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POLICE VERIFICATION OF PRIOR OFFENCES COMMITTED BY PEOPLE REQUIRED TO WORK WITH VULNERABLE CLIENTS

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INTRODUCTION

The Commission has received an application for an opinion on the legality of a screening process for candidates required to work on a paid or voluntary basis with vulnerable clients. The application asks the Commission to issue an opinion on "*the considerable latitude allowed to police authorities*"[1] in reviewing the criminal records of candidates wishing to work for the employer in question, a large school board. In this case, the screening process is characterized by the following elements :

1. Candidates provide written authorization for the local police department to "*verify their criminal records, i.e. any convictions for criminal or penal offences, as well as any form of negative behaviour reasonably suggesting that they present a potential risk to the physical or moral safety of the people with whom they will be working*" (our translation).

2. The employer undertakes not to accept applications from people in respect of whom the police department issues a negative recommendation.

Statement of the problem

The screening procedure described above must be viewed in the context of the responsibilities incumbent upon the organizations serving clients classified as "vulnerable" due to age or handicap, for instance.

School boards, day care centres, residences for elderly people and volunteer leisure associations have a special responsibility for the safety of such clients. These organizations, as well as many

[1] Letter from the lawyers of the applicant union, October 3, 1997.

others serving vulnerable clients, must ensure that their personnel are not likely to perpetrate acts of abuse, aggression or exploitation. As the Commission emphasized in a recent opinion on the prevention of sexual assault against children[2], verification of candidates' criminal records is one of the measures that can be implemented for this purpose.

Some organizations are now asking candidates to carry out this process individually, by obtaining a certificate of negative legal search, sometimes called a "certificate of good behaviour". This procedure engenders a number of formal and practical difficulties. First, some police departments apparently refuse to issue such certificates as soon as an offence is recorded in their files, even if there is no relation between the offence committed and the function to be exercised. The candidate is therefore unable to present a certificate to the recruiting organization. Furthermore, since many people convicted of offences do not request pardons, as they are entitled to do under the *Criminal Records Act*[3] (probably because they are unaware of the rules), their files are not classified separately, and they do not benefit from the confidentiality guaranteed by the Act. Some police departments also charge a fee of around $35 for issuing certificates. Finally, many people feel the entire process may be intimidating for candidates, even those who have nothing to feel guilty about.

Aware of these difficulties, a number of police forces have adopted memoranda of understanding, under which their verifications are limited to prior offences related to the candidate's future duties, based on the information contained in the police records. They then issue a positive or negative recommendation to the applicant organization. Some of the memoranda require a commitment from the organization to the effect that it will abide by the recommendation, while others simply state whether the results of the verification were positive or negative, leaving it up to the

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2 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *La prévention de la récidive des agressions sexuelles commises contre les enfants*, Research and Planning Department (Claire Bernard and Alberte Ledoyen), resolution COM-436-5.1.1, December 18, 1998, pp. 97-98.

3 R.S.C. (1985), c. C-47.

organization to decide whether or not to recruit the candidate. The memoranda were first developed for volunteer organizations, before being copied by other employers, as illustrated by the request leading to this opinion.

A criminal record verification is not limited to information about previous convictions or pending cases[4]. It also covers information concerning complaints, investigations and arrests, even when they do not lead to a formal charge. Indeed, some memoranda refer more broadly to the candidate's behaviour or presumed "misconduct".

The verifications required by existing memoranda cover the information contained in police records, including records stored in computer databases, such as the criminal and penal minute book, the Centre de renseignements policiers du Québec and the Canadian Police Information Centre. This latter database apparently comprises approximately two and a half million records[5], containing the names of one Canadian in every ten[6]. This is clearly far more than the number of people convicted. Indeed, police records not only provide information on convictions, but they also contain data of an operational nature, intended in principle to be used by the police[7]. Moreover, although considerable effort is made to ensure that police records are accurate, they may still contain incorrect information[8]. Hence, it is easy to understand why the screening process is a source of concern not only to the people who must submit to it, but also to recruiting organizations and police forces.

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4 See, for example, the memorandum of understanding adopted by the City of Cap-de-la-Madeleine in February 1998, under the Sexual Assault Prevention Policy for sports organizations.

5 Canadian Privacy Commissioner, *Study of the Criminal History Records as Maintained by the RCMP*, Ottawa, 1996.

6 Kathryn SCHELLENBERG, "Police Information Systems, Information Practices and Individual Privacy", (1997) 23 *Canadian Public Policy/Analyses de politiques* 23, 27.

7 *Police Act*, R.S.Q., c. P-13, s. 39.1 : "The Police Force shall maintain a central information service to facilitate the detection and solving of crimes and this service shall be available to other police forces."

8 K. SCHELLENBERG, *loc. cit.*, note 6, 31.

The goal of this opinion

The legislator has given the Commission the mandate of promoting the principles contained in the *Charter of Human Rights and Freedoms*[9]. These principles include the protection of elderly and handicapped people against exploitation[10], the protection of children[11], the prohibition of discrimination based on the existence of a criminal record[12], and respect for fundamental rights[13], including every individual's right to integrity. Within this framework, the Commission wishes to clarify the object and limits of the verification of candidates' criminal records, in order to provide the parties in question – organizations serving vulnerable clients, police forces and union organizations – with information on the scope of the Charter in this area.

9 R.S.Q., c. C-12 [hereinafter 'the Charter'].

10 S. 48 of the Charter.

11 *Id.*, ss. 39 and 57.

12 *Id.*, s. 18.2.

13 *Id.*, ss. 1 to 9.

1 PROHIBITION OF DISCRIMINATION BASED ON THE EXISTENCE OF A CRIMINAL RECORD

Section 18.2 of the Charter specifically prohibits discrimination based on the existence of a criminal record. It reads as follows :

> "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence."

Originally[14], the Charter did not contain provisions specifically prohibiting discrimination on this ground. Section 18.2 was added in an attempt to overcome this deficiency[15]. The goals of the new provision have been summarized as follows :

- to focus employer attention on candidates' qualities and skills;
- to eliminate the prejudices and stereotypes that undermine former offenders' chances of obtaining employment;
- to promote the pardon, resocialization, reassertion of the value and fulfilment of people who have fallen foul of the law;
- to reduce the risks of repeat offences;
- to allow criminal offenders to make a positive contribution to society[16].

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14 See : S.Q. 1975, c. 6.

15 This deficiency also arose from the courts' refusal to accept that discrimination based on the existence of a criminal record might fall under the heading of 'social condition' : *C.D.P.Q.* v. *Compagnie Price Ltée*, J.E. 81-866 (C.S.); *C.D.P.Q.* v. *Ville de Beauport*, [1981] C.P. 292; *Vermette* v. *Union des employés de commerce, local 298,* [1982] T.T. 404; *C.D.P.Q.* v. *Ville de Montréal*, (1983) 4 C.H.R.R. D/1444 (C.S.).

16 Christian BRUNELLE, "La Charte québécoise et les sanctions de l'employeur contre les auteurs d'actes criminels œuvrant en milieu éducatif", (1995) 29 *R.J.T.* 313, 325-326.

Rather than adding to the list of prohibited grounds for discrimination under section 10, the legislator opted to introduce a provision dealing specifically with discrimination based on the existence of a criminal record. The text of section 18.2 therefore stands alone, and sets its own limits.

1.1 The scope of section 18.2

Section 18.2 prohibits employers from considering prior offences committed by an individual in order to dismiss, refuse to hire or "*otherwise penalize a person in his employment"*. The provision therefore appears to relate solely to the field of employment[17] and is not applicable to other sectors, such as housing or the granting of credit[18].

Section 18.2 does not appear to prevent organizations from considering prior penal or criminal offences when engaging volunteer staff, even if those offences are unrelated to the volunteer's tasks, or if the person has obtained a pardon. Indeed, a contract of employment is defined as a contract by which an individual undertakes to carry out a task under the direction or control of another person, "*for remuneration"*[19]*.* One of the basic elements in a contract of employment is therefore absent in the case of volunteer work, since the volunteer, by definition, is not paid.

We might ask ourselves if, in this respect, the wording of section 18.2 truly reflects the concern that appears to have triggered the various representations made in favour of the legislator's intervention. Indeed, the pardon, resocialization and reassertion of the value of offenders can be

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17 Michèle RIVET and Sylvie GAGNON, "Quelques considérations sur la Charte des droits et libertés de la personne du Québec et le droit carcéral", in CANADIAN INSTITUTE FOR ADVANCED LEGAL STUDIES, *Droits de la personne : l'émergence de droits nouveaux*, Actes des journées strasbourgeoises, Cowansville, Éditions Yvon Blais, 1992, p. 131.

18 Thomas J. SINGLETON, "La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens", (1993) 72 *Can. Bar R.* 456, 477-478.

19 *Civil Code of Québec*, art. 2085.

achieved in ways other than through paid employment. In the current social and economic context, paid employment is becoming rarer, and volunteer work is recognized and valued as a means of social insertion. As a result, it is probably necessary to envisage an extension of the scope of section 18.2, to provide people whose prior offences bear no relation to the volunteer work they wish to do with a chance of obtaining equal access, along with other candidates, to volunteer activities[20].

1.2 The prior offences covered by section 18.2

Since human rights legislation such as the Charter is "special"[21], "fundamental"[22] and "*quasi constitutional"*[23] in nature, it should be interpreted broadly and liberally, to allow it to achieve its purpose[24]. In the specific case of section 18.2, this rule of interpretation means that, to identify the prior offences covered by the provision, it is necessary to refer not only to the letter of the law, but also to the concerns underlying its adoption.

Section 18.2 explicitly protects people "*convicted of a penal or criminal offence*". A literal interpretation of the section would appear to indicate that people who have, or have had, brushes with the penal justice system, but who have not been found guilty, are not protected by its provisions[25]. Such an interpretation is, of course, likely to detract from section 18.2's practical

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20 In some jurisdictions, the term "*employment*" is defined so as to include unpaid work. See for example : *Human Rights Code* (Manitoba), S.M. 1987-1988, c. 45, s. 14.

21 *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 C.S.R. 150, 156.

22 *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 C.S.R. 145, 158.

23 *La Métropolitaine, compagnie d'assurance-vie* v. *Frenette*, [1992] 1 C.S.R. 647, 673.

24 *O'Malley and Ontarian Human Rights Commission* v. *Simpsons-Sears,* [1985] 2 C.S.R. 536, 547. Regarding the Québec Charter, see : *Ford* v. *Attorney General of Québec*, [1988] 2 C.S.R. 712, 767.

25 In this respect, see : *C.D.P.D.J. v. Phil Larochelle Équipement Inc.,* T.D.P. Québec n° 200-53-000003-983, 29 September 1998 (Justice Sheehan). See also : *Pavillon du Parc* v. *Syndicat des employés du C.E.V. d'Aylmer,* D.T.E. 91T-1170 (T.A.), p. 15 (Mr. Bolduc, arbiter).

effectiveness. Indeed, it would be very easy for an employer to avoid the provision's application simply by ensuring that the employee is penalized before the case is decided[26].

A literal interpretation therefore produces results that are difficult to reconcile with the concern underlying the adoption of section 18.2, i.e. the desire to protect prior offenders from discrimination due to prejudice[27]. While this concern is clearly present in the case of people found not guilty, it is no less present with regard to people who have been charged and are still awaiting a court verdict, and especially after acquittal[28].

The main trend at the present time is to accept that section 18.2 covers not only people found guilty of offences, but also those awaiting trial[29], those who have been acquitted[30] and even, in some cases, those in prison[31]. On the other hand, section 18.2 does not cover people who are simply suspected or "accused" by their entourage or by public rumour of having committed some kind of misdeed[32]. In such cases, the people in question are protected by the provisions of the Charter concerning the safeguard of honour and reputation and respect for privacy, where applicable[33].

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26 C. BRUNELLE, *loc. cit.*, note 16, p. 327.

27 See above, p. 5.

28 C. BRUNELLE, *loc. cit.*, note 16, p. 328.

29 *Ville de St-Hubert* v. *Syndicat des cols bleus de la Ville de St-Hubert (C.S.D.)*, D.T.E. 98T-313 (Mr. Boisvert, arbiter); *Leclerc* v. *Guichet unique d'information et de développement économique*, D.T.E. 97T-1313 (C.T.); *Hayes* v. *Alliance Québec*, D.T.E. 96T-248 (C.S.); *St-Jean* v. *Commission scolaire régionale de l'Outaouais*, [1985] S.C. 637, 639; *C.D.P.D.J.* v. *Maksteel Québec Inc.*, [1997] R.J.Q. 2891, 2895 (T.D.P.Q., Justice Rivet; under appeal) (*obiter).*

30 *C.D.P.D.J.* v. *Maksteel Québec Inc.*, cited above, note 29 (*obiter*).

31 *C.D.P.D.J.* c. *Maksteel Québec Inc., ibid.* (*ratio*).

32 COMMISSION DES DROITS DE LA PERSONNE, *Lignes directrices pour l'application de l'article 18.2*, Research Department (Daniel Carpentier), resolution COM-306-9.1.2, May 12 1988, p. 3.

33 See below, section 2.

1.3 The relation to the job

In the context of section 18.2, only offences "*connected with the employment*" can be considered. It is up to the employer – or, in the case of a dispute, the courts – to decide whether or not such a connection exists. Since many very different types of employment and offences exist, each case must be considered on its own merits[34].

Accordingly, the fact that the job involves a vulnerable client base is highly relevant. The responsibilities of the educational community towards its child client base, and the intrinsic fragility of that client base, for example, entirely justify the relative severity with which case law tends to judge school personnel, both teaching and non-teaching, who fall foul of the law[35]. These same reasons are also relevant where the employer serves an elderly or deficient client base[36].

The nature of the offence must also be taken into consideration. This does not mean making a moral judgment of the offence[37], but asking if it would have a prejudicial "*tangible*", "*concrete*" or "*real*"[38] impact on the employment relationship. While some types of offences almost invariably generate disapproval (this is particularly true of sex-related offences, especially those involving young children[39]), the absence of contact between the employee and the clients should be considered when deciding whether or not the offence is really connected with the job[40]. It should

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34 COMMISSION DES DROITS DE LA PERSONNE, *Lignes directrices pour l'application de l'article 18.2*, *op. cit.*, note 32, p. 3.

35 See the abundant case law cited in : C. BRUNELLE, *loc. cit.*, note16, 340-346.

36 See, for example : *Syndicat de l'enseignement des Bois-Francs (C.E.Q.)* v. *Commission scolaire Jean-Rivard,* (1990) R.S.É. 616 (F. Morin, arbitrator); motion for review rejected in (1995) 42 R.S.É. 1259 (C.S.); confirmed in (1995) 42 R.S.É. 1263 (C.A.).

37 H. Allan HOPE, "Criminal and Immoral Acts Evidence, Proof and Penalty Assessment : An Arbitrator's Viewpoint", (1991) 2 *Labour Arbitration Yearbook* 111, 113.

38 *Syndicat des employés de la Commission scolaire Abitibi* v. *Commission scolaire Abitibi*, [1983] T.A. 595, 601 (J.-G. Ménard, arbitrator).

39 C. BRUNELLE, *loc. cit.*, note 16, p. 346. See, for example : *Union des employés de service, local 298* v. *Commission scolaire Baldwin-Cartier*, (1978) R.S.É. 87, 98 (G. Descôteaux, arbitrator).

be remembered that section 18.2 requires employers to have a solid appreciation of the impact of the offence on the employee's ability to perform his or her duties.

1.4 Pardon

Lastly, section 18.2 prohibits employers from considering offences where a pardon has been granted. In such cases, convictions may not be considered, whatever the relationship between the offence and the employment in question.

[40] See for example : *Provençal* v. *Ville de Magog*, C.S. St-François no 450-05-000061-941, February 16 1996 (Justice Gervais) (absence of a relation between the offence of incest and employment as a labourer).

2 THE FUNDAMENTAL RIGHTS

As we have just seen, a refusal to hire a person based on the existence of a criminal record uncovered during police verification may violate the provision prohibiting discrimination on this ground. In addition, however, the criminal record screening process may also violate the fundamental rights of people required to work with vulnerable clients. Such people may not be protected by section 18.2, either because they are volunteers or because their police records may contain details of presumed "misconduct" only. If we approach the discussion from this angle, we call into question not only the role of the organization requiring the verification, but more directly the role of the police forces themselves, who use information kept mainly "to facilitate the detection and solving of crimes"[41].

Verification of prior offences is likely to have impact upon the right of candidates to the safeguard of their reputation and protection of their private lives. The fundamental nature of these rights, stipulated respectively in sections 4 and 5 of the Charter, is reiterated in the *Civil Code of Québec* and in the *Act respecting Access to documents held by public bodies and the Protection of personal information*, which specify their scope[42].

2.1 The right to respect for privacy and the safeguard of reputation

Following on from the general principle established in the *Act respecting Access to documents held by public bodies and the Protection of personal information*, nominative information[43] held by public bodies is confidential and cannot be disclosed without the consent of the person concerned[44]. Disclosure

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41 *Police Act*, cited above, note 7, s. 39.1.

42 L.R.Q., c. A-2.1 [hereinafter "Act respecting Access"].

43 "In any document, information concerning a natural person which allows the person to be identified is nominative information." : Act respecting Access, s. 54.

44 Act respecting Access, s. 53 et 59, par. 1.

of nominative information contrary to the Act respecting Access may lead to the author of the disclosure being held liable under penal law[45] or under civil law[46].

However, disclosure of public information by a public body does not contravene the Act[47]. This is the case, among other things, for information concerning pending cases and convictions, since it is available at the penal registry[48].

In contrast, information contained in incident reports and investigation reports is considered to be nominative information where it relates to a natural person. The Court of Québec has recently reiterated this principle in a decision granting moral and exemplary damages following disclosure of such information to an employer by a police force[49].

Even though the memoranda of understanding do not give direct access to nominative information in police records, a negative recommendation will, in many cases, be based on information of a confidential nature, and will obviously be linked to the candidate's name. However, section 56 of the Act respecting Access stipulates that while the name of a natural person is not nominative of itself, it becomes so when mentioned in conjunction with other information concerning that

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45 Act respecting Access, s. 159.

46 Act respecting Access, s. 167 :

"Except on proof of a fortuitous event or irresistible force, a public body that keeps personal information is bound to compensate for the prejudice resulting from the unlawful infringement of a right established by Chapter III.

In addition, where the infringement is intentional or results from gross neglect, the court shall also award exemplary damages of not less than $200."

The recourse could also be exercised under section 49 of the Charter.

47 Act respecting Access, s. 55.

48 See *Sirois* v. *Ville de Candiac*, [1987] C.A.I. 332, 336; *E…* v. *Office de la protection du consommateur du Québec*, [1987] C.A.I. 350, 368.

49 *Lacroix* v. *Bilodeau*, J.E. 98-1921(C.Q.).

person. Moreover, article 37 of the *Civil Code* states that privacy may be invaded either by the act of disclosing the file or the information in it, or by the use made of that information.

In addition, offenders, like anyone else, are entitled to the safeguard of their reputation[50]. This, in fact, is one of the goals of pardon, as stipulated in the *Criminal Records Act* :

> "The grant of a pardon
> *a*) is evidence of the fact
> […]
> (ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character;
> […]." [51]

However, the dissemination to third parties of information concerning suspicions about an individual, or about convictions against that individual, even where such information is not confidential, as well as the fact of making a negative recommendation, is likely to harm the individual's reputation. Moreover, such violations can occur in respect of people who are entirely innocent, since as we have seen, police databases may contain incorrect information[52].

2.2 Justification of violations

A measure that violates a fundamental right can still be justified under section 9.1 of the Charter, where its goal is real and urgent. This is unquestionably the case where the goal is to protect the

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50 On the connection between criminal record and reputation, see Hélène DUMONT, "Le casier judiciaire : criminel un jour, criminel toujours ?", in André POUPART (Dir.), *Le respect de la vie privée dans l'entreprise : de l'affirmation à l'exercice d'un droit*, Montréal, Éditions Thémis, 1995, p. 105, pages 109 and following.

51 Cited earlier, note 3, s. 5.

52 *Supra*, note 8 and corresponding text.

integrity and security of vulnerable people. However, it is necessary to prove that the measure will allow the goal to be achieved, and that its effects are not disproportionate[53].

The purpose of verifying prior offences is to identify candidates with criminal records that suggest they may present a real danger to the safety of people who are vulnerable due to their age or handicap. The connection between the offence and the position sought is not always automatic, however, and each candidacy must be analyzed according to the nature of the offence, the risk of a repeat offence, the nature of the tasks to be carried out, and the possibility of supervising an individual who will be working with vulnerable people. This question does not arise when a court prohibits an individual from working with vulnerable people, in accordance with the provisions of the *Criminal Code*[54].

In the memoranda of understanding brought to the Commission's attention, the police force is responsible for establishing whether or not a connection exists between the offence and the tasks performed. In the Commission's view, it should be up to the recruiting organization to do this.

More fundamentally, it should be remembered that, in Québec's legislation, only an individual convicted in court can be excluded from specific types of employment and duties. This is the case, for example, in the *Act respecting childcare centres and childcare services*[55], the *Police Act*[56], the *Act respecting health services and social services*[57] and the *Cities and Towns Act*[58]. This principle is based on

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53 *R.* v. *Oakes*, [1986] 1 C.S.R. 103, 138-139 (Justice Dickson); *Dagenais* v. *Société Radio-Canada*, [1994] 3 C.S.R. 835, 890 (Justice Lamer).

54 The *Criminal Code* explicitly states that the court can prohibit an offender who has committed a sex-related offence against a person under 14 years of age from holding voluntary or paid employment that would place him or her in a relationship of trust or authority with children under 14 years of age. See articles 161 and 810.1 of the *Criminal Code*.

55 R.S.Q., c. S-4.1, a. 18.1. See also the *Regulation respecting childcare centres*, order-in-council of August 20, 1997, (1997) 129 G.O. II, 4369, ss. 12, 22, 24, 41 and 42.

56 Cited earlier, note 7, s. 3.

57 R.S.Q., c. S-4.2, ss. 150 and 398.1.

the presumption of innocence, a fundamental guarantee also used to justify the fact that pre-sentencing reports, on which the court can base its decision concerning the penalty imposed on adult and child offenders, include convictions alone[59]. It was to uphold this same principle that the Commission, in 1993, recommended the abolition of the practice of including information on pending cases in the pre-sentencing reports of young offenders[60]. Similarly, in 1997 the Commission recommended that the Ministère de la Justice should introduce a system that would allow citizens to remove their names from the criminal minute book when they are found not guilty of the charges brought against them[61].

For this reason, the Commission concludes that verification of police records should cover only the criminal or penal offences of which the individual has been convicted, the sentences imposed and the court orders outstanding against the individual. As regards pending cases, while the employer is justified in knowing about them, he or she must nevertheless evaluate the risk presented by the candidate, based on the fact that the court proceedings may lead to an acquittal or a conviction. In all other cases, in particular when the information concerns suspicions or arrests without charges, or where the charges were rejected or withdrawn, such details should not, in the Commission's view, be available to organizations screening candidates for paid or voluntary employment.

In view of the foregoing, the Commission is not required to give its opinion on the wisdom of making the police force, rather than the employer, responsible for establishing the connection between the "misconduct" and the position to be filled. However, the Commission would like to

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58 R.S.Q., c. C-19, s. 116, par. 1, subsections. 6 and 7.

59 Art. 721 of the *Criminal Code*; s. 14 of the *Young Offenders Act*.

60 COMMISSION DE PROTECTION DES DROITS DE LA JEUNESSE, *L'inscription des causes en suspens dans les rapports prédécisionnels de jeunes contrevenants*, January 28, 1993.

61 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE ET PROTECTEUR DU CITOYEN, *Le caractère public du plumitif criminel en cas de poursuites n'ayant pas mené à une déclaration de culpabilité* (Pierre Bosset and Pierre Alarie), January 16, 1997. The Ministère de la Justice adopted a directive in this respect, in March 1998.

point out that police forces do not always have a neutral attitude to the facts reported in their records, since they may be or have been involved directly or indirectly in the investigation. Moreover, a screening process should not serve to fuel an ongoing investigation, which may happen if the candidate attempts to explain himself or herself to the police. For these reasons, the Commission does not feel it would be appropriate to make the police responsible for establishing either the connection between the facts and the position in question, or the gravity of that connection.

The Commission also points out that, while a violation of fundamental rights may be justified within the limits described earlier, it is still necessary, before beginning the process, to obtain the free and informed consent of the candidate. Indeed, in such circumstances an effort should be made to limit the number of people affected[62]. In this perspective, the Commission recommends that verifications should be made only for screened candidates, and not for all applicants.

62 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Les examens médicaux en emploi*, Research Department (Daniel Carpentier), resolution COM-430-5.1.1, June 8, 1998, p. 36.

CONCLUSION

As the body responsible for promoting and upholding the right of people who are vulnerable due to their age or handicap to be protected against all forms of abuse, aggression and exploitation, the Commission des droits de la personne et des droits de la jeunesse is in favour of introducing mechanisms to screen the individuals likely to perpetrate such abuse[63]. However, it points out that all such screening measures must comply with the rights guaranteed in the Charter.

In this respect, the Commission reiterates the fact that it is up to the recruiting organization to assess the connection between the offence and the position to be filled. Moreover, the Commission believes that screening by means of police verification of prior offences should only be done if the candidate has first given his or her free and informed consent in writing, if the decision is made on the basis of the connection between the nature of the position to be filled and the offences committed, and if the procedure is carried out following an offer of employment conditional upon the results of the analysis.

In addition, the verification of police records should cover the following information only :

- criminal and penal offences of which the person has been convicted (except offences in respect of which a pardon has been granted under the *Criminal Records Act*);
- criminal and penal offences of which the person has been found guilty and subsequently absolved (except offences for which the *Criminal Records Act* requires that the mention should be removed from the record or statement);

63 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *op. cit.*, note 2.

- criminal and penal offences of which the person has been convicted under the *Young Offenders Act* (except offences for which the Act requires the record to be destroyed);
- sentences handed down;
- court orders outstanding against the person, including prohibition orders;
- criminal or penal charges outstanding against the person at the time of the verification.

The Commission believes the verification of police records should not engender a false sense of security among recruiting organizations or their clients. It feels the verification process should be part of a broader screening procedure that includes an interview with the candidate and the taking up of references. Once the selection has been made, it is important for all organizations serving vulnerable clients to maintain a preventive approach, in particular by adopting rules governing staff supervision and by applying information and awareness-raising programs for clients, their families and the members of the organization[64].

64 Canadian Association of Volunteer Bureaux and Centres, *The Screening Guide*, Ottawa, 1996, Part II, Chapter 3; MINISTÈRE DES AFFAIRES MUNICIPALES, DIRECTION DES SPORTS, *Les abus sexuels dans le sport amateur*, Prevention and intervention handbook for sports administrators, 1994. For example, see the *Politique de prévention en matière d'abus sexuel* that the City of Cap-de-la-Madeleine applies to sports organizations working with children.