

LAW UNION OF ONTARIO

31 PRINCE ARTHUR AVENUE
TORONTO, ONTARIO M5R 1B2
TEL. (416) 964-7406 EXT.153
FAX. (416) 960-5456

Submission to Toronto Police Service Board

Carding, Street Checks, Non Arrest Contacts:
The Addario Report and Opinion

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Law Union of Ontario

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1. Executive Summary

“Carding” or “street checks” are part of a police intelligence-gathering scheme in which the constitutional and privacy rights of members of the public (disproportionately racialized youth) are systematically violated for the purpose of amassing their personal information in a police database. It has been suggested by the police service that this scheme is intended to preserve public safety and prevent crime. However, the practice is divisive and it is antithetical to building public trust and confidence in the police because it is unlawful and unethical. This undermines the objective of preserving public safety.

The Law Union hereby submits that the Board should exercise its responsibility to protect the public and:

- (a) direct that the practice of stopping and questioning law-abiding persons for general intelligence-gathering purposes cease immediately; and**
- (b) direct that all of the data that has been collected under this program for general investigation purposes be immediately purged.**

Mr. Addario’s opinion and draft policy makes it implicitly clear that he views carding as presently practised to be a violation of the *Charter of Rights and Freedoms* and the *Human Rights Code*, as well as s.1(2) of the *Police Services Act*. Thus, as an interim measure (if the Board will not immediately take the actions described above on a permanent basis) the Law Union of Ontario respectfully asks the Board to **direct Chief Blair to immediately suspend the practise of carding or street checks while it deliberates Mr. Addario’s proposal or prepares and implements a new policy**. Otherwise, the Board would be condoning the continuation of practices that it knows to be unlawful.

The Law Union of Ontario maintains that the practise of stopping and questioning law abiding individuals for general intelligence-gathering purposes violates the right to life, liberty and security of the person; the right to be free from arbitrary detention; the right to be secure against unreasonable search and seizure; and the right to equality before and under the law and the equal protection and equal benefit of the law without discrimination guaranteed by the *Charter*. The practice also violates the prohibition of discrimination under the Ontario *Human Rights Code* (“*Code*”), Canada’s commitments under *the International Convention on the Elimination of all Forms of Racial Discrimination* (“*ICERD*”) and its obligations under the *Convention on the Rights of the Child* (“*CRC*”).

The practice of carding and street checks disproportionately singles out Black and Brown children and youth. This is a form of racial profiling that violates the *Code*’s prohibition of discrimination in the delivery of a service, and it violates a child’s right not to be subjected to arbitrary or unlawful interference with his or her privacy under the *CRC*. Racial discrimination by law enforcement officers causes significant individual and societal damage. It disproportionately criminalizes certain demographic groups, engenders public mistrust of societal institutions, and generates feelings of humiliation, vulnerability, and loss of dignity, confidence, and self-esteem.

“Community policing” has as its philosophy and rationale the embodiment of police building ties with communities and working closely and in a shared endeavour with members of the communities that they have sworn to serve and protect. Racial profiling, monitoring, over-scrutinizing, and arbitrarily stopping and questioning people and treating them like potential criminals because of the way they look – no matter how politely it is done – not only harms community members but serves to strain community/police relations.

Although Mr. Addario’s opinion makes it implicitly clear that he views carding as presently practised to be a violation of the *Charter* and the *Code*, the Law Union respectfully submits that the draft new Community Contact Policy fails to fully satisfy the Toronto Police Service’s obligations flowing from the operation of the *Charter* and the *Code*.

2. The Law Union of Ontario's Response

In its five earlier submissions and depositions to the Board the Law Union of Ontario has taken the position that the current practise of "carding" and "street checks" violates several rights and freedoms guaranteed by the *Charter* and the *Code*. Accordingly the Law Union has submitted that the Board should direct these practises to stop forthwith.

The Law Union has reviewed Mr. Addario's opinion and draft Community Contacts Policy. The Law Union submits that the proposals therein would continue to violate the *Charter* and in practise would violate the *Code*.

Put simply, any scheme whereby the police stop and question members of the public outside the context of an actual police investigation in order to obtain and retain so-called "police intelligence" information of a personal nature is unlawful.

3. Mr. Addario's Underlying Principle

In his draft Community Contacts Policy filed at the March 13, 2014 Board meeting, Mr. Addario asserts that police officers are entitled by law to start conversations with members of the public.

In his December 6, 2013 legal opinion to Board Chair Dr. Mukherjee Mr. Addario states:

The law of detention is drawn on a continuum. At one end is the *benign greeting* between a police officer and a citizen and at the other is the full control, formal assist process (emphasis added).

The assertion that benign or casual conversation between police officers engaged in community policing and members of the public are lawful quite simply is not relevant to the issue of whether "carding" or "street checks" are lawful under existing police powers or whether they are violations of several provisions of the *Charter* and the *Code*.

"Carding" and "street checks" involve far more intrusive engagement than mere benign or casual conversation between officers engaged in community policing and members of the public.

"Street checks" or "carding" are part of a policy, and perhaps a standing order on the part of the Toronto Police Service ("TPS"), to stop law abiding individuals who are just going about their daily lives and to question such persons with respect to personal

information. “Non arrest contacts” as envisioned by Mr. Addario would continue this practice.

Far from being benign conversation naturally arising between officers engaged in community policing and members of the public, this policy has as its purpose the interrogation of innocent persons for the purpose of creating so-called “intelligence” information.

Further, the information obtained is recorded in an intelligence information database for an undetermined length of time, likely forever, or at least at the pleasure of the police service.

Despite the efforts of Mr. Addario to improve the present practise of “carding”, any such policy is a violation of several provisions of the *Charter* and will invariably violate the *Code*.

Quite simply, any practise of “carding” or “street checks” cannot be fixed. The underlying purpose, policy and practise, of necessity, violate *Charter* rights, human rights, and fundamental freedoms.

4. DATA, SOCIAL CONTEXT & PRACTISE OF CARDING, STREET CHECKS AND CONTACTS

4.A. The Social Context

Carding, as a form of racial profiling, raises a number of unique social context issues that must be understood from a historical perspective. The concerns about discriminatory policing in Toronto and environs are not new and reach back to at least the 1960s. The reality is that Black and Brown citizens are stopped, questioned, and searched at a far higher rate than what the general population is subjected to. The discrimination arising from racial profiling is part of a wider set of issues linked to inequalities in employment, infrastructure, housing, training opportunities, and access to medical care and other governmental services.

The perception and reality in many racialized communities in Toronto is that the TPS is engaged in the systematic targeting of young, racialized males between the ages of ten to forty years of age via carding and other forms of racial profiling. The damage from these discriminatory tactics has been devastating. From criminalization to mistrust of

key societal institutions to the stigmatizing effects and feelings of humiliation, vulnerability, loss of dignity, confidence, and self-esteem - young, racialized males now view police harassment as a fact of life and a rite of passage. Unsurprisingly, forms of racial profiling are being linked to feelings of alienation amongst young, racialized males, which robs them of their sense of citizenship and belonging within their country and communities.

Forms of racial profiling are incurring very real social costs which impact on the economic, political, social, and cultural fabric of our city and country. It is undeniable that forms of racial profiling have had a chilling effect on entire swathes of Toronto's population for decades with little done to address the core grievances. Denial that any problem existed was the main response from the TPS for the better part of the last half-century and aside from a series of ineffectual actions that often exacerbated the problems, no concrete steps have been taken until very recently.

4.B. Data and Statistical Evidence

Various forms of racial profiling, including carding, have been the subject of numerous studies by journalists, academics, and community organizations. These studies have revealed widespread racial stereotyping and racial profiling arising from TPS activity predominantly targeting Black and Brown citizens.

Four separate Toronto Star investigations conducted over the period of a decade, from 2002 to 2013, utilized CIPS, MANIX, and FIR data in finding that racialized persons, particularly young Black and Brown males, were disproportionately represented in certain types of interactions with TPS officers and within the legal system. The most recent Toronto Star investigation found that carding of young, poor males in Toronto was increasing year-over-year and was at an all time high.

The research of Professor Scot Wortley and other academics examining racial profiling in Toronto and Southern Ontario reveals a pattern of racial stereotyping and racial profiling. Professor Wortley's research reveals that the Black community is subject to much greater police surveillance and faces a far higher rate of being stopped, searched, or arrested. Furthermore, his research reveals that racial profiling drives feelings of alienation and reinforces perceptions of discrimination within the Black community.

4.C. The Practice of Carding, Street Checks, and Contacts

Any process of “carding”, “street checks” or “non arrest contacts” will not simply involve community based police officers engaging in conversation with random persons they meet on the street or in communities, because the underling purpose of this practice is to collect private information from innocent members of the public and retain “intelligence” information based thereupon.

Once on duty, officers will attend in the communities that they have been directed to or that they decided to target, and arbitrarily stop individuals from continuing what they are doing in order to solicit their personal information. The decision about who to stop is not made on a random basis, but primarily on the basis of the officer’s observations about a person’s appearance. Naturally, that decision would be driven by an officer’s perception of which members of the public appear likely to be actual or potential criminals. Subsequently, the information gathered in these arbitrary stops is entered into an “intelligence” database in one form or another.

Such a policy is actually counterproductive to “community policing” which is community oriented and has as its philosophy and rationale the embodiment of police building ties with communities and working closely with members of the communities which they have sworn to serve and protect.

“Community based policing” is predicated on the belief that strong partnership with communities and their members is necessary to effective law enforcement. True “community policing” is the single most valuable crime prevention and detection tool.

The Principles of Policing first described by Sir Robert Peel in 1829 on the establishment of the London Police constabulary are as valid today as they have been through the decades since and in particular the following first principle applies to this issue:

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 behaviour, and on their ability to secure and maintain public respect.

The Law Union of Ontario is not attempting to discourage members of the public from participatory co-operation with the police. We adopt Peel’s principles establishing that public cooperation and respect are essential to effective law enforcement.

5. THE PURPOSE OF CARDING, STREET CHECKS AND PROPOSED CONTACT POLICY

Mr. Addario asserts that the purposes of police-citizen interviews, which he labels “contacts”, are to gather intelligence and to prevent and investigate offences with the overall goal of preserving public safety.

At several Board meetings and in the Pacer Report, Chief Blair and other police representatives have taken the position that intelligence information gathered in the practise of carding are valuable tools in ongoing or future criminal investigations.

This assertion is anecdotal and has never been substantiated by police through either research data or empirical studies. The Law Union submits that if there is such a value, the TPS must be required to demonstrate this through empirical evidence.

The Law Union notes that if such intelligence data is used by officers in investigations leading to criminal charges, this is not disclosed to defence counsel as part of disclosure. Such disclosure would be required in accordance with the case law and Attorney General’s directive.

However if there is such value in criminal investigations, the severe and ever increasing damage the practise of “carding” has done to individuals, communities and police – community relationships, far outweighs any possible benefit. For the same reason, the police are not permitted to engage in other intelligence gathering techniques, such as unauthorized wiretaps or torture.

6. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In his December 6, 2013 legal opinion and March 13, 2014 draft Community Contacts Policy, Mr. Addario takes the position that “carding” or “street checks”, now titled “non arrest contacts”, can be legitimized if modified by a new policy formulated by the TPS in accordance with principles adopted by the Board.

The Law Union submits that any such program of “non arrest contacts” will continue to violate several rights and freedoms guaranteed by the *Charter* and would not be justified under Section 1.

Similarly, any such program will invariably result in a disproportionate number of contacts involving persons of colour and would therefore be a violation of the *Code*.

The existing practise of “carding” and the proposed “contact” policy necessitate that innocent persons minding their own business will be stopped and interrupted by an officer. As Mr. Addario concedes, ‘There is no police power legally known as a “stop”’.¹

6.A. Section 9: Right To Be Free From Arbitrary Detention

Section 9 *Charter* protection is violated whenever the police detain a person absent a police power to do so. Detention under the *Charter* occurs whenever a person is stopped and for any reason believes that he or she is being detained physically or by psychological restraint leading to a belief or concern that they are not free to leave or to continue what they had been doing.

In examining whether such a belief or concern exists, Courts have stressed the power imbalance between a person and the police and differences in age or maturity. In addition, factors such as marginalization and the frequency with which a person has been stopped play a role in determining whether detention exists in any particular situation.

The existing practise of “carding” or “street checks” and the proposed “contacts” policy are clear violations of Section 9 of the *Charter* and cannot be saved by Section 1.

6.B. Section 8: Arbitrary Search and Seizure

Further, the eliciting of answers to questions asked during a “street check” or proposed “contact” and the retention of any personal information obtained through such questioning violates Section 8 of the *Charter*: the right to be secure against unreasonable search and seizure and cannot be saved by Section 1.

6.C. Section 15: Equality Rights

People of colour are vastly overrepresented among those carded by the TPS. For them, carding curtails a right others can take almost completely for granted: to be left alone. This differential treatment is an affront to their dignity, clearly contravening s. 15(1) of the *Charter*. It undermines the merits, capabilities, and worth of people from these communities, both drawing on and reinforcing hurtful racial stereotypes about

¹ Frank Addario letter to the Toronto Police Services Board, December 6, 2013, pg. 2.

criminality. It stigmatizes them and undermines their self-image—particularly that of young people—by sending a message that the State expects them, their friends, or their family to engage in criminal activity. Any response that they can simply choose whether to participate in these encounters would utterly fail to address the breach, for two reasons. First, it ignores the racialized power relationships that can make choosing to walk away difficult or impossible. Second, it does nothing to address the disproportionate number of approaches to people of colour, which in themselves constitute a *Charter* breach.

6.D. Section 7: Life, Liberty and Security of the Person

In *R v Clay*, [2003] 3 SCR 735 the Supreme Court of Canada held that the right to liberty is at the core of what it means to be an autonomous human being blessed with dignity and independence in matters that that can properly be characterized as fundamentally or inherently personal.

Carding, street checks or proposed contacts, by their very nature of the pursuit of personal information for intelligence purposes and retention, clearly violate these rights and are not in accordance with the principles of fundamental justice.

7. VIOLATIONS OF ONTARIO'S HUMAN RIGHTS CODE

Racial profiling is discrimination, and carding is a police practice that is largely driven by racial profiling. Discriminatory policies and practices, such as racial profiling or carding, are illegal under the *Code*, contrary to the public interest, and cannot be tolerated in a democratic society such as Canada. It is irrelevant whether the intention is to engage in racial profiling, it is the effect that matters and the data is clear that racialized youth are primarily targeted and adversely affected by the practice. Carding, as a form of racial profiling, is offensive to fundamental principles of Canadian society including justice, fairness, and equity.

Section 1 of the *Human Rights Code* prohibits discrimination during the delivery of a service based on the prohibited grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance. Section 9 of the *Code* contains a prohibition on direct or indirect infringements of *Code*-protected rights.

As stated in the *Police Services Act*, the police are legally obligated to deliver policing services in a manner that safeguards the fundamental rights guaranteed by the *Code* as well as the *Charter*.

The delivery of policing is considered a service under the *Code*. Carding that disproportionately targets racialized communities, and other forms of racial profiling, are prohibited discrimination under ss. 1 and 9 of the *Code*.

Discrimination has been consistently defined by the Human Rights Tribunal and the Courts to mean adverse treatment, or a distinction which creates a disadvantage, on the basis of a prohibited ground. Racial profiling has been defined by the Ontario Court of Appeal, in *R v Brown*, as “criminal profiling based on race [...] whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.” It is clear from the data that the decisions that officers make about who to stop and question for “general investigation” purposes are invariably driven by assumptions about the criminal propensity of the group to which the subject belongs, and thus constitute racial profiling.

Carding and other forms of racial profiling are rooted in racial stereotypes and may be the result of consciously or unconsciously held beliefs, biases and prejudices. The prohibited discrimination under the *Code* linked to carding and other forms of racial profiling occurs not just in the initial decision to question or detain, but also occurs in the general phenomenon of the heightened scrutiny applied during interactions between the TPS and racialized persons.

The phenomenon of racial stereotyping, racial profiling, and the prohibited discrimination under the *Code* manifests itself in the Officer’s use of their discretion to engage in conversation, question, stop, detain, or arrest, in whole or part, because a citizen is racialized. Furthermore, the stereotyping and discrimination can manifest itself through greater suspicion, scrutiny, investigation, in whole or part, because a citizen is racialized.

The December 6, 2013, letter from Frank Addario and the proposed TPSB Community Contacts Policy fail to adequately consider *Code*-related issues and the obligations flowing from the operation of ss. 1 and 9 of the *Code* which prohibit discrimination linked to carding and other forms of racial profiling. It is, however, implicitly clear from Mr. Addario’s opinion that the current practice of carding is not compliant with the *Charter* or the *Code*.

8. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The practice of carding, being a form of racial profiling, violates Canada's commitments under international law. The practice infringes the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD"), to which Canada is a signatory. Article 2 of the ICERD mandates that all State Parties undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.

The Committee on the Elimination of Racial Discrimination, the body of independent experts that monitors the implementation of ICERD, has repeatedly recommended that State Parties take necessary steps to prevent identity checks, questioning, arrests, searches and interrogations that are based on physical appearance, colour or membership of a racial or ethnic group.² It has expressed concerns about reports that African Canadians, in particular in Toronto, are being subjected to racial profiling and harsher treatment by police and judicial officers with respect to arrests, stops, searches, releases, investigations, and rates of incarceration than the rest of the population.³

To the extent that the practice of carding is directed against individuals who are under the age of 18, it may violate Canada's obligations under the Convention on the Rights of the Child ("CRC"). This includes a child's right not to be subjected to arbitrary or unlawful interference with his or her privacy.⁴ The CRC mandates that States Parties take all appropriate measures to ensure that the child is protected against all forms of discrimination.⁵

It should be noted that the enjoyment of a number of other international human rights may also be interfered with by the practice of carding, including a person's right to freedom of movement. The practice may also curtail people from exercising their right to engage in freedom of association and peaceful assembly given the impact that carding has on community members.

² Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, CERD/C/RUS/CO/19, 20 August 2008, para. 12, <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.RUS.CO.19.pdf>; Concluding Observations of CERD: Russian Federation, CERD/C/RUS/CO/20-22, March 1, 2013, para. 14 a).

³ CERD/C/CAN/CO/19-20, 9 March 2012, www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf

⁴ Article 16.

⁵ Article 2.

Finally, it bears noting that the international prohibition against racial discrimination is both preemptory and non-derogable. Article 4 of the International Covenant on Civil and Political Rights permits State Parties to derogate from their obligations during times of emergency except where that derogation would result in discrimination.

9. RECOMMENDATION

The Board has received deputations from community member and others for almost two years. Community members have continuously stressed the damage that the practise of “carding” has done not only within communities, but also to police/community relations.

The Toronto Star data clearly demonstrates that “carding” is a form of racial profiling which this Board has permitted to continue while it deliberates this issue.

Ultimately, the Law Union hereby submits that the Board should exercise its responsibility to protect the public and:

(a) direct that the practice of stopping and questioning law-abiding persons for general intelligence-gathering purposes cease immediately; and

(b) direct that all of the data that has been collected under this program for general investigation purposes be immediately purged.

In the interim, if the Board is not prepared to take this action and wishes to take time for further study or consultation, the Board still needs to take interim measures to protect the public and ensure compliance with the law. It is implicitly clear from Mr. Addario’s opinion and draft policy that he views carding as presently practised as a violation of the *Charter* and the *Code*. Should the Board adopt Mr. Addario’s opinion and policy it will take months to implement. However, communities must not be subject to another summer, or even longer period, of “carding” and “street checks”.

Therefore the Law Union of Ontario urges the Board to direct Chief Blair to suspend the practise of “carding” or “street checks” (or whatever the latest label the police use for this practice) forthwith. It should then take the opportunity to re-think the manner in which it wishes the police to positively and constructively engage with racialized and marginalized communities, and develop a policy based on those principles. It will not be sufficient to try to re-package an intelligence-gathering system that is based on carding of innocent people. Such a system, whatever form it takes and however politely it might be executed, is inherently and fundamentally unsound, unlawful, and unethical.

All of which is respectfully submitted.