



February 1, 2007

Mr. Art Hanger, MP
Chair, Justice and Human Rights Committee
180 Wellington Street, Room 622
House of Commons
Ottawa, ON K1A 0A6

Re: Bill C-299 (personal information obtained by fraud)

Dear Mr. Hanger:

We are writing on behalf of the Competition Law and Criminal Justice Sections of the Canadian Bar Association (the CBA Sections) about Bill C-299, concerning personal information obtained by fraud. We would appreciate the opportunity to present our views to the Justice and Human Rights Committee when you study the bill.

The CBA is a national association representing 37,000 jurists across Canada. Amongst its primary objectives is improvement in the law and in the administration of justice.

Bill C-299 would create new *Criminal Code* offences of obtaining, counselling or selling personal information obtained by false pretences or fraud. It also contains amendments to the *Competition Act*. In our view, the proposed amendments to *Competition Act* are unnecessary and undermine the logical scheme of the *Competition Act*. As for the proposed *Criminal Code* amendments, we believe that further examination is necessary to find the best approach to a broad and complex problem. If Parliament concludes after further study that existing *Criminal Code* provisions are not adequate and there is need for legislation of the nature contemplated by Bill C-299, any new offences do not belong in the *Competition Act*, but rather in the *Criminal Code*.

We will address each matter in turn.

***Competition Act* Amendments**

The *Competition Act* is economic framework legislation that generally applies to all businesses in Canada. As set out in section 1.1, the purpose of the *Competition Act* is to maintain and encourage

competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and provide consumers with competitive prices and product choices. The *Competition Act* amendments proposed in Bill C-299 are not directed at promoting competition or at providing consumers with competitive prices and product choices. Rather, they are directed at criminalizing the use of personal information obtained through fraudulent or dishonest means. This is clearly outside the ambit of the *Competition Act*. Such conduct, if not already prohibited by existing legislation, is more appropriately addressed by changes to the *Criminal Code*.

In Bill C-299, the proposed amendments to the *Competition Act* duplicate the proposed amendments to the *Criminal Code*. The only difference appears to be that the words “fraudulent personation” are included in the proposed amendment to the *Competition Act*, but not in the proposed amendment to the *Criminal Code*. This raises a number of questions. First, why is there a difference in wording? Second, if the provisions are substantially the same, what is the reason for duplicating the offence in the *Competition Act*? If the words “fraudulent personation” are meaningful, and amending the *Criminal Code* considered necessary, we suggest that these words be added to section 2(1) of Bill C-299, the relevant *Criminal Code* provision.

Bill C-299 proposes to add a new “fraudulent personation” provision to section 50 of the *Competition Act*. Section 50 has nothing to do with obtaining or using information. It addresses certain pricing practices. Consequently, in addition to being outside the ambit of the *Competition Act* generally, this proposed amendment is inappropriate in section 50 of the *Competition Act*.

Bill C-299 also seeks to amend the misleading advertising and deceptive marketing provisions of the *Competition Act* (sections 52 and 74.01) to provide that, where a product provided by means of fraud, false pretence or fraudulent personation is promoted without reference to such fraud, etc., the promotion constitutes a representation to the public which is false or misleading in the material respect.

In our view, the proposed amendment is unnecessary. Indeed, the proposed amendment commences with the language “for greater certainty”. However, we submit, the proposed amendment does not add certainty, but rather confusion.

The existing misleading advertising and deceptive marketing provisions in the *Competition Act* address a broad range of misleading representations made in connection with the promotion of goods and services or other business purposes. For example, the criminal misleading advertising offence, found in section 52 of the *Competition Act*, prohibits any person from knowingly or recklessly making a representation to the public that is false or misleading in a material respect for the purpose of promoting, directly or indirectly, any business interest. The same conduct is also prohibited under section 74.1, even when the conduct was not undertaken knowingly or recklessly. Therefore, to the extent that Bill C-299 is directed at prohibiting statements that are false or misleading in a material respect, including omissions of material information in the promotion of products, such conduct is already adequately addressed through the current misleading advertising provisions of the *Competition Act*. We believe that the proposed amendment will introduce unnecessary ambiguity into the existing misleading advertising provisions.

Further, the substance of the amendment is not clear. It indicates “where a product that is provided by means of fraud, false pretense or fraudulent personation is promoted without reference to such [conduct], the promotion constitutes a representation to the public that is false or misleading in a material respect”. It is unclear what kind of situations that might entail. That is, it is not clear exactly what is meant by "provision of a product by fraud, false pretense or fraudulent personation". If a seller says “I am Joe Smith, would you like to buy this car?”, he may be personating Joe Smith, but if he makes no false representation about the car, and actually has title and transfers it to the purchaser, it is unclear what misleading representation has occurred *vis-à-vis* the transaction. If the representation is false or misleading in a material respect, then the *Competition Act* already forbids it. If information is obtained by fraud, false pretences or personation, then the *Criminal Code* will prohibit that.

For all of the forgoing reasons the CBA Sections submit that sections 5 to 9 of Bill C-299, which seek to amend the *Competition Act*, are unnecessary and should not proceed.

Criminal Code Amendments

Bill C-299 would effectively create two new *Criminal Code* offences: obtaining personal information from a third-party by false pretence or fraud, and selling or otherwise disclosing information so obtained. In addition, the Bill would clarify and extend the reach of counselling provisions to include the circumstance where one person counsels another to obtain personal information from a third-party by a false pretence or fraud.

These additional offences would address some uncertainty in the law regarding theft of personal or confidential information. The 1988 Supreme Court of Canada case, *R. v. Stewart*¹ has been interpreted as standing for the proposition that theft does not occur where all that was lost was the confidential aspect of information. While *Stewart* can also be interpreted more narrowly as applying only where there is no potential for loss or fraud arising from the loss of the confidential nature of the information, some continue to apply it more broadly.² Bill C-299 would clarify that the criminal law applies to the fraudulent obtaining of personal information.

Further, the law of counselling in preparatory or precursor offences, particularly as it relates to internet crime, is a broad and complex area. In its response to Justice Canada’s 2004 Consultation on Identity Theft, the CBA suggested that the Supreme Court's decision in *R. v. Hamilton* should be carefully considered before addressing any perceived gaps in the *Criminal Code*. We argued that a more careful articulation of the exact nature of any legislative gaps was required. The Supreme Court recognized in *Hamilton* that there may well be Internet criminal activity not captured under the current counselling offences, but indicated that those gaps should be filled by Parliament rather than simply expanding the offence. There may well be aspects of criminal activity relating to the trafficking or exchange in fraudulently obtained personal information not captured by present offences, but the problem is more complex than could be addressed by simply extending the reach of the offence of counselling.

¹ (1988), 421 CCC (3d) 481.

² See, for example, *R. v. Alexander* 2006 CanLII 26480. (Ont. S.C.)

The CBA has suggested that further study and examination of these issues is appropriate. Piecemeal and isolated amendments to the *Criminal Code* are not the best approach to address such a broad and complex problem. Rather, such an approach tends to both increase the complexity of the *Criminal Code* and increase the risk of creating further gaps or inconsistencies. While we recognize the importance of clarifying the criminal law with respect to personal information, the context in which these issues arise is complex, and a comprehensive examination of that context is an approach that we believe will yield the best results in terms of criminal law reform.

Again, we would welcome the chance to present our concerns in greater detail when the Committee studies the bill.

Yours very truly,

(Original signed by Tamra Thomson for James Musgrove and Greg Del Bigio)

James Musgrove
Chair, National Competition Law Section

Greg Del Bigio
Chair, National Criminal Justice Section

cc.

James Rajotte, M.P.
Diane Diotte, Clerk, Justice and Human Rights Committee
Sheridan Scott, Commissioner of Competition