

# Criminal Record Checks

Managing liability and getting the information you need



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Hiring the right people is integral to the success of any organization. In some cases, a criminal record check might provide valuable information, but be careful what you ask for and what you do with the information you receive. Using information improperly can result in liability under applicable, local human rights legislation.

## What criminal record information is an employer legally allowed to obtain?

The information an employer can legally consider when making an employment decision varies across Canada. Every employer must therefore ensure its criminal record check procedure is tailored to the laws of each of the jurisdictions in which the employer carries on business.

Human rights legislation in British Columbia, Ontario, Quebec, Newfoundland, Prince Edward Island and potentially Manitoba (not yet determined) prohibit discrimination in employment on the basis of a criminal record. However, the scope of the prohibition varies. In British Columbia, for example, it is generally discriminatory to refuse to hire or continue to employ an employee because the individual has been charged or convicted of a criminal or summary conviction offence unrelated to the employment.

Conversely, in Ontario, it is not discriminatory to refuse to hire or continue to employ an individual on the basis the individual has been charged with a criminal offence, regardless whether the charge is related to the employment. It is also not discriminatory to refuse to hire or continue to employ an individual on the basis of a criminal record, unless the individual has been granted a pardon or the offence is in respect of a provincial offence (e.g. *Highway Traffic Act*). That said, refusal to hire an employee based on a pardoned conviction or provincial offence may be justified where: (i) having a clean criminal record is a *bona fide* qualification for the job; and, (ii) the essential functions of the job cannot be altered without creating undue hardship. For example, a trucking company may refuse to hire an individual with multiple safety-related convictions under the *Highway Traffic Act* on the basis of public safety.

Best advice? As an employer, consider *why* you think you require the information. Is the information rationally connected to the functions of the job? Is the connection in whole or in part? Could the applicant be accommodated without undue hardship to the employer?

## What are the risks of obtaining information even if the employer does not consider the information in its employment decision?

Even if an employer does *not* rely on information collected, the fact the information was collected – while itself not necessarily illegal – puts the employer at risk of an *allegation* of improper use. In such a case, the onus will shift to the employer to demonstrate it did not rely on the information in making its employment decision.

For example, a criminal record check revealing several convictions for drug-related offences may result in an allegation the prospective employer did not hire the applicant due to a drug addiction or mental disability (both protected disabilities under human rights legislation) which cannot form the basis for an employment decision.

Best advice? Consider carefully what information is *necessary* (as opposed to *nice to have*) and only seek out and review that which is necessary.

## What is the process?

In each case the prospective employee must provide informed consent. After obtaining consent, criminal record information can be obtained from the RCMP, local or regional police services, and private agencies. Processes vary from region to region, but in most regions there are two basic methods:

**“Vulnerable Sector Check” or “Police Reference Check”** – The information disclosed is detailed and may only be conducted by a local police station. It includes criminal convictions, outstanding charges before the courts, probation and whether the applicant is suspected of committing a criminal offence or is involved in a serious criminal investigation. A Vulnerable Sector Check is generally only obtained for a position of authority or trust relative to vulnerable persons; for example a teacher, social worker, day-care worker, or nurse. In Toronto, only an employer registered as a “vulnerable sector employer” may obtain a Vulnerable Sector Check. However, in other regions, anyone may obtain a Vulnerable Sector Check by attending at the criminal records check office and requesting one be completed. Generally, this process takes time; for example, in Toronto it can take up to twelve weeks.

**“Criminal Record Check” or “Clearance Letter”** - The information disclosed is less detailed than what is disclosed in a Vulnerable Sector Check and may be conducted through a private agency or local police station. This process generally verifies, at a minimum, the applicant does not have a criminal conviction for which a pardon has not been granted and can take five to ten business days. If a Clearance Letter search suggests the applicant may have a criminal record, a Clearance

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Letter will not be issued. In Toronto, the applicant must then submit fingerprints for a more definitive report. This can take more than 120 days. For a quicker resolution (a matter of days), fingerprints can be submitted electronically to some local police stations or an accredited private agency. This is more expensive than obtaining a Clearance Letter. However, it may also be the fastest and most efficient.

## Tips and Best Practices

As noted above, a criminal record check can take time. Moreover, obtaining and using this information carries certain risks. To manage this risk an employer should consider the following tips:

- Evaluate whether a clean criminal record is necessary for the performance of the job, or whether background information can more readily be obtained through other methods, such as a reference check.
- Conduct a Vulnerable Sector Check only where the employee will have direct contact with vulnerable persons.

- Keep notes of the decision to select one applicant over another, demonstrating the reasons were *bona fide* and not discriminatory.
- Given the length of time it can take to complete a criminal record check, any offer of employment should be in writing and conditional on a satisfactory (to the employer) report. If an offer of employment is not conditional upon the satisfactory completion of a criminal record check, an employer may be liable for notice upon termination if the employee is hired prior to the completion of the record check and must then be terminated due to an unsatisfactory report.
- Keep the results of a criminal record check confidential. The information should only be disclosed to individuals within the organization on a need-to-know basis.

To learn more and/or for assistance designing a hiring protocol tailored to your organization, contact a member of the Sherrard Kuzz LLP team. ©

# Flowing with the Tide

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year for marine currents. Lowering the costs of these technologies through more efficient designs while using low-cost materials and components, along with economies of scale, aim to improve the overall economic viability and acceptability of wave, tidal and water current energy converters.

The establishment of international standards will assist in mitigating the technical and financial risks associated with the diverse range of technologies that currently exist enabling a quicker uptake of commercial marine energy production.

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