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December 6, 2013

Dr. Alok Mukherjee
Chair
Toronto Police Services Board
40 College Street
Toronto, ON
M5G 2J3

Dear Chair Mukherjee:

Re: Legal opinion on police stops, community inquiries, detentions and record-keeping

I am pleased to provide my opinion and overview of the issues of police stops, detentions, community inquiries and record-keeping. I have had an opportunity to review the three legal opinions obtained by Chief Blair,[1] the November 29, 2013 draft Board policy and a number of community submissions.

As you know, I was retained December 2, 2013. Because this left only eight days before your next meeting, I am only able to provide a brief opinion. I would ideally like to meet with the Board to identify your specific concerns on all aspects of the issues the current police practices raise. This would enable me to write a comprehensive opinion, if you see fit. Please treat this as my overview of the topics without any input from you.

The issues I will address are:

1. Defining police "stops" and "detentions": what are the legal rules?
2. What are the traditional and accepted goals of police-citizen interviews where the purpose is not to arrest the citizen?
3. Documenting police stops and detentions.
4. Ways in which the Toronto Police Service could make police-citizen interviews comply with the *Canadian Charter of Rights and Freedoms* and the Ontario *Human Rights Code*.

[1] These opinions were provided to me under a common interest legal privilege and under strict conditions. They continue to be privileged.

1. Defining police stops and detentions[2]

There is a police power legally known as a "detention." The police detain a citizen when that citizen reasonably believes he or she is not able to walk away due to a physical or psychological restraint. There is no police power legally known as a "stop." This is a misnomer and tends to lead people to think the police have a formal legal power to engage civilians distinct from detentions. A stop is just a plain English way of describing what happens when the police successfully engage someone in conversation or questioning. Lawyers and judges think of the issue in terms of the law of detention. This is because the *Charter* protects against illegal detentions.

Not every interaction between police and a citizen is a detention. 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 arrest process. Constitutional law unlocks an array of rights as soon as the police detain an individual. It also makes certain police conduct unconstitutional. For this reason, the law emphasizes the importance of identifying when the police-citizen encounter turns into a detention. The criminal law gives the police great freedom to question individuals before a detention.

There are a number of considerations influencing the legality of non-detention police-citizen interviews (also called field questioning) and police detentions.

The first consideration is that there is an important legal difference between investigative detention and mere field questioning. The distinction affects both police rights and citizens' rights. The police can ask questions of any person from whom they think they might obtain useful information. They do not require any special power to do this. The citizen, for his part, is not required to answer or participate in the interview. The police do not have a general power of detention for investigative purposes and thus the citizen has the right to walk away. However, if the police reasonably suspect a person is linked to an unfolding (or just committed) offence, they are entitled to stop him or her to conduct a brief investigation. This is called an investigative detention. The person is not required to answer the officer's questions but cannot just walk away. An investigative detention triggers a citizen's *Charter* right to be informed of why he or she is being detained and the right to counsel. Investigative detentions are based on suspected criminal activity; field investigations generally are not. Investigative detention gives the police more power to interfere with liberty, field questioning less; conversely, the civilian has less freedom to walk away from an investigative detention.

The second consideration is that police behaviour during the encounter is essential in determining whether the person is detained. There are three ways in which the police can detain someone: physically, by psychological restraint with legal compulsion and by psychological restraint without legal compulsion. The first of these is not engaged by so-called "carding" or the Board's draft policy. The general description of psychological restraint is where the police conduct would cause a reasonable person to think he was not free to go and had to comply with the police demand or direction. The law recognizes that psychological restraint can take many forms. As a result, even if a would-be field investigation does not involve a formal arrest,

[2] I am not going to deal with motor vehicle stops in this letter. That issue has its own set of rules governed by the criminal law, the *Charter* and the *Highway Traffic Act*. In general, the police have much more freedom to act in relation to drivers than with people on foot in public places.

handcuffing or touching, it can violate the *Charter*. The Supreme Court has told judges to take into account the potential for a "power imbalance" between the citizen and the police in deciding if there is a detention.

The language the officer uses can be decisive in determining whether a citizen is detained. A focused question based on suspicion ("Why are you here?" "What's in your pockets?") signals a legal detention**.** The officer's form of words and demands can indicate his or her intention to investigate a particular offence, signalling an investigative detention. In contrast, exploratory and open-ended questions are more likely to telegraph to the individual that he is free to leave and to the reasonable observer that there is no detention. Telling the citizen directly she is free to leave signals non-detention. If TPS officers have not been trained about the importance of language during these interactions with citizens, the Board should consider encouraging that step.

The third consideration is the informational imbalance between citizens and police respecting their rights and obligations. Most police officers are aware of the limits of their authority; many citizens, in contrast, do not know when they may exercise their right to silence and their right to walk away. The courts recognize this informational imbalance. An officer conducting a field interview could state in simple, conversational language that he or she would like the citizen's cooperation, the citizen is not obliged to say or do anything and the citizen is free to walk away. While constitutional law does not require doing so, this is the surest way to avoid violating constitutional rights. The police should generally give the citizen information sufficient to allow him or her to choose whether to comply with demands, directions or requests for information.

The courts did not develop the law of police detention with the long-term effectiveness of police practices in mind. The legal rules defining detention are based on a judgment about where on the continuum to restrain police powers. The case law sets out constitutional limits. Judges have not taken into account the success rate of police-citizen interviews or their long-term impact on the community. The legal rules governing detention do not show the Board anything about whether the practice increases investigative success rates or citizen-police cooperation. There is a long-standing debate but little empirical evidence about whether the cost of the practice in place in Toronto for the last five years is too high. If the Board is going to make policy about community policing, it may choose to look at the American experience. There is a significant body of social science research in the United States about the impact of order-maintenance policing, zero tolerance policing, and so-called stop and frisk laws. There are competing arguments about those policing policies; proponents of more aggressive policing argue that it is responsible for the drop in crime rates, while detractors argue that this is counter-factual.[3] Although the legal basis for investigative stops in the U.S. is different than in Canada, some of this information would be valuable for the Board.

2. The goals of police interviews and inquiries

The TPS says the purposes of (non-arrest, non-detention) police-citizen interviews are to gather intelligence and prevent and investigate offences. The Police and Community Engagement Review confirmed that the overall goal of these interactions is to preserve public safety. Other police agencies the TPS consulted confirmed the public safety purpose behind police-civilian

[3] See, for e.g.: Richard Rosenfeld and Robert Fornango, "The Impact of Police Stops on Precinct Crime Rates in New York City, 2003-2010" (Sept. 2011), http://www.jjay.cuny.edu/Rosenfeld_Fornango.pdf.

interviews. In short, the information gathered during these interactions assists police officers in carrying out their statutory duties to prevent and investigate crime and protect the public.

It goes without saying that these interviews and inquiries are also important for non-legal, non-investigative reasons. They relate to the police-community relationship. It is valuable for both the TPS and the community to have positive police engagement with civilians. It can foster cooperation, trust, understanding and respect. It is axiomatic that positive police-community relations let the police carry out their duties effectively, enhance the community's feelings of safety and increase respect for the law and law enforcement.

3. Documenting police stops and detentions

The value of documentation can be argued from both sides. On the one hand, the creation of a record of a police detention or interview is a permanent record of police contact with a citizen. For some citizens who have done nothing wrong, this alone is invidious and a breach of privacy. This view is entitled to be considered carefully. Several community deputants made this point at the Board's November 18th meeting. On the other hand, some kind of documentation system allows officers to retrieve information that can assist in investigations. It is unthinkable that a modern police service could function effectively without recorded human-source intelligence. Citizens who voluntarily help the police will provide many of the recorded interviews.

Further, the existence of searchable records is currently the only available oversight tool for the TPS, the Board and the courts. Unless community interviews are banned entirely, the Board should consider how it would monitor their frequency and quality. The PACER proposal would eliminate some "306" cards or their electronic equivalent. This proposal should be examined carefully to determine what residual oversight capacity it would leave the Board.

4. Making police-citizen interviews comply with the *Charter* and the *Human Rights Code*

The legal limits of police-citizen interviews are set out in the Ontario *Human Rights Code* and the *Charter of Rights and Freedoms*. The police conduct in instigating or carrying out the interview cannot violate any *Charter* rights. In the interview scenario, the most relevant rights are likely to be the right to be free from arbitrary detention, the right to be free from unreasonable search and seizure, the right to counsel and equality rights. Under the OHRC, any services provided by the TPS must be provided in a non-discriminatory manner. Under the OHRC, everyone has the right to equal treatment with respect to services, goods and facilities without discrimination based on race, colour, ethnicity, or other identified protected grounds.

There are at least three areas of potential *Charter* litigation of which the Board should be aware. Class actions are one example. The second is an application to exclude evidence. This would only occur in the context of a criminal proceeding where charges have been laid. In effect, the conduct of the TPS would be "tried" by the judge. Third, it is foreseeable that a group of citizens or a public interest group might apply for a declaration that the conduct of community inquiries and informal interactions violates the *Charter*. In other words, the legal claim would relate to the use of a neutral program in a way that has a discriminatory impact. The Supreme Court has clarified that it would be illegal to use race, nationality or colour as a decisive basis for detention. Illegal detentions violate the *Charter.*

In carrying out its mandate of ensuring the police provide adequate and effective services, the Board can create a policy prohibiting a police practice that has a *Charter*-infringing purpose, such as discrimination on the basis of race. (You may consider this would be redundant in Toronto, since the TPS has pledged to abide by the *Charter* in numerous instruments and procedures.) The Board can also make a policy prohibiting a police practice that appears neutral on its face, but violates the *Charter* in its effect. It would be more challenging to demonstrate that the effect of a practice (as opposed to the purpose) violates the *Charter*, but the Board's objective would be the same: to ensure that all policing is *Charter*-compliant.

Although most legal consequences do not occur unless there is a *Charter* or human rights violation, the Board and TPS are entitled to set their sights above minimum standards. An example of this is the Supreme Court's suggestion in the 2009 *Grant* case that if the police want to eliminate any doubt or confusion about whether they have "detained" a person in a street encounter, they should refrain from interrogating the person and tell him in unambiguous terms that he is under no obligation to answer questions and is free to go. In consultation with the Chief, the Board might develop policies that go further than minimum *Charter* standards. In the limited time available to me, I have not been able to develop this idea any further. I asked through Albert Cohen for a copy of the existing 306 and other Community Inquiry Report forms. You may consider that the problems generated by the form are a product of the questions officers are directed to ask. Deputy Chief Sloly offered to meet with me to show me the forms; however, I could not arrange this in the brief period between my retainer and your next meeting.

While the Board is free to make policy above minimum constitutional standards, there are some caveats. The first is that if you prohibit the police from documenting their interactions with citizens altogether there will be no oversight of these interactions. The second is that the Board and Chief of Police have different powers under the *Police Services Act*.

It is obvious that Toronto requires a carefully considered policy on police-citizen interviews that achieves the Board's goals in purpose and effect. In my opinion, the Board requires legal advice, social science evidence and information about other jurisdictions to make good policy respecting field questioning. I can provide that by the beginning of February 2014. I would like to meet with you in January. I can assist in drafting a policy that reflects the benefits and detriments of field questioning to the police, individual citizens and the wider community. I will give you further information and legal advice when we meet.

Yours very truly,

Frank Addario