Privacy and Insurance in Canada, England, and France — How Does the Responsible Insurer "Put Guidelines and Procedures in Place for Retaining and Destroying Personal Information"?

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INTRODUCTION[1]

In an earlier issue of this journal, Ken Chasse predicts that "'records management law' will become a major field of the practice of law".[2] This prediction is based on what he describes as a "great dependence of laws and almost everything that we do upon electronic records".[3] The "laws and practices" that he specifically discusses in his article are those "controlling electronic discovery and admissibility of evidence proceedings".[4]

What is a "record"? It is "a number of related items of information which are handled as a unit".[5] "Information" is "what is conveyed or represented by a particular arrangement or sequence of things", or data "which are handled as a unit".[6] And "data" are "quantities, characters, or symbols on which operations are performed by a computer, which may be stored and transmitted in the form of electrical signals and recorded on magnetic, optical, or mechanical recording media".[7]

In this article, I will be discussing records containing personal data or information, and how "guidelines and procedures" are "put . . . in place for retaining and destroying [such] information"[8] by private-sector insurers carrying on business in Canada, England, and France. Where I discuss Canada, I use the examples of the law of Ontario — which belongs to the English legal tradition —

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1 Note that in these footnotes:

1. "(CA)" indicates that the author is referring to the law prevailing throughout Canada, "(ON)" to the law prevailing in Ontario (be it federal or provincial), "(QC)" to the law prevailing in Quebec (be it federal or provincial), "(EN)" to English law, and "(FR)" to French law; and
2. English "alinea" has been translated by the author from French "*alinéa*".

2 Ken Chasse, "'Records Management Law' — A Necessary Major Field of the Practice of Law" (2015) 13 CJLT 57 at 79.

3 *Ibid.*

4 *Ibid.* at 58.

5 *The Oxford English Dictionary*, 3rd ed., *sub verbo* "record".

6 *Ibid*, *sub verbo* "information".

7 *Ibid*, *sub verbo* "data".

8 Office of the Privacy Commissioner of Canada ("FCPC", for "Federal Canadian Privacy Commission"), online: < www.priv.gc.ca/information/pub/guide_org_e.asp >.

and of Quebec — whose private law belongs to the French legal tradition. As it happens, these are the two traditions with which I have the most experience relating to personal information.

So what is "personal information"? We may define it as "information about an identifiable individual".[9] It includes the following, regarding one or more identifiable individuals:

- age, name, ID numbers, income, ethnic origin, or blood type;
- opinions, evaluations, comments, social status, or disciplinary actions; and
- employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).[10]

Many an organization processes personal information — that is, engages in the "collection, use or disclosure"[11] of such information. However, in my experience, the issue of how to "put . . . procedures . . . in place for retaining and destroying personal information"[12] is a complex one for the insurer. There is considerable uncertainty as to what it means for the insurer to do this. And there is limited scholarship directly addressing the issue.

In this article, I will be drawing upon my own experience to show how the insurer may approach the issue responsibly — that is, in accordance with the best

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9 As the federal Canadian legislature defines it (*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (*PIPEDA*) [FCPA, for "*Federal Canadian Privacy Act*"], s 2(1)).

(ON) FCPA, *ibid* s 2(1), *sub verbo* "personal information".
Note that there exists the *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A (*PHIPA*). However, this Act is limited in its scope, and generally will not apply to the insurer (see especially ss 3(1)–(3) & 49(1)).
(QC) Quebec law defines "personal information" much as federal Canadian law does (*Act Respecting the Protection of Personal Information in the Private Sector*, CQLR, c P-39.1 [QPA, for "*Quebec Privacy Act*"], s. 2).
Note that the business that a private-sector insurer carries on in Quebec "is exempt from the application of [the provisions of the FCPA relevant for the purposes of this article]" (*Organizations in the Province of Quebec Exemption Order*, S.O.R./2003-374, s 1; see also QPA, *supra*, s 3, 1st & 2d alineas).
(EN) English law does not use the term "personal information", but "personal data". Also, it does not define "personal data" exactly as federal Canadian and Quebec law do "personal information" (*Data Protection Act 1998* (UK) (*DPA*) [*EPA*, for "*English Privacy Act*"], s 1, *sub verbo* "personal information"). However, the differences are irrelevant for the purposes of this article.
(FR) French law does not use the term "informations personnelles" ["personal information"], but "données à caractère personnel" ["data of a personal nature"] (*loi n° 78-17 du 6 janvier 1978*, J.O., 7 January 1978, 227 [*FPA*, for "*French Privacy Act*"], art 2, 2d alinea). However, it defines "data of a personal nature" much as federal Canadian and Quebec law do "personal information".

10 FCPC, *supra* note 8.

11 *Ibid.*

12 *Ibid.*

interests of its customers and of its shareholders (or members) and with the law. In my opinion, the responsible insurer approaches the issue by:

1. identifying the main elements of the procedures for the retention and destruction of personal information; and
2. taking proper account of the factual and legal context.

I. IDENTIFYING THE MAIN ELEMENTS

Whatever the context, the procedures will comprise four main elements. These elements are:

1. the relevant information processes; and

with regard to each such process:

2. the relevant personal information;
3. each period of time for which the insurer could retain this information, namely each "retention period"; and
4. the insurer's options for destroying the information at the end of the period.

(a) Information processes

In this article, I will be discussing six of the main information processes that specifically occur in the insurance sector:[13] those "relating to the conclusion, management, and performance of [insurance] contracts"[14]. They are the processes where the insurer:

1. receives the customer's application for insurance ("Application"). In this article, I will be discussing the case where the customer is a consumer,[15] and his/her Application constitutes an offer to *be insured*;[16]
2. accepts the Application;

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[13] Excluding those information processes that occur in business generally, e.g. those "*pour la gestion de leurs personnels*" (Commission nationale de l'informatique et des libertés (CNIL)) ("FPC", for "French Privacy Commission"), *délibération n° 2005-002 du 13 janvier 2005*, *norme simplifiée n° 46*, J.O., 17 February 2005, 40, made under the *FPA*, *supra* note 9, art 24).

[14] Translated by the author from French "*relatifs à la passation, la gestion et l'exécution des contrats mis en oeuvre par les organismes d'assurances, de capitalisation, de réassurance, d'assistance et par leurs intermédiaires*" (FCP, *délibération n° 2013-212 du 11 juillet 2013, norme simplifiée n° 16*, J.O., 14 August 2013, 0188, made under the *FPA*, *supra* note 9, art. 24 [this *délibération, Simplified Norm No. 16*]).

[15] In other words, discussing the "worst-case scenario" for the insurer, where the law is at its most restrictive of the insurer's conduct. Generally, the law is less restrictive where the customer is not a consumer.

[16] Theoretically, the Application could also constitute an invitation to treat (from the customer), depending on the facts and circumstances. If the Application did constitute an

3. rejects the Application;
4. receives a customer claim to benefit from the insurance (''Claim'');
5. accepts the Claim; and
6. rejects the Claim.

(b) Personal information

What personal information do these six processes involve? The answer depends on the process itself.

When, say, the insurer receives the Application, the information that it collects will be of two main types. The information will include:

1. general information regarding the customer's civil status (his/her name, date of birth, place of birth, gender, nationality, marital status, and so on); and
2. specific information regarding the risk insured. For example, information for home insurance will more particularly answer questions regarding the customer's home (such as whether it is detached or semi-detached or a condominium); information for health insurance will more particularly answer questions regarding the customer's health (such as whether he/she is currently undergoing treatment by prescription of a medical doctor).

Once it has accepted the Application, the insurer will request further information that is more specific. For example, if the insurer receives a Claim, the information will be more specifically connected to the facts and circumstances of the Claim itself.[17]

(c) Retention periods

For all the personal information that it processes, the insurer will have to determine its own ''in-house'' retention periods.

(i) Types

Every in-house retention period will be determined either ''extra-jurally'' or ''jurally''.

Extra-jurally determined retention periods will generally concern the interests of the customer and of the insurer's shareholders. Indeed, the insurer protects the interests of the customer particularly by retaining whatever information is necessary to provide a high level of customer service, and it will generally measure this level of service against extra-legal considerations.[18] The

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invitation to treat, then it would be the insurer making the customer an offer to insure him/her, or refusing to insure him/her.

[17] See section II(d)(i), below, ''*Personal information*''.

[18] E.g. ''1. core service (service product); 2. human element of service delivery; 3. systemization of service delivery (non-human element); 4. tangibles of service (servicescapes); and 5. social responsibility'' (B. Gopalkrishna, Lewlyn L.R. Rodrigues,

insurer protects the interests of its shareholders particularly by destroying the personal information; it may destroy the information simply because it costs money to store information, not because of any particular legal rule.

Jurally determined retention periods, on the other hand, will generally be of one of two types: aligned with a limitation period, or aligned with a "regulatory" retention period.

Why should the insurer align the in-house retention of personal information with a limitation period? Because the insurer should retain all personal information that it collects in case it becomes party to legal proceedings;[19] indeed, certain personal information could be necessary for it to make its case.

And why should the insurer align the in-house retention of personal information with a regulatory retention period? Because it may have a legal duty to retain certain records for a certain period of time, and these records may contain personal information. In particular, the insurer may have such a duty with regard to accounting and tax records,[20] in its capacity as a business. Also, in its capacity as a financial services provider, it may have such a duty with regard to anti-money-laundering and counter-terrorist-financing ("AML-CTF") records.[21] AML-CTF records may contain considerable personal information.

Importantly, the insurer must ensure that its in-house retention periods are consistent with any privacy-law duty to destroy personal information after a certain period of time.[22] Only in marginal cases may personal information be retained indefinitely.

(ii) Elements

Outside of these cases, the question arises as to the length of each retention period, and as to the day when it starts to run, namely its "accrual date". Generally, the length of the period will be expressed in years. Its accrual date, on the other hand, will be a specifically defined date.

(d) Options for destroying the personal information

Once the insurer knows what personal information it will be processing and what the corresponding in-house retention period will be, there remains only one broad question: what the insurer's options for destroying the information are.

& K.V.M. Varamball, "Service Quality in General Insurance Sector: An Empirical Study" (2008) 44:1 Indian Journal of Industrial Relations 49 at 51, referring to G.S. Sureshchandar, C. Rajendran, & R.N. Anantharaman, "The Relationship between Service Quality and Customer Satisfaction—A Factor Specific Approach" (2002) 16:4 Journal of Services Marketing 363 at 365, referring to G.S. Sureshchandar, Chandrasekharan Rajendran, & T.J. Kamalanabhan, "Customer perceptions of service quality: A critique" (2001) 12:1 Total Quality Mgmt 111 at 116.

[19] See II(b)(ii), below, "*In-house retention period*".

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

In this article, I will be discussing the case of an insurer whose contract management system (''CMS'') is relatively typical — that is, whose CMS destroys information automatically, according to pre-defined rules entered into it by the (human) user. Accordingly, I will be assuming that the CMS enables the user to:

1. create a dossier for every Application received, and, as the case may be, for any Claim under any Application accepted;
2. classify each dossier according to user-defined classes (''Application received'' and ''Application accepted'' being examples of such classes);
3. record in it the date of any occurrence having some legal effect in connection with the Application as accepted (such as the insurer receiving an Application or a Claim); and

that the CMS automatically:

4. takes all such dates into account so as to determine the date when the insurer must either reclassify the dossier (from, say, an ''Application received'' to, say, an ''Application accepted'') or destroy it; and
5. reclassifies or destroys the dossier on the relevant date.

II. TAKING PROPER ACCOUNT OF THE FACTUAL AND LEGAL CONTEXT

Once it has identified these four elements of the procedures, the insurer may start to decide on the procedure's content — that is, identify the relevant personal information and in-house retention periods, proceeding information process by information process.

(a) Receiving the Application

In many cases, the first of these processes will be where the insurer receives the Application.

(i) Personal information

The Application may take a number of forms, although it will generally be a questionnaire completed by the customer. If the questionnaire is physical, the insurer will enter the information into the CMS by, say, scanning the questionnaire; if the questionnaire is electronic, it may be the questionnaire itself that transfers the information to the CMS. In some cases, there may be no questionnaire as such; for example, where the customer makes his/her Application by telephone, the insurer may simply enter the information into the CMS as the customer provides it.

Whatever its form, the Application will generally contain considerable detail. Indeed, it will contain general information regarding the customer's civil status, as well as specific information regarding the risk insured.[23]

(ii) In-house retention period

There is no retention period as such for the process of receiving the Application. Rather, the Application is either accepted or rejected by the insurer, and reclassified by the user accordingly.

(b) Accepting the Application

Where the Application is accepted, the user reclassifies it as an Application accepted, namely as an "in-force" insurance contract.

(i) Personal information

The records in the corresponding dossier will be much the same as before the insurer accepted the Application. However, there will be some additional information. In particular, the dossier will also contain a copy of the insurer's notification to the customer that it has accepted the Application. Furthermore, if the insurer provides any premium invoice as a document separate from the notification, the dossier will contain this invoice, as well as any evidence that the customer has paid the corresponding premium; if the dossier does not contain these records, then it will generally contain whatever information is necessary for the user to locate them in its systems.

Generally, the records in this dossier will be accounting and tax records. Therefore, they will be subject to the regulatory retention period for such records.[24]

While none of the three countries has a clear definition of accounting and tax records, the tax administration of each has relatively clear expectations. For example, the Canadian Revenue Agency ("CRA") expects every business to retain all "organized accounting and financial documents that summarize [its] transactions and . . . support these transactions". The documents include "contracts", "bank statements", and other "correspondence";[25] therefore, it appears likely that the CRA would expect the insurer to retain the customer's Application, evidence that the insurer has accepted the Application, evidence that the customer has paid its premium, and so on. The English and French authorities have expectations that are similarly broad.[26]

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[23] See I(b), above, "Personal information".

[24] See II(b)(ii), below, "*In-house retention period*".

[25] Canada Revenue Agency ("CRA"), online: <www.cra-arc.gc.ca/tx/bsnss/tpcs/kprc/whkp-eng.html>.

[26] (EN) HM Revenue & Customs, online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/366523/record-keeping.pdf>.

(FR) Direction de l'information légale et administrative ("DILE"), online: <www.service-public.fr/professionnels-entreprises/vosdroits/F10029>.

(ii) In-house retention period

Accordingly, there is some variety in the most advisable in-house retention periods.

In Ontario, it is most advisable to align the in-house retention period with the ultimate limitation period for civil proceedings (plus 15 days, for reasons that we will see below). This limitation period is 15 years in length,[27] accruing on the date when the event causing the injury, loss, or damage occurred (the "Occurrence Date").[28]

However, in each of the other three jurisdictions, the most advisable period is the regulatory retention period for accounting and tax records.[29] In both Canada and England, this retention period is six years in length;[30] and in France, 10.[31] In all three countries, the period accrues at 24:00 on the closing date of the tax year in which the relevant transaction occurs. In Canada, this closing date is fixed at 1 April;[32] in England, at 6 April;[33] and in France, generally at 1 January.[34] Accordingly, each period accrues on the closing date of the tax year in which the last transaction under the insurance contract takes place. This date will be either the date when the insurance contract terminates,[35] or the date when the last of any obligations surviving the termination of the contract is performed.[36]

In all four jurisdictions, if the insurer fails to retain any relevant record for this period, it risks being penalised.[37] In Canada, the penalty is criminal.[38]

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27 *Limitations Act, 2002*, SO 2002, c 24, Sched B, s. 15(1).

28 *Ibid*, s 15(2).

29 However, it could more prudent for the insurer to use one of these shorter periods as its in-house retention period. Indeed, "[l]es dispositions [concernées de la *FPA*, *supra* note 9] ne donnent pas d'indication précise sur la durée exacte à appliquer selon le traitement mis en oeuvre", and there are "des risques juridiques non négligeables" (*Juris-Classeur Communication*, fasc. 932, "Données à caractère personnel—Conditions de licéité des traitements de données à caractère personnel" by Romain Perray, No. 43; see also note 66, *infra*).

30 (CA)*Income Tax Act*, RSC 1985, c. 1 (5th Supp.), s. 230(1), (4), and (4.1).

(EN) *Taxes Management Act 1970* (UK), s 12B(1) and (2); *Finance Act 1998* (UK), Sched 18, para. 21(1) and (2).

31 Art. L.123-22, 2d alinea, *Code de commerce* [*C. com.*].

32 *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8, s 2(1), *sub verbo* "fiscal year".

33 *Income Tax Act 2007* (U.K.), 2007, s. 4(3).

34 See DILE, online: < www.service-public.fr/professionnels-entreprises/vosdroits/F32069 > .

35 If the insurance contract terminates on the closing date of tax year Y (at 24:00), then it terminates in tax year Y, not in tax year Y + 1.

36 E.g. if the customer has paid the insurer more than the premium owed, and the insurer has an obligation to reimburse him/her.

37 (CA)*Income Tax Act*, RSC 1985, c 1 (5th Supp), s 238(1).

(EN) *Taxes Management Act 1970* (UK), s 12B(5); *Finance Act 1998* (UK), Sched 18, para. 23(1).
(FR) Art L.612-41 *Code monétaire et financier*.

Of course, there are other regulatory retention periods for accounting and tax records that could serve as the insurer's in-house retention period. One of these other retention periods is the one relating to AML-CTF records. However, in each of the three countries, this retention period will always end earlier than the retention period for accounting and tax documents. Each period for AML-CTF records is five years in length,[39] and none accrues any later than when the business relationship ends.[40]

The other main possibility for the insurer would be to use the limitation period for acting under an insurance contract,[41] as I propose for the case of Ontario.

In Ontario, it is generally impossible for the customer to bring a civil action against the insurer where 15 years have passed since the termination of the insurance contract. The contract-law limitation period is two years.[42] It accrues either on the Occurrence Date or on the date when the customer, acting as a reasonable person, would have discovered that this event had occurred (the "Objective Discovery Date") — whichever of the two dates is earlier.[43] In practice, there is no limit in time as to when the Subjective Discovery Date or Objective Discovery Date may fall, in relation to the termination of the insurance contract. However, the ultimate limitation period acts as a limit on the Subjective and Objective Discovery Dates; generally, the insurer is certain, by the end of the ultimate limitation period, that if the customer has not yet brought any against it, then no such action would be valid. However, the insurer should add a "buffer" of 15 days, to take account of the possibility of a valid statement of claim reaching the insurer shortly after the end of the 15 years.

Similarly, it is generally impossible for the customer to bring a contract-law action against the insurer in Quebec where the insurance contract has terminated

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38 *Ibid*, (CA).

39 (CA)*Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, s 69(1).

(EN) *Money Laundering Regulations 2007* (UK), r 19(1)—(3).
(FR) Art L.561-12 *Code monétaire et financier*.

40 *Ibid*.

41 In fact, the FPC implies that it would be satisfactory if "[e]n cas de conclusion d'un contrat, les données personnelles . . . sont conservées . . . conformément à la durée nécessaire à l'exécution du contrat. Ces données sont ensuite archivées pour une durée prévue par les articles L.114-1 et suivants du code des assurances . . . et les dispositions du code civil relatives à la prescription" (*Simplified Norm No. 16* (*supra* note 14), art 4, 1st alinea). In other words, these limitation periods are not retention periods by law, but the insurer opts for the limitation periods if it opts into *Simplified Norm No. 16* (*supra* note 14) (*FPA*, *supra* note 9, art 24). If it does not opt into the Norm, then the insurer must specifically declare to the FPC its in-house retention periods (*FPA*, *supra* note 9, art 30), and there are "des risques juridiques non négligeables" (see Perray, *supra* note 29, No 43; see also note 66, *infra*).

42 *Limitations Act*, *supra* note 27, s. 4.

43 *Ibid*, s. 5.

and the time elapsed is three years;[44] and in England, six years.[45] Indeed, these are the jurisdictions' respective contract-law limitation periods. Both periods accrue on the Occurrence Date.[46] Why would these periods serve poorly as in-house retention periods? In Quebec, the limitation period is shorter than the regulatory retention periods for accounting and tax documents; in England, the limitation period has the potential to end on the same date as the retention period, although it will generally end beforehand.

French law, on the other hand, is more restrictive for the insurer. Theoretically, it is possible in France for the customer to bring an action in connection with the insurance contract at any point in time, whether while the contract is in effect or after the contract has terminated.

Indeed, French law sets forth several limitation periods for insurance disputes. There is a specific limitation period for any action arising from an insurance contract. The period is two years in length. It accrues on the Occurrence Date;[47] or in the event of a Claim, on the Subjective Discovery Date, provided that the Subjective Discovery Date fell before the event causing the injury, loss, or damage.[48] Also, there are exceptions: for certain life and health insurance contracts, the period is 10 years in length, accruing on the same date as the two-year period;[49] and for certain permanent life insurance contracts, 30 years, accruing from the death of the customer.[50]

Also, it is possible that the insurance dispute will not even be subject to any of these limitation periods, but to the general limitation period for bringing a civil action. This period is five years in length, accruing on the Subjective Discovery Date or on the Objective Discovery Date — whichever of the dates is earlier. This five-year period is the one that applies, for example, where the customer has paid the insurer more than the premium owed and seeks to be reimbursed.[51]

There are other reasons why the limitation period may make an unreliable in-house retention date, whatever the jurisdiction.

The insurer should take particular care if it carries on liability insurance business. In all the jurisdictions except France, the limitation period for such insurance accrues on the date when the customer's liability to the third-party

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44 Art. 2925 C.C.Q.

45 *Limitation Act 1980* (U.K.), s. 5.

46 (QC)*Monahan c Québec (Procureur général)*, 1982 CarswellQue 423, [1983] CS 251 (CS Que).

(EN) *Limitation Act 1980* (UK), s 5; see also Malcolm A. Clarke, ed., *The Law of Insurance Contracts*, 6th ed. (London: Informa, 2009) at No. 26–5A.

47 Art L.114-1, 1st alinea, C. ass.

48 Art L.114-1, 4th alinea, C. ass.

49 Art L.114-1, 6th alinea, C. ass.

50 Art L.114-1, 7th alinea, C. ass.

51 Cass. civ. 2e, 14 June 2006, No. 05-15.248.

victim is established;[52] and in France, on the date when the victim brings proceedings against the customer or is indemnified by him/her.[53]

Also, there is a problem with all limitation periods (except ultimate limitation periods): their internal structure. Indeed, the limitation period may be suspended — that is, stop running and then continue running. For example, it is suspended where the customer is incapable of bringing an action.[54] The limitation period may also "accrue afresh" — that is, start to run again as if it had never started running at all. For example, there is fresh accrual where one party acknowledges liability.[55] The insurer's CMS must take account of any such suspension or fresh accrual; however, in practice, it will often be difficult or impossible for the CMS to do so.

And of course, the insurer may become party to proceedings that are not subject to a limitation period at all. Indeed, in neither Canada nor England is there a general limitation period for bringing criminal proceedings.

The risk is a lesser one in France, where the only criminal proceedings without a limitation period are proceedings for crimes against humanity.[56] However, the insurer must also take account of the risk of being accused of a so-called "consequential offence". By definition, every offence of this type is connected to a prior offence, this prior offence being the corresponding "predicate offence".

For example, consider the following case: the insurer is defrauded by one of its employees; it discovers the fraud only *after* the corresponding criminal action for fraud has become time-barred;[57] and then, having made this discovery, it knowingly engages in one or more transactions that conceal the fraud. In this case, the insurer is guilty of the (consequential) offence of money laundering,[58]

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[52] (ON)*Dundas v Zurich Canada*, 2012 ONCA 181, 2012 CarswellOnt 3580, leave to appeal to S.C.C. refused 2012 CarswellOnt 13540, 2012 CarswellOnt 13539.

(QC) *Montreal Tramways c. Eversfield*, 1948 CarswellQue 79, [1948] B.R. 545 (Que. K.B.); see also Didier Lluelles, *Précis des assurances terrestres*, 5th ed. (Montréal: Thémis, 2009) at 399.
(EN) *Bradley v Eagle Star Insurance Co. Ltd*, [1989] AC 957, [1989] 1 All ER 961 (QL).

[53] Art. L.114-1, 1st & 5th alineas, C. ass.

[54] See e.g.:

(ON) *Limitations Act 2002*, *supra* note 27, s 15(4).
(QC) Art 2904 CCQ
(EN) *Limitation Act 1980* (UK), s 28A(1).
(FR) Art 2234 C. civ.

[55] See:

(ON) *Limitations Act 2002*, *supra* note 27, s 13(1).
(QC) Art 2898 CCQ
(EN) *Limitation Act 1980* (UK), s 29(5).
(FR) Art 2240 C. civ.

[56] Art. 213-5 C. pén.

[57] This action having become time-barred three years from the day following the day on which the fraud was committed (arts. 131-3 & -4 & 313-1 et seq. C. pén. & art. 8, 1st alinea, C. proc. Pén).

[58] Arts 324-1 *et seq*. C pén.

regardless of the fact that the criminal action for fraud — the predicate offence — is itself time-barred.[59]

Furthermore, the insurer should take note that there are non-criminal proceedings in French law without a limitation period. Of particular importance is the fact that in principle, there is no limitation period for enforcement action to be taken by the insurance regulator.[60] The only legal requirement with regard to the timing of such action is one of "proportionality".[61]

Therefore, in all three countries, the insurer has numerous incentives to retain all its records indefinitely, exposed as it is to certain risks indefinitely. Why, then, should it *ever* destroy any records containing personal information?

The answer is that in all three countries, there is a general rule of privacy law that the information must be destroyed *eventually*. In Canada, "[p]ersonal information shall be retained only as long as necessary for the fulfilment of those purposes" "for which it was collected, except with the consent of the individual or as required by law".[62] The general rule is much the same in England and France,[63] where "[p]ersonal data must be . . . kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed".[64]

Note that there is no definition of "necessary" here. To determine how long is necessary, the insurer should in particular take account of the applicable limitation and regulatory retention periods, as we have in this article.

While this requirement of necessity is much the same in all three countries, the corresponding penalties for breach of the rule are not. In Canada and England, the most serious penalties for simple breach of the rule are regulatory,[65] whereas in France, the most serious penalty is criminal.[66]

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[59] And of the fact that the insurer was the victim of the predicate fraud.

[60] C.E., 14 October 2015, *Société Vaillance Courtage*, No. 393508.

[61] Cons. const., 25 December 2011, *Discipline des vétérinaires*, No. 2011-199, Q.P.C.; see e.g. Autorité de contrôle prudentiel et de résolution (ACPR), *décision de la Commission des sanctions n° 2014-01 du 19 décembre 2014 à l'égard de la société ALLIANZ VIE (contrats d'assurance sur la vie non réglés)*, online: <https://acpr.banque-france.fr/fileadmin/user_upload/acp/publications/registre-officiel/20141222-Decision-de-la-commission-des-sanctions.pdf>.

[62] *FCPA*, *supra* note 9, s 5(1) & Sched. 1, para. 4.5. Note that it could be impractical for the insurer to obtain "the consent of the individual" for the purposes of this exception. See also:

(QC) *QPA*, *supra* note 9, s 14.

[63] (EN)*EPA*, *supra* note 9, s 4 & Schedule 1, para. 5.

(FR) *FPA*, *supra* note 9, art 6, 5°.

[64] *Directive 95/46/EC of 24 October 1995*, Official Journal L.281, 23 November 1995, 0031, art. 6.1(e).

[65] (ON)*FCPA*, *supra* note 9, ss 11–17.

(QC) *QPA*, *supra* note 9, art 91.

(EN) See especially *EPA*, *supra* note 9, s 55A; *The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010* (UK), r 2; see also *FCA Handbook* (UK), PRIN 2.1, principles 1, 2, 3, 5, & 6; *Financial Services and Markets Act 2000* (UK), ss 205 & 206.

However, let us note a Canadian particularity here: the Office of the Superintendent of Financial Institutions (''OSFI''), the federal Canadian financial services regulator, expects life insurers to ''retain [certain records] indefinitely''.[67] These include ''records pertaining to premium payments'',[68] records which must — by logical necessity — include customer personal information if they are to serve as evidence that the customer made the relevant payments. As far as I am aware, the Canadian judiciary has never considered the effect of OSFI's (extra-legal) expectations on this issue. Therefore, it is uncertain whether the insurer may indeed retain ''records pertaining to premium payments'' ''indefinitely''.[69]

(c) Rejecting the Application

Of course, there is an information process that will involve no premium payment at all: where the insurer rejects the Application.

(i) Personal information

The records in the corresponding dossier will be same as before the insurer rejected the Application. However, there will also be an additional record: a copy of the insurer's notification to the customer that it has rejected the Application. Therefore, the dossier will contain little new personal information.

(ii) In-house retention period

In Canada and England, the in-house retention period should be the same as for any Application accepted.[70] However, the accrual date will of course be different: it will be the date when the customer receives this notification. Therefore, if the notification is by surface mail, then the insurer should regard the in-house accrual date as falling 15 days from when the insurer posted the notification.

The French authorities, on the other hand, have implied that for the case where the Application does not give rise to an insurance contract, there are two satisfactory retention periods:[71] a three-year general retention period[72] and a five-year special one,[73] for ''health data''.[74] The general accrual date is the date of

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66 Art 226-20, 1st alinea, C. pén. There are also regulatory penalties (see *FPA*, *supra* note 9, art. 45 *et seq*.).

67 Office of the Superintendent of Financial Institutions, Bulletin No. E-5, ''Retention/Destruction of Records'', May 1993, online: < www.osfi-bsif.gc.ca/eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/e5.aspx > .

68 *Ibid.*

69 *Ibid.*

70 See II(b)(ii), above, ''*In-house retention period*''.

71 These limitation periods are not retention periods by law, but the insurer opts for the limitation periods if it opts into *Simplified Norm No. 16* (*supra* note 14) (see also *supra* note 41).

72 *Simplified Norm No. 6*, *supra* note 14, art. 4, 2d alinea.

"collection" of the data or of "the last contact [with the insurer] initiated by the prospective [customer]" — whichever of the dates is later.[75] Surprisingly, the Commission does not explicitly define any special accrual date; however, it would prudent to assume that the special retention period accrues on the general accrual date.

(d) Receiving the Claim

Where, on the other hand, the insurer does in fact accept the Application, it may one day receive a Claim.

(i) Personal information

In order to process the Claim, the insurer collects information from the customer and, as the case may be, from others. As we have seen, the content of this information depends on the facts and circumstances of the Claim itself: in general terms, the information will answer the questions "who, what, when, where, why, and how" in relation to the Claim. And these answers will contain new customer personal information.

(ii) In-house retention period

As in the case of the Application received, there is no retention period as such for the process where the insurer receives the Claim. The Claim is accepted or rejected by the insurer and reclassified by the user in the CMS as accepted or rejected.

(e) Accepting the Claim

If the insurer decides to accept the Claim, it notifies the customer of its decision and provides the insurance benefit. This benefit may take one of two forms:

1. one or more payments, as is generally the case with life and health insurance; or
2. the provision of a service in kind, such as repairing or replacing property, as is often the case with property and casualty insurance. Where the benefit takes this form, the insurer or its representative will generally have the customer sign a declaration that the service has been provided.

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[73] *Ibid.*

[74] Translated by the author from French "données de santé" (see Perray, *supra* note 29, No. 84).

[75] *Supra* note 72.

(i) Personal information

Again, the records in this dossier — newly reclassified as a Claim accepted — will be much the same as before the insurer accepted the Claim, with two main exceptions. It will contain:

1. any further information collected by the insurer; and
2. evidence that the insurer has provided the benefit: the bank statement (or statements) evidencing the payment (or payments), or the customer's declaration.

(ii) In-house retention period

The in-house retention period should be the same as for the Application accepted.[76] Indeed, the Claim is simply one of the many transactions that may occur while the insurance contract is in effect—however much of a burden the Claim may represent.

Accordingly, the in-house accrual date should be the date when the insurer's duty to provide the benefit is extinguished. In principle, this duty extinguishes on the date on which the insurer makes the last of any payments due, or on which the customer signs the declaration.

(f) Rejecting the Claim

Of course, it is also possible that no such service will be provided: that the insurer will reject the Claim.

(i) Personal information

Accordingly, the records in the dossier for the rejected Application will be the same as before its rejection, with one difference: there will also be a copy of the notification to the customer that the insurer has rejected the Claim.

(ii) In-house retention period

The in-house retention period should be the same as for the Application accepted.[77] The accrual date should be the date when the customer receives this notification. Therefore, if the notification is by surface mail, the in-house accrual date should be regarded as falling 15 days from when the notification was posted.

CONCLUSION

It is for these reasons that the issue of how to put procedures in place for retaining and destroying personal information is a complex one for the insurer in Canada, England, and France. But is this complexity necessary? In my view, it is

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[76] See II(b)(ii), above, "*In-house retention period*".

[77] See II(b)(ii), above, "*In-house retention period*".

not. Such complexity would be necessary if it somehow protected the interests of the customer or of the insurer's shareholders. However, I do not see how it could.

The countries' authorities have attempted to clarify the relevant law somewhat. The Canadian and English governments have published guidance for the private sector,[78] and the French government has even published guidance for the insurance sector specifically.[79] Nevertheless, the relevant law remains complex.

It would be advisable for the governments, and in particular for the French government, to simplify the relevant limitation and regulatory retention periods themselves, with the issue of retention and destruction of personal information in mind. Why? To enable the insurer to focus on other aspects of its business — aspects of its business where complexity is a necessary evil for the purposes of protecting the customer and its shareholders.

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78 (CA)*FCPC*, *supra* note 8.

(EN) Information Commissioner's Office, online: <https://ico.org.uk/for-organisations/guide-to-data-protection/>.

79 *Simplified Norm No. 16* (*supra* note 14), s. 4; FPC, online: <www.cnil.fr/sites/default/files/typo/document/PACK_ASSURANCE_complet.pdf>.