA did apply to federal political parties registered under the *Canada Elections Act*, SC 2000, c 9.

The federal political parties had collected personal information from Elections Canada, publicly available data sources, and through voter outreach activities. The personal information was collected, used, and disclosed for the purposes of understanding and engaging with voters. The

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complainants in the proceedings were concerned that federal political parties were collecting personal information without the requisite individual consent.

Pursuant to section 3, PIPA applies to every “organization”. Organization is defined in section 1 of PIPA and includes “... a person, an unincorporated association, a trade union, a trust or a not for profit organization...”.<sup>1</sup> The federal political parties conceded that they were an unincorporated association; however, they argued that PIPA must be interpreted in a presumptively constitutional way despite absence of ambiguity and the inconsistency with the plain meaning of the statute.<sup>2</sup> The federal political parties argued that due to the division of powers, only Parliament can legislate regarding the right of federal political parties to engage voters and encourage them to vote.<sup>3</sup> Therefore, PIPA must be interpreted to not apply to federal political parties despite them being unincorporated associations.

The Court disagreed and found no ambiguity in the word “organization”. Its plain meaning applies to federal political parties in the context of the statute, and in the grammatical and ordinary sense.<sup>4</sup> Consequently, the presumptively constitutional interpretation did not apply, and federal political parties were governed under PIPA.

If PIPA applies to federal political parties, accordingly PIPA also applies to provincial political parties. There is more certainty regarding PIPA application to provincial political parties as they are organizations within the meaning of PIPA and provincial political parties cannot argue constitutional interpretations as federal political parties can.

### **3. Privacy laws in PIPA that apply to political parties**

Political parties are “organizations” by virtue of being unincorporated associations and therefore subject to the application of PIPA.<sup>5</sup> There are no exceptions under section 3(2) of PIPA preventing its application to political parties.

Pursuant to section 6(1) of PIPA, an organization must not collect, use, or disclose personal information about an individual unless the individual:

- (a) gives express consent,
- (b) is not required to consent under PIPA,
- (c) is deemed to implicitly consent under PIPA.

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<sup>1</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 1.

<sup>2</sup> *Liberal Party of Canada v The Complainants*, 2024 BCSC 814 at paras 25 & 104.

<sup>3</sup> *Liberal Party of Canada v The Complainants*, 2024 BCSC 814 at paras 104-107.

<sup>4</sup> *Liberal Party of Canada v The Complainants*, 2024 BCSC 814 at paras 114 & 116.

<sup>5</sup> *Liberal Party of Canada v The Complainants*, 2024 BCSC 814; Elizabeth Denham, “Investigation Report F13-04” *Office of the Information & Privacy Commissioner for British Columbia* at 7, online: <https://www.oipc.bc.ca/documents/investigation-reports/1482>.

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## *a) Consent requirements*

Pursuant to section 7(1) of PIPA, an individual has given express consent, if the following is met:

- (a) the organization discloses to the individual about the purposes for the collection of information, and on request of the individual, provides contact information for an officer/employee of the organization who can answer specific questions about the collection outlined in section 10(1), and
- (b) the individual voluntarily agrees to the collection, use, and disclosure of personal information.

Express consent can be negated pursuant to section 7(2) and 7(3) which includes an organization requiring an individual to consent as a condition of supplying a product or service or obtains consent using false or misleading circumstances or deceptive practices.

Pursuant to section 8(1) of PIPA, an individual is deemed to consent (implied consent) to the collection, use or disclosure of personal information for a purpose if:

- (a) the purpose would be considered obvious to the reasonable person, and
- (b) the individual voluntarily provides the personal information for that purpose.

The OIPC of BC notes that “the threshold of what is ‘obvious to a reasonable person’ is high”.<sup>6</sup> Therefore, clearly communicating the purpose of the organization may be required especially if the individual has little understanding of the organization and the activity for which it is engaged.<sup>7</sup>

## *b) Collection of personal information authorized under PIPA without consent*

An organization may collect personal information without consent of the individual from a source other than the individual (such as another organization) pursuant to section 12(1). Section 12(1) presents an exhaustive list of situations where an organization can collect information without requiring the consent of the individual. Situations applicable to the data transfer of political parties under 12(1) may be:

- (e) personal information available to the public which includes information available through directory assistance, personal information in a professional or business directory, information in a registry created by law that the public has a right of access to, or publicly-available personal information in a printed or electronic publication;
- (f) if the information disclosed to the organization does not require consent of disclosure (as described in sections 18-22 which will be discussed in Disclosure Authorized under PIPA without consent); or

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<sup>6</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 8, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>7</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 8, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

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(h) collection without consent when authorized by law (for example *Election Act* and the *Electoral Purposes for Access to and Use of Personal Information Regulation* which permits registered political parties to collect voter information from Elections BC<sup>8</sup>).

Furthermore, pursuant to section 12(2) an organization may collect personal information from another organization without consent of the individual if:

- (a) the individual previously consented to the collection by the other organization, and
- (b) the personal information is disclosed to/collected by the organization solely for the purposes for which the information was previously collected and to assist the organization to carry out work on behalf of the other organization.

If a political Party A (“**Party A**”) is transferring personal information to another political Party B (“**Party B**”), then 12(2) would only apply if (a) the individual previously consented to the collection by Party B; and (b) the information is disclosed to Party B for the purposes that Party A collected the information initially, and it assists Party B to carry out work on behalf of Party A.

If an organization does collect personal information from another organization, they are subject to the required notification under section 10(2). The organization must provide the other organization with sufficient information regarding the purpose of the collection which would enable the other organization to determine with the disclosure is in compliance with PIPA. An organization does not have to perform this notice requirement if the personal information was collected by implicit consent pursuant to section 8(1) or 8(2) of PIPA.

## *(c) Disclosure of personal information authorized under PIPA without consent*

An organization may disclosure personal information without consent of the individual in specific situations outlined in section 18. Some applicable situations mentioned in section 18(1) for political parties may be:

- (e) personal information is available to the public; or
- (o) disclosure is required or authorized by law.

Pursuant to section 18(2), there are similar requirements for an organization disclosing personal information to another organization. In essence, a political party can disclose personal information in its custody or control to another organization without consent of the individual if the other organization is contacting the individual on behalf of a political party.<sup>9</sup>

Similar to collection of personal information, organizations have limits to disclosure of personal information by section 17 where an organization may collect personal information if a reasonable person would consider the purpose of collection appropriate and that (a) fulfill the purposes the

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<sup>8</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 8, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>9</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 9, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

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organization discloses in the notice to the individual in section 10(1), (b) fulfill the purposes for which it was collected, or (c) is permitted under PIPA.

## *(e) Transfer of personal information in a merger of organization under PIPA*

A mentioned above, section 18(1)(p) allows an organization to disclose personal information to another organization without consent through a “business transaction”. Section 20(1) defines business transaction as “the purchase, sale, lease, merger or amalgamation or any other type of acquisition, disposal or financing of an organization or a portion of an organization or of any of the business or assets of an organization”.<sup>10</sup> Pursuant to section 20(1), an organization may disclose personal information through a business transaction; however, this is limited to personal information about its employees, customers, directors, officers or shareholders which is subject to conditions outlined in section 20(2) and 20(3).

In a merger of political parties, a disclosure of information through a business transaction may not be applicable as the disclosure of personal information may pertain to more than the organizations employees, customers, directors, officers, or shareholders. Furthermore, section 20(7) “does not authorize an organization to disclose personal information to a party or prospective party for purposes of a business transaction that does not involve substantial assets of the organization other than this personal information”.<sup>11</sup> Unless the merger of political parties involves substantial assets of the organization, information cannot be disclosed through a business transaction. As a result most information held by political parties will either need express consent for disclosure unless the disclosure falls under the exceptions in PIPA under section 18.

## **4. Election Act and regulations**

*Election Act* and the *Electoral Purposes for Access to and Use of Personal Information Regulation*, regulates the collection, use, and disclosure of personal information found on the voters list.<sup>12</sup> Some of the personal information that political parties collect will be through the voter list.

Upon the request of a political party, the Chief Electoral Officer must provide a voter list.<sup>13</sup> Registered political parties may also request copies of voter participation information which must be provided to them pursuant to section 51.01 of the *Election Act*. Section 275(3.2) to (3.3) restrict the subsequent use of that information by political parties to the purposes of the *Election Act* and prohibit use for any commercial purposes. The Election Act Regulation also limits the use of this information to “electoral purposes” such as the communication of voters by the political parties.<sup>14</sup>

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<sup>10</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 20(1).

<sup>11</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 20(7).

<sup>12</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 14, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>13</sup> *Election Act*, RSBC 1996, c 106, s 51(2).

<sup>14</sup> Michael McEvoy, “Investigation Report P19-01”, *Office of the Information & Privacy Commissioner for British Columbia* at 10, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>; *Electoral Purposes for Access to and Use of Personal Information Regulation*, BC Reg 206/2015.

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In relation to minors, the Chief Electoral Officer may maintain a list of future voters under s. 51.02(1) of the *Election Act*. However, the Act clarifies that the list of future voters may not be disclosed to candidates or political parties or used for commercial purposes<sup>15</sup>.

## 5. Information collected and used by political parties

The type of personal information that political parties may collect are outlined in Appendix A.

Political parties will collect information related to identity (name, address, electoral district, initials) and voter participation data from Elections BC.<sup>16</sup> The *Elections Act* authorizes the collection and use of this data for electoral purposes and the collection, use, and disclosure for electoral purposes does not require individual consent as it is prescribed by law under PIPA. However, other sources of personal information obtained outside of the voter list/voter participation data are not prescribed by law and will have different considerations under PIPA.

### (a) Information collected from canvassing

Door to door canvassing for information about a voter's gender, ethnicity, and religion will require express consent from the individual.<sup>17</sup> However, collection of preferred language may be authorized by implied consent under PIPA as it would be reasonable to assume that a canvasser would note an individual's language preference if they converse in a different language.<sup>18</sup> This type of personal information would require individual consent if a political party decides collect, use, or disclose the information under PIPA. For telephone canvassing, PIPA allows political parties to collect and use telephone numbers contained in a public phone directory by virtue of section 12(1)(e) of PIPA.<sup>19</sup> As this is public information, political parties may collect, use, or disclose this information without an individual's consent within the constraints of what a reasonable person would consider appropriate.

### (b) Information collected from social media

A political party may collect personal information about an individual if that individual directly communicates with a political party using social media.<sup>20</sup> Through this interaction, the individual has implied consent because it is reasonable to assume that the individual understands the nature of social media and has voluntarily communicated with the party.<sup>21</sup> However, the implied consent

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<sup>15</sup> *Election Act* s. 51.02(10).

<sup>16</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 13, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>17</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 15-16, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>18</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 15, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>19</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 17, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>20</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 21, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>21</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 21, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.



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is for the purpose of communication, so a political party may not use the personal information gathered on social media for voter profiling or scoring without the express consent of the individual.<sup>22</sup> Furthermore, an individual must have interacted with a political party beyond just liking or sharing information on social media as this does not meet the threshold of interaction for implied consent.<sup>23</sup>

## *(c) The use of personal information*

Political parties may not use the personal information collected in order to infer information such as ethnicity, gender or age without express consent from the individual.<sup>24</sup> This type of inferring would go beyond the reasonable expectations of the individual under PIPA and it may also contravene section 33 of PIPA requiring that an organization ensure that personal information collected be accurate as inferring information may lead to inaccuracy.<sup>25</sup>

With regards to publicly available information, although PIPA authorizes the collection and use without consent, this use must still be within what a reasonable person would consider appropriate in the circumstances.<sup>26</sup> For example, if a political party chooses to use personal information from a professional directory such as the Law Society of BC's Lawyer Directory, that information could not be used to identify potential donors.<sup>27</sup> There must be a reasonable connection between the use of that information. An appropriate use of the Lawyer Directory would be to see if a lawyer was within good standing with the Law Society.<sup>28</sup>

## **6. Ensuring protection of personal information**

Section 5 of PIPA requires political parties to have adequate privacy policies and practices to protect personal information. To protect your personal information, ensure that political parties are taking reasonable security measures to protect the personal information through technical and policy controls such as user access and storage.<sup>29</sup> This may include regular auditing to make reasonable security arrangements to prevent unauthorized access and disclosure of personal information in their custody.<sup>30</sup> Comprehensive privacy training plans and training materials

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<sup>22</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 21, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>23</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 21, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>24</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 22, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>25</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 22, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>26</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 11, 14.

<sup>27</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 24, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>28</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 24, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>29</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 27, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>30</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 28, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

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necessary to ensure the protection of personal information from staff and volunteers are also methods of ensuring protection of personal information.<sup>31</sup>

Individuals can also request a right of access to personal information in the control of a political party. Pursuant to section 23(1) of PIPA, organizations must provide the individual what information they have, how the information has been used, and names of individuals or organizations to whom the personal information has been disclosed to. However, this right is not absolute, and political parties can deny an individual's request if the information is protected by solicitor-client privilege or if disclosure would reveal confidential commercial information that would harm the competitive position of the organization.<sup>32</sup> These exceptions do not apply to political parties and most likely they will have to disclose to the individual what information they have collected and how it has been used.<sup>33</sup>

An individual can protect their personal information by withdrawing consent for the collection, use or disclosure of personal information at any time under section 9 of PIPA. Furthermore, an individual can also restrict the information that Elections BC provides to political party by applying to have their voter information omitted through an application to Elections BC.<sup>34</sup> An individual can also request an organization to correct an error in the personal information upon request through section 24 of PIPA. If an individual has a privacy complaint about a way an organization collected, used, or disclosed their personal information, a complaint can be made through the OIPC.<sup>35</sup>

## 7. Distinction between a candidate and a party

The *Election Act* distinguishes between political parties and candidates. Pursuant to the *Election Act*, voter lists (section 51(2)) and voter participation information (section 51.01) to either candidate or a registered political party. Because both candidates and registered political parties are eligible to receive the voter disclosure under the *Election Act*, no issues arise if a voter file was sent to the candidate instead of a political party or vice versa.

Under section 1 of PIPA, the definition of "organization" includes a person, an unincorporated association, a trade union, a trust or a not-for-profit organization. A candidate can be considered an organization under PIPA as a candidate is a person that does not fall under the exception of "an individual acting in a personal or domestic capacity or acting as an employee".<sup>36</sup> A candidate would be bound to follow the same laws under PIPA just as a registered political party would.

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<sup>31</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 29, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>32</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 23(3).

<sup>33</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 32-33, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.

<sup>34</sup> "Provincial Voters List", *Elections BC*, online: <https://elections.bc.ca/resources/voters-list/the-provincial-voters-list/>.

<sup>35</sup> "How do I make a complaint", *Office of the Information and Privacy Commissioner for British Columbia*, online: <https://www.oipc.bc.ca/for-the-public/how-do-i-make-a-complaint/>.

<sup>36</sup> *Personal Information Protection Act*, SBC 2003, c 63, s 1.



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## Appendix A

COLLECTED PERSONAL INFORMATION			
Information related to identity			
Surname	Given name(s)	Date of birth	Residential address
Mailing address	Email address	Phone number	
Other Information about the Individual			
Sex	Ethnicity	Age	Language(s)
Religion	Income	Education	Familial relations
Family or marital status	Profession	Workplace name	Job title
Profession status (e.g. practising or non-practising)	Number of years at residential address	Neighbourhood demographics	Issues of interest to the individual
Political support tier / score	Ease of persuasion tier / score	Do not call or Do not contact notices	LinkedIn ID
Twitter ID	Facebook ID	Skype ID	
Party Participation Data			
Party membership status	Type of membership	Prospective member	Volunteer status
Volunteer availability	Interest in a lawn sign	Donor status (monthly, one-time)	Donation amount
Date of donation	Previous election support level	If the individual subscribes to communications	What communications were sent and when
Internal working group membership			
Financial Information			
Personal cheque or credit card number	Name as shown on credit card	Card expiry	Signature
Election BC Data (Voters List / Voter participation data)			
Electoral district	Electoral District Code	Voting area code	Previous or current election voter number
Voting card number	Federal riding	Party's share of votes in an individual's riding	Voting location
Municipal District	If the individual has voted in the current election	If/when the individual voted in the last election (advanced v. general voting day)	

Figure 1: Personal information collected by political parties<sup>37</sup>.

<sup>37</sup> Michael McEvoy, "Investigation Report P19-01", *Office of the Information & Privacy Commissioner for British Columbia* at 12, online: <https://www.oipc.bc.ca/documents/investigation-reports/2156>.