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CANADIAN CONSUMER REPORTING LEGISLATION: TRENDS AND PROBLEMS*

By JACOB S. ZIEGEL**

Two problems coalesced during the 'sixties to bring to the forefront the subject of this paper. One was the burgeoning volume of consumer credit, which grew at an average annual rate of 11%, and now exceeds \$13 billion.¹ A flourishing credit economy cannot long survive without the reporting agencies which provide credit grantors with up-to-date information about the consumers to whom they are considering advancing credit.² There are about two hundred credit bureaux in Canada and between them they hold records on perhaps as many as ten million Canadians.³ The Credit Bureau of Greater Toronto alone holds one million such files.

The other major event was the technical innovations in the gathering and dissemination of consumer information introduced by the computer and the expected computerization of the records of consumer reporting agencies. The major consumer reporting bureaux in the U.S. have already computerized their files.⁴ For financial reasons Canada is still some distance from this goal, though the bureaux in Montreal and Toronto have the change under active consideration. When it occurs it will spell great potential, for good as well as evil. On the beneficial side it will make up-to-date information on large numbers of consumers scattered across Canada more speedily available. It has been estimated, for example,⁵ that, using a laser memory system, the equivalent of two thousand pages of data could be stored on every American in a room measuring fifteen feet by twenty feet. On the detrimental side, an error in the records, presently only local in impact, will be magnified dozens of times and do infinitely greater harm unless proper checks and balances are introduced at all the critical levels.

* This paper was delivered at a panel discussion on consumer reporting legislation held at the annual meeting of the Commercial and Consumer Law Section of the Association of Canadian Law Teachers on 5 June 1973.

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¹ *Bank of Canada Review*, Jan. 1973, Table 44.

² On the importance of accurate and comprehensive debt profiles to help prevent consumers from becoming overcommitted, see Law Soc. of Upper Can., *Lectures on Consumer Protection*, Feb. 1973, at 35.

³ For further particulars about their operations, see John Sharpe, *Credit Reporting and Privacy* (Toronto: Butterworths, 1970), ch. 2.

⁴ See Arthur R. Miller, *The Assault on Privacy* (Ann Arbor: Univ. of Michigan Press, 1971) at 67 *et seq.*

⁵ M. Trebilcock, Brief on Bill 229 submitted to the Committee on the Administration of Justice, December 1972.

So it is not surprising that the spotlight should have fallen on the consumer reporting industry. The process was accelerated by numerous reports in the popular media about alleged abuses and shortcomings in the industry,⁶ and by scholarly discussions by such authors as Alan Westin⁷ and Arthur Millar of Michigan⁸ about the threat to privacy presented by the awesome capabilities of the computer. Predictably, the first legislative steps were taken in the U.S. Congress adopted Senator Proxmire's Fair Credit Reporting Bill in 1970⁹ and a substantial number of state legislatures have taken parallel action at their jurisdictional levels.¹⁰

As in other consumer protection areas, Canada has benefitted from the American fall-out. Ontario introduced a credit reporting bill early in 1971,¹¹ but the bill was badly drafted and was allowed to lapse by the government in the face of widespread criticism.¹² A much improved bill, Bill 229,¹³ was given first and second reading in November and December of 1972¹⁴ but fell victim to the legislative timetable. A slightly revised bill, Bill 101¹⁵ was introduced in April 1973 and received its second reading in June.¹⁶ The prospects are that it will be enacted soon.¹⁷

In the meantime, several of the other provinces have already anticipated Ontario. Manitoba adopted its Personal Investigations Act in 1971,¹⁸ Saskatchewan followed with its Credit Reporting Agencies Act last year,¹⁹ and Nova Scotia adopted a Consumer Reporting Act in March of this year.²⁰ Quebec's Consumer Protection Act of 1971 also contains some skeletal and, it must be confessed, very inadequate provisions about credit reporting

⁶ See e.g., *Weekend Magazine*, 29 Nov. 1969, at 4, and *Toronto Daily Star*, 17 Jan. 1970, at 21.

⁷ A. F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967).

⁸ *Supra*, note 4.

⁹ P.L. 91-508, Title VI. For the legislative history of the Bill see Sen. Rep. 91-1139, H.R. 91-975, and H.R. 91-1587. Pursuant to major responsibility for its administration the FTC issued six final interpretations on the Act on 23 Feb. 1973.

¹⁰ E.g. (as of April 1971), Arizona, California, Massachusetts, New Mexico, and New York.

¹¹ Bill 23, 20 Eliz. II, 1971.

¹² See e.g., *Toronto Daily Star*, 17 May 1971, at 8.

¹³ 21 Eliz. II, 1972.

¹⁴ *Id.*, *Legis. of Ont. Deb.*, 6 Dec. 1972, pp. 5195 *et seq.* (2R.).

¹⁵ 22 Eliz. II, 1973.

¹⁶ *Legis. of Ont. Deb.*, 29 May 1973, pp. 2407 *et seq.*

¹⁷ This was the common expectation, freely predicted by The Hon. J.T. Clement, Min. of Consumer & Commercial Relations, in numerous public speeches, but events proved him (and us) wrong. Hearings on the Bill were held by the Committee on the Administration of Justice on June 7, 13, and 20, 1973 but at least one of these proved abortive for lack of a quorum and another started late for the same reason — a sad commentary on the way Canada's most populous province runs its legislative affairs. At its last meeting before the House was adjourned on June 22, 1973 the Committee reached Section 8 of the Bill.

¹⁸ Stat. Man. 1971, p.35.

¹⁹ Stat. Sask. 1972, c. 23.

²⁰ Stat. N.S. 1973, c. 4.

agencies.²¹ Several provinces, including Newfoundland and Alberta, have actively contemplated legislation for a year or more.²² One does not have to be a crystal-gazer to predict that within a year or two no self-respecting province will be without its own version of this motherhood legislation.

The American influence in all these initiatives is clear, but so are the idiosyncracies of individual draftsmen and their perceptions (or the lack of them) of the problems and the desirable solutions to them. As a result, there is a lamentable possibility that soon we may have ten different acts — a prospect that must surely cause much anguish to the consumer reporting agencies and the numerous credit grantors, life insurance companies, and employers whose operations encompass more than one province. This Breughelian chaos could have been avoided if the federal government or one of the provinces had seized the initiative in convening a conference for the drafting of a uniform statute.²³ It is still not too late, though precedent in other consumer protection areas leaves only a modest margin for optimism.

Time does not permit a detailed comparison of the minutiae of the existing acts and bills, nor would it be a particularly fruitful exercise. Instead I should like to focus on some important questions of principle and policy and the difficulties attendant upon trying to translate them into acceptable legislative mandates. My particular foci will be the Manitoba Act and the recent Ontario bills.

By way of introduction, let me sketch the general scheme of Ontario's Bill 101, which is substantially copied in the Nova Scotia Act and may well turn out to be the prototype of future Canadian legislation. It is simple to comprehend. First, it requires all consumer reporting agencies to be licensed²⁴ and subjects them to the surveillance of a new official to be known as the Registrar of Consumer Reporting Agencies.²⁵ Second, it requires all persons seeking a consumer report to notify the applicant in writing of their intention to do so unless, in the case of an application for credit, the application has been made verbally.²⁶ Independently of this requirement, the consumer is entitled to be told if he enquires whether or not a report has been ob-

²¹ Stat. Que. 1971, c. 74, Division IV, ss. 43-46.

²² Newfoundland has now adopted a Credit Reporting Agencies Act, Stat. Nfld. 1973, c. 76. A private members' Consumer Credit Disclosure Bill was introduced in the Alberta legislature in 1970 (Bill 141) but apparently did not receive second reading. The federal government could presumably exercise jurisdiction under a variety of BNA heads but, apart from commissioning the *Report on Privacy and Computers* (Ottawa, 1972), has so far shown little disposition to do so despite the prodding by some M.P.'s. See e.g., Bill C-128 (Mark Rose, M.P., 1970) and Bill C-205 (Harries, M.P., 1969).

²³ At the conference of federal and provincial consumer protection officials held in Quebec City on May 31-June 1, 1973, consumer reporting legislation was one of the items discussed. However, no firm plans for uniformity appear to have emerged although its desirability was accepted and a resolution was adopted calling for legislation uniform as to principle and methods. See statement by Hon. J.T. Clement, *Legis. of Ont. Deb.*, 12 June 1973, at 2981.

²⁴ Sec. 3 *et seq.*

²⁵ Sec. 2.

²⁶ Sec. 10(2)-(3).

tained, and from whom.²⁷ In addition, if a benefit has been refused because of an adverse report, the recipient must advise the consumer of this fact without waiting to be asked.²⁸ These requirements are designed partly to alert the consumer to the fact that his credit worthiness or other eligibility for the benefit sought may be investigated, and partly to enable him to trace the source of erroneous information and to take remedial measures if his application has been denied.

The reporting agency for its part is subject to some modest restrictions as to the types of information it may gather,²⁹ and to more controversial restrictions as to the persons to whom it may disclose it.³⁰ The consumer is entitled to know what information the agency has collected about him³¹ and, in the case of credit information, its source.³² The agency is required to correct any errors which are drawn to its attention "in accordance with good practice",³³ whatever this phrase may mean. It is also obliged to show the consumer a copy of any written report it has sent out about him.³⁴ Representatives of personal investigative agencies have strenuously opposed the latter requirement as jeopardizing the essentially confidential character of the agencies' informational sources, and because it may expose the agencies to libel actions.³⁵

So much by way of introduction. Let me now discuss several difficult policy questions. The first concerns the scope of the legislation. What type of individuals should it seek to protect? The title of the legislation would seem to suggest that it should be restricted to consumers, that is, to reports intended to be used in connection with the extension of credit, insurance or leases for personal, family, or household purposes, contracts for personal employment, and similar transactions. The definition of consumer in the Newfoundland Act and in Bill 101 is in fact circumscribed in this way.³⁶

²⁷ Sec. 10(1).

²⁸ Sec. 10(7).

²⁹ Sec. 9(2)-(3).

³⁰ Sec. 8.

³¹ Sec. 11.

³² Sec. 11(1)(b).

³³ Sec. 12(1).

³⁴ Sec. 11(1)(d).

³⁵ Retail Credit Company of Canada Ltd., *Submission to the Standing Committee on the Administration of Justice on Bill 229*, 12 Dec. 1972, and verbal submissions made by the same company to the Law Amendment Committee of the Nova Scotia Legislature on 20 March 1973 in the presence of the writer.

³⁶ Nfld., sec. 2(a); Ont., Bill 101, sec. 1(1)(a). Cf. FRCA, sec. 603(e). Ontario's position has vacillated. Bill 23, sec. 1(1)(a), was identical with the definition in the Newfoundland Act. Bill 229, sec. 1(1)(a), defined "consumer" as meaning "a natural person". The definition in Bill 101 reads: "'consumer' means a natural person but does not include a person engaging in a transaction, other than seeking employment, in the course of carrying on business". The 1971 Ontario version apparently influenced the Newfoundland definition, the later Ontario version the Nova Scotia definition [sec. 2(1)(a)]. The Man. Act applies to a person who is the subject of a personal investigation [sec. 1(k)] but excludes [sec. 2(c)] corporations and partnerships. The Sask. Act [s. 2(1)(a)] defines consumer as "an individual".

However, it seems to me to be open to the objection that it creates an invidious distinction between individuals as consumers and the thousands of other individuals in our society who seek credit, insurance and other benefits in their professional or other occupational capacities. I am not persuaded by the implicit reasoning that these types of persons should be able to protect their own interests because I do not think it squares with the facts.³⁷ If a lawyer or a doctor or a small unincorporated businessman does not know why he has been refused credit or insurance and is not entitled to be informed whether a report has been obtained about him, and from whom, how is he to be in a position to correct inaccurate information about him? A compromise solution may be suggested. While a professional or a small businessman may not need the full range of protection afforded by the reporting legislation (for example, the right to be notified that a report may be obtained about him), he should be entitled to have the same rights of access to the agency's records as a consumer and to correct errors.

The definitional problem also encompasses the types of consumer reporting agencies that should be regulated by the legislation. For descriptive and, to some extent, functional purposes a distinction is frequently drawn between credit reporting agencies and the investigative type agencies, such as the Retail Credit Company of Canada, who are the main suppliers of reports for insurance and employment purposes. There was a time when the credit bureaux were anxious not to be tarred with the same brush as the investigative type agencies and urged the adoption of separate legislation to regulate these different types of consumer reporting agencies. Ontario's Bill 23 actually heeded this argument but this unsound approach was abandoned in the subsequent bills. Unhappily, and for reasons that remain obscure, the Saskatchewan Act (and, now, the Newfoundland Act) are restricted to credit reporting agencies.

Leaving aside this question, there still remains the unresolved issue whether the legislation should be restricted to reporting agencies who carry on business for gain or profit, or whether it should also include cooperative agencies such as the lenders' exchanges which are run by the consumer loan companies across Canada. The Nova Scotia Act³⁸ and Bill 101³⁹ are confined to the former type whereas the Fair Credit Reporting Act includes both types.⁴⁰ As a matter of principle the American approach seems to me the preferable one. From the consumer's point of view, it surely does not matter whether the company with whom he is dealing obtains its information from

³⁷ This is one of the reasons put forward by the Min. of Consumer & Commercial Relations in the course of the hearings on Bill 101. The other was that the new definition is consistent with the definition of "buyer" in the Ont. Consumer Protection Act, R.S.O. 1970, c. 82 as am., s. 1(c).

³⁸ Sec. 2(1)(c). Cf. Man., sec. 1(j).

³⁹ Sec. 1(1)(c).

⁴⁰ Sec. 603(f). Ont. Bill 23, sec. 1(d), applied to both types ("whether for remuneration or otherwise") and this in turn appears to have influenced Newfoundland's version, sec. 2(e). Sask., sec. 2(1)(c), is ambiguous but apparently also applies to both types. On the scope of the American Act, see also *FTC News*, 23 Feb. 1973.

a profit or non-profit agency, and the need to protect him against inaccurate information appears to be the same in both cases. I do not wish to be misunderstood. I am not suggesting that lenders' exchanges are a fertile source of errors because there is no evidence to this effect. On the other hand, there is reason to believe that the cooperative type reporting agencies will grow in importance during the coming years and therefore there are sound practical reasons, as well as the question of principle, why they should be included within the scope of the legislation.

There are a number of difficulties which arise from the obligations cast upon the person who makes use of consumer reports, or obtains information from other sources, relevant to the application for personal benefits that is before him. As I have already mentioned, the current Ontario Bill⁴¹ requires anyone who has denied a benefit or increased his charge to advise the consumer if he has made use of a consumer report. This requirement also appears in a modified form in the Manitoba Act⁴² and in both cases the obvious source of inspiration was the Fair Credit Reporting Act.⁴³ The justification for this requirement seems self-evident.

Much more contentious is the requirement which also appears in the Manitoba Act⁴⁴ and the Ontario Bill⁴⁵ that the person denying the benefit

⁴¹ Bill 101, sec. 10(6). For the text of the provision, see *infra*, note 45.

⁴² Sec. 6. For the text of the provision see *infra*, note 44. Section 6 differs from the Ontario provision because, unlike the latter, it does not require the benefit denier to volunteer the information; he is, *semble*, only obliged to advise the subject of his right to obtain the information if he asks for it. However, this difference is not as significant as may appear at first sight because of the provision in sec. 3(1). This prohibits a personal investigation without the subject's consent or "unless the subject is given written notice by the user that a personal investigation was conducted and such notice is given within ten days of the granting or denial of the benefit for which the subject has applied". The result then emerges that under the Manitoba Act a disappointed applicant may have been previously notified that an investigation has been or will be conducted but, unlike his Ontario cousin, he will not know without further enquiry whether it was the investigation or some other factor which led to the refusal of the application.

⁴³ Sec. 615.

⁴⁴ Sec. 6: "Where a personal investigation has been conducted and the subject is subsequently denied a benefit, in whole or in part, the user shall, within ten days from the date of the denial, advise the subject in writing of the denial and the right of the subject to be advised as to any information obtained through the investigation, in accordance with section 7".

⁴⁵ Bill 101, sec. 10(6): "Where a benefit is denied to a consumer or a charge to a consumer is increased either wholly or partly because of information received from a consumer reporting agency or a person other than a consumer reporting agency, the user of such information shall deliver to the consumer at the time such action is communicated to the consumer notice of the fact and, upon the request of the consumer made within sixty days after such notice, shall inform the consumer, (a) of the nature of the information where the information is furnished by a person other than a consumer reporting agency; or (b) of the name and address of the consumer reporting agency, where the information is furnished by a consumer reporting agency; and the notice required to be given by the user under this subsection shall contain notice of the consumer's right to request the information referred to in clauses (a) and (b) and the time limited therefor."

disclose — in the case of the Ontario Bill apparently without waiting to be asked — whether or not he has obtained adverse information from any *other* source. On the face of it, it seems a reasonable requirement. From the consumer's point of view, it may well be argued that if the information is inaccurate its source is immaterial. To paraphrase a famous line, "an error is an error is an error". However, I see some very real difficulties. One is that it would encompass an enormous range of individuals (and not simply large and well established businesses) to whom it would never occur that they might be subject to the provisions of the new legislation. As examples consider the position of the professors who refuses to hire a research assistant because of a poor recommendation, the lawyer who interviews an articling student, or a landlady who declines to let a room, or the home-owner who is considering leasing out his house for the summer.⁴⁶

As a result, I believe the net is cast too wide and that if the second requirement is to be retained it will have to be circumscribed much more carefully. The comparable American provision appears to be restricted to credit grantors. Even this requirement may need to be refined still further so as to confine it to those credit grantors who are regularly in the business of granting credit. It may also be desirable to draw a distinction between the duty of notification of the benefit denier and his obligation to answer the consumer's enquiries with respect to adverse information obtained by him from outside sources. The first requirement may reasonably be limited to those regularly in the business of conferring a benefit of the type in question. The second could justifiably be extended to all benefit deniers on the ground that it involves no serious hardship and may avoid an unfair injury to the consumer.

A second difficulty, but one which is less objectionable than the one I have just discussed, is another requirement in the Manitoba Act⁴⁸ and the Ontario Bill⁴⁹ which obligates the person who is considering conferring a benefit to notify the consumer if he intends to obtain a consumer report about

⁴⁶ The writer enquired from Mr. J.E. Mason, the Manitoba Associate Deputy Minister for Consumer Affairs, to what extent this provision in the Manitoba Act was being enforced in practice and whether it was the government's intention that the Act should apply to informal investigations. Mr. Mason's reply of 5 April 1973 did not deal with the first point. With respect to the second point, he wrote as follows: "I don't think it would be sufficient to simply have the Act apply to investigations conducted by personal reporting agencies. We know, for instance, that a great many credit grantors do not use an agency. Rather, they make their own inquiries — sometimes to save expenses. Similarly, many employers and landlords make their own inquiries. The information obtained by these people in the course of their inquiry can be just as damaging and harmful as if it were obtained through an agency. Accordingly, we see no justification for exempting such investigations from the provisions of the Act."

⁴⁷ FCRA, sec. 615(b).

⁴⁸ Sec. 3.

⁴⁹ Bill 101, sec. 10(2)-(3).

him.⁵⁰ Where the application is in written form, the requirement presumably will normally be met by inserting a standard type clause. Difficulties will arise where the application is made verbally or where, once again, the person conferring the benefit runs only a small business establishment or indeed no business at all. The legislation does not distinguish between different types of benefactors. It may be argued that if the benefactors are sophisticated enough to obtain a consumer report they should be sufficiently informed to know about the statutory requirements. I see the force of this argument, although it still does not dispose of the difficulties created by verbal applications or the fact that the Manitoba Act applies to all sources of information, whether derived from consumer reporting agencies or not. I am also slightly troubled by the fact that no adequate explanation has been furnished as to why it should be necessary at all to give notice of the intention to procure a consumer report when its procurement may have no adverse consequences of any kind. The rationale appears to be that an investigation constitutes an invasion of the consumer's privacy and that, though it is justifiable, the consumer should at least be made aware of its happening. The basic premise is surely arguable in the context of a modern consumer society.

Before leaving this subject I should like to draw attention to a novel provision in the Ontario Bill which does not appear to have a counterpart in any of the other legislation. Section 10(5) of Bill 101 provides that a credit grantor may not disclose to others information about his transactions or experiences with the consumer without the consumer's consent. This appears to be an extension to a new range of business relationships of the well-known principle of confidentiality existing in banker-customer relationships. Its motivation is no doubt commendable, but will there not be large numbers of persons who will ignore it in practice? And is it really a meaningful step towards protecting the consumer's privacy in a domain where publicity and the free dissemination of information has long been the rule?

Finally, a few words about the principal obligations that are imposed on the consumer reporting agencies. They are of three types. First, there are some modest restrictions on the types of information that may be collected or retained beyond a prescribed period. Secondly, there are restrictions as to the types of persons to whom the information may be released and, finally, there are affirmative obligations on the reporting agency to open its records to an enquiring consumer. Ontario's Bill 23⁵¹ ambitiously sought to spell out in detail the types of information that reporting agencies may

⁵⁰ There are several differences between the Manitoba and Ontario requirements: (1) The Manitoba Act requires either the subject's consent or notice that an investigation has been conducted; apparently consent is an immaterial factor in the Ont. Bill. (2) The Man. Act applies to the procuring of factual or investigative information from *any* source; the Ont. requirement is limited to "consumer reports", i.e., reports from a consumer reporting agency. (3) Notice under the Man. Act may be given within 10 days of the granting or denial of the benefit for which the subject has applied; Bill 101 requires the notice to be given, in the case of personal information, before the report is requested or, in the case of credit information, at the time of the application for credit.

⁵¹ Sec. 21(1).

collect, rather than following the more normal route of indicating the types of information that may not be collected or retained. Happily, this unrewarding exercise has been abandoned.⁵² The only type of information that is still completely proscribed is information concerning the consumer's race, religion, ethnic background or political affiliations.⁵³ Beyond that there is a general limitation period of seven years on information deemed to have become obsolescent and there are also some reasonable obligations on the reporting agency to update information on writs that were issued or criminal charges that were laid more than a year before the time of reporting.⁵⁴

A problem that seems to have troubled the Ontario draftsmen more than their colleagues elsewhere is the extent to which uncorroborated information should be excluded from the agency's reports. Bill 229 contained a provision which apparently would have excluded all uncorroborated information unless the lack of corroboration was noted with and accompanied the information.⁵⁵ This requirement has now been much modified in Bill 101 and is restricted to adverse information in investigative reports.⁵⁶ Even then the agency is not precluded from using the information provided it has made reasonable efforts at corroboration and has noted the absence of corroboration in its report. In addition, there is a general requirement on agencies to adopt all reasonable procedures to ensure the accuracy of their records⁵⁷ and, in the case of credit information, to rely on the best possible evidence.⁵⁸ These provisions are a modest response to the widespread criticism about hearsay evidence in investigative reports.⁵⁹

During the hearings on the Fair Credit Reporting Bill and the operations of Commercial Credit Bureaux⁶⁰ much publicity was given to allegations by Allan Westin and the Columbia Broadcasting System that the credit bureaux were willing to supply information to almost any enquirer without attempting to check the bona fides of his credentials. As a result, most of the Canadian

⁵² Bill 101, sec. 9. *Contra*, Nfld. sec. 20, which appears to be based on Ont. Bill 23. The Ontario NDP MPP's opposed this reversal of policy and were particularly critical of Bill 101's failure to police the types and sources of information used in investigative type reporting. See, *inter alia*, *Legis. of Ont. Deb.*, 29 May 1973, at 2411 *et seq.* (Lawlor, M.P.P.), and *cf. Globe & Mail* editorial, "Information Unlimited", 11 June 1973, criticizing Bill 101 on the same grounds. The *Globe* refused to publish a letter of rebuttal from the author generally supporting these aspects of Bill 101.

⁵³ Bill 101, sec. 9(3)(e). Sex was added to the list at the committee hearing on Oct. 10, 1973.

⁵⁴ Bill 101, sec. 9(3)(c)-(k). *Cf. Man.*, sec. 4, N.S., sec. 10(3), and *Sask.*, sec. 18.

⁵⁵ Bill 229, sec. 9(3)(a). *Cf. Bill 23*, sec. 21(3), which would have precluded a credit reporting agency from collecting, storing, retaining or reporting any information incapable of corroboration from another source.

⁵⁶ Sec. 9(3)(b).

⁵⁷ Sec. 9(1).

⁵⁸ Sec. 9(3)(a).

⁵⁹ See e.g., *Hearings on Retail Credit Company Before the Subcommittee on Invasion of Privacy of the House Committee on Government Operations*, 90th Cong., 2d Sess. (1968).

⁶⁰ Miller, *supra*, note 7 at 71-72; *Hearings before the Subcommittee on Financial Institutions of the Committee on Banking & Currency*, U.S. Sen., 91st Cong., 1st Sess., on S. 823, at 92-93 (1969).

acts and bills,⁶¹ like the American Act,⁶² spell out in considerable detail the types of person to whom a consumer report may be released. Notwithstanding these efforts, one may question the effectiveness of the restrictions.

Generally speaking, any person who has a "legitimate business reason"⁶³ for seeking the information or has a "direct business need"⁶⁴ is entitled to receive it. These residuary categories are so wide that they will make it difficult for the agencies to do any effective policing, assuming they were minded to do so.⁶⁵ It may also have the perverse effect of precluding a large range of bona fide enquirers from obtaining even the most innocuous types of information because they do not propose to enter into a business transaction with the consumer within the meaning of the Act. For example, why should a deserted wife not be entitled to trace her husband's whereabouts with the help of a credit bureau's records? Following the American precedent,⁶⁶ the Ontario Bill also restricts the amount of information that may be disclosed to police authorities to the name and address and places of employment of the person being reported upon.⁶⁷ I am far from insensitive to the dangers of invasion of privacy on the part of over-zealous public servants but it is simplistic to believe that consumer reporting legislation has found an effective solution to the problem. I am not sure that it has made even a serious beginning. Much, if not most, of the information on record with reporting agencies is readily available from other sources.

The affirmative duty of disclosure to the enquiring consumer is spelled out in considerable detail in the American Act⁶⁸ and much of the Canadian legislation.⁶⁹ Only one important question of principle appears to be in issue and this is whether reporting agencies should be obliged to disclose their sources of information. As I have previously indicated, the investigative agencies feel particularly sensitive on this issue, but so far they have only enjoyed a limited success in persuading the provincial legislatures to their point of view. The recently adopted Nova Scotia Act⁷⁰ imposes a uniform dis-

⁶¹ Man., sec. 5; N.S., sec. 9(1); Sask., sec. 17; Ont., Bill 229, sec. 8(1), and Bill 101, sec. 8(1). Ont. Bill 23 and the Nfld. Act apparently contain no restrictions.

⁶² FCRA sec. 604.

⁶³ Man., sec. 5(a).

⁶⁴ Ont. Bill 101, sec. 8(1)(vi).

⁶⁵ The Manitoba formulation is perhaps narrower because it is probably governed by the *ejusdem generis* rule and the "legitimate business reason" may have to involve a transaction akin to the granting of credit or an application for insurance, employment, or tenancy. Qu. whether the Ontario test will be similarly construed. An affirmative argument can be based on the ground that the "direct business need" postulated in Ont. sec. 8(1)(vi) must be related to a "business transaction involving the consumer". Would a welfare agency considering a request for assistance satisfy the test? Should it?

⁶⁶ FCRA, sec. 608.

⁶⁷ Bill 101, sec. 8(3).

⁶⁸ FCRA, sec. 610.

⁶⁹ Man., sec. 8(1); N.S., sec. 12(1); Sask., sec. 22; Bill 101, sec. 11(1).

⁷⁰ *Supra*, note 20, sec. 12(1)(c).

closure of source requirement on all types of consumer reporting agencies.⁷¹ A compromise solution has been introduced in the Ontario Bill. It provides that an aggrieved consumer may appeal to the Commercial Registration Appeal Tribunal, which is then empowered to compel disclosure of the sources of information if it sees fit.⁷²

On the related question of qualified privilege, the Ontario government has adopted a much less flexible attitude. If a reporting agency is obliged to open its files to the consumer fairness would seem to suggest that it should also be protected against libel suits, at least in those cases where the agency has exercised reasonable care in the collection and dissemination of the information on its files and has acted without malice. This is what the Manitoba Act provides.⁷³ The Ontario government has been repeatedly urged to copy this provision. It has so far remained adamant and nothing whatever about the defence of qualified privilege appears either in Bill 229 or Bill 101.⁷⁴ The battle will no doubt be resumed when Bill 101 goes before the Administration of Justice Committee for detailed study.⁷⁵

Let me try and summarize my general impressions of the Canadian legislation. Necessarily, much of it is of a very technical character and will only be fully comprehensible to lawyers and possibly the members of the consumer reporting industry. I suspect that some parts of it will remain a dead letter either because they are not practical or because consumers will not know their technical rights or be sufficiently motivated to seek to pursue them to the letter of the law. Another danger is that the governments will fail to make available sufficient manpower for their conscientious enforcement. This has been the experience with much other recent consumer protection legislation. It may also be that in some respects the legislation is a little too zealous and that there has been some over-reaction to what

⁷¹ Medical information is also exempt from the scope of mandatory disclosure in several of the Acts. See, e.g., Man., sec. 1(c); N.S., sec. 12(2); Bill 101, sec. 11(2).

⁷² Bill 101, sec. 13(4).

⁷³ Sec. 16: "No user, personal reporter or personal reporting agency is civilly liable to the subject of a personal report or personal file, unless the user, reporter or agency, as the case may be is or ought to be reasonably aware that part or all of the information in the report or personal file is false, or misleading, or was obtained negligently." The Anglo-Canadian common law draws a distinction between reporting agencies operated for profit and those operated solely for the convenience and protection of its members. Only the latter can invoke the defence of qualified privilege. *MacIntosh v. Dun*, [1908] A.C. 390 (P.C.); Sharpe, *supra*, note 3 at 40-52.

⁷⁴ Both Bills contain a provision [Bill 229, sec. 11(1); Bill 101, sec. 11(8)] precluding a reporting agency from requiring the consumer to give any undertaking or to waive or release any right as a condition precedent to granting him access to his file. This veto was designed to neutralize a common practice among reporting agencies requiring consumers to sign a waiver form absolving the agency from any civil liability before allowing the consumer to see his file. It will be seen that the statutory provision merely preserves the consumer's rights of action without defining what they are.

⁷⁵ The House was prorogued before the Committee had an opportunity to consider the issue.

on the whole were only a small number of verified abuses.⁷⁶ Nevertheless, in my view the legislation and the debates which preceded it have accomplished two eminently worthwhile goals. In the first place, they have made the agencies much more conscious of the fact that they are working in a highly sensitive area, and have encouraged them to make important changes in their procedures and practices without waiting for the coercive legislation.⁷⁷ In the second place, the legislation has laid down broad parameters for the conduct of the industry and those who are their customers. This is surely a good base for the refinement of the legislation in future years in the light of actual operating experience.

ADDENDUM

Since this paper was revised for publication the Ontario committee has resumed and completed its consideration of Bill 101. A number of amendments were adopted but few of them were of major significance. The following changes are worthy of note. The definition of consumer reporting agency was enlarged to include a person furnishing reports on a regular cooperative non-profit basis.⁷⁸ The prohibition against agencies reporting information that is not stored in a Canadian repository has been relaxed in the case of foreign written reports.⁷⁹ For quite unsatisfactory reasons Section 10(5),⁸⁰ which extended the concept of confidentiality in debtor-creditor relationships, was deleted in its entirety.⁸¹

⁷⁶ "I cannot tell you that we have been overwhelmed with complaints under the Act, but in at least four cases that we have handled we have been able to provide needed relief in three instances of employment and one of credit", J.E. Mason, *supra*, n. 46, *Notes for an Address to the Credit Grantors Association of Winnipeg*, 24 Jan. 1973, at 6. Cf. the experience of the Cincinnati Credit Bureau. During the two years since the introduction of the FCRA the number of consumers seeking information from their files increased from approx. 400 to 1600. Australian Finance Conference, *Chairman's Annual Report 1972-73*, p.13.

The report adds: . . . "the cost is staggering compared to the number of file changes that result from the interviews. In less than 5% of the interviews is anything deleted, added or changed in the file so far as trade or identity information is concerned. Adding dispositions to public record items is a major expense factor, which in less than 1% of the cases changes the complexion of the file."

⁷⁷ An example is the point or letter grading system to evaluate payment habits previously used by many bureaux but which, the writer has been advised, has now been abandoned. Some credit bureaux apparently also indulged in general comments about the subject of their reports which were not always relevant and sometimes bordered on the irresponsible. A student of the writer culled the following gem from the report of a Southern Ontario credit bureau issued in May, 1971: "In May 1970 it was reported that [the subject] operated the Sexual Freedom Society of []. He was charged in May 1970 for showing obscene films. — No conviction as yet."

⁷⁸ Sec. 1(1)(c).

⁷⁹ Sec. 9(2)(b).

⁸⁰ See the discussion, *supra*, p.510.

⁸¹ Some members of the committee apparently feared that the restriction would interfere with the free flow of information between credit grantors. *Globe & Mail*, 4 Oct. 1973, p.1. The *Globe*, in an editorial of 5 Oct. 1973, sharply and somewhat unfairly criticized the Minister for his complacent attitude. See the writer's response in the issue of 10 Oct. 1973, p.7.

Only one change of significance was adopted in the section⁸² dealing with the obligations of a person who denies a benefit. He is now obliged to disclose the source as well as the nature of any adverse information he may have received from a person other than a consumer reporting agency. Paradoxically the committee failed to impose a similar requirement on a reporting agency.⁸³ The other contentious features of what was section 10(6) [and is now section 10(7)] have been retained.⁸⁴ The subsection also remains deplorably ambiguous.⁸⁵ Finally, the government has remained adamant in its opposition to the suggestion that reporting agencies should have the benefit of qualified privilege in actions for defamatory reports and has equally resisted the submission that the Crown should be bound by the Act.⁸⁶ The reader may well ponder this paradox.

⁸² Formerly sec. 10(7), now sec. 10(6).

⁸³ Anxiety to complete the committee stage of the Bill, as much as design, may have been responsible for this incongruity.

⁸⁴ *Supra*, pp.508-09.

⁸⁵ Astonishingly "benefit" is not defined nor is it clear whether the notice requirement applies to all benefits which have been denied or only those for which the consumer has applied. Hopefully these defects will be remedied on the third reading of Bill 101. [They were not, but the Minister has promised to review these and a number of other troublesome aspects after the Bill has been enacted. The Bill received third reading on Oct. 30, 1973, but will not come into force until proclamation].

⁸⁶ *Globe & Mail*, 18 Oct. 1973, p.5.

