

EMPLOYEE BACKGROUND CHECKS

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TABLE OF CONTENTS

Education Verification.....	2
Credit Check.....	2
Driving History.....	3
Criminal Record Check (Federal Offences).....	3

The subject of background checks represents a challenge to certain employers seeking to fulfill security and safety mandates in an age where privacy is sometimes a competing interest.

The following areas may require consideration:

- Human Rights legislation (such as the Ontario *Human Rights Code*)
- Privacy legislation (such as *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”), *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and *Personal Health Information Protection Act* (“PHIPA”))
- Security legislation such as the federal *Aeronautics Act* and Regulations governing airport restricted area access
- Specific workplace/sector legislation (e.g. *Education Act*/teachers and volunteers)
- External jurisdictions’ demands (Sarbanes Oxley)
- Collective Agreement and arbitral jurisprudence limitations
- Common law “right” (or expectation) of privacy

This presentation will primarily focus on checks for applicants. The subject of ongoing or periodic checks for current employees raises further challenges as can be seen from the Ottawa firefighter arbitration decision of Mr. M. Picher when he struck down mandated criminal record checks of all firefighters every three (3) years. In the absence of a fact specific cause for searching a particular individual’s record, the arbitrator ruled the demand was unreasonable.

In sectors such as education or child care, there are government mandated requirements for criminal background checks. Outside of those specific areas, employers historically had a mixed practice of conducting background searches, other than phone calls to references provided by the applicant. Historically, many employers would essentially accept on faith the accuracy of an applicant’s answers to questions about:

- education/credentials
- employment history
- licenses
- any criminal record for which no pardon exists.

In today's security sensitive environment, passive or blind acceptance of the accuracy of data, will not be viewed by regulators, the public, victims and the media as any form of due diligence, **once** a problem has occurred. Some will say, if the question is important or relevant, then surely some form of audit or verification is equally prudent and necessary.

Education Verification

Notwithstanding that many applicants identify the names of the educational institutions they attended, Human Rights Commissions in Canada typically stated, as a policy directive, that employers should not seek this information. The rationale is that employers may use this knowledge to screen out applicants based on a prohibited ground such as race, creed or place of origin.

At least one Commission (Manitoba) goes so far as to recommend that employers do not seek the year of graduation in order to avoid screening out older applicants.

These types of practices are not based on decided case law but rather are policy recommendations.

Employers are certainly entitled to obtain the year of graduation and name of the educational institution once a conditional offer is made.

It seems a bit excessive by Commissions to discourage employers from knowing whether the applicants have relevant degrees or diplomas from recognized institutions.

Employers should seek independent confirmation of a particularly relevant degree being granted to the prospective employee.

Credit Check

Following the *Enron* type of situation, some employers began seeking personal credit checks for an individual seeking a position or promotion to a senior financial/fiduciary role. For those governed by privacy legislation, the Privacy Commissions naturally frown on that degree of intrusion. Somewhat surprisingly, it was the Alberta Privacy Commissioner under the Alberta *Personal Information Act* (which is similar to the "PIPEDA") who rejected an employer's request to do credit checks of applicants. The Commission ruled that it was not reasonable for SAS Institute (Canada), a large software company, to seek this information. The Commission ruled there was insufficient correlation between managing one's own finances to managing the petty cash as a clerk. The Commission

further observed that the personal information was not necessary to minimize the potential for corporate credit card fraud. (*SAS Institute Canada Inc.*, P2005-IR-008)

Driving History

Verification of a valid driver's license is obviously reasonable if the position requires it. Some employers are going further to require the applicants' and employees' driving history, with varying degrees of success. A useful overview of this area is found in a recent arbitration award by David McKee in *Union Gas Limited* dated May 11, 2011 where the Arbitrator accepted the legitimacy and *bona fide* requirement by the employer to obtain this information from its unionized employees who drive not just employer vehicles but also personal vehicles on employer business. The clear thrust of the policy was to identify and remediate poor (unsafe) driving behaviour through a non-disciplinary approach.

Criminal Record Check (Federal Offences)

Even where there is no express statutory mandate to conduct criminal record checks as exist in education for example, employers are able to discriminate in most jurisdictions (including Ontario but not British Columbia) because an applicant has a federal criminal conviction of any kind, assuming no pardon has been granted. (Note: Provincial offences such as driving offences must be shown to be relevant and necessary for the job.)

Criminal convictions are a matter of public record. The original document or Certificate of Conviction resides in the Court office where the conviction was entered (until they are later archived in central storage facilities).

The Central Government Data Base ("CPIC") is not accessible to the public. Until recently, it was extremely difficult to run criminal record checks for the private sector through the RCMP finger printing process.

Now, the RCMP has opened up its data base to designated service providers such as the "Commissionaires". With their permission, I list their public website at <http://www.commissionaires.ca> and their telephone number (877-322-6777). Now, in a fairly cost effective and faster time frame, finger prints can be taken and transmitted by this Agency from any of its thirty-five (35) locations across Canada to the RCMP's Canadian Criminal Real Time Identification Service in Ottawa.

By way of a concluding observation, it still remains critical and worthwhile for employers to obtain numerous references and check them as part of any background check protocol for applicants.