

Fact Sheet

#19

*in a series of fact sheets
that examine questions
frequently asked about
the criminal justice
system*

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Pardons: What, where, when, how and why?

It is not unusual for people to have a criminal record. In fact, more than three million Canadians - approximately 10% of the population - have a criminal record.

Everyone who is convicted of an offence under a federal act has a criminal record. Typically these relate to *Criminal Code* offences. (Provincial or municipal offences do not result in a criminal record.) The high numbers suggest that most individuals with a criminal record are not currently involved in illegal activity. We do know that many are indeed law-abiding, productive and contributing members of our communities whose offences happened in their past, representing an isolated incident or a period of atypical behaviour.

Having a criminal record can be a barrier, particularly with respect to employment, volunteer activities and travel, even if one has lived a crime-free life for many years. Many individuals look to obtain a pardon as a way to remove the barrier of a criminal record.

What is a pardon and what is the process for obtaining one? What is the effect of a pardon? What will it not do? Once pardoned, what are one's rights with respect to employment, being a volunteer and entry into another country? This Fact Sheet will present

information on: the law relating to pardons, what one needs to know about applying for a pardon, and its effect upon receipt. Also, as the interest in pardons is often connected to travel to the United States, what a person with a criminal record needs to do to apply for entry into that country will be briefly detailed.

Criminal Records

When one is convicted of a federal offence, a record of that offence is entered into the Canadian Police Information Centre (CPIC), a computerized information system which is managed by the Royal Canadian Mounted Police (RCMP). All police forces in Canada can access the information stored in this system. As well, CPIC is connected with similar systems maintained by other countries, such as the U.S. National Crime

Information Centre and state databases. Only with the written consent of the person will record information be provided to someone (i.e., an employer) other than the authorized criminal justice agencies.

What is a pardon?

Under Canadian law, there are three types of pardons:

- 1) a free pardon granted by the Governor in Council under Section 748 of the *Criminal Code* or the Governor General in recognition of erroneous conviction;
- 2) a conditional pardon granted by the Governor in Council under Section 748 of the *Criminal Code* or the Governor General in recognition of undue hardship out of proportion to the nature and the seriousness of the offence and the resulting consequences; and,
- 3) a pardon ("ordinary" pardon) granted/issued by the National Parole Board under the *Criminal Records Act*.

Free and conditional pardons are exceptional remedies applied only in exceptional circumstances and are relatively rare. It is the "ordinary" pardon for which most apply and on which this publication is focused.



Under federal legislation, the *Criminal Records Act*, a person who has a criminal record by virtue of having been convicted of a federal offence can apply for a pardon once that person has completed their sentence and a defined waiting period. In this case, a pardon means that any federal agency or department that has records of convictions must keep the records separate and apart from other criminal records and the information pertaining to the offence for which the pardon was granted/issued will be taken out of the CPIC system.

Some details to highlight at the onset are as follows:

- The record is not destroyed. Disclosure of information in a pardoned record is possible. However, once the record is kept separate and apart upon receipt of a pardon, any information concerning that record can be disclosed only with the permission of the Solicitor General of Canada and under conditions specified in the *Criminal Records Act* (and its regulations);
- The legislation with respect to pardons does not apply to courts and local police services (other than the RCMP) which operates under provincial and municipal legislation. Therefore, they do not have to keep records of conviction separate and apart (although most do); and,
- A foreign government does not have to recognize a pardon. Once another country has information about a person's record, it can keep that information on their files forever.

Effect of a pardon

First and foremost, a pardon is important for what it does symbolically. It is a recognition that a person is of good conduct. Effectively, it rehabilitates that person's reputation. For some, this is their sole purpose for seeking a pardon.

Criminal Records Act

An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves

...

5. The pardon

(a) is evidence of the of the fact

(i) that, in the case of a pardon for an offence referred to in paragraph 4(a) [indictable offence], the Board after making inquiries, was satisfied that the applicant for the pardon was of good conduct; and,

(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, and

...

Employment

On a practical note, a pardon can limit the problems created by a criminal record with respect to employment. The *Canadian Human Rights Act* prohibits discrimination on the basis of a criminal record for which a pardon has been granted/issued. Therefore, those who are governed by this Act (Federal government agencies, departments, Crown corporations, some federally regulated industries) cannot refuse to hire, continue to employ or treat differently with respect to employment policies and practices people who have a criminal record for which they have received a pardon. In fact, any question about a criminal record must be phrased in the following manner: "Have you been convicted of a criminal offence for which you have not received a pardon?"

Some provincial human rights codes also have provisions which limit the right of employers to discriminate on the basis of a criminal record (B.C., Yukon, P.E.I., Quebec and Ontario). The

Ontario Human Rights Code, with which all employers in the province, both public and private, must comply, prohibits discrimination in employment on the basis of record of offences. "Record of offences" is defined as a conviction for an offence for which a pardon has been granted/issued and has not been revoked and for an offence under provincial law.

These rights under both the federal and provincial laws with respect to employment are not absolute. It would be permissible for an employer to ask questions about a pardoned criminal record or not to hire someone with a pardoned criminal record if the employer can prove that it is reasonable and directly connected to the nature of the job. Even if the person rightfully answers "no" to questions about the existence of a criminal record for which a pardon has been granted/issued, the employer may require a criminal record check and there are circumstances under which information in the pardoned criminal record can be disclosed. The *Criminal Records Act* contains a provision permitting disclosure by the Solicitor General of Canada on the grounds that it would be "desirable in the interests of the administration of justice or for any purpose related to the safety and security of Canada or any state allied or associated with Canada." There are also specific provisions with respect to the flagging and disclosure of pardoned sexual offences.

Volunteer activity

The sections related to employment in the *Ontario Human Rights Code* also cover volunteer activity. But here again, while discrimination on the basis of a pardoned criminal record may be generally prohibited, agencies and organizations may require disclosure of information related to a pardoned record if akin to the nature of volunteer position (i.e., for an organization

connected with children, “have you ever been convicted of a sexual offence against a child?”). Many utilizing volunteers now require a police check, and the check would come back with information on a pardoned record containing any sexual offence and may contain information on other pardoned offences if the Solicitor General deems it to be necessary.

Travel

A pardon does not necessarily ensure entry into another country. However, a pardon can be useful as a supporting document in certain entry application processes (see “Pardons and U.S. Waivers” on page 4).

The application process

First of all, some do not have to apply for a pardon - those who have a criminal record of only absolute and conditional discharges or of only findings of guilt as a young offender.

The record of an absolute or conditional discharge given after July 24, 1992 is automatically removed from CPIC computer system one year and three years respectively after the court decision. Further, the record is “purged” of all but fingerprints and basic identifying information which can only be accessed for purposes of crime scene investigations or identification of a deceased or amnesiac person. Those given an absolute or conditional discharge before July 24, 1992 need to write to the Pardon and Purge Services of the RCMP to institute this process.

Young offender records are kept for “access periods” defined in the *Youth Criminal Justice Act* - one year after an absolute discharge, three years after a conditional discharge, two years after the completion of extrajudicial sanctions, three years after for a summary offence and five years for an indictable offence. When the access

period is completed and there are no further convictions as an adult during this period, the record is “purged” (similar to discharges), except for those convicted of serious offences listed in the legislation - these records are kept longer or, for some, indefinitely. If the person with a youth record whose access period has not yet ended is convicted of another crime after the age of 18, his/her youth record becomes part of the adult record. In this case, one would need to apply for a pardon for both the youth and the adult record.

Also, pardons do not apply to prohibition orders.

Otherwise, to be eligible to apply for a pardon, the person must have completed their sentence (served the full sentence of imprisonment, paid the fine, restitution or compensation, completed the term of probation) and must be conviction-free afterwards for:

- a) five years, in the case of an indictable offence conviction under the *Criminal Code*, a summary or indictable offence under the *Transfer of Offenders Act* and service offences where the person was fined more than \$2,000 or imprisoned for more than six months or dismissed from the service under the *National Defence Act*; and,
- b) three years, in the case of a summary conviction offence or any other offence under the *National Defence Act* not listed above.

The application for a pardon is made to the Clemency and Pardon Division of the National Parole Board (NPB), with application forms available either by writing or phoning the NPB national or regional offices or on-line - www.npb-cnrc.gc.ca There is a \$50 fee for processing the application. Further costs include: fees for fingerprinting and to obtain a certified criminal record from the RCMP and any costs related to obtaining local police records checks (from the police services in the area which the person currently lives and

from all areas of residence within the previous five years). Also, court information will be required in the cases of: a summary conviction completed less than five years previously to prove that it was summary, not indictable and, where there were payments attached to a punishment (fine, compensation, restitution) imposed within the last 15 years, to confirm that the payments have been received in full. It does take considerable time and effort to complete.

Pardon Decisions

Once the pardon application has been submitted, the wait times for processing can be lengthy. In 2002/03, the average processing time was 17 months.

In the case of applications relating to eligible summary conviction cases, pardons are issued. It is a non-discretionary process. Of the approximately 15,000 applications processed in 2002/03, 49% were “issued.” Cases involving an indictable offence require a decision to grant or deny. In the vast majority of these eligible cases, the pardon is granted. However, some are denied - 286 in 2002/03. The low number of denials relative to those granted likely reflect the onerous nature of the application and the extent of information required in the process which would identify those who are not currently seen as being of “good conduct.”

Also, an issued or granted pardon can be revoked or cease to exist. It can be revoked on the following grounds: further summary conviction, evidence that the person is no longer of good conduct, and evidence of false, misleading or concealed information relative to the application. A pardon will cease to exist upon a further indictable or hybrid offence conviction or when there is new information that the person was not eligible at the time that the pardon was issued or granted.

In 2002/03, 369 pardons were revoked and 533 ceased to exist. Since the pardon process began in 1970, approximately 300,000 pardons have been granted/issued and only 3% have ceased to exist or been revoked.

Pardons and U.S. Waivers

While there are many reasons why individuals want to obtain a pardon, travel to the U.S., either for business or pleasure, seems to be the predominant one, especially so in the current environment. Most countries have laws that restrict entry to those with criminal records. The U.S. is very strict in this regard and, if they are aware of the record, gaining entry into the country can be problematic and may be impossible.

Section 212(2) of the U.S. *Immigration and Nationality Act* defines those who are ineligible to receive visas and admission on criminal and related grounds. The grounds are very broad and, with few exceptions, could apply to most people with a criminal record.

A pardon does not guarantee that the individual will be allowed into the U.S. The U.S. government does not recognize a pardon and would use any information on their files/databases, including a criminal record for which a pardon was subsequently granted/issued, to make a decision with respect to entry into the

country. The only way that a pardon could prevent any knowledge of the criminal record is if the person knows with certainty that the U.S. government had no reason to access the criminal record information available through CPIC (to which they are linked) prior to the pardon being granted/issued.

The only way to know is by attempting to cross the border. However, a person who tries to enter the U.S. when the U.S. authorities have information that a person is deemed ineligible because of a criminal record will, at the very least, be refused entry and may be subject to seizure of goods, fines and even incarceration on further attempts. Most are understandably anxious about taking a chance.

It is possible to receive a waiver of ineligibility. The application process consists of two forms, Form I-192 (Application for Advance Permission to Enter as a Non-Immigrant) and Form G-325A (Biographical Information) which are available through the U.S. Bureau of Citizenship and Immigration Services and are available on-line - www.immigration.gov/graphics/formsfee/forms/index.htm The fee for filing is \$195 (US). One has to provide details of the offence and the conviction, the official criminal record (from the RCMP) and any record of parole, probation and pardon.

While not specifically required, other

documentation, such as letters from employers, personal letters of reference, school transcripts, can be useful to support the application and demonstrate that the person is of good conduct. The application is then presented to the local Bureau of Citizenship and Immigration Services with jurisdiction over the port of entry where the person will enter the U.S. Fingerprints are taken at this time. The application processing time is not insignificant - approximately six months. Once granted, the waiver can be valid for up to five years.

Forgiving, but not forgetting

The John Howard Society views the pardon process as a very important aspect of our justice system. It recognizes that people can and do change and become productive members of the community.

However, pardons have limitations and, contrary to what most people believe, do not guarantee absolute protection of criminal record information. It is important for both the general public and those who wish to apply for a pardon to be aware of these limitations and know the facts about pardons.

Effective, just and humane responses to crime and its causes

For more information, please contact us at:

John Howard Society of Ontario
123 Edward St., Suite 701
Toronto, Ontario
M5G 1E2
Tel: (416) 408-4282
Fax: (416) 408-2991
E-mail: jhsont@johnhoward.on.ca

