

INFORMATION UPDATE

ROPER GREYELL
EMPLOYMENT + LABOUR LAWYERS

Issue no. 48, September 2010

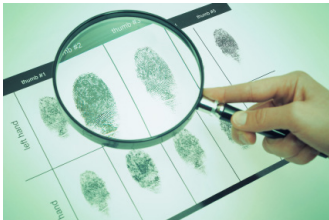
CRIMINAL RECORD CHECKS

The law regarding an employer's ability to require criminal reference checks continues to develop. In a lengthy decision published this May, Arbitrator Wayne Moore considered one municipality's criminal record check policy which required certain employees to submit to periodic criminal record checks due to the nature of their positions.

In this article, we summarize some of the key findings from this decision and identify important considerations for employers contemplating criminal record check policies for their existing employees.

Can Employees be required to Submit to Criminal Record Checks?

By Jennifer Roper



The focus of this article is on the introduction of mandatory criminal record checks for *existing employees*. The test for requiring criminal record checks of potential hires is different. If you would like more information on that topic, please contact Jennifer Roper or any other lawyer in our office.

Case Background

In *Vancouver (City) v. Vancouver Firefighters' Union, Local 18 (Police Records Checks Grievance)*, [\[2010\] B.C.C.A.A. No. 81](#), the employer gave its employees 12 months notice of a new policy that would oblige employees in certain designated positions to submit updated criminal record checks to the employer every five years.

The City designated positions for periodic criminal records checks based on the following criteria:

1. Positions that had an ongoing or significant relationship with vulnerable people, where the nature of the work placed them in a position of trust or care, or where the position required unsupervised access to vulnerable people in the ordinary course of employment;
2. Positions where the primary duties involved protecting the security of people and/or material assets; and
3. Positions responsible for regulatory and/or inspectional work involving by-law enforcement related to public safety and which generated major revenue collections for the City.

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What's New at RG

RG Lawyers Named Best in Canada

Roper Greyell congratulates **Duncan M. MacPhail, Thomas A. Roper, QC and Delayne M. Sartison** for being selected for the 2011 edition of **The Best Lawyers in Canada** in the specialty of Labour and Employment Law. Best Lawyers is one of the oldest and most respected peer-review publications in the legal profession. Selections are based on a peer-reviewed survey that has been developed and refined for more than 25 years. Inclusion in Best Lawyers is considered a singular honour.

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Legitimate Objective?

The employer's objective in implementing the periodic record checks was to maintain public trust, safety and the integrity of its operations. Arbitrator Moore found that assessing the ongoing suitability of employees for certain positions was a legitimate goal.

Importantly, the Arbitrator held that the employer did not have to demonstrate an "existing problem" before it could implement the record check policy. Instead, he found that "...it is not inherently unreasonable to enact a policy in anticipation of a problem so that the organization can be in a position to identify the problem and to address it. ... In my view, the Employer is entitled to act proactively, so long as it does so reasonably."

"The Employer is entitled to act proactively, so long as it does so reasonably."

Record Checks must be Relevant and Necessary

The Arbitrator applied the standard from BC's privacy legislation for public bodies (s. 26(c) of the *Freedom of Information and Protection of Privacy Act*). That standard requires that personal information collected by an employer in the form of criminal reference checks must "relate directly to" and be "necessary for" an operating program or activity of the municipality. This standard is onerous, but it stops short of requiring an employer to show that it would be *impossible* to carry out the activity without the personal information.

In relation to the City's policy, Arbitrator Moore employed a two stage analysis. He first considered whether the criteria the City used were relevant and necessary in order to properly designate a position as one requiring record checks. Second, he considered whether the information gathered in the record checks was directly related and necessary to the employer's objective.

Arbitrator Moore narrowed the scope of the three criteria used by the City. He captured only those positions where an employee's duties had the potential to cause a *significant risk* to the Employer. The Arbitrator ordered the criteria to be amended so that they captured only those positions where:

1. The employee had an ongoing or significant relationship with vulnerable people or where the position required totally unsupervised access to vulnerable people. Note that the arbitrator did not consider an employee who worked with (or was supervised by) another bargaining unit member to be "unsupervised";
2. The employee's primary duties involved protecting the security of people and/or material assets "in some significant way"; and/or
3. The employee exercised significant discretion and had independent power to make decisions such that they may be susceptible to corruption.

The Arbitrator left it to the parties to alter the policy language accordingly.

What's New at RG

New RG Associate

We are very pleased to welcome our newest associate, **Jennifer Roper**. Prior to joining RG, Jennifer practiced labour and employment law at a large firm in Vancouver, worked for the Minister of Justice in Ottawa as a policy advisor, and most recently worked in a labour relations management role at a large B.C. post-secondary institution. At Roper Greyell, we continue to build a legacy of dynamic leaders to serve your business needs, both today and tomorrow. Jennifer is a key part of this legacy.

Upcoming Events

On September 30, 2010, RG lawyers Gavin Marshall, Marino Sveinson, Jeevyn Dhaliwal and Michael Kilgallin will be presenting at the Vancouver chapter of the BC HRMA on the topic **Recruitment & Hiring: Legal Issues**. For more information please see

<http://www.bchrma.org>.

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Secondly, Arbitrator Moore considered each of the designated positions as against the revised criteria. He concluded that many of the positions originally designated by the employer did not meet the revised criteria. As a result, those employees would not be required to submit to periodic criminal record checks.

While it is relevant to consider whether there are less intrusive means to achieve the objective behind the demand for record checks, Arbitrator Moore determined that in this case at least, it appeared that the potential alternatives would be less effective in meeting the employer's objective. The decision leaves unanswered what alternatives may be "effective enough" to thwart a criminal record check policy.

Important Considerations for Employers

An employer may be required to compensate its employees for their time and all expenses incurred when it requires employees to obtain criminal record checks.

Although Arbitrator Moore's analysis is somewhat fact specific, general principles emerge that are of relevance to all employers.

First, the criteria used for designating positions that will be subject to criminal reference checks must be carefully considered and drafted.

If an employer is going to introduce a criminal record check policy, it must do so with great care and in accordance with the *KVP* principles. An employer must establish a bona fide objective, and ensure that criminal record checks are *relevant and necessary* both to that objective and to the operation of its program or activity.

Finally, subject to any specific language in a collective agreement, an employer may be required to compensate

employees (potentially at an overtime rate) for their time when they obtain a criminal reference check as well as any expenses the employee incurs in the process, including agency fees and parking.



Jenny is Roper Greyell's newest associate. She practices in all areas of labour, employment, human rights, and privacy law. Jenny is active in her community, volunteering as a Girl Guide Leader and a Special Olympics skating coach. In her volunteer capacity, she has been asked to submit police record checks to each organization and is pleased to advise that her record is clear.

Upcoming Webinars

Roper Greyell offers on-line webinars on a number of workplace law topics. We hope you can join us at one or more of our educational series sessions.

Workplace Privacy Update

This will be an update of the leading privacy cases from the past year from the Office of the Information and Privacy Commissioner, arbitrators, and courts. We will also discuss how these developments may impact you.

Webinar: October 19, 2010

Arbitration Update: The Year in Review

This will be an update on recent developments of significance in the labour arbitration context and will also involve a discussion of the impact of these developments on the unionized workplace.

Webinar: November 16, 2010

For more information please [click here](#).

QUESTIONS? SUGGESTIONS?

If you have questions about this month's *Information Update* or suggestions for topics you would like to see covered in future editions of the *Update*, please contact Jennifer Russell at jrussell@ropergreyell.com.

Non-Compliant Employers Will Be Made Public: New Immigration Regulations Effective April 1, 2011

Don't let your company's claim to fame be a posting on the Federal Government's website

By Jeevyn Dhaliwal



Despite the recent economic downturn, Canada's reliance on foreign workers continues and is expected to increase in the coming years. As a result of the Government's concern over the increasing prevalence of unfair treatment of such workers, amendments have been made to the sections of the Immigration and Refugee Protection Regulations that deal with temporary foreign workers.

To this point, no regulatory framework has existed within which to hold employers and their agents accountable for their actions in dealing with foreign workers. All of this will change on April 1, 2011 when the new laws take effect. Employers are therefore well advised to ensure they are aware of, and compliant with, their legal obligations when availing themselves of the benefits associated with the temporary foreign worker program.

Some of the more significant amendments include the following:

- Certain foreign workers will be limited to obtaining work permits for a maximum cumulative duration of four years. Thereafter, they will need to wait a period of four years without working in Canada before being permitted to apply for another work permit. Exceptions to this rule will be workers whose work permits are issued as intra-company transfers or pursuant to an International Agreement.
- An employer who has not complied with the terms of employment offered to the foreign worker, as approved by the Government, will be banned from accessing the temporary foreign worker program for a period of two years. This could mean failing to pay the worker the agreed salary or changing the job title or duties without a reasonable justification as set out in the Regulations.
- The Government will keep and publish a list of "banned" employers on its website.

With these changes, the Federal Government hopes to reduce the potential exploitation of foreign workers, implement stricter employer accountability mechanisms and emphasize that the employment of foreign workers is meant to be temporary.

As a result, we suggest that employers conduct an audit of their workforce to ensure they are compliant with respect to the terms and conditions of employment of their current foreign workers. Given the impending four year cap on work permits for such workers, employers may also want to identify which foreign workers are critical to their operations and consider making an application for permanent residency now.

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For further information as to how this development might affect your workplace, please contact [Jeevyn Dhaliwal](#) or any other lawyer at RG.



[Jeevyn](#) is an associate lawyer and RG's immigration expert. Jeevyn practices both employment and immigration law with a focus on facilitating the engagement of foreign workers in Canada and assisting employers in developing corporate immigration strategies.

In keeping with her day job of bringing people into Canada, she often spends her evenings singing O Canada as a guest anthem singer for many charitable and sporting organizations, including the Canucks!

Make us part of your training plan!

Did you know that RG provides employee training services? Ensuring your personnel have up to date knowledge of workplace law will help to manage your human resources proactively and correctly. It will also help to reduce your legal exposure and expenses

We provide training on a wide range of topics including:

- workplace human rights and the duty to accommodate
- performance management and discipline
- attendance management
- respectful workplace
- conducting effective investigations
- hiring and termination issues
- collective bargaining
- managing in a unionized environment

We will tailor our training to your business and can deliver it in large group, seminar or workshop format. Please contact [Gabrielle Scorer](#) or any one of our lawyers if you are interested in having us do some training at your organization.

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Roper Greyell LLP or any member of the Firm on the points of law discussed. Interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this bulletin.