



OFFICE OF THE
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Order P11-02

ECONOMICAL MUTUAL INSURANCE COMPANY

Nitya Iyer, Adjudicator

May 6, 2011

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Summary: A man complained that Economical had obtained his credit score without his consent when it renewed his homeowner's insurance. Economical argued on a number of grounds that it was authorized to collect the credit score. The adjudicator found that the purpose for which Economical collected the complainant's credit score was one that a reasonable person would consider appropriate in the circumstances within the meaning of s. 11. She also found that Economical was not requiring consent for collection beyond what is necessary within the meaning of s. 7(2), that there was no deemed consent under s. 8 and that the notice Economical provided for collection of the credit score was not adequate for the purposes of ss. 10(1)(a) and 7(1). The adjudicator concluded that it was not appropriate to consider in the circumstances whether the complainant had given express consent to the collection. The adjudicator ordered Economical to stop collecting and using personal information it had collected in contravention of PIPA, to review the consents it has provided to insurance applicants and to provide adequate notice to its applicants. Once it has provided adequate notice and obtained consents, Economical may resume collecting and using credit scores.

Statutes Considered: *Personal Information Protection Act*, ss. 6, 7, 8, 10, 11. *Business Practices and Consumer Protection Act*, ss. 107 and 108.

Authorities Considered: **B.C.:** Order F07-10, [2007] B.C.I.P.C.D. No. 15; Order P05-01 (*Gostlin*), [2005] B.C.I.P.C.D. No. 18; Order P09-01 (*Cruz Ventures*), [2009] B.C.I.P.C.D. No. 16; Order P09-02 (*Shoal Point*), [2009] B.C.I.P.C.D. No. 34. **Alta.:** Order No. P2010-12, [2010] A.I.P.C.D. No. 67; P2007-006, [2008] A.I.P.C.D. No. 19.

Cases Considered: *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94.

Authors Considered: *Driedger on the Construction of Statutes*, 5th ed., LexisNexis, Toronto: 2008; *Collection of Driver's Licence Numbers Under Private Sector Privacy Legislation – A Guide for Retailers*, http://www.oipc.bc.ca/pdfs/private/guide_edl_e.pdf.

1.0 INTRODUCTION

[1] This case arises under the *Personal Information Protection Act* (“PIPA”). It concerns the collection of a credit score (a number derived from some of the information in an individual’s credit report) by an insurance company for the purpose of assessing the individual’s future risk of loss when his/her homeowner’s insurance policy comes up for a renewal. This case is not about the validity of using credit scores in the underwriting of insurance for insurance purposes or about the compilation of a credit score by a credit reporting agency. It is about whether the collection of a credit score by an insurer for the purpose of assessing risk complies with PIPA.

[2] The Complainant and his spouse applied for homeowner’s insurance with the Federation Insurance Company of Canada (“Federation”) in 2003. The application form contained a statement consenting to Federation’s collection of certain personal information. Economical Mutual Insurance Company (“Economical”) subsequently acquired Federation, the Complainant’s homeowner’s insurance policy was transferred to Economical and the Complainant was notified of the transfer. In 2008, the Complainant and his spouse made a claim under their policy and were paid under it. In 2009, the Complainant learned that Economical had obtained certain information from his credit record when it was determining whether to renew the policy. He complained, first to Economical and then to the Information and Privacy Commissioner for BC (“Commissioner”), that he had not consented to Economical obtaining this information.

[3] Investigation by the Office of the Information and Privacy Commissioner (“OIPC”) did not resolve the matter and it proceeded to inquiry. The OIPC invited representations from the Complainant, Economical and potential intervenors. The Complainant, Economical and seven intervenors provided submissions. The participating intervenors are: the BC Freedom of Information and Privacy Association (“FIPA”), Equifax Canada Inc. (“Equifax”), the Insurance Bureau of Canada (“IBC”), TransUnion of Canada, Inc. (“TransUnion”), the Insurance Brokers Association of British Columbia (“BC Brokers”), the Consumers Council of Canada (“Council”) and the Canadian Association of Direct Response Insurers (“CADRI”).

[4] After the close of submissions in December 2010, Equifax notified the OIPC of a recent finding of the Office of the Privacy Commissioner of Canada (“Federal Commissioner”) under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) that it said was very similar to the facts and issues in this case. The OIPC invited the participants to make supplementary submissions on this issue and some did so.

[5] On March 15, 2011, the Commissioner delegated me to hear this complaint.

2.0 ISSUES

[6] The issues in this inquiry concern ss. 6, 7, 8, 10 and 11 of PIPA. There is no dispute that the burden of proof lies on each party to provide information and submit arguments to justify its position on the issues.

3.0 DISCUSSION

[7] **3.1 Preliminary Matters**—I will begin with some preliminary issues that arose during this inquiry.

Jurisdiction

[8] 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,

[9] 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.

[10] 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.

[11] This section means that Economical could not obtain a credit report about the Complainant from Equifax for underwriting purposes without the Complainant's consent.

[12] 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 other¹. 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.

[12] 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.

[13] Accordingly, I find that I have the jurisdiction to consider the issues before me.

Other matters

[14] Economical objected that the issue stated in the Notice of Inquiry was overly broad and that the Fact Report failed to include salient facts. The Registrar of Inquiries for the OIPC noted these objections and said that they would be considered along with Economical's submissions.

[15] The issue stated in the Notice of Inquiry is:

¹ See Sullivan, *Driedger on the Construction of Statutes*, 5th ed., LexisNexis, Toronto: 2008, pp. 223-225.

...whether the organization was authorized by PIPA to collect the complainant's credit information to assess risk prior to providing him with homeowner's insurance.

[16] After the Notice of Inquiry and the Fact Report were issued, the Registrar wrote to the parties and intervenors to specify that the sections of PIPA in issue in the inquiry were ss. 6, 7, 8, 10 and 11, and that the Notice of Inquiry and Fact Report should have included this information.

[17] Economical says the statement of the issue should refer to the factual context of the complaint, specifically, that the Complainant had made a claim under the policy, that the policy was up for renewal, that the information collected was a credit score and that it was collected for the purpose of making a decision about renewal.

[18] With respect to the Fact Report, Economical says that it should have stated that the Complainant made a claim under the policy in September 2008, which was paid out. Further, it should have stated that the Complainant's policy was up for renewal in 2009 and that Economical had a practice of referring to underwriting any policy up for renewal upon which a claim had been made.

[19] The purpose of stating the issue in a Notice of Inquiry is simply to give the parties notice of the scope of the inquiry so that they can present relevant evidence and make useful submissions. That occurred in this case and the Notice served its purpose. The parties' evidence and submissions address the issue and present relevant evidence. There is no need to amend the Notice.

[20] Similarly, the Fact Report is not a complete or conclusive recital of all facts. It is the Investigator's summary of the basic facts and provides some context for the issues. However, the adjudicator's factual findings must be based on the evidence before her. The participants in this inquiry tendered evidence and, as set out below, my findings of fact are based on that evidence. There is no need to amend the Fact Report at this time.

[21] Economical also submits that I should not accept the Complainant's submission because it was filed out of time. The Complainant's submission was filed on December 21, 2010, five days after the revised deadline for initial submissions. Economical and the other participants had a full opportunity to respond to it in their reply submissions. Economical has not pointed to any prejudice arising from this delay. I have therefore considered the Complainant's submission.

[22] Economical also suggests that the OIPC "encouraged" the Complainant to file a submission and that this may be "indicative of bias" towards the

Complainant.² This submission appears to be based wholly upon the first paragraph of the Complainant's submission:

First, let me apologize for my late response. In a recent conversation with Cindy Hamilton [OIPC's Registrar], I was encouraged to submit my perspective on this matter.

[23] Nothing in this passage suggests bias. Read in context, it simply signifies that the Registrar encouraged the Complainant to participate in the inquiry by making a submission. This is not only useful, it is appropriate in circumstances where a party is unfamiliar with OIPC's processes. It in no way suggests that the Registrar or OIPC would give special consideration or weight to the Complainant's submission. There is no indication of bias.

[24] **3.2 Facts**—Economical, Equifax and IBC submitted affidavit evidence. The BC Brokers submitted documentary information, including published studies. The Complainant did not submit any evidence, but his written submission included his recollection of events.

The application for insurance and claim made under it

[25] In June 2003, the Complainant and his spouse applied to Federation for homeowner's insurance. Their application was made on the standard Centre for Study of Insurance Operations ("CSIO") form. CSIO creates and maintains standard forms for use by the Canadian property and casualty insurance industry. The Complainant and his spouse were both named as applicants and information about both was provided on the form. Only the Complainant's spouse signed the form.³

[26] The information under the heading "Disclosure" on the CSIO application form included the following consent statement, which became a term of the insurance contract when Federation approved the application:

The Applicants agree that reports containing personal, credit, factual record, premium payment or claims history information may be sought or exchanged in connection with this application for insurance or renewal, extension, variation or cancellation thereof.⁴

[27] The CSIO form itself is dated October 1996.⁵ I infer that this was the date that CSIO adopted the form.

² Economical Reply Submission at para. 31.

³ Complainant's Submission; Exhibit "A" to Affidavit of Richard Seip; BC Brokers' Submission.

⁴ Exhibit "A" to Seip Affidavit.

⁵ Exhibit "A" to Seip Affidavit.

[28] PIPA came into force January 1, 2004. Subsequently, Economical purchased Federation. As policies issued by Federation came up for renewal in 2007-08, Economical provided renewal policies to policyholders, along with a letter informing them that, as a result of the transaction, Federation policies were now being underwritten by Economical and Economical was now their insurance provider. The letter also stated that policyholders' insurance brokers had not changed and referred them to their broker or Economical's website for more information. Economical says that it sent this letter to the Complainant.⁶

[29] Economical tendered its Privacy Statement and its Privacy Policy in evidence. Both documents are dated June 2010, after the date that the complaint was made. There is no evidence as to whether these documents existed or what they said before this date. The Privacy Statement is available on Economical's website. It states that Economical collects personal information from third parties, such as insurance brokers, insurance industry databases, governmental authorities, claims investigation organizations and regulatory organizations, and that the information collected may be used to make decisions about eligibility for insurance, administration of an insurance policy and processing of claims. It also says that comments, concerns or complaints about "your personal information or our privacy policy" should be directed to named individuals. It is not clear from this that Economical's Privacy Policy is actually a separate and much more detailed document than its Privacy Statement. Schedule B to the Privacy Policy expressly states that Economical may collect credit information for the purpose of obtaining an "insurance rating score".⁷

[30] In September 2008, the Complainant's home was burgled. A Property Loss Notice dated September 13, 2008 identified the Complainant and his spouse as the insureds and Economical as the insurer, and stated the policy number.⁸

[31] On September 15, 2008, Economical wrote to the Complainant and his spouse, confirming that their claim had been received from their insurance broker, providing them with a proof of loss form and notifying them that the deadline for a claim in respect of this loss was September 13, 2009.⁹

[32] The Complainant and his spouse submitted the proof of loss form on August 29, 2009. On October 9, 2009, Economical wrote to the Complainant and his spouse rejecting the proof of loss document because it did not contain sufficient information. Subsequently Economical made an offer to settle the claim and issued a cheque to the Complainant and his spouse on November 2, 2009. Both endorsed it.¹⁰

⁶ Affidavit of Catherine Coulson, para. 13.

⁷ Exhibit "A" to Affidavit of Dan Little.

⁸ Complainant's Submission; Seip Affidavit, para. 9; Exhibit "A" to Affidavit of Carol Ann Wiebe.

⁹ Wiebe Affidavit, Exhibit "B".

¹⁰ Wiebe Affidavit, Exhibit "C"; Seip Affidavit, Exhibit "B".

[33] In his submission, the Complainant states that he only decided to file a claim in the summer of 2009, although he acknowledges having reported the loss to his insurance broker at the time of the theft.

[34] Based on the documentary evidence, I find that the claim was filed with Economical in September 2008. The Complainant may have decided to pursue his claim in 2009 because, as he says, he was unhappy when he discovered Economical had made an inquiry into his credit report at that time, but he had actually already initiated the claims process right after the burglary in September 2008.

The credit inquiry respecting the complainant

[35] Economical's general practice is to automatically renew homeowner policies. However, where a claim has been made under a policy, the policy is sent for manual review by an underwriter prior to renewal. The manual underwriting review allows the underwriter to assess the risk associated with renewal of a particular policy using Economical's Personal Insurance Internal Underwriting Guidelines in effect at the time of renewal.¹¹

[36] When the policy issued to the Complainant and his spouse came up for renewal in 2009, the claim that had been filed in September 2008 was noted and the policy was sent for review by an underwriter.¹²

[37] In circumstances where renewal of a homeowner's insurance policy is manually assessed by an underwriter because a claim was made, one of the factors Economical's underwriters consider under its Personal Insurance Internal Underwriting Guidelines is the insured's Canadian Property Loss Score ("CPLS"). Economical's evidence is that, if the CPLS is less than a particular amount, renewal will not be offered.¹³ It therefore appears that, while other factors may be considered, the CPLS can be a determinative factor in some cases.

[38] The CPLS is not the same as an individual's credit report or credit history. It is a number that is derived from selected items of information in an individual's credit report using a particular statistical tool. In the literature, this number is also referred to as a "credit score" or an "insurance score". As these terms have slightly different meanings, I will use CPLS to refer to the number Economical obtains when assessing the risk of renewal of a homeowner's insurance policy after a claim has been made. I will use the more general term "credit score" when considering the literature on using credit scores to assess future risk of loss in the insurance industry.¹⁴

¹¹ Coulson Affidavit, paras. 11, 15, 16.

¹² Coulson Affidavit, para. 14.

¹³ Coulson Affidavit, paras. 14-16.

¹⁴ Coulson Affidavit; Affidavit of John Russo.

[39] Economical obtains a CPLS about an individual by sending an inquiry about the individual to Equifax, a credit reporting agency that is in the business of providing credit information about consumers to its clients, including insurers. Equifax obtains credit information about individuals from various sources, including financial institutions. In response to an inquiry about an individual from one of its clients, it will extract data from the individual's credit record, calculate the individual's CPLS based on a proprietary formula and provide that—not the information upon which it is based or the formula—to its customer, here, Economical.¹⁵

[40] In this way, Economical obtained the Complainant's CPLS. Its underwriter considered that information and determined, through application of Economical's Personal Insurance Internal Underwriting Guidelines, that the Complainant's policy should be renewed.¹⁶

[41] The Complainant says that, in or around April 2009, he received a "Credit Alert" from his bank that someone had inquired into his credit report. He contacted the credit agency and learned that Economical had made the inquiry. He contacted Economical and, after some persistence, satisfied himself that Economical had made the inquiry "for their own purposes, which were never disclosed to [the Complainant] completely". However, in his letter of June 9, 2009 to the Commissioner, the Complainant says that Economical told him that the inquiry had been made as part of the process of policy renewal.¹⁷

[42] Economical says that its inquiry would not have generated a credit alert from the Complainant's bank. It says that individuals can purchase monitoring services that provide notification to an individual when an inquiry is made into their credit report but, even if the Complainant had this service, Economical's inquiry would not have triggered any notification.¹⁸

[43] Economical submits that the Complainant's claim that he received a credit alert is not credible and is not supported by affidavit evidence. However, Economical's statements about whether its inquiry would have triggered a credit alert are also not supported by affidavit evidence.¹⁹

[44] For the purposes of this inquiry, it is not necessary to determine how the Complainant learned of Economical's inquiry, only that he did learn of it and claimed that it was unauthorized. It is clear that the Complainant learned that Economical had made an inquiry into what he described as his credit report

¹⁵ Affidavit of Scott Lennox; Russo Affidavit.

¹⁶ Coulson Affidavit, para. 16.

¹⁷ Complainant's Submission.

¹⁸ Economical Reply submission, paras. 35-36.

¹⁹ Economical Reply submission paras. 35-37.

because he called to complain about it on May 20, 2009. Economical's letter to the Complainant of May 28, 2009 confirms this.²⁰

[45] Economical's June 9, 2009 letter to the Complainant stated its position that, because the Complainant was a named insured, he had implicitly consented to Economical's collection of this information, even though only his spouse had signed the form. Economical quoted s. 8(2)(a) of PIPA as applicable in these circumstances. Its letter reproduces the section as follows:

- 8(2) An individual is deemed to consent to the collection, use or disclosure of personal information for the purpose of enrolment or coverage under an insurance, pension, benefit or similar plan, policy or contract if he or she
- (a) is a beneficiary or has an interest as an insured under the plan, policy or contract,

[46] However, in its letter, Economical did not include subsection 8(2)(b) of the same provision, which goes on to state:

- (b) is not the applicant for the plan, policy or contract.

The use of credit scoring in the underwriting of homeowner's insurance

[47] In the insurance industry, underwriting is the means through which risk is assessed and managed, including the determination of how much of a customer's risk the insurer will accept and what premium it will charge for doing so. Homeowner's insurance focuses on assessing the risks associated with the property to be insured and the risks associated with the customer purchasing the insurance. Insurers use a variety of tools to assist in the assessment of these risks. What tools are used evolve over time, as insurers look for more accurate methods of risk assessment. One tool, associated with the assessment of customer risk, is the credit score. This tool began to be used in the US in the 1990s and then spread to Canada.²¹

[48] Credit scores are not the same as credit records or credit histories. They are numbers derived from assessing or analyzing specific items of credit information using a formula. Agencies such as Equifax and TransUnion sell the service of providing credit scores based on each credit reporting company's proprietary formula or algorithm applied to specific credit data, to various groups including insurance companies who provide homeowner's insurance.

²⁰ Richard Seip's letter to Complainant, dated May 28, 2009.

²¹ Affidavit of Barbara Sulzenko-Laurie; Affidavit of Scott Lennox; Coulson Affidavit, paras. 3-11; *Credit Scoring: the case for a regulatory framework in Canada for insurance credit scoring*, Insurance Brokers Association of BC, October 2005, Appendix E to BC Brokers' Submission.

[49] As noted, a *credit score* used for assessing future risk of loss in connection with insurance underwriting is not based on the entirety of an individual's credit record, but is derived from certain types of *credit information* in the credit record.

[50] Credit information may include an individual's name, age, place of residence, previous places of residence, marital status, spouse's name and age, number of dependents, particulars of education or professional qualifications, place of employment, previous places of employment, estimated income, paying habits, outstanding debt obligations, cost of living or obligations and assets.²²

[51] Neither Economical nor Equifax submitted evidence as to what credit information Equifax uses to calculate the CPLS. Equifax's evidence simply stated that the data it obtains consists of information about the individual's "past credit behaviour". Scott Lennox, Economical's Vice President, Pricing Development and Research, described a credit score as derived from some of the information contained in a credit report and described a credit report as containing an individual's name, social insurance number, employer, credit inquiries, judgments, credit checks and payment levels. The studies submitted in evidence say that both the data obtained by a credit scoring company and the formula it applies to create the credit score are proprietary to the credit reporting company.²³

[52] The studies do provide some general information about the kind of data that make up a credit score. A 2005 discussion paper published by the BC Brokers on the use of insurance credit scoring reviews the much more extensive US literature and describes the types of information used to create a credit score as follows:

- Public records (bankruptcy, collections, foreclosures, liens and charges)
- Past payment history (the number and frequency of late payments and how late they are)
- Length of history with a creditor
- Inquiries for credit, such as mortgage loans, utility accounts and credit card accounts (including the number of times an individual has recently applied for new credit)
- Number of open lines of credit
- Type of credit in use, such as major credit cards, finance company loans

²² BPCPA, s. 106.

²³ Russo Affidavit, para. 9; Lennox Affidavit, paras. 5-6.

- Outstanding debt (how much an individual owes as compared to available credit)²⁴

[53] The discussion paper does not say that information such as the individual's age, marital status, place of residence, educational credentials or social insurance number are used to create a credit score.

[54] In the US, where the use of credit scores for risk assessment relating to various types of personal insurance is much more common, consumer and other groups have raised three concerns about the fairness of using credit scores as a factor to assess risk. First, is the credit score directly or indirectly influenced by what society considers irrelevant personal characteristics, such as race, ethnicity, religion or sex? Second, does use of the credit score penalize people who have little credit history or who have experienced extraordinary life circumstances, such that their credit score does not fairly reflect their situation? Third, how can the accuracy of the information used to compile the credit score be ensured? In 2005, the BC Brokers released a discussion paper canvassing the American literature and calling for the creation of a regulatory framework to govern the use of credit scoring by insurers for risk assessment in underwriting.

[55] While the questions raised by the American studies and the BC Brokers are important, they are not directly in issue, in that this case is not about Equifax's use of some of the Complainant's credit report to create a credit score. The Complainant has not raised this issue, nor has he complained about Economical's policy of using credit scores in relation to applying for or renewing homeowner's insurance. The questions that have been raised elsewhere about the propriety of using credit scores are only relevant in this case to the extent that they affect consideration of whether the collection of this information is reasonable.

[56] The American studies submitted to me in this case show that concerns have been raised in various American jurisdictions about whether: (1) a person's membership in certain racialized groups may sometimes indirectly affect her/his credit score; (2) it may be unfair to rely on credit scores where a person has little credit history or has encountered unusual life circumstances; and (3) the information used to create a credit score may not always be accurate. Various American jurisdictions have enacted regulations to address some or all of these issues.²⁵

²⁴ Insurance Brokers Association of BC, *Discussion Paper: Credit Scoring: the Case for A Regulatory Framework in Canada*, 2005; Appendix A to the BC Brokers Submission ("BC Brokers Discussion Paper"). See also *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Office of Financial and Insurance Services, Michigan, December 2002 ("Michigan Report") at p. 5.

²⁵ Michigan Report; American Association of Actuaries, *The Use of Credit History for Personal Lines of Insurance: Report to the National Association of Insurance Commissioners*, November 15, 2002 ("Actuaries Report"); Federal Trade Commission: *Credit-Based Insurance*

[57] Caution must be exercised in relying on these studies here. The legislative context in British Columbia differs in material respects from those of state governments in the US. In BC, three regulatory regimes presently affect the use of credit scores for underwriting purposes. As noted, the BPCPA permits use of a credit score by an insurer for the purpose of underwriting with the consent of the individual. Further, PIPA requires an individual's consent prior to the collection, use or disclosure of his/her personal information except in very limited circumstances. Finally, the BC *Human Rights Code* prohibits discrimination on any of twelve grounds, including race, religion, sex, disability, family status and age, in the provision of services to the public, including insurance services.²⁶ This regulatory structure differs markedly from American states.

[58] None of the participants in this hearing suggested in evidence or argument that the CPLS: (1) is based directly or indirectly on any prohibited ground of discrimination; (2) was unfair because it disadvantages individuals with little credit history or extraordinary life circumstances; or (3) is based on inaccurate information.

[59] In December 2010, the Insurance Bureau of Canada adopted a voluntary Code of Conduct for Insurers' Use of Credit Information ("Voluntary Code"). There is no evidence as to what guidance for insurers' use of credit scores existed before that date. Economical says that it supports the Voluntary Code. Among other things, the Voluntary Code directs insurers to ensure that:

- the credit information used in a credit score is current and accurate,
- the insurer responds immediately and appropriately when information is corrected,
- a credit score is not used as the sole variable for provision, renewal or determination of premiums for insurance,²⁷
- the credit scoring company does not use any of the following as a negative factor in a credit score: inquiries by the consumer for his/her own information, inquiries about insurance, income, gender, address, ethnic group, religion, marital status or nationality, multiple lender inquiries within 30 days regarding home or auto finance,
- consumers with little or no credit history are not denied coverage or renewal, but will be assessed based on the available information,

Scores: Impacts on Consumers of Automobile Insurance, July 2007; See also BC Brokers Discussion Paper.

²⁶ *Human Rights Code*, RSBC 1996, c. 210, s. 8.

²⁷ The evidence does not establish whether or not Economical actually complies with this directive. Paragraph 16 of the Coulson Affidavit suggests that, in some circumstance, an insured whose CPLS falls below a certain number will be denied renewal of insurance.

- the insurer discloses to the consumer any adverse action taken only as a result of credit information and
- where an individual believes that his/her credit has been adversely affected by an extraordinary life event, the individual can request the insurer to reconsider its use of a credit score in rating and underwriting the individual's insurance.

[60] Equifax, Economical, BC Brokers and IBC submitted evidence establishing that credit scoring is a reliable predictor of risk for homeowner's insurance because there is a statistically valid correlation between credit score and risk of future loss. As of 2007, a survey of Ontario property insurers found that insurers representing 55% of the Ontario property insurance market had conducted actuarial analyses of the relationship between credit scores and loss experience and demonstrated a direct correlation between them. Economical tendered evidence, based on an actuarial analysis of its own personal property book of BC policyholders between 2005 and 2009, that there is a direct and significant correlation between increased CPLS and decreased claims frequency.²⁸

[61] All of the evidence supported the proposition that there is a reliable correlation between credit score and future risk of loss. There was no evidence to the contrary and no participant argued that credit scores are not a valid predictor of future risk of loss. Studies have not yet conclusively explained why this correlation exists, but all of the evidence before me demonstrates that it exists.

[62] Not all providers of homeowner's insurance use credit scores. However, their use is becoming more common.²⁹ Some insurers do not use credit scores because of the cost of obtaining them. Credit scores are not used as the sole factor for risk assessment, but are one factor that an increasingly large proportion of insurers consider. Equifax contractually binds its clients, including Economical, to agree that credit scores will not be used as the sole factor in making a decision affecting any individual customer.³⁰

[63] Use of credit scores in BC has become sufficiently common that the BPCPA authorizes their use in connection with underwriting with the consent of the individual.³¹ As noted, as of December 2010, the IBC's Voluntary Code provides guidance to insurers in the use of credit information and credit scores. It requires that an individual's informed consent be obtained before the information is collected. The consent must be voluntary and the individual must

²⁸ *Report on the Credit-Based Insurance Scoring Questionnaire*, Canadian Council of Insurance Regulators, August 2009; Affidavit of Kristen Gill; Russo Affidavit.

²⁹ Sulzenko-Laurie Affidavit, para. 2; BC Brokers' Submission, p. 2

³⁰ Russo Affidavit, para. 11.

³¹ BPCPA, s. 108(1)(a)(iv).

know the nature and scope of the request so that “customers know specifically what they are consenting to and how that consent will be used.”³²

[64] The evidence also establishes that what a credit score is, and the way it is used in connection with homeowner’s insurance, are not well understood by consumers. Most consumers do not understand that they are consenting to credit scoring when they purchase insurance.³³

[65] **3.3 Analysis**—I noted above that the issues in this appeal concern ss. 6, 7, 8, 10 and 11 of PIPA. Section 11 of PIPA creates an overarching requirement that the purposes for the collection of personal information be reasonable and appropriate. If they are not, collection of such information contravenes PIPA. Accordingly, I will consider this issue first. Second, I will assess whether Economical is authorized under s. 7(2) to require the Complainant’s consent as a condition of obtaining or renewing insurance. Since the Complainant’s consent was solicited on the insurance application, it appeared to be a condition of providing insurance to the Complainant. Therefore, Economical must comply with the requirements of this section. Third, I will determine whether there was deemed consent under s. 8, as various participants have addressed that issue. Finally I will consider whether there was express consent within the meaning of ss. 6, 7(1) and 10. Section 7(3) does not arise in this case as Economical did not attempt to obtain consent by providing false or misleading information or using deceptive or misleading practices.³⁴

Were the purposes for which Economical collected the personal information those that a reasonable person would consider appropriate in the circumstances pursuant to s. 11?

[66] Section 11 of PIPA imposes an overarching requirement on any collection of personal information:

Limitations on collection of personal information

- 11 Subject to this Act, an organization may collect personal information only for the purposes that a reasonable person would consider appropriate in the circumstances and that
 - (a) fulfill the purposes that the organization discloses under s. 10(1),
 - or

³² Sulzenko-Laurie Affidavit, paras. 21-22 and Appendix A.

³³ Sulzenko-Laurie Affidavit, para. 21; IBC Submission, para. 9; *Credit Scoring: the case for a regulatory framework in Canada for insurance credit scoring*, Insurance Brokers Association of BC, October 2005, Appendix E to BC Brokers’ Submission.

³⁴ In its submission (at para. 22), FIPA simply states that “it could be reasonably stated that by failing to provide any information about the purpose for which it intended to use the credit report” Economical was contravening s. 7(3). This bare assertion is insufficient to establish a contravention of s. 7(3).

(b) are otherwise permitted under this Act.

[67] This section mandates a direct assessment of the reasonableness and propriety of the purposes of collecting personal information. Even where a person consents, PIPA prohibits collection of his or her personal information unless, assessed against an objective standard and in context, the purposes for which it is collected are appropriate.³⁵

[68] In *Gostlin*, Commissioner Loukidelis described the test under s. 11 as follows (at para 55):

[55] Section 11 of PIPA invokes the standard of “a reasonable person”. This is an objective standard—the idiosyncrasies, likes, dislikes or preferences of a particular individual do not determine the outcome. As s. 2 affirms, PIPA aims to balance the “right” of individuals to protect their personal information and the “need” of organizations to collect, use and disclose personal information. Under s. 11, one has to decide whether the hypothetical reasonable person, knowing the purposes for collection and the surrounding “circumstances”, would consider the purposes for collection to be “appropriate”. Relevant circumstances may include the kind and amount of personal information being collected, the uses to which it will be put and any disclosures the organization intends at the time of collection.

[69] In *Gostlin*, a retail store collected and used identifying information (name, address and phone number) from customers seeking to return purchased items, primarily for the purpose of identifying and deterring fraud. In his assessment of what a reasonable person would consider appropriate in these circumstances, the Commissioner noted that fraudulent return of goods is a significant and widespread problem and that it increases prices to consumers. He described the kind and amount of personal information involved as “non-sensitive” in nature, as it is generally publicly available (for example, in telephone directories). He also found that the information is not disclosed to others.

[70] Economical and all intervenors who addressed this issue, excepting FIPA, submit that Economical’s purpose for collecting the Complainant’s CPLS was reasonable and appropriate in the circumstances. FIPA submits that the purpose was not reasonable because other risk assessment tools have been adequate in the past. The Complainant did not address this issue.

[71] In considering s. 11, it is first necessary to identify the purpose of collecting the personal information. The purpose should be stated as precisely as possible so that the needs of the organization can be carefully balanced against the rights of the individual. In this case, the purpose for which

³⁵ *Cruz Ventures*, at para. 111; *Gostlin*, at para 55. See also *Leon’s Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, at para. 57, emphasizing that s. 11 of the Alberta *Personal Information Protection Act* (the equivalent of s. 11 of BC’s PIPA) does not require proof that the purpose is the “best” or “least intrusive” purpose, only that it is reasonable.

Economical collected the CPLS was to assist in an objective and accurate assessment of future risk of loss when renewing a homeowner's insurance policy in circumstances where a claim had been made under the policy. Economical uses the CPLS as a factor in underwriting policies in these circumstances. The evidence shows that more accurate risk assessment tools can decrease the cost of insurance for some consumers.³⁶

[72] The personal information that Economical collected was a number that represents the conclusion of an analysis of certain items from the Complainant's credit record. It was not disclosed to anyone else and was calculated based on certain information in the Complainant's credit record. Neither Economical nor Equifax provided me with evidence as to what items of credit information the CPLS includes. As I have noted, the Complainant's complaint is about Economical's collection of his credit score allegedly without his consent, not about Economical's policy of using credit scores or Equifax's creation of them. No one has argued or presented any evidence that the CPLS includes irrelevant or inaccurate information or that any of the grounds of prohibited discrimination in the BC *Human Rights Code* are factors in creation of the CPLS. Without the proprietary algorithm or a way to assess the number in context, the CPLS would be of little use for any purpose other than that for which Economical uses it. The CPLS is one factor, and possibly a determinative factor, in Economical's decision as to whether to provide or renew insurance and in setting a rate. It is not disclosed to anyone else.

[73] In light of these circumstances, I find that the purpose for which the CPLS is collected is reasonable. The ability to assess risk accurately is a central concern of the insurance industry generally. Improvements in the accuracy of risk assessment can affect the cost of insurance in ways that benefit some consumers. The evidence establishes that credit scoring generally and the CPLS specifically are statistically valid and useful predictors of future risk of loss. It is reasonable and appropriate to collect this personal information for the purpose of underwriting homeowner's insurance as occurred here. The information collected was a number derived from selected items in the Complainant's credit report using a proprietary formula. Unlike the information in issue in *Gostlin*, it is not otherwise publicly available. However, it would have little meaning to anyone other than a client of Equifax, or someone with access to Economical's Internal Underwriting Guidelines, and would not be easily adapted to a purpose other than assessing future risk of loss. Therefore, it is less sensitive. This is in marked contrast to collection of driver's license information, for example, which can be used for identity theft.³⁷

³⁶ Lennox Affidavit, at para 9; Sulzenko-Laurie Affidavit, at paras. 17-18; Michigan Report, at pp. 10-12

³⁷ See *Collection of Driver's Licence Numbers Under Private Sector Privacy Legislation – A Guide for Retailers*, Hhttp://www.oipc.bc.ca/pdfs/private/guide_edl_e.pdfH.

[74] Consideration of s. 108(1)(a)(iv) of the BPCPA supports this conclusion. That section permits a reporting agency, such as Equifax, to provide “credit information” in a credit report to a person who “intends to use the report in connection with underwriting insurance involving the individual”. This section suggests that the BC Legislature considers the use of credit scores in connection with underwriting to be a legitimate purpose for collecting this information.

[75] I am not persuaded by FIPA’s submission that the purpose for which the CPLS was collected is not reasonable because credit scoring is a relatively recent development and is not a traditional risk assessment tool. The implication of accepting that argument is that organizations could not evolve or change their practices with respect to the collection of personal information.

[76] In conclusion, I find that the purpose for which Economical collected the Complainant’s CPLS was one that a reasonable person would consider appropriate in the circumstances within the meaning of s. 11. Section 11 also requires that the information collected either fulfill the purposes that the organization discloses under s. 10(1) (s. 11(a)) or be otherwise permitted under PIPA (s. 11(b)). I will deal with the s. 10(1) issue below in my consideration of whether there was express consent under ss. 6 and 7(1), which also requires that the criteria in s. 10(1) be met. With respect to s. 11(b), no one has argued that collection of the CPLS is permitted without consent. I deal with the question of whether there was deemed consent below.

Could Economical require the complainant’s consent as a condition of obtaining insurance under s. 7(2)?

[77] Section 7(2) limits the circumstances under which an organization can require an individual to consent to its collection, use or disclosure of personal information as a condition of receiving a product or service:

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

[78] In other words, the information collected must not exceed the need for it. As interpreted in *Cruz Ventures*, “necessary” in this context does not mean “indispensable”, in the sense that it is not possible to supply the product or service without the information. However, the organization must demonstrate that obtaining the information is more than merely convenient or of some possible future use. It must be integral to the provision of the product or service, in that it plays a significant role in enabling the organization to achieve the purpose for which the information is collected. The organization’s demonstration of necessity will be carefully scrutinized in light of the purpose of PIPA. Factors that may be considered include the nature of the information, the purpose for which it is collected, the scope of the collection and whether there are less privacy-intrusive

means of achieving the purpose. It is important for the organization to show that the information that is actually collected is not excessive in light of the purpose.³⁸

[79] A helpful analogy is found in Alberta Order No. P2010-12.³⁹ There, the adjudicator relied on the Supreme Court of Canada's interpretation of the phrase "material to the insurance" in s. 567 of the *Insurance Act* as encompassing "information that would influence a reasonable insurer's decision to provide insurance or require higher premiums."⁴⁰ The *Insurance Act* required that such information be disclosed by an applicant for insurance and the adjudicator found that it was therefore "necessary" within the meaning of Alberta's *Personal Information Protection Act*. In the present case, the information in issue is material to Economical's assessment of future risk of loss in connection with renewing a policy on which a claim has been made, in that it influences the renewal decision.

[80] Economical argues that collecting the CPLS is necessary for the purpose of assessing future risk of loss in underwriting homeowner's insurance policies in circumstances where a claim has been made. I agree.

[81] I have found that the purpose for collecting the CPLS is appropriate within the meaning of s. 11. The evidence establishes that CPLS is reasonably tailored to that purpose—it is derived from the information that Equifax has determined necessary to generate a statistically valid credit score under its proprietary formula. There is no evidence that the CPLS contains inaccurate information, is based in any way upon the prohibited grounds of discrimination or is used in circumstances where it would not be fair to do so, such as where there is a limited credit history or extraordinary life circumstances have affected an individual's credit.

[82] With respect to consideration of whether there are less privacy intrusive means of achieving the purpose for which the CPLS is collected, Economical argues that this is not a factor that should be considered at all under s. 7(2). In the alternative, it argues that there is no less privacy intrusive way of achieving its purpose. As *Cruz Ventures* notes, whether there is a less privacy intrusive alternative is a factor to be considered but it is not necessarily a determinative factor.⁴¹ I find that it is not determinative here. Accordingly, it is not necessary to address Economical's argument that the existence of a less privacy intrusive alternative should not be considered in determining in what is "necessary" under s. 7(2).

[83] Economical says that, if it could not collect CPLSs, it would have to undertake physical home inspections when renewing policies upon which a claim

³⁸ *Cruz Ventures*, at para 34-43; *Gostlin*, at paras 64-91; see also Order F07-10, at paras. 37-49.

³⁹ [2010] A.I.P.C.D No. 67.

⁴⁰ *Ibid.* At para. 13.

⁴¹ *Cruz Ventures*, paras. 40-41.

has been made or it would have to conduct the risk assessment with less information.⁴² The evidence establishes that the CPLS plays a significant role in Economical's assessment of risk in these circumstances, whether or not a physical home inspection is a realistic alternative.

[84] FIPA argues that collection of the CPLS is not "necessary" within the meaning of s. 7(2) because insurance companies have been able to assess risk in the past without using it. It says that use of such credit information "would only play a 'significant role' if the insurance companies were to abandon their other, time-proven methods of risk assessment in favour of credit reports".⁴³

[85] It is true that the CPLS is not the only factor underwriters use in conducting risk assessment for homeowner's insurance and not all insurers use it. However, it need not be the only factor used in risk assessment or be universally adopted in order to satisfy the criterion of necessity in s. 7(2). Adopting FIPA's proposed standard would set too high a bar for demonstrating necessity within the meaning of s. 7(2), one that is inconsistent with the purpose of PIPA and the existing case law.

[86] The evidence shows that the established practice is to consider a number of factors in the process of risk assessment and that insurers increasingly include credit scoring as one of these factors. The authorization of use of credit information for underwriting purposes in the BPCPA is consistent with the conclusion that it is "necessary" within the meaning of s. 7(2) in that the legislature has recognized it as a valid consideration in underwriting from a consumer protection perspective. It is more than merely convenient. It is integral in the sense that it plays a significant role in Economical's practice of risk assessment when renewing homeowner's insurance policies.

[87] I conclude that, to the extent that it requires consent to collection of the CPLS or credit score for the purpose of risk assessment in providing or renewing homeowner's insurance, Economical is not requiring consent beyond what is necessary within the meaning of s. 7(2).

Was there deemed consent under s. 8?

[88] Section 8 specifies three circumstances in which an individual will have been deemed to consent to the collection of personal information. Under s. 8(1), deemed consent exists where, at the time the deemed consent is given, the purpose of collecting the information would be obvious to a reasonable person and the person voluntarily provides the information to the organization for that purpose. Under s. 8(2), deemed consent exists where information is collected for (among other things) coverage under an insurance policy, if the individual is a beneficiary or has an interest as an insured under the policy but is not an

⁴² Economical Submission, para. 112.

⁴³ FIPA Submission, para. 21.

applicant for it. Under s. 8(3), deemed consent exists where an organization collects the information for specified purposes, provides the individual with notice of those purposes in a form that the individual can reasonably be expected to understand, gives the individual a reasonable opportunity to decline to have the information collected, the individual does not decline and the collection of the information is reasonable in light of the information's sensitivity in the circumstances.

[89] I find that none of the circumstances in which consent will be deemed to have been given applies in this case.

[90] With respect to s. 8(1), I find that the purpose of collecting the information for risk assessment, while legitimate within the meaning of s. 11 and necessary within the meaning of s. 7(2), is not obvious to a reasonable person.

[91] As noted earlier, there is a great deal of consumer misconception and lack of awareness about the use of credit scoring for the purposes of risk assessment in the personal insurance industry. The use of credit scores for this purpose is distinct from their use for the purposes of assessing credit worthiness.⁴⁴

[92] Section 8(2) is not applicable because the Complainant was an applicant for the policy: his name, along with that of his spouse, is listed as the applicant on the insurance application form completed in 2003.

[93] Section 8(3) is not applicable because there is no evidence that the Complainant was given a reasonable opportunity to decline within a reasonable time to have his personal information collected as required by s. 8(3)(b). The Complainant says in his submission that he was not given a meaningful opportunity to decline to consent to the collection of his information.

[94] The Complainant did not sign the application for the homeowner's policy on which he and his spouse are listed as applicants. There is no evidence that he saw the application form, had an opportunity to read the consent statement it contained or was informed that his consent to collection of his personal information was *not* a condition of obtaining insurance. I accept that Economical wrote to the Complainant to inform him that his policy had been transferred to it when it acquired Federation. However, that letter did not address collection of personal information at all. When the Complainant's policy came up for renewal in 2009 and Economical decided to manually underwrite it because of the claim that had been made, it did not inform the Complainant that it was doing so or that it was going to collect his credit score or CPLS for that purpose. In these circumstances, he cannot be said to have had a reasonable opportunity to decline to have his information collected.

⁴⁴ References in footnote 32 supra.

[95] I find that there was no deemed consent within the meaning of s. 8 of PIPA.

Was there express consent within the meaning of s. 7(1)?

[96] Section 6 of PIPA prohibits organizations from collecting, using or disclosing personal information about an individual unless, among other things, the individual has consented to its collection, use or disclosure. Section 7(1) specifies what constitutes consent for the purposes of PIPA. Two separate requirements must be met. First, the organization must have provided the individual with notice of the purpose for the collection of the information before or at the time consent is sought, as set out in s. 10(1)(a).⁴⁵ Second, having received notice of the purpose, the individual must consent. That is, PIPA stipulates that express consent is consent that is informed by the purpose for which the information will be collected.

Did Economical give adequate notice of the purposes of collection?

[97] Economical submits that adequate notice of the purposes of collecting the CPLS was provided by the disclosure clause on the standard CSIO insurance application that the Complainant and his spouse completed in 2003 when they applied for homeowner's insurance from Federation. At that time, neither Federation nor Economical had any disclosure obligation under PIPA, as the statute did not come into force until January 1, 2004.

[98] After PIPA came into force and Economical acquired Federation, it was required to comply with the notice requirements in ss. 7(1) and 10(1) when collecting personal information. It could have provided the Complainant (and other policyholders) with such notice when it acquired Federation and wrote to policyholders in 2006-2007 or when, in 2009, it decided to refer the Complainant's policy renewal to manual underwriting. It did not. I understand Economical to say that the disclosure statement in the 2003 application form, if it had been completed after PIPA came into force, would have satisfied the notice requirements of ss. 7(1) and 10(1). For convenience, I reproduce that statement again here:

The Applicants agree that reports containing personal, credit, factual record, premium payment or claims history information may be sought or exchanged in connection with this application for insurance or renewal, extension, variation or cancellation thereof.

[99] Was this adequate notice of the purposes of the collection within the meaning of PIPA?

⁴⁵ Compliance with s. 10(1)(b) is not in issue in this case.

[100] Economical, Equifax and the BC Brokers argue that it was. The Council and FIPA argue that it was not. FIPA says that it was insufficient because it did not disclose that the information was being collected for the purpose of risk assessment, rather than for the purpose of determining creditworthiness.

[101] This is not a case like *Cruz Ventures*, where personal information was collected for a number of different purposes, some of which were not disclosed at all.⁴⁶ In this case, the statement of the purpose of collecting the information on the CSIO application form was very broad. It could cover virtually all activity in relation to a policy, including application, renewal, extension, variation or cancellation. Was this statement sufficiently specific to notify readers that their credit score information could be collected for the purpose of assessing future risk of loss?

[102] In this regard, it is useful to see how CSIO has revised its standard disclosure statement on homeowner's insurance application forms since PIPA and other privacy laws have been enacted. As set out by the BC Brokers, CSIO revised its consent statement in 2008 as follows:

2008: I have provided personal information in this document and otherwise (e.g., by telephone) and I may in the future provide further personal information and/or any policy issued as a consequence of this application. Some of this personal information may include, but is not limited to, my credit information and claims history. I authorize my broker or the insurer to collect, use and disclose any of this personal information, subject to my broker's or the insurer's policy regarding personal information, for the purposes of communicating with me, assessing my application for insurance and underwriting my policies, evaluating claims, detecting and preventing fraud, analyzing my broker or the insurer's business results such as evaluating claims results and setting insurance rates, and when otherwise permitted or required by law. If I apply for a premium payment plan, I also authorize the broker and the insurer to obtain and use my credit report for that purpose. I declare that all individuals whose personal information is contained in this document have authorized me to agree to the above on their behalf. I may obtain a copy of or ask questions about my broker's and the insurer's personal information policies by contacting their respective privacy officers.⁴⁷

[103] The question of the sufficiency of this statement as disclosure of the purposes for collecting personal information is not before me. However, this evidence suggests that, after the date PIPA came into force, CSIO considered that its standard statement should expressly refer to obtaining credit information for, among other things, the purpose of underwriting.

⁴⁶ *Cruz Ventures*, at para. 110.

⁴⁷ BC Brokers' Submission, Appendix C.

[104] PIPA does not explicitly address what level of detail must be provided in a notice that satisfies the requirements of ss. 10(1)(a) and 7(1). However, it does explain what communication of the purposes for obtaining the information entails. Section 11 states that the purposes must be those that “a reasonable person would consider appropriate in the circumstances” and s. 7(2), which applies in this case, requires that the purposes not go beyond “what is necessary to provide the product or service.” Further, s. 8(3) requires that an organization notify the individual of its specific purposes for obtaining the information “in a form that the individual can reasonably be considered to understand.” Considering the context provided by these sections in light of the purpose of PIPA, I conclude that notification of the purpose of collection under s. 10(1)(a) and s. 7(1) must be detailed enough to identify the particular purpose for collecting the information, as distinct from other purposes, in a way that is understandable to a member of the public. Where s. 7(2) applies, notice must be given of the particular purpose that is necessary to provide the product or service.⁴⁸

[105] I have found that the purpose of the collection of the Complainant’s CPLS (or, more generally, credit scores) is to assist Economical in the assessment of future risk of loss in connection with its underwriting practices. In order for consumers to be able to consent meaningfully to collection of their CPLS or credit score, they must be informed of this purpose. The notice need not be lengthy, but it must be such that a reasonable person would understand that the information being collected is being used for risk assessment in underwriting, not to assess creditworthiness or ability to make premium payments, or for other insurance-related purposes.

[106] This conclusion is consistent with the purpose of PIPA: in order to meaningfully exercise their right to protect their personal information, individuals need to fully understand the purposes for which it will be used. A vague or overly general statement of the purpose of collecting information does not allow the individual to make informed decisions.

[107] Equifax and Economical submit that I should reach the same conclusion as that in a recent decision of the Federal Commissioner, which Equifax brought to my attention after the close of submissions. In that case, the complainants, who resided in Ontario, alleged that Equifax (an intervenor in this case) used their personal information without their consent. The complainants had a homeowner’s insurance policy and were surprised when their premium rate increased considerably, despite the fact that they had made no claims under the policy. Equifax had provided the complainants’ insurer with a credit score, based on information from their credit report, so that the insurer could assess their

⁴⁸ In Alberta, the Commissioner has determined, with respect to the legislative equivalent of PIPA s. 10(1)(a), that asking an individual whether they consent to being added to a mailing list is not adequate notice that their contact information will be used for the purposes of marketing: *Endermologie Centre Operation*, Order P2007-006. See also *Cruz Ventures* at 109-110; *Gostlin*, 47-50; *Shoal Point*, paras. 51-53.

future risk of loss. The complainants had originally applied for homeowner's insurance in 2003 and had completed the same CSIO standard form application with the same consent statement as in this case.⁴⁹

[108] The Assistant Federal Commissioner concluded that Equifax had not contravened PIPEDA. She found that Equifax had obtained consent through its client insurer and that the consent statement on the application form completed by the complainants was sufficient to satisfy the consent principle under that statute. Principle 3 of PIPEDA governs consent. In material part, it provides as follows:

4.3 – Principle 3 – Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information except where inappropriate.

...

4.3.2.

The principle requires “knowledge and consent”. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in a manner that the individual can reasonably understand how the information will be used or disclosed.

4.3.3

An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use or disclosure of information beyond that required to satisfy the explicitly specified, and legitimate purposes.

[109] The Assistant Federal Commissioner also referred to s. 8 of Ontario's *Consumer Reporting Act* (“Ontario CRA”) which authorizes consumer reporting agencies to provide a consumer's credit information (or a credit score) for use in connection with underwriting insurance involving the consumer.

[110] With the greatest respect, I am unable to reach the same conclusion as to the sufficiency of the notice of the purpose of collecting the Complainant's personal information in this case. I find that the notice on the CSIO homeowner's insurance application the Complainant and his spouse completed in 2003 did not adequately inform them that their credit information (specifically, a credit score) would be collected for the purpose of underwriting or assessing future risk of loss.

[111] The Assistant Federal Commissioner relied on s. 8 of the Ontario CRA as authorizing Equifax to provide a credit score to the insurer. The equivalent

⁴⁹ Report of Findings, File 6100-010071.

provision here is s. 108(1)(a)(iv) of the BPCPA. Like s. 8 of the Ontario CRA, it also authorizes credit reporting agencies, such as Equifax, to provide an individual's credit information for use in connection with underwriting insurance for the individual. However, s. 107 of the BPCPA qualifies the authorization in s. 108(1)(a) by prohibiting collection without the individual's consent to its use for this purpose. Section 107(2) specifically states that consent may be obtained by "prominently displaying the information respecting the consent in a clear and comprehensible manner in an application for ... insurance".

[112] The Ontario CRA does not contain a similar provision. It simply requires that the consumer be given notice that a consumer report will be requested or obtained. Moreover, the Assistant Federal Commissioner did not consider s. 10(2) in her decision.⁵⁰

[113] The effect of the BPCPA is not to dispense with the need for informed consent, but to underscore its importance. In particular, s. 107(2) of the BPCPA complements and reinforces the notice requirements in PIPA by emphasizing that the purpose of obtaining the information may be communicated on an insurance application form, but it must be done in a clear and comprehensible manner.

[114] The consent statement on the Complainant's application form did not expressly say that credit information might be obtained for the purpose of underwriting. As I have discussed, consumers are not generally aware that credit scores are used for the purposes of assessing future risk of loss in underwriting and there are many misconceptions about the use of credit scoring by insurers. In light of this evidence, the consent statement in this case is overly broad. It does not inform the consumer of the particular purpose for collecting this information.

[115] In order to satisfy the notice requirements in ss. 7(1) and 10(1)(a) of PIPA, individuals must be informed that their credit information may be collected for the purpose of *assessing future risk of loss* in underwriting the policy. Without this information, it is not reasonable to expect that a consumer would understand how Economical actually uses this information and therefore could not meaningfully consent to its collection for this purpose.

[116] I note that, although it contends that the notice was adequate, Economical stresses the importance of consumer protection through express consent. It says that consumer protection is only achieved when express consent is fully informed.⁵¹

[117] From January 1, 2004 onwards, Economical was required to provide individuals with adequate notice of its purpose in collecting their CPLS before it

⁵⁰ Ontario CRA, s. 10(2).

⁵¹ Economical Reply submission, paras. 48-49.

collected that information. It did not do so. I conclude that the disclosure statement on the application form completed by the Complainant and his spouse does not satisfy the disclosure requirements in ss. 10(1)(a) and s. 7(1) of PIPA.

[118] Economical argues, in the alternative, that it provided notice of its purpose in collecting credit score information when it purchased Federation. As the policies that Economical had acquired from Federation came up for renewal, Economical sent a form letter to policyholders advising them of the change in ownership. That letter does not address the collection of personal information. The paragraph to which Economical points simply states:

Accordingly, Economical Insurance is now your insurance provider. Economical offers similar insurance products and payment plans and the same superior claims service. Economical Insurance is 100% Canadian owned and operated and has served Canadians since 1871. For more information about Economical, contact your independent insurance broker or visit our website at www.economicalinsurance.com.⁵²

[119] Economical says that one of the documents accessible through its website is its Privacy Statement and that it contains a statement that Economical collects information from third parties, such as insurance brokers, insurance industry databases, governmental authorities, claims investigation organizations and regulatory information. It also says that the Privacy Statement refers individuals to Economical's Privacy Policy which "specifically gives notice of the collection and use of credit scoring information".⁵³

[120] As noted above, Economical's Privacy Statement and Privacy Policy are both dated June 2010, well after Economical collected the Complainant's CPLS.⁵⁴ Therefore, I have no information about what Economical's Privacy Statement or its Privacy Policy disclosed with respect to collection of the CPLS or a credit score at the time that notice was required to be given under PIPA.

[121] I find that Economical has not established that it gave notice of the purposes of the collection of the Complainant's CPLS score within the meaning of ss. 10(1)(a) and 7(1) when it wrote to policyholders after it acquired Federation or when the Complainant's policy came up for renewal in 2009, after he had made a claim under it.

[122] In summary, I find that Economical did not disclose to the Complainant the purpose for the collection of his personal information, specifically the CPLS, either through the statement on the original application form or when it wrote to policyholders upon acquiring Federation, contrary to s. 10(1)(a). Accordingly, the Complainant could not have given consent under s. 7(1). Further, Economical

⁵² Coulson Affidavit, Exhibit A.

⁵³ Little Affidavit.

⁵⁴ See para. 29, supra.

has not complied with s. 11. Although the purpose of collecting the CPLS was one that a reasonable person would consider appropriate in the circumstances, it was not disclosed as required by s. 11(a).

Did the Complainant consent to the collection of his information?

[123] I have found that Economical did not give the Complainant adequate notice of its purpose for collecting his personal information. The parties also addressed the question of whether the Complainant expressly consented to the collection of his personal information as required by s. 7(1)(b).

[124] The Complainant argued that the fact that he did not personally sign the application he and his spouse made for home insurance meant that he did not consent to collection of his personal information (although presumably his spouse did because she signed the application form). He also says that Economical should have sought his express consent to its collection of his information when his policy was up for renewal.

[125] Economical argues that the Complainant's spouse was his agent, so that her signature on the application form binds both of them to all of the terms of the contract, including collection of the personal information of each of them as set out in the consent statement on the application form. It also says that, having relied on the insurance contract to receive payment on his claim under it, the Complainant cannot now argue that he is not bound by some of its terms.

[126] There is no evidence before me about the circumstances that surrounded the Complainant's and his spouse's joint application for insurance. There is no evidence as to whether he knew about the application, or read the application form, including its consent statement.

[127] Economical was not required to seek the Complainant's consent to disclosure at the point when the policy was up for renewal. Section 10(1)(a) of PIPA allows an organization to obtain the individual's consent any time before the information is collected. Therefore Economical could have sought the Complainant's consent at any time after PIPA came into force.

[128] In these circumstances, where I have already found that Economical did not provide adequate notice, where PIPA was not in force when the application for insurance was made and where there is no evidence about how the application form came to be signed only by the Complainant's spouse, I conclude that it is not appropriate for me to determine whether the Complainant consented within the meaning of s. 7(1)(b) to the collection of his CPLS or credit score by Economical.

4.0 Conclusion

[129] I have made the following findings:

- a) Economical's collection of the Complainant's CPLS or credit score was for a purpose that a reasonable person would consider appropriate under s. 11. Economical did not disclose that purpose to the Complainant as required by ss. 11(a) and 10(1).
- b) Economical can require consent to collection of a credit score for the purpose of assessing future risk of loss as a condition of supplying homeowner's insurance because this does not go beyond what is "necessary" for the purpose of providing homeowner's insurance within the meaning of s. 7(2).
- c) There was no deemed consent under s. 8.
- d) Economical did not give the Complainant adequate notice of its purpose for collecting his CPLS or credit score under ss. 6, 7(1) and 10(1)(a).

[130] For the reasons set out above, pursuant to s. 52(3)(e), I require Economical to cease collecting and using personal information in contravention of PIPA.

[131] Pursuant to s. 52(3)(a), I require Economical to provide all home insurance policyholders who have not been provided with adequate notice, and all present and future applicants for home insurance, with notice that a credit score based on their credit information may be obtained for the purpose of assessing future risk of loss in connection with underwriting their policies. It must provide this notice before collecting any credit score based on their credit information for this purpose.

[132] As conditions under s. 52(4), I specify the following:

- a) Economical must review the consents it has obtained from home insurance policyholders since PIPA came into force on January 1, 2004 and ascertain whether these individuals have been provided with notice that a credit score based on their credit information may be obtained for the purpose of assessing future risk of loss in connection with underwriting their policies.
- b) Economical must submit the notice it intends to provide to home insurance policyholders who have not been provided with adequate notice, and present and future applicants, in accordance with para. 131 to me for review and approval five business days before the deadline set out in (c) below, that is on or before June 13, 2011.

- c) Economical must provide me with proof that it has complied with my orders and these conditions within 30 days of the date of this decision, as PIPA defines day, that is on or before June 20, 2011.

[133] Once Economical has provided adequate notice in accordance with para. 131, and has obtained consent from affected individuals in accordance with PIPA, it may resume collecting and using credit scores for the purpose specified in the notice.

May 6, 2011

ORIGINAL SIGNED BY

Nitya Iyer
Adjudicator

OIPC File No. P09-38902