

# COMBATING CREDIT CARD CRIME: ENACTING EFFECTIVE CRIMINAL LAWS

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## I. INTRODUCTION

Modern technology has advanced to the point where, around the world, a large percentage of financial transactions involve the use of credit cards and devices for obtaining goods and services. Complicating the issue is the proliferation of other types of information-carrying cards, such as debit cards, and pre-payment cards designed for specific purposes, and electronic cash cards. The economy of any country that relies on the use of such cards must have an effective legal structure for deterring abuse.

Credit cards and other such cards function by transferring data or information; the cards themselves are of little value. It is the data or information stored on the card that is of use to trigger or make a commercial or financial transaction. The card is merely a physical mechanism by which this information can be stored and easily transported and used by the person wishing to make the commercial or financial transaction. However, the possibility of abuse is great. The relevant information can be intercepted and manipulated at various stages, from manufacture of the card, to delivery of the card to the card-holder, to possession and loss of the card by the card-holder, to the use of the card at a retailer. Abuse can occur in various ways, from unauthorized use of a card, to falsifying a card, and to unauthorized use of the information even without possession or use of the card. Moreover, the card and information may be subject to abuse by just

about anyone, from the card-holder to the merchant, from persons in temporary possession to sophisticated criminal organizations to a person who catches a glimpse of someone else's card and remembers the key information embossed on it.

Ultimately, modern technology brings more than just convenience, it also creates tremendous opportunity for clever criminals unlawfully to use or appropriate credit cards or the stored information. Industry losses from credit card crime reach millions of dollars every year, and the figure keeps increasing. In Canada alone, it was estimated that there were 89,000 occurrences of credit card fraud in 1997.<sup>1</sup> Equally important, the number of fraudulent uses of credit cards has increased dramatically over the past several years. As techniques for counterfeiting cards and misappropriating information become more sophisticated and less expensive, the problem of payment card fraud will continue to escalate.

Credit card companies and other financial institutions have implemented numerous technical and operational mechanisms for preventing and detecting credit card crime. Individuals who are legally in possession of cards may also take precautionary behavioural steps to reduce the likelihood of someone else obtaining the card or information for unlawful purposes. The problem can be attacked from many sides, and with the efforts and ingenuity of everyone involved with the cards.

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<sup>1</sup> Courtesy of Canadian Bankers Association.

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In addition to the various technical and behavioural countermeasures against credit card crime, there is a role for the criminal justice system in deterring credit card crime, and in providing an effective system for prosecuting offences when they do occur. This paper will address the latter issue: the role of substantive criminal law in addressing credit card crime. Reference will be made to various legal structures in North America, particularly within Canada, to illustrate and determine some optimum legal proscriptions and procedures for countering credit card crime.

## II. ESSENTIAL ELEMENTS OF A CRIMINAL LAW

Any criminal law that is intended to effectively prevent crime involving credit cards must have certain basic elements. The criminal law functions by describing as offences those acts that are to be prohibited, establishing a procedure for prosecuting individuals accused of those acts, and providing for penalties where the commission of those acts has been proved. Different jurisdictions may choose to penalize particular crimes in any number of different ways. However, in the case of a global and universal problems such as credit card crime, there may be certain common features to an effective set of criminal offences and procedures that are necessary for a coordinated international approach.

### A. Defining “Credit Card”

One fundamental feature of an effective criminal law against credit card crime is a definition of what is included within the term “credit card”. Absent a clear definition, a criminal law would be potentially too broad in which case it might catch behaviour that should not be criminalized, or too vague and ambiguous and therefore difficult to apply or interpret. It is also important to note that modern

technology has advanced and evolved rapidly, and continues to do so at a fantastic rate. The criminal law must keep up with that pace of change in order to be effective. Therefore, it is important that definitions not be too technologically or commercially specific.

For example, the state of New York describes “credit card” in the following way<sup>2</sup>:

“Credit card” means and includes any credit card, credit plate, charge plate, courtesy card, or other identification card or device issued by a person to another person which may be used to obtain a cash advance or a loan or credit or to purchase or lease property or services on the credit of the issuer or of the holder;

New York penal law also applies to “debit cards”<sup>3</sup>:

“Debit Card” means a card, plate or other similar device issued by a person to another person which may be used, without a personal identification number, code or similar identification number, code or similar identification, to purchase or lease property or services. The term does not include a credit card or a check, draft or similar instrument.

While the New York definitions are adequate in describing cards used to obtain credit or to debit directly an account for the purpose of purchasing property or services, it is not clear that bank cards used solely to access one’s bank account to withdraw, deposit or transfer money are included in these definitions. Interestingly, certain offences in New York also apply to a “public benefit card”, defined as any “medical assistance card, food stamp assistance card, or any other identification, authorization card or electronic access device issued by the state or a social

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<sup>2</sup> CLS Penal Law § 155.

<sup>3</sup> CLS Penal Law § 155 as am. L1987, ch556, § 7.

services district... which entitles a person to obtain public assistance benefits under a local, state or federal program...”.<sup>4</sup>

In Canada, the *Criminal Code*<sup>5</sup> defines the term “credit card” in s. 321<sup>6</sup> as:

“any card, plate, coupon book or other device issued or otherwise distributed for the purpose of being used:

- (a) on presentation to obtain, on credit, money, goods, services or any other thing of value; or
- (b) in an automated teller machine, a remote service unit or a similar automated banking device to obtain any of the services offered through the machine, unit or device”.

A definition such as this one takes into account the multiple functions served by payment and access cards. Paragraph 321(a) is commercially specific to a credit transaction. Paragraph 321(b), however, contains a broader definition, recognizing that modern technology has reached a stage where the ways in which a card is used are greater than just the presentation of the card to a merchant for the purchase of goods and services on credit. The definition catches not only debit cards (i.e. cards permitting direct debit of a bank account), but also what are commonly referred to as bank or access cards, a card inserted into automated machines for the purpose of obtaining any services offered by the machine associated with a financial institution. However, it should also be noted that paragraph 321(b) is still somewhat limited in that it applies only to cards used in automated machines somehow connected to the *banking* industry. So for example, long distance telephone calling cards or telephone pre-payment cards would not appear to be included.<sup>7</sup>

<sup>4</sup> CLS Penal Law§ 155 as am L1995, ch81, § 169.

<sup>5</sup> R.S.C. 1985, c. C-46.

<sup>6</sup> R.S.C. 1985 c. 27 (1st Supp.), s.42.

The United States Federal Code contains an even broader definition. The Code focuses on “access devices”, defined as “any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument)”.<sup>8</sup> This definition is very useful. It is sufficiently broad and open-ended to cover any technological advances in account access. It is also broad in terms of the types of transactions to which it applies. For instance, it applies not only to devices used for purchase of goods and services, but also to transfer of fund transactions, as well as transactions for “any other thing of value”. Unlike the Canadian definition, it is not limited to automated machines associated with financial institutions. As well, it includes “account number” as an access device, so that the offences apply to the use of the pertinent information alone, even in the absence of a card or other physical device.

## B. Proscribing Offences

In addition to the difficult task of defining the term “credit card”, it is essential that the criminal law carefully and adequately define all of the conduct that is to be prohibited. Because of the complexity and number of ways that credit cards are used, there is perhaps an even greater number of ways that credit cards can be used fraudulently or unlawfully. Each of these should be explicitly covered in a criminal law to ensure that all loopholes are closed to potential crime. It

<sup>7</sup> It should be noted, however, that fake telephone cards or other devices to improperly obtain telecommunication services are addressed by sections 326 and 327 of the *Criminal Code*.

<sup>8</sup> 18 U.S.C. § 1029(e)(1).

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should be noted that if numerous offences are set out, there may be overlap between the elements from one offence to another. Moreover, factual circumstances may reveal that more than one offence has been committed. Some of the types of criminal conduct associated with credit card (or access card) crime include: theft of the card; forgery or falsification, possession, use or trafficking of stolen, forged or falsified cards; possession, use or traffic in credit card data; possession of instruments for forging or falsifying credit cards.

Different jurisdictions may employ different techniques to proscribe conduct. Some may simply apply offences of general application, such as theft and forgery, to offences involving credit cards. Others may have specific offences concerning credit cards. Finally, some jurisdictions may use a combination of approaches. In Canada, a combined approach is used. The manner of prosecution and range of penalty for the general offence of theft is largely dependent on the value of the property that has been stolen.<sup>9</sup>

This approach is not appropriate with respect to theft of credit cards, since the cards themselves, the stolen property, have little or no value, but the economic loss associated with their misuse can be great. As the existing structure was not easily

adapted to credit cards and other payment cards, a new and separate provision was enacted to deal specifically with credit cards.<sup>10</sup> Within the specific provision on credit cards, reference is made to other existing offences, thereby importing the definition of these offences as part of the types of prohibited conduct in relation to credit cards. As well, the new provision contains new and specialized offences which relate exclusively to credit cards. Section 342 of the *Criminal Code* reads:

342. (1) Every person who
- (a) steals a credit card,
  - (b) forges or falsifies a credit card,
  - (c) possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered
    - (i) by the commission in Canada of an offence, or
    - (ii) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or
  - (d) uses a credit card knowing that it has been revoked or cancelled, is guilty of
  - (e) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or
  - (f) an offence punishable on summary conviction

1. Theft of Property

As the nature of property rights can be quite complex and because there are a multitude of types of property and uses of property, there may be many ways in which property can effectively be misappropriated by another without consent. It is, therefore, important that “credit cards” be considered as property, both in terms of the physical

<sup>9</sup> Pursuant to s. 334 of the *Criminal Code*, where the value of the property stolen exceeds \$5000, the offence is indictable and carries a maximum penalty of 10 years imprisonment. Where the value of the property stolen is equal to or less than \$5000, the offence is either indictable, with a maximum of 2 years, or summary, with a maximum of 6 months. An additional consequence is that theft under \$5000 is within the absolute jurisdiction of a provincial court judge according to s. 553 of the *Criminal Code*, while theft over \$5000 can be tried before a judge, a judge and jury, or a provincial court judge, at the option of the accused.

<sup>10</sup> R.S.C. 1985 c.C-46 as am. S.C. 1997, c.18, s.16(1). The manner of prosecution and the penalty are not dependent on the value of the card. This is one range or penalty, and the manner of prosecution is subject to prosecutorial discretion.

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card and as evidencing rights to property that the card may represent.

In Canada, “property” is defined in section 2 of the *Criminal Code* as:

- (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
- (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange, and
- (c) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of Parliament or the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is in the possession of the Crown or of any person...

In Canada, s.322 of *Criminal Code* defines the offence of theft:

322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
  - (b) to pledge it or deposit it as security;
  - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
  - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
- (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material

In this statute, the act of theft is committed by either a “taking” or a “conversion” of the property to the accused’s own use. Even in the absence of a taking, a person commits theft if they lawfully come into possession of the card and dishonestly intends to keep it, even temporarily, and use it for their own purposes. This is what is meant by “conversion”. The notion of conversion is important to address the situation of a card being borrowed and used without or beyond the consent of the cardholder. The taking or conversion must be done fraudulently and without colour of right. The term “fraudulently” has been interpreted to mean “dishonestly” and proof of fraud is not necessary. The term “without colour of right” means without an honest belief in the legal right to act as the person does. The accused must also have had the intent to deprive the owner or lawful holder of the card either permanently or temporarily. This catches, for example, the taking of a card from someone’s possession. or the conversion of the card, with the intent to make an unauthorized purchase and then return the card.

An important consideration with respect to the offence of theft is that it protects property rights vis-à-vis a lawful *possessor* and not merely the owner of the property. With respect to credit cards, this element is very important. Many agreements governing the relationship between the card issuer (e.g. credit card company) and the client provide that the card always

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remains the property of the issuer. The company remains owner and the card-holder is merely a lawful possessor. Therefore, the phrase "the owner of it, or a person who has a special property or interest in it" is of significance as it allows the card-holder (the person who has a possessory property interest) to be the complainant or "victim" in a case of theft.

In New York a person commits the offence of larceny when "with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof".<sup>11</sup> To "deprive" another of property means to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, while "appropriate" means to exercise control over property, or to aid a third person to exercise control over it. The notion of "appropriate" roughly parallels the Canadian concept of "conversion". However, the New York statute limits theft to taking or appropriating property from the "owner".

## 2. Theft of a Credit Card

Credit cards, being property, are capable of being stolen. Theft of credit cards can be subsumed under the general offence of theft, or it can be specifically prohibited in an offence that targets credit card crime. As noted above, in Canada, theft of a credit card (and other criminal acts in relation to credit cards) is a distinct offence, but theft is defined within that provision by reference to the general offence of theft.<sup>12</sup>

## 3. Forgery or Falsification of a Credit Card

Credit cards, like other documents that

contain and are intended to convey information, are vulnerable to being falsely fabricated and made to look legitimate. For example, blank cards can be imprinted with account information obtained from merchants or from discarded sales slips and an encoded magnetic strips can be added. The result is a card that looks authentic and liable to be accepted by merchants. Closely related to the act of falsely manufacturing a credit card is the act of altering or modifying an existing legally manufactured card. Numbers or letters can be smoothed out and re-embossed to reflect a different account.

When a forged or falsified card is used to obtain goods and services, the purchase is made on credit and the user of the card obviously incurs no cost. The cost will be borne by one of the other parties, either the card-issuer, the card-holder or the merchant. Crime involving counterfeit cards accounts for approximately 50% of all losses related to credit card misuse in Canada.<sup>13</sup> As well, as counterfeiting techniques become cheaper and more effective at circumventing security features, the problem will continue to cost millions of dollars in losses. An effective criminal law must, therefore, prohibit various acts related to manufacturing false credit cards and altering legally manufactured cards.

In Canada, s.342(1)(b) of the *Criminal Code* prohibits the forgery or falsification of a credit card. Forgery and falsification are defined in s.366 of the *Code* as:

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent
- (a) that it should in any way be used or acted on as genuine, to the prejudice

<sup>11</sup> CLP Penal Law §155.05.

<sup>12</sup> See subsection 342(1)(c).

<sup>13</sup> Statistics for year 1997 in Canada, courtesy of Canadian Bankers Association.

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- of any one whether within Canada or not; or
- (b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.
- (2) Making a false document includes
- (a) altering a genuine document in any material part;
  - (b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
  - (c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.
- (3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.
- (4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Section 321 of the *Criminal Code* expressly includes “credit card” within the definition of “document”. The definitions of “forgery” and “false document” in s.366 recognize that there are multiple ways in which a card or other document can be altered. They also recognize that harm stems from the *intent* to use the false card or document to someone else’s detriment. For this reason, it is important that the law also address incomplete forgeries, if there was intent to use the document upon its completion. As is the case with respect to theft of a credit card, the offences of falsification and forgery can be dealt with

in a specific provision dealing with credit card crime, or in a general forgery and falsification provision. In Canada, the offence can be prosecuted under either the specific or the general offence provision.

In the United States, a person commits a federal offence who “knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices”.<sup>14</sup> “Produce” is defined as including design, alter, authenticate, duplicate or assemble.<sup>15</sup> “Counterfeit access device” is defined as any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device”.<sup>16</sup> In New York, it is a crime to forge a credit card. A person commits forgery when, “with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be [a credit card], or which is calculated to become or to represent [a credit card] if completed”.<sup>17</sup>

#### 4. Possession of Instruments for Forging or Falsifying Credit Cards

If falsifying or forging a credit card is criminalized because of the potential harm of counterfeit cards, it follows that various other activities that assist or facilitate the forgery or falsification of credit cards should also be prohibited. Schemes for forging and falsifying credit cards can be quite complex and sophisticated, and involve numerous levels of individuals. Each link in the chain should be criminalized to deter more effectively such criminal operations.

In Canada, the *Criminal Code*<sup>18</sup>

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<sup>14</sup> 18 U.S.C. § 1029(a)(1).

<sup>15</sup> 18 U.S.C. § 1029(e)(4).

<sup>16</sup> 18 U.S.C. § 1029(e)(2).

<sup>17</sup> CLS Penal Code § 170.10.

<sup>18</sup> R.S.C. 1985 c. C-46 as am. 1997, c.18, s.17.

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specifically prohibits activities related to the possession of instruments for forging and falsifying credit cards:

- 342.01 (1) Every person who, without lawful justification or excuse,
- (a) makes or repairs,
  - (b) buys or sells,
  - (c) exports from or imports into Canada, or
  - (d) possesses

any instrument, device, apparatus, material or thing that the person knows has been used or knows is adapted or intended for use in forging or falsifying credit cards is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

The offence is drafted broadly to apply where there is knowledge of either past use or intended future use of the instruments for forgery. As well, it covers any instrument, whatever its original purpose, that is intended to be used for forging or falsifying credit cards. It is sufficiently broad to include any “material thing” and therefore would encompass materials such as blank cards. This provision is also sufficiently broad to prohibit many types of conduct related to forgery equipment or material, from possessing to selling or buying to repairing and manufacturing. Notably, it also prohibits the importation and exportation of such instruments or materials. This is important, especially in the Canadian context, since at present most instruments for forging cards are manufactured outside Canada, and brought into the country.

Under US federal law, anyone who “knowingly, and with intent to defraud, produces, traffics in, has control of, or possesses device-making equipment” is guilty of an offence.<sup>19</sup> “Device making equipment” includes any equipment,

mechanism or impression designed or primarily used for making an access device or a counterfeit access device.<sup>20</sup> The offence is less precise than the Canadian model, in that it does not expressly include the acts of repairing, buying or selling, or importing and exporting forgery equipment. It is also somewhat more narrow than the Canadian model in that it applies to instruments that are “designed or primarily used” for making cards. It is, therefore, not clear whether an instrument designed or generally used for another purpose, but which is adapted to use in forgery of credit cards, or whether blank cards, are covered by the definition.

In California, it is an offence to design, make, possess, or traffic in card making equipment or incomplete access cards with the intent that the equipment or cards be used to make counterfeit access cards.<sup>21</sup> This offence is interesting because it expressly includes blank or incomplete access cards. Other jurisdictions may still prohibit possession of blank cards under another offence, but California expressly treats blank cards in the same manner as other instruments of forgery, as Canada does by implication.

5. Possession, Traffic or Use of Stolen, Forged or Falsified Credit Card

Just as it is a crime to steal, forge or falsify a credit, debit or access card, a criminal law should also adequately deter against the possession of a card knowing that it has been dealt with illegally in some way. Mere possession of the unlawfully handled cards creates the potential for serious economic harm.

Trafficking is another problem that must be addressed. Trafficking involves the movement or distribution of property. Some criminal organizations have

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<sup>19</sup> 18 U.S.C. § 1029(a)(4).

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<sup>20</sup> 18 U.S.C. § 1029(e)(6).

<sup>21</sup> Penal Code § 484i.

sophisticated systems in place for transferring possession of unlawfully handled cards from person to person; many people who are involved do not actually use the cards to make a purchase or to obtain credit, and they may not remain in possession of the cards for any significant period of time. In other cases, individuals who come into possession of a lost or stolen card, for example, may sell it quickly for profit, or trade it for other property. This intermediary phase creates an equally damaging potential for economic harm and must be adequately prohibited.

More importantly, while forging, falsifying, stealing and possessing unlawfully handled credit cards creates the potential for economic harm and loss, that potential is fully realized when the cards are actually used. Credit Cards and other payment cards are primarily devices used for convenient access to goods and services. It is the purchase of those goods and services without payment that has major consequences for a society. Typically, the financial institution that issued the card will bear the cost of unlawful purchases, but in some cases, the merchant or the card-holder may be responsible for a certain portion of the loss. Even if the card-issuers generally absorb the cost of unlawful transactions, it is considered a cost of doing business, and so is ultimately passed on to the consumer in the form of higher service charges or fees. It is essential, therefore, that the criminal law adequately prevent the ultimate use of stolen or forged cards.

In Canada, section 342(1)(c) of the *Criminal Code* provides a global offence that catches each of the above types of conduct. It states that it is an offence to possess, use or traffic in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered by the commission of an offence, either in Canada

or elsewhere. This offence is quite broad in three ways: first, the types of predicate offences that result in the obtainment, making or alteration of the card are not specified, so that it applies broadly to any offence which could have any of those results, for example fraud; second, the predicate offence can occur anywhere, even outside Canada; and third, the definition of “traffic” is broad and means “to sell, export from or import into Canada, distribute or deal with in any other way”.<sup>22</sup>

Under US federal law, the offences are set out separately. A person who does the following acts is guilty of an offence:

- §1029 (a)(1) knowingly and with intent to defraud produces, uses or traffics in one or more counterfeit access devices;
- (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period;
- (3) knowingly and with intent to defraud possesses 15 or more devices which are counterfeit or unauthorized access devices;
- ...
- (5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or persons, to receive payment or any other thing of value during any 1-year period the aggregate value of which is equally to or greater than \$1,000;...

Each term is in turn defined, providing greater clarity. An “unauthorized access device” is a device that is “lost, stolen, expired, revoked, cancelled, or obtained with intent to defraud”. A “counterfeit access device” is one that is “counterfeit, fictitious, altered, or forged, or an

<sup>22</sup> Section 342(4), R.S.C. 1985, c.27 (1st Supp.), s.44 as am. 1997, c.18, s.16.

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identifiable component of an access device or a counterfeit access device” loss to the card issuer.

Interestingly, it is only possession of fifteen or more counterfeit or unauthorized access devices that constitutes an offence, while with respect to counterfeit devices, use or trafficking in a single card is an offence, and with respect to unauthorized devices, it is only use or trafficking that results in the acquisition of property equaling or exceeding \$1,000 that is prohibited. No monetary or quantum distinctions are made in the Canadian offence. Although worded differently, both the Canadian and US federal offence require knowledge by the accused of the illegal character of the card that is possessed, used or trafficked. This supplies the requisite mental element, along with any dishonest intent or intent to defraud.

In New York, a person commits theft of services when he “obtains or attempts to obtain a service, or induces or attempts to induce the supplier or a rendered service to agree to payment thereof on a credit basis, by the use of a credit card or debit card which he knows to be stolen”.<sup>23</sup> Interestingly, this offence seems quite restrictive, in that it prohibits use of a card that is known to be stolen, but not the use of a card that is known to be counterfeit. Other offences relating to credit cards, such as possession of stolen cards and possession of forged cards, are subsumed under the more general laws applicable to those offences.

#### 6. Use of Revoked or Cancelled Card

In addition to the use of a card that may have been obtained or altered illegally, a legitimately issued card can be used beyond its expiration or cancellation date, or after it has been cancelled on account of theft or loss. This results in equally direct financial

Revoked and cancelled cards are included within the definition of “unauthorized access device” in the US Federal Code, and consequently dealt together with stolen cards and cards otherwise obtained with intent to defraud, as noted above. Therefore, in addition to the offence of *using* revoked and cancelled cards, it is also an offence to knowingly and with intent to defraud *possess* fifteen or more revoked or cancelled cards. As possession of revoked or cancelled cards is not in itself wrongful, an intent to defraud is also required in addition to knowledge of the card’s character.

In other jurisdictions, revoked and cancelled cards are dealt with separately from forged or stolen cards. For instance, in Canada it is a separate offence to use “a credit card knowing that it has been revoked or cancelled”.<sup>24</sup> Similarly, in New York, a person commits an offence when, “in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card, debit card or public benefit card which he knows to be revoked or cancelled”.<sup>25</sup> As these two jurisdictions have treated the use and possession of forged and stolen cards separately from use of revoked or cancelled cards, there is no need to require an intent to defraud, in addition to knowledge, in respect of the offence of usage.

#### 7. Unlawful Use of Credit Card Data

One of the unique features of credit cards is that, unlike other forms of property, the value lies in the account information that is accessible by the data programmed into or embossed on the card. The card itself has little economic or other value. For this reason, the information alone, even in the

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<sup>23</sup> CLS Penal Law § 165.15.

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<sup>24</sup> Section 342(1)(d).

<sup>25</sup> CLP Penal Law § 165.17.

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absence of the card, can be used unlawfully. For example, a person who knows the name, number and expiration date embossed on a card can use that information to obtain goods and services, without any need for presenting the card; for example, over the telephone or computer, or by mail order. This information can be obtained in any number of ways, from observing an actual card and remembering the data, to obtaining carbon copies discarded by the card-holder, to intercepting a card in the mail, to a merchant taking a second electronic recording of the card's magnetic stripe.

Fraudulent use of credit card data or information is on the rise. In Canada, a recent phenomenon known as "skimming" has been observed by law enforcement. This practice involves a merchant double swiping a card, effectively capturing and recording the relevant data on the second swipe. The data is later transferred onto a Internet false or counterfeit card. The Internet is an entire new area of concern in the fight against credit card crime. For Instance, websites have been identified that contain lists of stolen card numbers and account numbers; the information is available to anyone to obtain and use for their own purposes. As well, law enforcement have discovered that security systems of internet commerce have been breached, and credit card information sent over the internet to merchants has been intercepted, recorded, and used to make counterfeit cards. With so much commerce taking place over the telephone and through computer networks, actual use of cards is diminishing in frequency. In the absence of a law that clearly prohibits unlawful use of the critical data, credit card crime will continue to be a major concern.

In Canada, this problem is addressed specifically by section 342(3) of the *Criminal Code*<sup>26</sup> which reads:

Every person who, fraudulently and without colour of right, possesses, uses, traffics in or permits another person to use credit card data, whether or not authentic, that would enable a person to use a credit card or to obtain the services that are provided by the issuer of a credit card to credit card holders is guilty of [an offence].

United States federal law takes a more generic approach: the definitions of "access device" includes account numbers or other means of account access, so that every offence related to access devices applies equally to access device data or information.

In California, it is a specific offence<sup>27</sup> for a person to:

publish... the number or code or an existing, cancelled, revoked, expired or nonexistence access card, personal identification number, computer password, access code, debit card number, bank account number, or the numbering or coding which is employed in the issuance of access cards, with the intent that it be used or with knowledge or reason to believe that it will be used to avoid the payment of any lawful charge, or with intent to defraud or aid another in defrauding...

This section defines "publishes" to mean "the communication of information to any one or more persons, either orally, in person or by telephone, radio or television, or on a computer network or computer bulletin board, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book".<sup>28</sup> As well, California also makes it a specific offence to acquire access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with

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<sup>26</sup> R.S.C. 1985, c. C-46 as am. 1997, c.18, s.16(2).

<sup>27</sup> Penal Code § 484j.

<sup>28</sup> *Ibid.*

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the intent to use it fraudulently.<sup>29</sup>

### 8. Merchant Fraud

Credit card crime can be especially difficult to detect and prosecute where a merchant participates in the unlawful activity. California has enacted laws that directly address the merchant.<sup>30</sup>

Every retailer or other person who, with intent to defraud:

(a) Furnishes money, goods, services or anything else of value upon presentation of an access card obtained or retained in violation of Section 484e or an access card which he or she knows is a counterfeit access card or is forged, expired, or revoked, and who receives any payment therefor, is guilty of theft. If the payment received by the retailer or other person for all money, goods, services, and other things of value furnished in violation of this section exceeds four hundred dollars (\$400) in any consecutive six-month period, then the same shall constitute grand theft.

(b) Presents for payment a sales slip or other evidence of an access card transaction, and receives payment therefor, without furnishing in the transaction money, goods, services, or anything else of value that is equal in value to the amount of the sales slip or other evidence of an access card transaction, is guilty of theft. If the difference between the value of all money, goods, services, and anything else of value actually furnished and the payment or payments received by the retailer or other person therefor upon presentation of a sales slip or other evidence of an access card transaction exceeds four hundred dollars (\$400) in any consecutive six-month period, then the same shall constitute grand theft.

California deems the obtaining of payment from the card-issuer, in the circumstances described, as theft. Other jurisdictions, however, address such conduct under the general offences of

“fraud”; i.e. payment by the card-issuer was voluntary and consensual, but was obtained as a result of deceit or false pretences by the merchant.

### C. Jurisdictional Issues

Technological advances have created a system of electronic commerce that does not require the merchant and the cardholder to be in the same location. Purchases are regularly made over the telephone or computer using only the information contained on a credit card; the merchant and card-user being in different countries. Moreover, people who own credit cards can travel great distances, across borders, and use the card far from their residence or the location of the card-issuer.

Each of these types of cases can result in jurisdictional problems when a crime is committed. Is the crime committed in the place where the card or its information is stolen? In the place where the person is when he or she makes an unlawful purchase? In the place where the merchant is located? In the place where the card-issuer is located? Which location has jurisdiction to prosecute? The law should account for the various possibilities and provide mechanisms for prosecuting offenders even where much of the criminal act occurs outside of a country's jurisdiction. Of course, there are limitations to the extra-territorial application of a country's criminal laws, but certain mechanisms can reduce the criminal's ability to evade prosecution.

In Canada, section 342(1)(c) makes it an offence to possess, use or traffic in a credit card or a forged or falsified card, knowing that it was obtained, made or altered either by the commission in Canada of an offence, or “by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.” Thus while the accused's act of

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<sup>29</sup> Penal Code § 484e(e).

<sup>30</sup> Penal Code § 484h.

possessing, using or trafficking must occur within Canada, the circumstances that render the character of the card as being unlawful can have arisen anywhere and by another person.

However, even with respect to conduct such as use or trafficking, portions of the conduct may often traverse a border. For example, trafficking or using a card may involve a transborder transaction, such as sale or distribution of the card across a border, or the purchase of goods across a border with use of the card. In the case of transborder conduct, where is the offence committed?

It is important that states have flexible jurisdictional laws in cases of transborder offences, particularly given the increase in international commerce by individual consumers. In Canada, an offence may be subject to the jurisdiction of Canadian courts if a significant portion of the activities constituting the offence took place in Canada. It is sufficient that there is a real and substantial link between the offence and Canada. For this purpose, the court must take into account all of the relevant facts that occurred in Canada justifying a prosecution, and consider whether there is anything in those facts that offends international comity such that the court should refrain from exercising its jurisdiction.<sup>31</sup>

With respect to the jurisdiction of the courts as between internal territorial jurisdictions within Canada, a prosecution in respect of credit card offences can occur not only in the place where the offence was committed but also in the place where the accused is found or arrested. This is significant in a country as geographically large as Canada. The cost of transferring

<sup>31</sup> *Libman v. The Queen* (1985), 21 C.C.C. (3d) 206 (S.C.C.).

<sup>32</sup> R.S.C. 1985, c.27 (1st Supp.), s.44.

an accused back to the place where the offence was committed can dissuade the commencement of a prosecution. Section 342(2) of the *Criminal Code*<sup>32</sup> states that:

An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be commenced in that place without the consent of the Attorney General of that province.

#### D. Evidentiary Matters

Due to the jurisdictional complications in credit card crimes, a trial may take place far away from some of the victims or witnesses who are required to testify about the ownership or possession of the card, or something else in relation to its character. For example, the card may be used in one jurisdiction, or part of a country, while the card-issuer and lawful card-holder are located elsewhere. The law should provide for evidentiary rules that facilitate the occurrence of trials in locations far from some of the witnesses.

As noted earlier, in Canada, it is possible to conduct a trial involving a credit card offence not only in the place where the offence is alleged to have been committed, but also in the place where the accused is found, is arrested or is in custody. Any one of these places can be far away from the place of residence or business of the card-issuer or the card-holder. In Canada, an evidentiary provision facilitates the proof of essential issues that can be provided by such witnesses. Section 657.1 of the *Criminal Code*<sup>33</sup> reads.

<sup>33</sup> R.S.C. 1985 c.23 (4th Supp.), s.3; S.C. 1994, c.44 s.63; S.C. 1997, c18, s.79.

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- (1) In any proceedings, an affidavit or a solemn declaration of a person who claims to be the lawful owner of, or the person lawfully entitled to possession of, property that was the subject-matter of the offence, or any other person who has specialized knowledge of the property or of that type of property, containing the statements referred to in subsection (2), shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature of the person appearing to have signed the affidavit or solemn declaration.
- (2) For the purposes of subsection (1), a person shall state in an affidavit or a solemn declaration
- (a) that the person is the lawful owner of, or is lawfully entitled to possession of, the property, or otherwise has specialized knowledge of the property or of property of the same type as that property;
  - (b) the value of the property;
  - (c) in the case of a person who is the lawful owner of or is lawfully entitled to possession of the property, that the person has been deprived of the property by fraudulent means or otherwise without the lawful consent of the person;
  - (c.1) in the case of proceedings in respect of an offence under section 342, that the credit card had been revoked or cancelled, is a false document within the meaning of section 321 or that no credit card that meets the exact description of that credit card was ever issued; and
  - (d) any facts within the personal knowledge of the person relied on to justify the statements referred to in paragraphs (a) to (c.1).
- (3) Unless the court orders otherwise, no affidavit or solemn declaration shall be received in evidence pursuant to subsection (1) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy of the affidavit or solemn declaration and reasonable notice of intention to produce it in evidence.

- (4) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration.

These provisions greatly facilitate the prosecution of trans-Canadian and transnational offences related to property, including credit cards.

### **E. Procedural Matters**

Other peripheral matters are also of great importance in the criminal justice system's fight against credit card crime. Without being exhaustive, certain matters which are useful include:

- the power to seize and, upon conviction, forfeit instruments for counterfeiting or forging credit cards.
- provision for wiretap authorizations to detect and gather evidence of credit card and other organized criminal activity.
- provision for seizing and, upon conviction forfeiting the proceeds of criminal activity, including credit card crime.

In Canada, it is clear that the first two of the above noted procedural measures can be applied in the investigation and enforcement of credit card crime.<sup>34</sup> With respect to seizure of proceeds of crime, while the provisions do not apply specifically to credit card offences, the proceeds obtained by such criminal activity can be seized within the context of the more general offences of theft, forgery, uttering forged document, and fraud.<sup>35</sup>

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<sup>34</sup> Sections 183 and 342.01(1) respectively.

<sup>35</sup> Section 462.3.

### III. CONCLUSION

Modern technology doubtlessly improves our lives in countless ways. In the realm of commerce, it allows us to search the world for a product or service that serves our needs and desires, with just the click of a few buttons. More importantly, we can acquire that desired thing of value, no matter how far away it is, with amazing ease and convenience. It is as simple as reading off a few numbers over a telephone line or punching them into a computer keyboard. Moreover, we do not even have to pay immediately. The immediate cost is borne by one of numerous credit card companies, who in turn request payment from us at a later date.

As noted at the outset of this paper, however, this technology brings more than just convenience. It also brings opportunity; opportunity for clever criminals to wreak economic havoc on a global scale. With each new technological development designed and intended to make our lives more comfortable and convenient, there comes a corresponding potential for criminal activity. It is a difficult but not an insurmountable task to discern what laws are needed to combat existing modes of credit card crime; that is what this paper has attempted to do. The first challenge will be for criminal laws to keep pace with current and future developments. The second challenge will be to ensure that similar laws exist in all countries in order that differences between the laws of states cannot be exploited to the benefit of clever criminals.