



Draft Regulation on Street Checks

Submitted to: Ministry of Community
Safety and Correctional Services

Submitted by: Ontario Bar Association

Dated: December 14, 2015



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A Branch of the
Canadian Bar Association

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BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to participate in consultations with the Ministry of Community Safety and Correctional Services (“the Ministry”), and comment on Ontario’s Draft Regulations for Street Checks (“Draft Regulations”).

The submission of the Ontario Bar Association to the Ministry about the Draft Regulations consists of the present submission as well as the OBA’s submission in the earlier consultative process, attached as Appendix “A”.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing more than 16,500 lawyers, 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 administration of justice and the profession.

The OBA’s submission on the Draft Regulations was formulated by a working group of members from our Criminal Justice Section, Constitutional, Civil Liberties and Human Rights Law Section, Privacy and Access to Information Law Section, Child and Youth Section, Aboriginal Law Section and 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.

Background

The Ministry seeks public input on regulating police powers relating to the practice known as “street checks” and “carding”. The province has posted the two Draft Regulations for public input on the random and arbitrary collection of identifying information by police, referred to as carding or street checks. As described in the Ministry’s accompanying communications, the regulations are intended to do two things:¹

1. Expressly prohibit the random and arbitrary collection of identifying information by police; and

¹ <https://news.ontario.ca/mcscs/en/2015/10/summary-of-draft-regulation-on-carding-and-street-checks.html>



2. Establish clear new rules for voluntary police-public interactions where identifying information is collected.

The Summary of Draft Regulations states that “these rules will ensure that interactions are consistent, conducted without bias or discrimination and done in a manner that promotes public confidence and keeps communities safe”.

Comments

The OBA supports the Ministry’s stated aim of ensuring that police powers are interpreted and exercised fairly, consistently, and in compliance with the *Charter of Rights and Freedoms* (“*Charter*”), the *Ontario Human Rights Code* and privacy law. The OBA supports the creation of effective constitutionally compliant tools that promote a better understanding of community concerns, help to solve and prevent crime, keep communities safe and promote public confidence in the police.

As noted in our prior submission, the OBA is of the view that it is essential that the Ministry provide an explanation as to how street checks and carding are considered to serve as effective and legitimate tools that help solve or prevent crime and help to understand community concerns. The Ministry’s rationale in this regard remains unaddressed in the Draft Regulations. The OBA continues to believe that the provision of guidance on this issue is important. In the context of the Draft Regulations, this would help establish the critical context in which to assess the appropriateness and effectiveness of any new rules for voluntary police-public interactions where identifying information is collected, stored, used and retained.

An individual’s ability to move freely on the streets and in society is not only one of life’s pleasures but is an important constitutional right.²

With respect, the OBA is unaware of evidence demonstrating that street checks, carding and the police powers included in the Draft Regulations will meet the Ministry’s stated goals. The OBA’s concern about the absence of a valid rationale for street checks and carding is heightened when the interests and experiences of racialized, Indigenous, vulnerable and marginalized individuals are taken into account.

The OBA has specifically identified the following as examples of key vulnerabilities with the Draft Regulations:

1. **Overly broad definition and application of exceptions.** A number of the exceptions are so broadly worded as to provide insufficient guidance to police, and could potentially be interpreted by the police to permit the types of police-public interactions that the Draft Regulations are intended to proscribe. For example, the broad drafting of section 1(2)(d) of the

² See *Dedman v. The Queen*, [1985] 2 S.C.R. 2, *MacDonald, R. v. Mann*, [2004] 3 S.C.R.59, and *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.), *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208.



Draft Regulations makes no reference to whether the particular offence must be a crime in progress, whether any temporal connection is required and whether the geographic location of the particular offence in relation to the street check in question is required. Such lack of clarity makes the Draft Regulation susceptible to broad interpretation and as such undermines its stated objectives that include the elimination of random, arbitrary and discriminatory interactions by police with members of the public.

2. **Need to provide for meaningful consent.** The Ministry's stated objective of establishing rules for voluntary police-public interactions for information collection, recording, retention and use is grounded in consent. The OBA believes that the Draft Regulations provide inadequate provisions for meaningful informed consent. The Draft Regulations appear to fail to recognize differences, not only in legal capacity, but as between individuals based on factors such as age, developmental/cognitive ability, mental health or membership in a vulnerable community that may be estranged from the justice system.
3. **Need for differentiation between adults and children/youth.** All areas of law (and indeed privacy protocols of social media sites) include special considerations and provisions that recognize the unique vulnerability of children and youth. The Draft Regulations fail to recognize the differing ways in which children and youth perceive authority, understand their rights and the exercise of their rights and benefit from the advice and presence of a parent or a trusted adult.
4. **Need for clear privacy and information management standards.** The Supreme Court of Canada has on several occasions underlined the constitutional status of privacy rights.³ Significant shortcomings are identified in the Draft Regulations under four key privacy principles that at a minimum are required for fair privacy practices:
 - 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.

The Ministry's objective in promulgating these Draft Regulations is in part to manage and oversee the collection of information by police. As drafted, police chiefs and/or police services

³ *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, *R. v. Spencer*, [2014] S.C.J. No. 43.



boards have discretion over the information collected, its storage, its management, its use and access to collected information.⁴

The Draft Regulations should be amended to add clear terms for how long information will be retained, accessed, used and by whom, when it will be purged, and a prohibition on sharing the information. In our view, the public interest in each of these warrants uniform practice across the province, as opposed to delegating the power to local police boards or chiefs. If there are legitimate reasons not to limit retention or sharing of information, then disclosing these reasons would aid transparency and public confidence in this new regime.

In addition, the OBA would recommend an amendment to section 5(1) of the Draft Regulations to add a duty to inform individuals of how their information may be used, who may access it, how long their information will be retained and with whom it may be shared.

5. **Need for uniformity - Section 6 “Receipts”:** The document police officers are required to give individuals pursuant to section 6 of the Draft Regulations is critically important to constitutional, privacy and human rights and the concerns discussed in Appendix “A”. In the OBA’s view, the document should be uniform across Ontario. The delegation of the responsibility for developing the document to individual police boards, rather than the Ministry, puts the Ministry’s goal of establishing clear new rules at risk. The province has, in the past, employed single standards for application across Ontario in respect of police powers, including in O. Reg. 266/10 (Suspect Apprehension Pursuits) and R.R.O. 1990, Reg. 926 (Equipment and Use of Force). This uniform approach ought to be adopted for this initiative as well.
6. **Need for accountability mechanisms.** Accountability for contraventions of the duties to inform and unauthorized use or sharing of collected information is also of critical importance. In its current form, the Draft Regulations do not provide a process for initiating and resolving complaints or disputes. The OBA calls upon the government to recognize the need for accountability measures that assist in ensuring the proper application of the new regime.

Conclusion

Once again, the OBA appreciates the opportunity to participate in the Ministry’s consultation with respect to the Draft Regulations.

If the Ministry moves forward with the Draft Regulations, the OBA would look for it to include clear provisions aimed at diminishing 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 Draft Regulations. The OBA asks the

⁴ Section 8(7)1.



government to recognize the need for independent transparent effective police oversight and to examine the roles of and relationship between police services boards and police services.

The OBA is committed to ensuring that the police interact with members of the public in a manner that is compliant with the *Charter*, constitutional, human rights and privacy law and looks forward to continuing to work with the Ministry in this regard.



Appendix “A”: OBA Street Check Submission - August 2015



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.