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CONTROVERSIAL PRACTICE OF "CARDING" HITS COURT: IN SIGNIFICANT DECISION, JUDGE EXPLAINS RIGHTS

By Stephen Thiele

For at least a decade, there has been controversy over a standard Toronto police practice by which information is gathered from individuals during random stops and transferred into a database. Referred to historically as the practice of "intervention" or "street checks" and now labelled by the police as "community engagement", opponents have popularized the practice as "carding".

While the Toronto police force has defended the practice on the grounds that it is a useful investigative tool, opponents have statistically demonstrated that the practice is a form of "racial profiling" and have contended that the practice puts innocent people at risk.

Based on analysis conducted by the T*oronto Star* newspaper, between 2008 and 2013 the people stopped by police for the sake of engagement were more likely to be African-Canadian than white. 2.1 million contact cards were recorded over this five year period involving 1.2 million people.[1]

The controversy surrounding the issue of "carding" was arguably made worse this April when the Toronto police services board adopted a new policy that now permits police to stop individuals without telling them that they are free to go unless the individual specifically asks. The police are also no longer required, as was previously the policy, to issue receipts to individuals who are "carded".[2]

Given the lengthy controversy over "carding", it is not surprising that recently the issue came before the Ontario court in a case where damages were sought for injuries suffered by an individual during a random stop by police.

In *Elmardy v. Toronto Police Services Board*[3], Justice Myers while not making any findings about the constitutionality or wisdom of "carding" and not making any finding that the plaintiff was discriminated against on the basis of his race, concluded that a random stop of the plaintiff by police on a frigid winter night and their subsequent actions during the stop resulted in a violation of the plaintiff's rights under the Canadian Charter of Rights and Freedoms and in the commission of a tort. The judge expressly found that an officer involved in the stop had wrongly took the law into his own hands and inappropriately administered some "street justice" when he struck the plaintiff twice in the face.

The facts further disclosed that the plaintiff was a refugee, permanent resident in Canada and that he had come to our nation to "feel

1. Lisa MacLellan, "Toronto Police controversy: What is 'carding' and is it illegal, Daily Brew, May 6, 2015
2. Richard Warnica, "Toronto police chief won't abolish controversial practice of carding: 'There will be an increase in crime'", National Post, April 29, 2015
3. 2015 ONSC 2952

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the law". Yet the incident shattered the plaintiff's feeling of the law and struck at the rule of law itself.

Thus, in addition to awarding general damages for pain and suffering and for breaches of the plaintiff's rights under the *Charter*, Justice Myers awarded the plaintiff $18,000 in punitive damages to express the court's disapproval at the deliberate and inappropriate conduct of the officer who struck him. Justice Myers stated that "administering street justice is the opposite of a society based on laws." In addition, His Honour justified his award for punitive damages on the basis that six police officers who were eventually involved in the encounter with the plaintiff did not know that a person who was not under criminal investigation was allowed to walk down the street and tell inquisitive police officers to "get lost" without being detained, searched, exposed to sub-zero temperatures or assaulted.

Lastly, Judge Myers was shocked by the manner in which the police officers who were called as witnesses in the case testified and that their contumelious disregard for the rights of the plaintiff further entitled him to punitive damages.

From a legal perspective, this case is arguably not overly significant for its ultimate damages award of $27,000 in favour of the plaintiff.

Instead this case is significant for, among other things, its explanation of the rights of police and, more importantly, the rights of individuals when randomly stopped by them. The case provides some useful guidance to police and to members of the public when interacting with one another, particularly in light of comments made by Toronto's new Chief of Police that "carding" will remain an active practice of Toronto police.

As stated by Justice Myers, the police are entitled to speak to members of the public with whom they interact. In fact, it is arguable that police should be encouraged to interact with the public on a friendly and casual basis. This kind of interaction is positive.

However, Justice Myers also explains that members of the public are entitled to decline to speak to the police.

While the plaintiff in this case had reacted with hostility when declining to speak with police at the time of the incident, this did not justify being assaulted or being unlawfully detained.

Justice Myers stated that the police have no right to detain a person for carding alone and a person does not commit a crime as a result of being rude or, as was the fact when the police stopped the plaintiff, keeping their hands in their pockets on a frigid January night.

While police can exercise a power of investigative detention, the common law only permits such detention to be for a few seconds. Indeed, where an investigative detention is held for longer than reasonably necessary for its limited purpose it has been held in cases such as *R. v. Byfield*[4] that such a detention becomes a *de facto* arrest.

This case is also significant because it demonstrates that persons who feel that they have been unlawfully detained by police as a result of the current practice of "carding" can seek justice through our courts, and that our courts can be an effective place to help frame issues of public policy and provide useful guidance to members of the public which will help serve to diffuse tensions on controversial subjects. Justice Myers arguably subtly did this by explaining that if it was he who had been approached by police, rather than reacting with hostility, he might have politely said: "Constable, I prefer to not answer your

4. 2012 ONSC 2781 at paras. 114 and 115

question and I would like to be on my way now please."

This case is also significant because it has provided an opportunity to open a new dialogue on the controversial subject of "carding".

Whether this new dialogue will resolve the controversy, the judgment of Justice Myers will arguably at least cause the various sides in the debate over this subject to reflect on the pros and cons of the overall practice and serve as a reminder that no one is above the law.

Lastly, by condemning the conduct of the police officers involved in the plaintiff's specific encounter, the judgment may cause the Toronto police force to amend the way in which certain of its police practices are delivered. so as to prevent and avoid similar incidents.

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