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# PRESUMPTION **OF GUILT?**

The Disclosure of Non-Conviction Records  
in Police Background Checks.

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## **Presumption of Guilt?**

The Disclosure of Non-Conviction  
Records in Police Background Checks  
Canadian Civil Liberties Association  
May 2012

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## **ABOUT THE CCLA**

The CCLA, formed in 1964, is a national organization dedicated to the furtherance of civil liberties in Canada. Its mandate is to promote respect for and observance of fundamental human rights and civil liberties and to defend, extend and foster the recognition of those rights and liberties. The CCLA has several thousand paid supporters from all across Canada. A wide variety of people, occupations and interests are represented in its national membership.

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# ONE

## EXECUTIVE SUMMARY

In 2010 alone, Calgary and Edmonton police ran over 140,000 individual background checks. While most of these checks are used to inform employment and volunteer hiring decisions, they are

also frequently performed in connection with adoptions, foster care applications and travel. Contrary to popular belief, however, the information that is revealed in these background checks is not limited to criminal convictions. A wide range of “non-conviction” records can be disclosed, including information about criminal charges that were withdrawn, cases where an individual was found not guilty or even complaints where charges were never laid. Even non-criminal interactions, such as experiences with police due to mental health needs, are recorded in police databases and may show up on background checks.

Disclosing this type of sensitive information may undermine the presumption of innocence. Employers who receive negative records checks may not fully understand the distinctions between different types of police information, creating a significant risk that non-conviction records will be misconstrued as a clear indication of criminal conduct. In the case of mental health records, this information may lead to illegal discrimination against those with mental disabilities.

Like most provinces in Canada, Alberta currently has a very limited legal framework governing the retention and release of non-conviction records. Although several pieces of federal and provincial legislation touch upon this issue, none comprehensively address the multiplicity of issues that would need to be considered in order to properly regulate the disclosure of this sensitive personal information. As a result, the inclusion of non-conviction records in police background checks occurs in a legal and policy vacuum. Ultimately, local police forces – and the individual officers who happen to be in charge of record checks – have an enormous amount of discretion over what information gets released and when.

This status quo is unacceptable. There is an urgent need for greater fairness and clarity in the police background check process. Mechanisms should be established that place tighter controls on the disclosure of non-conviction information. Specifically:

1. Non-conviction records should be regularly reviewed and destroyed in the overwhelming majority of cases.
2. Non-conviction records should be retained for inclusion in a police background check only in exceptional cases where police believe that doing so is necessary to reduce immediate public safety threats. The decision to treat a case as an exceptional one should be done at the time that the non-conviction record is created; i.e., immediately after the charge is dismissed, withdrawn or otherwise resolved by way of a non-conviction.
3. Where the government requests that a decision be made whether to retain a non-conviction record, the affected individual should be notified and provided with a right to make submissions.
4. If it is decided that retention is appropriate in a given case, the affected individual should have a right of appeal in front of an independent adjudicator.
5. Where non-conviction records are retained, they should be disclosed only in relation to certain employment or volunteer positions.
6. Proper monitoring mechanisms regarding the use and impact of all forms of police background checks should be put in place, including adequate data collection and public reporting.
7. Provincial human rights legislation should protect individuals from unwarranted discrimination on the basis of non-conviction disposition records.

Implementation of these safeguards would greatly reduce the privacy and human rights threats associated with the disclosure of non-conviction records without undermining legitimate public safety objectives.

ONE

# TWO

## INTRODUCTION

Individuals' interactions with governments and businesses regularly lead to the collection of information about their identities and activities. It is easier and cheaper than ever to collect,

store and retrieve large amounts of data. As our daily lives become increasingly integrated with the digital world, the amount of sensitive data collected and stored by various organizations will only increase. The resulting informational profiles can become a significant component of an individual's identity and, if made public, can influence how people are perceived and treated in a wide variety of contexts.

Police forces across Canada collect and retain a vast amount of personal information, and the information that can be disclosed in police background checks can be particularly sensitive. At the most basic level police databases will indicate whether or not an individual has a record of criminal convictions. Most Canadians who interact with the police, however, will never be convicted of a crime. People may come into contact with the police as victims, as persons with mental health needs, as witnesses, as "persons of interest" or as the targets of investigations into crimes alleged by others. In each of these circumstances, the police may record information regarding the interaction they had with these individuals. These records are labeled "non-conviction records" to distinguish them from records of criminal conviction that are recorded after a finding of guilt at trial. They can include the details of alleged incidents where no charges were laid, charges that were filed but subsequently withdrawn by the Crown, absolute or conditional discharges, stays of proceedings and acquittals. When this information is communicated to a potential employer it can have a significant impact on employment and volunteer hiring decisions.

The disclosure of mental-health-related police records raises a unique set of human rights, privacy and discrimination issues that are beyond the scope of this report to comprehensively address.<sup>1</sup> For example, more specific notice may be required before police can release mental health information. There may also be issues arising from human rights

<sup>1</sup> To the best of our knowledge there has been relatively little discussion of this issue in Alberta. Ontario, however, has had several bodies that have examined the relationship between police record checks and mental health. See, for example: Office of the Information and Privacy Commissioner of Ontario. Privacy Complaint Report Numbers MC-050045-1 and MC-050047-1, <[http://www.ipc.on.ca/images/Findings/up-mc\\_050045\\_1\\_and\\_mc\\_050047\\_1.pdf](http://www.ipc.on.ca/images/Findings/up-mc_050045_1_and_mc_050047_1.pdf)>. In Ontario, the Ontario Association of Chiefs of Police has developed non-binding guidelines that significantly restrict the disclosure of mental-health-related information in police background checks. These guidelines can be accessed at: Ontario Association of Chiefs of Police, *Guideline for Police Checks*, March 28, 2011, <[http://www.oacp.ca/upload5/news/GUIDELINES\\_FOR\\_RECORD\\_CHECKS\\_FINAL.pdf](http://www.oacp.ca/upload5/news/GUIDELINES_FOR_RECORD_CHECKS_FINAL.pdf)>.

legislation that need to be taken into account. The *Alberta Human Rights Act*, for example, prohibits discrimination on the basis of mental disability in the provision of goods, services, accommodation and employment practices.<sup>2</sup> Releasing information that an individual has had a mental-health-based interaction with police may lead directly to discrimination. At a minimum, including such information in background checks will have a disproportionate impact on individuals with mental health needs. Although these issues will not be addressed in depth in this report, policy-makers must be cognizant of the interface between police records and mental health.

The disclosure of non-conviction records in police background checks has been the focus of increased attention by privacy experts and advocates over the last decade. Employers presumably place a high degree of trust in the information that they receive from police, which raises numerous questions about how non-conviction records are collected, retained, used and perceived. Should non-conviction records ever be revealed to potential employers? Are there ways to minimize the potentially devastating impact that this information can have on the careers and personal lives of innocent people? The law currently provides limited guidance as to how these issues are to be resolved. This legal and policy vacuum, and the handling of non-conviction records in Alberta, are the subject of this report.

## TWO

<sup>2</sup> *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 4, 5, 7.



# THREE - PART I

## POLICE INFORMATION AND BACKGROUND CHECKS

Like many other public and private entities, police services collect and retain a wide range of information about the people that they come into contact with. This information can include criminal

convictions, records of charges that do not result in convictions, incident reports and any other information that police collect through their interactions with the public. Much of the information that police collect is retained in electronic databases and used for a variety of purposes, including criminal investigations and police background checks.

### 3.1 National Police Databases

At the national level, the police information database administered by the Canadian Police Information Centre (CPIC) is the primary repository of police records. The CPIC database contains information relating to “persons wanted by the police or accused persons,”<sup>3</sup> as well as “criminal intelligence information and information on persons... under surveillance.”<sup>4</sup> The CPIC database is also linked to the Royal Canadian Mounted Police’s (RCMP) Criminal Records Information Management Services database (CRIMS), which includes “an individual’s criminal charges and their dispositions, including convictions and discharges.”<sup>5</sup> In addition to CPIC and CRIMS, the RCMP also administers the Canadian Criminal Real Time Identification Services database (CCRTIS), which “maintains the national repository of fingerprint and criminal record information.”<sup>6</sup> In Canada, anyone charged with an indictable or hybrid offense is fingerprinted and photographed.<sup>7</sup> These fingerprints and photographs are retained even when the accused is not convicted. Although such individuals can request that all information taken at the time of their arrest be destroyed – including fingerprints and photographs – the police may choose to deny this request.<sup>8</sup>

<sup>3</sup> Royal Canadian Mounted Police. “Canadian Police Information Centre,” July 26, 2011. <<http://www.rcmp-grc.gc.ca/nps-snp/cpic-cipc-eng.htm>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Royal Canadian Mounted Police. “Canadian Criminal Real Time Identification Services,” July 26, 2011. <<http://www.rcmp-grc.gc.ca/cr-cj/index-eng.htm>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Identification of Criminals Act*, RSC 1985, c I-1, s 2(1). The *Youth Criminal Justice Act* specifies that this Act also applies to young persons. *Youth Criminal Justice Act*, SC 2002, c 1, s 113.

<sup>8</sup> Royal Canadian Mounted Police, “Pardon and Purge Services,” March 18, 2012. <<http://www.rcmp-grc.gc.ca/cr-cj/pp-er-eng.htm>>.

CPIC and its related databases are frequently accessed by police services across Canada. The RCMP's police information databases are also shared with American law enforcement agencies.<sup>9</sup> Information regarding the frequency with which U.S. authorities access the RCMP's databases is not readily available.

### 3.2 Local Police Databases

As with the RCMP-administered databases, local and provincial police databases also contain a wide range of police records relating to interactions with members of the public. These local databases can include records that were never entered into, or have been deleted from, the RCMP's databases because the RCMP and local police services may have different record collection, retention and destruction policies.

In Alberta the provincial government has been developing an integrated, province-wide database system that will contain a very wide range of police contact information and intelligence from police forces across the province. The Alberta Law Officers' Network, or TALON, is currently scheduled to be brought online in Calgary in spring 2012, with all other Alberta police forces gaining access by 2013.<sup>10</sup>

Like the records held in the RCMP's databases, local police records can be accessed for a wide range of purposes, including police background checks. The legal and policy environment surrounding the collection, retention and disclosure of non-conviction records by local police services, however, is underdeveloped. As a part of the TALON initiative a province-wide working group is reviewing and considering a comprehensive records retention schedule.<sup>11</sup> Currently, affected individuals can ask police to expunge their fingerprints, photographs and records of charges that did not result in convictions; however, there is no legal requirement to notify affected persons that such records exist or how to seek their destruction. Moreover, whether a destruction request is granted regularly depends on the internal policies of a particular police service, which often give significant discretion to individual decision-makers. As a result, there is a significant possibility that destruction requests will be handled inconsistently.

### 3.3 Police Background Checks

Many employers and volunteer agencies require police background checks as a mechanism for screening out potential sex offenders or other dangerous people. While the level of demand for background checks across Canada is difficult to quantify, the cost associated with such checks has received increased attention from policy-makers in recent years. For example, the Alberta government has recently begun funding the Police Information Check costs of eligible non-profit and voluntary-sector organizations.<sup>12</sup> This attention from policy-makers is likely a result of police background checks becoming increasingly

THREE

<sup>9</sup> The CPIC is accessible by U.S. law enforcement agencies through the Automated Canada United States Police Information Exchange System (ACUPIES). See Royal Canadian Mounted Police, "Canadian Police Information Centre - Quick Facts," July 26, 2011. <<http://www.rcmp-grc.gc.ca/nps-snp/cpic-cipc-eng.pdf>>

<sup>10</sup> Edmonton Sun, "Integrated police database to roll out in spring," November 5, 2011. <<http://www.edmontonjournal.com/2011/11/05/integrated-police-database-to-roll-out-in-spring>>

<sup>11</sup> Government of Alberta, Ministry of the Solicitor General and Public Security, "Alberta Police Integrated Information Initiative (API3): Privacy Framework," May 2011. <[http://www.solgps.alberta.ca/programs\\_and\\_services/public\\_security/law\\_enforcement\\_oversight/Documents/API3%20Privacy%20Framework.pdf](http://www.solgps.alberta.ca/programs_and_services/public_security/law_enforcement_oversight/Documents/API3%20Privacy%20Framework.pdf)>

<sup>12</sup> Volunteer Police Information Check Program. "About the Program," July 26, 2011. <<http://voan.volunteeralberta.ab.ca>>

common. As one Canadian media report notes, “Ottawa police processed more than 40,000 criminal record checks last year, and demand for the service is growing.”<sup>13</sup>

### 3.3.1 Types of Police Background Checks

Though the terminology used to describe different types of police background checks varies by jurisdiction, there are generally three common levels of checks: criminal record checks, Police Information Checks and vulnerable sector checks. The application process for all levels of checks is often handled through local police services, which canvass RCMP, provincial and local databases for relevant police information about the applicant. Even when TALON, the province-wide police information database, is fully implemented, individual police agencies will remain responsible for their own collection, use and disclosure of personal information.<sup>14</sup> As a result, while police across Alberta will have access to a dramatically increased amount of personal information, policies regarding disclosure of personal information may remain scattered, ad hoc and inconsistent.

All three types of police background checks have traditionally been processed using the name, date of birth and sex of the applicant; however, as of the summer of 2010, fingerprints may be requested to confirm the identity of the person being screened where the applicant’s name, date of birth and sex are deemed inconclusive. This has resulted in significant delays in the processing of police background checks, which have reportedly taken some individuals many months to receive.<sup>15</sup> It has also raised privacy concerns relating to the collection of fingerprints by police.

#### *Criminal Record Checks*

Criminal record checks are the least inclusive type of background check and will disclose only summary and indictable criminal convictions referred to in RCMP or local police databases. The results of a criminal record check are generally released to the individual that applied for the check, who may then provide this information to the relevant prospective employer, volunteer agency or other requesting organization.<sup>16</sup>

#### *Police Information Checks*

The next level of background check, the Police Information Check (PIC), can contain a much broader range of information and generally includes a “search of court records, and a query of records management systems in other police agencies’ jurisdictions.”<sup>17</sup> The results of this search can disclose many different types of non-conviction records, including:

- outstanding charges, warrants, judicial orders, peace bonds and probation and prohibition orders;

<sup>13</sup> CBC News. “Police background checks of volunteers soaring: May provide a false sense of security, critic says,” October 6, 2009. <<http://www.cbc.ca/canada/ottawa/story/2009/10/06/ottawa-volunteer-police-checks-soar.html#ixzz144kxjKXw>>.

<sup>14</sup> Government of Alberta, Ministry of the Solicitor General and Public Security, “Alberta Police Integrated Information Initiative (API3): Privacy Framework”, May 2011. <[http://www.solgps.alberta.ca/programs\\_and\\_services/public\\_security/law\\_enforcement\\_oversight/Documents/API3%20Privacy%20Framework.pdf](http://www.solgps.alberta.ca/programs_and_services/public_security/law_enforcement_oversight/Documents/API3%20Privacy%20Framework.pdf)>.

<sup>15</sup> The RCMP’s website indicates that certain background checks requiring fingerprint verification can take 120 days or more (Royal Canadian Mounted Police. “Processing Times,” July 26, 2011. <<http://www.rcmp-grc.gc.ca/cr-cj/time-temps-eng.htm>>). This is consistent with the reported experiences of several members of the public. See CBC News. “Criminal record check causes 4-month delay,” March 1, 2011. <<http://www.cbc.ca/news/canada/british-columbia/story/2011/03/01/bc-criminal-record-check.html>>.

<sup>16</sup> Royal Canadian Mounted Police. “Canadian Criminal Real Time Identification Services, Dissemination of Criminal Record Information Policy,” 2010. <<http://www.cpic-cipc.ca/pdfs/CPIC%20Policy%20FINAL%20E.pdf>> (25) [CCRTIS Policy Manual].

<sup>17</sup> *Ibid* at 4.

- 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.<sup>18</sup>

The extent to which information from a local police agency's records management systems will be included in a PIC depends on the local agency's policies and procedures.<sup>19</sup> As these policies and procedures are ultimately determined and applied by police service management and staff, individual judgment and discretion can play a significant role in determining whether or not certain information is included in a background check. As with criminal record checks, the results of a PIC are generally released to the applicant, who may then pass the results along to a prospective employer, volunteer agency or other requesting organization.

#### *Vulnerable Sector Checks*

The third level of background check is the vulnerable sector check. This type of check will include all of the information in a PIC, as well as any information about select sexual and violent offenses for which the offender has been pardoned.<sup>20</sup> As with other types of checks, the results of a vulnerable sector check are generally released to the applicant, who may then pass the results along to a prospective employer, volunteer agency or other requesting organization.

### **3.3.2 The Impact of Police Background Checks**

As noted above, the information that police disclose in PICs and vulnerable sector checks goes well beyond criminal convictions and may refer to police occurrence reports that did not lead to a charge, such as mental health apprehensions or other police interactions. Background checks can also include charges that do not lead to convictions, such as withdrawn charges, stays of proceedings, acquittals and absolute or conditional discharges.<sup>21</sup> Comprehensive data indicating the number of Canadians that police retain non-conviction records about is not readily available; however, based on available statistics, it would appear that approximately 125,000 non-conviction records are created each year as a result of charges that are withdrawn, are stayed or result in an acquittal.<sup>22</sup> This, of course, does not include records that are created about police interactions that do not result in charges.

Police services presumably include non-conviction records in background checks because they believe it will help prospective employers. This assumes that prospective employers are qualified to fairly assess both the safety prerequisites for a particular position and the safety risks that may be demonstrated by non-conviction records. Where these conditions are not met, there is a risk that prospective employers will unfairly and unnecessarily exclude innocent applicants

<sup>18</sup> See Ontario Association of Chiefs of Police, *Guideline for Police Checks*, March 28, 2011, <[http://www.oacp.ca/upload5/news/GUIDELINES\\_FOR\\_RECORD\\_CHECKS\\_FINAL.pdf](http://www.oacp.ca/upload5/news/GUIDELINES_FOR_RECORD_CHECKS_FINAL.pdf)>, at 4. Based on the information that we received from Alberta's police services, it appears that all of this information could also be disclosed in a PIC requested in that province.

<sup>19</sup> RCMP, *CCRTIS Policy Manual*, *supra* note 16 at 4.

<sup>20</sup> *Ibid* at 22.

<sup>21</sup> When a person is "discharged," he or she is found guilty by a court and then "discharged" rather than being convicted. Discharges are most commonly associated with less serious offences and come in two forms: absolute and conditional. When charges are resolved by way of an absolute discharge, the accused immediately has no criminal record. When charges are resolved by way of a conditional discharge, the accused must comply with certain conditions imposed by the Court. If these conditions are observed for the time period set by the court, then the accused will not have a criminal record.

<sup>22</sup> For example, of the nearly 400,000 criminal charges laid in 2008-2009 in Canada, approximately 30% were withdrawn or stayed, and an additional 3% resulted in acquittals. Statistics Canada, *Juristat: Adult criminal court statistics, 2008/2009*, Catalogue no 85-002-X, Vol 30, no 2 (Ottawa: StatsCan, July 2010), Table 3 at 28, available online at: <<http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.pdf>>. The data for 2006/2007 is similar. Statistics Canada, *Juristat: Adult Criminal Court Statistics, 2006-2007*, Catalogue no 85-002-XIE, Vol 28, no 5 (Ottawa: StatsCan, May 2008), Table 2 at 14. While annual increases may be offset by some records being destroyed as a result of statutory requirements and public requests, it seems likely that the number of nonconviction records added to police databases on an annual basis is greater than the number deleted.

due to a perception that a criminal charge is essentially analogous to a conviction.<sup>23</sup> This raises issues about the state's role in ensuring the presumption of innocence beyond criminal justice processes.

Even though non-conviction records document police interactions and criminal charges that did not result in a finding of guilt, their disclosure to potential employers and volunteer agencies can result in significant stigmatization. As early as 1987, the Solicitor General of Canada issued a *Ministerial Directive on the Release of Criminal Record Information* recognizing the sensitivity of this personal information:

The disclosure of criminal records, which contain only discharges ... and/or non-convictions ... may have adverse consequences on an individual's reputation, employment, mobility or access to services. Accordingly, caution must be exercised when disclosing these records in connection with non-criminal inquiries...<sup>24</sup>

This core recognition continues to be reflected in contemporary national policy directives, which again emphasize that "it must be remembered that disclosure of criminal records, or disclosure of records of absolute or conditional discharges under the *Criminal Code* and/or non-convictions may have an adverse effect upon many aspects of an individual's life."<sup>25</sup>

Numerous academic articles and privacy experts in Canada and internationally have documented the kinds of adverse effects that the disclosure of non-conviction records can have on one's personal circumstances.<sup>26</sup> It has been argued, for example, that non-conviction records "place a cloud over the character of people who may never have been convicted or even arrested for a crime"<sup>27</sup> and that such records can "have lingering effects on employment prospects as 'invisible punishment' or collateral consequences of contact with the criminal justice system."<sup>28</sup> There is often an assumption that non-convicted individuals are guilty and that the only reason they were not convicted is because the evidence did not meet the high standard of proof required in criminal cases or because the individual "got off on a technicality."<sup>29</sup>

As a result:

...a factually innocent defendant confronts the problem of being publicly accused by the government of criminal behavior with no real prospect of ever being officially vindicated. An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he [*sic*] may never be able to return to the life he knew before being accused.<sup>30</sup>

The cloud that often hovers over the character of non-convicted people can be omnipresent and, as one author notes, "the mistakenly arrested person never knows when [his record] will cause a denial of credit, loss of a new job, or simply the loss of esteem, trust, and respect from other

<sup>23</sup> See Albert G. Hess and Fré Le Poole, "Abuse of the Record of Arrest Not Leading to Conviction," *Crime & Delinquency*, Vol 13, No 4 (1967), 494-505, and R.H. Finn and Patricia A. Fontaine, "The Association between Selected Characteristics and Perceived Employability of Offenders," *Criminal Justice and Behavior*, Vol 12, No 3 (1985), 353-365.

<sup>24</sup> Royal Canadian Mounted Police, "Release of Criminal Record Information: Ministerial Directive on the Release of Criminal Record Information by the Royal Canadian Mounted Police," *CPIC Reference Manual* (September 2003) at 802, cited at *Tadros v Peel Regional Police Service*, 87 OR (3d) 563 at para 19 (SCJ).

<sup>25</sup> Ministry of Public Safety, "Ministerial Directive Concerning the Release of Criminal Record Information by the Royal Canadian Mounted Police," August 4, 2010. <<http://www.cpic-cipc.ca/pdfs/Ministerial%20Directive1.pdf>> (8-9).

<sup>26</sup> British Columbia Ombudsman, "The Use of Criminal Record Checks to Screen Individuals Working with Vulnerable People," Public Report No 5, April 1987; Information and Privacy Commissioner of Ontario, Letter to Susan Cardwell, Records Manager, Durham Regional Police Service, and Karen Vandervelde, Supervisor, Records Services, Peel Regional Police, Re: Police Records Checks; Legal Requirements and Best Practices in Ontario, December 6, 2010; Victoria (Australia), Office of the Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data* (Melbourne: Privacy Victoria, 2006); Elizabeth A. Gerlach, "The Background Check Balancing Act: Protecting Applicants with Criminal Convictions while Encouraging Criminal Background Checks in Hiring" (2005-06) 8 *University of Pennsylvania Journal of Labor and Employment Law* 981; Bronwyn Naylor, Moira Paterson & Marilyn Pittard, "In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks" (2008) 32 *Melbourne University Law Review* 171; Kathryn Schellenberg, "Police Information Systems, Information Practices and Individual Privacy" (1997) 23 *Canadian Public Policy - Analyse de Politiques* 23.

<sup>27</sup> James Jacobs and Tamara Crepet, "The expanding scope, use, and availability of criminal records" (2008) 11 *NYU J Legis & Pub Pol'y*, at 177.

<sup>28</sup> Nakamura, Kiminori & Alfred Blumstein, "Redemption in the Presence of Widespread Criminal Background Checks" (2009) 47:2 *Criminology*, at 330.

<sup>29</sup> Andrew D. Leipold, "The Problem of the Innocent, Acquitted Defendant" (2000) 94 *Nw UL Rev*, at 1299.

<sup>30</sup> *Ibid* at 1297.

members of the community.”<sup>31</sup> Moreover, Canadian experience shows that the disclosure of non-conviction records may also have an impact on an affected individual’s ability to travel, participate in an educational practicum, adopt a child or become a foster parent.<sup>32</sup> Given these significant consequences, the time has come for greater scrutiny of how non-conviction records are used in background check processes.

## THREE

<sup>31</sup> *Ibid* at 1306.

<sup>32</sup> See section 5.1.1 of this report, which summarizes information provided by Alberta-based police services about the common reasons for which police background checks are requested. See also British Columbia Ombudsman, “The Use of Criminal Record Checks to Screen Individuals Working with Vulnerable People”, Public Report No 5, April 1987; Information and Privacy Commissioner of Ontario, Letter to Susan Cardwell, Records Manager, Durham Regional Police Service, and Karen Vandervelde, Supervisor, Records Services, Peel Regional Police, Re: Police Records Checks; Legal Requirements and Best Practices in Ontario, December 6, 2010.

## FOUR – PART II

# THE LEGAL FRAMEWORK

### 4.1 A Limited Statutory Framework

#### 4.1.1 Retention of Police Records

A set of provincial and federal statutes place some restrictions on what records can be retained by the police. At the federal level, the primary operative statutes that determine RCMP data

retention are the *Privacy Act*,<sup>33</sup> the *Criminal Records Act (CRA)* and the *Youth Criminal Justice Act (YCJA)*. Although it would be reasonable to assume that the federal *Privacy Act* would govern police record retention, the legislation does not appear to place any limits on how long non-conviction records can be kept. Section 6.1 of the *Privacy Act* requires that “[p]ersonal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used ... in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.” Section 4(1) of the *Regulations with respect to Privacy*, S.O.R./1983-508, further stipulates such retention time to be “at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal.” There are no maximum time limits for retention.

Because there are no statutory limits in the *Privacy Act*, it appears that the RCMP can retain non-conviction records for as long as it wants, except where the *Youth Criminal Justice Act* and *Criminal Records Act* provide otherwise. The *CRA* states that records of absolute and conditional discharges must be removed from the RCMP’s databases after one and three years, respectively.<sup>34</sup> Paradoxically, similar requirements do not exist for other non-conviction records, such as those relating to withdrawn charges and stays of proceedings, that do not involve findings of guilt.

Youth records are subject to additional restrictions. Under the *YCJA*, most youth records in police databases must be destroyed after certain

<sup>33</sup> *Privacy Act*, RSC 1985, c P-21.

<sup>34</sup> *Criminal Records Act* RSC 1985, c C-47, s 6.1.

time periods have elapsed.<sup>35</sup> In the case of acquittals and withdrawn charges, the relevant records must be destroyed after two months.<sup>36</sup> Where charges are stayed or the youth sentence is an absolute discharge, police records must be destroyed after one year. Where the youth sentence is a conditional discharge, police records must be destroyed after three years. When police records are destroyed in accordance with these timelines, the RCMP is also required to ensure that they are purged from the CPIC databases.

To supplement the statutory requirements set out in the *YCJA* and *CRA*, the RCMP has developed a series of internal policies and procedures regarding the retention and destruction of non-conviction records.<sup>37</sup> The CPIC Code of Ethics, which forms a part of the RCMP's CPIC Reference Manual, outlines a number of principles with respect to the retention and removal of personal information found in the CPIC system. Principle 5, for example, stipulates that “[p]ersonal information held on CPIC databases for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.”<sup>38</sup> Neither the CPIC Reference Manual nor the Code of Ethics, however, specifies the retention duration that is considered “necessary” vis-à-vis different purposes. Principle 6(a)(ii) of the Code of Ethics also concerns the retention and destruction of records contained in the CPIC database. It provides that where a local police service contributed an entry in the CPIC system, the individual to whom this entry relates can ask the local police force to expunge this information if “some enactment or legislation provides for its removal; [or] the personal information is irrelevant or no longer required for the purpose for which it was gathered.”<sup>39</sup> The precise procedure followed, however, is not detailed.

At the provincial level, the retention and destruction of non-conviction records held by local police services in Alberta is governed by Alberta's *Freedom of Information and Protection of Privacy Act (FOIP)*.<sup>40</sup> Section 35(b) of *FOIP*, which applies to all personal information held by government institutions in Alberta,<sup>41</sup> states that police must retain a record “for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it, or for any shorter period of time as agreed to in writing” by the individual in question and local police authority.<sup>42</sup> Since *FOIP* does not specify the maximum amount of time for which a public body may retain personal information, it appears that local police, like their federal counterparts, can indefinitely retain non-conviction records. Moreover, because the *Criminal Records Act*'s provisions requiring the removal of absolute and conditional discharges require only that they be purged from CPIC, the RCMP's federal database, local police forces could retain a wider range of records indefinitely.<sup>43</sup>

<sup>35</sup> *Youth Criminal Justice Act*, SC 2002, c 1, s 128.

<sup>36</sup> In practice, it may take more than two months for records related to acquittals to be destroyed, as the two-month period may be calculated from the end of the timeframe in which the Crown can seek an appeal.

<sup>37</sup> Canadian Police Information Centre. “CPIC Reference Manual,” Revision 41-02. <[http://www.cpic-cipc.ca/pdfs/cpicpolicy\\_e.pdf](http://www.cpic-cipc.ca/pdfs/cpicpolicy_e.pdf)> (101).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIP].

<sup>41</sup> *Ibid.*, ss 4(1) and 6(1).

<sup>42</sup> *Ibid.*, s 35(1).

<sup>43</sup> *Criminal Records Act*, *supra* note 34, section 6.1.



#### 4.1.2 Disclosure of Police Records

The retention of non-conviction records raises different issues than their disclosure. Police may have valid reasons for retaining internal-use records of their activities for certain time periods; however, different considerations pertain to the disclosure of this information in the police background check context.

The disclosure of police records held in the RCMP's databases is governed by the federal *Privacy Act*.<sup>44</sup> The Act prohibits the dissemination of “personal information under the control of a government institution without the consent of the individual to whom it relates.”<sup>45</sup> “Personal information” is defined in sections 3 and 12(1)(a) of the Act as including “information relating to the ... criminal ... history of the individual” and includes police records. Similar protections apply to personal information held by government agencies in Alberta as a result of *FOIP*.<sup>46</sup> While both legislative schemes permit police to disclose personal information for law enforcement and investigative purposes,<sup>47</sup> police background checks do not fall within these exceptions and therefore require prior consent from the person to whom the information relates.

When consent to a background check is provided in the context of an employment application or other comparable process, the voluntariness of this consent should be questioned.<sup>48</sup> Job candidates, for example, have little choice but to submit to a background check or decline to pursue an occupation. The Supreme Court of Canada has observed that the “distinction between the meaning of ‘compliance’ and the meaning of ‘consent’ is real.”<sup>49</sup> Where the disclosure of otherwise private or protected information hinges on consent, this consent should be informed, voluntary and given without coercion in order to be considered valid. Given the coercive nature of employment hiring and other processes that often require police background checks, the use of consent as a presumed authorization for the disclosure of potentially irrelevant and misleading information is problematic.

The meaning of consent in this context has been addressed by two Ontario court cases. The first, *Ottawa v Ottawa Professional Firefighters Association*, 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.”<sup>50</sup> In the same vein, the Ontario Court of Appeal also stated in *Tadros v Peel Police* 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.”<sup>51</sup> 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

<sup>44</sup> *Privacy Act*, *supra* note 33.

<sup>45</sup> *Ibid*, s 7.

<sup>46</sup> *FOIP*, *supra* note 40, ss 17(1) & 17(4)(b).

<sup>47</sup> *Privacy Act*, *supra* note 33, ss 8(1) & 8(2), and *FOIP*, *supra* note 40, ss 17(4)(b). For an examination of actual and potential limits on police authority to access police databases in the course of law enforcement duties see Alberta, Office of the Information and Privacy Commissioner, Order F2006-033, Edmonton Police Service, Case File Number 3341, October 13, 2010. <<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2678>>.

<sup>48</sup> In addition, it is important to note that internships within a school or volunteering with a non-profit organization are increasingly requirements for graduation of academic programs.

<sup>49</sup> *R v Knox*, [1996] CR 199 at para 10.

<sup>50</sup> *Ottawa (City) v Ottawa Professional Firefighters Association*, [2009] OJ No 2914, at para 10.

<sup>51</sup> *Tadros v Peel (Police Service)*, 2009 ONCA 442, at para 38.

potential employee has the ability to explain the circumstances to the proposed employer.”<sup>52</sup> Unfortunately, this approach overlooks the very real risk that many employers will not want to hire an applicant with *any* criminal history, no matter how well it is explained, which could lead to the unwarranted denial of access to certain employment on the basis of either having been wrongly accused of criminal conduct or having a criminal history unrelated to the safety of vulnerable persons. To ensure that the potential for such injustice is limited as much as possible, more must be done to create mechanisms through which non-conviction information of no relevance to the safety of the public or vulnerable persons can be removed from one’s record.

## 4.2 An Uncertain Legal Landscape

Issues relating to non-conviction records have been raised in several cases before courts and tribunals. None of these cases comprehensively address police background check policies and procedures; however, each case highlights at least one important issue relating to the use of non-conviction records in background checks processes. This case law is summarized below.

### 4.2.1 The Legality of Asking for Background Checks

In the labour law context, the issue of whether it is appropriate for employers to conduct police background checks on current and prospective employees was first raised in *Ontario March of Dimes v CUOEGW*,<sup>53</sup> which addresses the permissibility of an employer introducing a police record check policy that would apply to existing employees. The union grieved the background check policy on the basis that it violated the collective agreement’s provisions protecting employees’ privacy. This argument was rejected by the arbitrator, who, without giving lengthy reasons, concluded that both new and current employees could be required to provide background checks. Several years later, in *Vancouver (City) v Canadian Union of Public Employees Local 15*,<sup>54</sup> an arbitrator was asked to adjudicate the application of a City of Vancouver policy that gave the City broad discretion to perform police background checks on municipal employees. The arbitrator ruled that it is generally reasonable for employers to have police background checks performed if the check is associated with a safety-sensitive “position of trust.” However, even after this decision had been made, the parties remained unable to reach a consensus about what positions should be considered “positions of trust,” so the same arbitrator was asked to rule on what *specific* positions the employer could require background checks for. In this second award,<sup>55</sup> the arbitrator looked at *whether the jobs in question involved matters requiring significant contact with vulnerable people*. He ruled that only some of the jobs earmarked as “sensitive” actually

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ontario March of Dimes v Canadian Union of Operating Engineers and General Workers*, [1999] OLAA No 569.

<sup>54</sup> *Vancouver (City) v Canadian Union of Public Employees Local 15* (2007), 91 CLAS 298.

<sup>55</sup> *Vancouver (City) v Canadian Union of Public Employees Local 15* (2008), 92 CLAS 174.

fell into that category and that the employer had overreached by defining others as “positions of trust.” As a result, the police background check requirements for those positions were struck.

The permissibility of an employer policy relating to police background checks was also at issue in the case of *Ottawa (City) v Ottawa Professional Firefighters Association*,<sup>56</sup> in which the Firefighters’ Association challenged a City of Ottawa policy of requiring periodic police background checks from firefighters. As in the *Vancouver City* cases, this arbitrator examined the specific characteristics of the job of firefighter to determine the extent to which background checks were necessary. The arbitrator held that it could be reasonable for new hires to be required to provide a background check as a condition precedent for getting the job, but that there was a “significant distinction” between the point of initial hire and an employee with whom the employer has an ongoing employment relationship. With respect to the latter, the arbitrator found that the employer has a “degree of ongoing... familiarity with the qualities and personality of the individual employee” that, at least in the case of firefighters, would be sufficient to determine their ongoing suitability for their job without a background check.<sup>57</sup>

The City of Ottawa sought judicial review of this decision by the Superior Court of Justice. On review, a panel of three judges agreed with and endorsed the arbitrator’s earlier award.<sup>58</sup> The Court held that the City’s right to potentially relevant information about its employees must be balanced with employees’ privacy rights and that it is appropriate to require a police check when someone applies to be a firefighter, but excessive to do so on a regular basis.

Based on the foregoing jurisprudence, both the extent to which an employee will have unsupervised contact with vulnerable people and the employer’s pre-existing knowledge of an employee’s trustworthiness should be considered when determining whether it is appropriate to ask for a background check. However, short of complaining to a union or human rights commission (see below), it is unclear how a potential employee could argue that an employer is overreaching by demanding a police check. This suggests that the scope of permissible background checks could benefit from further clarification. Police services are ill-placed to determine whether a particular background check request is necessary, and potential employees, eager to find employment, are not in a good position to challenge such a requirement.

#### **4.2.2 The Legality of Police Background Checks**

Ontario’s Information and Privacy Commissioner has made an Order regarding the handling and disclosure of non-conviction records by police. The Order relates to non-conviction records associated with sexual assault charges against a man accused of sexually assaulting his younger brother more than 40 years earlier. Following the withdrawal of the charges, the accused asked the Toronto Police Service to destroy

<sup>56</sup> *Ottawa (City) v Ottawa Professional Firefighters Association* (2007), 169 LAC (4th) 84.

<sup>57</sup> *Ibid* at para 43.

<sup>58</sup> *Ibid*

the related non-conviction records. This request was refused by the Toronto Police Service, which argued that retention was appropriate because of the type of offense involved. The Toronto Police Service further maintained that it would permanently retain the relevant non-conviction records and disclose them in all future background check reports.

In her Order, the Commissioner notes that the police “appear to assume that if records of this nature are retained pursuant to the by-law, their existence *must* be disclosed in response to a police reference check request.”<sup>59</sup> She then goes on to reject this view, noting that an applicable Regulation under the *Police Services Act* permits discretion in disclosing police records. The Commissioner further notes that the Toronto Police Service appears to have failed to consider “the option of not disclosing the existence of records,” “factors such as the non-conviction outcome in this case” and “the nature of the volunteer work the complainant proposes to undertake.”<sup>60</sup> In her view, automatic disclosure of non-conviction records – regardless of the alleged offence – is not consistent with provincial privacy obligations.

The permissibility of police retaining and disclosing non-conviction records has also been addressed in several court cases against police services that have either disclosed or refused to destroy non-conviction records. In *Lin v Toronto Police Services Board*,<sup>61</sup> Mr. Lin challenged the Toronto Police Service’s refusal of a request to destroy copies of his fingerprints associated with a charge that did not result in a conviction. At the time of *Lin*, the Toronto Police Service would destroy the fingerprints only of “first-time offenders.” Since Mr. Lin had been charged with two offences, the Toronto Police Service refused to recognize him as a “first-time offender,” even though both of the charges were subsequently withdrawn. The Court rejected the TPS’s characterization of Mr. Lin and found that he was never an “offender” at all because he was never convicted of an offence. As a result the Court ordered his fingerprints destroyed and awarded him \$3,000 in general and punitive damages plus his costs.

The decision in *Lin* relied heavily on the Ontario Court of Appeal’s earlier decision in *R v Dore*,<sup>62</sup> a criminal case dealing with the constitutionality of police retaining fingerprints that were collected at the time that a charge that did not result in a conviction was laid. In *Dore*, the Court analyzed this issue through the lens of section 8 of the *Canadian Charter of Rights and Freedoms*<sup>63</sup> (the *Charter*) and ultimately concluded that it can be constitutionally permissible to retain fingerprints after an acquittal. This finding, however, was heavily premised on evidence that requests to destroy fingerprints when a conviction is not entered are almost always granted. In the Court’s view, this near-automatic granting of destruction requests provided sufficient redress to persons concerned about the impact of fingerprint retention on their personal privacy.

<sup>59</sup> Information and Privacy Commissioner of Ontario Order MO-2258/December 21, 2007 at 11.

<sup>60</sup> *Ibid* at 12-13.

<sup>61</sup> *Lin v Toronto Police Services Board*, (24 January 2004), Toronto 75318/03, (Ont Sup Ct J).

<sup>62</sup> *R v Dore* [2002] 162 OAC 56.

<sup>63</sup> Section 8 of the *Charter* states that, “Everyone has the right to be secure against unreasonable search or seizure.”

While *Lin* and *Dore* are relevant to how police handle non-conviction records, it is important to note that both of these cases deal with *fingerprints* associated with charges that did not result in convictions. Even where police destroy fingerprints, they may continue to retain *records* indicating that charges were laid against a particular individual and disclose these records in background checks. The permissibility of this type of record disclosure was addressed in *Tadros v Peel Regional Police Service*,<sup>64</sup> which involved a former group home operator who had been the subject of sexual assault and sexual exploitation charges that were withdrawn when he entered into a peace bond. When Mr. Tadros subsequently applied for a police background check he discovered that his withdrawn charges were included in the background check report. He then applied for an Order prohibiting the Peel Regional Police Service (PRPS) from disclosing these charges in any future background checks.

Mr. Tadros argued that the disclosure of the withdrawn charges by the PRPS violated his right to privacy under both provincial privacy legislation and the *Charter*. He was successful in obtaining an Order prohibiting the disclosure of this information from the Superior Court of Justice;<sup>65</sup> however, the PRPS appealed this decision to the Court of Appeal for Ontario. The Appeal Court first analyzed Mr. Tadros's case through the lens of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. Even though Mr. Tadros asserted that he did not know his withdrawn charges could be included in a background check, the Court concluded that he had "consented" to the disclosure of this "personal information" by signing a vulnerable persons search consent form. The Court did acknowledge 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."<sup>66</sup> This potential unfairness was mitigated, however, by employers' obligation to protect vulnerable persons by accessing information about prospective employees' criminal histories. The Court explained 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."<sup>67</sup> Mr. Tadros' argument that the disclosure of his non-conviction records breached section 8 of the *Charter* was also rejected by the Court, which held that, in contrast to the collection of fingerprints, neither the creation nor disclosure of records about Mr. Tadros' withdrawn charges involved a "search" or "seizure" that would trigger section 8 of the *Charter*.

On the basis of *Tadros*, it is permissible in Ontario to disclose non-conviction records when "consent" has been provided by the person referred to in the record. The recent case of *JN v Durham Regional Police Service*,<sup>68</sup> however, demonstrates that, post-*Tadros*, there is likely to be a duty of fairness owed to individuals who have asked police to remove a non-conviction record from a background check

<sup>64</sup> *Tadros v Peel Regional Police Service* (ON CA), *supra* note 51.

<sup>65</sup> *Tadros v Peel Regional Police Service* (Ont SJC), *supra* note 24.

<sup>66</sup> *Tadros v Peel (Police Service)* (ONCA) *supra* note 51 at para 38.

<sup>67</sup> *Ibid.*

<sup>68</sup> *JN v Durham Regional Police Service*, 2011 ONSC 2892 (overturned at the Court of Appeal for Ontario on other grounds, *JN v Durham Regional Police Service*, 2012 ONCA 428).

report. Although the police had charged JN with assault, the charge was completely withdrawn by the Crown before the trial. The Durham Regional Police Service (DRPS), however, refused to remove the withdrawn charge from JN's background check report. JN then asked the Superior Court of Justice for an Order to remove the withdrawn charge. The application judge distinguished her case from *Tadros* indicating that the issue in *JN* was "whether there should be an effective remedy for an applicant to remove that information from his or her [background check report]."<sup>69</sup> This is an important issue because, as the Court noted, "in some situations, it may be extremely offensive to include charges which were withdrawn due to lack of evidence or other reasons which would indicate that there was nothing to the charge."<sup>70</sup>

The Court found that, under the *Police Services Act*, JN had a right to appeal the inclusion of the withdrawn charge in her background check report to the chief of police and that the chief's decision had to be consistent with the common law duty of fairness. The Court found that this duty had been breached for several reasons, including the DRPS's failure to provide JN with both the policies and criteria under which its decision would be made and the material that it would consider in reaching its decision. The Court also noted that the DRPS's failure to provide JN with reasons for its decision further demonstrated a lack of adherence to the duty of fairness. The Court then considered JN's further argument that the conduct of the DRPS had violated her rights under section 7 of the *Canadian Charter of Rights and Freedoms*, which prohibits deprivations of life, liberty or security of the person that are inconsistent with the "principles of fundamental justice."<sup>71</sup> On the section 7 issue, the Court found that the conduct of the DRPS had deprived JN of security of the person, stating that:

...if J.N. is unable to ever obtain employment in her chosen field, and is forced to work in unrelated fields of work or rely on public assistance, it can be easily understood to cause serious psychological impact on the Applicant. When this results from something arising from your reputation or the stigma attached to criminal charges, this impact would only become more severe. On an objective basis, then, I am able to find that the Applicant's inability to obtain employment resulting from her inability to clear the CIR is, objectively, something which would cause serious psychological impact. This accordingly is something that can affect the security of the person within the meaning of section 7 of the *Charter*.<sup>72</sup>

The Court further found that the deprivation was inconsistent with the principles of fundamental justice due to the procedural fairness failings of the DRPS's appeal process. As a result of its procedural fairness and section 7 findings, the Court ordered that all future background check reports requested by JN be issued without reference to the

<sup>69</sup> *Ibid* at para 34.

<sup>70</sup> *Ibid* at para 98.

<sup>71</sup> Section 7 of *Canadian Charter of Rights and Freedoms* states "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

<sup>72</sup> *JN v Durham Regional Police Service*, *supra* note 68 at para 128.

withdrawn charge. The *JN* case, however, is not determinative of all of the issues raised by the retention and disclosure of non-conviction records, as the Court left open the question of what criteria should be applied when weighing a request to expunge a non-conviction record from a background check report. Although the lower court's decision was appealed and the ruling overturned, the Ontario Court of Appeal decided the case on procedural grounds and declined to rule on the substantive issues.

#### 4.2.3 The Legality of Acting on the Information Obtained

The *Alberta Human Rights Act* does not currently prohibit discrimination on the basis of criminal convictions or criminal records. This stands in contrast to the human rights legislation in several other provinces, which do provide a measure of protection against such discrimination. Most broadly, the *Yukon Human Rights Act*, for example, explicitly prohibits discrimination on the basis of criminal charges that do not lead to a conviction.<sup>73</sup> This protection applies only when such charges are not relevant to the employment being sought. Other jurisdictions prohibit discrimination on the basis of “criminal convictions” or “record of offences.”

Human rights tribunals have differed over whether or not this language (“discrimination on the basis of criminal convictions”<sup>74</sup> or “record of offences”<sup>75</sup>) is broad enough to address discrimination on the basis of non-convictions reports. The British Columbia Human Rights Tribunal concluded that it was,<sup>76</sup> while the Ontario Human Rights Tribunal opted for a narrower interpretation.<sup>77</sup> In both cases, employees were terminated based on past alleged criminal charges that had not resulted in convictions. In both provinces, human rights legislation protected individuals from discrimination on the basis of “criminal convictions.”

There is a very real threat of discrimination on the basis of non-conviction records. Currently, however, Alberta's human rights legislation does not offer any protection to those who have had interactions with the criminal justice system. Legislative amendments should be introduced to protect individuals with non-conviction records from employment and service-based discrimination. This would prevent unwarranted discrimination based on non-conviction records of people who have done nothing wrong.

#### 4.3 Concluding Observations

The jurisprudence addressing non-conviction issues is not conclusive. The above cases are helpful in identifying and proposing partial solutions to some of the issues associated with the use of non-conviction records in police background checks; however, there are still many issues that remain unaddressed. For example, while the labour

<sup>73</sup> *Yukon Human Rights Act*, RSY 2002, c 116, ss 7(1): “It is discrimination to treat any individual or group unfavourably on any of the following grounds... (i) criminal charges or criminal record”; and (10(b)): “It is not discrimination if treatment is based on a criminal record or criminal charges relevant to the employment.”

<sup>74</sup> The *British Columbia Human Rights Code* prohibits the refusal of employment or discrimination in employment on the basis that a “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.” *British Columbia Human Rights Code* RSBC 1996, c 210, s 13.

<sup>75</sup> *Human Rights Code*, RSO 1990, c H-19, s 5(1).

<sup>76</sup> *Clement v Jackson*, 2006 BCHRT 411.

<sup>77</sup> *De Pelham v Mytrak Health Systems Inc.*, 2009 HRTO 172.

law cases identify the need to demonstrate the necessity of background checks for certain positions – namely those requiring significant contact with vulnerable people – they offer limited guidance to employers regarding when such necessity will be demonstrated. This highlights a need for further clarification of the specific job tasks and responsibilities that will commonly necessitate the provision of background checks. Similarly, there is a need for further clarification regarding when it may be appropriate for police to disclose non-conviction records, including criteria to guide decisions regarding the use of non-conviction records in background checks, as well as when police should be required to destroy non-conviction records and fingerprints. Finally, the distinction between voluntary and compelled “consent” needs to be further fleshed out and nuanced to ensure that these two different forms of “consent” are not improperly equated.

## FOUR



## FIVE – PART III

# THE USE OF NON-CONVICTION RECORDS IN BACKGROUND CHECKS IN ALBERTA

To determine how non-conviction records are used in background checks in Alberta, CCLA contacted the seven municipal police services in Alberta<sup>78</sup> and also received information directly from

the RCMP. We were successful in obtaining information from all of the relevant police services through a variety of methods, including freedom of information (FOI) requests and direct communications with police officials, in addition to accessing information that is publicly available on police services' websites. Based on the data that we received, it appears that the average annual number of police background checks requested in the province hovers around 160,000. The policies and procedures followed when implementing these checks are quite consistent, as they are based on a resolution passed by the Alberta Association of Chiefs of Police that sets out background check protocols. For example, an individual's consent is required before police will perform a search of their police records for background check purposes. Similarly, when police information is located, it is common practice to provide the results of the Police Information Check (PIC) only to the individual who requested it.

When performing background checks, all of Alberta's police services query federal, provincial and local police databases and will, where it is deemed appropriate, include non-conviction disposition records in PICs. There are no uniform criteria setting out when such records are to be included in PICs, leaving significant discretion in the hands of police authorities to make decisions about "relevancy."<sup>79</sup> Finally, none of the police services provide a formal mechanism for seeking the expungement of non-conviction records, which raises significant questions about how affected persons can challenge the inclusion of non-conviction records in PICs or seek to have their police records cleared.

The information that we received in response to our FOI requests is summarized below. This information is also set out in table format in Appendix A to this report.

<sup>78</sup> The seven police services that we consulted were the Calgary Police Service, the Camrose Police Service, the Edmonton Police Service, the Lacombe Police Service, the Lethbridge Regional Police Service, the Medicine Hat Police Service and the Taber Police Service.

<sup>79</sup> The Calgary Police Service provided several pages from its Police Information Unit policy manual in response to our FOI requests. Page 38 of that manual describes determinations regarding the "relevancy" of police occurrence reports to PICs as "very subjective."

## 5.1 Summary of Findings

### 5.1.1 Police Information Check Procedures

We asked a number of questions about the policies and procedures that presently govern how non-conviction records are handled and used in police background checks. Our questions included the following:

- Who can request a Police Information Check?
- Who is the Police Information Check provided to?
- What purposes can a Police Information Check be requested for?
- How does the Police Information Check process work?
- What information is canvassed and what other police services are consulted?
- What non-conviction information may be included in a Police Information Check?
- How long are non-conviction records retained for?
- What steps can members of the public take to prevent the disclosure of non-conviction records?

The responses that we received to these questions were generally quite comprehensive and direct. Some of the police services provided documents that set out their policies and procedures in relation to the questions that had been asked, while others simply answered the questions through correspondence or telephone interviews. In all of the cases where we spoke directly with police service representatives, we found them to be very helpful and forthcoming. The responses are summarized below.

#### **Who can request a Police Information Check?**

All of the seven police services consulted indicated that only the individual that the Police Information Check relates to can request it.

#### **Who is the Police Information Check provided to?**

The responses to this question varied. Five police services indicated that a Police Information Check will be released only to the individual who requested the information and to whom it pertains. One of the other police services indicated that it may release a Police Information Check to an employer or volunteer agency, but only after the individual who applied for the information check has signed a form consenting to this release. Another police service indicated that a PIC may be provided either to the applicant or to an “agency that has entered into a Memorandum of Understanding” with that police service. In all cases, third-party disclosure occurs only when no adverse information is included.

### **What purposes can a Police Information Check be requested for?**

All of the police services consulted indicated that a Police Information Check can be requested by the individual to whom the information relates for any purpose. Many of the police services indicated common reasons that PICs are requested, which include employment applications, volunteer applications, educational practicums, immigration, adoption, foster care and foreign travel. Of these reasons, employment was identified as the most common reason for a Police Information Check request.

### **How does the Police Information Check process work?**

Most police services indicated that the Police Information Check process requires that the individual requesting the information attend a police station in person with identification and payment. Some services provided additional details about the process, though it is not clear whether this information applies only to the police service that provided it or whether it applies to other services that did not describe their processes in comparable detail. For example, one police service indicated that applicants must provide two pieces of ID, that the average processing time is two to four weeks and that completed checks will be mailed out to applicants, who are then responsible for sharing the information with the agency or agencies that require it. Several other police services also indicated that the applicant must sign a consent form at the time of the Police Information Check request, which, as a result of *FOIP*, is also a requirement of the services that did not explicitly mention this aspect of the process.

### **What information is canvassed and what other police services are consulted?**

The police services that we consulted indicated that they will review three sources when preparing a Police Information Check: the RCMP's databases (i.e., CPIC, CRRTIS, CRIMS), Alberta's Justice Online Information Network database<sup>80</sup> and local police service records. None of the services queried indicated that they consult with other police services when conducting PICs; however, two services did indicate that they may contact other police services to verify information that is located through database searches.

### **What non-conviction records may be included in a Police Information Check?**

The responses that we received from all of the police services clearly indicated that non-conviction records can be included in Police Information Checks. Specific types of non-conviction records that were identified included pending charges, outstanding warrants, ongoing investigations, alternative measures, absolute discharges, conditional discharges, stays of proceedings, findings of not criminally responsible – mental disorder, and court orders, such as peace bonds. In addition

<sup>80</sup> The Justice Online Information Network database is used in Alberta to support the administration of the criminal justice process and manage data for federal, provincial and municipal enforcement agencies and courts.

to these types of information, most of the services also indicated that *occurrence reports or other “relevant information from police files”* may also be included in a Police Information Check. Whether or not this information is included in a Police Information Check is a matter of significant police discretion. One police service indicated that non-conviction records are not generally included in a Police Information Check unless they directly relate to the purpose of the check, such as an application for a specific job. Similarly, another police service indicated that non-conviction records will be considered “relevant” if they can assist with mitigating risks to persons or property that may arise in the context of why a Police Information Check is sought.<sup>81</sup> On this issue, the documentation provided by the Calgary Police Service notes that “relevancy is an area that can be highly subjective.” No specific criteria appear to exist to resolve this subjectivity, raising significant questions about how consistently different police services approach non-conviction record disclosure.

#### **How long are non-conviction records retained?**

The information that we received regarding the duration of non-conviction record retention was not entirely conclusive. Two police services did not provide any information about the length of retention, while two others indicated that records were retained in accordance with destruction schedules, which we were not provided. One police service indicated that different non-conviction records will be retained for different periods of time and that some records may be retained indefinitely unless a request is made to have them destroyed. Another police service gave a more thorough response, indicating that non-conviction records relating to major offences, such as homicide, child abuse, sex crimes and robbery, are kept indefinitely, while other police records are kept for 25 years.

#### **What steps can members of the public take to prevent the disclosure of non-conviction records?**

The information that we received about steps that members of the public can take to prevent disclosure of non-conviction information varied. Two police services indicated that non-conviction records are destroyed in accordance with existing destruction schedules but did not mention mechanisms for requesting destruction outside of those schedules. The other police services indicated that affected individuals could write to the relevant department or unit to request that certain information be purged. Criteria applied when considering expungement requests were not provided; however, the Medicine Hat police did indicate that, where a destruction request is made, non-conviction records will be retained where they relate to more serious offences, such as violent crimes and crimes of a sexual nature.

<sup>81</sup> The documentation provided by the Calgary police states that, “To determine whether an occurrence report is relevant it is necessary to take into consideration the nature of the organization or agency that the subject is applying to. This may include, but is not limited to: (1) the nature of the employment of volunteer position, (2) the type of organization being applied to, (3) the nature of the position that is being applied for, (4) the clientele that the subject will be dealing with, and (5) the frequency and recentness of the occurrence report(s).”

### 5.1.2 Police Information Check Statistics

The FOI requests filed by the CCLA also requested specific data from the last five years relating to non-conviction records and background checks, including:

- The number of requests made for Police Information Checks;
- The most common purposes identified for seeking a Police Information Check;
- The number of checks that disclose information other than criminal convictions;
- The types of non-conviction records that are most frequently disclosed;
- The number of requests for the destruction of information contained in the Police Information Checks; and
- The number of requests for the destruction of information granted, denied, appealed, etc.

The responses that we received to these questions were much less comprehensive than the answers to questions about Police Information Check procedures, and in many cases no data at all was available that was responsive to our inquiries. The information that we did receive is summarized below.

#### **The Number of Requests Made for Police Information Checks**

Five of the police services consulted provided information about the annual number of Police Information Check requests over the last five years. The Taber police provided only information about PIC requests from the last two years, while the Lacombe police provided no information about the annual number of Police Information Check requests that it receives. The data from Taber police indicated that 556 applications for Police Information Checks were made in 2008–2009 and that 640 were made in 2009–2010.

Of the services that provided five-year data, the Medicine Hat police provided an aggregate number of requests (19,220 over the last five years), while the others provided data that was broken down by year.<sup>82</sup> Not surprisingly, the largest number of requests for Police Information Checks were made in Calgary and Edmonton. In Edmonton, the number of checks requested annually ranged from 64,062 (2007) to 75,782 (2010) and, with some minor variation, the number of checks requested annually has increased in recent years. In Calgary, the number of Police Information Checks requested on an annual basis ranged from 78,247 (2006) to 83,488 (2008). There was also a trend toward more Police Information Checks being requested; however, this trend was less pronounced than in Edmonton.

<sup>82</sup> A detailed summary of this information is set out in Appendix A.

In Lethbridge and Camrose, the number of Police Information Checks requested was much lower. In Lethbridge, the number of PICs requested annually ranged from 6,015 (2007) to 7,448 (2005), and in Camrose it ranged from 1,448 (2006) to 1,588 (2007). In these smaller communities there was no observable increase in the number of checks requested per year.

**The Most Common Purposes Identified for Seeking Police Information Checks**

Several police services identified specific reasons that Police Information Checks are requested, the most common of which were employment and volunteering. Only the Edmonton Police Service provided a comprehensive breakdown of Police Information Check requests, which were classified into the following categories: employment, immigration, criminal pardons, security guards/locksmiths, daycare/adoption, volunteer, internal, CPIC/local indices and other. While there were some slight variations from year to year, the following table provides an approximation of the percentage of checks in Edmonton that fell into each category on an annual basis:

**FIVE**

REASON FOR POLICE INFORMATION CHECK REQUEST	APPROXIMATE PERCENTAGE OF ANNUAL POLICE INFORMATION CHECK REQUESTS
Employment	37%
Volunteer	22%
Internal	14%
Other	11%
Daycare/Adoption	5%
Immigration	4%
Security Guards/Locksmiths	4%
CPIC/Local Indices	1.5%
Criminal Pardons	1.5%

### **The Number of Checks That Disclose Information Other Than Criminal Convictions**

None of the police services provided data that was responsive to this question. Unfortunately, this lack of data prevents a comprehensive analysis of the scope and frequency of non-conviction record disclosure. Given that all of the police services consulted may include non-conviction records in police background checks, it would be very helpful to have data on how often these records are disclosed in order to assess the impact of this practice on affected members of the public.

### **The Types of Non-Conviction Records That Are Most Frequently Disclosed**

As above, none of the police services provided any data that was responsive to this question. This was unfortunate, as data regarding the types of non-conviction records that are most regularly disclosed would greatly assist with an assessment of the impact of non-conviction record disclosure on affected members of the public.

### **The Number of Requests for the Destruction of Information Contained in the Police Information Checks**

Only three of the seven police services consulted provided information that was responsive to this question. One of the smaller services indicated that it has not received any requests for the destruction of information that was included in a Police Information Check. Another smaller service indicated that it does, from time to time, discuss how to have non-conviction records expunged with members of the public but did not provide information about how often this occurs. More specific information was provided by the Edmonton Police Service, which indicated that 144 requests were made for file destruction from January 1–November 30, 2010, 92 requests were made in 2009 and 99 were made in 2008. We were advised that information regarding the types of requests and their outcomes is not available.

### **The Number of Destruction Requests That Are Granted, Denied, Appealed, etc.**

None of the police services provided data that was responsive to this question. Unfortunately, this lack of data prevents a comprehensive analysis of how non-conviction record destruction requests are handled by police.

## 5.2 Concluding Observations

Based on the information received from Alberta's police services, it is clear that a significant number of Police Information Checks are requested each year in Alberta, most commonly for employment and volunteer application purposes. It is also clear that a range of different non-conviction records can be included in background checks, including alternative measures, absolute discharges, stays of proceedings, peace bonds, occurrence reports and other "relevant" information from police files.

There are no criteria in place to determine when non-conviction information will be disclosed, leaving police forces with a significant amount of ad hoc discretion. Given the wide range of non-conviction records that can be included in Police Information Checks, the unwarranted disclosure of non-conviction records could have serious negative impacts on the lives of a wide range of Albertans.

The scope of these concerns is difficult to assess. There is a dearth of information on the number of Police Information Checks that include non-conviction records and the types of these records that are most commonly disclosed. There is also a lack of information on how many individuals have requested that their non-conviction records be destroyed. The one service that did provide these statistics stated that 144 people requested that their records be destroyed. This number would almost certainly be significantly higher had all of the services asked been able to provide comparable data.

Police also have a large amount of discretion when determining whether or not to grant record destruction requests, and it is unclear what percentage of these requests are approved. The absence of clear and consistent criteria for determining destruction requests and the lack of a meaningful appeal process are inconsistent with the police's procedural fairness obligations.<sup>83</sup>

Police background checks are becoming an increasingly regular part of employment and volunteer hiring processes. To ensure that members of the public are not unduly stigmatized, background check processes must be more in line with privacy and civil liberties concerns. Mechanisms that appropriately balance the competing interests engaged by the retention and disclosure of non-conviction records in police background checks must be implemented.

<sup>83</sup> *JN v Durham Regional Police Service*, *supra* note 68. Though not binding in Alberta, the *JN* case provides a helpful discussion of the content of police services' procedural fairness obligations in the background check context.



## SIX – PART IV

# BEST PRACTICE RECOMMENDATIONS

Police are under an obligation to protect the public from individuals who pose significant public safety threats. While this is obviously a very important objective, it should not be pursued

through practices that risk portraying innocent people as criminals. Unfortunately, Alberta's current approach to non-conviction records in police background checks falls short of this standard and creates a significant risk of unwarranted stigmatization. Major causes of this risk include excessive police discretion to determine what records are retained and included in background checks, the absence of effective mechanisms for challenging the inclusion of non-conviction records in background checks and limited guidance as to when background checks that could include non-conviction records should be requested.

There are various ways in which existing practices could be made less likely to result in unwarranted infringements of privacy rights. One option for achieving this outcome would be to significantly restrict the range of information that can be disclosed in all types of police background checks to records that involve findings of guilt. Under this approach, the standards set out in the *Criminal Records Act* are instructive. These standards would permit only the disclosure of criminal convictions for which a pardon has not been granted (with the exception of certain sexual and violent convictions, which can be disclosed even if a pardon has been granted),<sup>84</sup> conditional discharges (for a period of three years) and absolute discharges (for a period of one year). Under this approach, records that do not involve a finding of guilt by a court, such as occurrence reports and withdrawn charges, would never be included in background checks.

If, however, policy-makers believe that non-conviction records should continue to be available for inclusion in background checks, further steps should be taken to ensure that the disclosure of these records is subject to greater controls and oversight. To be both fair and effective, this approach would have to ensure that:

<sup>84</sup> S 6.3(2) of the *Criminal Records Act* permits the disclosure of certain sexual and violent offences even where a pardon has been granted. These offences are set out in Schedule 2 to the *Criminal Records Act*, *supra* note 34, s 6.3(2)

1. Non-conviction records are regularly reviewed and destroyed or segregated in the overwhelming majority of cases.
2. Non-conviction records are retained for inclusion in a police background check only in exceptional cases where police believe that doing so is necessary to reduce immediate public safety threats. The decision to treat a case as an exceptional one should be made at the time that the non-conviction record is created; i.e., immediately after the charge is dismissed, withdrawn or otherwise resolved by way of a non-conviction.
3. Where the government requests that a non-conviction record be retained, the affected individual should be notified and provided with a right to make submissions.
4. If it is decided that retention is appropriate in a given case, the affected individual should have a right of appeal in front of an independent adjudicator.
5. Where non-conviction records are retained, they should only be disclosed in relation to certain employment or volunteer positions.
6. Proper monitoring mechanisms regarding the use and impact of all forms of police background checks are put in place, including adequate data collection and public reporting.
7. Provincial human rights legislation protects individuals from unwarranted discrimination on the basis of non-conviction disposition records.

Each of these safeguards is discussed in greater detail below.

### **6.1 Regular Review and Destruction of Non-Conviction Disposition Records**

It is likely that many individuals with non-conviction police records have no idea that these records exist. When, for example, charges are withdrawn or a person is acquitted, it is reasonable for them to assume that they will have a “clear” police record. As is clear from the scope of police data retention and disclosure, however, this not the case. In order to ensure that non-conviction records are not needlessly included in police background check reports, they should be routinely reviewed and expunged or segregated from the databases accessed by police for background check purposes.<sup>85</sup> This approach would recognize that there is a significant difference between non-conviction dispositions and a conviction for a criminal offence, and affirm that non-conviction records should not adversely affect individuals in the vast majority of cases. Retaining records until a request is made to destroy them is unsatisfactory. It places an excessive onus on individuals to request the destruction of records that they do not appreciate the consequences of and in all likelihood do not know exist.

<sup>85</sup> This approach has been endorsed by the Information and Privacy Commissioner of Ontario, who has made submissions to the Toronto Police Services Board suggesting that the Toronto police should routinely expunge non-conviction records. Information & Privacy Commissioner/ Ontario, *Destruction of Adult Fingerprints, Photographs and Records of Disposition*, (Toronto, 28 February 2007) <<http://www.ipc.on.ca/images/Resources/2007-02-28-tpsb.pdf>>.

## 6.2 Retention Only in Exceptional Circumstances

While routine expungement or segregation should be the default, in exceptional circumstances, retention of non-conviction records may be justified where there are reasonable grounds to believe that disclosure of the particular non-conviction record will significantly mitigate a public safety risk. Ontario's Information and Privacy Commissioner has suggested that this threshold will be met where there are reasonable grounds to believe that an individual will commit a "serious personal injury offence" as defined in section 752 of the *Criminal Code of Canada*<sup>86</sup> and where disclosure of the non-conviction record will help mitigate the associated public risk.<sup>87</sup> This is an appropriately high threshold. Whether or not it is met in a particular case should be assessed at the time that the relevant record is created, with consideration given to the reasons that charges were disposed of by way of a non-conviction disposition (where charges were laid);<sup>88</sup> the nature, severity and probability of the perceived risk; and any mitigating circumstances, such as the physical or mental health or infirmity of the individual. Where a decision is made to retain a non-conviction record, this decision should be regularly reviewed, with consideration given to the time that has passed since the record was created.<sup>89</sup>

## 6.3 Notification of Decision to Retain and Opportunity to Make Submissions

Where exceptional circumstances exist and police wish to retain a non-conviction record, the affected individual should be notified of this decision and given reasons why the record was not expunged or segregated (i.e., why the police believe he or she poses a risk to the public). The individual should also be provided with the evidence relied upon to support that decision and given an opportunity to make submissions about why retention is unnecessary or inappropriate or may result in prejudice to the individual that outweighs any public interest in retention. Such a requirement would be consistent with the view of the Supreme Court of the United Kingdom, which recently held that guidelines for non-conviction record disclosure should "indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group"<sup>90</sup> and that "where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released."<sup>91</sup>

<sup>86</sup> *Criminal Code*, RSC 1985, c C-46, s 752. Section 752 of the *Criminal Code* defines a "serious personal injury offence" as:

- A. an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
  - i. the use or attempted use of violence against another person, or
  - ii. conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for 10 years or more, or
- B. an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

<sup>87</sup> *Destruction of Adult Fingerprints, Photographs and Records of Disposition*, *supra* note 85.

<sup>88</sup> Charges can be resolved by non-conviction dispositions for a variety of reasons. In the majority of cases, the fact that a charge did not lead to a conviction should be treated as a strong indication that it would be improper to disclose the charge in a police background check. There may, however, be rare exceptions to this general rule. For example, where an acquittal results from a successful *Charter* application to exclude highly incriminating evidence, it may be reasonable for police to wish to include a reference to the charge in a background check. Situations like this should be very rare, and any decision by a police service to make reference such charges must, like other inclusions of non-conviction records, be subject to independent review.

<sup>89</sup> One criminological study has recently concluded that "the risk of offending for those with criminal records converges toward the risk for those without a record as substantial time passes." See Nakamura, Kiminori & Alfred Blumstein, "Redemption in the Presence of Widespread Criminal Background Checks" (2009) 47:2 *Criminology* (332).

<sup>90</sup> *R (on the application of L) v Commissioner of Police of the Metropolis*, [2009] UKSC 3, at para 46.

<sup>91</sup> *Ibid* at para 46.

#### 6.4 Independent Appeal Process

Where, after considering the affected individual's representations, the police continue to believe that it is appropriate to retain the relevant non-conviction records, the affected individual should be provided with an opportunity to appeal this decision to an independent reviewer. This review process should be fully independent of the police service, and the onus should be on the police to demonstrate that there are reasonable grounds to believe that the individual will commit a "serious personal injury offence" as defined in section 752 of the *Criminal Code of Canada* and that disclosure of the non-conviction record would help mitigate this risk. Upon hearing from the parties, the independent adjudicator must provide reasons indicating whether the police have sufficient grounds to justify retaining the non-conviction record. This decision should be binding on the police, subject to judicial review if necessary.

#### 6.5 Background Checks Required Only Where Clear Criteria Met

Background checks that include non-conviction information should generally be permitted only in relation to positions that involve *significant unsupervised access to children or vulnerable adults*. Consistent with the definitions set out in the *Criminal Records Act*, "vulnerable persons" should be understood to include "persons who, because of their age, a disability or other circumstances, whether temporary or permanent, are in a position of dependence on others or are otherwise at a greater risk than the general population of being harmed by persons in a position of authority or trust relative to them."<sup>92</sup> Exceptions to this general rule should be rare and permitted only where clearly warranted, such as in the case of high-level government security clearances. For positions where the safety of vulnerable persons is not an issue, background checks should include only findings of guilt, such as criminal convictions and discharges, in accordance with the standards set out in the *Criminal Records Act*. This distinction is warranted because preventing property crime does not justify the same degree of privacy invasion that is justified to protect vulnerable people. Employers and volunteer agencies must carefully assess each position to determine whether background checks are really appropriate and, if so, how much information is actually necessary. It would be helpful for the Office of the Information and Privacy Commissioner to develop guidelines that indicate when it is appropriate to ask for different types of background checks. However, irrespective of the type of check that may be appropriate, employers should be permitted to request a background check only once a candidate has met all other qualifications for a position and a conditional offer of employment, pending the outcome of a police check, has been made.

<sup>92</sup> *Criminal Records Act*, *supra* note 34, s 6(3)(1).

## **6.6 Adequate Record-Keeping and Reporting on the Scope, Frequency and Impact of Police Background Checks**

CCLA's difficulties obtaining statistics regarding the frequency and outcome of non-conviction records checks and requests for record destruction clearly illustrate that police forces within Alberta do not adequately track this information. All police forces should collect statistics on the frequency and nature of records checks, as well as complaints, destruction requests, the outcome of these requests, appeals that are launched and the outcome of these appeals. Such information should be made public. In addition, evaluation of the management and disclosure of non-conviction records should be done regularly in order to ensure a proper assessment of the efficacy, scope and impact of records checks.

## **6.7 Protecting the Innocent Against Unwarranted Discrimination**

Human rights legislation is an essential barrier against discrimination in the provision of services, accommodation and employment. If the phrase "innocent until proven guilty" is to have any meaning, individuals who have never been tried and convicted of offenses must be protected against unwarranted negative treatment on the basis of their non-conviction police records. It is necessary to amend Alberta's *Human Rights Act* to include protection against discrimination on the grounds of a non-conviction police records.

# SEVEN

## CONCLUSION

# SEVEN

The inclusion of non-conviction records in police background checks creates a significant risk that innocent people will face unfair stigmatization. The repercussions of disclosing this type

of information can be felt in access to employment and volunteer positions, international travel, adoption and foster parent processes and other important aspects of individuals' lives. The current approach to this issue in Alberta and much of the rest of Canada is unsatisfactory. There is significant uncertainty in the governing legal and policy framework. Affected individuals also lack effective recourse to seek the suppression of non-conviction records where they believe their inclusion in a background check is inappropriate. As a result, individuals' privacy interests are significantly undermined in the absence of legitimate public safety concerns.

The status quo is unacceptable. Employers and volunteer agencies are requesting comprehensive police background checks at a much higher rate than previously. Mechanisms must be created to ensure that police services conduct individualized assessments of requests for detailed background checks. Non-conviction records should be disclosed only if doing so would address a significant public safety threat. Police services and governments must take action to ensure that non-conviction records are not disclosed in background check processes except in the most exceptional of circumstances.

# EIGHT

## APPENDIX A <sup>93</sup>

**TABLE 1: RESPONSES TO SPECIFIC QUESTIONS ASKED OF CALGARY, CAMROSE, EDMONTON AND LACOMBE POLICE<sup>94</sup>**

QUESTION ASKED	CALGARY	CAMROSE
Who can request a PIC?	A PIC can be requested only by the individual that the information relates to.	A PIC can be requested only by the individual that the information relates to.
Who is the PIC provided to?	Results of the PIC are provided to the applicant who attends in person or to an agency that has entered into a memorandum of understanding with the Calgary Police Service. A “conviction letter” will be released to the applicant only and <i>not</i> an Memorandum of Understanding agency.	A PIC is provided only to the individual who requested the information.
What purposes can a PIC be requested for?	Employment, volunteer, practicum or other reasons.	Employment, educational programs, acceptance to an organization or for any other reason.
How does the PIC process work?	Applicants attend in person, complete an application and sign a waiver for the police to collect the relevant information. Photo ID is required.	Applicants attend in person, complete an application and sign a waiver for the police to collect the relevant information. Photo ID is required.

<sup>93</sup> Tables 1 and 2 summarize the information that was provided from the seven municipal police services that were consulted.

<sup>94</sup> No responses or statistics were provided in relation to questions posed about: (1) the number of PICs that disclose information other than criminal convictions, (2) the types of non-conviction information that is commonly disclosed, (3) the number of requests granted, denied and/or appealed, (4) the number of requests for the destruction of information contained in PICs and (5) the number of destruction requests granted, denied and/or appealed.

QUESTION ASKED	EDMONTON	LACOMBE
Who can request a PIC?	A PIC can be requested only by the individual that the information relates to.	A PIC can be requested only by the individual that the information relates to.
Who is the PIC provided to?	A PIC is provided only to the individual who requested the information.	A PIC is provided only to the individual who requested the information.
What purposes can a PIC be requested for?	Employment, volunteering, immigration, child custody, adoption, foster care and U.S. waivers.	Whatever the person wants it for.
How does the PIC process work?	Applicants attend in person, complete an application and sign a waiver for the police to collect the relevant information. Photo ID is required.	Applicants attend in person, complete an application and sign a waiver for the police to collect the relevant information. Photo ID is required.



TABLE 1: RESPONSES TO SPECIFIC QUESTIONS ASKED OF CALGARY, CAMROSE, EDMONTON AND LACOMBE POLICE (CONTINUED)

QUESTION ASKED	CALGARY	CAMROSE
<p>What information is canvassed and what other police services are consulted?</p>	<p>Calgary PICs use information from CPIC, the Justice Online Information Network (JOIN) and the Police Information Management System (PIMS). If the client has resided in Calgary for one year, the Calgary PIC Unit may complete the PIC request. If the client has not lived in Calgary for at least one year, CPS staff will recommend that a local police check be conducted where the applicant previously resided. Other police services are not consulted, though information generated by other services may be available on the CPIC databases or the Justice Online Information Network.</p>	<p>Other police services are not consulted, though information generated by other services may be available on the CPIC databases or the Justice Online Information Network. The Camrose Police Service searches the records held in the CPIC, Alberta JOIN (Justice Online Information Network) and Camrose Police Service records.</p>
<p>What non-conviction records may be included in a PIC?</p>	<p>Pending charges, outstanding warrants, ongoing investigations, alternative measures (one year), absolute discharges (one year), conditional discharges (three years), stays of proceedings (one year), findings of not criminally responsible (mental disorder), court orders, such as peace bonds, and relevant occurrence reports that may or may not have resulted in charges being laid. “Relevancy” refers to the protection of persons and property and is described as “very subjective.” Determinations of “relevancy” will be made on a case-by-case basis, with consideration given to the nature of the position being applied for, the clientele that the subject will be dealing with and the frequency and recentness of the occurrence reports.</p>	<p>Pending charges, outstanding warrants, ongoing investigations, alternative measures (one year), absolute discharges (one year), conditional discharges (three years), stays of proceedings (one year), findings of not criminally responsible (mental disorder), court orders, such as peace bonds, and relevant occurrence reports that may or may not have resulted in charges being laid. “Relevancy” refers to the protection of persons and property and is described as “very subjective.” Determinations of “relevancy” will be made on a case-by-case basis, with consideration given to the nature of the position being applied for, the clientele that the subject will be dealing with and the frequency and recentness of the occurrence reports.</p>

QUESTION ASKED	EDMONTON	LACOMBE
<p>What information is canvassed and what other police services are consulted?</p>	<p>Other police services are not consulted, though information generated by other services may be available on the CPIC databases or the Justice Online Information Network (JOIN). All police services in the province of Alberta are subject to the same process for security background checks, which involve searches of local police records, the Justice Online Information Network (JOIN) and CPIC databases.</p>	<p>Other police services are not consulted, though information generated by other services may be available on the CPIC databases or the Justice Online Information Network (JOIN). Lacombe Police Service uses several search mechanisms: Canadian Police Information Centre (CPIC), the RCMP national depository in Ottawa; Justice Online Information Network (JOIN) (Alberta); Police Retrieval Occurrence System (PROS); and Police Information Record System (PIRS).</p>
<p>What non-conviction records may be included in a PIC?</p>	<p>Pending charges, outstanding warrants, ongoing investigations, alternative measures (one year), absolute discharges (one year), conditional discharges (three years), stays of proceedings (one year), findings of not criminally responsible (mental disorder), court orders, such as peace bonds, and relevant occurrence reports that may or may not have resulted in charges being laid. "Relevancy" refers to the protection of persons and property and is described as "very subjective." Determinations of "relevancy" will be made on a case-by-case basis, with consideration given to the nature of the position being applied for, the clientele that the subject will be dealing with and the frequency and recentness of the occurrence reports.</p>	<p>A PIC may include absolute/conditional discharges; alternative measures or diversion involvement; findings of not criminally responsible (mental disorder); pending charges, warrants and ongoing investigations; probation, prohibition and other judicial orders that are in effect, as well as relevant information from police files from any law enforcement agency, Canadian or otherwise.</p>

TABLE 1: RESPONSES TO SPECIFIC QUESTIONS ASKED OF CALGARY, CAMROSE, EDMONTON AND LACOMBE POLICE (CONTINUED)

QUESTION ASKED	CALGARY	CAMROSE
How long are Non-Conviction Dispositions records retained?	Records in the Police Information Management System (PIMS) database are purged pursuant to the Calgary Police Service retention schedule. All major offences (homicide, child abuse, sex crimes and robbery) are permanent records. All other police records are kept for 25 years.	“The Camrose Police Service follows a defined retention/ destruction schedule which is based on the seriousness of the investigation that created the record. Non-conviction information is retained or destroyed following the schedule dependent on the reason the record was created.” (The retention schedule was not provided.)
What steps can a member of the public take to prevent the disclosure of Non-Conviction Dispositions information (i.e., seek destruction of their records)?	The records in the Police Information Management System (PIMS) database are purged pursuant to the Calgary Police Service records retention schedule (explained above in previous question). No information on how to request destruction outside of the parameters of the schedule was provided.	Appropriate justification is provided to the applicant when non-conviction records are disclosed. All applicants can challenge the validity of the information they receive to ensure accuracy.
The number of requests for PIC? (last five years)	The Calgary Police Service has completed 386,166 PICs in the last five years in accordance with the following breakdown: 2006: 78,247; 2007: 78,554; 2008: 83,488; 2009: 79,319; 2010 (Jan-Oct): 66,558.	The Camrose Police Service has completed 7,458 PICs in the last five years in accordance with the following breakdown: 2006: 1,448; 2007: 1,588; 2008: 1,489; 2009: 1,480; 2010: 1,453.
Most common identified purpose for seeking a PIC?	Statistics are not compiled.	Employment and volunteer purposes.
The number of checks that disclose information other than criminal convictions?	No information provided.	No information provided.

QUESTION ASKED	EDMONTON	LACOMBE
How long are Non-Conviction Dispositions records retained?	No information was given.	Records that are flagged for “Non-Disclosure” are sealed until such time as the record management system produces an automatic purge date and the record is destroyed. Each files purge date is scheduled according to the individual classification of each file.
What steps can a member of the public take to prevent the disclosure of Non-Conviction Dispositions information (i.e., seek destruction of their records)?	If applicants disagree with the information on a PIC they may write to the EPS and explain, in detail, why they believe certain information should be removed. Requests should be accompanied by any references, resumes or other supporting documentation. No information was provided about what criteria are used to assess such requests.	“Applicants can make a formal request in writing to have verification that their records have been destroyed according to the non-disclosure laws.”
The number of requests for PIC? (last five years)	The Edmonton Police Service has completed 354,587 PICs in the last five years in accordance with the following breakdown: 2006: 66,270; 2007: 64,062; 2008: 72,695; 2009: 75,778; 2010: 75,782.	No statistics are collected on PICs.
Most common identified purpose for seeking a PIC?	Employment is the most common purpose and accounts for approximately 37% of PICs. Volunteering is the second most common purpose and accounts for approximately 22% of PICs. Other common purposes include immigration, criminal pardons, security guards/locksmiths and daycare/adoption.	Employment or volunteering with the vulnerable sector.
The number of checks that disclose information other than criminal convictions?	No information provided.	No information provided.

TABLE 1: RESPONSES TO SPECIFIC QUESTIONS ASKED OF CALGARY, CAMROSE, EDMONTON AND LACOMBE POLICE (CONTINUED)

QUESTION ASKED	CALGARY	CAMROSE
The types of non-conviction records that are most frequently disclosed?	No information provided.	No information provided.
Number of requests for the destruction of information that is contained in PICs?	Statistics not compiled for this matter.	“In five years one applicant requested review of the information released. No requests for destruction or appeals have been received.”
The number of requests granted, denied or appealed?	No information provided.	No information provided.

QUESTION ASKED	EDMONTON	LACOMBE
The types of non-conviction records that are most frequently disclosed?	No information provided.	No information provided.
Number of requests for the destruction of information that is contained in PICs?	144 requests for file destruction were received from January 1-November 30, 2010. 93 requests were received in 2009, and 99 requests were received in 2008. No records exist detailing the types of requests or their disposition.	No statistics collected on PICs.
The number of requests granted, denied or appealed?	No information provided.	No information provided.

**TABLE 2: RESPONSES TO SPECIFIC QUESTIONS ASKED OF LETHBRIDGE, MEDICINE HAT AND TABER POLICE<sup>95</sup>**

QUESTION ASKED	LETHBRIDGE	MEDICINE HAT	TABER
Who can request a PIC?	A PIC can be requested only by the individual that the information relates to.	A PIC can be requested only by the individual that the information relates to.	A PIC can be requested only by the individual that the information relates to.
Who is the PIC provided to?	When there is no adverse information, a letter is sent to the applicant and the agency that required the PIC. Where adverse information is identified, applicants are required to attend a police station to review the information and sign a consent waiver before the information is released to the agency/ employer. If the applicant refuses to sign the consent form, the agency/ employer will be advised that the PIC cannot be completed. When the PIC is not required for employment or volunteer purposes (i.e., for travel or other personal reasons) it will be automatically sent to the applicant.	Only the individual whom the PIC relates to, who must pick the PIC up from a police station.	Only the individual whom the PIC relates to.

<sup>95</sup> No responses or statistics were provided in relation to questions posed about: (1) the number of PICs that disclose information other than criminal convictions, (2) the number of requests for the destruction of information contained in PICs and (3) the number of destruction requests granted, denied and/or appealed.

QUESTION ASKED	LETHBRIDGE	MEDICINE HAT	TABER
<p>What purposes can a PIC be requested for?</p>	<p>PICs will be provided on request unless there is a concern that providing a PIC could jeopardize individual or public safety or compromise an ongoing police investigation. Common reasons for PIC requests include Canadian and international adoptions, foreign travel, employment, volunteer work, application for immigration to Canada, application for Canadian citizenship, pardon applications, name changes and permanent residency in foreign countries.</p>	<p>Applicants do not need to have a specific purpose. Anyone who wants information on themselves can request it.</p>	<p>Applicants do not need to have a specific purpose, but the most common reason is employment purposes.</p>
<p>How does the PIC process work?</p>	<p>The applicant attends in person at the police station, completes the application form and pays the required fee.</p>	<p>The applicant attends in person at the police station and completes the application form with front reception staff to ensure it is done correctly. The application form is then forwarded to the police information coordinator for the checks, and the appropriate certificate is completed. A clear/clean PIC is then returned to the front reception for pickup by the applicant. Anything other than a clear certificate will involve the applicant meeting with the police information coordinator to verbally confirm the information in the certificate. Under all circumstances the applicant must appear in person with proper identification to claim the completed certificate. There are no third-party releases or mailing of certificates.</p>	<p>The applicant produces valid and verifiable identification, fills in the appropriate form and pays a fee of \$45. The checks are then completed and the results recorded on a certificate picked up by the applicant.</p>



TABLE 2: RESPONSES TO SPECIFIC QUESTIONS ASKED OF LETHBRIDGE, MEDICINE HAT AND TABER POLICE (CONTINUED)

QUESTION ASKED	LETHBRIDGE	MEDICINE HAT	TABER
<p>What information is canvassed and what other police services are consulted?</p>	<p>PIC search indices include local police records, the Justice Online Information Network (JOIN) and the Canadian Police Information Centre (CPIC). All police information and/or files that are reviewed and records that appear to be relevant to the PIC may be disclosed.</p>	<p>PIC search indices include local police records, the Justice Online Information Network (JOIN) and the Canadian Police Information Centre (CPIC). All police information and/or files that are reviewed and appear to be relevant to the PIC may be disclosed. Where information is obtained through database searches, any police service that can help clarify that information may be consulted.</p>	<p>PIC search indices include local police records, the Justice Online Information Network (JOIN) and the Canadian Police Information Centre (CPIC). All police information and/or files that are reviewed and appear to be relevant to the PIC may be disclosed. Where information is obtained through database searches that originate with another police service, the information must be verified with that agency before it is used.</p>
<p>What non-conviction records may be included in a PIC?</p>	<p>A PIC may include absolute/conditional discharges; alternative measures or diversion involvement; findings of not criminally responsible (mental disorder); pending charges, warrants and ongoing investigations; probation, prohibition and other judicial orders that are in effect, as well as relevant information from police files from any law enforcement agency, Canadian or otherwise.</p>	<p>Non-conviction information can be included in a PIC. This information is generally included when it relates to the purpose of the PIC or position being applied for.</p>	<p>Non-conviction information can be included in a PIC. This usually occurs when someone is the subject of a complaint or a bona fide suspect in a complaint.</p>
<p>How long are Non-Conviction Dispositions records retained?</p>	<p>No information was given on retention.</p>	<p>All relevant information that is on file with the police will be disclosed in a PIC. Records may be kept indefinitely unless a request is made to expunge them.</p>	<p>Most police reports have a mandated retention period of between two and 10 years prior to destruction. This information cannot be purged upon request.</p>

QUESTION ASKED	LETHBRIDGE	MEDICINE HAT	TABER
<p>What steps can a member of the public take to prevent the disclosure of Non-Conviction Dispositions information (i.e., seek destruction of their records)?</p>	<p>Purge requests relating to non-criminal information can be made in writing to the sergeant in charge of the Identification Forensic Unit.</p>	<p>Applicants can dispute the inclusion of non-conviction records in a PIC or request that they be expunged. Fingerprints and photographs associated with non-conviction dispositions, will be destroyed on request at different intervals depending on the type of disposition where the following conditions are met: (1) the applicant does not have other criminal convictions; (2) the applicant does not have any other outstanding charges before the courts; (3) the charges did not relate to offences listed as a primary designated offence or secondary designated offence as defined in section 487.04 of the <i>Criminal Code</i>.</p>	<p>Most police reports have a mandated retention period of between two and 10 years prior to destruction. This information cannot be purged upon request.</p>
<p>The number of requests for PIC? (last five years)</p>	<p>The Lethbridge Regional Police Service has completed 3,166 PICs in the last five years in accordance with the following breakdown: 2005: 7,448; 2006: 6,271; 2007: 6,015; 2008: 6,565; 2009: 6,178; 2010: 5,711 as of October 21, 2010.</p>	<p>The Medicine Hat Police Service has completed 19,220 PICS over the last five years. No annual breakdown was provided.</p>	<p>The Taber Police Service has completed 1,196 PICs in the last two years in accordance with the following breakdown: 2008/2009: 556; 2009/2010: 640 applications. The management system retains the number of requests for only two years.</p>

TABLE 2: RESPONSES TO SPECIFIC QUESTIONS ASKED OF LETHBRIDGE, MEDICINE HAT AND TABER POLICE (CONTINUED)

QUESTION ASKED	LETHBRIDGE	MEDICINE HAT	TABER
Most common identified purpose for seeking a PIC?	Reasons for PIC requests include Canadian and international adoptions, foreign travel, employment, volunteer work, applications for immigration to Canada, applications for Canadian citizenship, pardon applications, name change and permanent residency applications.	No statistics are kept, but it is believed that employment is the most common reason for a PIC request and volunteer work is the second most common.	No information provided.
The number of checks that disclose information other than criminal convictions?	No information provided.	No information provided.	No information provided.
Types of non-conviction records that are commonly disclosed?	Only broad descriptions of the kinds of information that could be disclosed were provided.	No statistics were provided, but the Medicine Hat police indicated that to be included, non-conviction information must be related to the position/purpose that the PIC is being applied for.	No information provided.
Number of requests for the destruction of information that is contained in PICs?	Statistics not compiled for this matter.	Destruction requests are discussed with the public from time to time; however, there is no information available about how often this occurs.	No information provided.
The number of requests granted, denied or appealed?	No information provided.	No information provided.	No information provided.



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