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**INSURANCE BROKERS ASSOCIATION OF CANADA**  
**ASSOCIATION DES COURTIERS D'ASSURANCES DU CANADA**

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September 12, 2006

Ms. Jennifer Stoddart, Commissioner  
Office of the Privacy Commissioner of Canada  
*PIPEDA* Review  
112 Kent Street  
Place de Ville  
Tower B, 3rd Floor  
Ottawa, Ontario K1A 1H3

Dear Ms. Stoddart:

I am writing in response to the invitation extended in the *PIPEDA* Review Discussion Document: Protecting Privacy in an Intrusive World (the "paper"), issued in July, 2006 by the Office of the Privacy Commissioner of Canada ("OPCC"), to provide comments.

The Insurance Brokers Association of Canada ("IBAC") is a national association representing directly eleven provincial and regional members. Jointly, the provincial and regional associations represent the interests of nearly 30,000 property and casualty insurance brokers across Canada.

Provincial member associations may make separate submissions in this matter in order to address more specific concerns. However, IBAC stands as the "umbrella" for the interests of insurance brokers nationally in responding to the paper.

### **1) Preliminary Matters**

The paper is quite thorough in canvassing a range of issues that the OPCC considers to require review upon the mandatory 5-year legislative review of this legislation. Comments from stakeholders are solicited, but the review process thereafter is unclear. To our knowledge, there is no firm schedule set for parliamentary review of this statute, aside from that required by legislation. It would be appreciated if the OPCC would communicate in the reasonably near future how and when the review process will occur. We recognize that many of these logistics are managed by different government offices, however we make the request that we be advised by either OPCC or Industry Canada, both of whom we expect will be closely involved in every step of the process, of any developments. As well, we would expect and request that our submissions will be appended to any report or submission made by OPCC to Industry Canada or



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any other government ministry or body in furtherance of this review, in order to ensure that our comments are received and reviewed by all appropriate officials. Please advise us, in writing, if this is not possible.

As a general matter, I would like to comment briefly on the intent of the legislators of *PIPEDA*, as evidenced in parliamentary and other discussions when it was introduced. *PIPEDA* was intended primarily as a response to the distribution of personal information by electronic means, without regard to the wishes of the individuals to whom such information pertained. *PIPEDA* was and remains a very powerful expression in principle of the importance of individual integrity in the context of the value of information and the ease with which it can be moved. The legislation articulates the principles which all must consider when collecting, using and disclosing information. The legislation is also crafted in a general sense, and this is deliberate. The legislators recognized that the statute would be applied to a very broad range of entities and contexts, and took great care to underscore the importance of exercising discretion when applying the principles to particular fact situations.

## **2) Comment on Specific Issues**

IBAC reviewed the paper and will comment on those matters that it considers to be of greatest importance to the continued effective and efficient operation of insurance brokerages, optimizing customer service throughout Canada.

### ***a) Commissioner's Powers***

The paper indicates that perhaps the ombudsman-like model upon which the OPCC is developed should be modified in order to enhance the remedial and order-making powers of the Commissioner. In our view, the ombudsman model is appropriate and has been effective. Parties have access to collaborative dispute resolution, which, thus far, has characterized the OPCC approach.

However, we would recommend that the legislation be amended to allow the subject of the complaint made to the OPCC to appeal to the Federal Court, if that party is dissatisfied with the OPCC ruling. Currently, only the complainant has a right of appeal. The rationale for this one-sided approach is unclear, and the result may well be the entrenchment of procedural and substantive unfairness.

Additionally, whereas the OPCC has limited enforcement powers, it does have the power to publish its decisions and to identify the parties. This power, when exercised, has the potential to significantly and negatively impact the reputation of a business enterprise, which, of course, is a singular and critical asset. Selective disclosure of the identity of parties is not an approach which is consistent with the open court principle upon which our judicial and quasi-judicial processes are organized.

### ***b) Consent-Based Statute***

OPCC raises the possibility that one-time consents may not be “truly free and informed.” The standard suggested by “truly free and informed” is unclear. To date, the general understanding has been that the consumer must have knowledge of the circumstances to which they consent, and they must understand the nature of the consent. The “reasonable person” standard applies to such analysis, and any consideration of the appropriateness of the consent environment must be considered in context. These qualifying conditions for interpretation, set out in *PIPEDA*, are of the utmost importance, allowing flexibility of interpretation since the statute is applied so broadly.

One may surmise, based on OPCC comments and decisions, that it favours a form of renewed consent, with the consumer receiving ongoing communications regarding changes or modifications in the circumstances of the original consent. This view contrasts with that generally favoured by business, which empowers the individual to assess the scope of the consent and to take responsibility for the ongoing tracking of any relevant changes. With respect, implementing renewed consent in the context in which insurance brokers function would introduce much greater complexity and confusion to the system. It would simply be unworkable.

Insurance brokers typically represent two or more insurance companies, or markets, in their professional practice. They also represent thousands of clients, each with a customized insurance program, based on their individual lifestyle and needs. Insurance products are often modified, and the third party service providers with whom both brokers and companies interact may change. These business decisions ensure the smooth operation and, ultimately, efficient service delivery to the consumer. If consent were required to be modified to advise of each operational change, the result would bog down the system without any value added. Furthermore, consumers accept such flexibility in terms of operating a business as being a reasonable accommodation. IBAC submits, with respect, that the current system which allows the exercise of business and consumer judgement as to when additional information is required in order to make the consent meaningful, operates well and should not be changed.

### ***c) Disclosure of Personal Information before Transfer of Business***

OPCC discusses the fact that personal information is often disclosed without individuals’ consent in the context of the purchase and sale of a business. IBAC’s position is that the standards that have prevailed in such circumstances are more than adequate to ensure that proper protection is accorded to personal information, specifically, the execution of a mutual confidentiality agreement between the parties to such a purchase and sale. To propose any other approach, particularly one that would require consent from each individual in this context, would simply stifle any commercial transactions which require some degree of secrecy while they are being negotiated.

#### ***d) Work Product***

OPCC states in the paper that the definition of “work product” and the matter as to whether it is considered to be “personal information” (it seems they intend this in the situation where personal information is contained in the work product) are identified by OPCC as issues requiring clarification. The common law, and, accordingly, many businesses have interpreted work product to be proprietary, with only personal information contained in the work product falling within the scope of *PIPEDA*. To define work product as personal information would allow *PIPEDA* a degree of control over workplace operations not contemplated nor intended by the framers of the legislation.

#### ***e) Duty to Notify***

It is clear from comments and past actions that OPCC supports a protocol that would require an organization that had experienced a security breach to mitigate the impact of any inappropriate disclosure by notifying directly all individuals whose information was disclosed inadvertently. Of course, inadvertent disclosure could refer to a very wide range of experience, and may be more effectively addressed on a case-by-case basis, as the impact of such disclosure becomes clear.

In the context of many businesses, such a requirement may have very significant and negative ramifications. It may cause undue worry to the recipient of such a notice, and it may place too high a burden on a business – small or large – to notify all such individuals. In most cases of inadvertent disclosure, the impact is very limited, and it is important to give the business enterprise an opportunity to swiftly assess, address and mitigate errors. The more punitive regime contemplated in the paper will not enhance the system in a beneficial manner. In fact, OPCC recognizes in the paper that cost and consumer confusion may result, but presents these as being manageable variables. With respect, IBAC disagrees strongly with this position.

### **3) Conclusion**

IBAC appreciates this opportunity to comment on the paper, and looks forward to continuing this discussion with OPCC and other parties in order to modify the interpretation of *PIPEDA* so that it embodies the intent of the legislators, while meeting the varied needs of its stakeholders, consumers and business people across Canada.

If you would like to discuss these submissions, or any related issues, I would be pleased to do so at your convenience.

Yours truly,



Robert J. Kimball  
President