Canadian Internet Policy and Public Interest Clinic
Clinique d'intérêt public et de politique d'internet du Canada

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VIA EMAIL

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Dear Ms. Melbye,

Re: ***Consumer Protection Act, 2002***

We write to express the concerns of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC] with the exclusion of certain types of financial services – we focus on non-auto insurance, credit unions/caisse populaires, and mortgage brokers ["excluded services", collectively] – from the protective scheme of the *Consumer Protection Act*, *2002* [CPA].[1]

The CPA offers valuable protection to consumers and this protection should be extended to the excluded services. These excluded services typically involve sophisticated arrangements entailing large amounts of funds and as such potential high risk for consumers. The sophisticated nature of these services and the recent turmoil in financial markets suggest the need for greater protections in these areas. CIPPIC recognizes that the excluded services are partially addressed in other regulatory schemes. Nonetheless, CIPPIC maintains that current protections are inadequate. Consumers would benefit from the additional protection that would be afforded by bringing these excluded services under the protective umbrella of the CPA.

A full analysis of the harm that currently results from the present approach to consumer protection in respect of the excluded services is beyond the scope of this letter and would require further debate and empirical research. However, CIPPIC outlines in this letter a number of areas of particular concern with respect to regulation of the excluded services. These include:

[1] S.O. 2002, c. 30, Schedule A ["CPA"], s. 2 excludes services covered by the *Securities Act*, the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act*, the *Mortgage Brokerages, Lenders and Administrators Act, 2006,* the *Commodity Futures Act*, transactions related to the purchase, sale or resale of real property excluding time shares and, more generally, all "financial services related to investment products or income securities". In this particular letter, CIPPIC has chosen to focus on non-auto insurance companies and brokers, credit unions and caisse populaires, and mortgage brokers. A more detailed study may reveal the need to include other services currently excluded under s. 2.

- Lack of adequate disclosure requirements
- Lack of cooling off periods
- Lack of restrictions on unilateral changes in terms
- Lack of protection for electronic signatures

CIPPIC suggests the initiation of a more comprehensive consultation process to identify consumer harms that result from the present regulatory scheme covering the excluded services.

I. CIPPIC

CIPPIC was established at the University of Ottawa, Faculty of Law in the fall of 2003. CIPPIC's mandate is to ensure balance in policy and law-making processes by expressing under-represented interests and perspectives on issues that arise as a result of new technologies. Upper year law students work under the supervision of the Clinic Director and Staff Counsel on projects and cases involving the intersection of law, technology and the public interest. Clinic staff and students engage in research and analysis, drafting of reports and policy papers, policy and legislative advocacy, public education, client advice, and litigation. CIPPIC focuses in particular on the impact of technology on copyright, privacy, e-commerce and, more generally, consumer protection. For more information, see the "About Us" page on our website: www.cippic.ca.

II. The Consumer Protection Act

The *Consumer Protection Act*, *2002* was enacted in order to provide Ontario with a comprehensive and consolidated consumer protection framework, where before such protection had been criticized for its piece meal, sectoral approach.[2]

While to some extent, consumer protection is best handled on a sectoral basis with provisions tailored to specific dangers raised in specific contexts, there are other aspects of consumer protection that apply more broadly across numerous services and the CPA is an ideal vehicle for these types of protections.

CIPPIC contends that the general protections outlined below should be applied to the excluded services and that the best medium for doing so is within the context of the CPA. Most of these measures (as well as others currently contained in the CPA but not discussed in this letter) address issues of basic fairness and serve to correct shortcomings in the operation of basic principles of contract. As such, they are protections that consumers should generally have when subscribing to the excluded services. Moreover, there is nothing to suggest the dangers posed by these shortcomings are no less prevalent in these services. To the contrary, a preliminary examination of the issues suggests that there is great need for these protections. Given this, CIPPIC contends that the protections mentioned herein should be applied to the excluded services by default, and that any sector-specific tailoring should be accomplished through exceptions to this default exclusion.

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[2] E.L. McNaughton and P. Saber, *A Guide to the Ontario Consumer Protection Act*, (Markham: LexisNexis Canada Inc., 2007), at p. 1.

1. Adequate Disclosure Requirements

Adequate disclosure is a fundamental aspect of any contractual relationship. Statutory disclosure requirements aim to correct information imbalances that would otherwise undermine the essence of the contract – the basic assumption that the parties are binding themselves to a shared set of terms. A consumer cannot intend to agree to a contractual term she has not been made aware of.

Yet in many contexts, consumers are not given the opportunity to read complex and lengthy contracts before finalizing an agreement. In addition, it is sometimes common practice not to adequately specify certain terms and conditions within the contract itself. This is problematic in that parties may end up bound by detrimental terms they have no knowledge of and would never have agreed to had they been aware of them. In commercial contexts, which involve sophisticated parties in often lengthy negotiations, each party can be left to fend for itself to a certain extent. However, in the consumer context, terms are generally dictated by the vendor ('contracts of adhesion'), and there are practical limits on how much information a consumer can obtain of their own volition. It is this imbalance that justifies added legislative disclosure requirements aimed at ensuring vulnerable consumers are provided with sufficient information to make informed decisions.

Consumers of the excluded services are no less vulnerable to such informational deficiencies then those of other services. While *some* context-specific disclosure requirements are found in the various independent legislative regimes that regulate each of the excluded services, there are additional necessary disclosure requirements that would best be applied to these excluded services through the medium of the CPA.

One example is the general disclosure protections afforded by the CPA to internet agreements. Online transactions are rapidly becoming a ubiquitous feature of financial services.[3] Credit unions and caisse populaires provide more and more services through online banking. Consumers may even negotiate mortgage transactions online.[4] Yet transactions of this nature raise particular informational challenges for consumers. Online transactions are almost exclusively non-negotiable, and the online context "provides businesses with even more opportunities to impose unfair terms and conditions on consumers…in ways that are considered by many unfair."[5] Online contracts can involve 'clickwrap' or browsewrap' terms of much greater length and complexity than normal paper contracts and consumers are far less likely to read such contracts in full before completing a transaction.[6]

The CPA provides general disclosure requirements meant to combat these problems endemic to online transactions. For example, the CPA requires that consumers be given written copies of any online agreement so they can properly review the terms to which they have agreed in a

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[3] Office of Consumer Affairs, *The Consumer Trends Report*, (2004) Industry Canada, at p. 56, available online at: <http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/EN_CTR.pdf/$FILE/EN_CTR.pdf>.
[4] A. Bielanski, *Best Practices in Online Mortgage Origination: How to Attract and Retain Customers Online*, Mortgage Bankers Association, April 18, 2001, available online at: <http://www.mortgagebankers.org/files/present/tech01/bielanski.pdf>. In 2001, for example, online E-commerce funding amounted for $4.3 billion or 45% of one major mortgage company's national mortgage portfolio.
[5] University of Ottawa, *"The Virtual Consumer" Workshop: Summary of Proceedings*, June 20, 2007, p. 17.
[6] *Ibid*.

timely manner.[7] The context specific legislative regimes protecting the excluded sectors do *not* include such protection for online transactions. Thus, while the *Mortgage Brokerages, Lenders and Administrators Act, 2006* ["Mortgage Act"][8] may require an online mortgage broker to disclose the cost of borrowing and whether the consumer will have the right to pay off her mortgage before maturity, there is nothing to prevent that online mortgage broker from completing the transaction without presenting the consumer with a hard copy of its lengthy clickwrap agreement.

Such informational deficiencies are especially dangerous in light of recent financial troubles regarding mortgages. In fact, "inadequate disclosure of contract terms" and borrowers "not being given copy of contract document" have been noted as key contributing factors leading to the types of sub-prime loans that were a primary cause of the financial collapse experienced in more recent times.[9]

In conclusion, at least some of the disclosure protections already available in the CPA are integral to proper regulation of the excluded services, yet such protections are not otherwise available. The disclosure requirements applied to internet transactions (those listed above and those included in the regulations) are just as relevant in the context of the excluded services. Replicating them in the individual statutes regulating these services would be redundant. Moreover, as noted above, disclosure requirements address fundamental informational deficiencies that, if present, are problematic in any contractual relationship. As such there is broad scope for the application of some minimal disclosure standards to the excluded services within the CPA

2. <u>Cooling Off Periods</u>

Cooling off periods serve multiple purposes and are integral to consumer protection in a number of ways. First, cooling off periods enhance disclosure. As many customers do not always take the time to read the entire contract at the point of sale, a cooling off period provides them with an opportunity to read and consider all the terms to which they have agreed. Additionally, they work to protect consumers from high-pressure sales tactics by giving the purchaser time to reconsider his purchase.[10] As with disclosure requirements, cooling-off periods are not only

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[7] CPA, ss. 42, 46, for example.

[8] S.O. 2006, c. 29, at ss. 23(1) – 25(1).

[9] I. Ramsay, "The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches", (2001) 35(3) Can. Bus. L.J. 325, at pp. 381-384 highlights the importance role that the contract itself can play in mitigating sub-prime mortgage and other loans. T. Duggan, "Access to Credit in the Alternative Consumer Credit Market: An Australian Comparison", (2001) 35(3) Can. Bus. L.J. 402, at p. 403 lists inadequate disclosure of terms and unavailability of a hard copy of the contract as key factors in leading to unfair non-mortgage loans such as pay day loans. Others have highlighted the role that "lack of information" of borrowers plays in facilitating predatory home equity sub-prime mortgages and drawn an analogy between these deficiencies and those exploited in other predatory lending situations such as those mentioned by Duggan, *supra*: R.E. Scharar, "The Limits of Securitization: Why Bankruptcy Courts Should Substantively Consolidate Predatory Sub-Prime Mortgage Originators and their Special Purpose Entities", (2008) Mich. St. L.R. 913, at pp. 922-923. See also: D. Goldstein, "Understanding Predatory Lending: Moving Towards a Common Definition and Workable Solutions" (Sept. 1999), Joint Center for Housing Studies, available online at: <http://www.jchs.harvard.edu/publications/finance/goldstein_w99-11.pdf>, generally.

[10] Ontario House of Commons Debates, Tuesday November 19, 2002, at 15:30 (Honourable Tim Hudak).

essential to protecting consumers, but are consistent with basic principles of contract formation as they aim to ensure consumers only agree to what they truly intend.[11] Given these features, cooling-off periods are fair and would be a generally beneficial feature of most types of contractual transactions. This is no less true for contracts signed in the course of procuring the excluded services. Indeed, the excluded services often involve long and sophisticated transactions where many consumers would have difficulty grasping the terms involved at the point of sale. This added complexity merely exacerbates other predatory techniques employed in issuing such services.

High-pressure sales tactics, for example, are not just for door-to-door sales. Coercion of this nature is a common feature of non-auto insurance sales.[12] Insurance sales are, moreover, often conducted under circumstances that do not leave the purchaser much time to fully consider what he is agreeing to. A typical scenario could involve a consumer attempting to purchase one service, and having some form of insurance presented to them as an additional product (so-called 'tied selling'). Loaning institutions and credit card companies often offer life or disability insurance to consumers in such a manner.[13] The consumer, who has come prepared to purchase one product, will often not be prepared to properly assess the terms of the added insurance at the point of sale. This lack of preparation is often compounded by pressure tactics.

For these reasons, the *Bank Act* includes a specific provision restricting tied selling.[14] However this restriction applies only to enumerated banking institutions, and does not apply to insurance contracts in general or to practices of credit unions and caisse populaires. The *Insurance Act* does provide consumers with a grace period in certain very specific circumstances (see, e.g., s.263.1(2)),[15] but such circumstances are case-specific and fall far short of guaranteeing the benefit of a cooling-off period to all consumers of insurance services.

Cooling-off periods are of general consumer benefit. Introduction of such protections to the excluded services would facilitate greater consumer understanding of financial contracts. It makes sense to offer such protection to consumers in respect of the excluded services through the CPA instead of doing so piecemeal, through each of the distinct statutory regimes otherwise applicable to some of the excluded services, given the general applicability of the need for such protection.

3. <u>Restrictions on Unilateral Changes</u>

Unilateral material changes to contractual terms are antithetical to the basic idea of a contract, which is that parties are bound to terms to which they have agreed. Yet many vendors include

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Honourable Tim Hudak (Minister of Consumer and Business Services, Ontario).

[11] T.D. Rakoff, "Is 'Freedom From Contract' Necessarily a Libertarian Freedom?", (2004) Wis. L.R. 477, at p. 487.

[12] J.M. Barron and M.E. Staten, "Coercion in the Selling of Credit Life Insurance", (1995) 12(8) Psychology & Marketing 765. Such tactics are, additionally, listed along with informational deficiencies as a primary factor in predatory sub-prime lending mortgage practices: Goldstein, *supra* note 9, at p. 9.

[13] Barron *et. al., supra* note 12.

[14] S.C. 1991, c. 46, s.459.1.

[15] R.S.O. 1990, c.I.8. Section 263.1(2) provides consumers of auto insurance with a very specific cooling-off period by forcing collision repair shops to gain the consent of the consumer before initiating repairs. In this way consumers are able to take the time they need to assess the insurance liability they will incur from such repairs.

terms within their contracts that allow them to alter the contractual relationship, often without limitation, without actual notice, and without a reasonable opportunity for consumers to refuse.[16] Such changes are most problematic when they are not accompanied by notice, but can be equally unfair when injected into a pre-existing contractual arrangement, even if the consumer is notified.

These types of unilateral changes often occur in the online context, where agreements are posted online and vendors are able to post changes without notifying consumers under the assumption that consumers will regularly monitor the posted agreements for changes.[17] However few consumers do regularly monitor online notices of changes to contractual terms. Such monitoring requirements are unreasonable and unfair given the proliferation of online agreements most consumers are subject to these days. While the ease of updating a website makes it particularly simple to undermine the contractual terms a consumer has agreed to, this problem is not unique to online contracting. Terms allowing vendors to make unilateral changes are present in non-online contexts as well.[18] In the off-line context, such terms will generally be accompanied by notice, but will still be unfair in many circumstances, such as when the changes affect substantive consumer rights such as the right to relief in court or where there are consumer costs associated with terminating the agreement in response to these changes.

Financial service providers often reserve the capacity to unilaterally change consumer contract terms. Typically, service providers will deem continued use of their services as implicit consent to the changes. A representative clause in a credit union service agreement, for example, may look like this excerpt from Vancity's *Access Services and Cardholder Agreement*:

> **16. CHANGES TO AGREEMENT**
> Vancity can add to or change the terms and conditions of this Agreement from time to time, but Vancity will give you at least 30 days notice of any such additional or amended terms and conditions. Such notice may be given to you either in writing addressed to the last address you provided to Vancity, or in the form of a notice displayed at all Vancity branches, or in the form of a notice displayed on the sign-on screens accessed when using Online Banking. If you continue to use any of the Services after the effective date of any additional or amended term or condition to this Agreement, then you will be deemed to have accepted such additional or amended term or condition.[19]

Legislative protection against such clauses in excluded services is necessary. Such protection must first limit the scope of changes permissible by such means. So, for example, unilaterally adding a mandatory arbitration clause is extremely problematic as it vitiates the ability of an individual to have their rights determined before a court of law and, in addition, eliminates the

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[16] *Kanitz v. Rogers Cable Inc.*, [2002] 58 O.R. (3d) 299 (Ont. S.C.), for example. Here Rogers added a mandatory arbitration clause to its online agreement without notifying consumers. Consumers were expected to regularly monitor the online contract so as to be aware of such changes.
[17] *Ibid*.
[18] *Badie v. Bank of America*, (1998) 67 Cal. App. 4th 779 (4th Dist.), where the bank unilaterally notified the consumer that they were inserting a mandatory arbitration clause into her credit card agreement a few years after she had acquired the card.
[19] Vancity, "Personal Account Vancity Direct Access Services and Cardholder Agreement", available online at: <https://www.vancity.com/SharedContent/documents/DASCA_Retail.pdf>, accessed on May 22, 2009.

possibility of class actions – an essential consumer protection tool.[20] The unilateral addition of such extreme terms should not be permitted, regardless of notice.[21] Other types of changes might be acceptable, but only with notice, and only if notice is adequate.[22] Merely updating a document on a website is unacceptable and does not constitute adequate notice.[23] Finally, notice requirements would be defeated if vendors were permitted to maintain penalties for exiting the contractual relationship upon receipt of said notice, as is often the case.[24]

The CPA provides a general remedy for unilateral material changes. It places the onus on vendors to gain express consent from consumers before enforcing such material changes against them.[25] This right is provided to all consumers with respect to all contracts covered by the CPA. It is a right of general application that operates to improve the fairness of consumer contracts and to strengthen basic principles of contract. Such protections should be applied equally to the excluded services.

4. Electronic Signatures

The signature is another core aspect of contract formation. It signals the intent of each party to agree to the terms of the contract. Electronic signatures are potentially a beneficial invention, capable of increasing the efficiency and speed of financial services. However, reliance on such signatures in place of requirements for a physical signature raises certain concerns that should be addressed. Electronic signatures raise issues of capacity, of identification, and of distribution of subsequent liability.[26] Given the ever-expanding role that electronic commerce is having in our economy, ensuring a secure, dependable framework for the use of electronic signatures is necessary. Without a reliable authentication mechanism, many consumers will lose confidence in e-commerce, and those that do not shall be at undue risk.

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[20] S. Lott, M.H. Beaulieu, and J. Desforges, "Mandatory Arbitration and Consumer Contracts", (2004) Public Interest Advocacy Centre and Option Consommateurs, available online at: <http://www.piac.ca/consumers/mandatory_arbitration_and_consumer_contracts/>, at pp. 10-11.

[21] The CPA currently takes a further step, disqualifying mandatory arbitration terms altogether (see ss. 7, 8). Nonetheless, terms of this nature are illustrative of the category of material changes a vendor should not be permitted to make in the midst of a pre-existing contractual arrangement.

[22] A small increase in ongoing bank service fees might, for example, fall under this category. However it should be noted that the EU has issued a directive that in order to make *any* material changes, a vendor must disclose in its initial contract specific details regarding what it will be able to change and for what reasons (EC *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] O.J. L. 95/29, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML> Annex, s. (j): "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract" is deemed an 'unfair practice', prohibited by Article 3 of the Directive).

[23] As per *Kanitz, supra* note 16.

[24] Vancity, *supra* note 18, does not state, for example, that a consumer may terminate her contract with it upon receiving notice of a material change without any pre-existing penalty. In addition, the termination clause in the Vancity agreement, states that termination by the consumer shall *not* relieve her "of any obligations under this Agreement with respect to the Services" – a term that could potentially include cancellation penalties depending on the services the consumer has signed on to (for example a long term savings account sealed for x years).

[25] CPA, ss. 13(4), (5).

[26] P. Lawson, *Ontario Consumer Protection Law Reform*, Public Interest Advocacy Group comments on Ontario Consumer Protection Law Reform, November 03, 2000, available online at: <http://www.piac.ca/consumers/ontario_consumer_protection_law_reform/>.

In general, electronic signatures have the same force as physical signatures. The *Uniform Electronic Commerce Act* has as a central premise that an electronic signature is *per se* a legitimate substitution for a physical signature where one is required by law.[27] Yet when an electronic signature is used, because the person is not physically present, there are fewer opportunities to properly assess capacity and identity. As matters currently stand, it is unclear how liability will be distributed between consumers and businesses when issues of capacity and identity arise as a result of such deficiencies in the electronic signature as a means of signalling assent to the terms of a contract.

For this reason, some jurisdictions have enacted some standards surrounding the use of electronic signatures. In Canada, for example, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) sets out a set of standards that, when met, will permit an individual to substitute an electronic signature for a physical signature that is otherwise required by law. However these protections are limited in scope to a very limited number of services, while the dangers inherent in such signatures apply to all electronic transactions including those in the excluded services.[28] The European Union has gone further, passing a Directive that envisions the creation of a service industry aimed at providing electronic signature authentication.[29] The Directive requires member states to recognize all electronic signatures, but only if they have been properly authenticated. It additionally imposes a measure of liability on certification institutions for damages resulting from reliance on a certified signature.

As stated above, the excluded services make use of e-commerce and will continue to do so to greater and greater extents in the future. Electronic signatures are essential to e-commerce and legislative guarantees ensuring that an electronic signature is a reliable indication of an individual's intent to assent to terms in a contract are essential. While the degree of rigour with which such standards are applied should be contextual and will vary across different services, the excluded services generally involve serious transactions and will require some level of protection. Further, in spite of such variations, standards for electronic signatures work to preserve a fundamental aspect of contract formation, and should be included within the CPA and applied to the excluded services along with the other consumer protections outlined in this letter.

III. Conclusion

The CPA is a medium for enhancing consumer protection by strengthening principles of contract formation and fairness. While the excluded services each have statutory regimes regulating their operation, CIPPIC has found cause to believe that their inclusion within the protective scope of the CPA is desirable. There is indication that such inclusion would provide better protection for consumers. Additionally, these protections and others contained in the CPA are designed to

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[27] Uniform Law Conference of Canada, *Uniform Electronic Commerce Act*, Winnipeg, MB, 1999, available online at: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1999&sub=1999ia>, at s.10. This Act has been widely implemented in Canada: http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4b.
[28] S.C. 2000, c. 5 at s. 43. The requirements for what is necessary in order for an electronic signature to qualify are set out in the Secure Electronic Signature Regulations, SOR/2005-30. This only applies to physical signature requirements found in the statutes enumerated in schedules 2 and 3 of PIPEDA.
[29] EC *Council Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures*, [2000] O.J. L. 13/12, available online at: < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:013:0012:0020:EN:PDF>.

increase the overall fairness of transactions and as such are not onerous on vendors. To the contrary, many of these protections will serve to enhance consumer confidence in financial services in general. Finally, inclusion of the excluded services in the CPA will serve to address deficiencies in the general application of contract principles by ensuring that consumers will in general be held liable only for their informed, well thought out decisions.

Consumers undertake risk when assenting to any of the excluded services. The inclusion of these services within the scope of the CPA and the addition of protections for the use of electronic signatures in these services would help ameliorate these risks and so benefit consumers.

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We trust the foregoing is helpful.

Yours truly,

Original signed

Tamir Israel
Canadian Internet Policy and Public Interest Clinic