ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2020-03

April 21, 2020

GOWLING WLG (Canada) LLP

Case File Number 003980

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that Gowling WLG (Canada) LLP (the Organization) violated the *Personal Information Protection Act* (PIPA) when, during the course of ongoing litigation, it obtained his credit report from Equifax, and filed the credit report in Court as evidence in support of an application for security for future costs.

The Adjudicator considered the scope of PIPA with regard to section 4(3)(k) (the exclusion for court records). He held that the Organization's use and disclosure of the information that occurred once it was filed in court were beyond the scope of PIPA; however, collection, use, and disclosure that occurred prior to that were still subject to review.

The primary issue before the Adjudicator was whether the collection, use, and disclosure of the credit report in the absence of the Complainant's consent was permitted by sections 14(d), 17(d), and 20(m) of PIPA (collection, use and disclosure that is reasonable for the purposes of an investigation or legal proceeding).

Underlying the issues of whether the Organization complied with PIPA was the interaction between PIPA and the *Consumer Protection Act* (the CPA). While PIPA prescribes when personal information may be collected without consent, the CPA prescribes circumstances under which an organization may obtain a credit report from a reporting agency, and makes it an offence to collect the report in circumstances other than those prescribed. The question arose whether the Organization had complied with

the terms of the CPA in obtaining the information, and if it had not, whether this meant that its dealings with the information were not "reasonable" as required by sections 14(d), 17(d), and 20(m) of PIPA.

The Adjudicator considered whether the provisions of the CPA that restrict a person's ability to obtain a credit report are inconsistent with authority to collect personal information under PIPA; and whether PIPA was paramount to the CPA pursuant to PIPA's paramountcy clause in section 4(6). The Adjudicator also considered whether he had jurisdiction to determine that the CPA had been contravened. Finally, he considered the Organization's arguments that it complied with the CPA since its collection of the information had been "in connection with the collection of a debt", or was to determine the Complainant's eligibility under a law, as permitted by the CPA.

The Adjudicator found that the terms of terms of PIPA and the CPA are not inconsistent and therefore operate alongside each other. PIPA permits only reasonable collection, and whether collection was reasonable must take into account whether the information was collected under circumstances that are permitted by the CPA.

The Adjudicator concluded that he did not have jurisdiction to determine whether the CPA was contravened. However, while concluding he did not have such jurisdiction, the Adjudicator decided that under the Commissioner's powers to determine all questions of fact and law in section 50(1) of PIPA, he was able to take the terms of the CPA into account in the inquiry. The terms of the CPA were relevant to determining whether the Organization's dealings with the Complainant's personal information had been reasonable.

The Adjudicator found that the Organization collected the personal information in the credit report outside of the circumstances permitted under section 44 of the CPA.

Since collecting information outside of the circumstances under section 44 of the CPA is an offence under section 161(c) of the CPA, collecting it in such circumstances was not reasonable for the purposes of a legal proceeding. Accordingly, the Organization did not have authority to collect, use, and disclose personal information under sections 14(d), 17(d), and 20(m) and therefore, had not complied with section 7(1) of PIPA.

The Adjudicator applied similar reasoning to conclude that the Organization's collection, use, and disclosure of the credit report had been beyond a reasonable extent under sections 11(2), 16(2), and 19(2) of PIPA.

The Adjudicator ordered the Organization to cease collecting, using, and disclosing personal information in contravention of PIPA, and to destroy the Complainant's personal information, with the exception of the copy of the credit report contained in the court file and any copy made from such a copy.

Statutes Cited: AB: *Consumer Protection Act*, R.S.A. 2000, c C-26.3 ss. 43, 43(c), 44, 44(1), 44(1)(a)(i.1), 44(1)(a)(v), 44(2), 161(c); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 4(1)(a), 5; *Personal Information Protection Act*

S.A. 2003, c. P-6.5 ss. 1(1)(c), (g) and (k), 2, 4(3)(k), 4(6), 4(5)(b), 7(1), 11(1), 11(2), 14, 14(b), 14(d), 16(1), 16(2), 17(d), 19(1), 19(2), 20(m) and (o), 50(1), 52; *Alberta Rules of Court*, AR 124/2010, rule 3.62(1)(b*); Credit and Personal Reports Regulation*, AR 193/99 s. 2.1(a).

BC: *Business Practices and Consumer Protection Act*, SBC 2004 c 2 ss. 107, 108; *Personal Information Protection Act*, SBC 2003, c 63 s. 50(1)

Federal: *Excise Tax Act*, R.S.C. 1985, c. E-15 s. 141.1(3)(a).

Authorities Cited: AB: Orders F2005-007, F2014-42, P2010-019, P2017-05, P2017-08, P2018-09; Investigation Report P2005-IR-008. **BC:** Order P11-02

Cases Cited: *Alberta (Attorney General)* v. *Krushell*, 2003 ABQB 252; *Briardown Estates Inc.* v. *Robinson Estate*, 2007 Carswell Ont 5809; *Carbone v. Burnett*, 2019 ABQB 98; *Delta Muskoka General Contractors Inc*. v. *Ophelders*, 2011 ONSC 4345; *Home Exchange (Alberta) Ltd.* v. *Goodyear Canada Inc.*, 2001 ABOB 672; *Kitchener-Waterloo Real Estate Board Inc.* v. *Ontario Regional Assessment Commissioner, Region No. 21*, [1986] O.J. No. 763; *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29; *ONEnergy Inc.* v. *R.*, 2016 TCC 230; *ONEnergy* v. *Canada*, 2018 FCA 54; *Platinum Infrastructure Inc*. v. *Powerline Plus Ltd.*, 2018 ONSC 6891; *Tim Keith Contracting Ltd.* v. *Richform Construction Supply Co.*, 2010 BCSC 1861

Authors Cited: Sullivan, Driedger. On the Construction of Statutes, 5th Ed., LexisNexis, Toronto: 2008 pp.223-225.

I. BACKGROUND

[para 1] The Complainant was a defendant in a legal action in the Court of Queen's Bench. Gowling WLG (Canada) LLP (the Organization) was legal counsel for the plaintiff in that action. The action alleged, among other things, that the Complainant had breached a contract with the Organization's client.

[para 2] In the course of the litigation, the Organization obtained an order for costs against the Complainant in the amount of $2,500.00 (the existing costs award). While payment of these costs was outstanding, the Organization obtained a credit report about the Complainant from Equifax. The credit report was included in an affidavit, sworn by the Organization's client, in support of an application for security for costs. The application for security for costs sought security for costs in the amount of $167,249.23 in the event that the Complainant was unsuccessful in the ongoing litigation.

[para 3] The Complainant complained to this office that the Organization violated the *Personal Information Protection Act* S.A. 2003, c. P-6.5 (PIPA) when it collected, used, and disclosed his personal information which appeared in the credit report. Mediation and investigation did not resolve the matter, and it proceeded to inquiry.

II. ISSUES

[para 4] The issues identified in the Notice of Inquiry were as follows:

ISSUE A: Did the Organization collect, use, and / or disclose "personal information" of the Complainant as that term is defined in section 1(1)(k) of PIPA?

ISSUE B: If the answer to issue A is yes, did the Organization collect, use, and / or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use, and / or disclosure without consent)? In particular, did the Organization have the authority to collect, use, or disclose the information without consent as permitted by section 14(d), 17(d) and 20(m) of PIPA (reasonable for the purposes of a legal proceeding)?

ISSUE C: Did the Organization collect, use, or disclose the information contrary to, or in accordance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use, and / or disclosure for purposes that are reasonable)?

ISSUE D: Did the Organization collect, use, or disclose the information contrary to, or in accordance with sections 11(2), 16(2), and 19(2) of PIPA (collection, use and / or disclosure to the extent reasonable for meeting its purposes in collecting, using, and / or disclosing the information)?

[para 5] In its submissions, the Organization challenged my jurisdiction to address some of the foregoing issues on the basis that the information that was collected, used, and disclosed is information in a court file, and hence outside the scope of PIPA under section 4(3)(k). The Organization did not challenge my ability to address collection of the information from the credit reporting agency. I consider this challenge to my jurisdiction as a preliminary issue below

[para 6] The Organization also made submissions on the interaction between the provisions of PIPA and sections 44(1) and (2) of the *Consumer Protection Act*, R.S.A. 2000, c C-26.3 (the CPA) (which govern circumstances under which a credit report may be furnished by a credit reporting agency and obtained by a person). The Organization argued that pursuant to the paramountcy clause in section 4(6) of PIPA, PIPA is paramount to the CPA, and hence the prohibitive provisions of the CPA are irrelevant to the issues of reasonable collection, use, and disclosure. I will address this issue in the section of this order which discusses whether collection, use and disclosure of the credit report was reasonable for the purposes of a legal proceeding.

[para 7] In the alternative, the Organization challenged my jurisdiction to make a finding that the CPA had been contravened. Again, I will discuss this issue in the context of my discussion on the significance of the CPA to the question of reasonableness.

III. DISCUSSION OF ISSUES

Preliminary Matter – Reference to the *Consumer Protection Act*

[para 8] At the time of the events in question, the CPA was titled the *Fair Trading Act*. The sections of the *Fair Trading Act* that are relevant to this matter remain unchanged and are still the same in the version of the CPA that is currently in force. For clarity, I will refer to sections in the current CPA throughout this order.

Preliminary Matter – Jurisdiction under section 4(3)(k) of PIPA

[para 9] The Organization has argued that since the personal information in the credit report is part of a court file, use and disclosure of it falls outside of the scope of PIPA. As noted above, the Organization conceded that collection of the report falls within the scope of PIPA.

[para 10] Section 4(3)(k), states:

> *(3) This Act does not apply to the following:*
>
> *(k) personal information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master in chambers of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 11] For the following reasons, I find that PIPA does not apply to use and disclosure that took place once the credit report was filed in court. I find, however, that collection, use, and disclosure that took place prior to that are within my jurisdiction.

[para 12] Very similar circumstances to this case were considered in Order P2018-09. (at para 1):

> The Complainant made a complaint to the Commissioner that Maxim Research and Consulting Corporation Ltd (Maxim) had collected, used, and disclosed information about her employment history, as well as her motor vehicle registration and credit report information without her consent and in contravention of the *Personal Information Protection Act* (PIPA). She complained that Maxim had provided this information to a law firm, Elise J. Lavigne Professional Corporation (the law firm), and that her personal information had then been included in an affidavit sworn by her spouse's former wife and filed in legal proceedings by the law firm.

[para 13] The Adjudicator in Order P2018-09 then went on to discuss the application of section 4(3)(k) in respect of the use of personal information as evidence in an affidavit, at para. 8. The Adjudicator stated:

> Section 4(3)(k) of PIPA establishes that information in a court file is exempt from the application of the Act. The affidavit and its exhibits, which constitute the evidence of collection, use, and disclosure in this case, have stamps indicating that they were filed with the Court. However, the complaint is not that the affidavit discloses personal information, but that the Complainant's personal information was collected, used, and disclosed in order to create the affidavit and its attached exhibits, and the affidavit and the exhibits are evidence of this. As a result, section 4(3)(k) does not apply to the collection, use, and disclosure of the Complainant's personal information that took place prior to filing the affidavit. However, it does apply to the disclosure of the Complainant's personal information in Court. As a result, the disclosure of the Complainant's personal information in Court is not an issue I am authorized to address.

[para 14] I agree with the analysis of the Adjudicator in Order P2018-09 respecting the application of section 4(3)(k). The collection, use, and disclosure that occurred prior to filing the credit report in court are within my jurisdiction. Before filing the credit report in court, the personal information in it was not in a court file.

[para 15] The Organization argues that the decision in Order F2014-42 suggests the opposite conclusion. In Order F2014-42 the Adjudicator considered section 4(1)(a) of *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act), which is similar to section 4(3)(k) of PIPA. Section 4(1)(a) of FOIP reads as follows:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause*

[para 16] In Order F2014-42, the Calgary Police Service (CPS) disclosed the complainant's personal information to his parents. CPS informed the parents about the terms of a Recognizance, and Certificate of Analyst, and a Notice of Intention that applied to the complainant. The Adjudicator found that the Recognizance was a record of a justice of the peace within the terms of section 4(1)(a) of the FOIP Act. The Recognizance was the only record captured under that section.

[para 17] Regarding section 4(1)(a) of the FOIP Act, the Adjudicator stated (at paras. 16 to 18):

> In *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252, which was cited in the Court of Appeal decision referred to above, the Court stated:
>
> > […] one might consider the possible reasons for excluding court records from disclosure as an aid to determining which purpose s. 4(1)(a) was created to address.

> One such reason may indeed be that an ongoing alternate system for access to information is available. However, another may be the desire to protect the privacy of persons who are charged but have not yet and may never be convicted of a criminal offence. While such interests might be protected through the subsequent operation of section 17 it is also likely that the privacy concerns surrounding the unconvicted accused are without exception, and so should be excluded in the first instance from the operation of the Act rather than triggering the expense of having Alberta Justice having to subsequently locate and edit such documents under the s. 17 provisions.
>
> The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the *de facto* punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day internet postings would create concern about courthouse security and judge-shopping which could affect the administration of justice and thus judicial independence in ways the Legislature clearly attempted to avoid by so carefully exempting all matters relating to the judiciary in other subsections of s. 4.

The Court in *Krushell* commented on the purpose of section 4(1)(a) and opined that it was possibly intended to protect the privacy of persons charged with offences as well as to protect the administration of justice from interference. Another view would be that section 4(1)(a) is intended to recognize that Courts have inherent jurisdiction to control their own processes, including the manner in which information is collected, used, disclosed, and accessed in proceedings before them. If it were not for section 4(1)(a), the manner in which information is collected, used, disclosed or accessed by parties in a Court proceeding, such as a trial, would be reviewable by the Commissioner in circumstances where a public body, such as the Crown, is a party to a proceeding or otherwise has possession of information entered in such proceedings. Such a result would undermine the jurisdiction and independence of the courts.

On the facts of the present case, the police officer disclosed information from the Recognizance, which was signed by a justice of the peace. Although the police officer disclosed this information verbally, the source of the information remains the Recognizance. I find that the Recognizance is a record of the justice of the peace within the terms of section 4(1)(a). I therefore find that the information that the officer disclosed was not subject to the FOIP Act. It follows that the disclosure itself is not subject to the FOIP Act.

[para 18] For several reasons, I find that the reasons in Order F2014-42 do not indicate that the information at issue in this case is excluded from PIPA under section 4(3)(k).

[para 19] Order F2014-42 dealt with disclosure of information that was information in a record of a justice of the peace at the time when it was disclosed. It originated from within the system that created it as a record of a justice of the peace.

[para 20] The same situation was also present in *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (*Krushell*), where the Court was considering daily criminal dockets. The Court in *Krushell* stated at para 12:

> Criminal dockets are produced from court files by staff in each courthouse in the province, normally early on the day to which they relate. They are printed and distributed to the courthouse by approximately 6:00 a.m., to be posted by court staff in a prominent public place within the building prior to court sessions commencing that day. Accused persons and witnesses may use the criminal dockets to locate the number of the courtroom at which they should attend. [underlining mine]

[para 21] At para. 52 it said:

> The information contained in the criminal dockets comes from court files. If one were to apply the Privacy Commissioner's apparently self-contradictory comments, "the Act would not apply to that information". The mere fact it is extracted from those files and appears in a different format does not change the purpose of the legislation, which is to exclude the information contained in those materials from the ambit of the Act. The purpose of the Legislature was to exclude the information, not merely the paper format in which some of it originally appears. Whether it is contained in a physical paper file, or is removed from that file to another format it is excluded from production under the Act. [underlining mine]

[para 22] As in Order F2014-42, the information at issue in *Krushell* originated from within the system that created it as part of a court file.

[para 23] The fact that the information in Order F2014-42 and in *Krushell* was information captured in section 4(1)(a) at the relevant time in each case (at the time the disclosure in the former case was done and the access request in the latter one was made) is a key distinction between those cases and the present one.

[para 24] The circumstances in this case are different. The information did not originate from a court file, rather, it originated from a file at a reporting agency, and was then placed in the Organization's own file, before entering the court system. Prior to being filed in Court, the information was contained only in the files of organizations to whose handling of personal information PIPA clearly applies. Collection, use, and disclosure at that time did not concern information in a court file. As described in Order P2018-09 these are matters that the Privacy Commissioner may review. The independence of the Court is not compromised; its files remain outside of the Commissioner's reach.

[para 25] In contrast, once the information is disclosed into the court system, any further collection, use, or disclosure of that information by an organization in the course of the court process is outside of the scope of PIPA. In short, the Court, and organizations that are parties to legal proceedings, can handle information in a court file without the prospect of a review by the Commissioner.

[para 26] I note that this conclusion is consistent with the specific provisions of PIPA addressing collection, use, and disclosure of personal information for use in a legal proceeding in sections 14(d), 17(d), and 20(m). The presence of these sections indicates that the Legislature intended collection, use, and disclosure of personal information – existing outside of the Court's files – for the purposes of a legal proceeding to be subject to regulation and review under PIPA.

[para 27] Having concluded that PIPA applies to dealings with the credit report before it was filed in Court, I will consider the Organization's dealings with it during this period. They are described in the discussion below.

ISSUE A: Did the Organization collect, use, and / or disclose "personal information" of the Complainant as that term is defined in section 1(1)(k) of PIPA?

[para 28] PIPA defines "personal information" in section 1(1)(k) as "information about an identifiable individual."

[para 29] The CPA also contains its own definition of "personal information" in section 43(c). Where the term "personal information" is used in this order, it refers to the definition in section 1(1)(k) of PIPA.

[para 30] The credit report contains the following personal information about the Complainant:

- The Complainant's name
- Birth year and month
- Current and previous address
- Current and previous place of employment
- Banking, credit, and payment history
- Any outstanding collection accounts
- The lists of those who have made credit inquiries about the Complainant's files

[para 31] The Complainant is clearly identifiable from the information and it is about the Complainant. I find that the information in the credit report is the Complainant's personal information.

[para 32] I will now discuss whether the Organization collected, used, and disclosed this information.

1. Collection

[para 33] The Organization collected the Complainant's personal information when it obtained the credit report from Equifax.

2. Use

[para 34] The Organization used the information in several ways, apart from filing it in Court.

[para 35] It used the information to assess the Complainant's ability to pay future costs of litigation. It also used the information to prepare an affidavit in support of its application for security for costs.

3. Disclosure

[para 36] Prior to filing it in Court, the Organization disclosed the Complainant's personal information to its client to enable the client to swear the affidavit in support of the application for security for costs.

[para 37] I find that the Organization collected, used, and disclosed the Complainant's personal information.

ISSUE B: If the answer to issue A is yes, did the Organization collect, use, and / or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use, and / or disclosure without consent)? In particular, did the Organization have the authority to collect, use, or disclose the information without consent as permitted by sections 14(d), 17(d) and 20(m) of PIPA (reasonable for the purposes of a legal proceeding)?

[para 38] In view of its complexity, I provide an outline of the discussion of this issue, as follows:

ISSUE B OUTLINE

1. Collection of the Credit Report

a) Did the Complainant consent to the collection?

b) Was the collection for a legal proceeding?

c) Was the collection reasonable for the purpose of the legal proceeding?

i) The standard of reasonableness

ii) The role of the CPA in determining reasonableness under PIPA

1) Paramountcy

2) Jurisdiction to find that an offence has been committed

3) Contravention of the CPA is not determinative under PIPA

4) Conclusion on the role of the CPA in determining reasonableness under PIPA

iii) Was the credit report obtained in circumstances permitted under the CPA?

1) Did the Organization obtain the credit report "in connection with collection of a debt" under section 44(1)(a)(i.1)?

Carbone v. Burnett

The Organization's Intention

Interpretation of the phrase "in connection with collection of a debt" in section 44(1)(a)(i.1) of the CPA

Conclusion regarding "in connection with collection of a debt"

2) Was the credit report obtained in order to determine the Complainant's eligibility under section 44(1)(a)(v) of the CPA?

3) Orders P2017-08 and P2017-05

iv) Other relevant considerations

1) Other cases in which credit reports were used in applications for security for costs

2) Section 4(5)(b) of PIPA – information available by law

v) Conclusion regarding reasonableness of the collection for the purposes of the legal proceeding

2. Use and Disclosure of the Credit Report

3. Conclusion with regard to section 7(1)

[para 39] I continue below with the full discussion of this issue.

1. Collection of the Credit Report

a) Did the Complainant consent to the collection?

[para 40] Section 7(1) states as follows,

> *7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,*
>
> > *(a) collect that information unless the individual consents to the collection of that information,*

[para 41] It is clear that the Complainant did not provide consent, nor can the Complainant be deemed to have consented, to the Organization's collection. Whether or not the Organization complied with section 7(1) rests upon determining whether it had authority to collect the Complainant's personal information without consent under section 14(d).

b) Was the collection for a legal proceeding?

[para 42] PIPA sets out exceptions to the general prohibition against collection of personal information without consent in section 14. One of these, section 14(d), states,

> *14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*
>
> > *(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding; … .*

[para 43] The terms "investigation" and "legal proceeding" are defined in sections 1(1)(f) and (g) of PIPA, respectively:

> *(f) "investigation" means an investigation related to*
>
> > *(i) a breach of agreement,*
> >
> > *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
> >
> > *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to*
>
> > *(i) a breach of an agreement,*
> >
> > *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
> >
> > *(iii) a remedy available at law;*

[para 44] It is clear that the Organization was involved in a legal proceeding as defined in PIPA. The Organization was representing its client in litigation against the Complainant for, among other things, a breach of contract, which is a breach of an agreement. It is also clear that the information was collected, used, and disclosed, for the purpose of a legal proceeding. The information was used to assess the Complainant's ability to pay projected costs that may arise out of those proceedings, and to prepare submissions in support of an application for security for costs. The personal information was disclosed to the Organization's client so that it could swear an affidavit in support of the application.

[para 45] Since I have found the Organization collected the information for the purposes of a legal proceeding, I do not need to consider whether it also collected it for the purposes of an investigation. I note that even if the Organization had also collected the information for the purposes of an investigation, it would not affect the balance of my reasons.

c) Was the collection reasonable for the purpose of the legal proceeding?

[para 46] The next question is whether the Organization's collection of the information for the purposes of a legal proceeding was a *reasonable* collection.

i) The standard of reasonableness

[para 47] PIPA clarifies the standard of reasonableness under PIPA in section 2:

> *2 Where in this Act anything or any matter*
>
> *(a) is described, characterized or referred to as reasonable or unreasonable, or*
>
> *(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,*
>
> *the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.*

[para 48] The Organization argues that the applicable standard of reasonableness in this case is set by section 2. The Organization relies on the following passage from Order P2010-019, at para 35, in support of its position.

> In determining whether the purposes are reasonable under PIPA, all of the relevant circumstances of the case must be considered. I must consider and apply the standard which is "what a reasonable person would consider appropriate in the circumstances". This is an objective standard and does not include the subjective preferences of the particular individual. Rather, this standard is what a reasonable person in the circumstances of the case would find appropriate.

[para 49] The Complainant argues that the applicable test for reasonable collection was set out in Investigation Report P2005-IR-008. The Complainant argues that to establish that it reasonably collected information, the Organization must demonstrate the following:

> i) a clear need for the information;
>
> ii) that the information obtained addressed the need; and
>
> iii) that there were no other less intrusive means available.

[para 50] The Complainant contends that the Organization failed to meet these criteria. However, I do not need to consider the parties' arguments on these points. As described below, I reject the Complainant's argument that Investigation Report P2005-IR-008 sets out the test for reasonable collection.

[para 51] In Investigation Report P2005-IR-008, the Portfolio Officer was investigating the practice of an organization (SAS Institute Canada) to require a credit check from prospective employees. The criteria that the Complainant argues amount to a test are only part of the circumstances that the Portfolio Officer recommended that SAS consider. Investigation Report P2005-IR-008 does not set out a general test for reasonableness. The full passage from Investigation Report P2005-IR-008 discussing the criteria, at paras. 60 and 61, is below:

> I was pleased to note that SAS does not collect personal credit information from all applicants for a position. Instead, credit checks are only conducted once the hiring manager has advised the SAS Human Resources group that a particular candidate is acceptable for the position and that the hiring manager would like to move forward in the process with that particular applicant.
>
> However, I am concerned that SAS initially told the complainant that its policy is to conduct personal credit checks on "every single applicant being considered for a final offer, regardless of position." As set out in this report, collecting this type of information will only be reasonable where warranted under the circumstances. Therefore, I recommend that SAS:
>
> 1. Review the responsibilities of a position when hiring to ensure that credit information is reasonably required to determine a candidate's suitability. This will require assessing relevant factors including whether:
>
> • there is a clear need that must be addressed through the collection of the information,
> • the collection of the information is likely to be effective in addressing that need,
> • there are less intrusive and/or more effective means to achieve the same results.

[para 52] As the Organization has argued, I agree that determining what is reasonable is determined by section 2 of PIPA. I also agree with the Adjudicator in Order P2010-019 that reasonableness is an objective standard and all relevant circumstances should be considered. Even in a case where some of the criteria listed in Investigation Report

P2005-IR-008 are relevant, meeting all of them may not result in a determination that an organization's conduct is reasonable; conversely, failing to meet all of them may not result in a determination that its conduct was unreasonable.

ii) The role of the CPA in determining reasonableness under PIPA

[para 53] The standard for reasonableness set in section 2 of PIPA invites consideration of what is appropriate in the circumstances. The term "circumstances" is broad and encompasses not only the particular facts of a case, but also laws that apply in those circumstances.

[para 54] The CPA applies to the circumstances in which the Organization obtained the credit report; it governs when a person may obtain a credit report from a reporting agency. While PIPA sets out the circumstances in which personal information may be collected without consent, the CPA sets out the circumstances under which anyone (including an organization) may obtain a credit report from a reporting agency, and makes it an offence to collect the report in circumstances other than those prescribed. It is necessary to determine the significance of these provisions of the CPA to the issues in this case.

[para 55] The relevant provisions of the CPA are sections 43 and 44. Section 44(1) sets out circumstances under which an organization (and in some cases, specific government entities) may obtain a credit report without the consent of the person the report is about, and also some circumstances in which this may be done only with consent. Only those sections that permit an organization to obtain a credit report without consent are relevant here. The relevant parts of sections 43 and 44 of the CPA are reproduced below:

> *43 In this Part,*
>
> > *(a) "credit information" means information about an individual's name, age and place of residence and other information prescribed in the regulations;*
> >
> > *(b) "file", when used as a noun, means all of the information pertaining to an individual that is recorded and retained by a reporting agency, regardless of the manner or form in which the information is stored;*
> >
> > *(c) "personal information" means information other than credit information about an individual's character, reputation, health, physical or personal characteristics or mode of living or about any other matter concerning the individual;*
> >
> > *(d) "report" means a written, oral or other communication of credit or personal information of a type, or made in a manner, specified in the regulations;*
> >
> > *(e) "reporting agency" means a person who carries on the activity of furnishing reports as prescribed in the regulations.*
>
> ***Furnishing reports***

44(1) A reporting agency, and an officer, agent or employee of a reporting agency, may furnish a report to a person only in the following circumstances:

(a) if there are reasonable grounds to believe that the person intends to use the information in the report

…

(i.1) in connection with the collection of a debt from the individual to whom the report pertains,

...

(v) to determine the eligibility of an individual to whom the report pertains under a law, if the information is relevant to the eligibility requirement;

…

(d) if the person is the individual to whom the report pertains or if the person has the express consent of the individual to obtain the report; …

(2) No person may obtain a report from a reporting agency except in the circumstances referred to in subsection (1).

(2.1) The express consent of an individual referred to in subsection (1) must be in a verifiable form, including but not limited to writing and audio recordings.

[para 56] Under section 161(c) of the CPA, it is an offence to contravene sections 44(1) and (2) of the CPA:

161 Any person who contravenes any of the following provisions is guilty of an offence:

(c) in Part 5, sections 44(1) and (2) and 49;

[para 57] The Organization made several arguments with respect to the role of the CPA in this case.

1) Paramountcy

[para 58] The Organization argues that the provisions in section 44 of the CPA that restrict when it may obtain a credit report from a reporting agency cannot overwrite the authority it has under section 14(d) of PIPA to collect the Complainant's personal information without consent. The Organization contends that the paramountcy clause in section 4(6) of PIPA, removes consideration of the CPA regarding collection of personal information.

[para 59] Section 4(6) of PIPA states:

(6) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) the other enactment is the Freedom of Information and Protection of Privacy Act, or

(b) another Act or a regulation under this Act expressly provides that the other Act or a regulation, or a provision of it, prevails notwithstanding this Act.

[para 60] The application of a paramountcy clause was discussed by the former Commissioner in Order F2005-007. In that order, the former Commissioner considered the application of section 5 of the FOIP Act, which is substantially similar section 4(6) of PIPA. Section 5 of the FOIP Act is reproduced below:

5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para 61] In Order F2005-007, the former Commissioner considered two possible approaches to applying section 5 of the FOIP Act. The first was described at paras. 13 to 15:

Previous Orders of this Office under the FOIP Act, such as Order 2000-002, have established the approach for analyzing section 5 of the FOIP Act, as follows:

(i) I first decide whether the information falls within another enactment, or a provision of it, that expressly provides that the enactment or a provision of it prevails despite the FOIP Act. (In addition, I note that a regulation under the FOIP Act may also expressly provide that another Act or regulation, or a provision of it, prevails despite the FOIP Act, as provided by section 5(b) of the FOIP Act);

(ii) If the criteria in (i) above are met, I then decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the other enactment, or a provision of it.

Previous Orders of this Office have also said that said that [sic] the terms "inconsistent" or "in conflict with" refer to a situation where two legislative enactments cannot stand together, that is, compliance with one law involves breach of the other: see, for example, Orders 99-034 and 2000-002.

If there is an inconsistency or conflict, the other Act or regulation, or a provision of it, governs the disclosure of the information, the FOIP Act does not apply, and I do not have

> jurisdiction over the information. If there is no inconsistency or conflict, the FOIP Act applies, and I have jurisdiction over the information under the FOIP Act.

[para 62] The second approach is described at paras. 52 to 55:

> Section 5 of the FOIP Act is a "paramountcy" provision. It sets out two rules. In my view, the first and second rules in section 5 should be read independently of each other.
>
> The first rule in section 5 of the FOIP Act is that when a provision of the FOIP Act is inconsistent or in conflict with a provision of another enactment, the provision of the FOIP Act prevails. An inconsistency or conflict is resolved by applying the provision of the FOIP Act, rather than the provision of the other enactment.
>
> However, under the first rule, when there is no inconsistency or conflict between a provision of the FOIP Act and a provision of another enactment, the provision of the FOIP Act does not prevail. The provision of the FOIP Act and the provision of the other enactment both apply.
>
> The second rule in section 5 of the FOIP Act is that another Act or a regulation under the FOIP Act may expressly provide that the other Act or regulation, or a provision of it, prevails despite the FOIP Act. The second rule is independent of the first rule and does not require an analysis of whether provisions are inconsistent or in conflict. Under the second rule, the FOIP Act does not apply. The other Act or regulation, or a provision of it, applies, according to its own terms.

[para 63] Given the substantial similarity between the paramountcy provisions in PIPA and the FOIP Act, either approach described in Order F2005-007 is equally applicable to section 4(6) of PIPA. I do not need to determine which approach is proper here. Regardless of which approach I adopt, PIPA is paramount over another piece of legislation only if there is a conflict or inconsistency between them. For the reasons given below, I find there is no conflict or inconsistency between the relevant provisions of PIPA and the CPA in this case.

[para 64] The Organization does not set out which particular sections of PIPA and the CPA it believes are inconsistent with each other. Its submission on this point says only that, "In an instance where a collection contravenes the CPA, but not PIPA, PIPA is paramount and its collection provisions should prevail." Presumably, the Organization intends to suggest that permission to collect personal information without consent under section 14(d) of PIPA is inconsistent with conditions placed on obtaining a credit report from a reporting agency under sections 44(1) and (2) of the CPA.

[para 65] However, a number of provisions found in both PIPA and the CPA strongly indicate that the two statutes are meant to complement one another and work together.[1]

[1] Notably, section 14(b) of PIPA permits collection where it is permitted by another statute. Section 14(b) is reproduced below.

[para 66] PIPA specifically refers to the CPA in sections 1(1)(c) and 20(o):

> *1(1)(c) "credit reporting organization" means a reporting agency as defined in Part 5 of the Consumer Protection Act;*
>
> *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:*
>
> > *(o) the organization is a credit reporting organization and is permitted to disclose the information under Part 5 of the Consumer Protection Act;* [2]

[para 67] Reciprocally, the CPA regulations (the *Credit and Personal Reports Regulation*, AR 193/99) incorporate PIPA by reference. Section 2.1(a) of the regulations explicitly states that unless reporting agencies collect, use, and disclose information in accordance with the PIPA, the information may not be included in a report:

> *2.1 A reporting agency may include information in its reports only if*
>
> *(a) the information is*
>
> > *(i) stored in a form capable of being provided clearly and accurately to the individual who is the subject of the information or the individual's representative, and*
> >
> > *(ii) collected, used and disclosed in accordance with the Personal Information Protection Act and the Personal Information Protection and Electronic Documents Act (Canada)*

[para 68] It is also the case that the Legislature is presumed to enact statutes that are consistent with one another.[3] Thus, one piece of legislation should not be interpreted to permit doing what another piece of legislation prohibits.

> *14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*
>
> > *(b) the collection 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; … .*

[2] At the time of the events in question, PIPA referenced the former title of the CPA, which was the *Fair Trading Act.*

[3] See Sullivan, Driedger on the Construction of Statutes, 5th Ed., LexisNexis, Toronto: 2008 pp.223-225.

[para 69] Further, collection of personal information without consent is permitted under section 14(d) of PIPA *only when doing so is reasonable*. Where the relevant circumstances at play under PIPA are captured under another piece of legislation, I believe a reasonable person would consider whether those provisions inform what is reasonable under those circumstances. PIPA applies when personal information is collected, and the CPA regulates what is permissible in the particular circumstances in which collection of personal information took place in this case – obtaining a credit report from a reporting agency.

[para 70] In my view, it is not reasonable to collect personal information in the same circumstances in which it is an offence to do so. Since the scope of permission granted by section 14(d) is limited to reasonable collection, section 14(d) does not embrace collection of credit reports from a reporting agency in such circumstances.

[para 71] Accordingly, I find that section 14(d) of PIPA does not prevail over section 44 of the CPA. Both sets of provisions apply alongside of each other.

2) Jurisdiction to find that an offence has been committed

[para 72] A second argument the Organization makes respecting the CPA is that the Information and Privacy Commissioner has no jurisdiction to determine whether the CPA was contravened. The Organization also argues that since the Commissioner has no expertise in interpreting and applying the CPA, the issue of whether it collected the credit report in accordance with PIPA should not be informed by whether the collection breached the CPA.

[para 73] I agree with the Organization's assertion that I do not have jurisdiction to determine if there is a breach of the CPA, in the sense of bringing the Organization to account under that Act and imposing the related penalty. That is a matter for a court.

[para 74] However, this does not mean that I am barred from considering the terms of the CPA, nor am I barred from reaching a factual conclusion that when the information was obtained in the circumstances of the present case, there was no provision in the CPA that permitted this. I may also take into account that these are circumstances relative to which the Legislature found in appropriate to impose penalties. I understand the imposition of penalties to be comment on the reasonableness of the prohibited behaviour. The fact that I have no jurisdiction to convict a person of an offence under the CPA does not mean that I must be blind to the circumstances of this case, and the related the statutory provisions of the CPA that are directed at those circumstances.

[para 75] The same issue was discussed in Order P11-02; a decision of the British Columbia Office of the Information and Privacy Commissioner. In that Order, the Adjudicator considered whether she had jurisdiction under the *Personal Information Protection Act*, SBC 2003, c 63 (BCPIPA), to determine whether the *Business Practices*

and Consumer Protection Act, SBC 2004, c 2, had been violated. The Adjudicator's discussion at paras. 8 to12 is below:

> Economical submits that I do not have jurisdiction to decide whether insurers can collect credit scoring information for underwriting purposes. It says that the answer to this question is found in s. 108(1)(a)(iv) of the *Business Practices and Consumer Protection Act* ("BPCPA"). That section states:
>
> **To whom reports may be given**
>
> 108(1) A reporting agency must not knowingly provide any credit information about an individual in a report, except in a report given
>
> (a) to a person who, it has reason to believe
>
> …
>
> (iv) intends to use the report in connection with underwriting insurance involving the individual,
>
> Applied to this case, s. 108(1)(a)(iv) of the BPCPA authorized Equifax to provide a credit report about the Complainant to Economical for underwriting purposes.
>
> More significantly, in my view, s. 107 of the BPCPA provides:
>
> 107(1) A person must not obtain from a reporting agency a report respecting an individual for a purpose referred to in section 108(1)(a) without the consent of the individual.
>
> (2) A person may obtain the consent of the individual by any method that permits the person to produce evidence that the individual consented, including by prominently displaying the information respecting the consent in a clear and comprehensible manner in an application for credit, insurance, employment or tenancy.
>
> This section means that Economical could not obtain a credit report about the Complainant from Equifax for underwriting purposes without the Complainant's consent.
>
> The BPCPA does not say that consent within the meaning of this section is to be construed as having the same meaning as consent for the purposes of PIPA. It does not refer to PIPA at all. However, the legislature is presumed to enact statutes that do not conflict with each other. There is no indication in the BPCPA that consent for the purposes of s. 107 was intended to have a meaning inconsistent with what constitutes consent within the meaning of PIPA. In any event, even if it could be said that there is a conflict between s. 107 of the BPCPA and a provision of PIPA, s. 3(5) of PIPA expressly provides that, in the event of a conflict between a PIPA provision and a provision of another statute, the PIPA provision prevails.
>
> In the circumstances of this case, where a complaint has been made to the Commissioner under PIPA, and the Commissioner has delegated me to decide it, I have the jurisdiction to decide whether Economical's collection of the Complainant's personal information, which consisted of his credit score calculated by Equifax based on his credit information, complies

> with PIPA. To the extent that the BPCPA assists in answering that question, I may consider it. I am not deciding—and would not have the jurisdiction to decide—whether any provision of the BPCPA has been contravened.

[para 76] I note that the BC PIPA is substantially similar legislation to PIPA, and that the Commissioner's powers to determine questions of fact and law at inquiry are the same under both pieces of legislation. Under section 50(1) in each piece of legislation, the Commissioner has jurisdiction to "decide all questions of fact and law arising in the course of the inquiry."

[para 77] I agree with the BC Adjudicator. While I do not have jurisdiction to make a finding that an offence has been committed, I do have jurisdiction to take the provisions of the CPA into account. Accordingly, I find that in circumstances such as the present, in which the CPA makes it an offence to collect such information without consent in the absence of an authorizing provision, it is unreasonable to collect it.

3) Contravention of the CPA is not determinative under PIPA

[para 78] The Organization argues that whether or not it complied with the CPA is not determinative of whether it had authority to collect personal information under PIPA. To a certain extent, I agree. As mentioned, "circumstances" includes the facts of the case and the laws that apply in those circumstances. Both can inform what is reasonable.

4) Conclusion on the role of the CPA in determining reasonableness under PIPA

[para 79] Since the CPA applies to the circumstances of this case, its provisions must be considered when determining what is reasonable. They are a part of the totality of the circumstances which must be considered to determine whether collection was reasonable under those circumstances. The prohibition against obtaining a credit report outside of the prescribed circumstances, and the imposition of penalties for doing so, inform what is reasonable under PIPA.

iii) Was the credit report obtained in circumstances permitted under the CPA?

[para 80] The Organization argues that it obtained the credit report in connection with collection of a debt as permitted under section 44(1)(a)(i.1) of the CPA. In the alternative, it says that it obtained it in order to determine the eligibility of the Complainant under section 44(1)(a)(v). Those sections are reproduced below:

> *44(1) A reporting agency, and an officer, agent or employee of a reporting agency, may furnish a report to a person only in the following circumstances:*
>
> > *(a) if there are reasonable grounds to believe that the person intends to use the information in the report*

> *(i.1) in connection with the collection of a debt from the individual to whom the report pertains,*
>
> * * *
>
> *(v) to determine the eligibility of an individual to whom the report pertains under a law, if the information is relevant to the eligibility requirement;*

[para 81] I now address each of the Organization's arguments that it obtained the credit report as permitted by the CPA.

1) Did the Organization obtain the credit report "in connection with collection of a debt" under section 44(1)(a)(i.1)?

[para 82] In support of the first of its arguments (that it collected the credit report in furtherance of collection of a debt), the Organization relies upon the decision in *Carbone v. Burnett*, 2019 ABQB 98 (*Carbone*).

Carbone v. Burnett

[para 83] In *Carbone* the plaintiff and defendant (a client of the Organization) were involved in ongoing litigation and had already been through extensive litigation. The plaintiff was subject to an order for costs in favour of the Organization's client for $149,226.49. As part of efforts to collect on the outstanding costs, the Organization obtained a credit report about the plaintiff.

[para 84] Hollins, J., sitting as Case Management Justice, considered an application by the plaintiff to amend pleadings (and a cross application by the defendant to strike several statements of claim, and the proposed amendments to them). One of the amendments sought by the plaintiff was the addition of allegations that the defendant had breached PIPA when it collected personal information about her in a credit report.

[para 85] Hollins, J. denied the plaintiff's amendments under rule 3.62(1)(b) of the *Alberta Rules of Court*, on the basis that they were hopeless, and "would have been struck if pleaded originally." (*Carbone* at paras. 35 to 38.) Specifically regarding the amendments containing allegations of a breach of privacy, Hollins, J. held at paras. 41 to 46:

> Paragraphs 32-41, 48 and 49 of the proposed Amended Statement of Claim include claims that the Defendants breached the Plaintiff's privacy by commissioning a credit check without her consent on April 11, 2013. The Plaintiff calls this a "fraudulent scheme to search out her assets".
>
> Indeed, the Gowlings law firm did order an Equifax credit check respecting the Plaintiff as part of its preparation for its security for costs application, brought in the face of numerous unpaid costs awards. However, the privacy legislation relied upon by the Plaintiff allows for this. Specifically, the *Personal Information Protection Act*, SA 2003, c.P-6.5, ss.14(d) and 17(d) allow the collection and use of personal information without that individual's

> consent if the collection and use of that personal information is “reasonable for the purposes of … a legal proceeding”.
>
> Further, the Defendants’ actions were allowed under the *Consumer Protection Act*, RSA 2000, c.F-2, s.44(1) which allows such a report to be provided to a creditor in furtherance of collecting a debt, such as the costs awards which the Defendants were seeking to enforce for the benefit of Dr. Whidden. It is comparable to the procedure whereby a creditor may obtain a legal description of land owned by a debtor but only once there is a legally-recognized debt, which a Court-ordered costs award would be.
>
> For this reason, the Plaintiff cannot succeed in a breach of privacy claim grounded in Alberta’s privacy legislation. She also argues at common law for the tort of inclusion upon seclusion, based on the Ontario case of *Jones v Tsige*, 2012 ONCA 32. In *Jones, supra*, the defendant repeatedly and without authorization used her position as a bank employee to access the private financial information of her common law partner’s former wife. The trial judge summarily dismissed the lawsuit. However, the Court of Appeal overturned that decision, recognizing a common law tort of breach of privacy called “intrusion upon seclusion”, defined as the intrusion “physically or otherwise, upon the seclusion of another or his private affairs or concerns…if the invasion would be highly offensive to a reasonable person”; paras. 65, 70.
>
> Justice Sharpe, writing for the majority in *Jones, supra*, expressly limited the application of this tort to “deliberate and significant invasions of personal privacy” and even then, only where the privacy interest is paramount to possible competing claims; paras. 72-73. In *Jones, supra*, there was no competing interest to consider but here we do have a competing interest, namely the interest of Dr. Whidden in enforcing his legally-obtained order for costs. While that type of interest would not necessarily or typically defeat a privacy interest, Dr. Whidden’s counsel were employing legal methods to search for financial information to which they were entitled as representatives of a judgment creditor. This could not possibly be characterized as highly offensive on any objective basis.

[para 86] Hollins, J.’s conclusion that the amended pleadings would fail depended on her view that the collection of the credit report would fall within the language of section 14(d) of being “reasonable for the purposes of … a legal proceeding”. This conclusion was coupled with her comment that the CPA permitted the Organization’s action.

[para 87] It appears from these comments that that the court concluded that the Organization had complied with the CPA. I observe that Hollins, J. did not mention section 44(1)(a)(i.1)of the CPA specifically. However, she noted that the CPA permits a person to obtain a credit report without consent "in furtherance of collecting a debt". This is very similar to the language of section 44(1)(a)(i.1) that references an intention to use the information in a credit report in connection with collection of a debt. Thus, Hollins J. appears to have regarded the Organization as having obtained the credit report with the intention to use it in connection with the collection of the debt owed to its client, as the wording of section 44(1)(a)(i.1) specifies.

[para 88] *Carbone* may therefore be taken as standing for the proposition that where an Organization obtains a credit report from a reporting agency in compliance with the CPA, collection of the report may be reasonable for use in a subsequent legal proceeding under

section 14(d) of PIPA. The issue that must be addressed, therefore, is whether the present case involves such circumstances.

[para 89] The debt that the Organization states the credit report was in connection with is the costs its client was owed under the existing costs award. To determine whether the Organization met the circumstances under section 44(1)(a)(i.1) of the CPA, I must consider whether the Organization obtained the credit report with the intention of using it in connection with the collection of the debt owed under the existing costs award. I have broken down my reasons into considerations of the Organization's intentions, and whether the credit report could be considered to have been obtained "in connection with" the collection of a debt, as the phrase "in connection with" has previously been interpreted.

The Organization's Intention

[para 90] The Organization discusses the purposes for which the credit report was obtained in several points in its submissions. It states the following in its initial submission:

> The collection of the Credit Report was directly for the purposes of assessing the merits and preparing for the Application.

[para 91] In the affidavit in support of its submission the Organization says:

> I am informed by [a lawyer for the Organization's Client] that the Credit Report was obtained by Gowling WLG on or about May 19, 2015, in connection with the ongoing legal proceedings between the [Organization's Client] and the [Complainant's] Respondents, and specifically in connection with the Application.

[para 92] The affidavit in support of its submission also says that the Organization "decided to obtain the Credit Report since the information that could be included in the Credit Report could be relevant to the Application." [emphasis mine].

[para 93] These portions of the submission and affidavit say clearly and unambiguously that the purpose for obtaining the credit report was the application for security for costs. This purpose is clearly reflected in the application for security for costs and its supporting affidavit.

[para 94] Significantly, the application for security for costs contains *no* suggestion that it had the collection of the outstanding existing award as one of its purposes. A review of the application makes this clear. The remedies sought are laid out below. Collection of the existing costs award is not one of them.

> **Remedy claimed or sought:**
>
> 1. An Order in favour of the Defendants by Counterclaim (the "Applicants") directing the

> Plaintiffs by Counterclaim [The Complainant] (the "Respondents") to provide security for the payment of a costs award arising from the Counterclaim in the within action, in the amount of $167,249.23, or such amount as determined by this Court.
>
> 2, An Order staying the Counterclaim filed by the Respondents until the security directed by this Honourable Court is paid.
>
> 3. An Order permitting the continuation of the Applicants' claim in the within action, notwithstanding that the Counterclaim is stayed.
>
> 4. An Order directing that the security set by this Honourable Court be paid into Court within 45 days of the hearing of this Application, failing which the Respondents' Counterclaim shall be struck without further order.
>
> 5. An Order granting such further and other relief as this Honourable Court may deem just.

[para 95] The affidavit sworn in support of the application for security for costs is similarly limited to seeking security for costs, and contains no reference to collecting on the existing costs award. The purpose of the affidavit is stated thus:

> I swear this Affidavit in support of an Application for an Order directing the Plaintiffs by Counterclaim to post security for payment of a costs award in the Counterclaim.

[para 96] While the Organization makes clear that the credit report was obtained for use in the application for security for costs, the same clear purpose cannot be found in the Organization's statements in its submission or related affidavit concerning the existing costs award, or collection of the amount thereunder. As for the latter, the Organization describes what the credit report "could" or "would" be used for, rather than what it was actually being used for. As well, it does not directly address the particular existing costs award (except in one case as an item in a category), but rather, speaks about "outstanding cost awards" in plurals and generalities.

[para 97] For example, in the supporting affidavit the Organization writes that, "The Credit Report could address the issues of whether the Complainant…would be able to pay for outstanding cost awards like the one Justice…had ordered". [4] [emphasis mine]

[4] The relevant portion of the affidavit states:

> I am informed by [a lawyer for the Organization's Client] that the lawyers for the [Organization's Client] decided to obtain the Credit Report since the information that could be included in the Credit Report could be relevant to the Application. The Credit Report could address the issues of whether [the Complainant] had any assets in Alberta, whether [the Complainant] would be able to pay a costs award if one was ordered against [the Complainant], and whether [the Complainant] would be able to pay for outstanding cost awards like the one Justice [name of Justice granting the costs order] had ordered. …

[para 98] Similarly, in a passage from the Organization's initial submission it writes that its lawyers, "concluded that the Credit Report could help determine…whether [the Complainant] was capable of paying outstanding costs awards". [5]

[para 99] Read in isolation, the foregoing references could possibly be taken as assertions that one of the purposes for obtaining the credit report was to assist in collection of the existing "outstanding" costs award.

[para 100] However, in my view, the language that was chosen does not invite such a reading. Rather, the sentences are ambiguous. The Organization does not refer to the particular existing costs award, but instead refers generally to the idea of outstanding costs awards relative to which the credit report may prove useful. By employing plurals and speaking in hypothetical terms, the important distinction between the existing "outstanding" award and prospective awards (that might be granted in future should the defendant be unsuccessful, and might thereafter become "outstanding"), is blurred. It becomes impossible to determine whether the object and focus of the sentences is the existing award, or one that might yet become outstanding, or such awards in a general sense. The lack of specificity vis-à-vis the existing costs award (the only existing debt between the parties) is significant. Hollins, J. explicitly stated at para. 43 of *Carbone* that the CPA permits obtaining a credit report only once there is a legally recognized debt; not merely the prospect of one.

[para 101] I consider, too, that the Organization was doubtlessly aware of the central importance that the existing costs award has to the requirements of section 44(1)(a)(i.1) of the CPA. The Organization's submissions on section 44(1)(a) are detailed and it is familiar with the decision in *Carbone*. Given that, and the fact that the Organization is in the best position to know its own intentions, I believe an unambiguous statement that the credit report was obtained at least in part with the intention to collect the existing costs award is called for, as if such was the case. There was, however, no such unambiguous statement.

[para 102] Moreover, to the extent that the foregoing statements might be taken as assertions, they are contradicted by other assertions made by the Organization, which I

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[5] The relevant portion of the submission states:

> The lawyers for the [Organization's Client] reasonably considered the type of information that would typically be found in a consumer report, and whether it could potentially address the issues arising from the Application. They concluded that the Credit Report could help to determine:
>
> a. What assets [the Complainant] had in Alberta, and the likelihood that the [Organization's Client] would have been able to enforce an Order or Judgment against assets held by [the Complainant] in Alberta.
>
> b. Whether [the Complainant] was capable of paying for outstanding cost awards.

find are more convincing, since they were made at or near the time the credit report was obtained, rather than after the fact. I therefore prefer to rely primarily on the evidence that speaks best to the reasons that the credit report was obtained – that which reveals what those intentions were at the time when the Organization obtained it. This includes the following points, already discussed:

- The actual remedies claimed or sought in the application (which do not include payment of the existing costs award)
- The purpose for which the affidavit in support of the application was filed (which did not include payment of the existing costs award)

[para 103] Before leaving this topic I acknowledge that the existing costs award was mentioned in the application for security for costs and was also mentioned in the affidavit in support of the application for security for costs as part of the factual basis underpinning the application. However, a review of the affidavit indicates that outstanding payment of the existing costs award was merely a helpful fact to mention. Both the application and its supporting affidavit indicate that the Organization was not concerned with the Complainant's ability to pay the small debt – for $2,500.00 – that the Complainant owed. The concern was whether the Complainant would be able to pay a much larger amount ($167,249.23), should such a debt arise.

[para 104] The information in the credit report was specifically used to support the Organization's position that collecting on a large amount would be difficult since the Complainant does not have significant assets in Alberta. There is no suggestion that the information was used to suggest that the Complainant would have difficulty paying the much smaller existing costs award. Indeed, the Complainant paid the amount owing under the existing costs award months before the application for security for costs was heard.

[para 105] Based on the preceding, I see no other intention at work in obtaining the credit report than to use it to try to obtain security for a potential future costs award. There is no evidence from the relevant time that the credit report was obtained, even in part, with the intention of collecting the debt under the existing costs award. Had such an intention been present, it would have been a simple matter for the Organization, which is in the best position to know its intention, to say so unambiguously. As already noted, it did not do this. I find that the Organization has not established that it had the intention required by the CPA.

Interpretation of the phrase "in connection with collection of a debt" in section 44(1)(a)(i.1) of the CPA

[para 106] Section 44(1)(a)(i.1) of the CPA allows a person to collect a credit report for uses "in connection with" collecting debts. The Organization says that "in connection with" "would include preliminary steps in assessing the chances of success in recovery, and preparation of materials needed in furtherance of the debt collection."

[para 107] In support of its arguments that section 44(1)(a)(i.1) of the CPA was met when the credit report was obtained, the Organization referenced several precedents interpreting the meaning of "in connection with". The words were discussed in various contexts in *ONEnergy Inc. v. R.*, 2016 TCC 230 (*ONEnergy*) (reversed on other grounds in *ONEnergy v. Canada*, 2018 FCA 54), and *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 (*Nowegijick*). The words "in connection with" were given a very wide meaning in these decisions. *Nowegijick* at para. 30 describes the breadth of the terms:

> The words "in respect of" are, in my opinion words of the widest possible scope. They import such means as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between to related subject matters.

[para 108] The above passage was cited in *ONEnergy* at para. 13 when considering the use of the words "in connection with" in section 141.1(3)(a) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. Section 141.1(3)(a) reads as follows:

> *(3) For the purposes of this Part,*
>
> > *(a) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of a commercial activity of the person, the person shall be deemed to have done that thing in the course of commercial activities of the person; …* [underlining mine]

[para 109] In *ONEnergy*, the issue was whether there was a connection between a commercial activity and litigation arising out of events that led to the termination of the commercial activity. The Court observed at para. 12 that the modern custom of statutory interpretation involved a textual, contextual, and purposive analysis of a provision. Under this approach, while the Court found that "in connection with" enjoys broad meaning as stated in *Nowegijick*, it also noted, 'Certainly it is a broad expression but does not, I would suggest, even on a textual reading allow for the remotest of links, such as a link only arising by way of the "but for" test,' *ONEnergy*, at para. 17.

[para 110] The Court in *ONEnergy* also considered the discussion of "in connection with" from *Kitchener-Waterloo Real Estate Board Inc.*, v. *Ontario Regional Assessment Commissioner, Region No., 21*, [1986] O.J. No. 763 (*Kitchener*). In *Kitchener*, the Court stated,

> The word "connection" simply means that there is some relationship between two things or activities -- that they have something to do with each other. The relationship need not be purposive to constitute a connection. Many activities might be carried out in connection with a particular object, as integrally related activities, without being carried out for the purpose of that object. In this context I adopt what was said by Pennell J. in Re Grand Valley Construction Ass'n and City of Cambridge (Ont. H.C.J., unreported, February 27, 1979 [summarized [1979] 1 A.C.W.S. 272]). He was dealing there with associational activities of the construction industry. Unlike the multiple-listing service the activities of the occupant in Grand Valley were not in themselves business activities or activities which generated profit. He dealt with the words "in connection with" as follows (at pp. 13-4):

> It remains to consider the effect of the words "or in connection with" in section 7(1) which were introduced into the Act in 1947 (1947 (Ont.), c. 3, section 6). In my view, the words "in connection with" are broader in scope than the words "for the purpose of " and have extended the boundaries within which the taxing authority may assess land for business tax. However, I do not think that this form of words should be given a purely literal interpretation. In giving a fair application to the words "in connection with" the court must remember that the words are coloured by the context of the terms of the section. Merely because the preponderating purpose of the activity is related to the contracting business does not necessarily bring it within the scope of section 7. In my view the preponderating purpose of the applicant must be related to the building or contracting business not merely by loose threads but by solid ties before it could be treated as being "in connection with" the building industry as those words are used in section 7.

[para 111] I agree with the approach to defining "in connection with" taken by the Court in *ONEnergy*. The words have a very broad meaning literally, and so must be given a textual, contextual, and purposive consideration to avoid expanding the legislated provision beyond what the remaining scheme of the legislation indicates is intended. I also agree with the language in *ONEnergy* that "in connection with" does not capture the "remotest links" between two things, as well as the language in *Kitchener* that the words "in connection with" refer to a relationship founded on "solid ties" and not mere "loose threads."

[para 112] The Organization argues that a connection between obtaining the credit report and collection of the debt owed to its client under the existing costs award is established in the following ways.

[para 113] First, it contends that, while obtaining security for future costs was the primary remedy sought in the security for costs application, the existing costs award was outstanding (at the time when the application was filed), and it was open to the Court to enforce it.

[para 114] Second, it contends that even though the existing costs award was paid by the Complainant in September 2015, before the application for security for costs was heard in November 2015, the application for security for costs may have had the effect of expediting payment of the existing costs award by highlighting that the amount was still owing.[6]

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[6] The relevant portion of the Organization's submission on these points is as follows:

> While the primary remedy being claimed or sought during the Application was to compel [the Complainant] to provide new security in the amount of $167,249.23 the Application was also "in connection" with the previous $2,500.00 cost award that had not yet been paid.
>
> The fact that there was an outstanding cost award was directly referenced in the Application and the [Organization's client] Affidavit as a consideration for the court, and it was open for the court to provide other relief as may be appropriate in the circumstances, and deal with that outstanding award simultaneously. Ultimately, the court did not have to take this step when it heard the Application in November 2015, as the $2,500.00 cost award was paid to the [Organization's

[para 115] I find that neither of these arguments establishes that the credit report was obtained "in connection with collection of a debt" as contemplated under the CPA.

[para 116] First, as already noted, this remedy was not requested in the written application, nor was it suggested that it was requested orally, and it is entirely speculative to suggest the Court would grant such a remedy superfluously. Second, the Organization does not make clear what purpose would be served by the Court's "dealing with" the existing costs award, since the original award was in itself a court order that the costs be paid. Possibly the Organization is suggesting the court could have made payment of the award a condition for the litigation to proceed. However, even if there had been any likelihood this would happen without its being requested, it would be indicative of the Court's thoughts on how further litigation should proceed; it would not establish a connection between the existing costs award and the credit report.

[para 117] Regarding the suggestion that the application for security for costs might have expedited payment, the suggestion is pure speculation. Even if the advent of the security for costs application had prompted the Complainant to pay the debt promptly, that salutary effect would be indicative of the Complainant's response to the application for security for costs; it would not indicate any connection between such an expedited payment and the credit report.

[para 118] As far as I can see on the evidence before me, the only "connection" between the existing costs award and the credit report is that both were used as evidence in the security for costs application. Even applying the very broad, literal meaning of "in connection with", unbounded by a textual, contextual, and purposive analysis, any "connection" between the credit report and the debt owed as result of the existing costs award is beyond even the "remotest link" contemplated in *ONEnergy*.[7] It was the belief that it would be difficult to collect on much larger debt, should one come to be owed, that drove acquisition of the credit report.

[para 119] Alternatively, to use the words endorsed in *Kitchener*, the ties between the credit report and collection on the existing costs award are merely "loose threads". Even if the information in the credit report had turned out to be helpful in collecting the debt, the fact that the Organization had collected the information was merely coincidental to the debt, and not strongly tied to it. It is an unrelated piece of background scenery in the circumstances in which the Organization obtained the credit report.

Conclusion regarding "in connection with collection of a debt"

Client] in September 2015. However, the Application may have had an impact in highlighting the outstanding costs award, and expediting payment

[7] Because the "connection" falls beyond the remotest link, I find have no need to delve deeply into a textual, contextual, and purposive analysis of "in connection with" in this matter. It is clear that the "connection" falls outside of the accepted boundaries.

[para 120] To conclude, I do not find that the Organization obtained the credit report with the intention of using it in connection with collecting a debt as contemplated by section 44(1)(a)(i.1) of the CPA. The requisite intention and connection are absent.

2) Was the credit report obtained in order to determine the Complainant's eligibility under section 44(1)(a)(v)?

[para 121] The Organization has also briefly argued that it obtained the credit report pursuant to section 44(1)(a)(v) if the CPA, which states:

> *44(1) A reporting agency, and an officer, agent or employee of a reporting agency, may furnish a report to a person only in the following circumstances:*
>
> > *(a) if there are reasonable grounds to believe that the person intends to use the information in the report*
> >
> > > *(v) to determine the eligibility of an individual to whom the report pertains under a law, if the information is relevant to the eligibility requirement;*

[para 122] In this regard, the Organization proposes that the credit report was obtained in order to determine if the Complainant was "eligible" to be subject to a security for costs award. The argument relies on an understanding of the word "eligible" that particularly suits the Organization's case, but is inconsistent with the plain reading of the term as it used in this section. That context suggests a qualification or entitlement to receive something under the law, such as a benefit or advantage, in contrast to being subject to the imposition of a disadvantage. The suggested interpretation would amount to permitting a person to obtain a credit report any time they wanted to determine if an adverse litigant could be subject to any type of monetary/security order. I reject this argument.

[para 123] The Organization advances no further argument that it obtained the credit report pursuant to the CPA. I cannot see that credit report was obtained in any of the other circumstances permitted under the CPA.

3) Orders P2017-08 and P2017-05

[para 124] The Organization also made arguments relative to the CPA relying on two orders of this office. It relied on Order P2017-08 in support of its position that even if an organization engages in unlawful or otherwise contestable conduct in the course of collecting information, that fact has no bearing on determining whether collection, use, or disclosure is reasonable under PIPA. However, I do not find that Order P2017-08 is relevant to the facts of this matter.

[para 125] In Order P2017-08, the complainant's former employer obtained his personal information from his WCB file. The former employer passed that information to its lawyers at the respondent organization, Bishop & McKenzie. The law firm used information from the WCB file to amend a statement of claim to include allegations of

defamation against complainant. The complainant argued that his former employer obtained his personal information under false pretenses. On that basis, the complainant argued that the law firm's collection of his personal information from his former employer was not permitted under PIPA. Regarding collection of the personal information, the Adjudicator held at para. 15:

> Both the Complainant and Organization seem to be in agreement that the purpose of the collection was to further litigation against the Complainant. While the Complainant believes that the Complainant's [sic] client collected the information under false pretenses, I do not believe that this is determinative of whether the Organization had the authority pursuant to section 14(d) of the Act to collect the information from its client. Therefore, I find that the Organization's collection of the Complainant's personal information was permitted pursuant to section 14(d) of the Act. I also believe that this was reasonable but I will discuss that in greater detail below.

[para 126] In discussing subsequent uses and disclosures of the WCB, the Adjudicator also referenced an agreement between the WCB and Bishop & McKenzie's client; the agreement governed permitted uses for the information. The complainant in Order P2017-08 alleged that since the use of his personal information violated the agreement between the WCB and his former employer, the law firm's uses and disclosures of the information were not reasonable under PIPA. The Adjudicator concluded at paras. 20 and 21,

> The use/disclosure of the information from the WCB complaint was not for a purpose listed in the agreement signed by the Organization's client when the client collected the information from the WCB complaint. That being said, it is within the WCB's jurisdiction to enforce its own agreements. The fact that the agreement was breached is not determinative of whether the Organization had or did not have authority under section 17(d) and 20(m) of the Act to use/disclose the Complainant's personal information.
>
> Both the civil claim and the defamation claim would be considered legal proceedings as defined in section 1(1)(g) of the Act because there is a remedy in law for both breach of contract and defamation. I believe that the use/disclosure was for the purpose of a legal proceeding. Therefore, I believe that the use/disclosure of this information to as part of an Affidavit in support of a defamation claim was reasonable for the purpose of the legal proceeding.

[para 127] The Adjudicator did not set out the terms of the agreement. However, it appears that it was a private agreement between the WCB and Bishop & McKenzie's client. The power to enforce the terms of the agreement rested with the WCB as a party to it. I also note that the Adjudicator did not specify any section of the WCB or other legislation (apart from PIPA) that governed the disclosure of the information.

[para 128] There are several crucial factual differences between the facts in Order P2017-08, and the present matter. Bishop & McKenzie's *client* was the one that obtained the information from the WCB under allegedly false pretenses. The law firm's client was also the one bound by the agreement with the WCB; the law firm was not. There was no need in that case to consider whether an organization may collect information under

section 14(d) in contravention of an agreement or under false pretenses. The breach and the "false pretenses" were the actions of the complainant's former employer; the law firm's conduct was not impugned in the same way.

[para 129] Additionally, no reference appears to have been made to any statute, other than PIPA, that governed either the former employer's, or the law firm's collection of the information, or subsequent uses and disclosures of it. There was no issue of whether the law firm collected the complainant's personal information in circumstances that amount to an offence.

[para 130] I have also considered Order P2017-05, upon which the Organization also relies in support of its position that collection was reasonable under section 14(1)(d). Order P2017-05 dealt with facts related to those in Order P2017-08. In Order P2017-08 the respondent was the law firm who collected the complainant's personal information from his former employer. In Order P2017-05, the respondent was the former employer itself, which collected the complainant's personal information from the WCB, pursuant to an agreement between them.

[para 131] The terms of the agreement were set out in Order P2017-05, The agreement specified that the information would only be used for limited reasons:

> …to "facilitate return to work planning, understand progress of medical and vocational rehabilitation and decision made by the WCB" or "contemplate and/or advance a Review before the Dispute Resolution and Decision Review Body or Appeal before the Appeals Commission." Order P2017-05 at para. 24.

[para 132] The Adjudicator in Order P2017-05 found that the complainant's former employer collected the information for the purposes of addressing the complainant's WCB claim, and that this was *not* in contravention of the agreement. The Adjudicator found that collection was permitted under section 14(d) of PIPA since the WCB claim met the definition of "legal proceeding" under PIPA.

[para 133] Regarding collection of personal information, there are crucial distinctions between the facts in Order P2017-05 and those in this case. In Order P2017-05, the complainant's former employer was not in breach of the agreement when it collected his personal information, nor is there any suggestion that collection in the circumstances amounted to an offence.

[para 134] The Adjudicator in Order P2017-05 went on to consider subsequent uses/disclosures of the information from the WCB file. Specifically, the Adjudicator considered that the complainant's former employer passed the information on to its legal counsel, which used the information in a civil claim, to commence another claim against the complainant for defamation.

[para 135] The Adjudicator in Order P2017-05 concluded that these uses/disclosures did not conform to the conditions on use of information that had been set out in the agreement with the WCB. (Order P2017-05 at para. 35.) Regarding whether the

complainant's former employer had authority to use/disclose the information under sections 17(d) and 20(m) of PIPA, the Adjudicator held at paras. 35 and 36:

> Indeed, it appears that the Organization was in violation of the WCB's conditions regarding the use of the information when it used/disclosed the Complainant's personal information for the purposes of advancing the civil claim or adding a new claim of defamation to the existing civil claim. That being said, it is within the WCB's jurisdiction to enforce its own agreements. The fact that the agreement was breached is not determinative of whether the Organization had or did not have authority under section 17(d) and 20(m) of the Act to use/disclose the Complainant's personal information.
>
> Both the civil claim and the defamation claim would be considered legal proceedings as defined in section 1(1)(g) of the Act because there is a remedy in law for both breach of contract and defamation. It is clear from all of the information before me that the relationship between the Complainant and the Organization was acrimonious and that each party viewed the actions of the other as retaliation for one thing or another. Therefore, particularly given the relationship between the Organization and the Complainant, I believe that the use/disclosure of this information to legal counsel and as part of an Affidavit in support of a defamation claim was reasonable for the purpose of the legal proceeding.

[para 136] I acknowledge the Adjudicator's conclusion that the use and disclosure of the information at issue in that case was not unreasonable despite the fact that the agreement between the employer and the WCB was breached in the course of the use and disclosure. However, in my view, it is key that the *collection* of the information did not involve breach of the agreement. Once the information was validly in the Organization's possession, the only question was whether use or disclosure were reasonable for the purposes of a legal proceeding. Thus, the Adjudicator in Order P2017-05 was left to consider reasonable use for the purpose of a legal proceeding on the facts of the case. I accept the Adjudicator's conclusion that since it became clear that the information was of a type that would support bringing legal proceedings, given the facts of that case, it became reasonable at that point to use that information for the purpose of a legal proceeding.

[para 137] Further, in my view, breaching an agreement is fundamentally different from taking an action that can constitute an offence. A breach of an agreement is a choice that can be made as a matter of strategy and risk management. To use the circumstances in Order P2017-05 as an example, the complainant's former employer had the option to risk becoming a defendant in a civil legal action for breach of the agreement, brought by the WCB, in order to advance the lawsuit against the complainant. Legislative prohibitions are a more serious matter. Restrictions and prohibitions encoded in legislation bind the public. There is no option to contravene them; rather, they set a standard of conduct that the Legislature has declared must be adhered to, on pain of penalty enforced by the state.

[para 138] Further with respect to Order P2017-05, the Organization also argues as follows in support of its position that its collection was permitted under section 14(d):

> In Order P2017-05, the Adjudicator held that the organization's collection, use and

> disclosure of personal information was reasonable under ss. 11(1), 16(1) and 19(1), as defending or advancing a legal proceeding was considered to be a reasonable purpose in itself. Additionally, the Adjudicator found it was reasonable for the organization to provide all the personal information it collected to its legal counsel in order to get advice on its legal options, and for legal counsel to collect all of the information so that it could properly advise its client.

[para 139] Regarding the reasonableness of the collection, use, and disclosure on the part of the complainant's former employer, the Adjudicator in Order P2017-05 held as follows (at paras. 37 and 38):

> Sections 11(1), 16(1), and 19(1) of the Act require that an organization may only collect/use/disclose personal information for purposes that are reasonable.
>
> I have found that the collection/use/disclosure of the Complainant's personal information was done for the purposes of a legal proceeding. I find that defending or advancing a legal proceeding is a reasonable purpose.

[para 140] A close review of the Adjudicator's reasons makes it clear that the Organization's argument is untenable. The Organization suggests that if collection for the purpose of a legal proceeding is collection for a reasonable purpose under section 11(1), then collection for that purpose is reasonable under section 14(d).

[para 141] This argument fails to distinguish between collection for a reasonable purpose and collection that is reasonable for the (reasonable) purpose. Simply because a purpose is a reasonable one for which to collect information, does not mean all collection of personal information for that purpose is reasonable. There are reasonable and unreasonable ways to go about collecting information, no matter how sound the purpose for collection may be.

iv) Other relevant considerations

[para 142] As noted, in determining whether the collection of the credit report was reasonable for the purposes of a legal proceeding under PIPA, I must consider all relevant circumstances. Accordingly, beyond my finding that the credit report was not obtained under the circumstances prescribed in sections 44(1) and (2) of the CPA, I must consider any other relevant factors or arguments presented by the Organization.

1) Other cases in which credit reports were used in applications for security for costs

[para 143] The Organization pointed to five cases in which a credit report, or other information from Equifax, was used in an application for security for costs. The cases are as follows:

- *Home Exchange (Alberta) Ltd.* v. *Goodyear Canada Inc.*, 2001 ABQB 672;

- *Tim Keith Contracting Ltd.* v. *Richform Construction Supply Co.*, 2010 BCSC 1861;
- *Briardown Estates Inc.* v. *Robinson Estate*, 2007 Carswell Ont 5809;
- *Delta Muskoka General Contractors Inc*. v. *Ophelders*, 2011 ONSC 4345; and,
- *Platinum Infrastructure Inc*. v. *Powerline Plus Ltd.*, 2018 ONSC 6891.

[para 144] None of these cases concern personal information of an individual, and the circumstances under which the credit information was obtained is not discussed. Other than the marginally relevant fact that information in a credit report can be relevant to an application for security for costs, these cases add nothing to the determination of whether collection was reasonable under section 14(d) of PIPA.

2) Section 4(5)(b) of PIPA – information available by law

[para 145] The Organization also pointed to section 4(5)(b) of PIPA, which provides:

> *4(5) This Act is not to be applied so as to*
>
> *(b) limit the information available by law to a party to a legal proceeding, … .*

[para 146] The Organization argues, and I agree, that section 4(5)(b) informs what is reasonable under PIPA. Since the Organization's client is a party to a legal proceeding, I could not apply section 7 of PIPA to limit the Organization's ability to collect information that was available to its client by law.

[para 147] However, in the circumstances of this case, a finding that collection was not reasonable is not contrary to section 4(5)(b). The information in this case is personal information that is contained in a credit report issued by a reporting agency. Such information is only available by law to any person (including the Organization and its client) under the circumstances enumerated in the CPA. Since the Organization collected the information outside of those circumstances, the information was not available to it or its client by law.

v) *Conclusion regarding reasonableness of the collection for the purposes of the legal proceeding*

[para 148] I have considered the total circumstances as they have been described in this order, including the following, in particular:

- The Organization's client was involved in ongoing litigation with the Complainant.
- The Organization was concerned about the Complainant's ability to pay costs in the event of a future costs award.
- The personal information in the credit report was relevant to determining the Complainant's ability to pay costs.

- The credit report was obtained to support an application for security for costs, which was successful.
- The credit report was obtained from a reporting agency, which are circumstances regulated by the CPA in sections 44(1) and (2).
- The credit report was not obtained under the permitted circumstances enumerated in sections 44(1) and 44(2) of the CPA.

[para 149] I also consider that under section 161(c) of the CPA, it is an offence to contravene sections 44(1) and (2) of the CPA. Section 161(c) is reproduced again for ease of reference:

> *161 Any person who contravenes any of the following provisions is guilty of an offence:*
>
> *(c) in Part 5, sections 44(1) and (2) and 49*;

[para 150] I find that while the collection was for a reasonable purpose (the legal proceeding), it was done in circumstances in which doing so is not permitted by sections 44(1) and 44(2) of the CPA. I cannot see how a reasonable person would consider it appropriate to collect personal information for the purposes of a legal proceeding, when doing so under the circumstances is an offence. [8] Neither do I see any circumstances at

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[8] The Complainant relies on Order P2018-09 in support of his position that collection of his personal information in the credit report was unreasonable by reference to the CPA. The Organization replies that any comments from Order P2018-09 respecting the interplay between PIPA and the CPA are *obiter*.

While the circumstances in Order P2018-09 engage the CPA and PIPA, the Adjudicator did not make any conclusive findings regarding whether or not collecting personal information in contravention of the CPA was reasonable. She concluded, at paras. 19 to 21,

> Section 44(2) makes it an offence for a person to collect a credit report (and the information it contains) for any purpose other than those enumerated in section 44(1). Collecting a credit report for the purpose of litigation is not a purpose authorized by section 44(1). If it were the case that the Organizations collected the Complainant's credit report from a credit reporting agency, it would be arguable that it would not be reasonable to collect the personal information for legal proceedings, given that it would be an offence under section 44(2) of the CPA to do so.
>
> I asked the Complainant to gather evidence as to whether her credit report had been accessed from a credit reporting agency. She responded:
>
> …
>
> From the Complainant's response to my question, I conclude that neither of the Organizations accessed her credit report from a credit reporting agency. As a result, section 44(2) of the CPA is not engaged.

In this case I reach the conclusion that the collection of the credit report was unreasonable because it was done in circumstances that were not compliant with the CPA, which is the reasoning suggested in the Adjudicator's *obiter* comments. However, I do not do so because I believe myself to be bound by this suggestion. Rather, I agree with the reasoning underlying what she described as an "arguable" outcome.

work in this case that would lead to a conclusion that committing an offence was a reasonable course of action, if it ever could be said to be. The parties were simply involved in commercial litigation.

[para 151] Taking all of the foregoing circumstances into account, and the arguments of the parties, I find that the Organization's collection of the credit report was not reasonable for the purposes of a legal proceeding, and that it did not have authority to collect the Complainant's personal information in the credit report without consent under section 14(d).

[para 152] I note that in Order P2017-05, the Adjudicator's conclusion that use/disclosure were reasonable followed on her conclusion that collection was reasonable to begin with. The same is not the case here, as already discussed.

2. *Use and Disclosure of the Credit Report*

[para 153] Since the Organization did not have authority to collect the Complainant's personal information, it follows that it would not be reasonable to use and disclose the Complainant's personal information under sections 17(d) and 20(m).

3. Conclusion with regard to section 7(1)

[para 154] Since the Organization did not have authority to collect, use, and disclose the Complainant's personal information under sections 14(d), 17(d), and 20(m), I find that it has not complied with section 7(1).

ISSUE C: Did the Organization collect, use, or disclose the information contrary to, or in accordance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use, and / or disclosure for purposes that are reasonable)?

[para 155] Sections 11(1), 16(1), and 19(1) are reproduced below:

> *11(1) An organization may collect personal information only for purposes that are reasonable.*
>
> * * *
>
> *16(1) An organization may use personal information only for purposes that are reasonable.*
>
> * * *
>
> *19(1) An organization may disclose personal information only for purposes that are reasonable.*

[para 156] The same standard of reasonableness discussed in regard to section 14(d) applies to these sections.

[para 157] I refer to my earlier comments that simply because a purpose is a reasonable one for which to collect information, it does not mean that collection for that purpose is automatically reasonable. The reverse is true as well. Simply because the particular mode of collection was not reasonable *for* the purposes of a legal proceeding under section 14(d), does not mean that a legal proceeding is not a reasonable purpose for collection. An organization can carry out collection the wrong way under section 14(d), while still doing so for a reasonable purposes under section 11(1).

[para 158] I find that the Organization complied with section 11(1).

[para 159] Similar reasoning applies to consideration of use and disclosure for a reasonable purpose under sections 16(1) and 19(1) of PIPA. While the *use and disclosure* were unreasonable under sections 17(d) and 20(m), the *purpose* of use and disclosure under sections 16(1) and 19(1) is a reasonable purpose.

[para 160] I find that the Organization complied with sections 11(1), 16(1), and 19(1).

ISSUE D: Did the Organization collect, use, or disclose the information contrary to, or in accordance with sections 11(2), 16(2), and 19(2) of PIPA (collection, use and / or disclosure to the extent reasonable for meeting its purposes in collecting, using, and / or disclosing the information?

[para 161] Sections 11(2), 16(2), and 19(2) are reproduced below:

> *11(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.*
>
> * * *
>
> *16(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.*
>
> * * *
>
> *19(2) Where an organization discloses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is disclosed.*

[para 162] The Organization argues that its collection was to a reasonable extent. It observes that there are no restrictions in the *Alberta Rules of Court* that limit what information may be used in an affidavit in support of an application. The Organization also notes that it is for the Court to decide what evidence should be admitted in an application, and how much weight to afford it.

[para 163] In general, I agree with the Organization's submissions on this point. However, as stated above, collecting personal information from a reporting agency outside of the circumstances enumerated in section 44 of the CPA is prohibited and

constitutes an offence. As I have found that the credit report was obtained in circumstances in which this was not permissible under the CPA, and would constitute an offence, it seems obvious to me that the information was not collected to a reasonable extent.

[para 164] Therefore I find that the Organization collected the Complainant's personal information in contravention of section 11(2).

[para 165] Since the Organization collected the Complainant's personal information beyond a reasonable extent, it follows that any subsequent uses and disclosures were also beyond a reasonable extent. I find that the Organization used and disclosed the Complainant's personal information in contravention of sections 16(2) and 19(2).

[para 166] I note that this decision does not resolve how, if at all, a court wishes to deal with evidence submitted to it, when that evidence has been collected under the same circumstances as in this case. Those decisions are the courts' alone.

IV. ORDER

[para 167] I make this Order under section 52 of PIPA.

[para 168] I order the Organization to cease collecting, using, and disclosing the Complainant's personal information in contravention of PIPA.

[para 169] I order the Organization to destroy all of the personal information about the Complainant collected in the credit report. This does not include the copy of the credit report that is contained in court files or any copy made from such a copy, since such documents are outside of the scope of PIPA.

[para 170] I order the Organization to confirm to me, and the Complainant, in writing that it has complied with this Order, within 50 days of receiving it.

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John Gabriele
Adjudicator