Employment Law

Peter Bowal and Thomas D. Brierton

The Abuse of Criminal Record Checks

Publication is a self-invasion of privacy.

– Marshall McLuhan

Introduction

The recruitment manager pondered whether criminal record checks should be requested of every person applying to join his organization. "That seems to be the safest way to go these days," he mused.

He gained support for his proposition a month later when the Commander of a Canadian military base was charged with two murders and several counts of forcible confinement, break and enter and sexual assault relating to home invasions. This led to a massive investigation of a leader of a public organization who was trusted to ensure the safety of Prime Ministers and the Queen. It highlighted the risk that we may not know our workers as well as we should.

On the other hand, a criminal record check would not have turned up anything of concern about the Commander. Such checks are not flawless workforce filters and monitors for employees who engage in crime. Usually what these reports disclose comes too late.

The call to more frequent use of the criminal record check by the human resource manager made us wonder whether demanding such status reports as a matter of policy would even be legal. Is it a justifiable collection, use and storage of employee personal information?

By way of analogy, one of the most litigated topics in employment law over the last few years has been drug and alcohol testing. Employers must demonstrate the need for testing, such as in safety-sensitive work, and a rational basis for suspicion that someone has consumed drugs or alcohol. The legal foundations for curtailing employer rights in this way are found under the search, seizure, and privacy rubrics.

There are several variations of employer criminal record policies. A short-listed candidate may have to present a clear certificate prior to hiring or in conjunction with accepting an offer. The policy might state that consent must be granted on demand during employment, presumably with some reasonable cause for suspicion, or at regular intervals such as every three years. The record check is issued to the employee alone for privacy reasons, so the employee must obtain it or must furnish consent for the employer to obtain it on his or her behalf.

The question becomes whether an employer policy requiring consent to a criminal record check is illegal on the grounds that it violates privacy legislation.

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The Ottawa Firefighters Case

In 2007, the City of Ottawa awoke to the value of criminal record checks, at least for its fire department. It required new applicants for firefighter positions to consent, as a precondition of employment, to the City accessing the police department to obtain any criminal records. It also required such written consents from specific employed firefighters on a case-by-case basis justified on reasonable grounds. The firefighter union only objected to the third leg of the policy that compelled consent by firefighters to a criminal record check every three years. The City of Ottawa claimed that this was part of management rights in the collective agreement. The union grieved, saying this was an unjustified invasion of the firefighters' privacy.

The arbitrator sought to balance the privacy rights of the firefighters with the City's need to access information germane to its operations. He rejected "the position of the City … that it is entitled, by reason of management rights, to demand a blanket consent of all of its firefighter(s), regardless of their personal circumstances, to gain access to confidential information concerning their possible criminal or police record."

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The arbitrator concluded there was a significant distinction between the initial hire and the ongoing employment relationship. The considerations that apply to an applicant for employment did not apply to the same extent to ongoing employees who have been observed by the employer over time. Firefighters, despite their governing legislation, the arbitrator continued, are "essentially indistinguishable from a myriad of trades persons and professionals whose work would involve the normal attendance at a variety of premises." One cannot conclude that "the duties and responsibilities of firefighters are such as to require or justify such blanket invasion of privacy." He allowed the grievance and struck down the fixed periods of the policy, but left open the practice of the employer obtaining consent where reasonable grounds justify it even without compliance with the process set out in the *Privacy Act*.

The employer, the City of Ottawa, applied for judicial review of this arbitration decision to the Ontario Superior Court of Justice. In July 2009, this Court not only affirmed the arbitrator's decision to strike out the periods requirement but it went further.

The reviewing Court examined the provincial privacy legislation and found criminal records to constitute protected personal information. It said employers cannot, as a matter of managerial prerogative, circumvent the procedures in that legislation by requiring consent. Under the legislation, the consent must be entirely

free, informed, and voluntary on the part of the employee, and could not be obliged by a collective agreement or an employer. The request must then be vetted by an independent official to determine whether it should be disclosed in each case.

Conclusion

A criminal record check for some positions will be prudent, if not legally obliged. Security guards, locksmiths, bank tellers, private investigators and persons working with vulnerable groups such as with seniors in a long-term care facility or children in a group home all come to mind. This is part of the employer's due diligence in hiring and retention in sensitive positions. However, a criminal record is regulated personal information and may only be collected, used, and retained in compliance with the provincial privacy and human rights legislation. Managerial rights do not trump this legislation.

In less sensitive positions, there are several practical reasons why an employer would *not* want to adopt a policy of requesting a criminal record clearance from all employees. It is not a simple magical solution. Criminal record checks may be an example of where more is not necessarily better. A broad policy conveys a message of distrust and invasive oversight, so it should not be a lazy substitute for good recruitment and retention management practice.

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A broad criminal record policy can be expensive. Each check will cost between $30 and $60, a disbursement which employers will be expected to cover. The policy increases administration costs generally.

Obtaining the document may be inconvenient. Most applicants must appear at a designated location to request it in person, with proper identification and payment. Employer-mandated checks are usually not viewed as a priority and may take a month or more to obtain.

The checks may falsely reassure the employer because they may have gaps in them. Many police forces produce a simple letter-like document called a "Police Information Check." The document will only be as good as the identification information offered and the convictions screened. If names or other subject information such as previous locations of residence are inaccurate or incomplete, the report may be useless. The report may not contain information on current charges or convictions from other jurisdictions. Regulatory convictions – such as licence violations – which may be highly relevant to some employers, are generally not listed.

Accordingly, a horrendous driving record would escape this level of scrutiny.

If the employer collects data, in this case, criminal records, the employer must also have a way of processing that data. What convictions are acceptable? Employment law is clear that not all acts of dishonesty give rise to any discipline – much less termination – especially where it takes place off-hours and off-site. Human rights equality legislation in some Canadian jurisdictions specifically includes criminal conviction as a prohibited ground of discrimination. In those provinces, the employer cannot consider criminal conviction as a factor in employment-related decisions unless a clear case can be made that the conviction is relevant to job performance. Collecting the criminal conviction information calls for a rational system to process it.

Moreover, the emphasis on the formal criminal record is misguided. If the issue is to keep the employer up-to-date about employee suitability, there will be numerous opportunities on the job to continuously make that determination. Disclosure of a criminal conviction is not the only, or best, quality assurance benchmark.

Many candidates may be unattractive for a job merely because sufficient grounds existed for criminal charges, whether or not convictions ensued. Existing employees may be disciplined for misconduct amounting to much less than a crime.

For serious criminal behaviour, a record-checking policy will prove unnecessary. The employer will likely know about the charge and offence from other sources, and will enjoy leeway to investigate it at that time. Imprisonment or trial of an employee long enough to cause absence from work serves as sufficient independent ground for discipline.

A broad criminal record-checking policy is therefore ill-advised. It constitutes an over-inclusive interference with individual privacy and equality rights and it is unwieldy to manage in practice. The case-by-case approach to criminal behaviour by employees comprises the best overall employment strategy.

Peter Bowal is a Professor of Law at the Haskayne School of Business at the University of Calgary in Calgary, Alberta. Thomas D. Brierton is an Associate Professor at the Eberhardt School of Business at the University of the Pacific in Stockton, California.