



January 15, 2021

By email to consumerpolicy@ontario.ca

Consumer Policy and Liaison Branch
Ministry of Government and Consumer Services
777 Bay Street, 5th floor
Toronto, Ontario M5B 2H7

Dear Sir or Madam:

Re: Comments on the *Consumer Reporting Act* from the Professional Background Screening Association

The Canada Council of the Professional Background Screening Association (PBSA) thanks you for taking the initiative to review the *Consumer Reporting Act* (the “Act”) and for inviting members of our industry to the stakeholder consultation held on November 19, 2020. We appreciate the opportunity to provide these additional comments about a law that regulates our industry in Ontario.

The PBSA is a non-profit trade organization which represents organizations providing employment, tenant and other background screening services, and strives to foster excellence, integrity, ethics and compliance in our industry. We have over 815 member companies globally, including 26 members in Canada, all of which have employees, operations, or clients in Ontario. Together we conduct background checks on millions of Ontarians each year.

The PBSA supports a strong legislative framework for privacy and consumer protection in Ontario, and as an industry, we have built our businesses around fairness, transparency and privacy for consumers. We look to laws and regulations impacting our industry to be consistent, and not in conflict, with other legal obligations across the country and our goal is to cooperate with policymakers to ensure that these goals are met and that compliance is not unnecessarily burdensome for organizations.

The following comments reflect our experience with the Act and our thoughts on how it can be improved to provide more consistent protection to consumers without challenging our industry unnecessarily. For ease of reading, we have called out concrete proposals in **underlined, bold text**.

EXECUTIVE SUMMARY

We recommend that point-in-time background checks be explicitly removed from the scope of the Act, because these activities are already subject to other legislation at the provincial and federal level and cannot always be delivered in a way that aligns strictly with some provisions of the Act.

If the government prefers not to remove point-in-time background checks from the scope of the Act, we recommend:

- a simplification of the registration process to align with other jurisdictions;
- clarification around the necessity to corroborate subjective information, especially with regard to pre-employment reference interviews; and
- exemptions to the limitations set out in the Act on collection and reporting of criminal records and other protected information when that reporting is done in accordance with established federal or provincial rules (as in the case of criminal records) or is incidental to the purpose of the report (as in the case of certain protected characteristics which may appear in social media profiles, on identity cards, or on government-mandated consent forms).

SCOPE OF APPLICATION

Currently, the Act applies to any “consumer reporting agency” which is defined in clause 1 (1) of the Act as:

a person who for gain or profit or on a regular co-operative non-profit basis furnishes... a written, oral or other communication... of credit information or personal information, or both, pertaining to a consumer for consideration in connection with a purpose set out in clause 8 (1) (d)

This definition is extremely broad and would appear on its face to apply to almost any organization which provides any information about a consumer to another organization. The purposes referred to in clause 8 (1) (d) encompass essentially any business relationship involving a consumer. However, when reading the substantive provisions of the Act, its intent clearly appears to be geared towards credit bureaus whose business model involves the development and maintenance of independent files about consumers which are sold to third parties for the purposes of gathering identifying information about the consumer and evaluating the consumer’s financial position.

Members of the PBSA generally do not maintain ongoing files about consumers, but instead conduct a single, point-in-time background check at the request of the employer, volunteer organization, landlord or other contracting entity. These background checks may include credit information which is sourced from credit bureaus and tailored to the requirements of the Act, but may also include other information which is relevant and timely at the moment of the request, including court records, police records, employment history and education history. Background checks are conducted with the knowledge and full, informed and explicit consent of the consumer and, in Ontario, are generally subject to the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) as they are conducted in the course of the commercial activities of the background screening company. If the Ontario government chooses to put in place private-sector privacy legislation at the provincial level, background screening will most likely be subject to that law. Finally, a core aspect of background screening is criminal history, which is regulated in Ontario by the *Police Record Checks Reform Act* (“PRCRA”); our industry helped shape that law and its regulations to set appropriate guardrails for reporting police information about Ontarians.

As the background screening industry does not maintain ongoing files on consumers, and as it is already subject to privacy rules under provincial and federal law and may eventually be subject to further privacy rules under a provincial omnibus privacy law, we recommend that the scope of the Act be narrowed such that background screening—and indeed any activity that is not the maintenance of an

ongoing file about a consumer similar to a credit file—be excluded, similar to the New Brunswick Credit Reporting Services Act of 2018.

REGISTRATION

As currently written, the Act requires registration of any consumer reporting agency or personal information investigator. The Ontario registration process is an exception in Canada for its complexity; paperwork must be filed not only for the consumer reporting agency but for its parent companies and shareholders, and registration must be renewed annually with a full resubmission of documents. In comparison, Quebec, Saskatchewan and Newfoundland & Labrador's registration processes are significantly less onerous and involve little more than a one-page application form covering only the consumer reporting agency itself, and renewal only requires a confirmation of previously submitted information (or changes to it); Manitoba, Alberta and British Columbia do not require registration at all.

Additionally, registration is only permitted for organizations with offices open to the public in Ontario; this is an impossible compliance burden for an organization which offers enterprise-level background services to organizations operating in Ontario but does not happen to operate in Ontario itself. As a practical matter, consumers do not communicate with consumer reporting agencies by attending in person; they do so by telephone or by email. A requirement that registrants be present in Ontario does not add value to the consumer and likely drives down compliance with the registration rules.

We recommend taking one of the following actions to simplify the registration process: (1) limit the application to the consumer reporting agency itself and not its parent companies or shareholders, and limiting the renewal process to a simple confirmation or correction of previously submitted information; or (2) eliminating the registration requirement altogether.

We also strongly recommend that the registration prerequisite to have an office open to the public in Ontario be eliminated, as it encourages consumer reporting agencies outside of Ontario to operate in a legal grey zone wherein they are theoretically required to register but are unable to do so in practice.

CORROBORATION OF INFORMATION

Clauses 9 (3) (a)-(b) of the Act requires a consumer reporting agency to corroborate any information reported in a consumer report. While this requirement is certainly appropriate in a credit reporting context, in considering the other searches typically included in background screening it may not be appropriate, relevant or possible. For example, subjective information provided in personal reference interviews (a common feature of an employment background check) may be impossible to corroborate.

We recommend clarifying that corroboration is only required where it is reasonably possible given the nature of the information, and that information which is subjective by nature—like personal opinions of third parties—need not be corroborated with another source.

CONTENT OF CONSUMER REPORTS

While we believe the restrictions on the content of consumer reports set out at clauses 9 (3) (c) et seq. are generally reasonable and do not interfere with background screening providers' functions, some of these restrictions are, in practice, impossible to comply with in the context of a point-in-time background check. Most notably, the restrictions at clause 9 (3) (h) and (j) regarding criminal charges and convictions conflict with federal and provincial policy around police record checks, which grant local police departments the authority to determine what information to release, including through local Police Service Board policies, subject to certain legislated limitations (see the federal *Criminal Records Act* and the PRCRA). The standard practice of the RCMP and police services across Canada is to confirm an entire criminal record as a single unit based on the declaration of the consumer, which is not limited to seven years (see section 9.6.5 of the RCMP *Dissemination of Criminal Record Information Policy*). Background screening companies do not have the discretion under RCMP policy to amend or limit consumer declarations of criminal records. This puts background screening companies in the difficult position of having to decide whether to comply with RCMP policy or the Act.

If these restrictions will continue to apply to background screening, we recommend amending the Act such that clauses 9 (3) (h) and (j) do not apply to point-in-time police record checks conducted according to relevant federal and provincial criminal and police information legislation.

Additionally, clause 9 (3) (l) prohibits reporting of "information as to race, creed, colour, sex, ancestry, ethnic origin, or political affiliation." While these data points generally are not integral to a background check, it is possible for them to become apparent through some types of typical background check services like media or social media checks, or collection of government-issued identity documents, which may expose information about the consumer's appearance, nationality, interests and other activities.

If these restrictions will continue to apply to background screening, we recommend amending the Act such that clause 9 (3) (l) does not apply to information which becomes apparent incidentally while carrying out an otherwise permissible background check.

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Once again, we appreciate the opportunity to participate in this review of the *Consumer Reporting Act*. The Professional Background Screening Association's Canada Council offers its ongoing support in this effort and would be honoured to engage in further discussions with your office to help drive positive policy outcomes for consumers and businesses in Ontario.

Sincerely yours,

Government Relations Committee, PBSA