

# *Labour, Employment and Human Rights Group* NEWSLETTER

## A “ROUTINE” PRE-EMPLOYMENT BACKGROUND CHECK? THERE’S NO SUCH THING.

***By Derek Knoechel, Vancouver***

In 1990, a 21 year-old woman was caught shoplifting. She then pleaded guilty to a charge of theft, receiving a conditional discharge. Some five years later, she applied for a position with the Montreal police force. So began a thirteen year legal odyssey culminating in a Supreme Court of Canada decision<sup>1</sup> released in August of 2008.

As part of the background screening process, the Montreal police force became aware of the past guilty plea. It rejected her application, on the basis that the guilty plea showed she did not possess the necessary “good moral character” required of police officers. The “good moral character” test was legitimate - it was a statutory requirement. The police force believed this test supported their rejection of the woman’s application.

Thirteen years later, the Supreme Court ruled that the test was indeed legitimate, but that the police force had applied it improperly.

As it turns out, one of the legal effects of the conditional discharge the woman had received was that by the time she applied to the police force she had also received an “automatic pardon” for her offence. As a general rule, pardons are intended to help erase the “stigma” that attaches to a criminal conviction or guilty plea (the fact that the woman was only referred to by her initials, S.N., in the judgement underscores that this goal is difficult to achieve). What’s more, Quebec human rights laws expressly provided that employers could not refuse to hire someone merely because of an offence for which they had been subsequently pardoned. The court ruled that the police force had unfairly discriminated against her by relying on the mere existence of the woman’s guilty plea.

But what about the “good moral character” test, which was also grounded in provincial law? The presumption that S.N. had completely recovered her “moral integrity” as a result of the pardon could be countered, but this required actual evidence rather than a preconceived notion of what a guilty plea revealed about her character. The police force could investigate further to determine whether there were other facts that would disqualify the candidate, even if the facts related to the offence.

1. Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse), 2008 SCC 48.

## HUMAN RIGHTS LAWS

This case illustrates just one of the many potential pitfalls facing Canadian employers looking to conduct background checks of potential employees.

The Montreal police force became entangled by human rights laws. Although relying on pardoned criminal offences is currently prohibited in just a few Canadian jurisdictions, it can be tricky even absent such restrictions, given the purpose behind pardons. Further, pardoned offences may not even show up on many criminal records checks.

What about non-pardoned convictions and criminal charges? Well, human rights laws in several provinces prohibit the refusal to employ someone on the basis of a criminal conviction (which has been interpreted to include a charged offence) unless the employer can show that the offence is directly related to the position. This is not an easy test to meet. Again, the concern is that employers are improperly motivated by the “stigma” accompanying a criminal conviction or charge.

What’s more, merely asking the question or conducting a search, both of which constitute a collection of personal information, can raise serious legal issues, particularly if human rights considerations prevent you from legally acting upon the answer.

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## PRIVACY LAWS

In addition to the human rights concerns, serious privacy issues are raised each time an employer conducts a background check and collects personal information about potential employees.

The laws governing collection of personal information by employers vary from one jurisdiction to another and vary from public to private sector. However, general principles include the following:

1. In some jurisdictions, the information requested, whether it be a reference check, credit check, criminal record check, or police record check, must be “necessary” and more than just “nice to have” or “potentially useful”. The impact upon privacy must be minimized to the extent reasonably possible. In other jurisdictions, “reasonableness” governs the collection, such that the organization must demonstrate a legitimate purpose related to the hiring decision and show that the personal information required is relevant to and reasonably required for that purpose.
2. Employers should consider whether the collection of the information will be effective in addressing the identified concern, and whether there are less intrusive or more effective means of addressing this need.
3. Potential employees should be informed during the application process that personal information may be collected, used and disclosed by the employer to determine the suitability of the candidate for employment.
4. While obtaining consent is a best practice, notice may suffice from a privacy perspective. However, from a practical perspective, the administration of some background checks such as criminal record checks usually involves the express consent of the applicant.
5. Once obtained, any personal information should be treated as highly sensitive, only shared on a “need to know” basis, retained for the time period required under the applicable legislation, and be protected from loss or theft, unauthorized access or similar risks.

## PRIVACY LAWS (continued)

Timing issues also arise. Where such checks are required for the position, some employers may choose to fully review the qualifications of applicants prior to engaging in a background check of a short list of candidates. Some employers may wish to make an offer of employment prior to the check being conducted, in which case the offer should be made conditional upon a satisfactory result being returned.

Background searches are often conducted by third party service providers, but employers remain responsible (and potentially liable) for the collection of personal information. Time and effort must be committed to a full consideration of what information should reasonably be requested, as well as the proper use and storage of such information once the employer has collected it.

Additional considerations may be engaged where an employer decides that existing employees should be subjected to a background check. Assuming that the collection of information can be justified with reference to the above principles, such a change in policy may constitute a “material change” to the employment contract requiring reasonable notice prior to implementation. The amount of notice required will vary based on the characteristics of the specific position and the individual incumbent. An employer’s failure to provide reasonable notice of a material change to the contract of employment can trigger liability for wrongful (constructive) dismissal.

As already indicated, there are many potential legal issues that can trip up an employer who engages in such checks, even with the best of intentions. As you can see, there is no such thing as a “routine” background check.

Still wondering about the ultimate fate of the 21 year-old woman caught shoplifting in 1990? Don’t expect to see her as a member of Montreal’s finest any time soon. The Supreme Court of Canada noted that she had long since abandoned her pursuit of a career as a police officer. It is unlikely that she was even involved in this round of the litigation as it was the police force that brought the issue to the nation’s highest court.

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