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UNIFORM LAW CONFERENCE OF CANADA

A SCARLET RECORD:
**INTERIM REPORT OF THE WORKING GROUP ON
CRIMINAL RECORD CHECKS**

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1. Introduction

Section 1.01 1.1 Background

[1] Every year hundreds of thousands of Canadians are subjected to a criminal record check. These checks are used for a variety of reasons including to screen prospective employees and volunteers, but also for the purposes of adoption, international travel, name changes, student placements, record suspensions, and other applications.

[2] Over the last five years, a series of reports have been issued across the country concerning criminal record checks. Organizations such as the Canadian Civil Liberties Association (“CCLA”) and the John Howard Society have reported on the widespread use of criminal record checks and the problems that have arisen in this practice.¹ These reports have concluded that, among other things, criminal record checks are being overused, often include the disclosure of highly private and irrelevant information, and sometimes list inaccurate or outdated information. These practices have proven harmful to Canadians and there appears to be no empirical evidence indicating that these checks actually reduce risk in the workplace.

[3] One of the main criticisms of the practice is that these checks reveal much more than one’s “criminal record,” as that term is generally understood. These checks may include “non-conviction information” like mental health apprehensions, suicide attempts, and drug overdoses. Criminal record checks may also include reference to files where charges were dropped, stayed, or resulted in an acquittal, and in still other cases, information about police files where an individual was merely a “suspect”, “witness”, or “person of interest” in a matter that did not even result in charges (also known as “adverse” or “negative” police contacts).

[4] This is an issue affecting thousands of Canadians. In Ontario alone, approximately 43% of all criminal cases result in stays of proceedings or withdrawn charges, generating thousands of non-conviction records every year that may be disclosed in a record check. These are in addition to the numerous police records arising from incidents that did not result in formal charges.² In a recent study of records checks conducted by the Vancouver Police Department, it was found that 72% of all reports which produced a result contained only non-conviction information. In other words, nearly three-quarters of all “criminal records” in Vancouver did not include any actual criminal convictions.³

[5] The inclusion of this information in a record check occasions obvious prejudice to the applicant. As the CCLA recently pointed out, these records “place a cloud over the character of people who may never have been convicted or even arrested for a crime,” and act as an “invisible punishment” for having contact with the criminal justice system. While these kinds of records may not reveal a “conviction” *per se*, they create serious impediments to Canadians in their day-to-day pursuits:

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.” 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 may never be able to return to the life he knew before being accused.

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 members of the community.” 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.⁴

[6] Studies have also found that these negative impacts of disclosing non-conviction information disproportionately affect youth and minorities.⁵

[7] For these reasons, the CCLA and others have concluded that the *status quo* is unacceptable and that there is an urgent need for greater fairness and clarity in the police background check process.⁶ Similar conclusions were reached in British Columbia and Ontario following studies by privacy commissioners in each province.⁷

[8] The response to these reports and observations has varied. Recently, in Ontario, the *Police Record Checks Reform Act* was passed, a ground-breaking piece of legislation that will regulate the practice province-wide.⁸ This legislation will standardize and significantly limit the amount of non-conviction data that may be provided in response to a criminal record check. It also codifies certain procedural protections including a process to correct inaccurate information that may be contained in a record check, and an appeal mechanism to allow applicants to challenge the inclusion of irrelevant non-conviction information.

[9] In British Columbia, comprehensive guidelines have been issued in consultation with the Chiefs of Police. Similar guidelines have been adopted or are currently being drafted in other jurisdictions. In other provinces and territories, individual police forces are left to develop their own policies regarding what to disclose and what protections

should be afforded to applicants. The RCMP, our federal police force operating in almost every province, has its own policies and local practices.

[10] As a result of these developments, a patchwork of laws, policies, and guidelines have developed nationwide, which in turn has created inconsistencies in how criminal record checks are conducted from province to province. Inconsistencies exist in what kinds of checks can be conducted, what information is released with respect to each type of check, and what rights will be afforded to applicants to challenge the veracity or relevance of information that is ultimately disclosed in a check.

[11] A criminal record check may look very different depending on where you live. For example, an applicant in Calgary may have an apprehension under a mental health act disclosed in some form if it is deemed to be “relevant”, whereas the same person living in Toronto would be guaranteed by statute to have that information excluded from his or her check. In Fredericton, that person’s mental health history would not be disclosed, but could inform the police’s decision to issue a “clearance letter” or not for the applicant. In British Columbia, the applicant’s file could be disclosed if it involves the use or threat of violence, but without the mental health status of the applicant being included.

[12] Similar disparity exists with respect files which resulted in acquittals, findings of not criminally responsible by reason of mental disorder, and court orders like peace bonds.

[13] To complicate matters further, the rights to correct or appeal the inclusion of non-conviction information changes from place to place. In Ontario, there is a legislatively guaranteed appeal process. In British Columbia, there is a guideline recommending a “reconsideration” process. In some provinces, applicants may write to the issuing police authority to reconsider or correct information, and in other places no appeal or reconsideration process is provided at all.

[14] In 2016, in response to these issues, the Canadian Bar Association sought and received unanimous support for Resolution Can-CBA2016-04 at the Uniform Law Conference of Canada, which reads as follows:

A working group be constituted to study whether federal, provincial and territorial governments should adopt uniform legislation to restrict the disclosure of “non-conviction” information in police and RCMP databases to third parties, and whether to provide a mechanism for individuals to review and correct information contained in those databases.

[15] For the past year, members of the ULCC Working Group on Criminal Record Checks (“ULCC Working Group”) have studied criminal record checks across the country. This document represents an interim report from the ULCC Working Group, along with a recommendation to draft uniform legislation to regulate criminal record checks across the country.

Section 1.02 1.2 Project Status and Methodology

[16] Following the passage of Can-CBA2016-04, a steering committee was struck to organize the gathering of information for the ULCC Working Group. The steering committee developed a detailed questionnaire and “disclosure chart” to be disseminated nationwide. These documents, attached as Appendices A and B, were provided to volunteers in BC, Alberta, Saskatchewan, Quebec, Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island, as well as the Yukon Territory. A consultation was also organized with representatives of the Ontario government to discuss the progress of the *Police Record Check Reform Act*.

[17] The questionnaire and disclosure chart were developed to gather information on several relevant fronts. The overall purpose was to establish the *status quo* in each jurisdiction to determine if there were, in fact, disparities in practices across the country. The particular focus of the research was to identify the types of record checks being conducted across the country (of which there are many), the nature of information that was being disclosed, and the extent to which procedural protections exist from location to location. Some questions were also aimed at identifying legislation that may be affected should a uniform act be proposed in the future.

[18] The disclosure chart focused on how police forces handle particular kinds of information. It asked responding agencies to clarify what information is disclosed, and if any restrictions existed that might limit disclosure in any given case. The categories of information asked about included the following:

- **Current Judicial Orders** – currently enforceable peace bonds (an order issued pursuant to s. 810 of the *Criminal Code* akin to a restraining order, but with no finding of guilt); family court restraining orders; probation orders; and prohibition orders (e.g. firearms prohibition, driving prohibitions issued under the *Criminal Code*, etc.).
- **FIP (Firearms Interest Police)** – FIP is a sub-category of the Canadian Police Information Centre (CPIC) database.⁹ It is used to record data on persons who, in the last five years, have been involved in incidents with allegations of violence, harassment, drugs, or other categories of criminal activity. This may include mental health files and matters which did not result in charges.
- **INTERPOL** – a system of notices used to issue international alerts on fugitives, suspected criminals, and persons linked to or of interest in ongoing criminal investigations, etc.

- **NCIC (National Crime Information Centre)** – US-based police database that includes conviction and non-conviction information originating from American jurisdictions.
- **Outstanding Criminal Charges and Warrants** – listing of all unresolved criminal charges and outstanding warrants in Canada.
- **PIP (Police Information Portal)** – a searchable index of all police agency record management systems from across the country that includes both conviction and non-conviction data.
- **Mental Health Information** – apprehensions under provincial mental health acts, and files revealing mental health-related police interactions.
- **Police Information from Indices Query** – local police databases that include both conviction and non-conviction information; this is typically where “adverse” police contacts are recorded.
- **SIP (Special Interest Police)** – another sub-category of CPIC used to record data on record suspension (pardon) applicants, persons known to be dangerous to self or others, etc.
- **Acquittals, Dismissals, Withdrawn Charges, Stays of Proceedings** – cases where charges were laid, but ultimately no finding of guilt made (e.g. the person was acquitted, the Crown withdrew or stayed the charges, or the Court dismissed the matter).
- **Absolute and Conditional Discharges** – formal sentencing disposition where the offender is “discharged” from a criminal record after being found guilty. The discharge may be “absolute” and effective immediately, or “conditional” in the sense that the individual is subjected to a period of probation upon the completion of which the discharge becomes absolute.
- **Convictions and Summary Convictions** – Convictions refer to any findings of guilt where the individual received a criminal sanction including suspended sentences, conditional sentence orders, fines, and jail. Summary convictions are the same but relate to less serious offences in the *Criminal Code* which generally carry more lenient sentences. The dichotomy is similar to the misdemeanour/felony distinction in the United States.
- **Not Criminally Responsible Due to Mental Disorder (“NCRMD”)** – cases where an individual is found not criminally responsible due to a mental disorder

under Part XX.1 of the *Criminal Code*.

- **Expired Prohibition Orders Under the *Criminal Code*** – prohibition orders, like firearms prohibitions, that have expired.
- **Provincial Offences** – quasi-criminal offences contained in provincial legislation (e.g. motor vehicle act offences which carry the potential of jail time; *Offence Act* offences; etc.).
- **Record Suspensions (Pardons)** – criminal convictions which have been “suspended” or expunged through an application under the *Criminal Records Act*.
- **Youth Convictions** – criminal convictions registered under the authority of the *Youth Criminal Justice Act*.

[19] As of June 2017, responses were received from seven provinces (BC, Alberta, Saskatchewan, Ontario, New Brunswick, Nova Scotia, and Prince Edward Island). Should the project continue it is expected that further responses will be received from Quebec, Manitoba, Newfoundland, and the three territories.

[20] The responses to the questionnaire were reviewed and analyzed with an eye toward identifying any consistencies and inconsistencies from province to province. The results of these comparisons are detailed below.

2. Research Results

Section 1.03 2.1 General Findings

[21] The results received from across Canada revealed wide disparity in criminal record check practices.

[22] The first variance related to the **types of checks** that might be conducted in each jurisdiction. The nomenclature varied from place to place, but there generally existed at least two kinds of criminal record checks in each province. The first check was some form of “criminal record” check which listed all criminal convictions and potentially some non-conviction information. This type of check was normally less inclusive than a “vulnerable sector” check.

[23] Some form of “vulnerable sector” check was noted in every jurisdiction studied. These checks typically included more non-conviction information, discharges, NCRMD findings, and other miscellaneous kinds of information like record suspensions (pardons)

involving sexual offences which met the criteria for disclosure under the *Criminal Records Act*.¹⁰ For the most part, whether non-conviction information was released in these checks was determined on a case-by-case basis with reference to local policies if they existed. As noted, some jurisdictions have developed province-wide guidelines which set out disclosure criteria.

[24] Many jurisdictions offered a third kind of check, often referred to as a “police information” check. These checks were closer to a “vulnerable sector” check in their content, but with some notable differences. For example, these checks usually excluded record suspensions (pardons).

[25] As expected, the second area of major variance between jurisdictions was the **content of disclosure** provided in these checks. There was disparity from province to province, and sometimes within a province itself, in what could be released under both “criminal record” and “vulnerable sector” checks. There was also variance in what criteria needed to be met before non-conviction data was disclosed, including many places that did not appear to have any criteria other than generalized concepts like “relevance”. Attached as Appendices C and D are charts setting out the differences between police agencies who responded to the ULCC Working Group or whose practices were publicly available. Appendix C collates all data received regarding “criminal record” checks and Appendix D relates to “vulnerable sector” checks.

[26] The third area of variance concerned **procedural fairness** mechanisms to correct inaccurate information or to challenge the inclusion of arguably irrelevant information. In some jurisdictions, more formalized guidelines or legislation existed that provided for these rights (e.g. Ontario and BC). In other locations, quasi-formalized practices existed that allowed applicants to request an internal review of the record check by the issuing police agency. Some other agencies encouraged informal processes where applicants could request a review of a criminal record check by way of letter or meeting in person.

[27] More specific information relating to each responding jurisdiction is outlined below.

Section 1.04 2.2 Ontario

[28] As noted above, the Ontario Legislature passed the *Police Record Checks Reform Act* (the “Act”) in late 2015. The major aspects of this legislation can be summarized as follows:

- Section 2 – The Act governs all criminal record checks done for the purposes of employment, volunteering, licensing, membership in any body, enrollment in an educational institution or program, and with respect to a few other specified areas. This section also specifies various exemptions to the regime.

- Sections 5-8 – The police shall conduct one of three types of criminal record checks: (1) a “criminal record” check; (2) a “criminal record and judicial matters” check; or (3) a “vulnerable sector” check.
- Section 9 and the Schedule – Any disclosure made through a record check must be made in accordance with the Schedule. The Schedule lists the categories of information which can be disclosed under each type of check.
- Sections 1, 10 – “**Non-conviction information**” shall not be disclosed unless a “vulnerable sector” check is requested, and only where the “criteria for exceptional disclosure” are met. The criteria are robust and include that the alleged victim of the offence in question was a child or vulnerable person (both defined terms in the Act), that the offence related to a charge specified in the regulations (i.e. not all offences are subject to the regime), and finally that there are reasonable grounds to believe that the applicant has been engaged in a pattern of predation having regard to six factors outlined in s. 10(2).

The definition of “non-conviction information” is narrow, and only includes information concerning the fact that an individual was charged with a criminal offence which was later dismissed, withdrawn, stayed, or resulted in an acquittal. In other words, the Act prohibits the disclosure of non-conviction information that did not result in a formal charge, necessarily excluding all “adverse” police contacts, mental health files, and other police determinations which never resulted in a formal process.

- Section 10(4) – Applicants have the right to request a “**reconsideration**” of whether any “non-conviction information” that was included in a vulnerable sector check ought to be excluded having regard to the criteria set out in s. 10(2).
- Section 15 – All police record check providers shall create and implement a process to respond to requests from individuals to correct information disclosed in a record check that is believed to contain an error or omission.
- Section 12 – All record checks will be disclosed directly to the applicant, unless consent is obtained to do otherwise.
- Section 19 – Any person or organization that wilfully contravenes the central requirements of the Act may be prosecuted and are liable to a fine.

[29] In terms of specifics, the Schedule to the Act sets out exactly what information may be disclosed in each type of record check. Notably, a “criminal record” check will

now only include criminal offences for which an individual has been convicted. If the person has been convicted of a summary offence, these matters will not appear five years after the date of conviction. Absolute and conditional discharges will not be reported regardless of when they were granted.

[30] A “criminal record and judicial matters” check permits disclosure of discharges granted within one year (absolute) or three years (conditional) of the request, outstanding charges, current warrants for arrest, and some court orders (excluding orders made under the *Mental Health Act* or Part XX.1 of the *Criminal Code*, family law restraining orders, or court orders made in relation to a charge that has been withdrawn). Again, summary convictions which were entered more than five years earlier will be excluded.

[31] Finally, a “vulnerable sector” check will further permit the disclosure of NCRMD findings made within five years of the request, and “non-conviction information” as set out above. All other permitted disclosure must follow the same rules as set out under “criminal record and judicial matters” checks.

Section 1.05 2.3 British Columbia

[32] In addition to the RCMP, there are eleven municipal police forces in British Columbia that perform criminal record checks.¹¹ There are now two kinds of record checks in British Columbia: a “police information” check and a “police information check with vulnerable sector screening.” Simple “criminal record” checks are no longer offered in many jurisdictions “because of the significant delay of charge and conviction information being entered into the National Repository for Criminal Records and CPIC.”¹²

[33] Incorrect information can be addressed by way of a letter to the agency who conducted the record check. Recent guidelines published in British Columbia have also recommended that a “reconsideration” process be instituted whereby applicants may appeal the inclusion of non-conviction data in their vulnerable sector check. Such an appeal should be made within 30 days of receiving the check.¹³

[34] Absent written consent, record checks are generally provided directly to the applicant.¹⁴

[35] There have been a series of recent reports in British Columbia regarding criminal record checks. The Office of the Information and Privacy Commissioner released reports in 2012 and 2014 with several recommendations to limit the use and nature of criminal record checks,¹⁵ and in 2016, the Ministry of Public Safety and Solicitor General, in conjunction with the BC Association of Chiefs of Police issued province-wide guidelines for the practice.¹⁶

[36] The guidelines set out in detail the manner in which each respective record check must be conducted and what information can be released. Non-conviction data can be

released under each kind of record check, but with some restrictions. Generally, police information checks will disclose outstanding charges, warrants, and current judicial orders. The guidelines provide an “Exceptional Disclosure Assessment” tool to determine when non-conviction information ought to be disclosed in a “police information” check without vulnerable sector screening. Relevant factors include, but are not limited to the recency and number of past incidents, whether the incident resulted in charges or not, and whether there is a pattern of repeated behaviour.¹⁷

[37] Vulnerable sector checks will include recommended charges, NCRMD findings, dismissed charges, adverse police contact subject to retention periods, and mental health files involving the threat or actual use of violence (but without disclosing the mental health status of the applicant).¹⁸

[38] The guidelines provide specific instructions and criteria for when non-conviction data should be released. In total, there are 27 different categories of information that can be considered and for which guidelines have been developed.¹⁹

[39] Generally speaking, the BC guidelines allow for greater disclosure of non-conviction data than the Ontario model, but some restrictions now exist that are not provided in other provinces.

[40] The BC guidelines are not to be confused with the procedures set out in the *Criminal Records Review Act* (“CCRA”).²⁰ This provincial legislation regulates criminal record checks for certain employees in the “vulnerable sector” of the workforce. Specifically, anyone who works with children or vulnerable adults, particularly if the organization is funded by the provincial government, must submit to periodic criminal record checks under the CCRA.

[41] Notably, the CCRA clearly sets out which criminal offences may trigger additional scrutiny, and offers a risk assessment process that includes procedural protections for the applicant to challenge any findings of risk associated to their record. The risk assessment is based predominantly on convictions and charges, having regard to a number of factors. Trained risk assessors hired by the provincial government may also review adverse police contacts that did not result in a formal charge, but these are not disclosed to the prospective employer. Some other non-conviction information may be considered including outstanding charges, discharges, youth offences, pardoned offences, peace bonds, and files which resulted in the use of alternative measures,²¹ however, these specific matters are not disclosed to the employer. The employer is only notified of the results of the risk assessment, without reference to the underlying charges or convictions.²²

[42] The CCLA has recommended a process similar to the CCRA be instituted across the country to replace the *ad hoc* police processes that currently exist.²³

Section 1.06 2.4 Alberta

[43] There are eleven police forces which have the power to conduct record checks in Alberta.²⁴ The three largest forces are the Calgary Police Service, the Edmonton Police Service, and RCMP “K” Division.

[44] Generally, there are two kinds of criminal record checks in Alberta: a “vulnerable sector” check and a “criminal record” or “police information” check.²⁵

[45] The agencies who responded to the questionnaire all indicated that they offered some kind of appeal or review process for information contained in a criminal record check. This review is handled within the police service responsible for the criminal record check and can sometimes include a further appeal process to a supervisory level within the same organization.²⁶

[46] In some cities, the results from criminal records checks are only given to the applicant and never disclosed to third parties. In other places, the record is given to a third party if there is nothing to report and the applicant has consented to its dissemination.²⁷

[47] In 2013, following concerns regarding the disclosure of mental health and non-conviction information in criminal record checks, the Alberta Association of Chiefs of Police (“AACP”) formed a working group to study the issue.²⁸ The AACP created disclosure guidelines that are not publicly available, but which have been reported upon by the CCLA.²⁹

[48] The ULCC Working Group was advised that the guidelines prohibit the disclosure of mental health records unless the records relate to violence that had been threatened or directed against others. In such cases, only the details surrounding the interaction would be disclosed, but the fact that it was related to a mental health issue would not be revealed.³⁰

[49] In relation to non-conviction records, the decision to disclose this material depends on whether the record is relevant to the nature of the position being sought by the applicant, the recency of the record, and whether the record established a pattern of behaviour that would result in a public safety risk if not disclosed. A timeframe of five years is used for non-violent occurrences, and ten years for violent occurrences. A record is not disclosed if it reflects an isolated incident. The definition of “non-conviction” records appears to include police interactions which did not result in charges.³¹

[50] It appears that the AACP guidelines have not yet been universally adopted and disclosure of records continues to operate on a force-by-force basis, with variance within the province in what is disclosed under each kind of record check. For example, the application form for a record check through the Calgary Police Service indicates that

mental health information, NCRMD findings, and police reports may be disclosed if deemed relevant according to their internal policy.³²

Section 1.07 2.5 Saskatchewan

[51] The ULCC Working Group received responses from the Regina Police Service and the Saskatoon Police Service.

[52] Regina offers a “police information” check and a “vulnerable sector” check. Saskatoon offers a “criminal record” check, a “vulnerable sector” check, and a “certified record check” based on fingerprints.³³

[53] The Saskatoon Police Service does not offer any formal appeal process relating to the results of its criminal record checks. The Regina Police Service offers to review information should there be any “issues” identified, but no formal process appears to be in place to appeal the inclusion of incorrect information. Neither force provides a “reconsideration” process.³⁴

[54] Absent written consent to the contrary, the results of any criminal record check are provided directly to the applicant.³⁵

[55] The two major police forces in Saskatchewan appear to follow a “protocol” that was developed by the Saskatchewan Association of Police Chiefs. This protocol states that some non-conviction data will be disclosed in criminal record checks including the fact of a stay of proceedings which is less than one year old, alternative measures files which have not been completed, findings of unfitness to stand trial, and conditions arising from peace bonds or other court orders the police force may consider “detrimental” to the public. However, the specific nature and number of charges to which this non-conviction data relates would not be disclosed, nor would any apprehensions, orders or other matters related to the *Mental Health Services Act* or to the *Youth Drug Detoxification and Stabilization Act*.³⁶

[56] Despite this effort to standardize the criminal record check process, the responses from each police service revealed some inconsistent practices regarding what information is disclosed. For example, each police service appears to have different criteria for the disclosure of judicial orders currently in force (e.g. peace bonds), and practices varied regarding the disclosure of non-conviction data arising from searches of police indices.³⁷

Section 1.08 2.6 New Brunswick

[57] There are eleven police forces which have the power to conduct criminal record checks in New Brunswick. The Fredericton Police Force provided a detailed response to the questionnaire as a representative sample for the province.³⁸

[58] There are two kinds of criminal record checks available in New Brunswick: the “criminal record” check and the “vulnerable sector” check.³⁹

[59] Disputes concerning any errors in a criminal record check can be addressed through a letter to the Criminal Record Supervisor at the Fredericton Police Force. There is no “reconsideration” process available.⁴⁰

[60] The results of any criminal record check are provided to the applicant, who is then responsible for passing on the information to the employer or organization.⁴¹

[61] In Fredericton, the practice is to provide a “clearance letter” to the applicant regarding their request for a criminal record or vulnerable sector check. Only convictions, absolute discharges within one year of sentencing, and conditional discharges within three years of sentencing are disclosed in such letters. However, in deciding whether or not to “clear” an applicant, the Fredericton Police Force will consider non-conviction data without releasing it in the clearance letter. In other words, they may deny clearance to an individual on the basis of non-conviction data, but refrain from detailing that information in the letter. The Fredericton Police Force offers applicants who are denied clearance an opportunity discuss the decision face-to-face in an informal process.⁴²

[62] No efforts to standardize criminal record check practices in New Brunswick were reported.

Section 1.09 2.7 Prince Edward Island

[63] The ULCC Working Group was notified of three police forces which conduct criminal record checks in Prince Edward Island, with the most detailed response coming from the Charlottetown Police Service.⁴³

[64] The Charlottetown Police Service offers both a “criminal record” check and a “police information” check, but the latter is usually reserved for persons being considered for a position with the police or city.⁴⁴

[65] There is no appeal or reconsideration process for information provided in any kind of check.⁴⁵

[66] The record check is provided to the applicant unless they have given permission to release it directly to the employer or organization being applied to.⁴⁶

[67] There does not appear to be any standardized policy for the disclosure of non-conviction data in Charlottetown. The ULCC Working Group was advised that the information disclosed on a criminal record or police information check will depend on the circumstances and may include things such as outstanding charges, firearms related information, current judicial orders, and provincial offences. The decision is made on a case-by-case basis. The Kensington Police Service also appears to disclose some non-conviction data.⁴⁷

Section 1.10 2.8 Nova Scotia

[68] There are twelve police forces, in addition to the RCMP, that conduct criminal record checks in Nova Scotia;⁴⁸ six of these agencies provided some kind of response to the ULCC Working Group's questionnaire.⁴⁹

[69] In Nova Scotia, a person can obtain a "criminal record" check, a "vulnerable sector" check, or a "child abuse registry" check.⁵⁰ According to a recent local report, police forces will verify that the position applied for is in the "vulnerable sector" before conducting this more sensitive type of check. If the position is not so related, only a "criminal record" check will be completed.⁵¹

[70] There does not appear to be any formal appeal or review process in place to correct inaccurate information contained in a check, but most agencies agreed they would investigate such a matter if it arose from their jurisdiction, or put the applicant in touch with the police service responsible for the record in issue. No reconsideration process was offered in the responding jurisdictions.⁵²

[71] Generally, all record checks are provided to the applicant directly absent consent to do otherwise. Approximately 44% of all record checks are obtained with written consent to provide the material to a third party.⁵³

[72] In 2013-2014, the provincial government hired researchers to study criminal record check practices in the jurisdiction. It had been noted that there was a confusing and inconsistent pattern across the province in how these checks were being conducted. Approximately half of the police agencies would only search for convictions and pending convictions, while the other half would also search for non-conviction data including mental health information and police files where the applicant was only suspected of an offence.⁵⁴

[73] Disparities existed in these practices even within the RCMP itself from detachment to detachment. For example, a vulnerable sector check at RCMP Barrington would only include "convictions" and "pending convictions", while the same check at RCMP Pictou might include "anything out of the ordinary that presents itself when we are querying an individual." In these latter situations, the non-conviction information would be passed on to a supervisor for a decision on a case-by-case basis. Similarly, at

RCMP Bridgewater, “other adverse information including all charges regardless of disposition...” would be checked as part of a vulnerable sector analysis, and an indication of “adverse information” or “other police information” may be provided on the form returned to the applicant.⁵⁵

Section 1.11 2.9 Manitoba, Newfoundland, Quebec, and the Territories

[74] The ULCC Working Group hopes to receive responses from Manitoba, Newfoundland, Quebec and the three Territories during the upcoming year if the project continues. Previous reports studying criminal record checks provided some insights about these jurisdictions. For example, in 2014, it was noted that in Newfoundland a shared set of guidelines was used to conduct “criminal record” checks and “police information / vulnerable sector” checks. The former only provided information about convictions and discharges which had not yet expired. The latter check would also include outstanding charges and warrants, and pardoned sexual offences. Mental health apprehensions and non-conviction records such as withdrawn charges and adverse police contacts would not be disclosed in either kind of check.⁵⁶

3. Recommendations

[75] Through its research, the ULCC Working Group has confirmed that wide disparity exists in Canada regarding criminal record check practices. The disparities relate to the types of checks that can be conducted, what information will be disclosed in these checks, and what procedural mechanisms may exist to protect applicants from the adverse affects of incorrect or unfairly included information.

[76] The ULCC Working Group therefore recommends that draft uniform legislation be prepared to regulate criminal record check practices across Canada, with Ontario’s legislation being used as a starting point. In this regard, the legislation ought to include the following central features:

1. Standardization of the types of criminal record checks to be provided;
2. Limitations on the disclosure of non-conviction information, including the development of disclosure criteria; and
3. The provision of appeal and reconsideration processes to correct inaccurate information and to challenge the inclusion of irrelevant information.

[77] The ULCC Working Group also anticipates that while working on a uniform bill, it will conduct further study of whether applicants should be restricted in the type of check that may be requested (something not yet addressed in the Ontario legislation). Other than Nova Scotia, no jurisdiction appears to place any limit on the type of check

that can be requested.⁵⁷ In other words, in most places, an applicant may ask for a “vulnerable sector” check, even though the position applied for is not related to the “vulnerable sector” of the work or volunteer force. This practice undoubtedly leads to further disclosure than is necessary. This is likely why the BC government has restricted who can apply for a vulnerable sector check under the CCRA, and why the federal government restricts who can access record suspensions through a “vulnerable sector” check under the *Criminal Records Act*.

4. Selected Resources

[78] The ULCC Working Group has relied upon selected resources from organizations that have already studied criminal record check practices in Canada. These resources provide a comprehensive analysis of criminal record checks in Canada, many helpful statistics, legal and social commentary, and other insights beyond the scope of the ULCC Working Group’s mandate:

- Canadian Civil Liberties Association, *False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada* (Toronto: Canadian Civil Liberties Association, May 2014)
- Canadian Civil Liberties Association, *Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks* (Toronto: Canadian Civil Liberties Association, May 2012)
- Canadian Civil Liberties Association and John Howard Society of Ontario, *On the Record: An Information Guide on Police Record Checks in Ontario for Employers, Human Resource Professionals and Volunteer Managers* (Toronto: Canadian Civil Liberties Association and John Howard Society of Ontario, 2014)
- John Howard Society of Ontario, *Help Wanted: Reducing Barriers for Ontario’s Youth with Police Records* (Toronto: John Howard Society of Ontario, 2014)
- Office of the Information & Privacy Commissioner for British Columbia, *Use of Police Information Checks in British Columbia*, [2014] B.C.I.P.C.D. No. 14 (April 15, 2014)

- Office of the Information & Privacy Commissioner for British Columbia, *Use of Employment-Related Criminal Record Checks: Government of British Columbia*, [2012] B.C.I.P.C.D. No. 16 (July 25, 2012)
- Information and Privacy Commissioner of Ontario, *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC* (April 14, 2014)
- Alberta Civil Liberties Research Centre, *The Use and Disclosure of Non-Conviction Records in Police Background Checks*, online: <http://www.aclrc.com/disclosure-of-non-conviction-records/>
- BC Ministry of Public Safety and Solicitor General, *British Columbia Guideline for Police Information Checks* (November 2016), online: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/police-information-checks/police_infochecks_guidelines_dec16.pdf
- Ontario Association of Chiefs of Police Law Enforcement and Records Managers Network, *Guideline for Police Record Checks* (June 2014), online: http://www.oacp.on.ca/Userfiles/Files/NewAndEvents/PublicResourceDocuments/GUIDELINES%20FOR%20POLICE%20RECORD%20CHECKS%20%20%20%20June%202014_FINAL.pdf
- Kings Volunteer Resource Centre, *Nova Scotia Criminal Record Check Research Report* (December 15, 2014)

Notes

¹ See Section 4 of this paper, “Selected Resources”.

² John Howard Society of Ontario, *Help Wanted: Reducing Barriers for Ontario’s Youth with Police Records* (Toronto: John Howard Society of Ontario, 2014) [*JHS 2014*] at 1.

³ Canadian Civil Liberties Association, *False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada* (Toronto: Canadian Civil Liberties Association, May 2014) [*CCLA 2014*] at 63

⁴ Canadian Civil Liberties Association, *Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks* (Toronto: Canadian Civil Liberties Association, May 2012) [*CCLA 2012*] at 10-11. See also: *JHS 2014* at 4-6.

⁵ *JHS 2014* at 13-16.

⁶ *CCLA 2012* at 3.

⁷ Office of the Information & Privacy Commissioner for British Columbia, *Use of Police Information Checks in British Columbia*, [2014] B.C.I.P.C.D. No. 14 (April 15, 2014) [*BCIPC 2014*]; Office of the Information & Privacy Commissioner for British Columbia, *Use of Employment-Related Criminal Record Checks: Government of British Columbia*, [2012] B.C.I.P.C.D. No. 16 (July 25, 2012) [*BCIPC 2012*]; Information and Privacy Commissioner of Ontario, *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC* (April 14, 2014).

⁸ Bill 113, *Police Record Checks Reform Act, 2015*, S.O. 2015 C.30; online: http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b113ra.pdf

⁹ CPIC is a computerized information system operated by the RCMP that provides all Canadian law enforcement agencies with information on crimes and individuals who interact with the police from across the country. This information can include both conviction and non-conviction information.

¹⁰ The *Criminal Records Act* is a federal piece of legislation that regulates certain conviction and non-conviction records. For example, it legislates retention periods for absolute and conditional discharge records, and also sets out a procedure for gaining access to an individual’s record suspension in limited circumstances.

¹¹ *BCIPC 2014* at 9.

¹² BC Ministry of Public Safety and Solicitor General, *British Columbia Guideline for Police Information Checks* (November 2016) [*BC Guidelines*] at 5.

¹³ *BC Guidelines* at 39-40.

¹⁴ *BC Guidelines* at 4.

¹⁵ See *BCIPC 2012* at 33-34 and *BCIPC 2014* at 40.

¹⁶ *BC Guidelines*.

¹⁷ *BC Guidelines* at 5-21, 30-35.

¹⁸ *BC Guidelines* at 6-7.

¹⁹ *BC Guidelines* at 5-21.

²⁰ *Criminal Record Review Act*, RSBC 1996, Chapter 86.

²¹ “Alternative measures”, also known as “diversion”, is a process outlined in s. 717 of the *Criminal Code*. Diversion is available for certain offences. It allows an accused, upon completion of extrajudicial activities under the supervision of a probation officer, to be “diverted” out of the criminal justice system.

Upon successful completion of the program, the charge is dismissed or stay of proceedings is entered.

²² *CCLA 2014* at 14-15.

²³ *CCLA 2014* at 14-15.

²⁴ ULCC Working Group, Alberta Questionnaire; Alberta Law Reform Institute, “ULCC Police Security Checks Information” Memo (April 21, 2017).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *CCLA 2014* at 17-18.

³⁰ ULCC Working Group, Alberta Questionnaire; Alberta Law Reform Institute, “ULCC Police Security Checks Information” Memo (April 21, 2017).

³¹ *Ibid.*

³² Calgary Police Service, *Standard Operating Procedure: Police Information Check Unit Mental Health Relevant Report Disclosure*; Calgary Police Service, *Consent to Search and Disclosure of Personal Information Form*.

³³ ULCC Working Group, Saskatoon and Regina Questionnaires.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Guidelines for the Administration of Criminal Occurrence Security Checks (revised August 20, 2009).

³⁷ ULCC Working Group, Saskatoon and Regina Disclosure Charts.

³⁸ ULCC Working Group, New Brunswick Questionnaire and Disclosure Chart.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ ULCC Working Group, PEI Questionnaire and Disclosure Charts.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Kings Volunteer Resource Centre, *Nova Scotia Criminal Record Check Research Report* (December 15, 2014) [*Nova Scotia Research Report*] at 27-28. Within these 13 agencies there are approximately 60 detachments that individually complete criminal record checks. It appears that up until recently, there was disparity in practices from detachment to detachment.

⁴⁹ ULCC Working Group, Nova Scotia Questionnaire Emails.

⁵⁰ *Ibid.*

⁵¹ *Nova Scotia Research Report* at 3-4.

⁵² ULCC Working Group, Nova Scotia Questionnaire Emails.

⁵³ *Nova Scotia Research Report* at 13.

⁵⁴ *Nova Scotia Research Report* at 5, 19, 34-37, 41-42

⁵⁵ *Nova Scotia Research Report* at 36-37.

⁵⁶ *CCLA 2014* at 18.

⁵⁷ In British Columbia, criminal record checks done under the CCRA include similar criteria, but these do not apply to the wider police record checks that are more common in the province.