

MODULE 7: IDENTITY CRIME VICTIM RIGHTS AND REMEDIES

7.1 LEGAL RIGHTS AND REMEDIES FOR IDENTITY CRIME VICTIMS IN CANADA

Identity crime victims in Canada have certain legal rights and remedies that may assist them in detecting the problem, mitigating damages, restoring their reputation, and obtaining redress. Many of these legal rights and remedies are provided under provincial law and therefore vary by jurisdiction. See Appendix I for this information in tabular form.

Detection and Mitigation

Especially where the victim's information was obtained from a third party, it is important that victims are notified and that the third party takes reasonable steps to prevent fraudulent use of that information. The federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and similar provincial legislation require that organizations protect personal information under their control "by security safeguards appropriate to the sensitivity of the information".⁴⁰ It can be argued that implicit in this general requirement are duties to detect and report suspected fraud, as well as to take extra precautions to authenticate individuals where evidence of identity fraud exists. However, only Ontario and Manitoba explicitly require the latter, and only in situations where a fraud alert has been added to a consumer credit file.⁴¹

Most identity crime involves financial fraud. In addition to common law duties of care, all provinces but New Brunswick have consumer reporting legislation requiring that credit bureaus take reasonable measures to ensure that the information they report on consumers is accurate, complete, based on the best evidence available, and corroborated if unfavourable.⁴² Data protection legislation applicable in all provinces also requires that organizations take reasonable measures to ensure the accuracy of personal information they hold, and affected individuals can pursue enforcement and redress under most regimes.⁴³

Alberta is the only jurisdiction so far to have enacted a general legislative duty to notify individuals of security breaches involving their personal data.⁴⁴ Under the Alberta law,

⁴⁰ PIPEDA Schedule 1, Principle 4.7; Alberta *Personal Information Protection Act*, s.34; B.C. *Personal Information Protection Act*, s. 34; Quebec *Act Respecting the Protection of Personal Information in the Private Sector*, ss.10, 20.

⁴¹ Ontario *Consumer Reporting Act*, ss.12.1-12.3; Manitoba *Personal Investigations Act*, s.12.1.

⁴² B.C. *Business Practices and Consumer Protection Act*; Alta *Fair Trading Act (Credit and Personal Reporting Reg)*; Sask *Credit Reporting Act*; Man *Personal Investigations Act*; Ont. *Consumer Reporting Act*; *Civil Code of Quebec*; NS *Consumer Reporting Act*; NL *Consumer Reporting Agencies Act*; PEI *Consumer Reporting Act*.

⁴³ PIPEDA Schedule 1, Principle 4.6; Alberta *Personal Information Protection Act*, s.33; B.C. *Personal Information Protection Act*, s. 33; Quebec *Act Respecting the Protection of Personal Information in the Private Sector*, ss.11.

⁴⁴ Alberta *Personal Information Protection Act*, s.37.1.

organizations must notify the Privacy Commissioner first, and must notify affected individuals only if so required by the Commissioner. Ontario and Newfoundland require notification of data security breaches involving health information only.⁴⁵ Bill C-29, currently before Parliament,⁴⁶ would add a security breach notification requirement to PIPEDA. If passed, organizations subject to PIPEDA will be required to notify the Commissioner of any “material breaches” of security affecting their holdings of personal information, and to notify affected individuals if it is “reasonable” in the circumstances to “believe that the breach creates a real risk of significant harm to the individual”.⁴⁷

Credit bureau practices are critical in mitigating damages due to financial identity fraud. Ontario and Manitoba are the only jurisdictions in Canada to require that credit bureaus place fraud alerts on consumer files upon request by the consumer or otherwise.⁴⁸ Canadian credit bureaus do, however, voluntarily offer fraud alerts in other provinces.

Most provinces requires that credit reporting agencies give consumers the right to one free copy of their credit report per year,⁴⁹ and credit bureaus offer the same in those jurisdictions where it is not legislatively required. This allows consumers to detect identity crime. Additional credit monitoring services are offered by credit bureaus and other commercial entities for a fee.

Liability for Fraudulently Incurred Debts

Although not required to do so by law, credit card companies in Canada have voluntarily adopted zero liability policies for “card not present” transactions, and limited liability in other situations. The *Canadian Code of Practice for Consumer Debit Card Services*⁵⁰ encourages banks not to hold consumers liable for fraudulent debit card transactions where reasonable precautions were taken, but actual bank practices vary in this regard, and the code does not (yet) apply to electronic banking.

Real estate and mortgage fraud is a growing problem, and some jurisdictions have legislated protection for homeowners in this regard after highly-publicized cases in which unsuspecting homeowners lost title to their homes as a result of identity fraud.⁵¹

Compounded Victimization

One of the most frustrating problems for victims of identity crime is the often compounded nature of their victimization. Not only do they need to repair their finances and reputations,

⁴⁵ Ontario *Personal Health Information Protection Act*, ss.12(2), 16(2); Newfoundland & Labrador, *Health Information Act*, ss.15, 20(3).

⁴⁶ 40th Parliament, 3rd Session.

⁴⁷ Proposed new sections 10.1 and 10.2.

⁴⁸ Ontario *Consumer Reporting Act*, ss.12.1-12.3; Manitoba *Personal investigations Act*, ss.12.1-12.4.

⁴⁹ Except in BC where there is no provision with respect to access, credit reporting laws in all other provinces specify that a consumer has the right to access their credit report. Some provinces state that the report shall be provided free of charge (SK, ON, NS, NL and PEI). A report requested in Alberta must be provided free of charge once a year, and “reasonable fees” may be charged for additional reports. In Manitoba, credit bureaus may charge \$5 per report.

⁵⁰ See <http://www.fcac-acfc.gc.ca/eng/industry/RefDocs/DebitCardCode/DebitCardCode-eng.pdf>

⁵¹ See for example Ontario *Consumer Protection and Service Modernization Act, 2006*; Alberta *Land Titles Amendment Act, 2006*.

but they often find themselves treated like criminals and subjected to repeated harassment by debt collectors. Most provinces and territories have legislation governing debt collectors and proscribing overly aggressive debt collection practices. But only seven of the thirteen provinces and territories prohibit collection agencies from continuing to attempt collection where the consumer claims that they are not the debtor (and/or states that they would prefer for the matter to be taken to court).⁵²

Restoration of Reputation

Most but not all provincial credit reporting laws require that credit bureaus notify those to whom they have disclosed incorrect information of the inaccuracy. The time period for such notification ranges from 60 days to one year. Similar duties to notify apply to corrected data under data protection laws, but only where “appropriate” in most jurisdictions.

Compensation

The *Criminal Code* (s.738(1)(d)) allows victims of identity crime to claim restitution for expenses incurred “to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating” in addition to general restitution for direct losses due to the crime. However, restitution is applicable only in the small proportion of cases that are prosecuted and result in convictions, and where the criminal has the means to pay restitution. Restitution may therefore be helpful for a few victims of identity crime, but it is unlikely to be a meaningful remedy for the vast majority of victims.

In the event that the perpetrator is convicted and sentenced to a term of imprisonment, victims of identity crime may be eligible for funding to attend Parole Board hearings involving the perpetrator. Call 1-866-544-1007 or see <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/attend-audience.html>

There are a number of common law causes of action that could be used by victims to sue identity criminals and/or facilitators of identity crime for damages. However, Canadian courts are reluctant to award damages for “pure economic loss”, making such actions risky. Statutory rights of action are therefore more promising.

Under PIPEDA, individuals can ultimately take complaints of privacy violations to Federal Court and can obtain damages for humiliation as well as actual expenses incurred.

However, as noted above, the Federal Court has stated that an award of damages should only be made under PIPEDA “in the most egregious situations.”⁵³

Alberta and B.C. consumer protection and data protection legislation include private

⁵² B.C. *Business Practices and Consumer Protection Act*, ss.116(4); *Alberta Trade Practices Act, Collection and Debt Repayment Practices Regulation*, s.12(1)(k); *Manitoba Consumer Protection Act*, s.98; *Ontario Collection Agencies Act*, Regulation 103/06, s.22; *New Brunswick, Collection Agencies Act*, s.14(1)(l); *Quebec Act respecting the collection of certain debts*, s.3(2.1); *N.W.T. Consumer Protection Act, Debt Collection Practice Regulations*, ss.11, 13. Note: under Ontario and NB legislation, the debtor must provide notice to the collection agency by registered mail in order for this provision to have effect.

⁵³ *Randall v Nubodys Fitness Centres*, 2010 FC 681 (*CanLII*), para.55.

rights of action for damages as a result of violations of statutory provisions such as those applicable to credit bureaus. Other provinces, however, do not provide for such private rights of action in their relevant legislation.

Justice

Identity crime victims quite understandably usually want to see their perpetrators brought to justice and appropriately sentenced. Under ss.402.2 and 403 of the *Criminal Code*, identity criminals may be sentenced to imprisonment of up to five years for identity theft and ten years for identity fraud. Theft from mail (s.356), and trafficking in forged documents (s.368) are also subject to a maximum ten year sentence, while trafficking in identity documents is subject to a maximum five year sentence (s.56.1).

In the event that the offender is prosecuted, identity crime victims have the same rights as other victims of crime to information about and participation in criminal proceedings. Under s.722 of the *Criminal Code*, victims are entitled to file and read a Victim Impact Statement at the time of sentencing an offender. Under the *Corrections and Conditional Release Act*, victims are entitled to disclosure of certain information about the offender.⁵⁴ As well, all provinces have laws providing victims with similar rights to information about the offender and formally recognizing the needs of victims (e.g., legislating the Canadian Statement of Basic Principles of Justice for Victims of Crime).⁵⁵ Through the Policy Centre for Victim Issues (Justice Canada), victims may be able to obtain funding to attend Parole Board hearings involving their offenders.⁵⁶

7.2 LEGAL GAPS IN THE CANADIAN APPROACH TO VICTIMS OF IDENTITY CRIME

Compared to laws in the United States, Canadian law lacks a comprehensive set of rights and remedies for victims of identity crime, leaving victims without information or effective recourse that could otherwise be made available. See Appendix I for a table setting out existing legal rights and remedies under Canadian law, along with corresponding provisions under U.S. law, by issue. Below is a description of the gaps in Canadian law relating to consumer protection and victim assistance with respect to identity crime.

Awareness

Legal rights and remedies are of limited use if individuals are unaware of them. For this reason, U.S. legislators require that credit bureaus provide identity crime victims with a “Statement of Rights” approved by the Federal Trade Commission (“FTC”).⁵⁷ As well, the FTC is legislatively tasked with the duty to maintain a central internet and telephone-based service providing information and assistance (e.g., complaint referrals) to victims of identity crime.⁵⁸ No such initiatives have been taken in Canada, legislatively or otherwise.

⁵⁴ See ss.26(1) and 142(1).

⁵⁵ These statutes are typically entitled “Victims of Crime Act”, “Victims Bill of Rights” or “Victim Services Act”.

⁵⁶ See <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/attend-audience.html>

⁵⁷ U.S. *Fair Credit Reporting Act* [“FCRA”], 15 USC 1681, s.609(d)

⁵⁸ *Identity Theft Assumption and Deterrence Act*, s.5.

Detection and Mitigation

Although there is widespread support for mandatory data breach notification laws in Canada, Alberta is the only jurisdiction so far to have enacted such a law applicable across sectors.⁵⁹ Almost all U.S. states now require notification of data security breaches to authorities and affected individuals.⁶⁰

In the U.S., consumers have the right to place fraud alerts on their credit files, and indeed to have this done by all three credit bureaus through a single request.⁶¹ Creditors are required to take extra steps to authenticate applicants where a fraud alert appears. As noted above, Ontario and Manitoba are the only jurisdictions in Canada to legislate such requirements.

Of more value to many identity crime victims than fraud alerts are credit freezes, which, as the name suggest, stop the reporting of consumer credit information unless approved by the consumer on a transaction-specific basis. Such freezes are far more effective in both preventing and detecting identity fraud, since they do not rely on creditors to take extra precautionary measures (as in the case of fraud alerts), but simply deny access to the credit report. Almost all U.S. states now require that credit freezes be offered to identity crime victims.⁶² Yet, no Canadian jurisdiction requires this and credit bureaus do not voluntarily offer it in Canada.

In the U.S., federal legislation entitles every consumer to a free copy of their credit report annually, and to additional copies in the case of identity crime victims.⁶³ Although most provinces give consumers the right to one free copy of their credit report per year, not every province has legislated this as a consumer right.⁶⁴ Moreover, credit bureaus interpret this as allowing one free *hard copy* report, which must be ordered or obtained in person. Credit bureaus charge for electronic access to one's credit report (which may be necessary in order for the victim to act in a timely way), and for more than one hard copy per year.

Liability for Fraudulently Incurred Debts

Identity crime victims in Canada have no legislated protections from liability for losses due to identity fraud beyond their reasonable control. In contrast, the U.S. *Fair Credit Billing Act* protects consumers from liability for fraud in the case of "card-not-present" transactions, and limits consumer liability to \$50 in cases of lost or stolen cards as long as the consumer has notified the company of the loss promptly upon discovery.⁶⁵ In addition, the U.S. *Electronic Fund Transfers Act* limits consumer liability for fraudulent electronic fund transfers, depending on how quickly the loss is reported.⁶⁶ Furthermore, most states have legislation limiting consumer liability for new accounts that have been fraudulently established.⁶⁷

⁵⁹ *Personal Information Protection Act*, s.37.1.

⁶⁰ See <http://www.ncsl.org/default.aspx?tabid=13489>

⁶¹ FCRA, s.605A

⁶² See <http://www.ncsl.org/default.aspx?tabid=12516>

⁶³ FCRA, ss.612(a), (c) and (d).

⁶⁴ See Footnote 51.

⁶⁵ 15 USC 1666, ss.161-162.

⁶⁶ 15 USC 1693ff and 12 CFR 205.

⁶⁷ See <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/rights.html> under "Limiting Your Loss From Identity Theft".

Although some provinces (e.g., Ontario, Alberta) have legislated consumer protections against losses due to real estate and mortgage fraud, not all have done so.

Compounded Victimization

As noted above, most provinces and territories have legislation proscribing overly aggressive debt collection practices. However, unlike U.S. law, there is no Canadian law requiring debt collectors to notify the creditor of alleged fraud once made aware, nor is there any requirement for creditors not to send accounts to collection when they have been notified that the account resulted from identity fraud.⁶⁸

Credit bureaus can play an important role in stemming the damage to victims of identity crime by stopping the reporting of alleged fraudulent transactions, and by notifying their credit-granting customers of alleged fraudulent transactions. Although they are required to do so under U.S. law,⁶⁹ there is no similar explicit statutory duty in Canada.

In the U.S., an entire industry has built up around serving those victimized or fearful of being victimized by identity crime. While some of the services offered are worthwhile for victims, many charge high prices for services that are free and easily accessed directly by victims themselves. Without proper self-help guidance, those who have suffered identity crime can thus be further victimized by unscrupulous entrepreneurs.⁷⁰ This new industry is unregulated in both the U.S. and Canada.

Restoration of Reputation

Identity crime victims need, above all, to restore their reputations. In order to do so, they need to be able to prove that they are victims of fraud. And in order to do that, they need documentation regarding the fraudulent transaction(s) in question. But other than a general right under data protection laws to access their personal information held by organizations, Canadians have no rights to information regarding transactions conducted

fraudulently in their names. Nor has any program or process been established in Canada to facilitate the restoration of identity crime victims' reputations.

In the U.S., identity crime victims have statutory rights to obtain information from businesses and debt collectors about alleged fraudulent transactions, and the right to have such information provided directly to police or other governmental authorities.⁷¹ U.S. authorities have also established a process to facilitate the issuance of detailed police reports in identity crime cases.⁷² As explained in Module 4, this is the single most important service that law enforcement can provide to victims of identity crime, as it provides the basis on which victims can convince creditors to correct their records.

Some U.S. states have also established "Identity Fraud Passport" programs for victims of

⁶⁸ FCRA, s.615(f)

⁶⁹ FCRA, s.615(g)(1)

⁷⁰ See Privacy Rights Clearinghouse, Fact Sheet 33: "Identity Theft Monitoring Services".

⁷¹ FCRA, s.609(e)

⁷² See FTC *Guidebook for Assisting Identity Theft Victims*, s.II B, "[The Primary Tools to Show that the Victim is Not Responsible for the Fraud and to Correct Credit Reports](http://www.idtheft.gov/probono/docs/i.%20Table%20of%20Contents.pdf)", <<http://www.idtheft.gov/probono/docs/i.%20Table%20of%20Contents.pdf>>

criminal identity fraud. Under such programs, victims concerned about being arrested for crimes they did not commit can apply for a “passport” certifying that they are victims of identity fraud.⁷³ Australia has also adopted a process for the issuing by a court magistrate of “victim’s certificates” to individuals who can demonstrate that they are the victim of identity theft and likely to be impersonated in the commission of an offence.⁷⁴

No such programs exist in Canada. In 2008, the joint civil/criminal section working group on Identity Theft of the Uniform Law Conference of Canada reviewed the potential for “victim assistance options for erroneous criminal justice records” in Canada and identified a number of obstacles to adopting victim certification or related processes in the Canadian context. They concluded that more research and analysis was needed before any such programs could be recommended for Canada.⁷⁵

Moreover, creditors are required, under U.S. law, to expunge fraudulent accounts under certain conditions.⁷⁶ No such legislative requirement exists in Canada, although it could be argued that the general duty to ensure accuracy of personal information under Canadian data protection laws encompasses such measures.

Several U.S. states now have laws requiring that inaccurate information in the criminal records of identity crime victims be expunged or corrected.⁷⁷ No such laws exist in Canada.

Compensation

Criminal injuries compensation legislation applies only to victims of violent crime and therefore does not assist identity crime victims.

As noted above, s.738(1) of the *Criminal Code* allows victims of identity crime to claim restitution for expenses incurred “to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating”, in addition to general restitution for any direct losses due to the crime. It is not clear whether “costs of re-establishing one’s identity” include the value of time spent by victims in remediation efforts; this will be a matter for courts to determine. In contrast, U.S. legislation expressly permits restitution for the value of time reasonably spent by the victim in remediation efforts, in addition to out-of-pocket expenses incurred in the restoration process.⁷⁸

While victims of identity crime can sue identity criminals and/or facilitators of identity crime (if it is possible to identify them) for damages, few provinces explicitly provide for rights of action relevant to identity crime victims, and even in the event of success, there is no guarantee of a damage award sufficient to justify the expense of a lawsuit. In contrast,

⁷³ See <http://www.ftc.gov/bcp/edu/microsites/idtheft/reference-desk/state-crim-passport.html>

⁷⁴ *Criminal Code Act 1995*, Part 9.5 – Identity Crime, Division 375 – Victims’ certificates.

⁷⁵ Uniform Law Conference of Canada, *Report of the Joint Criminal/Civil Section Working Group on Identity Theft: A Progress Report* (August 2008).

⁷⁶ FCRA, s.611(a)(5), s.623(b)

⁷⁷ See <http://www.ftc.gov/bcp/edu/microsites/idtheft/reference-desk/state-crim-expunge.html>

⁷⁸ *Identity Theft Enforcement and Restitution Act*, 18 USC 3663(b)(6) and 3663(c)(1)(A)

the U.S. *Fair Credit Reporting Act* includes statutory rights of action wilful or negligent non-compliance with the Act.⁷⁹ In addition, a number of U.S. states have specific statutory rights of action for identity crime, some permitting treble damages and attorney fees.⁸⁰

Justice

Maximum sentences for convicted identity criminals in the U.S. are higher than in Canada where certain other offences are involved: under the *Identity Theft Assumption and Deterrence Act*, the maximum sentence is 10, 15 or 20 years, depending on the nature of the crime.⁸¹ As well, under the *Identity Theft Penalty Enhancement Act*, offenders convicted of identity theft during and in relation to other crimes are not eligible for probation, must serve sentences for each crime consecutively, and cannot have one sentence reduced to take into account the other sentence.⁸²

Conclusion: Legislative Gaps

Clearly, victims of identity crime in Canada would benefit from law reform designed to provide them with both additional protection (through more specific obligations on credit bureaus and others handling their personal information) and rights to information and assistance in the remediation process. The U.S., having recently gone through a policy process designed to achieve just that, offers a useful model for Canadian policy-makers.⁸³

7.3 POLICY GAPS IN THE CANADIAN APPROACH TO VICTIMS OF IDENTITY CRIME

National Statistics on Identity Crime

The first step in responding effectively to identity crime is to understand it. This requires the gathering and reporting of national statistics on the nature and incidence of identity crime and its impact on victims in Canada. Canada has very little in the way of publicly reported data on identity crime. The Canadian Centre for Justice Statistics *Uniform Crime Reporting Survey*, which gathers official crime statistics from police forces, does not yet track identity crimes as such.⁸⁴ Moreover, Statistics Canada has noted that better measurement of fraud in Canada could be obtained through a survey of businesses rather than police.⁸⁵ There is an obvious need for the systematic gathering of Canadian data on identity crime and its impact on individual victims.

⁷⁹ Ss.616, 617.

⁸⁰ See Jeffrey Dion and James Ferguson, "Civil Liability for Identity theft", (Feb 1, 2007); online at http://goliath.ecnext.com/coms2/gi_0199-6285492/Civil-liability-for-identity-theft.html

⁸¹ 18 USC 1029

⁸² 18 USC 1028A

⁸³ See President's Identity Theft Task Force Report (Sept.2008), www.idtheft.gov

⁸⁴ See <http://www.statcan.gc.ca>

⁸⁵ Statistics Canada, *A Feasibility Report on Improving the Measurement of Fraud in Canada, 2005* (April 2006), Catalogue no. 85-569.

Inter-jurisdictional coordination among law enforcement agencies

Another gap in Canada's response to identity crime is limited coordination among law enforcement agencies in the investigation and prosecution of identity criminals who operate across jurisdictions. On top of all their other challenges in achieving remediation, victims in such cases face the challenge of dealing with law enforcement agencies in different jurisdictions, who may be unwilling to share information with each other or to coordinate investigations. Current efforts to improve coordination among law enforcement agencies need to be expanded in order to deal effectively with the growing proportion of crime that is trans-provincial and trans-national in nature.

A National Strategy on Identity Crime

In June 2010, the RCMP undertook to lead the development of a National Identity Crime Strategy. This Strategy is being developed through broad consultation with private and public sector stakeholders that are directly affected by identity crime. It focuses on preventing identity crimes, whether through information provided to Canadians or through more robust processes and systems. As of March 2011, the Strategy has three priority areas: Criminal Intelligence and Analysis; Prevention, Awareness and Victim Assistance; and, Effective Enforcement, Disruption and Prosecution. As victim assistance is a component of the Strategy, it is anticipated that stakeholders representing the consumer and victim perspective will be included in the development of the Strategy and that a plan will be developed to address gaps in Canadian law relating to consumer protection and victim assistance.

At the same time, various Canadian public and private sector institutions are working on initiatives to combat identity crime and to assist identity crime victims. For example, privacy commissioners, consumer protection agencies, law enforcement agencies, financial institutions, credit bureaus, and others are all engaged in their own consumer/victim awareness efforts. The Identity Theft working group of the Consumer Measures Committee, a federal/provincial/territorial committee established under the Agreement on Internal Trade, published "Identity Theft" information kits for consumers and businesses in 2007⁸⁶ and is now working on harmonization of credit reporting laws. Some but not all provinces have moved forward with law reforms designed to assist identity crime victims. The Private Sector Liaison Committee of the Canadian Chiefs of Police is working to improve the coordination and sharing of fraud prevention and awareness information among stakeholders. The Federal Victims Strategy - led by the Policy Centre for Victim Issues (Justice Canada) and including partners in Public Safety Canada, the Public Prosecution Service of Canada, Correctional Service Canada, and the Parole Board of Canada - is researching victim needs and funding national initiatives with respect to identity crime victims. It is hoped that these and other related initiatives will be coordinated under the new National strategy.

⁸⁶ <http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00084.html>