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Decision P12-02
(in reference to Order P11-02)

ECONOMICAL MUTUAL INSURANCE COMPANY

Elizabeth Denham, Information & Privacy Commissioner

September 27, 2012

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Summary: Economical Mutual Insurance Company applied to the Commissioner to re-open, reconsider and vary Order P11-02, on the basis that there was new evidence that could not have been adduced in the inquiry, but which would have a direct impact on Order P11-02. The new evidence consisted of evidence of Economical's current practice of providing notice to policy holders and applicants for insurance, and evidence with respect to the hardship entailed by compliance with Order P11-02. The Commissioner applied the appropriate legal test for adducing extra-record evidence to Economical's new evidence and found that it failed to establish that there was a basis to re-open, reconsider or vary Order P11-02. She concluded that the new evidence of Economical's current practices was not relevant, as it did not bear upon the decisive issue in the original inquiry, which was whether the notice provided at the date of the complaint was sufficient for the purposes of PIPA. In addition, the evidence with respect to the hardship entailed by compliance with Order P11-02 was available to Economical during the original inquiry and could have been adduced at that time.

Statutes Considered: *Personal Information Protection Act,* SBC 2003, c. 63.

Authorities Considered: Decision F10-04, [2010] B.C.I.P.C.D. No. 16; Order F10-29 [2010] B.C.I.P.C.D. No. 41; Order P11-02, [2011] B.C.I.P.C.D. No 16.

Cases Considered: *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186; *R. v. Palmer*, [1980] 1 S.C.R. 759; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

INTRODUCTION

[1] On September 7, 2012, Economical Mutual Insurance Company ("Economical") applied to re-open, reconsider and vary Order P11-02[1] issued by Adjudicator Nitya Iyer on May 6, 2011. Previously, on May 25, 2011, Economical filed an application for judicial review of Order P11-02, and that application is currently scheduled to be heard on October 2 and 3, 2012.[2]

[2] Economical applied to re-open, reconsider and vary Order P11-02 on the basis that there is new evidence that could not have been adduced in the inquiry and that is relevant, credible and has a direct impact on Order P11-02.

ISSUE

[3] The issue for consideration is whether Economical has established that there is a basis to re-open and reconsider Order P11-02. I find that the evidence before me is sufficient to determine this issue and there is no need to invite submissions from the other participants at the original inquiry.

DISCUSSION

[4] **Background––**On June 8, 2009, an individual filed a complaint that Economical had obtained his credit score, without his consent, when it renewed his homeowner's insurance. Following unsuccessful mediation, the matter proceeded to a written inquiry under s. 50(1) of PIPA. The parties and seven interveners filed extensive submissions. The Adjudicator ultimately 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 of PIPA. She also found that Economical was not requiring consent for collection beyond what is necessary within the meaning of s. 7(2). However, she concluded that the "deemed consent" provision in s. 8 did not apply and that the notice that Economical provided for collection of the credit score was not adequate for the purposes of ss. 10(1)(a) and 7(1) of PIPA. The Adjudicator concluded that, in the circumstances, it was not appropriate to consider whether the complainant had given express consent to the collection.

[5] The Adjudicator then made the following orders under s. 52(3) of PIPA:[3]

> [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.

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[1] [2011] B.C.I.P.C.D. No. 16.
[2] By operation of s. 53(2) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("PIPA"), Order P11-02 was stayed from the date that the application for judicial review was filed until a court orders otherwise.
[3] Order P11-02.

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

[6] **Economical's Application**—Economical proposed a two-stage approach for consideration of its application to re-open in its letter of September 7, 2012. First, it suggested that notice and an opportunity to make submissions in the present application be provided to the participants in the inquiry and that Economical would have a right of reply. If the Commissioner decided to re-open Order P11-02, all participants would have an opportunity to make submissions on how Order P11-02 should be reconsidered and varied, or why it should not be varied, on the basis of the new evidence.

[7] By letter dated September 13, 2012, the Registrar advised that I was not prepared to conduct a two-stage inquiry and instead directed Economical to file any additional submissions by September 20, 2012. The Registrar stated that I would determine whether to invite submissions from the other participants prior to making a decision on the application, after receipt of all of Economical's material. Economical filed further material on September 19, 2012.

[8] In support of its application to re-open, Economical filed three affidavits. The first affidavit sworn by Dan Little, the Privacy Officer for Economical, on June 12, 2012, states that the Office of the Privacy Commissioner of Canada ("OPC") issued a report of findings on January 11, 2011, regarding a complaint brought against Equifax under the *Personal Information Protection and Electronic Documents Act*[4] and that the OPC issued a further report on April 27, 2012. Mr. Little states that the 2012 report addressed the complaint filed against Economical Insurance Group, which includes Economical. Mr. Little describes the corrective measures that Economical has implemented as part of its negotiated resolution of the issues identified in that report. He explains that, as of May 26, 2012, all applicants for insurance (*i.e.,* persons who are not existing policyholders) in British Columbia are provided with a notice that explains how Economical collects and uses personal information. A copy of this notice is appended to the affidavit. Mr. Little confirms that Economical's existing policyholders in British Columbia will be provided with a copy of the notice when their policies come up for renewal and that the notice for policy renewals will run from July 19, 2012 to July 18, 2013. As a consequence, all of Economical's existing policyholders will have been provided with a copy of the notice by July 18, 2013.

[9] The second affidavit sworn by John Beardwood, a partner at the law firm which represents Economical, on September 19, 2012, attaches an email exchange between Mr. Beardwood and a senior OPC privacy investigator and confirms that the OPC has not raised any objections to the form of notice that Economical is providing to applicants for insurance and existing insureds on renewal.

[10] The third affidavit sworn by Catherine Coulson, Vice President of Personal Insurance for Economical, on May 24, 2011, describes the consequences for Economical of complying with Order P11-02 and states that they amount to hardship. Ms. Coulson explains that when individuals apply for insurance, they go to an insurance broker who may refer the individual to a variety of insurance products available through different insurance companies. She notes that Economical has thousands of individual policy applications in hundreds of insurance brokers' offices throughout the province. Ms. Coulson states that it is the broker, not Economical, which keeps the hard copy of the applications and that brokers now store a significant number of applications electronically. In some, but not all, cases, the broker may submit a copy of the paper form of application to Economical, in which case the copy will be stored for two years, and then destroyed. She states that Economical does not store or keep the electronic copy of the application. Ms. Coulson states that in order to comply with paras. 131 and 132 of Order P11-02, Economical "would have to ask hundreds of insurance brokers in British Columbia to go into all of their individual files, find the applications from January 1, 2004 on that pertained to Economical,

[4] S.C. 2000, c.5.

and then have them notify us so we can notify others". She states her belief that brokers only keep their files for seven years, which means that potentially all of the files from the first six months of 2004 will have been destroyed, and that will further compound the difficulties in complying with the Adjudicator's orders. Finally, Ms. Coulson states that the effect of the Adjudicator's orders affects hundreds of brokers, pushing the costs of compliance on them. This, she states, has the potential to damage Economical's reputation and to harm its relationship with its brokers which, in turn, may be inclined not to recommend its insurance products to their clients.

[11] Economical cites the following passage from Order F10-29,[5] as support for the test for the admission of new evidence for re-opening an order:

> [19] In Decision F10-04, I also considered the circumstances where additional evidence might be considered after an order had been issued. I held that the test for admission of new evidence on appeal would be a relevant point of reference for re-opening the order in that case. This involves consideration of the following principles:
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> 1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial
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> 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial
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> 3. The evidence must be credible in the sense that it is reasonably capable of belief
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> 4. It must be such that, if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[12] Economical submits that the new evidence set out in the affidavits of Mr. Little and Mr. Beardwood satisfies this test. On the basis of the new evidence, Economical submits that Order P11-02 should be varied to confirm that:

> a) Economical is now providing adequate notice to applicants for insurance, and is providing or will be providing adequate notice to its existing policyholders regarding how it collects and uses credit information for the purpose of assessing future risk of loss in connection with underwriting their polices;
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> b) the actions prescribed in paragraphs 132(a), 132(b) and 132(c) of Order P11-02 are no longer necessary and those paragraphs are set aside; and

[5] [2010] B.C.I.P.C.D. No. 41.

c) paragraph 130 of the Order is set aside and Economical may collect and use credit scores for the purpose specified in the notice that is attached to the affidavit of Mr. Little as Exhibit "B".

ANALYSIS

[13] As PIPA does not provide any statutory guidance on whether the Commissioner can re-open an inquiry after issuing an order, nor does it outline the test to be used to determine whether to re-open an inquiry to consider extra-record evidence, it is necessary to consider the common law principles. The starting point for considering the issue of finality of administrative decisions and the doctrine of *functus officio* is the decision in *Chandler v. Alberta Association of Architects*,[6] where Sopinka J. observed:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*., *supra*.

[14] In Decision F10-04 (Additional to Order F08-13),[7] Senior Adjudicator Francis summarized the jurisprudence on the test for re-opening and the applicable principles for exercising that discretion to re-open an order under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"):[8]

> [49] 3.3 **Test for Re-opening**—The law is clear that an administrative tribunal that is without a statutory provision for reconsideration, and the decisions of which are not subject to a full right of appeal, can re-open its decisions to consider new evidence or argument in wider circumstances than can a court. The judicial history of the doctrine of *functus officio* and the development of finality in administrative law that flows from *Chandler* show that the more flexible application of the principle of finality to administrative tribunals is not premised on the discretion of a trial court to re-open between the pronouncement and formal entry of its judgement (the test in *Zhu v. Li*). The reason for the flexibility in

[6] [1989] 2 S.C.R. 848, at paras. 20-21. The exceptions in *Paper Machinery* permitting amendment of an entered judgment are where there has been a slip in drawing it up or there has been error in expressing the manifest intention of the court.
[7] [2010] B.C.I.P.C.D. No. 16.
[8] RSBC 1996, c. 165.

> administrative law is that judicial review of a tribunal decision is a more limited review than a right of full appeal of a judicial decision to a higher court. Because of the more limited nature of judicial review and its narrow scope for the admission of extra-record evidence, *Chandler* struck a more flexible application of the principle of finality, "in order to provide relief which would otherwise be available on appeal."
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> [50] I conclude that the test for the admission of new evidence on appeal is a more relevant point of reference for re-opening Order F08-13 than the test for re-opening a judicial trial before entry of formal judgement.
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> [51] Admittedly, the considerations are quite similar for adducing fresh evidence on appeal and for re-opening at trial before entry of the formal order. However, the latter is a less defined and potentially broader discretion. It seems to me that a factor not to be overlooked in this is that time limits themselves promote finality and the window to apply to re-open a trial is short, often very short, because it is contained by the entry of the formal judgement and what is usually a time limit to appeal within 30 days of the pronouncement of judgement.
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> …
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> [54] Whether the test to re-open Order F08-13 is the test for admission of new evidence on appeal, as I see it, or the test for the re-opening of a trial before entry of the formal judgement, as the Correctional Officer and Requester submitted, a necessary component of the flexible application of the principle of finality is discretion to refuse to consider re-opening after a period of time that is some reasonable parallel to the time to bring an application for judicial review of an order to comply with FIPPA or to settle and enter a trial judgement in court. I would express this as a requirement for diligence in applying for re-opening of a decision made under FIPPA.
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> [55] FIPPA has been in force since 1993. Applications to re-open an inquiry or order under FIPPA have not been frequent. The resulting decisions, few in number though they are, support the importance of timeliness as a factor in the flexible application of the doctrine of finality to inquiries and orders under FIPPA.

[15] Consistent with the approach in past orders, the Senior Adjudicator applied the test for the admission of new evidence on appeal as set out in *R. v*. *Palmer*:[9]

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

[9] [1980] 1 S.C.R. 759.

> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[10]

[16] The Senior Adjudicator also considered the timeliness of the application to re-open under the requirement for due diligence under the first branch of the *Palmer* test.

[17] Decision F10-04 and Order F08-13,[11] were subject to an application for judicial review. In *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*,[12] the Court held that the Senior Adjudicator correctly applied the *Palmer* test for adducing extra-record evidence on appeal to the decision of whether to re-open the inquiry and correctly considered the issue of timeliness under the first branch of that test.

[18] I agree with Economical that this is the test that I must also apply under PIPA in determining this application.[13]

The "New Evidence"

[19] Economical's new evidence falls into two categories. The first category is evidence of action taken subsequent to the issuance of Order P11-02 on May 6, 2011, and is described in the affidavits of Mr. Little and Mr. Beardwood. Mr. Little deposes that:

> 8. In British Columbia, effective May 26, 2012, all applicants for insurance (i.e., persons who are not existing policyholders) are provided with a notice that explains how Economical collects and uses personal information. A copy of the notice that is provided to all applicants for insurance is attached to this Affidavit as Exhibit "B" (the "Notice").
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> 9. The Notice is responsive to the concerns identified by the OPC in the 2012 Report.

[10] *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 15.
[11] [2008] B.C.I.P.C.D. No. 21.
[12] 2011 BCSC 1244.
[13] September19, 2012 submission, at para. 32.

> 10. Economical's existing British Columbia policyholders will be provided with a copy of the Notice when their policies are up for renewal. The process of sending out the Notice for policy renewals will run from July 19, 2012 to July 18, 2013. As a result, by July 18, 2013, all of Economical's existing policyholders will have been provided with a copy of the Notice.[14]

[20] The evidence of Economical's current practice of providing notice to policy holders and applicants for insurance relates to events that occurred subsequent to the issuance of Order P11-02. This evidence relates to the question of whether Economical has complied with the terms of the Order made by the Adjudicator. The steps that Economical has taken in response to the 2012 report from the OPC are prospective in nature. As a consequence, this evidence does not relate to the question of whether the notice that Economical provided at the date of the complaint was sufficient for the purposes of PIPA, which was a decisive issue in the inquiry. Additionally, Economical's submission presupposes that the resolution "negotiated" with OPC under the federal legislation is sufficient to address the notice requirements under PIPA, which is a different legislative scheme. For these reasons, I find that this first category of evidence fails to meet the second branch of the *Palmer* test.

[21] I am also concerned about the timeliness of Economical's application to re-open under the first branch of the test. Economical did not provide evidence of the date that it reached the negotiated resolution with OPC. Exhibit "A" to the affidavit of Mr. Beardwood confirms that an OPC senior privacy officer emailed Mr. Beardwood on July 24, 2012 to request confirmation that Economical had commenced sending notices to policyholders. The evidence establishes that Economical had in fact started providing notices to all applicants for insurance effective May 26, 2012. Economical has not explained why it did not file an application to re-open Order P11-02 at, or shortly after, the time that it began providing notice to applicants for insurance. For this reason, I find that Economical has not adequately demonstrated diligence in terms of timeliness in applying for re-opening of Order P11-02.

[22] The second category is evidence of hardship that will result if Economical is required to comply with the Order, in particular para. 132(a). That evidence is set out in the affidavit of Ms. Coulson who explains that Economical will have to ask hundreds of insurance brokers to search their individual files, find applications from January 1, 2004 onward that pertain to Economical, and then have them notify Economical so that it can notify others. Ms. Coulson deposes that this will adversely impact hundreds of brokers, pushing the cost of compliance onto them, which is a situation that has the potential to damage Economical's reputation and harm its business relationship with its brokers.[15]

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[14] Little Affidavit, paras. 8-10.
[15] Coulson Affidavit.

[23] Economical argues that the Adjudicator made orders that went far beyond the scope of the inquiry that was described in the Notice of Inquiry. In the face of inadequate notice on the scope of the proceeding, Economical submits that evidence of hardship resulting from these orders is relevant and admissible on the basis of the general discretion to admit evidence described in *Cambie Hotel (Nanaimo) Ltd. v. B.C. (General Manager, Liquor Control and Licensing Branch)*.[16] However, *Cambie Hotel* does not address the issue of admitting new evidence to re-open a final decision and the issue of whether Economical received adequate notice of the scope of the inquiry is one that has been raised in the application for judicial review.

[24] It is necessary to consider whether Ms. Coulson's affidavit meets the test for new evidence on an application to re-open. In my view, Economical's submission with respect to the hardship entailed by compliance with Order P11-02 fails the first branch of the *Palmer* test because all of this evidence was available to it, and could have been adduced, during the original inquiry. As the question of the adequacy of Economical's notice was squarely in issue, Economical should have been aware of the possibility that the Adjudicator might reject its arguments about the adequacy of its notice. It was open to Economical to make alternative submissions on the appropriate remedy. Economical's decision not to tender evidence during the inquiry on remedy and, specifically on the hardship that would arise if it were ordered to rectify an inadequate notice, cannot now be undone by seeking to re-open the inquiry.

[25] In conclusion, for the reasons outlined above, I decline to re-open Order P11-02.

CONCLUSION

[26] Pursuant to s. 52 of PIPA, I confirm the terms of Order P11-02.

September 27, 2012

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner

OIPC File No.: P09-38902

[16] 2006 BCCA 119.