

INDEPENDENT LEGAL OPINION ON STREET CHECKS EXECUTIVE SUMMARY

October 2019

In Dr. Scot Wortley’s recent report on street checks in Halifax, Nova Scotia (“the **Wortley Report**”), Dr. Wortley called for an independent legal opinion on the lawfulness of street checks. The Nova Scotia Human Rights Commission retained us to provide that opinion.

We wish to state, at the outset, that our opinion was prepared for the limited purposes of **(i)** advising the Commission in its response to the Wortley Report, and **(ii)** contributing to the public understanding of street checks in Halifax. We hope our opinion will be useful for the Commission and others involved, including community groups and the Board of Police Commissioners, as they work to implement the recommendations of the Wortley Report.

Before addressing the legality of street checks we will first **(a)** clarify any confusion over what we actually mean by “street check”, and **(b)** provide important context regarding the use of street checks in Halifax.

What is a Street Check?

It is crucial to understand what we mean by “street check.” As practiced in Halifax, a “street check” involves more than a check in the physical sense. It also involves data collection — and the data collection is a fundamental part of the “street check” practice.

Our Terms of Reference from the Commission provide the following definition of “street check”:

An interaction or observation (without interaction) whereby personal and/or identifying information is collected by an officer and entered into the Versadex database for future use.

(Versadex is the records management system used by the police in the Halifax Regional Municipality.)

Essentially, a “street check” is a record of identifying information about an individual. That is how street checks are treated in the Halifax Regional Police (“**HRP**”) and Royal Canadian Mounted Police (“**RCMP**”) policy documents (which are reviewed in more detail in our opinion proper).

The data may be collected during an interaction between the police and a member of the public, or upon observation of a member of the public by the police. (Although the RCMP policy on street checks requires “face-to-face contact”, the policy provides that RCMP members may use other methods to record “observations of policing value made by an officer without interaction with the public.”)

The “data collection” nature of street checks is not well understood, as highlighted in the Wortley Report:

To begin with, a street check DOES NOT capture all police traffic stops, pedestrian stops or other types of investigative police-civilian encounters. This is an important point because many community members believe that a street check and a police stop are the same thing. It must be stressed, however, that street checks capture only a small fraction of all police stops. Street checks also do not capture civilian calls for service, criminal incidents, arrests and many other types of police-civilian encounter. These types of events are typically captured on General Occurrence Reports (GOs). Finally, street checks do not capture casual conversations between police officers and members of the public.

Like Dr. Wortley, and in accordance with the definition in our Terms of Reference, we focus on street checks as an interaction or observation combined with data collection.

This means a street check involves two parts: **an action** (the police interact with, or observe, an individual) and **record-keeping** (the police collect and retain identifying information about the individual, in a database).

It is also important to distinguish street checks from the practice of carding in Ontario. The term “carding” stems from the actual cards used in Ontario (sometimes called “208 cards”), which came to be used by the Toronto Police Service as part of the Toronto Anti-Violence Intervention Strategy in response to a spike in firearms offences. We do not understand there to be similar cards used in Halifax, so “carding” is not the same as a “street check.”

The Honourable Justice Michael Tulloch recently released the *Independent Street Checks Review in Ontario* (“the **Tulloch Report**”), which also distinguishes between “street checks” and “carding.” We discuss the Tulloch Report throughout our opinion, but we note that Justice Tulloch’s task

was fundamentally different from ours. Justice Tulloch was asked to review a pre-existing regulation in Ontario, *Collection of Identifying Information in Certain Circumstances – Prohibition and Duties*. **There is no equivalent regulation in Nova Scotia.**

Important Context

To put our opinion in context, we highlight some of the key findings from the Wortley Report. We then consider three other contextual sources.

Wortley Report Findings

Dr. Wortley concluded that the police in Halifax disproportionately conduct street checks in relation to Black individuals — notably young Black men.

Dr. Wortley analyzed 12 years of data collected by the HRP and the RCMP between January 1, 2006 and December 31, 2017. He concluded that: “Black people are over-represented in the street checks that take place across the Halifax region — whether those regions have a high Black population or not.” (Full citations are contained in our opinion.)

In fact: “Black civilians were five times more likely to be subject to a street check than their proportion of the population would predict.” Black men, in particular, “are 9.2 times more likely to appear in Halifax street check statistics than their presence in the general population would predict” while young “Black males [15-24 years of age] are twenty times more likely to appear in the street check dataset than their proportion of the general population would suggest.”

According to the police officials consulted for the Wortley Report, street checks have not necessarily proved valuable. As Dr. Wortley reported: “The majority of the police officials who took part in the consultation process admitted that many street checks are of poor quality and contribute little to public safety. At almost every police meeting and focus group, the phrase ‘garbage in, garbage out’ was used to describe this situation.”

In his conclusion, Dr. Wortley said the research “clearly illustrates that street checks — along with other police stop, question and search tactics — are not harmless and should thus not be condoned in the name of public safety or crime prevention. The empirical evidence strongly suggest[s] that the costs are greater than the benefits.”

Other Essential Sources

Our opinion also reviews:

- the *Report of the Working Group of Experts on People of African Descent on its mission to Canada* (prepared for the UN Human Rights Council), which called for an end to street checks;
- the *Digest of Findings and Recommendations* of the Royal Commission on the Donald Marshall, Jr., Prosecution, which made recommendations on addressing systemic racism against Indigenous and Black Nova Scotians in the criminal justice system; and
- the decision of the human rights board of inquiry in the Kirk Johnson case, which found that Mr. Johnson was pursued, stopped, and mistreated by the Halifax Regional Police because of his race, and that this was discrimination contrary to the Nova Scotia *Human Rights Act*.

These are essential contextual sources. Our brief discussion of them in the opinion should not be seen as minimizing their importance.

Are Street Checks Legal?

In the context of policing, determining what is *legal* or *illegal* requires some nuance. Police conduct that unjustifiably breaches an individual's rights under the *Canadian Charter of Rights and Freedoms* is illegal. But we have been asked to evaluate the overall legality of a police practice, rather than advise whether an individual's *Charter* rights were breached in a particular fact situation.

To do this, we ask whether the activity in question is authorized as a police power.

The two main sources of police powers in Canada are (i) statutes and (ii) the common law (cases decided by courts).

There is no applicable statute that authorizes street checks in Nova Scotia. The Nova Scotia *Police Act* includes a very broad list of police duties, including the duties to maintain law and order and prevent crime. But it does not authorize particular information-gathering practices like street checks and, unlike in Ontario, there is no applicable regulation.

The other potential source of legal authority for street checks is the common law. The courts apply what is known as the “ancillary powers doctrine” to determine whether a police power exists (or, in the case of a new power, *should exist*) at common law.

The Supreme Court of Canada’s recent decision in *Fleming v Ontario* clarifies how to apply the ancillary powers doctrine.

The analysis has three parts. The threshold step involves defining the police power and liberty interests at issue. Then, if the police power appears to interfere with liberty, the analysis moves to stage one, where the question is: “Does the police action at issue fall within the general scope of a statutory or common law police duty?”

Stage two of the analysis asks: “Does the action involve a justifiable exercise of police powers associated with that duty?” In other words, is the police action “reasonably necessary for the fulfillment of the duty”?

Threshold Step in the Ancillary Powers Analysis

At issue is the police power to conduct street checks – meaning, the power to interact with or observe a person, in order to collect identifying information about them and enter it into a separate field of the police records management system for potential future use.

This is a distinct police practice. For example, the practice of recording street checks is different from recording information related to a vehicle stop pursuant to the *Motor Vehicle Act*, or information related to an actual occurrence (like a call for service or a criminal incident).

Street checks are also distinct from investigative detentions. The Supreme Court of Canada outlined the common law police power of investigative detention in the 2004 case of *R v Mann*. In order to conduct an investigative detention, the police are required to have a reasonable suspicion that there is a nexus between the individual and a recent or ongoing offence. Street checks as defined and conducted in Halifax do not require this kind of nexus.

In our view, the power in issue — the power to conduct street checks — involves an apparent interference with liberty. The overarching liberty interest at stake is the interest in being left alone, free from state interference. Many of the specific rights guaranteed in the *Canadian Charter of Rights and Freedoms* stem from this broad interest, including the right to be free from arbitrary detention (protected under section 9 of the *Charter*) and the right to be free from unreasonable search and seizure (protected under section 8 of the *Charter*).

Street checks have the potential to interfere with both of these rights. The Supreme Court of Canada in the recent case of *R v Le* found that an interaction involving carding in Toronto constituted arbitrary psychological detention. Racial context was an important part of the Court's analysis, including the analysis of whether a reasonable person would believe they had no choice but to comply with a police demand for information.

The Wortley Report concluded that street checks in Halifax disproportionately affect Black people. We suggest that a reasonable person with a similar racial background would perceive a face-to-face street check encounter as coercive and would likely assume they had no choice but to comply with the police request for information. This suggests that the interaction that leads to a street check would constitute a form of arbitrary detention under section 9 of the *Charter*.

Observation-based street checks raise *Charter* concerns as well. Broadly speaking, section 8 of the *Charter* protects privacy-related rights. As part of their privacy interests, Canadians are generally entitled to remain anonymous when they are walking down the street or spending time in public spaces, without the expectation that their movements are being observed and recorded by the police. However, with an observation-based street check, a person's whereabouts are not just observed, but permanently recorded by the police for reasons unrelated to an actual investigation.

In fact, all street checks raise privacy concerns. The information that is obtained through street checks is recorded in a dedicated police database for general intelligence purposes, unrelated to a specific service request, offence, or investigation. This kind of police record-keeping involves an interference with liberty, which meets the criterion for the threshold step of the test and takes us to the two-stage analysis.

First Stage of the Ancillary Powers Analysis

The issue at this stage is whether the police action in question falls “within the general scope of a statutory or common law police duty.” Statutes like the *Criminal Code* and *Police Act* contain general statements of police duties. These provisions reflect the common law.

At common law, the police have three primary duties: “preserving the peace, preventing crime, and protecting life and property.”

Street checks, from the police perspective, are part of the toolbox for preventing crime and protecting the public, so those are the most likely duties to apply.

It could be argued that street checks do not actually further these police duties. As discussed in the Wortley Report, there is a lack of evidence that street checks are effective at gathering useful information that would help the police prevent crime, protect the public, or fulfill their other general duties. However, some police officers maintain that street checks have the potential to be a valuable intelligence-gathering tool. Therefore, for the purpose of this *Fleming* analysis, we will assume that street checks fall within the general scope of the police duties to prevent crime and protect the public.

We then proceed to the second stage of the analysis.

Second Stage of the Ancillary Powers Analysis

This is the justification or proportionality stage of the analysis. Three particular factors are relevant, as summarized in *Fleming*:

1. the importance of the performance of the duty to the public good;
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty.

In our view, applying these factors confirms that a police power to record street checks is not reasonably necessary for the fulfillment of the relevant police duties to prevent crime and protect the public. We do not dispute that these duties are important for public safety. However, we do not consider it necessary for the police to interfere with liberty by recording street checks in order to fulfill these broad duties.

As reviewed in the Wortley Report, Dr. Wortley's team only received five specific examples from the police "where street checks had helped solve crime." The police officers consulted for the Wortley Report did not identify any concrete benefits to street checks. Dr. Wortley commented that: "overall, street checks have only a small role to play in police investigations and likely have only a small impact on crime rates."

In April 2019, Nova Scotia Minister of Justice and Attorney General Mark Furey imposed a moratorium on street checks, which has now been in effect for about six months. We are not aware of the police having any difficulty executing their duties during this time, without the ability to record street checks.

This makes sense, given how many other tools remain available to the police. As confirmed in the Minister’s Directive imposing the moratorium, the police are still entitled to collect and record identifying information during the following activities:

- a. motor vehicle stops where the driver is stopped under statutory or common law, including:
 - i. the *Motor Vehicle Act* to ensure compliance with license, registration, insurance and fitness of the vehicle;
 - ii. the *Criminal Code*, or for sobriety checks;
- b. police inquiries into suspicious activity;
 - i. when inquiring into suspicious activity, police officers are directed that where there is suspicious activity and it is feasible to do so, they should first make inquiries of an individual to confirm or dispel the officer’s suspicion without requesting identifying information;
- c. police investigations of an offence or where police reasonably suspect that an offence has occurred, and that the person stopped is connected to the offence;
- d. investigative detention or arrest;
- e. executing warrants.

In these scenarios, the police still have the option of recording and storing relevant information (for example, through “General Occurrence” [“GO”] reports). The police may also exercise statutory powers like the power of arrest, as well as other common law powers, including the power of investigation detention, where the applicable conditions are met. (For example, investigative detention requires an objective nexus “between the individual who is detained and a recent or on-going criminal offence.”)

As well, in our view, the police are still able to check up on people in need. If the police are legitimately concerned for someone’s personal health or safety, that would be an appropriate reason to stop them and ask some questions.

While the police are now more limited in when they can collect and record identifying information, they are not hampered in their ability to fulfil their duties.

On the other side of the scale, the Wortley Report confirms that street checks interfere with individual liberty, and disproportionately affect Black Nova Scotians.

When these two sides are balanced, there is an insufficient basis to conclude that, overall, street checks are reasonably necessary for the police to fulfil their duties. In these circumstances, the balance must favour individual liberty over police authority.

As a result, we have concluded that the common law does not empower the police to conduct street checks, because they are not reasonably necessary. They are therefore illegal.

Our opinion also considers Part XX of the *Municipal Government Act* (“**MGA**”) which covers freedom of information and protection of privacy (“**FOIPOP**”). The FOIPOP provisions in the *MGA* regulate how the municipality is supposed to protect personal information, and how people can access the information that public authorities have about them. **These provisions are not a source of authority for the police to create a database of street checks.**

Conclusion

Through street checks, the police in HRM have built a database of personal information for general purposes — unconnected to a particular incident or investigation — without necessarily telling people why their identifying information is being collected, or that it is being stored. We know from the Wortley Report that the data disproportionately come from Black Nova Scotians, and that the data have not proven useful in preventing or solving crime.

Against this factual background, we have concluded that there is no power for the police to conduct street checks in HRM. This practice is not authorized under statute, or at common law. In short, street checks are not reasonably necessary for the police to execute their duties, when balanced against the interference with individual liberty, and the disproportionate effects on Black Nova Scotians, that street checks entail.

We make two final comments.

First, we were asked for a conclusive opinion on the legality of street checks and we have attempted to provide that. This was a somewhat delicate exercise that involved drawing general principles from cases that arose in individual factual scenarios. But we wanted to provide, to the greatest extent possible, concrete and unequivocal advice, in order to respond to our Terms of Reference. That being said, nothing in our opinion should be taken as a basis for imposing liability or making other findings in court proceedings.

Second, we emphasize that we have not been asked to advise on whether the Nova Scotia government should consider legislation or regulations governing the specific practice of street checks (as has been done in Ontario). However, we note that any proposed legislation or regulation would have to comply with the legal thresholds set out in our opinion.

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