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Canadian Life & Health Insurance Association
Association canadienne des compagnies d'assurances de personnes

Submission to the

ALBERTA STANDING COMMITTEE ON RESOURCE STEWARDSHIP ON THE REVIEW OF THE PERSONAL INFORMATION AND PROTECTION ACT

May 31, 2024

EXECUTIVE SUMMARY

The Canadian Life and Health Insurance Association (CLHIA) is pleased to provide its comments to the Alberta Standing Committee on Resource Stewardship on the review of the *Personal Information and Protection Act* ("PIPA").

Every day, millions of Canadians entrust their most sensitive personal information to life and health insurers. Protecting the confidentiality of this 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 Canada.

The life and health insurance industry commends the government's willingness to modernize privacy legislation within Alberta. While PIPA has served Albertans well for over 20 years, it is important that the new legal framework reflects best practices and new ways of protecting personal information.

In this submission, we have provided more detailed responses to the questions outlined in the province's consultation document. However, we have highlighted two key recommendations for your consideration.

1. Harmonize with other Canadian privacy frameworks

Many companies operating in Alberta do business across Canada. Having separate and potentially incompatible rules in Alberta would be burdensome and can hinder companies' ability to operate in the province. In addition, having separate privacy rules across Canada creates confusion and uncertainty for consumers. A harmonized, national approach helps consumers understand how their information is protected and ensures a common approach to oversight of individuals' privacy. It is therefore important that legislative expectations are harmonized across Canada. Additionally, it is critical that the government leverage existing privacy frameworks within Canada to support a harmonized, national approach, rather than leveraging frameworks from other jurisdictions, such as General Data Protection Regulation (GDPR), which may create differing privacy rules within Canada.

As the government is aware, the federal government has introduced Bill C-27, which would modernize federal privacy legislation in provinces other than Alberta, British Colombia and Quebec. This legislation is currently working its way through the parliamentary review process. Once it is passed, the legislation will introduce the *Consumer Privacy Protection Act* ("CPPA") and result in significant changes from the requirements that exist under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

To support harmonization, we strongly recommend that the Alberta government wait until the federal privacy legislation has passed before making any changes to Alberta's privacy legislation.

2. PIPA should not include a framework to regulate artificial intelligence systems in Alberta

With the rapid pace of technological change, the use of data has become increasingly important in virtually all aspects of the lives of Canadians. The new legislative framework must undertake an important balancing act: It must protect personal information while at the same time, allowing businesses to innovate and offer customized products and services that meet the needs of consumers in a safe and secure manner.

Life and health insurers continue to develop ways to enhance the consumer experience and better meet the needs and expectations of their clients. This includes using innovative technology to reduce costs for small businesses as well as building technological interfaces to interact with consumers. It is therefore essential that the legislative framework does not present barriers to innovation.

Artificial intelligence is a form of new technology and should be treated the same way as any other technology. Privacy legislation is currently and should remain agnostic to technology. There are currently several frameworks being considered or already in force regarding the oversight of artificial intelligence. For example, the Office of the Superintendent of Financial Institutions ("OSFI") has recently revised its Guideline E-23: Model Risk Management to include artificial intelligence. The Autorité des marchés financiers ("AMF") in Quebec is also consulting on best practices for the responsible use of artificial intelligence in the financial sector. We also understand that the Alberta government is developing artificial intelligence regulations.

We therefore recommend that matters related to artificial intelligence be dealt with outside of PIPA.

WHO WE ARE

The CLHIA is the national trade association for life and health insurers in Canada. Our members account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products such as life insurance, annuities, and supplementary health insurance.

Protecting **3.2 million Albertans**

3.2 million
with drug, dental and other health benefits

2.2 million
with life insurance averaging $335,000 per insured

1.8 million
with disability income protection

$11.6 billion in payments to Albertans

$5.7 billion
in health and disability claims

$1.7 billion
in life insurance claims paid

$4.2 billion
in annuities

$307 million in provincial tax contributions

$53 million
in corporate income tax

$35 million
in payroll and other taxes

$219 million
in premium tax

Investing in Alberta

$103 billion
in total invested assets

98%
held in long-term investments

In 2022, the industry added 6,000 jobs across the country, employing over 170,000 Canadians. These jobs support Canadians making increased use of their health benefits. The industry remains financially stable, with capital reserves above regulators' expectations and our industry will continue to work closely with all levels of government.

RESPONSES TO QUESTIONS IN CONSULTATION DOCUMENT

CHANGING LANDSCAPE

1. Are there specific amendments needed to harmonize PIPA with other jurisdictions to make it easier for businesses to operate in all jurisdictions?

In addition to our general concerns, as expressed in the first item of our executive summary above, we propose the following:

Withdrawal of Consent

Section 9(5) of PIPA provides that consent withdrawal does not operate to the extent that it would frustrate the performance of the "legal obligation". We recommend that the section be amended to clarify that it also does not operate in situations of frustration of "contractual restrictions". This change would also ensure PIPA is more closely harmonized with PIPEDA (see section 4.3.8 of Schedule 1) and with the CPPA (s. 17).

Access Rights and Medical Information

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. The lack of a specific provision in this regard in PIPA is detrimental to individuals.

Medical information can be of a very sensitive nature and, in many circumstances, can be fully understood and properly explained only by a medical practitioner. As a result, there will be occasions where the individual may need support when receiving certain 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 to ensure the individual is not put at risk by virtue of the medical information provided, it has been customary in the insurance industry to disclose the medical information through the individual's medical practitioner.

The importance of this approach is recognized under 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"*.

Of note, this approach is also found in the proposed CPPA under section 66(3).

With the view to supporting the best interests of individuals, the industry recommends that this approach be expressly incorporated in PIPA in harmonization with the text already found in the federal legislation.

Access Rights and Litigation

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, for several years now, the industry has seen access rights provided by PIPA being used for a purpose that we feel was never intended when PIPA was enacted.

Specifically, we have observed that the plaintiff bar continues to make use of privacy laws to obtain disclosure of personal information, at minimal cost to them, sometimes before but also while litigation has already commenced thereby circumventing the discovery process that has long been in place to serve that very purpose. 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. The time required in administering these requests puts an additional burden on insurers which is unnecessary since, as mentioned, there are mechanisms in place through the legal process to obtain information. These unnecessary requests take time and resources that could be better spent elsewhere.

At present, Quebec's *Act respecting the protection of personal information in the private sector* ("RPPIPS") 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 that mirrors section 39(2) of Quebec's legislation.

2. Are there specific amendments to PIPA needed to modernize the Act for relevant businesses and organizations to conduct business in Alberta?

Fraud Protection

The requirements pertaining to the collection, use and disclosure of personal information without consent for the purposes of prevention, detection, suppression, and protection against fraud must be modernized.

Over the years, life and health insurers have developed sophisticated methods of investigating fraud. However, fraudsters are also getting more cunning, and insurers are limited in what they can do to protect their insured. Experience has shown that the best protection against fraud for individual insurers is to see the broader picture since crime rings or organized criminals will rarely only defraud one insurer.

The ability to share information with appropriate parties involved (e.g., professional bodies) allows the insurance industry to identify fraudulent activity before it spreads or repeats itself and therefore is beneficial for both organizations and individuals.

Section 7(3) of PIPEDA was strengthened in 2015 to allow organizations to disclose personal information without consent to fight fraud. Those amendments were based, in part, on the Alberta model. However, we suggest that PIPA also be modernized to allow for any organizations, in addition to those listed in section 20(n), to protect themselves against fraud when it is reasonable to collect, use and disclose personal information to do so. This is in agreement with our suggested changes for the CPPA as we have found our ability to fight fraud to be limited when essential information may not have been collected from the permitted disclosure.

ARTIFICIAL INTELLIGENCE

1. Should PIPA include a framework to regulate the design, development, and/or use of artificial intelligence systems within Alberta? If so, what should be included?

No. We believe that privacy legislation should be technologically neutral.

If there is a need to introduce technology-specific requirements, they should be in distinct legislation carefully harmonized throughout all of Canada. This is crucial as it is next to impossible to operationalize systems by province. Therefore, all provinces interested in developing an artificial intelligence framework should wait and consult after the passing of the *Artificial Intelligence and Data Act* ("AIDA").

PROTECTIONS OF SENSITIVE PERSONAL INFORMATION

1. Should provisions be added to PIPA to further protect potentially sensitive information? If so, for which information?

We believe sensitive information is adequately protected and no changes are needed.

In this section, the consultation document also refers to the protection of *personal information collected using technology that has functions allowing the person concerned to be "identified, located, or profiled"*. We would caution against creating a possible other category of personal information based on its use. Or to presume that any such information, without consideration of the context, will automatically be sensitive information.

We believe that, regarding such technologies, the application of privacy by default requirements are much better suited and would ensure much better protection since they consider the use of the technology as a whole.

2. Should provisions be added for biometric information?

We do not believe that specific requirements are needed regarding biometric information. However, the life and health industry would be supportive of disclosing the use of said information thereby making individuals aware of their use.

3. Should provisions be added to enhance the protection of children's personal information?

We would not object to amendments regarding the protection of children's information since they are a more vulnerable population. However, such changes should only be introduced to resolve actual problems, should be harmonized with already existing requirements and must not inadvertently capture organizations that do not deal with children.

CONSENT REQUIREMENTS

1. Are the provisions in PIPA dealing with forms of consent and the conditions attached to their use appropriate?

Yes. However, we believe some of the exemptions are missing or their conditions not fully appropriate. For example, the exemption from consent regarding fraud protection sections as already mentioned.

Also, an exemption from consent for de-identified information when used for statistical and analytic purposes is essential and should be introduced. For consistency, we suggest it be harmonized with the already existing exemption in the proposed CPPA (s. 21)

2. Should individuals receive notice in plain language when organizations explain the purposes for which personal information is collected, used or disclosed?

Yes. We suggest disclosure requirements be harmonized with those existing in the RPPIPS. It will alleviate some administrative burden on organizations and ensure a common understanding for consumers across the country.

INDIVIDUAL RIGHTS THAT ARE NOT INCLUDED UNDER PIPA

1. Should PIPA include other protections for individual information, such as an individual's right to be forgotten or de-indexed?

The right to be forgotten, as it is currently understood under PIPEDA, is the right for an individual to request that their personal information be erased when consent is withdrawn should be harmonized across the country. Including related restrictions that reasonable notice be given, and that the withdrawal of consent does not operate when it would frustrate the performance of legal and/or contractual obligations as already noted above.

2. Upon an individual's request, should organizations be required to transfer that individual's digital personal information to another organization in a structured, commonly used, and machine-readable format when it is technically feasible (data portability)?

The life and health industry does not object to a right to data portability if it is done properly. However, our experience with this requirement in Quebec is that the government should not leave it fully to organizations to figure it out. This was also the approach in the United States and the experience has not been successful. So much so that the government was forced to get involved but at too late a stage to be practical and thereby having to revisit processes that were already put in place.

We suggest that provinces learn from the consumer-driven banking framework currently being put in place at the federal level before introducing any requirements pertaining to data portability.

3. Should organizations be required to provide individuals with the logic involved in automated decision making about that individual (algorithmic transparency)?

Once more, we are concerned about a privacy legislation surpassing its purpose and suggest that any disclosure requirement be limited to regular privacy information. Any additional disclosures of a more technical nature should be in specific legislation and harmonized across the country. We again request that provinces wait and engage at a national level after the passing of the AIDA.

Safeguarding personal information

1. Should PIPA regulate the de-identification and/or anonymization of personal information within the control of an organization and the subsequent use or disclosure of the de-identified or anonymized information? If so, how?

Defining what is de-identification and anonymization of personal information should be subject to privacy legislation. It will be crucial to have uniformity regarding the definitions and use of these terms as they are often used, wrongly and interchangeably (sometimes by regulators) which creates confusion for

organizations but mostly consumers. For example, section 35(2)b) of PIPA refers to rendering personal information as “non-identifying” so that it can no longer be used to identify an individual. This expression is no longer appropriate in the context of the definitions of Act 25 and the proposed CPPA definitions. We respectfully suggest that the use of this expression is confusing and should rather be harmonized with existing definitions by referring to de-identification.

It will also be necessary to clarify that personal information, once anonymized, is no longer subject to PIPA. Hence, any ongoing obligation to monitor the status of anonymized data would not be subject to the legislation.

As for de-identified personal information, it remains personal information but should not be subject to consent requirements if appropriate disclosures have been made to consumers.

Any additional requirements that would push further any oversight of technical use of de-identification and/or anonymization systems would go beyond the purposes of privacy legislation and should not be included.

2. Should organizations be required to have a privacy management program and provide written information about the program to individuals and the Commissioner?

We believe a privacy management program is a reasonable requirement which enhances the protection of consumers and should be adopted by all organizations. We therefore suggest that any changes to PIPA be harmonized with the suggested CPPA requirements. This harmonization will ensure a coherent treatment of all consumers wherever they are in Canada while avoiding unnecessary administrative burden on organizations.

A summary of this program could be disclosed to individuals, and more detailed information could be provided to the Commissioner on request.

3. Should organizations be required to complete and submit a privacy impact assessment to the Commissioner for specific initiatives involving personal information?

Privacy impact assessments (PIA) are a useful tool when done in the appropriate circumstances. Hence, we would support a requirement to do a PIA before an organisation makes major changes to existing processes dealing with personal information. However, organizations should not be required to submit PIAs to the Office of the Information and Privacy Commissioner of Alberta (“OIPC”).

Life and health insurers have been completing PIAs for some time now and have had the benefit of the Office of the Privacy Commissioner of Canada’s guidance (even when aimed at public sector organisations) and most recently from the Commission d’accès à l’information du Québec and feel well equipped to do PIAs without having to submit them to the Commissioner for review. However, we understand that some organisations may need further assistance and therefore, would not object to a voluntary process.

BREACH NOTIFICATION

Are the provisions for notification of breaches to the Commissioner and individuals under PIPA appropriate?

We believe the provisions work adequately well and would not suggest making any changes.

ADMINISTRATIVE MONETARY PENALTIES

Should PIPA include the ability of the Commissioner to levy administrative monetary penalties against an organization for certain contraventions of the Act?

No, administrative monetary penalties are not a guarantee of compliance and will likely become a deterrence to innovation. However, should you choose to include a power to the Commissioner to levy them, they should be restricted for the most egregious of contraventions to ensure that mere mistakes or incidents out of the control of an organization will not be penalized.

Also, they should not be cumulative with similar penalties that could be levied in other jurisdictions for the same contravention.

CONCLUSION

We appreciate the opportunity to share our thoughts on the Standing Committee's review of PIPA. We would also welcome the opportunity to make an oral presentation to the Standing Committee on our proposed recommendations.

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

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