

Submission on Street Checks to the Saskatoon Board of Police Commissioners

EXECUTIVE SUMMARY

In this submission we assert that significant legal and practical concerns militate against the continued use of street checks. Drawing on published research as well as consultations with affected community members, we conclude that for Saskatoon to be a leader in progressive policing that takes seriously the rule of law and the realities of marginalized communities, street checks should be abandoned and the police should pursue approaches that build trust and more effectively protect the community.

There is an acute awareness among Aboriginal peoples in Saskatoon of the link between colonial history and current interactions with the criminal justice system. Due to the troubled history between police and Aboriginal peoples, distrust and fear persists. Street checks ignore this negative history and undermine all the laudable work the Saskatoon Police Service has done to address racism among its ranks. Many members of the community find oversight mechanisms of police power lacking in meaningful consequences for abuses of power, rendering people who experience street checks all the more vulnerable to mistreatment or coercion. We submit that street checks facilitate a form of racialized policing that directly leads to the over-incarceration of Aboriginal peoples. There is little, if any, evidence of the effectiveness of street checks in Saskatchewan or elsewhere; regardless, one's view of its effectiveness must be balanced by the compelling evidence of its harmful effects.

We submit that street checks as defined by Chief Weighill are unlawful as they constitute arbitrary detention contrary to s. 9 of the *Charter of Rights and Freedoms*. Street checks based on a general sense of suspicion fall short of grounds for investigative detention or arrest. To detain an individual, police must have suspicion that is particularized: specific indicia of criminal wrongdoing. In such a case, the individual's right to be informed of the reason for the detention and right to counsel arise. Further, police cannot claim that interactions with community members are consensual. The Supreme Court has recognized that nature of police power is inherently "coercive"; as a result, the police are unable to rely on consent as a justification for an investigative chat with a community member without advising of her/his right to walk away and of the right to counsel.

We unequivocally recommend the abolition of street checks in Saskatoon as they are unlawful due their arbitrary and coercive nature, and they replicate patterns of racial oppression experienced by Aboriginal peoples. We recommend the earnest and robust institution of a community policing model as well as in-depth, ongoing cultural education for members of the Saskatoon Police Service.

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1. Introduction

Thank you for the opportunity to provide submissions on the issue of street checks by police in Saskatoon. In this submission we assert that significant legal and practical concerns militate against the continued use of street checks. We draw on published research as well as consultations with affected community members. We conclude that for Saskatoon to be a leader in progressive policing that takes seriously the rule of law and the realities of marginalized communities, street checks should be abandoned and the police should pursue approaches that build trust and more effectively protect the community.

For the purposes of this submission, we consulted with community members at AIDS Saskatoon's 601 Outreach and STR8 UP: 10,000 Little Steps to Healing. Our consultations point to the practice of street checks as a barrier to better community-police relationships in our city. Some of the comments from community members include:

- Carding undermines all the good work the Saskatoon Police Service is doing to address racism and ignores the negative history between Aboriginal peoples and police.
- Carding is about intimidation and control. It creates distrust and lack of respect across the community. It fosters an "us versus them" mentality.

2. The Context and Impacts of Street Checks

A. *Historical context: colonialism past and present*

Any discussion about policing in Saskatoon must be situated in the historical context of colonialism. As observed by the Commission on First Nations and Métis People and Justice Reform:

The troubled relationship between First Nations and Metis people and the Royal Canadian Mounted Police grew out of oppressive policies of the federal government – policies that it was the duty of the RCMP and its forerunner, the North West Mounted Police, to enforce. For Metis people, the role of the mounted police in the Northwest Rebellion of 1885 created animosity that has simmered for more than a century.

As First Nations and Metis people began a move to the urban centers of Saskatchewan in the second half of the twentieth century, they carried with them memories of harsh treatment at the hands of police agencies. Those perceptions lingered and have had a

negative impact on the relationship between First Nations and Métis people and municipal police services.¹

The impacts of colonialism continue in the present day and are a root cause of the disproportionately high rates of interactions between Aboriginal people and the criminal justice system.² Policing in Saskatoon cannot be understood or improved without a non-defensive engagement with this reality.

For members of Aboriginal communities in Saskatoon, there is an acute awareness of the link between colonialism and current interactions with the criminal justice system. Community members we spoke to likened street checks to the infamous Starlight Tours, residential schools, and the pass system on reserves because they similarly invoke elements of intimidation, monitoring, and control.

B. Marginalized communities: distrust and fear

Although the Saskatoon Police Service has made strides to combat racism and build relationships with the Aboriginal community in the years since the Stonechild Inquiry and the notorious days of the Starlight Tours, the fact remains that Aboriginal peoples in Saskatoon have lower levels of trust in the police as compared to other populations.³ The Commission on First Nations and Métis People and Justice Reform describes the relationship as having an “**atmosphere of distrust and fear that cannot be ignored.**”⁴

As some community members who we consulted explained:

- First Nations people are raised with a distrust and fear of the police. A lot of negative things have happened.
- I’ve never trusted cops, I’m afraid of them.
- There’s been a history of brutality... the distrust remains.

Any given day in docket court demonstrates that a disproportionate number of Aboriginal people who are marginalized through precarious housing, employment, mental health and addictions interact with police in our city. Indeed, empirical studies support this assertion and demonstrate that marginalized neighborhoods tend to be policed disproportionately as compared to more wealthy neighborhoods.⁵ As such, we submit that it is particularly important in the interests of

¹ The Commission on First Nations and Métis People and Justice Reform, “Legacy of Hope: An Agenda for Change” (2004), Policing (Ch.5), at p. 5-3 [hereinafter “Commission report”].

² *Ibid*, at pp. 5-2 – 5-27.

³ Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild. (2004), which refers to the lack of trust of Aboriginal people in police at p. 209; Cheng, H. (2015), “Factors influencing public satisfaction with the local police: a study in Saskatoon, Canada”, Policing: *An International Journal of Police Strategies & Management*, Vol. 38, which notes the level of satisfaction in police in Aboriginal community in Saskatoon is lower as compared to non-Aboriginal communities.

⁴ *Supra* note 1, Commission report, at p. 5-3.

⁵ *Supra* note 3, Cheng study.

effective police-community relations to try to understand the perceptions of and levels of trust in police held by members of these communities.

University of Saskatchewan Professor Hongming Cheng's research supports the observation of community members that street checks damage the possibility of improved relations and trust in police. He notes that "involuntary contact with the police" tends to reduce satisfaction levels with police.⁶ This is true elsewhere where racial groups attract police scrutiny. A study published last month in the United States concluded that most police encounters with Black people should "not ever have occurred in the first instance." The authors noted that "[o]ur research shows that these repeated negative encounters, buttressed by the context of a lack of accountability, **contribute mightily to the state of distrust** between young Black people and the police."⁷ Our consultations also confirm that street checks undermine the ability of police to build trust with the community.

In light of the above, we are particularly concerned by Chief Weighill's report that individuals who are homeless, panhandling and vulnerable youth are special targets of street checks in Saskatoon.⁸ By Chief Weighill's own definition, street checks are primarily employed not with the aim of assistance but rather as a response to suspicion. People who are homeless, panhandling or vulnerable on the streets experience further disenfranchisement and distrust in police and the system as they are subject to street checks. Furthermore, empirical studies have shown that people who are living on the streets are far more likely to be targets of victimization than other groups in society and thus should be protected rather than treated with suspicion.⁹ Perceiving such individuals as inherently suspicious contributes to the criminalization of poverty. We submit therefore that street checks targeting these populations be ceased immediately.

C. External mechanisms to constrain police power

Chief Weighill suggests in his report dated December 2, 2015 that police practices and encounters with citizens are routinely and meaningfully scrutinized by the courts. He further points out that individual complaints about police encounters can also be taken up through the formal complaints process.¹⁰

⁶ *Supra* note 3, Cheng study, at p. 698.

⁷ Futterman, Hunt & Kalven, "They Have All the Power: Youth/Police Encounters on Chicago's South Side", (March 23, 2016), University of Chicago Legal Forum, Forthcoming; U of Chicago, Public Law Working Paper No. 573, available at SSRN: <http://ssrn.com/abstract=2754761> [emphasis added].

⁸ Chief Weighill's Report to the Saskatoon Board of Police Commissioners, December 2, 2015 [hereinafter "Weighill Report"].

⁹ See generally, Steven A. Kohm, "Justice and Victimization in the Inner City: Notes from Central Winnipeg" in Kelly Gorkoff and Richard Jochelson, eds., *Thinking about Justice: A Book of Readings* (Halifax: Fernwood Publishing, 2012).

¹⁰ *Supra* note 8, Weighill Report.

With respect, this suggestion is not borne out by empirical research or our community consultations. Instead, research shows that despite the constraints placed on policing practices by courts, members of marginalized communities are often not aware that external processes exist to check police power, are indeed skeptical of such processes,¹¹ and have access to justice challenges in bringing such applications to court or to the formal complaints process.

The Commission on First Nations and Métis People and Justice Reform observed that current mechanisms are inadequate to identify racist incidents, attitudes and behaviours. It supported recommendations that the mechanisms become more sensitive as well as result in actual corrective measures for racially motivated conduct.¹²

In Saskatchewan, “there has been particular dissatisfaction with the lack of response by police and governments to complaints about mistreatment by the police.”¹³ Community members we heard from indicated:

- They [police] bully and degrade us, and there are no consequences for them.
- Cops can do whatever they want.

External oversight must become more accessible and meaningful to be considered an effective check on police conduct.

Street checks are of particular concern here because, as noted above, they are often experienced by community members as situations where police are asserting their power and making demands without justification. Street checks become “fertile ground” for racial profiling because they are generally “low visibility encounters” for which police rarely have to account.¹⁴ This reality, we submit, urgently underscores the need for unequivocal and clear policies that govern all police-citizen interactions and militates against street checks.¹⁵

D. The question of racial profiling

Empirical studies have established that racial profiling, or what Elizabeth Comack terms “racialized policing,” persists in Canadian cities, despite protestations, justifications and official policies to the contrary.¹⁶ Where policing is concentrated in low-income and marginalized

¹¹ Linden, R., “Policing First Nations and Metis People: Progress and Prospects”, (2005) *Saskatchewan Law Review*, 68: 303-311 at p. 308.

¹² *Supra* note 1, Commission Report, at pp. 5-4 – 5-5.

¹³ *Supra* note 11, Linden article, at p. 309.

¹⁴ Tanovich, D.M., “E-Racing Racial Profiling” (2004) *Alberta Law Review*, 41:4 pp. 905-933 at p. 918.

¹⁵ *Supra* note 11, Linden article.

¹⁶ Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Halifax: Fernwood Press, 2012). Wortley, S., Tanner, J.,(2004) “Discrimination or “Good” Policing? The Racial Profiling Debate in Canada”, *Our Diverse Cities 1*: pp. 197- 201; Satzewich, V., Shaffir, W., (2009) “Racism versus Professionalism: Claims and Counter-claims about Racial Profiling”, *Canadian Journal of Criminology and Criminal Justice*, Vol.51.No 2, pp. 199-226.

communities, higher levels of arrest and criminalization occur. In other words, policing practices can actively create the criminalization of racialized and marginalized communities.¹⁷

This has been observed locally; University of Saskatchewan professor Tim Quigley has stated:

The commonly held view is that there is more criminality among Native people than among non-Natives, but is that true? ... The apparent differences are more explainable by police conduct than by anything else. ... Police use race as an indicator for patrols, arrests, detentions etc.... For instance police in cities tend to patrol bars where Native people congregate, rather than private clubs frequented by businessmen. ...

Does this indicate that police are invariably racist? Not necessarily, since there is some empirical basis for the police view that proportionately, more Native people are involved in criminality. It is just that **the police view then becomes a self-fulfilling prophecy ... they tend to police areas frequented by groups they believe are involved in criminality.**¹⁸

As police may become defensive by the allegation that their actions are racist, it is important to note that racialized policing may not be conscious or intentional on the part of police.¹⁹ As one academic notes:

Police may think that differential police treatment is simply a product of good, proactive—rather than biased—policing, this conclusion is based on their perception of who is the usual offender. **This subtle and often subjectively unrecognizable process is what racial profiling is all about.**²⁰

The Commission on First Nations and Métis People and Justice Reform observed that racism in policing is systemic; while policies and actions may not be expressly or even consciously racist, their application has a disproportionate effect on Aboriginal peoples.²¹

Any meaningful discussion of the racialized aspect of street checks must also acknowledge the crisis of Aboriginal overrepresentation in Saskatchewan's jails and prisons, a reality for which we are nationally shamed.²² **Policing is the initial interface, serving as a funnel to the**

¹⁷ *Ibid.*, Wortley & Tanner article.

¹⁸ Tim Quigley, "Introducing Cross-Cultural Awareness," paper presented at the Western Judicial Workshop, 1990. A similar observation was made by Chief of the Saskatoon Tribal Council, Felix Thomas, who observed that police checks disproportionately occur in core neighbourhoods and implied that suspicious behaviour could be found in wealthier neighbourhoods also, see: Saskatoon Star Phoenix, "Police street checks process needs to improve, says head of Saskatoon Tribal Council" (December 14, 2015).

¹⁹ *Supra* note 14, Tanovich article.

²⁰ *Ibid.* at pg. 916 [emphasis added].

²¹ *Supra* note 1, Commission Report, at pp. 5-4 – 5-5.

²² MacLean's Magazine, "Canada's prisons are the 'new residential schools'", (February 18, 2016).

criminal justice system and prisons. The Truth and Reconciliation Commission of Canada made multiple recommendations that governments work to eliminate the overrepresentation of Aboriginal people in custody.²³ For this to be undertaken in earnest, consideration must be paid to what is occurring at the street level.

Academics indicate that street checks in particular are a “breeding ground” for racial profiling.²⁴ Professor Cheng’s study concluded that Aboriginal people in Saskatoon have a significantly lower rate satisfaction with city police compared to non-Aboriginal people in the city.²⁵ There is a clear and consistent perception among Aboriginal people on the streets of low-income neighborhoods that street checks are racially motivated.

In the words of people we consulted:

- Because we’re Aboriginal, we’re treated like we’re inherently criminal and need to be removed from society. You’re Native and young, you must be up to no good. Cops just assume we’ve done something wrong.
- What did I do? Is my skin my sin?
- It’s bullshit to say I fit the description; we all do!

Aside from a determination or acknowledgment that the practice of street checks is racist, the fact that it is widely perceived as such should be sufficient motivation to cease or significantly change the practice.²⁶ The Saskatoon Police Service has been lauded for the steps it has taken to address racism within its ranks and improve its relationship with Aboriginal communities. Taking the bold but necessary step of abandoning the practice of street checks is, we submit, the next, natural step in building a more positive relationship with Aboriginal peoples; one that may, at last, be characterized by trust.

E. Street checks as ineffective

While Chief Weighill indicates that street checks are used by police as a “method to be proactive in their efforts to investigate, prevent and suppress crime,”²⁷ there is insufficient evidence to support the assertion that street checks are in fact an effective crime-fighting technique.

There appear to be very few studies into the effectiveness of street checks. Research conducted in the United States and the United Kingdom indicate that street checks are ineffective at detecting criminal activity as they lead to a very low rates of arrest.²⁸ One report from the U.K.

²³ Truth and Reconciliation Commission, “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015), Calls to Action 30, 38, and 55(v).

²⁴ *Supra* note 14, Tanovich article at p. 918.

²⁵ *Supra* note 4, Cheng study.

²⁶ *Supra* note 17, Satzewich & Shaffir article, at p. 200.

²⁷ *Supra* note 8, Weighill Report.

²⁸ Goldstein, J., (2013), “Judge Criticizes ‘High Error Rate’ of New York Police Stops”, *New York Times*; HMIC [Home Office] (2013) “Stop and Search Powers: Are the police using them effectively and fairly?”

found that police use of “stop and search” powers played only a “minor role” in solving crime and reported that it “reduce[d] the number of ‘disruptable crimes’ by just 0.2 per cent.”²⁹

In Canada it is said that the effectiveness of street checks is largely “anecdotal” and “speculative.”³⁰ The province of Ontario has recently taken strides to acknowledge the harm caused by the racialized nature of street checks and to curb the practice, despite a noted lack of evidence as to its effectiveness.³¹

We are unable to say conclusively how effective street checks are in the investigation of criminal activity. Regardless, **one’s view of its effectiveness must be balanced by the compelling evidence of its harmful effects:** stoking the fires of mistrust and fear, only to erode the hard-won successes elsewhere.

3. Street Checks and the Law

A. *Defining Street Checks*

The definition of street checks used by the Board in its “Saskatoon Citizen Survey on “Street Checks” Issue” is repeated here for convenience:

A street check is an event where a police officer stops an individual walking on the street, due to suspicious circumstances, and requests information from that person related to their activity. Street checks do not include vehicle stops by police or occurrences where an observation is recorded but the person is not stopped by police. The information is entered into the police service databank detailing the check. The information obtained by police is not used in relation to criminal record checks, nor is it shared outside of the Saskatoon Police Service. The police do not ask the ethnicity of the person involved.

It appears and it is respectfully submitted that in most if not all of the street checks conducted by the Saskatoon Police Service in 2015, Saskatoon citizens had their rights infringed.

As a starting point, it is useful to consider the circumstances in which the police can detain and/or arrest individuals in Canada in 2016. The powers of detention and arrest are relatively well defined in Canadian law.

²⁹ P. Strickland (Home Affairs Section), Stop and Search, 23 January 2014, found at: <https://docs.google.com/viewer?url=http%3A%2F%2Fresearchbriefings.files.parliament.uk%2Fdocuments%2F5N03878%2F5N03878.pdf>.

³⁰ Gillis, W. (2015), “Ontario says it can’t get data on effectiveness of carding for current review”, *Toronto Star*.

³¹ National Post, “Ontario unveils ‘clear and consistent rules’ for police street checks and promises to reform training” (March 22, 2016); Marin, A. Street Checks and Balances: Submission in response to the Ministry of Community Safety and Correctional Services’ consultation on proposed Ontario regulation for street checks. *Ombudsman of Ontario* at pgs. 9 & 21.

i. Power of arrest

The power of arrest is based on “reasonable grounds to believe” the accused has committed a criminal offence and is accompanied by a power to search incident to arrest.³² The arresting officer must have the requisite grounds for a lawful arrest which will be assessed subjectively and objectively.³³ An objective assessment by a judge is essential to safe guarding a citizen’s right to be free of arbitrary detention under s. 9 of the *Charter of Rights and Freedoms*. Upon arrest, the accused has the rights to be informed of the reason for arrest and the right to counsel both under s.10 of the *Charter of Rights and Freedoms* [hereinafter the *Charter*].

ii. Power to investigatively detain a suspect

This relatively new power was recognized by the Supreme Court of Canada in 2004.³⁴ A lawful “brief investigative detention” must be based on “reasonable grounds to detain” which requires that a police officer “has a reasonable suspicion of specific criminal activity based on objectively verifiable grounds and only when, in all of the relevant circumstances, the detention is reasonable.”³⁵ Reasonable suspicion has often been called “articulable cause” which requires that the officer be able to “articulate” a “constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity.”³⁶ As the Chief Justice of the Saskatchewan Court of Appeal has said:

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

...

Thus, in this way, **the prerequisites for investigative detentions help to ensure they will not be based on the sorts of hunches and intuitions which can serve as a cover for arbitrary conduct and either deliberate or unconscious profiling based on factors such as race, ethnic origin or socioeconomic status.**³⁷

Brief investigatory detentions also give rise the detained person’s rights including the right to be informed of the reason for detention³⁸ and the right to counsel.³⁹

³² Section 495, *Criminal Code of Canada*.

³³ *R. v. Storrey* [1990] 1 SCR 241.

³⁴ *R. v. Mann* 2004 SCC 52.

³⁵ *R. v. Yeh* 2009 SKCA 112, at paragraph 91, per Richards C.J.S.

³⁶ *Ibid.*, *R. v. Yeh*, at para. 69, per Richards C.J.S., quoting the Ontario Court of Appeal in *R. v. Simpson* (1993) 12 OR (3d) 182.

³⁷ *Ibid.*, *Yeh*, at paras. 75 & 91, per Richards C.J.S. [emphasis added].

³⁸ *R. v. Mann*, *supra* note 34, at para. 21.

iii. *Street check stops*

Beyond the powers listed above, no other stops are allowed by law and, as determined by the Supreme Court of Canada in 2009, where not allowed by law, any police detentions are illegal and arbitrary, and thus are contrary to s. 9 of the *Charter* which protects Canadians from arbitrary detention or imprisonment.⁴⁰

In his report to the Board of December 2, 2015, Chief Weighill claims that street checks have been used in Saskatoon for over 50 years. While we do not doubt that that is true, we note that the practice of using them as a “pro-active” crime detection tool, without the necessary requirement that they only be used when there is a specific crime being investigated and where the police have the requisite individualized suspicion, suggests that street checks are not in fact lawful brief investigative detentions as discussed above.

When Chief Weighill says that the suspicion, to which he refers, takes into consideration “neighborhood crime, calls for service, victimology and criminal behaviours” he is being entirely too general and fails to tie the stops to a specific crime suspected and individual reasonable suspicion of the questioned person’s involvement therein. Indeed the Supreme Court of Canada has held that neighborhood crime rates do not justify such conduct.⁴¹

Further, we understand the police do not see a need in such situations to honour section 10 of the *Charter*, which requires that the person who has been stopped be informed as to the reason for the detention and their the right to counsel. Indeed, we do not understand the Chief to be claiming that these stops are lawful investigative detentions under the Supreme Court’s decision in *Mann*. His position ignores the enactment of the *Charter* and its ongoing interpretation by the Supreme Court of Canada. With respect, it is no longer 1966.

Chief Weighill’s claim also ignores that before the 2004 decision in *Mann* by the Supreme Court of Canada, such checks were always based on the claim that such police interactions were consensual on-the-street encounters (as often claimed “the suspect is helping the police with their inquiries”).⁴² After the *Charter* came into force, and certainly after the important Supreme Court of Canada decisions cited above that claim cannot longer be made.

³⁹ *R. v. Suberu* 2009 SCC 33; It is noted that there are rather ill-defined powers to conduct check stops for impaired driving and some emergency situations involving immediate risks to public safety (with significant limits on any power to search) and which are limited to vehicle stops where the investigators are attempting to detect impaired drivers and to public safety emergencies. However these powers have little to do with Street Checks as defined by the Board.

⁴⁰ *R. v. Dedman* [1985] 2 SCR 2; *R. v. Mellinthin* 1992 3 SCR 615; *R. v. Clayton* 2007 SCC 32; *R. v. Grant* 2009 SCC 32.

⁴¹ *R. v. Mann*, *supra* note 34, at para 47, the Court said: “The high crime nature of a neighbourhood is not by itself a basis for detaining individuals”.

⁴² See for example: in 1981 before the *Charter* law developed, Martin JA in *Regina v. Dedman*, 1981 CanLII 1631 (ONCA):

B. Police Actions are Coercive in Nature

The Supreme Court of Canada has held several times, since the coming into force of the *Charter*, that **the nature of police power in Canada is inherently “coercive”** and, as a result, **the police are unable to rely on consent as a justification for an investigative chat with a citizen**, without advising the citizen of her/his right to walk away and of the right to counsel.⁴³

Chief Weighill further notes that “[d]uring a police interaction with the public, citizens are not obligated to supply their identification or information unless the officer has entered into an investigation based on the law.”⁴⁴ We submit it is very unlikely marginalized community members feel able to assert their right to silence and not comply with police requests for information. Community members indicated that they feel compelled to provide information upon request and that refusal to do so will arouse suspicion.

A street check, with or without suspicion, is illegal and unconstitutional, at least without following the reasonable grounds to detain requirement and without providing appropriate police warnings. To suggest that the police use these stops as “one method to be proactive in their effort to investigate, prevent and suppress crime” is to admit that the police are acting illegally and in breach of people’s rights. Indeed, it does not seem that Chief Weighill is denying that the stops are inherently coercive. The Police Chief has recently stated that they are a useful way to ensure that “people be accountable for what they’re doing in the evening”,⁴⁵ and that it is impractical to

It is, of course, a constitutional principle that the citizen has a right not to be subjected to imprisonment, arrest or physical restraint that is not justified by law, and every invasion of the property of the citizen is a trespass unless legally justified.... On the other hand, when a police officer is trying to discover whether, or by whom, an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks useful information may be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else. Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless, of course, the officer arrests him on a specific charge or arrests him pursuant to s. 450 of the Code where the officer has reasonable and probable grounds to believe that he is about to commit an indictable offence:...”

Further, the Supreme Court reviewed pre-*Charter* law in *An Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 (CanLII) [131] On March 21, 2003, the appellant was subpoenaed to give evidence at the trial of Malik and Bagri but, as stated, has cooperated neither with the police nor with the defence. Generally speaking, under our law, there is no legal obligation for an ordinary citizen to cooperate in a police investigation. As Martin J.A. put it in *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94:

Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he, as a general rule, has no power to compel the person questioned to answer. Moreover, he has no power to detain a person for questioning, and if the person questioned declines to answer, the police officer must allow him to proceed on his way unless he arrests him on reasonable and probable grounds.

⁴³ *R. v. Grant*, [2009] 2 SCR 353 at paras. 20- 21, 32 and 50; see also *Hunter v. Southam*, [1984] 2 SCR 145.

⁴⁴ *Supra* note 8, Weighill Report.

⁴⁵ Lagaden, C., “Saskatoon police do more carding than other Canadian Cities: report” *CBC News Online*, (Aug 19, 2015).

inform individuals that they have the right not to talk to the police because if individuals were informed that they don't have to talk to the police, then those people are "not going to tell us anything".⁴⁶ Under these circumstances, it is impossible to believe that these stops are voluntary.

The Supreme Court has said:

[P]olice officers ... only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties. The reason for this is the authoritative and coercive character of police action. **An individual knows that he or she may ignore with impunity the signal to stop of another private individual. That is not true of a direction or demand by a police officer. ... 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. The possible criminal liability for failure to comply constitutes effective compulsion or coercion.**⁴⁷

Therefore, the Board's definition confuses and conflates the power to investigatively detain a citizen with purported consensual interactions by police officers. One assumes the Chief's use of the word "suspicion" to try to support street checks is an admission that in such situations the police do not have the power to investigatively detain the citizen, because their suspicion is not reasonable or the situation is not such that there is any necessity to detain the individual. Certainly they do not purport to inform the detained person of their rights.

C. Databases and Collection of Illegally Obtained Information

We feel that it is also necessary to express that we have significant concerns about the storing of information gleaned from street checks in police databases. The submissions by Chief Weighill clearly states that these illegal stops are being used for future investigative purposes. Such a practice is very concerning, as the only justification for this sort of record is to ensure that an independent body is able to review the practice of street checks. Surely it is important to recognize that information illegally obtained by police should not be available to the police for use in subsequent investigations. Only where checks are lawfully conducted (where the citizen truly and voluntarily agrees to help the police) should the police be able to claim that they have a right to access the information in the future. The Ontario Government has recognized this important point in their recently released final *Regulations* regarding police street checks.⁴⁸

⁴⁶ HuffPost Alberta, "Saskatoon Police Chief: No Racism in Street Checks" (December 11, 2015).

⁴⁷ *R. v. Dedman* [1985] 2 S.C.R. 2, at paras. 58-59 [emphasis added].

⁴⁸ Province of Ontario, "Final Regulations Regarding Police Street Checks: Background", available at: <https://news.ontario.ca/mcscs/en/2016/03/final-regulations-regarding-police-street-checks.html>.

4. Conclusion and Recommendations: reconciliation, building trust and policing

It is time for change. We have entered an era of reconciliation, where Aboriginal peoples and Canadians are building “renewed relationships that are based on mutual understanding and respect”.⁴⁹ Carding policies and practices are widely criticized as deepening the fissures in this long-divided relationship and are now being seriously reexamined across our country.⁵⁰

The use of the word “suspicious” to ground a street check is an invitation for racial profiling. While racial profiling is inherently difficult to prove,⁵¹ street checks of marginalized people cause alienation and, if anything, leads to an increase in crime and certainly invites citizens to become suspicious of police motives resulting inexorably to alienation from police and the state. Unregulated street checks cause citizens to fear the police and to feel that they have no choice and are being unfairly picked-on. If these checks indeed do purport to be consensual the police should be required to inform the suspected person that they do not have any obligation to speak to the police. Further, there is a need to require police officer to articulate in their notes what exactly their suspicion is, so that the suspicion can be reviewed to ensure that it is adequate. There is also a significant need to specify what can and what cannot justify a suspicion, and to explicitly prohibit race as a relevant factor.

In view of the foregoing discussion, we unequivocally recommend the abolition of street checks in Saskatoon because they are unlawful due to their arbitrary and coercive nature, and replicate patterns of racial oppression experienced by Aboriginal peoples.

We echo the voices of academics and community leaders alike who call for the robust and genuine implementation of a **community policing model**.⁵² First and foremost this model requires the development of relationship with the community that is characterized by trust. This is cultivated when police officers spend time with the community, attending community events, such as cultural or sporting events, and school programs. Having the same officers work in the same community allows individuals to become familiar with them. Further, having a police presence at community events, not for enforcement, but for participation promotes relationship-

⁴⁹ Truth and Reconciliation Commission of Canada, found at: <http://www.trc.ca/websites/trcinstitution/index.php?p=10>.

⁵⁰ *Supra* note 31; CBC News, “Carding, or random street checks, under review by Edmonton police” October 30, 2015; CBC News, “Edmonton police respond to Alberta grand chiefs’ carding concerns” September 18, 2015; Winnipeg Free Press, “Police carding not a Winnipeg thing” October 19, 2015.

⁵¹ *Supra* note 1, Commission Report at pp. 5-12 – 5-15.

⁵² Giwa, S., James, C.E., Anucha U., & Schwartz, K. (2014) “Community Policing—A Shared Responsibility: A Voice-Centered Relational Method Analysis of a Police/Youth-of-Color Dialogue”, *Journal of Ethnicity in Criminal Justice*, 12:3, pgs. 218-245; Somerville, P. (2009), “Understanding community policing”, *Policing: An International Journal of Police Strategies & Management*, Vol. 32(2), pgs. 261 – 277; Ryan, N., Head, B., Keast, R., Brown, K., (2006) “Engaging Aboriginal Communities Toward Policy: A Framework for Aboriginal Community Justice Programmes”, *Social Policy & Administration*. Vol 30 (3), pgs. 304-321; Dubois, P. (1997), “Professional community policing in Canada”, *European Journal on Criminal Policy and Research* Volume 5, Issue 4, at pp. 113-117.

building and trust. Police officers and community members then begin to see each other as neighbours. Community policing occurs when community members and police work together to identify and resolve problems. It is characterized by mutual respect, trust, understanding and cooperativeness. Police officers listen to community members to set policing priorities and identify strategies to solve problems. Solving problems is prioritized over enforcement.

Community members we heard from are in favour of community policing, stating:

- [The police] could act like our neighbours, get to know people. That would restore trust.
- [The police] should see others as equals, care about one other, and think about what other people need.
- We need to meet and get to know each other, build relationship and communication. The police and community should get in a room and talk to each other.

The communication that occurs between police and community members in a community policing model is distinguishable from the communication that occurs during a street check because it is characterized by mutual respect and trust, from which genuine consent can flow. The principle of reciprocity is observed as community members and police work together to address the challenges affecting them.

Another key recommendation that emerges is **in-depth cultural education** for police officers.⁵³ There are repeated recommendations that police need to understand: the history of Aboriginal peoples in Canada; Aboriginal identities, beliefs, values and worldviews; cultural practices; and current-day realities from Aboriginal perspectives. Training sessions need to be robust and ongoing, starting early and continuing throughout officers' working lives.

Community members also identify education as a key strategy to address racialized policing; some of their comments include:

- If cops were educated about Native history and culture, that would make a difference.
- Educate the police force about the realities of Native peoples; use a lot of cultural training. Grandmothers should teach the cops.
- Cops need to get the picture that we didn't pick our lives.

⁵³ *Supra* note 1, report of the Commission at pgs. 5-8 – 5-9; Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild. (2004).

5. Responses to SBPC's questions (in consideration of the above):

1. Under what circumstances (if any) do you feel street checks by police should be allowed?

Street checks should not be allowed under any circumstances. The practice should be abandoned as harmful, ineffective and unlawful. If police have reasonable grounds to pursue a lawful detention, that should occur with the necessary warnings and safeguards in place.

2. Under what circumstances (if any) do you feel street checks by police should not be allowed?

Street checks cannot be allowed where there are no identifiable and specific criteria to establish suspicion, and therefore no grounds for a brief investigative detention. Street checks cannot be allowed when they, intentionally or not, constitute racialized policing.

3. What criteria or guidelines do you feel should govern the use of street checks?

Police must identify and document the criteria for "suspicion" in order to demonstrate the check is not arbitrary. Police must tell the individual stopped they do not have to answer their questions and have the right to leave, and/or provide the right of counsel to the individual, to increase the likelihood that free and informed consent is obtained to answer questions.

4. Do you have any other recommendations for the Saskatchewan Police Commission relative to the use of street checks?

A community policing model should be implemented in real and involved ways: police officers should seek out genuine relationship with community members, e.g. by participating in community events; and reciprocal dialogue must occur with police officers listening and being responsive to community strategies to solve problems.

Police officers need to understand the realities of Aboriginal peoples and be heavily educated on history and cultural practices. Police officers also need to receive anti-oppression training that helps them acknowledge internalized racial bias and work to break down stereotypes. Accountability over police officers' conduct can be enhanced by more effective mechanisms to identify racial profiling and ensure disciplinary and corrective consequences.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF APRIL, 2016
by:

- Glen Luther, Professor, College of Law, University of Saskatchewan
- *Other signatories to be added here*

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