

**APPLICATION AND INTERPRETATION OF SECTION 18.1 OF THE
CHARTER OF HUMAN RIGHTS AND FREEDOMS**

PLEASE NOTE:

This document is a translation of “*L’application et l’interprétation de l’article 18.1 de la Charte des droits et libertés de la personne*” adopted at the 625th meeting of the Commission, held February 26, 2016, under resolution COM-625-7.2.2.

Analysis and research:

M^e Stéphanie Fournier, legal counsel
Legal Affairs Department

TABLE OF CONTENTS

1	PROHIBITION OF DISCRIMINATION AT THE TIME OF HIRING	1
2	EXCEPTIONS.....	4
2.1	Aptitudes or qualifications required for an employment.....	4
2.2	Exceptions justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution	7
2.3	Equal access to employment programs	8
3	MEDICAL QUESTIONNAIRES AND PRE-EMPLOYMENT MEDICAL EXAMS.....	9
4	CRIMINAL RECORD	11
5	QUESTIONS AND PITFALLS TO AVOID	13
6	THE PARTICULAR CASE OF FALSE STATEMENTS AT THE TIME OF HIRING.....	16
7	PSYCHOLOGICAL OR PERSONALITY TESTS.....	18
8	THEORETICAL OR PRACTICAL EXAMS	19

Employment application forms and employment or promotion interviews are considered legitimate selection tools insofar as they enable employers to assess the qualifications of candidates with respect to the requirements of a job, and to select competent people on that basis.

During the selection process, the employer may collect an impressive amount of information the candidates. Obtaining such information is regulated by various laws. In addition to the *Charter of Human Rights and Freedoms* [hereinafter "the Charter"], it should be recalled that the *Act respecting the protection of personal information in the private sector*¹ and the *Act respecting access to documents held by public bodies and the protection of personal information*² set out a strict framework for personal information collected, held, used as well as released by the employer.³

This document focuses more specifically on the protection against discrimination at the time of hiring.

1 PROHIBITION OF DISCRIMINATION AT THE TIME OF HIRING

The hiring process is a prerequisite that leads to the job market. Employers enjoy broad discretion in the selection of candidates seeking a job. However, this discretion must be used in accordance with the rights and freedoms guaranteed by the Charter.

Sections 10 and 16 of the Charter specifically prohibit employers from discriminating during the hiring process. Discrimination occurs when an employer distinguishes or excludes a candidate based on "*race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap*" (s.10 of the Charter).

¹ R.S.Q. c. P-39.1.

² R.S.Q. c. A-2.1.

³ See sections 5 and 9 of the *Act Respecting Protection of Personal Information in the Private Sector*.

Discrimination also takes place when an employer excludes a candidate based on his or her criminal record, if the latter is in no way connected with the employment or if the person has obtained a pardon (s. 18.2 of the Charter).

In addition, section 18.1 of the Charter also governs the conduct of the employer during the selection of personnel. In effect, this provision prohibits, in an employment application form or employment interview, the collection of information regarding any ground mentioned in section 10 of the Charter. The purpose of this provision is to stem discrimination at the source.

“18.1 No one may, in an employment application form or employment interview, require a person to give information regarding any ground mentioned in section 10 unless the information is useful for the application of section 20 or the implementation of an affirmative action program in existence at the time of the application.”

Courts have given a broad interpretation to the protection provided under section 18.1. It extends in particular to:

- Employment application forms;
- Employment interviews;
- Written tests;
- Practical tests;
- Psychometric or personality tests;
- Pre-employment medical examinations, including questionnaires concerning applicant's health.⁴

An employer, employment bureau or any person involved in the selection of personnel must therefore refrain from asking direct or indirect questions with a view to obtaining information pertaining to prohibited grounds of discrimination in section 10 of the Charter. The employer is held responsible for breaches to the Charter committed by a third party (e.g. a medical clinic) to whom it delegates part of its selection process.

⁴ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#); *Commission des droits de la personne et des droits de la jeunesse v. Bathium Canada inc.*, 2015 QCTDP 13 (CanLII), par. 38.

PRINCIPLES EXPRESSED BY SECTION 18.1 OF THE CHARTER

- The sole fact of asking questions pertaining to a prohibited ground listed in section 10 of the Charter is sufficient to entail a violation of the right protected under section 18.1 of the Charter.⁵ The purpose of section 18.1 is to stem at the source a violation of the right to equality in employment.⁶
- It is not necessary that employment be denied for discrimination to occur. The mere presence of a discriminatory question before hiring is sufficient to prove that the right protected by section 18.1 of the Charter has been infringed.
- The employer's intention, when the question is asked, is irrelevant. Asking questions pertaining to prohibited grounds of discrimination out of curiosity, to break the ice or to lighten the interview process does not defend or justify violating the right protected under section 18.1 of the Charter.⁷
- The fact that a candidate answers a discriminatory question cannot automatically be interpreted as a waiver of his or her protected right under section 18.1 of the Charter. However, persons who, voluntarily and without being invited by the employer, disclose information protected under section 18.1 cannot subsequently allege violation of their protected right to equality under this provision.⁸
- An employer can justify a question that appears on the face of it discriminatory if he or she can demonstrate that it refers to qualifications or aptitudes required for the job (s. 20 of the

⁵ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#).

⁶ *Commission des droits de la personne et des droits de la jeunesse v. Systématix Technologies de l'information*, [2011] R.J.Q. 491, par. 111. *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#) par. 63-64.

⁷ *Commission des droits de la personne et des droits de la jeunesse v. Systématix Technologies de l'information*, [2011] R.J.Q. 491, par. 114.

⁸ *Systématix Technologies de l'information*, supra at note 7, par. 103: "In order to determine whether section 18.1 has been infringed, one should not be restricted to a summary analysis in order to determine **who spoke first of religion**. Rather there must be a realistic and objective evaluation of the complete interaction between Mrs. Laverdure, who conducted the interview, and Mr. Atir, who was interviewed, all the while without losing sight of the power relationship between the parties." (In bold in the judgment, our translation.)

Charter) or that it is relevant to the implementation of an equal access to employment program already in place.

“The purpose of section 18.1 is therefore to protect and to promote at source the right to equality without discrimination in hiring and in employment. Whether or not the employer has the intention of using the information collected, the sole fact of asking discriminatory questions is a violation of section 18.1 and can justify awarding damages.”⁹

However, the answers to some questions needed to assess a candidate’s qualifications may sometimes, or incidentally, provide indications on grounds for discrimination. A person’s given name usually indicates his or her sex. The name of an educational institution or the address of a previous employer may occasionally indicate the person’s national origin, but section 18.1 does not prohibit such questions.

However, the Charter prohibits the use of such indications to exclude a candidate based on these criteria.

The application of section 18.1 encourages a rigorous approach in the selection process, by leading the employer to focus on candidates’ professional qualifications with respect to the requirements of a job rather than on stereotypic generalizations relative to characteristics.

2 EXCEPTIONS

Section 20 of the Charter provides for some exceptions to the rule of non-discrimination:

“20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.”

2.1 Aptitudes or qualifications required for an employment

The employer may ask questions otherwise prohibited if he demonstrates that the information is related to aptitudes or qualifications required for an employment within the meaning of section

⁹ *Commission des droits de la personne et des droits de la jeunesse (Martin) v. Transport en commun La Québécoise inc.*, 2002 CanLII 9226, par. 29.

20 of the Charter. The employer is therefore justified in assessing the candidate's aptitudes or qualifications to ensure his ability to adequately and safely perform the tasks associated with the employment.

However, it is up to the employer to establish the standards that must be met by the candidate prior to the selection process. The Court of Appeal has found that “the right of an employer to obtain information from a candidate must be adjusted on the basis of the employment being sought and the tasks to be performed.”¹⁰ In other words, before even establishing the qualifications required of a candidate, the employer must set out the skills and essential occupational requirements that make it minimally possible to perform the work safely and efficiently.¹¹ The employer does not have the right to establish standards that are higher than those that are necessary to that end.¹²

By simply examining on these essential requirements, employers in some cases will be able to rephrase the question and thus avoid the pitfalls of discriminatory questions. The employer's attention will then be focused on the applicant's qualifications rather than on his or her personal characteristics.

For example, if the job requires a lot of travelling, it is preferable that the questions be limited to asking about the applicants' availability to travel in the performance of their duties rather than asking questions about family obligations (i.e. do you have dependent children?). Although the employer's objective is legitimate in both scenarios (that is, to know applicant's availability to travel), the language of the second question appears at first sight, discriminatory and contrary to section 18.1 of the Charter.

¹⁰ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867 (CanLII), par. 69.

¹¹ *Commission des droits de la personne et des droits de la jeunesse v. Gaz Métropolitain*, 2008 QCTDP 24 (CanLII) par. 72 and following. Sustained on appeal: *Gaz métropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 (CanLII).

¹² *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 RCS 868, 1999 CanLII 646 (CSC), par. 21.

By establishing a standard that is objective, well-defined, circumscribed and related to the requirements for the job, the employer will prepare the selection process, and avoid assessing candidates based on perceptions, prejudices or stereotypes. "The selection instruments must be developed in accordance with the requirements for the job, which themselves must stem directly from the essential duties of the position."¹³

If a discriminatory question is asked, the employer will have to demonstrate:

- **The existence of an aptitude or qualification required for the employment.**

The question must enable the assessment of the aptitude or qualification. The employer will have to establish that the aptitude or qualification corresponds to the essential requirements of the job. In short, the employer should be able to demonstrate:

- That there is a critical link between the duties deemed essential for the job and the job itself;¹⁴
- That the qualities or aptitudes sought in the applicant have a connection or correlation with the description of duties essential to the job.

Based on these requirements, it will be possible to develop appropriate selection tools to assess the various applicants without discrimination.¹⁵ The wording of the questions asked by the employer to assess the applicant's qualifications or aptitudes will be of paramount importance, as shown in the table below. Certain discriminatory questions could be worded differently and focus the employer's attention on the qualifications rather than on the personal characteristics of the applicant.

¹³ *Commission des droits de la personne et des droits de la jeunesse v. Gaz Métropolitain*, 2008 QCTDP 24 (CanLII) par. 429. Sustained on appeal: *Gaz métropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 (CanLII).

¹⁴ *Gaz Métropolitain*, supra at note 13, par. 131 and following.

¹⁵ *Commission des droits de la personne et des droits de la jeunesse v. Commission scolaire des Hauts-Bois-de-L'Outaouais*, 2010 QCTDP 4, par. 160 and 172 and following. In this matter, the Tribunal analyzed all the school board's processes governing the hiring and contracting decisions. The Tribunal questioned the relevance and objective application of the selection criteria used. It concluded that not only was the scoring process impressionistic, but it also added that it was applied without clear limits and without uniformity, reinforcing the likelihood of a discriminatory decision.

- **That the selection criterion used allows for an individualized assessment of the applicants.**

The hiring standard used by the employer must be inclusive and incorporate accommodation measures (a flexible standard reflecting the differences between each applicant should be favoured over a rigid standard completed by quick-fix accommodation measures).

- **That the employer cannot, without undue hardship, provide accommodation to applicants who do not have the aptitudes or qualifications required for the job.**

If it is possible for the employer to accommodate an applicant so that he or she may perform the work properly, then the question is not a justified occupational requirement within the meaning of section 20 of the Charter. The employer will not have established the existence of a defense against a charge of discrimination.

"The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job."¹⁶

2.2 Exceptions justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution

The second part of section 20 of the Charter allows certain non-profit institutions to create distinctions, exclusions or to indicate discriminatory preferences at the hiring stage. In order to benefit from this exception, the employer must demonstrate:

- 1) That it is a non-profit institution;
- 2) That the institution has a charitable, philanthropic, religious, political or educational nature which justifies a discriminatory hiring policy.

¹⁶ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, par. 36.

Being a non-profit institution is not sufficient to be entitled to the protection granted under the second part of section 20 of the Charter. It must also demonstrate that the institution's primary function or its principal objectives are related to the promotion of the interests of a group identified or characterized by one of the grounds of section 10 of the Charter.

Based on this, a political party might prefer hiring members who have joined who belonged to the party to fill certain positions in its offices. A private Catholic school might invoke the second part of section 20 to justify a preference given to Catholics in its hiring policy for teachers. Such situations could justify asking questions about the applicant's political or religious beliefs. In all such cases, the questions will at first be considered discriminatory and it will be up to the employer to show that he or she qualifies for the exception provided for by the second part of section 20 of the Charter.¹⁷ Furthermore, it should be clarified that not all jobs within a non-profit institution or organization will necessarily benefit from this protection.

2.3 Equal access to employment programs

When a firm or organization implements an equal access to employment program to remedy the situation of groups discriminated against in employment (under s. 86 and following of the Charter), it may ask candidates for information on their inclusion in the groups covered by the program (women, visible minorities, ethnic minorities, Aboriginals, disabled people).

These questions must be placed in a separate section of the employment application form in which it is clearly specified that the information is required for the purposes of an equal access to employment program (women, ethnic minorities, visible minorities, Aboriginals, disabled people) and that it will be treated confidentially.

This is only possible, however, when concrete steps have been taken to implement an equal access to employment program. Presently, employers wishing to ascertain or update the composition of their workforce for analysis and program development purposes may ask questions about the membership of their personnel in the target groups.

¹⁷ *Brossard v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, par. 117 and 118.

3 MEDICAL QUESTIONNAIRES AND PRE-EMPLOYMENT MEDICAL EXAMS

The search of information regarding health related problems of people seeking employment is covered by the ground of disability (handicap) as listed in section 10 of the Charter.¹⁸

Thus, a job applicant who demonstrates that he or she has filled out a pre-employment medical questionnaires or answered questions regarding his or her health establishes a *prima facie* case of discrimination under section 18.1 of the Charter.¹⁹

It is then up to the employer to justify how the medical information requested is related to aptitudes or qualifications required for the job shall be allowed. Thus, the employer must demonstrate that the information is rationally linked to the performance of the work in question and are reasonably necessary to meet this legitimate goal linked to the work.²⁰

Requiring an employee to undergo a medical test can also infringe on his or her right to integrity (section 1 of the Charter and 10 C. C. Q). It also constitutes an infringement of the right to privacy recognized in sections 5 of the Charter and 35 C. C. Q.²¹

Guidelines

Concerning the medical questionnaire, the employer should comply with the following guidelines:

- Questions must be asked in relation to the aptitudes or qualifications required for the job. These aptitudes or qualifications must be established in advance and the applicant should be able to know to which aptitudes or qualifications each question refers. An employer who uses the same questionnaire for every type of job will have difficulty justifying such a practice in light of section 20 of the Charter;

¹⁸ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#), par. 64.

¹⁹ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#), par. 65.

²⁰ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#), par. 65.

²¹ *Commission des droits de la personne et des droits de la jeunesse (Arseneault) v. Institut Demers inc.*, 1999 CanLII 51 (QC TDP), par. 57 to 59.

- The assessed aptitudes or qualifications must be rationally connected with the essential duties for the job. Accordingly, the employer must ensure that each job offered by its organization comes with a description of the duties essential for the safe and efficient performance of the job. The medical questionnaire should be adapted to each type of job;
- The qualifications or mental and physical aptitudes required for the job and assessed through the medical questionnaire must be based on serious objective scientific and medical data rather than on perceptions or impressions;
- Medical questionnaires must provide a fair assessment of the abilities of each applicant. The questionnaire should not be established on the basis of higher or more stringent standards or criteria than those required for the safe and efficient performance of the job;

In other words, the requirements indicated in the questionnaire should not result in the exclusion of applicants able to perform the job where the employer can agree to accommodation measures that would allow the employee to perform the work efficiently.

- Open-ended questions, or overly-broad questions that oblige the applicant to reveal medical information that is not required or not necessary to perform the work, must be avoided;
- Questions concerning possible requests for reasonable accommodation should not be included in the pre-employment medical questionnaire. Preventive accommodation measures that do not put in question the employee's ability to perform the work should only be discussed after the hiring.

*"[T]he goal of accommodation is to ensure that an employee who is able to work can do so."*²²

²² *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 CSC 43, par. 14.

- Pre-employment medical questionnaires should not be used to hire the perfectly healthy applicant representing the least risk of absenteeism;²³
- Pre-employment medical questionnaires should not be used to determine a candidate's health status for the purposes of assessing eligibility for an insurance plan. Employers who insure their own employees should make a distinction between an employee's ability to perform the essential duties of the job and eligibility for an insurance plan;
- Pre-employment questionnaire should not be used by the employer as an excuse to establish a complete medical file on the applicant, without any link to the job, in order to use the information in the event of a work-related injury claim. Such an approach will necessarily exceed the scope of section 18.1 of the Charter and will also infringe on the applicant's right to privacy.²⁴

4 CRIMINAL RECORD

A criminal record is not considered an unlawful ground of discrimination under section 10 of the Charter and therefore is not covered by section 18.1 of the Charter. Section 18.2 of the Charter which pertains to criminal record is covered in a separate legal opinion.

IN SUMMARY

- Under section 18.1 of the Charter, the simple fact of **asking a discriminatory question** is an infringement on a right recognized by the Charter, even if it is established that the

²³ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#), par. 69.

²⁴ COMMISSION DES DROITS DE LA PERSONNE, *L'utilisation des informations obtenues lors d'un examen médical pré-embauche pour contester une réclamation pour lésion professionnelle et le droit au respect de sa vie privée*. (Using information obtained in a pre-hiring medical examination to challenge a work-related injury and the right to privacy), Daniel Carpentier (Cat. 2.115.9.3) November 1990 available in French only at: http://www.cdpcj.qc.ca/Publications/examen_embauche.pdf

question has no relation with the decision not to hire.

- The **intention** to discriminate is not a relevant criterion. It is not the intent of the person who asked the prohibited question that must be assessed, but the effect of the discriminatory question on the applicant. Accordingly, even questions asked in good faith, with no intention of discriminating, are actionable under section 18.1 of the Charter.
- Some questions considered unlawful **prior to** hiring can be legitimately and legally asked by the employer **after** hiring.
- Some discriminatory questions will be justified if the employer demonstrates that they are necessary to assess **the aptitudes or qualifications required for the job**. The burden of proof then lies with the employer.
- For this purpose, the employer should always have a list of essential duties related to a job.

5 QUESTIONS AND PITFALLS TO AVOID

Subject	Questions consistent with the Charter	Questions to avoid*
Race / colour	None.	Any question related to race or colour, including eye, skin or hair colour. Any request for a photograph to accompany an employment application, or for a photograph to be submitted before an aptitude test or interview.
	Comment: A photograph may be requested after hiring for identification purposes.	
Sex	None, except where sex is an attribute objectively required for the job.	Mr., Ms., Miss or Mrs. Ability to work in a male-dominated environment. Different forms or different codes for men and women.
	Comment: A person's given name usually indicates his or her sex, but section 18.1 does not prohibit questions in this respect.	
Civil Status	Would you be available to travel as part of your work? Would you be available to work evenings and/or weekends?	Miss or Mrs. Maiden name. Married, separated, divorced, etc. Name and occupation of spouse and his or her eventual agreement in case of a transfer involving a move. Number of dependents. Arrangements for the care of dependents. Family ties with a person already employed by the firm or organization, without further explanation.
	Comments: It is common practice to address a woman as "Ms." or "Mrs." regardless of her civil status. If the employer has an anti-nepotism policy, this could be mentioned in the application form or during the interview, and applicants may be asked at that point about any family ties that may place them in a situation of conflict of interest. In addition, some questions concerning civil status, to be avoided in the application form or during the interview, may be asked after hiring, for among other reasons, income tax or social benefits purposes. After hiring, employees may also be asked to state their family ties with the people to be notified in case of emergency.	

* Exceptions to these guidelines may arise where section 20 of the Chapter applies (see points 2.1 and 2.2). In such a case, the burden of proof lies with the employer.

Subject	Questions consistent with the Charter	Questions to avoid*
Sexual orientation	None.	
Age	<p>None, except where a minimum age is set by legislation for a particular job, e.g. in licensed premises.</p> <p>In such cases, rather than asking the candidate to state his or her age, it is preferable to ask the person: "Are you of legal age to work?"</p> <p>Comments: There is no legal working age in Québec, except for certain regulated occupations. However, students who are subject to compulsory school attendance may not be employed during school hours. In this case, a question concerning the candidate's age may be asked at the time of the interview.</p> <p>Proof of age may be required after hiring.</p>	<p>Date of birth.</p> <p>Health insurance number. Driver's license number.</p> <p>A request to enclose a birth certificate with the application form.</p>
Ethnic or national origin	<p>Are you entitled to work in Canada?</p> <p>Comments: Anyone having Canadian citizenship, landed immigrant status or a work permit is entitled to work in Canada.</p> <p>The Social Insurance Number must not be requested until after hiring because in some cases it may provide information on national origin</p>	<p>Place of birth.</p> <p>Place of birth of spouse or parents. Previous addresses.</p> <p>Experience in Canada or Québec, unless a specific type of experience is objectively required for the job, in which case the nature of the experience must be specified.</p> <p>Citizenship, landed immigrant status or possession of a work permit.</p> <p>Social Insurance Number.</p>
Pregnancy	None.	<p>Are you pregnant?</p> <p>Do you intend to have children?</p> <p>Have you ever had pregnancy-related health problems?</p> <p>How long do you think you will remain on the employment market?</p>

* Exceptions to these guidelines may arise where section 20 of the Chapter applies (see points 2.1 and 2.2). In such a case, the burden of proof lies with the employer.

Subject	Questions consistent with the Charter	Questions to avoid*
Language	Applicants may be asked if they can understand, speak, read or write the language or languages required for the job.	Mother tongue. Place where languages were learned.
	Comments: The employer may not require knowledge of any language other than that or those needed for the job. An applicant's knowledge of, or fluency in a language may be used to assess the candidacy only where knowledge or fluency is required for the job.	
Religion	None.	Adherence to a religion or religious practices. Availability to work on a specific religious holiday. References from clergy or religious leaders.
	Comments: If a person's religious convictions or practices make it difficult for him or her to comply with a specific work schedule, the employer must try to adapt the schedule to suit the person, unless doing so would cause undue hardship. However, the question of reasonable accommodation should not be raised during the pre-hiring phase.	
Political convictions	None.	Political affiliation or activities.
Social condition	Could you have access to a car if needed for the job?	Do you have a car? Are you a landlord or a tenant? A credit check to assess the candidate's creditworthiness (see comment below).
	Comments: Some people do not own a car but could buy or lease one if they had a job. Being a renter or a homeowner often creates a distinctive perception of a person's social condition. The relation between a candidate's credit record and an eventual job appears debatable, even challengeable. Should the question arise before the Commission, it will be examined in terms of discrimination based on social condition.	

* Exceptions to these guidelines may arise where section 20 of the Chapter applies (see points 2.1 and 2.2). In such a case, the burden of proof lies with the employer.

Subject	Questions consistent with the Charter	Questions to avoid*
<p>Handicap / Disability</p>	<p>None.</p>	<p>Medical forms in the form of a complete medical examination.</p> <p>Have you ever been hospitalized, including for mental health issues?</p> <p>Have you ever filed a claim with the CNESST? Have you ever suffered an occupational accident with loss of time?</p> <p>Do you take any medication, or follow any treatment? If so, please specify.</p> <p>Have you ever been denied an insurance policy for health problems?</p> <p>Do you think you are presently pregnant?</p> <p>How much do you weigh? Height?</p> <p>(Note: This is not an exhaustive list)</p>
	<p>Comments:</p> <ul style="list-style-type: none"> ▪ The employer may not seek information on a person's health unless it is established that such information refers to aptitudes or qualifications required for the job (s. 20 of the Charter). ▪ Protection against discrimination based on disability covers actual functional limitations as well as perceived limitations or those based on stereotypes that have nothing to do with the actual ability of an individual to work. ▪ Questions must be worded so as to ensure that the applicant is only required to disclose information relevant to assessing the aptitudes or qualifications required for the job. ▪ Employers must adapt their selection methods to suit any disabled person who requests it. For example, an applicant with visual limitations can ask the employer to accommodate him or her by allowing him or her to take the written examination under conditions adapted to his or her visual limitations. 	

* *Exceptions to these guidelines may arise where section 20 of the Chapter applies (see points 2.1 and 2.2). In such a case, the burden of proof lies with the employer.*

6 THE PARTICULAR CASE OF FALSE STATEMENTS AT THE TIME OF HIRING

Discriminatory questions during the selection process and, in particular, pre-employment medical questionnaires and examinations, place candidates in a bind: either they waive their right to equality recognized and protected under section 18.1 of the Charter by revealing information on their health not directly related to aptitudes or qualifications required for the job, or they choose not to disclose such information because it is totally unrelated to the aptitudes or qualifications that ensure their ability to adequately and safely perform their job, thereby running the risk of being dismissed if an employer later discovers the existence of these false statements. Medical questionnaires generally include a cautionary note informing the applicant of the legal consequences of a false statement or omission on his or her part. The cautionary note may read something like this:

“IMPORTANT — PLEASE READ BEFORE COMPLETING THE QUESTIONNAIRE

This pre-employment medical questionnaire is designed to ensure that your health is compatible both with the requirements of the job you are applying for and a normal job performance. Hiring procedures can only be completed if you have properly answered all the questions on the form.

Remember that any false statement or omission on your part may lead to disciplinary action, including termination of your individual employment contract (dismissal) by the employer.”

It is important to note that the Court of Appeal found that a false statement cannot play a decisive role in determining the employment relationship if the statement relates to an element the employer is prohibited from considering under section 18.1 of the Charter.²⁵ Therefore, an employer may not dismiss an employee who has made a false statement about a matter that should not be raised during the pre-hiring phase, under the Charter.

²⁵ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur du Québec (SIIACQ) v. Centre hospitalier régional de Trois-Rivières*, [2012 QCCA 1867 \(CanLII\)](#), par. 79.

IN SUMMARY

Under section 18.1 of the Charter, an employer cannot blame a candidate for having made a false statement when answering a discriminatory question that may not be asked during the pre-hiring phase.

The situation is different in the event that an applicant lies to an employer or knowingly fails to provide the requested information relating to their criminal record. Section 18.2 does not protect against an employer asking about an applicant's criminal record. In other words, an employer always has the right to know whether or not an applicant has a criminal record.

Therefore, when asked about his or her criminal record, an individual is required to fully disclose any criminal record, even if a pardon has since been granted, unless the employer asks the question in a way which specifically exempts the applicant from having to give this information.²⁶

Failure to disclose a conviction for a penal or criminal offence may be considered by the employer as a false statement, depending on circumstances.²⁷

7 PSYCHOLOGICAL OR PERSONALITY TESTS²⁸

Like medical examinations, psychological tests may infringe on the candidate's right to integrity (s.1 of the Charter and 10 of the C.C.Q.) and violate their right to respect for his private life (s. 5 of the Charter and 35 of the C.C.Q.).

Indeed, these tests often compel applicants to answer personal questions and, incidentally, to reveal aspects of their private life.

²⁶ For example: "Do you have a criminal record for which you have not been granted a pardon"?

²⁷ *Commission scolaire de Montréal v. Alliance des professeures et professeurs de Montréal*, 2008 QCCA 995 (CanLII).

²⁸ For a more detailed analysis, please refer to the following document: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Les tests psychologiques et psychométriques en emploi (Psychological and psychometric tests in employment)*, Daniel Carpentier, (Cat. 2.115.9.6), June 1998 available in French only at : <http://www.cdpedj.qc.ca/publications/tests.pdf>

An employer could not routinely impose such a test on all applicants for all types of jobs. The use of these tests must target certain types of jobs. For example, these tests would be frequently used for jobs which may involve a high level of stress in order to assess the abilities of applicants to perform their duties, e.g. firefighters, police officers, or air controllers.

The administration of a psychological test could be disputed if, among other things: The applicant is asked discriminatory questions during the test:

- The applicant is asked discriminatory questions during the test;
- An applicant, who accepts to submit to such a test, is not clearly informed of the test's intent or of what it is trying to measure;
- The test has the effect of disproportionately excluding candidates based on prohibited grounds of discrimination.

8 THEORETICAL OR PRACTICAL EXAMS

Employers must pay particular attention to the selection tools and instruments they use during a selection test. They must ensure that their theoretical or practical exams are exempt from discriminatory biases and allow candidates to be assessed fairly.

Ideally, practical or theoretical tests imposed during a selection examination should be subjected to criterion-related validation.²⁹ The validation process confirms the relevance of the exam; it also establishes a correlation between the skills and knowledge assessed during the exam and the essential duties of the position.

Tests used by the employer must not cause a disproportionate exclusion of candidates based on prohibited grounds of discrimination. To avoid such exclusion, employers should always provide a description of duties and essential requirements of the position, and ensure the validation of their selection tools to prevent any discriminatory biases.

²⁹ Regarding the importance and relevance of subjecting selection tools to criterion-related validation, see *Commission des droits de la personne et des droits de la jeunesse v. Gaz Métropolitain*, 2008 QCTDP 24 (CanLII). Sustained on appeal: *Gaz métropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 (CanLII).

IN SUMMARY

- When developing selection tools or tests, an employer must ensure that they are exempt of any discriminatory biases.
- Thus, the employer must provide a description of the duties essential for the safe and efficient performance of the job.
- From this list of essential duties, the employer can establish the necessary requirements (qualifications or aptitudes) for the job.
- Indeed, prerequisites indicated in the job posting, and those assessed and measured throughout the selection process, must be justified by the need to have those qualifications in order to perform the duties essential of the job.³⁰

³⁰ *Commission des droits de la personne et des droits de la jeunesse v. Gaz Métropolitain*, 2008 QCTDP 24 (CanLII), par. 429. Sustained on appeal: *Gaz métropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 (CanLII).