

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2010-012

November 30, 2010

DESJARDINS FINANCIAL SECURITY

Case File Number P1164

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that Desjardins Financial Security (the Organization) had required her to complete the same form as her husband when she applied for insurance coverage as a dependant under her spouse's company plan. She took the position that the Organization was in contravention of section 7(2) of the *Personal Information Protection Act*, (PIPA), as it was unnecessary for the Organization to require her to do so in order to provide insurance coverage to her. She argued that the Organization should be required to provide plan members and dependants separate application forms when a dependant seeks to obtain coverage on a plan member's insurance plan.

The Adjudicator determined that section 567 of the *Insurance Act* required plan members and dependants to complete the same application, which necessitates a dependant disclosing personal information regarding insurability to the plan member. She therefore determined that requiring applicants to complete the same form and to disclose to each other their answers regarding insurability was a necessary condition for providing insurance. She found that the Organization had not required the Complainant to consent to the disclosure of any personal information that was unnecessary for the purpose of providing insurance, given the requirements of section 567 of the *Insurance Act*. She therefore found that the Organization was not in contravention of section 7(2) of PIPA.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 7, 8, 20, 49, 52; *Insurance Act* R.S.A. 2000 c. I-3 ss. 554, 567

Cases Cited: *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720; *Garand v. Mutual of Omaha Insurance Co.* [2001] A.J. No. 1108

I. BACKGROUND

[para 1] On December 2, 2008, the Complainant made a complaint to the Commissioner that Desjardins Financial Security (the Organization) had required her to complete the same application form as her husband when she applied for insurance coverage under his plan. She complained that it was unnecessary for the Organization to require her to complete the same application form to provide insurance coverage to her. Her position was that the Organization required disclosure of information as a condition of providing a service, within the terms of section 7(2) of the *Personal Information Protection Act* (PIPA).

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to mediate the Complainant's complaint under section 49 of PIPA. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The Canadian Life and Health Insurance Association (the Intervenor) requested the opportunity to intervene at the inquiry. I decided that information regarding insurance schemes and their administration would be helpful for the inquiry and I invited the Canadian Life and Health Insurance Association to participate as an intervenor.

[para 4] A notice of inquiry was sent to the parties. The notice of inquiry provides the following background and questions:

The *Insurance Act* R.S.A. 2000 c. I-3 applies to insurance, including life insurance, in Alberta. Section 567(1) of this Act states:

567(1) An applicant for insurance and a person whose life is to be insured must each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the applicant's or person's knowledge that is material to the insurance and is not so disclosed by the other.

(2) Subject to section 568, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer.

Section 7(2) of the *Personal Information Protection Act* S.A. 2003 c. P-6.5 states:

7(2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

Section 567 of the *Insurance Act* appears to state that an applicant and a person whose life is to be insured will complete a single application form and review each other's responses for completeness. In addition, an applicant and a person whose life is to be insured must disclose any information to the insurer about the other that is within the applicant's or person whose life

is to be insured's knowledge. The penalty for failing to disclose this information is that the insurer may declare the insurance policy void.

Questions:

- 1) Assuming that requiring an applicant and a person whose life is to be insured to complete the same form amounts to a disclosure by an organization of the applicant's personal information to the person whose life is to be insured, and vice-versa, would such disclosure be beyond what is necessary for providing life insurance, given the requirements of section 567 of the *Insurance Act*?
- 2) Did the Organization in this case require disclosure of personal information beyond what is necessary for providing life insurance to the Complainant and her husband by providing one application form for both the Complainant and her husband to complete?

[para 5] The parties and the Intervenor provided submissions. After I had reviewed their submissions, I reviewed the questions for the inquiry and decided that question 2 would be clearer if it were broken down into two questions. I therefore wrote the parties on October 21, 2010 to restate issue 2 and invited them to make further submissions regarding the restated issue if they chose. Issue 2 was restated in the following way:

- A. Does requiring a plan member and the plan member's spouse to complete the same form amount to a disclosure by the Organization of the plan member's and the plan member's spouse's personal information?
- B. If so, did the Organization in this case require consent to disclosure of personal information beyond what was necessary for providing life insurance to the Complainant and her husband?

The Intervenor provided submissions in relation to the restated issue, but the Organization and the Complainant did not.

II. ISSUES

Issue A: Assuming that requiring an applicant and a person whose life is to be insured to complete the same form amounts to a disclosure by an organization of the applicant's personal information to the person whose life is to be insured, and vice-versa, would such disclosure be beyond what is necessary for providing life insurance, given the requirements of section 567 of the *Insurance Act*?

Issue B: Does requiring a plan member and the plan member's spouse to complete same form amount to a disclosure by the Organization of the plan member's and the plan member's spouse's personal information?

Issue C: If so, did the organization in this case require consent to disclosure of personal information beyond what was necessary for providing life insurance to the Complainant and her husband?

III. DISCUSSION OF ISSUES

Issue A: Assuming that requiring an applicant and a person whose life is to be insured to complete the same form amounts to a disclosure by an organization of the applicant’s personal information to the person whose life is to be insured, and vice-versa, would such disclosure be beyond what is necessary for providing life insurance, given the requirements of section 567 of the *Insurance Act*?

[para 6] As noted above, section 567 of the *Insurance Act* states:

567(1) An applicant for insurance and a person whose life is to be insured must each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the applicant’s or person’s knowledge that is material to the insurance and is not so disclosed by the other.

(2) Subject to section 568, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer.

[para 7] In its submissions, the Organization made the following arguments in relation to the application of section 567 of the *Insurance Act* to the Organization’s requirement that both the Complainant and her husband complete the same application form:

The reason for the required disclosure of the applicant and any person benefitting from the insurance in question is that there is only one, single policy, that of the applicant for insurance. It is the applicant that is the member of the plan referred to in s. 554(g), not the other “person whose life is to be insured”. This is further clarified by the phrase “a single contract” in s. 554(g) and s. 554(a) of the *Insurance Act*:

554(a) “application” means an application for insurance or for the reinstatement of insurance.

It is thus submitted that the group insurance scheme is such that there is one plan for members of the plan. Members of the plan are those that have a contractual – usually employment – relationship to the planholder, usually the employer. Dependants include those such as the Complainant who fall within defined relationships to the member, here, the Complainant’s husband. There is one application for the member, one that may or may not include dependants under him.

This notion of the insurance product being that of the member – here, the Complainant’s husband – is also carried through to responsibility for the accuracy of the application for inclusion in the group plan. Since there is one applicant – the member – with one application, it is that person who must be responsible for the accuracy of the information contained in it. Were it otherwise and were the applicant [unable] to vet the accuracy of the information the applicant submits – even information of beneficiaries under him, the applicant would be liable to serious and dire – even penal consequences. Firstly, pursuant to s. 568(3), the contract of insurance may be voidable. Secondly, it is the applicant who could face even criminal prosecution for falsely submitting the information.

[para 8] The Intervenor also explains the difference between an individual and a group plan of insurance. The Intervenor notes:

Group insurance is not offered by the insurer directly to the individuals. Rather, a plan sponsor (also known as a group policyholder) contracts with an insurer to provide coverage for its plan members (also known as participants). The plan member then enrolls the individual members under the group insurance contract. A common example of group insurance is the life, disability, health and dental benefits many employers provide to their employees through a group insurance contract.

Unlike in the individual insurance context where more than one person can apply for joint coverage under a single policy, in the group insurance context only the individual (e.g. an employee) directly connected to the plan sponsor (e.g. an employer) may apply for enrollment under the group insurance contract. If the application is accepted, the individual becomes a plan member, also known as the group person insured, under the group insurance contract. Any other individual associated with the plan member, for example a spouse or child, would be considered a dependant under the plan member's coverage if eligible under the terms of the contract.

In this regard, the *Alberta Insurance Act* R.S.A. 2000, c. I-3 ("*Insurance Act*") (ss. 554(h), 554(k); 585; 662(i), 662(l) 662(m); and 689... explicitly sets out that the rights under the group insurance contract belong only to the plan member, and not to the dependent.

Hence the coverage under a group insurance contract is that of the plan member and not that of the dependant. Consequently, the right to obtain coverage for a dependant belongs to the plan member and not to the dependant. A dependant's ability to be covered under a group insurance contract is subordinated to the plan member's willingness to extend coverage for his/her dependent under the plan member's coverage.

As insurance contracts are contracts of utmost good faith, the applicant has an obligation and responsibility to answer all medical or lifestyle questions accurately and to provide correct and current information when applying for coverage. Given that the coverage belongs to the plan member (and not to the dependant), should there be fraud or misrepresentation in the application related to the dependant's answers, the insurer would generally seek recourse against the plan member, not against the dependant, and could void the member's coverage for the dependant.

[para 9] The Complainant argues the following:

From the perspective of the person being asked to disclose utmost personal information, it is not deemed important whether it is a group policy or individual policy and the *Insurance Act* should support confidentiality in an individual's application.

[para 10] In my view, the effect of section 567 of the *Insurance Act* is to require a dependent to answer questions from an insurer regarding material facts within his or her knowledge regarding insurability, which may then be reviewed by the plan member, as the plan member must disclose any facts not disclosed by the dependant. I agree with the Organization and the intervenor that section 567 reflects the fact that the insurance contract, in the case of group insurance, is entered by the plan member, and not the dependant, and that the consequences of providing inaccurate information regarding an insurable risk are therefore borne by the plan member. I also agree that section 554 contemplates one application for insurance for plan members and dependants, and not one application for each. Section 567 ensures that a plan member is made aware of information regarding dependants because the plan member, and not the dependant, is responsible for the accuracy of this information.

[para 11] I find that the combined effect of sections 554(a) and 567 of the *Insurance Act* is to require a dependant and a plan member to complete one application for insurance and to disclose personal information regarding insurability to each other in doing so. In my view, requiring a plan member and a dependant to complete one application form and to provide personal information for the other's review on the application form is contemplated by section 567 of the *Insurance Act* and is therefore authorized by that provision. Moreover, as a statute of Alberta requires a plan member and a dependant to complete the same application and, I find that it is necessary for a plan member and a dependant to undergo this process in order to obtain insurance for a dependant under the plan.

[para 12] As section 567 speaks of information "material to the insurance," the question becomes whether, in requiring the Complainant to answer the questions on the shared form, the Organization has required the Complainant, the dependant, to disclose to her husband, the plan member, personal information that is not material to the insurance, or information that is unnecessary for the purposes of section 567 of the *Insurance Act*.

[para 13] In *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720, the Supreme Court of Canada interpreted the phrase "material to the insurance" in a provision similar to section 567 of the *Insurance Act* in the following way:

...The determination of this appeal is to be governed by what was said by Lord Salvesen in the Mutual Life case at pp. 351-2 where he said:

...it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

If the matters here concealed had been truly disclosed they would undoubtedly have influenced the respondent company in stipulating for a higher premium and as there is no evidence to suggest that this was unreasonable or that other insurance companies would have followed a different course, I am satisfied that, on the evidence before us, it has been shown affirmatively that untrue answers respecting the medical advisers consulted by the insured were material to the risk. This is enough to avoid the policy.

In *Henwood*, the Court determined that information "material to the insurance" is information that would influence a reasonable insurer's decision to provide insurance or require higher premiums.

[para 14] In *Garand v. Mutual of Omaha Insurance Co.* [2001] A.J. No. 1108, Watson J. (as he then was) applied the Supreme Court of Canada's interpretation of the phrase "material to the insurance" in *Henwood* to section 567 (then section 365) of the *Insurance Act*.

[para 15] Facts within the insured's knowledge that are material to the insurance for the purposes of section 567, then, are the kinds of information, including personal information, that will influence an insurer when deciding whether to insure an applicant and at what rate. In reviewing the questions on the form to which the Complainant

objects, I find that questions all require information that would influence the Organization in determining the risks involved in insuring the Complainant. I therefore find that any information that would be disclosed to the Complainant's husband in answering the questions could be characterized as facts within the Complainant's knowledge that are material to the insurance. I therefore find that section 567 of the *Insurance Act* requires the Complainant to disclose all her answers to the questions to which she objects to her husband, the plan member, if she is to be covered by his plan.

Issue B: Does requiring a plan member and the plan member's spouse to complete the same form amount to a disclosure by the Organization of the plan member's and the plan member's spouse's personal information?

Issue C: Did the organization in this case require consent to disclosure of personal information beyond what was necessary for providing life insurance to the Complainant and her husband?

[para 16] Section 20 of PIPA establishes that there are situations in which an Organization may disclose personal information without consent. It states, in part:

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable

...

- (b) *the disclosure of the information is authorized or required by*
 - (i) *a statute of Alberta or of Canada,*
 - (ii) *a regulation of Alberta or a regulation of Canada,*
 - (iii) *a bylaw of a local government body, or*
 - (iv) *a legislative instrument of a professional regulatory organization...*

[para 17] I asked the parties whether requiring a plan member and a dependant to complete the same form amounted to a disclosure by the Organization, as the disclosure to which the Complainant objects is authorized by a statute of Alberta. If requiring a dependant to disclose personal information to a plan member is a disclosure by the Organization, then this disclosure would be a disclosure contemplated by section 20(b), and consent for the disclosure would not be required.

[para 18] The Organization argues that requiring a plan member and a dependant to complete the same form does not amount to a disclosure by the Organization. It states:

DFS submits that requiring a plan member and the plan member's spouse to complete the same form does not amount to a disclosure by the Organization of the plan member's and the plan member's spouse's personal information.

By requiring a plan member and the plan member's spouse to complete the same form, DFS does not disclose personal information in that it is not "showing, sending, telling or giving some other organization or individual the personal information in question", as discussed in "*A Guide for Businesses and Organizations on the Personal Information Protection Act*"... Indeed, as

discussed in our prior submission, the process of filling out an application form involves a voluntary sharing of personal information between the plan member and the spouse...

[para 19] The intervenor also presents the position that requiring a plan member and a dependent to complete the same form does not amount to a disclosure for the purposes of PIPA. The intervenor states:

To answer the restated question, no, requiring a plan member and the plan member's spouse to complete the same form does not amount to a disclosure by the organization of the plan member's and the plan member's spouse's personal information. In order to specifically address this question, it is helpful to restate what constitutes a disclosure. The OIPC has explained this expression in *A Guide for Businesses and Organizations on the Personal Information Protection Act* as meaning: "showing, sending, telling or giving some other organization or individual the personal information in question." Therefore, an organization must first be in a position to show, send, tell or give the personal information of the plan member or the plan member's spouse before it can disclose it. It is important to note that at the time that the plan member and the plan member's spouse fill out the enrollment form, the organization has not yet collected the personal information in the form. It is only after the form has been received that an organization is in a position to potentially disclose personal information.

[para 20] The Organization and the Intervenor make the point that an organization is not directly disclosing personal information when a dependant and a plan member complete an application for insurance. Moreover, there will be situations where an organization does not know that a dependant spouse intends to apply to be covered under a spouse's plan. As the Intervenor points out, if requiring applicants to complete the same form is disclosure, disclosure would be taking place before an organization has collected the personal information or is even aware of the existence of personal information.

[para 21] I agree with the parties that in the circumstances of the complaint, the Organization has not disclosed personal information. Rather, it required the Complainant to disclose personal information to her husband, the plan member, by requiring her to provide answers on a shared form, as a condition of providing insurance. This disclosure is therefore one contemplated by section 7(2) of PIPA.

[para 22] As noted above, section 7(2) of PIPA states:

7(2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

An organization need not disclose personal information to fall within the scope of section 7(2), it need only require that personal information be disclosed as a condition of providing a service.

[para 23] PIPA is silent as to how section 7(2) operates in a situation where a statute requires an individual to disclose personal information in order to obtain a service, such as the situation where a statute requires a dependant to disclose personal information to a plan member in order to obtain insurance. However, given that the compliance with

section 567 of the *Insurance Act* is a mandatory requirement for applicants and dependants, I find that compliance with this provision is necessary for providing insurance. As the Organization limited the questions on the application form to questions regarding insurability, and did not require the Complainant to answer any other questions on the application or disclose any such questions to her husband, I find that the Organization did not require the individual to consent to the disclosure of any more information than was necessary for providing insurance.

[para 24] Both the Organization and the Intervenor drew my attention to section 8(2.2) of PIPA, which came into force on May 1, 2010. This provision states:

(2.2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for the purpose of the individual's enrolment in or coverage under an insurance policy, pension plan or benefit plan or a policy, plan or contract that provides for a similar type of coverage or benefit if the individual

- (a) has an interest in or derives a benefit from that policy, plan or contract, and*
- (b) is not the applicant for the policy, plan or contract.*

As this provision came into force after the circumstances giving rise to the Complainant's complaint took place, and there is no indication that this provision is intended to be retroactive in effect, I find that it has no bearing on the matter before me.

IV. ORDER

[para 25] I make this Order under section 52 of the Act.

[para 26] I confirm the decision of the Organization to require plan members and dependants to complete a shared application form and find the Organization was not in contravention of the Act in so doing.

Teresa Cunningham
Adjudicator