

**STREET CHECKS AND CANADIAN YOUTH:
A CRITICAL LEGAL ANALYSIS**

A Thesis Submitted to the College of
Graduate and Postdoctoral Studies
In Partial Fulfillment of the Requirements
For the Degree of Master of Laws
In the College of Law
University of Saskatchewan
Saskatoon

By

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Abstract

Street checks occur when (a) a police officer engages with an individual, (b) in circumstances where the police officer does not have sufficient grounds to detain the individual, (c) the police officer elicits information from that individual, and (d) the individual's information is stored in a police database.

Street checks recently became a topic of discussion in many legal debates and in newspaper articles across Canada. Some individuals argue that street checks are conducted in a discriminatory manner and raise concerns about the constitutionality of the practice. Others argue that street checks are an important investigative tool that contributes to public safety. Unfortunately, absent from most of these debates is a discussion about the impact of street checks on youth, who are heavily targeted by the practice. Statistics reveal that young males from racial minority groups are disproportionately targeted for police stops, and the pattern is mirrored in street check data. Some of the harmful effects of disproportionately conducting street checks on young racialized males will be considered in my thesis.

In my thesis, I analyze the constitutionality of street checks using the framework of the *Youth Criminal Justice Act* and the *Charter of Rights and Freedoms*. Provisions of the *Charter of Rights and Freedoms* that are engaged by street checks include, but are not limited to, the right to not be arbitrarily detained, the right to silence, the right to be free from unreasonable search and seizure, and the right to counsel. The *Youth Criminal Justice Act* occasionally offers rights and protections that overlap with those offered by the *Charter*, for example, the right to silence and the right to counsel; however, the *Youth Criminal Justice Act* also extends beyond *Charter* protections, by restricting the use and retention of youth records and guaranteeing the right to enhanced procedural protections.

Next, I discuss the Regulations that were passed in Ontario to govern street check practices, and I analyze whether the Regulations sufficiently address the *Charter of Rights and Freedoms* and *Youth Criminal Justice Act* infringements. Ultimately, I conclude that concerns continue to exist regarding the constitutionality of street checks and that street checks involving young people should be banned. It does not appear that any Regulations or policies could be passed that would allow street checks to be conducted in a manner that complies with the *Youth Criminal Justice Act* and the *Charter of Rights and Freedoms*.

Acknowledgements

First and foremost, I would like to thank my supervisor Professor Sarah Buhler for her guidance, encouragement, and ongoing support. I would also like to thank the members of my committee, Professor Glen Luther and Professor Mark Carter, for your valuable feedback.

Also, thank you to the Law Society of Saskatchewan and the University of Saskatchewan for providing me with the funding to pursue my Master of Laws degree.

Additionally, I would like to thank Professor Heather Heavin as Associate Dean of Graduate Studies and the staff at the College of Law for assisting me throughout my enrollment in the Master of Laws program.

Dedication

This work is dedicated to my father John and stepmother Anna, my sister Julia, my partner Uche for his support, and to the memory of my mother Marion.

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Chapter I: Introduction

Street checks occur when police officers stop and question individuals in the absence of grounds for an arrest or detention. Street check advocates claim the practice is conducted pursuant to common law powers, aside from in the Province of Ontario, where Regulations have been passed to govern street check practices. Critics argue, however, that common law detention powers do not extend to authorize street check practices and the Regulations are unconstitutional. Some individuals and organizations support the practice, claiming that street checks are an important investigative tool for police officers to ensure community safety. Others assert that the practice is discriminatory and violates many of the subject's rights, with only little, anecdotal evidence suggesting that street check practices are an effective investigative tool.¹

Across Canada, several police organizations released statistics regarding the use of street checks as an investigative tool, and the statistics reveal that police officers routinely conduct street checks. The Globe and Mail compiled the data and prepared a report comparing the frequency of carding practices in major Canadian cities. The Globe and Mail reports the following:

In Saskatoon, there were 4,457 street checks conducted (approximately 2 percent of the population);

In Halifax, there were 6,798 street checks conducted (approximately 1.7 percent of the population);

In Toronto, there were 11,202 street checks conducted (approximately 0.4 percent of the population);

In Vancouver, there were 7,891 street checks conducted (approximately 1.3 percent of the population);

In Montréal, there were 10,735 street checks conducted (approximately 0.7 percent of the population); and

¹ CBC News, "Saskatoon police do more carding than other Canadian cities, report", *CBC News* (19 August 2015) online: CBC News <<http://www.cbc.ca/news/canada/saskatoon/saskatoon-police-do-more-carding-than-other-canadian-cities-report-1.3196741>>; San Grewal, "Peel police struggle to find proof carding works, emails reveal" *The Star* (30 September 2015) online: The Star <https://www.thestar.com/news/city_hall/2015/09/30/peel-police-struggle-to-find-proof-carding-works-emails-reveal.html>.

In Ottawa, there were 4,405 street checks conducted (approximately 0.5 percent of the population).²

The Globe and Mail provided an overview of street check statistics from 2014, but it appears that the frequency of street checks increases when the data is not limited to 2014. For example, data collected from Toronto suggests that police officers conducted 1,104,561 street checks between 2009-2011; the Peel Region conducted 159,303 street checks between 2009 and 2014; the Calgary Police Service conducted 47,000 street checks in 2010 and 27,000 in 2015; and 11,507 street checks were conducted in Vancouver in 2009.³ It is unclear whether any of the police services report an interaction as a street check, if the street check ultimately results in charges being laid. It is likely that if these incidents were recorded as street checks the numbers could be even higher.

My contribution to the street check discourse will focus on young people and the unique rights afforded to young people, which are triggered during a street check. The rights afforded to young people extend beyond the scope of rights afforded to members of the general public, but it seems that young people are frequently overlooked in street check discussions.

My thesis is divided into seven chapters. Chapter two focuses on establishing a definition for street checks. Given the inconsistent manner in which the terms “street checks”, “carding”, and “community contacts” are defined, it is important to establish a clear definition of the term “street check” as it will be used throughout my discussion.

In chapter three, I will explore the context in which street checks are conducted, as the data suggests that young males from racial minority groups are most frequently

² The data provides an overview of street check practices in many major cities, but several police organizations refused to disclose statistics regarding the frequency of street check practices. Krista Hoffman, Patrick White and Danielle Webb, “Carding across Canada: Data show practice of ‘street checks’ lack mandated set of procedures”, *Globe and Mail* (17 August 2015) online: [Globe and Mail <https://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/>](https://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/).

³ Toronto Police Service, “The Police and Community Engagement Report (PACER)”, Toronto Police Service (1 July 2013) at 7, online: [Toronto Police Service <http://www.torontopolice.on.ca/publications/files/reports/2013pacerreport.pdf>](http://www.torontopolice.on.ca/publications/files/reports/2013pacerreport.pdf); San Grewal, *Supra* note 1; Salmaan Farooqui, “Chief of Police speaks on ‘carding’ controversies in Calgary”, *Calgary Herald* (28 June 2016) online: [Calgary Herald <http://calgaryherald.com/news/local-news/chief-of-police-speaks-on-carding-controversies-in-calgary>](http://calgaryherald.com/news/local-news/chief-of-police-speaks-on-carding-controversies-in-calgary); Memorandum of Tim Szkopek-Szkopowski, Planning and Policy Analyst, to Leslie Stevens, Sgt. Organizational Planning Unit, Vancouver Police Department: Planning, Research and Audit Section, (4 April 2009) at 3, online at: [The Vancouver Police Department <vancouver.ca/police/assets/pdf/foi/2010/foi-final-report-2009-040-policing-non-residents-of-vancouver.pdf>](http://vancouver.ca/police/assets/pdf/foi/2010/foi-final-report-2009-040-policing-non-residents-of-vancouver.pdf).

targeted for street checks. The issue of biased police practices will be explored generally, followed by a focus on biased police practices during street checks. Finally, I will explore some of the harmful effects of biased police practices on individuals and communities.

In chapter four, I turn my attention to the legal and constitutional issues arising from street checks. Given my focus on street checks involving youth, the analysis will extend to discuss infringements of the *Youth Criminal Justice Act*. Although there has been some prior criticisms of street check practices concentrating on *Charter of Rights and Freedoms* violations, it appears that the unique legal issues raised by the *Youth Criminal Justice Act* have not been extensively explored.

Some of the proposed solutions to the rights infringements, as presented in Ontario's street check Regulations, will be discussed in chapter five. Provisions of the Regulations that will be discussed include: the need to advise individuals that participation in a street check is voluntary; the articulated grounds for conducting a street check; the restrictions on access to street check records after a specified period of time; and the direction that officers cannot engage in street checks on an arbitrary basis.

In the sixth chapter, I will present some proposed steps forward, with young peoples' rights under the *Youth Criminal Justice Act* in mind. Finally, my conclusion is presented at chapter seven. Ultimately, it is proposed that street check practices should not be conducted on youth, due to the harmful impact of street checks on young people and the unconstitutional nature of the practice.

Chapter II: Establishing a Definition for Street Checks

“Street checks,” also referred to as “community engagements” or “carding”, have been defined by several stakeholders. There have been significant variances in the definitions provided by stakeholders, given the unique perspectives and interests represented. The Ontario Court of Appeal in *R v Fountain* define carding as incidents when:

... police officers randomly approach people and engage them in conversation, which may reveal information of a general or investigative interest ... usually fill out a Field Investigative Report (an “FIR” or “208 card) ... [and] use 208 cards to build and maintain a database of individuals and their associates, primarily in high-crime or so-called “priority” areas of the city.⁴

The Ontario Court of Justice in *R v K.(A.)*, define street checks as “a practice involving stops of citizens by the police, whether there is an offence being committed or not, and recording the contact and personal information about the citizen”.⁵ The Toronto Police Service Board define the practice as “non-detention, non-arrest interactions between Service and community members that involve the eliciting and/or recording of personal information”.⁶ Anthony Morgan says the term refers to “the police practice of discriminatory, unreasonable and/or arbitrary stopping, questioning and documenting of civilians who aren’t suspected of being either involved in or connected to a crime, and indefinitely storing and sharing their personal identifying information in police service databases”.⁷ Saskatoon’s Chief of Police, Clive Weighill, states that there are various types of street checks, including: contact with an individual who is in an area where a specific criminal activity has been occurring; Beat Officers conducting street checks of persons who are homeless and panhandling; street checks being conducted on young

⁴ *R v Fountain*, 2015 ONCA 354 at para 2, 324 CCC (3d) 425.

⁵ *R v K.(A.)*, 2014 ONCJ 374 at para 5, [2014] O.J. No. 3908.

⁶ Toronto Police Services Board, News Release, Minute No. P102/14, “Community Engagements: Joint Statement of Principles between the Toronto Police Services Board and the Toronto Police Service Concerning Community Engagements” (24 April 2014) online: CP24 <http://www.cp24.com/polopoly_fs/1.2300712!/httpFile/file.pdf>.

⁷ Anthony Morgan, “Speaker’s Corner: Carding regulations will shape legal landscape”, *Law Times* (7 November 2016) online: Law Times <<http://www.lawtimesnews.com/201611075745/commentary/speaker-s-corner-carding-regulations-will-shape-legal-landscape>>.

people who are in exploitable situations; and organized crime surveillance or coincidental observations of known prior offenders, where information about the individual is submitted on a street check card, but there is no direct contact with the individual.⁸ The details recorded during a street check may include “an individual’s date of birth, address, gender, skin colour, hair colour, eye colour, weight, clothing, etc.”, and the information is stored in a searchable database for a determinate or indeterminate period of time.⁹

Although there are variations between the proposed definitions, for the purpose of my discussion, street check practices will include the following features: (a) a police officer engages with an individual, (b) in circumstances where the police officer does not have sufficient grounds to detain the individual, (c) the police officer elicits information from that individual, and (d) the individual’s information is stored in a police database.¹⁰

Furthermore, given the variety of definitions provided by stakeholders in forums regarding the legality of street check practices, it is important to specifically note that some of the circumstances identified as street checks by stakeholders are not included in my definition, including: stopping individuals in suspicious circumstances that amount to grounds for an investigative detention, engaging in community policing efforts to help at-risk or runaway youth, and recording observations about individuals’ behaviour without making contact with the individual.

Street checks differ from situations where one’s suspicious circumstances provide grounds for an investigative detention. Investigative detentions occur when there are “reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances”.¹¹ On the other hand, street checks occur when a police officer cannot satisfy the threshold for an investigative detention, usually because the individual is not

⁸ Memorandum from Clive Weighill, Saskatoon Chief of Police (2 December 2015) *Inquiry – Commissioner Brander – Street Checks*, Memo to Don Atchison and Board of Police Commissioners, at 4-5.

⁹ *Ibid* at 4 and 6; see also Neil Price, Project Director of Community Assessment of Police Practices, “This Issue has Been with us for Ages: A Community-Based Assessment of Police Contact Carding in 31 Division: Final Report” (November 2014) Logical Outcomes at 17, online: Public Safety Canada <<https://www.publicsafety.gc.ca/lbrr/archives/cnmcsc-plcng/cn000043559042-eng.pdf>>.

¹⁰ Some of the concerns that arise will exist regardless of whether the information obtained during the street check is retained on the police database, but the retention of street check information is included in the definition of street check for my purposes as it is a common feature of street checks and the retention of these records is a highly aggravating feature during street checks with youth.

¹¹ *R v Mann*, 2004 SCC 52 at 60, 241 DLR (4th) 214.

connected to a particular crime. Additionally, unlike street checks, investigative detentions have been recognized and accepted as a lawful police practice.

Street check practices also differ from community policing efforts that aim to ensure the safety of at-risk or runaway youth. Police organizations occasionally rely on safety and run-away concerns to engage young people in street checks, but many provinces have legislation specifically authorizing police officers to engage with runaway youth or youth in need of protection.¹² Police interactions with youth in the absence of authorizing legislation, or taking shortcuts to circumvent existing runaway and at-risk youth legislation, raise concerns regarding the scope and exercise of police powers. Street check concerns specifically arise when police officers claim to be helping at-risk or runaway youth, but obtain identifying information from a young person to (a) determine whether the young person has outstanding criminal charges, (b) determine whether the young person is subject to conditions that are being breached, (c) add the young person's information to a computer database for intelligence purposes, or (d) pursue any other investigative purpose.

When an officer intends to question the young person for investigative purposes, the officer is no longer engaging in community policing efforts, or with the purpose of ensuring the safety of the young person, and the interaction may amount to a street check. In the event that an officer claims to have acted in the interest of the young person's safety, a great deal of scrutiny must be exercised to consider whether the police officer is relying on safety concerns as a guise for conducting an unlawful street check. To determine whether an interaction amounts to a street check, courts should examine the nature of the interaction, including: the type of questions asked of the young person; whether the young person was advised that participation in the interaction was voluntary; whether the young person's name was searched in a police database; whether any information was recorded about the young person in a police database; and whether the circumstances suggested that the young person was in need of protection. The court

¹² See, for example: *Child and Family Services Regulation*, Man Reg 16/99, Form CFS-25; *Child and Family Services Act*, RS O 1990, c C.11 s 43(2), *Family Services Act*, SNB 1980, c F-2.2 s 31(5); *Family Court Rules*, NS Reg 20/93, Form 24.03C; *Child and Family Services Act*, SY 2008, c 1 s 31. Note that Saskatchewan does not have Regulations or Act authorizing detention for the purpose of investigating at-risk or runaway youth. Further note that some jurisdictions (Manitoba and Ontario) require a warrant to apprehend a runaway youth.

should also consider existing laws in the jurisdiction to deal with at-risk and runaway youth, and determine whether the police officer abided by the procedures outlined in these statutes.

Finally, street checks do not include situations when police officers observe an individual and make notes regarding that individual's activities. Street checks, for my purposes, require that the police officer have contact with the individual.

Chapter III: Racialized Policing and the Context in which Street Checks Occur

When considering the rights infringements that accompany street check practices, one cannot ignore the context in which police officers conduct street checks. Researchers have unveiled discriminatory police practices at a systemic level, on the basis of age, race, and gender. Specifically, studies exploring general police practices reveal a pattern that young men from minority groups are disproportionately targeted for police-initiated encounters initiated. It is my intent to demonstrate that street checks are not immune to discriminatory police practices, and to explore the harmful effects of discriminatory police practices in the context of street checks. As such, statistics relating to the over-policing of young people, minorities and males will be explored. Next, it will be demonstrated that similar policing patterns exist during street checks. Finally, the impact of discriminatory police practices will be considered from the perspective and experiences of those who are most frequently subjected to discriminatory police practices.¹³

(a) Prevalence of Discriminatory Police Practices

Age

Nicholas Bala and Sanjeev Anand identified that young people suffer from biases and stereotypes that results in their over-policing. Bala and Anand identify that the data relating to the over-policing of young people may be partly due to the greater presence of young people on the streets and in public places, but identify that over-policing young people is also partly due to a stereotype regarding criminality and adolescents:

While there is controversy about the extent (or existence) of racial profiling by police, no doubt exists about whether “age profiling” occurs – adolescents are much more likely to be stopped by the police than are

¹³ My objective is to demonstrate *some* of the harms associated with discriminatory policing but I do not purport to exhaustively discuss discriminatory police practices or critical race theory. For additional information about racialized police practices, you may wish to refer to the complete works of Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Winnipeg: Fernwood Publishing Company Limited, 2012); Carol Tator & Frances Henry, *Racial Profiling in Canada: Challenging the Myth of ‘A Few Bad Apples’* (Toronto: University of Toronto Press, 2006); Barbara Perry, *Policing Race and Place in Indian Country: Over- and Underenforcement* (Lanham, Lexington Books, 2009); and Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (New York: Oxford University Press, 2015).

adults. This may in part reflect the fact that youth are more likely to be out at night on the streets and in “high crime” public places, but there is also a degree of stereotyping by the police who are aware that criminal activity peaks in late adolescence and early adulthood. While age profiling may result in police apprehending some youth offenders, it also results in the harassment of many innocent youth and increases youth distrust of the police. Further, this police action may result in unconstitutional searches and questioning of youth by police.¹⁴

As identified by Bala and Anand, in addition to legal concerns that emerge from over-policing a segment of society, policing practices that are directed by bias and stereotypes can result in the harassment of innocent people and generate feelings of distrust towards the police. In fact, in a study conducted by Logical Outcomes, it was found that “youth were significantly more likely to cite being spoken to disrespectfully by police (51.9%),” and youth were more likely to feel “surrounded and intimidated (43.3%)” by police than adults.¹⁵

Other academics have contemplated and researched the issue of age-based discrimination in policing practices. Carl James (1998) and Robynne Neugebauer (2000) explored the issue of over-policing youth, with a dual focus on age and race. James and Neugebauer conducted interviews and it was reported, “African-Canadian youth told these researchers that they were stopped by police, mainly because of their skin colour”.¹⁶ Wortley and Tanner (2003) conducted research by surveying 3,400 Toronto high school students, and report the following findings:

Over 50 per cent of African Canadians surveyed claimed to have been stopped and questioned by the police on two or more occasions in the past two years, compared to 23 per cent of Whites, 11 per cent of Asians, and 8 per cent of South Asians.

Over 40 per cent of African Canadians claimed to have been searched by the police in the past two years, compared to 17 per cent of Whites and 11 per cent of Asians.

¹⁴ Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin Law Inc., 2012) at 233.

¹⁵ Neil Price, *Supra* note 9 at 26.

¹⁶ Tator & Henry, *Supra* note 13 at 76.

Of African Canadians who had not been involved in criminal activity, 34 per cent claimed they had been stopped by the police on two or more occasions in the past two years, compared to 4 per cent of Whites.¹⁷

The research therefore demonstrates that, whether or not the young person was involved in criminal activity, African Canadian youth were much more likely to be stopped and questioned by the police. The data also reveals that half of African Canadian youth were stopped *on two or more occasions* in the past two years. The data from Wortley and Tanner's research therefore reveals that police officers routinely stop young people, but a racial bias is also observed in the data. Similar results regarding racial bias exist when exploring the data compiled from adults.

Race

Adults report being stopped by police less frequently than young people, but the same patterns of racial bias persist in studies that focus on adult interactions with police officers. Specifically, the data reveals that young people of African-Canadian descent are most likely to be subject to over-policing, and the pattern is mirrored in the data regarding police practices focused on adults.¹⁸ Commissioners of the Commission on Systemic Racism in the Ontario Criminal Justice System concluded:

Systemic racism, the social process that produces racial inequality in how people are treated, is at work in the Ontario criminal justice system. Commission findings leave no doubt that the system is experienced as unfair by racialized people and, at key points in the administration of justice, the exercise of discretion has a harsher impact on black than white people. The conclusion is inescapable: the criminal justice system tolerates racialization in its practice (Ontario 1995: 106).¹⁹

The conclusion reached by the commissioners can be further illustrated in the following data, generated by Scot Wortley's research:

¹⁷ Scot Wortley and Julian Tanner, "Data, Denials and Confusion: The Racial Profiling Debate in Toronto" (2003) 45:3 Canadian Journal of Criminology and Criminal Justice 367, cited in Tator & Henry, *Supra* note 13 at 76-77.

¹⁸ Dakshana Bascaramurty, "Majority of black people in Toronto feel targeted and disrespected: study" *Globe and Mail* (19 July 2017) online: *Globe and Mail* <<https://www.theglobeandmail.com/news/toronto/new-study-sheds-light-on-being-black-in-toronto/article35745653/>>.

¹⁹ Comack, *Supra* note 13 at 33-34.

28.1 per cent of African Canadians reported having been stopped by police, compared to 18.2 per cent of Whites and 14.6 per cent of Chinese Canadians;

16.8 per cent of African Canadians reported having been stopped twice by police, compared to 8.0 per cent of Whites and 4.7 per cent of Chinese Canadians; and

11.7 per cent of African Canadians reported having been stopped by police ‘unfairly’ in the past two years, compared to 2.1 per cent of Whites and 2.2 per cent of Chinese Canadians.²⁰

In urban Ontario studies, over-policing research concentrates on the Black population, and the above-reported results from Ontario grouped respondents into the categories African, Chinese and White; however, similar discriminatory police practices are reported by members of Indigenous communities:

In the racialized space of the inner city, young Aboriginal men are regularly stopped because they “fit a description,” while Aboriginal women are assumed to be involved in the street sex trade.²¹

Thus, compared to the results reported from high school students, the results reflect that police have stopped a much smaller percentage of adults, but similar patterns exist with regard to race-based discrimination.

Unfortunately, while some data is available from research and interviews conducted by academics, many police forces do not retain data regarding the ethnic breakdown of individuals who are stopped by police.²² Toronto Police terminated the practice of recording ethnicity, but the Chief of Police nevertheless denied that the Toronto Police engage in racial profiling:

“You don’t know the origin of these arrests, you don’t know the socio-economic circumstances involved. You don’t know the other factors that play into why people have encounters with police.”

²⁰ Tator & Henry, *Supra* note 13 at 75, citing Scot Wortley, “The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice” (Paper presented to the 48th Annual Conference of the American Society of Criminology, Chicago, 1997).

²¹ Comack, *Supra* note 13 at 220.

²² Toronto’s police board banned the keeping of statistics linking race and crime in 1989. Jim Rankin et al, “Singled Out” *The Star* (19 October 2002) online: The Star <<https://www.thestar.com/news/gta/knowntopolice/singled-out.html>>.

“We’re not perfect people but you’re barking up the wrong tree. There’s no racism.”

And, [Chief Julian] Fantino emphasized, “we don’t do profiling.”²³

Unfortunately, it appears that the data contradicts claims made by Toronto’s Chief of Police regarding the absence of racial profiling in police practices. Some may assert that the data is reflective of more active policing in high-crime neighbourhoods, which are often marked by lower socio-economic status and greater racial diversity, rather than racialized policing; however, studies have revealed that racial minorities are also more likely to be approached by the police in neighbourhoods with predominately white residents: “the areas of the city that had a higher percentage of whites in the population were also the ones in which Black people were most likely to be overrepresented, suggesting that police were more likely to be suspicious of Black people when they were “out of place” (Toronto Star 2010a)”.²⁴

Gender

Over-policing based on gender has also been studied and the results reveal that males are more frequently stopped by police officers. Scot Wortley’s research reports the following findings, with a mixed focus on gender and race:

42.7 per cent of African-Canadian males reported having been stopped by the police in the past two years, compared to 22.1 per cent of Whites and Asians; and

28.7 per cent of African-Canadian males reported having been stopped twice in the past two years, compared to 9.9 per cent of Whites and Asians.²⁵

²³ *Ibid.*

²⁴ Comack, *Supra* note 13 at 54; See also Glaser, *Supra* note 13 at 33: “Blacks, who represented 25.6% of New York City’s population, were 50.6% of those stopped. The disparities were most likely not attributed to higher rates of patrolling in higher-crime, minority neighbourhoods – stop rates of Blacks and Hispanics were disproportionately high in overwhelmingly White neighbourhoods as well” citing Office of the Attorney General of the State of New York, “The New York City Police Department’s “stop & frisk” practices: A report to the people of the State of New York from the Office of the Attorney General” (New York: Office of the Attorney General of the State of New York, 1999).

²⁵ Tator & Henry, *Supra* note 13 at 75, citing Scot Wortley “The Usual Suspects”, *Supra* note 20.

Thus, 42.7 per cent of African-Canadian *males* report being stopped in the past two years as compared to 28.1 per cent of African-Canadians (see discussion above), and 28.7 per cent of African-Canadian *males* report being stopped twice in the past two years as compared to 16.8 per cent of African-Canadians (see discussion above). The numbers thus reflect that African-Canadians are more likely to be targeted based on race, and the numbers rise significant when only African-Canadian males are considered in the statistics.

The combined data therefore demonstrates that males, young people and racial minorities are policed more heavily than members of other demographics. Additional studies were conducted to reveal that these discriminatory police practices persist when police officers engage in street checks.

(b) Prevalence of Discriminatory Police Practices during Street Checks

When street check statistics are available, the data reveals that street checks are disproportionately conducted on young males who are part of a racial minority group. The data regarding street checks therefore demonstrates that street checks are not immune to the discriminatory police practices that have been previously observed.

Some police organizations do not routinely record an individuals' race during street checks, including Saskatoon and Edmonton.²⁶ In the absence of these statistics, however, Saskatoon's Chief of Police Clive Weighill denied that street check practices reflect racial bias: "[t]he people who we are conducting street checks on are out at three or four in the morning. It doesn't matter what race or ethnicity they are".²⁷ Similarly, Acting Staff Sergeant Brent Dahlseide, who is in charge of downtown foot patrols in Edmonton, says that street checks are not racially motivated:

"It's not who. It's the behaviour," or the location, said Dahlseide.

²⁶ Karen Bartko, "Aboriginal women, black people much more likely to be 'carded' by Edmonton police" *Global News* (27 June 2017) online: Global News <<http://globalnews.ca/news/3559077/aboriginal-women-black-people-much-more-likely-to-be-carded-by-edmonton-police/>>. Bartko: "Edmonton police said this is because the street check forms do not collect racial information, and 23 per cent of all street-check reports contain no race information whatsoever. Police said the street-check forms are automatically linked to other police reports that may contain information about a person's race". See also Charles Hamilton & Jason Warick, "Race not a factor in 'street checks': Police chief" *The Star Phoenix* (7 December 2015), online: The Star Phoenix <<http://thestarphoenix.com/news/crime/race-not-a-factor-in-saskatoon-street-checks-says-police-chief-clive-weighill>>.

²⁷ Charles Hamilton & Jason Warick, *Supra* note 26.

"I know we don't racially profile. I would be very taken aback if somebody came up and told me that my members who I'm putting out on the street daily were conducting their business in a racial manner. It would really surprise and shock me."

Dahlseide said police don't keep tallies broken down by ethnicity for people who are street checked.²⁸

Given the failure by police services in Edmonton and Saskatoon to record race during street checks, it is not as easy to demonstrate that police practices are racially biased in these cities. However, police organizations that do record one's racial identity during a street check acknowledge that racial bias exists in policing practices, even when the practice is not intentional and police officers are not instructed to conduct their investigations in this manner.

In Halifax, Nova Scotia, it was revealed that 11 percent of individuals stopped for street check purposes were black, whereas the black population is less than 4 per cent of the city's population.²⁹ In Brampton and Mississauga, black people were found 3 times more likely to be stopped by Peel police than white people, according to 6 years of data obtained regarding race-based practices in street checks.³⁰ Black people in Brampton and Mississauga were the subject of 21 per cent of street checks; yet only approximately 9 per cent of the total population in Brampton and Mississauga identified as black.³¹ In Ottawa, the relationship between gender and racial discrimination were paired together, and it was reported that racialized men interacted with the police nearly 4 times their share of the population, and 80 per cent of the people street checked were male.³² Finally, a Report examining racial profiling in Ontario found that "[a] large number of racialized and

²⁸ Andrea Huncar, "Police street checks: Valuable investigative tool or racial profiling?" *CBC News* (14 September 2015) online: CBC News <<http://www.cbc.ca/news/canada/edmonton/police-street-checks-valuable-investigative-tool-or-racial-profiling-1.3226705>>.

²⁹ Josh Dehaas, "Halifax police far more likely to stop black people, data shows" *CTV News* (9 January 2017) online: CTV News <<http://www.ctvnews.ca/canada/halifax-police-far-more-likely-to-stop-black-people-data-shows-1.3234363>>.

³⁰ San Grewal, "Blacks three times more likely to be carded by Peel police than whites" *The Star* (24 September 2015) online: The Star <<https://www.thestar.com/news/gta/2015/09/24/blacks-three-times-more-likely-to-be-carded-by-peel-police-than-whites.html>>.

³¹ *Ibid.*

³² Shaamini Yogaretnam, "Street checks data about racialized men concerning to civil liberties advocates" *Ottawa Citizen* (26 July 2015) online: Ottawa Citizen <<http://ottawacitizen.com/news/local-news/street-checks-data-about-racialized-men-concerning-to-civil-liberties-advocates>>.

Indigenous survey respondents talked about being arbitrarily stopped by police while walking and questioned about who they were, why they were in the area, where they were going, and asked for identification.”³³ A breakdown of the races that identified being street checked were provided in the Report:

Black respondents most commonly reported experiencing this type of interaction (25.9%), followed by Indigenous respondents (24.0%), other racialized respondents (17.9%), Arab or West Asian respondents (17.4%) and Muslim respondents (14.7%). In contrast, only 8.6% of respondents who identified as exclusively White reported this conduct.³⁴

The Ontario Report also identifies the role of age and gender in street check practices:

A much greater proportion of men reported experiencing carding or street checks (28.4%) than women (10.0%).

Notably, over half of the Black male survey respondents reported being stopped, questioned, and their information recorded by police. A greater proportion of Black males reported that this happened to them (55.7% or 39 responses) compared to Black females (12.2% or 19 responses). Three-quarters of the Black males under age 35 reported such an experience (although only 32 Black males of this age category responded to the question).³⁵

The practice of street checks in Canada was compared to the police practice of a ‘stop and frisk’ in New York City, and “a black person’s chances of being carded in Toronto have actually been found to be higher than their chances of being stopped and frisked in New York City”.³⁶

The data regarding police practices during street checks therefore supports the conclusion that street checks are not immune to discriminatory police practices which have been exhibited and studied in the past. Specifically, police practices during street checks discriminate by targeting young racialized males.

³³ Ontario Human Rights Commission, “Under Suspicion: Research and consultation report on racial profiling in Ontario” (2017) online: Ontario Human Rights Commission <<http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>>.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Akwasi Owusu-Bempah & Anthony Morgan, “A hard truth: Canada’s policing style is very similar to the U.S.” *Globe and Mail* (18 July 2016) online: *Globe and Mail* <<https://www.theglobeandmail.com/opinion/a-hard-truth-canadas-policing-style-is-very-similar-to-the-us/article30942053/>>.

(c) Impact of Discriminatory Street Checks

The harmful effects of street checks are apparent from the experiences of those who are most frequently targeted by the practice. In a Toronto-based study conducted by Logical Outcomes, researchers asked individuals to reflect on their experiences during the last incident of being ‘carded’ by police, and the following results were reported from survey respondents:

<i>Response Statements</i> ³⁷	<i>Number</i>	<i>Percent</i>
I was spoken to disrespectfully	66	48.2
I was surrounded and intimidated by police	53	38.7
I was told "I fit the description"	45	32.8
I felt I needed to do something to change the way the police do their job	45	32.8
I felt anxious about the incident	39	28.5
I've changed my walking route to avoid police	37	27.0
I feel like I am constantly being watched by police	36	26.3
I avoid going out at certain times because of police	35	25.5
I felt depressed	30	21.9
I was asked to show ID in or just outside my friend or family member's home apartment building?	27	19.7
An officer showed me respect	27	19.7
The police accused me of being in a gang or asked me if I was a gang member	26	19.0
My property was taken by police and never returned	24	17.5
I had a nice conversation with police	19	13.9
An officer did something nice for my family member (or friends)	13	9.5

Young males from racial minorities are most frequently the subjects of street checks and, as demonstrated by the Logical Outcomes research, street checks tend to have a negative effect on individuals. The negative consequences of street checks extend beyond the individual who is targeted by the practice, however, and ripples throughout the community.

Some of the negative consequences of street checks on individuals and communities include the fact that street checks are most often conducted on the streets or other public domains, which are important spaces for marginalized youth; street checks generate a sense of injustice among marginalized youth, who are aware of discriminatory

³⁷ Neil Price, *Supra* note 9 at 36.

police practices; street checks involve an over-policing of racialized members of the community, such that street checks perpetuate the perceived relationship between race and criminality; street checks are a stressor to those psychologically detained during the practice; the practice results in the loss of time for individuals who are targeted for the purpose of conducting a street check; and discriminatory policing, including discriminatory street check practices, have the effect of discouraging members of marginalized communities from participating in the criminal justice system as witnesses or as victims.

(i) Infringing on the Rights of Marginalized Youth Occupying the Streets

The street is a familiar public space that many people occupy on a daily basis for brief periods of time, without having a significant sense of attachment to the space. A particularly important relationship between marginalized youth and the street has been identified, however, given the limited space available for marginalized youth to occupy. The street is a means of walking from one location to another, but the street also represents a social sphere for youth who may not have any other space to gather with friends to socialize.

The significance of “the street” for marginalized youth is discussed in a study conducted in Ontario by Carl James:

... Carl James commented on the importance of “the street” as a social space for marginalized youth:

The streets serve many purposes. For the car owner or drivers, the street may be the “public” asphalted path used to drive from one place to another and/or a place to park one’s vehicle. For pedestrians, particularly those with no alternatives, the street, or more specifically, the sidewalk, is much more. It is a public path to move about, get from one place to another, and a social space; probably the most available, accessible and relatively non-restrictive social space in which to meet, “hang out”, and converse. For some “street users”, particularly young, working-class apartment dwellers, because of their limited access and opportunities to alternative leisure and recreational spaces, the sidewalk, the street, the street corner and the mall become an integral part of daily living and a part of cultural life (James 1998: 162).

Nevertheless, while “the street” constitutes a meaningful part of everyday life for many marginalized youth, their presence and visibility in that space makes them ready targets for heightened police surveillance and intervention. From a police perspective, youth who congregate on the streets are considered to be “doing nothing” or “up to no good”. As a result they are regularly stopped and questioned.³⁸

The intrusion by police officers on an individual’s rights, by engaging the individual in a street check while he or she is occupying the streets, is therefore significant for marginalized youth who may view the street as much more than a means of getting from one place to another.

(ii) Sense of Injustice and Disempowerment

Individuals targeted for street checks are not blind to discriminatory police practices. Reports indicate that at least some individuals believe the police have stopped them in the past because of their skin color.³⁹ The impact of the discriminatory practices on the subjects of street checks can be significant, as it generates a sense of injustice and leave the individual feeling vulnerable to further police interference without lawful cause:

... the perception of recurrent negligence, harassment, and victimization leaves its subjects feeling disempowered. They feel themselves to be without a voice, without an avenue to justice. They feel marginalized at best, violently constrained at worst.⁴⁰

And:

Over the years some residents began to formulate critiques of policing centred on the notion that an unspoken aim of the police was to actively undermine the life chances of youth in the 31 Division area by saddling them with criminal records for petty offences or fabricated offences. In the words of Bev Folkes, a long-time community worker, “sometimes I feel that if kids don't have a criminal record here, the police want to ensure that they get one”.⁴¹

The experience of discrimination also generates a sense of distrust towards police:

³⁸ Comack, *Supra* note 13 at 63.

³⁹ Tator & Henry, *Supra* note 13 at 76, citing Carl James, “Up to No Good: Black on the Streets and Encountering Police” in Victor Satzewich, ed, *Racism and Social Inequality in Canada: Concepts, Controversies, and Strategies of Resistance* (Toronto: Thompson Educational Publishing, 1998) 157; and Robynne Neugebauer, “Kids, Cops and Colour: The Social Organization of Police-Minority Youth Relations” in Robynne Neugebauer, ed, *Criminal Justice: Racism in the Criminal Justice* (Toronto: Canadian Scholars Press).

⁴⁰ Perry, *Supra* note 13 at 84.

⁴¹ Neil Price, *Supra* note 9 at 69, citing Bill Schiller, “Police Profile in Jane-Finch Stirs Tension, Residents Say” *Toronto Star* (2 November 1986).

55 percent of respondents reported that they believe police abuse their power in 31 Division (Figure 15). 38 percent reported that police were not trustworthy. 35 percent felt that police are dishonest and unfair in their practices, respectively. 33 percent reported feeling that police do not work within their best interest or the best interests of the communities they serve. 28 percent reported having little respect for police. 25 percent indicated that they would not contact police in the event that they witnessed a crime in the future. 25 percent also reported that they feel unsafe when police are present. And, only 22 percent of respondents indicated that they believe police prevent problems in the community.⁴²

The practice of over-policing takes on additional significance in the context of over-policing Indigenous people, due to the historical relationship between the Indigenous community and the police. Jonathan Rudin has written that:

While Aboriginal people are clearly over-policed today, over-policing has a particular history with regards to Aboriginal. Governments in Canada have historically used the police to pre-emptively attempt to resolve Aboriginal rights disputes by arresting those attempting to exercise those rights prior to any determination as to the validity of the claims. In addition, police have been used to further the objectives of the government in terms of assimilation of Aboriginal people through apprehension of children in order to have them attend residential school, and later in support of child welfare agencies. Police also were used to support many of the most egregious provisions of the *Indian Act*. The impact of over-policing has led to great distrust of the police by Aboriginal people. Over-policing also leads to the police forming attitudes that view Aboriginal people as violent, dangerous, and prone to criminal behaviour.⁴³

Efforts towards reconciliation between police officers in Indigenous communities are constrained when police officers are perceived as untrustworthy, and police officers discriminate against Indigenous community members through street checks.

The relationship between young people and police officers is hindered by street checks as the experience generates a sense of injustice and discrimination, and ultimately contributes to a perception that police officers are unhelpful and untrustworthy. The perception develops as police officers seek out young males from minority groups for the purpose of conducting street checks, street checks are conducted in the absence of any

⁴² Neil Price, *Supra* note 9 at 46.

⁴³ Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" at 1, online: Government of Ontario <http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf>.

grounds to suspect that the individual is involved in any illegal act, and members of this demographic are aware that they are subjected to discriminatory police practices.

(iii) Perpetuating the Misconception of Racialized Youth as Criminal

A serious consequence of racialized policing and over-policing in communities with a large percentage of racial minorities is the resulting crime statistics that deceptively suggest a correlation between race and criminality. When police officers engage a disproportionate number of individuals from racial minority groups, police statistics will inevitably reflect that racial minorities commit a disproportionate number of crimes. The statistics are a result of the sample group engaged by police. Unfortunately, rather than recognizing the underlying cause of the perceived relationship between race and crime, the data fuels the misperception that a causal relationship exists between race and crime.

Several academics have recognized that crime statistics are skewed as a result of over-policing in racialized communities. The Institution on Race and Poverty at the University of Minnesota observed:

One traditional law enforcement justification for racial disparities in police stops and searches is that it makes sense to stop and search people of colour in greater numbers, because they are more likely to be guilty of drug offences. The reality is that people of colour are arrested for drug offences in connection with vehicle stops at a high rate because they are targeted at a high rate, not because they are more likely than Whites to have drugs in their cars' (2000, 3-4).⁴⁴

Black and Indigenous community members have been most heavily impacted by discriminatory police practices and the resulting perceptions arising from crime statistics:

The primary impact of over-policing Native American communities, then, is disproportionate rates of arrest and formal sanctions. As noted above, Native Americans represent a substantial number of federal state and local inmates, often criminalized for relatively minor offences. *In short, disparate policing is among those mechanisms by which Native American individuals and communities become criminalized. The heightened surveillance and excessive zeal with which law enforcement appears to enforce the law in Indian Country means that they are disproportionately caught in the web of social control.*⁴⁵ [Emphasis Added]

⁴⁴ Tator & Henry, *Supra* note 13 at 56, citing Institute on Race and Poverty, "Components of Racial Profiling Legislation" (Minneapolis: University of Minnesota Law School, 2000).

⁴⁵ Perry, *Supra* note 13 at 79.

And:

Racial profiling has, thus, created a disproportionately large class of racialized offenders. It has also criminalized many predominately black neighbourhoods in Toronto that are commonly referred to by the police as ‘high crime areas’. *This criminalization has contributed to the perpetuation of the belief that there is a link between race and crime. For example, a 1995 Angus Reid Gallup Poll indicated that 45 per cent of those surveyed believed that there is such a link. The widespread belief that the face of crime is black has stigmatized the black community, and has had a tremendously negative impact on their dignity and self-worth.*⁴⁶
[Emphasis Added]

The harm suffered by the members of a group who are labeled as ‘criminal’ will be profound during every day interactions, including social settings, employment opportunities, and participation in daily activities in the community.

In addition to the stereotype negatively impacting individuals of minority groups, the community also suffers the effect of over-policing men from minority groups, and the resulting perception that race and criminality have a causal relationship. When racialized communities are disproportionately policed and a disproportionate number of charges are laid, the community suffers from the absence or restricted potential of wage earners, the removal of parents from the community, and the effect of a self-fulfilling prophecy:

There is yet another manner in which racial profiling can be counterproductive, and that is through the destabilizing effects that result from incarcerating a substantial proportion of minority men. This destabilization can lead to a self-fulfilling prophecy in the sense that minorities whose lives and opportunities have been disrupted by criminal punishment (incarceration or probation) become less able to be productive members of society and more likely to commit more crime in the future... the negative effects on the incarcerated individuals reverberate throughout their communities.⁴⁷

And

... these high rates of incarceration destabilize minority communities, at the very least depriving them of wage earners and parents, and costing legal fees.⁴⁸

⁴⁶ Tator & Henry, *Supra* note 13 at 77.

⁴⁷ Glaser, *Supra* note 13 at 124.

⁴⁸ Glaser, *Supra* note 13 at 124.

The community also suffers from cyclical reasoning, as statistics demonstrating higher rates of criminality in a specific region will result in more active policing in these neighbourhoods, where police will be dispatched to seek out criminal activity. The negative consequence of over policing includes the laying of charges in circumstances of minor infractions, particularly against individuals belonging to racial minority groups.⁴⁹

The impact of a ‘criminality’ stereotype is thus profound for individuals and the entire community. Individuals suffer from prejudice and discrimination in daily interactions as a result of biases and stereotypes associating the individual’s racial identity with criminality. The community suffers the loss of individual family members or neighbours who could have been valuable, contributing members of society. The community also suffers the social problems that emerge within a community as a result of higher rates of crime and the over policing of minor criminal infractions.

(iv) Time Lost and Stress Experienced during a Street Check

An individual seeking to defend street check practices could argue that a typical street check interaction is brief, and often will not amount to anything beyond a verbal exchange. It could further be argued that the intrusion is a minor inconvenience, compared to the potential benefit of identifying and prosecuting criminal conduct.

When an intrusion on one’s liberty occurs in circumstances that are not authorized by law, the interference with an individual’s liberty by state officials should be alarming for all members of society, regardless of the brief nature or the outcome. Even a single, brief unlawful intrusion on an individual’s rights during a street check may have particularly damaging and unpredictable consequences on an individual’s life; however, concerns about the intrusion into one’s daily activities are heightened when the exchange is not brief in duration or when the individual is repeatedly unlawfully stopped. The impact of a street check’s intrusion on one’s liberty may also be exacerbated by the identity and status of the individual in society, in terms of the stress experienced during an interaction with a police officer.

The unpredictable, damaging effects of a single street check relates to the circumstances of individuals who are typically targeted for the purpose of conducting a street check. The individuals most frequently targeted for street checks are from lower

⁴⁹ Perry, *Supra* note 13 at 11.

socioeconomic groups in society, where the loss of time may have a significant impact on the street check subject:

More practically, these stops represent time lost for the civilian. Because racial and ethnic minorities tend to be lower in socioeconomic status with relatively tenuous employment, the resulting cost of being late for work or for a job interview could be substantial.⁵⁰

Police officers engage with individuals for the purpose of street checks and restrict the individual's movements during the accompanying psychological detention. The impact on the individual's life may appear to be minor for observers of the interaction, but the consequences may be dire for individuals who are targeted for the street check, particularly given the socio-economic position of those who are most often approached by the police.

The cumulative effect of numerous street checks will amount to an inconvenience beyond a brief, single exchange and many individuals do report being stopped by police for street checks on more than one occasion. In fact, as noted above, "[o]f African Canadians who had not been involved in criminal activity, 34 per cent claimed they had been stopped by the police on two or more occasions in the past two years, compared to 4 per cent of Whites".⁵¹ An obvious effect of repeated street checks is the cumulative loss of time spent interacting with a police officer during a psychological detention and the cumulative effects of the delays spent interacting with an officer; however, individuals may also experience psychological stress during street check incidents.

Although officer-initiated interactions are not likely to be viewed as an enjoyable experience by most individuals in society, when conducted on a member of a racial minority group, street checks may be a particularly stress-inducing experience. The experience of interacting with the police may be particularly difficult for young men from racial minority groups due to the collective experiences of the community with police officers and the stereotype associating the individual's identity with criminality:

Anyone who has been pulled over has experienced an accelerated heart rate accompanying the feelings of disappointment and concern. It is an anxiety-provoking experience. For Black men, this stress may be a chronic feature of their driving experience, compounded by concern that they may be treated with extra suspicion... Research has even specifically

⁵⁰ Glaser, *Supra* note 13 at 123.

⁵¹ Wortley & Julian Tanner, *Supra* note 17, cited in Tator & Henry, *Supra* note 13 at 76-77.

demonstrated that the psychological stress resulting from racial, ethnic, and gender discrimination has severe emotional and psychological consequences.⁵²

One cause of this stress is social stigma. People who are consistently treated differently become stigmatized, and belonging to a group that is stigmatized can have that effect indirectly. If one belongs to a group that has an undesirable stereotype associated with it, such as criminality for Blacks, situations like interactions with police that signal that stereotype are especially unpleasant and threatening. Whites who are stopped by the police may experience frustration and embarrassment when they reflect their circumstance in the eyes of bystanders. Blacks, who are stigmatized by crime, are likely to experience far more intense and negative emotions as a result of attention from the police.⁵³

And:

One consistent outcome reported to the inquiry was the “disempowering impact of profiling. Several participants used the words ‘impotent,’ ‘powerless,’ ‘helpless’ and ‘emasculated’ to describe how they felt as a result of one or more incidents of profiling” (OHRC 2003: 35). Participants reported feelings of profound embarrassment and shame at an incident of racial profiling that occurred in public and in front of family and friends.⁵⁴

The research therefore suggests that at least some individuals from racial minority groups respond to police interactions with a high degree of stress, embarrassment and frustration. The stress experienced during these unlawful police stops demonstrate that street checks are not always a minor intrusion or mere inconvenience; the effect of unlawful stops by the police can have significant psychological consequences for the targeted individual.

In response to police officers conducting street checks, some individuals may argue that the practice represents a minor interference with the individual’s rights; however, unlawful stops by police officers should raise concerns for all members of society because police officers should not be operating outside of the scope of powers authorized by law. Additionally, street checks should raise concerns because the loss of time experienced by subjects, who are often marginalized groups in society; the risk that the same person may be routinely stopped for the purpose of a street check; and the psychological impact on individuals who find the street check experience to be

⁵² Glaser, *Supra* note 13 at 123.

⁵³ Glaser, *Supra* note 13 at 123.

⁵⁴ Comack, *Supra* note 13 at 46-47.

profoundly stressful and humiliating. It is improper to expect that individuals from certain neighbourhoods or racial groups should have to allot additional time in their daily schedules, in case that person is delayed by a street check stop. It is also improper to subject law-abiding citizens to a profoundly stressful interaction with the police, when he or she is not suspected of being involved in any criminal activity, and police officers are operating outside the scope of their recognized powers.

(v) Unwillingness to Participate in the Justice System

When police officers engage in discriminatory and arbitrary conduct, the justice system is brought into disrepute, as individuals no longer trust the justice system or its participants. One phenomenon that has been observed in the context of street checks is the lower likelihood that an individual will report a crime or present as a witness, if he or she has been subjected to a street check in the past.

Individuals who believe the justice system is a biased institution that operates on the basis of prejudice and stereotype will not place trust in that institution to protect their interests. In fact, many researchers have revealed that distrust of the justice system manifests as a refusal to participate in the justice system, even when one has been victimized or has witnessed a criminal offence:

The social cost of creating mistrust of institutions includes a lack of respect shown to people associated with them, greater acting out against those institutions or the law, and an unwillingness to work with those institutions, for example, by reporting crime, acting as witnesses, etc.⁵⁵

And:

Psychologists Tom Tyler and Yuen Huo ... argue that when communities (e.g., racial or ethnic minority groups) do not trust police, they are less inclined to help with law enforcement activities – less likely to report crimes, provide information, or cooperate in investigations. In addition to creating an uncivil environment, this can undermine police effectiveness in solving crimes and keeping the peace.⁵⁶

⁵⁵ Ontario Human Rights Commission, “Paying the price: The human cost of racial profiling” (Toronto: Ontario Human Rights Commission, 2003) at 29, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling>>, cited in Perry, *Supra* note 13 at 82.

⁵⁶ Glaser, *Supra* note 13 at 124.

A further consequence that stems from a distrust of the police is the increased risk of harm posed to that group as a result of being unwilling to participate in the justice system by reporting incidents of victimization:

While the disparate policing of Native American communities has a direct impact on arrest and incarceration, as noted above, it also has dramatic implications for the risk of victimization of Native Americans as individuals and as communities. The patterns of policing described herein place Native Americans at an elevated risk of physical danger. This is exacerbated by the perception, also noted above, that Native Americans do not have faith in the willingness or ability of police to intervene, and so are reluctant even to report victimization, even their own.⁵⁷

The cycle generated by distrust of police institutions is thus an underreporting of crime, an unwillingness to participate in the criminal justice system as a witness or victim, and a greater risk of harm posed to individuals in these communities, as a result of not reporting criminal activity.

To the extent that street checks are viewed as an investigative tool that allows police officers to identify and prosecute crime, the effects of the practice should be viewed using a wider lens. Street checks are conducted with the objective of investigating crime, in the absence of grounds for an investigative detention. As such, individuals are stopped without reasonable grounds to suspect that the person is connected to a criminal offence. In a study conducted in Toronto, the effect of street checks on future reporting was examined and “it was found that respondents who have been carded were 1.6 times more likely to not have called the police when a problem arose than respondents who have never been carded”.⁵⁸ As such, street checks are being used to try to identify crimes that may not exist, and the consequence of conducting street checks is the reluctance or refusal of street check subjects to report the commission of actual offences in the future.

(d) Summary of the Context, Circumstances and Impact of Street Checks

Street checks involve stopping and questioning individuals, in the absence of reasonable grounds to suspect that the individual has committed an offence. The context and circumstances in which street checks are conducted is discriminatory, as police

⁵⁷ Perry, *Supra* note 13 at 88.

⁵⁸ 48 percent of respondents who were never carded vs. 30 percent of respondents who were carded, according to Neil Price, *Supra* note 9 at 44.

officers operate in a manner that is racist, sexist and ageist: street checks disproportionately target young men from minority groups.

The impact of discriminatory policing during street checks is profound. Street check practices interfere with youth on the streets, where young people frequently gather for social purposes; members of the groups who are disproportionately targeted by police practices are aware of the discriminatory practices, and experience feelings of injustice and disempowerment as a result of street checks; the practice of racialized policing perpetuates the myth that a causal relationship exists between race and criminality; the individuals who are stopped by police experience a loss of time and delay; there is evidence that police stops are uniquely stressful for certain individuals in society, including those who are most frequently targeted by street check practices; and individuals subjected to street checks are less likely to participate as victims and witnesses in the criminal justice system, which may cause these groups to be more frequently victimized.

Discriminatory police practices during street checks is clear, as is the harm caused to the subjects of street check practices, and an exercise of police powers in this manner is highly problematic. As Hamilton and Sinclair have pointed out,

Police officers occupy a unique and powerful position in our society. They have the ability to interfere with the freedom of citizens and are called upon to protect society from the misdeeds of its members. The position of police officers provides them with opportunities to intrude into our lives – a right denied to all others. We have every right to expect and demand from them that they fulfill their responsibilities fully, fairly and in a manner that does not discriminate against anyone on account of race. It is not acceptable for any member of society to do that, but it is even more unacceptable for a police officer to do so.⁵⁹

Arbitrary stops conducted under the guise of street checks must therefore be condemned as an unacceptable practice that targets young racialized males. As my thesis will argue in the next chapter, the practice is also very likely unlawful. The next chapter will discuss some of the *Charter* and *Youth Criminal Justice Act* infringements arising from street check stops involving young people.

⁵⁹ Report of the Aboriginal Justice Inquiry of Manitoba, “Chapter 11: Police and Aboriginal People” *Public Inquiry into the Administration of Justice and Aboriginal People, Volume III: The Death of John Joseph Harper* at 102, online, <<https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=10982&md=1>>.

Chapter IV: An Examination of Street Check Practices using the *Charter of Rights and Freedoms* and *Youth Criminal Justice Act*

Street checks have been criticized for infringing on individuals' rights, as guaranteed by the *Charter of Rights and Freedoms*. A discussion focused on street checks involving young people, however, necessitates that street check practices also be considered with an appreciation of the protections afforded by the *Youth Criminal Justice Act*. At times, the rights guaranteed by the *Charter of Rights and Freedoms* will be enhanced or mirrored by the protections in the *Youth Criminal Justice Act*, but there may be times when rights or protections exist without any overlap. In addition to expanding, enhancing or adding to the rights afforded by the *Charter of Rights and Freedoms*; the rights and protections afforded by the *Youth Criminal Justice Act* are important because these protections are not subject to the reasonable limits clause outlined at section 1 of the *Charter*. Specifically, section 1 of the *Charter* states: “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁶⁰ No similar provision exists in the *Youth Criminal Justice Act*.

A significant number of *Charter* and *Youth Criminal Justice Act* protections are directly or indirectly engaged by street check practices. The rights and protections that I discuss are not intended to be an exhaustive overview. Rather, my discussion will focus on arbitrary detention at section 9 of the *Charter*; the right to silence arising from section 7 of the *Charter*, which is enhanced by section 146 of the *Youth Criminal Justice Act*; the right to counsel at section 10(b) of the *Charter*, which is enhanced by section 25 of the *Youth Criminal Justice Act*; the retention of records arising from street checks, which raises concerns under section 8 of the *Charter* and is contrary to section 119 of the *Youth Criminal Justice Act*; and the principle that youth are entitled to enhanced procedural pursuant to section 3(1)(b) of the *Youth Criminal Justice Act*.

⁶⁰ *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

(a) Arbitrary Detention

Section 9 of the *Charter*

Section 9 of the *Charter of Rights and Freedoms* states that “everyone has the right not to be arbitrarily detained or imprisoned”.⁶¹ It is necessary to establish when an interaction amounts to a detention and what would cause a detention to be declared arbitrary, by exploring jurisprudence and secondary sources from legal scholars. Once a satisfactory definition is reached for detention and arbitrariness, street checks will be assessed within that framework, to determine whether a street check interaction amounts to a detention and whether street checks are conducted in an arbitrary manner.

(i) What is a “Detention”?

A detention occurs when an individual’s liberty is constrained by the police. Police officers’ power to detain was expanded in *R v Mann*, when the Supreme Court of Canada recognized the power to conduct an investigative detention:

Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. These circumstances include the extent to which the interference with individual liberty is necessary to the performance of the officer’s duty, to the liberty interfered with, and to the nature and extent of the interference.⁶²

The Court in *Mann* clearly expressed the need to balance the interests of effective law enforcement and the rights of individuals when carving out the power of an investigative detention:

As stated earlier, the issues in this case require the Court to balance individual liberty rights and privacy interests with a societal interest in effective policing. Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law. The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties.⁶³

⁶¹ *Ibid* at s 9.

⁶² *Mann*, *Supra* note 11 at para 60.

⁶³ *Mann*, *Supra* note 11 at para 15. See also *Mann*, *Supra* note 11 at paras 16-18.

By establishing the criteria for investigative detention in *R v Mann*, the Supreme Court implicitly held that detention for reasons falling short of the criteria for an investigative detention would amount to an unlawful detention: “*Mann*, in confirming that a brief investigative detention based on ‘reasonable suspicion’ was lawful implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9”.⁶⁴ *Mann* has therefore shaped the interpretation of section 9 of the *Charter*.

The Supreme Court of Canada in *R v Therens* identified three types of detention: when a person is subject to physical constraint by the officer, when a person is given an order and there are legal consequences for non-compliance, or when a person reasonably believes that he or she possesses no choice as to whether or not to comply with the officer’s demands.⁶⁵ Unless there are grounds to detain, however, each of those forms of detention amount to an unlawful exercise of police powers.

Psychological detention is paramount in discussing street checks as officers do not physically restrain those who are stopped during a street check and there are no legal consequences for non-compliance during a street check. In recognizing the possibility of a psychological detention, the Supreme Court in *Therens* elaborated on police powers and the sense of compulsion experienced by those who are subject to a psychological detention:

In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. *The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person*

⁶⁴ *R v Grant*, 2009 SCC 32 at para 55, [2009] 2 SCR 353.

⁶⁵ *R v Therens*, [1985] 1 SCR 613 at 642-644, 18 DLR (4th) 655.

*concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.*⁶⁶ [Emphasis Added]

Psychological detention has been difficult for courts to assess as psychological detentions involve police action in the absence of a specific power to act.⁶⁷ Additionally, psychological detentions are difficult for courts for assess because the court is required to consider whether the individual reasonably believed there was no choice but to comply with the police officer's instructions.

In determining whether a person is detained during a psychological detention, courts have stated that it is necessary for the trial judge to examine all of the circumstances of the case to determine whether the line has been crossed between general questioning and detention.⁶⁸ The Supreme Court in *R v Grant* identified factors to be considered by the trial judge when assessing whether the encounter amounts to a detention:

To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- a. The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- b. The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- c. The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.⁶⁹

The Court in *Grant* states that these three factors must be considered in the context of the entire interaction and notes that, in times of uncertainty, the police officer can articulate that a person is *not* being detained:

To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain

⁶⁶ *Ibid* at 644.

⁶⁷ Steve Coughlan & Glen Luther, *Detention and Arrest*, 2d ed (Toronto: Irwin Law Inc., 2017) at 283.

⁶⁸ *R v Suberu*, 2009 SCC 33 at 462, [2009] 2 SCR 460.

⁶⁹ *Grant*, *Supra* note 64 at para 44.

whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go.⁷⁰

R v Grant was clearly influential in establishing the law regarding psychological detention and it is noteworthy that the decision in *Grant* arose from a street check encounter.

In *R v Grant* police officers were patrolling in a high crime area and stopped the accused on the sidewalk, observing that he was acting in a suspicious manner: “the accused stared at them, while at the same time fidgeting with his coat and pants in a way that aroused their suspicions”.⁷¹ The police officers asked Mr. Grant several questions and then asked if he “had anything that he should not”, at which time Mr. Grant admitted to carrying a firearm and drugs.⁷² The Court observed:

Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant’s identity to determining whether he “had anything that he should not”. At this point the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.⁷³

And:

We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed line of questioning. At this point, Mr. Grant’s liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.⁷⁴

The Court found that Mr. Grant was detained, even though he did not ask or attempt to leave the encounter with police. Rather, the Court considered all of the circumstances of the encounter and determined that the conduct of the officers resulted in a psychological detention. The police officers’ directions to Mr. Grant, the physical positioning of the officers, and the nature of the questions contributed to the finding of a psychological detention. Additionally, Mr. Grant was singled out for questioning at random. He was not a witness or suspect of any specific recent criminal offence. Mr. Grant was also a young

⁷⁰ *Grant*, *Supra* note 64 at para 32.

⁷¹ *Ibid* at 354.

⁷² *Ibid*.

⁷³ *Ibid* at para 49.

⁷⁴ *Ibid* at para 52.

person, who was part of a racial minority group, so his personal characteristics also weighed in favour of a finding that he was psychologically detained.

To summarize, an individual is detained when police officers restrict the individual's liberty, either by physical or psychological restraint. The Court in *Mann* recognized that detentions for investigative purposes were lawful, only if the grounds were met for an investigative detention, specifically when there are "reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary".⁷⁵ It was held that a detention falling short of this standard is implicitly unlawful.⁷⁶ When the standard for an investigative detention has not been met, it may be difficult to determine whether that interaction amounts to a psychological detention or a mere conversation with a police officer. The Court in *Grant* identified that some factors may be helpful in determining whether the interaction amounts to a detention, including: the circumstances giving rise to the encounter as would be reasonably perceived by the individual, the nature of the police officer's conduct and the particular characteristics of the individual.⁷⁷ The Supreme Court in *Grant* also stated that in times of uncertainty, the police officer is able to provide clarity by defining and articulating the nature of the interaction, and by advising the individual whether he or she is being detained.⁷⁸

(ii) When is the Detention "Arbitrary"?

If it is determined that a detention has occurred, the court will next determine whether the detention was arbitrary. Section 9's guarantee against arbitrary detention is a guarantee that "a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice".⁷⁹ The protection against arbitrary detention is important since arbitrary state action "creates an atmosphere of vulnerability and powerlessness, as the individual is left guessing as to why he or she has been intruded upon".⁸⁰ Arbitrariness is assessed by asking whether the detention is authorized by law,

⁷⁵ *Mann*, *Supra* note 11 at para 60.

⁷⁶ *Grant*, *Supra* note 64 at para 55.

⁷⁷ *Ibid* at para 44.

⁷⁸ *Ibid* at para 32.

⁷⁹ *Ibid* at para 54.

⁸⁰ Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall LJ 329 at 356.

whether the law itself is arbitrary, and whether the detention was carried out in an arbitrary manner.⁸¹

Police powers to detain may be derived from statute or common law; however, the Supreme Court in *Grant* makes it clear that “a detention not authorized by law is arbitrary and violates s. 9”.⁸² The Supreme Court in *Grant* also specifically rejects prior suggestions that an unlawful detention does not necessarily amount to an arbitrary detention:

Earlier suggestions that an unlawful detention was not necessarily arbitrary (see *R v Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court confirmed the existence of a common law police power of investigative detention... *Mann*, in confirming that a brief investigative detention based on “reasonable suspicion” was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.⁸³

Therefore, if a detention is not authorized by law, it is arbitrary. If, however, there are lawful grounds for the detention, the assessment moves into the next steps of the arbitrariness analysis, to determine whether the law itself is arbitrary and whether the detention was carried out in an arbitrary manner.

A law is arbitrary if there are “no criteria, express or implied, which govern its exercise”.⁸⁴ Luther and Coughlan identify that this is a limited and focused analysis:

The important point to note is that the Court has not merely said that not being governed by any criteria is *one* way to be arbitrary. Rather, it actually does intend that “not governed by any criteria” is the definition of “arbitrary” for section 9 purposes.

And:

On this approach, the section 9 question reduces to whether criteria exist at all: if they do, the detention is not arbitrary. Questions relating to the

⁸¹ *Grant*, *Supra* note 64 at para 56.

⁸² *Ibid* at para 54.

⁸³ *Ibid* at para 55.

⁸⁴ Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 24 April 2017), 5th ed (Toronto: Thomson Reuters Canada Limited, 2007) ch 49 at 2-3; referring to *R v Hufsky*, [1988] 1 SCR 621 at 633, 40 CCC (3d) 398. *R v Hufsky* helped establish the definition of arbitrariness, as roadside stops were deemed arbitrary given the absolute discretion of police officers; however, the Supreme Court found roadside stops were saved by s. 1 as the stops promote highway safety.

content of the criteria would fall to be decided under some other section, such as section 7 or 12.⁸⁵

Thus, although there may be arbitrariness concerns in considering the *types* of criteria being applied, the arbitrariness analysis at this stage simply asks whether *any* criteria exist to govern the exercise of discretion.

The final stage of the arbitrariness assessment looks at whether the detention is carried out in an arbitrary manner. Luther and Coughlan note that the test at the third stage of the analysis has not been clearly articulated:

It is clear as a matter of policy, as a matter of practice, and as a matter of precedent that there is a third step to the arbitrariness analysis, and that it focuses on the way in which a lawful and non-arbitrary power was exercised. Whether that third step should be framed as “was the manner in which the detention was carried out arbitrary,” or “did the manner in which the detention was carried out violate section 9”, or “was the manner of the detention reasonably necessary”, or something else is not yet clear. It would be of great benefit if the Court were to clarify this aspect of the law.⁸⁶

It seems that the final stage of the arbitrariness assessment should consider the reasonableness of the actions of police officers, including the content of any criteria relied upon by police officers to justify the detention. Some courts have embraced this approach by considering whether the police officers detained the individual for an “improper purpose”. In *Herter*, the accused was held for more than 7 hours in the “drunk tank” because the police officer was frustrated with the accused’s lack of cooperation.⁸⁷ The underlying law was legitimate but a section 9 violation was found because the way it was applied in Mr. Herter’s circumstances:

He was not detained in custody because he represented a risk to himself or others, or because he was likely to commit another offence, or because he was aggressive or physical with the police officers, or because he was highly intoxicated, but rather because had not “co-operated” with the arresting police officer insofar as responding to his demands for a breath sample or advising if he wanted to speak to a lawyer. The police officer candidly admitted he was frustrated, and in fact he advised the accused he was going to the “drunk tank” before they even left the scene to go to the police station. It is clear that he chose to keep the accused in

⁸⁵ Coughlan & Luther, *Supra* note 67 at 299-300.

⁸⁶ *Ibid* at 305.

⁸⁷ *R v Herter*, 2006 ABPC 221 at paras 16 and 33, 40 CR (6th) 349; rev’d 2007 ABQB 756, referred to in Coughlan & Luther, *Supra* note 67 at 304.

custody because he had the power to do so and he was in effect punishing him for his perceived lack of co-operation. The actions of the police officer were arbitrary and capricious, undertaken with intent to punish the accused for failing to co-operate with the police officer to the degree he thought appropriate.⁸⁸

Similarly, the court in *R v Khan* found that the police stopped Mr. Khan's vehicle for an improper purpose, noting that Mr. Khan was the target of racial profiling "because he was a black man with an expensive car".⁸⁹ The "improper purpose" test was therefore applied to determine whether an exercise of police powers, pursuant to a legitimate underlying law, was carried out in an arbitrary manner measures.

(iii) Do Street Check Interactions Amount to a Detention?

The most likely form of detention during a street check is psychological detention, since police generally do not physically restrain the individual and there are no legal consequences for failing to comply with a street check. The test for determining whether the individual was subjected to a psychological detention asks whether the conduct of the police officer "would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police".⁹⁰ In determining whether the encounter amounts to a psychological detention, the trial judge is instructed to consider the circumstances giving rise to the encounter as reasonably perceived by the individual, the conduct of the police officer, and the personal circumstances of the individual.⁹¹

When an individual is stopped for a street check, the most likely scenario involves a police officer interacting with a pedestrian on the street or another public space. Either the police officer would have to shout from behind to get the person's attention, or the police officer would approach from in front of the person and intercept their intended pathway. In any event, the approach involves the police officer stopping an individual, using words or physically blocking the individual's movement. The officer is either uniformed, or identifies him or herself as a police officer. Whether the police officer intends to detain the person or not is immaterial, as the message conveyed to the individual is that he or she is not free to

⁸⁸ *Ibid* at para 33, referred to in Coughlan & Luther, *Supra* note 67 at 304.

⁸⁹ *R v Khan* (2004), 244 DLR (4th) 443 (Ont Sup Ct) at paras 68-69, 189 CCC (3d) 49, referred to in Coughlan & Luther, *Supra* note 67 at 304.

⁹⁰ *Suberu*, *Supra* note 68 at para 22.

⁹¹ *Grant*, *Supra* note 64 at 44.

leave. In *R v Fountain*, the Court of Appeal for Ontario rendered a decision on street checks and the psychological impact of police officers impeding on pedestrians' intended travels:

The appellant and another young black male were walking past a police car when Constable Ryan Fardell singled out the appellant and called him over for questioning. Constable Fardell first clarified the appellant's identity and asked whether he had any outstanding warrants. Once Constable Fardell established the appellant's identity and realized he had no outstanding warrants, Constable Fardell turned to filling out a 208 card.

...

It is unclear to me from the trial judge's reasons when he finds the unlawful detention began. In my view, Constable Fardell unlawfully detained the appellant from the moment he called out to him.⁹²

The Court in *R v Fountain* recognized the psychological effect of being singled out by police officers and found that police officers calling out to a person on the street, for the purpose of a street check, amounts to a detention.

The Supreme Court found that it is important to note whether the police officer is making general inquiries or singling out the individual for a focussed investigation, when considering the circumstances giving rise to the encounter and whether the encounter amounts to a detention.⁹³ Police officers who conduct street checks will typically stop the individual, ask for identification, perhaps ask about past criminality, search the individual's name on the police database to determine if there are outstanding warrants for arrest or conditions the individual may be breaching, ask about the individual's present activities, and record details of the stop in a police database; as such, the circumstances of a street check amount to a focussed investigation into the individual's activities. In these circumstances, it is clear that the individual is not being engaged as a potential witness to an offence, the officer is not having a casual conversation with the individual, and the police officer is not offering assistance to the individual.

In *R v Grant*, the Court held that a detention arose, not when Mr. Grant was approached by Cst. Gomes, who stepped in his path and made general inquiries; rather, the Court found that a detention arose when Cst. Gomes told Mr. Grant to keep his hands in front of him, two other officers approached and flashed their badges, the two other officers took tactical adversarial positions behind Cst. Gomes, and the nature of the questioning

⁹² *Fountain*, *Supra* note 4 at paras 4 and 17.

⁹³ *Grant*, *Supra* note 64 at para 44.

changed from ascertaining Mr. Grant's identity to determining whether he "had anything that he should not".⁹⁴ With respect, Mr. Grant was asked a significant question prior to being asked if he had anything in his possession. Mr. Grant was asked, "Have you ever been arrested before?"⁹⁵ The Supreme Court does not address the significance of this question, yet it amounts to "singling out the individual for a focussed investigation", and Mr. Grant's answer to that question did lead to a further investigation by officers. Furthermore, street checks are often conducted to determine if there are any outstanding warrants or conditions being breached, so asking questions about one's past criminality forms part of an investigation into the existence of outstanding warrants or breaches of conditions.

Courts have considered, but apparently not resolved, the significance of a request for identification in a detention analysis. Police often request identification from individuals who are subject to street checks, and Alan Young identifies the request for identification goes beyond the scope of a normal social interaction and suggests an exercise of police authority:

... a request to provide formal identification beyond one's name is not an accepted feature of social interaction, and it is essentially an exercise of authority. Whether it would constitute a detention, as defined in the next section of the paper, is problematic, and this difficulty in characterization is compounded by the reluctance of both the judiciary and Parliament to address the legal significance of a request for identification.⁹⁶

The request for identification during a street check was further discussed in the decision of *R v K.(A.)*, where police officers took possession of the accused's identification:

These males were almost immediately asked to turn over identification to the police. The requests can be heard on the video. Once in the hands of police, how can one reasonably argue that the citizen is free to leave, especially since it was admitted that the purpose of getting the identification is to run it on CPIC.⁹⁷

Police officers, in some circumstances, hold on to the individual's identification document and walk away to search the police database system. As noted in *R v K.(A.)*, the physical taking of one's identification suggests detention, as a reasonable person is not likely to leave and thereby abandon their identification documents.

⁹⁴ *Grant, Supra* note 64 at paras 47-49.

⁹⁵ *Ibid* at para 7.

⁹⁶ Young, *Supra* note 80 at 342.

⁹⁷ *K.(A.)*, *Supra* note 5 at para 50.

Street check encounters also differ from the features of a typical social interaction, as an individual who is targeted for a street check may suffer criminal consequences for providing a false name. The individual stopped for a street check is not legally obligated to participate in the street check, but the individual is not usually advised of the right to not participate. If an individual tries to otherwise circumvent the police officer's questioning by providing false information, the individual is at-risk of being charged with obstruction.⁹⁸ Given the risk of incurring criminal charges during the street check interaction for not providing accurate information, the interaction with the police officer differs dramatically from a normal social interaction. The risk of incurring criminal charges during a street check weighs in favour of a finding that the interaction amounts to a detention.

The particular characteristics of the individual are also considered when assessing whether a person was subject to a detention. A characteristic is deemed relevant if "in the circumstances of the case, a reasonable person possessed of that characteristic would be more or less likely, by reason of that characteristic, to conclude that he or she has no choice but to cooperate with the police".⁹⁹ Individuals who are targeted for street checks are proven to include a disproportionate number of young people and racial minorities.¹⁰⁰ Fortunately, courts have acknowledged that these characteristics are relevant in considering whether the individual has been detained:

The trial judge found that Constable Fardell had psychologically detained the appellant. Constable Fardell, as a uniformed officer, ordered the appellant, *a young, black man*, to come over and talk to him. The officer asked the appellant if he had any open warrants, and planned to arrest the appellant if he did. He told the appellant to keep his hands down. He did not tell the appellant that he was free to leave. The trial judge inferred that, in

⁹⁸ As defense counsel, I observed young people charged with obstruction after providing a false name during a street check. For additional examples where a street check or a stop for bylaw enforcement purposes led to obstruction charges, see: The Canadian Press, "No bell on bicycle turns into whole slew of charges for Edmonton man", online: Toronto Sun <<http://www.torontosun.com/2015/10/15/no-bell-on-bicycle-turns-into-whole-slew-of-charges-for-edmonton-man>>; and *R v Gray*, 2010 ONCJ 629 at paras 25 and 29 (appeal dismissed).

⁹⁹ *R v Bennight*, 2012 BCCA 190 at para 58, 320 BCAC 195.

¹⁰⁰ Bala and Anand, *Supra* note 14 at 233; Jim Rankin & Patty Winsa, "Known to police: Toronto police stop and document black and brown people far more than whites" *The Star* (9 March 2012) online: The Star <https://www.thestar.com/news/insight/2012/03/09/known_to_police_toronto_police_stop_and_document_black_and_brown_people_far_more_than_whites.html>; and Jeremy Warren, "Indigenous university students more likely to be stopped by police, survey says" *Saskatoon StarPhoenix* (20 February 2016) online: Saskatoon StarPhoenix <<http://thestarphoenix.com/news/local-news/indigenous-university-students-more-likely-to-be-stopped-by-police-survey-says>>.

all these circumstances, a reasonable person would have felt compelled to obey the officer and felt that he could not walk away... I agree with the trial judge's inference. Therefore, I conclude that Constable Fardell unlawfully detained the appellant from the outset of their conversation.¹⁰¹ [Emphasis Added]

Other examples exist to demonstrate courts' willingness to acknowledge factors such as minority status, physical size, age and timid dispositions when considering whether a reasonable person in the individual's circumstances would have experienced a psychological detention.¹⁰²

When considering the personal circumstances of an individual, including the age and inexperience of the individual, the lack of public education regarding legal rights and police powers should also be considered. However, the test for detention does not accommodate the lack of public legal education:

If most citizens feel compelled to cooperate with the police by remaining in police custody until dismissed, then virtually every encounter, whether innocuous or overbearing, would trigger a reasonable perception of being detained. It appears that the courts do not employ a reasonable person test that is empirically-based, but rather they employ a normative concept of reasonableness based on an assessment of when an individual *should* believe that he or she is being detained.¹⁰³

The reality is that many citizens in Canada do not know their legal rights or how to exercise their legal rights: “[i]t is probably not widely understood in the public at large that in Canada the police possess no general power to detain a person, even for a short time, for the purpose of answering questions”.¹⁰⁴ Yet an individual can be the subject of a street check, without having the opportunity to inquire with a third party about the scope of police powers or having their rights read aloud by the police officer. As such, to suggest that cooperation with the police is voluntary, rather than the result of a psychological detention and coercion, is unjust:

¹⁰¹ *Fountain*, *Supra* note 4 at paras 20 and 21.

¹⁰² See, for example, *R v Way*, 2011 NBCA 92 at para 36, 377 NBR (2d) 25: “the question is whether a reasonable young, non-assertive, not confident and unsophisticated person would have felt obliged to cooperate with the investigation in the circumstances”; *Grant*, *Supra* note 64 at para 50 “... the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant's youth and inexperience” and “the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct”.

¹⁰³ *Young*, *Supra* note 80 at 352-353.

¹⁰⁴ *Hogg*, *Supra* note 84 at ch 49 at 5.

[I]t is not meaningful in practice to attempt to distinguish between field interrogation with consent and that which takes place without consent. In high crime-areas, particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three.¹⁰⁵

Legal tests should not operate in a manner that suggests individuals are aware of police powers and that compliance is equal to voluntariness. Police officers, as agents of the state, argue that consent is obtained when individuals comply with police officers' directions or requests as the individual is not being detained; however, it is simultaneously the state's decision to not actively educate or advise the public of the scope of police powers.

It seems the lack of public education regarding legal rights has not been considered within the scope of the individual's characteristics, but it should be recalled that the Supreme Court in *R v Grant* states it is open to the police officer to indicate when a person is *not* detained, not obliged to answer questions, and free to go.¹⁰⁶

The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights.¹⁰⁷

Grant suggests that police officers may notify individuals when they are or are not subject to detention, if the circumstances are unclear. Given the difficulties in identifying whether a psychological detention has arisen and the lack of public legal education, the recommendation in *Grant* should be revisited, and a presumption in favour of detention should exist in circumstances where the police officers do not explicitly tell the individual that he or she is not being detained. Arguments regarding coercion and intimidation,

¹⁰⁵ Young, *Supra* note 80 at footnote 71, citing Lawrence P. Tiffany, Donald M. McIntyre, & Daniel L. Rotenberg, "Detection of Crime: Stopping and Questioning, Search and Seizure, Encourage and Entrapment" (Boston: Little, Brown, 1967) at 17.

¹⁰⁶ *Grant*, *Supra* note 64 at para 32.

¹⁰⁷ *Ibid* at para 39.

respectfully, skips a step in that these arguments suggests an individual is overwhelmed during the interaction with police officers and participates as a result of the authoritative role of police officers. The sense of coercion or intimidation experienced when interacting with a police officer will certainly operate in some cases to prevent an individual from asserting his or her rights.¹⁰⁸ However, the reality is that some individuals may not be giving up rights and freedoms as a result of coercion; rather, some individuals may not be aware of the rights that are engaged during the interaction or how to engage these rights. Individuals may simply assume that police officers are acting within the scope of police powers and comply with the officer's requests as a result of this mistaken assumption.

The police officer's conduct during a street check, the circumstances surrounding the street check stop as reasonably perceived by the subject of the stop, and the personal circumstances of the individual, each weigh in favour of a finding that the typical street check does amount to a psychological detention. Police officers stop individuals on the street by interrupting their travels and ask for the individual's identification. The interaction is therefore a focused investigation into the individual's conduct and the individual's identity. In addition to asking for identification, the interaction differs dramatically from a routine social interaction as the individual is at risk of criminal charges if a false name is provided to police. Furthermore, the demographic of individuals who are most often targeted for street checks are young males from racial minority groups, and it has been recognized that youth and individuals from racial minority groups are more likely to experience a psychological detention when interacting with the police. Finally, when considering the circumstances of an individual who is stopped by police, courts should approach the analysis with an understanding that most individuals are unaware of the scope of police powers in Canada. Members of the public are not widely educated about police powers and may be psychologically detained due to an assumption that police officers would not operate beyond the scope of recognized police powers, and a belief that there is no alternative but to comply with the officer's requests.

¹⁰⁸ The issue of consent and voluntariness will be discussed in the context of waivers at Chapter V.

(iv) Is the Detention that Arises during a Street Check Arbitrary?

When street checks amount to a psychological detention, the individual is generally arbitrarily detained since street check detentions are conducted without lawful authority, and an unlawful detention is necessarily arbitrary. Street check detentions are not authorized by common law because street checks are conducted without satisfying the grounds required for an investigative detention. Additionally, there is no legal authority for a street check detention in most jurisdictions, as police officers in most jurisdictions lack statutory authority to conduct street checks.¹⁰⁹ The arbitrariness assessment should therefore be resolved at the first stage of the assessment, as the practice is not authorized by law. Nevertheless, street check practices will be assessed using the criteria outlined at the third stage of the arbitrariness assessment, to determine whether street checks are conducted in an arbitrary manner.

Freedom from arbitrary detention is intended to ensure that police officers act in accordance with the rule of law:

Arbitrariness is the absence of reasoned decision-making. The right to be free from arbitrary detention is a command to the police to apply their experience, expertise and reasoning to ensure that deprivations of liberty are not based upon whims and prejudices.¹¹⁰

A detention is arbitrary if an individual's liberty is constrained in the absence of any criteria or if the individual is detained for an improper purpose. Unlike investigative detentions or arrests, which require police officers to articulate the grounds for the exercise of their powers, according to criteria set by statute and courts; street checks are often conducted on a whim or based on suspicions that are insufficient grounds for an investigative detention. In other words, police exercise absolute discretion in determining who to detain for a street check. No criteria have been established to restrict or guide police officers' exercise of discretion.

Some courts have indirectly recognized that street check practices are unlawful, based on the manner in which police disproportionately target specific demographics, or

¹⁰⁹ Ontario is an exception as Regulations were passed dealing with the collection of identifying information by police officers. The arbitrariness of the Regulations will not be explored at this stage as Chapter IV focuses on the shortcomings of the Regulations, including a discussion on arbitrariness.

¹¹⁰ Young, *Supra* note 80 at 361.

police officers' reliance on "hunches" regarding suspicious activity in circumstances that do not amount to grounds for an investigative detention:

This idea of the particularity of a suspicion is easily illustrated. For example, the police could not detain an individual for investigative purposes simply because he was walking in a downtown alley at 2:00 a.m. and they had a hunch he might be doing *something* illegal;¹¹¹

As noted, a generalized feeling on the part of the police that an individual is doing something wrong can not serve as the basis for a lawful detention. Thus, in this way, the prerequisites for investigative detentions help to ensure they will not be based on the sorts of hunches and intuitions which can serve as a cover for arbitrary conduct and either deliberate or unconscious profiling based on factors such as race, ethnic origin or socioeconomic status;¹¹²

The presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals;¹¹³ and

It is, of course, well established that the police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. More particularly, they may not conduct an investigative detention to determine whether an individual is, in some broad way, "up to no good". In order to justify an investigative detention, the police suspicion must be particularized, i.e. it must relate to specific criminal wrongdoing.¹¹⁴

Given that courts have clearly condemned the detention of individuals based on hunches, suspicions, prejudices and racism in the past; the same criteria should be rejected as grounds for detaining individuals during street checks. When street checks are conducted on the basis of prejudices and whims, the resulting detention is made for an improper purpose and the detention is arbitrary.

(b) The Right to Silence

Section 7 of the *Charter* and section 146 of the *Youth Criminal Justice Act*

Police officers often request personal information from individuals during a street check, and rights under section 7 of the *Charter* are therefore engaged. Section 7 of the *Charter* protects the right to silence as a principle of fundamental justice.¹¹⁵ Section 7's

¹¹¹ *R v Yeh*, 2009 SKCA 112 at para 76, [2009] 11 WWR 193.

¹¹² *Ibid* at para 91.

¹¹³ *Mann*, *Supra* note 11 at para 47.

¹¹⁴ *Yeh*, *Supra* note 111 at para 75.

¹¹⁵ *Charter*, *Supra* note 60 at s 7.

right to silence is always afforded to those questioned by the police: it does not rely on a finding that the individual is detained or arrested. During a street check, unfortunately, individuals are not advised of the right to silence. Police officers' failure to properly advise an individual of the right to silence while detained and questioned is a breach of the individual's section 7 *Charter* rights. The breach is exacerbated when young people are involved in street checks, since the police officer's conduct will also violate the *Youth Criminal Justice Act*. Specifically, section 146 of the *Youth Criminal Justice Act* requires that police officers satisfy several procedural requirements before obtaining a statement from a young person, in order for the statement to be deemed admissible.

The section 7 *Charter* right to silence is intended to protect “the right of the detained person to make a meaningful choice whether or not to speak to state authorities” and “the focus is on the conduct of the police and its effect on the accused’s ability to exercise his or her free will”.¹¹⁶ The test is objective but it allows the individual’s personal characteristics to be considered.¹¹⁷ The Supreme Court in *R v Singh* recognized that the experience of being detained can have “a significant impact on the suspect and cause him or her to feel compelled to give a statement”, and “the importance of reaffirming the individual’s right to choose whether to speak to the authorities after he or she is detained is reflected in the jurisprudence concerning the timing of the police caution”.¹¹⁸ Yet, individuals are routinely psychologically detained during a street check, and police officers probe for information without advising the individual of his or her right to silence. Given the nature of the test, which allows the individual’s personal characteristics to be considered in the voluntariness assessment, young people are given some additional protection from the *Charter* as compared to adults. However, the *Youth Criminal Justice Act* provides even further right to silence protections for individuals under the age of 18.

The right to silence is more heavily guarded when young people are the subject of a police encounter. The *Youth Criminal Justice Act* states that statements to a police officer are inadmissible unless, *inter alia*, the young person is advised *in language appropriate to his or her age and understanding* that: the young person is not obliged to

¹¹⁶ *R v Singh*, 2007 SCC 48 at 406, 3 SCR 405.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid* at para 32.

give a statement; the statement may be used as evidence in proceedings against him or her; the young person has the right to consult with a parent or counsel; and the young person is entitled to have the presence of a parent or counsel, unless the young person wishes to give a statement in their absence.¹¹⁹ Furthermore, when a young person waives the right to counsel, the police officer “must obtain a signed or audio- or videotaped waiver from the youth.”¹²⁰ Thus, in addition to the *Charter* right to silence warning that must be provided upon detention and common law requirement that statements be provided voluntarily, the *Youth Criminal Justice Act* imposes several procedural requirements on officers who intend to question a young person for the purpose of obtaining an admissible statement. There is no suggestion or claim that police officers are fulfilling their duty to warn individuals of the right to silence, or that police officers are fulfilling their obligations under the *Youth Criminal Justice Act* when conducting street checks.

Although the section 7 right to silence is always afforded to Canadian citizens, section 146 protects young people when police try to extract an admissible statement from the young person. It may be argued that street checks do not trigger section 146 rights, as police officers are not seeking to obtain an admissible statement from the young person; however, this approach to questioning youth should not allow police officers to curtail section 146 protections. When an officer asks a young person questions during a street check, the officer is seeking to obtain incriminating information from that youth. An officer who asks questions about the youth’s identity, the youth’s recent activities, the youth’s associates, or the youth’s outstanding legal matters may gather information that is valuable for laying charges against the young person or that may result in a further investigation of that young person. By ignoring the section 146 requirements and relying on a claim that the statements are not sought with the intention of admitting the statements in court, police are operating in a manner that is inconsistent with the core principles of the *Youth Criminal Justice Act*. Essentially, the argument would allow police officers to bypass rights and protections afforded to citizens, as long as the police officer does not intend to admit that specific evidence in court. The officer’s duties under

¹¹⁹ *Youth Criminal Justice Act*, SC 2002, c 1, at s 146(2)(b).

¹²⁰ Bala and Anand, *Supra* note 14 at 398; see also *Ibid* at s 146(4).

section 146 should arise when the officer begins questioning a young person with the intention of gathering incriminating information as, at that stage, the police officer is conducting an investigation. Allowing officers to rely on a claim that the statements are not sought for admissibility purposes does not uphold the principles of protecting youth by offering enhanced protections in the criminal justice system, including an opportunity to consult with counsel and a parent prior to giving a statement to the police.

Section 146(6) anticipates some circumstances in which a police officer does not need to comply with procedural requirements for obtaining a statement from the youth, specifically:

When there has been a technical irregularity in complying with paragraphs (2)(b) to (d), the youth justice court may admit into evidence a statement referred to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.¹²¹

And

The requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.¹²²

The exceptions outlined at section 146, for statements to be admitted when officers do not comply with the procedural steps of obtaining a young person's statement, cannot be relied upon for statements made during a street check. When a technical irregularity is said to occur, the youth justice court may admit the evidence if admitting the evidence would not bring into disrepute the principle of enhanced procedural protection, to ensure the fair treatment and protection of youth rights. Police officers engage numerous youth in street checks each year and question these youth, without properly advising of the right to silence or the right to counsel. As such, it is not a technical irregularity; it is an ongoing systemic disregard for *Charter* and *Youth Criminal Justice Act* protections. Allowing officers to question youth, with a routine disregard for statutory requirements in the *Youth Criminal Justice Act*, brings the principle that youth are entitled to enhanced procedural protections into disrepute.

¹²¹ *Youth Criminal Justice Act*, *Supra* note 119 at s 146(6).

¹²² *Ibid* at s 146(3).

When oral statements are spontaneously made to a person in authority, before the person in authority has a reasonable opportunity to comply with the procedural requirements of the *Youth Criminal Justice Act*, the statement may also be admitted. Oral statements are not made spontaneously when the individual is stopped and questioned by police officers. In the typical street check scenario, the police officer has the opportunity to comply with the *Youth Criminal Justice Act* requirements immediately upon approaching a young person, but the officer elects not to satisfy these requirements. The information obtained from a young person during a typical street check is elicited by the officer, rather than being statements that are spontaneously made by the young person.

The questions posed by officers during street checks should not be treated in a different manner than the same questions being posed at the police station in an interview room. Police officers request information from young people during street checks that may be used against the young person, even if the intent is not to admit these statements as evidence. The information gathered may be used for other investigative purposes or trigger a further investigation of the young person. Young people are not being advised of the *Charter* section 7 right to silence during the street check detention, and their age and inexperience weighs in favour of a finding that these statements are not voluntary. Nor are officers complying with the procedural safeguards outlined at section 146 of the *Youth Criminal Justice Act* when young people are questioned during street checks. The exceptions, which would allow statements to be admitted in the absence of compliance with the *Youth Criminal Justice Act's* statutory requirements, do not apply to street checks. As such, the questioning of young people during a street check should be deemed an infringement of section 7 of the *Charter* and section 146 of the *Youth Criminal Justice Act*.

(c) The Right to Counsel

Section 10(b) of the *Charter* and section 25 of the *Youth Criminal Justice Act*

Section 10(b) states that everyone has the right “on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right”.¹²³ The Supreme

¹²³ *Charter*, *Supra* note 60 at s 10(b).

Court concluded that the right to counsel arises immediately upon detention, “whether or not the detention is solely for investigative purposes”.¹²⁴ Additionally, “the detained person must understand in a general way ‘the extent of his jeopardy’ in order to be validly warned of the right to counsel.”¹²⁵

The right to counsel imposes an information duty and an implementation duty on police officers. Police officers must advise individuals of their right to counsel, and allow the opportunity for that right to be exercised:

The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so.¹²⁶

Street checks are not conducted in a manner that encourages detainees to be aware of their rights and the scope of police powers through the usual police cautions: police officers may not even advise the individual that participation in a street check is optional – let alone advising the individual of the extent of their jeopardy or providing the right to counsel.¹²⁷ As such, individuals are placed in a vulnerable position where there is a significant power imbalance, and they are not provided with the tools to make an informed and voluntary decision about whether or how to interact with the police. Police agencies maintain that these cautions and warnings are not required during street checks since the individual is not detained; however, as established above, street check subjects are often psychologically detained. A detention is even more likely to be found when young people are involved, as a person’s youth and inexperience are factors that may be considered when determining if the person believed that he or she had no choice but to comply with the officer’s requests.

¹²⁴ *Grant*, *Supra* note 64 at para 58; *Suberu*, *Supra* note 68 at para 2.

¹²⁵ Hogg, *Supra* note 84 at ch 50 at 13 and 17; see also *R v Smith*, [1991] 1 SCR 714 at 727, 4 CR (4th) 125.

¹²⁶ *Suberu*, *Supra* note 68 at para 38.

¹²⁷ Saskatoon Police Chief Weighill noted that Ontario’s new regulatory requirement, that officers advise individuals they are not required to provide identifying information, is impractical as people would elect not to provide information to the police. The Canadian Press, “Saskatoon Police Chief: No Racism in Street Checks” (11 December 2015) online: Huffington Post <http://www.huffingtonpost.ca/2015/12/11/saskatoon-police-racism_n_8784230.html>.

In addition to having the *Charter* section 10(b) right to counsel, which arises upon arrest or detention, the *Youth Criminal Justice Act* states that a young person is entitled to contact counsel *at any stage of proceedings*, including the time *before and during* any consideration of whether to use extrajudicial measures:

A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing judicial proceedings against the young person under this Act, to use an extrajudicial sanction to deal with the young person.¹²⁸

The right to counsel for young people is therefore extended far beyond the scope of what is guaranteed to adults. Young people can contact a lawyer even *before* the police consider whether to start judicial proceedings or extrajudicial sanctions. It seems clear that the provision granting the right to counsel “at any stage of proceedings” should therefore include a right to contact counsel during street check encounters. A young person does not need to be detained or arrested, a young person does not need to be charged, a young person does not need to appear before a court, or reach any other stage in proceedings for the right to counsel to be engaged. Nevertheless, police officers do not advise young people of the right to contact counsel during a street check or give young people an opportunity to contact counsel during a street check.

The right to contact counsel is a significant protection for young people who come into contact with police officers, as consultation with counsel will help the young person make an informed decision about how to proceed when confronted by a police officer who is performing a street check. The opportunity to contact counsel will also allow the young person to become aware of any risks that may arise from a decision to participate in a street check. The statutory protection of young peoples’ right to counsel, beyond the scope of the *Charter* right to counsel, reflects that young people are easily intimidated by police officers and young people are in need of additional assistance when determining how to exercise their rights. Stopping a young person for the purpose of conducting a street check, without advising of the young person of the right to contact counsel, is a violation of the protections of the *Youth Criminal Justice Act*. Additionally, questioning a young person who is psychologically detained during a street check,

¹²⁸ *Youth Criminal Justice Act*, *Supra* note 119 at s 25(1).

without fulfilling the information and implementation duties of the right to counsel at section 10(b) of the *Charter*, amounts to a breach of the young person's *Charter* rights.

(d) The Retention of Youth Records

Section 8 of the *Charter* and Section 119 of the *Youth Criminal Justice Act*¹²⁹

The *Youth Criminal Justice Act* strictly limits who can access youth records, for what purpose, and for what period of time, to ensure that young people are provided with enhanced privacy and enhanced procedural protections.¹³⁰ The *Youth Criminal Justice Act* defines records as “any thing containing information, regardless of its physical form or characteristics ... that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.”¹³¹ The record generated during a street check interaction meets the definition of a record pursuant to the *Youth Criminal Justice Act*'s definition, as street check records are created by police officers who are *investigating* offences that are or *could* be committed; however, police practices do not respect the *Youth Criminal Justice Act*'s restrictions on youth records. Street check practices therefore gravely infringe on protections in the *Youth Criminal Justice Act* regarding the access to youth records.

The *Youth Criminal Justice Act* states that officers may keep records regarding young people who are alleged to have committed an offence, or young people who are referred to extrajudicial measures:

115 (1) *A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence.*

¹²⁹ Section 8 of the *Charter of Rights and Freedoms* could be paired as an accompanying protection for the seizure of information and the retention of records arising from street check interactions; however, the *Youth Criminal Justice Act* addresses records explicitly. A section 8 breach would depend on a finding that the individual had a reasonable expectation of privacy in the information seizure during a street check (*R v Edwards*, [1996] 1 SCR 128 at para 45, 26 OR (3d) 736) and a finding that there is no law authorizing the seizure, or that the authorizing law is unreasonable, or that the manner in which the seizure is conducted is unreasonable (*R v Collins*, [1987] 1 SCR 265 at para 23, 38 DLR (4th) 508). In circumstances where adults are subject to street checks, section 8 would merit consideration, but young people are provided with an alternate, more specific protection regarding the retention of street check information.

¹³⁰ *R v Mosa*, 2016 ABQB 336 at para 6: “Access to records under the *YCJA* is strictly controlled in order to provide enhanced procedural and privacy protections to youth dealt with under the *Act*.”

¹³¹ *Youth Criminal Justice Act*, *Supra* note 119 at s 2.

(1.1) The police force shall keep a *record of any extrajudicial measures* that they use to deal with young persons.¹³² [Emphasis Added]

Section 115 does not provide authority to retain records from street check interactions, as only records that arise from the allegation of an offence or the imposition of extrajudicial measures are “records” for retention purposes under section 115.

Section 116 states that the department or agency of the government may keep records that were obtained for specified purposes under the *Act*:

116(1) A department or an agency of any government in Canada may keep records containing information obtained by the department or agency:

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
- (b) for use in proceedings against a young person under this Act;
- (c) for the purpose of administering a youth sentence or an order of the youth justice court;
- (d) for the purpose of considering whether to use extrajudicial measures to deal with a young person; or
- (e) as a result of the use of extrajudicial measures to deal with a young person.¹³³

Section 116 provides greater authority to collect and retain records regarding young people; however, the greater discretion at section 116 still does not anticipate keeping records from street check interactions. Even if one were to somehow successfully argue that section 116 should apply to street check records, the use and retention of records in section 116 records is ultimately subject to the restrictions set out in section 119, which determines who may access the records and how long the records will remain accessible.

For my purposes, the relevant subsections of section 119 are 119(1)(g) and (o), which allow police officers to access youth records and individuals performing criminal record checks to access youth records:

119 (1) Subject to subsections (4) to (6), from the date that a record is created *until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116...*

*(g) any peace officer for
(i) law enforcement purposes, or*

¹³² *Youth Criminal Justice Act*, *Supra* note 119 at s 115.

¹³³ *Ibid* at s 116.

- (ii) any purpose related to the administration of the case to which the record relates, during the course of proceedings against the young person or the term of the youth sentence...
- (o) a person, for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services, with or without remuneration.¹³⁴ [Emphasis Added]

Sections 125 and 127 illustrate additional circumstances when records may be disclosed, which go beyond the scope outlined in section 119(1).¹³⁵ For instance, section 125(1) allows police officers to disclose any information in section 114 or 115 to any person if it is necessary for the investigation of an offence; section 125(2) allows the Attorney General to disclose section 114 or 115 records pertaining to witnesses and co-accused; section 125(3) allows disclosure of records to foreign states; section 125(4) allows disclosure of records to insurance companies; section 125(5) allows disclosure of records for the purpose of preparing reports; and section 125(6) allows disclosure of records to schools, when some conditions are satisfied. Additionally, section 127 states that the youth justice court may, on application by the provincial director, the Attorney General, or a peace officer, make an order permitting disclosure of specified information in the record to specified persons, if the court finds that disclosure of the record is necessary given the following: the young person has been found guilty of an offence involving serious personal injury, the young person poses a risk of serious harm to others, and disclosure of the information will help avoid the risk. If an application for disclosure is brought under section 127, the young person and a parent of the young person, is given the opportunity to be heard.

Even those individuals and organizations who are granted access to youth records under section 119(1), 125, or 127 are only able to access records during the access period, as defined by section 119(2).¹³⁶ The access periods outlined in the *Youth Criminal Justice Act* at section 119(2) do not apply to street check records, as section 119(2) anticipates either the use of extrajudicial sanctions or the laying of charges:

119 (2) *The period of access referred to in subsection (1) is*

¹³⁴ *Youth Criminal Justice Act*, *Supra* note 119 at s 119(1).

¹³⁵ *Ibid* at s 125 and s 127.

¹³⁶ *Ibid* at s 119(1), 125(8) and 127(4).

- (a) if an *extrajudicial sanction* is used to deal with the young person, the period ending two years after the young person consents to be subject to the sanction in accordance with paragraph 10(2)(c);
- (b) if the young person is *acquitted of the offence* otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, the period ending two months after the expiry of the time allowed for the taking of an appeal or, if an appeal is taken, the period ending three months after all proceedings in respect of the appeal have been completed;
- (c) if the charge against the young person is *dismissed for any reason other than acquittal, the charge is withdrawn, or the young person is found guilty of the offence and a reprimand is given*, the period ending two months after the dismissal, withdrawal, or finding of guilt;
- (d) if the charge against the young person is *stayed*, with no proceedings being taken against the young person for a period of one year, at the end of that period;
- (e) if the young person is found guilty of the offence and the youth sentence is an *absolute discharge*, the period ending one year after the young person is found guilty;
- (f) if the young person is found guilty of the offence and the youth sentence is a *conditional discharge*, the period ending three years after the young person is found guilty;
- (g) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is a *summary conviction offence*, the period ending three years after the youth sentence imposed in respect of the offence has been completed;
- (h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an *indictable offence*, the period ending five years after the youth sentence imposed in respect of the offence has been completed...¹³⁷ [Emphasis Added]

The *Youth Criminal Justice Act* at section 119(2) therefore demonstrates legislators' intent to restrict the access and use of youth records to circumstances when a young person is charged with an offence or is referred to extrajudicial measures. Sections 120 and 123 allow access to occur beyond the periods of time identified in section 119(2) in special circumstances, when applications are made to a court or when the young person reoffends. Neither of these sections allow access to street check records, or access to street check records beyond the access period.

Police organizations in Canada do not treat youth records arising from street checks with the care and attention mandated by the *Youth Criminal Justice Act*. Even

¹³⁷ *Youth Criminal Justice Act*, *Supra* note 119 at s 119(2).

when a young person is not charged with an offence or referred to extrajudicial measures, records arising from street checks are kept indefinitely by some police organizations: “unlike youth court records which are typically sealed anywhere from two months to five years after a young offender has served a sentence, the information in the database is never purged”.¹³⁸

The harm caused by the lengthy retention of youth street check records can be illustrated by the stigma associated with prior known encounters with the police. In future interactions with police officers, records relating to prior street checks will be available for inspection on the police database. Street check records may also be used as grounds for a former street check subject to become a suspect in a subsequent investigation, based on the information recorded at the time of the street check. Furthermore, police organizations have admitted that a search of street check records is conducted when considering candidates for employment within the police department.¹³⁹ A young person who is subject to a street check may therefore be denied employment opportunities due to the information retained from a street check, which may have taken place years prior to the person’s application for employment, without any criminal charges being laid. Finally, an additional harm posed by the retention of street check records relates to young people’s inability to assess the accuracy of the information that is recorded by police officers before it is stored on a police database.

The harm associated with an inability to assess the accuracy of the information retained by police officers can be illustrated by the circumstances of a law student, George Knia Singh. Mr. Singh submitted a freedom of information request for Toronto police records, and criticized that the reports contained inaccurate personal information stemming from five separate street checks. For example, he notes that there is reference to a possible immigration warrant investigation although he was born in Canada; his height is recorded as “8” although he is approximately 6 feet tall; his birthplace is inaccurately recorded as Jamaica; and it was noted that he was being “rude to police”

¹³⁸ Patty Winsa, “Youth carding records should be purged, advocates say” *The Star* (27 September 2013) online: The Star <https://www.thestar.com/news/gta/knowntopolice2013/2013/09/27/youth_carding_records_should_be_purged_advocates_say.html>.

¹³⁹ Neil Price, *Supra* note 9 at 64.

when he alleged racial profiling, after being followed in his vehicle for approximately one kilometre.¹⁴⁰

The information recorded by police may therefore influence the nature of future interactions with police officers, cause one to become a suspect in a criminal investigation, or even hinder future employment opportunities, yet there is no transparency or easily accessible process for ensuring the street check information is accurately recorded.

In circumstances where a young person is tried and convicted of an offence, the *Youth Criminal Justice Act* limits who can access a young person's record and for what purpose the record may be accessed. When the young person is tried and convicted of an offence, the *Youth Criminal Justice Act* also requires that the record be inaccessible after the specified access period has lapsed. During a street check, on the other hand, the information gathered from the young person may result in a finding that the young person was not acting in a criminal manner. Records obtained from a street check, however, are accessible for an indeterminate time period, beyond the accessibility period for records pertaining to the actual commission of an offence. The contents of street check records are also not subject to challenges for accuracy, as the records are not disclosed in the absence of criminal proceedings, yet these records can profoundly shape the young person's future by stigmatizing the young person during future police stops, identifying the young person as a possible suspect in future investigations, or hindering the young person's employment opportunities. As such, significant concerns arise from police officers' failure to comply with the *Youth Criminal Justice Act's* restrictions on youth records when handling information that is obtained during a street check.

¹⁴⁰ Jim Rankin, "CI-Ridealong-Main: Top criminal law student Knia Singh blames refusal on 'carding' incidents" *Toronto Star Touch* (28 June 2016), online: Toronto Star Newspapers Ltd. <startouch.thestar.com>.

(e) Enhanced Procedural Protections for Youth

Sections 7 and 15 of the *Charter*,¹⁴¹ and Section 3(1)(b) of the *Youth Criminal Justice Act*

A young person is entitled to enhanced procedural protections according to the *Youth Criminal Justice Act*, which states that a purpose of the *Act* is “to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected”.¹⁴² Young people are recognized as a protected group in society and, by virtue of the *Youth Criminal Justice Act*, these protections extend to youth in criminal law matters. Despite the *Youth Criminal Justice Act*’s protections, present police practices demonstrate a pattern that young people are disproportionately targeted for street checks,¹⁴³ so it appears that widespread police practices fail to recognize the enhanced procedural protections of young people. Additionally, since young people are disproportionately targeted for street checks, it appears that young people are actually granted *less* procedural protections than adults.

When young people are systematically and disproportionately targeted by police officers conducting street checks, they are not granted the standard procedural protections guaranteed to all members of society by the *Charter*, let alone benefitting from the enhanced procedural protections that are guaranteed by the *Youth Criminal Justice Act*. The disproportionate targeting of young people for street checks in itself is contrary to the principle that young people have enhanced procedural protections; however, each of the above *Charter of Rights and Freedoms* and *Youth Criminal Justice Act* infringements that arise during a street check represent a further failure by police to recognize young peoples’ enhanced procedural protections in criminal law.

¹⁴¹ Section 15 of the *Charter* will be excluded from my analysis, as the *Youth Criminal Justice Act* will sufficiently address the protections afforded to young people, without the complexity of a *Charter* equality analysis. Similarly, section 7 of the *Charter*, which recognizes as a principle of fundamental justice that young people have reduced moral blameworthiness, will not be addressed. Each of these sections would require an extensive analysis that would overwhelm my discussion, and should be addressed in a separate paper.

¹⁴² *Youth Criminal Justice Act*, *Supra* note 119 at s 3(1)(b)(iii).

¹⁴³ Bala and Anand, *Supra* note 14 at 233.

Chapter V: Proposed Solutions to the *Charter of Rights and Freedoms* and *Youth Criminal Justice Act* Infringements as observed in Ontario’s Regulations, *Collection of Identifying Information in Certain Circumstances - Prohibition and Duties*

To date, Ontario is the only province to pass Regulations regarding street check practices.¹⁴⁴ It appears that Ontario’s Regulations, *Collection of Identifying Information in Certain Circumstances - Prohibition and Duties*, intend to address some of the *Charter* violations that were identified by critics of street check practices and discussed in my thesis. The apparent attempts to address *Charter* concerns in the Regulations include: requiring officers to advise individuals that participation in street checks is voluntary; articulating grounds that may be relied upon for conducting a street check; prohibiting arbitrary street checks; and imposing a time limit on the retention of records generated from a street check. In this chapter, each of the proposed solutions presented in the Regulations will be critically considered. The analysis will demonstrate that the Regulations do not adequately address some of the central legal concerns outlined in the previous chapter. In particular, it is noteworthy that, despite apparent efforts to address or mitigate *Charter* infringements, the Regulations do not recognize any of the unique protections afforded to young people by the *Youth Criminal Justice Act*.

(a) Consent Required from Participants

The Ontario Regulations, *Collection of Identifying Information in Certain Circumstances – Prohibitions and Duties*, are the only regulations passed in Canada to guide officers’ conduct during street checks. Section 6 of the Regulations impose a duty on police officers to advise street check subjects that they are not required to provide their identifying information,¹⁴⁵ and section 6 of the Regulations came into force on January 1, 2017.¹⁴⁶ Unfortunately, despite the numerous *Charter* rights that are engaged by street checks, the voluntariness requirement outlined in the Regulations does not amount to the standard typically imposed for a waiver of *Charter* rights.

Charter rights are engaged by street checks, given the stopping and questioning of individuals without advising of the right to silence, the collection and retention of

¹⁴⁴ *Collection of Identifying Information in Certain Circumstances - Prohibition and Duties*, O Reg 58/16.

¹⁴⁵ *Ibid* at s 6.

¹⁴⁶ *Ibid* [Editorial note in regulations: “On January 1, 2017, sections 5 to 9 come into force”].

personal information obtained during a street check, the discriminatory manner in which street checks occur, the unlawful psychological detention that arises during a street check, and the failure to advise or accommodate the right to consult with counsel during a street check detention. The Ontario Regulations do not sufficiently address the need to obtain one's consent to waive *Charter* rights. The Regulations in Ontario state:

A police officer shall not attempt to collect identifying information about an individual from the individual unless the police officer, in accordance with the procedures developed under section 13, (a) has *informed the individual that he or she is not required to provide identifying information to the officer*; and (b) has informed the individual why the police officer is attempting to collect identifying information about the individual.¹⁴⁷
[Emphasis Added]

Police officers' duty to inform individuals they are not required to provide identifying information to the police, and police officers' duty to advise individuals why they are seeking identifying information, is waived by the Regulations in some circumstances:

Section 6(2) states that an officer "is not required to inform the individual under clause (1)(a) or (b) if the officer has a reason to believe that informing the individual under that clause might compromise the safety of an individual";¹⁴⁸

And

Section 6(3) states that the officer is not required to inform the individual under clause 1(b) if the officer has a reason to believe that informing the individual, "would compromise an ongoing police investigation", "might allow a confidential informant to be identified" or "might disclose the identity of a person contrary to the law, including disclosure of the identity of a young person".¹⁴⁹

The Regulations set a low threshold for obtaining consent from an individual, as compared with the standard that is typically imposed on police officers who allege that an individual has waived his or her *Charter* rights. The standard that is typically imposed when claiming that one has waived a *Charter* right is illustrated by *R v Mellenthin*, *R v Wills* and *R v Borden*.

In *Mellenthin*, the Supreme Court of Canada discussed consent to waive one's *Charter* rights in circumstances where the appellant was asked questions about his gym

¹⁴⁷ *Ibid* at s 6(1)(a) and (b).

¹⁴⁸ *Ibid* at s 6(2).

¹⁴⁹ *Ibid* at s 6(3).

bag and then police conducted a search of his gym bag.¹⁵⁰ The Court found that the appellant was detained and could have reasonably felt compelled to answer questions posed by the police officer.¹⁵¹ The Supreme Court in *Mellenthin*, when discussing informed consent, stated, “consent must be one that is informed and given at a time when the individual is fully aware of his or her right” and “the Crown must adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his or her rights to refuse to respond to the questions or to consent to the search”.¹⁵²

In *R v Wills*, the Court of Appeal for Ontario heard the appeal of Mr. Wills, who was charged with impaired driving causing death.¹⁵³ Mr. Wills was involved in an accident and two of his passengers died.¹⁵⁴ He participated in a roadside A.L.E.R.T. test and the device registered a warning, indicating levels between 0.05 and .1.¹⁵⁵ The police officer recommended that the appellant provide a breathalyzer sample to aid in the event of a civil action.¹⁵⁶ The officer advised, before taking the breath sample, that the appellant “did not have to provide the sample and the accused responded that he was aware of that”.¹⁵⁷ To the surprise of the officer, the appellant’s breathalyzer result was .128.¹⁵⁸ It was subsequently discovered that the A.L.E.R.T. device was not properly calibrated.¹⁵⁹ The parties agreed that the accused consented to the taking of the sample, but the issue was whether the consent was voluntary and informed.¹⁶⁰ The Ontario Court of Appeal articulated six criteria for considering whether an individual has waived his or her *Charter* rights:

The application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search requires that the Crown establish on the balance of probabilities that: (1) there was a consent, express or implied; (2) the giver of the consent had the authority to give the consent in question; (3) the consent was voluntary

¹⁵⁰ *R v Mellenthin*, [1992] 3 SCR 615 at 616, [1993] 1 WWR 193.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 616-617.

¹⁵³ *R v Wills*, 1992 CanLii 2780, 7 OR (3d) 337 (Ont. C.A.).

¹⁵⁴ *Ibid* at 2.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested; (4) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent; (5) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and (6) the giver of the consent was aware of the potential consequences of giving the consent.¹⁶¹

In *Wills*, it was found that the sixth criterion was not met, as the appellant was not aware of the potential risk of being criminally charged.¹⁶²

In *R v Borden*, the accused was under investigation for two sexual assaults, but he was only advised that he was under investigation for one sexual assault upon his arrest.¹⁶³ The accused consented to provide bodily samples to the police, and the samples were subsequently used to compare evidence in both sexual assault cases.¹⁶⁴ The Supreme Court indicated “[w]hile the accused need not have a detailed comprehension of every possible outcome of giving consent, he or she should understand that the police are also planning to use the product of the seizure in a different investigation from the one for which the accused is detained”.¹⁶⁵

The decisions of *R v Mellenthin*, *R v Wills* and *R v Borden* demonstrate that consent to waive a *Charter* right requires knowledge of the right to refuse to participate and knowledge of the potential consequences of giving consent. It is noteworthy that *R v Mellenthin*, *R v Wills* and *R v Borden* relate to the right to be free from unreasonable search and seizure; however, a high threshold for obtaining consent to waive a *Charter* right is also reflected in case law that addresses the right to counsel. In *Clarkson v The Queen*, the Supreme Court held that a waiver of the right to counsel “must be premised on a true appreciation of the consequences of giving up that right”.¹⁶⁶ In *R v Prosper*, the appellant asserted his right to counsel and then indicated that he was no longer interested in exercising his right to counsel. The Supreme Court found:

¹⁶¹ *Ibid.*

¹⁶² *Ibid* at 3.

¹⁶³ *R v Borden*, [1994] 3 SCR 145 at 146, 119 DLR (4th) 74.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid* at 147-148.

¹⁶⁶ *Clarkson v The Queen*, [1986] 1 SCR 383 at 384, 26 DLR (4th) 493.

The waiver must be free and voluntary and must not be the product of either direct or indirect compulsion. The standard required for an effective waiver of counsel is very high. A person who waives a right must know what is being given up if the waiver is to be valid.¹⁶⁷

Finally, in *R v L.T.H.*, the Supreme Court dealt with a young person's waiver of the right to counsel. The Court held:

[40] Like adults, young people can waive their right to counsel. They may also waive their unique right to have counsel and an adult present during the making of a statement. However, *as in the adult context, a waiver will be valid only if the judge is satisfied that it is premised on a true understanding of the rights involved and the consequences of giving them up.*

[41] This Court has repeatedly reaffirmed the test for valid waiver of the *Charter* right to counsel under s. 10(b) and has indicated that the standard required for such a waiver is very high (see, for example, *R. v. Prosper*, 1994 CanLII 65 (SCC), [1994] 3 S.C.R. 236; *Clarkson v. The Queen*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383; *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233; and *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869). According to Lamer C.J., “a person who waives a right must know what he or she is giving up if the waiver is to be valid” (*Prosper*, at p. 275, citing *R. v. Bartle*, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173).¹⁶⁸ [Emphasis Added]

The case law therefore demonstrates that a valid waiver of *Charter* rights is measured using a strict standard: a valid waiver requires an understanding of the right that is being waived and an understanding of the consequences of waiving that right.

Unfortunately, it seems that similar case law does not exist regarding the standard for waiving one's right to not be arbitrarily detained under section 9 of the *Charter*. Although the standard for a waiver of one's rights under section 9 of the *Charter* has not yet been established, there is no justification for suggesting that a lower standard should be imposed, as the law is clear that no *Charter* right should be given preference over others.¹⁶⁹ In any event, the same standard for waiving one's right to be secure from unreasonable search and the right to counsel should be applied to a street check, as these rights are also engaged during a street check. The questioning of an individual during a street check and the retention of street check records engage section 8 rights, and failing

¹⁶⁷ *R v Prosper*, [1994] 3 SCR 236 at 240, 118 DLR (4th) 154.

¹⁶⁸ *R v L.T.H.*, 2008 SCC 49 at paras 40-41, [2008] 2 SCR 739.

¹⁶⁹ *Dagenais v Canadian Broadcast Corporation*, [1994] 3 SCR 835 at 877, [1994] S.C.J. No. 104; see also *R v N.S.*, 2010 ONCA 670 at para 48, 102 OR (3d) 161.

to advise individuals of the right to counsel during a psychological detention engages section 10 rights.

The standard set by Ontario's street check Regulations, which only require an officer to advise the individual that he or she is not required to provide identifying information, falls short of the traditionally strict standard of proof imposed when alleging that an individual has waived his or her *Charter* rights. The Regulations do not require an officer to advise the individual that he or she is not subject to a detention and may leave at any time, advise of the potential consequences for providing identifying information, advise what use will be made of the identifying information, advise that the individual's name will be searched in the police database and it may result in the discovery of criminal charges, or advise that there are no repercussions for choosing not to provide identifying information. The Regulations therefore set a lower standard for waiving *Charter* rights than the informed consent standard that is typically required when waiving one's *Charter* rights. Furthermore, in some circumstances, the Regulations waive the duty to advise that participation is voluntary.

The difficulty presented by the voluntariness standard that is set out in the Regulations can be further illustrated by using the following hypothetical scenario:

Taylor is walking to work at 10 p.m., taking a shortcut through an alley. A police officer enters the alley in a police cruiser and Taylor looks away from the car's headlights. Taylor is stopped by the officer and asked for identification. Pursuant to section 6(a) (and assuming that none of the exigent circumstances in section 6(b) and (c) apply), the officer advises Taylor that he is not required to provide identifying information, and the officer may advise that Taylor is being stopped because of his suspicious activity (looking away from the officer and travelling in the alley at night).¹⁷⁰ Alternatively, the officer could simply state he is gathering information for intelligence purposes or an offence that *might* be committed.¹⁷¹

Taylor is not advised that the officer intends to check the police database to determine whether there are grounds for an arrest, nor does the officer advise Taylor that the identifying information will be stored on a police database for an indefinite period of time. Taylor is also unaware that the information stemming from the street check could result in him being "flagged" as a suspect at a later date (i.e. if a string of break-ins occur in

¹⁷⁰ *Collection of Identifying Information*, *Supra* note 144 at s 1(1)(b).

¹⁷¹ *Ibid* at s 1(1)(a) and (c).

the area and the database demonstrates that he was routinely stopped in this alley – given that it was his route to work).

Taylor may not wish to comply with the street check, as he is late for work, and this is not the first time Taylor has been stopped walking through the alley. However, Taylor is worried that there may be consequences for failing to comply with the officer's requests (i.e. worrying that the officer will detain him for a longer period of time due to a refusal to provide identifying information; worrying that the officer will note that he is non-compliant and target him for future "community policing" stops; worrying that the officer will note that he is non-compliant and somehow undertake an investigation in relation to him; or even worrying that the police officer will use force against him).

It is difficult to articulate the typical thought process engaged by an individual who is stopped for the purpose of a street check, particularly if that individual is not familiar with the law, but I suggest that the above-scenario is not too far removed from the reality of many individuals who are approached by police officers for street checks. As demonstrated by the above-scenario with Taylor, even when police officers abide by the street check procedures in Ontario's Regulations, individuals will continue to be ill informed about the consequences of complying and refusing to comply, as the Regulations do not impose a duty on police officers to obtain informed consent.

Given the potential legal consequences faced by an individual who participates in a street check, it is necessary to expand on the officer's duty to advise an individual that he or she is not required to provide identifying information. Specifically, no less than a standard of informed consent should be applied. Informed consent will require the officer to clearly advise the individual that his or her participation is voluntary; that the individual stopped has the right to not participate in the street check; there are no negative repercussions for an individual who decides not to participate; the reason for the street check; the anticipated and possible additional use of the information obtained; the risks that accompany the use of the individual's information (i.e. searching for breaches or outstanding warrants, or adding the information to a database which may result in the individual being "flagged" as a person of interest in future offences); and the manner in which the information will be stored.

Saskatoon Police Chief Weighill has noted that Ontario's new regulatory requirement, requiring officers to advise individuals they are not required to provide

identifying information, is impractical as people would elect not to provide information to the police¹⁷². In other words, Chief Weighill takes the position that Ontario's Regulations went too far by requiring officers to advise individuals that they do not need to participate in the street check, and his concern is that the requirement will render street checks ineffective as an investigative tool. The *Charter* rights of individuals must take priority over street checks as an investigative tool, and only informed consent should satisfy the standard for waiving *Charter* rights. Courts have previously ruled on the standard required for waiving *Charter* rights and determined that police officers must meet a standard of free and informed consent, and there is not justification for suggesting that police officers conducting street checks are exempt from such a requirement.¹⁷³

(b) Grounds for Conducting a Street Check

In the absence of regulations, individuals are stopped for street checks and officers do not necessarily have a specific reason for the stop. According to the new Regulations in Ontario at section 1(1), a person may be stopped for the purpose of: inquiring into offences that have been or might be committed; inquiring into suspicious activities to detect offences; or gathering information for intelligence purposes.¹⁷⁴ There is no attempt to define 'suspicious activities' or 'intelligence purposes' in the Regulations. Additionally, the Regulations at section 1(2) specify that the Regulations do not apply when an officer is investigating an offence that the officer reasonably suspects has been or will be committed.¹⁷⁵ Section 1(2) therefore helps to demonstrate the low standard set by section 1(1) regarding the investigation of offences: not only can the officer investigate an offence that *might* be committed, the officer does not need to demonstrate reasonable suspicion that an offence *might* be committed. The Regulations in Ontario therefore expand police powers by authorizing officers to conduct street checks, a new police power similar to an investigative detention, but the Regulations allows street checks to occur without requiring officers to satisfy the grounds of an investigative

¹⁷² The Canadian Press, *Supra* note 127.

¹⁷³ In any event, Chief Weighill's concerns are unfounded. Even when individuals are advised of their rights using a standard of informed consent, individuals often cooperate with police despite these warnings, due to the coercive and intimidating nature of the interaction. Consider, for example, individuals who choose to provide statements to the police following the right to silence, or individuals who waive the right to contact counsel.

¹⁷⁴ *Collection of Identifying Information*, *Supra* note 144 at s 1(1).

¹⁷⁵ *Ibid* at s 1(2).

detention. In fact, the Regulations go so far as to authorize street checks to detect offences that *might* be committed, to investigate suspicious activities without defining what constitutes a suspicious activity, and to gather information for intelligence purposes without clarify what ‘intelligence purpose’ will be met or how the ‘intelligence purpose’ will be met by conducting a street check. Essentially, street check powers are unrestricted by the Regulations in terms of the grounds for conducting street checks.

The manufacturing of a new street check power is concerning, given courts’ historical reluctance to extend police detention powers in the absence of grounds for an investigative detention.¹⁷⁶ Even more concerning is the fact that the new police power is recognized in Ontario’s Regulations without articulating clear boundaries or restrictions on the power. The scope of powers afforded to police by section 1(1) of the Regulations allow police to conduct street checks, without imposing an evidentiary standard to be met, and without providing definitions for critical terms that are used to established the grounds for conducting street checks (i.e. “intelligence purposes”, “suspicious activity”). Even when suspicious activity is absent and the officer is not investigating an offence that might be committed; the officer could simply assert that the street check was conducted for the purpose of gathering intelligence information, and the street check would comply with the grounds identified in the Regulations for conducting a street check.

(c) Prohibition on Arbitrary Street Checks

The Regulations in Ontario state that an officer shall not attempt to collect identifying information from an individual, if any part of the reason for the attempted collection of information is that the officer perceives the individual to be from a particular racialized group (unless the officer is seeking a particular individual who is part of the racialized group, and has a physical description with details beyond the person’s race, approximate age, and sex), or if the attempted collection is done in an arbitrary way.¹⁷⁷ The Regulations go on to state that an attempt to gather information is done in an arbitrary way unless the officer is able to articulate reasons, and the reason cannot be “only that the individual is present in a high crime location”.¹⁷⁸ The Regulations’ prohibition on arbitrariness is problematic to the extent that the officer must

¹⁷⁶ See discussion above regarding Arbitrary Detention at Chapter IV.

¹⁷⁷ *Collection of Identifying Information*, *Supra* note 144 at s 5(1)(a) and (b).

¹⁷⁸ *Ibid* at s 5(4).

articulate the reason for the stop: the Regulations requires reasons to be articulated but, as identified above, the grounds for conducting a street check could be as simple as gathering information for intelligence purposes, investigating suspicious behavior or investigating an offence that might be committed. Furthermore, the Regulations' prohibition on arbitrary street checks is problematic since the Regulations do not specifically indicate that a stop based on an individual's perceived age amounts to an arbitrary stop.

Despite being among the group of individuals who are disproportionately targeted for street checks, and despite the enhanced procedural protections according to the *Youth Criminal Justice Act*, young people are not adequately protected by the Regulations in Ontario. The Regulations prohibit an officer from stopping an individual on the basis of race or presence in a high crime location, but the Regulations do not similarly prohibit street checks that are conducted on the basis of one's apparent age. The Regulations thereby ignore unique protections that exist for young people and ignore the principles of the *Youth Criminal Justice Act*, which state that young people have the right to enhanced procedural protections.

(d) Time Limits Imposed on Record Retention

In the absence of guiding regulations, police officers have indicated that street check information is recorded in a police database for an "indeterminate" period of time, and that police officers liberally access the information for investigative and hiring purposes.¹⁷⁹ The Regulations in Ontario provide some restrictions on the access and use of information obtained from street checks, but the restrictions apply equally to adults and youth, and the restrictions do not comply with the *Youth Criminal Justice Act*:

9(3) Access to identifying information shall be restricted in accordance with subsection (10) unless the information may be included in a database, under this section, without limiting the access of members of the police force.

(4) Identifying information may be included in a database without limiting the access of members of the police force if,

- (a) the police officer who collected the information,
 - (i) has indicated that the attempted collection complied with section 5,

¹⁷⁹ Neil Price, *Supra* note 9 at 17; see also Memorandum from Clive Weighill, *Supra* note 8 at 4 and 6.

(ii) has indicated that the individual was informed as required under clauses 6 (1) (a) and (b) or, if informing the individual under one of those clauses was not required under subsection 6 (2) or (3), has indicated the reason why that was not required,

(iii) has indicated that the individual was offered the document as required under clause 7 (1) (a) or, if offering the document was not required under subsection 7 (2), has indicated the reason why that was not required, and

(iv) has indicated that the individual was given the document offered under clause 7 (1) (a) or, if giving the document was not required under clause 7 (1) (b) or subsection 7 (2), has indicated the reason why that was not required; and

(b) either,

(i) the chief of police or a person designated by the chief of police has determined, after considering the officer's reasons for the attempted collection, including the details referred to in paragraph 1 of subsection 5 (4), that it appears that section 5 was complied with and has ensured that clause (a) has been complied with, or

(ii) the database indicates that what is required under subclause (i) has not yet been done.¹⁸⁰ [Emphasis Added]

Access to records may be restricted if it is not established within 30 days that subsections (9)(4)(a) and (b) have been satisfied.

Access to records from street checks may also be restricted if, within 30 days, it is not established that the requirements for unrestricted inclusion in the police database have not been satisfied:

9(5) The following apply if what is required under subclause (4)(b)(i) was not done when the identifying information was included in the database...

3. If it is not determined, before the end of the 30-day period described in paragraph 1, that it appears that section 5 was complied with and that clause (4)(a) has been complied with, the identifying information shall be retained, subject to the procedures developed under section 13 in relation to paragraph 4 of subsection 12 (1), in a database under the control of the police force but access to such retained information shall be restricted in accordance with subsection (10).

Thus, records may still be accessible if compliance with the Regulations has not been satisfied, but access will be restricted.

¹⁸⁰ *Collection of Identifying Information, Supra* note 144 at s 9(3) and (4).

Even when the Regulations requirements are met, access to records becomes restricted after 5 years:

*(9) Access to identifying information shall be restricted in accordance with subsection (10) after the fifth anniversary of the date on which the information was first entered into a database under the control of the police force.*¹⁸¹ [Emphasis Added]

Restricted street check records are not removed from the police database; rather, these records are kept in the police database, but the record can only be accessed if the chief of police authorizes access to the record.

Some of the grounds for accessing a restricted record include access for the purpose of an ongoing investigation, or in connection with a legal proceeding or an anticipated legal proceeding:

9 (10) The following apply with respect to identifying information to which access must be restricted:

- 1. No person may access the information without the permission of the chief of police or a person designated by the chief of police.*
 - 2. A member of the police force may be permitted to access the information only if the chief of police or a person designated by the chief of police is satisfied that access is needed,*
 - i. for the purpose of an ongoing police investigation,*
 - ii. in connection with legal proceedings or anticipated legal proceeding*
 - iii. for the purpose of dealing with a complaint under Part V of the Act or for the purpose of an investigation or inquiry under clause 25 (1) (a) of the Act,*
 - iv. in order to prepare the annual report described in subsection 14 (1) or the report required under section 15,*
 - v. for the purpose of complying with a legal requirement, or*
 - vi. for the purpose of evaluating a police officer's performance.*¹⁸²
- [Emphasis Added]

Finally, the Regulations state that policies may be developed to allow records to be retained, even when the information is collected contrary to the Regulations or the records were obtained prior to the regulations coming into force:

12. (1) A board shall develop policies regarding the following matters:

¹⁸¹ *Ibid* at s 9(5) and (9).

¹⁸² *Ibid* at s 9(10).

4. *The retention of, access to, and disclosure of identifying information collected on or after January 1, 2017, including the retention of identifying information collected contrary to this Regulation.*

5. *The retention of, access to, and disclosure of identifying information collected before January 1, 2017 with respect to which this Regulation would have applied had the collection taken place on January 1, 2017.*

(2) The policy developed under paragraph 4 of subsection (1) shall provide that *identifying information collected contrary to this Regulation shall not be retained longer than is reasonably necessary to ensure the information is available in the circumstances in which access may be permitted under paragraph 2 of subsection 9 (10).*¹⁸³ [Emphasis Added]

Thus, neither the traditional practices nor the Regulations in Ontario anticipate the handling of information obtained from street checks in a manner that complies with the *Youth Criminal Justice Act's* protections. The Regulations treat youth street check records in a manner that is indistinguishable from the treatment of adult street check records, and the treatment of street check records that are outlined in the Regulations fail to comply with the firm restrictions on the use and access of youth records in the *Youth Criminal Justice Act*.

The Regulations do not appear to dramatically alter the retention of information in a police database as the Regulations allow information to be retained in a database, even when the practices outlined in the Regulations are not followed by police officers. The Regulations also allow the identifying information to be held for a significant period of time: five years with unrestricted access if the police officer has complied with the Regulations; after five years with access subject to approval from the chief of police; with the approval of the chief of police even when the Regulations have not been satisfied; and with no definite expiry on the retention of records.¹⁸⁴

¹⁸³ *Ibid* at s 12.

¹⁸⁴ *Ibid* at s 9(9).

Chapter VI: Proposed Steps Forward

It is difficult to imagine how Regulations or policies could be passed in a manner that would permit police officers to engage youth in street checks, without infringing on protections outlined in the *Charter of Rights and Freedoms* and the *Youth Criminal Justice Act*. It is therefore unsurprising that studies have recommended youth should not be subjected to street check practices. The Ontario Ombudsman wrote in *Street Checks and Balances*:

Any regulation on street checks should prohibit street checks of individuals under the age of 18 years.¹⁸⁵

The same recommendation to prevent the use of street checks involving young people was made in the report from Logical Outcomes in November 2014, which involved a “community-based assessment of police contact carding in 31 Division”:

On the basis of policy compliance issues related to right-to-leave protocols, as well as the psychological impact of carding on children, the practice of carding minors should be terminated immediately.¹⁸⁶

And:

Almost 30 years later, and millions of contact cards later, 70% of CAPP survey respondents who have been carded since June 2014 felt they did not have the right to leave when they were stopped and questioned. Speculatively speaking, this might indicate some measure of progress (perhaps in previous years the figure would have been higher) but at this point right-to-leave injunctions seem to have more life on paper than on the streets; this issue is especially pressing in light of the fact that children are not exempt from being carded and are the population subset most likely to experience psychological detention when approached and questioned by police officers.¹⁸⁷

Given the *Charter* and *Youth Criminal Justice Act* breaches, as well as the recommendations from the Ontario Ombudsman report and Logical Outcome study, it is proposed that street checks should not be conducted on young people.

When a *Charter* breach is found, courts may undertake a section 1 analysis to determine whether the offending law can be upheld as a reasonable limit on one’s

¹⁸⁵ André Marin, Ombudsman of Ontario, “Street Checks and Balances: Submission in response to the Ministry of Community Safety and Correctional Services’ consultation on proposed Ontario regulation for street checks” (31 August 2015) online: Ombudsman Ontario <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/OntarioOmbudsman-StreetChecks-EN.pdf>>.

¹⁸⁶ Neil Price, *Supra* note 9 at 7.

¹⁸⁷ Neil Price, *Supra* note 9 at 54.

Charter rights. When violations are found of the *Youth Criminal Justice Act*, the Act does not have a similar clause to reasonably limit the rights and protections of youth. Even if a *Charter* section 1 analysis is undertaken with respect to *Charter* breaches, it is unlikely that the infringements will survive a section 1 analysis, the test for which was developed by the Supreme Court of Canada in *R v Oakes*.¹⁸⁸ The *Oakes* test requires courts to consider whether the common law police power, or the street check regulations, address a pressing and substantial objective and whether the means of meeting the objective are proportionate to the objective.¹⁸⁹ There has been some anecdotal evidence that street checks have assisted to solve crimes in the past, but the practice has not been regarded as a highly effective investigative tool.¹⁹⁰ Furthermore, street checks do not meet a pressing objective as the stops are done without any indication that the individual stopped is connected to any offence, so there is not even a clear or identifiable problem that the practice seeks to resolve. On the other hand, street checks have been regarded as a discriminatory police practice that disproportionately targets young men from racial minority groups, the negative consequences of discriminatory police practices have been established by numerous studies and reports, and the practice simultaneously infringes on several *Charter* and *Youth Criminal Justice Act* protections. Additionally, the Supreme Court in *R v Mann* cautiously extended police powers in circumstances of an investigative detention, where grounds exist to reasonably suspect that an individual is connected to a specific offence. The Supreme Court would not likely allow the power to extend to street checks, which are *de facto* detentions that do not meet the minimum grounds established for an investigative detention. As a result, it is proposed that street check practices involving young people must be immediately terminated. The practice cannot be saved insofar as the practice violates provisions of the *Youth Criminal Justice Act*, and the practice should not be saved as a reasonable limit on *Charter* rights given the previously established scope of police powers and the absence of evidence regarding the alleged benefits of street checks.

However, in the event that street check practices are upheld as a valuable investigative tool, laws that are passed authorizing the use of street checks as an

¹⁸⁸ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719.

¹⁸⁹ *Ibid* at 105-106.

¹⁹⁰ San Grewal, *Supra* note 1.

investigative tool must be crafted in a manner that respects the rights and protections of young people.¹⁹¹

A primary concern arising from the Regulations in Ontario is the failure to differentiate between officers' conduct when engaging a young person and an adult in a street check, despite young peoples' unique protections and rights in law. Some relevant protections in the *Youth Criminal Justice Act* that are not upheld by the practices outlined in Ontario's Regulations include, *inter alia*: the right to contact counsel at any stage of proceedings (section 25); the requirement that officers fulfill various duties prior to taking an admissible statement from a young person (section 146); restriction on the use and access to records relating to young people (section 119); and the guarantee of enhanced procedural protections (section 3(1)(b)). Regulations should not be passed in a "one size fits all" manner, when young people are clearly an exceptional group with unique standing in criminal law.

If regulations are passed to authorize street checks involving young people, the regulations should include several provisions that are presently absent in Ontario's Regulations. Given the enhanced procedural protections afforded to young people, street checks should be deemed arbitrary if the stop is conducted based on the individual's apparent age, in the same manner that a stop based on race or presence in a high crime neighbourhood is considered an arbitrary stop. Due to the enhanced procedural protections afforded to youth, the young person must also be advised that participation is voluntary, and that he or she is not being detained. Police officers' duty to provide these warnings during street checks should not be waived by the regulations in an extensive list of alleged exigent circumstances, as done in Ontario's Regulations; rather, these warnings should be required in all street check incidents. The young person should be advised of the right to counsel and the right to silence, and the young person should be offered the opportunity to consult with counsel or a parent. Warnings about the possible use of information obtained during a street check should also be articulated to the young

¹⁹¹ The proposed steps forward outlined in this chapter intend to address some of the concerns that arise from conducting street checks on young people. There are outstanding concerns with respect to discriminatory police practices and the constitutionality of street checks. It is not proposed that these steps forward will resolve all of the issues associated with street checks, rather, it is proposed that these steps are a minimum requirement that must be implemented in any regions that insist on conducting street checks involving young people.

person. Additionally, the records obtained during a street check should not be accessible subsequent to the street check incident, unless the *Youth Criminal Justice Act* provisions are reformed, as the *Youth Criminal Justice Act* presently does not recognize a power to access youth records in the absence of extrajudicial sanctions or the laying of criminal charges. If an officer asserts that the individual waived any of the rights that are engaged during a street check, the waiver must be obtained in a manner that requires free and informed prior consent.

It may be argued by street check advocates that street checks will be rendered ineffective, if the steps proposed by this thesis are implemented.¹⁹² The claim that the practice would be rendered ineffective if people were advised of their *right* to not participate in a street check is an indication of the abhorrent nature of the practice. An appropriate solution to *Charter* and *Youth Criminal Justice Act* infringements is not to craft a secretive way to continue infringing on individuals' rights by keeping individuals ill-informed, and it should be alarming if individuals are pushing an agenda to ensure that individuals are not aware of their rights during police interactions.

In any event, the proposed steps forward do not reflect a novel approach to police interactions. The proposed steps forward reflect practices and procedures that were previously mandated by courts to achieve compliance with the *Charter* and *Youth Criminal Justice Act*. The suggestion that these steps would render police practices ineffective ignores the real issue; the real issue is that current police practices violate individuals' rights, and the proposed steps forward ensure that police practices comply with previously recognized rights and protections afforded to Canadian citizens.

¹⁹² See Chief Weighill's comments regarding warnings and waivers being provided during street checks in *The Canadian Press*, *Supra* note 127.

Chapter VII: Conclusion

Street checks involve the stopping of individuals in public places, in the absence of grounds for a lawful detention, asking the individual to provide identifying information, and recording the information provided by the individual into a police database. Street checks are currently conducted in many regions across Canada without any governing laws, policies, or regulations. Instead, police officers rely on alleged common law powers as authority for the practice or allege that there is no exercise of police powers, since the individual is not being detained. Even in Ontario, where regulations have been passed, concerns continue to exist regarding the grounds for conducting a street check and the manner in which street checks are conducted.

Concerns arising from street check practices include the discriminatory nature in which police officers conduct street checks. The likelihood of being stopped for a street check is not equal for all individuals, as young males from racial minority groups are most frequently targeted by discriminatory police practices. The impact of discriminatory policing is profound on the individual as well as the community. Additionally, in the course of conducting street checks, young peoples' rights under the *Charter* and *Youth Criminal Justice Act* are infringed. The Regulations in Ontario appear to have implemented procedures to address some of the *Charter* infringements, but the Regulations were passed in a manner that does not differentiate between youth and adult street check procedures. In fact, it appears that no efforts were made to consider the infringement on *Youth Criminal Justice Act* provisions. Even where the Regulations purport to address some *Charter* infringements, the efforts fall dramatically short of resolving the widespread breach of *Charter* during street check practices.

The only logical step forward is to prohibit street check practices when the subject of the street check is a young person. The *Charter* and *Youth Criminal Justice Act* infringements that occur during street checks cannot be reconciled due to the inherently offensive nature of street check practices, specifically the exercise of an alleged police power despite clear indications from the Supreme Court that individuals cannot be detained absent reasonable grounds to suspect the individual is connected to an offence. The effectiveness of street checks as a police investigative tool rely on individuals being ill-informed about their rights, and the individual mistakenly believing that he or she is

being lawfully detained. Street checks are therefore contrary to the protections afforded to youth, including enhanced rights to privacy and enhanced procedural protections.

It should be made clear that criticisms of street checks, particularly street checks involving youth, and criticisms of Ontario's Regulations are not attempts to curb existing police powers. Instead, these criticisms rest on the fact that police officers currently operate beyond the scope of police powers that were carefully carved out by jurisprudence. The proposed steps forward are an attempt to ensure street check practices do not continue to unlawfully intrude on individual rights, or unilaterally expand police powers. Insofar as young people are the target of street checks, it is proposed that the only logical step forward is to put an end to street check practices.

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