The credit report as instrument of extralegal justice

Research report

Produced by Option consommateurs
and presented to Industry Canada's Office of Consumer Affairs
June 2013

Option consommateurs

Mission

Option consommateurs is a not-for-profit association whose mission is to defend the rights and interests of consumers and to ensure that they are respected.

History

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999 it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years

Principal activities

Options consommateurs has a team of some 30 employees working in five departments: Budgeting, Energy Efficiency, Legal Affairs, Press Room, and Research and Representation. Over the years, Option consommateurs has developed special expertise in the areas of financial services, health and agrifood, energy, travel, access to justice, trade practices, indebtedness, and the protection of privacy. Every year, we reach 7,000–10,000 consumers directly, conduct numerous interviews in the media, participate in working groups, sit on boards of directors, carry out large-scale projects with key partners, and produce research reports, policy papers and buyers' guides, including the annual *Toy Guide* in *Protégez-vous* magazine.

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In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs at www.option-consommateurs.org

Summary

The credit report is occupying an ever greater place in the everyday lives of Canadians. This does not mean, however, that we necessarily understand what a credit report is, or the importance it has in our lives.

A bad credit report can have serious consequences that can affect a consumer's life for several years. It can also prevent the consumer from getting access to credit at a reasonable rate or can limit access considerably. In addition, it can be a source of problems when searching for a new apartment or a new job or when applying for property and damage insurance.

A creditor who claims that a consumer owes a him sum of money may make a negative entry in the latter's credit report. In doing so, the creditor exercises his power to punish the consumer without having to prove the merits of his claim before a court of law. This raises ethical issues because, since the creditor controls the information released, it is as if he were at the same time judge and plaintiff.

Entering a negative entry in a credit report reverses the burden of proof. Even though it is the creditor who is claiming a right - the right to claim his due - if the entry is false, inaccurate, incomplete or disputed (which is common), it is up to the consumer to prove that it is so. To avoid the trouble caused by a negative entry on a credit report, the consumer can of course decide to pay the sum demanded under protest and then sue the creditor. But there again, the burden of proof rests with the consumer.

Admittedly, protection of privacy laws impose certain rules and guidelines regarding the accuracy of the information contained in credit reports and give consumers the right to correct information and add explanatory notes to their files. But how effective are the measures in place? Can an explanatory note really offset the negative perception created by a negative entry? Are such notes taken into in account in calculating the credit rating?

In this research, we wanted to examine the effectiveness of the existing rules and assess whether they adequately protect the consumer.

Methodology

In order to achieve our objectives and to find answers to these questions, we carried out a literature review on the credit report; this was primarily conducted on the Internet.

We then contacted a number of stakeholders in order to hear their views on these issues and the position they adopt. In particular, we contacted experts in the field of privacy protection, representatives of privacy commissions, law professors, representatives of consumer associations, and representatives of the Association of Canadian Bankers, the Financial Consumer Agency of Canada (FCAC) and the Ministry of Consumer Services of Ontario.

We had planned to conduct interviews with the two main credit bureaus in Canada, Equifax and Trans Union, but unfortunately they both refused our requests for interviews. We can only lament their lack of cooperation.

We carried out case law research to determine the position of Canadian courts on the issues of false, misleading, incomplete or disputed information in credit reports.

We then examined Canadian laws to determine the legal framework for credit reports.

We also reviewed various documents from credit agencies; these included contracts between the agency and its members and the agencies' privacy policies. It should be noted that we had planned to review the contracts of the two credit rating agencies, but we were only able to obtain a copy of the Equifax contract through an unofficial channel. It would have been interesting to see the TransUnion contract, but we believe that its impact on our research would actually have been quite minor given the laws governing this sector and the fact that the two agencies command the largest share of the market in Canada. Accordingly, it is reasonable to assume that their contracts would be very similar.

We also reviewed consumers' complaints about credit reports received by consumer associations, privacy commissions and the FCAC.

Finally, we studied the laws of France and the United States and performed a comparative analysis of their laws with those in Canada.

Conclusions and recommendations

The credit report has undergone major changes since its inception in the late nineteenth century. Today, it is ever-present in the lives of Canadians. This does not mean, however, that they know very much about it.

We recommend that the federal government, the provincial governments and the various privacy commissions better educate Canadian consumers about credit reports.

We recommend that Canadian consumers better inform themselves about credit ratings and reports.

Canadian privacy laws contain very few provisions specifically related to credit reports. This creates problems of consistency and law enforcement. The current system leaves too much room for interpretation and does not sufficiently protect consumers. Challenge mechanisms are often too cumbersome, complex and lengthy, and are weighted in favor of the creditor who makes the entry in the credit report. Finally, certain indications lead us to believe that credit reports have a relatively high error rate, a fact that government authorities should find alarming.

We recommend that the two levels of government (federal and provincial), in collaboration with the various privacy commissions, conduct a comprehensive survey on the accuracy rate of credit reports in Canada.

We recommend that the aforementioned levels of government (federal and provincial) find inspiration in the U.S. model and adopt a comprehensive legislative framework specifically for credit reports. We also recommend that they seek inspiration in some of the ideas introduced in the French model. The amended regulations should enable more effective monitoring of credit rating agencies and, in turn, lead them to assume greater responsibility. In particular, the laws governing credit reports should at the very least include:

- a provision that a company that makes a decision about a person based "in whole or in part" on his credit report must notify that person in writing and forward him a copy of his credit report.

- a provision that a company that makes a negative entry in a credit report must notify the consumer concerned and inform him about the challenge procedure.

- a provision governing the entry of disputed claims in the credit report such that these will not cause undue hardship to the consumer.

We recommend that the Québec legislature introduce provisions governing credit reports into its *Consumer Protection Act*, as other Canadian provinces such as British Columbia, Ontario and Alberta have done.

We recommend that credit rating agencies assume responsibility for the accuracy of the information they collect and disseminate, including improving their verification process.

We recommend that federal and provincial legislators, in litigation involving consumer credit, grant common law courts the power to order the rectification of credit reports, in the interests of the effective administration of justice.

We recommend that federal and provincial legislators grant privacy commissions the authority to award damages when entries in the credit report cause harm to consumers.

Entering litigious claims in the credit report causes problems. There are almost no provisions in current laws covering such situations, apart from an explanatory statement by the consumer which is often outweighed by the negative impression created by the creditor's note in his record.

We recommend that credit reporting agencies provide a notation that would permit a disputed claim to be entered in the credit report in such a way that it will cause no harm to the consumer for as long as the dispute is not resolved.

We recommend that the two levels of government (federal and provincial) develop a policy for quickly settling disputed claims that could taint the consumer's credit report and prohibit any negative entries being made in the credit report until such time as the dispute is resolved.

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1 - Introduction

The credit report is assuming ever greater importance in the everyday lives of Canadians. This does not mean, however, that we necessarily understand what a credit report is, or the importance it has in our lives.

A bad credit report can have consequences that can seriously impact a consumer's life for several years. It can also prevent the consumer from gaining access to credit or for obtaining credit at a reasonable rate. In addition, it can be a source of problems when searching for a new apartment or a new job or when applying for property and damage insurance.

A creditor who claims that a consumer owes a him sum of money may make a negative entry in the latter's credit report. In doing so, the creditor exercises his power to punish the consumer without having to prove the merits of his claim before a court of law. This raises ethical issues because, since it is the creditor who controls the information on the report, it is as if he were at the same time acting as judge and plaintiff.

In law, the burden of proof usually rests with the party who claims a right. Making a negative entry in a credit report reverses the burden of proof. Even though it is the creditor who is claiming a right - the right to claim his due - if the entry is false, inaccurate, incomplete or challenged (which occurs often)[1], it is up to the consumer to prove that it is so.

Admittedly, we have privacy laws, which impose certain rules and guidelines regarding the accuracy of the information contained in credit reports and give consumers the right to correct information and add explanatory notes to their files. But how effective are the measures in place? Can an explanatory note really offset the perception created by a negative entry? Are these notes taken into in account in calculating the credit rating?

Negative entries in credit reports are also problematic when false, inaccurate or disputed information is disseminated, which can harm a consumer's reputation. To avoid the trouble caused by a negative entry on a credit report, the consumer can of course decide to pay the sum demanded under protest and then sue the creditor. But there again, the burden of proof rests with the consumer.

Most disturbing is the fact that that the courts seem to endorse such situations. We have come across judgments in which the judge clearly acknowledged that the consumer did not owe the amount claimed, yet in the same breath cast the blame for the stain on the consumer's record on the consumer himself, declaring that the latter should have paid the amount claimed under protest to avoid having a bad credit rating.

In this study, we attempted to examine the effectiveness of the existing rules and decide whether they adequately protect consumers.

[1] In 2005, the Public Interest Advocacy Centre (PIAC) conducted a study that revealed an error rate in credit reports of approximately 18%. See Susan Lott, "Credit reporting : How are consumers faring?" PIAC, Ottawa, August 2005, consulted online at: http://www.piac.ca/financial/credit_reporting_how_are_consumers_faring

1.1 The research questions

The aim of this research, specifically, is to answer the following questions: How can credit be used as an instrument of extralegal justice? Do the rules currently in force in Canada adequately protect consumers? What are the rules in force in France and the United States and can we find inspiration in their example? [2]

1.2 Research methodology

In order to attain our objectives and to find answers to these questions, we carried out a literature review on the credit report; this was primarily conducted on the Internet.

We then contacted a number of stakeholders who are familiar with this topic in order to hear their views on these issues and the position they take. In particular, we contacted experts in privacy protection, representatives of privacy commissions, law professors, representatives of consumer associations, and representatives of the Association of Canadian Bankers, the FCAC and the Ministry of Consumer Services of Ontario[3].

We had planned to conduct interviews with the two main credit bureaus in Canada, Equifax and Trans Union, but unfortunately they both refused our requests for interviews. We can only lament their lack of cooperation.

We also conducted case law research to determine the position of Canadian courts on the issues of false, misleading, incomplete or disputed information in credit reports.

We then examined Canadian laws to determine the current legal framework for credit reports.

We also reviewed various documents from credit agencies; these included contracts between the agency and its members and the agencies' privacy policies. It should be noted that we had planned to review the contracts of the two credit rating agencies, but we were only able to obtain a copy of the Equifax contract, and that through unofficial channels. It would have been interesting to see the TransUnion contract, but we believe that its impact on our research would actually be quite minor given the laws governing this sector and the fact that the two agencies command the largest share of the market in Canada. It is reasonable to assume, however, that their contracts would be very similar.

We also recorded complaints regarding credit reports that consumers made to consumer associations, privacy commissions and the FCAC.

Finally, we studied the laws of France and the United States and performed a comparative analysis of their laws with those in Canada.

[2] We chose to study the laws of the United States due to its proximity to Canada and the fact that the standards governing credit reporting agencies in Canada have been developed for all of North America. We also chose to study French law because of its marked differences with the North American system.
[3] See the list of the people interviewed in the acknowledgments section.

2 - The context

2.1 Credit reports and credit ratings

To properly situate our research, we first need to understand what a credit report is. According to the FCAC, it is "a summary of your credit history. If you have ever used a credit card, taken out a personal loan, or used a 'buy now, pay later' offer, you have a credit history."[4]

A credit report is created by a credit reporting agency whenever a consumer borrows money or makes a loan application for the first time. A credit reporting agency only collects and organizes the information it receives from lenders and disseminates this information to whoever asks to see it. It does not make any decisions about what is recorded in the file or the consumer's eligibility for a loan.

In Canada, there are two main credit reporting agencies: Equifax and Trans Union. Both are private companies.

A credit report typically contains the following information:

• Personal information such as the consumer's name, address and Social Insurance Number and the name of his employer;

• The date(s) on which the credit account(s)[5] was/were opened;

• The amount (s) owing;

• Every credit application made by the consumer, whether accepted or rejected;

• Information about the frequency of payments, on a scale of 0-9, (this number is preceded by a letter that indicates the type of credit)[6]. The number 1 means that the consumer makes payments as agreed while the number 9 means that the consumer has been placed for collection or has declared bankruptcy. Figures ranging between both mean that the consumer has paid but with a certain delay, the higher the number, the greater the delay;

• Personal information in the public domain, such as a bankruptcy or a judgment[7].

Information relating to telecommunications accounts may be included in the credit report, even though these are not actually credit accounts.

[4]Financial Consumer Agency of Canada, *Understanding Your Credit Report and Credit Rating*, online at: http://www. acfc.gc.ca/eng/resources/publications/budgetmoneymgmt/creditreportrating/reportrating-2-eng.asp
[5] The term "credit account" includes credit card, line of credit and personal loan accounts.
[6] For example, the letter R means revolving credit," and the letter O means "open credit." This system of notation is a North-American standard used by every credit agency in North America. For more details, consult Industry Canada's Office of Consumer Affairs site at: http://www.ic.gc.ca/eic/site/oca-bc.nsf/fra/ca02179.html
[7] A criminal conviction or divorce decree, for example.

The credit rating can be defined as follows:

"A credit rating is a three-digit number calculated using a mathematical formula based on the information contained in your credit report. You get points for transactions that show creditors that you know how to use credit instruments responsibly, and you lose points for transactions that show you have trouble managing credit"[8].

This figure varies between 300 and 900, 900 being the best rating.

According to a 2004 Option consommateurs research report on credit ratings[9], credit bureaus first appeared in the United States in the late nineteenth century. The bureaus were born out of the need for creditors to have tools for more accurately assessing the risk posed by potential debtors. Credit reports gave them access to information from other creditors.

Since that time, the market has changed dramatically. The number of forms of credit available has mushroomed and powerful computing tools have made it possible to rapidly exchange an ever increasing amount of information.

Credit ratings appeared rather recently in the history of credit reports. They were a result of the need to equip lending institutions with more powerful risk assessment tools able to handle the enormous amount of data made available by the new information technology.

However, it is very difficult to know exactly which information is actually taken into account in calculating the final rating and the influence that each item of information has upon it. Credit bureaus keep this information secret.[10]

2.2 The legislative framework in Canada

Canada's *Constitution Act*, 1867 (LC1867)[11] distributes certain competencies between the federal government and the provinces. It also decrees that any new jurisdiction will be shared. Jurisdiction over privacy has not been defined in the Constitution; it is shared between the federal and provincial governments.

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[8] Financial Consumer Agency of Canada, *Understanding Your Credit Report and Credit Rating,* consulted online at: http://www.
acfc.gc.ca/eng/resources/publications/budgetmoneymgmt/creditreportrating/reportrating-2-eng.asp

[9] Vallée, Marie et St Amant, Jacques. *Le bon grain de l'ivraie : les ratings de crédit and le filtrage automatisé des consommateurs canadiens, Option consommateurs*, Montréal, 2004, p. 11, consulted online : http://www.option-consommateurs.org/documents/principal/fr/File/rapports/services_financiers/oc_ratings_credit_fr_2004.pdf

[10] Vallée, Marie et St Amant, Jacques. Le bon grain de l'ivraie : les ratings de crédit and le filtrage automatisé des consommateurs canadiens, Option consommateurs, Montréal, 2004, p. 11, consulted online : http://www.option-consommateurs.org/documents/principal/fr/File/rapports/services_financiers/oc_ratings_credit_fr_2004.pdf

[11] *The Constitution Act, 1867,* 30 & 31 Vict, c 3, ss. 91 and 92

In 1994, Québec was the first province to adopt a law on the protection of privacy in the private sector[12]. In 2000, the federal government followed suit by adopting the *Personal Information Protection and Electronic Documents Act* (PIPEDA)[13] which applies to companies operating under federal jurisdiction as listed in Section 91 of LC1867, companies under provincial jurisdiction when operating outside their province and provinces that do not have a statute "substantially similar" to the federal law. To date, Québec, Ontario, Alberta, British Columbia, Newfoundland and Labrador, and New Brunswick have laws that have been declared "substantially similar" to the federal law. However, the laws of Ontario, Newfoundland and Labrador, and New Brunswick relate only to the field of health care and will not be analyzed in this report.

Various provincial statutes have been added to these privacy laws specifically governing credit bureaus. More about this later.

2.2.1 Federal legislation

Section 3 of PIPEDA sets forth the purpose of the *Act*:

> to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

PIPEDA sets forth ten broad principles, which are listed in Schedule 1 of the *Act*[14]. Some of these principles are only recommendations[15]; companies subject to the Act are not obliged to follow them.

Following is the list of these principles and a description of each:

> 1) Accountability: An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles.
>
> 2) Identifying purposes: The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.
>
> 3) Consent: The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

[12] *An Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1
[13] *Personal Information Protection and Electronic Documents Act (*S.C. 2000, c 5)
[14] Principles set out in the *National Standard of Canada* entitled *Model Code for the Protection of Personal Information*, CAN/CSA-Q830-96f
[15] S. 5(2) PIPEDA

4) Limiting Collection: The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

5) Limiting Use, Disclosure, and Retention: Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes..

6) Accuracy: Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

7) Safeguards: Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

8) Openness: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

9) Individual Access: Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

10) Challenging Compliance: An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

Section 7 of the *Act* complements these ten principles by adding provisions that limit the gathering and use of personal information to third parties and its transmission to third parties.

The *Act* gives the Privacy Commissioner the right and the power to oversee compliance with PIPEDA by the private sector and to deal with complaints related to its application. The Commissioner, however, only has the power to make recommendations, and cannot issue orders[16]. Following the Commissioner's report, the complainant may apply to the Federal Court for it to issue an order. The Federal Court, among its other powers, can award damages to the complainant, including damages for "humiliation"[17].

2.2.2 Legislation in Québec

In Québec, the privacy protection is governed by the *Civil Code of Québec* (CCQ)[18] and by the *Act Respecting the Protection of Personal Information in the Private Sector,* RSQ, c P-39.1

[16] S. 14(1) PIPEDA
[17] S. 16 PIPEDA
[18] Ss. 36(6) and 37 to 41 of the *Civil Code of Québec*, L.Q. 1991, *v.* 64

(ARPPIPS)[19]. This law complements the rules set forth in the CCQ. Its sections lays down the general rules for any person who establishes a file on another person.

The Québec law has been declared to be “substantially similar” to the federal law, but since it was adopted prior to the federal law and contains some noteworthy differences, we felt it was appropriate to look at it a little more closely.

The *Civil Code* states that any person who establishes a file on another person must have a serious and legitimate interest in doing so. In addition, this person may only collect information that is relevant to the stated purpose of the file, and may not, without legal consent or authorization[20], disclose it to third parties or use it for any purpose that is not compatible with the purpose of the file. Nor may this person, in the constitution or use of the file, otherwise invade the other person’s privacy or reputation [21].

Both the *Civil Code* and ARPPIPS permit individuals free access to records that concern them. Whoever establishes a file on another person cannot refuse the latter access to the file without having a “serious and legitimate reason” for doing so, or if the information contained in the file could seriously prejudice a third person[22].

The ARPPIPS states that the information contained in a person’s file must be accurate and up to date when it is used to reach a decision on this person [23].

The *Civil Code* and ARPPIPS also provide the right for anyone to correct inaccurate, incomplete or ambiguous personal information in their file, to have outdated or unjustified information removed and to add comments in order to clarify certain information[24].

ARPPIPS also states that

> Every person carrying on an enterprise having as its object the lending of money, who consults credit reports or recommendations as to the solvency of natural persons prepared by a personal information agent, must inform such persons of their right of access and rectification in relation to the file held by the agent and indicate to them the manner in which and the place where they may have access to the reports or recommendations and cause them to be rectified, where necessary.
>
> The person carrying on such an enterprise must communicate to a natural person, on request, the content of any credit report or recommendation he has consulted for the purpose of making a decision concerning the person.[25]

[19] *Act Respecting the Protection of Personal Information in the Private Sector*, c. P39.1
[20] The law does authorize this in certain situations, such as when the life of a person is in danger.
[21] S. 37 CCQ and ss. 4 and 5 ARPPIPS
[22] Ss. 38 and 39 CCQ and s. 27 ARPPIPS
[23] S. 11 ARPPIPS
[24] S. 40 CCQ and s. 28 ARPPIPS
[25] S. 19 ARPPIPS

ARPPIPS gives the Privacy Commission (CAI) exclusive jurisdiction over disputes concerning access to, and rectification or deletion of personal information[26]. However, the CAI does not have the power to resolve disputes over the validity of claims or to award damages to the complainant[27]. For this, the complainant must apply to the Court of Québec if he wants to settle a dispute related to a claim or to claim damages as a result of a negative entry in his credit report[28].

2.2.3 Legislation in British Columbia

In 2004, British Columbia adopted a law[29] that is "substantially similar" to PIPEDA. Since this law is so similar to PIPEDA, with the exception of a number of added details that are unimportant from the standpoint of credit, we do not need to analyze this law.

On the other hand, British Columbia does regulate credit reports through its consumer protection law known as the *Business Practices and Consumer Protection Act*.[30]

This *Act* states that anyone wishing to consult a credit report must first obtain the consent of the person concerned. It prescribes what information may appear in the report and how long it may remain there. In addition, it states that no one may make an entry in a credit report knowing it to be false or misleading.

The *Act* limits access to credit for certain categories of persons and for the attainment of certain objectives. For example, a landlord may only give access to credit to a prospective tenant or tenant and may only do so only in order to enter into or renew a lease.

The *Act* also stipulates that any company that makes a negative decision "in whole or in part" about a person on the basis of their credit must notify that person in writing. It also entitles that person to add a supporting statement of no more than 100 words about the information contained in his or her credit report. Finally, the *Act* states that no one may make an entry into a credit report knowing it to be false or misleading.

2.2.4 Legislation in Alberta

In 2004, Alberta also adopted a "substantially similar" law to PIPEDA. Consequently, it is unnecessary to analyze this law.

On the other hand, like British Columbia, Alberta regulates credit reports through its own consumer protection law, the *Fair Trading Act*[31]. Although this law is "substantially similar" to the one adopted by British Columbia, some differences are worth noting.

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[26] Ss. 42 and 55 ARPPIPS and *Eidda v. Crédit Jaguar Canada Inc.*, 2005 CanLII 25913 (QC CS), clienthttp://canlii.ca/t/1l72s

[27] *Équifax v. Daniel Leblanc* (1997) CAI 438 and *Bitton v. Citifinancial* , C.A.I., Decision 02 02 30, September 3, 2002

[28] *Bourret v. Wells Fargo Financial Services*, 2009 QCCQ 2125 (CanLII),

[29] *Personal Information Protection Act*, [SBC 2003] c. 63

[30] [SBC 2004] c. 2, part 6

[31] *Revised Statutes of Alberta 2000*, C. F-2, div.3, part 5

The first distinction is that under Alberta law, credit reporting agencies have a duty to take reasonable steps to ensure that the information that they disclose is accurate and complete. The *Act* also stipulates that consumers may add a note to their file, but does not limit the number of words. Finally, it provides civil remedies if a person suffers damage as a result of a breach of the provisions of the *Act*.

2.2.5 Legislation in Ontario

Since Ontario does not have its own law regarding the protection of personal information in the private sector, it is the federal law that applies. On the other hand, like British Columbia and Alberta, it does regulate credit reports through certain provisions of the *Consumer Reporting Act*[32].

Since the provisions of this law are so similar to those of the law in British Columbia, we shall once more emphasize only the differences.

First, the Ontario law requires credit reporting agencies to make a reasonable effort to ensure that the information in one's credit report is supported by the best possible evidence. In addition, the *Act* imposes upon the agency the duty to investigate whenever consumers ask it to correct information contained in their credit report. The agency must do whatever necessary to confirm the information, supplement it, and correct it if necessary.

2.3 Who can make an entry in a credit report ?

The current privacy laws in Canada require that any creditor wishing to make an entry in a credit report must in principle obtain prior consent from the person concerned. Typically, the consumer who is applying for credit signs a document giving his or her consent to the creditor.

As explained above, credit reports are created by the two credit reporting agencies. These agencies are private companies that charge for their services. Consequently, anyone who wants to consult a credit report or make an entry into it must become a member of one (or both) of these agencies and pay the applicable fees.

We managed to get hold of a copy of the contract that Equifax requires its members to sign[33]. It is clear that the client has to comply with all applicable laws regarding privacy, particularly those relating to consent. It is usual for credit rating agencies to also allow lending institutions, telecommunications companies and collection agencies to make entries in credit reports.

2.4 Importance of the credit report in the lives of Canadians

As outlined in Section 2.1 of this report, credit reports and ratings were originally intended for the exclusive use of lending institutions. They were used to determine the risk posed by a potential debtor in a situation of loan or credit.

[32] R.S.O. 1990, c. C.33

[33] Equifax did not reply to our requests for an interview; we nevertheless managed to obtain a copy of the contract by other means.

In recent years, the credit report has been used by other types of organizations and for other purposes. As a result, consumers are feeling the consequences of credit reports and ratings more often in their lives and these consequences are becoming increasingly serious.

In 2009, Option consommateurs conducted a study on the issue of using credit reports for non-financial purposes, particularly in the area of employment, housing and damage insurance[34]. The aim of this research was to find out who made credit checks of this type, the reasons for such checks and whether they were always justified and systematic. The research showed not only that credit reports and ratings were the main assessment tools used by lending institutions, but also that more and more insurers, landlords and employers were using them to evaluate candidates. Their aim was to establish a correlation between the credit report and the credit rating and the risk posed by the consumer in their sectors.

For insurers, a bad credit rating indicates that there is a higher risk that the insuree will file a claim, causing them to increase their premiums accordingly. For landlords, a bad credit report indicates that a tenant may not pay his rent (or not do so on time), causing them to prefer another candidate. For employers, a bad credit report indicates that the potential employee is experiencing financial difficulties, which could affect his performance at work (also causing them to prefer another candidate).

It is clear that a bad credit rating can have serious consequences on many aspects of a consumer's life. Despite this, Canadians know very little about credit reports and ratings. In December 2011, the FCAC published the results of a public opinion poll about the rights and responsibilities of consumers[35]. According to the report, only 38% of Canadians said they knew how to challenge an entry in their credit report (compared to 49% in 2006). These statistics are very worrying.

Consumer organizations also find that consumers know very little about credit in general. Most of the questions we saw from consumers to consumer associations had to do with how to dispute an entry on their credit report. Also, they asked a lot of questions about how credit reporting functions in general (how long entries stay in their file, how to initiate a dispute procedure, how to access their report, etc.)

Consumers also addressed their requests to government agencies. For instance, the FCAC told us that it received 624 requests for general information on credit reports[36] in the 2012-2013 fiscal year. The CAI said it received about 150 applications last year.

[34] Geneviève Grenier, *Des chiffres sur l'incalculable : l'utilisation des dossiers de crédit à des fins non financières*, Option consommateurs, Montréal, March 2009, consulted online at: http://www.option-consommateurs.org/documents/principal/fr/File/rapports/renseignements_personnels/oc_rr_dossiers_credit_2009.pdf

[35] Financial Consumer Agency of Canada, *Public Opinion Research on Consumers' Rights and Responsibilities,* December 2011, consulted online at: http://www.fcac-acfc.gc.ca/eng/resources/surveystudies/2012research/2012research-eng.asp

[36] These requests were made by telephone.

The increased use of credit by financial institutions and other organizations and individuals, combined with Canadians' low level of understanding of the issues involved has all kinds of undesirable consequences. If we add to this the effect of extralegal justice that can result from a bad entry in the file and the lack of monitoring of the accuracy of the information contained in the credit report (we will return to these issues later), we find ourselves faced with a very worrying situation.

3 - How credit reports can be an instrument of extralegal justice

3.1 Effects of a negative entry in the credit report

As stated earlier, the credit report was first used exclusively in the context of loan and credit applications. We can assume for the purposes of this research that in such a context the credit report would permit a creditor to better understand the potential risks posed by a debtor. Information about a debtor in a credit report indicating that he does not respect his payments or is heavily indebted can be useful to the creditor. It is in the interest of a number of creditors to share the information they possess about a debtor in order to better assess the risk he represents. Positive entries, by the way, are in the consumer's interest, and anyone who has such entries will get credit at affordable rates and enjoy an excellent reputation among creditors.

However, creditors should not rely solely on credit reports and ratings in making their assessments. A multitude of factors need to be taken into account when evaluating a credit application: income, expenditures, financial commitments that are not included in credit, etc. Moreover, since the accuracy of the information contained in the credit report is sometimes unreliable[37], creditors should be exercise caution when making decisions based on information found in credit reports.

There are several ways of looking at the negative effects of a negative entry in a credit report. Arguably, if a consumer does not pay his debts in the manner agreed upon with the creditor, he must suffer the consequences of his actions and see his credit history tarnished. This basic premise holds up if we are in the context of credit.

On the other hand, we need to consider the consequences of the use of credit reports for non-financial purposes. As we have already stated, a negative entry in a credit report can cause consumers many problems; it can make it difficult to get credit or get it at a reasonable rate, to rent accommodation, to get (home or auto) insurance, or to find a job.

The consequences of a negative entry in one's credit report extend well beyond what was intended when credit reports were introduced. Does a consumer who does not pay his debts deserve to be punished to such an extent? Given that the laws of Ontario, British Columbia and Alberta specifically allow the use of credit reports in the areas of employment, housing and insurance, we can only assume that the governments of these provinces see nothing abusive about the practice.

We believe that in the current state of knowledge about the use of credit for non-financial purposes, negative entries add unfairly to the sanction imposed on the consumer. In 2009, Option consommateurs came to the conclusion that independent studies need to be conducted

[37] See section 3.2.

to gauge the effectiveness of credit checks in most of the domains in which credit reports are used for non-financial purposes (insurance, employment and housing) [38]. We reiterate these recommendations and ask that credit checks be prohibited in the areas of insurance and housing until independent studies can demonstrate the effectiveness of credit checks for non-financial purposes, and that consumers are adequately protected against abuse.

Another way of appreciating the effects of a negative entry in a credit report would be to consider the process of making entries in a credit report, noting where the burden of proof lies. A party who wants to oblige a debtor to pay off his debt generally has several ways to do so. He can put pressure on the consumer by means of notices or hire a collection agency. If the customer still refuses to pay, he can go to court. In this case, he must prove to the court that his claim is well founded. The burden of proof rests on his shoulders.

On the other hand, by recording an entry in a credit report, the burden of proof is practically reversed. Recording such an entry gives the creditor the power to punish a consumer without having to prove the merits of his claim in a court of law. This raises ethical issues, since, because it is the creditor who controls the information released, it is as if he were both plaintiff and judge.

Very often, it will be up to the consumer to demonstrate to the credit reporting agency that the entry is false, incorrect, or incomplete. As we saw in the section on the legislative framework, the privacy laws that govern credit bureaus provide mechanisms for challenging the credit report and allow the consumer to add explanatory notes. We will discuss this in more depth in Section 3.3 of this report and we will see that challenging and correcting entries can be a very daunting task for consumers, producing only mixed results.

Consumers who want to avoid a stain in their credit history can also decide to pay the amount claimed under protest and take the company to court later to claim their due. Again, the burden of proof rests with the consumer, even though one judgment by the Québec Small Claims Court did rule that a payment made under protest in order to avoid a stain on a credit report is not a payment in the legal sense of the term and that it is up to the creditor to prove his claim and not the reverse[39].

3.2 Monitoring and verifying the accuracy of the information contained in the credit report

As we saw earlier, the privacy laws state that all information contained in a credit report must be accurate, up-to-date and complete. This requirement applies both to those who enter the information (the creditors) and the credit rating agencies themselves.

[38] Grenier, Geneviève, *Des chiffres sur l'incalculable : l'utilisation des dossiers de crédit à des fins non financières*, Option consommateurs, Montréal, March 2009, consulted online at: http://www.option-consommateurs.org/documents/principal/fr/File/rapports/renseignements_personnels/oc_rr_dossiers_credit_2009.pdf

[39] *Amghar v. Visa Desjardins,* 2011 QCCQ 4309 (CanLII)

A close look at the privacy policies of both TransUnion and Equifax and the contract that Equifax has its members sign reveals that that these agencies tend to release themselves from any liability for the accuracy of the information they collect and disseminate.

In the contract that Equifax requires members to sign, the agency assumes no responsibility for any damage or expense incurred by the customer arising from any inaccuracy or omission in the data, even if this is due to negligence on the part of Equifax.

It also insists that Equifax has no control over the information that it collects and that the quantity and nature of the information in the credit reports make it impossible for Equifax to independently verify the accuracy of the information it receives and disseminates.

On the other hand, it states that it will investigate from time to time to verify whether the client is in compliance with the contract and the requirements of the law. The kind of investigation is not specified.

Also, the privacy policies[40] of both agencies state that the accuracy of the information they collect is wholly the responsibility of those who report such information. We found one sentence in the TransUnion privacy policy particularly startling:

> **Access and accuracy of credit reports**
>
> (. . .) When gathering personal information, we work with our clients to increase their awareness of the importance of providing only personal information that is accurate, complete, and up-to-date. However, TransUnion cannot alter the information reported by our clients, unless the information is determined to be wrong, incomplete or otherwise inaccurate.

We examined the document closely to see if TransUnion makes any mention of a verification procedure such as the one referred to in the Equifax contract. We did not find anything. It was really interesting to examine the contract that TransUnion requires its members to sign to see if such a procedure exists. We can only deplore their lack of cooperation. In addition, their privacy policy makes very little mention of the responsibility of the agency concerning the accuracy of the information, except in very general terms about their obligation to comply with the law. TransUnion places more emphasis on the responsibility of its clients.

The Equifax policy, in our view, goes a little further with regard to the responsibility of the agency concerning the accuracy of the information it collects. Nevertheless, it also places the bulk of the responsibility on the shoulders of its clients.

So, the law requires the information to be current, complete and accurate. The credit agencies place responsibility for this almost exclusively onto their clients. But is the information found in the credit reports really up to date, complete and accurate? Who monitors the agencies to ensure that this is the case?

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[40] Consulted online at: http://www.TransUnion.ca/ca/privacypolicy_fr.page and http://www.consumer.equifax.ca/privacy_policy/fr_ca

In the United States, several studies have been conducted in recent years in an attempt to verify the accuracy rate of the credit reports. These studies were carried out various different lobbying groups, the credit reporting agencies themselves and the Federal Trade Commission (FTC). Recent studies show an error rate of between 19% and 26%.

In 2004, a survey conducted by the U.S. Public Interest Research Group (PIRG)[41] on its members showed that 25% of the reports contained serious errors that could result either in a denial of credit or a higher interest rate for the consumer.

In 2011, the Policy and Economic Research Council (PERC) released a study[42] conducted on behalf of the Consumer Data Industry Association (CDIA). PERC asked 2,338 consumers to review their credit reports and see if there were any errors. It turned out that 19% of the files contained errors and that only 0.5% of these could have had a negative impact on a credit application.

More recently, the FTC released the interim results of an extensive survey on the accuracy rate of information in credit reports[43]. Note that this survey is a requirement of the *Fair and Accurate Credit Transactions Act* (*FACT Act*)[44], which orders the FTC to conduct a study over a period of 10 years. The results of this study show that 26% of credit reports contain errors and that 5% of these errors could result in negative impacts on a credit application.

To our knowledge, there are very few Canadian studies on this subject and we found no study by the regulatory authorities. We might be tempted to import statistics from our southern neighbours, and conclude that the same figures apply in Canada. Caution needs to be exercised in the use of such statistics, however. Although the two main credit reporting agencies in Canada (Equifax and TransUnion) are subsidiaries of U.S. companies, the two markets are not identical and the legislative frameworks are different.

In 2005, the Public Interest Advocacy Centre (PIAC), a non-profit organization that represents the interests of consumers, published a study on the credit report industry[45]. The study, funded by Industry Canada's Office of Consumer Affairs, reveals an error rate of about 18%, based on a survey carried out on Canadians. PIAC gives us a first indication that the error rate in Canada is far from trivial. We can only hope that the regulatory authorities are conducting further investigations to obtain a clearer picture of this problem.

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[41] Allison Cassady and Edmund Mierzwinski, *Mistakes Do Happen : A Look at Errors in Consumer Credit Reports*, National Association of State PIRGs, June 2004, consulted online at: http://www.uspirg.org/sites/pirg/files/reports/Mistakes_Do_Happen_2004_USPIRG.pdf

[42] Michael A. Turner, Ph.D, Robin Varghese, Ph.D, Patrick D. Walker, M.A., *U.S. Consumer Credit Reports : Measuring Accuracy and Dispute Impacts*, PERC, May 2011, consulted online at: http://perc.net/files/DQreport.pdf

[43] Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, December 2012, consulted online at: http://www.ftc.gov/os/2013/02/130211factareport.pdf

[44] 117 STAT. 1952 PUBLIC LAW 108–159—DEC. 4, 2003, consulted online at: http://www.gpo.gov/fdsys/pkg/PLAW-108publ159/pdf/PLAW-108publ159.pdf

[45] Susan Lott, *Credit reporting : How are consumers faring ?*, PIAC, Ottawa, August 2005, consulted online at: http://www.piac.ca/financial/credit_reporting_how_are_consumers_faring

3.3 Procedures to dispute an entry in a credit report

Any consumer who wants to challenge an entry in his credit report may do so by following the procedures established by law. Let us take a closer look at these procedures.

The laws provide privacy mechanisms for consumers to challenge an entry in their credit report and to add a note to their file.

A consumer who wants to challenge a registration to the credit must first apply in writing to a credit reporting agency. The agencies must respond within 30 days. The agency that receives a request for correction must carry out the necessary checks to validate the accuracy of the disputed information. According to the privacy policies of both agencies, the check is performed on the creditor who entered the information in the credit report; if the creditor confirms the information, they do not change it.

Given such a context, it can be very difficult for consumers to rectify any information that concerns them. The creditor controls the information. He has only to produce an invoice and confirm that the consumer has not paid, and the agency takes him at his word. In the event that the consumer can prove that he has indeed paid a bill – for example, by producing a check that was cashed by the creditor - the agency will correct the information. But it is not always possible for the consumer to prove his point. Consider, for example, the consumer who is a victim of identity theft: there is virtually no way to prove that it is not he who incurred the debts listed in his credit report.

Also, when a consumer has a dispute with a merchant over a debt (for example, if he denies owing some amount) or if there is a dispute over a good purchased by means of credit, the credit rating agency will not interfere in the conflict, but will maintain the information in the report as reported by the creditor. The consumer will have no choice but to add a note to the file in the hope that it is taken into account in his any of his future credit applications. After that, he can only sue the creditor and let a court of law decide.

The creditor has the duty to report fair, accurate and complete information. However, if the creditor knows that the consumer is challenging a claim that he is making against him yet still makes a negative entry in the consumer's credit report, we believe that this constitutes a breach of the requirements of the law. Similarly, if the credit rating agency is aware of the challenge but ignores this information, we believe that it is in violation of its legal obligations.

As we saw in section 2.1, the scoring system used by credit rating agencies is on scale of 1 to 9, 1 meaning that the debt was paid as agreed, and 9 meaning that the debt has not been paid. There is no score corresponding to a disputed debt. The creditor thus has two choices: either he does not record the disputed information, or he records it in accordance with the scoring system. Neither of these choices reflects the reality of the situation.

We therefore recommend that the credit reporting agencies set up a rating system that would record a disputed debt in the credit report without assigning it a score for as long as the dispute is not resolved. This would have the advantage of providing information that would not prejudice the consumer.

It is also necessary that the consumer's challenge is not frivolous or made with the sole purpose of avoiding negative entries in his credit report. We discussed this with Mtre. Pierre-Claude Lafond[46], a specialist in consumer protection and access to justice. Mtre. Lafond confirms that there is indeed a problem with entries that involve disputed claims. He also asserts that one must be careful about any solutions that we propose to address this problem, because consumers cannot be allowed to get away with avoiding the negative consequences of their actions.

Mtre. Lafond suggests a mechanism for quickly resolving disputes between consumers and creditors; he also suggests that the entry in the report should be suspended while this mechanism is under way. Another suggestion is that a complaint filed to a regulatory body authorized to receive such complaints should automatically suspend entry of the disputed claim in the credit report. We believe it would be interesting to implement such a procedure, as it would provide government consumer protection agencies with a context for effectively mediating between consumers and credit bureaus. When a consumer lodges a formal complaint with a competent authority, it does not necessarily mean that he is right in contesting that claim, but nonetheless gives an indication of the seriousness of the consumer's concerns.

For this solution to be effective, we recommend a mediation system be established that enables consumers to quickly resolve disputes over claims that stain their credit history. Given the serious consequences that a negative entry in a credit report can have, it is of the utmost importance that the dispute does not drag on. Moreover, Mtre. Lafond insists that whatever solution is put forward, one should avoid taking the dispute to court, which would only weigh down the procedure and extend timeframes.

In addition, consumers who have been denied a request for a correction of their credit report may apply to the Privacy Commissioner of Canada. However, the powers of the privacy commissions are rather limited. In fact, the Privacy Commissioner of Canada has only a power of recommendation and cannot issue orders. He may make a recommendation to rectify, modify or remove any information from a credit report, but has no authority to award damages to consumers who have suffered damage as a result of erroneous false, incomplete or outdated information[47]. On the other hand, if either party is unsatisfied with the Commissioner's findings, they may submit the Commissioner's report to the Federal Court, which does have the power to issue orders.

Moreover, in the case of a disputed claim, neither the Commissioner nor the Federal Court has jurisdiction to settle the dispute. The consumer must first apply to a common law court. If the consumer wins the case, the court may award damages if he is judged to have suffered harm as a result of the entry in the report. If, following this judgment, the creditor does not make the required adjustments to the consumer's credit report, the consumer must then apply to the Commissioner in order to have the report rectified.

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[46] M[e] Pierre-Claude Lafond is a law professor at l'Université de Montréal and is the author of several works on consumer law and access to justice. See questions posed to Mtre. Lafond in Appendix 1

[47] Consumer who find himself in this type of situation must apply to the Federal Court.

In Québec, as we saw in Section 2.2.2, ARPPIPS awards exclusive jurisdiction over disputes concerning access, rectification or deletion of personal information to the Commission d'accès à l'information (CAI). However, the CAI does not have the power to resolve disputes over the validity of a claim, or to award damages to the complainant. A consumer who wishes to obtain damages following a negative entry in his credit report must first contact the CAI to correct the information and, second, make an application to the Court of Québec for damages. In the case of a disputed claim, a consumer must do the opposite. He must first of all make an application to the Court of Québec to settle the dispute and obtain damages. If the creditor refuses or fails to rectify the information, he must then make an application to the CAI.

Certain provinces such as Alberta, British Columbia and Ontario have chosen to integrate the federal provisions on credit into their consumer protection acts to avoid the pitfalls of dual jurisdiction described above. Indeed, in these provinces, consumers may apply to a court of general jurisdiction to decide all matters related to their credit.

We are not about to recommend that the powers of rectification of information be taken away from privacy commissions. They have specific expertise in this area and we believe it is useful that such entities exist. However, it is clear that the consumer who wants to challenge a debt that has left a stain on his credit report is faced with a difficult task that most would find daunting. Nor do we believe either that the solution lies in giving more power to the privacy commissions and allowing them to settle disputes that should most definitely be dealt with in the law courts. We therefore recommend that, in the interests of efficiency of justice, the common law courts should have the power to order the correction of credit reports in disputes involving consumer credit reports, and, with the same interests in mind, we recommend that privacy commissions be granted the power to award damages when an entry in a credit report causes harm to a consumer.

3.4 Consumers complaints and requests for information

In our study, we wanted to know what types of complaints and inquiries consumers make with regard to credit report. To find out, we turned to consumer associations, privacy commissions, the ACFC, the Canadian Bankers Association and the Ministry of Consumer Services of Ontario.

We shall begin with the consumer associations. We contacted several consumer associations across Canada[48]. We received responses from three associations in Québec, two associations in Ontario and one association in Saskatchewan. We also analyzed some of the 300 complaints or inquiries that Option consommateurs has handled since 2001. These complaints and requests for information can classified as follows:

- Requests for information on how to make a correction to a credit report
- Complaints about erroneous entries that harm the consumer

[48] See Appendix 2 for the questions put to the consumer associations

- Complaints about companies that threaten to tarnish the consumer's credit history[49]

- Requests for information on how to maintain a good credit report

- Inquiries about how long notes can remain in the credit report.

Most consumer organizations that responded indicated that the consumers they are in contact with generally know very little about credit reports. Moreover, they stated almost unanimously that credit had become all-pervasive in the lives of consumers and that they found this worrying.

Also, as we were going through the complaints and inquiries made to Option consommateurs, we noticed one very particular problem. Option consommateurs had previously filed two class actions suits against retailers of furniture and appliances. Each class action involved consumers who had purchased furniture through the financing program offered by the retailer. In the ads, consumers were told that they would have nothing to pay for a number of months (interest free financing). However, during the contract period, they saw annual fees appear on their invoices that had not been mentioned in any of the advertisements. The lender threatened to tarnish the credit history of anyone who refused to pay the fees. Because of the threats made by the lending institution, we could only suggest that the consumers paid these fees, despite the fact that the claim was being challenged in a class action suit.

Even though we advised the consumers to pay the fee, some were so angry about the actions of the furniture retailers, that they chose not to. They sorely regretted this later, when they saw that their credit history had been stained. Some were even been denied credit as a result of the negative entry.

This example perfectly illustrates the effect of extralegal justice that a negative entry can have on a credit report.

Despite the class action, the lending institutions and credit rating agencies dispensed information that was certainly not complete.

CAI Québec[50] informed us that it received about 150 inquiries a year about credit reports, representing approximately 3% of all the requests it receives. This may seem small, but it should not really be surprising when one considers the latest statistics on Canadians' knowledge of credit. What is more, consumers did not even know about the existence of the CAI, let alone its role[51]. The requests for information that CAI receives most often relate to correcting information in credit reports. Also, CAI has issued only seven decisions on credit reports since ARPPIPS came into force in 1994.

[49] This could involve collection agencies, for example.

[50] See the questions put to the various privacy commissions in Canada in Appendix 3

[51] Option consommateurs realizes this every time we raise the topic to consumers.

Next, we asked the ACFC[52], which produces and disseminates a lot of documentation on credit reports and ratings. In the 2012-2013 year, the ACFC received 431 inquiries about credit rating agencies. One hundred and twenty-nine inquiries were about the procedure for correcting errors.

The Canadian Bankers Association[53] told us that that the vast majority of complaints received by its members are from customers who are denied credit and think they deserve a better credit rating.

We also inquired at the Office of the Privacy Commissioner of Canada (OPC), where we were told us that during 2012, they received 16 inquiries about credit reports, which represents approximately 2% of all requests made to the OPC. They also received six complaints (2% of all complaints). The requests and complaints that come up most often relate to removing a Social Insurance Number (SIN) from a credit report, correcting inaccurate information, removing information from the files that relates to another person, disclosing information without consent, and consulting the credit report without good reason.

Finally, the Ministry of Consumer Services of Ontario[54] said that their department received 1047 complaints and inquiries during 2012-2013. Most of these requests and complaints related to errors in the credit reports.

Looking at these data, we can infer that inaccurate information in credit reports is a recurring theme for the consumers who turn to these agencies. We feel obliged to remark that much work remains to be done in this area, both in terms of consumer education and of monitoring by regulatory bodies.

3.5 Studies of legal decisions

We consulted several legal databases to find a variety of decisions on credit reports by Canadian courts and privacy commissions. We limited our search to cases of requests for corrections to credit reports and cases of disputed claims that tainted a consumer's credit history.

Let us take a closer look at the most relevant of the 50 or so decisions we identified.

One case in 2009 in Saskatchewan involved a consumer who had bought and financed a vehicle through GMAC. Some time later, the consumer complained to the dealer about the quality of vehicle and a dispute arose concerning the application of the guarantee. The customer refused to pay and GMAC made a negative entry in her credit report even though it was fully aware of the dispute over the vehicle. The judge declared that making a negative entry in a consumer's credit report without also mentioning that the consumer is at the same time disputing the

[52] See Appendix 4 for the questions put to the ACFC
[53] See Appendix 5 for the questions put to the Canadian Bankers Association
[54] See Appendix 6 for the questions put to the Ministry of Consumer Services of Ontario

quality of the good is a fault within the meaning of the *Consumer Reporting Act* because the information recorded was still incomplete at the time[55].

In 2003, the Ontario Court of Appeal authorized a class action lawsuit against Equifax and TransUnion [56]. The plaintiffs claimed that the two agencies had disseminated information that was not permissible by law and, in so doing, had besmirched the reputation of consumers. Unfortunately, were unable to find out know what became of the class action. We could not find the judgment that decided the issue in dispute. It needs to be pointed out that in a class action, there are two steps. In the first step, the judge must ensure that the application meets certain basic criteria and filter out any frivolous or ill-founded claims. In the second step (the trial), he rules on the dispute.

In 2006, an Ontario judge sentenced Equifax and a bank to pay damages to a consumer for including false statements in his credit report .[57] The judge was particularly severe to Equifax: he criticized it for believing the bank and not actually checking when the consumer disputed an entry in his credit report. In his judgment, the judge spoke of the credit agencies' duty toward consumers, who are in a position of vulnerability relative to them and their creditors. In the situation referred to here, it was Equifax's duty to ensure that the information it disseminated was accurate, complete and current.

In 2010, the Federal Court clearly stated that credit bureaus are responsible for the accuracy of the information they disseminate[58]. The judge rejected the arguments of TransUnion, who claimed that it was impossible, in commercial terms, to check each piece of information, given the astronomical amount of data they deal with every day, and that the law requires it only to quickly correct an error whenever it is reported. We take the liberty of reproducing the following long passage from the judgment, which is very clear and deals with the liability of credit rating agencies:

> [38] The use of a partial match system may, from time to time, result in matching errors. However, it does not follow that the collector of information under such a system can escape responsibility under PIPEDA merely because that system is the commercially sensible one. The practical necessity of administering a partial match system does not mean that the Accuracy Principle can never be breached or that it has not been breached in this case. There is no defence of practical necessity set out in PIPEDA.
>
> [39] PIPEDA does not require that personal information be completely accurate, complete, and up-to-date; rather, it requires that personal information be as accurate, complete, and up-to-date "as is necessary for the purposes for which it is to be used." Thus, it is the use that the information is put to that dictates the degree of accuracy, completeness, and currency the information must have.

[55] *Chrysler Financial Canada v. Morris*, 2009 SKQB 510 (CanLII), consulted online at: http://canlii.ca/t/2770s
[56] *Haskett v. Equifax Canada Inc.*, 2003 CanLII 32896 (ON CA)
[57] *Martinek* v. *CIBC and Equifax Canada*, 2006 CarnswellOnt no. 7143 (CS) (Wec)
[58] *Nammo v. TransUnion of Canada Inc.*, 2010 CF 1284 (CanLII)

> [40] Credit information, such as that supplied by TransUnion, has one use only: to allow credit grantors to make informed, reliable and objective decisions. Informed, reliable and objective decisions require that the information on which the decisions are based meets a high standard of accuracy, completeness and currency. This role of credit information and credit agencies such as TransUnion was described by Justice Feldman of the Ontario Court of Appeal in *Haskett v Equifax Canada Inc. et al.*, [2003] O.J. No. 771, para 29, as follows:
>
>> 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, and its contents could well affect whether they are able to obtain the loan, the job or the accommodation. 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.
>
> [41] The information TransUnion had in its database concerning the applicant and, more importantly, that it provided to RBC, may have been complete and up-to-date; however, it was not accurate. It was grossly inaccurate.
>
> [42] It appears to the Court that a human check of the information prior to transmitting it to RBC would most likely have stopped the false information being transmitted to RBC. It did not require a close examination of the information from CBV to conclude that it had been improperly placed on Mr. Nammo's file.
>
> [43] I find that the applicant's personal information in the possession of TransUnion was not "as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used" (clause 4.6) and was not "sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual" (clause 4.6.1). I agree with the findings of the PCC that TransUnion failed to meet its obligations under clauses 4.6 and 4.6.1 and thus breached PIPEDA[59].

So, the courts consider that entering a disputed claim into a credit report, with no mention that the claim is being disputed, is wrong. In addition, the credit reporting agency that disseminates this incomplete information is also at fault.

[59] *Nammo v. TransUnion of Canada Inc*., 2010 CF 1284 (CanLII), par 38 to 43

In 2011, the Superior Court of Ontario issued, under the *Consumer Reporting Act*, a judgment which contrasts markedly with the decision of the Federal Court in *Nammo*[60]. Here, the judge stands behind Equifax's arguments and states that:

> [33] Equifax receives approximately 110,000,000 entries into its database every month. To require Equifax to consider and analyze each piece of information before that information receives full status in the database is unrealistic and unwieldy in light of the objectives of the CRA system.
>
> [34] Also, it must be recognized that a credit reporting agency such as Equifax does not create the consumer credit information that is stored on its database. Rather, it relies on its members to provide accurate information which it then stores for the benefit of its members. The duty on Equifax is not to guarantee the accuracy of the information, but rather to set up reasonable procedures (s.9) and to investigate disputes (s.13).
>
> [35] In that respect, I find that Equifax has set up reasonable procedures in an attempt to ensure the accuracy and fairness of the information that is stored and distributed by Equifax. I accept the evidence of Paul Lefevre (hereinafter called "Lefevre"), director of operations of Equifax, that any business that wishes to become an Equifax member must pass a rigorous screening process before that business will be accepted as an Equifax member. Through the screening process the applicant business must convince Equifax that the business maintains good business practices and has a justifiable purpose for requiring credit information.
>
> [36] Equifax also has restrictions as to who may provide information to the Equifax database. Equifax monitors the system-to-system electronic connection between a member's database and the Equifax database. Further, Equifax has a system for purging entries in the database after the expiry of a number of years. Thus, the data provided by the members to Equifax, and stored in its database, has an inherent integrity to it.
>
> [37] In my opinion, given the above-mentioned procedures, Equifax is entitled to accept the data provided by its members at face value. Thus, I conclude that Equifax has not breached its duty by accepting credit information from Tarion without any further consideration."

Further on, the judge even adds that Equifax has no duty to verify every piece of information that is disputed. He says:

> [39] I will next consider whether Equifax's response to Spencer's dispute of the Tarion information was a breach of its duty to investigate the dispute. Spencer submits that when Spencer disputed the Tarion information, Equifax had a duty to demand documents from Tarion in support of the data, and then make a determination as to

[60] *Spencer v. Equifax Canada Inc.*, 2011 ONSC 7284 (CanLII)

> whether the data was correct. Again, I reject that suggestion. A credit reporting agency receives extremely high volumes of data, and it cannot be required in every case to examine the underlying documents for that data simply upon a consumer disputing the accuracy of the data. The duty to investigate the dispute does not include in each case a duty to review the underlying documentation.
>
> [40] Further, Equifax is not required to adjudicate disputes. Disputes may be adjudicated by mediators, arbitrators, or courts of law, but Equifax is none of these. To require Equifax to adjudicate disputes would cause significant delays and would again mean that information in the database may not be current."

Here, the judge imposes a much lighter burden on the credit rating agencies than did the judge in *Nammo* [61].

Several Québec Small Claims Court judgments order companies and credit reporting agencies to compensate consumers as a result of erroneous entries in their credit reports[62]. On the other hand, other decisions by the same court have gone in the opposite direction, with the judges placing a great deal of responsibility on the shoulders of consumers.

In 2009, a judge concluded that a creditor who entered false information in a consumer's credit report was responsible for the harm that the consumer suffered as a result of this entry, yet nonetheless assigned contributory fault to the consumer, saying he should have contacted Equifax to clarify the situation[63].

In 2006, a small claims court judge came to the conclusion that although the consumer was right to contest a creditor's claim, he was the architect of the misfortune caused by the stain on his credit history. According to the judge, the consumer should have paid the sum demanded under protest to prevent the entry in his credit report[64].

Also in 2006, the same Québec Small Claims Court judge stated that even if a creditor submits false information to credit reporting agencies, this does not necessarily mean that the consumer has a right to claim damages. She said that the consumer had an obligation to minimize his damages and that he should have taken all the steps necessary to make corrections to his credit report [65].

Going through these decisions, we find that the majority of Canada's highest courts, with one exception, invoke the responsibility of the credit bureaus and creditors who make entries in credit reports. However, this kind of litigation very rarely reaches the highest courts. In fact, since such cases are usually consumer disputes involving relatively small sums of money, they are mostly heard in small claims courts. However, we found that the decisions of the small

[61] *Nammo v. TransUnion of Canada Inc*., 2010 CF 1284 (CanLII)
[62] *Bélanger v. Citifiancière*, 2004 QCCQ 40795 (CanLII), *Boulerice v. Acrofax Inc*, 2001 QCCQ 16570 (CanLII), *Cloutier v. Citibank Canada*, 2009 QCCQ 5883 (CanLII), *Breault v. Gestion Dreymax*, 2011, QCCQ 3171 (CanLII), *Fatiha Lattab v. Equifax Canada*, 2009 QCCQ 8611 (CanLII)
[63] *Déry v. Brault and Martineau inc.,* 2009 QCCQ 1044 (CanLII)
[64] *Gallico v. Équifax Canada inc.*2006 QCCQ 15723
[65] *Stoica v. Royal Bank of Canada* 2006 QCCQ 16672

claims courts are very varied, some even confirming and endorsing the extralegal punishment imposed by means of credit reports.

We deplore the lack of cohesion in small claims courts decisions, particularly in Québec. We recommend that Parliament add provisions governing credit reports to the *Consumer Protection Act*. This, in our view, this would send the message to judges that, in credit reports, as in consumer affairs in general, the consumer is the vulnerable party and must be accorded a high degree of protection.

3.6 The credit report as pressure tactic

As we have said, credit is occupying an ever larger place in the lives of consumers. It is a powerful weapon in the hands of creditors. One pressure group in the United States that is associated with credit agencies has understood this. In 2009, PERC released a study that analyzed how entries in credit reports could influence consumers to pay their bills[66]. This study focussed on two case studies of energy utilities that decided to relay their clients' payment habits to credit reporting agencies. According to PERC, the utilities' collection accounts have been significantly reduced since the measure was implemented. In addition, a survey conducted by PERC on American consumers shows that consumers are more likely to pay their bills when payment is recorded in their credit history than when it is not. PERC finds that credit reports are an excellent way for utilities to reduce the number of overdue accounts.

This research has been challenged by, among others, a consumer rights advocacy group, which pointed out the perverse effect that such a measure can have on low-income households[67]. It reported several negative impacts, such as the pressure this practice exerts on low-income households that leads them to focus on paying the bill at the expense of paying for other items such as groceries, and medical and dental care. In addition, it reported that low-income households are overrepresented in the energy suppliers' overdue accounts.

On the basis of the PERC study, Hydro-Québec made an application in August 2012[68] to be permitted to make entries in its customers' credit reports[69]. Before anything else, this request by Hydro-Québec needs to be put in context: Hydro-Québec is a Crown corporation with a monopoly; it cannot choose its customers. It has an obligation to supply every Quebecker who requests it, except those who have an outstanding debt toward the distributor. However, Hydro-Québec's application was not motivated by the need to assess the risk associated with their customers' likelihood of honouring a debt repayment schedule, which, we will recall, is

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[66] Michael Turner, Robin Barghese, Patrick Walker and Katrina Dusek, *Credit Reporting Customer Payment Data : impact on customer payment behaviour and furnisher costs and benefits*, PERC, March 2009, consulted online at: http://perc.net/files/bizcase_0.pdf

[67] John Howat, *Full Utility Credit Reporting : Risk to low income consumers*, National Consumer Law Center, December 2009

[68] This request was made within the context of its annual application to the Régie de l'énergie regarding setting electricity rates and modifying its conditions of service.

[69] Hydro-Québec, *Modifications aux conditions de services d'électricité*, Demande R-3814-2012, HQ-11, document 2, pages 20 à 30, consulted online at: http://publicsde.regie-energie.qc.ca/projets/80/DocPrj/R-3814-2012-B-0048-DEMANDE-PIECE-2012_08_01.pdf

the original purpose of credit reports. Hydro-Québec wants to use credit reports as a tool to pressure customers into prioritizing payment to the distributor.

Option consommateurs and other consumer groups have objected strongly to this application by Hydro-Québec, and a number of consumer groups have argued their position before the Régie de l'énergie[70]. These consumer groups argue that the study that Hydro-Québec based itself on was insufficient and that the distributor had in no way demonstrated to the Régie that the proposed measure would reduce its bad debts. In addition, they were extremely concerned about the impact that entries in credit reports could have on the less fortunate in Québec society who have little control over their energy consumption. Allowing Hydro-Québec to make entries in credit reports made low-income households even more vulnerable. On March 13, 2013, the Régie rejected Hydro-Québec's application regarding credit reports[71], aligning itself with the arguments put forward by the consumer associations.

The PERC study and Hydro-Québec's application clearly show how powerful a weapon credit report has become in the hands of creditors. Many see it as the ultimate way to put pressure on customers. We are very concerned about this new practice. It seems that creditors are dissatisfied with the traditional methods of punishing consumers who fail to fulfil their obligations, i.e. through the courts. Litigation is a slow, cumbersome, expensive and complex process. Numerous creditors have seen in the credit report a simple, inexpensive and effective tool for reducing and recovering bad debts. This is how we came to consider the credit report as a tool of extralegal justice.

4 - The legislation abroad

4.1 Legislation in the United States

In 1970, the United States passed a law on the protection of personal information, the *Fair Credit Reporting Act* (FCRA)[72]. This law was passed by the U.S. Congress to address abuses by the credit reporting agencies, since credit reports at that time contained errors that had serious consequences for consumers. Congress wanted to make the credit agencies responsible for ensuring the accuracy of the information they gathered. This highly detailed law is a veritable protection system specifically designed to protect against the abusive use of credit reports. It has been amended several times since its adoption in order to take changing practices into account.

[70] See the various briefs presented by consumer associations on the Régie de l'énergie website at http://publicsde.regie-energie.qc.ca/_layouts/publicsite/ProjectPhaseDetail.aspx?ProjectID=80&phase=1&Provenance=A

[71] Régie de l'énergie, *Décision finale - Demande relative à l'établissement des tarifs d'électricité de l'année tarifaire 2013-2014*, p. 156, online at:http://publicsde.regie-energie.qc.ca/projets/80/DocPrj/R-3814-2012-A-0072-DEC-DEC-2013_03_13.pdf

[72] *Fair Credit Reporting Act*, 15 U.S.C. § 1681

The FCRA defines the acceptable uses of credit reports. Under the *Act*, a credit reporting agency may make a credit report available to anyone who reasonably wishes to use it in one or more of the following situations:

- to make a decision regarding consumer credit;

- for employment purposes;

- for the purposes of subscribing to an insurance policy;

- to determine the consumer's eligibility for a government policy requiring an assessment of his or her financial responsibility;

- to assess the risks related to awarding credit;

- in connection with a legitimate business need:

- in connection with a business transaction initiated by the consumer;

- to verify whether the consumer continues to meet the conditions of an existing contract.

In addition, the person viewing the credit report who intends to take adverse action toward the consumer based in whole or in part on information contained in it, must provide the consumer with a copy of his or her credit report accompanied by a written description of consumers' rights under the FCRA.

The FCRA requires credit reporting agencies to play a role in the prevention of identity theft and fraud committed against consumers. At a consumer's request, agencies are obliged to place an alert in the consumer's file to let potential creditors that know he or she may be a victim of fraud or identity theft and thereby prevent the dissemination of information resulting from such theft.

The FCRA requires credit bureaus to ensure that the information in their possession is as accurate and as complete as possible. The FTC has even published guidelines for credit rating agencies outlining best practices for ensuring the accuracy of the information they collect.

The *Act* also sets up a mechanism for challenging information contained in the credit report. When a consumer disputes information contained in their credit report, the FCRA requires the credit bureaus to verify any disputed information within 30 days of the request. The agency may, however, refuse to verify it if the application seems frivolous or irrelevant. Following the audit, the agency must correct the information. Also, the credit reporting agency must establish procedures to ensure that misinformation does not reappear in the consumer's credit report.

The FCRA requires that, each year, credit reporting agencies send to consumers who so request a free copy of their credit report. A free copy must also be sent following an unfavorable decision against the consumer.

In the event of a violation of the FCRA, the *Act* prescribes specific civil liability remedies. It makes a distinction between willful noncompliance, which is behaviour that shows a reckless disregard for the law, and noncompliance due to negligence. These remedies may be exercised directly in civil court.

The United States has no Commissioner responsible for seeing to complaints, as in Canada. However, the FTC is responsible for monitoring compliance with the FCRA. As we saw above, the FCRA requires the FTC to investigate the accuracy of the information contained in the credit reports held by U.S credit agencies.

4.2 Legislation in France[73]

The French system differs appreciably from the North American system. France has opted for a central, State-controlled approach. Whenever a French debtor has payment difficulties related to a credit agreement, he or she runs the risk of having each instance of non-payment recorded in a centralized national register managed by the Bank of France, which is the only body authorized to centralize such information.

This central register is called the *Fichier d'incident de remboursement des crédits aux particuliers* (FICP) **[**National Register of Household Credit Repayment Incidents]. The FCIP was established by the *Loi du 31 décembre 1989 sur la prévention et au règlement des difficultés liées au surendettement des particuliers and des familles*[74] [Act on Preventing and Resolving Personal and Household Debt Problems – the "Neiertz Act"]. The provisions were subsequently integrated within the *Consumer Code*[75] under Articles L333-4 to L333-6. Only debtors who default on debt repayments are recorded in the file.

The types of repayment incidents that can be entered into the FICP are clearly defined in the law. These are incidents of default of payment, for which the credit institution may initiate legal proceedings or declare the forfeiture of the term after a formal notice to the debtor has had no effect.

Once the credit institution records a repayment incident, it contacts the debtor to advise him or her of the situation and the risk of having the incident reported to the Bank of France. The institution must give the debtor in default 30 days to rectify the situation. The notice sent to the debtor must state the particulars of the incident. This includes the amount owed, references, the amount of credit, the means by which the debtor can resolve the situation and the period within which the situation must be rectified.

The institution must also state how the stored data can be accessed and rectification made to it. If the debtor is able to pay the full amount due or to reach an agreement with the

[73] In this section, we have attempted to reflect the terminology used in the French legislation, some of which may strike the reader as unusual.
[74] *Loi n°89-1010 du 31 décembre 1989 relative à la prévention and au règlement des difficultés liées au surendettement des particuliers and des familles* NOR: ECOX8900100L, consulted online at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000343019&dateTexte=20111230
[75] Consulted online at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069565

institution, the incident cannot be reported. However, if after 30 days, no change has occurred in the debtor's file, the incident became reportable. The credit institution now has four business days to inform the Bank of France of the incident. It is up to the credit institutions whether or not to declare debts of less than 150 euros for which no forfeiture has been imposed.

The information to be transmitted to the Bank of France are the contact information on the debtor, the type of credit that resulted in the payment incident and the date on which the incident became reportable. For each reported incident, the credit institution must notify the Bank of France of full repayment of all sums due no later than four working days after these are paid. The information related to these incidents is immediately expunged upon receipt of a statement of full payment of amounts due by the establishment or organization that originated the registration request. It cannot in any case be kept in the register for more than five years from the date on which the Bank of France registered the incident that led to the declaration.

Consumers registered in the FICP have the right of access to their file and the right to request corrections. They must submit their request to the credit institution, since the Bank of France has no authority to evaluate information provided by credit institutions, debt commissions and Court registry. Thus, corrections can only be made upon the express request of the credit establishment or organization that made the disputed entry. Consumers must therefore make an application to the credit institution that made the entry. In the case of a correction or a dispute concerning an debt repayment incident, they should contact the secretariat of the debt commission in charge of their case.

Consumers may further request that the National Commission for Informatics and Liberties (CNIL) exercises its remedies against the credit institution or organization at fault. The CNIL is the body responsible for monitoring best practices with regard to data bases. If it finds evidence of abuse, it may intervene to correct the situation. Victims of abusive entry in their file or of tardy removal of an entry can go to court to rectify the situation. However, the debtor has no direct recourse against the Bank of France. Only the organizations and lending institutions that made the entry have the power to correct or request the removal of any entry from the register. The Bank of France, for its part, is responsible for checking modifications or removing entries from the FICP.

When the debtor has paid off all his debts to his creditors and is on time with his payments to the bank or credit institution, he has the right to have his file removed from the FCIP registry.

4.3 Comparative analysis with legislation in Canada

The means by which personal information in credit reports and credit scores is protected is similar in Canada and the United States. France, however, has adopted a completely different system.

The Canadian approach is quite simple. The laws often lay down broad principles aimed at striking a balance between the consumers’ right to privacy and the business needs of companies using credit reports. The protection available to consumers is not clearly defined by law, but is based on the good faith of the users of personal information. In addition, the protection of personal information in credit reports usually comes under general privacy laws. Some provinces have added specific provisions to their credit laws to protect consumers, but such measures often provide only a minimum of protection.

The U.S. approach to privacy is a little different. The *Fair Credit Reporting Act,* which is very complex and highly detailed, specifically regulates credit reports. Canada could certainly learn from the U.S. regulations and adopt a comprehensive plan specifically for credit reports. Finally, Canada and the provinces could give more power to privacy commissions in the area of privacy protection in order to monitor credit rating agencies more closely, as does the FTC. One of our recommendations is that the Canadian legislation should include provisions for monitoring the accuracy of the information contained in credit reports, as required in the FCRA.

The French approach seems impractical in Canada, given the North American context in which we operate. On the other hand, Canadian legislators might find inspiration in some of the more interesting ideas in the French regulations. For example, it seems a good idea to determine at what point a default may be entered in a credit report . Such a procedure could give consumers an opportunity to settle the debt before it is entered in the credit report. Also, a minimum amount could be specified below which it a negative entry in a credit report is unjustified. We regularly see consumers who have seen their credit tarnished for ridiculous sums such as $15, $20 or $30. These simple steps would establish a better balance between the various parties involved and ensure better consumer protection.

5 - Conclusions and recommendations

The credit report has undergone major changes since its inception in the late nineteenth century. Today, it is ever-present in the lives of Canadians. This does not mean, however, that they know very much about it.

We recommend that the federal government, the provincial governments and the various privacy commissions better educate Canadian consumers about credit reports.

We recommend that Canadian consumers better inform themselves about credit ratings and reports.

Canadian privacy laws contain very few provisions specifically related to credit reports. This creates problems of consistency and law enforcement. The current system leaves too much room for interpretation and does not sufficiently protect consumers. Challenge mechanisms are often too cumbersome, complex and lengthy, and are weighted in favor of the creditor who makes the entry in the credit report. Finally, certain indications lead us to believe that credit reports have a relatively high error rate, a fact that government authorities should find alarming.

We recommend that the two levels of government (federal and provincial), in collaboration with the various privacy commissions, conduct a comprehensive survey on the accuracy rate of credit reports in Canada.

We recommend that the aforementioned levels of government (federal and provincial) find inspiration in the U.S. model and adopt a comprehensive legislative framework specifically for credit reports. We also recommend that they seek inspiration in some of the ideas introduced in the French model. The amended regulations should enable more effective monitoring of credit rating agencies and, in turn, lead them to assume greater responsibility. In particular, the laws governing credit reports should at the very least include:

- **a provision that a company that makes a decision about a person based "in whole or in part" on his credit report must notify that person in writing and forward him a copy of his credit report.**
- **a provision that a company that makes a negative entry in a credit report must notify the consumer concerned and inform him about the challenge procedure.**
- **a provision governing the entry of disputed claims in the credit report such that these will not cause undue hardship to the consumer.**

We recommend that the Québec legislature introduce provisions governing credit reports into its Consumer Protection Act, as other Canadian provinces such as British Columbia, Ontario and Alberta have done.

We recommend that credit rating agencies assume responsibility for the accuracy of the information they collect and disseminate, including improving their verification process.

We recommend that federal and provincial legislators, in litigation involving consumer credit, grant common law courts the power to order the rectification of credit reports, in the interests of the effective administration of justice.

We recommend that federal and provincial legislators grant privacy commissions the authority to award damages when entries in the credit report cause harm to consumers.

Entering litigious claims in the credit report causes problems. There are almost no provisions in current laws covering such situations, apart from an explanatory statement by the consumer which is often outweighed by the negative impression created by the creditor's note in his credit report.

We recommend that credit reporting agencies provide a notation that would permit a disputed claim to be entered in the credit report in such a way that it will cause no harm to the consumer for as long as the dispute is not resolved.

We recommend that the two levels of government (federal and provincial) develop a policy for quickly settling disputed claims that could taint the consumer's credit report and prohibit any negative entries being made in the credit report until such time as the dispute is resolved.

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7 - List of Appendices

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Annexe 1 - Interview questions– Mtre. Pierre-Claude Lafond

1. Que connaissez-vous des dossiers de crédit ?

2. Selon vous, quel est le rôle du dossier de crédit ? pour un commerçant ? pour un consommateur ?

3. Comme nous l’avons exposé dans la mise en situation qui vous a été transmise, le système actuel semble opérer un renversement de fardeau de preuve, c’est-à-dire que le consommateur devra démontrer que l’entry est fausse ou erronée. Que pensez-vous de cette situation ?

4. Selon vous, comment devrait être traité les créances litigieuses dans un dossier de crédit ? Le commerçant devrait-il avoir le droit de rapporter une créance litigieuse ? Pourquoi and si oui, comment ?

5. Selon vous, que devrez être le rôle des agences de crédit (Equifax and TransUnion) lorsqu’un commerçant rapporte des renseignements ? Devrait-il être imputable des erreurs qui pourraient se glisser dans le dossier de crédit ? Devrait-il avoir un rôle à jouer lorsque le consommateur rapporte une entry litigieuse ? Lequel ? Expliquez

6. Que pensez-vous du jugement que nous avons cité dans la mise en contexte ? Selon vous, le consommateur a-t-il une certaine responsabilité quant à l’exactitude des renseignements qui s’y trouvent and à la correction des renseignements erronés ?

7. Selon vous, le système actuel des dossiers de crédit fonctionne-t-il bien ? Pourquoi ?

8. Connaissez-vous les recours légaux du consommateur lorsqu’il veut contester une information erronée ou litigieuse dans son dossier de crédit ? Si oui, pouvez-vous nous en parler ? Selon vous, est-ce que cette façon de faire est efficace ?

   8.1 Un consommateur qui veut faire corriger une entry dans son dossier de crédit doit s’adresser obligatoirement à la CAI. Par contre, s’il s’agit d’une entry litigieuse, la CAI n’a pas compétence. Le consommateur devra d’abord s’adresser à la Cour du Québec pour faire trancher le litige and ensuite s’adresser à la CAI pour faire corriger le dossier de crédit. Il devra aussi s’adresser aux deux instances s’il veut aussi obtenir des dommages en plus de la correction car la CAI n’a pas compétence pour accorder des dommages intérêts. Que pensez-vous de cette situation.

9. Croyez-vous que le consommateur est bien protégé par les règles actuelles ? Pourquoi ? Comment pourrait-on les améliorer ?

Annexe 2 - Interview questions– Consumer Associations

Bonjour,

Option consommateurs effectue présentement une recherche sur les dossiers de crédit pour laquelle nous sollicitons votre aide. Nous aimerions savoir si vous avez reçu des plaintes sur les dossiers de crédit et, le cas échéant, leur nombre and leur nature.

Cette recherche vise à déterminer si le dossier de crédit est devenu un « outil de justice alternative », c'est-à-dire s'il sert aux créanciers de moyen pour punir ou menacer un consommateur sans faire appel aux tribunaux. Sachant combien un mauvais dossier a de graves impacts sur le consommateur, il nous apparaît pressant d'étudier cette question.

Au terme de cette recherche, nous souhaitons évaluer les lois applicables aux dossiers de crédit and formulé des recommandations pour protéger plus adéquatement les consommateurs.

Annexe 3 - Interview questions– Privacy Commissions

1. Approximativement, combien de demandes de renseignement concernant les dossiers de crédit recevez-vous dans une année? Expliquez quel genre de demande recevez-vous ? Quelle sorte de demande revient le plus souvent ?

2. Approximativement, combien de plaintes concernant les dossiers de crédit recevez-vous dans une année? Expliquez le genre de plaintes ? Quelle sorte de plainte revient le plus souvent ?

3. Approximativement, par année, combien de décisions rendues par votre organisme concernent les dossiers de crédit ? Expliquez les décisions.

4. Quel est le rôle de votre organisme dans le contrôle and vérification des renseignements personnels qui se trouvent dans un dossier de crédit ?

5. Est-ce que votre organisme constate qu'il des dossiers de crédit qui contiennent des erreurs ? Quelles genres d'erreurs.

6. Quelles sont les recours du consommateur qui veut contester une entry dans son dossier de crédit ?

7. Si un consommateur a subi un dommage suite à une entry fausse ou erronée, peut-il présenté une demande auprès de votre organisme pour se faire dédommager ? Si non, que doit-il faire, devant quelle instance doit-il se présenter ?

8. Selon vous, les agences de crédit sont-elles bien encadrées par la loi ? Que devrait-on améliorer ?

Annexe 4 - Interview questions– Financial Consumer Agency of Canada

1. Approximativement, combien de demandes de renseignement concernant les dossiers de crédit recevez-vous dans une année? Expliquez quel genre de demande recevez-vous ? Quelle sorte de demande revient le plus souvent ?

2. Approximativement, combien de plaintes concernant les dossiers de crédit recevez-vous dans une année? Expliquez le genre de plaintes ? Quelle sorte de plainte revient le plus souvent ?

3. Quel est le rôle de votre organisme concernant les dossiers de crédit ?

4. Selon vous, les agences de crédit sont-elles bien encadrées par la loi ? Que devrait-on améliorer ?

Annexe 5 - Interview questions– Canadian Bankers Association

1 - Est-ce que votre association s'intéresse à la question des dossiers de crédit en général ? Pourquoi ?

2 - Est-ce que les dossiers de crédit font partie des sujets que vous abordez avec vos membres ? Si oui, de quelles façons ? Si non, pourquoi ?

3 - Comment vos membres utilisent les dossiers de crédit de leurs clients ? Dans quel but ?

4- En général, vos membres trouvent-ils que le système actuel des dossiers de crédit fonctionne bien ? Pourquoi ?

5 - Avez-vous des préoccupations quant à l'exactitude des informations qui sont rapportées dans les dossiers de crédit ? Si oui, lesquelles ? Abordez-vous cet aspect avec vos membres ?

6 - Avez-vous une position sur la façon que vos membres rapportent une information litigieuse dans les dossiers de crédit ?

Annexe 6 - Interview questions—Ministry of Consumer Services of Ontario

1. Do you receive complaints about credit reports?

2. If so, what kind of complaints ?

3.Does your organization offer any information to consumers about credit reports?

4. Is your organization concerned about credit report issues?