February 26, 2016

The Standing Committee on Alberta's Economic Future
c/o Committee Clerk
3rd Floor, 9820 -107 Street
Edmonton, Alberta T5K 1E7

Dear Committee Members:

Review of the Personal Information Protection Act

The Canadian Life and Health Insurance Association (CLHIA) is pleased to have this opportunity to participate in the comprehensive review of the *Personal Information Protection Act* (PIPA) in Alberta. In this letter, we will emphasize the importance of harmonization of PIPA with other private sector privacy legislation and we will comment on some of the questions raised in the discussion guide.

The CLHIA, established in 1894, is 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 and social contributor in Alberta. It protects about 3 million Alberta residents and makes over $8.8 billion a year in benefit payments to residents in Alberta (of which 90 per cent goes to living policyholders as annuity, disability, supplementary health or other benefits and the remaining 10 per cent goes to beneficiaries as death claims). In addition, the industry has more than $81 billion invested in Alberta's economy. Seventy-nine life and health insurance providers are licensed to operate in Alberta. Of these, five are headquartered in the province.

For over 100 years, Canada's life and health insurers have been handling the personal information of Canadians. Information regarding individuals is essential for the industry's operations, both in the evaluation of applications for life and health insurance coverage and in the assessment of claims for benefits (e.g., death claims, disability claims, medical or dental claims). Full disclosure of relevant information by both parties is recognized by insurance law as a fundamental requirement for insurance contracts. Protecting personal information has long been

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recognized by the industry as an absolutely necessary condition for maintaining the trust of insurance consumers and for ensuring continued access to such information. Accordingly, over the years, the life and health insurance industry has taken a leadership role in this area. For example, in 1980, our industry was the first in Canada to put in place "right to privacy guidelines", which represented the first privacy code to be adopted by any industry group in Canada. Since then, we have participated actively and provided input on all major privacy initiatives, including in the mid-'90s when Quebec introduced its private sector legislation, and later in the development and updates of the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), as well as BC's and your province's PIPA, and health information legislation in various provinces.

One of the industry's overarching objectives in these processes is to achieve harmonization in the treatment of personal information across Canada, as much as possible. The operations of life and health insurers are national in scope, and many common day-to-day transactions may involve interprovincial collection, use, and disclosure of personal information. Thus, the coordination or harmonization of privacy legislation is very important to avoid unproductive duplication and confusion for consumers, organizations, and regulators alike.

With harmonization in mind, the industry has a strong interest in the review of the information privacy rules contained in PIPA. Below, we will comment on various topics of specific interest to life and health insurers that carry on business in Alberta, including: access rights and medical information, and disclosure of personal information without consent.

Form of Consent and Exceptions (Question #4)

Generally, the current forms of consent recognized in PIPA (i.e., express and implied consent, depending on the particular circumstances) are both appropriate and reasonable. That being said, there are two situations which we would like to identify for your consideration.

First, please note that section 9(5) of the Act provides that a withdrawal of consent does not operate to the extent that the withdrawal would frustrate the performance of the "legal obligation". We recommend that the section be amended to clarify that, as well, it does not operate in situations of frustration of "contractual restrictions". This change would also ensure the Act aligns more closely with PIPEDA (see section 4.3.8 of Schedule 1).

Our second issue under this heading relates to disclosure without consent for the purposes of protecting against, for the prevention, detection or suppression of fraud. Over the years, life and health insurers have developed sophisticated methods of investigating fraud. However, fraudsters are also getting more cunning and experience has shown that the best protection against fraud for individual insurers is to see the broader picture, as much as possible, since crime rings or organized criminals will rarely only defraud one insurer. The ability to share information with appropriate parties (e.g. professional bodies) involved allows the insurance industry to identify fraudulent activity before it spreads or repeats itself and therefore is beneficial for both organizations and individuals.

As you know, PIPEDA was updated in 2015 to strengthen its provisions (section 7(3)) allowing organizations to fight fraud. Those amendments were based, in part, on the Alberta model. In turn, we believe that in order to continue the harmonization process across Canada, the text of section 20(n) of PIPA should be made more consistent with the new section 7(3) of PIPEDA.

Disclosure Without a Warrant and Transparency Reports (Questions #7 and #8)

We do not believe that the provisions of PIPA pertaining to disclosure without a warrant require any changes.

With respect to the publication of transparency reports, in our industry's context, it is not at all clear to us that their publication would provide sufficient benefits to individuals so as to warrant the associated costs. We suggest that if such reports are deemed necessary, their application should be limited (potentially by regulation) to organizations that need to make such disclosures on a regular basis -- possibly telecom/internet service providers.

Access Rights and Medical Information (Questions #9)

We strongly believe that it would be in the best interests of consumers for a life and health insurer to be able to choose to make sensitive medical information available to individuals through a medical practitioner. We further strongly believe that the lack of a specific provision in this regard can be detrimental to individuals.

Medical information can be of a very sensitive nature and, in most circumstances, can be fully understood and properly explained only by a medical practitioner. As a result, there will be many occasions where the individual may need support when receiving

the information (as an extreme example, the information tells the individual that he or she has a dread disease and has only a short time to live). In such situations, it is in the best interest of the individual that the information be provided by a properly trained person (i.e., their medical practitioner) within the context of the individual's health history. In that way, a proper explanation of the information can be given to the individual and appropriate next steps can be taken, working with the medical practitioner, to best address the situation.

Depending on the specific medical information involved, and in order to ensure that the individual is not put at risk by virtue of the medical information provided, it has been customary in the industry to disclose the medical information through the individual's medical practitioner.

The importance of this approach is recognized under the federal PIPEDA and is specifically reflected in the individual access principle (Principle 9 of Schedule 1) where clause 4.9.1 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 view to the best interests of individuals, the industry recommends that this concept, whereby disclosure can be made through a medical practitioner, be expressly incorporated in PIPA in harmonization with the text already found in PIPEDA.

Access Rights and Litigation (Questions #12)

It is clearly appropriate that the right of access be available to individuals where they are unsure or have concerns regarding the specific personal information an organization holds, and the use and disclosure of that information. Similarly, it is clearly appropriate that an individual be able to determine, for example, if there are inaccuracies that need to be corrected. However, in the last number of years, the industry's experience has seen access rights provided by PIPA being used for a purpose that may have not been intended when PIPA was enacted.

Specifically, we have observed that the plaintiff bar is making more and more use of privacy laws to obtain disclosure of personal information, at minimal cost, sometimes before but also while litigation has already commended thereby circumventing the discovery process that has long been in place to serve that very purpose. This practice has become more and more commonplace. Insurers regularly receive identical and detailed requests for access, clearly prepared by members of the plaintiff bar, which

appear to be using the access request route as “fishing expeditions” to obtain information that would otherwise, and properly, be accessible through the discovery process, and then only if relevant.

At present, Quebec’s *Act respecting the protection of personal information in the private sector* contains a provision that addresses this type of situation to some degree. Section 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 industry suggests that consideration be given to adding a provision to section 24(2) of PIPA to provide that an organization may refuse to provide access to personal information in similar situations described above. One way to accomplish this is to incorporate the useful precedent established by section 39(2) of Quebec’s legislation.

Transparency of Third-Party Service Providers Outside of Canada (Questions #16)

In today's increasingly globalized world economy and with the development of technologies such as cloud computing, the requirements surrounding third-party service providers outside of Canada are becoming more and more cumbersome for organizations. And given that Canadian organizations remain ultimately accountable for the protection of personal information under their control (even more so for insurance companies that are subject to the outsourcing requirements in Guideline B-10 issued by the federal Office of the Superintendent of Financial Institutions), we suggest that the existing measures should be revisited. In this regard, we would very much appreciate participating in any discussions regarding any potential changes.

Notification of a Breach of Privacy (Questions #17)

The industry has always supported a risk-based approach to notification, where the need to notify and the method of notifying the individual are proportional to the risk of harm that may be experienced by those whose personal information has been compromised. We have now had several years of experience working with the Alberta approach for assessing and notifying/reporting privacy breaches under PIPA and we believe the system is working well.

Consequently, no changes should be made to PIPA in respect of breach notification.

Conclusion

The life and health insurance industry is fundamentally committed to protecting the privacy of its customers' personal information. Consistent with the principles in PIPA, we support privacy legislation that strikes a reasonable balance between an individual's right to control how their personal information is used with the needs of organizations to use personal information for purposes that are reasonable and appropriate.

The Committee's review of PIPA serves as a good opportunity to make some adjustments of a clarifying nature, to fill in some gaps and to streamline some parts of the Act, and to further harmonize the Act with the other private sector privacy legislation that is in place in Canadian jurisdictions.

The industry stands ready to provide whatever assistance it can as the Standing Committee continues its work. Should you have any questions or require additional information, please contact me [redacted] or my colleague Anny Duval,Counsel [redacted].

Yours very truly,

Frank Zinatelli

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