

**Submission on
National Identity Card Proposal**

CANADIAN BAR ASSOCIATION



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TABLE OF CONTENTS

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PREFACE.....	i
I. INTRODUCTION.....	1
II. PRINCIPLES FOR A NATIONAL POLICY ON IDENTITY DOCUMENTS	3
1. General	3
2. Detailed Analysis	5
i. Identifying a specific and limited purpose	5
ii. A national identification system for Canadians must recognize and respect privacy rights	5
iii. A national identification system must meet Canada’s national commitments and international treaty obligations.....	6
iv. A national identification system must be secure	7
v. Penalties and enforcement measures must be in place to deal with fraudulent or criminal use of national identity documents or personal information	7
vi. The costs of a national identification system must be known and must be commensurate with the purposes for which the system is required	8
vii. A national identification system must be Canadian in purpose and design	9

III.	A NATIONAL IDENTITY CARD FOR CANADIANS	10
1.	What is the Purpose of a National Identity Card?	12
2.	Contents of a National Identity Card	13
3.	Obtaining a National Identity Card	15
4.	Would Possession of a National Identity Card be Voluntary?	17
5.	Would the National Identity Card require renewal?	18
6.	Use of the National Identity Card	19
7.	Can we guarantee the security of National Identity Card?..	20
8.	Enforcement measures against those without National Identity Card	21
9.	Costs of Implementing a National Identity Card Program...	22
IV.	CONCLUSION	23

PREFACE

The Canadian Bar Association is a national association representing 38,000 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 is the product of collaboration between several groups within the Canadian Bar Association, including the National Citizenship and Immigration Law Section, National Criminal Justice Section, National Constitutional and Human Rights Law Section and National Privacy Law Section, 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 Canadian Bar Association.

Submission on National Identity Card Proposal

I. INTRODUCTION

The Canadian Bar Association (CBA) is pleased to be a part of the debate about enhanced document security and consideration of a National Identity Card for all Canadians. We understand that the debate, which has been initiated by the Minister of Citizenship and Immigration as the federal Minister responsible for coordinating Canada's efforts,¹ is intended to involve the public in what potentially represents a critical shift in Canadian public policy.

The CBA believes that far too little background information, research or direction has been provided to guide interested individuals in considering this significant issue of national importance. The Minister, through the Parliamentary Standing Committee on Citizenship and Immigration, has invited comments on several questions, but in our view, those questions provide an inadequate basis for the debate. They either assume too great a degree of knowledge about the current system of government identity documents, a comprehension of sophisticated biometric technology, knowledge of the success or failure of current government identification programs, research into the international experience with National Identity Card and an awareness of the security problems with government

1

Minister Coderre first raised this subject in his appearance before the Standing Committee on Citizenship and Immigration on February 6, 2003. The public debate continued in the House of Commons on February 13, 2003.

computerized data collection, or are simply too general and ambiguous to be helpful in eliciting and informing public opinion.²

The National Identity Card debate has been raised at the same time as a debate on a national policy on identity. As the former (a National Identity Card) would be only one possible method of achieving the latter (a national policy), we believe that the policy itself must be developed and established before any specific implementation measure is considered. Unfortunately, the contemporaneous debate about a National Identity Card has inflamed and actually derailed the general policy debate.

RECOMMENDATION:

The CBA recommends that a national policy on identity and fundamental guiding principles be adopted by Parliament following public input and consultation, before any specific implementation strategies, including a National Identity Card, are considered.

During the period of developing a national policy on identity, the federal government should propose comparative strategies. If there is to be a change to the *status quo*, Canadians should be clear as to why the change is necessary and why the current system is inadequate to address the nationally developed policy. In this discussion of the issues, we will address what we see as deficiencies in the

2 The Parliamentary Committee has invited comments on the proposed National Identity Card, guiding the comments with the following questions;

What are the existing problems with Canadian identity documents, particularly "foundation" documents such as birth certificates?

What should be the guiding principles for a national strategy on identity documents?

Do we need to create a new national identity card, or can the security features of existing "foundation" documents be strengthened?

Should everyone in Canada be required to carry a secure identity document at all times? Or should the identity document be voluntary for some (e.g. Canadian citizens and permanent residents) and mandatory for others (e.g. refugee claimants, foreign students, or other temporary residents)?

What information should be imbedded in the cards, who should be able to access that information, should the information be stored centrally, and what safeguards would be required to prevent misuse?

What technologies are available for enhancing document security and what issues are raised by the use of particular technologies, such as biometrics? (Biometric identifiers include fingerprints, iris scans and facial scans.)

How much would a national identity card cost? What savings would be realized by introducing such a card (e.g.

current process. First, we consider principles that should guide a national policy on identity. Following that consideration, we address specific issues for debate if the government decides to pursue the introduction of a National Identity Card.

II. PRINCIPLES FOR A NATIONAL POLICY ON IDENTITY DOCUMENTS

1. General

Canada needs to be able to establish the personal identity of Canadians, both nationally and internationally. The federal government is a party to international agreements and commitments that require Canadians traveling and seeking entry to other countries to be identifiable. Within Canada, the federal and provincial/territorial governments have shared responsibility for the provision of identity documents: for example, birth and death certificates are within provincial/territorial jurisdiction, while passports and social insurance numbers come under federal jurisdiction.

Various identity documents have differing purposes, and the information required to obtain each document is tailored to the underlying purpose of that document. However, fundamental principles should ground a national policy on identity documents.

RECOMMENDATION

The CBA recommends that the federal government adopt basic principles as a foundation for a national policy on identity documents for Canadians, including:

- **A national identification system must have a specific and limited purpose that is both clearly stated and**

sufficiently important to justify infringements on privacy rights of individuals;

- **A national identification system must recognize and respect the privacy rights of individuals, including the right to anonymity, and intrude on those privacy rights only to the extent necessary to meet the stated purposes of the identification system;**
- **A national identification system for Canadians must meet Canada's national commitments and international treaty obligations;**
- **A national identification system must be reasonably secure against fraud and theft;**
- **Penalties and enforcement measures must be in place to deal with individuals who seek to replicate national identity documents or steal personal information contained in those documents;**
- **The costs of implementing and maintaining a national identification system must be known and commensurate with the purposes for which such a system is required; and**
- **A national identification system must be Canadian in purpose and design, and not driven by international pressures.**

2. Detailed Analysis

i. Identifying a specific and limited purpose

When a government infringes upon individual rights in the name of the public good, that government should be obliged to specify the purpose or goal it seeks to achieve. Any intrusion on individual rights must be as minimal as possible to achieve the purpose or goal and rationally linked to the objective sought.

Identity is personal to each individual. Before the government intervenes to establish a national policy on identity that will affect all Canadians and certainly intrude on our privacy rights, the government should clearly state the purpose for such an intrusion.³ This policy cannot be developed in a vacuum.

The more broadly such a policy is stated, the greater will be the intrusion into personal privacy rights. For that reason, any expressed policy objectives must be limited to the most essential requirements of the state. The government should conduct its own analysis under section 1 of the *Charter* to determine whether the pressing importance of the objectives underlying its policy and/or legislation on identity documents justifies any infringements on privacy rights.

ii. A national identification system for Canadians must recognize and respect privacy rights

Privacy lies at the heart of liberty in our modern state. Canada's laws attempt a balance between the rights of the state and the rights of the individual. Our courts have a supervisory role to ensure the correct balance between the public interest and the protection of individual rights, including the right to privacy.

Information technology has placed continual challenges on privacy rights, often developing faster than our ability to deal with the ethical and practical issues

3 Various courts have established that section 7 of the *Charter* protects privacy rights. In *Ruby v. Canada* (Solicitor General) (2000), 3 C.F. 589 (C.A.), at 165 to 170 (*obiter*, appeal allowed in part for other reasons, at [2002] S.C.C. 75, at 30 to 33 - the Supreme Court of Canada found it unnecessary to the disposition of the case to decide the issue). See also *R. v. Mills*, [1999] 3 S.C.R. 668, at 722, *R. v. Dymont*, [1988] 2 S.C.R. 417, *R. v. Beare*, [1988] 2 S.C.R. 387, *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 and *R. v. O'Connor*, [1995] 4 S.C.R. 411, referred to in the Federal of Appeal decision in *Ruby* to the effect that there is an emerging view that the liberty interest found in s.7 of the *Charter* protects an individual's right to privacy.

relating to the protection of privacy. As arguably the largest holder of private information about individuals, the federal government has acknowledged the importance of protecting the privacy of Canadians by establishing an office of the Privacy Commissioner. It has taken the lead in protecting privacy rights with the introduction, passage and implementation of the *Personal Information Protection and Electronic Documents Act*.⁴ The Privacy Commissioner monitors the collection, use and disclosure of information contained by the federal government. As Canadians' "watchdog" when privacy rights are at stake, the Privacy Commissioner has stated that the government must meet a four-fold test before implementing any new program that will infringe the privacy rights of Canadians. To paraphrase, the program must:

- be demonstrably necessary to address a specific problem;
- be likely to be effective in addressing that specific problem;
- impair privacy in proportion to the benefit likely to be derived; and
- be the least invasive alternative to accomplish the specified purpose.⁵

In our view, these considerations should guide the development of a national policy on identity documents.

iii. A national identification system must meet Canada's national commitments and international treaty obligations

An effective national identity policy must meet Canada's commitments and obligations under various international agreements. Further, it should address Canada's national and international security concerns. Any proposal for a national identification system should be explicit as to how it would address specified obligations and commitments.

4 S.C. 2000, c.5.

5 Excerpts from Hansard, February 13th, 2003: Mr. Pat Martin, Winnipeg Centre NDP, quoting then Privacy Commissioner, George Radwanski.

A constructive debate about a national identity policy will require full sharing of information. This is not to suggest that the government should release security-sensitive information. However, to meet the concerns of many Canadians that the debate is driven more by pressure from other governments than from a demonstrated need within Canada itself, our government should openly and fully disclose which obligations Canada is attempting to meet through any policy changes. The public has a right to know the extent of the concrete problems fuelling this debate. An honest consultation with the public requires this disclosure and clarity.

iv. A national identification system must be secure

The security of confidential government documents and information should always be a primary goal of government. That is a particularly onerous responsibility when the information is the personal and private data of citizens. When Canadians are obliged to share private information with the government, they have a right to expect that it will be kept secure from fraud and theft.

The government should disclose both its ability to guarantee security of personal information and the costs involved, as a prerequisite to eliciting informed public input and establishing sound public policy on national identity documents.

v. Penalties and enforcement measures must be in place to deal with fraudulent or criminal use of national identity documents or personal information

Advances in technology have provided authorities with highly sophisticated means of combating crime. However, as technology becomes increasingly pervasive, it is not only state agents that have unprecedented access to new technologies and therefore personal information. The fraudulent use of identity documents and theft of personal and private information is very difficult to combat. The more secure documents are reputed to be, the greater will be their value to organized crime. In fact, for persons without prior criminal involvement, the authority of a document such as a National Identity Card “would become a weapon in and of itself, used against the state and proving the bearer’s legitimate

status before the law.”⁶ This type of criminal activity is not new, but our reliance on modern technology and interconnectivity allows for novel means to access and misuse personal information. In addition, many of the methods used to perpetrate crimes of this sort are now virtually untraceable.

It is incumbent upon the government to not only develop sound security systems, but also to ensure that appropriate legal penalties and enforcement measures exist to curb abuses that are detected after fraud or theft has occurred.

vi. The costs of a national identification system must be known and must be commensurate with the purposes for which the system is required

The government must openly and accurately address the costs of establishing, implementing and enforcing a national identity policy and identification system, particularly one engaging biometric technology.

According to some estimates, the cost of implementing a national identification system could be as much as \$5 billion.⁷ There may well be a financial point at which the Canadian public deems such a policy to be insufficiently beneficial and secure to merit the cost. Part of the development of a national policy must be a commitment to publicly identify the costs associated with the proposed system, and to permit debate concerning its cost-effectiveness given the other goals of the policy, such as reducing fraud on the health care and social insurance systems, and identity fraud and theft. This debate should include consideration of whether the security of existing identification documents, such as Canadian passports, drivers’ licences, and social insurance and health cards, could instead be enhanced as an alternative to proposed innovations such as adopting a National Identity Card.

6 Morris Manning, Q.C., J.D., Statement of Position on National Identity Card, presented to the House of Commons Standing Committee on Citizenship and Immigration, February 10, 2003 at 3.

7 Interim Privacy Commissioner of Canada, Robert Marleau, Submission to the House of Commons Standing Committee on Citizenship and Immigration, September 18, 2003 at 6.

vii. A national identification system must be Canadian in purpose and design

When the government has initiated public debate over issues fundamental to Canadian values, it has at times appointed a Task Force or presented a White Paper to facilitate and inform that debate.⁸ In this case, however, the important issue of a national identification system was introduced through a Minister's speech to a Parliamentary Committee, without background information, research, or a clearly defined purpose. In our view, the public should be given information and time to deliberate on these weighty issues. Anything less erodes public confidence in the process.

RECOMMENDATION:

The CBA recommends that a Task Force be established to develop a White Paper on a National Identity Policy.

A national identity policy should strengthen and ensure national security without unduly hampering individual and collective privacy rights, or eroding principles of democracy guaranteed by the *Charter of Rights and Freedoms*, such as the right to life, liberty and security of person. Such a policy must be designed by Canadians and for Canadians, inspiring pride in our nationality and citizenship. This does not mean that we ignore our international obligations or commitments. This does not mean that we do not consult with our allies and neighbors to discuss their concerns when trying to identify and track Canadians traveling abroad. It does mean, however, that the policy and methods of implementation will be more likely to be tailored to suit Canadians.

⁸ For example, the Immigration Legislative Review Advisory Committee Report, *Not Just Numbers*, 1997; *Law Enforcement & Criminal Liability* White Paper, June 2000; *The Protection of Personal Information - Building Canada's Information & Economy*, January 1998.

III. A NATIONAL IDENTITY CARD FOR CANADIANS

The fundamental principles that we have listed to guide a national policy on identity can be applied to the specific proposal to introduce a Canadian National Identity Card. In our view, a National Identity Card is a solution in search of a problem. It is being posited without a clear and careful articulation of the problems it is designed to fix, or how precisely it will achieve those goals. While there have been suggestions that a National Identity Card will address identity theft and enhance security, no analysis has been provided about the specific impact that a National Identity Card can be expected to have on either of these problems, nor why a national identity card is the preferred solution over other potential solutions. This is particularly troubling given the far-reaching impact of a National Identity Card on the privacy of Canadians.

This issue mandates the kind of full and informed public debate we described in the context of developing a national policy on identity. Important questions must be answered frankly and fully before even beginning to discuss what a National Identity Card would look like, who would carry it, who would have access to it or its underlying database, or whether it should be produced at all. Such questions include:

- Is the National Identity Card primarily a secure identity card, reflecting the current status and basic identity information of the individual?
- Exactly what national and personal security concerns are to be met by these cards, and how?
- What range of options is being considered to remedy the problem?
- Might the intended national and personal security concerns be better addressed by enhancing the security and integrity of existing identity documents, such as passports, drivers' licences, social insurance and health cards?

- What is the extent of information imbedded in the card and capable of being accessed through the card and its underlying database?
- Which authorities will rely upon the card? Is it for use by police forces in identifying individuals upon initial questioning or arrest? Will police demand the card as a first level of investigation of any person coming under their scrutiny?
- Will Immigration or Customs officials in Canada, abroad or at port of entry rely upon the card in the processes of entry to Canada or in inland investigations?
- Is the National Identity Card to be used internationally by agencies such as the U.S. Department of Homeland Security as an alternative or supplement to passports or Permanent Resident Cards? Will, for instance, U.S. authorities demand a National Identity Card as a requisite to entry to the United States?
- Under what circumstances will an individual be required to produce the National Identity Card to state authorities?
- What have other comparable jurisdictions done to address the perceived problem, and what are their results to date?⁹
- What is the relationship of the proposed National Identity Card to the wide range of other identifying documents now in existence?
- Are the resulting intrusions on privacy or other *Charter* guarantees demonstrably justifiable under section 1?

In addition, strict protocols regarding the creation, verification and use of identifying documents by government personnel will be as important, if not more important, than the security features of the document itself. The "human" factors in any security system usually fail long before any technical aspects of the system are breached. Without satisfactory answers to these and other questions, and a thorough analysis of existing practices and procedures regarding identity documents, technological advances such as those permitting the production of a

National Identity Card will leave us no further ahead in terms of security, but will significantly compromise our privacy, at enormous expense.

1. What is the Purpose of a National Identity Card?

The fundamental purpose of any identity document is control. A passport is used to control entry to and exit from countries internationally. A social insurance number is used to control collection of taxes and payment of federal benefits. A driver's license is used to control the operation of motorized vehicles on our roads. However, existing identity documents permit some degree of choice and anonymity. A person who does not wish to drive, does not have to get a driver's license. A person who does not wish to travel internationally, need not get a passport.

Similarly, the state requires individuals to provide biometric identifiers (such as fingerprints) only in limited circumstances, such as criminal proceedings. There is no general obligation for individuals to provide biometric identifiers beyond photographs. Mandating a National Identity Card containing biometric identifiers such as iris scans or fingerprints from all citizens or resident would represent a significant, even excessive, breach of the deference shown by the state for identifiers that are most personal, our individual personal characteristics. "Identification cards allow us to be identified when we have every right to remain anonymous, reveal more information about us than is strictly required to establish our identity or authorization in a particular situation, and allow our various activities to be linked together in profiles of our lives."¹⁰

The functional purpose of a National Identity Card is to monitor and in some cases to control people within Canada. How that control would occur, and what that control would be used to accomplish must be addressed before even considering implementing a national identification system that would have enormous potential to erode privacy rights. In our view, it is entirely insufficient

to say only that a National Identity Card would be a valuable tool to protect national and personal security, without substantiating that claim.

Articulating the real purpose for a National Identity Card is all the more significant given the U.S. government demand that all visa waiver countries implement the use of biometric identifiers within their passports by the fall of 2004, to facilitate entry into the U.S. This requirement will apply to Canada, E.U. countries, Australia and New Zealand, amongst others. If Canada already plans to implement biometric identifiers into Canadian passports, we need to ask what further purposes would justify the implementation of a National Identity Card for all those within our borders.

RECOMMENDATION:

The Canadian Bar Association recommends that the government clearly and fully disclose what it considers to be the purpose, capabilities, and use of a National Identity Card to both Parliament and to the public to properly inform the debate.

2. Contents of a National Identity Card

An identity card linked securely to the individual and not easily used by any other person offers obvious efficiencies over traditional primary identity documents that contain either no, or easily manipulated identifiers (birth certificates or driver's licenses). However, as recognized by Minister Coderre, it also has potential to allow access to much more than basic identity information:

When we are talking about identity we are talking about authenticity. It is an authentication process. We want to know who a person in front of us is without asking a lot of different questions, and that is the bottom line. ... We cannot counterfeit our own fingerprints because it requires a mathematical calculation, not just a reproduction.... It is also the same with the iris of the eye. Basically I believe that biometrics can be used in a friendly manner.¹¹

The suggested purpose of the National Identity Card is to provide conclusive proof that we are who we say we are. The proposed National Identity Card would both define status of the individual and contain imbedded biometric identifiers accessed through scanner technology, possibly linking to database information through electronic means.¹² Depending upon the mechanics and process of card issuance, the card could be a “key” unlocking computer access to underlying imbedded information and a database. The extent of this database is yet undefined but has potential to include data accumulated by any federal department (for example, Customs and Immigration Canada, Canada Customs and Revenue Agency, Human Resource Development Canada), from police agencies, foreign agencies and from individuals themselves in the process of applying for the National Identity Card.

This would represent a very sophisticated identity document capable of containing as much personal information as the government chooses. Just because we have the technological capability to create such a document does not mean that we should use that capability. The mere idea of a National Identity Card containing biometric data goes against recognition and respect for the privacy rights of individuals, and should not be embraced without an explicit purpose that has been considered and judged acceptable by Parliament and the Canadian public.

If asked to tender the card, would a person be doing so to provide identification through a secure document, or to offer all the information that the card and database yield? Is there an explicit or implicit agreement that, by using the card, the individual agrees to disclosure of this information and waives all privacy interest in that information? To whom is the information to be yielded, in full or part? Will the individual even know the extent of the information that is accessible? What will happen to the information upon an individual’s death? The advent of computer databases and electronic access exposes individuals to an

12 Biometrics is the study and statistical analysis of biological data. In this context, an individual's unique physiological characteristics, including fingerprints, iris, face, voice or other attributes, can be reduced to mathematical algorithms that can be stored on a chip or machine-readable strip and retrieved to verify an individual's identity. The amount or type of

unprecedented level of electronic scrutiny. Further, no express referendum from the population has established that such databases or access are considered acceptable.

Individuals already tolerate a limited but necessary degree of state intrusion into privacy. However, current obligatory disclosures are tailored to specific state objectives. We do not need to show our passport to drive a car. We do not need to show our driver's license to file income taxes. In other words, the personal information currently obtained relates to the purpose and use of each particular identity document. In contrast, the National Identity Card would have the potential for obligatory disclosure of far more information, limited only by the content of imbedded information, database and limits of access.

RECOMMENDATION

The Canadian Bar Association recommends that, if a National Identity Card is to be introduced, it be limited to a card that confirms identity and status only, with or without biometric identifiers. There should be no imbedded information or accessible database until the privacy intrusion capacities have been fully disclosed to Parliament and to the public, and there has been clear and informed approval outlining the extent of privacy intrusion that is acceptable, and the circumstances under which disclosure will be mandatory and to whom.

3. Obtaining a National Identity Card

The application process for a National Identity Card would be significant for its validation of issuance and integrity. A good comparison is found in the Permanent Resident Card (PR Card) process, implemented by the *Immigration and Refugee Protection Act* (IRPA)¹³ in June 2002.

information that can be placed on such magnetic strip is almost limitless.

13 *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

The PR Card is the standard status document provided to permanent residents in Canada. It was introduced with the promise of convenience and security, providing evidence of status and identity. It contains a photograph and imbedded identity information, using advanced technology that is intended to render counterfeiting difficult.

Permanent residents must apply to obtain or renew the card every five years. Upon request, applicants must undergo an examination, providing all relevant documentation and answering all questions upon penalty of significant fine or imprisonment. Taken in legislative context, it is clear that the objective and function of the PR Card is to be an enforcement tool, with the application process being the investigative mechanism for examining compliance with residency obligations or any other concerns. The card's actual issuance and use is secondary to the investigation and enforcement functions triggered by the application process.

There has been no indication of whether eligibility and the application process for a National Identity Card will involve an enforcement function for some, or perhaps for all applicants. For example:

- Will all applicants be legally obliged to submit to a compelled examination when applying for the National Identity Card, similar to the program for the PR Card?
- What will the criteria be for determining eligibility for a National Identity Card? How will the criteria differ for native-born Canadians, naturalized Canadians, permanent residents, or other foreign nationals in Canada?
- What requirement will be imposed upon applicants for disclosure of personal and background information?
- Would information provided be open for scrutiny and challenge?
- Will applicants be required to undergo security and criminal background checks?
- Under what circumstances could an applicant be refused a card?

- What is the validity period for a National Identity Card?
- At what age would Canadians be obliged to obtain and carry a National Identity Card: at 18 years of age, the age of majority in the province/territory of residence, or perhaps when entering the school system?

Related questions arise as to how the National Identity Card will reflect changes in status. If a National Identity Card is issued to a refugee claimant or foreign national, how and when could the card reflect a change from foreign national to permanent resident to citizen? Would the application process require re-application and re-examination as an individual acquired each of these status levels? Would the underlying imbedded or database information be changed?

4. Would Possession of a National Identity Card be Voluntary?

It is unclear whether the National Identity Card would be mandatory for all, or voluntary for some (e.g. Canadian citizens and permanent residents) and mandatory for others (e.g. refugee claimants, foreign students, or other temporary residents). This question implicitly raises issues of privacy and equality rights and the potential for discrimination. Again, the extent to which citizens and other segments of Canadian society should acquiesce to the loss of privacy represented by a National Identity Card must be considered. It may make sense that the National Identity Card would apply only to Canadian citizens, given that the government already tracks permanent residents through the new PR Card.

If enhanced national security is the underlying purpose for a National Identity Card, then clearly an *ad hoc*, voluntary program would be inappropriate. Any individual wanting to avoid government scrutiny would simply not apply for a card, at least not using their real identity.

The obligation to hold the National Identity Card would be more intrusive than the obligation to hold most other forms of identification, given the amount of information it contains. Requiring that it be carried at all times would further diminish the liberty interests of all Canadians, and is frighteningly reminiscent of the Pass Card laws from the regime of apartheid in South Africa. It also increases the likelihood of theft and loss to require everyone to carry the National Identity Card at all times. If a National Identity Card is to be mandatory, would each Canadian have to pay a user fee for a card, or would it, together with the costs of training, implementation, processing, overseas issuance, and other related costs, be extracted from the general revenue?

The population should not be deemed to have acquiesced to such measures because fears remain following the events of September 11, 2001. Certainly, it is understandable that we might accept a National Identity Card if it actually guaranteed that terrorists could not use false Canadian identities. However, we cannot safely presume that the use of a National Identity Card will prevent such abuse, or that the substantial erosion of privacy interest will be constrained to only that necessary to meet legitimate security considerations.

RECOMMENDATION:

The Canadian Bar Association recommends that, if a National Identity Card is to be introduced, the government clearly delineate very limited circumstances requiring possession and presentation of a National Identity Card, as well as a clear statement of consequences of not possessing and presenting a National Identity Card as required.

5. Would the National Identity Card require renewal?

It may be true that one's biometric data are personal and immutable. However, the other identifiers that will appear on the card may be changeable. If so, Canadians would be forced to reapply for the card periodically, with penalties for

non-compliance. The renewal requirements must also be explicitly stated for an informed discussion in regard to any proposed policy.

6. Use of the National Identity Card

Perhaps the most alarming concern about introducing a National Identity Card is that its possible uses are virtually infinite. It provides “a tool that permits the bearers to prove, with a high degree of certainty, that they are who they say they are”, according to Minister Coderre. But, what the Minister has not addressed is to whom we must establish our identity, in what circumstances and for what purpose. If intended to enhance security by preventing terrorism and identity fraud, it is unclear if, and how it will address what this goal, or how its use will be carefully limited to only those objectives.

Even if the government carefully limits its own use of the National Identity Card, the private sector may seize opportunities to use those cards for proof of identity, even without legal authority. It is entirely likely that a National Identity Card could suffer from the same “function creep” as we have seen with our social insurance numbers, meaning that a system designed to address a specific purpose eventually can become used for others, without challenge, while system safeguards are gradually eroded. Examples already exist of such misuse, including again, social insurance numbers being demanded on such things as applications to lease an apartment or driver’s licenses being required to board an airline. Similarly, the National Identity Card could potentially be used by police, but also in time by landlords and employers. It could certainly be used by CSIS, and by Canada Customs and Revenue Agency. It could be used to track the movement of Canadians, not only within Canada, but internationally. Further, new unanticipated uses are likely to be found as we become more accustomed to the National Identity Card. For example, financial institutions might find the National Identity Card helpful in tracking debtors.

If it is true that existing travel documents are increasingly fraudulently reproduced and used internationally, it does not necessarily imply that Canadians

would support replacing the passport with a more invasive document with increased potential to intrude into an individual's privacy. Perhaps the real issue is to resolve problems with existing identity documents through enhanced security features.

The CBA is concerned about collateral, and perhaps unanticipated drawbacks surrounding the introduction of a National Identity Card, in terms of loss of privacy, erosion of individual liberties, and especially the tracking of profiled individuals or groups. Whatever its intended use, the power of the state to intervene in the private affairs of individual Canadian citizens will certainly increase should we proceed with a National Identity Card.

7. Can we guarantee the security of a National Identity Card?

The Minister has stated that a National Identity Card will provide "certainty because of the security around its issuance and the technology used in the card". While perhaps a sophisticated technological advancement, we question whether the government will be able to guarantee any real degree of enhanced security through these cards. For as long as we have used identity documents as a method of control, there has been a criminal element at work to circumvent that control. Whether the abuse has been in the form of replicated documents or the theft of personal information held by the government, fraud has always followed the introduction or implementation of advanced security measures. By upping the ante and treating a document as increasingly reliable proof of identity, so too the value of such a document to criminals will increase. Technology is no panacea to fraud, and the technological capabilities of organized crime do not lag far behind that of law enforcement.¹⁴

The same problems that exist with lost passports, drivers' licenses, birth certificates will inevitably come to exist with a National Identity Card. Biometric data may belong to one individual only, but fraud artists will soon devise ways to get around these controls. The Minister has acknowledged that the "smart

technology” used to develop the new PR Cards required of all permanent residents traveling outside Canada after December 31, 2003, has already been fraudulently duplicated in counterfeit PR Cards.

It is also misleading for the government to suggest that the 12,000 cases of identity theft in 2001 would have been prevented by a National Identity Card. Many cases of identity theft have nothing to do with the interactions between individuals and the government. Most cases arise in the commercial context through the use of electronic communications that are not even under government control.

If the government decides to proceed with the proposal for a National Identity Card, it is imperative that it is also able to guarantee that the confidential personal data it collects and stores, and that would be contained on such cards, could be kept secure from theft or duplication. To date, the record on any identity cards, including passports, the PR Card, and social insurance cards, is not reassuring. Again, it may well be that government resources can better address concerns about identity theft by enhancing the security features of existing identity documents.

8. Enforcement measures against those without a National Identity Card

If a National Identity Card is introduced, enforcement measures will have to be devised to deal with possession or use of fraudulent cards and the theft of private information. More importantly, if possession of a National Identity Card is mandatory, the government will have to devise support and enforcement measures to deal with those who, for whatever reason, do not have or refuse to obtain this card.

It would seem that the government could potentially create a new class of criminals by introducing a mandatory National Identity Card. There are penalties for working without a social insurance number and for driving without a driver’s

license. There are penalties abroad for traveling without a passport. If Canadians living peacefully in Canada, with no prior criminal records, are called upon to produce a National Identity Card that they do not have, it would seem that they would have to be charged with an offence or at least fined. Enforcement measures have the potential to lead to substantial injustice against otherwise honest Canadians. This alone should elicit concern that the state has gone far beyond its demonstrated need to intrude into the private lives of individuals.

9. Costs of Implementing a National Identity Card Program

The costs of implementing a new government program must always be weighed against its promised benefits. The government's recent experiences with the federal gun control registry and the PR Card provide concrete examples to allow an accurate estimate of the financial costs of a National Identity Card system, although such a system for all Canadians would be much more expansive than either the gun registry system or the PR Card system. Initial estimates suggest that a National Identity Card system would cost between \$3 to \$5 billion to implement.¹⁵

Administrative difficulties encountered in the current PR Card issuance process are also illustrative. Existing permanent residents, perhaps in excess of one million persons, have for the past year been involved in the process of acquiring a PR Card before the deadline date of December 31, 2003, when the cards become the required document for commercial travel. Currently, four to six months are required for the card to be issued, from date of application. The application is initially assessed in a central processing centre in Nova Scotia. The instructions for card issuance are then passed on to the manufacturing facility in Montreal. The produced cards are then sent in bulk to distribution centres in major cities, and those centers are responsible for contacting the resident and arranging a pick-up appointment. Line-ups for pick-up are so long that they have been covered by television news.

The issuance process for PR Cards has been criticized as slow, as failing to efficiently distribute the cards, and as repeatedly failing in effective communication between applicants and issuing offices. There is no process for an applicant to access an agent of the local distribution office to inquire about a particular card. There is only a centralized call-in centre, which does not or cannot directly comment on distribution difficulties arising in local offices.

To learn from this experience, the government should produce comprehensive data on the time frames for production of the PR Cards, the volume of applications made, the capital and operating costs of production, and the personnel resources required. If the demands of approximately one million existing PRs and 200,000 new applicants each year can only be met with six month processing times and considerable cost, it boggles the mind to imagine the resources required and production levels that can be expected for National Identity Card processing for more than 30 million citizens, and potentially for the more than 35 million foreign nationals (visitors, students, workers, and refugee claimants) in and outside Canada.

Certainly, before embarking upon such an ambitious project, a thorough cost-benefit analysis must be undertaken to ensure that the cost is warranted given the objectives, and that those objectives can be accomplished in a cost-effective manner.

IV. CONCLUSION

In summary, the Canadian Bar Association is very concerned about the proposal to create a National Identity Card for Canadians because:

- (a) It is unclear what the purpose and scope of the National Identity Card would be.
- (b) There are significant privacy concerns with the use of imbedded information and database information that could be accessed through a

National Identity Card.

- (c) If the card would be applicable to permanent residents, then there would be duplication of process with the existing PR Card process; if it would be applicable to citizens, there would at most be a marginal benefit, as many already possess satisfactory evidence of status through birth certificates, federal records and passports.
- (d) If the card would be applicable to foreign nationals (students, workers, visitors and refugee claimants), then the PR Card experience puts in question whether the process would be cost effective, timely and capable of flexibility to adapt to the changing status of such individuals.
- (e) Even if the National Identity Card would be limited to a biometric secure identity card confirming status and standard identity data, the production costs and infrastructure involved may be overwhelming.

Advances in technology should not drive this proposal. Technology is a tool to implement public policy, not a capability that should drive policy. Similarly, responsible public policy makers should not exploit the public's desire to be guaranteed security.

A national identification system and National Identity Card complete with biometric data represents a highly controversial shift in policy and practice. The advantages and disadvantages of giving up existing privacy rights central to our enjoyment of our Canadian identity cannot be debated in a vacuum. Before asking Canadians to support a very costly leap into an area of technological sophistication most do not properly understand, the government must do its own homework and share full information with the Canadian public.

In our view, a more serious and thoughtful debate is required before any identity system is proposed. That debate should begin with clearly stated government objectives, anticipated benefits and a realistic assessment of costs. The government should also state the principles according to which any identity policy will evolve. These are essential components of responsible leadership on a

critical issue.