# Submission regarding B.C. Personal Information Protection Act

## Presented to Special Committee to Review the Personal Information Protection Act

Canada Life and Health Insurance Association
July30, 2021

## OVERVIEW

The Canadian Life and Health Insurance Association (CLHIA) is pleased to provide its comments to the Special Committee to Review the *Personal Information Protection Act* (PIPA). The CLHIA a voluntary association with member companies which account for 99 per cent of Canada's life and health insurance business. The life and health insurance industry is a significant economic contributor in British Columbia
The industry also plays a key role in providing a social safety net to British Columbians.

### Protecting 3.6 million British Columbians

**3.5 million** with drug, dental and other health benefits

**2.3 million** with life insurance averaging $278,000 per insured

**1.4 million** with disability income protection

### $11.7 billion in payments to British Columbians

**$5.4 billion** in annuities

**$4.9 billion** in health and disability claims

**$1.4 billion** in life insurance policies



### $225 million in provincial tax contributions

**$57 million** in corporate income tax

**$37 million** in payroll and other taxes

**$131 million** in premium tax

### Investing in British Columbians

**$100 billion** in total invested assets

**98%** held in long-term investments

We would like to begin by commending the government's willingness to review PIPA so that it reflects best practices and new ways of protecting personal information. Information regarding individuals is essential for the industry's operations. By law, full 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).

Protecting the confidentiality of this personal information is crucial to maintaining public confidence in our industry. The CLHIA and its members are keen to work with the government to put in place a robust, coherent regulatory framework that will protect consumers while promoting innovation and a dynamic insurance market in British Columbia and across Canada.

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 PIPA. Our industry previously made a submission to the Special Committee in August 2020.

## THE IMPORTANCE OF A COHERENT REGULATORY FRAMEWORK

Many companies operating in British Columbia do business across Canada. Having separate and potentially incompatible rules in British Columbia can hinder their ability to operate in the province. As Canada's governments and businesses begin to bounce back from the COVID-19 crisis and direct their efforts towards the economic recovery, it is essential that there be regulatory coordination across all jurisdictions so as not to impose an additional burden on businesses that have been financially impacted by the pandemic.

Further, a coherent regulatory framework will ensure businesses are able to innovate and offer customized products and services that meet British Columbians' needs. Life and health insurers need to be given the ability to continue to develop ways to better meet the needs of their clients, whether by using innovative approaches to reduce costs for small businesses or by providing consumers with access to virtual health care. A coherent regulatory system will also help provide British Columbians with a clear understanding of how their information is used, rather than having to decipher a disjointed system that is inconsistent or unclear. In order for British Columbian businesses and consumers to take full advantage of these new approaches, it is essential that the regulatory framework does not present barriers to innovation.

It is important to ensure that our privacy framework reflects the increasing use and importance of data and the rapid pace of technological change, while continuing to balance the rights of Canadians to protect their personal information with the legitimate use of data by business for innovation and improving the lives of Canadians.

For these reasons, it is essential to ensure that modernization is coordinated with other Canadian jurisdictions as much as possible. We also 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 the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) or any new federal privacy legislation and have adequacy status in relation to the European Union's General Data Protection Regulation (GDPR).

We welcome the fact that the federal government has actively engaged with industry and other stakeholders on Bill C-11, and we look forward to continuing this dialogue as we seek clarifications of certain aspects of the legislation. Our industry generally supports the direction as established in the draft legislation because it:

- Maintains much of what works well in Canada – for instance, the Bill is principles based, technology neutral and focused on early resolution;
- Achieves advances in key areas, such as the inclusion of new individual rights such as the right to be informed of automated decision-making, business activities/innovation and a role for voluntary codes and certification;
- Maintains a focus on consent, where consent can be most meaningful, while also introducing practical exceptions to consent with parameters for business; and
- Ensures comparability to – or interoperability with – other jurisdictions, while also remaining tailored to our specific circumstances in Canada.

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

## 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 protect the personal information under its custody or under its control.

## INDUSTRY COMMENTS ON PIPA

While PIPA generally works well to protect the privacy of individuals in BC, there are some technical elements that could be updated. We have highlighted two important issues below on access rights involving medical information and access rights used for litigation purposes. Further details on these two issues and other technical issues can be found in the attached annex.

*Access rights involving medical information*

Currently, Section 5 of the regulation sets an administrative process to provide access to medical information in the context of an access request but it is overly complex. The industry believes that the legislation should be amended to clearly allow an organization to choose to make sensitive medical information that is subject to an access request available through a medical practitioner without cumbersome processes. For example, asking the family doctor of an individual to provide them with any sensitive information is preferable as they have an established professional relationship and the doctor is best qualified to provide any further explanations.

*Access rights used for litigation purposes*

We believe the legislation should be amended to allow an organization to refuse to communicate information to the plaintiff bar before or during litigation as it circumvents the judicial process, which was set to protect the participants and equity. This exclusion has been in place in Quebec for a long time and has not impaired the access rights of its constituents.

## CONCLUSION

The life and health insurance industry supports private sector privacy legislation that is harmonized across Canada and strikes a reasonable balance between an individual's right to control how their personal information is used and the reality that organizations often require personal information in order to provide services to consumers.

The industry greatly appreciates this opportunity to provide comments to the Special Committee to Review the Personal Information Protection Act. Should you have any questions or require additional information, please contact Susan Murray, Vice President of Policy and Government Relations at smurray@clhia.ca.

## ANNEX: TECHNICAL REVIEW OF THE PERSONAL INFORMATION PROTECTION ACT

*Access Rights Involving Medical Information*

In prior submissions to this Special Committee, we pointed out that the protection of consumers' privacy would be better served if organizations holding health care information, including 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 because it allows the individual to have access to their personal information faster and in a way that is safer for them.

Medical information can be of a very sensitive nature and, consequently, best explained by a medical practitioner. There will be occasions where the individual making the request may need support when receiving such information or is ill equipped to deal with information that may be delicate. As an extreme example, the information subject to the access request could contain a fatal or debilitating disease diagnosis that has not yet been communicated to the patient. In such a situation, it is in the interest of the individual that the information be presented by a medical practitioner properly trained to share such difficult information and with whom they often already have a relationship (i.e., their family doctor). 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 without delay.

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 that has been requested by the individual. However, the applicable provision (subsection 23(4)(b) of PIPA) continues to be problematic as it sets too high a test (e.g., grave and immediate harm). Insurers may not have enough information about the all-around health of the individual to specifically assess the gravity of possible harm, for example, on their mental health. However, based on the information they do possess, can reasonably surmise that harm could come to the individual if the information contained in the access request and this is where the assistance of a medical professional would be most welcomed.

PIPA's solution to this problem is section 5 of the Regulation sets a complicated administrative process to provide personal health information which includes obtaining an assessment from the practitioner before disclosing information, entering into a confidentiality agreement etc. This process is unduly complex when the information could be directly provided by the medical practitioner and consequently compromises the ability of life and health insurers from fulfilling the access request in a timely manner.

The life and health industry is of the view that it would be beneficial to individuals 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"*. Of note, this important section has also been reprised in section 66(3)[2] of federal Bill C-11, the *Digital Charter Implementation Act, 2020*.

With the goal of preserving the individual's best interests, the industry recommends that PIPA be amended to introduce a section specifically giving organizations an option to provide access to sensitive medical information through a medical practitioner similar to the one found in PIPEDA.

*Access Rights Used for Litigation Purposes*

It is clearly appropriate to provide individuals with a right of access when they 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, the access rights provided by PIPA are being used for purposes that were not intended when PIPA was enacted and are detrimental to both the affected individual and the organizations attempting to comply with their obligations.

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. Of note, and following the legislator's review, this section remains unchanged under Quebec's Bill 64[3].

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

*Comments Regarding OIPC Comments*

While we support most of the OIPC's recommendations, including the importance of harmonization with the CPPA and that reasonable limits should apply to the right to data portability, we are concerned with a small number of recommendations found in the OIPC's supplemental submission because they will be significant in matters of harmonization.

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[2] Sensitive medical information (3) An organization may choose to give an individual access to sensitive medical information through a medical practitioner.

[3] *An Act to modernize legislative provisions as regards the protection of personal information.*

*a. Modernizing Consent Requirements – Exceptions*

- Internal research and development purposes

Economic progress cannot be achieved without innovation. *In economic terms, innovation describes the development and application of ideas and technologies that improve goods and services or make their production more efficient*[4]. Innovation benefits all including consumers, businesses and the economy at large. Internal research and development are the main drivers at organizations' disposal to improve the goods and services they offer to consumers. Consequently, the legislator should encourage organizations to continue to innovate and to do so responsibly using de-identified information.

Rather than requiring consent for the use of de-identified information, the legislation should put in place protections to mitigate against the risk of re-identification by setting expectations with regards to the level of de-identification required, introducing a proportionality test applicable to the technical and administrative measures used and impose important penalties to unauthorized re-identification. These are all valid protection against privacy risks, and each can be found in the CPPA respectively under sections 2, 74 and 75.

In addition, all personal information remains subject to accountability obligations of organizations in the legislation. Research and development are activities crucial for organizations. Rather than impose barriers to these activities, the goal of any legislation should be to implement a supervisory framework that works. We believe reliance on consent in this context is not a solution.

- Business activities

We understand that the OIPC has expressed concerns with the exception to consent for "business activities" found in bill C-11 indicating it could "*enable indirect collection of personal information without any apparent limits on what activity the business might be pursuing…*".

This suggests that there are no limits to the exception in the CPPA. However, section 18(1) clearly sets both a requirement for the expectation of the reasonable person to be met, and an obligation that information cannot be used for the purpose of influencing behavior or decisions. These are important requirements which, once viewed in conjunction with a restricted list of activities do impose actual limits to the exclusion. In addition, the list is focused on activities where consent does not always work or goes without saying such as when the collection or use is necessary to provide or would easily meet the expectations of the individual such as when it relates to the delivery of a product or service that the individual has requested.

We believe these are exactly the kind of situations where the concept of consent can evolve to better serve consumers. It is worth noting that this exception aligns with the notion of "legitimate business interest" adopted in the GDPR where organizations must show that the data processing is necessary for the purposes of the legitimate interests pursued by the organization. These

[4] European Central Bank article "How does innovation lead to growth" https://www.ecb.europa.eu/explainers/tell-me-more/html/growth.en.html

interests have to be balanced against other interests and so, in the Canadian context, will be tied back to what a reasonable person would consider appropriate in the circumstances.

*b. Automated Decision Making*

We understand that the OIPC has expressed some concerns about the requirements pertaining to automated decision making in Bill C-11 arguing that they do not go far enough in regulating this kind of activity while also noting that the GDPR approach *goes too far*.

We suggest that between the obligation to provide a general account (that we understand to be the necessary information to support an individual's understanding) and the right to obtain further details through an access request, an individual has all the tools they need to obtain as much information as they may want without overwhelming them with overly detailed information. We believe that most consumers will not want to be provided with detailed explanations at the outset. Therefore, the balance struck in C-11 is the correct one.

With regards to the example of the denied mortgage[5], we wish to bring to your attention that the use of outdated information would not reflect issues with the automated decision making process but rather non-compliance with the accuracy obligations under section 33 of the legislation. In addition, we suggest that no financial institution's goal is to refuse to provide products to consumers. Therefore, it is not in the interest of any financial institution to use "outdated, false, incomplete, or otherwise defective" information.

Although no system is infallible, the same is true of human decisions. Answering questions with regards to decisions, processes and many other aspects of an organization's business is a normal part of the customer service we offer – which would include automated decisions.

Moreover, privacy legislation guarantees individuals access to an appropriate complaint handling and investigation processes.

[5] on page 15 of the OIPC Supplementary Submission

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