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# DON'T GET ENOUGH CREDIT? THE NEED FOR AN IMPARTIAL CONSUMER CREDIT REPORT APPEAL TRIBUNAL IN ONTARIO

KENT GLOWINSKI\*

## RÉSUMÉ

Au cours des dix dernières années, on a assisté en Ontario à un renforcement du droit de la consommation et de la protection des renseignements personnels. Avec l'accroissement du nombre de cas de vol d'identité et de fraude, beaucoup de consommateurs se retrouvent souvent avec des remarques négatives sur leur rapport de solvabilité, avec pour conséquence des difficultés pour obtenir un prêt hypothécaire, un financement, un rapport de sécurité positif, un logement, et dans le pire de cas, un emploi. Parfois, de simples erreurs grammaticales ou des informations erronées sur un rapport de solvabilité peuvent entraîner des préjudices graves et irréparables à un particulier. Les rapports de solvabilité qui sont fournis par des sociétés privées, connus sous le nom d'agences d'évaluation du crédit, comme par exemple Equifax Canada Inc. et Trans Union of Canada Ltd., sont utilisés couramment non seulement pour vérifier la « solvabilité » d'un individu, mais aussi sa fiabilité. Malheureusement, les agences d'évaluation du crédit (qu'on appelle communément « bureaux de crédit »), opèrent dans une zone grise du droit de la consommation et de la protection des renseignements personnels : pas soumises au droit relatif à la protection de la vie privée, possiblement soumises à la *Loi sur la protection des renseignements personnels et les documents électroniques (LPRPDE)*, et indirectement affectées et réglementées grosso modo par les lois sur la protection du consommateur.

Cet article examine où en est, sur les plans juridique et réglementaire, l'évaluation du crédit pour les consommateurs en Ontario et se concentre sur la nécessité de créer un tribunal d'appel sur les rapports de solvabilité, un tribunal spécialisé et impartial devant lequel les consommateurs peuvent interjeter appel pour corriger des informations de fond et des erreurs contenues dans leur rapports de solvabilité.

## INTRODUCTION

As the John Smiths of Ontario know, it is not easy sharing a name with thousands of other people. Sometimes it is a simple mistake in receiving another John Smith's mail, but other times it is a collection agency hounding him for an unpaid telephone bill. The problem is, he never used that telephone company's services and the collection agency is contacting the wrong John Smith. Even worse is when John Smith applies for a line of credit at the bank and is declined because of an allegedly unpaid telephone bill he has never heard about.

The situation may also arise where there is a confusing call from a creditor, a random Internet company with whom he has never done business. However, the creditor has John Smith's address, banking information, and perhaps his social insurance number. "Pay up or we are reporting you to the credit bureau," threatens the creditor. Unfortunately, John Smith's wallet was stolen last week and he is now the victim of identity fraud. Too bad—John Smith is going to be reported as a delinquent debtor to Equifax Canada Inc. [Equifax] and Trans Union of Canada Ltd. [Trans Union], Canada's two national credit bureaus.<sup>1</sup>

Equifax and Trans Union are private companies in the business of collecting credit information about consumers. In their own words, they take no responsibility for the information about a consumer that appears in their databases. Credit bureaus passively receive information from creditors and add this information to an individual's credit report.<sup>2</sup> If you have ever applied to own a cellular phone, or if you have ever applied for a credit card and even if you have a bank account, you have a consumer credit report with either Equifax or Trans Union. So, don't blame Equifax or Trans Union for incorrect information. Don't shoot the messenger, right?

Equifax and Trans Union receive millions of bytes of information every day regarding individual consumers. This information comes from banks, utilities companies, student loan lenders, collection agencies, parking lot operators and even your local video store (regarding late payments, unpaid accounts and late fees on a DVD rented last year).

The problem with so much data is that there is bound to be an error. For example, a John Smith in Toronto is incorrectly blamed for a late mortgage payment expected from John Smith in Brockville. In the worst case, there may be a nefarious comment on a credit report that does not even belong to the credit report's owner, as the result of a case of fraud or identity theft. What can John Smith do to correct the information on his credit report? He could write to Equifax and Trans Union to dispute the incorrect information. If Equifax and Trans Union deny John Smith's request, where can he turn to appeal this decision in Ontario?

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1. For the ease of the reader, "consumer reporting agencies" will be referred to in this paper as "credit bureaus". While there is a third credit bureau in Canada named Experian, this company began operations in Canada only in 2006 when it acquired Quebec-based Northern Credit Bureaus Inc. As such, Experian is not yet integrated into Canada enough that its operations have a material impact on Canadian consumers (see Experian, Press Release, "Experian Expands Operations in Canada" online at <<http://experian.global-pressoffice.com/documents/showdoc.cfm?doc=2345>>).
2. Equifax neither grants nor denies any application for credit. Equifax will provide a factual account of your credit history to credit grantors. The credit grantor reviews this information and makes an independent decision based on its own policies. "Frequently Asked Questions" online: Equifax <[http://www.equifax.com/EFX\\_Canada/consumer\\_information\\_centre/faqs\\_e.html](http://www.equifax.com/EFX_Canada/consumer_information_centre/faqs_e.html)>.

This paper will review the regulatory history of credit bureaus in Ontario, the interplay of privacy and consumer law *vis-à-vis* consumer credit reporting, case law and credit bureau liability, and discuss the policy rationale for a Credit Report Appeal Tribunal.

## THE LEGISLATIVE SCHEME

### *Ontario Consumer Reporting Act*

Credit bureaus are covered by provincial jurisdiction in Canada. In Ontario, credit bureaus are regulated by the *Consumer Reporting Act* [Act].<sup>3</sup> Under section 3 of the Act, credit bureaus have to be registered to operate in Ontario. The Act and its corresponding regulations are administered by the Ministry of Government Services.

Credit bureaus are subject to the regulation and order-making power of the Registrar of Consumer Reporting Agencies [Registrar]. This order-making power includes the power to compel credit bureaus to “amend or delete any information, or by order restrict or prohibit the use of any information, that in the Registrar’s opinion is inaccurate or incomplete or that does not comply with the provisions of this Act or the regulations.”<sup>4</sup>

The Act lays out a very low threshold that a credit bureau must meet in addressing the complaint of a consumer. In particular, the credit bureau must use its “best endeavours” in accordance with good practice to confirm or complete the information in a credit report. Subsection 13(1) of the Act reads:

Where a consumer disputes the accuracy or completeness of any item of information contained in his or her file, the consumer reporting agency within a reasonable time shall use its best endeavours to confirm or complete the information and shall correct, supplement or delete the information in accordance with good practice.

The Act does not provide a definition of “best endeavours” or “good practice”.

The jurisdiction of the Registrar to order amendment or deletion, however, is limited to actual “technical” errors on a credit report, or to situations where the credit bureau did not make “best endeavours” in a “reasonable time” to verify the information. The Registrar does not consider the substantive merit of the information reported on the credit report. The Registrar has no obligation to “look behind” information on a credit report and ask the credit bureau or creditor to furnish proof of a debt.

The Act contains offence sections that make it illegal to knowingly report incorrect or false information on a consumer’s credit report.<sup>5</sup> In *Richardson v. CIBC World Markets Inc.*,<sup>6</sup> Justice Daley reviewed the meaning of sections 22 and 23 of the Act:

3. R.S.O. 1990, c. C.33.

4. *Ibid.* s. 14(1).

5. *Ibid.* ss. 22 and 23.

6. [2008] O.J. No. 3414 (S.C.J.) [*Richardson*].

In my view, the defendants are statutorily obligated to report accurate credit information in accordance with this legislation. As such, in the circumstances of this case, the plaintiffs would not be entitled to injunctive relief requiring the defendants to withhold the reporting of their credit information. This issue has recently been considered in the decision *Martinek v. Canadian Imperial Bank of Commerce* [2008] O.J. No. 2670.

In that case, the court concluded that in compliance with its reporting obligation under the legislation, CIBC had a statutory duty under the *Consumer Reporting Act* to accurately report its customers' credit history and such reporting was done in the usual course of its business.<sup>7</sup>

The offence sections of the *Act* were also discussed in *Anderson v. Excel Collection Services Ltd.*,<sup>8</sup> where Justice Swinton discussed the state of mind required to be convicted under section 22 of the *Act*:

The Collection Agencies Act, in s. 28(10)(c), makes it an offence for a person to “knowingly” contravene the Act and regulations. Moreover, the Consumer Reporting Act, R.S.O. 1990, c. C.33, s. 22 prohibits a person from “knowingly” supplying false or misleading information to another who is engaged in making a consumer report.<sup>9</sup>

Consumers who are unhappy with an entry on a credit report can file a complaint under the *Act* with the Registrar. If they are unhappy with the response of the Registrar, they can further appeal that decision to the Licence Appeal Tribunal.<sup>10</sup> Since 2000, not one appeal regarding incorrect information on a credit report has been brought before the Licence Appeal Tribunal.<sup>11</sup> Again, in practice, the *Act* provides no real protection to a consumer who disputes information on a credit report.

Although not a case dealing directly with consumer reporting agencies, *Balogun v. Canada*<sup>12</sup> provides an example of the importance of the information in a credit report. Abdur-Rashid Balogun, the applicant/appellant in the matter, had been refused enrolment as a primary reserve officer in the Canadian Forces by the minister of national defence when concerns over his creditworthiness arose. The minister obtained a credit report that indicated that two small consumer debts had been referred for

7. *Ibid.* at paras. 27–29.

8. [2005] O.J. No. 4195 (Div. Court) [*Anderson*].

9. *Ibid.* at para. 15.

10. *Act, supra* note 3, s. 14(3).

11. The lack of appeals is clearly not due to a lack of disputes over information contained in consumer credit reports, as the section of this paper on “case law” will show. Rather, as the Registrar of Consumer Reporting Agencies only has the limited legislative authority to order the amendment or deletion of true errors (i.e. technical), not the jurisdiction to “look behind” the information, an appeal to dispute the veracity of information in a credit report is pointless. In effect, an appeal to the Licence Appeal Tribunal, while in form is an appeal from a decision of the Registrar regarding information on a credit report, is in substance not going to result in a discussion or challenge of the merits of an alleged negative entry on a credit report. “Introduction to Decisions” online: Licence Appeal Tribunal <<http://www.lat.gov.on.ca/english/decisions/index.htm>>.

12. [2005] F.C.J. No. 728 (FCA) [*Balogun*].

collection activity. Dr. Balogun maintained that the credit report was incorrect, but nonetheless, the minister maintained his refusal.

Despite the significant technological changes over the last thirty years to consumer credit reporting, the *Act* has remained essentially unchanged from its original state when it was passed in the 1970s. At the time the original *Consumer Reporting Act* was passed, consumer reporting agencies tended to be decentralized county by county across Ontario. Reporting agencies received and reported information based on phone calls and letters from local creditors. Over the past thirty years, an U.S.-based credit bureau, Equifax, has bought smaller county credit bureaus. As a result, credit reporting has become centralized, and credit information is sent by direct, secure electronic transfers from creditors to the credit bureaus. Thus, errors that were common before automation have decreased significantly, hence the authority of the Registrar under the *Act* is rarely exercised.

### **Personal Information Protection and Electronic Documents Act in Ontario**

Ontario lacks provincial private sector privacy legislation. As such, in January 2004, the *Personal Information Protection and Electronic Documents Act* [*PIPEDA*]<sup>13</sup> began to apply to all private companies in Ontario that collect, use or disclose personal information in the course of commercial activity. “Commercial activity” is defined in the legislation as being any activity that is of a commercial character and includes sales and purchases as well as barter and exchanges.<sup>14</sup>

*PIPEDA* incorporates ten “principles” regarding the collection and use of personal information. One of those principles is accuracy—this means not using inaccurate or out-of-date personal information to make decisions about the individual. The logical result is that individuals have a right to correct personal information that is incorrect.<sup>15</sup> Unfortunately, the privacy commissioner does not issue reported decisions or orders in relation to complaints regarding the application of *PIPEDA*. Instead, she issues “Case Summaries”. These Case Summaries do not name the parties to the complaint, even when the subject of the complaint is found to be in contravention of *PIPEDA*. Further, the Case Summaries have no legally binding effect and are only morally persuasive on credit bureaus.

Equifax and Trans Union are subject to the authority of *PIPEDA*.<sup>16</sup> In fact, the privacy commissioner of Canada has several Case Summaries that deal exclusively with information held by consumer credit reporting agencies.<sup>17</sup>

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13. S.C. 2000, c. 5.

14. *Ibid.* at s. 2(1).

15. *Ibid.* at Schedule 1, 4.6, Principle 6—Accuracy.

16. *PIPEDA*, *supra* note 13, s. 4(1).

17. *PIPEDA* Case Summaries #124 and 157.

### ***An Overview of the Legislation: Credit Bureaus and Collection Agencies***

On the Ontario Ministry of Small Business and Consumer Services website, the Province of Ontario acknowledges the awkward state of privacy legislation governing credit bureaus:

Many consumers believe credit reporting is an invasion of their privacy. Remember that information recorded on the credit files is based on facts and not arbitrary judgments. Therefore, a trade-off of a certain amount of your privacy is necessary in order to obtain such benefits as credit.<sup>18</sup>

In effect, the only legislative duty a credit bureau in Ontario has to a consumer in regards to alleged “incorrect” information is to reasonably verify that the information provided by a creditor is correct.<sup>19</sup> In practical terms, this means calling the creditor and enquiring if a debt exists. There is no requirement for the credit bureau to ask a creditor for proof of the debt, since a simple assurance will suffice to meet the duty legislated by subsection 13(1) of the *Act*.

Collection agencies and creditors have a *carte blanche*, with some exceptions, to add negative credit information to a consumer’s credit report.<sup>20</sup> There is no true due process model to permit the consumer to challenge a creditor on the veracity of the alleged debt. The consumer who denies responsibility for a debt does not have an appeal process available under the *Act*, but instead, would have to bring the discrepancy to court by way of litigation. Ontarians are thus left with a legislative scheme regulating credit bureaus that was implemented in the 1970s, that addresses only technical errors or omissions on credit reports and fails to consider privacy concerns of citizens. To date, there is no binding legislative or administrative tool for a consumer to challenge or dispute incorrect information on a consumer credit report.

### **CASE LAW: DAMAGE TO FINANCIAL REPUTATION?**

Litigation challenging the accuracy of information on credit reports is a relatively new phenomenon. This may be due to the economy’s growing reliance on credit information as an efficient way to verify not only creditworthiness, but reliability. In *Haskett v. Equifax Canada Inc.*,<sup>21</sup> the Court of Appeal stated:

Credit is an integral part of everyday life in today’s society. Not only people seeking loans, mortgages, insurance or car leases, but those who wish, for example, to rent an apartment or even obtain employment may be the subject of a credit report [footnote omitted], and its contents could well affect whether they are able to obtain the loan, the job or the accom-

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18. “More Information on the Credit Reporting Act” online: Ministry of Government Services <[http://www.sse.gov.on.ca/mcs/en/Pages/Personal\\_Finance\\_Credit\\_Reporting\\_Act.asp](http://www.sse.gov.on.ca/mcs/en/Pages/Personal_Finance_Credit_Reporting_Act.asp)>.

19. *Act*, *supra* note 3, s. 13(1).

20. *Ibid.* Paragraph 9(3) of the *Act* lays out the information that cannot be included on a person’s consumer credit report. For example, information regarding “race, creed, colour, sex, ancestry, ethnic origin, or political affiliation” cannot be included in the report.

21. (2003) 63 O.R. (3d) 577 (C.A.) [*Haskett*].

modation. Credit cards are a basic form of payment but their availability is also limited by one's creditworthiness. Without credit, one is unable to conduct any financial transactions over the telephone or on the internet. As credit is so ubiquitous, there is nothing exceptional about consumer reliance on credit reporters to carry out their function not only honestly, but accurately, with skill and diligence and in accordance with statutory obligations.<sup>22</sup>

Litigation regarding information on credit reports takes on two forms. The consumer will either commence proceedings against the creditor who reported the allegedly incorrect information to the credit bureau, or the consumer will commence proceedings against the credit bureau directly for failing to correct disputed information on the credit report. This section of the paper will discuss these two forms of litigation.

### *Duty of Care of a Credit Bureau / Consumer Reporting Agency*

*Haskett* is the leading case in Ontario on the duty of care owed by a credit bureau to a consumer regarding reported information. The *Haskett* decision resulted from an appeal by Haskett of a successful Rule 21<sup>23</sup> motion (striking a claim as disclosing no reasonable cause of action) by Equifax and Trans Union. Haskett was a representative plaintiff in two proposed class actions against Equifax and Trans Union, which had not yet been certified under the *Class Proceedings Act, 1992*.<sup>24</sup>

Haskett was a real estate broker in Toronto. In the early 1990s he was obliged to make a voluntary assignment in bankruptcy when third parties breached their obligations to him during the recession. After his discharge, he had been consistently denied credit, despite making uninterrupted earnings in excess of \$75,000 annually, having significant assets and meeting all of his debt obligations. Haskett later discovered that Equifax and Trans Union had continued reporting pre-bankruptcy debts on his credit report allegedly in contravention of the *Act*.

In allowing Haskett's appeal, a unanimous Court of Appeal considered whether an action against a credit bureau for reporting incorrect information should proceed as a claim in negligence. The Court of Appeal reviewed the two-stage negligence test and considered whether a claim against a credit bureau could fit neatly into the category of negligent misrepresentation or be a novel cause of action. The court concluded that, regardless of the matter fitting into the established category of negligent misrepresentation or not, there existed a duty of care between credit bureaus and individuals about whom credit information is reported. The court held that claim for negligence is available for incorrect reporting of information.

In *Neil v. Equifax Canada Ltd.*,<sup>25</sup> an appeal to the Saskatchewan Court of Queen's Bench, the court upheld the lower court's decision that the credit bureau had been

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22. *Ibid.* at para. 29.

23. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

24. S.O. 1992, c. 6.

25. (2006), 277 Sask. R. 275 (Q.B.) [*Neil*].



negligent in failing to correct erroneous information on an individual's credit report in a reasonable amount of time. In *Neil*, the respondent/plaintiff was a lawyer who had applied for a credit union loan and was declined because of a judgment registered on his credit report. It was revealed upon investigation that the judgment was against the plaintiff's client and was incorrectly added to Mr. Neil's credit report.

In describing the standard of care of credit bureaus, Justice Krueger stated:

The standard of care contained in s. 19 of *The Credit Reporting Agencies Act* provides:

Every credit reporting agency shall take reasonable steps to assure the maximum accuracy of any information in a credit report.

As providers of credit information to lending institutions, credit reporting agencies are in a position to exert considerable influence on the credit rating of individual consumers. Any error in the information reported to a lending institution has the potential of affecting the success of individual endeavours. Maximum accuracy is the goal in recording and disseminating credit information. The standard is understandably high.<sup>26</sup>

In *Birchill Home Sales Ltd. v. Equifax Canada Ltd.*,<sup>27</sup> a Nova Scotia Small Claims Court decision, Adjudicator Richardson, described the duty of care of credit bureaus as follows:

For the purposes of what follows, I am prepared to accept that the Defendant owes a duty of care to people whose credit files are maintained by it to take reasonable steps to ensure that the files are reasonably accurate.<sup>28</sup>

In *Birchill*, the plaintiff claimed that as a result of inaccurate information about three outstanding lawsuits, all of which had settled, the company was unable to obtain financing for a housing project. Consequently, the plaintiff was forced to sell homes before completion at a loss. Adjudicator Richardson dismissed the plaintiff's claim, finding that Equifax corrected the record promptly after being advised of the error by the plaintiff.

### ***Defamation or Negligence by Reporting Creditor?***

Creditors, like credit bureaus, have also been held liable for reporting incorrect information regarding consumers to credit bureaus. Courts have found credit bureaus liable for reporting incorrect or false information in actions framed as negligence or defamation, as will be discussed below. On the other hand, courts have refused to establish a unique cause of action framed as "intrusion on financial integrity".

In *Clark v. Scotiabank*,<sup>29</sup> for example, the plaintiff commenced an action after continually being declined loans between 1994 and 2000. The plaintiff contacted Equifax

26. *Ibid.* at para. 4.

27. [2001] N.S.J. No. 317 [*Birchill*].

28. *Ibid.* at para. 14.

29. [2004] O.J. No. 2615 (S.C.J.) [*Clark*].

and was told that if an error existed on his credit file, it would be corrected. The plaintiff contacted both Equifax and Scotiabank repeatedly, but did not put his complaint into writing until 2000. At that point, Equifax discovered the error was a delinquent loan of a person with the same last name as the plaintiff erroneously reported on the plaintiff's credit report. In awarding damages against both Equifax and Scotiabank, Justice Day stated:

I further find that Equifax and Scotiabank breached their duty of care to Mr. Clark when they failed to take reasonable care with his credit rating. Scotiabank has admitted their failure. While Equifax could not be blamed for applying information provided by Scotiabank, they indeed can be faulted for not responding to the plaintiff's repeated requests for clarification over the span of years ...<sup>30</sup>

However, in overturning the award to Clark and allowing an appeal by Scotiabank, the Divisional Court stated:

We are of the view that there is no cause of action known to law which corresponds to what the trial judge labeled as "intrusion on financial integrity". Although we cannot be certain what the underlying elements of the award were, it falls under the heading of "other general damages" in the Reasons and appears to refer to the exposure of the plaintiff to the error which occurred in the credit records pertaining to the plaintiff in the files maintained by Equifax. That error occurred because of the confusion of the plaintiff with another person whose name was similar to the plaintiff's that resulted in an unwarranted low credit rating being attributed to him and reported by Equifax to others. Although the error resulted in some understandable frustration and inconvenience to the plaintiff, there was no actual monetary loss proven by him or compensable psychological damage.<sup>31</sup>

In effect, the Divisional Court's decision in *Clark* closed the door to a new cause of action being established in Ontario that specifically permits a litigant to assert specific legal rights in regards to the integrity of information reported to a credit bureau by a reporting creditor. As will be discussed below, litigants are required to fit their grievance into a pre-existing cause of action, such as negligence or defamation in order to hold a reporting creditor liable.

*Millar v. General Motors of Canada Ltd.*<sup>32</sup> involved a dispute between a consumer and General Motors. The plaintiff had leased a new Yukon SLE truck. Immediately after leasing the truck, the plaintiff began to notice defects. The plaintiff returned the vehicle and General Motors sold the vehicle, yet charged the plaintiff for the \$1000 shortfall and reported the transaction as a "repossession" to credit bureaus. Despite the plaintiff's request, General Motors refused to remove the information from the plaintiff's credit report.

The plaintiff framed his action in defamation, intentional interference with economic relations and breach of obligations under the lease agreement. Regardless of

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30. *Ibid.* at para. 30.

31. *Clark v. Scotiabank*, [2006] O.J. No. 5581 (Div. Ct.), at para. 4.

32. [2002] O.J. No. 2769 (S.C.J.) [*Millar*].

the framing of the cause of action, Justice Seppi found General Motors liable for the increased interest rate on a personal loan as a result of the negative information on the plaintiff's credit report. Furthermore, Justice Seppi made an order deleting the information from the plaintiff's credit report and found General Motors liable for damages for breach of its obligation to provide accurate and complete information.

The finding in *Millar* was consistent with the defamation approach applied to information reported in error by parties on credit reports in the United States. In *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*,<sup>33</sup> the United States Supreme Court held that Dun & Bradstreet Inc., a company in the business of selling financial and credit reports about businesses, was liable for defamatory statements made in a credit report that incorrectly reported that Greenmoss Builders had previously filed for bankruptcy.

On the other hand, in *Houseley v. Global Credit Collection Inc.*<sup>34</sup> Deputy Judge Kilian found the defendant collection agency was negligent in reporting an unliquidated debt to the credit bureau without even investigating the source or reason for the debt. No damages were awarded to the plaintiff, since he failed to establish that the negative statement on the credit report caused him harm. No correction of the credit report could be ordered, as the Small Claims Court in Ontario does not have the jurisdiction to order equitable relief.<sup>35</sup>

### ***Current State of Case Law***

Despite the relative laxity of provincial consumer protection legislation and federal private sector privacy legislation in regards to consumer credit agencies, the courts in Ontario appear open to holding credit bureaus and reporting creditors liable when they are negligent in reporting information on a consumer's credit report.

While this is a welcome evolution of consumer protection law, it also raises issues of access to justice and judicial efficiency. Not all individual consumers have the expertise, nor can they afford litigation against a corporation like Equifax. Furthermore, litigation involving negative information on a credit report requires the entire judicial process of a civil action, which further backlogs Ontario courts.

### **AN ADMINISTRATIVE TRIBUNAL DEDICATED TO CREDIT REPORT APPEALS?**

An administrative tribunal dedicated to credit report appeals would provide a forum for individuals to resolve a dispute with a credit bureau expeditiously and inexpen-

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33. 472 U.S. 749 (1985) (U.S. Supreme Court).

34. [2003] O.J. No. 5679 (S.C.J.-Small Claims) [*Houseley*].

35. Subsection 96(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 reads, "Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided."

sively. A tribunal can also process a high volume of cases inexpensively, with less formality and with an emphasis on mediation.<sup>36</sup>

As stated, in Ontario, there is only one practical way to appeal disputed information on a consumer credit report: initiating litigation in the Ontario Superior Court of Justice, including Small Claims Court. Under the *Act*, the Registrar has the statutory jurisdiction to order the correction of technical errors without “looking behind” a debt. Consumer reporting agencies have only a duty to “reasonably investigate” the veracity of a disputed debt, and the Small Claims Court has no statutory jurisdiction to order corrections or amendments to a credit report.

This section of the paper provides the reasons and arguments in favour of establishing an administrative tribunal dedicated exclusively to hearing credit report appeals.

### ***Inadequate Appeal Processes***

The current appeal process available to a consumer who disputes information contained in a credit report is less than transparent. Both Equifax and Trans Union have a “dispute resolution” process, but it requires only that the credit bureaus “within a reasonable time shall use its best endeavours to confirm or complete the information.”<sup>37</sup>

The test inherent in this statutory requirement is “reasonableness”. What does this mean in practical terms? If a creditor confirms that the debt is real, then it is real. The credit bureau is not required to “look behind” the debt to confirm such critical information as a signed contract, a document authorizing a debt or any other proof legitimizing a debt. As a result, unliquidated debts, such as monies alleged in a demand letter, can often be incorrectly reported on a credit report.

Equifax and Trans Union have very similar internal appeal processes that allow a consumer to challenge information on a credit report. For the purposes of this paper, only Equifax’s policy will be reviewed. Equifax describes its “Dispute Resolution” policy in the following words:

First, we review and consider the information you have sent us about your dispute. If this initial review does not resolve the problem, we will continue our investigation. This involves contacting the submitter of the disputed information on your behalf to review the details. They will investigate and report their conclusions to us. *Based on their findings, we may make changes to your credit file.* If the disputed information is correct, we will not make any changes.

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36. S. Blake, *Administrative Law in Canada*, 4th ed. (Markham, ON: LexisNexis Butterworths, 2006) at 3.

37. *Act, supra* note 3, s. 13(1).

We will send you a revised credit report if changes are made as a result of the Dispute Resolution process. [Emphasis added.]<sup>38</sup>

It is of note that the internal “appeal” process involves simply asking a creditor if the information is correct—based on “their findings”. If a consumer says the debt does not exist, but the creditor continues to affirm it exists, it is not likely that Equifax will amend or remove the information since it is impossible for a third party to make changes in your file if the facts have been correctly reported. Of course, the issue in question is how “the facts” are established. Under current legislation in Ontario, “the facts” are what a creditor says they are—period.

The only small condolence available to the consumer, should Equifax refuse to amend or remove information on the credit file, is the short statement Equifax will permit a consumer to add to a credit report:

If you still do not agree with an item after it has been verified with the submitter, you can send us a brief statement explaining that you disagree. We will add this statement to your credit file and it will be shown every time your credit file is reviewed.<sup>39</sup>

What Equifax does not mention is the disputed information still has a negative impact on one’s overall credit score. Most credit grantors do not even look at the overall credit report, instead relying on one’s FICO, Empirica or BEACON score.<sup>40</sup> If the score is high enough, credit will likely be extended. If not, the creditor *may* look behind the score and read the credit report. Generally, the accepted practice in the credit industry is that a prospective credit grantor will treat any information on a credit report, regardless of a consumer’s comments, as truth. In effect, any disputed information on a credit report is *de facto* negative information.

As mentioned earlier in the paper, should a consumer still disagree with the information on a credit report, a complaint can be made to the Registrar of Credit Reporting Agencies.<sup>41</sup> Again, the Registrar will only verify that the credit bureau took “reasonable steps” to investigate the debt with the creditor. No substantive investigation will be launched by the Registrar.

38. Equifax Canada, “Frequently Asked Questions” *supra* note 3. [http://www.equifax.com/EFX\\_Canada/consumer\\_information\\_centre/faqs\\_e.html#ques9](http://www.equifax.com/EFX_Canada/consumer_information_centre/faqs_e.html#ques9) (accessed 4 March 2009).

39. *Ibid.*

40. FICO stands for Fair, Isaac and Company (credit scoring model). BEACON and Empirica are Credit Bureau scores. BEACON is calculated from a customer’s Equifax credit file and is used to understand a customer’s likelihood to repay. The score uses a mathematical equation that evaluates information on the customer’s credit file compared to information patterns in millions of past credit files. BEACON scores can range from 300 to 850. The higher the score, the lower the risk to creditors. The Trans Union’s equivalent of the BEACON score is the Empirica score.

41. *Act, supra* note 3, s. 14(3).

### ***Access to Justice***

Often those with the least income, skills and means will have the most to lose when it comes to disputing information on a credit report. Not only will this demographic likely be the least educated about consumer rights and the laws surrounding consumer reporting agencies, they will also be the demographic most likely to be harassed by creditors and collection agencies. Not all creditors and collection agencies are bad. However, one of the threats available in their collection strategy arsenal is to threaten to destroy one's credit history. As was seen in the *Houseley* case, collection agencies do report unliquidated debts, which are supposed to vest as true debts only once ordered by the court. Since credit bureaus have no statutory obligation to "look behind" a debt, this often leaves the most vulnerable section of society at the mercy of unscrupulous creditors and collection agencies.

As was discussed above, the Small Claims Court of Ontario, a more accessible court, lacks the jurisdiction to order corrections to credit reports. The only option available to correct information on credit reports is to proceed to the Superior Court of Justice. Unfortunately, not having enough to pay a creditor likely means one does not have enough to pay a lawyer, let alone court fees or a process server to deliver court documents once an action is commenced.

In Ontario, access to justice issues has been acknowledged and addressed in the creation of administrative bodies such as the Ontario Rental Housing Tribunal, now the Landlord and Tenant Board. One's credit is directly linked to the ability to find shelter and employment and to establish financial security. A credit report contains information that can have a significant impact on the lives of all Ontarians and an access to justice issue that no realistic recourse exists to remove incorrect information. The creation of an administrative tribunal to handle credit reporting complaints would be another way to ensure greater access to justice for Ontarians, particularly those on a low income.

### ***Judicial Efficiency***

Almost all reported litigation in Canada involving challenges to the accuracy of information in credit reports has emerged after 2000. With the establishment of definitive legal precedents, such as the *Haskett* case from the Ontario Court of Appeal, more Ontarians may be willing to bring forward similar cases involving the correction or deletion of information in credit reports. What is especially concerning is the citation in the Statement of Claim in *Haskett* of the statistics that approximately 80,000 individuals *per year* in Canada have debts that are statute-barred by legislation, yet still appear on credit reports. This means that a potentially innumerable number of persons have substantively incorrect information on their credit reports and may have to turn to the courts to amend them. This number does not include errors or inaccuracies as a result of identity theft, fraud or the reporting of unliquidated debts.

Should Ontario courts, and in effect Ontario taxpayers, have to shoulder the burden created by a corporation-established consumer credit reporting scheme? As credit has become an integral part of daily activities, the answer to the question may have to be yes. On the other hand, rather than burdening the legal system with an issue that has been recognized already as a consumer protection and privacy issue (through legislation and case law), a statutorily created, specialized administrative tribunal would be better suited to deal exclusively with credit report appeals. Considering that the Ontario courts have now faced a proposed class action on the matter (*Haskett*), now may be the time to be proactive and create an alternative method to deal with these types of disputes, rather than wait until the floodgates open and a plethora of related litigation appears.

### ***Ineffective Privacy Laws Protecting Personal Information in Credit Reports***

Only British Columbia, Alberta and Quebec have provincial private sector privacy legislation that regulates private companies' activities in collecting personal information about individuals.<sup>42</sup> Private companies in Ontario, on the other hand, except for healthcare practitioners,<sup>43</sup> are subject to *PIPEDA*. Unfortunately, any orders made by the federal privacy commissioner of Canada pursuant to *PIPEDA* have no binding legal effect on companies and are thus only morally persuasive. Furthermore, only a handful of such decisions have been made by the federal privacy commissioner.

### ***Policy Grounds***

An amended *Act* and a new Credit Report Appeal Tribunal [Tribunal] would also give creditors, consumers and credit bureaus an incentive to ensure ongoing accuracy of information on credit reports. As orders would be binding and legally enforceable, it would be good business and good economics to avoid a proceeding before the Tribunal. The cost and time savings alone would provide enough incentive to ensure compliance.

While credit bureaus may argue that a Tribunal would be another added level of regulation, credit bureaus currently operate in a regulation-free environment in Ontario. The exclusive income source of credit bureaus is information collected about people, often without their consent. Given this incursion into individuals' privacy and financial well-being, it is not unreasonable to require that credit bureaus adhere to a standard of accuracy that permits individuals to effectively challenge their information.

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42. *Personal Information Protection Act*, S.B.C. 2003, c. 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *An Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q. c. P-39.1.

43. See *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Schedule A.

The relative difficulty in actually contacting Equifax or Trans Union to challenge the accuracy of information is another reason to give consumers an appeal process through a tribunal. In Canada, for example, there is no way to contact a “live representative” of Equifax without first ordering a free credit report, which arrives in the mail two to three weeks later, or by paying a fee for instant access. The credit report then comes with a special 1-800 number to speak with a real person. Only if one’s wallet or ID is stolen is there instant access to an Equifax representative.

Equifax and Trans Union consider all consumers about whom information is collected as their “customers”. Yet it is this purposefully difficult process for “customers” to contact credit bureaus and correct their personal information that compelled the Federal Trade Commission in the United States to accuse the three large credit bureaus in the United States (Equifax, Trans Union and Experian) of violating the *Fair Credit Reporting Act*.<sup>44</sup> In the words of the Federal Trade Commission, the three large credit bureaus:

have agreed to a total of \$2.5 million in payments as part of settlements negotiated by the Federal Trade Commission to resolve charges that they each violated provisions of the Fair Credit Reporting Act (FCRA) by failing to maintain a toll-free telephone number at which personnel are accessible to consumers during normal business hours. According to the FTC’s complaints, Equifax, Trans Union and Experian (collectively, consumer reporting agencies or CRAs) blocked millions of calls from consumers who wanted to discuss the contents and possible errors in their credit reports and kept some of those consumers on hold for unreasonably long periods of time ...<sup>45</sup>

If that was not a strong enough message to the credit bureaus, three years later, Equifax was again accused of the very same tactics of purposely ignoring “customer” concerns:

Equifax Credit Information Services, Inc. (Equifax) will pay \$250,000 to settle Federal Trade Commission charges that its blocked-call rate and hold times violated provisions of an FTC consent decree that settled a 2000 lawsuit for violations of the Fair Credit Reporting Act (FCRA). That lawsuit settled charges that Equifax did not have sufficient personnel available to answer the toll-free phone number provided on consumers’ credit reports.<sup>46</sup>

For consumers, the benefit of a Tribunal is self-evident. The development of a Tribunal would send a message to credit bureaus that consumers are not just an income stream but individuals whose lives can be adversely affected by the so-called neutral information the credit bureaus passively report. It would also be a strong signal that credit bureaus must be prudent in ensuring the protection and accuracy

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44. 15 USC 1681 et seq.

45. U.S. Federal Trade Commission, Press Release, “Nation’s Big Three Consumer Reporting Agencies Agree to Pay \$2.5 Million to Settle FTC Charges of Violating Fair Credit Reporting Act” (13 January 2000), online at <<http://www.ftc.gov/opa/2000/01/busysignal.htm>>.

46. U.S. Federal Trade Commission, Press Release, “Equifax to Pay \$250,000 to Settle Charges, FTC Alleges Blocked and Delayed Consumer Calls Violated Consent Decree” (30 July 2000) online: <<http://www.ftc.gov/opa/2003/07/equifax.htm>>.



of information. To creditors, the establishment of a Tribunal would signal that empty threats and punishing a consumer, through incorrect or unjustified additions to credit reports, would not be tolerated.

Creditors would also benefit from credit reports that contain accurate information about consumers. As case law indicates, more than a negligible number of consumers are subject to either identity fraud or mistakes on their credit reports. The effective result is these consumers, with overwhelmingly positive credit history, are now labelled “high risk” prospective customers—thus causing the creditor to lose business by dismissing a legitimate client. In businesses operating on the evaluation of risk, such as lenders or mortgage brokers, business is only as good as the reliability of accurate information. Creditors should welcome a Tribunal that would allow consumers to challenge incorrect credit information on their credit reports.

## WHAT WOULD A TRIBUNAL LOOK LIKE?

### *Statutory Changes*

The creation of a new appeal tribunal would require wholesale amendments to the *Act*.

The *Act* would be separated into two distinct parts, with powers clearly delineated. For example, Part 1 would be specifically dedicated to “registration” of credit reporting agencies. This would not be a difficult task, considering there are currently only two true national consumer reporting agencies, Equifax and Trans Union.

Part 2 of the *Act* would be dedicated to the statutory creation of the new Tribunal. It would establish membership, powers, jurisdiction and order-making power. References to the “Director” in the current *Act* would also have to be removed.<sup>47</sup> References to the Registrar would be limited to Part 1 of the *Act*, and powers of the Registrar constrained to dealing specifically with consumer reporting agencies’ registration issues and concerns.<sup>48</sup>

The amended *Act* would include a new section requiring a consumer to write the credit bureau requesting an amendment or deletion to the credit report. If the credit bureau denies the request, the credit bureau is required to send a letter to the consumer. The letter would include a statement directing the consumer to file an appeal with the Tribunal if unsatisfied with the credit bureau’s response. An appeal could be requested within thirty days of the credit bureau’s response. The fee for the appeal would be reasonable. Hearings could be written or oral, at the request of any party to the appeal if permitted by the Tribunal, or on the consent of all parties. A new set

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47. *Act*, *supra* note 3, ss. 18, 21 and 24.

48. This means ss. 14(1), 14(2), 14(3), 14(4), 15, 16(1), 16(2), 16(3), 17, 18.1 and 18.2 of the *Act*, would have to be removed.

of Regulations would have to be enacted through order-in-council establishing the Rules of Procedure of the Credit Report Appeal Tribunal.<sup>49</sup>

### ***Tribunal Jurisdiction and Powers***

It must be kept in mind that the Tribunal would not be a Superior Court. As such, its jurisdiction and powers would have to be specifically worded and conferred. The Tribunal would be subject to the *Statutory Powers Procedure Act*.<sup>50</sup> The Tribunal would operate on a civil burden of proof: balance of probabilities. The Tribunal's jurisdiction would be limited to making a decision on whether a debt, judgment, remark or any other piece of information on an individual or corporate credit report is, in fact, permitted to be registered on a credit report. This means a negative remark regarding payment of a debt would have to be supported by documented proof that the debtor actually authorized the debt. Creditors would have to present proof of a *bona fide* belief that the said debtor actually owes the debt named in the credit report. Further, judgments on a credit report would have to be proved with a certified court order verifying a judgment, and negative remarks would have to be supported by reasonable proof.

Unliquidated debts are debts where an amount owing is not specifically ascertained. An amount "may" be owed, but it is not specifically an agreed-to debt. An example would be late fees at a video store. Perhaps under a contract a video renter agreed to pay for "any late fees" incurred, but the amount is not agreed upon. Where the video rental company then arbitrarily sets a late fee, reasonable or not, and attempts to collect it, the debt is unliquidated. Unliquidated debts would be *prima facie* unacceptable to register on a credit report and any reference to them would be struck without any countervailing proof that the debtor specifically agreed to the said debt. A reverse onus would apply to the creditor.

Unliquidated debts are especially concerning in current times, as private parking lot operators and "shoplifting recovery companies" (effectively security guards) regularly register unliquidated debts on credit reports. For example, private parking lot operators will present persons with "tickets" for trespass if they fail to pay for parking on the private lot. The damages for trespass stipulated on the tickets are arbitrarily set by the parking lot operators, despite the matter never having gone before a judge. Shoplifting recovery companies, on the other hand, will send out demand letters to individuals they have caught and accused of shoplifting, requesting a specific sum of money to compensate the store for the cost of the security service. These individuals may or may not have been convicted of shoplifting. If either the parking ticket or demand letter is not satisfied, the unliquidated debts are then reported to a credit bureau. The *Millar* case involved the reporting of just such an unliquidated debt—an

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49. Section 25 of the *Act* already contains the Regulation-making power.

50. R.S.O. 1990, c. S.22

alleged “charge” for returning a faulty vehicle that should have been covered by a manufacturer’s warranty.

On the other hand, the Tribunal’s jurisdiction would not include the ability to decide the merits of the debt itself. For example, if a cellular phone company provided services and rendered a bill to a customer, and had a copy of that bill that it could present, that bill would satisfy proof of the debt. If the debtor disputed the quality of the service, the debtor would have to take the dispute to the Superior Court of Justice.

The Tribunal would have no powers to award damages or compensation for any corresponding economic loss due to incorrect information on a credit report. The Superior Court of Justice would still retain exclusive jurisdiction to hear any negligence claims against credit bureaus or creditors. The most the Tribunal could order would be administrative and application fees for the successful party. The Tribunal would exist to ensure that credit reports contained not only accurate information, but that a creditor or collection agency was reporting correct and justified information on credit reports. This is especially important for victims of identity theft who are often viewed suspiciously when they attempt to clear their credit reports of fraudulent information.

### ***Order-Making Power***

Under the amended *Act*, the Tribunal would have order-making power, and these orders would have a binding effect on credit bureaus. Order-making power would involve orders to amend, delete or add information to a credit report, orders to change the credit rating in a credit report (i.e. a creditor reports a debtor as sixty days late “R3 rating” when, in fact, the debtor is only thirty days late “R2 rating”), and orders to appoint an investigator (in cases of systemic problems arising in a credit bureau that affect many people at the same time).

Orders that were not followed by the credit bureau could be registered in the Superior Court of Justice, and failure to follow the registered order would then be treated as contempt of court.

### ***Parties to a Tribunal Proceeding***

A proceeding would be commenced by a creditor or a consumer. The creditor may want to register information that the credit bureau refuses to register. The consumer may want to amend or delete information that the consumer believes should not be on the credit report. The named credit bureau would always be a party to the proceeding and would have the choice whether or not to make submissions.

### ***Membership of the Tribunal***

The Tribunal would be led by a chairperson, appointed by order-in-council. The Tribunal would then have a membership body appointed by order-in-council. The membership would be split evenly into quarters: one-quarter of members appointed from a list of nominations from creditors, banks or collection agencies; one-quarter appointed from a list of nominations from Equifax and Trans Union; one-quarter appointed from a list of nominations from consumer groups; and one-quarter appointed from the general public.

A hearing panel of the Tribunal would consist of four members (one creditor, one bureau, one consumer and one public member). In the event of a tie, the chairperson would make the final decision, considering the reasoning of all of the panel members.

### ***Appeals***

Appeals from the Tribunal could be brought before the Divisional Court, either by express wording in the amended *Act* or pursuant to the *Judicial Review Procedure Act*.<sup>51</sup>

### ***Funding the Tribunal***

The Tribunal would be funded by a hybrid user-pay and government-funded model. For example, a consumer or creditor who initiates a proceeding at the Tribunal would pay an application fee. This fee would then be matched by the responding credit bureau. The fee would also help to limit unnecessary or unmeritorious complaints, which are an inevitable reality in any Tribunal.

The reasoning for this funding model is economics and efficiency. Rather than having another level of taxation or fees levied upon a credit bureau, the bureau would be responsible only for responding to matters upon which it is challenged. Considering a credit bureau's unique and privileged near-monopoly position to hold, sell and share consumers' personal information, it is not an unreasonable cost of doing business to require the bureau to defend the legitimacy and correctness of its product.

The hybrid user-pay model would not, however, be enough to offset the necessary funding from the provincial government to ensure the complete operations of the Tribunal. There would likely, however, be long-term cost savings since courts would be unburdened by any matters dealing with credit reports.

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51. *Ibid.* c. J.1

## ALTERNATIVES TO A TRIBUNAL

### *Small Claims Court Jurisdiction*

Subsection 96(3) of the *Courts of Justice Act*<sup>52</sup> states:

Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, *unless otherwise provided*. [Emphasis added.]

In effect, despite the Small Claims Court's limitation on equitable relief, a section could be added to the *Act* permitting the Small Claims Court to make equitable orders in amending, deleting or adding information on a credit report. The Small Claims Court already has an established judiciary and accessible fees and procedures.

Second, despite the Court's lack of equitable relief jurisdiction, judgments of the Small Claims Court on the merits of a debt could be submitted to the Tribunal as persuasive evidence to remove remarks on the credit report. Going back to the example of the cellular phone customer, if the Small Claims Court determines that the service was unsatisfactory and the judge orders that the debt should not exist, this judgment could be presented to the Tribunal for consideration in ordering the removal of the debt from a credit report.

### *Information and Privacy Commissioner/Ontario*<sup>53</sup>

It has been inferentially acknowledged through *PIPEDA* that information in an individual's credit report affects the privacy and information rights of the consumer.

A section could be added to the *Act* or to the *Freedom of Information and Protection of Privacy Act*<sup>54</sup> permitting any consumer to appeal information on a credit report to the information and privacy commissioner/Ontario [commissioner]. The commissioner already has an established tribunal with Rules of Procedure and is highly accessible for the average Ontarian.

## CONCLUSION

In a world where efficiency and speed rule, quick ways to make informed judgments on business and risk are preferred. Verifying information on a consumer credit report is a logical way of doing this. Unfortunately, there is no practical way for a con-

52. *Ibid.* c. C.43

53. Dr. Ann Cavoukian is the information and privacy commissioner of Ontario, and order-in-council position established pursuant to the Ontario *Freedom of Information and Protection of Privacy Act*. The commissioner's role is to adjudicate access to information requests made to provincial public bodies in Ontario and investigate privacy violations committed by provincial public bodies and private health care providers. The commissioner does not yet have jurisdiction over the access to information and privacy activities of the private sector in Ontario. "About the Commissioner" online: Information and Privacy Commissioner/Ontario, <<http://www.ipc.on.ca/english/About-Us/About-The-Commissioner/>>.

54. R.S.O. 1990, c. F.31.

sumer to appeal and correct information on a consumer credit report, resulting in an unequal and potentially oppressive situation where creditors can unilaterally punish an alleged debtor simply by sending information to a credit bureau.

Credit bureaus are middlemen that choose to distance themselves from creditor-debtor disputes, characterizing their operations as reporting agencies that report the facts alone.

Since 2000, Ontario has seen an unprecedented rise in Superior Court litigation aimed at credit bureaus and creditors that report allegedly incorrect credit information. There have also been privacy complaints to the federal privacy commissioner regarding credit information.

The Ontario Court of Appeal has recently recognized the inherent importance that credit reports play in our lives. Realistically, only well-informed, substantially wealthy Ontarians have the knowledge, time and money to exercise their rights and challenge creditors and credit bureaus on information contained in their credit reports. The average Ontarian is left at the mercy of creditors and collections agencies—some of which choose to report debts that, in good conscience and at law, should rightfully not be reported.

A Tribunal would be a public acknowledgement by the Government of Ontario that consumers have solid rights to control information about themselves—information that affects the ability to get a mortgage, find accommodation and secure things as basic as employment. Enough time has passed without the law addressing the need to treat credit reports as a fundamental piece of personal information that directly affects an individual's ability to secure housing and employment in Ontario. A Tribunal would provide a forum where individuals can resolve disputes regarding their personal credit information.

This paper has presented not only an argument for establishing a Tribunal, but also for realistic alternatives, should the Government of Ontario so choose. Expensive and time-consuming litigation should not be the only option to protect an individual's personal information contained in a credit report.

