



*False promises, hidden costs: The case for reframing employment and volunteer police record check practices in Canada*

Canadian Civil Liberties Association, May 2014

CANADIAN  
CIVIL LIBERTIES  
ASSOCIATION



ASSOCIATION  
CANADIENNE DES  
LIBERTES CIVILES

## About the Canadian Civil Liberties Association

The Canadian Civil Liberties Association is a national, non-profit, independent, non-governmental organization that was constituted to promote respect for and observance of fundamental human rights and civil liberties, and to defend and foster the recognition of those rights and liberties. The CCLA has been at the forefront of protecting fundamental freedoms and democratic life in Canada since 1964.

## Acknowledgments

The research, analysis, writing and editing of this report would not have been possible without assistance from many individuals. We were very fortunate to have the collaboration and support of Professor Kelly Hannah-Moffat, Professor Paula Maurutto and PhD candidate Alexandra Hunter for the interview portion of the research. Many thanks also to CCLA legal interns Sam Heppell, Maria Szabo, Jennifer Hancock, Golnaz Nayerahmadi, Oren Barbalat, and legal volunteers Wendy Litner and Tanya N. Jawa. We also had a veritable army of volunteers helping to transcribe interviews: Maria Reshetnikova, Rob Scherf, Richa Sandill, Alexis Godard, Mai Dao, Larkin Liu, Philip Stiles, Anupa Varghese, Bruno Savoie and Mary Thibodeau all helped process audio files into written records. We are grateful to the access to information and records management staff of police forces across the country who assisted with our records requests. Special thanks to Jianlan Zhu, who lent her expertise in privacy law to conduct analysis and write numerous background memos, and Mahtot T. Gebresselassie, who spent hours corresponding with interview participants, juggling schedules, facilitating group discussions and analyzing data. We are indebted to those experts who provided very helpful comments on an earlier draft of this report. Thanks also to Iva Cheung, who copy edited, designed and formatted the report. Finally, thank you very much to all those who took time out of their busy schedules to speak with us about their experience with and use of police record checks.

This report and research was funded in part through a grant from the Office of the Privacy Commissioner. This report was written by Abby Deshman, Public Safety Program Director, Canadian Civil Liberties Association.

# CONTENTS

Executive Summary	5
I. Introduction	10
II. What is a police record, and what types of record checks do Canadian police provide?	13
A. What is a criminal record?	13
B. Types of police record checks	14
1. Police criminal record check	14
2. Police information check	16
3. Police vulnerable sector check	16
C. Police practices across Canada: inconsistent and unpredictable	17
III. The law governing police record checks	20
A. What can be released: legal limits on releasing police records	20
1. Legislative and constitutional privacy protections	20
2. Human rights codes	21
3. <i>Criminal Code</i>	21
4. <i>Youth Criminal Justice Act</i>	22
5. <i>Criminal Records Act</i>	22
B. What can be requested and received: legal limits on employers, non-profits and other organizations asking for and receiving record checks	23
1. Privacy legislation and employees or volunteers	23
2. Human rights legislation and employees or volunteers	27
3. Employment law	29
4. Privacy and human rights law in non-employment contexts: A note on record checking tenants, service recipients and customers	32

<b>IV. Evaluating the demand</b>	<b>33</b>
A. The purpose of police record checks: why are organizations asking for record checks?	38
B. The scope of current record check practices: who is required to submit record checks?	41
C. Interpreting the results	43
1. How are record checks being used in the recruitment process?	43
2. Treatment of non-conviction records, police contact and mental health information	46
3. Balancing risk mitigation, privacy and human rights	50
<b>V. Servicing – and building – the demand: third-party record providers</b>	<b>52</b>
<b>VI. The false promise of a police record check</b>	<b>57</b>
A. Criminal convictions: limited correlation to future behaviour	58
B. Criminal convictions and the workplace: an irrelevant factor in predicting future work-related crime?	59
C. Implications for non-conviction records	60
<b>VII. The hidden personal and societal costs of widespread police record checks</b>	<b>61</b>
<b>VIII. Conclusion and recommendations</b>	<b>66</b>
<b>Appendix: Methodology</b>	<b>76</b>
A. Interviews	76
B. Access to information requests	77
C. Survey of private sector companies providing police record checks	78
<b>Notes</b>	<b>79</b>

# EXECUTIVE SUMMARY

An increasing number of Canadian organizations – employers, volunteer managers, educational institutions, licensing bodies and governments – are incorporating police record checks into their hiring and management practices. This report examines the Canadian legal regulation of these practices and the available social science evidence regarding the utility and impact of conducting police record checks. In the course of our research we conducted interviews with individuals from a wide range of organizations that request record checks. Our research was also informed by contact with over one hundred Canadians regarding the impact that record checks have had on their lives.

There is no clear or consistent definition of a “criminal record” in Canadian law, and existing legislation establishes only a patchwork of partial regulation. There are statutes that set clear limits on the disclosure of certain records, including less serious findings of guilt, youth records and, upon application, some convictions. Local and federal police databases, however, store not only a history of criminal convictions but also details about mental health apprehensions, 911 calls, casual police contact, unproven allegations, withdrawn charges and acquittals (“non-conviction records”). In many jurisdictions, these non-conviction records are frequently disclosed on police record checks. Most employees are not covered by existing privacy legislation. Human rights statutes provide varied levels of protection, at times prohibiting discrimination against pardoned convictions, while leaving those with non-conviction records open to unfair treatment. Because of these and other gaps in Canadian law, depending on where a person lives, receiving an acquittal or having a withdrawn charge can be more personally and professionally damaging than a formal finding of guilt.

Our research suggests that Canadian employers and volunteer managers regularly require applicants to provide record checks during the application process. Organizations appear generally risk averse. Some simply have zero-tolerance policies, requiring applicants to provide an absolutely clean record check. Others will say they exercise some discretion but will nonetheless err on the side of requesting more information and turning away individuals where there is any perceived

link between the entry on the police record and the position. Awareness of the legal restrictions on requesting and using police record checks is limited; based on our interviews, even the clear legal provisions that are in place to limit the use of vulnerable sector checks – the most invasive form of police record check – are being contravened.

Our interviews also revealed a general perception that a police record check is a useful risk-mitigation tool – that it will help screen out “bad” people and keep organizational assets and vulnerable clients safe. The available social science evidence, however, does not support this assumption. The academic research that has been done to date has found that past criminal convictions are not correlated with a likelihood to commit a work-related offence in the future. Moreover, these studies focus only on the predictive value of convictions; an enormous range of circumstances may give rise to a non-conviction record, making their utility in employee screening even more questionable.

This growing reliance on police record checks has significant collateral consequences that are damaging on multiple fronts. On a personal level, individuals who have paid their debt to society find that they are facing years of social and economic exclusion. Those who called 911 for medical assistance or faced baseless allegations are being excluded from school, denied employment and isolated from their communities on the basis of old non-conviction records and police contact. On a societal level, placing increased and unnecessary barriers in front of individuals who are seeking employment, education or volunteer experience is counterproductive. For those who have committed a crime, employment – along with the social networks and economic stability that work provides – increases the likelihood of successful rehabilitation and reintegration.

The current legal lacunae largely leave it to requesting organizations and local police services to decide what should be disclosed, to whom, and under what circumstances. Organizations are generally risk averse. Numerous police services across the country, concerned about protecting vulnerable individuals and about potential liability for not sharing seemingly relevant information, have moved towards greater disclosure. Employers and volunteer managers are similarly concerned about protecting vulnerable individuals and organizational assets and are also worried about potential liability for not requesting all available information – and not acting upon information if something is disclosed. Ultimately, it is left up to the individual with some type of notation on their record to find a job, to explain why the police were called to the house four years ago, or to try to navigate complex bureaucratic systems to suppress or expunge their non-conviction record.

The time has come for our provincial, territorial and federal governments to address this issue. There is no evidence that broad use of criminal records materially reduces the risk of crime or violent offences in the workplace. To the contrary, systemic barriers to employment undermine the significant efforts and resources put into reintegration and ultimately prejudices community safety. The widespread release of non-conviction records runs counter to the presumption of innocence; violates individuals' privacy; and leads to discriminatory, stigmatizing exclusion from employment, education and community opportunities. The bottom line is that widespread, unnecessary police record checks do not contribute to public safety; they undermine it. The following recommendations – both short- and long-term – are aimed at reintroducing perspective and balance to the societal use of police record checks.

## Recommendations

### 1. To provincial, territorial and federal governments

- 1.1 Governments should legislatively prohibit the disclosure of non-conviction records for criminal record and police information checks.
- 1.2 Governments should introduce legislation based on British Columbia's *Criminal Records Review Act*, establishing centralized bodies to conduct vulnerable sector screening and evidence-based risk assessments. These bodies should provide screening services for all positions that would qualify for a vulnerable sector check.
- 1.3 Human rights statutes across the country should be amended to clearly prohibit discrimination on the basis of police contact, non-conviction records and criminal records of conviction.
- 1.4 Provincial and territorial privacy statutes across the country should be amended to provide privacy protection for applicants, employees and volunteers not already covered by existing provincial or federal privacy statutes.
- 1.5 It is in the public interest for individuals with a criminal record to have the fullest opportunity for employment. Governments should critically review legislative provisions that permit or require police record checks, as well as government grants and contracts that require the recipient organization to conduct police record checks. Recent federal amendments that further restricted Canadians' access to record suspensions should be repealed.

## 2. To police services and police service boards

- 2.1 Police services should not disclose non-conviction information on criminal record and police information checks.
- 2.2 Until recommendation 1.2 is adopted, there should be a strong presumption against the disclosure of any non-conviction information on vulnerable sector checks. Non-conviction information should be disclosed only in exceptional circumstances where there are reasonable grounds to believe that disclosure of this information will mitigate an identifiable risk to public safety.
- 2.3 Police services should bring existing policies into compliance with the intent of federal legislation governing police records, including the *Youth Criminal Justice Act*, the *Criminal Records Act* and the *Criminal Code*.

## 3. To businesses and not-for-profit organizations

- 3.1 Organizations should critically assess whether current record check practices are necessary. The majority of positions should not require any form of record check, and in general only individuals who are in ongoing, unsupervised positions of trust with or power over the vulnerable sector should be subject to a vulnerable sector search.
- 3.2 Checks that may disclose applicants' mental health information and history of police contact are highly privacy invasive and likely contravene Canadian privacy law, where applicable. They should not be utilized.
- 3.3 Organizations offering positions that do warrant a criminal record or vulnerable sector check should develop detailed, clear, written guidelines. The full policy should be public and available to all applicants, and criminal record checks should be requested only once a conditional offer of employment has been extended.

## 4. To third-party record check companies

- 4.1 Third-party record check companies should enhance transparency and clarity; fully comply with the *Personal Information Protection and Electronic Documents Act* and provincial privacy statutes; and end services that provide or facilitate access to non-conviction records.



## 5. To privacy commissioners and human rights commissions and tribunals

- 5.1 The development, interpretation and application of privacy and human rights law should take into consideration the most recent social science evidence regarding the dubious value of police record checks as a workplace screening tool.
- 5.2 Where a privacy commissioner has the authority to initiate its own investigations, it should consider investigating the collection, use and disclosure of both conviction and non-conviction information for employment purposes by organizations within its jurisdiction.

# I. INTRODUCTION

Reading the primary Canadian laws governing the disclosure of criminal records, the intent appears to be clear and consistent. Youth, first-time offenders and those who commit minor criminal offences are not to be saddled with a criminal record.<sup>1</sup> Those who are subject to the most serious penalty – formal criminal conviction by a fine or custodial sentence – may, after time has passed, be granted a record suspension if they have not been involved in any criminal activity in the interim.<sup>2</sup> At least on paper, Canada has created a system where those who have the least individual culpability and the greatest chance of getting their lives “back on track” will generally not be branded with a criminal record that prevents them from getting a job, accessing services, volunteering or going to school. Across the country most human rights statutes supplement these privacy protections by, at a minimum, prohibiting employers from discriminating against individuals on the basis of a record suspension or other form of pardoned offence.<sup>3</sup>

Unfortunately, the intent of Canadian laws on criminal records is being thwarted. Over the years, the type of information collected, retained and disclosed by Canadian police services has grown far beyond the categories of records covered by the *Criminal Code* and the *Criminal Records Act*. Today local and federal databases store details about casual police contact, unproven allegations, mental health apprehensions, suicide attempts, 911 calls, withdrawn charges and acquittals, as well as information about victims, witnesses and suspects (we refer to these records collectively as *non-conviction records*). None of this information is explicitly addressed in the *Criminal Records Act* or the *Criminal Code*. Many police services across the country have taken the position that these police contact and non-conviction records,<sup>4</sup> which by definition do not demonstrate an individual’s guilt, should be disclosed on police record checks. There is significant variation between the information disclosed by different police forces, making it difficult for individuals to know what exactly will be disclosed on a record check. Because of these legislative gaps, many non-conviction records can be disclosed on a record check for longer than findings of guilt. In many jurisdictions, employers are prohibited from discriminating on the basis of a pardoned conviction – but not a non-conviction record. Depending on where a

person lives, therefore, receiving an acquittal or having a withdrawn charge on record can be more professionally damaging than a formal finding of guilt.

Individuals are often shocked to find out that an allegation they thought was resolved or police records containing information about a personal medical issue can be disclosed years later through a police record check. Canadian academics researching the impacts of releasing police contact and non-conviction records have found that disclosing these records serves as a barrier in areas as diverse as employment, volunteer and educational opportunities; housing; travel; insurance and immigration.<sup>5</sup> Students obtaining degrees in human and medical services find, after years of study, that they are unable to qualify for placements because of a withdrawn charge from a decade ago. Parents realize that they cannot accompany their children on field trips – at least not without explaining to school authorities why the police were called to their house many years ago during a domestic dispute. Individuals who have phoned 911 for mental health-related medical emergencies find that a notation appears on their police record check and, if they are not automatically excluded from positions, they are regularly required to revisit the details of the incident, and their current mental health status, during the interview process. In some jurisdictions even victim and witness information has been intentionally disclosed on police record checks.

Some of these people may have access to a local suppression or expungement procedure requiring them to justify to the police why this information should either not be disclosed or be deleted from police databases. Processing these requests, however, can take months. At best, their placement or employment offer will be significantly delayed, frequently causing emotional stress and financial loss. At worst, they will miss the opportunity all together. Many individuals also self-select out of opportunities, deciding not to apply for a job or community work to avoid facing the possibility of having to disclose their personal history.

An increasing number of Canadian businesses, not-for-profit organizations, service organizations and educational institutions are using police record checks as part of their volunteer and employee screening processes.<sup>6</sup> The available evidence, however, suggests that individuals with prior criminal records are *not* more likely to commit employment-related crimes.<sup>7</sup> Moreover, research shows that risk factors as interpreted by employers or other agencies “depart markedly from criteria included in commonly accepted and validated assessments of offender risk.”<sup>8</sup> Research also shows that stable employment, as well as the income, stable housing and social networks that employment can foster, are significant *protective* factors against future reoffending.<sup>9</sup>

Canada is not the only country that is struggling with the human rights, privacy and societal implications of increased recourse to police record checks. In Australia, a 2006 report from the Victorian Privacy Commissioner identified very similar themes: the number of police record checks was growing and resulting in unjust impacts on large proportions of the community, prejudicing individuals and undermining the community benefit of reintegrating individuals into society.<sup>10</sup> In the United Kingdom, multiple appellate court decisions have restricted the release of police information on background checks,<sup>11</sup> and the government commissioned an independent report into the issue, which recommended restricting access to old convictions and to consider never disclosing “soft intelligence” to an employer via the standard criminal record check process.<sup>12</sup> Across the United States “ban the box” campaigns have taken hold, and, as of May 2013, fifty cities or counties and nine states have decided to remove questions about conviction history from applications for public employment;<sup>13</sup> four states and fifteen cities have extended the ban to private employers.<sup>14</sup> More already have legislation pending, scheduled for approval in 2014. As Delaware Governor Jack Markell explained, “we should ban the box for state government hires this year . . . because marginalizing [people with records] helps none of us.”<sup>15</sup>

In 2012, the Canadian Civil Liberties Association released a report criticizing the release of non-conviction information on police record checks. We recommended that these records – a violation of privacy and a threat to the presumption of innocence – be presumptively removed from all levels of police checks. In this report, we close the circle by examining the rising demand for police record checks – focusing on the private and non-profit organizations that are requesting the information, as well as the third-party companies that are selling background check services.

## II. WHAT IS A POLICE RECORD, AND WHAT TYPES OF RECORD CHECKS DO CANADIAN POLICE PROVIDE?

### A. What is a criminal record?

Practically speaking, Canada has no consistently applied definition of a criminal record.

The *Criminal Code* states that a person found guilty of a criminal offence can either receive a criminal conviction or a discharge. A person convicted of a crime can be sentenced to a term of imprisonment (continuous or intermittent),<sup>16</sup> a fine or forfeiture,<sup>17</sup> a conditional sentence (where the sentence is to be served in the community)<sup>18</sup> or a suspended sentence with probation (rehabilitative supervision in the community through probation).<sup>19</sup> All of these are criminal convictions that typically will remain on an individual's record until the person applies for and receives a record suspension (formerly called a pardon) under the *Criminal Records Act*.<sup>20</sup> As affirmed by the Supreme Court, "[t]he primary aim of a pardon, granted under the *Criminal Records Act (CRA)* is the removal, as completely as possible, of the negative consequences of conviction once the offender has fulfilled the sentence and enough time has elapsed to establish, with some degree of certainty, law abiding behaviour."<sup>21</sup> At the very least, then, a person who has been convicted of a crime will have a criminal record, and for most convictions there exists a possibility of sealing that record through a record suspension.

The *Criminal Code* also sets out that a person who pleads or is found guilty of a criminal offence may receive an absolute or conditional discharge.<sup>22</sup> These are explicitly *not* criminal convictions and fall into the broad category of non-conviction records. You cannot receive a record suspension for a discharge, and the *Criminal Records Act* requires that these records be automatically sealed and removed from RCMP databases after one year for an absolute discharge, and three years for a conditional discharge.<sup>23</sup> Individuals who are discharged are frequently told that they will not have a criminal record of convictions. While this is technically correct, it is misleading: the fact that a person received a discharge is widely disclosed on a basic "criminal record check," at least within the one- and three-year retention time frames.

Finally, there are a large number of court and police records that may be generated in connection with policing duties or criminal court

proceedings. While none of these dispositions or records involve a formal finding of guilt, they nonetheless generate “police records” or “criminal court records” and, depending on the specific policies of the policing service, can be disclosed on a “record check.” People can come into contact with the police as victims, persons with mental health needs, witnesses, “persons of interest” or the targets of investigations into crimes alleged by others. Police records can include details of alleged incidents where no charges were laid, apprehensions under provincial mental health legislation, withdrawn charges (via diversion, Crown assessment of no reasonable prospect of conviction, or as not in the public interest), stays of proceedings and acquittals. Although these records are not based on any finding of guilt, much less a criminal conviction, they frequently appear on police record checks.<sup>24</sup>

## B. Types of police record checks

There are significant differences in the types of police checks performed by police services across the country. In general, however, they can be divided into three levels of checks:

- police criminal record checks,
- police information checks, and
- police vulnerable sector checks.

Each of these levels is described below. British Columbia provides a unique, centralized process available to some employers aimed at determining whether a potential employee or volunteer poses certain risks to children or the elderly. This process, governed by BC’s *Criminal Records Review Act*, has significant benefits in terms of consistency, accuracy, human rights, privacy and fairness. It is described in Box 1 and, in our view, constitutes a best practice when contrasted with the ad hoc, variable status quo across the rest of the country.

### 1. Police criminal record check

Criminal record checks are governed by a national policy framework established by the RCMP.<sup>25</sup> These checks will disclose summary and indictable criminal convictions referenced in RCMP or local police databases. The results of a police criminal record check are by default released to the individual that applied for the check;<sup>26</sup> if additional consent is provided, the police may send the results of the record check directly to the employer, school or volunteer agency. According to RCMP policy, only a limited amount of information can be revealed based on a name and date of birth search. On a name-based search, individuals are asked to self-declare their criminal record, and the police will verify whether the search was negative (no records with the name and birthdate found), incomplete (could not complete search), or a possible match (record as declared possibly matches RCMP records). Certified

## BOX 1

### British Columbia's *Criminal Records Review Act* – a best practice example

British Columbia's *Criminal Records Review Act (CRRRA)* aims to prevent the physical and sexual abuse of children and the physical, sexual and financial abuse of vulnerable adults by establishing a uniform, comprehensive screening procedure for employees and volunteers who work directly with or have unsupervised access to children or vulnerable adults. The service is provided free of charge to organizations that receive provincial funding.

The *CRRRA* procedure has a number of significant advantages compared with the ad hoc screening that takes place across the rest of the country.

First, the legislation clearly establishes which employees and professional governing bodies are required to use the screening. These criteria provide an additional, centralized safeguard to help ensure that employers are not requesting vulnerable sector checks for positions that are not eligible for this level of record check.

Second, the *CRRRA* procedure allows for more standardized, evidence-based and detailed risk assessments. The legislation establishes a set list of sexual, physical and financial offences that will trigger a more in-depth investigation. If a

relevant prior conviction or pending charge is found, trained *CRRRA* staff will conduct a detailed risk assessment that will take into account a wide range of circumstances and factors. In coming to a final decision staff can do a full investigation, reviewing relevant court and police files and conducting interviews with relevant individuals or agencies such as the victim and police or probation officers. The detailed, standardized, centralized and professionalized risk assessment process should, at least in theory, result in significantly more predictable, accurate, fair and evidence-based outcomes.

Third, individuals who are flagged for a risk assessment are notified and are given the opportunity to participate in the risk-assessment decision. They are able to provide submissions, and they may challenge a negative finding through an established appeal avenue. These guarantees of due process make the assessment considerably fairer for employees as compared with an employer's decision, which would frequently be made in an opaque manner without input from the candidate.

Finally, the procedure set up by the *CRRRA* is significantly more privacy and rights protective for employees and

volunteers. If an individual does not have a prior conviction or pending charge for a relevant offence, the *CRRRA* will simply notify the employer that the person passed the screening. The employer, therefore, is never sent any details of irrelevant convictions, charges, or mental health interactions. If a relevant offence is found, the criminal record is not sent to the employer; the risk posed is determined entirely by trained *CRRRA* risk assessors, who send a letter to the employer that discloses only the results of the screening process, not the underlying convictions or charges. This process not only eliminates unnecessary privacy invasions but also prevents employers from making discriminatory decisions based on an irrelevant criminal record.

Throughout our interviews and discussions both organizations and policing leaders expressed a strong desire for a centralized process that would specifically address the types of risks targeted by the *CRRRA*. In our view, neither police records managers nor recipient organizations have the capacity or expertise to conduct risk assessments in the ad hoc police record check process that exists across the majority of the country.

confirmation of whether a criminal record exists can be provided only by fingerprint submission. Several police forces across the country have eliminated this level of check entirely.<sup>27</sup> Confusingly, the RCMP's own "Certified Criminal Record Check" will disclose not only convictions but also discharges within the retention timeframes set out by the *Criminal Records Act*.

## 2. Police information check

The next level of background check, which we will refer to as a police information check (PIC), includes a broader range of information. Unfortunately, there is a large amount of local variation in this level of check, as there is no provincial or federal legislation that directly and comprehensively governs the process.<sup>28</sup> Generally, the PIC will include a search of local and federal police databases, “court records, and a query of records management systems in other police agencies’ jurisdictions.”<sup>29</sup> The results of this search can disclose many different types of records, including:

- outstanding charges, warrants, judicial orders;
- peace bonds, and probation and prohibition orders;
- absolute and conditional discharges;
- family court restraining orders;
- dispositions including, but not limited to, withdrawn, dismissed, and not criminally responsible by reason of mental disorder; and
- occurrence reports and other police contact information, including allegations that did not result in charges, 911 calls and mental health-related apprehensions.<sup>30</sup>

Some police services will also, on a discretionary basis, disclose youth records and victim or and witness information.

The extent to which some or all of the above information will be included in a PIC and the format of the disclosure depends on the local police service’s policies and procedures.<sup>31</sup> As these policies and procedures are frequently determined and applied by police service management and staff, individual judgment and discretion can also play a significant role in determining whether certain information is included in a background check. The results of a PIC are generally released to the applicant, who may then pass the record check along to a prospective employer, volunteer agency or other requesting organization. Again, not all police services provide this level of check.<sup>32</sup>

## 3. Police vulnerable sector check

The third level of background check is the police vulnerable sector check. This type of check will include all of the information in a standard police criminal record check or PIC, as well as information about select sexual and violent offences for which the offender has received a record suspension (formerly called a pardon).<sup>33</sup> Again, the extent to which non-conviction information is disclosed on this level of check depends on the specific police service. The results of a vulnerable sector check can be released only to the applicant or to the requesting



## C. Police practices across Canada: inconsistent and unpredictable

organization, if authorized by the applicant. In addition to having to provide fingerprints to confirm the existence of a criminal record, individuals whose gender and birthdate match a record in the pardoned sex offender registry are required to submit fingerprints to make sure there has not been a change of name.

The amount and types of information released by police agencies in record checks varies considerably across the country.

In British Columbia, Alberta and Ontario the provincial associations of chiefs of police have each instituted voluntary guidelines for police record checks. The Ontario Association of Chiefs of Police (OACP) guidelines describe three levels of checks.<sup>34</sup> A criminal record check reveals unpardoned convictions. A police information check currently includes the information in the first level of check and adds a wide range of non-conviction information and police contact. A vulnerable sector check includes the same information as a police information check but may also include information about selected sexual offences for which a record suspension has been received. In February 2014, the OACP agreed to update their guidelines, instituting a presumption against the release of non-conviction records on all levels of police checks.<sup>35</sup> A narrow public safety exception will be adopted to allow for the release of records where there is a risk to the safety of vulnerable community members.<sup>36</sup> Not all Ontario police services follow the OACP guidelines.

The Alberta Association of Chiefs of Police has established guidelines on police checks that are reviewed annually.<sup>37</sup> The “standard” police check, called a *police information check*, may contain a wide range of non-conviction records, including mental health apprehensions and all “relevant” police information or files. Even information that is sealed by legislation – including pardons or record suspensions, diverted charges, and youth records – may be disclosed from police files “if relevant.”<sup>38</sup> Information about police involvement with youth will also be disclosed with the label *Youth*. The specific procedures developed by the Calgary Police Service and Lethbridge Regional Police Service largely follow the provincial guidelines,<sup>39</sup> and interviews with organizations in Alberta confirmed that a wide range of information would be disclosed on police checks. As described by one interviewee:

There was an Edmonton police staffer who was especially diligent about including whatever pertinent information she felt a volunteer manager should know about a volunteer. And there have been issues with things appearing like if you have a mental health... inquiry or if one calls

police in a suicide-type situation, that could show up potentially on a check. . . . Some of the things she would put on there were if you were a witness, if you made a phone call about your neighbours in a domestic abuse situation, things like that.

The British Columbia guidelines, which are currently in draft form but have been implemented by many British Columbia police services,<sup>40</sup> have only two levels of checks, roughly corresponding to the police information check and the vulnerable sector check outlined in the current Ontario guidelines.<sup>41</sup> All levels of checks potentially include non-conviction information and police contact records.<sup>42</sup>

Saskatchewan has developed a provincial standard for record checks that allows for the disclosure of criminal convictions and conditions imposed by court order.<sup>43</sup> Pending criminal charges, stays of proceedings within the past year, active diversion programs, or findings of Unfit to Stand Trial will result in a statement that there are charges before the court.<sup>44</sup> Police contact information and mental health apprehensions are not disclosed.<sup>45</sup>

Newfoundland has provincial guidelines that outline two types of police record checks: a criminal record check and a combined police information check and vulnerable sector check.<sup>46</sup> The criminal record check discloses only convictions and discharges within the *Criminal Records Act* retention period. The check for the vulnerable sector also includes outstanding charges and warrants and selected pardoned sexual offences. Non-conviction records such as withdrawn charges, acquittals and police contact, including mental health records, are not disclosed on any level of check.

At the national level the RCMP offers Certified Criminal Record Checks and Certified Vulnerable Sector Checks that must be accompanied by fingerprint submission. These searches will reveal convictions that have not received a record suspension (pardon), absolute and conditional discharges within the *Criminal Records Act* retention period, and, for a vulnerable sector search, pardoned offences as permitted by the *Criminal Records Act*. Non-conviction information is not normally disclosed as part of a criminal record or vulnerable sector check. Procedures at local RCMP detachments, however, are variable. In British Columbia, for example, RCMP detachments use a form that provides four categories of possible information, ranging from convictions only to “all information related to non-convictions and all charges regardless of disposition.”<sup>47</sup> BC organizations that receive record checks from the RCMP report that if there is an apparent match, the RCMP will confirm there is information in their system by indicating that a record “may

or may not exist” in a given category. The organization then typically asks the individual to provide details of what they think may be in the police databases. The organization can then phone the RCMP, which will confirm whether the information the volunteer provided matches what they have in their police records. Organizations report that, depending on the RCMP detachment, the record check will indicate the possible existence of a non-conviction entry as a result of a wide range of police contact, including non-criminal mental health interactions.

Manitoba, Quebec, New Brunswick and Nova Scotia do not appear to have any province-wide guidelines.<sup>48</sup> Practices in these jurisdictions are varied. The Winnipeg Police Service does not have any manual outlining record check policies and processes.<sup>49</sup> Brandon Police Service offers a “Police Criminal Record Check” that, according to the consent form, “will include” non-conviction and police contact information<sup>50</sup> but, according to local policy, appears to search only for convictions and pending charges.<sup>51</sup> Halifax Regional Police provides only two levels of checks – a criminal record check and a vulnerable sector check – and will only disclose prior convictions.<sup>52</sup> Saint John Police Force will only confirm that an applicant does not have a criminal record. Details of convictions are not released, and information contained in police contact files such as incident and investigative reports will only be disclosed pursuant to a judicial order.<sup>53</sup> As was explained in response to our access to information request, “[t]he judicial order remedy is central to protecting the integrity of the criminal justice process, and protecting the privacy of these [sic] identified in police records.”<sup>54</sup>

# III. THE LAW GOVERNING POLICE RECORD CHECKS

## A. What can be released: legal limits on releasing police records

Numerous statutes limit the information that can be released on various levels of checks. Relevant provisions can be found in the *Criminal Records Act*, the *Criminal Code*, the *Youth Criminal Justice Act*, and federal and provincial privacy and human rights legislation. There are also numerous policies governing the release of information from various police databases.<sup>55</sup>

### 1. Legislative and constitutional privacy protections

The legislation that directly governs police services can have provisions governing police use of private information.<sup>56</sup> Police forces also are governed by provincial, territorial or federal privacy legislation that restricts how they can collect, use and disclose private information.<sup>57</sup> Privacy legislation frequently addresses the use and disclosure of information by law enforcement specifically, a situation that can result in a complex set of overlapping regulatory provisions.<sup>58</sup> The British Columbia Information and Privacy Commissioner, which has examined the legality of police record checks under provincial privacy legislation, has ordered police services in British Columbia to immediately cease disclosing mental health apprehensions on all levels of record checks and prohibit the release of non-conviction information on record checks outside the vulnerable sector.<sup>59</sup>

Section 8 of the *Canadian Charter of Rights and Freedoms* also protects individual privacy by constitutionally entrenching the right to be free from unreasonable search and seizure.<sup>60</sup> This right requires an examination of not only how the information is collected but also why it was collected and how it is used and retained. As stated by the Court of Appeal for Ontario in *R. v. Dore*, “the ‘protective mantle’ of s. 8 extends during the duration of the holding and retention of the thing seized in order to protect the privacy interest of the person from whom it was seized.”<sup>61</sup>

A full analysis of police services’ legal authority to disclose personal information on record checks is beyond the scope of this report.<sup>62</sup>

However, the fact that the individual has signed a consent form before the record check is not necessarily a sufficient legal basis for the release of this information.<sup>63</sup> When consent to a background check is provided in the context of an employment application, a mandatory educational placement or other comparable situations, both courts and privacy commissioners have found that the voluntariness of this act is highly questionable.<sup>64</sup> Given the coercive nature of hiring and other processes that often require police background checks, consent should not be used as a basis to justify the legality of an entire police record check program.

## 2. Human rights codes

All Canadian human rights legislation protects individuals from discrimination based on disability, and the majority provide explicit protection from discrimination based on various types of criminal records as well.<sup>65</sup> The Ontario Human Rights Commission has addressed police disclosure of mental health-related records and stated that “the disclosure of information by police forces may constitute a violation of the *Code* if it goes beyond the *bona fide* criminal record of an individual.”<sup>66</sup> The commission recommends that “where a police service has records about contact with a person relating to mental illness, the person should not be automatically assumed to be unfit for the position or to pose a risk, nor be identified as such in any information disclosed to outside organizations.”<sup>67</sup> Instead, they urge police services to conduct an individualized assessment that takes into account the nature of the police contact, the essential duties of the potential position and the degree of risk (including the nature, severity, probability and scope of risk) associated with the position.<sup>68</sup> In other provinces where criminal records are broadly protected under human rights legislation, this logic would suggest that a position-specific assessment for the relevance of specific entries on criminal records is required as well.

## 3. Criminal Code

The *Criminal Code* restricts the release of police and court records for persons who have had their charges dealt with by “alternative measures,” also commonly referred to as diversion.<sup>69</sup> The police force responsible for the investigation is permitted to keep records relating to these offences,<sup>70</sup> and the government can keep records related to the investigation, court proceedings or diversion program.<sup>71</sup> This information can be disclosed only to a very limited list of individuals or agencies; there is no provision permitting disclosure for an employment or volunteer-related criminal record check.<sup>72</sup>

#### 4. *Youth Criminal Justice Act*

The *Youth Criminal Justice Act* governs how long youth records are accessible and tightly restricts disclosure of the records during specific time frames. There is a blanket prohibition on releasing youth records or information in records that would identify youth. The only individuals exempted from this prohibition are specifically listed in the statute; this list includes, for example, the youth, the youth's lawyer or parents, and specific government and legal actors who are dealing with the youth's case. It is the Canadian Civil Liberties Association's position that youth records may not be released for the purposes of a criminal record check unless the check is required by a federal, provincial or municipal government for the purpose of paid or unpaid employment or services.<sup>73</sup> Numerous police services, however, take the position that they can disclose youth records during certain "access periods" because the youth themselves are entitled to access their own records. Although this is true, it ignores the fact that it is illegal for the young person to disclose their own record to an individual or organization that is not authorized to receive it under the *Youth Criminal Justice Act*. It is CCLA's view that such a result is contrary to the spirit, if not the letter, of the *Youth Criminal Justice Act*. At a minimum, the Information and Privacy Commissioner of Ontario has recently affirmed that the release of youth records on a vulnerable sector check outside the legislated access periods is not permitted under the *Youth Criminal Justice Act* if the records will be indirectly disclosed to a third party that is not entitled to access them under the statute.<sup>74</sup>

Even those who are explicitly authorized to view youth records do not have perpetual access. In general, records may be accessed for between one and five years depending on the seriousness of the crime, the sentence a youth receives and whether another crime is committed before a record is automatically sealed.<sup>75</sup> If a person is found guilty of another offence committed when they are an adult while the youth record is still open, the youth record is treated as an adult record for the purposes of retention and disclosure.<sup>76</sup>

#### 5. *Criminal Records Act*

The *Criminal Records Act* prohibits the disclosure of absolute and conditional discharges in the custody of the RCMP or the Government of Canada after one and three years, respectively, unless the Minister of Public Safety and Emergency Preparedness gives prior approval.<sup>77</sup> All references to discharges must be automatically removed from all databases maintained by the RCMP after those periods expire.<sup>78</sup>

## B. What can be requested and received: legal limits on employers, non-profits and other organizations asking for and receiving record checks

There is also a broad prohibition on the release of any conviction for which an individual has received a record suspension (formerly called a pardon).<sup>79</sup> There are, however, specific provisions allowing the release of some types of suspended records with ministerial approval for the purpose of a vulnerable sector check.

Finally, the *Criminal Records Act* has specific provisions governing vulnerable sector checks, including limits on:

- who can ask for the check,
- the position for which a check can be requested,
- how the check must be processed, and
- what can be done with the results of the search.

A vulnerable sector search can be requested only by a person or an organization responsible for the well-being of a child or vulnerable person. There must be an existing application for a paid or volunteer position, and the position must be one of “trust or authority” in relation to a child or vulnerable person.<sup>80</sup> These checks can be run only by a member of the police force or a specified “authorized body,” and the subject of the check must provide prior written consent.<sup>81</sup> To date, British Columbia is the only province that has established an organization authorized by the *Act* to perform vulnerable sector checks.<sup>82</sup> That procedure, set out in British Columbia’s *Criminal Records Review Act*, is described in more detail in Box 1.

A wide range of organizations and businesses, both in the public and private sector, require employees, volunteers and service recipients to provide record checks. The diversity of organizations and contexts in which record checks are used makes it difficult to comprehensively summarize the applicable law. In general, however, three broad areas of law are relevant to the organizations and institutions that are the ultimate recipients of police record checks:

- privacy legislation,
- human rights legislation, and
- employment law.

### 1. Privacy legislation and employees or volunteers

Provincial and federal privacy legislation limits organizations’ ability to collect personal information in the employment context. The application of privacy legislation will change depending on a number of factors, including whether the employer or volunteer agency is federally or provincially regulated and whether it is a government or private sector entity.

The application of privacy legislation to private sector employment is quite varied. The *Personal Information Protection and Electronic Documents*

Act (*PIPEDA*),<sup>83</sup> for example, is federal legislation that sets out how private sector organizations may collect, retain, use and disclose private information. While *PIPEDA* applies broadly to govern personal information used in the course of commercial activity, however, the provisions regarding the private information of employees are applicable only to federally regulated private sector organizations such as banks, airlines and telecommunications companies.<sup>84</sup> Alberta, British Columbia and Quebec are the only jurisdictions that have passed privacy legislation targeting the private sector;<sup>85</sup> Manitoba has proposed privacy legislation that is not yet in force.<sup>86</sup> In Alberta, British Columbia and Quebec, the provincial legislation, rather than *PIPEDA*, applies, and privacy protections in the employment context have been extended to provincially regulated private sector organizations. In other provinces, the majority of private sector businesses are generally not subject to privacy legislation governing the use of employees' personal information in the employment context.

Public sector organizations and government bodies are frequently governed by distinct privacy legislation that may apply in the employment context.<sup>87</sup> These statutes can apply to a wide range of institutions, including provincial agencies, boards and commissions, community colleges, universities, hospitals and regulatory bodies performing delegated governmental functions.<sup>88</sup>

Some privacy commissioners have specifically considered whether it is permissible for employers and regulatory bodies to require police record checks, and in those jurisdictions organizations must comply with these rulings. For those organizations in other jurisdictions the analyses are instructive and can serve as best practice standards for privacy-respecting employment practices.

The British Columbia Information and Privacy Commissioner (IPC) has provided the most comprehensive analysis and guidance on this issue to date.<sup>89</sup> Under BC's public sector privacy laws, a public body can collect personal information only if "the information relates directly to and is necessary for a program or activity of the public body."<sup>90</sup> Given the lack of evidence linking a history of criminal convictions to employment suitability, the BC IPC concluded that even basic criminal record checks must be requested with significant restraint:

Under BC privacy legislation, employers cannot automatically subject every employee they hire to a criminal record check. Instead, employers must take a more nuanced approach to implementing criminal record checks and ensure that they are not collecting more information than is necessary to determine suitability for employment for each specific position.<sup>91</sup>



The breadth of the information disclosed on police record checks was also a concern to the BC IPC: private sector employers may be justified in asking about some types of prior convictions, but a request for all convictions through a criminal record check will be overly broad.<sup>92</sup>

In the BC government context, the positions the BC IPC identified as properly requiring a pre-employment criminal record check for prior convictions included select positions within law enforcement, positions with expense authority over \$500,000 or very significant assets, select positions with unrestricted access to operational, data and information management systems, and high-level government positions.<sup>93</sup> Basic criminal record checks revealing past convictions are an unnecessary privacy invasion for a range of other positions. The government was ordered to cease criminal record checks for positions where the sole reason for the check was responsibility for accessing personal information; the protection of personal and confidential information and assets; conducting financial, operational and performance audits; or investigations required only by police or other third parties.<sup>94</sup> The BC IPC also recommended that current employees should not be rechecked simply because of a short absence or a transfer and that unless there are exceptional circumstances, ongoing record checks for existing employees should apply only to “particularly sensitive” positions and in any event should not happen more frequently than once every five years.<sup>95</sup>

Turning to British Columbia’s police information checks, the more invasive level of check that reveals non-conviction and police contact information, the privacy commissioner ruled that they were “considerably more privacy invasive than criminal record checks and their use by employers results in collection of personal information that is seldom justifiable under privacy legislation in British Columbia.”<sup>96</sup> Because of the breadth of personal information released on these checks, the IPC ruled that

all public bodies that require a police information check from prospective employees are collecting personal information in contravention of s. 26(c) of *FIPPA* [*Freedom of Information and Protection of Privacy Act*] . . . [T]his is the case irrespective of the results of a check because of the breadth of the search being conducted.<sup>97</sup>

Similarly, all private sector organizations that require police information checks in British Columbia are in violation of privacy legislation because the information released on these checks – including suicide attempts and a wide range of police contact – is not reasonable:

I cannot foresee an instance where a reasonable person would consider it appropriate for an organization to collect this amount of personal

information. Regardless of the results of a police information check, the search itself involves looking at such items as suicide attempts by an individual. This is not a question that organizations are authorized to directly ask an individual in an interview nor is it a question that organizations are authorized to ask as part of a record check. It is simply not reasonable for any organization to know this information . . . .

It is also difficult to foresee many instances where it would be reasonable for an organization to collect most other non-conviction information.<sup>98</sup>

Other privacy commissioners have also made relevant findings with respect to specific complaints. The Alberta Privacy Commissioner, for example, has found that private businesses may not conduct credit checks on prospective employees for positions such as sales associates. In coming to this finding, the Commissioner's Investigator found that personal credit history could be reflective of many different personal circumstances and that the collection of this information was not reasonable for meeting the purpose for which the information was collected. In other words, if the purpose of collection was to determine trustworthiness for handling money, the credit check information did not meet that purpose. Similarly, a credit check "was not reasonably required to assess the [prospective employee's] ability to perform the duties of a [sales associate], or to assess whether he might have a tendency towards committing in-store theft or fraud."<sup>99</sup> In another line of cases, the Alberta Privacy Commissioner has ruled that various statutory regulatory bodies may conduct police record checks on potential and existing licensees where these checks relate to the regulator's statutory purpose.<sup>100</sup>

The federal privacy commissioner has also considered the legality of security clearance checks in federally regulated workplaces. The legality of those checks includes an analysis of whether the employee had been fully notified of and consented to the extent and purposes of the background check and "whether a reasonable person would consider it appropriate in the circumstances for the company to collect personal information from employees for the purpose of conducting security clearances."<sup>101</sup> Relevant factors have included the nature of the work and position (e.g., nuclear plant employees or workers who must enter restricted areas in airports), mandatory requirements from statutory regulators, and the existence of local or international security threats in a given category of workplace settings.<sup>102</sup> Business convenience cannot justify imposing extensive, open-ended security clearance checks mandated by foreign governments.<sup>10</sup>

Private organizations in British Columbia, Alberta, Quebec, and companies in federally regulated industries must comply with privacy legislation governing the collection of personal information in the employment context. The preponderance of privacy case law requires full, informed and knowledgeable consent from the employee and a strong connection between the requirements of the specific position and a criminal record check. The existence of less privacy-invasive alternatives is relevant, and the breadth of information that is searched on a record check may, in itself, be sufficient to make the request illegal. Highly security-sensitive workplaces such as police departments, nuclear facilities and airports may justify enhanced employee screening. For the vast majority of jobs, however, requiring even basic criminal record checks from prospective and existing employees would constitute an unnecessary and unjustifiable collection of personal information. Requesting checks that include non-conviction and mental health information would almost never be justifiable. Even those workplaces that are not subject to privacy legislation in the employment context should, as a best practice, aim to put in place privacy-respecting employment policies.

## 2. Human rights legislation and employees or volunteers

All human rights legislation prohibits discrimination on the grounds of a disability, including a mental illness. In jurisdictions where police record checks disclose police contact, 911 calls or mental health apprehensions, asking for and making decisions based on a police record check may leave an organization vulnerable to claims of discrimination on the grounds of disability. The Ontario Human Rights Commission has recommended that employers refrain from asking for police record checks unless necessary:

Because of the potential for an adverse human rights impact, police background checks should only be requested of individuals where it is a reasonable and *bona fide* requirement because of the job or volunteer position being applied for. While an organization may prefer to have as much information as possible about someone, human rights concerns prevail.<sup>104</sup>

Even when it is based on a *bona fide* job occupational requirement, the request for the record check should not be made until the organization has decided to offer a candidate the job; the candidate should be told that that a job offer is conditional on the satisfactory outcome of a background check.

Human rights legislation can also prohibit employers and services providers from discriminating against individuals with criminal records.

Ontario, the Northwest Territories and Nunavut explicitly protect individuals from discrimination if they have a pardoned conviction (now known as a record suspension). In these jurisdictions, there is no explicit protection for non-conviction records. Ontario also provides human rights protection for individuals who have a conviction for any provincial offence.<sup>105</sup>

Quebec, Prince Edward Island, Newfoundland and British Columbia provide more comprehensive protection. The Quebec *Charter of Human Rights and Freedoms*, for example, prohibits an employer from dismissing, refusing to hire or otherwise penalizing a person because of a criminal conviction that is “in no way connected with the employment or if the person has obtained a pardon.”<sup>106</sup> The Supreme Court has found that absolute and conditional discharges, which are automatically sealed and purged from federal databases after one and three years, respectively, are included in the *Charter’s* definition of a “pardoned” offence.<sup>107</sup> In British Columbia and Prince Edward Island a person cannot be discriminated against “because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.”<sup>108</sup> Newfoundland has a similar provision.<sup>109</sup> The British Columbia Human Rights Tribunal has found that this provision of the *BC Human Rights Code* also prohibits discrimination on the basis of non-conviction records such as allegations of criminal acts, charges, or findings of guilt where no conviction is registered.<sup>110</sup> Finally, Yukon explicitly provides the most protection, prohibiting discrimination on the basis of “a criminal record or criminal charges” unless the history is relevant to the employment.<sup>111</sup>

The federal *Human Rights Act* and the provincial human rights codes in Alberta, Saskatchewan, Manitoba, Nova Scotia and New Brunswick do not explicitly address whether they protect individuals from discrimination on the grounds of a criminal record.<sup>112</sup> This does not necessarily mean, however, that employers are free to discriminate on these grounds. The Manitoba *Human Rights Code*, for example, has a general clause protecting some classes or groups of people on the basis of personal characteristics that are not specifically listed. The Manitoba Human Rights Commission has found that “discrimination in employment on the basis of a criminal charge or conviction may constitute the basis of a complaint” under this general provision.<sup>113</sup>

In jurisdictions that offer some level of protection for individuals with criminal records, courts and tribunals have identified a number of factors to help determine whether a record is related to the proposed or existing job. The precise considerations will vary depending on the jurisdiction and the wording of the statute. Some of the circumstances and factors that are relevant in various jurisdictions include the following:

1. Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
2. What were the circumstances of the charge and the particulars of the offence involved – e.g., how old was the individual when the events in question occurred, and were there any extenuating circumstances?
3. How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Have they shown any tendencies to repeat the kind of behaviour for which they were charged? Has the individual shown a firm intention to rehabilitate themselves?
4. Has a pardon or record suspension been secured, or has a conditional discharge been successfully received?
5. Having considered all the above, was the severity of the particular action taken against the potential employee warranted by the nature and circumstances of the charge or conviction?
6. Where discrimination is based on a criminal charge, the evidentiary onus on an employer will be greater; the employer must clearly demonstrate that the risk to the public, co-workers or the employer's business is so severe that the mere possibility of a conviction warrants the discriminatory employment decision.<sup>114</sup>

Again, where a criminal record check is warranted, it should be the last step in the hiring process, and a job candidate should be informed that they have an offer of employment that is conditional on the completion of a background check. There should also be a clear policy established ahead of time outlining the purpose of the criminal record check, the process that will be followed, the scope of the information that will be received, and the way that information will be used with reference to the specific criteria of the position.

### 3. Employment law

Employment contracts, either between an employer and an individual employee or in the form of a collective agreement, may restrict an

## BOX 2

### When are organizations legally required to ask for a criminal record?

Some categories of organizations are statutorily required to conduct police record checks. In British Columbia, for example, the *Criminal Records Review Act (CRRRA)* requires doctors, nurses, hospital employees, dentists, teachers, non-teaching staff in schools, registered students in a post-secondary program who will work with children or vulnerable adults as part of their practicum, early child care educators, daycare employees and employees in long-term care facilities and other facilities that provide health services to vulnerable adults to go through the *CRRRA* screening process.<sup>116</sup>

Other provinces also have clear statutory and regulatory provisions requiring certain classes of organizations to record check their employees and volunteers. Depending on the jurisdiction, statutes and regulations may require teachers, employees in long-term care facilities, daycare operators, registered social workers, pharmacists and police officers to provide record checks. There are also a number of licensing processes that specifically mention criminal record checks in the legislation or regulations

setting out the regulatory framework: taxi drivers, real estate agents, driver training school operators, charity lottery and gaming license applicants, liquor license applicants and others may need to submit record checks. Various professional regulatory bodies are also authorized to conduct criminal record screening.

Most organizations, however, are not legislatively obligated to conduct police record checks.

Even if an employer is not explicitly required to record check by statute could an organization be liable if it did not perform a criminal record check and an employee or volunteer went on to commit a criminal offence? In the United States some courts have found employers liable in negligent hiring for failing to conduct sufficient background checks, including police record checks, when hiring certain classes of employees.<sup>117</sup>

While there is a tort of negligent hiring in Canada, claims remain very rare. The only reported appellate case on negligent hiring sets out a narrow doctrine that

does not support widespread police record checks as a standard part of employee or volunteer screening.<sup>118</sup> This is not to suggest that record checks are never prudent screening measures: jobs in high-security sites and those with unsupervised positions of trust in relation to vulnerable populations will justify more detailed employee vetting, of which a record check may be one justifiable component. Legislation imposing criminal record checks should also be followed. Ultimately, however, we were unable to identify any Canadian cases where an employer was found liable for failing to conduct a criminal record check, and in many workplaces asking for this information would violate privacy and human rights legislation. It is also important to keep in mind that, in addition to negligent hiring, an employer may also be liable if it is negligent in its training or supervision of employees or volunteers.

Employers can also be vicariously liable for the criminal acts of their employees, meaning that the employer will be responsible for the wrongful acts of

employer from imposing a criminal record check policy. In unionized workplaces, “any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union . . . must be consistent with the collective agreement and be reasonable . . .”<sup>115</sup> Therefore, if the employment agreement does not explicitly allow an employer to conduct record checks, an employer may not be able to impose this requirement on current employees without renegotiating the contract or collective agreement. An assessment of whether police record checks are a reasonable exercise of unilateral management rights can include multiple aspects of the proposed policy, including:

the employee even if the employer has done nothing wrong. Normally, vicarious liability will be imposed if the employee's wrongful act falls within the scope of the employment duties. Most criminal acts will not be sufficiently connected to the legitimate job-related functions for employers to be held directly liable.

Vicarious liability may also apply where there is "a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act."<sup>119</sup> This doctrine applies only to select types of workplace harms and to select employees within those workplaces. A court must analyze whether the specific "job-created power and duties" given to an employee increased the risk of the employee's wrongdoing.<sup>120</sup> Simply creating a situation that gave an employee the opportunity to commit wrongful acts by employing them in a workplace where vulnerable persons were present is not sufficient: "[i]t must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or

her position and requiring him to perform the assigned tasks."<sup>121</sup> The simple fact that a person was employed in a school or another setting with passing or regular contact with the vulnerable sector will not be a sufficient basis for imposing vicarious liability.

Some legal summaries appear to suggest that an employer can minimize the risk of having vicarious liability imposed by conducting criminal record checks on prospective employees.<sup>122</sup> However, performing police record checks will not prevent an employer from being held vicariously liable, as this form of liability is unrelated to whether the employer was at fault in the hiring or supervision of employees. These suggestions, therefore, are not strategies to minimize an employer's exposure to liability but, rather, aim to prevent a criminal act from occurring during the course of employment. As reviewed in Section VI of this report, however, there is little evidence to suggest that police record checks are an effective tool to prevent work-related crimes.

Finally, our interviews suggested that some organizations are under the impression that statutory workplace health and safety obligations impose a duty on employers to conduct police record checks to identify potentially violent employees. This point was raised mainly in Ontario, where there are relatively new statutory provisions requiring employers to address violence and harassment in the workplace.<sup>123</sup> As explained by the Ontario government, however, an employer's duty to proactively identify workplace risks focuses on dangers inherent to the nature and characteristics of the workplace setting and the job duties: high stress levels, extended periods alone, workers transporting large amounts of cash, etc. The Ontario government's guide to understanding the law on workplace violence and harassment specifically states that "the Occupational Health and Safety Act does not require employers or supervisors to do criminal background checks or to otherwise seek out information on workers or other people who are likely to be in the workplace."<sup>124</sup>

- whether the check is relevant to the specific position,
- whether there are privacy protections for employee personal information,
- how much notice is given to affected employees,
- how the information is used in the employment context, and
- whether employees who are not cleared have access to an appeal mechanism.

Policies that do not comply with applicable privacy and human rights legislation will not be reasonable. Again, there may be particular safety-

sensitive positions such as airport security officers or social workers dealing with young children that will justify the imposition of criminal record checks. Multiple arbitrators, however, have found that overbroad background screening programs or blanket policies unilaterally imposing police record checks on employees who are not in such sensitive positions are unreasonable.<sup>125</sup>

#### 4. Privacy and human rights law in non-employment contexts: a note on record checking tenants, service recipients and customers

It appears to be increasingly common for organizations and individuals to demand record checks from service recipients such as program attendees and prospective tenants. These organizations are generally not in an employer relationship with the individuals from whom they are requiring record checks. Many of these service recipients are in a commercial relationship with the requesting organization and will therefore be subject to federal or certain provincial privacy laws. The federal privacy commissioner, for example, has found that landlords are subject to *PIPEDA* when they collect information from tenants,<sup>126</sup> and the British Columbia and Alberta privacy commissioners explicitly state that, as service providers, landlords cannot demand a criminal record check from prospective tenants.<sup>127</sup> Human rights legislation also frequently applies differently to these types of relationships, as they may be categorized as service provision rather than employment.



## IV. EVALUATING THE DEMAND

There are no publicly available statistics that systematically track the use of record checks in Canada. In order to get some idea of the volume of record checks conducted across Canada, we filed access to information requests with over twenty police services.<sup>128</sup> All police forces that responded reported increases in the number of record checks being processed, with growth that ranged from an average of 2% a year over seven years (Hamilton Police Service), to an average annual increase of 439% at the Victoria Police Department (see Figure 1). Calgary, Toronto, Edmonton, Peel and York Region reported the highest number of record checks. In Calgary, the number of record checks rose from approximately 75,400 in 2003 to over 93,000 checks in 2012.<sup>129</sup> Similarly, York Regional Police processed just under 28,000 record checks in 2003, a figure that rose to about 71,700 in 2012. In London, Ontario, the volume of record checks has nearly tripled in the past ten years. Across all police services, the median yearly increase in police record checks was 7%. Although population increases may account for some of these changes, it cannot explain such a high rate of growth.<sup>130</sup>

The significant growth in record check processing was also confirmed by a number of interviewees with a historical perspective on the use of police record checks in Canada. Increased use of record checks was perceived across all sectors – public, private, for-profit and not-for-profit. Educational institutions are also asking for students applying to certain programs to provide a police check before admission. As explained by one college, “Employers and agencies offering student placement opportunities will require a Police Record Check before accepting a student for field placement” and “Failure to meet the requirements for field placement will prevent students from completing the program and/or securing employment.”<sup>131</sup> These observations also align with the conclusions in previous reports. The British Columbia Centre for Non-Profit Development, for example, surveyed thirty-five Canadian law enforcement services and found that 91.4% indicated that the volume of criminal record checks had increased in the past twelve months, and 94.3% reported an increase in the past five years.<sup>132</sup>

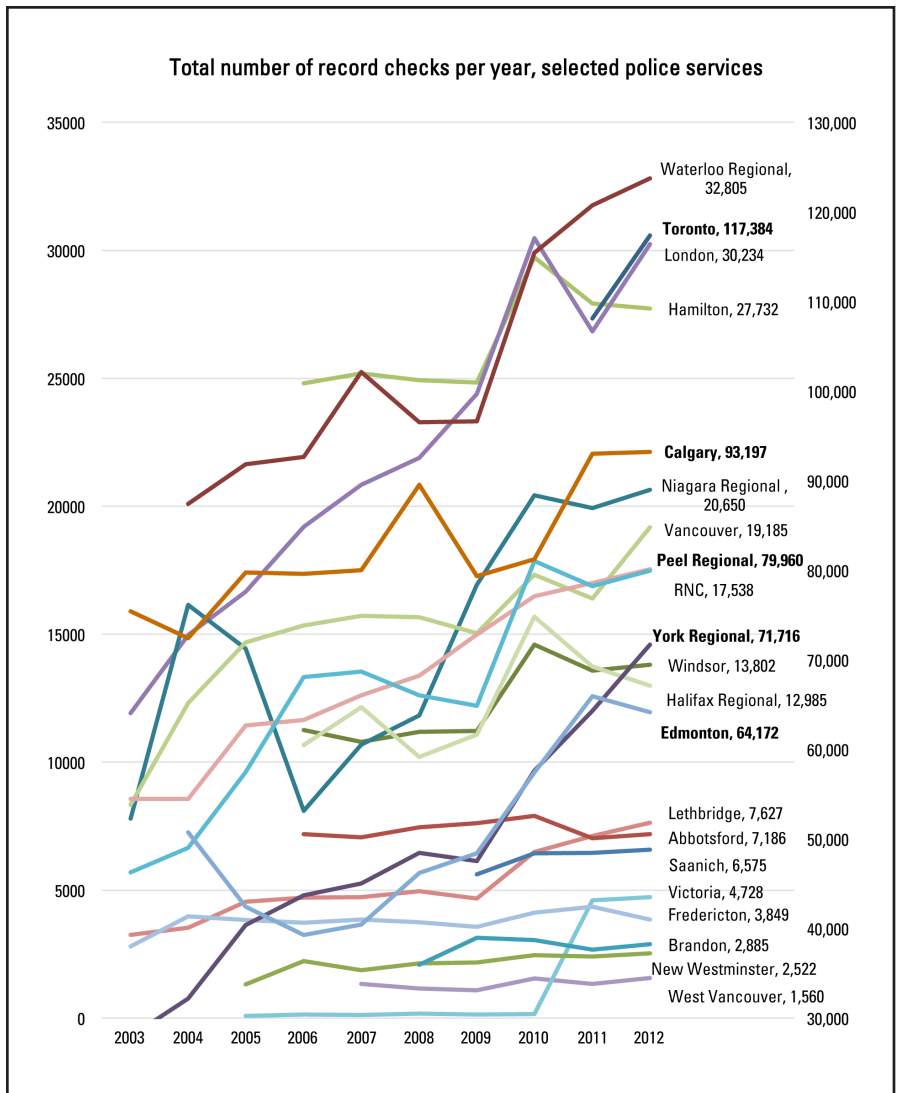


Figure 1: Total number of record checks per year, selected police services. Note that Calgary Police Service, Toronto Police Service, Peel Regional Police and York Regional Police use the right axis.

Based on our interviews, in the non-profit sector this increase is likely attributable to a significantly increased awareness of the risk of organizational liability for child sexual abuse. During the 1990s a number of very high-profile sexual abuse cases drew intense media attention. Numerous legal cases were also launched: between 1999 and 2005 the Supreme Court of Canada released nine separate judgments dealing with institutional liability for child sexual abuse.<sup>133</sup> Umbrella groups focused on the voluntary sector initiated national and provincial

education campaigns to make organizations aware of the duty of care they owed towards vulnerable clients and to emphasize the importance of volunteer screening. Volunteer Canada launched the National Education Campaign on Screening in the mid-1990s aiming to mitigate the risk of abuse of vulnerable people and raise awareness of volunteer screening.<sup>134</sup> Large non-profit organizations began to respond soon thereafter by implementing criminal record check requirements,<sup>135</sup> and after several years of concerted educational efforts there was greatly increased awareness about the need to conduct volunteer screening, including police record checks.

“ I think [a concern about risk mitigation and an increased reliance on police checks] has been happening in the sector probably for the last ten or fifteen years. And that’s a trend that we’ve seen in the US, but it’s also been because of a few high-profile charity non-profit cases with scouts, with the churches, around vulnerable people being injured and taken advantage of. And police record checks were one easy way to try and mitigate that issue.

*Minor hockey, there’s been lots of examples. So it’s the high-profile cases. So although it’s not in legislation, some funders do require a risk-management plan or a volunteer screening plan or police checks. And secondly, insurance companies. There’s some pressure from insurance companies to ensure appropriate risk management’s in place. So I don’t know many insurance companies that I’ve heard of that actually require proof of a police record check done for every volunteer, but they certainly do often require a risk-management plan, which includes your policy on police record checks.*

– Interviewee, BC organization servicing not-for-profit sector

Similar trends are found in government-mandated record checks for employees, volunteers and external agencies servicing the vulnerable sector. In 1995, for example, Ontario’s Ministry of Community and Social Services (MCSS) issued a directive “requiring all agencies funded or licensed by MCSS, and which provide direct services to children (including child care) or vulnerable adults, to incorporate criminal reference checks as a mandatory component of their hiring processes.”<sup>136</sup> The trajectory of record check practices at the City of Toronto shows how these requirements have expanded over time. In 1999, the City of Toronto granted authority to use police reference

checks for employees in the Parks, Forestry and Recreation Services Division where primary employment or volunteer duties included working directly with children, youth and/or other vulnerable populations.<sup>137</sup> Over the next six years the police record check requirements were expanded to staff and volunteers in child care services and old age homes. In 2010 City Council directed that vulnerable sector checks should be obtained from all qualified external candidates and all selected applicants for volunteer or student placements in the Shelter, Support and Housing Administration Division whose work involves “unsupervised contact with, or proximity to, vulnerable clients.”<sup>138</sup> In 2012, the City of Toronto reported that the Toronto Public Service requests about two thousand vulnerable sector checks per year.<sup>139</sup>

There is very little information on how Canadian businesses use record checks. A John Howard Society of Ontario study on businesses’ use of record checks in two Ontario counties found that 49% of organizations surveyed required a police record check in the hiring process and 15% of businesses would not hire anyone with a positive police background check.<sup>140</sup> Interviews with social service organizations in other jurisdictions suggests that they are used commonly in the private sector hiring process (see Box 5) and the “internal estimate” of one company that sells record check services in Canada is that over 70% of Canadian employers now use record checks.<sup>141</sup>

Canadian private sector practices and perceptions may be driven in part by trends in the United States. The United States experienced an “explosion” in the demand for employment-related criminal background checks after the September 11, 2001, terrorist attacks.<sup>142</sup> Around forty years ago, employment background checks in the United States were “relatively rare” and “typically limited to high-ranking or particularly sensitive positions.”<sup>143</sup> Immediately after 9/11, the government began to put in place legislative requirements for certain employers to conduct police record checks. Two major companies that sell record checks reported that the number of background checks they ran increased dramatically at that time: one conducted 20% more checks from 2001 to 2002, and another reported that its “monthly volume of background checks increased eightfold in the five months following September 2001.”<sup>144</sup> A significant number of Canadian cases addressing the legality of employment-related record checks state that the policies under dispute were being imposed as a direct or indirect result of US legislation related to 9/11.<sup>145</sup> Today, US background check services constitute a \$4 billion industry composed of over 3,500 private companies offering a wide range of employment-related checks.<sup>146</sup> According to a 2010 survey, 93% of US employers use criminal record

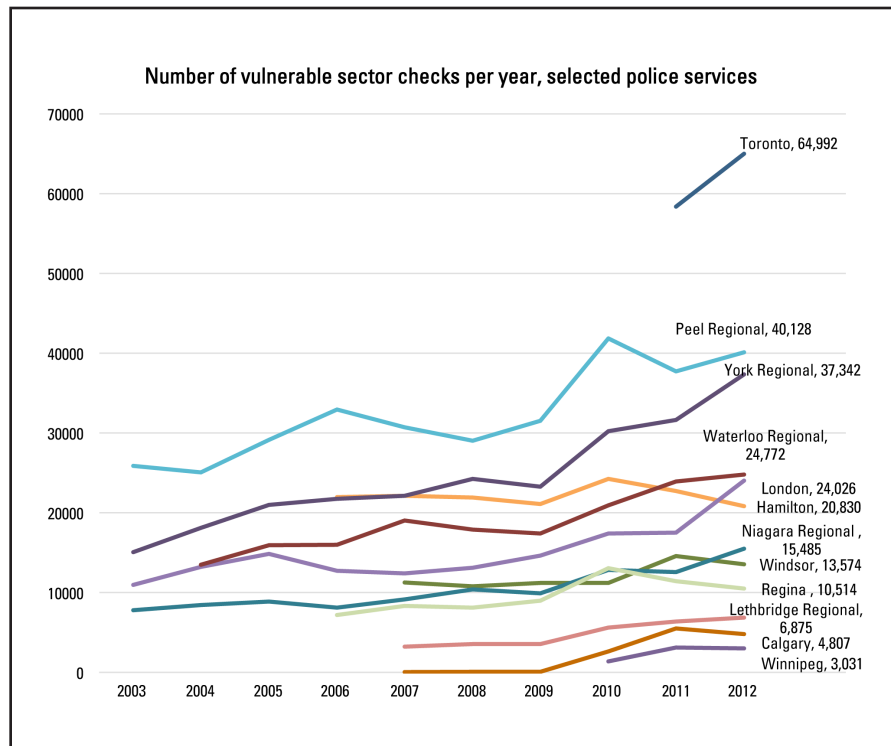


Figure 2: Number of vulnerable sector checks per year, selected police services.

checks to screen some potential applicants, and 73% of employers use criminal record checks for all potential applicants.<sup>147</sup>

There has not been any Canadian research to date examining why the private sector is engaging in criminal record checks or how this information is being used in the hiring and recruitment processes. Researchers spoke to dozens of organizations over the course of several months to gain insight into how police record checks were being used in volunteer and employment contexts. Because of the heightened privacy and human rights interests implicated by vulnerable sector searches, we focused on organizations that were serving vulnerable individuals. These interviews canvassed a number of issues, including what types of positions require record checks, what rationale organizations give for requesting this information, and how this information is being used in the recruitment process. While the information presented below cannot be viewed as a comprehensive survey of the practices and rationales, it does provide some indication of the range of practices that exist in Canada.

Twenty-one of the 25 organizations surveyed used some form of criminal record check in their employee and/or volunteer screening. Of

## A. The purpose of police record checks: why are organizations asking for record checks?

those that did not use checks, one organization was a legal advocacy group, a second was a legal clinic, and the remaining two were organizations that assisted other organizations in the voluntary sector – including training them on how to conduct police record checks – and did not engage in direct service provision.

The majority of respondents stated that police record checks were a standard part of their organizational policy to manage organizational risk and protect clients, volunteers and staff. Interviewees were generally aware that they and their organizations had a duty to keep their vulnerable clients safe, and viewed a police record check as an essential tool in order to achieve that goal. When asked for more details, however, interviewees were rarely able to specify the precise source or scope of their legal obligations. One exception to this trend is Ontario, where a recent survey found that employers and volunteer agencies are engaging in record checks in response to recent amendments to workplace health and safety legislation.<sup>148</sup> Moreover, although numerous respondents cited liability and risk management concerns and assumed their insurance required record checking, only one organization had been explicitly told by their insurer that they had to conduct criminal record checks – a requirement that emerged in the context of obtaining coverage for sexual abuse claims. One British Columbia interviewee who conducted volunteer screening training for the non-profit sector stated that, in general, insurance companies would not require police record checks as part of the screening process unless an organization wanted abuse and molestation coverage.

When asked to describe the purpose of requesting police record checks, interviewees generally identified two goals: mitigating risks to clients, and minimizing organizational liability. This accords with the results of a John Howard Society of Ontario survey, which found that risk management and liability were the most frequently cited reasons for requiring record checks.<sup>149</sup> The following statement from a staff person at a library provides an example of a typical response:

I think in this day and age we would be negligent not [to ask for record checks].... We really have to do some due diligence.... Unfortunately there are people out there that are committing crime and not respecting the rights of other people and especially because of the positions that we have... because we're a public service organization, all of our volunteer staff are in contact daily with other individuals. Often they are also hearing a lot of personal information from other people as well, so we want to make sure we are bringing people into the organization that will respect others, that will respect the information they are

hearing, that won't try to take advantage of it. Because this is really a human services organization, we have to be maybe more careful than other types of workplaces where there may not be that level of human interaction. . . . So I think because the people we're working with are all working very closely with other individuals who are sharing their personal information with them in some cases, we really have to make sure we have folks we can trust to operate in the way we expect them to operate.

Most organizations stated that record checks were requested to prevent the “wrong people” from volunteering or working with vulnerable individuals. When pressed on what type of “wrong people” organizations were trying to screen out, a few broad categories of concerns were consistently raised: the risk of child sexual abuse, financial crimes against adult vulnerable individuals, and workplace violence in general. Organizations were also frequently concerned about employee and volunteer access to private information such as addresses or phone numbers.

“*It's been too complicated to do police record checks for some volunteers and staff but not for others. To make it simpler, most [organizations] have adopted a blanket policy saying that everyone has to have them. They'll say the funder or insurance requires it or it's part of their risk-mitigation strategy. . . . Most organizations did the checks, but they had no idea what to do with them, how long to keep them, what the privacy implications were of that information.*

– Staff person, Ontario organization servicing voluntary sector

Government contracts and grants were also identified as one of the drivers of record checks. In general conversations with Ontario organizations, they report that government contracts and grants required them to record check their staff and volunteers.<sup>150</sup> There is no comprehensive reporting on the number of provincial government contracts or funding agreements that require police record checks. Organizations that worked with or were contractors for the federal government reported that mandatory federal government security practices required all employees to undergo police record checks if they will have access to a location with even a minimal amount of private information.<sup>151</sup>

## BOX 3

### Ontario Public Service Personnel Screening Checks Policy – A sample rationale

The *Ontario Public Service Personnel Screening Checks Policy* provides a good overview of the common goals and intended results of criminal records screening in an employment context. The following excerpt from the policy was reproduced in *Ontario Public Service Employees Union v. Association of Management, Administrative and Professional Crown Employees of Ontario*, 2010 CanLII 52649 (ON GSB).

#### INTRODUCTION

*Employees of the Ontario Public Service (OPS) are entrusted with protecting the public interest. Employees take great pride in their efforts at protecting the public interest and in communicating to the public that the public's trust is warranted.*

*In order to ensure that the public trust continues to be protected, a policy regarding personnel screening checks is being introduced. This policy will ensure that there is consistent practice in screening across the OPS; that the level of intrusiveness related to screening is based on a consistent evaluation of risk and that in an age of increasing concern about identity theft, identity fraud and*

*security, appropriate action is being taken.*

*Strengthening the organization's security processes regarding its employees is part of a modern framework to risk management where processes are routinely examined to ensure that risk is identified and appropriately addressed. As well, personnel screening checks are one element of a modern framework for recruitment that provides for the ability to ensure that hiring decisions are well founded.*

*This personnel screening check policy will not only harmonize practice across the OPS but will align the practices of the OPS with the practices of other public, private, non-profit and volunteer organizations. Personnel screening checks will ensure:*

- *An enhanced protection of the public interest.*
- *A safe working environment for all employees.*
- *Protection of the organization's assets and people.*
- *Due diligence on the part of the employer with respect to the recruitment and selection of individuals.*

- *Informed decisions are made throughout the recruitment process.*
- *Public confidence in the ability of the government to protect its interests.*

#### PURPOSE

*The intent of this policy is to support the Government of Ontario's objective of providing appropriate protection for its employees, stakeholders, assets, information and business processes in the most effective and efficient manner within a modernized recruitment framework. The policy will:*

- *Support the Government of Ontario's business objectives by safeguarding employees and assets and assuring the continued delivery of service.*
- *Provide a harmonized and consistent application of personnel screening practices in the Ontario Public Service.*
- *Align the Government of Ontario's personnel screening practices with established best practices acceptable in the security industry.*

The goal of protecting private, personal information appears to be driving criminal record check practices in at least some private sector industries as well. As one interview participant familiar with private sector pre-employment screening practices explained:

Consumers are becoming more aware of how their information is being used or how their information is gathered and stored... So, I think the drive or the demand from the consumers for organizations is to increase their security and their risk measures... It's gonna make them more accountable, more aware, and to drive up the security measures,



and practices and policies to ensure that there is a heightened level of security around consumer information.

The more that companies view personal consumer information as a high-value asset to be protected, the more relatively low-level jobs such as cleaning services and data entry are going to be pushed towards a securitized model.

## B. The scope of current record check practices: who is required to submit record checks?

“In our training, we try to impart that blanket check is unnecessary and it should be related to the position.... It was a real stretch to get them [organizations] to do that... for two reasons. One, it's more work. And two, boards of directors are risk averse.... They really wanted just to have [a blanket policy]... because [they would say], “If anything were to happen, if we didn't do a police record check on that particular person... so... let's just cover everybody.”

– Staff person, Ontario organization servicing voluntary sector

The majority of organizations we interviewed require all of their volunteers and staff to submit to the most detailed level of record check – the vulnerable sector check; in British Columbia, many organizations followed the procedure for vulnerable sector screening set out by the *Criminal Records Review Act*. Although all of these organizations did provide services to the vulnerable sector, not all of their staff or volunteers were directly involved in service provision, and very few volunteers were ever in unsupervised contact with vulnerable individuals or in positions of power or authority. In some organizations even board members, who had no contact with the vulnerable sector, were required to provide vulnerable sector checks. One Nova Scotia interviewee stated that organizational record checks policies were “handed-down processes” and that organizations “weren't critically thinking about whether or not it was the right thing to do, whether they needed to do it, and what information it was giving them.” Another Ontario interviewee indicated that, although not all the staff worked with the vulnerable sector, it was nonetheless an organizational policy that everyone had to provide a vulnerable sector check:

[We require police record checks] for everything. All staff that's hired are required to provide police checks. I believe they are all required at the vulnerable sector level. They probably shouldn't be, but the majority of the positions are working with children and youth at some point, so that has been a standard practice there. Our volunteers, which are the

people that I coordinate, are all required to provide police checks as well, so vulnerable sector check if they are working with children and youth, and just a police information check if they are working in other positions where they are not working with vulnerable sector.

... I know, when I started three years ago [all staff] was required to get a vulnerable sector check. And I made the recommendation about two years ago that that probably should not be the case, but I don't know what has happened since then. They were just doing it across the board, as were a lot of organizations at that point, and I don't know whether they've changed that practice or not.

Very few organizations indicated that they differentiated between those positions that required vulnerable sector checks and those that required a less invasive form of record check. We found that numerous organizations were requiring vulnerable sector checks for positions where there was no particular relationship of authority over or trust with the vulnerable sector. These kinds of requests contravene the *Criminal Records Act*.

“Almost everybody these days are requiring [a criminal record check]. It's getting to be a pretty accepted practice. Sometimes I think it's overused.... My understanding is that with the school right now, even the parents who want to go on a day trip have to have been cleared, approved.

**Q: Do you think that's useful?**

*No. You could be with your child and have those same handicaps at home, but because you're on a school outing, you can't be there, doesn't really make sense to me, because a school outing is supposed to be supervised.*

– Executive director of community organization and former police officer

Organizations provided a variety of reasons for these blanket record check practices. The most common rationale was that, although an individual might not be working directly with the vulnerable sector, they may nonetheless encounter children, the elderly, or other vulnerable individuals in passing on the organization's premises. Other organizations justified the policy on the basis that volunteers or staff might start out stuffing envelopes but, after a few years, switch roles

to a position providing direct services and that it would be too difficult to require a record check at the point of transfer. Many identified logistical issues: it was easier to impose standard volunteer recruitment requirements for all volunteer positions, and requiring a person who had been volunteering for several years to provide a criminal record check may be insulting to the volunteer. One organization had been explicitly told by their insurance company that vulnerable sector searches were required for every person in their organization, including their board members and administrative staff.

“ Any staff person within the organization has to [get a vulnerable sector check]. Which I find very interesting because . . . in my function right now I’m mainly an administrative person. And my contact with patients could be absolutely zero . . . . My exposure to sensitive information would be zero, my exposure to risk for vulnerable people would be pretty much nil. I could understand with respect to financial crime . . . because I am responsible for a corporate card. I just think it’s interesting that as a blanket the whole [health organization] requires that you have a criminal record check to work here.

– Staff person, Nova Scotia healthcare organization

## C. Interpreting the results

### 1. How are record checks being used in the recruitment process?

Although almost all organizations required potential staff and volunteers to provide police record checks, very few provided their staff or applicants with specific policy guidance as to how those record checks should be used or applied. As described by one interviewee who had provided training in volunteer screening procedures, “What we noticed missing was that they’d have a policy that says everyone should have a police record check but didn’t have procedures to say who saw it, how does it get filed, how do we [use] information based on what the records say.” Decisions about how to proceed once a record check disclosed some kind of incident, or what type of criminal history would preclude an applicant from a particular position, were often left to the discretion of the individual volunteer manager or hiring staff. Many interviewees said that if a record check came back with a result on it, they would consult with a peer, their direct manager or the executive director to determine what course of action to take.

## BOX 4

### Private sector for-profit employers – a perspective from one corporate human resources professional

#### ***What is the purpose of the record check?***

“The police check is used primarily for three things: one, confirm identity...; two, to determine any sort of convictions that are concerning to the organization; and the third piece is to simply help establish any patterns.... For example, are you someone that is constantly moving every six months.”

“... talent acquisition is an activity of management risk and as such we need to ensure that folks that are coming into an organization not only met the minimum criteria but also were eligible to work and didn’t have any sort of criminal background that would prevent them from being successful or would deem to be some sort of threat or risk to the organization.”

#### ***Who would be required to provide a record check?***

“[There are] very isolated incidents of not performing checks; I would say that

the majority of the time we conduct checks....”

#### ***How are decisions made based on the results?***

“... we called it a tiered approach. Tier one, being any sort of offence, any sort of criminal offence. In particular, because we’re involved in an environment where... we work in close proximity to other people, specifically ones of harmful nature. Any sort of sexual offences... violent acts. And then we looked at tier two, convictions that took place a significant time period that may or may not have any sort of direct correlation to the job. So we always use the example of someone who is working in the call centre, they were convicted of drunk driving three or four years ago. Well, that’s a conviction, but they are not required to drive in their job. So, therefore, we’ll look at it in a case by case scenario.... Tier two is, ... let’s look at the situation, let’s look at the individual, let’s look at their total

background and determine how big of a threat they are to our organization, if they are a threat at all.”

#### ***Are all employers using this approach?***

“No. I don’t think that’s a common practice at all. Organizations are still trying to determine what is their best approach. I think what is becoming more prevalent though in this war for talent is [to reject] the one-size-fits approach. Therefore, what sort of methodology or approach are we going to employ that will ensure that we continue to get good talent in the door while minimizing the amount of risk that we’re taking on as well. So, whether it’s a tiered structure, a role segmentation, whether it’s looking at it from a geographic perspective. Companies are going to get pretty creative within the boundaries of conducting successful police checks and how the result of the police checks are going to make an impact on their decision to hire.”

Interviewees also had a wide range of instincts regarding how they would respond to specific entries on a criminal record check. Some organizations are simply taking a zero-tolerance approach to any notation on a record check. As one Nova Scotia interviewee stated, “there’s certain people... that if they didn’t get a clear, they wouldn’t go ahead with allowing them to volunteer.” A trainer in British Columbia echoed these comments, stating that for some organizations the appearance of a record of conviction meant a person would be simply rejected without any further inquiries:

There are a few that just will say that [if there’s any conviction that person can’t volunteer with us] straight out... that tells me that

there are more that are thinking that and not saying it, know that it's probably not a good thing to say. But part of that is, people thinking, I really don't feel comfortable, I don't know how to make a decision that would say no. And I've had privacy officers tell me – because each organization has to have its own privacy officer – I've had privacy officers say, you know, you really can't take any risks. Because privacy issues around a potential volunteer and their criminal record shouldn't be a concern to managers of volunteers. Because [the volunteer manager's] number one priority is to avoid risk to their clients and other volunteers. So you've gotta look at a conviction as a serious risk factor.

The interviews with individuals who conduct trainings on volunteer screening in Alberta and Ontario confirmed that similar trends existed in those provinces as well. An Ontario survey by the John Howard Society of Ontario found that 15% of businesses who responded would not hire anyone with a positive background check.<sup>152</sup>

Most of the organizations interviewed in the course of this research, however, indicated that they would at least consider whether the criminal history was relevant to the anticipated position before determining whether an individual could volunteer. Previous convictions for sexual assaults against vulnerable populations or financial fraud were common examples of entries that would be highly relevant to most organizations, depending on the specific position. Interviewees also frequently cited the example of an old impaired driving conviction as one that would not necessarily preclude an individual from volunteering, unless the position involved driving. Many interviewees also stated that they would not accept someone who had a “violent” offence on their record because of concerns that person may be “hot headed” or have a “short fuse.”

Finally, interviews also showed that volunteer managers had secondary uses for the police record checks, beyond direct candidate screening. Numerous organizations stated that the criminal record check requirement in practice functioned as a way to deter “inappropriate” individuals from applying. The interviews also made it clear that the criminal record check functioned as an additional interview tool for assessing a person's character or judgment. They felt that knowing a person's criminal history, for example, provided additional insight into an applicant's past and allowed for more probing questions in the interview process. Religious organizations were also interested in criminal history to identify any individuals who had committed acts that were contrary to their religious tenets. For one church, knowing a resident's criminal history was useful to provide more comprehensive ministry services to that person.

It is worth noting that self-reported information about sensitive decision-making practices should be viewed with caution. Studies from the United States have shown that employers whose interview statements indicated an increased likelihood to hire an individual with a criminal record in fact were no more likely to do so in practice.<sup>153</sup> This was particularly true for those hiring managers that had a large amount of discretion in determining the relevance and impact of an applicant's criminal record, a situation that applied to almost all the organizations we surveyed.<sup>154</sup> Researchers have theorized that individuals with a large amount of personal discretion are more likely to be concerned about the personal and professional consequences of hiring an individual with a criminal record and are therefore more likely to be risk averse in the hiring decision.<sup>155</sup>

**Q: Do you see the criminal record as a predictive tool?**

*A: Yes, I do. Regardless of what it is, if they wanted to work with children and that comes up, they wouldn't be able to.*

**Q: What about, say, a DUI?**

*A: If it was a teenager when this happened, and this is twenty years later, I'd probably let it go, especially where they're not driving any children, we've met them a few times and there's been no liquor on them or anything like that. If it's just last year, then I'd suggest them to fill it out again in five years and they'd probably never come back.*

**Q: What is it about a DUI then, given that they're not driving children or they're not involved with a vehicle at all, that would be of concern in this situation?**

*A: Well, it's against the law to start with, and if they can't follow the law, they probably won't follow policy. If they're handling confidential information, who's to say if they're having a few drinks and names come up and something like that. I wouldn't want to take the risk.*

– Interview, Nova Scotia organization

## 2. Treatment of non-conviction records, police contact and mental health information

Numerous jurisdictions release non-conviction information and police contact histories on record checks. In general, organizations indicated that they would treat non-conviction entries similarly to convictions:

they would ask about the circumstances of the incident, how old it was, and other details to determine whether an applicant was suitable for a position. Individuals across the country who trained volunteer organizations, however, stated that the organizations did not have a good understanding of what a non-conviction record was or whether this information would be included on a police background check. One Ontario trainer, when asked whether organizations understood the different terminology on police record checks that would indicate whether an entry was a conviction or not, replied:

Not well enough. I do not think that understanding the difference should be left as a responsibility of the organization. It's not their experience. They don't have the knowledge base to be able to understand that easily.

Another trainer stated she was unsure whether this information should be released on record checks:

I think the question is always, what are you gonna do with it, to what end? If something comes up in the record check that there's a mental illness, or if they've been involved with a police altercation... when they were inebriated or whatever that might be. How – y'know, does that mean that they can't do the job that they're tasked with? So, and I think the whole sophistication and understanding, I think that the non-profit sector just doesn't, by and large, have a good way of handling.

Most managers themselves, however, were reluctant to say they did not want this information, and thought it might be relevant to the recruitment process.

Direct service providers in jurisdictions that disclosed mental health interactions on police checks generally expressed concern about taking on an individual with a mental health-related entry on their police check. One interviewee, for example, stated that, although he was unsure whether he should be requesting mental health information, if a record came back showing a mental health apprehension it would be a “big red flag” and raise concerns about violence, instability and potential harm to the children. As described by a volunteer manager trainer in British Columbia:

One of the things managers will say is, “I want to know about those negative contacts with police. I don't want to bring in somebody who has self-harmed, or has been brought into the hospital with a psychotic episode.” And [they] are completely unaware that that in itself is protected, that our human rights legislation says you can't discriminate

against someone with a disability or a mental illness. And to just say because that happened you can't volunteer is in fact discrimination . . .

[When they find that out,] there's a lot of thoughtful faces. But then there's also [people who say,] "Well, you know really I feel it's dangerous. I feel it's a risk." And they have no way to assess the current psychological stability of the person. There is no process where they would phone the person's psychologist or anything like that, which in itself might be a privacy concern anyway. So they really are left to their own devices in terms of what they're personally comfortable with or not. So it really hugely varies from organization to organization.

“ *There was a lot of confusion [when a record came back with a notation on it]. Most organizations, it would be either their HR person or their volunteer manager or their executive director, depending on how big the organization was, that would see those police record checks. There was a lot of confusion about what the wording meant and what it was on there . . .*

*And, there was a lot of confusion around what they did with those things. For example, if . . . Big Brothers and Sisters were screening out someone that could be alone with a child in that program. Certain driving things come up. How does that affect whether a person is a good match for, to be a good brother, if they have driving things on their record? What if it's drunk driving? What if it's just a driving infraction? So those conversations were very difficult, and I would say the sector in general has very little understanding of how to . . . actually assess the value of what was on the record check.*

– Staff person, organization servicing voluntary sector

She went on to describe both her own discomfort at receiving mental health information as an executive director, as well as other organizations' reluctance to take on an individual with that type of record:

As ED, when one comes back with a hit, it's up to me to decide whether that volunteer is a risk or not in the police record check system. And usually it would be that "box 4" that's checked, and that would be some kind of negative contact with police. Something that hasn't turned into a charge, or that hasn't turned into a conviction,



but it's there on the record. And not knowing what it was, I would need to find out before I could make a decision. And that would mean I would have to have conversations with volunteers to find out was in that box, and I would feel really uncomfortable with that because I was finding out things that I really had no right to know. I found out that someone had been taken to the hospital because they had had a psychotic episode ten years ago. I don't need to know that, and it's uncomfortable for someone to have to tell me that. And it really shouldn't have any bearing on whether or not I bring them in as a volunteer. But for a lot of organizations, they would look at that and go, well, we can't have somebody who is psychologically unstable, and they would have no way of knowing if that is still a problem or not a problem, and so if you are risk averse, you just won't take any risks at all. So there really wasn't any process in our field to balance the human rights concerns, versus the privacy concerns, versus the risk concerns. Because we've all been so trained about risk that people think if there's any risk at all then we'd better not take it.

In jurisdictions where this information was not usually provided, several interviewees thought it would be “useful” to know if an applicant had prior mental health-related interactions with the police. Some viewed it as a relevant screening tool, while others thought they could use this information to provide extra support to that volunteer or staff person. Other interviewees, however, were unsure why that information would be relevant or how they would use it. One interviewee from BC, who did not receive that kind of information on the police checks in her area, stated, “I've heard of other cities that have had [mental health information] come back. And I think that's horrifying. I don't need to know that somebody tried to commit suicide last week.”

“ *There's 46,000 non-profit organizations in Ontario. Half of them don't have any paid staff. It could be service clubs like Lions Club, they could be soccer clubs, minor hockey associations, and many of them have volunteers in positions with vulnerable citizens. So if you have no paid staff and your volunteer or volunteer coordinator rotates every year, how do you maintain those policies and procedures in a way that . . . is legal, and also ensures appropriate risk management? And, is respectful of the volunteers and the clients themselves. It's a tricky situation.*

– Staff person, Ontario organization servicing voluntary sector

### 3. Balancing risk mitigation, privacy and human rights

Overall, it appears organizations are risk averse and have little understanding of their human rights and privacy obligations towards volunteers and employees. Most of the direct service providers we interviewed were not aware that human rights laws might apply. Some of these answers may reflect the fact that not all jurisdictions disclose mental health information, and some provinces prohibit discrimination on the basis of a criminal record. However, a trainer from a jurisdiction that provides relatively comprehensive human rights protection for prospective employees with criminal records reported that most organizations were not aware of their human rights obligations:

[Organizations are] definitely risk averse . . . . I think probably in the last four months I've trained one hundred organizations . . . . And most of them are quite surprised that human rights is even an issue in what they're doing. They see volunteering as something that's, you know, voluntary. They could see it if someone was being denied a work opportunity, like a paid job; they can't see it in terms of a volunteer opportunity . . . .

Similar sentiments were echoed by an Ontario interviewee with extensive experience training organizations on volunteer screening:

[Organizations'] primary concern was around risk management and mitigation as opposed to privacy and human rights issues, and it rarely came up in our conversations with them. In some savvy organizations, it would come up in terms of who sees this information and what we do with it.

There was greater awareness that record checks raised privacy concerns. Most organizations recognized that a record check contained sensitive personal information and stated that they ensured the results were kept as confidential as possible and stored in a secure location. In general, however, the requirement to disclose the private information in the application process was not seen as engaging privacy concerns: individuals who did not want to disclose this information should simply not volunteer. As one Ontario interviewee stated, “[t]he bottom line . . . is your duty of care for your clients. So if you have some doubt, you have to ask for [the information].”

“ *I am trying to help the agencies come to a point when they can get and understand what they should request and what they should do with it. . . . I don't know if it's reasonable or fair to load that onto a sector that has no experience or knowledge of it.*

*If we want to do it properly, what do we want them to do, what do we need to give them or what kind of training do we need to provide and how thorough or effective do we think that training needs to be to serve the purpose we want to serve. I've got serious doubts. I've been training on this topic for fifteen years. I get folks coming back who have been through it before to better understand it. So if it's that difficult – and it is, trying to help a sector understand what a police record check means, it's a very complicated body of knowledge – I would prefer to find a different way to solve it, than trying to help keep them OK enough to understand all of their complicated obligations.*

– Staff person, Ontario organization servicing voluntary sector

## V. SERVICING – AND BUILDING – THE DEMAND: THIRD-PARTY RECORD PROVIDERS

Numerous private companies offer police record check services in Canada, actively marketing their products to a broad spectrum of industries, including government, healthcare, banking and finance, energy, retail, telecommunications and landlords. These companies provide a range of services, from basic name-based criminal record checks, to RCMP-authorized fingerprint capture, to holistic human resources screening and management, to in-depth private investigations. There is very little data about how many Canadian employers use these services. In one recent survey of Ontario employers, over half of those who requested police record checks used a third-party provider to facilitate this process.<sup>156</sup> Only one of the not-for-profit organizations we interviewed used a private sector record check company. Several volunteer managers who we interviewed, however, stated that they had received marketing calls from these companies, and a wide range of organizations and businesses are shown in publicly available client lists.<sup>157</sup>

To gain a better understanding of the industry we surveyed nine companies that were offering some form of Canadian criminal record check service (see Appendix). Based on our review of publicly available information and selected interviews, the third-party record check companies we surveyed operate their pre-employment police check services on a consent basis. In general, the companies receive consents from the individual applicants – either directly or via the employer – and then transmit the applicant’s information to specific local police services that run the record checks. These local police services appear to be small services that have contracts with the private companies and will run the checks for applicants regardless of where they live. These arrangements can generate revenue for the police service. The variability in local police practice creates variability in the results of the record checks received by the companies. Because companies partner with police services across the country, individual applicants will not know what police organization is actually running a check. This can make it difficult, if not impossible, to reliably predict how a particular record check will be processed. Once the contracted police

service completes the relevant database searches, the results are sent back to the private company to be forwarded on to the applicant or, if authorized by the applicant, a third-party recipient.

All the companies surveyed provided at least a name-based criminal record check, where an applicant is asked to self-declare their criminal record. A smaller selection of the companies had also entered into agreements with the RCMP to facilitate the collection and transmission of fingerprints for certified criminal record checks.<sup>158</sup> At least one company also offers to help police services process record check requests – for example, by setting up an online “virtual front desk” and facilitating the collection of individual identification and consents.<sup>159</sup>

In addition to the basic criminal record check, a number of the companies are providing services that facilitate the discovery of non-conviction records. At least two companies, for example, offer provincial record checks, which include a search of provincial court records “in the public domain” and “usually reveal all details of an offence, including date, location, conviction status and sentence.”<sup>160</sup> Others offer “premium” or “enhanced” criminal record searches that include searches of local police records and “other relevant data banks” that they advertise as being able to identify a wide range of non-conviction information, including non-conviction dispositions and negative police contacts.<sup>161</sup> Most organizations do not specify what databases are being searched or the process by which access to this information is facilitated.

The RCMP has in the past raised a number of concerns about the conduct of private sector record check providers and in 2010 stated that companies were engaging in practices that directly contravened federal law and policy.<sup>162</sup> The RCMP cited “questionable business practices, including a lack of identity verification and informed consent for individuals undergoing criminal record checks” and “instances of criminal record information being disseminated without confirming identity by means of a fingerprint comparison . . .”<sup>163</sup> They also stated that private companies were conducting vulnerable sector checks which “potentially conflict with the *Criminal Records Act* and the *CPIC Reference Manual* policy.”<sup>164</sup> They were also concerned that private companies were not offering as comprehensive searches as those offered by local police services, as the private sector-facilitated searches usually did not include relevant local records or queries of the Investigative and Intelligence CPIC data banks.<sup>165</sup> In response to these concerns, the RCMP issued a new policy clearly stating that third-party companies are not authorized to conduct or mediate vulnerable sector searches.<sup>166</sup>

Despite the fact that it has been nearly four years since the clarified RCMP policy took effect, several individuals we spoke to reported receiving marketing calls that left them with the impression that private companies could conduct vulnerable sector checks. One company claims on its website that it can “assist with obtaining a search of the Pardoned Sexual Offenders Registry.”<sup>167</sup> Access to information requests also revealed correspondence within a police service expressing concern and requesting immediate action to address misleading advertising from a national private sector company.<sup>168</sup>

Third party-facilitated access to non-conviction records also raises concerns. One company asks individuals to disclose all non-conviction police contacts and offers to verify that information through a local police service.<sup>169</sup> There is no indication of what databases will be searched, and the manner in which the search is conducted potentially discloses sealed records including pardoned offences, diverted charges and youth records. Based on the description of the service, if this record check uses RCMP databases, it is likely in violation of federal policy.<sup>170</sup>

Another private company states that it can access local records by having its partner police service(s) search the Firearms Interest Police (FIP) database.<sup>171</sup> This database was created in 1998 for internal policing and law enforcement purposes in order to flag individuals who may be ineligible to hold a firearms license.<sup>172</sup> Non-conviction records from local police forces are automatically uploaded to this database daily. In 2001, the Federal Privacy Commissioner criticized the accuracy of the information in the database, raising concerns about the propriety of using this information as a screening mechanism:

A FIP hit sometimes directs the FO [firearms officer] to unsubstantiated and derogatory information, unproven charges or allegations, hearsay, records that are older than 5 years, incidents and charges that have been cleared or acquitted, duplicate entries as well as information about witnesses, victims of crime and various other associated subjects. People are unaware that they are being flagged in FIP as possible risks to public safety. Also, inaccurate information on FIP or information that has already been the subject of a previous investigation and cleared, is used over and over.<sup>173</sup>

Even if the quality and accuracy of FIP records has improved in the last decade, the privacy commissioner’s description of unsubstantiated, unproven allegations, “cleared” charges and acquittals is accurate with respect to non-conviction records in general. In order to avoid disclosing the content of a record directly, applicants who have a FIP entry are told that “possible relevant information may exist” and told to

approach the originating police services to “determine if the record(s) are relevant to the screening process, and if any information relating to the record(s) may be released.”<sup>174</sup> This process accords with federal government policy directing these searches.<sup>175</sup> Redirecting an applicant to the originating police force, however, will place some individuals in an impossible situation, as many police services will not provide a record check for an individual who does not live within their service area. Moreover, as this database is distinct from the Investigative and Intelligence data banks referenced by the RCMP in 2010, the concerns about under-inclusivity of these “local” record searches remain. The practice of collecting personal information from court records for the purposes of an employment background check is also concerning. The fact that court records are public information does not necessarily mean that collection is authorized under *PIPEDA* or provincial statutes. Although *PIPEDA* has an exemption allowing for the non-consensual collection of information that is publicly available in a record or document of a judicial or quasi-judicial body, the Federal Privacy Commissioner has found that this exemption “only applies where the collection, use and disclosure of the personal information *relates directly* to the purpose for which the information appears in the publicly available record or document.”<sup>176</sup> Even where this information is collected with an individual’s consent, searching court records could reveal records that are intended to be sealed and are unavailable through standard police record checks. These may include convictions that have been pardoned or record suspended and diverted charges. If there is significant growth in this form of record check, it could effectively undermine many of the legislative protections in place to prevent the continued disclosure and impact of a criminal record.

Finally, although the companies generally touted their legal compliance by assuring customers they fully comply with *PIPEDA*, there was in general no mention of the potential privacy obligations their clients might owe to employees or volunteers. One company, for example, urged landlords to get record checks and credit checks on prospective tenants,<sup>177</sup> a practice that contravenes privacy laws.<sup>178</sup> Another company’s FAQs answered questions about the legality of background checks only with reference to human rights statutes; the fact that there might be provincial and federal privacy legislation governing pre-employment or volunteer screening was not mentioned.<sup>179</sup>

As organizations engaged in commercial activity within Canada, private sector record check companies are required to comply with *PIPEDA* and, where applicable, provincial privacy statutes. During the course of our interviews we received reports that some companies, in particular

those based in the United States, were not operating in compliance with federal privacy law. We performed a basic privacy compliance survey of nine companies that offer Canadian criminal record checks (see Appendix). Although all of the companies had some form of privacy statement on their website, the level of detail provided in these statements varied considerably between companies.

Overall, the privacy policies were not detailed enough to let prospective customers know what kind of information would be disclosed in a criminal or provincial record check. Presumably, further details on the information that would be collected and disclosed for specific checks should have been found either on the companies' websites or certainly on the relevant consent forms. Most publicly available service descriptions were too vague to allow an individual to know what databases would be searched or predict what information might be disclosed. This was particularly true for those companies offering some form of "enhanced" criminal record search. Consent forms were also not available on the majority of the companies' websites. When we contacted these organizations to request the consent forms, fewer than half of the companies replied. Many of the consent forms provided did not address the more detailed checks offered.



## VI. THE FALSE PROMISE OF A POLICE RECORD CHECK

As shown in Section IV of this report, organizations have a variety of reasons for requiring potential or existing employees, volunteers, students or service recipients to provide a criminal record check. Ultimately, however, the most compelling justification for these checks is that they reduce the risk of criminal acts being committed in the workplace. Organizations want to protect their organization, staff and clients from possible incidents of fraud, theft and violence, and be seen by the public to be offering that protection.

When asked about whether a criminal record check is a useful way to protect vulnerable clients or mitigate organizational risk, most interviewees readily acknowledged that it was not a flawless screening tool. It was frequently stated that a record check was “only as good as the day it is printed” and that while it was an important step in the screening process, it was just one step out of many. A criminal record check without further screening steps, interviewees acknowledged, would not mitigate all risks.

Interviewees, however, did not tend to question whether a past criminal record was indicative of a risk that an individual would commit a criminal act against the organization or its clients or volunteers. There was a general consensus that excluding individuals with criminal records from employment or volunteering would reduce the risk of a similar criminal act happening in the future. For example, there was a frequent assumption that a person with an impaired driving charge or conviction presented an unacceptable risk if the position included driving. No respondents questioned whether a person with one prior impaired charge was actually more likely than another individual to drive intoxicated while on the job.

The assumed correlation between a prior criminal conviction or record of police contact and the likelihood of future criminal acts in the workplace needs to be questioned. The little empirical research that has been done on this issue suggests that prior criminal convictions are *not* reliable indicia of a person’s likelihood to commit an employment-related criminal offence in the future. The utility of workplace screening based on non-conviction records is even more questionable.

## A. Criminal convictions: limited correlation to future behaviour

The logic supporting the relevance of police record checks as a screening tool has a strong intuitive appeal: if a person committed a certain crime, or had a run-in with the police in the past, it is believed that they will be more likely than others to repeat that behaviour in the future. Unfortunately, social science evidence regarding the connection between past behaviour and future behaviour shows that past behaviour is a useful assessment tool only under specific conditions. For example, past behaviour is most useful as a predictor if:

- the behaviour has been frequently repeated or is habitual,
- a short amount of time has passed,
- the person is fairly behaviourally consistent,
- if the person finds themselves in essentially the same “triggering” context,
- the person is essentially unchanged, and
- the past behaviour has not been corrected by negative feedback.<sup>180</sup>

When these conditions are not present – because, for example, the specific situation the person will be in is different, time has passed, the behaviour was infrequent or the person has changed – past behaviour is not a reliable predictive tool.

Turning to criminal records specifically, studies have found that there is a correlation between having an existing conviction and the likelihood of being re-arrested for another crime – albeit not necessarily a related offence.<sup>181</sup> This correlation is also time limited; the BC Information and Privacy Commissioner cites one US study that suggests that “the risk of new offences among individuals who have not offended for six or seven years begins to approximate the risk of new offences among persons with no previous criminal record.”<sup>182</sup> The existence of a correlation, however, does not make criminal records a good predictive tool. Evidence-based risk assessment tools used by trained professionals in the Canadian justice system include not only an individual’s record of convictions but also family ties, education, employment, personal attitude and many other dynamic factors.<sup>183</sup> Academic literature has also questioned the validity of transposing generalizations regarding risk from one population to another (e.g., across countries, men to women, across cultures).<sup>184</sup> Moreover, even after taking into account a wider range of factors, generalized risk-prediction matrices will not offer insight into whether a new criminal offence will actually be committed by a specific individual, whether the offence will be violent, or whether there is any specific risk in a workplace setting.

Probably the most important factor that is overlooked when general recidivism risk assessments are used in the employment context is, ironically, the potential impact of obtaining employment. Stable

## B. Criminal convictions and the workplace: an irrelevant factor in predicting future work-related crime?

employment, as well as the income, stable housing and social networks that employment can foster, are significant protective factors against future reoffending.<sup>185</sup> Moreover, studies have found that risk factors as interpreted by employers or other agencies requesting background checks “depart markedly from criteria included in commonly accepted and validated assessments of offender risk,” throwing doubt on the practical utility of employers and volunteer agencies receiving this information.<sup>186</sup>

Very few studies have specifically examined whether police record checks are an effective way to reduce crime in the workplace. The research that has been conducted in this area, however, suggests that records of conviction are *not* good predictive tools for workplace screening. There is one academic study we are aware of that tracked reoffending in the employment context. They found that “variables which normally predict subsequent criminal activity made no impact in trying to predict offenses against an employer.”<sup>187</sup> Specifically, age and previous criminal history, which are usually correlated to future criminal offences, were not predictive of the likelihood to commit employment-related offences.<sup>188</sup> Even when the group of offenders was narrowed to those who had specifically committed a previous criminal offence against an employer, there was no measurable difference in these individuals’ likelihood to commit work-related crimes:

This series [of individuals] – many with poor records in terms of offenses against employers – unexpectedly showed that previous OAE [offences against employers] offenses do not provide much help in predicting the likelihood of subsequent OAE offenses, nor, again perhaps more surprisingly, do criminal histories (in terms of the typologies we developed) provide any assistance. Indeed, the variables that normally predict the likelihood of subsequent criminal activity made no impact in trying to predict OAE activity.<sup>189</sup>

According to the authors, the study’s findings “should challenge the ‘exaggerated fears’ of employers.”<sup>190</sup>

The questionable predictive value of criminal records in the employment context is reinforced by some ad hoc observations about the nature of criminal acts in Canadian workplaces. A survey of the perpetrators of fraud in Canadian workplaces found that 88.9% of fraudsters in the survey had “never been charged or convicted of a fraud-related offence,” indicating that “criminal background checks will have limited effectiveness as an anti-fraud measure.”<sup>191</sup> Similarly, a *Toronto Star* investigative report on the requirement that new teachers receive a police check concluded that “the police check is an illusion of security that is not worth the paper it is printed on.”<sup>192</sup> A report into teacher

misconduct in 2000 had recommended police checks and background screening for all teachers. The *Toronto Star's* 2011 investigation into Ontario teachers who had sexually assaulted and abused children over a ten-year period, however, showed that “all but one . . . had a clean record before they were finally caught and convicted” and the one who did have a record “simply forged his police check.”<sup>193</sup>

One potential consequence of the overreliance on police record checks is that they will give employers and volunteer managers a false sense of security, leading them to rely less on or forgo ongoing oversight, check-in and accountability measures. Although best practice guides for volunteer screening consistently emphasize that police checks are only one step among many, organizations that do not have the capacity to implement all suggested screening steps focus at times exclusively on the police record check.

## C. Implications for non-conviction records

All of the above-referenced studies and evidentiary risk prediction tools speak to the utility (or lack thereof) of past criminal records of *conviction*. There is simply no evidence that a *non-conviction* record is predictive of future behaviour or a risk to public safety. The almost infinite range of circumstances that can give rise to a non-conviction record includes false allegations, very minor actions that do not constitute crimes, medical emergencies and even police contact with victims and witnesses. While employers and volunteer managers may feel they would *like* to have this information, the significant privacy invasions it occasions far outweigh any perceived benefit it has in the hiring process. Furthermore, considerable harm and suspicion may accrue from uninformed speculation regarding what the information might mean. For the vast majority of jobs, a criminal record check that discloses non-conviction information will be an unwarranted invasion of privacy and lead to discriminatory, stigmatizing outcomes for innocent individuals.

Despite the lack of evidence in this area, we do believe that there are some highly sensitive positions where extra precautions and security clearances, including a check of criminal records of convictions, may be reasonable. Moreover, although there may be reason for enhanced screening when individuals have ongoing, unsupervised contact with the vulnerable individuals, the least invasive screening mechanism should be used. It is our view that the procedure offered by the British Columbia *Criminal Records Review Act* is less intrusive than a police record check and should be used as the primary vulnerable sector screening mechanism whenever possible.

## VII. THE HIDDEN COSTS OF WIDESPREAD POLICE RECORD CHECKS

It is estimated that 13% of Canadians adults – and by extrapolation one in five adult Canadian men – have a formal criminal record of convictions.<sup>194</sup> The barriers that record checks create for individuals who are trying to reintegrate into society after having been convicted of a crime have been well documented, particularly in the United States.<sup>195</sup> Individuals with records experience significant barriers in the areas of employment, volunteer and educational opportunities; housing; immigration; and mobility and subsequent interactions with the criminal justice system.<sup>196</sup> On an individual level, it can be deeply demoralizing to know that, after having served a full sentence, you will continue to pay for a past mistake for years more through the continued impact of having a criminal record. A criminal record can extend punishment beyond the judicial sentence, preventing individuals from moving on with their lives and returning to a full, normal participation in the labour force, family and community. On a societal level, putting in place unnecessary barriers to employment and education increases marginalization and, with it, the likelihood that an individual will commit another criminal offence. Education, employment and the financial and social stability that comes with a steady job are key elements that help prevent recidivism. As reviewed in the previous section, we could identify no evidence showing that police record checks enhance workplace safety. Widespread, unnecessary police record checks do not contribute to public safety; they undermine it.

Less academic work has been done on the impact that *non-conviction* records have on individuals and society. Based solely on statistics about the number of charges that are withdrawn or dismissed, however, it is clear that a large percentage of Canadians have some form of non-conviction record or record of police contact. In 2011–2012 alone more than a third of all criminal cases – over 139,000 proceedings – did not result in any finding of guilt (i.e., the charges were withdrawn or stayed, an acquittal was entered, etc.).<sup>197</sup> Moreover, just under half of all guilty findings resulted in “other [non-custodial] sentences,” including absolute and conditional discharges.<sup>198</sup> This means that approximately two-thirds of all charges result in a non-conviction record – a figure that does not include all those who were never charged or the individuals

## BOX 5

### Getting a job with a criminal record: two perspectives

#### Halifax, Nova Scotia

"The vast majority [of employers] do not want to hire if you've got a criminal record, . . . they're not using any measure or rationale; they just don't want to be bothered with it. So they just take a zero-tolerance approach. Even though there's jobs within their organization for which having a criminal record would be absolutely, have no bearing on their ability to work there . . .

Even if an employer might not be asking for the criminal record check per se, the post for the position, if that requires the employee to be bondable, so . . . either way it's coming back to what a participant has in their background . . . that's what makes the decision there . . . A lot of the places we've been noticing, they may not make it obvious they're

going to ask for the criminal record check, and it may not be part of the initial application, but it ends up coming up, either upon the job offer or even a couple of weeks or months into employment that they require that for insurance . . . [Then] they're finished, because of this conditional hire.

[People with criminal records may get hired for] kitchen work, in some restaurants, or food services . . . somewhere where the kitchen staff is separate from any money or valuables . . . There are some general labour smaller companies that don't bother with the record check, or the bondability issue, but again the smaller scale operations, . . . oftentimes that's not long-term work. That will be for a couple of jobs, and after

that couple months period is done . . . seasonal work . . .

Even the difficulty there is that it may be a condition of the contractor's contract with the client that they all, everybody had to be screened in order to be on the premises. So a very obvious example would be the Department of National Defence, who hires a private contractor to do work, you won't get in with a criminal record. They'll just exclude you, they'll just strike you off the list, because they make you submit all the names of employees and date of birth, and the list comes back and there's just a whole bunch of names scratched off. Those people aren't approved to come on site. [And they don't do fingerprint verification], no, none of that."

#### Toronto, Ontario

"I don't [have a sense of what companies are not requiring record checks] anymore. Because it seems like every client that's coming to me, they're complaining about the exact same thing. And they come from a wide variety of experiences, training, background and education. They are qualified to do anything – from IT, to construction, to wanting to be in healthcare. Not wanting to be a nurse but just to be administrative support for example or a technician. It seems like everybody's doing a background check now . . . I try to point them in the construction or the trades area, as well as some social service agencies . . .

Most of my clients are coming in ready to start a new job, maybe potentially in

a new field . . . Some of them are in the middle of their [city training], some are just finishing up their training, but they can't get anywhere because of the record check.

The sense I get from my clients is that as soon as you have a record or they find out that you have a record, you're not hireable anymore . . . My clients tell me that those potential employers don't directly tell them it's because of their record that they're not being hired, but they think . . . they get a sense it is because of their record. Because they meet the job description, they have the education and background and whatnot, they think they have provided good references, and that's the only blemish

they have in their entire application package.

Their frustrations mainly stem from, number one, every employer they go to is doing a record check and they can't seem to pass it. And number two, the process of removing your record is so long, they still have to remain on social assistance. And that's what they're frustrated about. Because it's like their life is on hold right now, and they can't go anywhere or do anything. They're stuck on welfare, they're trying to become employed so that they are more financially stable, but they just can't, and they feel like there's a roadblock everywhere."

who have a record of police contact due to casual contact or mental health issues in that year. If 13% of Canadians have a criminal record of conviction, the number of people with non-conviction records could easily be three times as high.

This calculation roughly aligns with statistics reported by the Vancouver Police Department (VPD). Of the 18,250 checks run in 2013, 797 of them disclosed some type of record. The vast majority of those 797 checks – 72% – disclosed only non-conviction information. Six percent of those records disclosed mental health information.<sup>199</sup>

Since CCLA released its report on non-conviction records in the fall of 2012, the organization has received dozens of calls and emails from individuals across the country who have been directly impacted by non-conviction records in particular. The stories range from individuals who lost jobs because of baseless allegations, to students ejected from post-secondary degrees after years of study because of delays in obtaining a clear check, to professionals scared to phone 911 for medical assistance because of the potential consequences a police attendance could have on their careers, to community members who had been surveilled by the police and had been, for reasons unbeknownst to them, flagged as “gang affiliated.” Many people experienced concrete problems related to their employment, travel and community engagement. Even more were concerned about the impact that police contact, dismissed charges or a mental health history would have for themselves or their family members in the future and were looking for help navigating the opaque bureaucratic procedures in an attempt to “clear” the relevant records. We talked to multiple individuals who, upon seeing that a placement or job required a record check, self-selected out of the process rather than disclosing their record and running the risk that they would be rejected because of it.

Other organizations that have examined non-conviction records have received similar reports. Professors at the University of Toronto have conducted a study to examine the impact of non-conviction records. Their preliminary conclusion is that “those with non-conviction records are increasingly being characterized as an undesirable candidate for employment, housing, citizenship, adoption and volunteer placements, among others.”<sup>200</sup> The responses they received through their research closely align with the accounts of individual prejudice related by those who have contacted CCLA directly:

Our interviews reported multiple instances where police background checks resulted in the disclosure of a non-conviction disposition, including a peace bond, withdrawn charges and allegations that

resulted in people losing their jobs and compromising other opportunities and pro-social supports. Of particular concern is the growing impact of such checks on those with professional aspirations where accreditation or licensing (i.e., law, medicine, and education) requires a vulnerable sector background check in order to participate in placements. Our research results revealed various incidents where students finishing teacher's college or social work school were shocked to find out they would not qualify for placements and were, therefore, unable to graduate. In the best cases, the record was cleared and the student only suffered stress, delay and financial loss. In the worst cases, the process of clearing the record took too long or was prohibited and the young person was unable to finish school, left with the burden of a heavy student debt. One interviewee reported on the experience of a young woman who after finishing all her university courses, was denied access to her field placement and unable to finish her program because of a decade old withdrawn charge. She was at the wrong place at the wrong time as a teenager. Although the charge was immediately withdrawn and she had no other recorded incidents, her career and finances were severely compromised. This case illustrates the precariousness of the presumption of innocence in situations where there are acquittals and/or charges are stayed, withdrawn or never applied in response to an allegation and how knowledge of contact with the police and courts (even if legally innocent) is equated with de facto guilt.

In another instance, a young man, who had experienced a difficult time after graduating from high school, threatened to kill himself and was sent to hospital after his concerned parents called the police. He was quickly released, recovered from his depression and moved on. Unfortunately, he was confronted about his record after applying to the military. The background check showed that he had a police record. This simple flag of a record caused him tremendous difficulty with his application . . . . Examples such as these raise increasing concerns regarding the barriers to seeking emergency medical assistance for fear of the lifelong effects of disclosure of police contact information.<sup>201</sup>

The research also identified cases where individuals experienced significant negative impacts in the areas of immigration, travel and the ability to obtain insurance due to non-conviction records.

Individuals with prior police contact are not the only ones impacted by the increasing demand for police record checks; policing services are also strained. Earlier this year the Toronto Police Service reported that in January 2014 there was a backlog of nearly 17,000 vulnerable sector record check applications.<sup>202</sup> Applicants can wait four to six months



to process even a standard vulnerable sector check. Although interim staff were redeployed to help deal with the backlog, “this utilization of staffing comes at a cost to other areas of the program.”<sup>203</sup> The delay in processing requests can be devastating: students who are not able to obtain their record check in time have been forced to withdraw from their college programs, and job seekers are forced to wait in limbo for months.<sup>204</sup>

Policing services can recoup these resource allocations by increasing the costs of obtaining a record check – but this approach simply redistributes the costs to individuals or organizations. Depending on the location and whether fingerprints are necessary, the fees associated with record checks can range from free to over \$100. Not-for-profit organizations and charities regularly express concerns about these costs. Where the organization pays for the record checks of its volunteers, it is frequently using donated or public money to cover this expense. Charities that cannot afford this expense must download that cost onto those who want to donate their time. Job seekers and students, who presumably do not have an income or are living on limited means, must similarly pay for expensive record checks before being hired. The difficulties caused by the cost and procedural differences between police services are issues that have been raised multiple times in different provinces.

## VIII. CONCLUSION AND RECOMMENDATIONS

An increasing number of Canadian organizations – employers, volunteer managers, educational institutions, licensing bodies and governments – are incorporating police record checks into their hiring and management practices. These background checks are highly privacy invasive and stigmatizing. Depending on the level of check requested and the jurisdiction, they can reveal not only previous criminal convictions but also a wide range of non-conviction records and police contacts which are of questionable value in the screening process. Local and federal databases store details about casual police contact, including unproven allegations, withdrawn charges and acquittals, as well as information about victims, witnesses and suspects. In numerous jurisdictions, information about unproven allegations, mental health apprehensions and suicide attempts in particular are frequently being included on police record checks.

A wide range of entry-level jobs and basic volunteer positions are now requiring some form of criminal record check. For the vast majority of positions, however, even a basic criminal record check will be unnecessary. A deeper police record check, particularly one that indiscriminately reveals police contact, mental health apprehensions and suicide attempts, will almost never be justifiable. This is not to say that criminal record checks are never appropriate: some security-sensitive positions warrant more in-depth background screening. There is also a legitimate need to screen those employees who will have ongoing, unsupervised contact with the vulnerable sector – although, as found by the BC Information and Privacy Commissioner, the scope of information that many of these organizations receive is far wider than is justifiable.

There is a general perception that getting a criminal record check is a useful risk-mitigation tool. The available social science evidence does not support this belief. Indeed, the few studies that have been done to date have found that past criminal convictions do not correlate with a likelihood to commit a work-related offence in the future. Employers and volunteer managers, however, regularly view a criminal record as a risk factor and make decisions to exclude individuals based on this information.

The consequences of this trend are deeply damaging on multiple fronts. On a personal level, individuals who have paid their debt to society find that they are facing years of social and economic exclusion. Those who have attempted suicide or successfully defended themselves against baseless allegations are being kicked out of school, excluded from employment and isolated from their communities on the basis of non-conviction records and police contact. On a societal level, placing increased and unnecessary barriers in front of individuals who are seeking employment and education is intensely counterproductive. For those who have committed a crime, employment – and the social networks and economic stability work provides – greatly increases the likelihood of successful rehabilitation and reintegration. Even police services are impacted, as they divert scarce resources to keep up with the growing demand – and are passing on a least a portion of that cost to prospective volunteers, not-for-profit organizations, businesses and the unemployed.

Businesses and organizations do have ethical, and at times legal, obligations to protect clients, their private information and their assets. These obligations do not justify any and every organizational practice aimed at risk mitigation. Organizations also have an ethical and legal duty towards employees, volunteers and applicants – not to discriminate against them, to treat them with dignity, to refrain from making decisions based on prejudice and stereotype, and to respect their privacy. We all also share a wider societal obligation to increase the safety of our communities by supporting the reintegration of individuals with criminal records. We must constantly strive to strike a balance between all of these obligations and search for the evidentiary foundation underpinning risk-mitigation practices – particularly when these practices have significant negative impacts on individual privacy and human rights.

The laws across Canada are inconsistent and provide a patchwork of protection and regulation. Most private sector employees are not protected by Canadian privacy legislation. Human rights statutes provide varying levels of protection, at times prohibiting discrimination based on pardoned convictions while leaving those with non-conviction records open to unfair treatment. Even in the jurisdictions that do provide relatively robust legal protections, many volunteer managers are not aware of their legal obligations. Those who do know that privacy and human rights laws apply remain risk averse – uncertain how to meaningfully respecting applicants' privacy and human rights in the face of vague but ever-present concerns about risks to vulnerable individuals. Although there are statutes that set out seemingly coherent schemes limiting the stigmatizing impact of criminal records, they leave

most non-conviction records unaddressed. Based on our interviews, even the legal protections that are in place to limit the use of vulnerable sector checks are not understood and are regularly being contravened.

The current legal lacunae leave it to requesting organizations and local police services to decide what should be disclosed, to whom, and under what circumstances. Given the weak privacy and human rights protections in most jurisdictions, it is not surprising that both these communities default to the most risk-averse position. The police, concerned about protecting vulnerable individuals and potential liability for not sharing seemingly relevant information, frequently default towards greater disclosure. Employers and volunteer managers are similarly concerned about protecting vulnerable individuals and organizational assets and are also worried about potential liability for not requesting all available information – and not acting upon information if something is disclosed.

Canada is not the only country struggling with the human rights, privacy and societal implications of increased recourse to police record checks. In Australia, a 2006 report from the Victorian Privacy Commissioner identified very similar themes: the number of police record checks was growing and resulting in unjust impacts on large proportions of the community, prejudicing individuals and undermining the community benefit of reintegrating ex-offenders into society.<sup>205</sup> In the United Kingdom, multiple appellate court decisions have restricted the release of police information on background checks.<sup>206</sup> The UK government commissioned an independent report into the issue, which recommended restricting access to old convictions and to consider never disclosing “soft intelligence” to an employer via the standard criminal record check process.<sup>207</sup> Across the United States, “ban the box” campaigns have taken hold and, as of May 2013, fifty cities or counties and nine states have decided to remove questions about conviction history from applications for public employment;<sup>208</sup> four states and fifteen cities have extended the ban to private employers.<sup>209</sup> More already have legislation pending, scheduled for approval in 2014. As Delaware Governor Jack Markell explained, “We should ban the box for state government hires this year . . . because marginalizing [people with records] helps none of us.”<sup>210</sup>

The time has come for Canadian governments to address this issue. The widespread release of non-conviction records runs counter to the presumption of innocence; violates individuals’ privacy; and leads to discriminatory, stigmatizing exclusion from employment, education

and community opportunities. There is no evidence that broad use of criminal records materially reduces the risk of crime or violent offences in the workplace. To the contrary, systemic barriers to employment for ex-offenders undermine the significant efforts and resources put into reintegration and ultimately prejudices community safety.

Over the past four years various policing leaders, not-for-profit organizations, mental health organizations and privacy commissioners have actively attempted to address the policy issues raised in this report and have made concrete improvements in response to the concerns. Ultimately, however, this issue is cross-sectoral and requires a comprehensive legislative response to protect individual rights and the public interest. The following recommendations – both short- and long-term – are aimed at reintroducing perspective and balance to the societal use of police record checks.

## Recommendations

### 1. To provincial, territorial and federal governments

- 1.1 **Governments should legislatively prohibit the disclosure of non-conviction records on criminal record and police information checks.**
- 1.2 **Governments should introduce legislation based on British Columbia's *Criminal Records Review Act*, establishing centralized bodies to conduct vulnerable sector screening and evidence-based risk assessments. These bodies should provide screening services for all positions that would qualify for a vulnerable sector check.**

It is not realistic to expect that police services, private organizations and individual volunteer managers will be able to unilaterally curtail the request for, disclosure of and use of police record checks on a large scale. The police records of those who are going to be in unsupervised positions with the vulnerable sector should be reviewed by trained and impartial professionals who use evidence-based risk assessment tools to determine whether there would be an elevated risk to vulnerable individuals. British Columbia's *Criminal Records Review Act* should serve as a model for other provinces in this regard.

- 1.3 **Human rights statutes across the country should be amended to clearly prohibit discrimination on the basis of police contact, non-conviction records and criminal records of conviction.**

- 1.4 **Provincial and territorial privacy statutes across the country should be amended to provide privacy protection for applicants, employees and volunteers not already covered by existing provincial or federal privacy statutes.**
- 1.5 **It is in the public interest for individuals with a criminal record to have the fullest opportunity for employment. Governments should critically review legislative provisions that permit or require police record checks, as well as government grants and contracts that require the recipient organization to conduct police record checks. Recent federal amendments that further restricted Canadians' access to record suspensions should be repealed.**

Municipal, provincial, territorial and federal governments should conduct a comprehensive review of the policies, rules, regulations and statutory provisions that require or authorize police record checks in licensing or employment contexts. Those that are unjustifiable or overly broad should be repealed.

Governments should refrain from making funding grants and contracts conditional on the recipient organization's conducting police record checks unless the contract language aligns with best practice principles for use of police record checks. Where a government entity comes to the conclusion that a specific organization's role or history necessitates a contractually mandated record check program, the government should review the organization's record check policies and practices to determine whether they follow best practice guidelines in their requests for, and uses of, criminal records information. This review should encompass not only whether they are record checking highly sensitive positions but also how they are treating the results of those checks and whether they are requiring record checks for too many positions. Recent amendments to the *Criminal Records Act*, which made it more difficult and expensive to secure a record suspension (formerly known as a pardon) are counterproductive – particularly in light of the low revocation rate for pardons – and should be repealed.

## **2. To police services and police service boards**

- 2.1 **Police services should not disclose non-conviction information on criminal record and police information checks.**

In the vast majority of cases releasing non-conviction records to employers and volunteer managers will not enhance public safety. These records contain information that is subjective and not easily interpreted

or applied by laypersons. Disclosure of this information is highly privacy invasive and leads to discriminatory and stigmatizing decisions. This information should not be releasable on consent-based police record checks. Third-party record providers should not be permitted to mediate record searches of investigative and local records databases such as the Firearms Interest Police database.

**2.2 Until recommendation 1.2 is adopted, there should be a strong presumption against the disclosure of any non-conviction information on vulnerable sector checks. Non-conviction information should be disclosed only in exceptional circumstances where there are reasonable grounds to believe that disclosure of this information will mitigate an identifiable risk to public safety.**

We were unable to find any evidence supporting the use of non-conviction records as an indicator of an individual's future behavioural patterns. Nevertheless, discussions with community groups show that there remain particularly strong fears about two categories of predatory crimes: child sexual predators and fraud schemes targeting the elderly or other vulnerable populations with financial assets. These scenarios seem to illustrate a concern about those who might intentionally seek out positions of trust or power over vulnerable populations in order to take advantage of them.

There may be exceptional circumstances where a non-conviction or police contact record gives rise to a reasonable belief that a particular individual is attempting to gain access to a position in order to take advantage of a vulnerable population. In such circumstances, police services may consider using their authority to release private information without consent for the purpose of protecting public safety.

Recent non-conviction records that show a clear, evidenced pattern of alleged predation on vulnerable individuals, sexually or financially, may meet this threshold. The focus of this examination should not be on general behaviour prediction but, rather, on identifying those who may be knowingly targeting vulnerable populations to facilitate the commission of criminal acts.

These cases should rarely arise, and the vast majority of record checks should therefore be processed in line with the non-disclosure presumption. To ensure that the guidelines and non-disclosure presumptions are appropriately implemented, the exceptional disclosure mechanism should be separated from the routine processing of record checks. Records clerks should not be charged with exercising discretion over the release of this information. Moreover, to tie the release closely

to a public safety rationale, the disclosure should be grounded in the permissible non-consensual disclosure provisions allowing for disclosure to protect public safety.

The Canadian Civil Liberties Association collaborated with members of the Ontario Association of Chiefs of Police to develop the following proposed procedure for this narrow exception:

1. Records clerks will process vulnerable sector requests, which will include disclosure of convictions, pending charges and warrants, and pardoned sex offences.
2. In addition to the above standard checks, clerks will also query whether there are multiple non-conviction entries for relevant offences – namely,
  - a. sex offences as defined by Schedule 1 or 2 of the *Criminal Records Act* when directed towards a vulnerable individual; or
  - b. fraud-related criminal offences as identified in British Columbia's *Criminal Records Review Act*.

The multiple charges should reflect not just various aspects of one alleged incident but, rather, allegations of repeated criminal behaviour towards one or more persons.

3. If multiple relevant non-conviction records are found, the file should be passed on to a higher-level decision maker to consider whether the non-conviction records should be disclosed. The decision maker would evaluate whether, in the circumstances of the application, there would be a significant and imminent risk to the physical well-being or the property of a vulnerable individual, and whether the disclosure of the non-conviction information would reduce this risk. Factors to be considered would include:
  - the nature of the alleged offence,
  - whether the alleged offence targeted a vulnerable population,
  - when the alleged offence took place,
  - the number of allegations and whether they stem from a single complaint,
  - whether there is a pattern of allegations, and
  - why the allegations did not result in a conviction.
4. If it is decided that the non-conviction information should be disclosed, an additional page should be attached to the formal vulnerable sector check. This page should include the relevant personal information listed in s. 3 of Ontario's *Disclosure of Personal Information Regulation*. It should also include an



explanation of the difference between a conviction and a non-conviction record. The document should be paginated to ensure the last page cannot be detached. The entirety of the record check should be released directly to the applicant.

5. There should be a reconsideration process allowing an individual to appeal the decision regarding the public safety risk posed by the applicant and the relevance of the non-conviction record.

**2.3 Police services should bring existing policies into compliance with the intent of federal legislation governing police records, including the *Youth Criminal Justice Act*, the *Criminal Records Act* and the *Criminal Code*.**

### 3. To businesses and not-for-profit organizations

**3.1 Organizations should critically assess whether current record check practices are necessary. The majority of positions should not require any form of record check, and in general only individuals who are in ongoing, unsupervised positions of trust with or power over the vulnerable sector should be subject to a vulnerable sector search.**

Organizations should limit their collection of private information to only what is truly necessary for a specific position. These decisions of relevance should be arrived at while taking into account the lack of evidence regarding the utility of police record checks. For the majority of jobs – including those where an individual is subject to significant oversight, has access to personal information or relatively small amounts of organizational assets – no criminal record check is warranted. Basic criminal record checks should be reserved for those jobs that do not engage the vulnerable sector but nevertheless unavoidably involve a significant amount of risk and low levels of employee oversight or accountability. In our view, jobs and volunteer opportunities that may warrant a criminal record check include positions in high-security environments such as correctional facilities, airports or nuclear facilities, and positions involving independent control over large amounts of organizational assets where ongoing oversight or auditing measures are not feasible to implement.

Vulnerable sector checks should be reserved for individuals who are in ongoing, unsupervised positions of trust with or power over the vulnerable sector. Although it is a difficult line to draw, CCLA suggests that individuals who incidentally come into contact with vulnerable individuals during the course of their work and those who

have infrequent, supervised contact with the vulnerable sector should not be subjected to a vulnerable sector search. Indeed, doing so may contravene the explicit limits established by the *Criminal Records Act*.

- 3.2 Checks that may disclose applicants' mental health information and history of police contact are highly privacy invasive and likely contravene Canadian privacy law, where applicable. They should not be utilized.**
- 3.3 Organizations offering positions that do warrant a basic criminal record check or a vulnerable sector check should develop detailed, clear, written guidelines. The full policy should be public and available to all applicants, and criminal record checks should be requested only once a conditional offer of employment has been extended.**

Both profit and not-for-profit private sector organizations should, if they determine record checks are necessary at all, develop clear, written guidelines for volunteer managers and hiring departments. Organizational guidelines should specifically state which positions require police record checks and the level of check required, as well as specify exactly what types of criminal records will be relevant and why. If some kinds of records may be relevant depending on the circumstances, those circumstances should be explicitly stated and justified. Given the difficulties inherent in predicting future behaviour, the focus should generally be on identifying any individuals who may be intentionally seeking a position in order to take advantage of a vulnerable population or organization. The full policy should be available to all applicants, and criminal record checks should be requested only once a conditional offer of employment has been extended.

## **4. To third-party record check companies**

- 4.1 Third-party record check companies should enhance transparency and clarity; fully comply with the *Personal Information Protection and Electronic Documents Act* and provincial privacy statutes; and end services that provide or facilitate access to non-conviction records.**

There was a wide range of privacy compliance among among third-party record check companies. Those that are not in compliance with *PIPEDA* should take immediate steps to bring themselves into compliance. Most companies could also be more transparent regarding the scope of the record check services they offer. Consent forms should be posted

online or, at a minimum, be available upon request without cost. There are continuing concerns that some of these businesses imply, through advertising and marketing, that they can conduct vulnerable sector searches. Moreover, given the privacy and human rights concerns that arise from the collection of non-conviction information, services that provide or facilitate access to non-conviction information should cease.

## 5. To privacy commissioners and human rights commissions and tribunals

### 5.1 The development, interpretation and application of privacy and human rights law should take into consideration the most recent social science evidence regarding the dubious value of police record checks as a workplace screening tool.

There seems to be an assumption – at times endorsed by legal doctrine – that a criminal record is relevant to predicting future employment-related behaviour. The only social science evidence found on this point suggests that criminal records are not correlated with the likelihood to commit future employment-related crimes. Both human rights and privacy frameworks should attempt to avoid unproven assumptions about risk, especially those based on stereotypes. In jurisprudence on randomized workplace alcohol testing, the Supreme Court has held that simple assertions of the inherently dangerous nature of a workplace are insufficient to show that randomized testing is reasonable. Similarly, employer or organizational claims about the necessity for and relevance of police record checks should be approached from a critical perspective.

### 5.2 Where a privacy commissioner has the authority to initiate its own investigations, it should consider investigating the collection, use and disclosure of both conviction and non-conviction information for employment purposes by organizations within its jurisdiction.

# APPENDIX: METHODOLOGY

## A. Interviews

Semi-structured face-to-face and/or phone interviews were conducted with a range of individuals, including both those who had knowledge of human resource practices within the private and not-for-profit sectors and those who worked for private third-party providers of police record checks. The majority of the interviews were private conversations with two researchers, although in some cases an organization had more than one person speak to us at the same time.

Potential interview participants were contacted through professional email lists and direct email outreach to a wide range of organizations and individuals. We asked all contacts to share the call for participation (which was also circulated on several listservs) with others who may be interested. We directly contacted nine companies that provide record check services to invite them to participate in the research.

We conducted thirty interviews over the course of four months. Our interview sample included:

- staff and executive directors at not-for-profit organizations,
- representatives of private companies that provide record checks,
- employees or executive directors of organizations that serve individuals with criminal records,
- one private sector human resource professional, and
- one individual employed in the insurance industry.

We obtained specific details about the record check practices of twenty-five organizations, twenty-two of which were not-for-profit organizations.

The organizations were located primarily in British Columbia (6), Ontario (7) and Nova Scotia (6), although we also collected information from four organizations that were national in scope and two in Alberta. The organizations varied in size, ranging from very small programs with two paid staff, to multi-service not-for-profit organizations with hundreds of staff and volunteers, to large private sector corporations. We also spoke to five organizations in three different provinces with experience training not-for-profit managers on the police record check process and screening in general; staff at those organizations had

collectively worked with hundreds of not-for-profit organizations over many years and were able to provide us with a broader perspective on record check practices in the not-for-profit sector. We spoke to four individuals from three different private sector companies that provided police record check services and representatives from two different organizations that provide services targeted at individuals with criminal records.

Semi-structured interviews allowed the researchers to guide the interview, while giving participants room to steer the conversation to their particular experiences. Participants were asked about their thoughts and experiences with police record checks. Questions explored:

- whether organizations used record checks,
- why they used checks (or not),
- what procedures they followed, and
- how they used the results.

Individuals with a broader perspective on record checks – those who provided record check services, worked with organizations to develop screening or human resources practices, or helped individuals with records seek employment – were asked for their experiences with police record checks more broadly. Participants were also asked whether they perceived any challenges with police record checks.

Access to information requests were sent to twenty-nine police services across the country:

- Abbotsford Police Department
- Brandon Police Service
- Calgary Police Service
- Central Saanich Police Service
- Edmonton Police Service
- Fredericton Police Force
- Halifax Regional Police
- Hamilton Police Service
- Lethbridge Regional Police Service
- London Police Service
- New Westminster Police Department
- Niagara Regional Police Service
- Ontario Provincial Police
- Ottawa Police Service
- Peel Regional Police
- Regina Police Service
- Royal Canadian Mounted Police

## **B. Access to information requests**

## C. Survey of private sector companies providing police record checks

- Royal Newfoundland Constabulary
- Saanich Police Department
- Saint John Police Force
- Saskatoon Police Service
- Toronto Police Service
- Vancouver Police Department
- Victoria Police Department
- Waterloo Regional Police Service
- West Vancouver Police Department
- Windsor Police Service
- Winnipeg Police Service
- York Regional Police

Police services were asked to provide any documents or policy guidelines governing their record check programs, as well as statistics showing the number of record checks processed from 2003 to 2013, including a breakdown by the type of record check run and the reason the check was requested. Police services were also asked for any agreements, notes, memos, correspondence, etc., regarding third-party record check companies.

We used combined keyword searches (“online screening company” and “police background check”) to compose a list of nine companies who provide police record check services in Canada. For purposes of the survey, we examined publicly available information (company websites) to find privacy policies and consent forms. Where these documents were not found, we contacted the companies directly to get copies.

Nine companies that provided police record check services were surveyed. The questions asked included:

- Is there a privacy policy accessible on the company’s website, and does it address the privacy principles set out in PIPEDA?
- Is the scope of the company’s criminal record check services clearly explained on the company’s website?
- Are the relevant consent forms available on the website?
- Was the consent form provided upon request?
- Is the scope of the record check clearly explained on the consent form?

# NOTES

1. The *Youth Criminal Justice Act*, *Criminal Code* and *Criminal Records Act* create a variety of punishments that result in either a criminal record that is not releasable or records that are automatically sealed after a certain period has elapsed without incident. *Criminal Code*, RSC 1985, c. C-46, s. 717; *Criminal Records Act*, RSC 1985, c. C-47 [CRA], s. 6.1. (The CRA states that records of absolute and conditional discharges must be removed from the RCMP's databases after one and three years, respectively.)
2. CRA, *supra* note 1, s. 4.1.
3. For a summary of human rights protections for criminal records across Canada see Sections III A-2 and III B-2 of this report. See also *Montréal (City) v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, [2008] 2 SCR 698 [Montréal].
4. Throughout this report, "police contact records" refer specifically to any recorded interaction with the police that *did not* result in a charge being laid. "Non-conviction records" include not only police contact but also incidents in which a charge was laid but there was no conviction. These include charges that are withdrawn or stayed, or charges in which there was a finding of not guilty.
5. Kelly Hannah-Moffat and Paula Maurutto, "Impact of disclosures," prepared for the John Howard Society of Ontario and Canadian Civil Liberties Symposium, Indeterminate Punishment: The Disclosure of Non-Conviction Information on Police Record Checks in Ontario, November 8, 2012.
6. Although there are no official statistics, this trend has been noted in several Canadian reports and legal cases, and aligns with the general perception of professionals spoken to across various industries (non-profit organization representatives, private sector background check companies, law enforcement officials, an insurance representative and a private sector human resources professional). For a more detailed discussion see Section IV, this report.
7. For a fuller discussion see Section VI B, this report.
8. Patricia Harris and Kimberly Keller, "Ex-offenders need not apply: the criminal background check in hiring decisions," *Journal of Contemporary Criminal Justice* 21, no. 1 (2005): 6.
9. Curt T. Griffiths, Yvon Dandurand and Danielle Murdoch, *The Social Reintegration of Offenders and Crime Prevention* (Ottawa: National Crime Prevention Centre, 2007), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/scl-rntgrtn-eng.pdf>; Dominique Fleury and Myriam Fortin, "When working is not enough to escape poverty: An analysis of Canada's working poor," Human Resources and Social Development Canada (working paper, 2006), [http://tamarackcommunity.ca/downloads/vc/When\\_Work\\_Not\\_Enough.pdf](http://tamarackcommunity.ca/downloads/vc/When_Work_Not_Enough.pdf); Christopher Uggen, "Work as a turning point in the life course of criminals: A duration model of age, employment and recidivism," *American Sociological Review* 65, no. 4 (2000): 529.

10. Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data: Report to the Attorney-General Pursuant to Section 63(3) of the Information Privacy Act 2000* (Melbourne: Office of the Victorian Privacy Commissioner, June 2006), [https://www.privacy.vic.gov.au/privacy/web2.nsf/files/report-02.06-controlled-disclosure-of-criminal-record-data/%24file/report\\_06\\_06.pdf](https://www.privacy.vic.gov.au/privacy/web2.nsf/files/report-02.06-controlled-disclosure-of-criminal-record-data/%24file/report_06_06.pdf).
11. *R. (on the application of L) v. Commissioner of Police of the Metropolis*, [2009] UKSC 3; *T, R (on the application of) v. Greater Manchester Chief Constable & Ors*, [2013] EWCA Civ. 25.
12. Sunita Mason, Independent Advisor for Criminality Information Management, *A Balanced Approach: Safeguarding the Public through Fair and Proportionate Use of Accurate Criminal Record Information* (2010), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97894/common-sense-approach.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97894/common-sense-approach.pdf).
13. Legal Services for Prisoners with Children, “Ban the Box Campaign,” <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/ban-the-box-campaign/>.
14. Michelle Natividad Rodriguez, “‘Ban the Box’ fair hiring policies take hold around the nation,” *Huffington Post* (February 18, 2014), [http://www.huffingtonpost.com/michelle-natividad-rodriguez/ban-the-box-fair-hiring\\_b\\_4811072.html](http://www.huffingtonpost.com/michelle-natividad-rodriguez/ban-the-box-fair-hiring_b_4811072.html).
15. Jack Markell, Governor of Delaware, quoted in *ibid.*
16. *Criminal Code*, *supra* note 1, s. 732.
17. *Ibid.*, s. 734.
18. *Ibid.*, s. 742.1.
19. *Ibid.*, s. 731(1).
20. The *Criminal Records Act* sets out a procedure for “the suspension of the records of persons who have been convicted of offences and have subsequently rehabilitated themselves.” *CRA*, *supra* note 1, preamble.
21. *CRA: Proposal for Reform of the Criminal Records Act* (July 20, 1991), quoted with approval in *Montréal*, *supra* note 3 at para. 15.
22. *Criminal Code*, *supra* note 1, s. 730. Discharges are not available if the underlying offence carries a mandatory minimum sentence or is punishable by imprisonment for fourteen years or life.
23. *CRA*, *supra* note 1.
24. Because the records released in many Canadian police checks go well beyond criminal convictions and findings of guilt, throughout this report we will refer to “police record checks” to signify all levels of checks.
25. Royal Canadian Mounted Police, *Canadian Criminal Real Time Identification Services, Dissemination of Criminal Record Information: Policy* (Ottawa: CCRTIS Policy Centre, 2010) [RCMP].
26. *Ibid.*
27. Draft British Columbia guideline for police information checks (February 29, 2012), obtained via access to information request [Draft British Columbia guideline].
28. There is a large amount of legislation that bears on specific aspects of police information checks, including the *Criminal Code*; the *Youth Criminal Justice*



- Act; federal and provincial privacy statutes, acts and regulations governing police forces; human rights legislation; and constitutional requirements.
29. Ontario Association of Chiefs of Police, *Guideline for Police Checks* (Toronto: Ontario Association of Chiefs of Police, 2013), 4, [http://www.oacp.on.ca/Userfiles/Committees/CPEGLawEnforcementAndRecordsManagersNetwork\\_LEARN\\_/ResourceDocs/2013%20Police%20Record%20Checks.pdf](http://www.oacp.on.ca/Userfiles/Committees/CPEGLawEnforcementAndRecordsManagersNetwork_LEARN_/ResourceDocs/2013%20Police%20Record%20Checks.pdf).
  30. *Ibid.*
  31. RCMP, *supra* note 25 at 4.
  32. For example, the Toronto Police Service, the Royal Newfoundland Constabulary and the Halifax Regional Police do not provide this level of check.
  33. See Ontario Association of Chiefs of Police, *Guideline for Police Checks*, *supra* note 29 at 22.
  34. *Ibid.*
  35. Ontario Association of Chiefs of Police, “OACP statement on changes to the OACP LEARN guidelines on police record checks” (February 26, 2014), <http://www.oacp.on.ca/news-events/news-releases/oacp-learn-guideline-for-police-record-checks-statement>.
  36. *Ibid.*
  37. Alberta Association of Chiefs of Police, “Resolution” (undated), obtained via access to information request; “PIC disclosure guidelines – Revised 2013 January 08” (January 8, 2013), obtained via access to information request.
  38. *Ibid.*
  39. Calgary Police Service and Lethbridge Regional Police Service policy documents, received through access to information requests.
  40. All municipal police agencies and the majority of Royal Canadian Mounted Police detachments in the British Columbia Lower Mainland are participating in a pilot project. Report from Chief Constable Jim Chu to the Vancouver Police Board – Service and Policy Complaints Review Committee, “Service and policy complaint #2013-96SP (police information checks)” (October 25, 2013), <http://vancouver.ca/police/policeboard/agenda/2013/1112/SPAagenda.pdf>.
  41. Draft British Columbia guideline, *supra* note 27.
  42. *Ibid.*
  43. Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F14-01: Use of Police Information Checks in British Columbia*, 2014 BCIPC No. 14.
  44. *Ibid.*
  45. *Ibid.*
  46. Royal Newfoundland Constabulary, Draft guidelines, obtained via access to information request.
  47. For further details see RCMP, “Consent for disclosure of criminal record information” (form), [http://www.jibc.ca/sites/default/files/justice\\_public\\_safety/pdf/Consent-Criminal-Record-Check.pdf](http://www.jibc.ca/sites/default/files/justice_public_safety/pdf/Consent-Criminal-Record-Check.pdf).
  48. Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43; access to information requests.
  49. Access to information request (October 28, 2013).

50. Brandon Police Service, “Police criminal record check, police vulnerable sector verification,” (form), <http://police.brandon.ca/images/pdf/crc.pdf>.
51. Brandon Police Service, “Legal process, Chapter C: Criminal record search” (2012), obtained via access to information request.
52. Halifax Regional Police, “Criminal record check,” [www.halifax.ca/police/CriminalRecordCheck.html](http://www.halifax.ca/police/CriminalRecordCheck.html).
53. Access to information request (July 3, 2013). There are exceptions for non-civil disclosure – for example, to the Crown or other police services.
54. *Ibid.*
55. For example, *CPIC Reference Manual, Ministerial Directive on the Release of Criminal Records* (2010), provincial and local police policies, *Police Records Information Management Environment Policy*, *Police Information Portal Policy*, and *INTERPOL Charter*.
56. See, for example, *Police Services Act*, RSO 1990, c. P.15: *Disclosure of Personal Information*, O. Reg. 265/98; *Police Act*, RSPEI 1988, c. P-11.1: *Code of Professional Conduct and Discipline Regulations*, PEI Reg. EC142/10, s. 7; *Police Act*, SNB 1977, c. P-9.2: *Code of Professional Conduct Regulation*, NB Reg. 2007-81, s. 39.
57. For example, *Privacy Act*, RSC 1985, c. P-21; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165.
58. See, for example, the analysis in IPC Privacy Complaint *MC-060020-1* (December 27, 2007); Privacy Complaints *MC-050045-1* and *MC-050047-1* (November 2, 2006).
59. Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
60. *Constitution Act*, 1982, c. 11, s. 8.
61. *R. v. Dore*, [2002] OJ no. 2845.
62. For a more in-depth discussion of this subject see Canadian Civil Liberties Association, *Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks* (2012).
63. The federal privacy commissioner has found that employees who are told they must consent to background checks or face transfer or job loss do still possess some form of “choice” and that this can be valid consent for the purposes of *PIPEDA* (*Finding #127*, 2003 CanLII 36718 (PCC); *Finding #65*, 2002 CanLII 42373 (PCC)). These demands, however, are still reviewable under *PIPEDA* for general reasonableness, an inquiry that will include an assessment of the security needs of the particular position (*Finding #127*, 2003 CanLII 36718 (PCC); *Finding #65*, 2002 CanLII 42373 (PCC)). In contexts where there is no opportunity to review the reasonableness of privacy-invasive employment or admission policies, it becomes more important to qualify the validity of “consent.” The Information and Privacy Commissioner of Ontario has come to the conclusion that consent is not a sufficient legal basis for an entire police record check program; this is a view CCLA shares. This reasoning was applied most recently in a complaint filed against the Guelph Police Service for releasing local police information relating to youth and child records on a vulnerable

sector search. The Ontario Privacy Commissioner found that under the circumstances the complainant could not be said to have consented to the release of the information:

As I indicated above, the complainant was asked to and did sign a consent form before the police would complete the PVSC [Police Vulnerable Sector Check].

In my view, the police cannot rely on this consent form to support the use of the complainant's personal information about the child matter in the context of this PVSC....

In the circumstances before me, it cannot be said that the complainant provided informed consent for a number of reasons. First, the complainant's position is that the complainant did not know that the records relating to the child matter existed – the complainant only learned of their existence after reading the representations filed by the police in this investigation.

In addition, it is important to note that there is an element of coercion that comes to play in the police record check process. Applicants are required to provide their consent in the form chosen by the police. The young person or child, who is now an adult, seeking to participate in employment or an education program has no choice but to sign the form, including the consent, or no reference check will be performed.

– Information and Privacy Commissioner of Ontario, MC13-49 (March 26, 2014).

64. *Ottawa (City) v. Ottawa Professional Firefighters Association* (2007), 169 LAC (4th) 84, noted that for an employer to rely on an employee's consent to a background check, it "must be a free and informed consent... and not merely one that he or she has been obliged... to provide." The Supreme Court of Canada, in *R. v. Knox*, [1996] 3 SCR 199 at para. 10, has observed that the "distinction between the meaning of 'compliance' and the meaning of 'consent' is real." Unfortunately, this approach overlooks the very real risk that many employers and volunteer agencies will err on the side of caution and choose not to hire an applicant with any history of police interaction, no matter how well it is explained. The Ontario Court of Appeal also stated, in *Tadros v. Peel (Police Service)*, 2009 ONCA 442, at para. 38, that "the fact that a person effectively must consent to a Vulnerable Persons Search in order to apply for certain types of jobs may be perceived as coercive and, in that way, possibly unfair." In the court's view, however, this potential unfairness is mitigated by the fact that employers involved with vulnerable persons need access to information about prospective employees' criminal histories and that, "in a case where withdrawn charges which were false are disclosed, the potential employee has the ability to explain the circumstances to the proposed employer."

CCLA prefers the analysis of the Supreme Court of the United Kingdom on this issue in *R. (on the application of L) v. Commissioner of Police of the Metropolis*, [2009] UKSC 3, where the court found that "those who apply for positions that require an ECRC [enhanced criminal record check] cannot be regarded as consenting to their privacy being violated." The court rejected a blanket approach to disclosure and ruled that the "proportionality of the proposed disclosure must be considered in each case." This ruling was followed by a 2013 Court of Appeal decision *T, R (on the application of) v. Greater Manchester Chief Constable & Ors*, [2013] EWCA Civ. 25, which considered whether blanket policies to release criminal convictions violated the right to respect for private life protected in article 8(1) of the *European Convention on Human Rights*. The court found at para. 37 that although the general aim of protecting

employers and vulnerable populations through record checks was legitimate, “the statutory regime requiring the disclosure of all convictions and cautions relating to recordable offences is disproportionate to that legitimate aim.” As the court explained:

The fundamental objection to the scheme is that it does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance must depend on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do. These same factors also come into the picture when the balance is to be struck (as it must be) between the relevance of the information and the severity of any impact of the individual’s article 8(1) right.

– *T, R (on the application of) v. Greater Manchester Chief Constable & Ors*, [2013] EWCA Civ. 25 at para. 38.

65. For a more detailed summary of the applicable human rights provisions see Section II B-2, this report.
66. Letter, Barbara Hall, Chief Commissioner of the Ontario Human Rights Commission, to Chief Terrence McLaren, Peterborough – Lakefield Community Police Service (January 22, 2007).
67. *Ibid.*
68. *Ibid.*
69. *Criminal Code*, *supra* note 1, ss. 717.1, 717.2, 717.3, 717.4.
70. *Ibid.*, s. 717.2.
71. *Ibid.*, s. 171.3.
72. *Ibid.*, s. 717.4.
73. *Youth Criminal Justice Act*, SC 2002, c. 1 [YCJA], s. 119(1)(o).
74. Information and Privacy Commissioner of Ontario, MC13-49 (March 26, 2014).
75. Justice for Children and Youth summarize the access period for youth records as follows:
  - for extrajudicial sanctions (for example diversion), two years after agreeing to participate in the program;
  - acquittals, two months after the appeal period ends if there is no appeal or three months after an appeal;
  - withdrawn, dismissed or guilty with reprimand, two months;
  - absolute discharge, one year;
  - conditional discharge, three years;
  - summary conviction sentence, three years after sentence completed;
  - indictable conviction sentence, five years after sentence completed;
  - sentence for murder, attempted murder, manslaughter or aggravated sexual assault, potentially permanent.

If another crime is committed before the access period expires, the record will remain open until the expiry of the new access period. Justice for Children and

- Youth, “Youth records,” *Street Law Smarts*, no. 24 (November 2012). [http://www.jfcy.org/PDFs/24\\_Youth\\_Records.pdf](http://www.jfcy.org/PDFs/24_Youth_Records.pdf).
76. *YCJA*, *supra* note 73, s. 119(9).
  77. *CRA*, *supra* note 1, s. 6.1(1).
  78. *Ibid.*, s. 6.1(2).
  79. *Ibid.*
  80. *Ibid.*, s. 6.3(3).
  81. *Ibid.*
  82. *Criminal Records Review Act*, RSBC 1996, c. 86.
  83. *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5 [PIPEDA], s. 4(1). Federal works, undertakings and businesses are those under the legislative authority of Parliament under s. 92 of the *Constitution Act*, 1867. PIPEDA expressly includes only employees of federal works and, by implication, excludes employees of non-federal works.
  84. *Ibid.*, s. 4(1)(b).
  85. These statutes also clearly include protections for job applicants. The private sector privacy legislation in Quebec broadly addresses the protection of personal information that is collected, held, used or disclosed in the “course of carrying on an enterprise”: *An Act respecting the Protection of personal information in the private sector*, CQLR c. P-39.1, s. 1. Alberta’s statute, while somewhat narrower, does explicitly include the personal information of “a potential, current or former employee” in the definition of “personal employee information”: *Personal Information Protection Act*, SA 2003, c. P-6.5, s. 1(1)(j). Similarly, the British Columbia legislation includes “personal information about an individual that is collected . . . solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual . . .” In British Columbia an “employee” is defined to include a volunteer, and “employment” includes unpaid volunteer work. *Personal Information Protection Act*, SBC 2003, c. 63, s. 1.
  86. *The Personal Information Protection and Identity Theft Prevention Act*, CCSM c. P33.7.
  87. See, for example, Ontario’s *Freedom of Information and Protection of Privacy Act*, s. 38(2). (“No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.”)
  88. See, for example, *A College of Applied Arts and Technology (Re)*, 1995 CanLII 6830 (ON IPC) (college violating privacy laws when conducting a background check on a student).87. *Use of Employment-Related Criminal Record Checks (Re)*, 2012 BCIPC 16, <http://www.canlii.org/en/bc/bcipc/doc/2012/2012bcipc16/2012bcipc16.pdf>; Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
  89. *Use of Employment-Related Criminal Record Checks (Re)*, 2012 BCIPC 16, <http://www.canlii.org/en/bc/bcipc/doc/2012/2012bcipc16/2012bcipc16.pdf>; Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
  90. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 26(c).

91. *Use of Employment-Related Criminal Record Checks (Re)*, *supra* note 89.
92. Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
93. *Use of Employment-Related Criminal Record Checks (Re)*, *supra* note 89.
94. *Ibid.*
95. *Ibid.*
96. *Ibid.*
97. Office of the Information and Privacy Commissioner for British Columbia, *Use of Police Information Checks in British Columbia*, *supra* note 43.
98. *Ibid.*
99. *Mark's Work Warehouse Ltd. Investigation Report P2010-IR-001*, Office of the Information and Privacy Commissioner of Alberta; see also *SAS Institute (Canada) Inc. Investigation Report P2005-IR-008*, Office of the Information and Privacy Commissioner of Alberta. Unnecessarily intrusive job candidate screening processes have also been curtailed under the federal *Privacy Act*: Office of the Privacy Commissioner of Canada, *Findings under the Privacy Act: RCMP Medical Questionnaire Too Intrusive for Civilian Applicants*, archived content available at [http://www.priv.gc.ca/cf-dc/pa/2003-04/pa\\_200304\\_02\\_e.asp](http://www.priv.gc.ca/cf-dc/pa/2003-04/pa_200304_02_e.asp).
100. *Order F2002-029*, 2003 CanLII 71667 (AB OIPC) (regulatory body with delegated governmental function authorized to collect criminal records under applicable public sector privacy legislation because governing statute allows for refusal to grant license due to relevant criminal convictions); *Order P2009-004*, 2009 CanLII 90945 (AB OIPC) (Real Estate Council of Alberta is authorized to collect information about convictions as the collection is reasonably related to its statutory purpose which includes licensing members and suppressing mortgage fraud; where certain information is not used in the licensing process, however, the collection of that information is not reasonable); *Order P2011-004*, 2011 CanLII 96591 (AB OIPC) (Real Estate Council of Alberta (RECA), as a regulatory body issuing a license under a statutory scheme, is not subject to s. 7(2) of Alberta's *Personal Information Protection Act*. The collection of certified criminal record checks is "reasonable for meeting the purposes for which the information is collected," and it may be obtained without the individuals' consent, as the *Real Estate Act* authorized RECA to make rules respecting a requirement for a criminal record check.)
101. *Finding #65*, 2002 CanLII 42373 (PCC); *Finding #127*, 2003 CanLII 36718 (PCC); *Finding #106*, 2002 CanLII 42350 (PCC); *Finding #255*, 2003 CanLII 6591 (PCC).
102. *Finding #65*, 2002 CanLII 42373 (PCC); *Finding #127*, 2003 CanLII 36718 (PCC). In the aftermath of the 9/11 terrorist attacks, the federal privacy commissioner also found that background checks against spouses of nuclear facility employees were reasonable and that spousal consent was not required where consent had been obtained from the employee: *Finding #232*, 2003 CanLII 23759 (PCC).
103. *Finding #106*, 2002 CanLII 42350 (PCC).
104. Canadian Human Rights Commission, *Human Rights at Work*, Third edn. (2008). <http://www.ohrc.on.ca/en/book/export/html/4266>.
105. *Human Rights Code*, RSO 1990, c. H.19, ss. 5(1), 10(1)(b).

106. *Charter of Human Rights and Freedoms*, 1982, c. 61, s. 5; 1990, c. 4, s. 18.2.
107. *Montréal*, *supra* note 3.
108. *Human Rights Act*, RSPEI 1998, c. H-12, s. 6(1)(b).
109. *Human Rights Act*, SNL 2010, c. H-13, s. 14.
110. *Muir v. Emcon Services Inc.* (1991), 16 C.H.R.R. D/65; *Clement v. Jackson and Abdulla*, 2006 BCHRT 411.
111. *Human Rights Act*, RSY 2002, c. 116, ss. 7(i), 10(b).
112. *Canadian Human Rights Act*, RSC 1985, c. H-6; *Alberta Human Rights Act*, RSA 2000, c. A-25.5; *The Saskatchewan Human Rights Code*, SS 1979, c. S-24.1; *The Human Rights Code*, CCSM c. H175; *Human Rights Act*, RSNS 1989, c. 214; *Human Rights Act*, RSNB 2011, c. 171; *Human Rights Act*, 2010, SNL 2010, c. H-13.1.
113. *Manitoba Human Rights Commission Policy and Procedures Manual*, [http://www.manitobahumanrights.ca/publications/policy/policy\\_criminal-record2.html](http://www.manitobahumanrights.ca/publications/policy/policy_criminal-record2.html); *Penner v. Fort Garry Services Inc.*, 2009 CarswellMan 641 (Manitoba Board of Adjudication).
114. *Manitoba Human Rights Commission Policy and Procedures Manual*, *Ibid.*; *Woodward Stores (British Columbia) Ltd. v. McCartney*, 1983 CanLII 444 at para. 20. *See also* Newfoundland Labrador, Human Rights Commission, “Guidelines regarding employment of persons with criminal convictions” (February 23, 2011), [http://www.justice.gov.nl.ca/hrc/publications/criminal\\_conviction\\_and\\_employment.pdf](http://www.justice.gov.nl.ca/hrc/publications/criminal_conviction_and_employment.pdf).
115. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 24.
116. British Columbia Ministry of Justice, *Who Must Have a Criminal Record Check under the Criminal Records Review Act*, <http://www.pssg.gov.bc.ca/criminal-records-review/who-qualifies/>.
117. *See, for example, Ponticas v. K.M.S. Investments*, (1983) 331 N.W.2d 907.
118. *Wilson v. Clarica Life Insurance Co.*, 2002 BCCA 502. Much Canadian legal commentary about criminal record checks and negligent hiring speculates about whether the US jurisprudence will, at some point, be adopted in Canada.
119. *Bazley v. Curry*, [1999] 2 SCR 534 at para. 42.
120. *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 SCR 45 at 28–29.
121. *Bazley v. Curry*, *supra* note 119.
122. Joseph Berta, “Employer liability for the wrongful acts of its employees” (November 14, 2003), McCarthy Tétrault, [http://www.mccarthy.ca/pubs/wrongful\\_acts.pdf](http://www.mccarthy.ca/pubs/wrongful_acts.pdf). *See also* Mervyn White, “Supreme Court of Canada brings clarity to vicarious liability of churches in Canada” (May 31, 2005), Carter & Associates, <http://www.carters.ca/pub/bulletin/church/2005/chchlb11.htm>.
123. Ontario Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009, came into force on June 15, 2010.
124. Occupational Health and Safety Branch, Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (Toronto: Occupational Health and Safety Branch, Ministry of Labour, 2010), 17. [http://www.labour.gov.on.ca/english/hs/pdf/wpvh\\_gl.pdf](http://www.labour.gov.on.ca/english/hs/pdf/wpvh_gl.pdf).

125. See, for example *City of Ottawa v. Ottawa Professional Firefighters Association* (2007), 169 LAC (4th) 84 (M. Picher), upheld in [2009] OJ no. 2914 (Ont. Div. Ct.); *Ontario Public Service Employees Union (Union) v. Ontario (Government Services)*, 2011 CanLII 23158 (ON GSB) (Collective agreement, crown disclosure requirements in prosecution of offences, Crown not permitted to conduct CPIC checks); *Vancouver (City) v. Vancouver Firefighters' Union, Local 18*, 2010 CanLII 81705 (BC LA) (overall upholding the reasonableness of a tailored policy, but finding that portions of a criminal record check requirement for specific positions within the fire service were overly broad or vague); *Ontario Power Generation Inc. v. Society of Energy Professionals (Security Clearances Grievance)*, [2004] OLAA no. 247 (finding that collecting detailed spousal information for the purpose of security screening from nuclear employees who do not have access to protected areas is unreasonable). But see also *Toronto Community Housing Corporation v. OPSEU*, 2012 CanLII 97798 (ON LA) (holding that the Toronto Community Housing Corporation's (TCHC) implementation of criminal record checks for any TCHC special constables, community patrol officers, parking enforcement officers and dispatchers who have direct or indirect access to CPIC-derived information, in excess of the security clearance policy required by the RCMP, was reasonable).
126. *Owner allowed to disclose tenants' rent information*, 2006 CanLII 37527 (PCC).
127. Office of the Information and Privacy Commissioner for British Columbia, "Privacy guidelines for landlords and tenants" ("a landlord cannot as a condition of renting or providing any service to a tenant, ask for consent to collect personal information beyond what is necessary to provide tenancy or that service. Requiring a criminal record check is not reasonably necessary."); see <http://www.oipc.bc.ca/guidance-documents/1456>. See also "Frequently asked questions, privacy and landlord – tenant matters, *Alberta Personal Information Protection Act*" (2007), <http://servicealberta.ca/pipa/documents/Landlord-Tenant-FAQs-Mar2007.pdf>.
128. The calculation method to determine the total number of record checks likely varied depending on the police force. Some police services, for example, may not have included record checks done for pardons in their totals. As a result, comparisons between police services should be viewed with caution. Reported increases *within* a given police service, however, should be more reliable. Where police services specifically indicated that years were anomalous, that data was excluded.
129. The statistics provided by Calgary Police Service included "Supplementary Name Checks (other names, maiden, married, legal name change)" in their total count. Other police services did not appear to include these supplementary checks in their totals. The figures for Calgary were therefore adjusted to remove this category of check from the total.
130. Canada's population growth rate ranges from 0.8% to 1.2% per year. Alberta, which had the highest provincial growth rate in 2012–2013, grew by 3.4%. Statistics Canada, *Canada's Total Population Estimates, 2013*, Catalogue no. 11-001-X (September 26, 2013), <http://www.statcan.gc.ca/daily-quotidien/130926/dq130926a-eng.htm?HPA>. Population growth in census metropolitan areas grew slightly above the national average (7.4% between 2006 and 2011, as compared with a 5.9% growth rate over the same period for the whole country). Statistics Canada, *The Canadian Population in 2011*:



- Population Counts and Growth*, Catalogue no. 98-310-X2011001 (February 2012), <http://www12.statcan.ca/census-recensement/2011/as-sa/98-310-x/98-310-x2011001-eng.cfm>.
131. Humber College, “How to apply, additional information: Police record check,” available at <http://www.humber.ca/admissions/how-apply/additional-information>.
  132. BC Centre for Non-Profit Development, *Criminal Record Checks for the Non-Profit Sector in British Columbia* (Abbotsford: BC Centre for Non-Profit Development, 2010).
  133. *Bazley v. Curry*, *supra* note 119 (whether a non-profit foundation operating residential care treatment facilities for emotionally troubled children was vicariously liable for an employee’s sexual abuse of a child); *Jacobi v. Griffiths*, 1999 CanLII 693 (SCC), [1999] 2 SCR 570 (whether a children’s recreational organization is vicariously liable for sexual abuse by an employee); *Rumley v. British Columbia*, 2001 SCC 69 (certification of class action); *E.D.G. v. Hammer*, 2003 SCC 52 (whether a school board is liable for sexual assaults committed by a school janitor); *M.B. v. British Columbia*, [2003] 2 SCR 477, 2003 SCC 53 (whether the provincial government is liable for a child’s being sexually abused by a foster father); *John Doe v. Bennett*, 2004 SCC 17 (whether an episcopal corporation is liable for a priest’s sexual assault of boys); *Blackwater v. Plint*, 2005 SCC 58 (whether the federal government and church are liable for a dormitory supervisor’s sexual assaults against Aboriginal students in residential school); *K.L.B. v. British Columbia*, 2003 SCC 51 (whether a provincial government is liable for sexual and physical abuse suffered in foster homes); *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60 (whether the Catholic order that operated a residential school is vicariously liable for the sexual assaults committed by a lay employee on the children).
  134. Volunteer Canada, “Screening: History,” <http://volunteer.ca/content/screening>.
  135. Starting in 1997, for example, Scouts Canada implemented screening processes for its volunteers – over 20,000 people per year. CBC News, “Scouts Canada kept ‘confidential list’ of pedophiles” (October 20, 2011), <http://www.cbc.ca/news/canada/scouts-canada-kept-confidential-list-of-pedophiles-1.1010983>.
  136. City of Toronto, Recommendation from Employment and Labour Relations Committee to Executive Committee, “Police reference checks for prospective employees for Shelter, Support and Housing Administration Division” (August 11, 2010), 6. <http://www.toronto.ca/legdocs/mmis/2010/ex/bgrd/backgroundfile-33094.pdf>.
  137. City of Toronto, Staff Report from City Manager to Employee and Labour Relations Committee Executive Committee, “Police reference check process” (October 10, 2012). <http://www.toronto.ca/legdocs/mmis/2012/ex/bgrd/backgroundfile-51398.pdf>.
  138. City of Toronto, “Police reference checks for prospective employees for shelter, support and housing administration division,” *supra* note 136.
  139. City of Toronto, “Police reference check process,” *supra* note 137.
  140. John Howard Society of Ontario, Help Wanted\*: Reducing Barriers for

- Ontario's Youth with Police Records (Toronto: John Howard Society of Ontario, 2014).
141. Brian Mazoff, Account Executive at BackCheck, "Sure, he's a fun guy, but can he get the job done?" (March 22, 2013), <http://www.backgroundcheckblog.com/tag/criminal-record/>.
  142. SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (Sacramento, CA: SEARCH, 2005), 1, <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.
  143. *Ibid.*, 19.
  144. National Consumer Law Center, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* (Boston, MA: National Consumer Law Center, 2012), 8, <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.
  145. See, for example, *Ontario Public Service Employees Union v. Ontario (Management Board Secretariat)*, 2003 CanLII 52975 (ON GSB); *Finding #106*, 2002 CanLII 42350 (PCC); *Reference re Marine Transportation Security Regulations (CA)*, 2009 FCA 234; *Greater Toronto Airports Authority*, [2004] CLAD no. 524.
  146. IBISWorld, *Background Check Services Market Research Report: Report Snapshot* (Melbourne: IBISWorld, 2013), <http://www.ibisworld.com/industry/background-check-services.html>.
  147. Society for Human Resource Management, "Background checking: Conducting criminal background checks" (January 22, 2010), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx>. Another study reported that in 2001 about 40% of employers required police background checks: Harry J. Hozer, Steven Raphael and Michael A. Stroll, "How willing are employers to hire ex-offenders?" *Focus*, 23 no. 2 (2004): 40.
  148. This trend was also noted by the John Howard Society of Ontario in a 2014 survey of record check practices in two Ontario counties: 30% of employers who engaged in record checks cited Bill 168 as a reason. In 2010 Ontario passed Bill 168, which amended the *Workplace Health and Safety Act* to include provisions regarding workplace violence and harassment. As explained in Box 2 of this report, however, the Ontario government has explicitly stated that criminal record checks for prospective and current staff are *not* required for compliance with this legislation.
  149. John Howard Society of Ontario, *supra* note 140.
  150. As previously mentioned, for example, in 1995 Ontario's Ministry of Community and Social Services (MCSS) issued a directive "requiring all agencies funded or licensed by MCSS, and which provide direct services to children (including child care) or vulnerable adults, to incorporate criminal reference checks as a mandatory component of their hiring processes." City of Toronto, Recommendation from Employment and Labour Relations Committee to Executive Committee, "Police reference checks for prospective employees for Shelter, Support and Housing Administration Division," *supra* note 136.
  151. For at least some organizations, it was reported that any employee, volunteer or contractor requiring access to the private office area of the organization had

to be cleared by Public Works and Government Services Canada regardless of whether the individual was actually working with private information. Public Works and Government Services Canada has implemented background screening processes for individuals with access to “Protected” documents. Any information that is not related to national security but that could be exempted under the *Access to Information Act* or the *Privacy Act* is classified as Protected A, Protected B or Protected C information. Protected A information is private information of “low sensitivity” that may, if compromised, cause “minimal injury.” A document with a person’s name and age will be designated as Protected A document. More sensitive personal information, including job performance records, medical records or personal relationship information, is given Protected B designation. In order to work with Protected information, employees must receive Reliability Status security screenings, which includes a criminal record check. See Office of the Information Commissioner of Canada, *Information Management Manual* (Gatineau: Office of the Information Commissioner of Canada, 2010), 25, [http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=ae5081c8-76ce-4477-9faa-7125b238fb76&section=e6cd6a12-a913-44fd-b2bd-f302a166a8b0&file=IM\\_manual-eng.pdf](http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=ae5081c8-76ce-4477-9faa-7125b238fb76&section=e6cd6a12-a913-44fd-b2bd-f302a166a8b0&file=IM_manual-eng.pdf) (describing Protected A, B and C documents); Public Works and Government Services Canada, “Chapter 5 – Handling and safeguarding of classified and protected information and assets,” *Industrial Security Manual*, <http://ssi-iss.tpsgc-pwgsc.gc.ca/msi-ism/ch5/mnpltn-hndlng-eng.html>, and Public Prosecution Service of Canada, “Terms and conditions of appointment of legal agent,” [http://www.ppsc-sppc.gc.ca/eng/pub/tca-cnm/a\\_b.html](http://www.ppsc-sppc.gc.ca/eng/pub/tca-cnm/a_b.html).

152. John Howard Society of Ontario, *supra* note 140. For example, Fanshawe College, a post-secondary institution in Ontario, states on its website that “most agencies will not accept students with a criminal record” and advises students that, if they are denied a placement, they will not meet the requirements for graduation. Fanshawe College, School of Health Sciences and Nursing, “Clinical/field pre-placement process: Vulnerable sector screening,” <http://www.fanshawec.ca/preplacement/vss>.
153. Sarah Esther Lageson, Mike Vuolo and Christopher Uggen, “Legal ambiguity in managerial assessments of criminal records,” *Law and Social Inquiry* (forthcoming, 2014); Devah Pager and Lincoln Quillian, “Walking the talk? What employers say versus what they do,” *American Sociological Review* 70, no. 3 (2005): 355.
154. Lageson, Vuolo and Uggen, *Ibid.*, 17.
155. *Ibid.*, 18.
156. John Howard Society of Ontario, *supra* note 140, 17.
157. BackCheck has a list of Canadian companies that have provided testimonials about its service. As of April 5, 2014, listed companies that mentioned criminal record checks as one service provided included Loblaw, ConocoPhillips Canada, TELUS, VersaCold Logistics Services, Boys and Girls Clubs of Calgary, BC Hockey, Manitoba Council of Girl Guides of Canada, Special Olympics Manitoba, Canadian Museum of Immigration at Pier 21 and Scouts Canada. BackCheck, “Testimonials,” <http://backcheck.net/testimonials.htm>.
158. These include Commissionaires and RecordCheck, which is affiliated with Reliability Screening ([www.reliabilityscreening.ca](http://www.reliabilityscreening.ca)).

159. BackCheck has initiated an arrangement like this with the Halifax Regional Police. Halifax Regional Police, access to information request.
160. Michelle Morra-Carlisle, "Hire wisdom: Criminal background checks," *HR Voice* (April 12, 2002), <http://www.hrvoice.org/hire-wisdom-criminal-background-checks/>.
161. Reliability Screening consent form.
162. Letter from Tim Killam, Deputy Commissioner, Policing Support Services, RCMP, to Brian Young, OASIS Board President (February 16, 2010), <http://oasisonline.ca/pdf/Response%20from%20RCMP%20Re%20Criminal%20Record%20Checks.pdf>.
163. *Ibid.*
164. *Ibid.*
165. *Ibid.*
166. Dan Michaluk, "New RCMP commitment to enforcement of background check policies squeezing Canadian employers," *Slaw* (January 27, 2010), <http://www.slaw.ca/2010/01/27/new-rcmp-commitment-to-enforcement-of-background-check-policies-squeezing-canadian-employers/>.
167. CSI Screening, "FAQ," <https://www.csiscreening.com/faq/>.
168. Correspondence, Royal Newfoundland Constabulary, obtained via access to information request.
169. CSI Screening states that an enhanced criminal record check is processed by having the applicant self-declare "any arrests, charges, warrants, upcoming court cases and any other police or court involvement. CSI Screening will then verify that the applicant has provided all details. If they have not we will advise [sic] that not all information was provided by the applicant. This allows employers to know about police involvement that has not resulted in a conviction. Written consent is required by applicant." <https://www.csiscreening.com/>.
170. RCMP, *supra* note 25.
171. BackCheck, "Supplemental information sheet regarding name based criminal record checks and FIP" <http://backcheck.net/docs/Sup%20Info%20Sheet%20Regarding%20Name%20Based%20Crim%20Check%20-%20FIP%20V1.4e.pdf>.
172. Department of Justice Canada and the Royal Canadian Mounted Police, *Review of the Personal Information Handling Practices of the Canadian Firearms Program* (Ottawa: Office of the Privacy Commissioner of Canada, 2001), 28.
173. *Ibid.*
174. BackCheck, *supra* note 171.
175. RCMP, *supra* note 25.
176. *Mortgage administrator/broker should have confirmed consent prior to issuing letter of interest for mortgage financing in couple's name (Re)*, 2012 CanLII 96454 (PCC).
177. BackCheck, "Protect your family and property by implementing a tenant screening program," <http://backcheck.net/tenant-screening/index.htm>.
178. Office of the Information and Privacy Commissioner for British Columbia, *supra* note 127. The Alberta privacy commissioner has also found that private businesses may not conduct credit checks on prospective employees for

positions such as sales associates. In coming to this finding, the commissioner found that personal credit history could be reflective of many different personal circumstances and that this information “was not reasonably required to assess the [prospective employee’s] ability to perform the duties of a [sales associate], or to assess whether he might have a tendency towards committing in-store theft or fraud.” *Mark’s Work Warehouse Ltd. Investigation Report P2010-IR-001*, Office of the Information and Privacy Commissioner of Alberta; see also *SAS Institute (Canada) Inc. Investigation Report P2005-IR-008*, Office of the Information and Privacy Commissioner of Alberta. In most other provinces, landlords are subject to *PIPEDA* when they collect information from tenants: *Owner allowed to disclose tenants’ rent information*, 2006 CanLII 37527 (PCC).

179. Hire Performance, “FAQs,” <http://www.hireperformance.ca/faqs.asp#4>.
180. Karen Franklin, “‘The best predictor of future behavior is . . . past behavior’: Does the popular maxim hold water?,” *Psychology Today* (January 3, 2013), <http://www.psychologytoday.com/blog/witness/201301/the-best-predictor-future-behavior-is-past-behavior-0>.
181. Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, “Scarlet letters and recidivism: Does an old criminal record predict future offending?” *Criminology and Public Policy* 5, no. 3 (2006).
182. *Use of Employment-Related Criminal Record Checks (Re)*, *supra* note 89, citing Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, “Scarlet letters and recidivism: Does an old criminal record predict future offending?” *Criminology and Public Policy*, 5 no. 3 (2006): 483, as well as Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, “Enduring risk? Old criminal records and short-term predictions of criminal involvement,” *Crime and Delinquency*, 53, no. 1 (2007): 64. See also A. Blumstein, and K. Nakamura, “Redemption in the presence of widespread criminal background checks,” *Criminology* 47, no. 2 (2009): 327.
183. Corrections Canada captures information across eight broad areas: criminal history, procriminal attitudes, procriminal associates, antisocial personality pattern, employment/education, family/marital status, substance abuse, and leisure/recreation.  
L. Gutierrez, H.A. Wilson, T. Ruge and J. Bonta, “The prediction of recidivism with aboriginal offenders: A theoretically informed meta-analysis,” *Canadian Journal of Criminology and Criminal Justice* 55, no. 1 (2013): 55.
184. See, for example, Kelly Hannah-Moffat and Margaret Shaw, *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada* (Ottawa: Status of Women Canada, 2001). <http://www.publications.gc.ca/collections/Collection/SW21-66-2001E.pdf>. (See in particular p. 15, summarizing academic research suggesting that “the nature of women’s offending is qualitatively different from men’s even if the charges are similar” and citing studies that suggest that “women who commit violence are often not at risk of re-offending violently against the general public.”)
185. Curt T. Griffiths, Yvon Dandurand and Danielle Murdoch, *supra* note 9; Dominique Fleury and Myriam Fortin, *supra* note 9; Christopher Uggen, *supra* note 9.
186. Harris and Keller, *supra* note 8.

187. Keith Soothill, Les Humphreys and Brian Francis, "Middle-class offenders as employees –Assessing the risk: A 35-year follow-up," *Journal of Offender Rehabilitation* 52, no. 6 (2013): 407.
188. *Ibid.*
189. *Ibid.*
190. *Ibid.*
191. Association of Certified Fraud Examiners and Dominic Peltier-Rivest, *Detecting Occupational Fraud in Canada: A Study of Its Victims and Perpetrators* (Austin, TX: Association of Certified Fraud Examiners, 2007), [http://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/documents/rtnn-canadian.pdf](http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rtnn-canadian.pdf).
192. Kevin Donovan, "Police check to screen new teachers gives illusion of security," *Toronto Star* (October 2, 2011), [http://www.thestar.com/news/canada/2011/10/02/police\\_check\\_to\\_screen\\_new\\_teachers\\_gives\\_illusion\\_of\\_security.html#](http://www.thestar.com/news/canada/2011/10/02/police_check_to_screen_new_teachers_gives_illusion_of_security.html#).
193. *Ibid.*
194. Calculation first made by Tony Doob, John Ll. J. Edwards Lecture, "Losing our Balance: Old and New Directions in Canadian Criminal Justice Policy" (Centre for Criminology & Sociolegal Studies, University of Toronto, February 6, 2014). Public Safety Canada reports that in 2009 approximately 3.8 million individuals had a Canadian criminal record (Public Safety Canada, *Corrections and Conditional Release: Statistical Overview, 201* (December 2013) at p. 107, <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/crrctns-cndtnl-rls-2013/crrctns-cndtnl-rls-2013-eng.pdf>). While this certainly includes convictions, it may also include discharges as they are findings of guilt. It does not include other non-conviction records. It is unclear whether this statistic includes youth or other sealed records. Assuming that it does, it reflects records among individuals aged 12 and over – in 2009 about 29,247,000 people (Statistics Canada, CANSIM Table 0051-0001). This means that approximately 13% of adult Canadians have a criminal record. Females are less likely to be charged with and found guilty of a criminal offence than men: in 2008/2009, only 18% of cases disposed of in adult criminal courts involved female accused, and 59% of cases against women ended in a guilty finding, as compared to 68% for men (Tina Hotton Mahony, *Women and the Criminal Justice System*, Statistics Canada Catalogue no. 89-530-X (April 2011), <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11416-eng.htm> ). It follows that men likely account for over 80% of the total number of individuals with criminal records.
195. Mirjan R. Damaska, "Adverse legal consequences of conviction and their removal: A comparative study," *Journal Crime Law Criminology and Police Science*, 59, no. 3 (1968): 347; Michael Pinard, "Collateral consequences of criminal convictions: confronting issues of race and dignity," *New York University Law Review* 85, no. 33(2010): 457; Margaret Colgate Love, "The Debt That can Never be Paid: A Report Card on the Collateral Consequences of conviction" (2006) 21 *Criminal Justice* 16; Margaret Colgate Love, "Alternatives to conviction: Deferred adjudication as a way of avoiding collateral consequences," *Federal Sentencing Reporter* 22, no. 1 (2009): 6; Bronwyn Naylor, Moira Paterson and Marilyn Pittard, "In the shadow of a criminal record: Proposing a just model of criminal record checks," *Melbourne University Law Review* 32, no. 1 (2008): 171; Deborah N. Archer and Kele s. Williams, "Making America 'the land of second chances': Restoring

- socioeconomic rights of ex-offenders,” *NYU Review of Law and Social Change* 30, no. 4 (2006): 527.
196. Devah Pager, “The mark of a criminal record,” *American Journal of Sociology*, 108, no. 5 (2003): 937; Helen Lam and Mark Harcourt, “The use of criminal record in employment decisions: The rights of ex-offenders, employer and the public,” *Journal of Business Ethics* 47, no. 3 (2003): 37; Roger Boshier and Derek Johnson, “Does conviction affect employment opportunities?” *British Journal of Criminology*, 14, no. 3 (1974): 264; Michael Stoll and Shawn Bushway, “The effect of criminal background checks on hiring ex-offenders,” *Criminology and Public Policy* 7, no. 3 (2008): 371; Jessica s. Henry and James B. Jacobs, “Ban the box to promote ex-offender employment,” *Criminology and Public Policy* 6, no. 4 (2007): 755; Harris and Keller, *supra* note 8; Bruce Western, Jeffrey R. Kling and David F. Weiman, “The labor market consequences of incarceration,” *Crime and Delinquency* 47, no. 3 (2001): 410; Barbara Mulé and Michael Yavinsky, “Saving one’s home: Collateral consequences for innocent family members,” *NYU Review of Law and Social Change* 30, no. 4 (2006): 689; Pinard, *Ibid.*; Love, *Ibid.*; Damaska, *Ibid.*; J. Roberts, “Public opinion, criminal record, and the sentencing process,” *American Behavioral Scientist* 39, no. 4 (1996): 488; Manuel D. Vargas, “Immigration Consequences of Guilty Pleas or Convictions,” *NYU Review of Law and Social Change* 30, no. 4 (2006): 701.
  197. Statistics Canada, “Cases completed in adult criminal court, by type of offence and decision, Canada 2011/2012,” <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804/tbl/tbl04-eng.htm>.
  198. Statistics Canada, CANSIM table 252-0056, “Adult criminal courts, guilty cases by type of sentence,” 2011–2012.
  199. Statistics cited in Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
  200. Hannah-Moffat and Maurutto, *supra* note 5. See also Office of the Information and Privacy Commissioner for British Columbia, *supra* note 43.
  201. *Ibid.*
  202. Toronto Police Service Board, Minutes, #P43 “Update report: Clearing backlog of background check requests – police reference check program” (March 13, 2014).
  203. *Ibid.*
  204. Jennifer Pagliaro, “Toronto police criminal-background check backlog puts thousands of jobs and studies in limbo,” *The Toronto Star* (March 19, 2014), [http://www.thestar.com/news/crime/2014/03/19/toronto\\_police\\_criminalbackground\\_check\\_backlog\\_puts\\_thousands\\_of\\_jobs\\_and\\_studies\\_in\\_limbo.html](http://www.thestar.com/news/crime/2014/03/19/toronto_police_criminalbackground_check_backlog_puts_thousands_of_jobs_and_studies_in_limbo.html).
  205. Victorian Privacy Commissioner, *supra* note 10.
  206. *R. (on the application of L) v. Commissioner of Police of the Metropolis*, *supra* note 11; *T, R (on the application of) v. Greater Manchester Chief Constable & Ors*, *supra* note 11.
  207. Mason, *supra* note 12.
  208. Legal Services for Prisoners with Children, *supra* note 13.
  209. Natividad Rodriguez, *supra* note 14.
  210. Jack Markell, Governor of Delaware, quoted in *ibid.*

