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Toronto Police Service Board
40 College Street
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**THE PACER REPORT
SUBMISSIONS ON BEHALF OF THE LAW UNION OF ONTARIO**

I – THE PACER REPORT AND THE LEGALITY OF STREET CHECKS

The Police Services legitimacy in continuing with the practice of “street checks” or “carding” is dependent on demonstrating two minimum requirements:

- A. That the practice is necessary for legitimate “policing reasons” and is carried out in accordance with the principles prescribed in Section 1 of the *Ontario Police Services Act* RSO 1990.
- B. That the practice does not violate the *Canadian Charter of Rights* or the *Human Rights Act* and is otherwise lawful.

A. LEGITIMATE POLICING REASONS AND SECTION 1 OF THE *POLICE SERVICES ACT*.

The term “legitimate policing reasons” as relied on the *Pacer Report* to justify the need for “street checks” or “carding” is amorphous.

The *Pacer Report* claims that there is a fundamental need for the collection of personal data and other personal information from law abiding persons who have done nothing which would otherwise justify engagement by the police.

There is a clear onus on the Police Service not only to convince the Board that there are compelling *bona fide* reasons to engage in “street checks” or “carding” but also that

such reasons are legitimate and that they do not violate the *Charter of Rights* or the *Ontario Human Rights Act*.

From a purely intelligence gathering perspective the police might find it useful to know absolutely everything about everyone at all times. Clearly this Board would not permit such a scenario. The question for the Board therefore is where to draw the line on intelligence gathering operations.

The Law Union of Ontario submits that “street checks” and “carding” as presently conducted and as envisioned by the *Pacer Report* are neither legitimate nor justifiable.

It is further submitted that the practice of “carding” both at present and as envisioned by the *Pacer Report* violate the following principles mandated by section 1 of the *Police Services Act*:

1. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*
2. The need for cooperation between provinces of Police Services and the communities they serve.
3. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.

B. VIOLATION OF THE *CHARTER OF RIGHTS AND FREEDOMS* AND THE *ONTARIO HUMAN RIGHTS ACT*.

In our earlier submissions to the Board (November 12, 2012, January 23, April 24, June 20, 2013) the Law Union of Ontario set out our position that the practice of “carding” or “street checks” violates the *Charter of Rights*, the *Ontario Human Rights Act*, and provincial and municipal privacy legislation.

The recommendations set out in the *Pacer Report* fail to alter the fundamental violation of these provisions.

The approaching, stopping, and questioning of persons solely for the purpose of a “street check” in and of itself violates the *Charter of Rights* in several respects as outlined in our earlier submissions. The fact that such intrusions disproportionately involve male, black, youth as evidenced by reports from Communities and the Toronto Star findings are a clear violation of these safeguards. Street Checks are discriminatory and often race based and as such violate the *Ontario Human Rights Act*.

While the Pacer Report and its recommendations are an attempt to modify the practice, such do not and cannot legitimize “street checks” because the practice itself is illegitimate.

II. THE LEGAL FOUNDATIONS CITED IN THE PACER REPORT.

At pp 33-37 the Report attempts to justify “street checks” in terms of its legality by citing legal opinions from three unnamed “eminent jurists” all of whom have apparently concluded that there is nothing “legally wrong” with the practice.

To date the Police Service has refused to make these legal opinions available for scrutiny.

Further we are advised that at a private consultation held by the Police Service on October 23, 2013 Mr. Paul Copeland, a member of the Law Union was quoted as being of the view that “street checks” were lawful.

This was simply untrue and Mr. Copeland has so stated in his letter to Chief Blair of October 29, 2013.

Whether or not this assertion apparently made by both Chief Blair and Deputy Chief Sloy was an attempt to mislead and placate persons at the consultation it should be retracted by a letter from Chief Blair to all who were present at the consultation.

It should also be noted that the Law Union of Ontario, whose members are often in daily contact with various communities concerned about “street checks” and have spent considerable time and effort before this Board on the issue, was not invited to the private gathering.

We request that the Board direct Chief Blair to make the three opinions of the “eminent jurists” public in order that there be a further and fairer discussion of the issue of legality.

III. THE POLICE SERVICE BOARD LEGAL OPINION

At its January 23, 2013 meeting, the Board appeared to recognize its obligation, pursuant to the *Justice Morden Report*, to ensure that the policy and practice of “carding” did not violate the *Charter* or Human Rights legislation. The Board requested the City Solicitor to provide a legal opinion on this issue for the March 27, 2013 meeting. This legal opinion has still not been provided and the delay seems indicative of the Board’s lack of commitment to the public’s concern and apprehension of this issue.

It is unclear whether the City solicitor's opinion is still in the making or whether the Board has withdrawn its request and is simply going to rely on the opinion of the three lawyers retained by the Police Service.

We request that the Board make its intentions known and advise when the opinion will be completed.

Recommendation

- (i) **The practice of "carding" or "street checks" is a violation of the *Charter of Rights and Freedoms*, the *Ontario Human Rights Act* and privacy legislation both as it presently exists and as envisioned by the *Pacer Report*. The Board is urged to suspend the practice of "carding" and "street checks" until the Board comes to its own independent conclusion on this issue.**
- (ii) **That the Board expedite the completion of the legal opinion as directed at its January 23, 2013 meeting.**

IV. ADVISING PERSONS STOPPED THAT THEIR COOPERATION IS VOLUNTARY

Throughout the Pacer Report the authors continually stress that cooperation by persons stopped on a "street check" is purely voluntary on the part of such persons.

Such assertion seems to be restated throughout the Report in order to buttress the Police Services conclusion that "street checks" are lawful.

However, when the Law Union recommended in its April 24, 2013 submission to the Board that as an interim measure the Board direct that when a person is stopped for a "street check" the officers must immediately advise such person that the cooperation is voluntary, such recommendation was not accepted.

When a person, particularly a young person is stopped by an officer for a "street check" or "carding" the power imbalance is overwhelming.

It is difficult to imagine how the Chief or the Board could oppose such a recommendation. The officer is the legal representative of the state and presumably is aware that the cooperation of persons stopped is voluntary. Many individuals stopped are either unaware or unsure of their right not to cooperate. Many more are hesitant to assert their right not to cooperate because they fear reprisal by the officer as we have outlined in our previous submissions.

The only possible reason to oppose our recommendation is the fear that some persons may actually assert their right not to cooperate. Clearly this fear is not a valid reason for law enforcement officers refusing to simply advise persons of what the law is. This is particularly so in light of the *Pacer Reports* quest for “community engagement” and its repeated reliance on the fact that such cooperation is voluntary.

Recommendation

As an interim measure only the Board should forthwith direct that Chief Blair issue a standing order or directive mandating that officers immediately advise persons stopped for a “street check” that their cooperation is voluntary.

We recommend that the following statement be used by officers:

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 cooperating with the police. To the contrary, we subscribe to Sir Robert Peel’s principles on policing citing that public cooperation is essential to effective law enforcement.

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. [Emphasis added]

Sir Robert Peel: Principles of Policing on the Creation
of the London Police Constabulary, 1829.

CHAIR MUKHERJEE MEMORANDUM

The principles and procedures recommended by the Chair are a significant step in the right direction insofar as the *Ontario Human Rights Act* is concerned. However, the memo fails to address violations of the *Canadian Charter of Rights and Freedoms*.

In fact apart from a passing reference to the *Police Services Act* on page 4, the *Charter* is not even mentioned in the Chairs memo.

This is a major failing of the memo.

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) 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*.

That having been said however we make the following preliminary comments:

1. Recommendation #2 refers to *bona fide* reasons as a fundamental underpinning for the gathering and retention of "contact information". We submit that rather than an amorphous categorization, i.e. "*bona fide* reasons", the specific reasons or specifications for the collection and retention of information from persons who are simply out and about and have done nothing wrong should be enumerated and spelled out in clear terms.
2. Recommendations #3 and 5 again refers to the terms "*bona fide* investigative reasons" which seems to suggest that persons information will only be collected and retained where such information is demonstrably relevant to specific police investigations.

We are confused as to the meaning of these two recommendations. If they only refer to the retention of information they are inadequate. At a minimum, an officer should only approach a person for the purpose of a street check if the officer has an honest and reasonable belief that such person's information will be demonstrably relevant to a specific, ongoing police investigation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE LAW UNION OF ONTARIO.

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