

We acknowledge the land on which we gather is the unceded territory of the Coast Salish peoples, including the territories of the xwməθkwəyəm (Musqueam), Skwxwú7mesh (Squamish), and salilwataɁ/Selilwitulh (Tsleil-Waututh) peoples.

MEMORANDUM

To: Director of Police Services' Street Checks Committee

Date: July 8, 2019

Subject: A Moratorium on Street Checks

About Pivot Legal Society

For nearly 20 years, Pivot Legal Society has highlighted the impact of policing on low-income communities and advocated for police accountability and policy reform. We recognize that the police occupy a uniquely powerful role in our society. For people who are marginalized as a result of things like poverty, disability, or ethnicity, police power is often experienced as oppressive, colonial, and classist. We believe that it is critical for law enforcement to respond to the needs of diverse communities and, where possible, cede its role to more appropriate responders (service providers, peers, nurses, harm reduction workers, etc.). Pivot's Police Accountability campaign works with communities to establish a system of transparent and accountable policing that ends the criminalization of poverty and holds law enforcement responsible for violence, discrimination, and disproportionate use of force.

Street Checks

This memorandum has been prepared for members of the Director of Police Services' Street Checks Committee. For the purpose of this memo, street checks (also known as "carding") refer to the unregulated practice of stopping people for information, including identification, outside of a police investigation.

Recommendation

The Director of Police Services should adopt a policy prohibiting the practice of street checks pursuant to her power to "establish standards respecting ... the promotion of unbiased policing and law enforcement services delivery".¹

Overview

Across Canada, "carding" is gaining more attention and more frequent use. It is a practice that has been employed by various law enforcement bodies, including the Toronto Police Service², Hamilton Police

¹ *Police Act*, RSBC 1996, c 367 at s. 40(1)(a.1)(viii).

² Toronto Police Services Board, *COMMUNITY ENGAGEMENTS* (Toronto: Toronto Police Services Board, 2013), online: Toronto Police Service <http://www.torontopolice.on.ca/publications/files/reports/2013pacerreport.pdf>

Service³, Edmonton Police Service⁴, and the Saskatoon Police Service.⁵ Street checks have received significant attention from media, law enforcement, and policymakers in the recent past largely due to their discriminatory application. Although street checks have been characterized by police forces as a legitimate policing practice, they are not enforced equally; they disproportionately impact urban Indigenous people, poor people, and Black people. This is not surprising, given the Supreme Court of Canada's recent affirmation in *R v Le* of research showing disproportionate policing of racialized and low-income communities.⁶ The practice of carding persists, however, even in spite of findings that "there is little to no evidence that a random, unfocused collection of identifying information has benefits that outweigh the social cost of the practice".⁷

The Vancouver Police Department (VPD) has come under significant criticism for its street check practices. As is the case in other jurisdictions, street checks involve racial profiling and the targeting of poor people, such as residents of the Downtown Eastside.

Based on data from the VPD, between 2008-2017:⁸

- 20% of women who were carded were Aboriginal
- 16% of men who were carded were Aboriginal
- 5.6% of men who were carded were Black

These statistics are particularly troubling in light of recent data collected by the federal government, which indicates that just 2.5% of Vancouver's population identifies as Aboriginal Peoples⁹ while Black men make up only 0.6% of the population.¹⁰

Following the release of the VPD's street check data, the Union of BC Indian Chiefs (UBCIC) and the BC Civil Liberties Association (BCCLA) filed a complaint with the Office of the Police Complaints Commissioner

³ Hamilton Police Service, *ACTION Addressing Crime Trends in Our Neighbourhoods* (Hamilton: Hamilton Police Service, 2013), online: Hamilton Police Service, https://hamiltonpolice.on.ca/sites/default/files/13-051_year_end_action_strategy_1.pdf

⁴ Edmonton Police Service, *Understanding Street Checks* (Edmonton: Edmonton Police Service, 2019), online: Edmonton Police Service <https://www.edmontonpolice.ca/News/UnderstandingStreetChecks>

⁵ Saskatoon Police Service, *Chief Statement - Police Contact Interviews with The Public* (Saskatoon: Saskatoon Police Service, 2018), online: Saskatoon Police Service <https://saskatoonpolice.ca/news/2018432>

⁶ *R. v. Le*, 2019 SCC 34.

⁷ Michael H. Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018), online: Ministry of the Solicitor General <https://www.mcscs.jus.gov.on.ca/english/Policing/StreetChecks/ReportIndependentStreetChecksReview2018.html>

⁸ Vancouver Police Department, *VPD Street Check Data 2008-2017 by Gender and Ethnicity Fields* (Freedom of Information Requests) (Vancouver: Vancouver Police Department, 2018), online: VPD <https://vancouver.ca/police/assets/pdf/foi/2018/vpd-street-check-data-2008-2017-by-gender-and-ethnicity-fields.pdf>

⁹ Statistics Canada, *Aboriginal Peoples: Fact Sheet for British Columbia*, (Ottawa: Statistics Canada, 2016), online: <https://www150.statcan.gc.ca/n1/pub/89-656-x/89-656-x2016011-eng.htm>

¹⁰ Statistics Canada, *Census Profile, 2016 Census Vancouver [Census metropolitan area], British Columbia and Alberta [Province]*, (Ottawa: Statistics Canada, 2018), online: <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?B1=Visible+minority&Code1=933&Code2=48&Data=Count&Geo1=CMACA&Geo2=PR&Lang=E&SearchPR=01&SearchT ext=Vancouver&SearchType=Begins&TABID=1>

against the VPD.¹¹ One month later, the UBCIC and BCCLA amended the complaint to account for the significant overrepresentation of Indigenous women in VPD street check data.¹² Notably, the VPD attempted to characterize a number of these street checks as supposed “wellness checks”. VPD Sgt. Jason Robillard stated that:

*Engaging and interacting with vulnerable people, especially at-risk, Indigenous women in the downtown east side, is a significant priority for the VPD. We know that historical issues have led to increased vulnerability of Indigenous women and girls and that Indigenous women experience higher rates of violent victimization than non-Indigenous women.*¹³

Legal Analysis

There is no legal justification for institutionalizing and authorizing the invented practice of street checks, effectively entrenching expanded police discretion and the loss of *Charter*-protected rights. By seeking to develop Provincial Policing Standards on street checks, even under the auspices of restraining the practice and reducing bias in policing, the Director of Police Services Policing and Security Branch is lending legitimacy to an otherwise illegal and racist practice. It is Pivot’s position that the only satisfactory Standard is one that prohibits the practice of street checks entirely.

Street checks¹⁴ are illegal: they are arbitrary detentions not authorized by statute or the common law.¹⁵ By inventing the practice of street checks, the police seek to escape the constitutional protections guaranteed to individuals during investigative detentions. Under well-developed law from the Supreme Court of Canada, the *Charter* requires that police only detain someone (physically or psychologically) if the officer has reasonable grounds to suspect that person is connected to a specific crime and the detention is reasonably necessary; once detained, the police must tell the person why they are being held and inform them of their right to legal counsel.¹⁶ The current law of investigative detention protects individual liberties and restrains police power during interactions. Any so-called ‘street checks’ properly fall under the existing power – and attendant responsibilities - of investigative detention.

¹¹ Union of BC Indian Chiefs & BC Civil Liberties Association, *Re: Policy Complaint Concerning Street Checks by the Vancouver Police Department* (Vancouver: BC Civil Liberties Association, 2018), online: BCCLA <https://bccla.org/wp-content/uploads/2018/06/UBCIC-BCCLA-OPCC-Complaint-re-Street-Checks-Jun-14-2018-Approved-1.pdf>

¹² Union of BC Indian Chiefs & BC Civil Liberties Association, *Re: Methodology for investigation of Service or Policy Complaint #2018-133 (Street Checks); OPCC #2018-14863* (Vancouver: BC Civil Liberties Association, 2018), online: BCCLA <https://opcc.bc.ca/wp-content/uploads/2018/07/14863-2018-07-17-UBCIC-BCCLA-Letter-to-Van-Police-Board-re-methodology-S....pdf>

¹³ Little, S. & Lazatin, E., *1 in 5 women ‘carded’ by Vancouver police in 2016 were Indigenous: complaint* (Global News BC/CKNW, 2018), online: Global News BC <https://globalnews.ca/news/4328087/1-in-5-people-carded-by-vancouver-police-in-2016-were-indigenous-women-complaint/>

¹⁴ A street check occurs when “identifying information [is] obtained by a police officer concerning an individual, outside of a police station, that is not part of an investigation.” (Tulloch, M. H. (2018). Report of the Independent Street Checks Review. Queen’s Printer for Ontario at xiv)

¹⁵ See for example: “[a] street check – unless it represents an authorized detention under the current law – is a form of arbitrary and illegal detention” (“Street Checks and Balances”, Ombudsman Ontario (2015) at page 6); and “Street Checks and Canadian Youth: A Critical Legal Analysis” (Masters of Law thesis by Christina Abbott (September 2017)) at page 43: “Street check detentions are not authorized by common law because street checks are conducted without satisfying the grounds required for an investigative detention. Additionally, there is no legal authority for a street check detention in most jurisdictions, as police officers in most jurisdictions lack statutory authority to conduct street checks... Ontario is an exception as Regulations were passed dealing with the collection of identifying information by police officers.”

¹⁶ Investigative detentions were described and constrained by the Supreme Court of Canada in *R v. Mann*, 2004 SCC 52; *R. v. Grant*, 2009 SCC 32.

The recent Supreme Court of Canada decision in *R. v. Le*¹⁷ demonstrates why street checks are in reality a form of investigative detention, and any attempt to artificially hive street checks off to create a new heading of police power is instead an end-run around existing constitutional rights.

In *Le*, the Court ruled that psychological detention occurs more frequently and rapidly in low income and racialized communities. In short, the individuals who are most likely to be street checked are the same individuals most likely to experience even brief police interactions as psychological detention.

Le sets out a number of factors which increase the risk a person will experience psychological detention. These factors generally apply to the communities who are most frequently subject to street checks:

Individual and community history with policing: A history of police interactions can contribute to an experience of psychological detention.¹⁸ The Court in *Le* found that “we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities.”¹⁹ As Pivot identified in a recently published research project, people who reported being subject to police interactions and street checks were disproportionately racialized and predominantly Indigenous.²⁰ Additionally, people who are homeless and rely on public space are the targets of policing as a constant and harmful institution.²¹ The frequency of street checks, detentions and arrests in some communities compounds the myriad other bylaw and private security interactions people may be subject to for relying on public space and/or the grey economy in order to survive and earn an income. By increasing the frequency of police stops, street checks increase the risk that an individual will perceive future interactions as mandatory, and therefore investigative detention.

Witnessing police interactions with your peers: When a person witnesses another person submitting to police authority, they are more likely to believe they too are detained. In the case of Mr. Le, watching others obey police commands “likely increased the perception and reality of coercion... A reasonable person would have thought they had no alternative, but to remain and obey.”²² Our experience working with highly policed communities, such as Vancouver’s Downtown Eastside, makes clear that not only are individuals frequently subjected to police interactions themselves, but they also frequently witness others involved in police interactions. As we have seen, and as the Court acknowledged in *Le*, highly policed communities tend to feel less agency in the midst of a police interaction. This results in a predictable feedback loop whereby individuals living and surviving in highly surveilled communities are likely to witness their peers being subjected to and submitting to street checks, and therefore are more likely to conclude they have no choice in the matter, and are in fact being detained.

¹⁷ *R. v. Le*, 2019 SCC 43 (“*Le*”)

¹⁸ *Le* at paras. 60, 109 – 110.

¹⁹ *Le* at para. 97, *see also* paras. 90-96.

²⁰ Bennett, D., & Larkin, D. J. (2018). *Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia* (“Project Inclusion”) at pp. 45, *see also* pp. 57 & 58.

²¹ Project Inclusion at pp. 45, *see also* pp. 52 & 53.

²² *Le* at para. 64.

The inability to retreat from police interactions: Poor and racialized communities often lack access to private space. Due to a lack of means, public spaces such as parks and city streets effectively function as living rooms and backyards. The Court in *Le* discussed the impact of poverty and resulting “visibility” in the context of minority youth:

[T]he impact of carding on minority youth, especially those who live in less affluent communities, is acute. As Justice Tulloch notes (at pp. 41-42):

Youth, especially Indigenous, Black and other racialized youth, and youth in low-income housing, are disproportionately impacted by street checks. “[W]hile the ‘street’ constitutes a meaningful part of everyday life for many marginalized youth, their presence and visibility in that space makes them ready targets for heightened police surveillance and intervention”. A street check is often a young person’s first contact with the police. [Footnote omitted.]²³

People who are homeless or otherwise rely on public space to socialize and survive frequently have no private space to retreat to. This includes people scraping by in the oftentimes street-based “grey economy”, such as sex workers and people engaged in street vending, who are reliant on public space to financially support themselves. As a result, daily interactions with police are commonly perceived as far more intrusive, as they have “no alternative place to retreat from further forced intrusion.”²⁴ To walk away from an officer when you are homeless or poorly housed is to simply move to another space that is subject to police surveillance. The indoor spaces that poor people have access to, such as shelters, community centers or public libraries are not ‘private spaces’ free from surveillance.

Summary of our Legal Analysis

The communities who are most frequently subject to police interactions are the same communities that are most frequently targeted for street checks: poor, racialized communities with a history of being targeted by police and a lack of private space to retreat to.

The practice of engaging in street checks then exacerbates these circumstances by increasing the number of police interactions a person and their community faces, contributing to their experience of being targeted and unable to avoid police engagement.

Accordingly, street checks bear the clear risk of undermining public confidence in police. The Court in *Le* considered this factor in *Le*:

As was said in the 1989 Solicitor General of Ontario’s Race Relations and Policing Task Force report (at p. 23) and, more recently, in the Tulloch Report (at p. 45 (footnote omitted)): “[t]he worst enemy of effective policing is the absence of public confidence.” The Tulloch Report went on to say that, “[w]hen a segment of society believes that it has been unfairly targeted by the police, it will de-legitimize the police in their eyes” (p. 45 (footnote omitted)). Effective law enforcement

²³ *Le* at para. 94

²⁴ *Le* at para. 51.

depends upon the co-operation of the public and the police must act in a manner that fosters co-operation and contributes to the public's perception of police legitimacy.²⁵

These same concerns were noted in a recent Vancouver Police Department report.²⁶

In summary, authorizing and regulating street checks would increase policing of already over-policed racialized and impoverished communities; infringe constitutional rights; and decrease public confidence in policing.

Social Harms of Street Checks

People living in poverty, and particularly Indigenous and racialized people, experience street checks with alarming regularity. The police routinely use a host of reasons to rationalise the practice, including responding to suspicious circumstances,²⁷ but also the paternalistic need to ensure people's well-being, as though police innately have the skills, training and resources to facilitate access to necessary supports. Engagements and interactions with the police, however, are rarely characterized as benevolent overtures by communities who are impacted by interlocking oppressions. Street checks are actually a racial macroaggression that is indicative of larger structures of racism. *Red Women Rising* (2019) describes carding as one of many forms of state violence enacted by the police. *Red Women Rising* specifically demands an "end [to] the policing practice of street checks".²⁸ Similarly, the *Halifax, Nova Scotia: Street Checks Report* (2019) examined the impact of police street checks on the Black community found that the checks "are not harmless and should thus not be condoned in the name of public safety or crime prevention."²⁹ Pivot maintains that marginalized communities possess expertise in their own safety and needs, and the use of street checks undermines trust with the police.

Despite cries from directly-impacted communities, police have utilized media to further justify the use of street checks and carding, which can be read as an attempt to bypass accountability. The mainstream media and police discourse tend to delegitimize and cast doubt upon the experiences of people who face carding, justifying it as a policing strategy; this practice is known as 'gaslighting'. As Tobias and Joseph observe, "over time, gaslighting emotionally and psychologically exhausts racialized and marginalized groups of the city when they realize that their voices are not being heard or taken seriously".³⁰

²⁵ *Le* at para. 162.

²⁶ Vancouver Police Department report to the Vancouver Police Board, September 2018: "Service or Police Complaint (#2018-133) on Street Checks" at pp. 24-25.

¹⁵Vancouver Police Department, "Statements on Street Checks from Chief Constable Adam Palmer" (Media Releases, 2018) (Vancouver: Vancouver Police Department), online: VPD <https://mediareleases.vpd.ca/2018/06/14/statement-on-street-checks-from-chief-constable-adam-palmer/>

²⁸ Carol Muree Martin and Harsha Walia, "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (2019), Downtown Eastside Women's Centre, p. 156.

²⁹ Scot Wortley, "Halifax, Nova Scotia: Street checks report" (2019)(Halifax: Nova Scotia Human Rights Commission), online: NS Human Rights Commission https://humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf

¹⁶Heston Tobias and Ameil Joseph, "Sustaining Systemic Racism through Psychological Gaslighting: Denials of Racial Profiling and Justifications of Carding by Police Utilizing Local News Media" (2018) 1 SAGE.

Although carding and street checks are framed as contemporary policing practices, they hearken to previous tools used to manage Indigenous and racialized people. For example, the historic “Pass System” legislated that Indigenous people required permission slips issued by Indian Agents to leave reserves for set time periods. Without the slip, Indigenous people could be arrested and detained.³¹ The Pass System enabled “powerful and illegal control of people” and lasted over 60 years.³² Historic policies inform people’s contemporary sense of the police, including their power and control. Although police have argued that their work “ensure[s] the well-being of individuals in the community,”³³ their surveillance of Black, Indigenous, and poor communities actually erases and undermines trust in policing agencies. For undocumented migrants, the practice of carding can have deleterious consequences, potentially leading to detention, deportation, or death in custody.³⁴

To summarize, carding is an often-used police tactic that is enacted by police discretion alone. This discretion is exercised in ways that lead to Indigenous and Black communities being over-scrutinized, dehumanized, and violated. Currently, the prevalent narratives about carding mislead the public about its effectiveness and utility; carding is described as both an effective tactic in the arsenal of police procedures and as a proactive tool to conduct wellness assessments. These narratives, predominantly employed by law enforcement, obfuscate the fact that this practice has no legal premise, and further erases harmful consequences and valid concerns articulated by people who have been subject to carding or street checks. Accordingly, such calculated narratives obscure the impact on the daily lives of people living in heavily policed areas (i.e. low-income neighbourhoods, racialized neighborhoods), or areas where racialized and poor people are seen as “out of place” and made disposable through street checks.

Conclusion

Street checks, carding, and any other set of policing practices that permits stopping people for information outside of an investigation evade the Constitutional protections guaranteed to individuals during investigative detentions. The lack of protection, coupled with the incredible amount of social harms experienced by Black, Indigenous, racialized, and low-income communities due to these types of practices highlights how street checks erode trust with police. We recommend that the Director of Police Services call for a moratorium on street checks immediately.

¹² Circles For Reconciliation, “The Pass System: Segregation in Canada” (Circles for Reconciliation, 2018).

¹³ *Ibid.*

³³ Vancouver Police Department, “Report to the Vancouver Police Board: Service or Policy Complaint (#2018-133) on Street Checks” (Vancouver: Vancouver Police Department), online: VPD: <https://vancouver.ca/police/policeboard/doc/SP-3-2-VPD-report-back-and-Understanding-Street-Checks-Appendix-Report.pdf>

³⁴ Ministry of Justice, Coroners Service, “Verdict at Coroner’s Inquest” (Burnaby: Ministry of Justice), online: Province of British Columbia <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/inquest/2014/vega-jimenez-lucia-dominga-2013-0380-0004-verdict.pdf>