



Ontario Proposed Regulation for Street Checks Consultation

Submitted to: Ministry of Community Safety and
Correctional Services

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on the Ministry of Community Safety and Correctional Services consultation for Ontario’s Proposed Regulation for Street Checks.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government with dozens of legislative and policy initiatives each year - in the interest of the public, the profession and the administration of justice.

This submission was formulated by a working group of members from our Constitutional, Civil Liberties and Human Rights Law Section, Privacy and Access to Information Law Section, Criminal Justice Section, Child and Youth Section, and Aboriginal Law Section, as well as the OBA’s Equality Committee (the “Working Group”). The Sections which form the Working Group represent approximately 1,500 lawyers who would count as clients individuals from a wide range of backgrounds whose rights and interests are engaged in this consultation, municipal police services, provincial prosecutors and other law enforcement.

Comments

The Ministry seeks public input on regulating police powers relating to the practices known as “street checks” and “carding”. The consultation document asserts that police officers use street checks to engage and record interactions with individuals whose activities and/or presence seem out of the ordinary, including by asking what they are doing, requesting identification, and entering information into a database. According to the online consultation document, the rationale for the exercise of these powers is to understand community concerns and to collect information that may help solve or prevent crime.

The OBA supports the stated aim of ensuring that police powers are exercised fairly, consistently, and in compliance with the *Charter* and Ontario’s *Human Rights Code*. The OBA also supports the creation of effective tools that promote better understanding of community concerns, as well as help solve and prevent crime. With the greatest respect, however, the consultation paper does not include evidence to show how street checks, carding, and the police powers it seeks to put into the



proposed regulation are effective tools, how they improve understanding of community concerns, or how they help solve or prevent crime. The Working Group has not seen evidence out there to show that street checks and carding achieve these. We echo what we heard from stakeholders who met with the Ministry and questioned the assumption that street checks and carding are useful and necessary police practices.

In the absence of the specific proposed regulation you are considering, we have concerns about the impact such a regulation as you are describing will have on privacy, constitutional and human rights. Specifically, we wish to highlight that for the proposed regulation to withstand constitutional scrutiny, the government will have to demonstrate that it meets the legal tests set out in *R. v. Waterfield*¹, as applied in *Dedman v. The Queen*², which considered the right to move freely on public sidewalks and streets, and upheld in post-*Charter* decisions. The *Waterfield* test is in two stages. The first asks whether the action falls within the general scope of a police duty imposed by statute or recognized at common law. The second test is explained by the Supreme Court of Canada in *R. v. MacDonald*³ as a weighing (1) the importance of the police duty to the public good, (2) the extent to which it is necessary to interfere with liberty to perform the duty, and (3) the degree of interference with liberty.⁴

A survey of cases – including *Dedman*, *MacDonald*, *R. v. Mann*⁵, and *Brown v. Durham Regional Police Force*⁶ – reveals that courts have consistently rejected police practices based on the same rationale as street checks and carding as expressed in the consultation document. In the recent decision of the Ontario Court of Appeal, *Figueiras v. Toronto (Police Services Board)*⁷, the use of police powers the Ministry may be contemplating for the proposed regulation failed to pass the second test. In that case, the Court found that the police stopping an individual in public space near the security fence erected for the G20 summit in Toronto was not rationally connected to their duty, nor did it materially reduce the likelihood that a crime would be committed. Without clear evidence to demonstrate that street checks and/or carding materially reduces crime, the Working Group believes the proposed regulation will similarly fail to satisfy constitutional standards.

Our concern about the absence of a valid rationale for street checks and carding grows even stronger when the interests and experiences of racialized, indigenous, and disadvantaged

¹ [1963] 2 All E.R. 659 (C.C.A.)

² [1985] 2 S.C.R. 2

³ [2014] 1 S.C.R. 37

⁴ *MacDonald* at para. 37

⁵ [2004] 3 S.C.R.59

⁶ (1998), 43 O.R. (3d) 223

⁷ 2015 ONCA 208



individuals are taken into the balance. In addition, the Working Group has concerns about the legal interests of children, youth and persons with mental illness with respect to consent, voluntariness and understanding their rights. We echo and support the position taken by other stakeholders that the rationale provided in the consultation document – that a person’s activities or presence “seem out of the ordinary” – is unacceptably vague and broad. The Working Group is concerned that vague rationales of this kind can too easily serve as pretext and risk perpetuating discriminatory practices that disproportionately affect racialized, vulnerable and marginalized individuals, violating their human rights.

In addition to these significant constitutional and human rights concerns, we also wish to highlight the particular need to ensure proper respect for privacy rights and appropriate protection of personal information. The Supreme Court of Canada has on several occasions underlined the quasi-constitutional status of privacy rights.⁸ In the Working Group’s view, the proposal to regulate street checks must at the very least undergo a thorough privacy impact assessment (PIA) that details the risks and mitigation strategies with the street check proposal. The PIA, which ought to be made public, would also have to demonstrate how the proposal would comply with fair information practices, including at minimum:

- (a) Collecting the least amount of information necessary to achieve the proposal’s objective;
- (b) Retaining personal information only as long as necessary;
- (c) Ensuring that personal information is used only for the purpose for which it was collected, and that it is not improperly shared, and
- (d) Disposing of personal information in a secure manner.

In our respectful view, these requirements are legally significant and essential, and we call upon the Ministry to ensure that any proposed regulation identifies how they will be met.

Conclusion

Once again, the OBA appreciates the opportunity to comment on the Ministry of Community Safety and Correctional Services consultation for Ontario’s Proposed Regulation for Street Checks.

For the reasons expressed above, we have serious concerns about the impact street checks and carding have on privacy, constitutional and human rights. If the government moves forward with the proposed regulation, we would look for it to include clear provisions aimed at diminishing

⁸ *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2000] 214 D.L.R. (4th); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.



existing discriminatory patterns in police practices, by restricting street checks to very limited and clearly defined purposes and adding accountability mechanisms that enable individuals to identify and redress activities that fall outside the regulation. We also look for the opportunity to share our legal expertise by working with Ministry officials to ensure the proposed regulation addresses the constitutional, human rights, and privacy issues the Working Group has raised.