

ARTICLE

A ROSE BY ANY OTHER NAME: WELL-BEING CHECKS, A NEW MANIFESTATION OF DISCRIMINATORY POLICING?

Leila Gaind *CITED: (2020) 25 *Appeal* 3

ABSTRACT

Citizens and advocacy groups across Canada have called for an end to street checks, a practice that involves the police stopping and questioning people on the street, absent grounds for arrest or detention, to collect identifying information. Across jurisdictions, the data reveals that street checks disproportionately target Black, Indigenous, and other racialized and marginalized persons. Police departments have historically justified these racial disparities by framing street checks as a proactive policing tool, but in recent years, the rhetoric around street checks has shifted. Now, street checks are a way for officers to check in on the “well-being” of marginalized community members. In Vancouver, the VPD has framed this practice as promoting a social good, but this article contends that well-being checks are another manifestation of arbitrary street checks. This article first examines how street checks and the discourse surrounding them have evolved in Toronto, leading to the current moment, where departments face mounting pressure to justify racial disparities in their data. Next, this article shifts its focus to the Downtown East Side (DTES) of Vancouver, where police are facing a similar public reckoning, and have responded with one specific, novel justification: street checks are justifiable as a proactive policing tool that protects the interests of society’s most vulnerable. This article concludes by arguing that well-being checks may function as a new manifestation of discriminatory policing, one that responds to a specific history and context but duplicates the experience of an arbitrary street check.

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I. INTRODUCTION

In recent years, police departments across Canada have faced scrutiny because racialized,¹ Indigenous,² and marginalized³ persons are disproportionately subject to the police practice of “carding” or “street checks.” These checks typically involve police stopping and questioning people on the street, absent grounds for arrest or detention, to collect identifying information, which is then entered and stored in a centralized database for intelligence gathering purposes.⁴

Advocates defend the practice as a necessary tool for solving and preventing crime, but the resulting harm to those inordinately targeted, who find themselves subject to pervasive and ongoing harassment and surveillance, is undeniable.⁵ Paired with mounting evidence regarding the inefficacy of street checks,⁶ the practice is becoming increasingly difficult for police departments to justify.

The most recent, high-profile indictment comes from the Ontario Court of Appeal’s Honourable Michael Tulloch. In January 2019, Justice Tulloch released his long-awaited *Report of the Independent Street Checks Review*,⁷ which confirmed what critics of carding have been saying for years: it is an ineffective policing tool that comes at a tremendous social cost, and as such, should be banned.⁸ While Justice Tulloch’s condemnation of carding marks an important turn in public discourse, it is unclear how his findings will

1 “Racialization” refers to the processes that produce and sustain race as a real and unequal category.

2 As the Ontario Human Rights Commission explains, while Indigenous people are also racialized, this designation “fails to recognize that many members of First Nations, Metis and Inuit communities object to being referred to as a racial group,” and thus I will be using the term Indigenous separately to give recognition to the unique historical experience of Indigenous communities in Canada. See Ontario Human Rights Commission, “Under Suspicion: Research and consultation report on racial profiling in Ontario” *Ontario Human Rights Commission* (April 2017), online: <http://ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf> at 15 archived at [<https://perma.cc/9WND-VU3P>].

3 While street check data clearly indicates that racialized and Indigenous persons are subject to disproportionate police attention, the way in which poverty and social marginalization also determine who is unfairly targeted has been more difficult to track. However, policing poverty is a pervasive, inextricable problem that often affects those who experience intersecting forms of oppression.

4 Law Union of Ontario, “Submissions to Toronto Police Services Board Re: Community Contacts Policy” *Law Union of Ontario* (25 May 2014), online: <<http://www.lawunion.ca/tag/carding/>> archived at [<https://perma.cc/YA6Z-Q4UB>].

5 The harmful effects of racial profiling are well-documented. As Desmond Cole stated, “because of that unwanted scrutiny, that discriminatory surveillance, I’m a prisoner in my own city.” See Desmond Cole, “The Skin I’m In” *Toronto Life* (21 April 2015), online: <<https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>> archived at [<https://perma.cc/7R9V-ESSY>].

6 CBC News, “An Ontario judge says carding doesn’t work. But will politicians listen?” *CBC News* (4 January 2019), online: <<https://www.cbc.ca/news/canada/toronto/ontario-carding-review-michael-tulloch-1.4964768>> archived at [<https://perma.cc/S576-SR2A>].

7 The Honourable Michael T. Tulloch, *Report of the Independent Street Checks Review* (Queen’s Printer for Ontario: 2018), online: <<http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf>> archived at [<https://perma.cc/ZA24-CKBP>]. (“The Tulloch Report”)

8 On April 17, 2019, Nova Scotia’s Justice Minister directed police across the province to immediately yet temporarily suspend the practice of street checks. This decision came shortly after a landmark report indicated that Black people in Halifax were being disproportionately targeted. See Taryn Grant, “Nova Scotia suspends police street checks” *The Star Halifax* (17 April 2019), online: <<https://www.thestar.com/halifax/2019/04/17/nova-scotia-announces-immediate-suspension-of-police-street-checks.html>> archived at [<https://perma.cc/K6D6-SWZ6?type=image>].

affect police policies within and beyond Ontario, in part because the practice manifests differently across jurisdictional lines.⁹

Most police departments now publicly condemn what has been conventionally understood to be carding.¹⁰ Yet, there are disparities between policy and practice, and it is within this liminal space that racialized, Indigenous, and marginalized people continue to get caught. These communities are still carded at disproportionate rates. However, these interactions are not recognized as discriminatory because police departments can point to other reasons for the stops: namely, the individual in question may (1) exhibit suspicious behaviour, (2) be present in high-crime areas, or (3) appear to need assistance.¹¹ These reasons are repeatedly used to legitimize police interactions and circumvent allegations of racial profiling, even though the data continues to reveal racial discrepancies.¹² The discriminatory history of the first two reasons for stops—what behavior looks suspicious and what neighbourhoods are labelled high crime—have been thoroughly explored.¹³ However, how racialized, Indigenous, and marginalized people may be deemed “in need of assistance” for the purpose of a street check has not, as of yet, been examined in great depth.

Recent data revealing the overrepresentation of Indigenous women in Vancouver’s street check data suggests that well-being checks may not be benign, nor fundamentally different than their controversial counterparts. In May 2018, following two freedom of information requests, the Vancouver Police Department (“VPD”) released data on street checks for the 2007–2018 period.¹⁴ The data indicated that Black and Indigenous persons were disproportionately subject to street checks, leading the British Columbia Civil Liberties Association and the Union of British Columbia Indian Chiefs to file a complaint with the Office of the Police Complaint Commissioner, calling for an investigation into the practice.¹⁵ In response to this complaint, the VPD conducted an internal review¹⁶ of their

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- 9 Kristy Hoffman, Patrick White and Danielle Webb “Carding across Canada: Data show practice of ‘street checks’ lacks mandated set of procedures” *The Globe and Mail* (19 June 2017), online: <<https://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/>> archived at [<https://perma.cc/5B6U-UNNX>].
- 10 Tulloch, *supra* note 7, at 36.
- 11 Chelsea Laskowski, “Saskatoon police board to discuss proposed carding policy” *CBC News* (21 February 2019), online: <<https://www.cbc.ca/news/canada/saskatoon/saskatoon-police-carding-new-policy-1.5027662>> archived at [<https://perma.cc/DXJ7-WDCL>].
- 12 Anjali Patil, “Halifax residents call for stop to street checks after racial profiling report” *CBC News* (30 March 2019), online: <<https://www.cbc.ca/news/canada/nova-scotia/halifax-street-checks-racial-profiling-rally-1.5078428>> archived at [<https://perma.cc/R6GZ-28J9>].
- 13 See, for example, David M. Tanovich’s book, *The Colour of Justice*, for a thorough exploration of how race, ethnicity, and religion have been used as markers of suspicion by police and security officials; David M. Tanovich, *The Colour of Justice*, (Toronto: Irwin Law, 2006). For a discussion of how the racial composition of a neighbourhood may lead to perceptions that the area is “high crime,” see, for example, Lincoln Quillian and Devah Pager, “Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime” (2001) 107: 3 *American Journal of Sociology* 717 and Brian Jordan Jefferson, “Predictable Policing: Predicting Crime Mapping and Geographies of Policing and Race” (2018) 108:1 *Annals of the American Association of Geographers* 1.
- 14 An excel spreadsheet of the data can be accessed here: <<https://vancouver.ca/police/assets/pdf/foi/.../vpd-street-check-data-2008-2017.xlsx>> archived at [<https://perma.cc/4QQ9-4336>].
- 15 Dylan Mazur, “Unpacking the public dialogue on discriminatory street checks in British Columbia” *British Columbia Civil Liberties Association* (30 August 2018), online: <<https://bccla.org/2018/08/unpacking-the-public-dialogue-on-discriminatory-street-checks-in-british-columbia/>> archived at [<https://perma.cc/G524-4UGZ>].
- 16 An independent review of the department’s policies and practices was underway, as of the time of this article’s writing. See Mike Howell, “Police board orders independent study of VPD ‘street checks’” *Vancouver Courier* (4 October 2018), online: <<https://www.vancourier.com/news/vancouverpolice-board-orders-independent-study-of-vpd-s-street-check-practice-1.23443814>> archived at [<https://perma.cc/LD83-6TJC>].

data and policies, finding that there is “no statistical basis”¹⁷ to establish that street checks are carried out in an arbitrary, discriminatory manner. This conclusion is at odds with the lived experiences of many Black and Indigenous community members, a number of whom have spoken publicly about how their interactions with the VPD appear to be targeted.¹⁸

The VPD internal review justifies the practice of street checks as proactive policing, a necessary and effective strategy for not only curbing criminal activity but also ensuring the well-being and safety of vulnerable community members. The VPD asserts that “well-being” checks are a practice that encourages officers to interact with and check-in on those with drug dependency issues, those experiencing homelessness, and other at-risk populations, interactions that are typically documented and “[followed] up on... to ensure the person’s condition has not deteriorated.”¹⁹ Anecdotal accounts indicate that these types of checks occur at much higher frequencies than the data indicates,²⁰ and officers appear to be afforded considerable discretion to act in the interests of well-being.²¹

While carding has faced a public reckoning,²² well-being checks have evaded scrutiny, framed as a practice that promotes a social good. Yet, as this article hopes to show, well-being checks are simply another manifestation of street checks, and, in the same way, continue to disproportionately harm racialized, Indigenous, and marginalized communities. They are necessarily targeted interactions, supposedly undertaken to fulfil the broad policing duty of ensuring the safety and security of society’s most vulnerable. Importantly, however, under the pretence of a well-being check, the police may be able to evade and justify allegations of racial profiling. While the VPD has publicly condemned the use of race as a proxy for criminality,²³ “wellness,” or specifically, lack thereof, may be operationalized as a proxy for race and socioeconomic status, thus justifying the well-being check as non-arbitrary while having the same detrimental impact on the affected party.

This article begins by examining how street checks and the discourse surrounding them have evolved in Toronto, culminating in the current moment, where police departments face mounting pressure to justify racial discrepancies in their data. Then, this article moves to the Downtown East Side (“DTES”) of Vancouver, where police have faced a

17 Vancouver Police Department, *Understanding Police Checks: An Examination of a Proactive Policing Strategy*. (September 2018), online: <<https://vancouver.ca/police/assets/pdf/understanding-street-checks.pdf>> at 4 archived at [<https://perma.cc/LD83-6TJC>].

18 Cherie Seucharan “Police carding data may not show full extent of police interactions on the street” *The Star Vancouver* (16 June 2018), online: <<https://www.thestar.com/vancouver/2018/06/16/police-carding-data-may-not-show-full-extent-of-police-interactions-on-the-street.html>> archived at [<https://perma.cc/AR45-5Z6K>].

19 Vancouver Police Department, *supra* note 17 at 14.

20 Seucharan, *supra* note 18.

21 The report also does not indicate the processes that officers follow when dealing with persons they deem as vulnerable, and little evidence is offered to corroborate the narrative that such interactions have a positive effect on those checked.

22 As of January 23, 2020, the VPD released a new policy governing street checks. This policy was developed pursuant to the province’s new Provincial Policing Standards. While the policy does not permit arbitrary street checks, it fails to mention the circumstances in which well-being may be conducted. In essence, it reiterates the law and *Charter* protections surrounding police-civilian interactions; information that police should already know. Moreover, given that police are already expected to know the law that governs their actions, this policy does not add anything substantive to the conversation, and will likely not be effective in restraining discriminatory conduct. See Vancouver Police Department, *Addition to the Regulations and Procedures Manual Section 1.6.53 Conducting and Documenting Street Checks (and Police Stops)* (January 2020), online: <https://vancouver.ca/police/policeboard/agenda/2020/0123/2001P01-Street-Checks-Policy.pdf?utm_source=vancouver%20is%20awesome&utm_campaign=vancouver%20is%20awesome&utm_medium=referral> archived at [<https://perma.cc/U3VX-46L7>].

23 Vancouver Police Department, *supra* note 17 at 11.

similar public reckoning but have responded with one explanation in particular: racial discrepancies in street checks are justified as proactive policing that promotes the well-being of marginalized community members. This article concludes by arguing that well-being checks function as a new manifestation of discriminatory policing, one that responds to a specific history and context, but nonetheless duplicates the harms of arbitrary street checks. In light of the history of policing in Toronto and Vancouver, we must remain wary of how this shifting discourse around street checks may reify existing discriminatory police practices as not only an acceptable approach to socio-economic vulnerability but as a socially desirable one that comes at the expense of marginalized people.

Evidently, the overrepresentation of racialized, Indigenous, and marginalized people within all dimensions of the criminal justice system is not a natural occurrence and must be understood in reference to the violent histories and enduring sociopolitical and economic structures that dispossess and police people deemed deviant or threatening. While this article does not endeavour to un-map all of these entanglements, it accepts as a fundamental premise that context matters, and that the relationships that currently manifest between race, space, and the law²⁴ did not spring forth from a vacuum.

II. HISTORY OF STREET CHECKS

The street check, or the practice of law enforcement requesting identification more broadly, has a long lineage in Canada, “the purpose and effects [of which] vary, based on the historical perspective from which it is viewed.”²⁵ Police have consistently maintained that street checks are simply a harmless form of proactive policing, but for racialized communities, the practice bears a striking resemblance to historically racist policies aimed at their disenfranchisement.²⁶ As Justice Tulloch explains, many members of Canada’s Black community analogize carding to the enforcement of slave passes,²⁷ which took the form of written documents that served as proof that slave owners had permitted their slaves to move freely in a designated area for a specified period. Indigenous communities have similarly likened street checks to the off-reserve pass system,²⁸ which was designed to control their movement on and off reserves.²⁹ Those who breached the pass system faced punitive consequences, often in the form of incarceration.³⁰

Both slave passes and the off-reserve pass system served as explicit mechanisms of oppression, segregation, and surveillance, aimed at ensuring that Black and Indigenous communities stayed within carefully demarcated spaces. These practices have not been forgotten by those affected, who have observed that “random carding in its current form [shares] certain public shaming and fear-inducing characteristics with these historic practices by showing Indigenous, Black and other racialized people that their presence in certain spaces [is] always in question.”³¹ While inter-generational trauma and memory persist within many

24 *Race, Space and the Law* is the name of a book by Sherene Razack that draws upon critical geography, sociology, law, education, critical race and feminist studies to “unmap” specific spaces and the way in which they implicate racialized and Indigenous bodies. See Sherene Razack, *Race, Space, and the Law: Unmapping a White Settler State* (Between the Lines: Toronto, 2002).

25 Tulloch, *supra* note 7 at 36.

26 *Ibid.*

27 *Ibid* at 37. This observation arose in Justice Tulloch’s consultations with Indigenous, Black and other racialized people.

28 This system was created by the Department of Indian Affairs in 1885.

29 Tulloch, *supra* note 7 at 37.

30 *Ibid.*

31 *Ibid.* This observation arose in Justice Tulloch’s consultations with Indigenous, Black and other racialized people.

affected communities, a broader phenomenon of societal and institutional forgetting has repeatedly silenced those who dare remember Canada's violent past.³²

To see how well-being checks may duplicate the problems inherent to arbitrary street checks, it is important to understand how both the practice and the rhetoric surrounding it have evolved. This section begins by mapping out a history of street checks in Toronto.³³ It then explores the incongruent discourses that have emerged as allegations of racial profiling have gained credence and entered the public consciousness and is followed by an overview of the Government of Ontario's response to these allegations.³⁴

A. The Provenance of "Carding" in Toronto

What we now understand to be carding has been traced back to 1957, when the newly minted Metropolitan Toronto Police Force used street checks to gather information on persons of interest.³⁵ The relevant information was recorded on "Suspect Cards" or "R41 Cards," and then subsequently passed along to detectives to assist with their investigations.³⁶ For several decades, the targeted practice of street checks became increasingly indiscriminate as police were conferred with broader discretion to investigate people on the street, particularly if the person was known to police.³⁷

The practice further intensified in 2006, when police instituted the Toronto Anti-Violence Intervention Strategy ("TAVIS"), a specialized division that arose in response to widespread anxieties related to the preceding "Year of the Gun."³⁸ Described as a "community mobilization strategy,"³⁹ TAVIS increased police presence in designated high-crime neighbourhoods, where officers would conspicuously patrol the area, engaging with community members for alleged intelligence gathering purposes. The majority of those stopped were not suspected of a crime, nor were they exhibiting suspicious behaviour,

32 When the police, politicians, and the other institutions of power deny and/or justify racial profiling, they are in effect silencing and gaslighting racialized communities, whose lived experiences are invalidated and disbelieved.

33 While the history and evolution of street checks in Toronto is well documented, I had difficulty tracing the roots of the practice in Vancouver. Thus, this section will focus primarily on Toronto, as it has been the site of thorough reporting and conversation.

34 Despite the longstanding, biased treatment of racialized persons by law enforcement in Canada, history has repeatedly shown that anecdotal accounts of discrimination are typically not afforded belief by the general public unless the statistics are able to prove it. The African Canadian Legal Clinic—as cited by Charles C. Smith, *Conflict, Crisis, and Accountability: Racial Profiling and Law Enforcement in Canada* (Canadian Centre for Policy Alternatives, 2007: Ottawa) at 30—offers the following statement in their report entitled "Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination":

Since the end of the 19th and beginning of the 20th century, there has been ample evidence identifying the disproportionate impact of the criminal justice system on peoples of African descent.... Despite the expression of concern by the African Canadian community regarding these facts, there has been little leadership from either government or the public to address these issues. The only time attention has been paid to these serious concerns is after a significant event, usually one in which police use of violence and/or force has resulted in serious injury or death.

35 Jim Rankin, "How the cards have played out since 1957" *Toronto Star* (26 May 2015), online: <<https://www.thestar.com/news/gta/2015/05/26/how-the-cards-have-played-out-since-1957.html>> archived at [<https://perma.cc/5CN2-VDCD?type=image>].

36 Tulloch, *supra* note 7 at 38.

37 Rankin, *supra* note 35.

38 2005 was named the "Year of the Gun" because it resulted in 52 gun-related deaths. See Tulloch, *supra* note 7 at 38.

39 Public Safety Canada, *Toronto Anti-Violence Intervention Strategy* (Synopsis) (2013), online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cnmcs-plcng/ndx/snpss-en.aspx?n=72>> archived at [<https://perma.cc/3H9X-G95A>].

revealing how arbitrary the practice had become over the years. While the stated intention of TAVIS was to reduce gun violence, it gained notoriety for producing the city's highest carding rates, affecting predominantly Black communities.⁴⁰

In 2008, the practice underwent a further change when the information filled out for “any person or vehicle of interest during the course of [an officer’s] duties,” then referred to as “Field Information Reports (“FIR”),” could be entered directly into a computer database.⁴¹ By 2012, less than one in 10 cards were completed specifically for intelligence gathering purposes, and the practice had expanded beyond the boundaries of the designated crime hotspots.⁴² Since this time, the practice has been subject to both rebranding and technological advancement, yet the essential characteristics have remained mostly unchanged.

While conversations surrounding street checks have been particularly pronounced in Toronto, the practice takes place nationwide, often under different labels. Vancouver,⁴³ Edmonton,⁴⁴ and Halifax,⁴⁵ amongst other jurisdictions, engage in “street checks”; Calgary has carried out “check-up slips”⁴⁶ and “info-posts”⁴⁷; and Saskatoon has recently re-labelled the practice “contact interviews.”⁴⁸

B. The Emergence of Allegations of Racial Profiling

In 2002, the *Toronto Star* published the first of a series of articles focused on the prevalence of racial profiling of Black people. The series, entitled *Singled Out*, was based on the Toronto Police’s arrest and charge data from 1996–2002, which revealed significant disparities between the way Blacks and whites were treated by law enforcement.⁴⁹ As Carol Tator and Frances Henry detail extensively in their book, the series sparked widespread conversation and controversy, generating hundreds of news stories, opinion pieces, and editorials, ultimately leading to what the authors describe as a “discursive crisis.”⁵⁰ This crisis revealed ruptures between majority-minority relations in Canada; while the series

40 Wendy Gillis, “Experts warn against return to policing that targets ‘communities and not individuals’” *Toronto Star* (6 July 2018) online: <<https://www.thestar.com/news/gta/2018/07/06/experts-warn-against-return-to-policing-that-targets-communities-and-not-individuals.html>> archived at [<https://perma.cc/N9JG-F4Z3?type=image>].

41 Rankin, *supra* note 35.

42 *Ibid.*

43 Vancouver Police Department, *supra* note 17.

44 Edmonton Police Service, “Understanding Street Checks” (29 June 2017), online: <<https://www.edmontonpolice.ca/News/UnderstandingStreetChecks>> archived at [<https://perma.cc/NM56-5RWY>].

45 Anjali Patil, “Halifax residents call for stop to street checks after racial profiling report” *CBC News* (30 March 2019), online: <<https://www.cbc.ca/news/canada/nova-scotia/halifax-street-checks-racial-profiling-rally-1.5078428>> archived at [<https://perma.cc/R6GZ-28J9>].

46 CBC News, “Police carding a useful tool for Calgary police, says chief” *CBC News* (28 June 2016), online: <<https://www.cbc.ca/news/canada/calgary/calgary-police-carding-meeting-1.3655719>> archived at [<https://perma.cc/5JX6-DGPK>].

47 CBC News, “Calgary police ‘carding’ practice to be modernized, made more accountable” *CBC News* (5 October 2016), online: <<https://www.cbc.ca/news/canada/calgary/calgary-police-carding-1.3791827>> archived at [<https://perma.cc/M28U-DFW8>].

48 Guy Quenneville, “What Sask. civilians should know about new police street check rules” *CBC News* (6 June 2018), online: <<https://www.cbc.ca/news/canada/saskatoon/sask-police-commission-contact-interview-1.4693987>> archived at [<https://perma.cc/7PYP-7NH5>].

49 For example, the data showed that Black drivers were disproportionately ticketed for violations that surfaced only following a traffic stop, and were significantly more likely to be held for bail than white offenders for drug possession charges. See Carol Tator and Frances Henry, *Racial Profiling in Canada: Challenging the Myth of ‘A Few Bad Apples’* (Toronto: University of Toronto Press Incorporated, 2006) at 4.

50 *Ibid* at 5.

validated the lived experiences of Black community members and confirmed what many targeted individuals had been claiming for years, it faced considerable critique from those in institutions of power. Police Chief Julian Fantino's indignant remarks demonstrate:

We do not do racial profiling. We do not deal with people on the basis of their ethnicity, their race, or any other factor. We're not perfect people but you're barking up the wrong tree. There's not racism... it seems that, according to some people, no matter what honest efforts people make, there are always those who are intent on causing trouble.⁵¹

The rhetoric employed by many white elites⁵² perpetuated both the “denial of racial profiling in policing; and the social construction of Blacks as the ‘other.’”⁵³

The discourse of denial relies on the fiction that Canadian society and its institutions are colour-blind and structured around the principles of equality and liberalism. To concede that law enforcement agencies practice racial profiling would be to reify racism and undermine the democratic values on which Canada prides itself. Instead, by dismissing racial profiling outright, those in power attempted to reduce the widespread discrimination experienced by the Black community to individualized instances of racial bias, carried out by “a few bad apples.” This framing ignored the systemic nature of racism,⁵⁴ and deflected responsibility from the institution to the individual, in effect insulating the broader structure of policing from critique.⁵⁵

Moreover, while denying the existence of racial profiling, white elites simultaneously suggested that criminality was inherent to the Black community, thus justifying the disproportionate police attention they received. This was particularly amplified in regard to the discourse surrounding the “war on drugs” and the moral panic it engendered. Beginning in the mid-1980s, Canada mimicked the American approach to drug enforcement, creating a racialized profile of a drug courier that led to the overrepresentation of Blacks arrested for drug offences. This unsurprisingly led to racial discrepancies within the criminal justice system more broadly, confirming the legitimacy of the racialized profile itself, and circuitously legitimizing increased surveillance.⁵⁶ By racializing crime in this way, police and politicians alike essentially condoned the very thing they claimed did not occur: racial profiling. This rhetorical dance displaced blame one step further, from the institution, to the “bad apples,” to their targets, who were characterized as unruly,

51 Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (November 2018), online: <http://ohrc.on.ca/sites/default/files/TPS%20Inquiry_Interim%20Report%20EN%20FINAL%20DESIGNED%20for%20remed_3_0.pdf#overlay-context=en/news_centre/ohrc-interim-report-toronto-police-service-inquiry-shows-disturbing-results> at 43 archived at [<https://perma.cc/HW4K-BMXW>]

52 Included within this group of white elites were the chief of police, the police services board, the Ontario minister for public safety and security, the mayor of Toronto, and the president of the Toronto Police Association. See Smith, *supra* note 34 at 25.

53 Tator and Henry, *supra* note 49 at 123.

54 Racial profiling is more than individualized expressions of prejudice, and “occurs when law enforcement or security officials, consciously or *unconsciously*, subject individuals at any location to heightened security based solely or in part on race, ethnicity, Aboriginality, place of origin, ancestry, or religion, or on stereotypes associated with any of these factors rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity.” [emphasis added] See Tanovich, *supra* note 47 at 13.

55 This framing also gave credence to the perspective that “racial bias” could be corrected through simple changes such as increasing cultural sensitivity training and hiring more officers of colour. See Tator and Henry, *supra* note 49, at 17.

56 David M. Tanovich, *The Colour of Justice* (Toronto: Irwin Law, 2006), at 85–87.

disruptive, and dangerous.⁵⁷ Not only did this “othering” legitimize racist stereotypes, it also generated a narrative of victim-blaming whereby Toronto’s Black community was chastised and derided for failing to take responsibility for its collective actions and alleged propensity for deviance. As Tator and Henry explain, “the voice of white public authority focused strongly and consistently on the Black community’s failure to act like ‘responsible citizens’”⁵⁸ and further reinforced and perpetuated the notion that race and crime are inextricably linked.

While responses to *Singled Out* were polarizing, the series incited a public conversation. The following year, the Kingston Police launched an experimental data collection project,⁵⁹ intended to gather information on the kinds of contacts being made between officers and the broader public. As stated by Chief William J. Closs, “this project grew out of our genuine interest in addressing the issue of racial profiling in policing” and “was an honest effort to move beyond denial and to cause change.”⁶⁰ In 2005, the results were released, indicating that Black residents, specifically young males, were more likely to be stopped and questioned than any other demographic group.⁶¹ That year, the Ontario Human Rights Commission also released a report entitled *Paying the Price*, featuring the stories and experiences of those subject to racial profiling.⁶² These accounts not only demonstrated the toll that racial profiling has on its targets, but also indicated how the dismissal of concerns erodes public confidence and breeds mistrust and antagonism.

In 2010, the *Toronto Star* released a second series of articles, entitled *Race Matters*, that documented the continued prevalence of racial profiling in the city. While the 2002 reporting focused on the disproportionately harsh treatment of racialized persons in the criminal justice system, *Race Matters* focused on how racialized persons were subject to street checks in incommensurate rates. The series included both anecdotal accounts of carding and a detailed analysis of the city’s contact card data for the 2003–2008 period.⁶³ Over those six years, the Toronto Police filled out 1.7 million contact cards, the majority pertaining to non-criminal encounters.⁶⁴

57 Tator and Henry, *supra* note 49 at 13.

58 *Ibid* at 139.

59 From 2003–2004, officers were required to make a report each time they conducted a traffic or pedestrian stop.

60 William J. Closs, *The Kingston Police Data Collection Project: A Preliminary Report to the Kingston Police Services Board* (17 March 2005), online: <<https://qspace.library.queensu.ca/bitstream/handle/1974/8656/Bias-Free%20Policing%20-%20Kingston%20Police.pdf?sequence=1&isAllowed=y>> at 1 archived at [<https://perma.cc/7HJY-L2MY>].

61 Scott Wortley and Lysandra Marshall, *Bias Free Policing: The Kingston Data Collection Project Final Results* (20 September 2005), online: <<https://qspace.library.queensu.ca/bitstream/handle/1974/8655/Bias%20free%20policing%20-%202005%20-%20Wortley%20-%20Policy.pdf?sequence=1&isAllowed=y>> archived at [<https://perma.cc/G4LU-5DU8>].

62 Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (2005), online: <http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf> archived at [<https://perma.cc/2Z8U-ML53>].

63 Andrew Bailey and Jim Rankin, “Toronto Star Analysis of Toronto Police Service Data – 2010: Advanced Findings” (2010), online: <https://www.thestar.com/content/dam/thestar/static_images/advancedfindings2010.pdf> archived at [<https://perma.cc/R536-MH8R>].

64 “General investigation” garnered the largest number of entries, with 158,685 of the 289,413 stops falling under this heading. Close behind were “traffic stop” (47,593), “vehicle related” (15,500), and “loitering” (10,885), with more serious offences accounting for comparatively few contacts. See *Ibid* at 9.

By this time, the prevalent discourse had shifted from denial to justification, as the influx of affirmative data made outright dismissal an untenable position.⁶⁵ However, despite the acknowledgement that racial profiling does occur, the police continued to defend the practice of carding as a critical crime-solving tool, intended to promote public safety.⁶⁶

In 2013, the *Toronto Star* published a third series entitled *Known to Police*, analyzing data from the 2008–2012 period. Again, the analysis revealed stark racial discrepancies, exceeding the proportion of Black New Yorkers subject to the city’s racist stop and frisk policy.⁶⁷ The chair of Toronto Police Services Board, Alok Mukherjee, called these statistics “devastating” and “unacceptable”⁶⁸ and challenged the long-repeated reprise that the prevalence of gun violence justified “the legitimacy of potentially carding every single young black man in the city.”⁶⁹ Moreover, despite heightened awareness and widespread criticism of the stops, the analysis revealed that the frequency at which carding occurred had actually increased.

In the succeeding years, numerous reports continued to affirm both the prevalence of racial profiling in the practice of carding, and its destructive consequences. Perhaps the most seminal piece on racial profiling comes from Desmond Cole, a reporter and activist who shared his own experiences with carding in the award-winning editorial “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black.”⁷⁰ As Cole explains, Black people must always be “prepared to prove [they are not] criminals,”⁷¹ and must carry the burden of being considered “suspect” or an “outsider” in predominantly white spaces.⁷² The devastating effects of carding also circulated widely in the *Star* piece entitled, “The man police can’t stop carding,”⁷³ which chronicled the ongoing surveillance, harassment, and trauma that Dale James experienced at the hands of the police. James was subject to 43 encounters with the police from April 2006 to

65 However, as noted in the *Star*, the response to *Race Matters* was largely without teeth: “Instead of denying that racial profiling occurs, the chief and other senior officers admit it happens, imply it’s normal, and go on to explain why the police practice of carding so many blacks is not something we should worry about.” See John Sewell, “Racial profiling still has no place here” *Toronto Star* (11 February 2010), online: <https://www.thestar.com/opinion/2010/02/11/racial_profiling_still_has_no_place_here.html> archived at [<https://perma.cc/R5WX-SGPR>].

66 Chief Bill Blair indicated that officers were being deployed to neighbourhoods that experience high victimization, typically those areas where poverty and race intersect, and emphasized that being carded does not amount to a criminal record. While not explicitly attributing criminality with race, this justification nonetheless legitimized the over-policing of these communities. See Jim Rankin, “When good people are swept up with the bad” *Toronto Star* (6 February 2010), online: <https://www.thestar.com/news/gta/2010/02/06/when_good_people_are_swept_up_with_the_bad.html> archived at [<https://perma.cc/E26U-T7U9>].

67 Jim Rankin and Patty Winsa, “As criticism piles up, so do the police cards” *Toronto Star* (27 September 2013), online: <<https://www.thestar.com/knownstopolice2013/carding.html>> archived at [<https://perma.cc/7ZYM-8QFU>].

68 *Ibid.*

69 *Ibid.*

70 Cole, *supra* note 5.

71 *Ibid.*

72 Cole was recently stopped by Vancouver police for an alleged bylaw infraction while smoking a cigarette on a sidewalk near Stanley Park. While the officer threatened to arrest him, he eventually left without issuing a ticket. The sad irony of the situation is that Cole was in Vancouver that weekend to deliver a speech on racial inequality.

See Laura Kane, “Anti-carding activists Desmond Cole stopped by police in Vancouver” *The Canadian Press* (15 November 2018), online: <<https://bc.ctvnews.ca/anti-carding-activist-desmond-cole-stopped-by-police-in-vancouver-1.4178555>> archived at [<https://perma.cc/8PS2-PNQF>].

73 Jim Rankin, “The man police can’t stop carding” *Toronto Star* (14 August 2016), online: <<https://www.thestar.com/news/insight/2016/08/14/the-man-police-cant-stop-carding.html>> archived at [<https://perma.cc/B7K5-NULK>].

November 2015, interactions that left him “feeling bullied, profiled and humiliated.”⁷⁴ Sadly, these accounts are not unique, and countless other racialized folk have and continue to experience the dehumanizing effects of profiling.

Not only do the visceral effects of profiling bear down on racialized and Indigenous communities, making them feel unsafe and hyper-visible within public space, but this heightened surveillance also affects its targets in ways that extend beyond the immediacy of the interaction. Street check data has been recognized as impacting individuals’ employment and educational opportunities and has led to the creation of profiles, stored in police databases, that are used to justify continued surveillance of innocent people.⁷⁵

C. Ontario’s Legislative Response

In 2016, the Ontario provincial government responded to the controversy surrounding carding by enacting Regulation 58/16 under the *Police Services Act*.⁷⁶ In doing so, Ontario became the first province to formally regulate street checks and provide police departments with “‘clear and consistent rules’ for so-called ‘voluntary’ police-public interactions.”⁷⁷ The regulation now explicitly prohibits officers from eliciting identifying information if they are motivated by a perception that the individual is part of a racialized group.⁷⁸ The regulation also outlines several duties that must be fulfilled before attempting to collect information, including informing the individual of their right to walk away⁷⁹ and explaining the reason for the stop.⁸⁰

Although the regulation imposes some constraints on the practice, its scope of protection is minimal, especially concerning well-being checks. The regulation only applies to circumstances where the attempt to gather information is “done for the purpose of: (1) inquiring into offences that have or might be committed; (2) inquiring into suspicious activities to detect offences; or (3) gathering information for intelligence purposes.”⁸¹ This implicit limitation excludes a wide range of interactions, including when an officer is assisting individuals through a well-being check.⁸² As Justice Tulloch notes, “officers should not be discouraged from assisting members of the public because of concerns over having to fill out paperwork” and emphasizes that the regulation should not apply in circumstances where the officer intends to input identifying information in a “database in order to be able to follow-up on the well-being of the person who was checked.”⁸³

74 *Ibid.*

75 Tulloch, *supra* note 7 at 43. Street-check data has also been linked to “counter-terrorism” initiatives in Ontario. A 2014 document that was posted by a local police department and then later removed indicated that street check data was being shared between the police, the Mounties, and CSIS, raising questions and concerns about how this data was being used. See Jim Rankin and Wendy Gillis, “Ontario police forces share carding data with Mounties, CSIS” *Toronto Star* (23 April 2017), online: <<https://www.thestar.com/news/canada/2017/04/23/ontario-police-forces-share-carding-data-with-mounties-csis.html>> archived at [<https://perma.cc/CY7Y-TFUN>].

76 O Reg 58/16.

77 The Canadian Press, “Ontario regulation bans random street checks by police” *Macleans* (22 Mar 2016), online: <<https://www.macleans.ca/news/canada/ontario-regulation-bans-random-street-checks-by-police/>> archived at [<https://perma.cc/YNZ2-VUV6>].

78 *Supra* note 76, ss 5(1)(a).

79 *Ibid.*, ss 6(1)(a).

80 *Ibid.*, ss 6(1)(b). Officers are also required to provide individuals with a formal receipt that includes the officer’s name and badge number, along with information regarding how to contact the Independent Police Review Director and instructions on how to access the individual’s record through the *Municipal Freedom of Information Protection of Privacy Act*, RSO 1990, c M.56 or *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31. See ss 7(4).

81 Tulloch, *supra* note 7 at 88. [emphasis in original]

82 *Ibid.* at 89.

83 *Ibid.*

Critics have waged that the regulation is an insufficient response to the problem at hand. Anti-carding activists have expressed concerns that the new rules only serve to codify carding as a legitimate practice, and continue to allow the police to question those who appear suspicious, a highly discretionary assessment that has consistently led to racial profiling.⁸⁴ The Ontario Human Rights Commission has taken issue with the narrow scope of the regulation and the circumstances in which it applies, noting that interactions where police are investigating a specific offence can be interpreted broadly, and its exclusion “threatens to render [the regulation’s] mandate meaningless.”⁸⁵ Moreover, the regulations have left it up to individual police boards to decide what to do with the data that has been collected over the past decade,⁸⁶ and the Toronto Police has stated that it intends to keep the historic data, subject to limited access.⁸⁷

D. The Current Moment

Because the discourse surrounding racial profiling has evolved significantly over the past two decades, widespread racial disparities in policing data can no longer be unequivocally dismissed. In a sense, the Ontario provincial government had no choice but to act given the extensive recognition that racial profiling is an ongoing phenomenon that is inconsistent with the liberal values on which Canada prides itself.

Yet, while police forces across the country concede that racial profiling does occur, they continue to rely on justifications that implicitly reinforce a connection between race and criminality, and often refer to the overrepresentation of racialized demographics within the criminal justice system to validate their own disparate data. These justifications function in a circular way, ignoring the critical contextual piece: over-policing begets over-representation. To claim that the police “[do] not control where crime falls along racial and gender lines”⁸⁸ is to engage in an insidious practice of institutional forgetting. It is due to the tireless work and advocacy of racialized, Indigenous, marginalized, and other allied communities that these long-standing refrains are repeatedly challenged.

III. VANCOUVER STREET CHECKS IN CONTEXT

The practice of street checks in Vancouver is rooted in a specific context, one that is unique to the city and its demographics, geography, and history. Street checks have functioned quite differently in Vancouver relative to Toronto, with the VPD relying more heavily on tropes of “well-being” to justify over-policing of marginalized communities. Ultimately, both jurisdictions exhibit patterns of over-surveillance, and use pervasive stereotypes of the city’s Indigenous community to justify continued interactions with the criminal justice system.

84 John Rieti and Chris Glover, “Toronto police board approves new rules for street checks, angering critics” (17 November 2016), online: <<https://www.cbc.ca/news/canada/toronto/police-board-approves-policy-1.3855805>> archived at [<https://perma.cc/2PFF-XYSX>].

85 Ontario Human Rights Commission, *Submission to the Independent Street Checks Review* (1 May 2018), online: <<http://www.ohrc.on.ca/en/ohrc-submission-independent-street-checks-review>> archived at [<https://perma.cc/NS77-9GXX>].

86 Alok Mukherjee, “Time for police to destroy carding data” *Now Toronto* (27 April 2017), online: <<https://nowtoronto.com/news/time-for-police-to-destroy-carding-data/>> archived at [<https://perma.cc/AVQ6-VC3L>].

87 *Ibid.*

88 Adam Palmer, “Statement on Street Checks from Constable Adam Palmer” *Vancouver Police Department* (14 June 2018), online: <<https://mediareleases.vpd.ca/2018/06/14/statement-on-street-checks-from-chief-constable-adam-palmer/>> archived at [<https://perma.cc/9CA9-VK73>].

As laid out in the introduction, the VPD intended the report to respond to allegations of racial profiling, as the city's street check data revealed significant racial discrepancies. Ultimately, the department's analysis revealed that:

- The overwhelming majority of street checks are of persons previously involved in crime;
- Street checks occur in areas where violent crime is most prevalent;
- Street checks can be a result of a call for service from the public and street checks occur most in areas where we have high concentrations of calls for service from the public; and
- Street checks are also used to check on the well-being of vulnerable individuals, such as those who are struggling with mental health, addiction issues, or homelessness.⁸⁹

The VPD define street checks as a “type of interaction arising from *non-random* contact between members of the public and the police” and assert that they “are not necessarily negative in nature, as many street checks are done to ensure the well-being and safety of citizens.”⁹⁰ The report is cognizant of the cross-national concerns that have arisen with regard to racial profiling, and it further acknowledges the psychological and physical impact of profiling, its broader impact on society, and the way in which perceived discrimination by law enforcement erodes public trust and confidence.⁹¹ However, despite this awareness, the report does not concede that the VPD's street check policies and procedures do in fact lead to discriminatory outcomes.⁹² In fact, it distances the VPD's targeted practice from the controversy surrounding arbitrary, random checks in both Ontario and Edmonton.⁹³

The first three reasons that the VPD cites for conducting streets checks are not novel, but rather pertain to the police's general crime prevention duties. However, the report's reliance on well-being checks as the primary reason for stopping, and recording identifying information, of a disproportionate number of Indigenous women deviates from other oft-cited justifications. Unlike other forms of street checks, the VPD maintains that well-being checks are an extension of the police's affirmative duty to:

[T]ake action that prevents harm to any individual. [A duty that] is even more vital to fulfill when it pertains to potentially vulnerable persons including those dealing with mental health challenges, addiction issues or homelessness.⁹⁴

Despite the prevalence of well-being checks, they are not defined in the report and the VPD does not have any formal policy regarding how and when they are to be conducted.⁹⁵ However, the report offers the following circumstances as examples of when a well-being check may be warranted: “during the winter months, when temperatures drop below

89 Vancouver Police Department, *supra* note 17 at 2.

90 *Ibid* at 12. [emphasis added]

91 *Ibid* at 24.

92 Josh Paterson, “Re: Service or Policy Complaint #2018-133 on Street Checks” *British Columbia Civil Liberties Association* (26 September 2018), <<https://bccla.org/wp-content/uploads/2018/09/Microsoft-Word-Brief-response-to-VPD-report-street-checks-Sept-26-2018-UBCIC-BCCLA-1.pdf>> archived at [<https://perma.cc/93LE-QYJA>].

93 Vancouver Police Department, *supra* note 17 at 21.

94 *Ibid* at 2.

95 The VPD's Director of Planning, Research and Audit confirmed the lack of a formal policy on well-being checks over email.

freezing and vulnerable members of the community are at risk for exposure to the elements,⁹⁶ to “assist in locating missing persons,”⁹⁷ and to ensure that those with drug dependency issues are “able to care for themselves, and to make them aware of available overdose prevention and treatment services.”⁹⁸

It is important to note here that:

The role of police officers in Canada has undergone significant reform in the past 20 years. [And] the duties performed by police have expanded beyond traditional crime prevention and law enforcement to include a role more akin to that of a social worker, mental health professional, and community outreach worker.⁹⁹

This shift in the nature of police work is not unique to Vancouver. In other jurisdictions, such as Edmonton, officers have been required to address an increasing range of social issues that extend beyond typical law enforcement activities.¹⁰⁰ The expanded scope of police duties has been attributed in part to widespread disinvestment in social services, and the subsequent “downloading”¹⁰¹ of duties that have historically been relegated to other public service agencies.

Evidently, neoliberal governance and the dismantling of crucial social services has changed the nature of police work, and it is not this article’s intention to challenge the fact that police are, in essence, front line workers. Rather, while well-being checks may be useful in certain circumstances, they are also a highly discretionary mechanism that may not only duplicate the experience of an arbitrary street check, but may also be used in a disingenuous way to acquire an individual’s identifying information.

A. Proactive Policing: Laying the Foundations for Racial Profiling

Reflective of the changing nature of police work, the VPD practice “problem oriented policing,” which, as Sergeant Jason Robillard has publicly stated, is “a proactive, targeted approach to reduce crime or after an underlying problem has been identified.”¹⁰² This form of policing is preventative in nature, and requires officers to “[maintain] a high-visibility presence by walking the beat and conducting routine vehicle patrol” and “[identify]

96 Vancouver Police Department, *supra* note 17 at 10.

97 *Ibid* at 14.

98 *Ibid*.

99 *Ibid* at 12.

100 Edmonton’s street check review states that officers have been required to do the following: “checking on the well-being of persons, finding persons who are reported as missing, and, increasingly, interacting with persons with mental illness and addiction issues and those who are marginalized and vulnerable.” See Curt Taylor Griffiths, Ruth Montgomery, and Joshua J. Murphy, “City of Edmonton Street Checks Policy and Practice Review” (June 2018), online: <<https://edmontonpolicecommission.com/wp-content/uploads/2019/02/EP5-Street-Check-Study-Final-REDACTED.pdf>> at 36 archived at [<https://perma.cc/E6M4-XDTC>].

101 Public Safety Canada, *Contemporary Policing Responsibilities* (Research Summary) (2018), online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2017-s006/index-en.aspx>> archived at [<https://perma.cc/3H9X-G95A>].

102 Sunny Dhillon, “Vancouver Police Department’s use of carding disproportionately targets Indigenous people” *The Globe and Mail* (15 June 2018), online: <<https://www.theglobeandmail.com/canada/british-columbia/article-vancouver-police-departments-use-of-carding-disproportionately/>> archived at [<https://perma.cc/GX3Z-PYKS>].

problems that damage the quality of life.”¹⁰³ Proactive policing is also inherently predictive, drawing upon data to identify crime hot-spots, or areas where crime and disorder are likely to be concentrated. This is confirmed in the VPD report, which states that “the deployment of police to a particular neighbourhood is not random and arbitrary but rather, premised on addressing an emerging crime and disorder issue and the best use of police resources to ensure community safety.”¹⁰⁴

Proactive policing appears to be a veiled manifestation of the “broken windows” theory, which asserts a causal link between disorder and crime.¹⁰⁵ This form of policing was popularized during Rudy Giuliani’s tenure as mayor of New York, when he waged a rapacious campaign against minor offences such as graffiti, loitering, and panhandling in part of his effort to “clean up the city.”¹⁰⁶ According to Nancy Heitzeg, the broken windows theory “emerges from the tradition of criminology which searches vainly for individual and environmental causes of crime while ignoring the vast array of well-documented structural contributors such as poverty, unemployment, lack of quality education, and racism.”¹⁰⁷

Policies and bylaws aimed at addressing “disorder” are often “cloaked in the populist language of civic morality, family values and neighbourhood security.”¹⁰⁸ Order is dichotomized with disorder, and likewise, the orderly law-abiding citizen with the disorderly criminal.¹⁰⁹ This duality assumes that individuals are defined by these fixed qualities, but as Bernard Harcourt asserts, “the category of disorderly is itself a reality produced by the method of policing.”¹¹⁰ Through the discursive creation of the “disorderly” citizen, defined by specific behaviours (such as public drunkenness, panhandling, prostitution, urinating in public, squeegeeing, etc.), the police are able to control and monitor certain populations.¹¹¹ Often, perceptions of who is disorderly or lawless falls along racial lines and becomes a coded category that “maintains the literal and figurative boundaries of whiteness.”¹¹²

103 Both maintaining a high-visibility presence and identifying “quality of life” issues are outlined as the functions of the police constable in the position profile. See Vancouver Police Department, “Vancouver Police Department Position Profile” (12 August 2003) online: <<http://www.missingwomeninquiry.ca/wp-content/uploads/2011/10/EXHIBIT-50G-Document-entitled-Vancouver-Police-Department-Position-Profile-Police-Constable-Neighborhood-Policing-Team.pdf>> archived at [<https://perma.cc/HT2J-MSYU>].

104 Vancouver Police Department, *supra* note 17 at 13.

105 The theory’s central thesis is that: “if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken.” See George L. Kelling and James Q. Wilson, “Broken Windows: The Police and Neighbourhood Safety” *The Atlantic* (March 1982), online: <<https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>> archived at [<https://perma.cc/7X8Y-B8LQ>].

106 Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (New York: Routledge, 1996) at 224.

107 Nancy Heitzeg, “Broken Windows, Broken Lives and the Ruse of ‘Public Order’ Policing” *Truthout* (17 July 2015) online: <<https://truthout.org/articles/broken-windows-broken-lives-and-the-ruse-of-public-order-policing/>> archived at [<https://perma.cc/257U-NK76>].

108 Smith, *supra* note 106 at 207.

109 Bernard Harcourt, “Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing in New York” 97 *Mich LJ* 291 at 297.

110 *Ibid* at 298.

111 Just as the discursive creation of the deviant Black body has justified over-policing Blackness, so too has the discursive creation of the disorderly citizen justified over-policing poverty, a practice that is compounded for those whose racialization intersects with their socioeconomic status.

112 Heitzeg, *supra* note 107.

B. Proactive Policing in the DTES

For years, the Downtown East Side, often referred to as “Canada’s poorest postal code,”¹¹³ has been the primary focus of the VPD’s proactive policing strategy. The DTES is viewed as an area where “homelessness, poverty, affordable and quality housing, unemployment, mental health, drug use and crime”¹¹⁴ are particularly concentrated. As a material space,¹¹⁵ the DTES has a complicated history, marked by “successive rounds of capital investment and disinvestment in urban ‘real estate,’”¹¹⁶ that have culminated in stark socio-economic and racial stratification. The community has also long been characterized by “unrelenting images of deviance, disease, and broken bodies [that have been] increasingly framed by prevailing understandings of poverty, gender, and indigeneity”¹¹⁷; such images have become ingrained in the popular imaginary.

Like the majority of other poor urban spaces across North America, the DTES has been subject to a neoliberal, frontier ideology¹¹⁸ and the gentrifying impulse to “clean up”¹¹⁹ the neighbourhood and the bodies associated with its apparent decay. This process has manifested through both insidious mechanisms, such as increasing rent and dismantling and decentralizing crucial social services, and overt mechanisms, such as racial profiling and the criminalization of poverty through bylaw enforcement.¹²⁰

Launched in the early 2000s,¹²¹ the Beat Enforcement Team (“BET”) is the primary team policing the DTES. This team is a division of the VPD with officers who patrol the neighbourhood by foot and maintain a high visibility presence.¹²² While the VPD have stated that their intention is to foster trust by encouraging increased engagement with community members, many residents associate the BET with “routine street checks, detention, arrests, search and seizure, bylaw tickets, use of force, extortion of information,

113 The Honourable Wally T. Oppal, *Missing Women Commission of Inquiry, Forsaken: The Report of the Missing Women Commission of Inquiry Executive Summary* (Vancouver: Missing Women Commission of Inquiry) <<http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-ES-web-RGB.pdf>> at 12 archived at [<https://perma.cc/Z7ZC-RTBQ>].

114 City of Vancouver, *Downtown Eastside: Local Area Profile 2013* (7 November 2013), online: <<https://vancouver.ca/files/cov/profile-dtes-local-area-2013.pdf>> archived at [<https://perma.cc/E7NJ-9B2G>].

115 It is also important to note that gentrifying processes are only an extension of colonial processes, and as Nicholas Blomley points out, “native peoples have occupied and used these lands since, they say, the beginning of time, establishing summer camps, villages, and fishing settlements.” See Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2003) at 32.

116 *Ibid.*

117 *Ibid* at 33.

118 In *New Urban Frontier*, Neil Smith posits the inner city as the “new frontier” to be colonized by the gentry, who regenerate and cleanse otherwise hostile urban landscapes. See Smith, *supra* note 106.

119 Yasmin Jiwani and Mary Lynn Young, “Missing and Murdered Women: Reproducing Marginality in News Discourse” (2006) 31:4 *Canadian Journal of Communication* 895.

120 Darcie Bennet and DJ Larkin, *Project Inclusion*, (2018) Pivot Legal Society, online: <http://www.pivotlegal.org/full_report_project_inclusion_b> at 30 archived at [<https://perma.cc/Y2D8-P5CX>].

121 DH Vancouver Staff, “What should policing in the Downtown Eastside look like?” *Daily Hive Vancouver* (3 June 2015), online: <<https://dailyhive.com/vancouver/policing-downtown-eastside-look-like/>> archived at [<https://perma.cc/7WB3-VAS8>].

122 While the BET has been associated with the increased enforcement of poverty-related offences, their presence has been welcomed by some, such as the executive director of the business improve association, DTESHastings Crossing. See Jessica Kerr, “Vancouver police increase presence in the Downtown Eastside” *Vancouver Courier* (31 January 2018) online: <<https://www.vancouver.com/news/vancouver-police-increase-presence-in-the-downtown-eastside-1.23160339>> archived at [<https://perma.cc/K2LC-75Z5>].

use of police dogs, escalation during a mental health crisis, entry in homes, [and] catch-and-release as a form of intimidation.”¹²³ In the following section, I will explore how residents of the DTES, specifically Indigenous women, have been subject to both over-policing and under-protection. This context provides a framework for understanding why those targeted may nonetheless feel more unsafe, despite the benign stated objective of the police practice.

C. Bylaw Enforcement in the DTES: A Previous Manifestation of Well-Being Checks

Prior to the 2010 Olympic Games, the VPD increased bylaw enforcement in what is now referred to as “the ticketing blitz of 2008,”¹²⁴ during which residents of the DTES were disproportionately ticketed for a range of bylaw offences. The 2009 Strategic Plan’s policy explicitly mandated the BET increase its time spent “curbing and deterring disorder on the street.”¹²⁵ The BET’s approaches included: increased discretion for arresting and charging individuals for simple drug possession, increased bylaw infractions for nuisance offences, increased enforcement of the *Safe Streets Act*¹²⁶ and the *Trespass Act*,¹²⁷ and a “minimum of 4 checks per BET member per block.”¹²⁸ While the VPD spokesperson at the time, Constable Tim Fanning, cited “quality of life and safety for all residents and visitors in the area”¹²⁹ as the impetus for pursuing such aggressive policing strategies, the heightened criminalization¹³⁰ of street offences was widely criticized as a mechanism for sanitizing the “city’s black eye”¹³¹ in light of the impending games. In particular, the “4 check per block” requirement imposed on the BET was intended to discover and apprehend residents with outstanding warrants, and was ultimately challenged as unconstitutional.¹³²

The increased issuance of bylaw tickets was coupled with the implementation of the *Assistance to Shelter Act*,¹³³ which empowered the police to force people who are street entrenched into shelters through the use of “non-forceful touching.”¹³⁴ Posited as life-saving legislation intended to prevent extreme-weather related deaths, it was dubbed the “Olympic Kidnapping Act” by DTES residents and activists groups, who challenged the draconian way in which it permitted the police to deposit people who are street entrenched at shelters

123 Carol Muree Martin and Harsha Walia, *Red Women Rising: Indigenous Women Survivors in Vancouver’s Downtown Eastside*, (2019) Downtown Eastside Women’s Centre, online: <<http://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf>> archived at [<https://perma.cc/FHN6-QEGF>].

124 Pivot Legal Society and VANDU, “Backgrounder on By-Law Enforcement in Vancouver’s Downtown Eastside” (2013), online: <http://d3n8a8pro7vhm.cloudfront.net/pivotlegal/mailings/82/attachments/original/Ticketing_Backgrounder.pdf?1362558098> archived at [<https://perma.cc/N24Q-LLFV>].

125 Carlito Pablo, “Vancouver police plan Downtown Eastside crackdown ahead of Olympics” *The Georgia Straight* (21 January 2009) online: <<https://www.straight.com/article-197388/vancouver-police-plan-downtown-eastside-crackdown-ahead-olympics>> archived at [<https://perma.cc/C6LU-6JWG>].

126 SBC 2004, c 75.

127 RSBC 2018, c 3.

128 Pivot Legal Society and VANDU, *supra* note 125.

129 Pablo, *supra* note 125.

130 As Don Mitchell states, “quality of life initiatives in the contemporary city rely on fear as a driving force and thus tend toward... the wholesale elimination of a class of people who have nowhere else to be but in public.” See Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003) at 9.

131 Lucy Hyslop, “Winter Olympics on slippery slope after Vancouver crackdown on homeless” *The Guardian* (3 February 2010), online: <<https://www.theguardian.com/world/2010/feb/03/vancouver-winter-olympics-homeless-row>> archived at [<https://perma.cc/62YR-HCGY>].

132 Pivot Legal Society and VANDU, *supra* note 124.

133 SBC 2009, c 32.

134 Hyslop, *supra* note 131.

without their consent and with no regard for their safety, belongings, or community.¹³⁵ As noted by the MLA for Vancouver-Hastings at the time, Shane Simpson, the legislation had the consequence of deeming those who refused to go to a shelter as “mentally ill,” and thus making them vulnerable to apprehension under the *Mental Health Act*,¹³⁶ leading to a catch 22: “If you’re opposed to coming to the shelter in extreme weather, then you must have a mental health issue so I’ll use this other piece of legislation to take action.”¹³⁷ Together, these two acts provided the police with expansive authority to control street-entrenched populations, all in the name of ensuring their well-being. While poverty and the lack of accessible housing was and continues to be a pervasive problem in the DTES, these legal mechanisms targeted the aesthetics of poverty and not its root causes, and were viewed by many as a desperate attempt remove undesirable persons from public spaces.¹³⁸

Both the VPD and City of Vancouver eventually acknowledged that the “ticketing blitz” was ultimately ineffective. Consequently, city councillors partnered with community groups to address the same issues that the VPD had endeavoured to target through a range of grassroots initiatives, such as “the creation of a vendors market on Sundays, improved pedestrian safety initiatives, and the expansion of access to public toilets for residents who don’t have a decent bathroom where they live.”¹³⁹ Yet, despite the blitz’s failure to invoke any changes in behaviour, the 2013 Strategic Plan illustrated a continued insistence on proactive policing initiatives aimed at controlling disorder through bylaw enforcement.¹⁴⁰

That same year, Pivot Legal Society (“Pivot”) and the Vancouver Area Network of Drug Users (“VANDU”) obtained police data on city-wide bylaw enforcement through a freedom of information request. The statistics indicated that once again, enforcement was disproportionately concentrated in the DTES, with 76 percent of jaywalking and 31 percent of panhandling tickets being issued in the area. Earlier that year, Pivot and VANDU also acquired data that revealed that 95 percent of street-vending tickets were handed out in the DTES. The VPD maintained that the numbers correlate to the areas in which the offences predominantly take place. However, unlike the nuisance offences of panhandling and street vending, Pivot pointed out that jaywalking occurs uniformly across city intersections and bears no relation to socioeconomic status.¹⁴¹

135 Andrew MacLeod, “New Law Lets Police Force Homeless to Visit Shelter” *The Tyee* (30 October 2009), online: <<https://theyee.ca/News/2009/10/30/PoliceForceHomeless/>> archived at [<https://perma.cc/KCR4-MS3T>].

136 RSBC 1996, c 288.

137 *Ibid.*

138 Raina Delisle, “The Olympics’ other legacy” *This Magazine* (March/April 2010), online: <<https://search-proquest-com.ezproxy.library.uvic.ca/docview/1016221194/fulltextPDF/47163CD16FC5401EPQ/1?accountid=14846>> archived at [<https://perma.cc/QK7P-4ZTB>].

139 Pivot Legal Society and VANDU, *supra* note 124.

140 *Ibid.*

141 Douglas King, “Pivot and VANDU slam VPD over city bylaw enforcement” *Pivot Legal Society* (6 June 2013), online: <http://www.pivotlegal.org/pivot_and_vandu_slam_vpd_over_city_bylaw_enforcement> archived at [<https://perma.cc/9BHZ-7WYE>].

The VPD responded to this assertion by claiming that the tickets were being enforced to promote public safety and “educate and deter individuals from committing the offence and possibility getting hit by a car and either injured or killed,”¹⁴² although they had previously ignored the community’s request for increased pedestrian safety measures.¹⁴³

As stated by Douglas King, Pivot’s police accountability lawyer at the time, “these statistics confirm our fears that city bylaws are not being enforced for reasons of public safety, but to circumvent the constitutional protections in this country against profiling and arbitrary detention.”¹⁴⁴ In an interview with *The Georgia Straight*, King further noted his concern that the disproportionate ticketing of jaywalking offences in the DTES was “creating an industry of enforcement that has nothing to do with criminal behaviour and has everything to do with profiling people who are of a different social class.”¹⁴⁵ Through the pretext of a bylaw infraction, the police were legally able to obtain an individual’s identifying information, which was then used to track those with outstanding warrants.¹⁴⁶

The continued issuance of bylaw tickets fostered an environment of fear and mistrust, compounding the existing antagonism between the VPD and DTES residents. As noted by Wally Oppal in the *Missing Women Commission of Inquiry* (“MWCII”),¹⁴⁷ the constant surveillance and fear of being targeted for outstanding fines and warrants is the primary reason why many Indigenous and marginalized women in the DTES do not feel comfortable going to the police, leading to another critical contextual point regarding the history of policing in the DTES.

D. Indigenous Women and Over-Policing in the DTES

While the DTES has been subject to rampant surveillance and over-policing through bylaw enforcement, street checks, and other discriminatory policies and practices, for years the police have simultaneously failed to take violence against Indigenous women seriously.¹⁴⁸ From 1997–2002, 69 women disappeared from the DTES, the majority of whom were Indigenous and poor.¹⁴⁹ Despite these staggering numbers, police showed a reluctance to investigate the disappearances, and consistently declined to acknowledge the possibility that they could be linked to a serial killer.¹⁵⁰ Instead of addressing the concerns of family members, both the police and the media characterized the missing women as drug dependent sex workers, “peripatetic wanderers forever in search of the

142 Tiffany Crawford, “Vancouver police asked to explain huge disparity in ticketing between wealthy, impoverished neighbourhoods” *Vancouver Sun* (6 July 2013), online: <<http://www.vancouversun.com/vancouver+police+asked+explain+huge+disparity+ticketing+between+wealthy+impoverished+neighbourhoods/8487433/story.html>> archived at [<https://perma.cc/KBJ4-FMC8>].

143 In fact, in 2010, VANDU members launched the Pedestrian Safety Project, an initiative intended to address the prevalence of pedestrian injuries along Hastings Street. The VPD however initially refused to implement the changes recommended by the project, which included reducing the driving speed to 30 km/h. See <<http://pedestriansafety.vandu.org/>> archived at [<https://perma.cc/XXH2-YYXH>].

144 King, *supra* note 141.

145 Marcel Chaves, “Advocacy groups accuse VPD of unfairly targeting Downtown Eastside residents for jaywalking tickets” *The Georgia Straight* (6 June 2013), online: <<https://www.straight.com/news/389541/advocacy-groups-accuse-vpd-unfairly-targeting-downtown-eastside-residents-jaywalking-tickets>> archived at [<https://perma.cc/ZE7V-Z4ZN>].

146 Pivot Legal Society and VANDU, *supra* note 124.

147 *Ibid.*

148 Martin and Walia, *supra* note 123 at 44.

149 Elaine Craig, “Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside” (2014) 60:1 McGill LJ 1.

150 Jiwani and Young, *supra* note 119 at 897.

latest fix and with no sense of responsibility.”¹⁵¹ Even when Robert Pickton was eventually charged and convicted for many of the murders in 2002, media reporting continued to identify the victims as “troubled, abused runaways,”¹⁵² and associated their vulnerability with their apparent high-risk lifestyles. This narrative served to further stigmatize street-entrenched, marginally housed Indigenous women, implicitly blaming them for their own misfortune without attending to the fact that “colonial patriarchy is the highest risk factor in Indigenous women’s lives.”¹⁵³

In 2012, the MWCI concluded that the investigations were a “blatant failure,”¹⁵⁴ caused by a range of intersecting factors, such as racist and dismissive attitudes on the part of the police, inadequate resource allocation, insensitive and offensive treatment of victims’ families, and a lack of coordination between police forces.¹⁵⁵ As the report made clear, the missing women were forsaken not only by the police, but by society at large, marginalized by the “retrenchment of social assistance programs, the ongoing effects of colonialism, and the criminal regulation of prostitution and related law enforcement strategies.”¹⁵⁶

Despite this acknowledgement, community members have criticized the MWCI for failing to include the voices of those most affected by both the murders and subsequent investigations. Indigenous groups, women’s groups, sex workers’ groups, and other human rights organizations were denied funding to participate in the Inquiry.¹⁵⁷ Unfortunately, while the MWCI had the potential to repair fractured relationships between these communities and law enforcement, it has been denounced for reaffirming a toxic dynamic characterized by “colonialism, criminalization, discrimination, mutual distrust, and paternalism.”¹⁵⁸

E. Putting Well-Being Checks into Context

The practice of well-being checks must be understood within the particular context of how they affect Indigenous women living in the DTES. The VPD report justifies the overrepresentation of Indigenous women in the street check data as the response to the issue of missing and murdered Indigenous women and girls, stating that:

The documented street check information—including locations where the at-risk female may frequent, friends or associates that she was with who may have means of contacting or later locating the female—provide valuable information that can be used by police if the woman goes missing.¹⁵⁹

This statement implies that *any* Indigenous woman who appears to be “vulnerable” or “at-risk” may be subjected to a check, although no objective markers of “un-wellness” are offered to guide this assessment. In other words, despite being a targeted, proactive measure,

151 *Ibid* at 898.

152 *Ibid* at 906.

153 Martin and Walia, *supra* note 123 at 43.

154 *CBC News*, “Pickton inquiry slams ‘blatant failures’ by police” *CBC News* (17 December 2012), online: <<https://www.cbc.ca/news/canada/british-columbia/pickton-inquiry-slams-blatant-failures-by-police-1.1191108>> archived at [<https://perma.cc/85MH-DDHW>].

155 Martin and Walia, *supra* note 123 at 45.

156 Oppal, *supra* note 113 at 111.

157 Darcie Bennett, David Eby, Kasari Govender, and Katrina Pacey, *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry*, BC Civil Liberties Association, West Coast Women’s Legal Education and Action Fund, Pivot Legal Society (2012), online: <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/189/attachments/original/1353022676/Missing_Women_Inquiry_web_doc.pdf?1353022676> at 23 archived at [<https://perma.cc/6EBE-C59X>].

158 *Ibid* at 15.

159 Vancouver Police Department, *supra* note 17 at 2.

without a carefully delineated framework, a well-being check may be no less arbitrary than a random street check. This is especially the case if a well-being check is informed by pervasive stereotypes of Indigenous women (among other racialized and marginalized persons living in the DTES). Similar to the response by white elites in Toronto, the VPD appear to be claiming that they do not practice racial profiling, while simultaneously offering reasons why their attention is disproportionately, and justifiably, directed toward a specific population. While this practice may be read as an attempt to remedy past wrongs by keeping tabs on a vulnerable community that was so long overlooked, this has not been the perception, nor the experience, of those actually checked.

In April 2019, the Downtown Eastside Women's Centre released a comprehensive report featuring the voices and perspectives of Indigenous women survivors. Indigenous women have historically been construed incorrectly as passive victims, statistics and stereotypes. However, the report, *Red Women Rising*, demonstrates the resilience and strength of Indigenous women in the DTES, and provides them with a platform to articulate their experiences, dreams, and ideas for change. Despite the *stated* good intentions of the VPD, "only 15% of 157 women said they would go to the police if they felt unsafe."¹⁶⁰ Many women feel as though the police will not protect them, and in fact, some articulate a fear of the police themselves: "The police don't protect us; they harass us. There is too much police brutality down here."¹⁶¹ People on the street are afraid of the police. At best, the police do nothing. At worst, the police brutalize us."¹⁶² The long-standing history of colonialism, dispossession, and racism, intertwined with a recent-history of over-policing and under-protection, have culminated in an immensely asymmetric power dynamic between police and Indigenous women residents of the DTES. As a result, harmonious, let alone productive, police-civilian relations are forestalled.

Red Women Rising includes 35 key recommendations, including:

End the policing practice of street checks; reduce the number of bylaw infraction tickets issued by police in the DTES; prohibit police from carrying and using all lethal weapons; develop guidelines to facilitate greater use of police discretion not to lay charges especially for minor poverty-related offences.¹⁶³

This report and other anecdotal accounts¹⁶⁴ make clear that while the police frame well-being checks in benign terms, Indigenous women's experiences with the police may make them feel *more* vulnerable and unsafe.

Considering the history of over-policing in the DTES, it is reasonable for those being checked to view the interaction as simply another means of acquiring their identifying information for the more underhanded purpose of surveillance and criminalization. If those subject to well-being checks feel harassed and afraid, arguably compounding their marginalization, then we must ask whose well-being is really being protected.

¹⁶⁰ Martin and Walia, *supra* note 123 at 129.

¹⁶¹ *Ibid* at 12.

¹⁶² *Ibid* at 48.

¹⁶³ Martin and Walia, *supra* note 123 at 156.

¹⁶⁴ See *Project Inclusion* for further anecdotal accounts of the negative ramifications of over-policing for homeless people. See Bennett and Larkin, *supra* note 120.

IV. WELL-BEING CHECKS BEYOND VANCOUVER

While Vancouver appears to be the first jurisdiction to heavily cite well-being checks as a major reason for the racial disparities within their data, the supposed pursuit of the well-being of marginalized people has allowed police to nefariously collect data across the country. As recently reported, both Ontario and Saskatchewan maintain a “risk-driven tracking database,” shared by police, social services, and health workers, that inputs highly personal, identifying information, such as a “whether a person uses drugs, has been the victim of assault, or lives in a ‘negative neighbourhood.’”¹⁶⁵ Those who are seen as at risk of engaging in criminal activity may be subject to “rapid intervention” that could range from “a door knock and a chat to forced hospitalization or arrest.”¹⁶⁶

The issue of whether an officer was conducting an arbitrary street check or a well-being check garnered considerable attention in Hamilton, Ontario, when Mathew Green, the city’s first Black councillor was approached by a police cruiser while waiting for a bus. As Green reported, the officer asked the following questions: “What are you doing there? Where are you going? Are you even from this city?” leading Green to conclude that the “conversation felt confrontational in nature... [causing] embarrassment, frustration and anger.”¹⁶⁷ According to the officer, it was a cold and windy day, and Green appeared “mentally unstable,” “hiding” near the bridge and standing in a puddle of mud, in an area with three lodging homes for people suffering from mental health issues.¹⁶⁸ While the officer was initially charged with discreditable conduct under the *Police Services Act*,¹⁶⁹ he was found not guilty of conducting “an arbitrary or unjustified street check.”¹⁷⁰ This finding was based in part on the hearing officer’s conclusion that Green’s testimony was not credible, as he is “clearly an intelligent individual who feels relatively comfortable talking to frontline officers,”¹⁷¹ and the fact that the officer was simply carrying out an innocuous well-being check.

In reaching this conclusion, the hearing officer relied on Green’s prior positive interactions with the police in his role as city councillor as proof that he was not being sincere when he claimed that he felt intimidated and profiled during the unprovoked stop. This finding evidently fails to account for the different dynamics the two contexts engender: while Green may have formed good relationships with frontline officers during community events,¹⁷² this fact should not be unfairly used to invalidate his experience of fear and intimidation

165 See Nathan Munn, “Police in Canada are Tracking People’s Negative Behaviour in a ‘Risk’ Database” *Motherboard* (27 February 2019), online: <https://www.vice.com/en_ca/article/kzdp5v/police-in-canada-are-tracking-peoples-negative-behavior-in-a-risk-database> archived at [<https://perma.cc/WGP7-E2ZP>].

166 *Ibid.*

167 Kelly Bennett, “What does a criminal look like? Councillor files complaint over police stop” *CBC News* (16 April 2016), online: <<https://www.cbc.ca/news/canada/hamilton/headlines/what-does-a-criminal-look-like-councillor-files-complaint-over-police-stop-1.3554921>> archived at [<https://perma.cc/KM7U-N4BW>].

168 Molly Hayes, “Street Check’ or ‘Well-being Check?’ Police carding case comes at key juncture in Ontario” (17 November 2017), online: <<https://www.theglobeandmail.com/news/national/carding-ruling-to-come-at-critical-point-for-policing-regulations/article37013729/>> archived at [<https://perma.cc/D7W8-CE6K>].

169 RSO 1990, c P.15.

170 Samantha Craggs, “Tribunal rejects black councillor’s claim Hamilton police stop was racial profiling” *CBC News* (26 April 2018), online: <<https://www.cbc.ca/news/canada/hamilton/matthew-green-andrew-pfeifer-1.4636773>> archived at [<https://perma.cc/PWX2-5QWM>].

171 *Police Constable Andrew Pfeifer Badge #408 v Hamilton Police Service* (26 April 2018) [*Police Constable*], online: <<https://www.hpa.on.ca/files/files/Pfeifer%20PSA%20Tribunal%20Decision%20April%202018.pdf>> at 53 archived at [<https://perma.cc/J9P9C-9XAR>].

172 *Ibid* at 52.

under completely different circumstances.¹⁷³ This inference belies the coercive nature of police power, and the complex relationships that exist between racialized community members and the Hamilton Police, who have previously been indicted by the Ontario Human Rights Commission for practicing “a textbook description of racial profiling.”¹⁷⁴

Under the premise of a well-being check,¹⁷⁵ an officer may be permitted to stop and question individuals arbitrarily with impunity, despite legislative safeguards. Green explained that “neither officer asked about his well-being or explained to him why he was stopped or were concerned about him because of the conditions.”¹⁷⁶ When a witness was asked whether she was of the opinion that Green looked as though he required assistance, she stated “No, not at all. He was dressed similar, maybe to what he’s wearing today, business casual.”¹⁷⁷

CONCLUSION

Ultimately, while well-being checks have been framed by the VPD as a benign exercise of discretion intended to protect vulnerable populations, in practice, they appear to perpetuate the same problems inherent to arbitrary street checks. Similar to the way in which Black people have been repeatedly represented as deviant and dangerous to justify their over-policing, so too have Indigenous people been constructed as inherently vulnerable, thus leading to a phenomenon whereby they are viewed both as the obvious, fated victim, and as a demographic to be closely monitored.¹⁷⁸

What the crises in Toronto and Vancouver (and elsewhere) have taught us, is that it is crucial that we listen to the experiences of those targeted by these supposedly beneficial policing practices. If the communities subject to carding and well-being checks do not feel safe, then we must ask *who* these practices are intended to protect. For those who deviate from whiteness, and have endured its panoptic gaze, the answer to this question is clear.¹⁷⁹ It bears remembering that “racialized law enforcement has been an extraordinarily important tool in preserving social power, and over the last 150 years police forces have been a central resource to social control.”¹⁸⁰

173 While the racial profiling correspondence test may not have been met in this case, the hearing officer’s comments regarding Mr. Green’s credibility are problematic, insofar as they undermine the lived experience of racism, and the way in which racialized people move through the world. It is also important to recognize that while the test for psychological detention relies on objective criteria, finding that an individual in similar circumstances would not have felt as though they were being detained is different than explicitly disbelieving an individual’s subjective experience.

174 Bennett, *supra* note 167.

175 Constable Pfeifer stated that a well-being check had never been defined to him in any policy or procedure, and that “they all make their own observations and arrive at conclusions at their own pace and time, that it’s the case where each officer is unique and that gets based on many things in their experience as officers.” See *Police Constable*, *supra* note 171 at 28.

176 *Ibid* at 5.

177 *Ibid* at 13.

178 As Simone Browne states, “racializing surveillance is a technology of social control where surveillance practices, policies and performances concern the production of norms pertaining to race and exercise a “power to define what is in or out of place.” See Simone Brown, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015) at 16.

179 Whether used to target those who appear “out of place,” or to ensure that populations are exactly where they are supposed to be, discriminatory policing creates and maintains boundaries.

180 Charles C. Smith, “Racial Profiling in Canada, the United States, and the United Kingdom” in Carol Tator, Frances Henry, Charles Smith and Maureen Brown (eds), *Racial Profiling in Canada: Challenging the Myth of a “Few Bad Apples”* (Toronto: University of Toronto Press, 2006), at 56.

When faced with justifications for racial disparities in street check data (and the criminal justice system more broadly), we must remain vigilant and remember that these patterns are *not* natural, nor necessary, occurrences. Canada is a white settler society, one built on the dispossession and displacement of Indigenous people and the ongoing maintenance of rigid racial hierarchies.¹⁸¹ The disproportionate policing of racialized persons cannot be neatly cleaved from this context, and we must collectively guard against attempts to cloak discriminatory practices in benign language.

181 Sherene Razack, *supra* note 24 at 1.