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BARREAU CANADIEN

September 25, 2009

The Honourable Ed Fast, M.P.  
Chair  
Committee on Justice and Human Rights  
House of Commons  
Ottawa, ON K1A 0A6

Dear Mr. Fast,

**Re: Bill S-4, *Criminal Code* amendments (identity theft)**

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section) regarding Bill S-4, *Criminal Code* amendments (identity theft). The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Members of the CBA Section include both prosecutors and defense counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

Amendments to Bill S-4 by the Senate unfortunately did not address the issues we raised. I have therefore attached the CBA Section's prior submission on the Bill in both official languages.

We look forward to discussing the CBA Section's concerns about the Bill.

Yours sincerely,

*(Original signed by Gaylene Schellenberg for Joshua Weinstein)*

Joshua A. Weinstein  
Chair, National Criminal Justice Section



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## **Bill S-4 - *Criminal Code* amendments (Identity Theft)**

**NATIONAL CRIMINAL JUSTICE SECTION  
CANADIAN BAR ASSOCIATION**

**June 2009**

## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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# **Bill S-4 - *Criminal Code* amendments (Identity Theft)**

## **I. INTRODUCTION**

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill S-4, *Criminal Code* amendments (Identity Theft). The CBA Section includes prosecutors, defence counsel and academics from every province and territory in Canada.

We commend Bill S-4's efforts to address identity theft and related criminal activity, as these are serious problems giving rise to significant individual and societal losses. We appreciate that Bill S-4 would restrict the scope of some of the proposed new offences so as not to inadvertently capture unrelated or innocent conduct, particularly in relation to new offences concerning identity documents and information. We also support Bill S-4's proposed removal of certain "reverse onus" provisions. The CBA Section suggests several amendments that we believe add clarity and certainty to the proposals in Bill S-4.

## **II. GENERAL PRINCIPLES**

Three general principles provide the foundation for our specific comments on Bill S-4. The first is the principle of legislative restraint: additions to the *Criminal Code* should only be made where existing provisions are inadequate. Second, any new proposals must comply with the *Charter of Rights and Freedoms*. Third, changes to the criminal law alone are generally insufficient to address serious or complex problems. To be effective, these changes must often be accompanied by refinements in law enforcement practice and procedure, increased public education or other legislative amendment.

This last observation may be particularly applicable to the problem of identity theft. The federal Privacy Commissioner and other organizations have noted that an effective response

to identity theft will require a comprehensive approach, including a broad range of initiatives in addition to changes to the *Criminal Code*.

### III. THE PROPOSED NEW OFFENCES

Bill S-4 would create seven new offences, each directed at different aspects of the problem of identity theft.

#### A. Identity Document Offences

The Bill defines a new category of documents described as “identity documents”. It proposes a wide range of offences, including procuring to be made, possessing, transferring, selling or offering for sale an identity document relating in whole or part to another person. Identity documents are defined broadly to include Social Insurance Number cards, drivers’ licenses, health insurance cards, birth certificates, passports or other documents simplifying entry into Canada, citizenship certificates, immigration documents, certificates of Indian status or similar documents issued or purported to be issued by a foreign government.<sup>1</sup>

Given the combined scope of the definition and the proposed offences, we believe that the Bill’s proposals to add new defenses to the existing concept of “lawful excuse” are appropriate. We support the Bill’s clear attempt to restrict the reach of these provisions as consistent with concerns we have articulated in an earlier submission.<sup>2</sup> In that submission, we stressed that possession and similar offences should be limited to circumstances where an unlawful purpose has been demonstrated.<sup>3</sup>

In spite of Bill S-4’s proposed restrictions, other jurisdictions go further to restrict the reach of similar provisions in at least two ways. First, they expressly exclude the general provisions of attempt and counseling. Second, they expressly exclude certain types of *de*

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<sup>1</sup> Bill S-4, section 1 (56.1(3)).

<sup>2</sup> National Criminal Justice Section, Submission on Identity Theft (Ottawa: CBA, 2005), in response to a 2004 Justice Canada consultation paper.

<sup>3</sup> *Ibid.* at 8.

*minimus* behavior, such as for young persons possessing identity documents to gain admission to licensed premises.<sup>4</sup>

**RECOMMENDATION:**

**The CBA Section recommends that Bill S-4 be amended to expressly exclude the general provisions of attempt and counseling and certain types of *de minimus* behaviour.**

Bill S-4 would prohibit certain activities usually undertaken either as a precursor to, or in preparation for other fraudulent activities. Such preparatory acts may already be prosecuted using the general attempt or counseling provisions of the *Criminal Code*. Given this potential overlap, the relationship between the proposed new offences and existing general provisions should be clarified to avoid unintentionally broadening the reach of the law.

**RECOMMENDATION:**

**The CBA Section recommends that the relationship between the new offences proposed in Bill S-4 and the existing general provisions be clarified.**

**B. Identity Information Offences**

Bill S-4 would create two offences in relation to a category of material called “identity information”. Such information is broadly defined to include “biological or physiological information of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual”.<sup>5</sup> While we understand the need to keep the definition as technologically neutral as possible, significantly increased use of biometric and digitally rendered personal information in large scale data storage suggests that digitally rendered information as described in section 402.1 should perhaps be explicitly included in the definition.<sup>6</sup> Parenthetically, we also note that “photograph” is not included in the list of examples in that section.

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<sup>4</sup> See for example, sections 144E-F, *Criminal Law Consolidation Act, 1935*, Government of South Australia.

<sup>5</sup> Bill S-4, section 10 (402.1).

<sup>6</sup> The use of such processes is increasingly common. See for example, Anil K. Jain, A. Ross and S. Pankanti, “Biometrics: A Toll for Information Security”, (June 2006) “1 IEEE Transactions on Information Forensics and Security” No. 2 at 125-143.



The first of these offences would prohibit possession of another person's identity information “in circumstances giving rise to a reasonable inference” that the information is intended to be used to commit an offence. The type of offence in question is further restricted by a requirement that the offence include fraud, deceit or falsehood as an element of the offence. An inclusive list of offences is also provided for greater certainty.<sup>7</sup>

The second offence would prohibit possession for the purpose, transmission, making available, distribution and sale or offer for sale of that information where an individual knows, believes or is reckless as to whether the information will be used to commit an indictable offence containing an essential element of fraud, deceit or falsehood. Including recklessness as a form of the mental element for this offence could be seen as responding to comments from the Supreme Court of Canada in *R. v. Hamilton*,<sup>8</sup> but we also note concerns about this formulation, particularly as it might apply to businesses or industries that handle large volumes of such information.<sup>9</sup> While the term “reckless” is already used in the *Criminal Code*, it is not free from controversy and occasional interpretive difficulty.<sup>10</sup>

To provide greater clarity and to address some business and industry concerns, we suggest that more explicit language be used. For example, in *Hamilton*, the Supreme Court of Canada equated recklessness with the conscious disregard of a “substantial and unjustified risk”.<sup>11</sup> The concerns we expressed above concerning the relationship of the proposed new offences to the attempt and counseling provisions of the *Criminal Code* apply equally to these provisions.

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<sup>7</sup> Bill S-4, section 10 (402.2(3)).

<sup>8</sup> *R. v. Hamilton* 2005 S.C.C. 47.

<sup>9</sup> *Ibid.*, at paragraphs 26-33. See for example, Kathleen Lau, “Reckless Data Handling Could Violate ID-Theft Law”, Computer World Canada, November 27, 2007.

<sup>10</sup> A brief review of the literature indicates that both the term and concept of recklessness has given rise to controversy in a wide range of criminal law contexts. See for example, Gary T. Trotter, “Instructing Juries on Murder and Intent” (2005) 24 C.R. (6<sup>th</sup>) 178, and “Inconsistent Intent at the Supreme Court” (1994) 31 C.R. (4<sup>th</sup>) 35, Isabel Grant, Natasha Bone and Kathy Grant, “Canada’s Criminal Harassment Provisions: A Review of the First 10 Years” (2003) 29 Queen’s Law Journal 175.

<sup>11</sup> *Supra*, note 8 at paragraph 27.

**RECOMMENDATION:**

The CBA Section recommends that the proposal to prohibit possession of identity information be amended to offer greater clarity by replacing the term, “is reckless”, with more explicit language.

**C. Instruments Used for Copying Credit Card Data**

Bill S-4 proposes an amendment to section 342.01 of the *Criminal Code* to expressly recognize the criminal activity associated with “phishing” devices. These devices are used to copy credit card data, not the credit card itself. The CBA Section supports this amendment as a necessary addition to the current *Criminal Code* section, given the highly technological advancement of computer crime.

**D. Selling, Transferring or Offering for Sale a Forged Document**

Bill S-4 would also amend section 368 in several respects. First, it would capture an individual who knows, *or believes* that a document is forged. Second, a new offence of transferring, selling, offering for sale, or making available a forged document would be created. Third, the Bill proposes an offence to possess forged material with intent to commit any of the other offences listed in the section.

These changes appear to respond to the growing phenomenon of trafficking in forged documents. Increases in this activity, particularly associated with identity theft, are well documented.<sup>12</sup> In addition, the mental elements stipulated in the proposed offence would require actual knowledge or recklessness. Subject to earlier comments regarding clearer language describing recklessness, we believe that these specified mental states appropriately restrict the scope of the proposed offences.

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<sup>12</sup> See for example, “Legislative Approaches to Identity Theft: An Overview”, Canadian Internet Policy and Public Interest Clinic, March 2007. This paper is available online at: <http://www.cippic.ca/documents/bulletins/Legislation.pdf>, News Release, December 13, 2006, United States Immigration and Customs Enforcement, available online at: <http://www.ice.gov/pi/news/newsreleases/articles/061213dc.htm>

## E. Mail Related Offences

Under section 356(1)(a)(i), the Bill would include theft of mail after delivery but prior to possession by the addressee. This amendment may appropriately clarify the law in light of an earlier decision of the Ontario Court of Appeal regarding precisely when mail is “delivered” for the purposes of the *Criminal Code*.<sup>13</sup> In addition, the proposal would explicitly recognize this type of theft as a significant feature in many cases of identity theft. It would provide a greater range of sentence than would otherwise be available if the offence was prosecuted as a simple theft, particularly if the item in question is of nominal value. The amendment would make this a hybrid offence, enabling prosecution by way of either indictment or summary conviction.

We support the addition of a new offence of fraudulently redirecting material sent by post. Again, this practice is frequently employed in identity theft schemes, and although it can be prosecuted by way of other offences, such as fraud or forgery in relation to the underlying documents used to effect the redirection, those offences less clearly reflect the nature of the conduct in question.

Finally, we support the proposed removal of the reverse onus from section 369, which takes the obligation of establishing a lawful authority or excuse from the accused.

## F. Exceptions for Police or Other Official Acts

Sections 7 and 9 of the Bill propose another exception for certain activities by a public officer, as defined in section 25.1 of the *Criminal Code*, or for actions by others at the request of a police force, the Canadian Forces, or any department or agency of the federal or a provincial government. Given the existing general legislative scheme in sections 25.1-25.3 of the *Code*, it is unclear why another exemption would be necessary. The CBA Section has strongly opposed an exemption from criminal liability for police or their agents, arguing that

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<sup>13</sup> *R. v. Weaver*, [1980] CarswellOnt 1352 (Ont. C.A.). The definition of “delivery” in the *Canada Post Corporation Act*, R.S.C. 1985 C-10, section 2, deems delivery of mail to occur once it is left at the residence, or in any place provided for the receipt of mail.

one law should apply to everyone,<sup>14</sup> but acknowledges that the existing sections contain certain detailed procedural safeguards and reporting requirements. We see no reason why the acts specified in Bill S-4 would be inadequately addressed by the existing scheme and are opposed to creating further exemptions of this sort.

**RECOMMENDATION:**

**The CBA Section recommends the exemption for certain police activities in sections 7 and 9 of Bill S-4 be removed.**

**IV. CONCLUSION**

The CBA Section recognizes the prevalence and seriousness of identity theft. We appreciate the efforts in Bill S-4 to provide narrowly circumscribed new offences to address aspects of this issue without inadvertently capturing what should properly be considered non-criminal activity. To further advance this objective, we have suggested some clarification of the language in the Bill, for example, surrounding the mental element of recklessness, as well as a clarification of the interaction of some of the proposed offences with the attempt and counseling provisions of the *Code*. We also appreciate the proposal to increase use of a hybrid structure of offences to give greater flexibility and scope to the exercise of prosecutorial discretion in dealing with these matters.

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<sup>14</sup> National Criminal Justice Section, Submission on Bill C-24, *Criminal Code* amendments (Organized Crime and Law Enforcement) (Ottawa: CBA, 2001) at 12, and CBA, Submission on the Three Year Review of the *Anti Terrorism Act* (Ottawa: CBA, 2005) at 14.