The Confidentiality of Tax Returns Under Canadian Law

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Synopsis

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Introduction

Canadians have, until recently, been either complacent about or confident in the belief that all information released to the tax authorities is kept secret. While s. 241 of the *Income Tax Act*[1] purports to protect the confidentiality of tax returns, a number of events in the past few years have shaken these beliefs. Testimony before the McDonald Commission of Inquiry into the R.C.M.P.[2] revealed that tax information was released to the R.C.M.P. on the basis of very remote and incidental "tax interests" relating to non-tax prosecutions. Furthermore, the Alberta Royal Commission headed by Mr Justice Laycraft which investigated Royal American Shows Inc., uncovered a secret agreement between Revenue Canada and the R.C.M.P. allowing release of tax information in any investigation of a violation of the *Income Tax Act* by members of organized crime.[3] Although

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[1] *Income Tax Act*, R.S.C. 1970-1-2, c. 63, s. 241.

[2] Ellis, *Tax Return Confidentiality* (1979) 1 Cdn Taxation, 29-30.

[3] Mr Justice James Laycraft, *Royal Commission of Inquiry into Royal American Shows Inc. and its Activities in Alberta* [:] *Report of a Public Inquiry* (1978), C-40 *et seq.* [hereinafter *Royal Commission of Inquiry into Royal American Shows*].

Mr Justice Laycraft did not find this agreement to contain any breaches of the secrecy provisions in s. 241 of the *Income Tax Act*, publicity surrounding the McDonald Commission and the Laycraft Commission has raised questions about the adequacy of existing safeguards. Perhaps the most blatant example of the ineffectiveness of the secrecy provisions was the release of information about Progressive Conservative Leader Joe Clark's tax return to a private investigator who then gave the information to Toronto broadcasters Pierre Berton and Charles Templeton.[4]

Another explanation for growing concern among commentators about the confidentiality of tax returns is that such confidentiality is one aspect of personal privacy which, like many others, is widely seen to be under increasing attack in an age of computers, bureaucracy and extensive government intervention. Professor A.S. Miller, an eminent American academic, has put the point succinctly: "Emphasis on privacy and freedom in law and legal literature ... comes at precisely the time that the demands of the State for ever increasing amounts of data and the closing of the frontier make their realization, in any substantial manner, unlikely at best."[5]

The purpose of this article is to evaluate the Canadian position with respect to confidentiality of tax returns.[6] The development of the Canadian statutory provisions relating to confidentiality will be examined and the effectiveness of the current provisions will be reviewed. Finally, using American legislation on the subject as a basis of comparison, future possibilities for the amendment of existing Canadian provisions will be examined.

I. The Canadian Position

Privacy as an enforceable right appears to be at a rather anomalous stage of development in Canada. It cannot be said that there is clearly a "right" to privacy as in the United States.[7] The Canadian legislative framework is

[4] Ellis, *supra*, note 2.

[5] Miller, "Privacy in the Modern Corporate State: A Speculative Essay" in D. Baum, *The Individual and the Bureaucracy* (1975), 44.

[6] For general discussions of the right to privacy see: Prosser, *Privacy* (1960) 48 Cal. L. Rev. 383; H. Gross, *Privacy: Its Legal Protection* (1964), XI; S. Strömholm, *Right of Privacy and Rights of the Personality* (1967), 17-8; *A Report to the Alberta Legislature of the Special Legislative Committee on the Invasion of Privacy* (1970), 8 [hereinafter *A Report to the Alberta Legislature*]; Miller, *supra*, note 5; United States Privacy Protection Study Commission, *Personal Privacy in an Information Society* [:] *Report* (1977) 541, 564-5; Mellors, "Governments and the Individual: Their Secrecy and his Privacy" in J. Young, *Privacy* (1978), 87, 91; Velecky, "The Concept of Privacy" in J. Young, *Privacy* (1978), 13, 34; Glenn, "The Right of Privacy in Quebec Law" in D. Gibson, *Aspects of Privacy Law: Essays in Honour of John M. Sharp* (1980), 41 [hereinafter *Aspects of Privacy Law*]; Schafer, "Privacy: A Philosophical Overview" in *Aspects of Privacy Law*, 1.

[7] Burns, "Privacy and the Common Law: A Tangled Skein Unravelling" in *Aspects of Privacy Law*, *ibid.*, 21; Prosser, *supra*, note 6, 386. For a recent, authoritative overview of American privacy law, see Gavison, *Privacy and the Limits of Law* (1980) 89 Yale L.J. 421.

based on the British model which tends not to affirm or enforce general principles or rights.[8] On the other hand, American developments are influencing Canadian legislators. The concept of privacy is increasingly invoked in Canadian legislation.[9] Whether or not the introduction of mere legislative terminology has provided any substantial protection of personal privacy is an open question.

The position of the common law within the Commonwealth as it relates to privacy is less ambiguous. There is no general protection for personal privacy.[10] Violation of one's privacy is not in itself a cause of action, although there are several causes of action recognized at common law and equity which do protect privacy interests — such as trespass to land, trespass to chattels, trespass to the person and nuisance. It should be noted that none of these actions could be the basis for an action resulting from the release of a tax return to a third party for a purpose unrelated to the collection of taxes. The absence of a right of privacy as an independent cause of action may result from the inherent conservatism and reluctance of Commonwealth courts to establish new causes of action. There may, however, be a more positive theoretical reason which emerges from a perusal of British authors.

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[8] *Infra*, note 13, *passim*.

[9] Legislative attempts to imbed a right to privacy in Canadian law have not been unqualified successes. For example, subs. 52(2) of the *Canadian Human Rights Act*, S.C. 1976-7, c. 33 as am., purports to provide protection of personal information:

> 52(2) Every individual is entitled to be consulted and must consent before personal information concerning that individual that was provided by that individual to a government institution for a particular purpose is used or made available for use for any non-derivative use for an administrative purpose unless the use of the information for that non-derivative use is authorized by or pursuant to law.

The most obvious problem with this subsection is the fact that no guidance is given to the meaning of the term "non-derivative use". In Canadian Human Rights Commission, *Annual Report of the Privacy Commissioner 1979* (1980), 7, the Commissioner stated that "the rather narrow provisions of the Act are easily misunderstood and some difficulties of interpretation are bound to arise." Perhaps because of these difficulties of interpretation, none of the complaints with reference to "non-derivative use" of information dealt with by the Commission in 1979 were found to be justified. British Columbia (*Privacy Act*, R.S.B.C. 1979, c. 336), Saskatchewan (*The Privacy Act*, S.S. 1979, c. P-24 as am.) and Manitoba (*The Privacy Act*, S.M. 1970, c. 74, am. S.M. 1971, c. 82, s. 49) have enacted legislation creating tortious rights of action for violations of privacy. It is too early to predict how the courts will deal with this legislation. The burden is on the judiciary to give the legislation form and predictability, and to balance the needs of society and the interests of the individual. See Osborne, "The Privacy Acts of British Columbia, Manitoba and Saskatchewan" in *Aspects of Privacy Law*, *supra*, note 6, 73, 77-8. Canadian courts have not enthusiastically welcomed such a role. See, *e.g.*, the interpretation given the *Canadian Bill of Rights*, R.S.C. 1970 (App. III) in *Lavell* v. *A.-G. Canada* [1974] S.C.R. 1349 and *A.-G. Canada* v. *Canard* [1976] 1 S.C.R. 170. The traditional conservatism of Canadian courts and, in particular, their tendency to place restrictive interpretations upon generally phrased statutes, has placed an onus on the legislator to define clearly and unambigously the right which he wishes the courts to enforce.

[10] Burns, *supra*, note 7.

Privacy has been seen as a right which must, to a certain extent, be surrendered in return for social benefits.[11]

While the influence of Britain is clearly manifest in the Canadian parliamentary system, the American influence has also been strong. The last twenty years in Canada have brought with them a great interest in individual rights and a move towards constitutional guarantees of these rights such as exist in the United States.[12] For the most part, however, it is not accurate to say that an enforceable right to privacy *per se* exists in Canada.[13]

It should be mentioned that the situation in Québec civil law is very similar to the common law in the rest of Canada. Although "the right to respect for ... private life" is a right enumerated in the *Québec Charter of Human Rights and Freedoms*,[14] the *Charter* is simply declaratory of a group of independently existing rights.[15] Violation of privacy leading to moral damages *may* constitute a civil fault under art. 1053 of the Civil Code. While the courts have not widely endorsed this position, it was expressly recognized in *Robbins* v. *C.B.C.*[16]

II. The American Position

In the United States there is a general, independent right of privacy which will support a cause of action.[17] The origin of that right is clear. In 1890, Samuel D. Warren and Louis D. Brandeis published an article entitled *The Right to Privacy*.[18] By interpreting a series of old English cases related to the invasion of property rights, breach of confidence and defamation, Warren and Brandeis were able to construct an individual right to determine "ordinarily, to what extent ... thoughts, sentiments, and emotions shall be communicated to others."[19] This general right of privacy opened an "action of tort for damages in all cases".[20]

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[11] Mellors, *supra*, note 6. See also D. Flaherty, *Privacy and Government Data Banks* [:] *An Internal Perspective* (1979).

[12] See, generally, *A Report to the Alberta Legislature, supra*, note 6; Glenn, *supra*, note 6; *Canadian Human Rights Act*, S.C. 1966-67, c. 33 as am.; *Canadian Bill of Rights*, R.S.C. 1979 (App. III); see also the *Canada Act, 1982*, Schedule B, *The Constitution Act, 1982*, Part 1, *The Canadian Charter of Rights and Freedoms*.

[13] See, generally, Burns, *supra*, note 7; Osborne, *supra*, note 9; *R.* v. *Snider* [1954] S.C.R. 479, 483-4 *per* Rand J.

[14] *Québec Charter of Rights and Freedoms*, L.R.Q., c. C-12, s. 5.

[15] Glenn, *supra*, note 6, 42.

[16] [1958] C.S. 152. The prospects for the development of privacy as an enforceable principle or right may, however, be better in Québec than in the common law provinces, since the civil law is by nature much more comfortable with broad principles. See Glenn, *supra*, note 6, 45.

[17] See Burns, *supra*, note 7, and Gavison, *supra*, note 7.

[18] (1890) 4 Harv. L. Rev. 193.

[19] *Ibid.*, 198.

[20] *Ibid.*, 219.

American courts did not immediately adopt the analysis of Brandeis and Warren. Their opinion was rejected by a superior court in New York soon after the article was published.[20a] In 1905, however, the Supreme Court of Georgia rendered its decision in *Pavesich* v. *New England Life Insurance Co.*[21] — a case involving the unauthorized use of the plaintiff's photograph in an advertisement — and gave judicial recognition to an independent right of privacy for the first time.[22] For some thirty years, American courts vacillated between recognition and rejection of the "right" to privacy. It was not until the publication of the *Restatement of Torts* in 1939 that the Warren and Brandeis analysis was firmly established in United States jurisprudence.[22a]

In 1960, a leading expert on American tort law, Professor William Prosser, published a seminal article entitled *Privacy*.[23] Prosser accepted that there was a right of privacy in the United States but he suggested that it was not one right; rather, he described it as a compendium of four distinct torts which dealt with the protection of solitude, disclosure of embarrassing facts, publicity which places an individual in a false light, and the appropriation of an individual's name or likeness for the advantage of another.[24]

Against this general background, the American legislator has superimposed two wide-ranging statutory provisions which affect the right of privacy as manifested in the confidentiality of tax returns. In 1974, the United States Congress enacted the *Privacy Act*[24a] which established for all government agencies "a broad set of restrictions regarding the uses and disclosures that can be made of records" of individuals.[25] In 1976, Congress passed the *Tax Reform Act*.[25a] One of the essential provisions of the *Act* was the modification of s. 6103 of the *Internal Revenue Code* to include a lengthy and complex set of guidelines governing the disclosure of tax return information. Both of these recent statutes start from the premise that

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[20a] *Roberson* v. *Rochester Folding Box Co.* 64 N.E. 442 (N.Y.C.A. 1902).

[21] 50 S.E. 68 (Ga 1905).

[22] The decision in *Pavesich, ibid., per* Cobb J. has become the leading American case on privacy and it owes its theoretical basis to the work of Brandeis & Warren, *supra*, note 18. The Supreme Court of Georgia, at p. 69, held that "[t]he right of privacy has its foundation in the instincts of nature" and, at p. 70, that "[i]f personal liberty embraces the right to publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law." In fact, it was a new idea — new in 1890 when it was first suggested by Warren & Brandeis. It was not until the decision in *Griswold* v. *Connecticut* 381 U.S. 479 (1965) that the United States Supreme Court (Black and Stewart JJ., dissenting) recognized that the right to privacy was a civil right guaranteed by the Constitution.

[22a] For a complete historical review, see Prosser, *supra*, note 6, 384-8.

[23] *Ibid.*, 383.

[24] *Ibid.*, 389.

[24a] 5 U.S.C. §552a (1976).

[25] *Personal Privacy in an Information Society*, *supra*, note 6, 537.

[25a] 26 U.S.C. §6103 (1976).

privacy is a right and that disclosure of personal information should be allowed only in strictly limited circumstances. American legislators, like jurists before them, have adopted the basic reasoning of Warren and Brandeis.

III. The Confidentiality of Tax Returns in Canadian Law

Although a growing number of authors have expressed concern about the inadequacy of existing confidentiality safeguards, there is scant evidence that the general public is concerned. In 1978, only eight complaints were registered with the Privacy Commissioner against the Minister of National Revenue (M.N.R.) with respect to confidentiality of tax information.[26] The following examination of the development of the Canadian "secrecy" provisions will attempt to define both the direction in which Canadian law has been moving as well as the extent to which s. 241 of the *Income Tax Act* protects the privacy of the taxpayer's tax information.

Richard Green commented ten years ago that "[t]he annual or quarterly outpouring to the confessional in Ottawa is thought, by the confessors, to be veiled in the utmost secrecy. The foundation of these beliefs is uncertain."[27] The confidentiality of tax returns is not only important because it involves a right to personal privacy. Professor J. Ellis has suggested that confidentiality is also a means of maximizing revenue collection:

> It is well established that the charging provisions of the *Income Tax Act* apply both to legally and illegally obtained income. Surely we cannot expect a lawbreaker (for example, a professional gambler) to make a complete report of his income unless he believes that the potentially incriminating evidence could under no circumstances be used against him.[28]

The validity of this point is open to question. Is it realistic to believe that illegal income — especially from organized crime — is likely to be set down on income tax forms? A more serious argument is that unlimited access to tax returns could substantially impair the effectiveness of Canada's self-assessment tax system by diminishing the average, non-criminal taxpayer's disposition to co-operate voluntarily with the tax authorities.[29] The recent revelation that a private investigator was able to obtain information about the tax returns of Joe Clark serves as an example of the ineffectiveness of current secrecy safeguards. One might expect Clark to be disillusioned about the supposed confidentiality of his tax returns, and perhaps uninclined to co-operate with the M.N.R. any more than is absolutely necessary. When public figures are disillusioned, the general public may be expected to follow

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[26] *Annual Report of the Privacy Commissioner 1979*, *supra*, note 9.

[27] Green, *The Confidentiality of Income Tax Returns* (1972) 20 Cdn Tax J. 568.

[28] Ellis, *supra*, note 2, 30.

[29] See Benedict & Lupert, *Federal Income Tax Returns — The Tension Between Government Access and Confidentiality* (1979) 64 Cornell L. Rev. 940, 944.

suit. The following examination of the past and present secrecy provisions of the *Income Tax Act* will illustrate the current status of confidentiality of tax returns.[30]

A. *The Protection of Confidentiality under the Income Tax Act before 1966.*

The first secrecy or confidentiality provision with respect to income tax information appeared in s. 11 of the 1917 *Income War Tax Act*: "No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any written statement furnished under the provisions of this Act."[31]

The section also stipulated that such a violation, upon summary conviction, led to a fine of not more than $200. This was re-enacted as s. 81 in the 1927 *Income War Tax Act*,[32] and the only change made was that the penalty section became subs. 81(2). In 1948, the provision was re-enacted as s. 121 of the *Income Tax Act*, with minor changes in wording, and was reconsolidated as one section.[33] In 1952, it was re-enacted as s. 133 of the *Income Tax Act*.[34] Although this section underwent important changes in 1966,[35] it continued to be numbered as s. 133 until 1970 when it became s. 241, as it remains today.

The most cursory analysis of subs. 133(1), as it stood before 1966, indicates that it provided a minimal degree of protection for the taxpayer. The wording consisted of a sweeping principle of non-communication — just the sort of principle that Canadian courts are loathe to handle with any great courage.[36] This may partly explain the fact that the provision was simply not applied in cases such as *Clemens* v. *Clemens*,[37] *Weber* v. *Pawlik*[38] and *M.N.R.* v. *Die Plast Co.*[39] The section was couched in very general

[30] In Québec there is no general protection of tax return confidentiality. In *La loi sur les impôts*, L.R.Q., c. I-3, the only recognition of a possible wish for confidentiality is contained in s. 1074, which deals with appeals to the Provincial Court: "Such appeal may, at the discretion of the court, be heard *in camera* or in public, unless the taxpayer requests that it be heard *in camera*, in which case it shall be ordered to be heard *in camera*." There are no provisions preventing disclosure of tax information nor is any duty imposed upon the Minister to protect the taxpayer's privacy.

[31] S.C. 1917, c. 28.

[32] R.S.C. 1927, c. 97, s. 87.

[33] S.C. 1948, c. 52.

[34] R.S.C. 1952, c. 148.

[35] S.C. 1966-7, c. 47, s. 17 and S.C. 1966-7, c. 91, s. 22.

[36] *Supra*, note 9, *passim*.

[37] (1952) 6 D.T.C. 1128 (Ont. S.C., T.D.).

[38] (1952) 6 D.T.C. 1059 (B.C.S.C.).

[39] (1952) 6 D.T.C. 1082 (Qué. Q.B.).

language and offered no definitions. There are, in fact, no reported cases which applied the old s. 133 in the *ratio* of the judgment. It is also interesting to note that in none of the cases which dealt even peripherally with s. 133 or its predecessor sections was it the taxpayer himself who sought the protection of the section to prevent the release of confidential information from his own tax records.

In *Weber* v. *Pawlik*, an action for accounting of partnership profits, the plaintiff subpoenaed tax records of the partnership from the M.N.R. It was the Minister who objected to the release of the information. Robertson J.A. of the Supreme Court of British Columbia, found that s. 121 of the 1948 *Act* provided no justification for the Minister's objection to release of the information, but nevertheless the Court found that the Minister's objection could validly be based on grounds of "public interest". Similarly, in *M.N.R.* v. *Die Plast Co.* the taxpayer wanted to gain possession of his own records to use as evidence in a civil action. The Minister argued in this case that according to s. 121, only the M.N.R. could decide whether or not to release tax return information even if the taxpayer authorized release. Again, the Court avoided applying s. 121. In fact, Casey J. held that s. 121 in itself was not a sufficient basis for the Minister's objection. As in *Weber* v. *Pawlik*, the Court justified the Minister's objection on the broader grounds of public policy. It should be noted that these cases do not support a principle of confidentiality of tax returns on behalf of the taxpayer. Rather, they support broad discretionary powers of the Minister to decide how "public interest" is served. As Casey J. pointed out in *M.N.R.* v. *Die Plast Co.*, "public interest" as defined by the Minister may not always be to the taxpayer's advantage.[40] *McPherson* v. *Vang*[41] explicitly stated that the Minister may refuse to release information even to persons otherwise legally entitled to it.

These cases support the proposition that the courts tend to avoid the application of legislation framed in broad principles. The highly generalized nature of s. 121 was not, however, its only problem. The sole guideline provided in the statute for discerning who may see tax return information was the prohibition against release to persons "not legally entitled thereto". No definition of this term was provided. Consequently, a court which did wish to apply the section would be forced to grapple first with the meaning of that term. Such vagueness in the wording of the prohibition was a further

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[40] *Ibid.*, 1086. See also *Clemens* v. *Clemens*, *supra*, note 37, as an example of a similar case in which the Court found S.C. 1948, c. 52, s. 121 to be irrelevant.

[41] (1967) 21 D.T.C. 5041 (B.C.S.C.). In *Weber* v. *Pawlik*, *supra*, note 38, 1060, Robertson J.A., in *obiter dicta*, stated that the phrase "person legally entitled thereto" referred to people in the Department as well as others "who might find it necessary for the administration and enforcement of the Act to see the [return] and to obtain information with regard thereto." This comment about enforcement has now found statutory expression in subs. 241(3) of the *Income Tax Act*. It first appeared in S.C. 1966-7, c. 47, s. 17.

disincentive to judicial application of the section.[42] Section 121 was intended, at least superficially, as a protective device for the taxpayer. In fact, the section created a *carte blanche* for the Minister to consider almost anyone to be "legally entitled" to the information as long as they could show some vague need. At the same time, it is clear from cases such as *McPherson* v. *Vang* that the Minister was most likely to refuse to release information to a person "otherwise legally entitled" when that person was the taxpayer himself.

In the cases discussed above, one finds very little concern for the right of the individual, either to prevent disclosure, or to obtain release of documents for his own use. The Minister, on the other hand, had only to utter the words "public interest" and the issue was settled. He had almost total discretion to prevent or allow disclosure. This judicial attitude, which was probably to a large extent reflective of the public mood, suggests that in the 1950s the Canadian position with regard to privacy and the rights of the individual was much closer to the British outlook, stressing broad social utility, than to the individualistic American approach which emphasized concern for personal liberties. The Canadian legislator apparently approved of this judicial attitude, for in 1966, the new subs. 133(2) explicitly stated that the Minister could not be required to release information with respect to any legal proceeding.

A limitation on this Ministerial discretion was made apparent in *In the Matter of Regina v. Snider*[43] in which the Supreme Court of Canada found that the Minister could not refuse to disclose information subpoenaed with respect to a trial under the *Criminal Code.* In this case, the Minister objected to the subpoena on the grounds that release of the information would be contrary to the public interest under s. 121 of the *Income Tax Act.* This case perhaps came closest to directly testing the effectiveness of the privacy principle. The result could not have been encouraging for civil libertarians. In discussing the principle involved, Mr Justice Rand stated:

> The disclosure of a person's return of income for taxation purposes is no more a matter of confidence or secrecy than that, say, of his real property which for generations has been publicly disclosed in assessment rolls ... .
>
> The ban against departmental disclosure is merely a concession to the inbred tendency to keep one's private affairs to one's self.[44]

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[42] Subsection 133(2) was added when s. 133 was reworked in S.C. 1966-7, c. 47, s. 17:
133(2) Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceeding,
(a) to give evidence relating to any information obtained by or on behalf of the Minister for the purpose of this Act, or
(b) to produce any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.

[43] [1954] S.C.R. 479.

[44] *Ibid.*, 483-4.

The majority found that the real test of whether or not to prevent disclosure was a test of "public interest". Therefore, the reasoning in *Snider* did not differ from the earlier cases. A distinction was drawn, however, between civil and criminal matters, the Court holding that the Minister could be compelled to release tax information with respect to criminal proceedings.

The net result of *Snider* seems to have been to lessen even further the degree of confidentiality protected by s. 121. The individual whose records were involved was in a very vulnerable position. If he requested them for use in a civil proceeding the Minister could refuse on grounds of public interest. In criminal cases there was no possibility that ministerial discretion could operate in the individual's favor. In such cases, *Snider* compelled the Minister to release tax information. In summary, the original confidentiality provisions of the *Income Tax Act* did not have the effect of protecting confidentiality of tax returns *per se*.

B. *The Effect of the 1966 Revisions*

In 1966, the entire section dealing with communication of information was overhauled. It was then still called s. 133, but since the amendments have been only slightly altered — in 1979 and 1981 — and are now in s. 241 of the *Income Tax Act*, when citing the 1966 amendments we will refer to the section numbers according to the numbers in the current *Act*.

The critical change in 1966 occurred in the wording of the general prohibition in subs. 133(1), which is now s. 241 of the *Income Tax Act*.[45] The new section took the form of a prohibition against release to anyone — not just against release to persons "not otherwise legally entitled thereto" as in subs. 133(1).[46] Subsections 133(2) and 133(3) were also amended in 1966 and have also remained identical to the present subs 241(2) and 241(3). Subsection 133(2) incorporated the previous jurisprudential rule that no official or authorized person could be compelled to produce tax information in civil matters. Subsection 133(3) was enacted to apply and extend the *Snider* decision, and has continued as subs. 241(3).[47] The exception to the rule of non-disclosure has been extended by subs. 241(3) to include

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[45] 241(1) Except as authorized by this section, no official or authorized person shall
(a) knowingly communicate or knowingly allow to communicate to any person any information obtained by or on behalf of the Minister for the purposes of this Act, or
(g) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.

[46] It should be remembered that the problem of defining a person "not otherwise legally entitled thereto" still exists. See discussion, *infra*, note 55 and accompanying text.

[47] Subsections 241(1) and (2) of the *Income Tax Act* do not apply in respect of criminal proceedings, either by indictment or on summary conviction, under an Act of the Parliament of Canada, or in respect of proceedings relating to the administration or enforcement of the Act.

"proceedings relating to the administration or enforcement of this Act". Subsection 241(4) provides more details with respect to the right of the Minister to disclose information in respect to the administration or enforcement of the *Act*.[48] The only changes to this section subsequent to 1966 were the additions of paras 241(4)(d)-(f) in 1981.[49] Paragraph 241(4)(d) permits release of information relating mainly to the assessment or reassessment of a spouse's income. Paragraph 241(4)(e) allows communication of certain information relating to the cost of newly acquired property. Paragraph 241(4)(f) permits the communication of information to officials of the Department of Finance solely for the purposes of formulating tax policy and to officials of the Department of National Revenue to aid in the enforcement of Acts under their administration.

The general effect of these provisions is to make the section easier to apply. There is now a general prohibition against release of tax information to anyone. The subsections which follow the general prohibition set up exceptions to the rule, and the circumstances in which ministerial discretion may operate seem to be clear.[50] The organization of the section is, in this respect, more amenable to application by common law courts as it resembles a set of rules rather than an abstract principle.

The recent case of *Re Glover and Glover*[51] was decided under s. 241 and as such became the first case to protect the right of the taxpayer not to have such information released. In a divorce action, Mrs Glover was awarded

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[48] 241(4) An official or authorized person may,

(a) in the course of his duties with the administration or enforcement of this Act,
  (i) communicate or allow to be communicated to an official or authorized person information obtained by or on behalf of the Minister for the purposes of this Act, and
  (ii) allow an official or authorized person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act;
(b) under prescribed conditions, communicate or allow to be communicated information obtained under this Act, or allow inspection of or access to any written statement furnished under this Act to the government of any province in respect of which information and written statements obtained by the government of the province, for the purpose of a law of the province that imposes a tax similar to the tax imposed under this Act, is communicated or furnished on a reciprocal basis to the Minister; or
(c) communicate or allow to be communicated information obtained under this Act, or allow information of or access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act, to or by any person otherwise legally entitled thereto.

[49] A minor amendment adding para. 241(4)(d) to the *Income Tax Act* was made in S.C. 1978-9, c. 5, s. 9. This amendment was repealed in S.C. 1980-1, c. 48, s. 107, and replaced by para. 241(4)(d)-(f).

[50] Subsections 241(2), 241(4) and 241(5).

[51] [1980] C.T.C. 531 (Ont. C.A.), *aff'd Glover* v. *M.N.R.* (1981) 130 D.L.R. (3d) 383 (S.C.C.). See the discussion of the decision in (1982) 1 Cdn Current Tax 508.

custody of her two young children, but Mr Glover absconded with the children. When the *decree nisi* was granted, Mr Justice Lerner of the Supreme Court of Ontario made an order directing, *inter alia*, that "Revenue Canada, Taxation, ... provide 'this Court with particulars of the addresses of the respondents Paule Wenenn and James Glover.' "[52] The Minister moved to set aside the order but this was denied by the trial judge. MacKinnon A.C.J. allowed the Minister's appeal, stating, "[s]ection 241, in my view, is a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the *Income Tax Act*."[53]

The Supreme Court of Canada, in a unanimous decision, affirmed the judgment of the Ontario Court of Appeal. In adopting the reasons of MacKinnon A.C.J., the Chief Justice commented that "the statutory provisions above-mentioned for non-disclosure, in connection with any legal proceedings of a civil character, do not give any power to a Court to qualify them, nor do the exceptions set out in s. 241(4)(c) assist the appellant."[54]

Mrs Glover's case did not fall within any of the exceptions to the general rule of prohibition and consequently the information could not be released. In this respect, the decision lends support to the contention that the revision of the section in 1966 made it much more likely to be applied broadly by the courts. But there may be an additional factor in that, unlike the courts in *Clemens* v. *Clemens*, *Weber* v. *Pawlik*, *McPherson* v. *Vang* and *Regina* v. *Snider*, the Court of Appeal in *Re Glover and Glover* seems to place a greater emphasis on the confidentiality of the individual's return rather than on public interest. For example, MacKinnon A.C.J. considered whether Mrs Glover was a person "otherwise legally entitled" within para. 241(4)(c) and decided that she was not. To find otherwise, he said, "would ... give far too wide a meaning to the words 'otherwise legally entitled' and once again the result would be to ignore or subvert the limitations imposed by the section in its attempt to ensure the confidentiality of the information secured and received by the Revenue Department under the Act."[55]

It is submitted that in the 1950s, the judicial reaction would have been to find Mrs Glover to be a "person otherwise legally entitled" even if the effect was to emasculate the confidentiality provision. *Re Glover and Glover* may be a landmark in that it did not use the first escape-hatch available to avoid enforcing individual privacy provisions in favour of a larger public interest. This may be partly due to the new structure of the section, but it is submitted that the social consciousness of the late 1970s and early 1980s is one which is much more concerned with individual rights and protections than the social consciousness of the 1950s.[56]

[52] *Ibid.*, 532.
[53] *Ibid.*, 533.
[54] *Glover* v. *M.N.R.*, *supra*, note 51, 384.
[55] *Supra*, note 51, 535.
[56] *Supra*, p. 487.

The suggestion that the result in *Re Glover and Glover* may reflect a shift in values rather than a simple reaction to the changes in the *Act* is illustrated by comparing the *Glover* case with the earlier Federal Court of Appeal decision of Mr Justice Thurlow in *In re M.N.R.* v. *Huron Steel Fabricators (London) Ltd.*[57] With one minor alteration, s. 241 was identical when the *Glover* and *Huron Steel* decisions were reached.

In the *Huron Steel* case, however, the Court upheld the subpoena of tax records of Peron Holdings by Huron Steel Fabricators (London) Ltd. Thurlow J. noted:

> The statutory provisions with respect to disclosure have undergone notable changes since the *Snider* case was decided, but it appears to me to follow from the reasoning in that case that in this country there is no basis for a conclusion that the disclosures which the *Income Tax Act* requires the taxpayer to make are confidential and there is no immunity for them from production in legal proceedings except to the extent that Parliament has expressly spelled out such immunity in the statute.[58]

The Court found that as there was no statutory basis for preventing disclosure, no broad ground of public policy could do so either. The Court, it appears, was narrowing the broad application of public policy that had existed in earlier cases but still did not recognize any basis for individual protection from release of tax information. Interpreting the same s. 241, the Court in *Huron Steel* refused to find the general right of confidentiality that only seven years later would be asserted in *Glover*.

C. *Recent Developments Relating to Confidentiality*

In light of *Glover*, then, it would appear that the courts may now be willing to apply s. 241 more broadly, putting a higher value on protection of the confidentiality of an individual's tax information. However, one should not have too much faith that the courts will protect personal privacy as no clear attitude has yet been established. *Glover* may be a mere aberration. Citizens must look to the legislature for protection. The central question is whether the *Income Tax Act*, in its present form, offers a sufficient guarantee of confidentiality, with limited and well defined exceptions.

Subsection 241(1) of the *Income Tax Act* prohibits any official or authorized person from "knowingly" communicating or allowing to be communicated to any person any information obtained for the purposes of the *Act*. The prohibition may not be as wide as it first appears: the burden of proof on the victim of such a release is very heavy. Consider, for example, the position of Joe Clark if he wished to press charges under subs 241(1) and 241(9). Because subs. 241(1) is framed in individual terms, he would first have to be able to identify the official or authorized person who divulged the information. As this was apparently done over the telephone, and as the

[57] (1973) 27 D.T.C. 5347 (F.C.A.).
[58] *Ibid.*, 5352.

natural reflex of many bureaucrats is never to volunteer their identity, the matter would probably end right there. But even if Mr Clark could identify the person, he would then have to prove that the individual "knowingly" communicated the information. If, for example, the individual negligently assumed he or she was speaking to another official or authorized person involved in the processing of the tax returns, it seems that subs. 241(1) would not apply.

Another problem raised by subs. 241(2) is that even if the taxpayer could identify an intentional violator of s. 241, the enumerated exceptions to the confidentiality rule could provide further obstacles. The broadest exception to subs. 241(1) is subs. 241(3) which states that subs 241(1) and 241(2) do not apply "in respect of criminal proceedings, either by indictment or on summary conviction, under an Act of the Parliament of Canada, or in respect of proceedings relating to the administration or enforcement of this Act." The most obvious problem with this section is that no definition of criminal "proceedings" has ever been provided. A court so inclined might find that an investigation of suspected criminal activity constituted a criminal proceeding. If this were the case, the R.C.M.P. would have a free rein to conduct "fishing expeditions" into anyone's return without the need for a warrant. Mr Justice Laycraft interpreted the term somewhat more narrowly:

> In my view, the words "in respect of criminal proceedings" in section 241(3) are words of wide import, which comprehend every step of the criminal procedure *from the time a charge is laid* until the final disposition of the matter by the court .... The disclosure of tax information to assist in preparation of the charges for court, once a criminal charge is laid, is within the exemption provided by section 241(3).[59]

While Laycraft J.'s opinion may be preferred, there is no case law at present which supports his restrictive interpretation.

The other exemption in subs. 241(3) is "in respect of proceedings relating to the administration or endorsement of this Act". The combination of the two exemptions may in fact be extremely wide when one considers that the R.C.M.P. are involved in both criminal and tax investigation. What happens, one may ask, if in the course of a prosecution for tax evasion, the R.C.M.P. discovers evidence connecting the tax evader to a theft ring? It might be argued that, as subs. 241(1) simply does not apply once the proceedings fall within subs. 241(3), any information discovered is fair game. This seems to be the opinion of Mr Justice Laycraft who stated that, once disclosed for a tax investigation, "nothing in the section precludes the use of tax information for any other purpose."[60] On the other hand, the exemption of subs. 241(3) is in respect of the proceedings, not of the information in

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[59] *Royal Commission of Inquiry into Royal American Shows*, *supra*, note 3, C-46 [emphasis altered].

[60] *Ibid.*, C-47.

question, so it could be argued that such information would not be within the subs. 241(3) exemption after the tax proceedings ended. The effect would not, however, be very significant; the R.C.M.P., put on the track by the tax information, could work back from that point to gain additional evidence, lay charges and bring back the tax information a second time. The effect of subs. 241(3) suggests that the notorious Ms Eldridge[61] may have had a solid basis for her reluctance to report income from her "house of ill repute".

Section 241 contains further provisions which limit the confidentiality of tax return information. Subsection 241(4) permits an official or authorized person to communicate or allow to be communicated tax information in certain defined circumstances. Paragraph 241(4)(a) allows an official or authorized person to communicate such information to other officials or authorized persons in connection with their duties. Paragraph 241(4)(b) allows such information to be communicated to the government of a province "for the purpose of a law of the province which imposes a tax similar to the tax imposed under this Act." Paragraph 241(4)(d) allows information to be given to a spouse when it "is necessary for the purposes of an assessment or reassessment of tax". In para. 241(4)(c), communication of information is permitted to "any person otherwise legally entitled thereto". This phrase is similar to the wording used in s. 121 of the 1948 *Act*. Formerly, it was placed in the general prohibition, and as discussed above, it contributed to the ineffectiveness of the section. Now that it is within a section which states an exception, it may be less likely to cause serious difficulties of interpretation, as *Re Glover and Glover* suggests. A problem does arise, however, when one tries to envision just who is "otherwise legally entitled thereto". The first possibility which comes to mind is the taxpayer himself, but if this is the intended meaning, then subs. 241(5) is redundant. Another possibility might be that the phrase refers to other officials or authorized persons in the Department, but again, para. 241(4)(a) permits this explicitly. It is difficult to imagine someone not already mentioned in subs 241(4) or 241(5), who could be considered "otherwise entitled thereto" without rendering subs. 241(1) nugatory. This phrase, it is submitted, effectively leaves the application of subs. 241(1) to the absolute discretion of the judiciary.

Mr Justice Laycraft pointed out another major problem with the 1966 amendments: "[t]he only persons for whom s. 241 creates an offence are 'officials' or 'authorized persons' as defined in subsection (10). The person receiving the information commits no offence, nor does his further communication of it render him liable unless he is, himself, an 'official' or 'authorized person.'"[62] There was no obligation placed on third parties receiving such information legitimately, to protect the confidentiality of the

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[61] *M.N.R.* v. *Eldridge* [1965] 1 Ex. C.R. 758.

[62] *Supra*, note 3, C-44-5.

information. This problem has been dealt with by the 1981 amendment adding para. 241(9)(b).[63]

The new paragraph places an obligation upon persons legitimately receiving such information to protect its confidentiality. As discussed in Part IV, recent American legislation has also attempted to remedy a similar situation. The change is welcome. However, there is a curious legislative lacuna in the 1981 amendment. Paragraph 241(9)(a), dealing with the liability of the "official" or "authorized person", refers back to subs. 241(1). One of the effects of subs. 241(1) is that in order to attract liability, the disclosure must have been knowingly made. Paragraph 241(9)(b), however, refers the reader only to subs. 241(4), which contains no comparable restriction. It may be, then, that the effect of para. 241(9)(b) is to place a higher standard of liability on the person receiving the information from the official or authorized person than that placed on the official or authorized person himself. There seems to be no rational purpose in imposing two different standards of liability.

An overview of the protection of the confidentiality of tax information in Canada suggests that, both in terms of the legislation and the attitude of the courts, the taxpayer's protection is increasing. On the other hand, a closer examination of s. 241 reveals that a court reluctant to apply subs. 241(1) could easily avoid doing so. The Americans have recently instituted major changes in their legislation regarding protection of the confidentiality of tax returns. Some of these changes will be examined. A comparison of the two statutory positions could provide useful suggestions for improving the privacy of the Canadian taxpayer.

D. *Confidentiality of Tax Returns in American Law*

The law of the United States, unlike that of Canada, does provide a general protection for the privacy of the individual, even though the concept of privacy has not yet been defined comprehensively.[64] This general protection has been extended in specific statutes to protect the right of the individual, in most situations, to confidentiality of his income tax returns. Nevertheless, A.S. Miller has stated recently that "[w]hen the State *really* needs information ... it can lawfully get it, despite the Constitution and

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[63] S.C. 1980-1, c. 48, s. 107 adds subs. 241(9) to the *Income Tax Act*:

Every person

(a) who, being an official or authorized person, contravenes subsection (1) or

(b) to whom information has been provided pursuant to subsection (4) who uses, communicates or allows to be communicated such information for any purpose other than that for which it was provided,

is guilty of an offence and is liable on summary conviction to a fine not exceeding $1,000 or to imprisonment for a term not exceeding 2 months or to both such fine and imprisonment.

[64] For a general discussion of tax return confidentially under American law, see Benedict & Lupert, *supra*, note 29.

despite any legal or moral notions of personal or associational privacy."[65] He went on to say that American courts will recognize an individual right of privacy only when recognition of that right also benefits the state.

Professor Miller's rather bleak outlook is completely at variance with the declared hopes and intentions of the United States Privacy Protection Study Commission. In their final *Report* of 1977, the Commission issued a stirring call to arms for the protection of individual privacy: "As long as America believes, as more than a matter of mere rhetoric, in the worth of the individual citizen, it must constantly reaffirm and reinforce its protections for the privacy, and ultimately the autonomy, of the individual."[66] Just how far has the United States Congress gone in reaffirming and reinforcing its protection of privacy in respect of income tax returns? Has it followed the wishes of the Privacy Protection Study Commission, or has it cynically offered plums while retaining control over information it really wants, as Professor Miller suggests? As regards tax returns, the issue was stated succinctly by the Privacy Protection Study Commission: "The fact that tax collection is essential to government justifies an extraordinary intrusion on personal privacy by the IRS (Internal Revenue Service), but it is also the reason why extraordinary precautions must be taken against misuse of the information the Service collects from and about taxpayers."[67]

The first "extraordinary precaution" taken by American legislators to control government invasion of personal privacy was the *Privacy Act of 1974*.[68] In that *Act*, Congress expressly recognized that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies".[69] It also recognized that the potential harm to individual privacy by government information-collection had been magnified greatly by "the increasing use of computers and sophisticated information technology".[70] Following the lead of the Supreme Court in *Griswold* v. *Connecticut*,[71] Congress also stated that privacy "is a personal and fundamental right protected by the Constitution of the United States".[72]

After its ringing declaration of principle, Congress went on to enact a far-reaching compendium of provisions designed to regulate the collection

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[65] Miller, *supra*, note 5, 67.

[66] *Personal Privacy in an Information Society*, *supra*, note 6, 537.

[67] *Ibid.*

[68] *Privacy Act of Sept. 3, 1974*, 5 U.S.C. §552a (1976).

[69] *Privacy Act of Sept. 3, 1974*, Pub. L. No. 93-579, §2(a)(1), 88 Stat. 1896 (congressional findings and statement of purpose).

[70] Section 2(a)(2). See also Horvitz & Sardinas, *Impeachment of Government Systems Documentation for Taxpayers Classified as Nonfilers* (1977) 6 Rutgers J. of Computers and Law 73, 89.

[71] 381 U.S. 479 (1965).

[72] Pub. L. No. 93-579, §2(a)(4), 88 Stat. 1896.

and dissemination of personal information by all agencies of the federal government. The governing principle of the *Act* is found in s. 552a(b) which provides that: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains". The Privacy Protection Study Commission noted that the *Act* had succeeded in making all Federal agencies "subject to a broad set of restrictions regarding the uses and disclosures that can be made of records they maintain about individuals".[73] However, the Commission also noted that there were eleven statutory exceptions to the principle of non-disclosure.

Many of these exceptions are uncontroversial. For instance, an employee of the agency which collected the information can secure its release if he needs the record in the course of his duties with that agency.[74] Release of information is also allowed for statistical purposes to the Bureau of Census, employees of which must take an oath of secrecy, and to other statisticians only if the transferred record is "in a form that is not individually identifiable".[75]

Other exceptions to the general rule of non-disclosure are potentially more objectionable. Section 552a(b)(9) allows records to be released to Congress or to any Congressional subcommittee which has jurisdiction over the requested information. Under s. 552a(b)(10), the Comptroller-General's Office is also given access to records needed "in the performance of the duties" of that Office. The head of a civil or criminal law enforcement agency may also request records in writing if he describes the portion of the record required and reveals the nature of the particular investigation for which it is required. There are no further controls placed on the release of records to these three elements of the federal governcment.

The *Act* does offer some further protection to the individual by requiring that an agency which releases records to any other organ of government must keep a record of the date, nature and purpose of the disclosure, and the name and address of the person or agency to whom the disclosure was made.[76] In addition, an individual does have a right to view any records relating to him which are kept by a federal agency, except when those records have been compiled "in reasonable anticipation of a civil action or proceeding".[77] Section 552a(g) provides that an agency which incorrectly releases records or which unjustifiably refuses an individual's request to view his own records may be the target of a civil action. This provision is very

[73] *Personal Privacy in an Information Society*, *supra*, note 6, 537.
[74] 5 U.S.C. §552a(b)(1) (1976)
[75] Section 552a(b)(5).
[76] Section 552a(c)(1).
[77] Section 552a(d)(5).

significant because it means that the agency itself may be liable for breaches of confidentiality. In Canada, s. 241 of the *Income Tax Act* makes only the individual employee liable, and as was discussed in Part III(C), it may be difficult to identify that individual.

In theory, the protections offered by the *Privacy Act* are substantial, although the uncontrolled release of records to members of Congress is somewhat at variance with the stated purpose of the *Act*. In practice, however, the statutory restrictions on the release of information seem to have been somewhat ineffective. In Hearings before the House Committee on Ways and Means concerning the confidentiality of tax return information, Representative Charles A. Vanik revealed the results of a survey of forty-eight agencies. The survey examined the release of records after the *Privacy Act of 1974* and indicated that, in large measure, the requirements of the *Act* were not being met. In most agencies there was an "appalling failure" to maintain accurate records of which information had been disseminated. It was virtually impossible for an individual citizen to exercise the rights granted to him under the *Act*.[78]

The Committee also heard testimony from Vanik which suggested another weakness in the practical application of the 1974 statute. While acknowledging that the survey of agencies indicated that the Internal Revenue Service (I.R.S.) had tried diligently to fulfill its obligations under the *Privacy Act of 1974*, Vanik went on to say: "The problem is that the IRS, as well as many other Federal agencies that we polled, are so large and decentralized that record-keeping by the headquarters office is often inadequate, and it is highly doubtful whether field offices ... maintain records which are complying with the Privacy Act."[79] Unless the bureaucracy is in a position to implement effectively the guidelines established in the *Privacy Act of 1974*, the broad assertions of principle contained in the purposes clause of the *Act* shall always have a hollow ring. Of course, this problem of discontinuity between the expressed will of the legislator and the performance of the bureaucrat is not limited to the United States. Should the Canadian Parliament decide to enact stronger protections of tax return confidentiality, our legislators will have to explore ways to encourage and help the government agencies affected to comply with the new policy or any changes will be ineffectual.

American legislators were perhaps aware of the practieal difficulties surrounding the *Privacy Act of 1974* when they enacted the *Tax Reform Act* in 1976.[79a] One of the major objectives of that legislation was to provide a

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[78] *Confidentiality of Tax Return Information: Hearing before the Committee on Ways and Means*, 94th Cong., 2d Sess., 1-7 (1976).

[79] *Ibid.*, 3.

[79a] *Tax Reform Act of Oct. 4, 1976*, 26 U.S.C. §6103 (1976).

comprehensive set of rules governing the confidentiality of tax returns. The *Act* added s. 6103 to the *Internal Revenue Code*, a section which enumerates in great detail rules governing the release of information obtained by the I.R.S. The *Code* is far more specific than the *Privacy Act of 1974*, because it regulates the actions of only one of the myriad of government agencies which were covered by the *Privacy Act*. Section 6103 of the *Internal Revenue Code* is entitled "Confidentiality and Disclosure of Returns and Return Information". It begins with the premise that no one who possesses information obtained from income tax returns shall be permitted to disclose the information. The governing principle of non-disclosure follows directly from the interim report of the Privacy Protection Study Commission which recommended a general rule of confidentiality of individually identifiable data unless an individual has consented to a disclosure.[80] Section 6103(b) defines exactly what information is covered by the non-disclosure provision. The section enumerates certain categories of information but the list ends with the words "or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary." It appears, then, that any information received under the authority of the *Internal Revenue Code* is included within the purview of s. 6103.

At the outset, one important distinction is evident between s. 6103 and s. 241 of the Canadian *Income Tax Act*. The American *Act* prohibits all disclosure, whereas the Canadian *Act* proscribes only knowing disclosure by officials or authorized persons. Strangely enough, the recent addition of para. 241(9)(b) is more in line with the American approach. It proscribes all unauthorized disclosure by persons receiving information from officials or authorized persons, thus covering the case of negligent or incompetent employees.

Another important contrast is evident upon even a cursory comparison of the Canadian and American statutes. Section 241 contains certain exceptions to the general principle of non-disclosure but these exceptions are phrased in very general terms. Section 6103 of the *Code* enumerates over twenty very specific circumstances in which tax information can be released. It is clear that the American legislators sought to be extremely precise in framing any derogations from the general rule of non-disclosure, whereas their Canadian counterparts saw fit to allow disclosure whenever a particular case could be brought within the general guidelines of s. 241. This is not to say that the American statute is an obviously superior model which should be followed *verbatim* in Canada.

The *Tax Reform Act of 1976* contains certain exceptions to the general non-disclosure provision which do not seem to meet the criterion of "compelling societal need" set down by the Privacy Protection Study

[80] *Supra*, note 6, 541.

Commission.[81] They seem to be based on political expediency rather than on any legitimate need for information. The most striking example of a politically sensitive exception is s. 6103(g) which allows full disclosure of any tax information to the President, upon written request stating why the information is required. The Privacy Protection Study Commission did not endorse this provision, finding that the exception was far too broad.[82] Of course, the Commission was well aware of the abuse of the President's power to inspect tax records which occurred during the Nixon Administration. In testimony before the House Ways and Means Committee, Representative Vanik took strong exception to s. 6103(g). He pointed out that the exception gave the executive a virtual *carte blanche* to examine personal tax records and cited one case where the Justice Department had requested and received information by stating merely that the return was "of interest in connection with the matters ... under investigation".[83] No further or more explicit justification is required. The potential for abuse is enormous.

Another exception which has been criticized by the privacy monitoring agency is s. 6103(h)(5) which gives Department of Justice attorneys access to tax records for the purpose of jury selection. The rationale for this exception is that the government wants to know whether a prospective juror is biased against it as a result of a past conflict with the I.R.S. The Privacy Protection Study Commission has stated that it believes that such use of tax records is wrong because the use is incompatible with the purpose for which the information was collected.[84]

The Study Commission also reported that it believed that the 1976 *Tax Reform Act* allowed too much disclosure to officials involved in the prosecution of non-tax criminal offences.[85] Section 6103(i)(1) permits disclosure of tax information to all "officers" or "employees" of an agency *in preparation for* an administrative or judicial proceeding pertaining to the enforcement of a "specifically designated Federal Criminal Statute". This exception may be wider than the criminal law exception contained in s. 241 of the Canadian *Income Tax Act* depending upon the judicial interpretation of subs. 241(3) which states that the non-disclosure rule does not apply "in respect of criminal proceedings". If a "criminal proceeding" exists only once

[81] *Ibid.*

[82] *Ibid.*, 551. The position of the Study Commission is endorsed by Benedict & Lupert, *supra*, note 29, 967-9.

[83] *Supra*, note 78, 3.

[84] *Supra*, note 6, 545.

[85] *Ibid.*, 553. For a similar point of view, see Gortlan, *The Need for Reform of the Information and Evidentiary Use of Tax Returns in Nontax Criminal Proceedings* (1976) 14 Am. Crim. L. Rev. 163. The article was written before final passage of the *Tax Reform Act of 1976*, but the author criticizes certain provisions of the proposed legislation which were subsequently enacted. See also Joyce, *Raiding the Confessional — The Use of Income Tax Returns in Nontax Criminal Investigations* (1980) 48 Fordham L. Rev. 1251, for a comprehensive review of the issues.

a charge has been laid, the disclosure cannot take place at the stage of mere investigation. It appears that in the United States, disclosure can be authorized during an investigation because "investigation" is certainly encompassed within the words "in preparation for" an administrative or judicial proceeding.

Despite the potentially wider exception of s. 6103(i)(1), the American statute actually offers greater protection for privacy of citizens under investigation for criminal offences than does its Canadian counterpart. The Canadian *Act* merely allows the exception without providing any guidelines as to how, in practice, it will operate. In s. 6103(i)(1) of the American *Act*, the legislators have decreed that any application for disclosure of information to be used in preparation for a criminal proceeding must be heard before a Federal District Court Judge. Although the application is heard *ex parte*, the judge must nevertheless be convinced of three things. First, that there is reasonable cause to believe that a criminal act has been committed. Secondly, that there is reason to believe that the requested return contains probative evidence relating to the criminal act. Thirdly, that the information to be disclosed cannot reasonably be obtained from any other source. The federal criminal investigators have a heavy burden of proving reasonable cause which is entirely absent in the Canadian *Act*.

The Privacy Protection Study Commission believed that this heavy burden of proof was justified. Indeed they suggested that it be extended: "In sum, the Commission believes that Federal law enforcement officials should not have easier access to information about a taxpayer when it is maintained by the IRS than they would have if the same information were maintained by the taxpayer himself."[86] This forceful position was not adopted in full by Congress. It is, at the same time, completely contrary to the spirit of s. 241 of the Canadian *Act*. Indeed, the Canadian statutory position would be much to the satisfaction of American law enforcement officials who have criticized s. 6103(i)(1) because they believe that it inhibits criminal investigations.[87]

Section 6103 of the United States *Internal Revenue Code* permits many other exceptions to the general rule of non-disclosure but these exceptions are generally considered to be necessary even by strong proponents of confidentiality. For example, the *Code* permits release of information to the taxpayer himself (s. 6103(e)) or to his designated representative (s. 6103(d)) and to State tax officials to the extent necessary to administer state tax laws. Of course, federal officers are given access to tax records for purposes of tax administration under s. 6103(h). The *Code* also permits disclosure by s. 6103(l)(6)(A) to federal state or local child support agencies of names, addresses and certain income information to aid in the location of persons owing child support payments. It appears from the *Glover* case discussed

[86] *Supra*, note 6, 546.

[87] *Supra*, note 78, 26 (statement of Richard L. Thornburgh).

above, that such disclosure is not permitted under the Canadian *Income Tax Act*.

One serious practical problem has emerged after the passage of the *Tax Reform Act of 1976*. The Privacy Protection Study Commission has pointed out that although s. 6103 authorizes release of information only when necessary, the collection of information contained in I.R.S. files is so tantalizing and so well organized that there exists "a tendency of other agencies to view IRS files as sources of information that could have been easily obtained from other sources".[88] The Assistant Attorney-General of the Criminal Division of the Justice Department, in testimony before the House Ways and Means Committee explained why I.R.S. files are such a rich source of information:

> Even where alternate sources are used, other problems arise. First, it is often impossible to verify the validity of the information obtained in the alternative source without the tax return.
>
> Second, the use of alternative sources and the resultant publicity may infringe upon the privacy of innocent third parties, as when bank records dealing with these individuals must be subpoenaed for information concerning transactions with a person under investigation.
>
> In this sense, the ability of the government to focus on the particular transaction and obtain the information through the more discreet use of tax returns actually protects and enhances rights of privacy.[89]

A cynical observer might question the motives behind the Assistant Attorney-General's pious invocation of the rights of privacy. The first reason he gives for allowing disclosure is probably more to the point.

Despite the potential loss in efficiency of other government agencies who are now required to use alternate sources of information, the American legislator has obviously been at least partially convinced by the reasoning of the Privacy Protection Study Commission which urged the passage of s. 6103 in the first place. The Commission believed that

> the individual taxpayer is inherently at a disadvantage *vis à vis* a government agency that has access to IRS information because the IRS has the threat of serious punishment to compel the disclosure of information the individual would otherwise not divulge. That fact alone, in the Commission's view, argues in general for carefully controlled dissemination of IRS data on individual taxpayers and in most cases for no disclosure.[90]

In large part, s. 6103 fulfills the goal of non-disclosure. However, the section does permit wide exceptions which may be hard to justify on grounds of public utility if that concept is divorced from political considerations. This failing aside, the *Tax Reform Act of 1976*, when read together with the *Privacy Act of 1974*, does provide a coherent and comprehensive set of guidelines which ensures the confidentiality of tax returns except under

[88] *Supra*, note 6, 563.

[89] *Supra*, note 78, 29 (statement of Richard L. Thornburgh).

[90] *Supra*, note 6, 540.

specifically enumerated circumstances. If the federal government is able to improve the functioning of the huge bureaucracy which must comply with the guidelines thereby limiting the number of accidental disclosures, the privacy of the individual's financial situation will be very well ensured. The generalized notion of privacy first propounded by Brandeis and Warren has been given a precise statutory meaning in the law of income tax confidentiality in the United States.

Conclusion

It is clear that since 1966 there has been a considerable improvement in Canada in the protection accorded the individual taxpayer with respect to the confidentiality of tax returns. The 1966 amendments to the *Income Tax Act* set down a general principle of non-disclosure. More importantly, the 1966 amendments and the more limited changes made in 1979 and 1981 have provided a clear set of exceptions. The latest improvement to s. 241 included the significant addition of para. 241(9)(b) which creates an offence for a third party who discloses tax return information. Despite these improvements, significant problems remain.

In contrast to the American *Tax Reform Act*, the exceptions under s. 241 are very broadly drawn. In particular, the provision of para. 241(4)(c) which allows disclosure to persons "otherwise legally entitled thereto" is so wide that it could deprive the entire section of any effect.

An extremely serious deficiency of the *Act* is that only an individual employee is made liable under s. 241. The individual whose personal information has been released has no recourse against the Ministry as a whole. In the United States, a separate tort action does lie against the I.R.S. for any unauthorized disclosure of information. In Canada a plaintiff must furthermore prove that a particular individual who disclosed information did so "knowingly". In practice, such a burden is very difficult to meet. The American statute imposes no such burden. In Canada, a plaintiff must furthermore prove that a particular official or authorized person who discloses information did so "knowingly".

Perhaps inadvertently, Parliament has lifted this burden with respect to persons receiving information from officials or authorized persons. It is difficult to envision why the standard of liability should be different as between officials and receivers of information. Nevertheless, the imposition of liability upon receivers of information is a positive step.

The recent changes made to the United States *Internal Revenue Code* in the field of confidentiality have enhanced the privacy of the American taxpayer. Canadian legislators would do well to study these recent changes and amend s. 241 along similar lines.

The American *Act*, however, should not be followed slavishly. The *Tax Reform Act* has one great weakness. Although its exceptions to

confidentiality are defined narrowly, the basis for some of the exceptions is highly questionable. The *Act* allows almost unlimited release of information to members of congressional committees, to White House officials and to the President himself. Such widespread release of information at the whim of political figures substantially undercuts the American guarantees of individual privacy. Despite these inadequacies, the structure of the American *Act* is worthy of emulation. Its exhaustive enumeration of exceptions to the general principle of non-disclosure facilitates the task of the judiciary.

Even if the Canadian legislator sees fit to follow the American example, it would be a mistake to assume that personal privacy of tax information would be absolutely guaranteed. The widespread diffusion of information in government data-banks is increasingly difficult to control, in part because in a large bureaucracy, it is impossible to avoid human error. Moreover, when personal financial information is also in the hands of private organizations, it may be difficult to establish where or when a breach of confidentiality has occurred. Despite these inevitable difficulties, it is important to try to protect individual privacy. Even though privacy may not be an absolute right, it is an important individual need which has been recognized in all Western democracies. In the field of tax return confidentiality, the assurance of privacy may be an important incentive to voluntary compliance.

Some British authors have suggested that it is more important to know to whom information is being released than to know that it will not be released.[91] This highly debatable assumption implies that freedom of government information is valued more highly than personal privacy. Unquestionably, some information is widely considered to be "personal" and although citizens are willing to divulge information on the grounds of social utility, they expect that such information will be dealt with in confidence. The government cannot always ensure that no breach will occur, but as the Commissioner of the I.R.S. stated to the House Committee on Ways and Means, "we can't legislate integrity, but by a combination of good laws, stiff penalties, and a strong enforcement, we can do much to meet [the problem of] the unauthorized and impermissible and illegal disclosures".[92] The 1966 and 1981 amendments to the *Income Tax Act* and the decision of the Supreme Court of Canada in *Re Glover and Glover* indicate a modest trend toward the protection of privacy interests in tax law. However, problems remain which must be studied and remedied by Canadian legislators.

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[91] See Flaherty, *supra*, note 11; Velecky, *supra*, note 6. For an excellent discussion of the conflict between freedom of information and personal privacy see Rosenfeld, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974* (1976) 11 Harv. Civ. Rts — Civ. Lib. L. Rev. 596.

[92] *Supra*, note 78, 14 *et seq.* (statement of Donald C. Alexander).