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OPINION

Date: October 15, 2019

To: Nova Scotia Human Rights Commission –
Christine Hanson, CEO and Kymberly Franklin, Senior Legal Counsel

From: J. Michael MacDonald, Counsel
Jennifer Taylor, Research Lawyer

Re: NS Human Rights Commission – Independent Legal Opinion on Street Checks

File: SM037082.00003

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INTRODUCTION

As part of the Nova Scotia Human Rights Commission's public policy mandate, the Commission retained Dr. Scot Wortley to study police "street check" practices in the Halifax Regional Municipality. In his comprehensive March 2019 report, Dr. Wortley in turn called for an independent legal opinion on the legality of these practices ("**Wortley Report**").[1]

We commend the Commission for taking on this important work and are grateful for the opportunity to provide this opinion. In the process of our opinion, we will incorporate the Terms of Reference provided to us in July 2019, including the following questions:

> In order to examine this question in conjunction with Dr. Wortley's report, it should be broken down into two main parts.
>
> 1. Are street checks by definition illegal? If they were conducted in the way they were intended and also in accordance with police policy are they legal? Is there a requirement for policing function and/or activity to be statutory driven? Does not being legislated mean they are illegal?
>
> 2. Are street checks illegal they way police (HRP/RCMP) in Nova Scotia have been performing them? This is a general question. Not all police street checks involve further activity on the part of police. Many are stand alone.

We will begin with an Executive Summary. Then, we will proceed to the body of our opinion, which contains four main parts.

In **Part I**, we set out the factual background by (1) clarifying what we mean by "street checks"; (2) summarizing the police policies on this issue; and (3) providing some historical and socio-legal context.

Part II is our legal analysis. In Part II, we (1) review statute law and common law as potential sources of authority for police activities; (2) apply the "ancillary powers doctrine" that the Supreme Court of Canada has established, in order to evaluate the purported police power to conduct street checks; and (3) discuss the relevant Nova Scotia legislation on freedom of information and protection of privacy.

It was beyond the scope of our opinion to separately consider the issue of drivers being stopped by the police pursuant to the *Motor Vehicle Act*[2] and/or to investigate impaired driving.[3]

Our Terms of Reference also invite us to respond to specific questions the Commission received from the Halifax Board of Police Commissioners and the African Nova Scotian Decade for People

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1 Dr. Scot Wortley, *Halifax, Nova Scotia: Street Checks Report*, March 2019, available online: https://humanrights.novascotia.ca/streetchecks ["**Wortley Report**"]. See page 166 (Recommendation 2.1).

2 The *Motor Vehicle Act*, RSNS 1989, c 293 will be replaced by the new *Traffic Safety Act*, SNS 2018, c 29 on a date to be proclaimed.

3 See generally Steve Coughlan & Glen Luther, *Detention and Arrest*, 2d ed (Toronto: Irwin Law, 2017) at 119-130 ["Coughlan & Luther"].

of African Descent ("**DPAD Coalition**"). **Part III** answers these questions, along with a question from the Commission about the role of consent in street checks.

Finally, in **Part IV**, we incorporate several scenarios identified in the Wortley Report to contextualize our conclusions. The **Appendix** contains some additional case law summaries.

Our authorities are cited in footnotes throughout the document, and in a **List of Authorities** (which is hyperlinked to the extent possible) at the end of the document.

EXECUTIVE SUMMARY

In his recent report on street checks in Halifax, Nova Scotia, Dr. Scot 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 their use 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 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. 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:

> Before reviewing the findings, it is important to provide a clear definition of police "street checks." 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 "street checks."

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 the body of 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*, 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.

Arguably, street checks do not actually further any of 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." 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" (or "**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 the duties listed in the *Police Act* and under the *Motor Vehicle Act*.

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 particular incidents or investigations — without necessarily telling people why their 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.

We will now proceed to the body of our opinion.

PART I – FACTS AND CONTEXT

1. Defining Street Checks

(a) *What is a street check?*

It is crucial to understand what we mean by "street check." As practiced in Halifax,[4] a "street check" involves more than a check in the physical sense (a street engagement or observation). It also involves data collection— and the data collection is a fundamental part of the "street check" practice.

Our Terms of Reference contain the following definition:

> *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.*

We understand that the Versadex database is the records management system used by the police in HRM. We further understand there to be a specific "street check" field within the Versadex data management system."[5]

The Tulloch Report offers a useful definition of "identifying information":

> *Any information which, alone or in combination with other information, can be used to identify an individual. Identifying information includes information about an individual's race, age, sex, sexual orientation, gender identity, marital or family status, socioeconomic circumstances, and education, medical, psychiatric, psychological, criminal or employment history.*[6]

The "data collection" aspect of street checks is not well understood.

The Wortley Report repeatedly highlighted the distinct disconnect between public and police on this issue:

> *At the beginning of each community meeting, and the start of the one-on-one interviews, participants were asked to provide their own definition of a "street*

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4 "Across Canada, there are different names given to similar practices. There is also variation between police services in the definition of what constitutes a street check": Curt Taylor Griffiths, Ruth Montgomery & Joshua J Murphy, *City of Edmonton Street Checks Policy and Practice Review* (June 2018) at 28, online:

https://edmontonpolicecommission.com/wp-content/uploads/2019/02/EPS-Street-Check-Study-Final-REDACTED.pdf.

5 Wortley Report, page 162 (in Recommendation 1.1).

6 The Honourable Michael H Tulloch, *Report of the Independent Street Checks Review* (Ontario: Queen's Printer for Ontario, 2018) at xii ["**Tulloch Report**"], online: https://www.mcscs.jus.gov.on.ca/english/Policing/StreetChecks/ReportIndependentStreetChecksReview2018.html. The Minister's Directive of April 17, 2019 imposing a moratorium on street checks in Nova Scotia (discussed later in the opinion) uses the same definition of "identifying information" (online: https://novascotia.ca/street-checks/Minister-Directive-Street-Checks-April-2018.pdf).

> *check." The findings reveal that most community members believe that street checks refer to all incidents in which civilians are stopped and questioned by the police. These incidents include traffic stops, pedestrian stops (i.e., being stopped by the police while walking in a public place) and other incidents in which civilians are approached by the police and asked questions (i.e., approached by the police while hanging out in a park, mall, cafe or in another public setting).*
>
> *[…]*
>
> *For example, some participants claim that street checks involve demands for formal identification – not only for drivers (as expected) but for passengers as well. Furthermore, several community members stated that pedestrian street checks almost always involve a police command to produce formal ID. According to some community members, street checks also involve intrusive police questions including queries about where the person lives, what they are doing, where they are going, their employment situation and whether they have ever been arrested. In some cases, participants stated that they have been explicitly asked by the police whether they are carrying drugs or weapons or if they have been recently involved in criminal activity. Others claim that, during a street check, the police will ask them if they have any court conditions or outstanding warrants. Finally, some participants claim that street checks involve "consent search" requests. These include police requests to search vehicles, empty pockets or knapsacks or consent to a frisk or "pat-down" search.*[7]

Dr. Wortley went on to say:

> *It is important to note that relatively few community participants identified street checks as the formal documentation of (non-criminal) police-civilian encounters for police intelligence purposes. Most focused on the actual police stop — or the nature of the encounter between the civilian and the police — rather than the existence of a "street check" dataset.*[8] [emphasis added]

Dr. Wortley ultimately applied the police definition of "street check":

> *According [to] the police policy manual, and extensive consultations with police officials, street checks are to be completed by police officials when they believe that they have observed or collected information about a civilian or civilians that could be of intelligence value. This might include the recording of unusual or suspicious behaviour, the presence of a known offender in a particular location at a specific time, associations between offenders, or the movements of a transient person. According to police officials, street checks are supposed to be collected and compiled based on their potential to assist with future police investigations.*

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7 Wortley Report, pages 3-4. See also The Honourable Michael H Tulloch, *Report of the Independent Street Checks Review* (Ontario: Queen's Printer for Ontario, 2018) ["**Tulloch Report**"], online: https://www.mcscs.jus.gov.on.ca/english/Policing/StreetChecks/ReportIndependentStreetChecksReview2018.html, ch 2 at paras 23-26 (under the heading "What is a Street Check?").

8 Wortley Report, page 5. See also page 23, point 1: "The majority of participants from the Black community believe that street checks involve being stopped and questioned by the police. Few defined street checks as the police collection of personal information for intelligence purposes."

> *Street checks can evolve out of a police decision to stop and question a civilian or civilians. For example, an officer might conduct a 102 normal traffic stop and, during the interaction, discover that the driver has an extensive criminal record. The officer may then decide to complete a street check to note that this offender was seen in a certain area of Halifax. However, a street check does not have to involve direct contact with a civilian. Street checks often consist of nothing more than a visual observation (a visual check). For example, an officer on patrol may observe a known criminal hanging out at a local bar. The officer could potentially fill out a street check on this individual, for intelligence purposes, without ever speaking a word to the target of their attention. In sum, it is important to remember that: 1) Hypothetically, street checks are only to be completed if police officers perceive some intelligence value in recording an encounter or observation; and 2) The majority of police interactions – including police stops – are not captured in the current Halifax street check dataset.*[9] [emphasis added]

We emphasize that the definition from our Terms of Reference includes the interaction or observation as well as the data collection.

This means a street check involves two parts: **an action** (interacting with or observing an individual) and **record-keeping** (collecting and retaining information about the individual).

Although the police use the term "street check" to describe something that is filled out (information that is entered into Versadex),[10] this activity is necessarily prompted by an engagement with or observation of the person whose information is being recorded. In other words, the police need a way to obtain the information that is then recorded as a "street check."

Like Dr. Wortley, we focus on street checks as an interaction or observation combined with data collection.

(b) What is not a street check?

The Wortley Report provides several examples of what is not a street check:

> *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.*[11]

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9 Wortley Report, pages 101-102. See also pages 99-100; 174.

10 Wortley Report, page 77.

11 Wortley Report, page 101. Emphasis added.

As Dr. Wortley explains, a "street check" (on the police definition) may be recorded at the same time as another type of police stop, but that other kind of stop is not the "street check."

The term "carding" is commonly used in Ontario and often used synonymously with "street checks."[12] However, "carding" is not the same as "street checks."

The term "carding" stems from the actual cards used in Ontario, which Justice LaForme (as he then was) explained in *R v Ferdinand*:

> *A 208 card is approximately 3" by 5" and is printed on both sides, commencing with the words, "Person Investigated". It records information obtained from a person who is stopped by the police that includes information such as, "name, aliases, date of birth, colour, address, and contact location including the time". On the back it has entries for things such as: "associates" and "associated with: gang, motorcycle club, Drug Treatment Court". The police then input the information from the completed 208 cards into a police computer database for their future reference.*[13]

Carding was a longstanding practice that intensified in the early 2000s:

> *The intensification of carding in Toronto, which ultimately sparked much of the controversy around the practice, began when the Toronto Police Service instituted the Toronto Anti-Violence Intervention Strategy (TAVIS) and used what were then known as "208 cards" in an effort to reduce the level of gun violence. This was in response to an unprecedented spike in gun violence across Toronto in 2005. The year included the murders of Livvette Olivea Miller and Jane Creba, and the shooting of four-year-old Shaquan Cadougan. It was subsequently labelled "The Year of the Gun" and culminated in 87 murders, 52 of those by gunfire.*
>
> *TAVIS had teams of officers specifically policing high-crime and high-risk neighbourhoods in an intentionally visible manner. Any interaction that took place when TAVIS was in force constituted a valid reason for completing a 208 card, which widely expanded their use. Over time, the practice became colloquially known as "carding" and evolved to no longer target persons of interest to detectives, but rather anyone who the police deemed "of interest" during the course of their duties.*
>
> *The TAVIS initiative resulted in an increase in the number of times that individuals were stopped and asked to provide identifying information. For the most part, the people were not acting suspiciously nor were they suspected of having committed any crime. While pursuing the laudable objective of reducing violent crime, the exercise of coercive police powers strayed further and further from its original scope.*

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12 See also the comments from community members in the Wortley Report at pages 63, 68, 70, 73.

13 *R v Ferdinand*, 2004 CanLII 5854 (Sup Ct J) at para 10. Defence counsel did not argue that 208 cards were "*per se*" improper, but submitted "that the manner in which they are currently being used is improper" (para 11). See also *R v K (A)*, 2014 ONCJ 374 at para 5; *R v Fountain*, 2015 ONCA 354 at paras 1-2.

> *Over time, other police services also intensified their carding practices, giving officers greater discretion to stop individuals and record information for general intelligence gathering purposes. While TAVIS is an extreme example that drew much media attention, some variation of carding appears to have been part of the policy of most police services in Ontario. That said, many police services did not view their practice as discriminatory or arbitrary, and some police services argue that they have been drawn into a situation that was not of their own making.*[14]

We do not understand there to be similar cards used in Halifax, so "carding" is not a directly equivalent synonym of "street checks."

The *Report of the Independent Street Checks Review* by Justice Michael Tulloch ("**Tulloch Report**") offers separate definitions for "carding" and "street check".

Justice Tulloch defines "carding" as:

> *Situations in which a police officer randomly asks an individual to provide identifying information when there is no objectively suspicious activity, the individual is not suspected of any offence and there is no reason to believe that the individual has any information on any offence. That information is then recorded and stored in a police intelligence database.*[15]

"Street check" is defined in the Tulloch Report as:

> *Identifying information obtained by a police officer concerning an individual, outside of a police station, that is <u>not part of an investigation</u>.*[16]

According to Justice Tulloch:

> *Random gathering of information for intelligence purposes, however, amounts to the practice traditionally known as carding: people are being identified simply to create a database of individuals in the area.*[17]

As conducted in Halifax, street checks involve elements of both of these definitions – interactional street checks involve the request for identifying information when there is no objectively suspicious activity or connection to an investigation, as well as the recording of the identifying information. Visual street checks involve the observation of the individual combined with the recording of certain identifying information. Common features of both kinds of street checks are that they are <u>not</u> conducted as part of the investigation of a specific crime, and that they are used to create a police "database of individuals in the area."

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14 Tulloch Report, ch 2 at paras 23-26.

15 Tulloch Report, page xi.

16 Tulloch Report, page xiv. Emphasis added. See also paragraph 6 of the Executive Summary.

17 Tulloch Report, Executive Summary at para 39.

2. Police Policies & Police Consultations for Wortley Report

The Halifax Regional Municipality has "an integrated policing model with both a municipal police force, Halifax Regional Police[,] and a contracted police force, Halifax District RCMP."[18]

HRP and the RCMP both have policies on street checks.

The HRP Policy Statement[19] provides:

> **4 STREET CHECKS** Department Order #: 17-08 (Originally issued under Department Order #27-02)
>
> **A. POLICY STATEMENT**
>
> 1. Section 4 contains policy related to the gathering of field intelligence through the use of Street Checks.
>
> **B. POLICY**
>
> 1. A Street Check shall be submitted under the following circumstances:
>
> a. A subject is queried by an officer on CPIC and a CNI hit is obtained, but the subject is not classified as an entity on any current GO Report, Summary Offence Ticket or other electronic record stored within the RMS.
>
> b. A member observes a person or vehicle in a location, at a time and/or under circumstances that suggest would be of significant to future investigation. The person/vehicle does not have to be stopped or occupants interviewed nor must the vehicle be checked to require a Street Check be submitted in this instance.
>
> c. A person(s) are passengers of a motor vehicle which has been stopped for an offence and the passengers are known to police or have criminal records.
>
> 2. A Street Check will not be submitted (with all known relevant information supplied on a Text) for any incident which will be recorded in the RMS/CAD in another form such as:

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[18] Online: https://www.halifax.ca/fire-police/police/about-halifax-regional-police. This model means the RCMP "is subject to the direction of the provincial Attorney General" but also "regulated by" the federal *Royal Canadian Mounted Police Act* and "subject to the authority of the" RCMP Commissioner in Ottawa: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (accessed through Thomson Reuters ProView, current to 2018-1) at ¶19.5(c).

[19] Available online through the Board of Police Commissioners: https://www.halifax.ca/sites/default/files/documents/city-hall/boards-committees-commissions/HRP%20Street%20Check%20Policy.pdf.

> a. A traffic stop which has resulted in the issuance of a summary offence ticket(s) to the driver of the vehicle unless the circumstances in A1(c) above exist.
>
> b. A General Occurrence Report is required to be submitted.
>
> [emphasis added]

HRP's Law Enforcement Code of Ethics (Section 1.2 – Valuing Race Relations & Diversity) prohibits "racially-biased policing" which, according to the definition, "occurs when law enforcement inappropriately considers race or ethnicity in deciding with whom and how to intervene in an enforcement capacity."

Officers are not permitted to "in isolation consider a person's race/ethnicity...In deciding to initiate even those non-consensual encounters that do not amount to legal detentions or to request…consent to search." It is unclear whether street checks are considered "non-consensual encounters" pursuant to this policy.

The Code of Ethics requires that:

> 3. Officers must be able to determine and articulate they have **articulable cause** that support[s] their actions prior to conducting any of the following:
>
> a. Investigative detentions.
>
> b. Traffic stops.
>
> c. Arrests.
>
> d. Non-consensual searches. And
>
> e. Property seizures.
>
> [emphasis added]

Street checks are not included in this list.

The RCMP Operational Manual covers street checks in chapter 1.4.[20] From the Definitions:

> **Street check** means an electronic record of information obtained through a contact with a person who was not detained or arrested during his/her interaction with the police.

The RCMP criteria require "face-to-face contact":

> 2.1 Street checks should meet the following basic criteria:
>
> 2.1.1. the member has had face-to-face contact with a person;

[20] Provided to us by the Human Rights Commission.

> 2.1.2. the member has obtained identifying information from that person;
>
> 2.1.3. the contact was not the result of an active investigation or call for service; and
>
> 2.1.4. the recording of the information obtained during the contact services a policing purpose.

Under the RCMP manual, observations cannot lead to a street check but may be recorded in other ways:

> 2.8 The following will not be electronically recorded through a street check:
>
> […]
>
> 2.8.5 observations of policing value made by an officer without interaction with the public.
>
> > NOTE: Observations of policing value made without a public/police interaction (where the identity of the individual is known) must be recorded through, either an information or an intelligence file.

Section 2.4 states that: "Street checks must comply with bias-free policing directives."

Section 3.1.1 advises members of the RCMP "that the subject of a street check is not obligated to provide information to police."

Additional comments on these policies can be found in Part III, below.

There were extensive police consultations conducted for the Wortley Report.[21] The police participants offered their perspectives on the usefulness of street checks:

> *Most of the police participants maintained that street checks can help with criminal investigations and thus, when used correctly, contribute to public safety. Several officers stated that street checks can be used to identify persons who were present, in a specific location, at the approximate time of a criminal incident (i.e., a burglary, robbery, shooting, etc.). This information, in turn, could be used to identify potential suspects, victims or witnesses. Such information, in other words, could provide valuable leads to investigators. It was also noted that street checks can serve to clear individuals of suspicion.*[22]

Although the "majority of police officials who took part in the consultation process admitted that many street checks are of poor quality and contribute little to public safety", there were some references to "high-quality street checks":

> *Officers identified high-quality street checks as those that provided new information about an offender (i.e., changes to their location, dress, vehicle,*

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21 Wortley Report, beginning at page 76.

22 Wortley Report, page 78.

> *address, behaviour, etc.), new information about a previously undocumented civilian engaged in suspicious activity, or new information about possible criminal associations. Low-quality street checks were defined as those that provided no new information about an offender or documented a civilian's presence without clear justification.*[23]

According to the Wortley Report: "All officers involved in the police consultation process were aware that Black civilians are significantly over-represented in street checks statistics."[24] Further:

> *Consistent with the results of the community consultations and the community survey, the vast majority of police participants acknowledged that, in general, trust and confidence in the police is significantly lower among Black civilians than White Halifax residents. While many highlighted the existence of strong relationships between individual police officers and individual community members, most described the overall relationship between the police and Black community as "strained." Others stated that they are aware that many Black Nova Scotians perceive that racism and racial bias are major problems within the law enforcement community. Although they may not agree with this assessment, several participants stated that perceived police racism is an issue that must be addressed. As one officer noted, "At the very least we have a serious public relations problem."*
>
> *While most officers are aware of the problematic relationship between the police and Nova Scotia's Black community, several stated that, in their opinion, this relationship was improving and not as bad as it had once been[.]*[25]

Several police officers thought that the "nature and purpose" of street checks could be better communicated,[26] while "other police officials acknowledged that street checks, and other forms of proactive policing, could have a negative impact on how the Black community views the police."[27]

Dr. Wortley summarized the recommendations coming out of the police consultations:

> *While police participants did not recommend the elimination of street checks, most felt that the quality of street checks could be greatly improved. It was expressed that a reduction of "low quality" street checks could be achieved by:*
>
> - *The cessation of the practice of evaluating officer performance by the number of street checks completed. It was argued that the focus should be placed on the quality of street checks, not the quantity;*

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23 Wortley Report, page 81.

24 Wortley Report, page 85. This section of the Report goes on to review the officers' explanations for this over-representation.

25 Wortley Report, page 89.

26 Wortley Report, page 91.

27 Wortley Report, page 92.

- *The establishment of a formal street check policy that clearly describes when street checks should be conducted and what information should be included in street check documentation[;]*

- *Improved officer street check training. After the establishment of the formal street check policy, officers should be better trained on when to conduct a street check and the type of information that should be included in street check documentation. It was argued that this would reduce the number of "unnecessary" street checks and improve the quality of the information collected;*

- *Supervisory review. Supervisors should periodically review or audit street check data for quality and potential utility. Low quality street checks should be immediately purged from the system;*

- *Improvements to the street check dataset. Many officers felt that the system should be changed to better reflect the various reasons for completing street checks and the type of information collected.*[28]

Additional police comments and recommendations are contained in the Wortley Report.[29]

3. Historical and Socio-Legal Context

To put our opinion in context, we will first highlight the key findings from the Wortley Report, arising from the street checks data set.

We will then consider three other resources to complete the picture. They are the *Report of the Working Group of Experts on People of African Descent on its mission to Canada*;[30] the report of the Royal Commission on the Donald Marshall, Jr., Prosecution ("**Marshall Commission**"); and the decision of the human rights board of inquiry in the Kirk Johnson case. Our review of these topics will be brief by necessity but that should not be seen as minimizing their importance.

We note that Justice Moir, in the recent case of *Taylor v Nova Scotia (Attorney General)* (which involved the judicial review of a Police Complaints Commissioner decision), included a section entitled "Social Context and Race" wherein Justice Moir considered the Marshall Commission; the Kirk Johnson decision; the Wortley Report; and relevant case law on judicial notice.[31] This consideration of context is becoming an essential part of the legal analysis in cases where race and policing intersect.

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28 Wortley Report, page 96.

29 Wortley Report, pages 96-99. See also the Summary at pages 99-101.

30 *Report of the Working Group of Experts on People of African Descent on its mission to Canada* (16 August 2017), Report to the United Nations Human Rights Council, 36th Session (11-29 September 2017), A/HRC/36/60/Add.1, online: https://ansa.novascotia.ca/sites/default/files/files/report-of-the-working-group-of-experts-on-people-of-african-descent-on-its-mission-to-canada.pdf ["UN Working Group Report"].

31 *Taylor v Nova Scotia (Attorney General)*, 2019 NSSC 292 beginning at para 47.

(a) 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 Halifax Regional Police and the Royal Canadian Mounted Police 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."[32]

In fact: "Black civilians were five times more likely to be subject to a street check than their proportion of the population would predict."[33] 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"[34] 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."[35]

Dr. Wortley explained that: "These stops — or street checks — were often viewed as random, arbitrary and unfair. Participants often complained that officers did not properly explain the reason for the street check or why they were being detained. Many directly accused the police of racial bias or racial profiling."[36]

Participants in Dr. Wortley's community meetings highlighted the difference between street checks and routine traffic stops:

> *It is important to note that several respondents maintained that street checks can be distinguished from routine traffic stops by the types of questions asked by the police or the commands issued during police interactions. For example, some participants claim that street checks involve demands for formal identification – not only for drivers (as expected) but for passengers as well. Furthermore, several community members stated that pedestrian street checks almost always involve a police command to produce formal ID. According to some community members, street checks also involve intrusive police questions including queries about where the person lives, what they are doing, where they are going, their employment situation and whether they have ever been arrested. In some cases, participants stated that they have been explicitly asked by the police whether they are carrying drugs or weapons or if they have been recently involved in criminal activity. Others claim that, during a street check, the police will ask them if they have any court conditions or outstanding warrants. Finally, some participants claim that street checks involve "consent search" requests. These include police requests to search vehicles, empty pockets or knapsacks or consent to a frisk or "pat-down" search. Several respondents stated that such police treatment is evidence that the police*

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32 Wortley Report, page 143.

33 Wortley Report, page 104.

34 Wortley Report, page 111.

35 Wortley Report, page 116.

36 Wortley Report, page 6.

> *consider Black people criminals even when there is no cause or reasonable suspicion.*[37] [emphasis added]

Dr. Wortley found that the police justifications for street checks were not always clear:

> *The results suggest that the reason for 25% of all street checks was "suspicious activity" (see Figure 5.12). An additional 25% were conducted for "intelligence purposes." One fifth (20.4%) of all street checks involved a "visual check." However, the justification for the "visual check" is far from clear. This category seems to capture the type of street check more than the justification for the street check. Another fifth (19.5%) of all street checks involved a traffic infraction. Once again, the meaning of traffic infraction is difficult to interpret. Was the purpose of the street check to document a traffic infraction or did the encounter that led to the street check emerge because of a traffic infraction? Finally, very few street checks involved loitering (4.8%), a spot-check (2.5%), the* Liquor Control Act *(1.6%) or probation/parole issues (1.2%).*[38]

Dr. Wortley's team asked the police to provide "specific examples of cases where street checks had helped solve crime."[39] They only received five. 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."[40]

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."[41]

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."[42]

On April 17, 2019, Nova Scotia Minister of Justice and Attorney General Mark Furey imposed a moratorium on street checks,[43] which is still in place. In imposing the moratorium, the Minister has defined "street check" as "an interaction between police and a person for the purpose of collecting

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37 Wortley Report, page 4.

38 Wortley Report, page 120.

39 Wortley Report, page 148.

40 Wortley Report, page 150.

41 Wortley Report, page 81.

42 Wortley Report, page 155.

43 Minister's Directive (17 April 2019), online: Nova Scotia https://novascotia.ca/street-checks/Minister-Directive-Street-Checks-April-2018.pdf (the URL says 2018 but it is from 2019). See also Mairin Prentiss, "Nova Scotia places moratorium on random street checks after community backlash" (17 April 2019), online: CBC News https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-puts-moratorium-on-street-checks-1.5101921.

and recording identifying information for general intelligence purposes."[44] It is unclear whether this definition, which requires "an interaction", was intended to allow for observational street checks to occur during the moratorium, or whether those were also intended to be banned.

(b) The United Nations Working Group Report

The United Nations Working Group of Experts on People of African Descent, which visited Halifax in 2016, also provides us with helpful context:[45]

> *People of African descent have lived in Canada since the beginning of transatlantic settlement. Among the earliest arrivals were enslaved Africans from the New England States of the United States of America and the West Indies. Between 1763 and 1865, most Blacks migrating to Canada were fleeing slavery in the United States. Indeed, the United States remained the main source of new Black immigrants to Canada until the 1960s when changes to the* Immigration Act *removed the bias against non-white immigrants and permitted large numbers of qualified West Indians and Africans to enter Canada. This major influx of Black people greatly outnumbered the original Black population in every Canadian region, except the Maritimes.*
>
> *Slavery existed in Canada from the 16th century until its abolition in 1834. After slavery was abolished, African Canadians still had to contend with* de facto *segregation in housing, schooling and employment, and exclusion from public places such as theatres and restaurants.*
>
> *African Canadians made significant contributions to early Canadian society. In the war of 1812, African Canadians fought in the British army defending Canadian borders against the United States. […]*
>
> *In the 1960s, the African Nova Scotian community of Africville, north of Halifax, was destroyed to make way for industrial development. For over 150 years, Africville had been home to hundreds of African Canadian individuals and families, some of whom could trace their roots in Nova Scotia back to the late 1700s. Africville was a vibrant, self-sustaining community that thrived despite the harshest opposition, and most of its inhabitants were landowners. The denial of services, environmental racism and targeted pollution of the community and other deplorable tactics employed by the authorities to displace the residents of Africville is a dark period in Nova Scotian history. In the 1980s, the Africville Genealogy Society initiated legal action seeking compensation for their loss. In 2010, an apology was issued by the city of Halifax for the destruction of the community and the land, and $3 million were allocated to build a museum on the Africville site.*

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44 Online: https://novascotia.ca/street-checks/. See also the Minister's Directive, page 2.

45 UN Working Group Report at paras 6-9 (footnotes omitted).

This summary only scratches the surface,[46] but it reminds us that the enslavement and segregation of Black Nova Scotians are essential to understanding the experiences of their communities today.

The UN Working Group recommended "that the practice of carding, or street checks, and all other forms of racial profiling be discontinued and that the practice of racial profiling be investigated and the perpetrators sanctioned. There must be a cultural change in law enforcement and greater respect for the African Canadian community."[47]

(c) Marshall Commission

The report of the Marshall Commission is essential context for our analysis of street checks.[48] This was, and remains, a landmark report for the justice system in Nova Scotia.

In 1971, Donald Marshall, Jr., a Mi'kmaq man, was wrongfully convicted of the murder of Sandy Seale, a 17-year-old black man, and spent 11 years in prison, until the Appeal Division of the Nova Scotia Supreme Court overturned the conviction and acquitted him.

The Royal Commission was created in 1986 to review the wrongful conviction. The Royal Commission identified that one reason Marshall was wrongfully prosecuted in 1971 was because of the lack of trust and meaningful communication between the police and members of the Indigenous and African Nova Scotian communities.[49] Several of the Report's recommendations were aimed at addressing systemic racism in Nova Scotia's criminal justice system and the treatment of Indigenous and Black Nova Scotians within the justice system.[50]

The Commission recommended "that municipal police departments develop official policies on racial stereotyping, and that police training institutions and police forces place greater emphasis on multicultural education and sensitivity training at both the recruit and continuing training levels."[51]

The Wortley Report demonstrates that the implementation of the Marshall Commission's recommendations remains an unfinished project.

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46 It does not discuss the historically Black communities of Preston, for example. On the ongoing land titles initiative in Preston, see Sherri Borden Colley, "Residents in five black N.S. communities see progress on land title claims" (24 June 2019), online: CBC News https://www.cbc.ca/news/canada/nova-scotia/black-communities-legal-land-titles-government-deeds-1.5185190.

47 UN Working Group Report, page 17 at para 90.

48 Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (Province of Nova Scotia: December 1989), available online: https://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf ["Marshall Commission Digest"].

49 Marshall Commission Digest, Recommendation 54.

50 Marshall Commission Digest, page 12.

51 Marshall Commission Digest, page 17.

(d) Kirk Johnson Decision

The Wortley Report actually begins with the story of what happened to Kirk Johnson on April 12, 1998.[52] Mr. Johnson, described as "a well-known professional boxer and Olympian from North Preston, Nova Scotia, was pursued in his vehicle, on a local highway, by a Constable from the Halifax Regional Police Service." Mr. Johnson (whose vehicle was registered and insured in Texas) was then ticketed for driving without proof of insurance and driving without proof of vehicle registration, and his vehicle was seized and towed. Mr. Johnson filed a human rights complaint alleging that the police engaged in racial profiling during the events of that evening.

Prof. Philip Girard, the Board of Inquiry who heard the complaint, concluded that Mr. Johnson was pursued, stopped, and mistreated because of his race, and that this was discrimination contrary to the Nova Scotia *Human Rights Act*.[53]

Prof. Girard benefited from expert evidence from Dr. Wanda Thomas Bernard (now a Senator) on the effects of racism:

> *Dr. Bernard testified as to the sense of violation that members of minorities experience when subjected to acts of racism; she analogized it to an assault. We understand that a person who has been physically assaulted will continue to experience psychic after-effects for some period of time long after any physical injury has healed. A similar reaction can occur after a direct encounter with racism. When the act occurs at the hands of the police, contact with whom one has no control over, it is bound to create an ongoing sense of vulnerability.*[54]

Like the Marshall Commission, Prof. Girard called for better police training:

> *I also wish to address an understandable concern of officers reading this decision. If we are to be held liable for violating the* Human Rights Act *on the basis of unconscious stereotypes, some might say, how can we ever be sure we are acting correctly? How can we guard against something that is not conscious? Isn't it unfair to hold us to such a high standard? I think the answer to this question was given by Constable Christopher Regan at the inquiry. In response to a question about how to deal with racial stereotypes, he replied that you have to work at it. That simple answer is the essence of it. Recognizing the problem and developing techniques to deal with it, both at the personal and institutional level, are the key. Police pride themselves on being professionals and part of that professionalism involves rigorous training on a wide variety of matters. Learning to recognize and deal with racism is another form of training that the police must add to their repertoire in order to continue to provide quality policing services[.]*[55]

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52 Wortley Report, page 1.

53 *Johnson v Halifax Regional Police Service* (2003), 48 CHRR D/307, 2003 CarswellNS 621 (Board of Inquiry) online: Nova Scotia Human Rights Commission https://humanrights.novascotia.ca/sites/default/files/2003-Johnson.pdf [cited to online version].

54 *Johnson* at 35.

55 *Johnson* at 25-26.

Michael Wood (then counsel for the Human Rights Commission and now Chief Justice of Nova Scotia) asked the Board of Inquiry to direct HRP "to begin collecting and maintaining statistics on the race of all drivers who are stopped by police officers."[56] Prof. Girard asked for further submissions[57] but apparently did not end up making this order. However, HRP in 2005 started collecting data on the race of people stopped by police.[58]

Prof. Girard also suggested that HRP "consider a study of the impact of race on traffic stops" but "this 'traffic stop' study was never conducted" — as discussed in the Wortley Report:

> *However, following inquiries by the CBC, the HRP eventually released a report on race and police "street checks" (Giacomontonio 2017). The release of this report produced considerable media coverage and public debate. In the midst of this controversy, I was commissioned by the Nova Scotia Human Rights Commission to conduct an inquiry into the relationship between race and police street checks in the Halifax region, through and analysis of the 12 years[']' worth of statistical data collected. This report reveals the findings of that inquiry.*[59]

PART II – LEGAL ANALYSIS

This Part of the opinion is divided into three sections.

First, we review statute law and common law as potential sources of authority for police powers, and introduce the recent Supreme Court of Canada decision in *Fleming v Ontario* ("***Fleming***").

Second, we apply the "ancillary powers doctrine", which the Supreme Court has developed for evaluating a purported police power, to the practice of street checks.

We then discuss the applicable statutory provisions on freedom of information and protection of privacy.

1. Sources of Police Authority – From *Waterfield* to *Fleming*

The two main sources of police powers in Canada are **(i)** statutes and **(ii)** the common law. As the Supreme Court recently reviewed in *Fleming*:

> *When interfering with the freedom of individuals, the police must act in accordance with the law. In many cases, their powers are clearly outlined in statutes, such as the* Criminal Code*, R.S.C. 1985, c. C-46. But, as this Court recognized in* Dedman*, statute law is not the only source of legal authority for police powers. In particular*

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56 *Johnson* at 36.

57 *Johnson* at 40-41.

58 Phlis McGregor & Angela MacIvor, "Black people 3 times more likely to be street checked in Halifax, police say" (9 January 2017), online: CBC News https://www.cbc.ca/news/canada/nova-scotia/halifax-black-street-checks-police-race-profiling-1.3925251.

59 Wortley Report, page 1.

> *circumstances, the common law may also provide a legal basis for carefully defined powers.*[60]

There is a close relationship between these two sources of law when it comes to what the police are authorized to do. As Justice Tulloch explained in his Report:

> *Certain powers are granted to police officers in order to enable them to discharge their duties. These powers come from both statute (e.g. the* Criminal Code*) and from common law. Police duties include the preservation of peace, the prevention of crime and the protection of life and property. To discharge these duties, police officers may need to engage with members of the public, including stopping and questioning them. But their ability to do so is not unlimited: a balance must be struck between protecting individual liberties and properly recognizing certain police functions.*[61]

In other words, police have broad duties, but "only limited powers to perform those duties":

> *Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have* carte blanche *to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a* de facto *arrest.*[62]

The Nova Scotia *Police Act* is the statute that governs policing in Halifax (including the HRP and RCMP).[63] There is no explicit reference to, or authorization for, street checks in the Nova Scotia *Police Act*, the *Criminal Code* (which is federal legislation), or any other legislation.

Unlike in Ontario,[64] there is no regulation made under the Nova Scotia *Police Act* that addresses street checks. The HRP and RCMP policies reviewed above are made by the police forces themselves for internal guidance, so they do not have the force of law.[65]

In sum, street checks are not specifically authorized under any federal or provincial statute.

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60 *Fleming v Ontario*, 2019 SCC 45 at para 39, citing *R v Dedman*, [1985] 2 SCR 2. See also *R v Aucoin*, 2011 NSCA 64 at para 50, Beveridge JA, dissenting (but not on this point), majority decision aff'd 2012 SCC 66.

61 Tulloch Report, Executive Summary at para 24.

62 *R v Mann*, 2004 SCC 52 at para 35. See also *R v Simpson* (1993), 12 OR (3d) 182, 1993 CarswellOnt 83 (CA) at para 134 [cited to Westlaw]. And see *R v Clayton*, 2007 SCC 32 at para 68, Binnie J, concurring; *R v Gonzales*, 2017 ONCA 543 at para 61.

63 *Police Act*, SNS 2004, c 31.

64 *Collection of Identifying Information in Certain Circumstances – Prohibition and Duties*, O Reg 58/16, made under the *Police Services Act*, RSO 1990, c P.15. Online: https://www.ontario.ca/laws/regulation/160058. This Regulation was the subject of the Tulloch Report.

65 *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 50. See also *Fleming* at para 104.

For this reason, we must examine the common law test for determining police powers. This is known as the "ancillary powers doctrine" ("ancillary" because the police actions at issue "are ancillary to the fulfillment of recognized police duties").[66]

The ancillary powers doctrine was reviewed and applied by the Supreme Court of Canada in *Fleming*.[67]

Fleming was a civil case. The plaintiff was arrested during a counter-protest in Caledonia, Ontario which was planned in response to the ongoing Six Nations occupation of Douglas Creek Estates. He was arrested to prevent an apprehended breach of the peace by others involved.

As Justice Côté summarized:

> *He had committed no crime. He had broken no law. He was not about to commit any offence, harm anyone, or breach the peace. In essence, the O.P.P. [Ontario Provincial Police] officers claimed to have arrested Mr. Fleming for his own protection.*[68]

Mr. Fleming sued the province of Ontario and several police officers, alleging assault and battery; wrongful arrest; and false imprisonment, and seeking damages (including for breaches of his *Charter* rights).[69]

The main issue before the Supreme Court of Canada was whether the arrest was lawful. There was no *statutory* power of arrest in these circumstances, but the police asserted that "there is a common law police power to arrest an individual in Mr. Fleming's circumstances in order to prevent an apprehended breach of the peace."[70]

Ultimately, the Supreme Court upheld the trial judge's finding that the arrest was unlawful because it "was not authorized at common law."[71] Justice Côté stated that:

> *The ancillary powers doctrine does not give the police a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. A drastic power such as this that involves substantial interference with the liberty of law-abiding individuals would not be reasonably necessary for the fulfillment of the police duties of preserving the peace, preventing crime, and protecting life and property. This is particularly so given that less intrusive powers are already available to the police to prevent breaches of the peace from occurring.*[72]

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66 *Fleming* at para 45.

67 *Fleming* at para 43.

68 *Fleming* at para 1.

69 *Fleming* at para 22, citing the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

70 *Fleming* at para 6.

71 *Fleming* at para 101.

72 *Fleming* at para 7; see also para 92.

The Supreme Court's framework for determining whether a particular police power is authorized at common law originates with *R v Waterfield*,[73] a 1963 case from England that has had an outsized impact on the common law of police powers in Canada.

It makes sense to review the facts of *Waterfield* to better appreciate its legacy.

Two men, Waterfield and Lynn, were convicted of assaulting peace officers in the execution of their duty. A police officer had asked to examine their car, because it had been involved in an earlier collision with a brick wall, when Waterfield told Lynn to "drive at" one of the officers, who then jumped out of the way.

The Court of Appeal quashed the convictions, finding that the officers had no authority to detain the vehicle so they were not acting in the due execution of their duty when the alleged assault occurred.

Justice Ashworth found it difficult to set out "specific limits" for police duties:

> *In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was* prima facie *an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.*[74]

The Court rejected the Crown's argument "that the two police constables were acting in the execution of a duty to preserve for use in court evidence of a crime." The appellants in *Waterfield* had not been charged or arrested. The Court concluded "the two police constables were not acting in the due execution of their duty at common law when they detained the car."[75]

It can be seen that the Court in *Waterfield* took a narrow view of police powers, which led to the convictions being overturned. And yet this 1963 case from England became the basis for the "*Waterfield* test" in Canada, used to determine the boundaries of common law police powers in many cases where individuals alleged that police conduct had violated their *Charter* rights.[76]

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73 *R v Waterfield*, [1963] 3 All ER 659 (Court of Criminal Appeal).

74 *Waterfield* at 661.

75 *Waterfield* at 662.

76 See e.g. *Mann* at para 24; *Fleming* at para 43. The Coughlan & Luther text is a comprehensive resource on this topic.

Justice Côté, writing for a unanimous Court in *Fleming*, recognized this strange evolution:

> *To determine whether a particular police action that interferes with individual liberty is authorized at common law, this Court applies the framework that was originally set out in* Waterfield*. This approach has often been referred to as the "Waterfield test". I prefer to use the terminology of the "ancillary powers doctrine". This is because, as Binnie J. observed in* R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, "*Waterfield *is an odd godfather for common law police powers" (para. 75). At issue in* Waterfield *was whether a certain constable had been acting in the execution of his duties when he was assaulted; the case did not actually concern the recognition of a purported new common law police power. However, regardless of the doctrine's origins, this Court has consistently applied the test set out by the majority in* Dedman*.*
>
> *Furthermore, the English court in* Waterfield *was concerned with actions related to investigating crime. But the ancillary powers doctrine has a broader reach than that: it can be applied to purported police powers — with appropriate clarifications that I will discuss below — even where no crime is alleged.*[77]

Even though *Waterfield* was never intended to be used as a source of police powers, that was how the Supreme Court of Canada applied it in many cases before *Fleming*. The Court expressly viewed itself as performing a gap-filling and law-making function in this regard.[78]

With *Fleming*, the Court has now clarified, and arguably tightened, the criteria for when a new common law police power may be recognized, citing the rule of law:

> *Police officers are tasked with fulfilling many important duties in Canadian society. These include preserving the peace, preventing crime, and protecting life and property. The execution of these duties sometimes necessitates interference with the liberty of individuals. However, a free and democratic society cannot tolerate interference with the rights of law-abiding people as a measure of first resort. There is a line that cannot be crossed. The rule of law draws that line. It demands that, when intruding on an individual's freedom, the police can only act in accordance with the law.*[79]

Justice Côté reiterated this point:

> *The police, in fulfilling the important duties they are tasked with in a free and democratic society, are sometimes required to interfere with the liberty of individuals. This is a fact that legislatures and courts in common law jurisdictions have long recognized. However, the rule of law requires that strict limits be placed on police powers in this regard in order to safeguard individual liberties. In* Dedman v. The Queen*, [1985] 2 S.C.R. 2, Dickson C.J., dissenting but not on this point, set out the foundation for the analysis on this subject:*

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77 *Fleming* at paras 43-44.

78 *Fleming* at para 42 and cases cited therein.

79 *Fleming* at para 2. Emphasis added.

> *It has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law. Laskin C.J. dissenting, in* R. v. Biron*, [1976] 2 S.C.R. 56, made the point at pp. 64-65:*
>
> > *Far more important, however, is the social and legal, and indeed, political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. Only to the extent to which it so provides can a person be detained or his freedom of movement arrested.*
>
> *Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they act unlawfully.*[80]

Fleming now provides the governing framework "to determine whether — and in what circumstances — a particular power exists at common law."[81] The essential, overarching criterion is "reasonable necessity."

To review the *Fleming* framework:

> *The basis of the doctrine is that police actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties. Intrusions on liberty are accepted if they are reasonably necessary — in accordance with the test set out below — in order for the police to fulfill their duties.*
>
> *At the preliminary step of the analysis, the court must clearly define the police power that is being asserted and the liberty interests that are at stake (*Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641, at paras. 55-66). The ancillary powers doctrine comes into play where the power in issue involves prima facie interference with liberty. The term "liberty" here encompasses both constitutional rights and freedoms and traditional common law civil liberties (see* Clayton*, at para. 59;* Figueiras*, at para. 49). Once the police power and the liberty interests have been defined, the analysis proceeds in two stages:*
>
> > *(1) Does the police action at issue fall within the general scope of a statutory or common law police duty?*
> >
> > *(2) Does the action involve a justifiable exercise of police powers associated with that duty?*

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80 *Fleming* at para 38.

81 *Fleming* at para 49.

> *(*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 35-36;* Reeves*, at para. 78)*
>
> *At the second stage of the analysis, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty (*MacDonald*, at para. 36). As this Court stated in* Dedman*:*
>
> > *The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35]*
>
> *In* MacDonald*, the majority of the Court set out three factors to be weighed in answering this question:*
>
> > *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. [para. 37; citations omitted.]*
>
> *Throughout the analysis, the onus is always on the state to justify the existence of common law police powers that involve interference with liberty.*[82]

This framework "can be applied to purported police powers…even where no crime is alleged."[83]

Importantly, the framework is meant to incorporate *Charter* considerations. Where the ancillary powers doctrine applies, a standalone *Charter* analysis is not conducted (at least where sections 8 and 9 of the *Charter* are at issue):[84]

> *While the ancillary powers doctrine concerns police action that interferes with liberty — a term that, as noted above, encompasses many constitutional rights — determining whether a common law power exists does not itself require the court to apply s. 1 of the* Charter *(*Clayton*, at para. 21). That being said, the two frameworks are not completely unrelated.*
>
> *Certain concepts which play a significant role in the* Charter *justification context — such as minimal impairment and proportionality — have clear parallels in the ancillary powers doctrine analysis (see R. Jochelson, "Ancillary Issues with* Oakes*: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory" (2012-13), 43 Ottawa L. Rev. 355; J. Burchill, "A Horse Gallops Down a Street … Policing and the Resilience of the Common Law" (2018), 41 Man. L.J. 161, at p. 175). For example, the three factors from* MacDonald

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82 *Fleming* at paras 45-48.

83 *Fleming* at para 44.

84 *Fleming* at para 111.

> *require a proportionality assessment. Moreover, the concept of reasonable necessity requires that other, less intrusive, measures not be valid options in the circumstances. If the police can fulfill their duty by an action that interferes less with liberty, the purported power is clearly not reasonably necessary (see* Clayton*, at para. 21).*
>
> *Ultimately, the ancillary powers doctrine is designed to balance intrusions on an individual's liberty with the ability of the police to do what is reasonably necessary in order to perform their duties (see* Clayton*, at para. 26).*[85]

We will now apply this framework in order to assess the purported police power to conduct street checks.

2. Application of the Ancillary Powers Doctrine

To refresh, the ancillary powers doctrine is applied in three stages. The threshold step involves defining the police power and liberty interests at issue. Then, assuming there is a conflict between the potential police power and individual liberty interests, the analysis moves to stage one.

Stage one asks: "Does the police action at issue fall within the general scope of a statutory or common law police duty?" Stage two asks: "Does the action involve a justifiable exercise of police powers associated with that duty?"

(a) Threshold Step: Defining the Police Power and Liberty Interests at Issue

(i) Defining the Police Power

At issue is the police power to conduct street checks: 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 general intelligence purposes and potential future use.

As we have discussed, street checks in Halifax are often conducted without any interpersonal engagement or interaction — at least by the HRP. According to RCMP policy, "street checks" require "face-to-face contact", although "[o]bservations of policing value made without a public/police interaction (where the identity of the individual is known) must be recorded" in another way, as "an information or an intelligence file." This kind of street check is a visual or "observational" street check, as opposed to an "interactional" street check.

The practice of recording "street checks" is distinct from recording information related to a **vehicle stop** pursuant to the *Motor Vehicle Act*, or information related to an actual occurrence (e.g. "civilian calls for service, criminal incidents, [or] arrests") which would be "typically captured" through General Occurrence (or "GO") reports.[86]

Street checks are also distinct from **investigative detentions**. The Supreme Court delineated the common law police power of investigative detention in *R v Mann*.[87] To conduct an investigative

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85 *Fleming* at paras 53-55. Emphasis added.

86 Wortley Report, page 101.

87 *Mann* at para 34.

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.[88]

(ii) Defining the Liberty Interests at Stake

According to *Fleming*, "The term 'liberty' here encompasses both constitutional rights and freedoms and traditional common law civil liberties."[89]

The overarching liberty interest at stake is the right to be left alone; "the social and legal, and indeed, political, principle upon which our criminal law is based" is "the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise."[90]

As Justice Sopinka pointed out in his concurring reasons in *R v Ladouceur*, it "would not be tolerated" if the police could stop people walking down "public streets and walkways" at any time, for any reason.[91] This is distinct from the motor vehicle context (where many *Charter* cases have arisen).[92] Justice Charron, for the majority in *R v Orbanski*, stated:

> *First, we are concerned here with the use of a vehicle on a highway. This Court has recognized that, while movement in a vehicle involves a "liberty" interest in a general sense, it cannot be equated to the ordinary freedom of movement of the individual that constitutes one of the fundamental values of our democratic society. Rather, it is a licensed activity that is subject to regulation and control for the protection of life and property: see* Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35. The need for regulation and control of the use of vehicles on the highway is heightened both because of the high prevalence of the activity and its inherent dangers.*[93]

In terms of specific constitutional rights, street checks raise issues under section 9 of the *Charter*, which protects the right to be free from arbitrary detention. As well, street checks involve the

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88 According to Profs. Stuart and Tanovich, "the much criticised carding practices used for so long in Toronto are clearly a violation of the strict *Mann* standards for investigative detention": Don Stuart & David M Tanovich, Annotation to *R v K (A)*, 2014 CarswellOnt 11378 (Ct J).

89 *Fleming* at para 46.

90 *R v Biron*, [1976] 2 SCR 56 as cited in *Dedman* which is excerpted in *Fleming* at para 38. See also *Fleming* at paras 65-66.

91 *R v Ladouceur*, [1990] 1 SCR 1257 at 1264.

92 Additional case law summaries are contained in the Appendix.

93 *R v Orbanski; R v Elias*, 2005 SCC 37 at para 24 (emphasis added); see also paras 25-28.

collection and retention of personal information by the police, "which raises concerns under section 8 of the *Charter*"[94] related to personal privacy and autonomy.[95]

We will further examine these issues under the headings of Section 9 and Section 8.

➢ Section 9

Section 9 of the *Charter* provides that: "Everyone has the right not to be arbitrarily detained or imprisoned." The section 9 jurisprudence helps define the liberty interests at stake when examining the potential police power to conduct street checks.[96]

The purpose of section 9 "is to protect individual liberty from unjustified state interference."[97]

As recently stated in *R v Le*: "Underlying this purpose is an uncontroversial principle that is inherent to a free society founded upon the rule of law: 'government cannot interfere with individual liberty absent lawful authority to the contrary'… Absent compelling state justification that bears the imprimatur of constitutionality by conforming to the principles of fundamental justice" an individual is "entitled to live [their] life free of police intrusion."[98]

This does not mean an individual is detained in every interaction with the police:

> *"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the* Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the* Charter *are not engaged by delays that involve no significant physical or psychological restraint.*[99]

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94 Christina Abbott, *Street Checks and Canadian Youth: A Critical Legal Analysis* (LLM Thesis, University of Saskatchewan College of Law, September 2017), at 28; see also page 51 and footnote 129 https://harvest.usask.ca/bitstream/handle/10388/8098/ABBOTT-THESIS-2017.pdf?sequence=1&isAllowed=y ["Abbott"].

95 Other *Charter* rights are also implicated, including the section 7 right to life, liberty, and security of the person (which includes the right to silence) and the section 10 rights to be informed of the reason for detention and of the right to counsel. See generally Abbott at ii and ch 4.

96 See the comprehensive summary in chapter 4 of the Tulloch Report, at paras 99-110. We have included additional summaries of section 9 cases in the Appendix.

97 *R v Grant*, 2009 SCC 32 at para 20. See also *R v Le*, 2019 SCC 34 at para 152. And see Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29:2 Osgoode Hall LJ 329 at 387: "Properly understood, the right to be free from arbitrary detention is not only a right that secures freedom from irrational and capricious intrusion, but is also a safeguard to ensure that police-community relations do not become divisive because of policing decisions to target individuals who do not fit into the majority mainstream mould."

98 *Le* at para 152, citing James Stribopoulos, "The Forgotten Right: Section 9 of the *Charter*, Its Purpose and Meaning" (2008), 40 SCLR (2d) 211 at 231.

99 *Mann* at para 19. See also *Orbanski* at para 30.

Whether a "detention" has occurred involves examining "the general principle of choice":[100]

> *The general principle that determines detention for* Charter *purposes was set out in* Therens*: a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (per Le Dain J., at p. 644). This principle is consistent with the notion of choice that underlies our conception of liberty and, as such, shapes our interpretation of ss. 9 and 10 of the* Charter.[101]

These liberty interests were discussed in the Tulloch Report:

> *Absent a legal rule to the contrary, people are free to move about as they please. In particular, in common law people have "a right to travel unimpeded down a public highway" or, said differently, a right "to walk the streets free from state interference". Young people – indeed all people – also "have a right to 'just hang out', especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim".*
>
> *Faced with police questioning on the street, a person is generally free to decline to answer and walk away. While citizens may have a "moral or social duty" to assist the police, there is no general legal obligation for them to do so. If a person does decline to assist, the officer must allow them to be on their way.*
>
> *However, the presumptive right to walk down the street unimpeded by police does not mean that police officers cannot engage with people and ask them questions. Police engagement with the community can take many forms. In certain instances, the police may have a legal duty to engage with people going about their business on the street.*
>
> *But an officer can only prevent a person from leaving by invoking legal powers of arrest or detention. If the person is arrested or detained without proper legal grounds, their right against arbitrary detention will have been violated.*[102]

It is clear that street checks, by definition, do not include physical restraint (like putting someone in handcuffs or placing them in a jail cell). However, street checks may involve psychological restraint,[103] which may be a form of arbitrary detention contrary to section 9 of the *Charter*.

The Supreme Court's recent decision in *Le* supports the conclusion that street checks may constitute arbitrary detention.[104]

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100 *Grant* at para 27.

101 *Grant* at para 28.

102 Tulloch Report, ch 4 at paras 3-6 (footnotes omitted).

103 Abbott at 30; see also 36.

104 According to *Fleming* at para 111, "a lawful detention pursuant to a common law power" may not be arbitrary. However, the potentially arbitrary nature of a police practice is also relevant when determining whether the police power exists at all. See also Abbott at 42-43.

To review the facts of *Le*:

> *One evening, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. The young men appeared to be doing nothing wrong. They were just talking. The backyard was small and was enclosed by a waist-high fence. Without a warrant, or consent, or any warning to the young men, two officers entered the backyard and immediately questioned the young men about "what was going on, who they were, and whether any of them lived there" (2014 ONSC 2033, at para. 17… They also required the young men to produce documentary proof of their identities. Meanwhile, the third officer patrolled the perimeter of the property, stepped over the fence and yelled at one young man to keep his hands where the officer could see them. Another officer issued the same order.*
>
> *The officer questioning the appellant, Tom Le, demanded that he produce identification. Mr. Le responded that he did not have any with him. The officer then asked him what was in the satchel he was carrying. At that point, Mr. Le fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash. At trial, he sought the exclusion of this evidence under s. 24(2) of the* Canadian Charter of Rights and Freedoms *("*Charter*") on the basis that the police had infringed his constitutional rights to be free from unreasonable search and seizure and from arbitrary detention, contrary to ss. 8 and 9 of the* Charter*.*[105]

The majority's analysis focused on psychological detention. There was no legal obligation to comply with the police request,[106] so the analysis came down to "whether a reasonable person, who stood in the appellant's shoes, would have felt obligated to comply and would not have felt free to leave as the police entered the backyard and made contact with the men."[107]

At this point, "no statutory or common law power authorized" Mr. Le's detention.[108] The circumstances supported a finding of detention, as did the particular characteristics of the accused. The majority framed this analysis as follows:

> *At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The s. 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.*[109]

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105 *Le* at paras 1-2. Somewhat unexpectedly, the decision focused on section 9 of the *Charter* rather than section 8.

106 *Le* at para 28.

107 *Le* at para 28.

108 *Le* at para 30.

109 *Le* at para 75.

A detention was established on the facts of *Le*. The next issue was whether it was arbitrary.

According to the majority, "the detention of Mr. Le was not authorized by law, and was, therefore, arbitrary."[110] In particular, there was no statutory authority "to detain anyone in the backyard." The common law test for investigative detention, from *R v Mann*, was not met:[111]

> *It follows from the foregoing discussion that Mr. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a s. 9 claim. This detention, therefore, infringed Mr. Le's s. 9* Charter *right.*[112]

Although *Le* did not apply the ancillary powers doctrine to determine whether the police conduct was authorized, the Court's comments and findings on arbitrary detention should factor into our analysis of street checks as a potential police power. Constitutional rights, like the right to be free from arbitrary detention, are part of the test for common law police powers outlined in *Fleming*.

➢ Section 8

The liberty interests protected under section 8 are also engaged.

Section 8 protects against unreasonable search and seizure, but it is also the source of broader principles related to the protection of privacy that are relevant for scrutinizing street checks. As Justice LeBel explained in *R v Kang-Brown*: "Section 8 of the *Charter* expresses one of the core values of our society: respect for personal privacy and autonomy… Although the word 'privacy' does not appear in the *Charter*, from the first days of its application, s. 8 evolved into a shield against unjustified state intrusions on personal privacy."[113]

The Supreme Court has now established a "purposive approach" to section 8 "that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society."[114] As the majority in *Le* recently stated: "the analysis must always focus on s. 8's fundamental concern with the public being left alone by the state…"[115]

In *R v Wong*, a leading case on section 8, the police engaged in surreptitious video surveillance of a hotel room without prior judicial authorization, in the hopes of uncovering an illegal gambling

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110 *Le* at para 124.

111 *Le* at paras 129-132.

112 *Le* at para 133.

113 *R v Kang-Brown*, 2008 SCC 18 at para 8, citing *Hunter v Southam Inc*, [1984] 2 SCR 145.

114 *R v Spencer*, 2014 SCC 43 at para 15.

115 *Le* at para 137.

operation.[116] Justice La Forest commented (referring to the Court's earlier decision on electronic surveillance in *R v Duarte*):

> R. v. Duarte *was predicated on the notion that there exists a crucial distinction between exposing ourselves to the risk that others will overhear our words, and the much more pernicious risk that a permanent electronic recording will be made of our words at the sole discretion of the state. Transposing to the technology in question here, it must follow that there is an important difference between the risk that our activities may be observed by other persons, and the risk that agents of the state, in the absence of prior authorization, will* ***permanently record*** *those activities on videotape, a distinction that may in certain circumstances have constitutional implications. To fail to recognize this distinction is to blind oneself to the fact that the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities. It is thus an important factor in considering whether there has been a breach of a reasonable expectation of privacy in given circumstances.*[117] [emphasis added]

Interestingly, Justice La Forest did not accept that the police had common law authority to conduct the surveillance:

> *Nor can I accede to the arguments to the effect that the police, in installing the hidden camera, acted in the exercise of authority derived from their duties at common law. […] I do not think judicial development of new search powers should be encouraged. Moreover, even if the respondent were to be able to point to common law authority it is clear to me that such authority would not pass muster under the* Charter.[118]

Justice La Forest then stated that: "it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties."[119] This statement was cited in *Fleming*.[120]

In *R v Spencer*, Justice Cromwell considered the anonymity component of privacy:[121] "Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance."[122] Citing Justice La Forest's dissent in *Wise*, Justice Cromwell went on:

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116 *R v Wong*, [1990] 3 SCR 36. See also Justice La Forest's dissenting reasons in *R v Wise*, [1992] 1 SCR 527, 1992 CarswellOnt 71 (SCC) at paras 86-88 [cited to Westlaw]. In *Wise*, the police had put a 'beeper' tracking device on a suspect's vehicle. The Supreme Court majority found this constituted an unreasonable search contrary to section 8 of the *Charter*, but disagreed with the trial judge that the evidence arising from the tracking device should be excluded under section 24(2).

117 *Wong* at 48.

118 *Wong* at 54.

119 *Wong* at 57.

120 *Fleming* at para 4.

121 *Spencer* beginning at para 38. See also *R v Mills*, 2019 SCC 22 at para 21.

122 *Spencer* at para 43.

> *La Forest J. (who, while dissenting on the issue of exclusion of the evidence under s. 24(2), concurred with respect to the existence of a reasonable expectation of privacy), explained that "[i]n a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the 'situational landscape'": p. 558 (emphasis added), quoting M. Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 Syracuse L. Rev. 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public. Thus, in order to uphold the protection of privacy rights in some contexts, we must recognize anonymity as one conception of privacy.*[123]

Canadians are generally entitled to remain anonymous while walking down the street or spending time in a public space. They are not ordinarily required to provide identifying information to the police in these circumstances (unlike when driving). It may be argued that there is no reasonable expectation of privacy in one's name, race, or whereabouts at a particular time, but that does not necessarily entitle the state to collect, record, and maintain this information in a police database.

Observation-based street checks also affect individual liberty interests. As with street checks arising from interpersonal encounters, a person's whereabouts are not just observed, but permanently recorded by the police, for reasons unrelated to an actual investigation.

Justice LaForme in *Ferdinand* said about carding in Ontario: "This kind of daily tracking of the whereabouts of persons — including many innocent law-abiding persons — has an aspect to it that reminds me of former government regimes that I am certain all of us would prefer not to replicate."[124]

As in *Fleming*, we can conclude this preliminary step of analyzing the police power and liberty interests at stake by stating that:

> *The purported power in this case would directly impact on a constellation of rights that are fundamental to individual freedom in our society. It would directly undermine the expectation of all individuals, in the lawful exercise of their liberty, to live their lives free from coercive interference by the state.*[125]

This takes us to the two-stage analysis.

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123 *Spencer* at para 44.

124 *Ferdinand* at para 21. See also the Tulloch Report, ch 7 at para 23: "Policing efforts should be focused on specific individuals — not the tracking of entire communities."

125 *Fleming* at para 67.

(b) First Stage: Scope of Police Duty

The issue at this stage of the "ancillary powers" analysis is whether the police action in question (which, we have concluded, engages several liberty interests) falls "within the general scope of a statutory or common law police duty."[126]

At common law, the police have three "principal duties": "preserving the peace, preventing crime, and protecting life and property."[127] 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.

Section 42(2) of the Nova Scotia *Police Act* enumerates these and other duties:

> ***(2)*** *Subject to this Act and the regulations, or any other enactment or an order of the Minister, the authority, responsibility and duty of a member of a municipal police department includes*
>
> *(a) maintaining law and order;*
>
> *(b) the prevention of crime;*
>
> *(c) enforcing the penal provisions of the laws of the Province and any penal laws in force in the Province;*
>
> *(d) assisting victims of crime;*
>
> *(e) apprehending criminals and offenders who may lawfully be taken into custody;*
>
> *(f) laying charges and participating in prosecutions;*
>
> *(g) executing warrants that are to be executed by peace officers;*
>
> *(h) subject to an agreement respecting the policing of the municipality, enforcing municipal by-laws within the municipality; and*
>
> *(i) obeying the lawful orders of the chief officer,*
>
> *and the person shall discharge these responsibilities throughout the Province.*

Arguably, street checks do not actually further any of these police duties.[128] 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 investigate, solve, and prevent crime, or otherwise fulfil their

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126 *Fleming* at para 46.

127 *Fleming* at paras 69-70.

128 *Fleming* at para 73.

duties.[129] 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 maintain law and order.

(c) Second Stage: Reasonable Necessity / Justification

This is the *justification* or *proportionality* stage of the analysis (akin to the test applied under section 1 of the *Charter*).[130]

Justice Côté in *Fleming* made two general comments on justification that apply here, too.

First, like the arrest power that was asserted in *Fleming*, a street check power would be distinct from the powers recognized in other cases:

> *Firstly, the purported police power would expressly be exercised against someone who is not suspected of any criminal wrongdoing or even of threatening to breach the peace. In the past, this Court has only recognized common law police powers that involve interference with liberty where there has been some connection with criminal activities. In these cases, the powers were restricted to circumstances in which there was at least a suspicion that the person affected by the exercise of the power was involved in, or might commit, some offence. For example, this Court has accepted powers intended to prevent an assault on the person of a foreign dignitary (*R. v. Knowlton*, [1974] S.C.R. 443), detect impaired driving (*Dedman*) or eliminate threats to officers posed by weapons (*MacDonald*;* Mann*). In other cases, the recognized powers related directly to the investigation of particular crimes (*Godoy*;* Mann*;* Clayton*;* Kang-Brown*).*[131]

Individuals whose information is recorded as a street check are not suspected of any particular offence. The police record these individuals' identifying information for its potential future value for intelligence-gathering purposes.

Secondly, similar to *Fleming*, the exercise of a purported street checks power would be "evasive of review" by the courts. Street checks are unlikely to lead to "the laying of charges", so individuals are unlikely to challenge the practice in a court proceeding. It follows that:

> *Judicial oversight of the exercise of such a police power would therefore be rare. For this reason, any standard outlined at the outset would have to be clear and highly protective of liberty.*[132]

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129 See also 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) at paras 23-24, online: https://www.ombudsman.on.ca/Files/sitemedia/Documents/OntarioOmbudsman-StreetChecks-EN.pdf.

130 *Fleming* at paras 54 and 75-76.

131 *Fleming* at para 77. Emphasis added.

132 *Fleming* at para 84.

With these comments in mind, we endeavour to apply the "reasonably necessary" threshold in a way that is "highly protective of liberty."[133]

We do this by weighing three factors, as reviewed 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.*[134]

In our view, applying these factors confirms that a police power to conduct street checks "is not reasonably necessary for the fulfillment of the relevant duties."[135]

(i) *Importance of Duty*

As in *Fleming*, "there is no doubt that" the police duties to prevent crime, and maintain law and order, are important to the public good[136] and to public safety.

(ii) *Necessity of Interference*

However, we do not consider it necessary for the police to interfere with liberty by conducting 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."[137] 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."[138]

The Minister of Justice imposed a moratorium on street checks following the release of the Wortley Report. The moratorium 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.

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133 *Fleming* at para 84.

134 *Fleming* at para 47, citing *R v MacDonald*, 2014 SCC 3.

135 *Fleming* at para 88.

136 *Fleming* at para 89.

137 Wortley Report, page 148.

138 Wortley Report, page 150.

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:[139]

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.

As Justice Côté explained in *Fleming*: "the concept of reasonable necessity requires that other, less intrusive, measures not be valid options in the circumstances. If the police can fulfill their duty by an action that interferes less with liberty, the purported power is clearly not reasonably necessary."[140]

The list from the Minister's Directive indicates that there are "other, less intrusive, measures" available for the police to fulfill their duties. The police can still record "civilian calls for service, criminal incidents, [or] arrests" (e.g. through General Occurrence reports).[141] And they are certainly entitled to engage civilians in conversation, or to make observations, without collecting personal information and recording it in a separate field in Versadex.

As well, 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.

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139 Minister's Directive, clause 4. The Directive states at clause 2: "No police activities, whether addressed in this Directive or not, shall be conducted on the basis of discrimination, including race."

140 *Fleming* at para 54.

141 Wortley Report, page 101.

(iii) *Extent of Interference with Liberty*

We now consider the final factor of the "reasonable necessity" stage – the extent of the interference with individual liberty.

In our view, street checks as conducted in Halifax involve an interference with individual liberty that outweighs any perceived benefit from street checks. This means that, in our view, there can be no common law power to conduct street checks. Therefore, street checks are illegal.

The potential for street checks to involve arbitrary detention is an important part of this analysis.

Recall that it is "the general principle of choice that underlies the determination"[142] of whether someone is "detained" within the meaning of section 9:

> *Even, therefore, absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state,* ***a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave****. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request.*[143] [emphasis added]

Racial context informs the reasonable person analysis.[144]

It is likely that a reasonable person, familiar with the racial context of street checks in Halifax, would feel obligated to comply with a police request for information and would not think they were free to leave. This is a key reason why street checks arising from face-to-face interactions may be a form of psychological detention, and represent a disproportionate interference with individual liberty.

The Wortley Report confirms that people, especially Black people, who are asked for information in a street check scenario do not necessarily see themselves as having the choice not to comply:

> *In addition to the frequency of police stops, community members also complained about the quality of police treatment. Many felt that the police had treated them rudely or with disrespect. Others felt that their civil rights had been violated or that they had been subject to unfair, unlawful searches. Importantly, many participants felt that that they had to comply with police requests – even when they felt that their rights were being violated. Participants stated that when they did question police authority they were usually met with overt hostility and threats of arrest. Respondents often expressed that they felt intimidated or frightened during these police encounters. They also worried about the consequences of not complying*

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142 *Grant* at para 27; see also para 28.

143 *Le* at para 26.

144 *Le* at paras 75 and 81.

> *with police requests and therefore (reluctantly) followed police orders.*[145] [emphasis added]

The evidence in the Wortley Report indicates that a street check (at least, the interactional kind) is not experienced as a trivial or insignificant interference; it is experienced as coercive, and involves a significant negative impact on individual liberty.

Observational street checks are also troubling when weighed against individual liberty.

Through visual street checks, police officers are purposefully creating a record of an individual's whereabouts without them knowing that the record is being made, and for reasons unrelated to the investigation of a crime. This 'surreptitious surveillance' aspect of visual street checks is concerning. Street checks interfere with the privacy and anonymity of individuals, who should be entitled to go about their business without having to provide their information to the state unless there is a countervailing public policy reason (like there is with driving).[146]

We cannot see any compelling state interest that would outweigh individual liberty in these circumstances. To paraphrase *Wong*, we should not equate the risk of having one's activities observed with the risk of having the state make a permanent recording of those activities.[147]

As indicated, this stage of the ancillary powers analysis involves a "proportionality assessment" much like the *Charter* justification analysis.[148]

The former Ombudsman of Ontario, André Marin, has persuasively argued that street checks do not meet the justification test under section 1 of the *Charter*:

> ***Too drastic a measure***
>
> *24 Street checking is more than a minor inconvenience. For instance, in Toronto, it can take 10 minutes or more to ask questions and record the personal information that is usually collected. Police have various methods at their disposal to obtain information in less intrusive ways, including the ability to engage in fully consensual and voluntary exchanges.*
>
> ***Not proportionate***
>
> *25 The detrimental effects of street checks are also disproportional to any purported benefits that can be derived from them. Street checks can have real and lasting negative impact on the lives of those whose information has been collected. Individuals who have been subjected to this process*

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[145] Wortley Report, page 6; see also page 168, Recommendation 2.7. As described in the Wortley Report, Black people in Halifax have also experienced the police asking if they had any "court conditions or outstanding warrants" (page 4).

[146] See e.g. *R v Hufsky*, [1988] 1 SCR 621, 1988 CarswellOnt 956 (SCC) at para 23 [cited to Westlaw].

[147] *Wong* at 51-52. See also 53.

[148] *Fleming* at para 54.

> *have convincingly described the loss of dignity and the fear associated with these encounters with police.*[149]

The Ombudsman submitted that: "Applying these considerations, street checking does not measure up to constitutional standards."[150] The Ombudsman expressed the "bottom line" on street checks as follows:

- *Stopping citizens without an objective and reasonable basis for believing that they may be implicated in a recent or ongoing criminal offence, or where there are reasonable and probable grounds to arrest them, is unconstitutional – it's a form of arbitrary detention contrary to section 9 of the* Canadian Charter of Rights and Freedoms*;*

- *The purported benefit of street checks – their effectiveness as a policing tool to improve public safety – does not meet the reasonable limits test established by section 1 of the* Charter*; and*

- *The detrimental effects of street checks on individuals and the community are simply too great to justify this practice.*[151]

This "bottom line" fits well with our conclusion on the ancillary powers doctrine. Applying this framework, as refreshed in *Fleming*, we have concluded that street checks are not justifiable as a reasonably necessary intrusion with individual liberties. This means there could be no common law power to conduct street checks. As such, street checks are unlawful.

3. Freedom of Information and Protection of Privacy

This section focuses on the applicable legislation covering freedom of information and protection of privacy ("**FOIPOP**").

We have concentrated on the FOIPOP provisions in Part XX of the *Municipal Government Act* ("***MGA***"),[152] which apply in Halifax by virtue of section 366 of the *Halifax Regional Municipality Charter* ("***HRM Charter***").[153]

Section 68 of the *HRM Charter* authorizes Council to "provide police services in the Municipality":

> **Police services**
>
> **68 (1)** The Council may provide police services in the Municipality by a combination of methods authorized pursuant to the *Police Act* and the board of police

149 Marin, "Street Checks and Balances" at paras 24-25.

150 Marin, "Street Checks and Balances" at para 22.

151 Marin, "Street Checks and Balances" at para 4.

152 *Municipal Government Act*, SNS 1998, c 18, Part XX.

153 *Halifax Regional Municipality Charter*, SNS 2008, c 39, s 366.

> commissioners of the Municipality has jurisdiction over the provision of the police services, notwithstanding that they are provided by a combination of methods.
>
> **(2)** The Municipality may contract with the Royal Canadian Mounted Police, the Minister of Justice or another municipality to provide police services.

Because the Municipality is the ultimate provider of police services, we interpret the FOIPOP provisions in the *MGA* as applicable to the police in Halifax.[154] (The RCMP generally falls under the federal Access to Information and Privacy regime,[155] but the *Municipal Government Act* provisions likely apply to the RCMP operating in Halifax because of the shared policing arrangement with HRP.)[156]

Street checks involve the collection and retention of personal information. While the broad terms of the legislation could be interpreted as authorizing the collection of information through street checks (because this is done ostensibly for "law enforcement" purposes), this would be an improperly technical conclusion, for two reasons.

First, the FOIPOP provisions of the *MGA* would not authorize the creation of a police database for "general intelligence" purposes. These provisions regulate how the municipality is supposed to protect personal information, and how people can access the information that public authorities have about them. The provisions would not be a *source of authority* for the police to create a database.

Second, statutory interpretation requires a "contextual and purposive approach."[157] A court interpreting Part XX of the *MGA* would have the benefit of the Wortley Report, and the data on street checks. It is unlikely that a court would interpret the *MGA* as authorizing the disproportionate collection of Black Nova Scotians' personal information through street checks.

Nevertheless, we will examine the legislation in more detail.

Section 483(1) of the *MGA* provides:

> **Collection of personal information**
>
> **483 (1)** Personal information shall not be collected by, or for, a municipality unless
>
> (a) the collection of that information is expressly authorized by, or pursuant to, an enactment;

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[154] The *Police Act* does not contain any FOIPOP provisions, and the *Freedom of Information and Protection of Privacy Ac*t, SNS 1993, c 5 itself does not include HRP (or the RCMP) as a "public body."

[155] *Cummings v Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38 at para 26.

[156] Section 2.10 of the RCMP Street Checks policy states: "In provinces where the RCMP are designated as police officers, members must comply with provincial legislation relating to the collection of identifying information or street checks."

[157] *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 at para 28. See also the *Interpretation Act*, RSNS 1989, c 235, s 9(5).

> (b) that information is collected for the purpose of law enforcement; or
>
> (c) that information relates directly to, and is necessary for, an operating program or activity of the municipality.
>
> [emphasis added]

The term "personal information" is defined in section 461(f):

> (f) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
>
> (iii) the individual's age, sex, sexual orientation, marital status or family status,
>
> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> (v) the individual's fingerprints, blood type or inheritable characteristics,
>
> (vi) information about the individual's health-care history, including a physical or mental disability,
>
> (vii) information about the individual's educational, financial, criminal or employment history,
>
> (viii) anyone else's opinions about the individual, and
>
> (ix) the individual's personal views or opinions, except if they are about someone else.

Street checks involve the police requesting and recording information that falls into at least some of these categories. So we can say that street checks involve the collection of "personal information."

The general rule in section 483(1) is that personal information "shall not be collected by, or for, a municipality" (or, by extension, the police services overseen by that municipality). The next question is whether any of the exceptions to this general rule apply.

Subsection (1)(a) does not apply – as indicated, street checks are not "expressly authorized by, or pursuant to, an enactment." Subsection 1(c) does not apply, either; the data in the Wortley Report, and the application of the ancillary powers doctrine, show that street checks are not "necessary for" any "operating program or activity of the municipality."

That leaves subsection (1)(b): "that information is collected for the purpose of law enforcement."

It could be argued that street checks, as an information-collection mechanism, are conducted "for the purpose of law enforcement." This seems very broad, but it is narrowed somewhat by the definition of "law enforcement" in section 461(c):

> (c) "law enforcement" means
>
> (i) policing, including criminal-intelligence operations,
>
> (ii) investigations that lead, or could lead, to a penalty or sanction being imposed, and
>
> (iii) proceedings that lead, or could lead, to a penalty or sanction being imposed[.]

We have discussed that street checks are not conducted for investigative purposes, and they are not part of any "proceedings", so options (ii) and (iii) do not apply. This means that the information-collection aspect of street checks would only be permitted under the *MGA* if the information is collected for "policing, including criminal-intelligence operations." The Act does not define "criminal-intelligence operations." (The HRP Policy Statement uses the somewhat similar term "field intelligence.")

It is circular to say the police can collect personal information through street checks because it is part of policing. There must be some limiting criteria on what is meant by "policing, including criminal-intelligence operations." Our "ancillary powers" analysis above confirms that the police have limited powers, and concludes that these limited powers do not include the power to conduct street checks.

We suggest the definition of "law enforcement" in section 461(c)(i) should be interpreted against the standard of the ancillary powers analysis: the meaning of "law enforcement" must be limited to lawful activities, and not based on the definitions the police use.

The *collection* of personal information is only one part of the FOIPOP regime. The *use* of that personal information is another. Note section 485(1) of the *MGA*:

> **Use and disclosure of personal information**
>
> **485 (1)** A municipality may use personal information only
>
> (a) for the purpose for which that information was obtained or compiled, or for a use compatible with that purpose;
>
> (b) if the individual the information is about has identified the information and has consented to the use; or
>
> (c) for a purpose for which that information may be disclosed to the municipality pursuant to this Section.

Individuals are not necessarily asked to consent to the use of their personal information as part of the street checks category in the Versadex database, so subsection (1)(b) is not available. The police could rely on subsection (1)(a), but the difficulty is that street check information is not obtained for a proper purpose, following our conclusion that the police have no statutory or common law basis for collecting it.

For comparative purposes, the Ontario Regulation on *Collection of Identifying Information in Certain Circumstances* "sets out the parameters for collecting and storing an individual's identifying information." Justice Tulloch remarked in his report that:

> *As a society, we place a high social value and privacy interest on an individual's personal information as well as the state's power and responsibility to protect such information from both arbitrary collection and use. As such, no attempted collection of identifying information can be done in an arbitrary way. An attempted collection of identifying information is deemed by the Regulation to be done in an arbitrary way unless the police officer can articulate a proper reason for collecting the identifying information.*[158]

Right now, in Nova Scotia, there are no statutory or regulatory parameters on the collection of information through street checks.

Catherine Tully, the former Information and Privacy Commissioner for Nova Scotia, made recommendations to Dr. Wortley on how Part XX of the *MGA* could be amended to better protect privacy.[159] She suggested that:

> *Law makers should explicitly prohibit, in Nova Scotia's* Municipal Government Act*, Part XX, randomly or arbitrarily collecting and recording identifying information to create a database for general intelligence purposes. The explicit prohibition should state that random or arbitrary collection is not an authorized collection of personal information for law enforcement purposes under s. 483(1)(b).*[160]

Commissioner Tully recommended that the definition of law enforcement be amended to "explicitly state that for the collection of personal information to be authorized as a collection for 'policing' and 'criminal-intelligence operations' under s. 461(c)(ii) it must be based on suspicious activity", meaning "there are objective, credible grounds for the suspicion, none of which may be grounds prohibited by the" *Human Rights Act*.

Commissioner Tully also recommended that police should have to notify individuals that their information is being collected, and why:

> *The protections surrounding the use of personal information to make decisions about individuals contained in ss. 483(2) and (4) of the* Municipal Government Act*, Part XX, are meaningless if an individual is not aware that personal information is being collected, stored and used to make decisions. Decisions made by police based on the intelligence information they collect are among the most impactful decisions a municipal public body can make about an individual. Law makers should explicitly require notification to individuals when their personal information is collected by police and how individuals may exercise their rights under the*

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158 Tulloch Report, ch 6 at para 17.

159 Letter from Catherine Tully to Dr. Scot Wortley, 14 February 2019, provided by the Human Rights Commission.

160 See also the Wortley Report, page 167 (Recommendation 2.4).

> Municipal Government Act*, Part XX to access records containing their own personal information and to seek correction where they believe it contains an error.*

Right now, police are not notifying individuals when observational street checks are recorded, and are not necessarily notifying individuals when interactional street checks are recorded, either. We agree with former Commissioner Tully that the protections in section 483 "are meaningless if an individual is not aware that personal information is being collected, stored and used to make decisions."

PART III – SPECIFIC QUESTIONS FROM COMMISSION, BOARD, AND COMMUNITY

1. From the Commission

We have been asked by the Commission to consider the role of consent in street checks, and the "consent searches" that may occur in conjunction with street checks. To be clear: citizens are free to talk to, and share information with, the police. But they are under no obligation to do so.

In the case of observational street checks, it is impossible for citizens to consent because they do not know the street check is happening.

The situation is more complicated for interactional street checks. It may appear to the police that an individual is sharing information voluntarily, but the reality is more complicated. This was identified in the Wortley Report: "Importantly, many participants felt that they had to comply with police requests — even when they felt that their rights were being violated."[161]

In the Ontario Ombudsman's words: "Voluntary street checks are only voluntary to the extent that the individuals subjected to them thoroughly understand their rights and the implications of cooperating with police requests."[162]

The Supreme Court in *R v Dedman* made a similar point: "Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense."[163]

We have concluded that section 8 and 9 rights are at stake where the police are requesting identifying information from citizens and collecting that information in a database, where there is no suspicious activity or connection to an investigation.

Because we have concluded that there is no police power to conduct street checks, there would be no power to search incidental to a street check.

In *Mann*, where the Supreme Court outlined the police power of investigative detention, the Court also confirmed a power to search incidental to detention, if the search is "rationally connected to the purpose of the initial detention and reasonably necessary to ensure the security of police officers or the public, to preserve evidence or to prevent the escape of an offender."[164] This power depends on there being a valid purpose for the initial detention — namely, reasonable grounds to

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161 Wortley Report, page 6. See also Young at 352 and footnote 71.

162 Marin, "Street Checks and Balances" at para 43.

163 *Dedman* at para 63. See also *R v Therens*, [1985] 1 SCR 613 at 644, Le Dain J.

164 *Mann* at para 67.

suspect that the person is connected to a particular crime. It would be unreasonable to search someone incidental to a street check, where there is no suspicion that the person is connected to a particular crime.

The question remains, could someone still consent to being street checked? Theoretically, but the threshold is high.

In the *Charter* context (which informs our analysis), "consent" is approached by asking whether the individual has waived their *Charter* right.[165]

R v Mellenthin is a helpful case. The Court found that the appellant, who was stopped by the police at a vehicle check stop, had not consented to answering police questions about his gym bag (which was in the car) or to the physical search of the bag:

> *The subsequent questions pertaining to the gym bag were improper. The officer had no suspicion that drugs or alcohol were in the vehicle or in appellant's possession when the questions were asked. Appellant's words, actions or manner of driving showed no sign of impairment. The primary aim of check stop programs, which result in the arbitrary detention of motorists, is to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of either conducting an unfounded general inquisition or an unreasonable search.*[166]

As Justice Cory explained: "It is true that a person who is detained can still consent to answer police questions. However, that consent must be one that is informed and given at a time when the individual is fully aware of his or her rights."[167] A person who is arbitrarily detained may feel "compelled" to answer police questions and/or to agree to a search.[168] In that situation, the Crown has "to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search."[169]

The street checks Regulation in Ontario, *Collection of Identifying Information in Certain Circumstances – Prohibition and Duties*, imposes a "duty to inform" on the police:

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165 Abbott at 59-62.

166 *R v Mellenthin*, [1992] 3 SCR 615 at 624.

167 *Mellenthin* at 622-623.

168 *Mellenthin* at 624-625. It is harder to apply this concept to a situation of psychological detention, which is all about whether the individual feels like they have no choice but to comply with the police request. If someone is truly aware that they do not have to comply, then they may not be under psychological detention in the first place.

169 *Mellenthin* at 624. See also Abbott at 59-61.

Duties to inform before attempting to collect information

6. (1) 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.

(2) A police 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.

(3) A police officer is not required to inform the individual under clause (1) (b) if the officer has a reason to believe that informing the individual under that clause,

(a) would likely compromise an ongoing police investigation;

(b) might allow a confidential informant to be identified; or

(c) might disclose the identity of a person contrary to the law, including disclose the identity of a young person contrary to the *Youth Criminal Justice Act* (Canada).

(4) A reason required under subsection (2) or (3) must be a reason the police officer can articulate and must include details relating to the particular circumstances.

The Tulloch Report recommended that this provision should be modified:

Before identifying information is requested, individuals should be informed of the following:

a. the reason for the request to provide identifying information;

b. that, if the individual provides identifying information, the information may be recorded and stored in the police records management system as a record of this interaction;

c. that participation is voluntary; and

d. that, if they chose to provide information, some of the identifying information that may be requested, such as the person's religion, is being requested by law to help eliminate systemic racism.[170]

[170] Tulloch Report, Recommendation 7.2, page 226.

(We have not been asked to comment on a potential regulation to govern street checks in Nova Scotia.)

Consent is also relevant under the FOIPOP provisions of the *MGA*, as discussed. If the police were entitled to collect personal information through street checks (which we have concluded is not the case), the individual's consent would be one basis for the permissible use and disclosure of that information for police / municipal purposes.[171]

2. From the DPAD Coalition

The DPAD Coalition has requested that the "current written policy be reviewed as well as the actual practice" in "determining if street checks are illegal."

As noted, we have reviewed the Halifax Regional Police and Royal Canadian Mounted Police policy documents on street checks (referred to as the "**HRP Policy**" and "**RCMP Policy**" for convenience). It is important to note that internal police policy cannot provide legal authority for police conduct that is not otherwise permitted by legislation or common law.

Given the data in the Wortley Report, it would be artificial to separate the definition of street checks from how they are performed. The Wortley Report's findings of disproportionate racial impact must inform our opinion on the legality of street checks. In the recent Supreme Court of Canada case of *R v Le*, the majority emphasized the impact of practices like street checks on minority communities in its *Charter* analysis.

We have several concerns about the policies, from a legality perspective.

There is no statute authorizing street checks in Nova Scotia, but that is not necessarily required for a police practice to be legal. However, in our view, the street check 'power' would not meet the test for common law police powers that the Supreme Court recently reviewed in *Fleming v Ontario*. This test essentially requires any police power that interferes with liberty to be "reasonably necessary" for the police to fulfill their duties.

However, the HRP and RCMP, by sanctioning street checks through policy, have purported to give the police a power to collect identifying information from / about people without requiring any sort of "reasonable necessity" criteria.

Essentially, police have built a database of personal information for general purposes (unconnected to a particular incident or investigation), without necessarily telling the individuals why their 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 the practice significantly interferes with the liberty of Black Nova Scotians. Furthermore, the data have not proven useful in preventing or solving crime. In our view, this evidence indicates that street checks would not meet the test for a common law police power.

We will now discuss the HRP Policy and RCMP Policy in more detail.

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171 *Municipal Government Act*, s 485(1)(b).

HRP Policy

The HRP Policy says street checks — which are explained as something that is *submitted* — are "related to the gathering of field intelligence."

The term "field intelligence" is not defined, but it can be inferred from the rest of the Policy that this kind of intelligence-gathering does not relate to a specific incident or offence that the police are investigating, or to a *Motor Vehicle Act* purpose. This is because the Policy states that a street check will not be submitted where "a traffic stop…has resulted in the issuance of a summary offence ticket(s) to the driver" or where a "General Occurrence Report is required to be submitted." This indicates that a street check may be submitted when a vehicle has been stopped for a *Motor Vehicle Act* purpose but no ticket has been issued.

Under the HRP Policy, one of the three situations where a street check "shall be submitted" is when a subject "is queried by an officer on CPIC [Canadian Police Information Centre] and a CNI [Criminal Name Index] hit is obtained, but the subject is not classified as an entity on any current GO Report, Summary Offence Ticket or other electronic record stored within the RMS" (records management system). The term "shall" is concerning, because it indicates that this record-keeping is mandatory.

It is unclear how the subject comes to be "queried by an officer on CPIC" in the first place. The HRP Policy contains no criteria to guide the officer's decision to run someone's name through CPIC. Presumably, this happens after the officer has engaged with the subject, but again, there are no criteria to guide that engagement.

This kind of street check is only recorded when a "CNI hit is obtained." CNI means "Criminal Name Index" and it is part of CPIC. It "is simply a list of names of people for whom a criminal record may exist."[172] It is unclear whether the subject is asked (or told?) to wait while the officer checks CPIC, or if they are told the police obtained a CNI hit.

Notably, street checks are not listed in the section of the policy on articulable cause, which includes investigative detentions; traffic stops; arrests; non-consensual searches; and property seizures. This means that, according to the HRP Policy, the police do not need a particular reason to engage with a person, "query" them in CPIC, and then record a "street check."

In our view, the fact that someone's name is in the CNI does not justify the police then creating an additional record of that person's identifying information and whereabouts. For the reasons in Part II, that is an interference with individual liberty that would outweigh the vague objective of "gathering field intelligence."

The second type of street check in the HRP Policy is *observational*: "A member observes a person or vehicle in a location, at a time and/or under circumstances that suggest would be of significant [?] to future investigation."[173] In Part II, we concluded that this form of street check also involves an interference with liberty.

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[172] The Star, "How CPIC works" (19 July 2008), online: https://www.thestar.com/news/crime/crime/2008/07/19/how_cpic_works.html.

[173] There appears to be a word missing in the Policy.

The third category of street check in the HRP Policy is when information is recorded about passengers in a "motor vehicle which has been stopped for an offence and the passengers are known to police or have criminal records." This category of "passenger stops" is addressed separately below, in Part IV.

RCMP Policy

Moving to the RCMP Policy (RCMP Operational Manual, chapter 1.4), it defines "street check" as "an electronic record of information obtained through a contact with a person who was not detained or arrested during his/her interaction with the police."

The RCMP Policy states at section 2.2 that: "A street check is a valuable investigative tool that allows the storing and sharing of information related to crime and public safety issues." However, police *belief* in the value of an activity does not constitute legal *authority* for that activity. As we have discussed, the general duties of the police do not authorize the police to conduct every activity they believe could help them fulfill those duties.

Section 2.5.1 asserts that: "The common law provides the authority to police to speak with members of the public during the commission of their duties." This is accurate as far as it goes, but the common law does not specifically authorize street checks (as we discussed earlier, in Part II).

The RCMP Policy — unlike the HRP policy — requires members to have "an articulable cause for conducting a street check":

> 2.7 Street check stops must not be random or arbitrary but may be completed for incidents that relate to police and public safety. Members must have an articulable cause for conducting a street check including but not limited to:
>
> 2.7.1. non-detention or non-arrest interactions;
>
> 2.7.2. suspicious circumstances or behaviour observed by police;
>
> 2.7.3. contact with persons of interest at locations where criminal activity occurs, time of day, or at high crime areas identified by officers, crime analysts, or community stakeholders;
>
> 2.7.4. interactions with persons known to be, or reasonably believed to be, involved in criminal activity;
>
> 2.7.5. gathering information on drug, gang, or organized crime suspects; and
>
> 2.7.6. officer safety interactions with persons or groups who may be deemed a risk to the public or police.

Despite the opening words of section 2.7, the examples of "articulable cause" could result in arbitrary encounters, given the lack of criteria. For example:

- what is the basis for engaging in a "non-detention or non-arrest interaction"?
- what constitutes "suspicious circumstances or behaviour"?

- what is the basis for classifying someone as a "person of interest"?

- how / why is someone "deemed a risk to the public or police"?

There are some valid police activities in this list, including "gathering information" on actual suspects. But it is unclear why a street check must be recorded in a separate database, if it is part of an investigation.

Furthermore, "articulable cause" has a particular meaning at law, which is not expressly reflected in the RCMP Policy. In *R v Simpson*, Justice Doherty (of the Court of Appeal for Ontario) defined "articulable cause" as "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."[174] In *R v Mann*, Justice Iacobucci of the Supreme Court clarified that: "Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest…, is likewise both an objective and subjective standard."[175]

The "articulable cause" standard was not adopted in *Mann*; the majority went with "reasonable grounds to detain" instead.[176] Justice Iacobucci explained:

> *The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the* Waterfield *test, along with the* Simpson *articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the* Waterfield *test.*[177]

As articulated in *Mann*, an investigative detention requires a "reasonable suspicion that the particular individual is implicated in the criminal activity under investigation."

There is no such requirement in the RCMP's formulation of "articulable cause." The RCMP criteria for street checks make clear that the "face-to-face contact" was "not the result of an active investigation or call for service" so the connection between "crime and public safety issues" is

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174 *Simpson*, as cited in *Mann* at para 27. This standard comes from the US context, as reviewed in *Mann* at para 31: "the articulable cause standard discussed in *Simpson* has been adopted from American Fourth Amendment jurisprudence, namely the 'stop and frisk' doctrine with its genesis in *Terry v. Ohio*, 392 U.S. 1 (1968). The doctrine developed as an exception to the Fourth Amendment right to be free from unreasonable search and seizure, where detention is viewed as a 'seizure' of the person."

175 *Mann* at para 27. See also the Tulloch Report, page xi,

176 *Mann* at para 33.

177 *Mann* at para 34. The "*Waterfield* test" is now known as the "ancillary powers doctrine."

tenuous. This is further evidenced by section 2.8.1 which provides that "offence-related occurrences, investigations, or calls for service" will "not be electronically recorded through a street check."

Another concern is the lack of notice to the individuals being street checked, which we discuss next.

Notice / Voluntary Participation

Both Policies raise concerns about notice to the individuals with whom the police are engaging.

Under the HRP Policy, the police are not required to tell an individual that they are being street checked (some street checks occur without the individual even knowing the police are observing them and recording their observations).

The RCMP Policy at section 2.6 states: "The subject of a street check is not obligated to provide information to police. Providing personal identifying information must be voluntary" (see also section 3.1). The "NOTE" under section 2.6 says:

> If the interaction is not voluntary, or the willingness of the person providing the identifying information is in question, the member should remind the person that they are free to go and are under no obligation to provide this information.

Neither Policy requires police officers to always advise individuals of their right not to provide identifying information. Neither Policy requires police officers to tell individuals who willingly provide their personal information that it is being collected as a street check and will be recorded and stored in a compartmentalized area of the police records management system.

We reiterate that policy documents cannot empower the police to undertake an activity that is not authorized by statute or common law. And the HRP and RCMP policy documents on street checks raise several concerns when considered against the case law on police powers. These policy documents inform, but are not determinative of, our conclusion that street checks are illegal.

3. From the Board of Police Commissioners

Our Terms of Reference include a list of questions from the Board of Police Commissioners, which we now address (in a slightly different order).

- *What is meant by the term* illegal*? Can we define the statute/law/act [that applies] to street checks?*

The term "illegal" can be complicated to define.[178]

Some definitions seem circular. For example, the leading law dictionary, *Black's*, defines "illegal" as: "Forbidden by law; unlawful."[179] This does not get us very far.

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[178] See e.g. Stephen Waddams, *Introduction to the Study of Law*, 8th ed (Toronto: Carswell, 2016), chapter 1 – "What is Law?".

[179] *Black's Law Dictionary*, 11th edition (2019), *sub verbo* "illegal" (available on Westlaw International).

In the context of policing, what is "illegal" requires a more nuanced definition. 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 determining whether an individual's *Charter* rights were breached in a particular fact situation.

To do this, we ask whether the activity is authorized as a police power by **(a) statute** or **(b) common law**.

"It is well established that in acting in furtherance of their duties, the police need not point to express statutory authority for every action they take which imposes some limitation on individual liberties"[180] — but, if not set out in statute, that authority must come from common law. Otherwise, the police conduct is illegal.

There is no applicable statute that authorizes street checks. The *Police Act* contains a very broad list of police duties, 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 is the common law.

The Supreme Court's recent decision in *Fleming v Ontario* clarifies the applicable analysis where potential common law police powers are at issue. Applying this framework leads us to conclude that the common law does not empower the police to conduct street checks. (See Part II for the details of this analysis.)

The framework outlined in *Fleming* requires a proportionality assessment.

On the one hand, the Wortley Report teaches that street checks interfere with individual liberty and disproportionately affect Black Nova Scotians. On the other hand, there is no evidence that street checks are reasonably necessary, in any given circumstance, for the police to fulfil their duties.

In these circumstances, the balance must favour individual liberty over police authority.

This is why we have concluded that street checks, as defined and practiced in Halifax, do not meet the test for common law police powers, because they are not reasonably necessary. They are therefore illegal.

- *Do the current policy documents of the HRP and RCMP represent activity that would be considered illegal?*

Yes, following from the previous answer. The policy documents are not law and cannot, themselves, provide the legal authority for police activity. In our view, there is no supporting authority in any statute, or at common law, for the police to stop individuals to gather general intelligence information that is unrelated to a particular investigation (or to observe individuals and record personal information for this purpose) and store it in a police database.

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[180] *Brown v Durham Regional Police Force* (1998), 167 DLR (4th) 672, 1998 CarswellOnt 5020 (CA) at para 60 [cited to Westlaw].

- *Is the entire concept of a street check or carding illegal?*

We cannot speak to other jurisdictions, but street checks as conducted in Halifax are illegal, in our view. There is no statutory authority for street checks (and, unlike Ontario,* there is no regulation either), and we have concluded that there is no common law power to conduct street checks.

The Halifax practice of street checks is illegal because it envisions police stopping or observing individuals and gathering information from them for "general intelligence purposes", outside the context of responding to a call for service or an actual criminal incident, arresting someone, or conducting an investigation. The data in the Wortley Report demonstrate that this practice is conducted disproportionately against members of the Black community, which supports the conclusion that the practice is illegal.

**We emphasize that Justice Tulloch's task was very different from ours. Justice Tulloch was asked to review a pre-existing regulation governing street checks, and that is the focus of his Report. There is no such regulation in Nova Scotia.*

- *Are street checks or carding only illegal if done without probable cause of suspicious activity? Under what other circumstances are they potentially illegal?*

Earlier in our opinion, we discussed the differences between street checks and carding. Carding is not a practice in Nova Scotia, so this answer focuses on street checks.

The HRP Policy does not require an officer to have "probable cause of suspicious activity" to submit a street check (or "articulable cause", which is the term used in the policy).

The RCMP Policy states that: "Members must have an articulable cause for conducting a street check." One of the listed examples is "suspicious circumstances or behaviour observed by police" (which is not defined). However, in this policy, street checks are <u>not limited</u> to suspicious circumstances; for example, they may also be recorded following "non-detention or non-arrest interactions." This is quite broad, and gives the police extensive discretion over when to interact with someone and request their information for the purpose of storing it.

In our view, if the police had "probable cause of suspicious activity" they would not need to record a street check, because there would be other legitimate, lawful action they could take – for example, they could conduct an investigative detention, and fill out a corresponding report.

The Tulloch Report (although written for the Ontario context) has a helpful "Definitions" section[181] that outlines the various standards that have been applied in the case law, including "**articulable cause**" (aka "reasonable suspicion", the standard that applies to investigative detention) and "**reasonable and probable grounds**" (a higher standard, which applies to arrest). The common thread in these standards is that there is a relationship between the individual with whom the police engage, and an actual or suspected criminal offence.

[181] Tulloch Report, beginning at xi.

- *Is there a legal definition of suspicious activity or a way to define suspicion that exists today?*

The law requires that "suspicious activity" be determined objectively.

Justice Tulloch in his Report recommended the following definition: "an activity where, under all of the circumstances, there are objective, credible grounds to request identifying information."[182] This definition accurately reflects the case law.

The case law is clear that the police cannot act on a "hunch" but must have objective support for their conduct. Justice Doherty's reasons in *R v Simpson* are perhaps the best example. After reviewing the US case law on "articulable cause", he stated:

> *These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an [objectively] discernible standard is recognized in connection with the arrest power:* R. v. Storrey*, [1990] 1 S.C.R. 241 at 251, 53 C.C.C. (3d) 316 at 324 [75 C.R. (3d) 1 at 9], and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch". In this regard, I must disagree with* R. v. Nelson *(1987), 35 C.C.C. (3d) 347 at 355, 29 C.R.R. 80 at 87 (Man. C.A.) where it is said that detention may be justified if the officer "intuitively senses that his intervention may be required in the public interest". Rather, I agree with Professor Young in "All Along the Watch Tower",* supra*, at p. 375:*
>
> > *In order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that, at minimum, bears some relationship to a reasonable suspicion of crime but not necessarily to a credibly-based probability of crime.*[183]

The requirement for objective suspicion is important, as Justice Tulloch explained in his Report (in reviewing the Ontario Regulation's reference to "suspicious activities"):[184]

> *This terminology suggests that the inquiries are not random. Rather, an individual would be targeted not simply because they happen to be walking down the street or in a certain area at a particular time, but rather because they are engaged in some form of suspicious activity.*

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182 Tulloch Report, Recommendation 5.13. See also ch 5 at paras 49-57.

183 *Simpson* at para 61; emphasis added. See also *R v Byfield*, 2005 CanLII 1486 (Ont CA) at paras 18-20.

184 Tulloch Report, ch 5 at para 57.

> *However, some stakeholders are concerned that the reference to suspicious activities could be interpreted very broadly and include behaviour that is simply out of the ordinary due to an individual's cognitive impairment or destitution, or simply because it is outside usual societal norms. One stakeholder noted that an earlier directive of one police service defined suspicious activity as "behaviour that can be characterized as unusual or out of place".*
>
> *That definition is too broad. For example, there is a "race out of place" concern relating to minorities being more likely to be searched in predominantly white neighbourhoods.*
>
> *Police officers may view anything as suspicious. Even contradictory actions have been deemed by police officers to be suspicious, such as not making eye contact with police officers or staring at police officers, and driving too fast or driving too slow. In one court decision involving carding, police officers found everything to be suspicious, including walking, trotting, running, head turning, slowing down, getting into a high-end car, being young, being Black and being in the back seat of a car.*
>
> *Police are often called to reports from the public of a person engaging in suspicious activity. That activity might appear to be innocuous to the police officer. Is the situation an investigation (to which the Regulation does not apply) or an inquiry (to which the Regulation does apply)? Some police services have included in their training materials that responses to calls for service from the public are not to be considered regulated interactions.*
>
> *It is critical that there be clarity as to what constitutes suspicious activities, given that what is considered suspicious can be highly subjective.*[185]

In *Ferdinand,* LaForme J (as he then was) said that:

> *Stopping and investigating people merely because of some "Spidey sense" being engaged goes far beyond the standards our society demands and expects of our police. Young people have a right to "just hang out", especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent. Mere hunches do not give police the grounds to "surprise" a group of young people, or to "get right on them" for investigative purposes without something further that provides a lawful basis for doing so.*[186]

Notably, the Minister's Directive imposing the street check moratorium includes an objective element in its definition of "suspicious activity": "any activity where, under all of the circumstances, there are objective, credible grounds to request identifying information."[187]

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185 Tulloch Report, ch 5 at paras 49-54.

186 *Ferdinand* at para 54.

187 Online: https://novascotia.ca/street-checks/Minister-Directive-Street-Checks-April-2018.pdf (17 April 2019).

- *How does investigative detention differ from a street check?*

A key difference is that the common law has clearly authorized the power of investigative detention, and prescribed the limits on the power:[188] an investigative detention must be "premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence."[189]

Investigative detention differs from a street check because with 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.[190] Street checks as defined and conducted in Halifax are much broader than this.

PART IV – SCENARIOS FROM THE WORTLEY REPORT

We have been asked to use some of the narratives from the Wortley Report[191] to illustrate our conclusions. This Part has three sections: we first review some common themes related to vehicle stops, we then discuss the related issue of passenger stops, and finally we engage directly with five personal stories contained in the Report.

We are taking the scenarios from the Wortley Report as truthful, recognizing that we do not have the perspective of other participants in these events. We should not be understood as offering legal opinions on these specific cases (which, in some instances, could be before the courts).

Vehicle Stops

Many of the personal experiences in the Wortley Report relate to vehicle stops, which are not necessarily street checks — but may involve arbitrary detention. These stories raise common themes. We make the following comments (again, keeping in mind that we do not know how the police and any other participants viewed these events, or whether any key facts are missing):

- **Roadblocks**: There are several troubling stories about police roadblocks being set up in Preston, a predominantly Black area of HRM. Although vehicle checkpoints are justifiable where directly related to authentic vehicle and highway safety purposes, it is illegal to set up roadblocks in order to target drivers of a particular area. (See our summary of *Brown v Durham Regional Police Force* in the Appendix.) Furthermore, it is not appropriate for the police to say, "*Because I can*" when someone asks why they are being stopped at a roadblock / checkpoint. Members of the public are entitled to know why they are being stopped.

- **Following a vehicle as a "routine check"**: A Black man in his 40s described the police following his Mercedes from Bedford to Windsor Street and then pulling him over for a "routine check." When the driver refused to get out of the car or answer

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188 *Mann* at para 34.

189 *Mann* at para 34.

190 According to Profs. Stuart and Tanovich, "the much criticised carding practices used for so long in Toronto are clearly a violation of the strict *Mann* standards for investigative detention": Don Stuart & David M Tanovich, Annotation to *R v K (A)*.

191 Wortley Report, pages 6-15.

the officer's questions, a police supervisor was called to the scene and also claimed that it was a "routine check." However, there are no details provided that would support the claim that this was a routine check.

Certainly, if this man was indeed targeted because he was Black and driving a Mercedes, it could not be characterized as a "routine check." (Especially if no other vehicles were being followed and checked at that time and in that manner.) This vehicle pursuit and stop sounds like an arbitrary detention, with echoes of what happened in the Kirk Johnson matter (reviewed above).

- **Police weapons**: We have not studied the police policies on weapons use. However, we note that many of the stories reveal what appears to be a disproportionate police response: pulling over a 17-year-old and approaching with guns drawn; taking out their batons when asking a teenager whether he witnessed a playground fight (and threatening to "deal with" him "how they did it back in the old days"); and displaying assault rifles or other guns during a vehicle stop.

- **Trunk searches**: In two of the scenarios, police asked drivers to open their trunk (one of them apparently wanted to check the trunk "to see if anybody's in there" when there was no apparent basis for suspecting that someone was hiding in the trunk). The police are not necessarily entitled to search the trunk of a vehicle even if they had legitimate reasons for stopping the vehicle.

  It is likely that these drivers had a reasonable expectation of privacy in their trunks (as found in the Nova Scotia case of *R v Henderson*).[192] A warrantless search of the trunk would be presumptively unreasonable."[193] These scenarios do not include any facts that would help rebut that presumption.

  We also reiterate our comments about consent, above. If the police ask someone to open their trunk and the person complies, that person may think they have no choice but to comply, so it is not necessarily accurate to call it a "consent search."

- **Car matching a description**: In some of the scenarios, police said they were stopping a vehicle because it matched the description of a vehicle involved in an offence — for example, the vehicle pulled over near Mic Mac Mall on suspicion that it was stolen, and the vehicle pulled over on Young Street that allegedly matched the description of a vehicle just involved in a robbery in Sackville. If the police genuinely suspect, for objectively credible reasons, that a vehicle is stolen, or may have been involved in a robbery, they could pull it over and potentially exercise the power of investigative detention to question the driver. They could only arrest the driver (as happened in the Young Street situation) if they had reasonable and probable grounds to believe they had committed a criminal offence.

- **Parked vehicles**: In a couple of the narratives, people in parked cars were questioned. In one of them, a man was parked, waiting for his wife in a church

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[192] *R v Henderson*, 2008 NSSC 386 at paras 22-23.

[193] *R v Nolet*, 2010 SCC 24 at para 21.

parking lot, and put his seat back to rest: "He was woken by banging on the car window and flashlights in his face. The police asked him for ID, where he was from and what he was doing there." There were two cars blocking him.

Conceivably, someone sleeping in a parked car in a church parking lot could give the police objectively credible reasons to ask a few questions, but this seems like a disproportionate and unreasonable response and, therefore, a potentially arbitrary detention.

In another example, several young men were smoking in a parked car. The police approached "and started asking questions and asking guys to lift their shirts in the back of the car." There is no basis in this scenario to suggest that the police had any objective reasons to question the men, or any basis to search them (which they were doing by asking the men to lift their shirts). Obviously, smoking in a parked car is not an objectively suspicious activity. This also seems like an arbitrary detention.

- **Window tinting**: Window tinting is regulated in Nova Scotia. If car windows appear to be tinted contrary to the *Standards of Vehicle Equipment Regulations*,[194] the police could stop the car to investigate that particular issue.

Passenger Stops

This common theme from the Wortley Report deserves some additional consideration and analysis.

The HRP Policy requires a street check to be submitted when a person is the passenger "of a motor vehicle which has been stopped for an offence and the passengers are known to police or have criminal records." The RCMP Policy does not explicitly refer to passengers of motor vehicles, or to vehicle stops in general.

Section 83(1) of the Nova Scotia *Motor Vehicle Act* provides that: "It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer." "Any person" would include a passenger. But the "order, signal or direction" must be lawful and must relate to "traffic on the highway" (the title of Part V of the Act, where this provision is found).

Even assuming that, in accordance with the HRP Policy, the initial vehicle stop was authorized under the *Motor Vehicle Act* or common law — and therefore legal — a street check that gathers and records a passenger's information is not necessarily a legitimate additional purpose if there was no connection between the passenger and the *Motor Vehicle Act* (or other) offence in question. There is no authority in the *Motor Vehicle Act* to record the personal information of passengers who "are known to police or have criminal records." Those factors are unrelated to the reason the vehicle was stopped.

194 *Standards of Vehicle Equipment Regulations*, NS Reg 51/85, as amended.

As Dr. Wortley commented: "The police have the legal right to request the personal information (i.e., licence, insurance, etc.) of drivers. However, in most cases, the same legal right does not apply to passengers, pedestrians and other civilians."[195]

According to the Supreme Court in *R v Nolet*: "A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a *Charter* violation."[196] *Nolet* involved a random vehicle stop, but Justice Binnie's comments are still relevant to other vehicle stops:

> *Random roadside stops must be limited to their intended purposes. "A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over", per Cory J., in* Mellenthin*, at p. 629.*[197]

The Alberta Court of Queen's Bench recently stated that: "The lawfulness generated by the *Traffic Safety Act* is exceeded where the aim of the stop is combined with a purpose that encapsulates general detection of criminal activity or speculative criminal investigation, or a 'fishing expedition.'"[198]

The street check of a passenger is distinguishable from the situation that unfolded in the Nova Scotia case of *R v Cooper*.[199] In that case, the Court of Appeal found there was a lawful basis for detaining the passenger of a vehicle.[200] The police "decided to conduct a traffic stop" of a Grand Am "to check compliance with the *Motor Vehicle Act*" and activated the lights and siren on their vehicle.[201]

The Grand Am then took three hard left turns (apparently to evade the police). When the vehicle finally stopped, on a dead-end street, the driver and passenger got out and ran away. The police pursued them. Mr. Cooper ignored the police commands to stop. When he was eventually apprehended, the police searched him and discovered he was carrying a butterfly knife.

Mr. Cooper was charged with misleading a police officer by giving a false name; resisting an officer in the lawful execution of his duty; possessing a dangerous weapon; and possessing a prohibited weapon. He argued that he had been arbitrarily detained contrary to section 9 of the *Charter*, and subjected to an unreasonable search and seizure contrary to section 8.

These arguments were rejected at trial and on appeal. The Court of Appeal accepted that a lawful investigative detention had occurred:

> *Section 83(1) of the* Motor Vehicle Act *states that it is an offence for "any person" to fail to comply with an order of a peace officer respecting a traffic stop. This differs from s. 83(2), which states that it is an offence for the "driver of any vehicle" to*

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195 Wortley Report, page 168 (Recommendation 2.7).

196 *Nolet* at para 39.

197 *Nolet* at para 23.

198 *R v Mohamed*, 2019 ABQB 499 at para 45. See also *Mayor* at paras 7-10.

199 *R v Cooper*, 2005 NSCA 47.

200 *Cooper* at para 40.

201 *Cooper* at para 2.

> *disobey traffic signs. Section 83(1) does not expire just because the individual runs off the highway during the police chase.*
>
> *Although my reasons differ somewhat from those of the trial judge, I agree with her conclusion that Cst. Chediac had reasonable grounds to suspect that there was a clear nexus or connection between Mr. Cooper and a recent or ongoing offence under either s. 83(1) of the* Motor Vehicle Act *or s. 129(a) of the* [Criminal] Code *[resisting a peace officer in the lawful execution of their duty].*[202]

At best, *Cooper* may authorize the police to detain a passenger for investigative purposes related to a recent or ongoing offence (according to the reasoning in *Cooper*, this occurred when the driver and passenger evaded the police in the vehicle and on foot). *Cooper* does not authorize the detention of, and recording of information about, a passenger because they are known to police for other reasons or because they have a criminal record.

Someone who is "known to police" and/or has a criminal record is entitled to expect that they can be a passenger in a vehicle without having their whereabouts recorded by the police. It bears emphasizing that the Wortley Report found "that Black respondents were more likely to experience passenger stops, as well as pedestrian stops and driving stops."[203]

We note that the Tulloch Report recommended that Ontario's regulation on street checks "should specifically apply when identifying information is requested from passengers of vehicles during vehicle stops when the passenger is not in violation of the *Highway Traffic Act*, the *Criminal Code*, or any other Act of Parliament or Legislature."[204]

Personal Stories

The scenarios reviewed below are taken directly from the Wortley Report. As a warning, some of them involve offensive language.

Scenario 1 – Age and gender not provided: "Last year I was walking home after skating at the Oval. I was dressed nicely and carrying skates. I look like a professional person. A police vehicle left the street and jumped the curb to cut me off on the grass. I was detained and asked questions about who I was, where I was going and where I had been. No explanation given."[205]

Without more, this appears to be an arbitrary detention. It is unclear what objective basis there would be for the police to question someone walking down the street and carrying skates. This same respondent was also questioned while handing out money to people in need on Gottingen Street at Christmas time, and again while walking home with groceries. There does not seem to be any objective reason for stopping this person in these situations. Furthermore, it does not appear that the police explained that they were conducting a street check and retaining whatever information was provided (if that is indeed what they were doing).

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202 *Cooper* at paras 44-46.

203 Wortley Report, page 39.

204 Tulloch Report, Recommendation 5.7.

205 Wortley Report, page 7.

Scenario 2 – Male, 25-30 years old: "The other day the police started following me at the police station on Gottingen Street and I started cutting through streets, they would just look at me and do the thumbs up and smile."[206]

It is difficult to characterize this as a detention, because the individual knew he did not have to stop for the police, and exercised his right to keep moving. But the police are not entitled to follow someone 'just because' (whether they smile or not), as this interferes with individual liberty, the right to move about freely.

Scenario 3 – Male, early 20s: "I was leaving a party close to the university. It was night and very quiet on the street near Point Pleasant Park. I did jaywalk, but anybody would at that time of night on a residential street with no traffic. Then a police car approached and stopped me. The officer started to ask me questions and asked for my ID. I know my rights and I refused. I know my rights. Then I was grabbed by the cop and thrown to the ground and handcuffed. I asked what I did wrong and the officer would not tell me. I found out later that I was charged with obstruction. The officer told me that 'we run this community.'"[207]

It does not seem the police had an objective basis for stopping this man. If they had another reason for stopping him, they should have told him.

In any event, based on this information, there would be no reasonable and probable grounds to arrest him for obstruction. He had no obligation to answer the police questions, so it would not be a criminal offence to refuse to do so.

Scenario 4 – Male, late 20s: "I got stopped just walking with a Donair and a pop. Where would I be coming from? I tried to walk by, so they arrested me. Why am I under arrest? You can't arrest me! They arrested me, take me down to the station, find out I have no criminal record, then they drop me back up the street."[208]

Without more to this story, we have to conclude this was an illegal arrest. Clearly, walking with a donair and pop is not a basis for being stopped by the police, let alone arrested.

Scenario 5 – Male, 30s: "I got in an incident on the street downtown by the Cheers and Boomer nightclubs. I was hanging out with some White friends of mine and I yelled over to one of them across the street. The police stopped and grabbed me while I was standing at a bank machine. They said I was drunk, and they arrested me. I was taken to booking. When they went to release me there was money missing. I came in with $385 and they gave me back only $78. I got mad and told them I wanted my cash back. They took me back to the cells. The incident escalated. The male officer punched me and said, 'Don't look at me you fucking nigger.' The female officer said 'Who you gunna call? Barack Obama?' They didn't give me a breath test or take blood so I could prove I was not drunk. I had to fake a heart attack to get to the hospital. While I was at the hospital, I asked the Dr. to take a blood and hair sample to prove I wasn't drinking. I had no

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206 Wortley Report, page 10.

207 Wortley Report, page 9.

208 Wortley Report, page 9.

criminal charges going into this incident. But eleven charges were laid as a result of it. I had to hire a lawyer and spend thousands to get out of this situation and clear my record."[209]

This is an incredibly concerning story, and it would be beyond the scope of our task to unpack the many legal issues involved. We briefly mention the *Liquor Control Act*, section 87(2):[210]

> **(2)** Where an officer has reasonable and probable grounds to believe a person is in an intoxicated condition in a public place, the officer may, instead of charging the person under the Act, take the person into custody to be dealt with in accordance with this Section.

It is unclear how yelling over to a friend across the street could give an officer "reasonable and probable grounds to believe a person is in an intoxicated condition." The other allegations of course would represent reprehensible conduct.

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[209] Wortley Report, page 14.

[210] *Liquor Control Act*, RSNS 1989, c 260, s 87.

CONCLUSION

We have concluded that the police in Halifax do not have the power under statute or at common law to detain or observe people in order to record street checks. Street checks, as they have been defined and practiced in Halifax, have interfered with individual liberty — particularly the liberty of individuals from the Black community who are over-represented in the street check data reviewed in the Wortley Report — in a manner that is not reasonably necessary for the police to fulfil their duties. Therefore, in our view, street checks are not legal.

In reaching this conclusion, we would echo the Supreme Court majority in *R v Le*: "The police will not be demoralized by this decision: they, better than anyone, understand that with extensive powers come great responsibilities."[211]

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, any proposed legislation or regulation would, in our view, have to comply with the legal thresholds set out in our opinion.

Sincerely,

J. Michael MacDonald, Counsel
Jennifer Taylor, Research Lawyer

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[211] *Le* at para 165.

APPENDIX – CASE SUMMARIES

The cases summarized below help trace the evolution of the Supreme Court's jurisprudence on common law police powers (before *Fleming v Ontario*),[212] focusing on section 9 of the *Charter*. Section 9 provides for freedom from arbitrary detention.

- ***R v Dedman***

R v Dedman is the first case where the Supreme Court of Canada relied on the English case of *R v Waterfield* to determine an issue of police power.[213] At issue in *Dedman* was the "R.I.D.E." (Reduce Impaired Driving Everywhere) program in Ontario, which involved the police randomly stopping motorists in order to detect and deter impaired driving. The program was not authorized by statute.[214]

Dedman was stopped as part of the program, when "the police officer formed a reasonable suspicion that the appellant was driving with alcohol in his body and demanded that he provide a sample of his breath." Dedman tried but was unable to provide a sample, and he was charged with the criminal offence of refusing to comply with a roadside demand.

The relevant issue before the Supreme Court was whether the police officer had "statutory or common law authority to require the appellant to stop his motor vehicle."[215]

(The incident occurred before the *Charter* came into force so it was not analyzed as a possible arbitrary detention under section 9.)

Justice Le Dain, for the majority, applied the *Waterfield* test, finding that the program "fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic" and that the random stop was necessary for carrying out the public purpose of combatting impaired driving. It "was not, therefore, an unjustifiable use of a power associated with the police duty."[216] He concluded that "there was common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. program."[217]

However, Chief Justice Dickson's dissenting reasons offered a more principled approach to police powers:[218]

> *With respect, I am unable to agree with Le Dain J. that the general duties of police officers provide the foundation for common law authority to stop a motor vehicle for the purpose and in the manner contemplated by the R.I.D.E. program.*

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212 *Fleming v Ontario*, 2019 SCC 45.

213 *R v Dedman*, [1985] 2 SCR 2, 1985 CarswellOnt 942 (SCC) at paras 71-73 [cited to Westlaw version], citing *R v Waterfield*, [1963] 3 All ER 659 (Court of Criminal Appeal). See also Steve Coughlan & Glen Luther, *Detention and Arrest*, 2d ed (Toronto: Irwin Law, 2017) at 20 ["Coughlan & Luther"].

214 *Dedman* at para 12.

215 *Dedman* at para 8.

216 *Dedman* at paras 72-73.

217 *Dedman* at para 73.

218 A portion of Chief Justice Dickson's dissent was cited by the unanimous Court in *Fleming* at para 38.

> *It has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law. Laskin C.J. dissenting, in* R. v. Biron*, [1976] 2 S.C.R. 56, made the point at pp. 64-65:*
>
> > *Far more important, however, is the social and legal, and indeed, political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. Only to the extent to which it so provides can a person be detained or his freedom of movement arrested.*
>
> *Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they act unlawfully.*[219]

Chief Justice Dickson distinguished police duties from police powers:

> *The fact that a police officer has a general duty to prevent crime and protect life and property does not mean that he or she can use any or all means for achieving these ends. The question raised by this appeal is whether the police have the power at common law, in other words the lawful authority, to execute their general duties by means of random stops of motorists when they have no reason to believe, prior to the stop, that the motorist has committed, is committing or will commit a criminal offence. In my opinion, they possess no such authority.*
>
> *The distinction between the scope of a police officer's duties and the ambit of his or her power is well stated by L. H. Leigh,* Police Powers in England and Wales *(1975), at p. 29:*
>
> > *The police have long functioned under a regime of wide duties but limited powers. That is to say, that while they are under general duties to prevent crime, and breaches of the peace and to detect criminals, they do not have all those powers which, it might be thought, would be reasonably necessary for them to do so. Historically, there is no warrant for an ancillary powers doctrine of this sort. Police interferences with individual liberty must, if they are to be valid, be founded upon some rule of positive law.*
>
> *[…]*
>
> *Short of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation.*[220]

He continued:

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219 *Dedman* at paras 13-14.

220 *Dedman* at paras 16-18 and 21; emphasis added.

> *A police officer is not empowered to execute his or her duty by unlawful means. The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.* [emphasis added]

Chief Justice Dickson would have found that the random stops under the R.I.D.E. program were "illegal at common law":[221] "the majority of the court departs firm ground for a slippery slope when they authorize an unlawful interference with individual liberty by the police solely on the basis that it is reasonably necessary to carry out general police duties."[222] He concluded:

> *…without validly enacted legislation to support them, the random stops by the police under the R.I.D.E. program are unlawful. In striving to achieve one desirable objective, the reduction of the death and injury that occurs each year from impaired driving, we must ensure that other, equally important, social values are not sacrificed. Individual freedom from interference by the state, no matter how laudable the motive of the police, must be guarded zealously against intrusion. Ultimately, this freedom is the measure of everyone's liberty and one of the corner-stones of the quality of life in our democratic society.*[223]

- ***R v Hufsky***

The Supreme Court again considered random vehicle stops in *R v Hufsky*, this time in the *Charter* context.[224] The facts were similar to *Dedman*: Hufsky was randomly stopped at a checkpoint pursuant to a *Highway Traffic Act* provision authorizing vehicle spot checks. The officer "detected the odour of alcohol on the appellant's breath and noticed that his speech was slightly slurred", and asked the appellant to perform a roadside test for alcohol. The appellant refused, and was charged for doing so. He was convicted.

Before the Supreme Court of Canada, Hufsky argued that the vehicle stop was an arbitrary detention contrary to section 9 of the *Charter*.[225] The Court agreed – there was a detention, and it was arbitrary:

> *By the random stop for the purposes of the spot check procedure the police officer assumed control over the movement of the appellant by a demand or direction that might have significant legal consequence, and there was penal liability for refusal to comply with the demand or direction. […]*

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221 *Dedman* at para 34.

222 *Dedman* at para 32.

223 *Dedman* at para 37.

224 *R v Hufsky*, [1988] 1 SCR 621, 1988 CarswellOnt 956 (SCC) [cited to Westlaw].

225 The relevant section of the *Highway Traffic Act* provided that: "A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop…" The Crown did not rely on the "common law authority for a random stop affirmed in *Dedman*" (*Hufsky* at para 13).

> *[…] Although authorized by statute and carried out for lawful purposes, the random stop for the purposes of the spot check procedure nevertheless resulted, in my opinion, in an arbitrary detention because there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise. The appellant was therefore arbitrarily detained, within the meaning of s. 9 of the* Charter*, as a result of the random stop for the purposes of the spot check procedure[.]*[226]

However, the Court found the *Highway Traffic Act* provision was a reasonable limit under section 1 of the *Charter*: "The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and control in the interests of safety, is proportionate to the purpose to be served."[227]

- ***R v Ladouceur***

Similar issues arose in *R v Ladouceur*.[228] The appellant was convicted of driving while his licence was suspended but alleged that the police violated his section 9 right to be free from arbitrary detention. The suspension was discovered when he was randomly stopped by the police, who were "on a stake-out" and "decided to stop the appellant as a matter of routine."[229]

There was no organized check point as in *Dedman* and *Hufsky*.[230] Justice Cory, for the majority, agreed that "the routine check random stop constituted an arbitrary detention in violation of s. 9 of the *Charter*."[231] However, the majority "concluded that routine checks are a justifiable infringement on the rights conferred by s. 9"[232] — largely because of the dangers inherent in driving and the state interest in highway safety.

The fact there was no checkpoint was important for Justice Sopinka (concurring):

> *The organized check point is available … as a means of detection of the unlicensed driver. This case may be viewed as the last straw. If sanctioned, we will be agreeing that a police officer can stop any vehicle at any time, in any place, without having any reason to do so. For the motorist, this means a total negation of the freedom from arbitrary detention guaranteed by s. 9 of the* Charter*. <u>This is something that would not be tolerated with respect to pedestrians in their use of the public streets and walkways</u>.*[233]

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226 *Hufsky* at paras 15-16.

227 *Hufsky* at para 23.

228 *R v Ladouceur*, [1990] 1 SCR 1257.

229 *Ladouceur* at 1262.

230 *Ladouceur* at 1264.

231 *Ladouceur* at 1277.

232 *Ladouceur* at 1288.

233 *Ladouceur* at 1264. Emphasis added.

Justice Sopinka recognized there may be "racial considerations" that motivate the police to make random stops. He found there was an unjustifiable breach of section 9, but would not have excluded the evidence under section 24(2) of the *Charter*.[234]

- ***R v Simpson***

R v Simpson, a decision from the Court of Appeal for Ontario, is the next major case in the evolution of section 9. It is important for discussing the various standards that apply to the police powers to stop and detain.

In *Simpson*, the Court found that the accused was arbitrarily detained when a police officer stopped his vehicle outside of a suspected drug house.[235] Applying a standard of "articulable cause",[236] Justice Doherty concluded:

> *Attendance at a location believed to be the site of ongoing criminal activity is a factor which may contribute to the existence of "articulable cause". Where that is the sole factor, however, and the information concerning the location is itself of unknown age and reliability, no articulable cause exists. Were it otherwise, the police would have a general warrant to stop anyone who happened to attend at any place which the police had a reason to believe could be the site of ongoing criminal activity.*
>
> *As Constable Wilkin had no articulable cause for the detention, the common law police power did not authorize his conduct. It was unlawful.*[237]

(This case may have been decided differently after the Supreme Court of Canada's decision in *Mann*, which recognized a police power of investigative detention.)

The cocaine found on the accused was excluded under section 24(2).[238]

- ***Brown v Durham Regional Police Force***

Brown v Durham Regional Police Force is another decision of the Court of Appeal for Ontario (and the one non-criminal case in the Appendix).[239]

In *Brown,* the police had set up highway checkpoints on four different weekends when members of a motorcycle club, which police believed to be a criminal organization, were expected to be gathering nearby:

> *Persons who were stopped were required to produce their licence, ownership and insurance documentation. They were detained at the checkpoint while the*

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234 *Ladouceur* at 1267.

235 *R v Simpson* (1993), 12 OR (3d) 182, 1993 CarswellOnt 83 (CA) [cited to Westlaw].

236 *Simpson* at para 58.

237 *Simpson* at paras 69-70.

238 *Simpson* at para 81.

239 *Brown v Durham Regional Police Force* (1998), 167 DLR (4th) 672, 1998 CarswellOnt 5020 (CA) [cited to Westlaw].

> *information drawn from those documents was checked through the Canadian Police Information Centre (CPIC) computer. While waiting for the CPIC results, officers checked the vehicles and equipment such as helmets for mechanical fitness and compliance with applicable safety standards. Those stopped were videotaped by the police.*[240]

The Court of Appeal found that the plaintiffs / appellants were detained at the checkpoints, but relied on the trial judge's finding that highway safety concerns were "one of the purposes behind the stops"[241] making them lawful under the *Highway Traffic Act*. The additional police purpose of gathering intelligence did not render the stops unlawful.[242] However, an improper purpose, like selectively stopping people based on race, would have rendered the stop unauthorized under the *HTA*.[243]

The Court considered the *Waterfield* test in the alternative. Justice Doherty recognized that this test may seem unsatisfactory:

> *Those who prefer hard and fast rules are troubled by the fact-specific nature of the ancillary power doctrine as enunciated in* Waterfield*, adopted in* Dedman *and applied in* Simpson*. Obviously, clear and readily discernible rules governing the extent to which the police can interfere with individual liberties are most desirable. The infinite variety of situations in which the police and individuals interact and the need to carefully balance important but competing interests in each of those situations make it difficult, if not impossible, to provide pre-formulated bright-line rules which appropriately maintain the balance between police powers and individual liberties. In any event, a controlling statute or reconsideration by the Supreme Court of Canada, the ancillary power doctrine is the established means by which the courts must draw the line between police conduct which is lawful and that which amounts to an unconstitutional interference with individual liberties[.]*[244]

Applying the *Waterfield* test, the Court of Appeal would have found the checkpoints were <u>*not*</u> authorized at common law. Justice Doherty's reasons are worth reviewing in full:[245]

> *Applying the totality of the circumstances approach to the situation which led to the roadside detentions, I am not satisfied that the detentions were a justifiable intrusion on the appellants' rights and, therefore, a proper exercise of their ancillary powers. In arriving at the conclusion, I have in mind the following:*

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240 *Brown* at para 7.

241 *Brown* at para 27.

242 *Brown* at paras 31, 49.

243 *Brown* at para 41. See also *R v Nolet*, 2010 SCC 24 at para 23 ("Random roadside stops must be limited to their intended purposes") and at para 39 ("A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a *Charter* violation"). And see *R v Mohamed*, 2019 ABQB 499 at para 45; *R v Mayor*, 2019 ONCA 578 at paras 7-10.

244 *Brown* at para 62.

245 *Brown* at paras 77-79.

- *Any apprehended harm was not imminent.*

- *There was no specific identifiable harm which the detentions sought to prevent. The police had a general concern that the situation could get out of hand unless it was made clear to the appellants, their friends and associates that the police were in control.*

- *The police concern that some harm could occur rested not on what those detained had done, but rather on what others who shared a similar lifestyle with those who were detained had done at other places and at other times.*

- *The liberty interfered with was not a qualified liberty like the right to drive, but rather the fundamental right to move about in the community;*

- *The interference with individual liberty resulting from the police conduct was substantial in terms of the number of persons detained, the number of times individuals were detained and the length of the detentions; and*

- *The detentions could not be said to be necessary to the maintenance of the public peace. A large police presence without detention would have served that purpose. In fact, it is arguable that the confrontational nature of the detentions served to put the public peace at risk.*

> *In this case, the police chose to detain the appellants and their friends and associates in the belief that the detentions would diminish the risk that a situation would develop in which there would be an imminent risk of harm. In effect, the respondent would extend the common law power to arrest or detain to prevent an imminent breach of the peace to a power to detain whenever the detention would assist in keeping the public peace. The respondent would equate the police duty to keep the peace and the police power to take steps to keep the peace. This equation ignores the importance attached to individual liberties in our society. The common law ancillary power doctrine has never equated the scope of the police duties with the breach of the police powers to interfere with individual liberty in the performance of those duties:* R. v. Simpson, supra*, at p. 194 O.R., p. 493 C.C.C. Any interference with individual liberty must be justified as necessary:* R. v. Dedman, supra*. When taking proactive measures to maintain the public peace, the requisite necessity arises only when there is a real risk of imminent harm. Before that point is reached, proactive policing must be limited to steps which do not interfere with individual freedoms.*
>
> *The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety.* ***We want to be safe, but we need to be free****.* [emphasis added]

In *Peart v Peel Regional Police Services* (which also involved an unsuccessful civil action against the police) the Court cited *Brown* and confirmed that: “Police conduct that is the product of racial

profiling and interferes with the constitutional rights of the target of the profiling gives rise to a cause of action under the *Charter*."[246]

- ***R v Mann***

Mann is the case where the Supreme Court held that the police have the power to conduct an "investigative detention."[247]

The Court established the following test for investigative detentions:

> *The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the* Waterfield *test.*[248]

Despite the confirmation of this new power, a *Charter* breach was found on the facts of *Mann*.

The police had the power to conduct an investigative detention, because the accused matched the description of a suspect in a break and enter that had just been reported. The police also had the power to conduct a pat-down search incidental to the investigative detention, for police safety purposes. However: "The officer's decision to go beyond this initial pat-down and reach into the appellant's pocket after feeling an admittedly soft object therein is problematic."[249] This is where the *Charter* breach occurred, and the Supreme Court held that the cannabis found in the accused's pocket was properly excluded from the evidence at trial.[250]

- ***R v K (A)***

The next two decisions, *R v K (A)* and *R v Fountain*, involved carding incidents in Ontario.

The Court in *K (A)* found that a carding interaction in Toronto (where the police had followed a group of young black men down a lane, questioned them, and filled out 208 cards) was an arbitrary detention:

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246 *Peart v Peel Regional Police Services*, 2006 CanLII 37566 (Ont CA) at para 91, leave to appeal to SCC refused, 2007 CanLII 10553 (SCC).

247 *R v Mann*, 2004 SCC 52.

248 *Mann* at para 34. There has been some debate in the post-*Mann* case law regarding what constitutes a "recent or on-going criminal offence": see e.g. *R v Yeh*, 2009 SKCA 112; see also Coughlan & Luther at 146-150.

249 *Mann* at para 49.

250 *Mann* at paras 50 and 60.

> *In my view, the pro-active policing aspect of the night's events – going down a lane to see why citizens might be there – was legitimate. But once the police [k]new the group was going to their parked car, to now prolong the investigation because of the price of the vehicle, the age and colour of the occupants takes this fact situation out of legitimate.* R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 makes it clear that a brief detention for investigative purposes is a recognized but limited police power, but there need to be reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. The officers in this case cited graffiti and theft of construction materials as the particular crime, yet there existed no evidence that would give them the requisite reasonable grounds.*[251]

This case affirms that the police need to have an objectively defensible, legitimate reason for stopping someone and taking their information.

- ***R v Fountain***

R v Fountain was another carding case.[252] Justice LaForme (who, as a trial judge, had warned about carding in *R v Ferdinand*),[253] for the Court of Appeal for Ontario, considered a young black man to have been detained when he was called over to a police car for questioning. This was an unlawful psychological detention:

> *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 all these circumstances, a reasonable person would have felt compelled to obey the officer and felt that he could not walk away: see* R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 31.*
>
> *I agree with the trial judge's inference. Therefore, I conclude that Constable Fardell unlawfully detained the appellant from the outset of their conversation.*[254]

- ***R v Orbanski***

R v Orbanski was a 2005 decision of the Supreme Court of Canada that featured a powerful debate between the majority and dissenting Justices on the test for determining common law police powers.

In *R v Orbanski*, the Court concluded that it was contrary to section 9 for the police to require roadside sobriety tests, but that they were justified as a reasonable limit on the accuseds' section

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251 *R v K (A)*, 2014 ONCJ 374 at para 54.

252 *R v Fountain*, 2015 ONCA 354.

253 *R v Ferdinand*, 2004 CanLII 5854 (Sup Ct J).

254 *Fountain* at paras 20-21.

9 rights under section 1.[255] Justice Charron addressed the common law development of police powers:

> *The recognition of these powers is not carved out of whole cloth from common law principles to suit the occasion — these powers are part of a longstanding statutory scheme that permits police officers to stop drivers and check their sobriety. The scope of justifiable police conduct will not always be defined by express wording found in a statute but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable that common law principles will need to be invoked to determine the scope of permissible police action under any statute. In this context, it becomes particularly important to keep in mind that any enforcement scheme must allow sufficient flexibility to be effective. The police power to check for sobriety, as any other power, is not without its limits; it is circumscribed, in the words of the majority of this Court in* Dedman *by that which is "necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference" (p. 35).*[256]

Justice LeBel criticized this reasoning in a forceful dissent:

> *Most respectfully, this argument is essentially a utilitarian one based on expediency rather than legal principles. Drunk driving is evil. Drunk driving is dangerous. Drunk drivers must be swiftly taken off the road. If there is something missing in the statute, let us read in the necessary powers. Failing that, let us go to the common law and find or create something there.*
>
> *It is not appropriate to adopt a strained legal interpretation to sidestep inconvenient* Charter *rights for the greater good. Curtailing* Charter *protections through the inventive use of the law-making powers of the courts is even less acceptable. Doing so turns the country's legal system upside down. Ironically enough, while* Charter *rights relating to the criminal justice system were developed by the common law, the common law would now be used to trump and restrict them.*[257]

He continued:

> *Circularity is the hallmark of this chain of reasoning, which appears to conflate the process of creating the common law rule with the process of justifying it. The difficulties attendant on such a process appear to confirm the need for prudence in exercising judicial powers to develop the common law in areas which are highly regulated and where Parliament and the legislatures have been active.*
>
> *The adoption of a rule limiting* Charter *rights on the basis of what amounts to a utilitarian argument in favour of meeting the needs of police investigations through the development of common law police powers would tend to give a potentially*

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255 *R v Orbanski; R v Elias*, 2005 SCC 37.

256 *Orbanski* at para 45.

257 *Orbanski* at paras 69-70.

> *uncontrollable scope to the doctrine developed in the* Waterfield-Dedman *line of cases, which — and we sometimes forget such details — the court that created it took care not to apply on the facts before it (*R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)). The doctrine would now be encapsulated in the principle that what the police need, the police get, by judicial fiat if all else fails or if the legislature finds the adoption of legislation to be unnecessary or unwarranted. The courts would limit* Charter *rights to the full extent necessary to achieve the purpose of meeting the needs of the police. The creation of and justification for the limit would arise out of an initiative of the courts. In the context of cases such as those we are considering here, this kind of judicial intervention would pre-empt any serious* Charter *review of the limits, as the limits would arise out of initiatives of the courts themselves.*[258]

In a case comment on *Orbanski*, Prof. Tim Quigley approved of LeBel J's dissent and called the majority decision "a continuation of the disturbing trend by the Supreme Court of Canada to create police powers via the common law":

> *…it is inappropriate for the Supreme Court of Canada to usurp the role of the legislature by the creation of common law police powers. Unfortunately, the Court has frequently relied upon a rather obscure English case* [Waterfield] *as its authority for this use of the common law. It is particularly important in a legal system with entrenched legal rights in which the courts are called upon to assess the constitutionality of legislative provisions that the courts await legislative action. Otherwise, the opportunity to test the constitutionality of a law is effectively lost.*[259]

- ***R v Clayton***

R v Clayton, decided two years after *Orbanski*, is another seminal Supreme Court of Canada case on common law police powers.

In *Clayton*, a majority of the Supreme Court found that the police had the power, at common law, to set up a roadblock and detain vehicles outside of a nightclub, following a 911 call that several black men were brandishing guns in the parking lot.[260] The vehicle of the two accused was stopped at the roadblock. As events unfolded, both men (who were black, but whose vehicle did not match the caller's description) were found to have guns.

The Crown conceded that the initial stop was a detention.[261] However, the Court ultimately agreed with the Crown that it was not an *arbitrary* detention. The police were acting within their common law authority, so the roadblock detentions were justified.[262]

This conclusion was based on a "balancing" test:

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258 *Orbanski* at paras 80-81.

259 Tim Quigley, Annotation to *R v Orbanski*; *R v Elias*, 2005 CarswellMan 190 (SCC).

260 *R v Clayton*, 2007 SCC 32.

261 *Clayton* at para 18.

262 *Clayton* at para 41.

> *The justification for a police officer's decision to detain, as developed in* Dedman *and most recently interpreted in* Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary". If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in* Mann*, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.*
>
> *The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.*
>
> *In my view, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.*[263]

Justice Binnie, concurring, thought the "reasonably necessary" test was "not an adequate substitute for proper *Charter* scrutiny."[264] He proposed the following analysis instead:

> *An asserted common law police power that is challenged on* Charter *grounds should be subjected to the usual* Charter *analysis that requires the Court to articulate the individual's asserted* Charter *right (here ss. 8 and 9) and measure it against the countervailing societal interests (s. 1) in an open and candid manner. The growing elasticity of the concept of common law police powers must, I think, be subjected to explicit* Charter *analysis.*[265]

This was preferable to Justice Binnie than "calling in aid a British case like *Waterfield* decided almost 20 years before the *Charter* came into existence."[266] Justice Binnie echoed Justice LeBel's *Orbanski* dissent, stating that:

> *Conflating in a* Waterfield*-type analysis the consideration of the individual's ss. 8 and 9 rights and society's s. 1 interests can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of* Charter *analysis.*[267]

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263 *Clayton* at paras 30-32.

264 *Clayton* at para 58.

265 *Clayton* at para 59.

266 *Clayton* at para 61.

267 *Clayton* at para 61.

The next year, in *Kang-Brown*, Justice Binnie wrote that precedents like *Mann* and *Clayton* "do not mean that the Court should always expand common law rules, in order to address perceived gaps in police powers or apprehended inaction by Parliament, especially when rights and interests as fundamental as personal privacy and autonomy are at stake."[268] He asked: "How are litigants to anticipate whether they will find the Court in a 'can do' mode or a 'leave it to Parliament' mode? In my view, *Mann* and *Clayton* resolved the Court's attitude to this particular area of common law police powers in favour of the former. We have crossed the Rubicon."[269] Nevertheless, Justice Binnie agreed that "the Court should proceed incrementally with the *Waterfield/Dedman* analysis of common law police powers rather than try to re-cross the Rubicon to retrieve the fallen flag of the *Dedman* dissent."[270]

- ***R v Grant***

We then come to the leading case of *R v Grant*, which the Court viewed as an opportunity "to take a fresh look at the" section 9 framework.[271] In this case, the police stopped and questioned a young black man on the street, so it is an important case for the issue of street checks.

Two plainclothes officers were driving an unmarked vehicle, and a third officer was in uniform in a marked car, in the Greenwood and Danforth neighbourhood of Toronto, an area with several schools and "a history of student assaults, robberies, and drug offences occurring over the lunch hour." They noticed Mr. Grant walking and thought he was "staring" at them, while also "fidgeting" with his clothes.

One of the plainclothes officers "got out of his car and initiated an exchange with Mr. Grant, while standing on the sidewalk directly in his intended path. The officer asked the appellant 'what was going on', and requested his name and address. In response, the appellant provided a provincial health card." The uniformed officer joined the conversation, and he and his partner obstructed the path. Grant confessed to having "a small bag of weed" and a firearm on him.[272]

The section 9 issue was whether Grant was "detained"; the parties agreed that "[i]f he was detained, the detention was arbitrary" because the police did not have "legal grounds" to detain.[273]

Chief Justice McLachlin and Justice Charron, for the majority, reviewed the purpose of section 9 as being "to protect individual liberty from unjustified state interference", noting that "an individual confronted by state authority ordinarily has the option to choose simply to walk away":[274]

> *Where this choice has been removed — whether by physical or psychological compulsion — the individual is detained. Section 9 guarantees that the state's ability to interfere with personal autonomy will not be exercised arbitrarily. Once*

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268 *R v Kang-Brown*, 2008 SCC 18 at para 6.

269 *Kang-Brown* at para 22.

270 *Kang-Brown* at para 51.

271 *R v Grant*, 2009 SCC 32 at para 3.

272 *Grant* at paras 5-8.

273 *Grant* at para 12.

274 *Grant* at paras 20-21.

> *detained, the individual's choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence.*
>
> *"Detention" also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective* choice *whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty.*[275]

Importantly, the Supreme Court concluded that Grant was detained when the police stopped him and one officer told him to "keep his hands in front of him."[276] He experienced psychological detention.

There are two forms of psychological detention:

> *The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated.*

Regarding the second kind of psychological detention:

> *This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in* Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. …the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.*[277]

That was the form of psychological detention at issue in *Grant* (and, as discussed below, is most relevant to the street check context).

The majority commented on the "complex" nature of neighbourhood policing:

> *A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can*

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275 *Grant* at paras 21-22; emphasis the Court's.

276 *Grant* at para 48.

277 *Grant* at para 31.

> *subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice.*[278]

The Court in *Grant* did not rely on the *Waterfield* test (or cite *Waterfield* at all).

Chief Justice McLachlin and Justice Charron applied a contextual test: "Whether the individual has been deprived of the right to choose simply to walk away will depend…on all the circumstances of the case."[279] In the circumstances of *Grant*, a detention occurred: Grant became "the object of particularized suspicion"; "the encounter took on the character of an interrogation" and was "inherently intimidating" in light of the "power imbalance" at play.[280]

Justice Binnie (in his concurring reasons in *Grant*) recognized that: "A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified 'low visibility' police intervention in their lives… Courts cannot presume to be colour-blind in these situations."[281]

Despite the finding of a section 9 breach in *Grant*, the Court refused to exclude the evidence (firearm and drugs) under section 24(2) of the *Charter*.[282]

- ***R v Aucoin***

The Supreme Court returned to the *Waterfield* test in *Aucoin*, a case from Nova Scotia.[283]

The accused in *Aucoin* was detained for two motor vehicle infractions: having the wrong licence plate, and having alcohol in his system despite being a "newly licensed driver." The allegedly arbitrary detention arose when the police officer decided to place the accused in the back of the police cruiser "while he wrote up the ticket for the motor vehicle infractions", and conducted a pat-down search beforehand.[284] The pat-down search revealed that the accused was in possession of cocaine.

The majority found that the pat-down search and detention in the police cruiser were not "reasonably necessary" (using the language of *Waterfield* without citing the case):[285]

> *Constable Burke chose to secure the appellant in the rear of the cruiser and pat him down as a prelude to doing so. But for that decision, there would have been no pat-down search. Because detaining the appellant in the back of the cruiser would have been an unlawful detention — given there were other reasonable means by which Constable Burke could have addressed his concern that the appellant might flee — it cannot constitute the requisite basis in law to support a*

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278 *Grant* at para 40.

279 *Grant* at para 43.

280 *Grant* at paras 48-50.

281 *Grant* at paras 153-155, Binnie J, concurring.

282 *Grant* at para 140.

283 *R v Aucoin*, 2012 SCC 66, 2012 CarswellNS 847 (SCC).

284 *Aucoin* at paras 32-34.

285 *Aucoin* at para 39. Justice LeBel, dissenting, explicitly cited the *Waterfield* test, at paras 73-76.

> *warrantless search:* Collins*, at p. 278. Therefore, the pat-down search was unreasonable within the meaning of s. 8 and constituted a breach of the appellant's* Charter *right against unreasonable search and seizure. With respect, the trial judge and the majority of the Court of Appeal erred in concluding otherwise.*[286]

Despite the ultimate conclusion, *Aucoin* can be read as creating a broader "common law power of detention" than the power of investigative detention that was confirmed in *Mann*.[287]

As Prof. Stuart commented:

> *Certainly those who are uncomfortable with the increasing reliance by the Court on common-law powers will be less than satisfied by the solid reaffirmation of the approach in* R. v. Clayton *… that there is a very general and open-ended ability for police to detain simply on the grounds that it is "reasonably necessary in the totality of the circumstances" (*Aucoin*, para. 36). That ability is not really a "power" at all, in the sense of an authority based on pre-determined criteria like the power to arrest: it is simply a case-by-case determination of whether to retroactively approve of the way the police behaved in a particular situation.* Aucoin *firmly fixes that approach in the criminal law firmament.*
>
> *However, it also makes clear that among the "circumstances" that enter into the totality are the* Charter *rights of the accused, and it is this recognition which has the ability to make the* Clayton *analysis less open-ended.*[288]

- ***R v Reid***

The recent Ontario case of *R v Reid* involved what the Court called "a police-citizen interaction"[289] (what is commonly referred to as carding). The appellant Reid's friend, Paisley, was arrested for being in breach of a conditional sentence order. While that was happening, another officer recorded Reid's name, birth date, and address on a 208 card.

The officer used his radio to run a record check on Reid, and was advised that he "was the subject of a weapons prohibition order." Reid then moved his body away from the officer and ran, at which point a firearm fell out of his clothing.

The Court found these circumstances did not give rise to a detention: "the police were entitled to ask the appellant the questions they did as part of their legitimate community policing exercise. Those questions did not create a detention."[290]

The Court expressly rejected the appellant's "psychological detention" argument, which was based in part on his race:

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286 *Aucoin* at para 44.

287 Coughlan & Luther at 161-164, 168-169.

288 Don Stuart, Annotation to *R v Aucoin*, 2012 CarswellNS 847 (SCC). Emphasis added.

289 *R v Reid*, 2019 ONCA 32 at para 1.

290 *Reid* at para 17.

> *In claiming that he was detained, the appellant emphasizes that he "was a black man in a public housing project who was being questioned and ordered around by a uniformed TAVIS officer". He contends that those circumstances would have left a reasonable person with the perception that he had no choice but to comply. Although we do not know what was actually going on in the appellant's mind because he did not testify, I agree that the "minority status" of an individual is a relevant consideration in the mix of factors informing what a reasonable person in the individual's circumstances would have concluded:* Grant*, at para. 44. At the same time, there are other individual factors to be taken into account, such as the person's physical stature, age, level of sophistication, and so on:* Grant*, at para. 44.*[291]

Important factors were that Reid and Paisley were walking towards, not away from, the police officers when the conversation began; Reid "showed no sign of wanting to leave"; the police did not order him to approach or stay where he was; and he volunteered information, including his birth date and address. Justice Fairburn concluded: "I see nothing in that interaction that would have caused a reasonable person in the appellant's situation to feel like he had no choice but to comply."[292]

The result in *Reid* may have been different if the case was decided after the Supreme Court's decision in *Le*.

- ***R v Le***

To review the factual background:

> *One evening, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. The young men appeared to be doing nothing wrong. They were just talking. The backyard was small and was enclosed by a waist-high fence. Without a warrant, or consent, or any warning to the young men, two officers entered the backyard and immediately questioned the young men about "what was going on, who they were, and whether any of them lived there" (2014 ONSC 2033, at para. 17… They also required the young men to produce documentary proof of their identities. Meanwhile, the third officer patrolled the perimeter of the property, stepped over the fence and yelled at one young man to keep his hands where the officer could see them. Another officer issued the same order.*
>
> *The officer questioning the appellant, Tom Le, demanded that he produce identification. Mr. Le responded that he did not have any with him. The officer then asked him what was in the satchel he was carrying. At that point, Mr. Le fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash. At trial, he sought the exclusion of this evidence under s. 24(2) of the* Canadian Charter of Rights and Freedoms *("*Charter*") on the basis that the police had*

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[291] *Reid* at para 28.

[292] *Reid* at para 35. See also para 42.

> *infringed his constitutional rights to be free from unreasonable search and seizure and from arbitrary detention, contrary to ss. 8 and 9 of the* Charter.[293]

The Supreme Court split three to two on whether there was an arbitrary detention in this interaction which, all told, "lasted less than a minute."[294] Justices Brown and Martin (writing for themselves and Justice Karakatsanis) found there was. Justice Moldaver in dissent (writing for himself and Chief Justice Wagner) strongly disagreed and accused the majority of overlooking the trial judge's findings of fact.[295]

The majority focused on psychological detention. The men had no legal obligation to comply with the police request,[296] so the analysis came down to "whether a reasonable person, who stood in the appellant's shoes, would have felt obligated to comply and would not have felt free to leave as the police entered the backyard and made contact with the men."[297]

At this point, "no statutory or common law power authorized his detention."[298] As Justices Brown and Martin reviewed:

> *We accept that officers have wide powers to police communities and often do so by walking around. The conduct of the police in this case, however, exceeded the norms of community policing. Not only did three police officers enter a small private backyard in which five young men were standing around, talking, and "appeared to be doing nothing wrong", the officers immediately questioned the young men about "what was going on, who they were, and whether any of them lived there". They also required the young men to produce documentary proof of their identities and gave instructions about where to place their hands. It is common ground that the police had no legal authority to force the young men to do these things and the young men were under no legal duty to comply.*
>
> *Based on the relevant considerations in* Grant *and the officers' own evidence, the police were not called to the backyard to provide general assistance, maintain order, or respond to unfolding events. No assistance was requested or required by the young men and no specific complaint had been received from a third party about trespassing or any form of disturbance. No order needed to be maintained as the young men were "just talking". Nor were the police responding to any particular occurrence. The circumstances were simply that the officers themselves chose to walk to, and then into, that particular backyard.*[299]

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293 *Le* at paras 1-2. Somewhat unexpectedly, the decision focused on section 9 of the *Charter* rather than section 8.

294 *Le* at para 65.

295 *Le* beginning at para 167.

296 *Le* at para 28.

297 *Le* at para 28.

298 *Le* at para 30.

299 *Le* at paras 34-35.

These circumstances and the police conduct (which involved trespassing on private property)[300] supported a finding of detention, as did the particular characteristics of the accused. The majority framed this analysis as follows:

> *At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The s. 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.*[301]

The question of racial profiling is more relevant to whether a detention was arbitrary, not to whether there was a detention in the first place:[302]

> *While racial profiling looks inwards at what motivated the police interaction with a person, the racial context analysis relevant to the timing of the detention under s. 9 is not inward-looking, but rather focuses on the relational aspect between the police and racialized communities in order to discern what a reasonable person in the circumstances would perceive. The focus under s. 9 is thus on what a reasonable person in the shoes of the accused would perceive and it is to that question we now turn.*
>
> *A reasonable person in the shoes of the accused is deemed to know about how relevant race relations would affect an interaction between police officers and four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative.*[303]

The majority held that "reliable reports on race relations", like the Tulloch Report, could inform the reasonable person assessment:[304]

> *The Tulloch Report is relevant because it focuses on the* perceptions *of those subject to police encounters similar to the kind that occurred here. Justice Tulloch notes that "[h]istorically, Indigenous, Black and other racialized communities have different perspectives and experiences with practices such as street checks and carding" (p. 37). Not only do these communities have fundamentally different perceptions and experiences with carding, the impact of carding on minority youth, especially those who live in less affluent communities, is acute. […]*

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300 *Le* at paras 43-44, 51, 56. The dissenting judges agreed "that the police entry into the backyard was unlawful": para 217.

301 *Le* at para 75.

302 *Le* at paras 76-79.

303 *Le* at paras 81-82.

304 *Le* at paras 89-90.

> *The impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience. Carding takes a toll on a person's physical and mental health. It impacts their ability to pursue employment and education opportunities (Tulloch Report, at p. 42). Such a practice contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization[.]*
>
> *[…]*
>
> *Courts generally benefit from the most up to date and accurate information and, on a go-forward basis, these reports will clearly form part of the social context when determining whether there has been an arbitrary detention contrary to the* Charter*.*
>
> *We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities (see D. M. Tanovich, "Applying the Racial Profiling Correspondence Test" (2017), 64* C.L.Q. *359). Indeed, it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions. The documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused.*[305]

(This approach would necessitate consideration of the Wortley Report, as a key part of the social context, when considering the legality of street checks in Halifax.)

The majority rejected the argument that a psychological detention is less likely where the individual has repeated interactions with the police:

> *We see no good reason for the conclusion that* more *frequent encounters with the police make it* less *likely that a person feels "detained" when police approach. Such reasoning is flawed and is premised on a non-sequitur: that familiarity with police encounters breeds familiarity with the scope of police entitlement to detain and with one's* Charter *right to be free from arbitrary detention. […]*
>
> *Merely because an individual has had repeated interactions with the police does not mean that the individual has acquired a level of sophistication in dealing with the police. Indeed, in our view, it is more reasonable to anticipate that frequency of police encounters will typically foster* more*, not* less*, "psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice" (*Therens*, at p. 644). Individuals who are frequently exposed to forced interactions with the police more readily submit to police demands in order to move on with their daily lives because of a sense of "learned helplessness" (M.E.P. Seligman, "Learned Helplessness" (1972), 23* Annu. Rev. Med. *407, at p. 408, as discussed in* R. v. Lavallee*, [1990] 1 S.C.R. 852). That is, when individuals have repeated exposure to unwanted experiences from a more powerful source, they learn to*

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305 *Le* at paras 94-97. Underlining added.

> *simply acquiesce and try to get through the unwanted experience by getting it over with as quickly and peaceably as possible.*
>
> *[…] Any previous experiences would not attenuate the power imbalance or reduce the coercive force of multiple police officers entering a private backyard without explanation or authority.*[306]

A detention was established on the facts of *Le*. The next issue was whether it was arbitrary. According to the majority, "the detention of Mr. Le was not authorized by law, and was, therefore, arbitrary."[307]

In particular, there was no statutory authority "to detain anyone in the backyard." The common law test for investigative detention, from *Mann*, was not met:[308]

> *It follows from the foregoing discussion that Mr. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a s. 9 claim. This detention, therefore, infringed Mr. Le's s. 9* Charter *right.*[309]

Notably, the majority did not apply *Waterfield*'s "reasonably necessary" test to determine whether the police conduct was authorized.

Le indirectly accomplishes something that Prof. Tanovich has recommended: "infusing section 9 with the equality principles animating section 15(1) of the *Charter*."[310] He has argued that:

> *Equality concerns can be reflected in section 9, for example, by recognizing that police stops of black citizens are far more intrusive than stops of other groups, that they have imposed disproportionate burdens on the black community, and that racial profiling has led to distorted policing.*[311]

The majority would have excluded the evidence arising from the unlawful detention.

The dissenting judges expressly agreed that the "judicially constructed reasonable person must reflect and respect racial diversity, as well as the broader state of relations between the police and various racial groups" and that "[c]redible reports, studies, and other materials on race relations may assist courts in understanding how racialized persons may experience police

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306 *Le* at paras 108-110; emphasis the Court's.

307 *Le* at para 124.

308 *Le* at paras 129-132.

309 *Le* at para 133.

310 David M Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 145, 178-181. The Supreme Court cited this article in *Grant* at para 154 but did not adopt the section 15 analysis.

311 Tanovich, "Using the *Charter* to Stop Racial Profiling" at 180-181. He recommended (inter alia) an approach that would "deem all police investigative stops a detention under section 9" (at 184).

interactions differently, and courts may take judicial notice of such materials" in appropriate cases.[312] The dissenting judges also agreed that there was an arbitrary detention.[313] The point of departure came with the dissent's conclusion under section 24(2) that the evidence was admissible.[314]

[312] *Le* at para 260.

[313] *Le* at para 279.

[314] *Le* at paras 280, 306, 310.

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