August 10, 2020

Ms. Rachna Singh
Chair, Special Committee to Review
the Personal Information Protection Act
Parliament Buildings
Victoria, BC V8V 1X4

Dear Committee Members:

REVIEW OF THE PERSONAL INFORMATION PROTECTION ACT

The Canadian Life and Health Insurance Association (CLHIA) appreciates the opportunity to provide feedback from our member companies to the Special Committee to Review the *Personal Information Protection Act*.

ABOUT CLHIA

The CLHIA is a voluntary organization whose member companies account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products to about 3.5 million residents in British Columbia, has $80 billion invested in the province, and employs nearly 17,000 people.

OVERVIEW

Information regarding individuals is essential for the industry's operations. By law, full

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disclosure of relevant information is required to establish valid life and health insurance contracts and it is also needed in the assessment of claims for benefits (e.g., death claims, disability claims, medical or dental claims). As most of this information is personal in nature, protecting its confidentiality has long been recognized by the industry as crucial in order to maintain the trust of consumers.

Given life and health insurers' lengthy and active history in the protection of personal information, the industry has a strong interest in the review of the *Personal Information Protection Act* (PIPA). We therefore submit comments on several key issues with the current legislation, namely: disclosure of personal information without consent in the context of fraud, privacy breach notification, access rights involving medical information, access rights used for litigation purposes, and cross-border data flows.

Finally, we wish to echo the words of Commissioner McEvoy in the BC OIPC General Briefing[1] document and highlight the importance for the Special Committee to consider in its review the need for PIPA to remain substantially similar to PIPEDA and have adequacy status in relation to the European Union's General Data Protection Regulation.

DISCLOSURE OF PERSONAL INFORMATION WITHOUT CONSENT

Fraud is inherently about deception and is designed to go undetected. As such, it is difficult to present precise figures on the consequences of fraud to the Canadian life and health insurance industry. However, even if fraudulent activities accounted for only one per cent of what the industry pays in health claims (approximately $36 billion in 2018), it would represent $340 million lost yearly. The hundreds of millions of dollars lost every year cost everyone, starting with plan sponsors (employers) and employees, who pay the premiums for extended health benefits plans.

[1] P. 16 BC OIPC General Briefing for the Special Committee to Review the Personal Information Protection Act June 2020

It is important to support industry efforts to control and minimize fraud and deceptive practices. As such, PIPA's section 18(1) must be modernized to ensure insurers can disclose information without consent when required for the purposes of detecting, suppressing, and preventing fraud as is done under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Fraudsters do not limit their fraudulent actions to a single service provider or insurer, and they have developed sophisticated schemes spread across the industry. The only efficient way for insurers to protect themselves against such schemes is to have the ability to see what is occurring at an industry level. Harmonization between jurisdictions will also ensure that British Columbia does not become a haven for fraudsters and remains a safe place to do business.

Consequently, we suggest amending section 18(1) of PIPA by adding a new subsection (q) as set out below. This new subsection would not only further clarify the list of acceptable disclosures without consent under PIPA but to also to harmonize it with the amended language to PIPEDA section 7(3)(d.2) CLHIA presented to Innovation, Science and Economic Development (ISED) in our October 2019 letter[2] as part of the PIPEDA review process.

> "**18** (1) …
>
> (q) the disclosure is made <u>either on the initiative of an organization</u> to another organization**,** <u>or made by an organization to another organization upon the other organization's request</u>, and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud"

[2] The suggested amendments presented to ISED are underlined in this text

PRIVACY BREACH NOTIFICATION

It has been twelve years since we first commented on breach notification to the Special Committee in 2008. Our members understand and are comfortable with the applicable test when assessing and, as needed, notifying/reporting privacy breaches under Alberta's *Personal Information Protection Act.* Since 2018, our members have further expanded their experience to these requirements under the federal legislation. Insurers have been able to learn from the guidance and relevant Orders issued by the Office of the Information and Privacy Commissioner of Alberta in addition to the Office of the Privacy Commission of Canada guidance on mandatory breach notification requirements. Consequently, we strongly recommend that any notification/reporting test be harmonized with the already existing Alberta and federal requirements.

In addition, as pointed out by then Commissioner Denham in section 4.1.2 of the 2014 BC OIPC General Briefing for The Special Committee to Review the *Personal Information Protection Act* entitled "Importance of Harmonization", harmonization "makes sense from a consumer's perspective". In fact, lack of harmonization would create inconsistencies between provinces and would be problematic for both consumers and organizations in their understanding and application of the rules. Further, it could have unfortunate consequences, such as, in the words of Commissioner Denham: *"It would be concerning to have a situation where affected consumers in Alberta were notified of a privacy breach - but consumers in BC affected by the same breach were not."*.

ACCESS RIGHTS INVOLVING MEDICAL INFORMATION

In CLHIA's 2008 and 2014 submissions to the Special Committee, we pointed out that consumers' interests would be better served if life and health insurers were clearly able to choose to make sensitive medical information subject to an access request available through a medical practitioner. We continue to strongly support this view.

Medical information can be of a very sensitive nature and, consequently, best explained by a medical practitioner. As a result, there will be occasions where the individual making the request may need support when receiving such information. As an extreme example, the information subject to the access request could contain a fatal or debilitating disease diagnosis. In such a situation, it is in the interest of the individual that the information be provided by a properly trained health care provider (i.e., their medical practitioner). This will ensure that a proper explanation of the information can be given to the individual and appropriate next steps to address the situation can be discussed with the medical practitioner.

Although British Columbia's PIPA recognizes, to some degree, the importance of having a medical practitioner act as a conduit in providing access to medical information, the applicable provisions (subsection 23(4)(b) of PIPA and section 5 of the Regulations) set too high a test (e.g., grave and immediate harm) as well as complicated administrative thresholds (e.g., obtaining an assessment from the practitioner before disclosing information; entering into a confidentiality agreement). This complicated process impairs life and health insurers from disclosing information in a timely manner to an individual that has asked for access.

The life and health industry is of the view that it would be appropriate to follow the approach described in Principle 9 of Schedule 1 of PIPEDA and more specifically clause 4.9.1 that provides, in part: *"The organization shall allow the individual access to this information. However**, the organization may choose to make sensitive medical information available through a medical practitioner**"*.

With the goal of preserving the individual's best interests, the industry recommends that the relevant PIPA provisions be streamlined to ensure that medical information can be properly explained to the individual through a medical practitioner and to allow the access request to be complied with in a timely manner.

ACCESS RIGHTS USED FOR LITIGATION PURPOSES

It is clearly appropriate to provide individuals with a right of access when they are unsure or have concerns regarding the personal information an organization holds about them, or regarding the use and disclosure of that information. It is also appropriate for an individual to be able to determine, for example, if this information contains inaccuracies that need to be corrected. However, based on our experience, there is growing concern within the industry that the access rights provided by PIPA are being used for purposes that were not intended when PIPA was enacted.

In fact, the plaintiff bar is using PIPA as a cost-effective way of obtaining documents for litigation purposes before, and during litigation. This circumvents the discovery process that has long been in place to serve that very purpose. Insurers have received identical and detailed requests for access, clearly prepared by members of the plaintiff bar, with the view of using access requests as "fishing expeditions" to obtain information that would otherwise, and properly, only be accessed if relevant through the discovery process.

Quebec's *Act respecting the protection of personal information in the private sector* contains a provision that addresses this type of situation. Subsection 39(2) of that Act provides that a person carrying on an enterprise may refuse to communicate personal information to the person it concerns where disclosure of the information would be likely to *"affect judicial proceedings in which either person has an interest"*. That provision requires that there be a serious indication that proceedings will initially be commenced, based on the facts of the case.

The life and health industry suggests that consideration be given to adding a similar provision to PIPA thereby providing an organization with the right to refuse access requests to personal information in these limited situations.

CROSS-BORDER DATA FLOWS

The industry is aware that the Special Committee heard concerns over the transfer of data across borders. The ability to move data quickly and securely within and across markets is standard business practice for many international companies. Canadian life and health insurers rely on the secure and uninterrupted flow of data across borders for any number of commercial and back-office functions including underwriting, client services, product development and market research. The protection of this information is of the utmost importance for our industry in order to maintain the trust of consumers. We believe that the protection of personal information across provincial and international borders is captured under section 34 of PIPA which requires organizations to maintain reasonable security for personal information.

CONCLUSION

The life and health insurance industry is fundamentally committed to protecting the privacy of its customers' personal information. The industry greatly appreciates this opportunity to contribute to the Special Committee’s PIPA review.

Should you have questions regarding any of our comments, please contact Anny Duval, Senior Counsel, by email at aduval@clhia.ca.