

THE
LAW UNION
OF ONTARIO

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Toronto Police Service Board
40 College Street
Toronto, Ontario
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**SUBMISSIONS OF THE LAW UNION OF ONTARIO RE: STREET CHECK
SUBCOMMITTEE – UPDATE**

To recognize always that the power of the police to fulfill their functions and duties is dependent on public approval of their existence, actions and behavior, and on their ability to secure and maintain public respect.

To recognize always that to secure and maintain the respect and approval of the public means also the securing of willing cooperation of the public in the task of securing observance of laws.

To recognize always that the extent to which the cooperation of the public can be secured diminishes, proportionately, the necessity of the use of physical force and compulsion for achieving police objectives.

To seek and to preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustices of the substance of individual laws; by ready offering of individual service and friendship to

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all members of the public without regard to their wealth or social standing; by ready exercise of courtesy and friendly good humour; and by ready offering of individual sacrifice in protecting and preserving life.

Sir Robert Peel, principles 2-5 of the nine Principles of Policing on the creation of the London Police Constabulary, 1829

It is respectfully submitted that the April 19, 2013 update by the subcommittee evolves from a conclusive underpinning which flies in the face of supreme law of Canada.

This conclusive, underpinning, rationale for the sub-committee's conclusions and recommendations is stated in paragraph 1 at page 3 of the Update as follows:

The Subcommittee has carefully reviewed the request made by several deputants that the practice of Street Checks be stopped in its entirety. Given TPS operational requirements, the Subcommittee does not believe that stopping the practice of Street Checks is realistic. The Subcommittee believes that it is more practical to focus on the impact and purpose of Street Checks. (Emphasis added)

The issue is not whether the use of Form 208 and the manner in which it is deployed are necessary in order that the TPS can meet its operational requirements.

The issue is whether such use and deployment are lawful.

The Law Union of Ontario continues to maintain that both Form 208 and the manner in which it is filled out ie, street checks are used, are violations of the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code*, and municipal and provincial privacy legislation.

Throughout the history of the common law many unlawful investigative stratagems have been used by police officers in free and democratic societies. These stratagems were often carried out under the guise of being necessary due to "operational requirements" to facilitate criminal investigations and prosecutions or intelligence gathering operations.

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Some examples of such conduct are:

- Using physical or psychological force to obtain confessions or statements.
- Unlawful entry on property or buildings without a search warrant or exigent circumstances.
- Unlawful wiretap or other interception of communications without judicial authorization.
- The unlawful removal and replacement of private property for investigative purposes.

Even prior to the *Charter of Rights and Freedoms* such conduct was held by Courts to be unlawful requiring a cessation on their use. Under the *Charter of Rights* such practices have been held to be violations of the supreme law of Canada.

We appreciate that the legal opinion requested by the Board is not yet completed. We anxiously await to review it.

In the interim we are concerned that the “questions” set out in Appendix B of the Subcommittees Update fail to even mention the overriding issue before the Board, i.e.: **Are form 208 street checks lawful? Are they violations of Charter rights and freedoms? Do they violate the *Ontario Human Rights Code* and privacy legislation?**

The Law Union of Ontario restates its position set out in our November 12, 2012 submission that this Board has an absolute obligation to undertake a comprehensive analysis of the practice of “carding”.

The *Police Services Act* of Ontario provides as follows:

- s.1 Police services shall be provided throughout Ontario in accordance with the following principles:

2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.

s. 31(1) A board is responsible for the provision of adequate and effective police services in the municipality and shall:

s.31 i(e) The board shall... direct the Chief of Police

Justice Morden in his June 29, 2012 *Report* into INDEPENDENT CIVILIAN REVIEW INTO MATTERS RELATING TO THE G-20 SUMMIT cites sections 1.2 and 31(1) and finds as follows:

... The purpose of the provision is rather to remind those acting under the Police Services Act of the constant bearing of the *Charter* and the *Human Rights Code* on the performance of their duties. This is critically important because the exercise of so many police powers, for example, those of arrest, detention and search and seizure engage rights that are protected by the *Charter* and the *Human Rights Code*.

Recommendation

In addition to the interim measure set out in the update, the Board should forthwith direct Chief Blair to issue a standing order or directive mandating that all officers caution persons approached, advising such persons that they have the right to refuse to answer questions and are free to go.

Such a caution could read as follows:

I am a police officer.

I would like to ask you some questions.

You have the right to refuse to answer my questions and you are free to go.

The Law Union of Ontario is not attempting to discourage persons from co-operating with the police. We adopt Sir Robert Peels principles citing that public cooperation is essential to elective law enforcement.

However, just as the police have a right to ask pertinent questions in a professional manner, members of the public with extremely few exceptions have an absolute right to refuse to answer questions. It is difficult to imagine why law enforcement officers would oppose advising members of the public what the law is.

In our January 23rd, 2013 submission we stated the following:

In labeling street checks as form of "community engagement" Police claim they are a form of community policing. In reality, street checks are carried out as intelligence gathering of personal information from of the tracking of individuals who are not engaged in criminal or antisocial behavior and who are conducting themselves in a law abiding manner.

Many individuals, particularly youths, are unaware that they have the right to walk away. They feel intimidated and obliged to respond often arising out of the inherent power difference between the police and youths. Even if individuals are aware of this right they often fear reprisal of one form or another if they attempt to exercise their right. There are authenticated reports from individuals who claim that when they declined to produce identification and/or answer questions, officers resorted to illegitimate ruses and strategies such as the following:

1. Officers falsely state that they are involved in a criminal investigation and that the individual matches the description of the suspect. It would seem that some officers wrongly believe that by so stating they bring themselves within the broader scope of investigative detention as prescribed in *R. v. Mann*.

2. Officers attempt to circumvent the individuals assertion that they do not wish to identify themselves or answer questions by making implicitly threatening remarks such as:
- What's in your pockets?
 - What are you trying to hide?
 - Do I have to take you to the Police Station to straighten this out?
 - Have you been using drugs?
 - What is your criminal record?
 - What are you doing in this neighborhood?

Furthermore, street checks are most often carried out in neighborhoods and communities in which the police seek and require cooperation in their pursuit of legitimate law enforcement and criminal investigation purposes. However, community groups, legal clinics, and social justice groups strongly believe that the basis for street check policy is racist policing of persons who are often young, racialized, or marginalized. This belief is supported by reports from persons who have been the subject of street checks and by statistics reported by the Toronto Star.

See also Appendix A (attached)

All of which is respectfully submitted on behalf of the Law Union of Ontario.

Howard F. Morton, Q.C.

SCENARIO

Two 17 year old black males X and Y are walking on the sidewalk in a residential area at 3pm in the afternoon. Neither youth is doing anything suggestive of wrongdoing. The youths are stopped by two officers who are on foot patrol. One officer states "we want to see ID" in a demanding tone and asks them why they are at that location. The youths, who at this point seem quite nervous, advise the officers that a lawyer had told them at a school function that they were not required to produce ID or answer any questions. One of the officers then falsely states that the youths match the description of gang members who had committed a series of break and enters one street over the day before. The officer then states "we can settle this here or: We will take you to the station and settle it there". The officers then conduct a pat down search of the youths while asking: "What do you have to hide? Are those drugs in your pocket?"

The youths become increasingly alarmed and provide their ID. One of the officers returns to his cruiser with the ID while the other stands beside the youths. On his return, the officer holds onto the ID and asks several questions such as where they live, where they attend school, where were they born, whether their parents are married and live together, and the names of their associates. The youths now very nervous, answer all of the questions. The second officer writes their responses on his notebook. After some twenty minutes they are given back their ID and told to be on their way and keep their noses clean. Subsequently the officer fills out a "Form 208".

The officers are clearly in violation of the *Charter* and the *Human Rights Code* for the following reasons:

1. The officers are on general patrol and are not in the course of a criminal investigation.
2. While the officers would be entitled to lawfully approach and stop the youths requesting identification and asking some questions that is not what occurred. The officers' expression was a demand rather than a request.
3. There is absolutely nothing in the conduct of X and Y which could cause an officer to have a reasonable suspicion that the youths were in any manner connected to a recent or ongoing crime. There is no suggestion of trespass.
4. Although there are some elements of a physical detention there is clearly psychological detention as per *Grant* in that a reasonable person in these circumstances would conclude that they had no choice but to provide identification and answer questions.
5. The physical contact involved in the pat down search.
6. The power imbalance between the police and the youths.
7. The youths are members of a racial minority.
8. The falsehoods and implicit threats made by the officers.
9. The duration of the interaction.