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Attorney general calls B.C. privacy case ‘premature,’ says federal political parties can ‘self-regulate’ use of voter data: new documents

IAN CAMPBELL

The attorney general’s ‘principal strategy’ appears to be to ‘push off a court ruling to a later date,’ but the ‘elephant in the room’ is the federal election set for October 2025 or sooner, said lawyer Connor Bildfell.

The Attorney General of Canada wants to see a B.C. court case involving federal political parties’ use of voter data sent back to the office of the B.C. privacy commissioner—a move which could further delay a resolution of the matter as the next federal election draws nearer.

At stake in the case is whether British Columbia’s privacy commissioner can apply its more stringent voter privacy laws to federal political parties when they operate in the province, or if these parties can continue to self-regulate their use of voter data under the guidelines presently set out under the Canada Elections Act.

The Hill Times has obtained a copy of the written submissions of the Attorney General of Canada in response to the

Notice of Constitutional Question filed in the ongoing case involving Canada’s three largest federal political parties and the Office of the Information and Privacy Commissioner (OPIC) in British Columbia.

The Attorney General is arguing the case is “premature,” and should be returned to OPIC to finish a process that was paused when the federal Liberals, Conservatives, and NDP questioned its jurisdiction in the matter, leading to the courts to taking over in the first place.

If the prematurity argument is not accepted, the attorney general is also arguing a position similar to the federal political parties’ when it comes to the constitutional matters at play—namely, that the federal Parliament has the exclusive authority to legislate in this area, and that it has expressed its intent to do so based on changes made to the Canada Elections Act last year.

The federal privacy regime created by those changes allows federal political parties to create their own privacy policies. They must report to Elections

Documents obtained by The Hill Times offer the first window into what the office of Attorney General Arif Virani will argue in a B.C. court case about how federal political parties use voters’ personal information. The Hill Times photograph by Andrew Meade

Canada that they have a privacy policy, but there are no requirements for what it should contain. That leaves the door open for political parties to take actions such as sharing voter data—without obtaining consent—with platforms like Facebook in order to construct customized audience targeting online, or collecting data in-person while canvassing door-to-door, again without informing voters they are doing so. It also allows parties to operate—if they choose—without any obligation to share data breaches with voters. These aspects of the current federal framework have raised concerns among privacy experts.

Connor Bildfell, a lawyer with McCarthy Tétrault based in B.C. who specializes in litigation, including on privacy matters, told The Hill Times that the attorney general’s “principal strat-

egy” appears to be to “get the matter ap-
back before the B.C. privacy commis-
sioner for further rulings and push off a
court ruling to a later date.” However, he
added, the “elephant in the room” is the
federal election that must be held by Oc-
tober 2025 or sooner.

“If the attorney general’s prematurity ar-
guments succeed, that would likely push
out a court decision on the key constitu-
tional issues significantly,” said Bildfell.
“On the other hand, if the attorney gen-
eral’s prematurity arguments fail, we’ll
likely see a B.C. Supreme Court deci-
sion on the matter sometime this year.”

Bildfell said in either circumstance the
courts would eventually weigh in.

“As a practical matter, even if these pre-
maturity arguments succeed, the attor-
ney general can’t avoid a court ruling on
the issues raised,” said Bildfell. “They
will at some point land up before the
courts, and their resolution could have
major impacts on federal political par-
ties.”

Case was launched by three private citi-
zens in 2019 The federal parties object-
ed to B.C. ’s privacy commissioner in-
vestigating the matter, asserting OPIC
did not have jurisdiction. That prompted
OPIC to pause its investigation of the
complaint and appoint a delegate—for-
mer B.C. privacy commissioner David
Loukidelis—to rule on that issue. In a
March 2022 decision, Loukidelis said
B.C. privacy laws could be applied to
the federal parties.

That ruling prompted the three major
parties to petition the B.C. courts to
have the Loukidelis ruling overturned,
and left the OPIC investigation—and
any enforcement actions—on pause.

However, as the initial court date ap-
proached in spring 2023, the federal par-
ties sought a last-minute adjournment to
the proceedings they had initiated on the
grounds that the Liberals had introduced
legislation in their Budget Implementa-
tion Act which addressed the issue of
privacy regulation for federal political
parties.

With those laws now on the books, they
form a key part of a revised petition
filed by the Liberal Party of Canada in
the fall of 2023.

The political parties were expected to
head back to court this fall to make that
case, but a scheduled court date of Nov.
20 was deferred because of a shortage of
judges. The case is now expected to go
ahead from Apr. 22-29.

Since then, the Attorney General of
Canada has chosen to become involved,
as reported by The Hill Times in De-
cember 2023. At that time, University of
Ottawa law professor Adam Dodek said
Attorney General Arif Virani (Parkdale-
High Park, Ont.) must be “very careful”
in this case not to be seen to be tak-
ing any political direction. However, the
Attorney General’s Office told The Hill
Times that the Privy Council Office was
“leading” on the file.

The attorney general’s submission ob-
tained by The Hill Times offers the first
window into how that office is ap-
proaching the case.

Court ‘may be skeptical of self-regula-
tion’:Bildfell On Feb. 23, the Office of
the Attorney General filed its written
submissions to the other parties in the
case. The document, which had not pre-
viously been publicly released, is signed
by Adrienne Copithorne, the lead coun-
sel in the case for the Attorney General

of Canada.

Bildfell said, when compared with the
Liberal Party of Canada’s petition, sub-
mitted last fall, their positions “share
important similarities, but also reveal
important differences.” The petitions of
the Conservative Party and New Demo-
cratic Party are not publicly available,
but the three political parties are expect-
ed to take a broadly similar approach.

Unlike the Liberal petition, the attorney
general is arguing for the case to go back
to the OPIC so it can conclude its inves-
tigation. Furthermore, it argues that the
constitutionality of the changes made to
the Canada Elections Act last spring
should first be ruled on by OPIC.

“The political parties who filed the judi-
cial review application might have con-
sidered it too risky—both legally and
politically—not to challenge the dele-
gate’s ruling immediately, which may
explain why they didn’t wait until the
privacy commissioner completed his in-
vestigation,” said Bildfell. However, he
added, the federal political parties may
yet also argue for a return to OPIC.

“Delaying a court ruling on the subject
would likely serve the interests of the
political parties,” said Bildfell.

He added that “the interests of the attor-
ney general and the interests of the fed-
eral political parties are not necessary
the same.”

“The attorney general’s mandate is to
provide legal advice to and protect the
legal interests of the Crown, whereas the
mandate of the federal political parties
is, basically, to win elections,” said Bild-
fell.

On the substantive matters—whether

they end up being argued in April, or at a later date—the Attorney General takes a similar view to the federal Liberal Party’s petition, arguing that the amendments made to the Canada Elections Act as part of the 2023 Budget Implementation Act should be the sole privacy regime that federal political parties must follow.

“Parliament expressed its clear intention that federal political parties’ dealings with personal information for electoral purposes be governed exclusively by the uniform, national and complete regime in [the Canada Elections Act], based primarily on transparency and self-regulation, subject only to federal law, with a view to triggering the doctrine of paramountcy,” reads the submission from the Attorney General.

Bildfell said the issue of “self-regulation,” which the attorney general repeatedly champions in its submission, may prove an issue in the arguments it seeks to make.

“Questions have been raised about whether this type of self-regulation is adequate to protect Canadians’ personal information,” said Bildfell. “We’ve heard calls for stricter standards applicable to federal political parties, especially given the amount of personal information that they collect and use on a daily basis. Against the backdrop of these criticisms and concerns, some members of the court and the public may be skeptical of self-regulation in this context.”

The Hill Times reached out to the Office of the Attorney General, and to the Privacy Council Office for comment, but they did not respond by deadline.

The Conservative and NDP critics for the Attorney General, Conservative MP

Rob Moore (Fundy Royal, N.B.) and NDP MP Randall Garrison (Esquimalt-Saanich-Sooke, B.C.), also did not reply to requests for comment.

Submit to regime similar to C-27:privacy expert With the prospect of the proceedings dragging on for some time—either through a return to OPIC or appeals of a B.C. court ruling—Colin Bennett, an emeritus political science professor at the University of Victoria who specializes in digital privacy issues, said there is another way forward.

“This whole complex and expensive case would go away if the federal political parties agreed to apply the same standards to their operations that they have been happy to impose on government agencies and private businesses over the years, and which they are currently debating in the context of Bill C-27,” said Bennett.

“But they have come to realize that data wins elections. And the more data on the electorate they can gather, analyze, and use for targeted messaging, the better chance they have of convincing people to vote, or perhaps not to vote.”

Bennett cautioned that rapid advances in AI will only raise the stakes on this issue.

“When AI meets micro-targeting that is a whole new and potentially dangerous reality for Canadian politics,” he said. “More information disorder, and less accountability.”

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