

INSURANCE
BUREAU
OF CANADA



BUREAU
D'ASSURANCE
DU CANADA

Submission to the House of Commons

Standing Committee on Access to Information, Privacy and Ethics

on the review of the

Personal Information Protection and Electronic Documents Act

November 24, 2006

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EXECUTIVE SUMMARY

1. We recommend that PIPEDA be revised to clarify that P&C insurers can obtain statements from witnesses to incidents for which insurance claims are being made without first obtaining the consent of the claimant. This can be achieved by: i) revising the definition of “personal information” to clarify that personal information expressed by one individual (“the witness”) about another (“the subject”) is the personal information of the witness; and ii) revising section 7 to provide that an organization may, during the course of investigating and settling contractual issues or claims for loss or damages, collect, use and disclose a witness statement without the subject’s knowledge or consent.
2. We recommend that PIPEDA be revised to exempt from access, requests for “work product” information, which includes the work documents of an employee or business person that were generated in the course of the employee’s or business person’s work. This can be achieved by adding to PIPEDA a definition of “work product” and then excluding “work product” information from the definition of “personal information”.
3. We recommend that PIPEDA be revised to provide that an individual may not withdraw consent if doing so would frustrate the performance of a legal obligation.
4. We recommend that PIPEDA be revised to provide that an individual can give consent on behalf of another individual when the other individual can claim the benefit of a product or service for which their personal information was provided.
5. We recommend that PIPEDA be revised to address the procedural difficulties that have arisen from the designation of “investigative bodies” while acknowledging the importance of their role in allowing organizations to conduct investigations to protect themselves and their customers from fraudulent acts. This can be achieved by amending PIPEDA to harmonize with the equivalent provisions in Alberta and B.C.’s *Personal Information Protection Acts* for the purposes of an “investigation” or “proceeding”.
6. We recommend that PIPEDA be revised to address the problems faced by P&C insurers in responding to access requests for personal information before and during litigation and for access to witness statements. This can be achieved by: i) including a new exemption in section 9(3)(e); and ii) clarifying that once litigation has commenced, the provincial rules of civil procedure govern and prevail over the access provisions in PIPEDA.
7. In our view, the responsibility of an organization to notify affected individuals of a privacy breach is a sound business practice and does not need to be included in PIPEDA.
8. We also have set out recommendations in the Appendix on the issues of: i) access to personal information; ii) clarifying the effect of PIPEDA on outsourcing of business functions; iii) revising the definition of business contact information; iv) the amount of fees for handling access requests; v) retention periods; vi) giving organizations access to Federal Court to challenge a Finding of the Privacy Commissioner; and vii) mergers and acquisitions.

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PART 1

INSURANCE BUREAU OF CANADA AND ITS MEMBERS

Insurance Bureau of Canada (“IBC”) is the national trade association representing the private general insurance industry. IBC members account for 90% of the non-government, property and casualty (“P&C”) insurance business in Canada. The private P&C insurance industry in Canada provides insurance protection for most homes, motor vehicles and commercial enterprises throughout the country. There are over 200 private P&C insurers actively competing in Canada. The industry is one of the largest employers in Canada, providing some 105,000 jobs, including positions for independent brokers, adjusters and actuaries. With registered sales of about \$36 billion in 2005, and controlling assets of \$103 billion, the industry is a major part of the social and economic fabric of Canada. Last year the industry paid out \$22 billion in claims, including rehabilitation of those injured in motor vehicle collisions, replacement of stolen goods, compensation for commercial losses, and repairs to homes and damaged vehicles. The P&C insurance industry also works to improve the quality of life in Canadian communities by promoting loss prevention, safer roads, crime prevention, improved building codes, and coordinated preparation for coping with natural disasters.

IBC has been an active participant in the discussions and consultations over the last several years on the development of private sector privacy laws by the Federal, Alberta, British Columbia and Quebec governments. IBC was a member of the government-consumer-business group that, in the mid-1990’s, wrote the CSA Model Code for the Protection of Personal Information that is the Schedule to the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). IBC’s member companies support the stated purpose of PIPEDA which is to balance the rights of privacy of individuals and the needs of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. IBC’s member companies are strongly committed to protecting the personal information of the individuals with whom they deal.

PART 2

ISSUES WITH PIPEDA

1. Definitions and concepts

PIPEDA is lacking some key definitions or concepts. At the same time, other definitions in the Act need to be clarified.

a) “Witness statement”

PIPEDA defines “personal information” as “information about an identifiable individual”. This definition is very broad, but in our view it does not properly address an issue which is faced every day by P&C insurers. In the investigation and settling of insurance claims, P&C insurers are often required to obtain witness statements from people who saw the incident or who have information that is necessary for the investigation of the claim. A witness statement may contain different types of information, such as the individual’s observations of the facts of the incident, information about another individual who was involved in the incident, and information about the individual who is giving the statement.

P&C insurers have a contractual legal obligation to defend the interests of their policyholders and to defend them against claims that are made against them. It is to the benefit of all parties - policyholders and those individuals who are making insurance claims - that all of the relevant facts and information are gathered by the insurer as quickly and accurately as possible. As a practical matter, witness statements must be obtained as soon as possible after the incident, and in some cases even before a claim has been formally made to the insurer and before the identities of the individuals have been established. In our view, it would be unreasonable to prevent the insurer - and the court and jury if a lawsuit is commenced and the matter proceeds to trial - from collecting all of the relevant facts related to the incident. We are opposed to the view that an insurer should obtain the consent of the claimant or potential claimant before obtaining witness statements. This would have serious consequences as it would effectively allow one individual to prevent another individual (witness) from reporting what they saw or heard and would prevent an insurer, and by extension the court, from collecting all of the relevant facts about the incident. A witness statement may as easily confirm and verify the claimant's version of the events as it might cast doubts about the incident. An insurer must be able to collect all of the necessary facts about the incident, including obtaining statements from witnesses.

PROPOSAL: The definition of “personal information” should be revised to clarify that personal information expressed by one individual (“the witness”) about another (“the subject”) is the personal information of the witness. Section 7 of PIPEDA should be amended to provide that an organization may, during the course of investigating and settling contractual issues or claims for loss or damages, collect, use and disclose a witness statement without the subject’s knowledge or consent.

b) “Work product”

The issue of “work product” information arises in the context of an access request when an individual may request access to their personal information in the possession of the organization. An individual is not entitled to obtain access to “work product” information.

“Work product” is not mentioned in PIPEDA, but it is an issue that needs to be addressed, particularly in light of the continuing uncertainty on this issue and the fact that the British Columbia *Personal Information Protection Act* (“B.C. PIPA”) does address this issue. “Work product” is not personal information because it does not relate to an identifiable individual; instead, it is proprietary business information that belongs to the organization. For example, an insurance company’s strategy on handling a specific claim is not personal information as it is not information about an identifiable individual; it is information about how the insurer will handle the claim. “Work product” is often intertwined or mixed with personal information, but it can be separated or severed.

The issue of “work product” was addressed in 2001 by the Office of the Privacy Commissioner of Canada (“OPC”) in its Finding #14 which stated that there was a “work product” exemption. The issue in that case was whether information on physicians’ prescribing patterns was “personal information” under PIPEDA. The Commissioner decided that it was not personal information, as noted in the Finding:

“The primary consideration for the Commissioner was whether the information at issue was personal information within the meaning, scope, and purpose of the Act. In making this determination, the Commissioner took the view that the meaning of “personal

information", though broad, is not so broad as to encompass all information associated with an individual. An individual prescription, though potentially revealing about a patient, is not in any meaningful sense about the prescribing physician as an individual. Rather, it is about the professional process that led to its issuance and should be regarded as a work product - that is, the tangible result of the physician's work activity."

This Finding has not been overruled, but in our view it would be better to amend PIPEDA to specifically address this issue. We recommend the approach taken in the B.C. PIPA which defines "work product information" and then excludes it from the definition of "personal information". The B.C. PIPA definition of "work product information" is as follows:

"information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information."

The effect of these provisions in the B.C. PIPA is that "work product" information is not accessible by an individual. We agree with this sensible and reasonable approach.

Alternatively, in the absence of a "work product" exemption, an insurer could take the position that the information in a claims file should fall within the exemption for "confidential commercial information" in section 9(3)(b) of PIPEDA. In Finding #39, the Privacy Commissioner decided that a bank's credit-scoring model was confidential commercial information and thus not subject to an access request. This reasoning would apply to some, but perhaps not all of the information in an insurer's claims file. In our view, the B.C. PIPA approach is preferable because it allows for certainty and can be applied consistently.

PROPOSAL: A definition of "work product", which includes the work documents of an employee or business person that were generated in the course of the employee's or business person's work, should be added to PIPEDA. "Work product" should then be excluded from the definition of "personal information".

2. Consent

a) Withdrawal of consent by third party claimants

Section 4.3.8, Consent, of Schedule 1 to PIPEDA, provides that an individual "may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice." In our view, the reference to "subject to legal or contractual restrictions" applies to situations where there is a claim by the policyholder or person who is insured under an insurance policy - an insurance policy is a contract between the insurer and its customer (policyholder/insured) - but it is uncertain whether it applies to a situation involving a "third party" with whom the insurer does not have any contractual relationship. A "third party" is not a customer of the insurer. A "third party" is an individual who alleges that they sustained a loss or damages as a result of the actions of the insurer's customer/policyholder. For example, Bob Jones slips and falls on Mary Smith's front walk. Jones alleges that he was injured in the slip and fall which was caused by Smith's failure to keep the front walk safe. Smith informs her insurer about the incident. The insurer investigates the claim by Jones. Jones is a "third party" claimant.

While we understand that this is not an issue for most businesses that deal exclusively with their customers, this is a critical issue for the insurance industry where dealings with third parties occur as a matter of course and the information the third parties provide is often central to the consideration or adjudication of an insurance claim. There is no contractual relationship between the insurer and the third party claimant and it does not appear that this particular situation is addressed in PIPEDA. However, the withdrawal of consent by a third party can result in the frustration of the legal obligation that the insurer owes to its insured to defend the insured against claims made against him or her.

In this regard, we recommend the approach taken in section 9(5) of the B.C. PIPA which addresses the issue of withdrawal of consent in a different manner:

“An individual may not withdraw consent if withdrawing the consent would frustrate the performance of a legal obligation.”

In our view, the reference to a “legal obligation” - as opposed to “legal or contractual restrictions” in PIPEDA - includes the legal obligation of the insurer to defend and settle claims on behalf of its insured. This would address the problem being faced by insurers.

PROPOSAL: PIPEDA should be revised to provide that an individual may not withdraw consent if doing so would frustrate the performance of a legal obligation.

b) Consent on behalf of another individual

It is common in the P&C insurance industry for an insurance policy to be applied for and issued in the name of one individual (the “named insured”), but for other individuals to be named or listed on the policy as “additional” or “listed” insureds. These other individuals are provided insurance coverage under the insurance policy; in other words, they can claim the benefit of the insurance policy even though they did not apply for it. In some situations, such as automobile insurance, it is, in fact, a legal requirement in all of the provinces and territories that all licensed drivers residing in the household be listed on the insurance application form. In order to ensure that the additional persons who are listed on the policy understand the nature of the consent, P&C insurers work with their distribution agents (either independent insurance brokers or in-house insurance agents) to clarify that fact to the policyholder. For example, if an independent insurance broker meets with a policyholder, they will advise the policyholder that they (policyholder) must seek the consent of all listed drivers. The policyholder, in effect, is the proxy of the listed drivers.

In this regard, we recommend the approach taken in section 8(2) of B.C.’s PIPA which contains a deemed consent provision that specifically applies in the insurance context:

“An individual is deemed to consent to the collection, use or disclosure of personal information for the purpose of his or her enrollment or coverage under an insurance, pension, benefit or similar plan, policy or contract if he or she

- is a beneficiary or has an interest as an insured under the plan, policy or contract, and
- is not the applicant for the plan, policy or contract.”

While we appreciate that the B.C. PIPA wording might not be applicable to PIPEDA which is based on the federal government’s trade and commerce jurisdiction, we ask that consideration

be given to including within the scope of implied consent in PIPEDA those individuals who can claim the benefit of the product or service for which another individual provided the first individual's personal information. In the context of the P&C insurance industry, the individual who is providing the insurer with the other individual's personal information is, almost without exception, a family member, usually the mother or father of the other individual. In our view, our proposal falls within the reasonable person test in sections 3 and 5(3) of PIPEDA.

PROPOSAL: PIPEDA should be revised to provide that an individual can give consent on behalf of another individual when the other individual can claim the benefit of a product or service for which their personal information was provided. We propose the B.C. PIPA wording serve as a model for this revision.

3. Investigative bodies

The PIPEDA provisions relating to "investigative bodies" should be changed because of inherent problems in the nature and operation of investigative bodies and the designation process. We suggest that consideration be given to adopting the approach in the Alberta *Personal Information Protection Act* ("Alberta PIPA") and the B.C. PIPA.

Detecting and preventing insurance fraud is a critical issue for both P&C insurers and their customers. The annual cost of P&C insurance crime is estimated at \$3 billion. This cost is borne by everyone who has an insurance policy. Many investigations of fraud and other criminal activity cross into multiple jurisdictions. Accordingly, investigations by different organizations in the public and private sector are required. Information developed by one organization may be required by another organization to complete the investigation.

The process under PIPEDA by which organizations, including P&C insurers, can investigate suspicious situations is by means of obtaining an "investigative body" designation under a regulation issued pursuant to section 26(1) of PIPEDA. This designation allows the investigative body to disclose personal information without the individual's knowledge or consent in very limited circumstances, such as for purposes "related to investigating a breach of an agreement or a contravention of the laws of Canada or a province". An insurance policy is an agreement between the insurer and insured in which the insurer agrees, amongst other things, to indemnify the insured for loss or damages and to defend the insured if the insured is sued for losses covered under the policy. The insured agrees to co-operate with the insurer to investigate a claim. The insurer and the insured are required to deal with each other in utmost good faith.

Insurance Crime Prevention Bureau, now known as Investigative Services of IBC, obtained the designation as an investigative body on January 1, 2001, and since then approximately seventy-five organizations and others have also received this designation. However, confusion still remains between these investigative bodies and others that may be party to an investigation as to what, how and to whom information developed during an investigation can be disclosed. For example, if an organization affected by criminal activity does not have investigative body status, can it share personal information with another organization that might be investigating similar criminal activity? This is a common dilemma that is being faced by all organizations. As well, the designation of investigative bodies by class result in a situation where the organization claiming to fall within the class may be unable to satisfy the organization it asks to disclose the personal to it, that it has the investigative body designation.

It is our view that the drafters of PIPEDA did not intend to frustrate the efforts of organizations to protect themselves from criminal or fraudulent activity. It is our belief that the architects of PIPEDA wanted those organizations to be accountable and responsible for the information they collect, use and disclose about individuals who may be the subject of an investigation.

The Alberta PIPA and B.C. PIPA offer an alternative approach to this issue that is both practical and workable. These statutes provide that organizations may collect, use and disclose personal information for specified purposes similar to those set out in PIPEDA. However, there is no need under these statutes for special designation as an “investigative body”; rather, an organization may collect, use or disclose personal information without the individual’s consent for purposes related to an “investigation” [Alberta and BC] or “legal proceeding” [Alberta] or “proceeding” [B.C.]. “Investigation”, “legal proceeding” and “proceeding” are defined terms within the Alberta and B.C. PIPAs. These provisions provide organizations with slightly broader scope for investigating suspicious circumstances than does PIPEDA, and in our view, these terms better reflect the reality and address the difficulties that organizations face in trying to deal with fraudulent or criminal activity. For example, investigating a suspicious insurance claim may not necessarily result in the determination that there was a breach of the insurance policy. An organization seeking to rely on these provisions is responsible for making certain that the investigation it is undertaking falls within the circumstances that are defined in the legislation. The consequences for an organization not complying with these provisions should be clearly enunciated as grounds for the making of a complaint and an investigation by OPC.

In addition, adoption of the Alberta and BC PIPA models would eliminate the cost and expense of the Federal Government in reviewing, considering and monitoring the applications by organizations that seek to have the investigative body designation.

PROPOSAL: It is clear that there will always be a need for organizations to conduct investigations to protect themselves and their customers from fraudulent acts. In order that these investigations can proceed in a timely and cost effective manner, we propose that paragraphs 7(3)(d)(i) and (h.2) of PIPEDA be amended to parallel the provisions in Alberta and BC’s PIPA’s and thus permit collection, use or disclosure of personal information without consent by all organizations for the purposes of an “investigation” or “proceeding”.

4. Access request

We have the same proposal for an amendment to PIPEDA to address the following two issues.

a) Access request before and during litigation

A key principle of a privacy law, including PIPEDA, is that an individual can obtain access to their personal information for the purpose of correcting inaccuracies. However, in our view, this principle of access and correction is not intended to allow an individual to thwart the legitimate business needs of the organization.

P&C insurers strongly support the individual’s right to request access for the purpose of ensuring the accuracy and completeness of their personal information. However, in a small number of critical situations, these access requests are being made for a different purpose, namely, to circumvent an insurer’s claims handling process by allowing the person making the request to see the information in the insurer’s files for the purpose of trying to change the information so as to strengthen their claim. These requests, which are being made by both

insureds and third party claimants, can arrive before litigation has commenced or during the course of litigation. Section 9(3) of PIPEDA sets out situations when an access request is prohibited or may be refused by organizations, but PIPEDA does not take into account the unique litigious nature of the P&C insurance industry. Unlike most other organizations that only receive access requests from their customers, P&C insurers also receive access requests from third party claimants who are not their customers. Our experience is that a number of third party claimants are using PIPEDA not as it was intended, but rather as a means to circumvent the rules of civil procedure and discovery that apply to legal actions in the courts. It is both necessary and reasonable for insurers to fully investigate insurance claims to ensure that legitimate claims are properly settled and that false claims are dealt with accordingly.

Section 9(3) of PIPEDA does not address the situation where an access request is made by an individual for the purpose of getting an early look at the information in the insurer's claims file. While section 9(3) includes an exception for solicitor-client privilege, it does not include an exception for litigation privilege which is a separate and distinct privilege. Solicitor-client privilege applies to the communication between a lawyer and client; the privilege is intended to promote full and frank communication between lawyer and client. Litigation privilege, on the other hand, applies to documents and information that are prepared in anticipation of litigation. The courts have recognized and enforced the right of litigation privilege as a necessary part of the adversarial legal system; the privilege exists to ensure that each party to litigation has a "zone of privacy" that will allow the party to prepare their case in private. These access requests are a particular concern for P&C insurers in situations where litigation has been commenced. Once litigation has been commenced, the provincial rules of civil procedure dictate the process by which information is to be disclosed by and to the parties to the litigation. In our view, the rules of civil procedure should govern and the right to access under PIPEDA should be restricted. In order to avoid posturing by the claimant's lawyer to avoid such a provision by making the access request before litigation is formally commenced, a reasonable mechanism should be developed to cover the situation where there is a reasonable expectation or contemplation of a lawsuit. It would also be reasonable to limit an individual's ability to obtain access after an insurance claim has been filed.

In our view, the exemptions in section 9(3) of PIPEDA do not protect insurers' ability to investigate and settle a claim when an access request is received. The forced disclosure of the personal information that an insurer has collected during the claims process may compromise the insurer's ability to further investigate and settle the claim.

We propose the addition of a new exemption to section 9(3) of PIPEDA which would deal with the situation of access requests at the pre-litigation stage. We propose the following new wording:

"9(3)(e) the information was generated in the course of the process to investigate and settle contractual issues or claims for loss or damages, and access would compromise the accuracy and availability of the information or would jeopardize the process."

b) Access to witness statements

PIPEDA provides that an individual can have access to their personal information in the possession of an organization. In the P&C insurance context, this could include access to a witness statement that was obtained by the insurer in the course of investigating the claim. The nature of P&C insurance is that a significant amount of the information obtained in

investigating claims is collected from people who may wish to remain anonymous. There is a risk to the integrity of the insurance industry if the relationship between witnesses and insurers is not protected because not only would people be deterred from providing statements, they would also be deterred from reporting crime. When the identity of a witness is revealed, there is the possibility that witnesses may be bullied, threatened, physically harmed or the information provided may be improperly influenced resulting in requested alterations of statements. Information that identifies the witness can be severed from the other information, but in some cases, such as, for example, where it is obvious that only the next door neighbour could have given the witness statement, the whole statement might have to be severed or blacked out in order to protect the identity of the witness. Allowing access to witness statements through PIPEDA can hamper the regular legal process of claims proceedings, as well as result in the circumvention of the provincial rules of civil procedure that govern the discovery and document exchange processes of litigation.

PROPOSAL: PIPEDA should be revised to: i) include a new exemption in section 9(3)(e) as set out above; and ii) clarify that when litigation has commenced, the provincial rules of civil procedure should govern and prevail over the access provisions in PIPEDA.

5. Breach notification

While there is no specific obligation in PIPEDA for an organization to notify an individual of a loss or theft of their personal information, it is a sound business practice for an organization to take the appropriate steps to address a loss or theft of personal information so that the individual can take necessary steps to mitigate or lessen the effects of the loss or theft. We agree with the B.C. Office of the Information and Privacy Commissioner's four-step approach in responding to a privacy breach: 1) contain the breach; 2) evaluate the risks associated with the breach; 3) notify the affected parties as necessary; and 4) prevent future breaches. Under this approach, notification is based upon the evaluation of the risks associated with the breach i.e., notification is to the affected parties and may not be required in all circumstances.

There has been some suggestion that organizations should also notify the appropriate Privacy Commissioner about a privacy breach, but in our view, this should be left as a suggested practice and not as a requirement. We appreciate the willingness of the Privacy Commissioners to assist organizations in the handling of privacy breaches, including advice on the appropriate method(s) to notify affected individuals, but in some circumstances the organization may not require this assistance. We support the approach taken in Ontario's *Personal Health Information Protection Act*, which is to notify the individual(s) whose personal information has been lost or stolen.

Our final comment on this issue is that a privacy breach should not be considered in the context of strict liability i.e., if there is a loss or theft of personal information, the organization is automatically at fault regardless of the actual circumstances. If the information is stolen, and if the organization had reasonable and appropriate safeguards in place, it would not be reasonable to find the organization at fault for the privacy breach. If it is made clear that a privacy breach is not strict liability, in our view, organizations would be more likely to seek the assistance and advice of the Privacy Commissioners.

PROPOSAL: The responsibility of an organization to notify affected individuals of a privacy breach is a sound business practice and does not need to be included in PIPEDA.

APPENDIX

1. Definitions and concepts

a) “Access to personal information”

Principle 4.9, Individual Access, of Schedule 1 of PIPEDA, states that an individual shall be given access to their personal information. Typically when responding to an access request, an organization will, after reviewing and blacking out information that is not properly accessible, photocopy and send copies of the relevant forms, records, etc. in its files to the individual. This is an easy approach but it can also be very frustrating for the individual who receives blacked out pages or multiple copies of the same information. For these same reasons, it can also be very inefficient for the organization. For example, in handling an insurance claim, a P&C insurer may collect information on a series of forms that repeat certain basic information about the claim. From a practical perspective, it makes no sense to require the insurer to provide access to those forms that contain duplicate information.

It is unclear from PIPEDA, and from the longstanding practice in this area that has developed with the public sector privacy laws, whether an organization must provide access to the actual documents in which the personal information is recorded or whether it can instead cut and paste all of the relevant information into a new document, thus eliminating the inefficiency of the current approach of photocopying all of the documents. Some organizations may prefer to create this new document.

PROPOSAL: PIPEDA should be amended to provide organizations with an option of how they provide access to personal information.

b) Definitions of “agent”, “use” and “disclose”

PIPEDA does not define the words “agent”, “use” and “disclose”. In the absence of a statutory definition, words are to be given their regular dictionary definitions, but there is a specific aspect of PIPEDA in which this lack of statutory definitions causes a problem. The problem arises in the context of an outsourced business function in which an organization (the “agent”) is acting on behalf of and under the instructions of another organization (the “principal”). The principal-agent relationship is a well understood common law concept, but it is not expressly provided for in PIPEDA. This is in contrast to section 12(2) of the B.C. PIPA which does recognize the role of the “agent”:

“An organization may collect personal information from or behalf of another organization without consent of the individual to whom the information relates, if

- (a) the individual previously consented to the collection of the personal information by the other organization, and
- (b) the personal information is disclosed to or collected by the organization solely (i) for the purposes for which the information was previously collected, and (ii) to assist that organization to carry out work on behalf of the other organization.”

In a principal-agent relationship, the consent that is obtained by the principal (typically the organization that has the contact with the individual whose personal information is being collected) can also be relied upon by the agent in carrying out the outsourced function. In

that situation, when the personal information is sent between the principal and the agent, it is a “use” and not a “disclosure”. A “use” is the transfer of information within an organization, including its agents, while a “disclosure” is a transfer outside of the organization.

In the P&C insurance context, P&C insurers may outsource the investigating and settling of some insurance claims to independent adjusting companies. In this situation, the adjuster is collecting, using and disclosing the personal information for the purposes of the insurer, and not for its own purposes.

Outsourcing of business functions to agents is a necessary and integral part of business practices for all business sectors. A reasonable person, who is referred to sections 3 and 5(3) of PIPEDA, would expect that an insurer, like any other business, would outsource certain functions to others who act as agents on behalf of the insurer. If the agent wants to use the personal information for its own purpose, then the agent would have to obtain a separate consent from the individual for that separate purpose.

There are two ways to address this problem. First, definitions of “agent”, “use” and “disclose” could be added to PIPEDA, and second, the B.C. PIPA approach could be adopted. In our view, the best way to address this issue is by following the B.C. PIPA approach which expressly recognizes the role of an “agent” and does not require the agent to have a separate consent.

PROPOSAL: PIPEDA should be revised to incorporate the concept of “agent” as set out in section 12(2) of BC’s PIPA.

c) Business contact information

The current definition in PIPEDA of “business contact information” – “name, title or business address or telephone number of an employee of an organization” – is much too limited and is tied to out-of-date technology. The definition needs to be revised to include, at a minimum, business fax numbers and business e-mail addresses. But just as the current definition did not take into account changes in technology, the best long term approach would be to leave open the class of business contact information; otherwise, every time a new technology is developed for the dissemination of business contact information, an amendment to PIPEDA will be required. In this regard, we suggest that consideration be given to the definition of “business contact information” in Alberta’s PIPA:

“business contact information” means an individual’s name, position name or title, business telephone number, business address, business e-mail, business fax number and other similar business information.”

We also suggest that the exclusion for business contact information should also apply to agents, independent contractors and consultants, and not just to employees.

PROPOSAL: The definition of “business contact information” should be revised to include the relevant types of information that are given out in a business context. The definition should not be tied to any specific technology. The definition should also apply to agents, independent contractors and consultants.

2. Access fees

Section 4.9.4, Individual Access, of Schedule 1 to PIPEDA, states that an organization shall respond to an access request at “minimal or no cost to the individual”.

In our view, “minimal or no cost” may be reasonable in a situation where the organization has minimal personal information about an individual - for example, a retail store that sold the individual a couch and for which the total amount of personal information can be printed on one piece of paper - but it is unreasonable in the context of an insurance claim where the insurer must collect personal information in order to investigate and settle the claim. For example, an insurance claims file may be very large and contain hundreds of different types of information and records of multiple pages in length from different individuals and sources e.g., statements from parties to the incident, witness statements, police reports, medical reports, financial records, investigation reports, etc. In handling an access request for personal information in a claims file, an insurer might need to have someone other than administrative staff, for example an adjuster, law clerk or lawyer review the file to determine what information can be accessed, what information should be refused and what information must be severed. An insurer should be able to charge a reasonable fee that accurately reflects the amount of time and effort that is required to have a person, who has the requisite knowledge of the subject matters in the claims file, process the access request.

In this regards, we recommend the approach taken in Section 32(1) of Alberta’s PIPA where an organization may charge a “reasonable fee”.

PROPOSAL: PIPEDA should be amended to provide that organizations may charge a reasonable fee for responding to access requests.

3. Records retention

The P&C insurance industry faces significant challenges with respect to the implementation of PIPEDA in the area of records retention. Section 4.5, Limiting Use, Disclosure, and Retention, of Schedule 1 to PIPEDA, states that “Personal information shall be retained only as long as necessary for the fulfilment of those (identified) purposes.” and section 4.5.3 of the same Schedule states that “Personal information that is no longer required to fulfil the identified purposes shall be destroyed, erased or made anonymous.” While the concept of records retention may appear to be simple, the application of this in the tangled business, legal and regulatory environment of the P&C insurance industry is not.

One area of significant concern for the P&C insurance industry is the late reporting of claims. For example, a claim on an environmental issue can be made to the insurer 30 or 40 years after the event. Claims that have arisen in such areas as tobacco, sexual abuse, asbestos and mould demonstrate the need for insurers to retain information for long periods of time. In order to properly defend its insured in such a claim, an insurer must have access to its underwriting information that may be decades old. Such information is important to determine such issues as the nature of the risk insured, the extent of coverage, and whether the insured misrepresented the risk. In most jurisdictions the operation of limitation periods for court actions will be delayed by the “discoverability rule”, which states that a limitation period will not commence to run until the person could have reasonably discovered they have a claim. The effect of this rule is that an action can be launched many years after the

occurrence of an event. In addition, persons who are under a disability (such as minor children or persons with disabilities) will also have the limitation period extended.

The problem faced by the P&C insurance industry is that it cannot determine in advance which types of insurance policies might generate this retention issue. An insurer may be unaware that the possibility of such a claim might exist. Even if the insurer has some idea that a claim may be brought forward, the insurer often has no idea when that might occur. Issues such as these make record retention an important and complicated issue for insurers. It is also clear that insurers may have a need to keep information after the termination of the relationship with the insured.

A second issue is that the limitation periods are not uniform across the country. Each province has its own laws governing limitation periods. In attempting to come up with a reasonable retention policy, a multi-jurisdiction insurer will typically pick the longest retention period from any jurisdiction and apply that as its retention period across Canada.

There are also a number of other areas that impact on the retention policies of insurers and which may require records to be kept longer than some might expect. For example, there are a number of regulatory and legal requirements that must be met by insurers. Records of claims payments must be kept for a significant period of time following payment to satisfy tax requirements. In addition, subsection 261(2)(c) of the federal *Insurance Companies Act* (“ICA”) requires that a company shall prepare and maintain adequate records “showing, for each customer of, or claimant under a policy issued by, the company, the amount owing to the company and the nature of the liabilities of the company to the customer or claimant.” However, the ICA does not specify for what length of time these records must be maintained. It is not clear if these records should be maintained indefinitely or can be safely deleted after some passage of time or the occurrence of some event (for example, the discharge of the liabilities). Logic suggests that upon the occurrence of an event (the discharge of liabilities) that the records could be deleted following a reasonable retention period, but the ICA does not specifically authorize the deletion of such records. This is but one example of this sort of issue. Each company has developed its own rules as to what it believes are appropriate retention periods for the information in its possession.

The Alberta and B.C. PIPAs take a different approach than that in PIPEDA. These laws recognize that there may be legal or business purposes for an organization to retain the personal information. Section 35 of Alberta’s PIPA states: “Notwithstanding that a consent has been withdrawn or varied under section 9, an organization may for legal or business purposes retain personal information as long as is reasonable.” [our underlining]. Section 35(2) of B.C.’s PIPA states: “An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that: (a) the purpose for which that personal information was collected is no longer being served by retention of the personal information, and (b) retention is no longer necessary for legal or business purposes.” [our underlining]

In our view, this approach is more reasonable and practical than that found in PIPEDA.

PROPOSAL: PIPEDA should be amended, along the lines of Alberta or B.C.’s PIPAs, to provide that organizations may retain personal information for legal or business purposes for as long as is reasonable and despite any withdrawal of consent.

4. Access to Federal Court

IBC supports the ombudsperson model of the Office of the Privacy Commissioner of Canada and hopes that OPC will continue to respect the limits of this role and will work co-operatively with organizations to address problems rather than seek redress through litigation in the Federal Court. OPC's mandate includes the investigation of complaints and the issuing of non-legally binding Findings that contain the Commissioner's recommendations on complaints. It is crucial that this investigative function be predicated upon the rules of natural justice. However, it would be helpful if there were a manner in which the findings of the Commissioner would lead to legal certainty. The courts have made it clear that while they will take the findings of the Commissioner into account, the courts are not bound by such findings. It is the courts and not the Privacy Commissioner which is the final arbiter of the law. Currently, only individuals who filed privacy complaints can take a Commissioner's finding to the Federal Court; the organization against whom the complaint was made cannot take an adverse finding to the Federal Court. In our view, PIPEDA should be amended to allow the organization to have access to the court in order to challenge a Finding of the Commissioner. This would be in keeping with the rules of natural justice.

Even though the Commissioner's Finding is not legally binding, the very fact that it has been issued can adversely affect the organization's reputation in the marketplace and with its regulators. Reputation risk is an important concern for insurers' boards of directors and insurance regulators alike. The Office of the Superintendent of Financial Institutions ("OSFI"), which is the federal regulator of insurers and banks, has identified reputational risk as a risk area that must be managed by these organizations. In July 2005, OSFI released a document, "OSFI's Review of Reputation Risk Practices: Principles, Observations and Next Steps". This document sets out OSFI's concerns about this issue of reputational risk and its expectations of the steps that federally regulated financial institutions, including P&C insurers, will take to address this problem.

It is our view that organizations should be given the opportunity to challenge a Finding in court in order to clear their names and protect their reputations where circumstances warrant it. It is in our view fundamentally unfair to deprive organizations of this opportunity.

PROPOSAL: PIPEDA should be revised to provide that organizations have the right to challenge in court a Finding of the Privacy Commissioner.

5. Mergers and acquisitions

PIPEDA does not include provisions for mergers and acquisitions of organizations. This is an obvious omission in the law that should be addressed. In this regards, we recommend the approach taken in the Alberta PIPA and B.C. PIPA, both of which contain provisions that address both the due diligence stage and the actual merger and/or acquisition.

PROPOSAL: PIPEDA should be revised to include specific provisions for mergers and acquisitions, and in that regards, we propose the Alberta and B.C. PIPAs as models.