SUBMISSIONS TO - Standing Committee on Administration of Justice
of
the Legislative Assembly of Ontario

RE - Bill 68
Complaints Against Metropolitan Toronto Police

FROM - Canadian Civil Liberties Association

DELEGATION - Walter Pitman
(President)
Allan Strader
(Research Director)

A. Alan Borovoy
(General Counsel)

Toronto

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C O N T E N T S

Introduction

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than 5000 individuals, more than 30 associated groups which, themselves, represent several thousand people, and nine affiliated chapters. Our membership roster includes a wide variety of callings and interests - lawyers, writers, housewives, trade unionists, professors, minority groups, media performers, business executives, etc.

Essentially our objectives are two-fold:

- to promote legal protections against the unreasonable invasion by public authority of the freedom and dignity of the individual
- to promote fair procedures for the resolution and adjudication of conflicts and disputes.

It is not difficult to anpreciate the relationship between these objectives and the subject matter of Bill 68. As one of the few institutions in our society especially empowered to use force and violence, the police are in a position to commit substantial intrusions on the freedom and dignity of individuals. Thus far, our community has provided highly inadequate procedures for dealing with allegations of such misconduct by the police. To this extent, at least, the Canadian Civil Liberties Association welcomes the appearance of Bill 68. What concerns us about this initiative, however, is that, after so much public rancor and controversy, the government's proposed remedy should fail so dramatically to accommodate the needs at issue.

The ensuing submissions are addressed, therefore, to overcoming the flaws in the Bill.

Independent Investigation - The Central Issue

To the extent that Bill 68 provides for some kind of independent civilian review of complaints against the police, it represents an improvement over the status quo. Unfortunately, however, the Bill omits a very crucial component of a fair system - independent investigation. In the main, the government approach contemplates a system of internal investigation monitored by external review. As the Solicitor General has noted, it would be "rare" for the independent Public Complaints Commissioner (PCC) to investigate complaints from the outset. Indeed, for such purposes, the Bill would confine his investigatory powers to "exceptional circumstances".

So long as the front line investigations are handled by officials who have departmental or even general police interests to protect, the system will be severely flawed. Many aggrieved people simply will not confide their complaints about the police to other police officers. The Canadian Civil Liberties Association has had this experience time and again, particularly with minority racial and ethnic constituencies. In fact CCLA conducted a number of surveys among arrested people in the City of Toronto during the 1970's. Invariably, only a miniscule minority of those who claimed to have been abused by the police were prepared to take retaliatory action. The overwhelming number declared flatly that such action "would do no good". In this regard, it is pertinent also to note the comments of the McDonald Commission into RCMP wrongdoing.

> "Although difficult to ascertain with any great precision, it is probable that many complainants would not have complained had our Commission not existed. We infer this from the fact that many persons who wrote to us after the cut-off date, when advised that we would not investigate but that they could forward their allegations directly to the Solicitor General or the Commissioner of the RCMP, expressed the view that such action would inevitably prove to be useless".

Since so much depends upon the willingness of aggrieved people to take the initiative, any failure to provide for independent investigation could render many complaints stillborn at the outset. To this extent, the experimental project contemplated by Bill 68 will be unable to perform its intended objective. The one thing it cannot measure is the number of aggrieved people who will never file complaints because of dissatisfaction with the investigative machinery.

Nor do we think that the government approach will command a sufficient amount of general public confidence. Even though the PCC is slated to be external to all police departments, he would be nevertheless largely dependent on the findings of the initial investigators. Unless there were glaring gaps in the material, his independent review would not be expected very often to detect inadequacies in the front line investigations. Again, the initiative to identify such inadequacies would most often have to come from those who can least be counted on to press these matters - the aggrieved complainants. While we realize that the PCC would have some opportunity to do his own investigations, as a rule this would come only after a 30 day period of internal investigation. After so long a time, it is not hard to imagine numbers of situations where evidence could be irretrievably lost. Thus, there is a substantial risk that many members of the public might come to perceive the external review as a rubber stamp for most of the internal investigations.

Where the Bill would allow the PCC to conduct his own investigations at an earlier stage of the proceedings, it would severely encumber his discretion to do so. He would require reasonable grounds to anticipate "undue delay" in the police handling of the investigation or there would have to exist "other exceptional circumstances". And if these criteria were not confining enough, the applicable section explicitly provides for judicial review of this discretion. As a practical matter, to what extent would the opportunity for judicial review enable the Chief of Police to suspend such investigations by merely initiating the requisite court actions? If a PCC investigation could be stopped in this way, pending a decision of the court, the entire matter might well become academic afterwards. On the other hand, it is difficult to fathom what serious interests of the police department are likely to be prejudiced in the event that the PCC sometimes exercised this discretion wrongly. Perhaps the chief function of the provision for judicial review is to underline the intention of government policy with respect to direct PCC investigations - they are to be the exception rather than the rule.

In a nut shell, it is our view that a system essentially of internal investigation, even if monitored by external review, cannot adequately address the problem which has occasioned the impulse for reform - the perception of bias. No matter how fair in fact, internal investigation is not likely to <u>appear</u> fair. From the standpoint

of many members of the public, the investigating officials would continue to be vulnerable to the suspicion that they were "covering up" for their colleagues or fellow police officers. From the standpoint of many accused police officers, in-house investigation would continue to be vulnerable to the suspicion that internal jealousies and considerations of public relations could prevail over the interests of scrupulous fact-finding.

A number of commentators have suggested that outside investigators would not be as effective as internal ones for the job of penetrating the police bureaucracy. According to this argument, only the colleagues of impugned officers would be likely to get crucial information from them. Rarely are such arguments based upon anything except intuition. There are facts, however, which point in the opposite direction. The most important of the recent royal commissions into police conduct have relied exclusively on outside investigators - the Morand Commission on Metro Police Practices and the McDonald Commission on the RCMP. Indeed, faced with the bitterness of the Black community over the recent police shooting of Albert Johnson, the then Metro Police Chief himself requested the OPP to conduct the investigation. We are aware of no suggestion that those outsiders were unable to penetrate the police bureaucracy.

The proposal for independent investigation has also been attacked on the grounds that experiments with it have allegedly failed in the United States. It must be noted, however, that racial strife in the United States has produced a level of political polarization which has no counterpart in this country. The American civilian review boards were never given a chance to prove themselves. No sooner was one established than it was engulfed in political controversy and litigation. Indeed, the destruction of civilian review was the avowed policy of many American police brotherhoods. Whatever disagreements some Canadian police officials might have with this concept, there is no reason to expect a comparable reaction from them. In this regard, it is useful to remember that as recently as 1976 the Metro Police Association collaborated with the Canadian Civil Liberties Association in a joint brief which called for a completely independent system of investigation. Even if the Police Association's policies may have changed since that time, this experience suggests a rather wide gulf between the Toronto police and their American counterparts. On the basis of all the foregoing, the Canadian Civil Liberties Association would urge this Committee to amend Bill 68 so as to provide for independent investigation of all civilian complaints against the police.

Reducing Double Standards

Unfortunately, the Bill is contentious in a number of additional respects. Findings of misconduct against police officers will require proof beyond a reasonable doubt. Where the consequence of such a finding could be a criminal conviction and a term of imprisonment, this high standard of proof should be as available to accused police officers as it is to civilians who are accused of crimes. But, where the consequence could not go beyond the loss of a job, it is questionable whether so high a standard of proof should be required. This is not to say, of course, that employment discharge, suspension, or discipline are not most serious consequences. It is to question, however, whether employment discipline for police officers should involve criteria so different from those which apply to ordinary civilians. In most unionized industrial settings, for example, the imposition of employment discipline does not require the kind of proof which is normally reserved only for criminal trials.

What must be borne in mind is that police employment involves a position of public trust. The claim to hold such a position cannot command the same protection as the claim to stay out of jail. Thus, there must be misgivings about requiring the same standard of proof in both cases. In view of the number of times complaints of police misconduct involve one complainant on one side and several police officers on the other, even the best investigative system will be hard put to make a finding adverse to the police officers. But the requirement of proof beyond a reasonable doubt would make the job a virtual impossibility.

Elsewhere, the Bill provides that the Metro Police Commission and Police Association will recommend at least one-third of the members of the independent Police Complaints Board. There is no necessary objection to having on the Board people with police training. But it is another matter entirely for the Board's membership to include people with police loyalties. It is expected that the interests of the Police Commission and Association will frequently be implicated in hearings of the Board. Why, then, should the Bill provide for the representation on the Board of the implicated interests and omit such representation for the aggrieved interests? Nowhere does the Bill provide for comparable recommendations to the Board from any of the racial and ethnic minority constituencies. Nor is there an opportunity for complainants to make analagous recommendations.

Section 16(1) clothes the Public Complaints Commissioner with a number of powers concerning the entry into police stations and the examination there of books, papers, and documents relating to complaints under investigation. But, for some reason, the Public Complaints Commissioner may exercise such powers only "after informing the Chief of Police". Again, why such unique solicitude for the interests of the police department? When civilian interests are under investigation, there is no comparable requirement to inform them before such entry and inspection may occur. The way the Bill is currently drafted, it would be necessary to inform the Chief of such entry and inspection even if he were the one under investigation.

Before a formal hearing occurs, Section 19(4) permits the police officer under investigation to examine any written material which is slated to be produced in evidence at the hearing. But, for some reason, no comparable right of prior examination can be exercised by complainants. Again, we can see no justification for the existence of such double standards.

Unless the officer under investigation consents, a disciplinary hearing may not admit into evidence any statement which such officer has been required to give in response to a complaint. Suppose, however, an auto worker or steel worker were required, under threat of discipline, to reply to his superior's questions concerning possible employment misconduct? There is nothing in the law which would prevent such statements from being tendered in evidence at a subsequent arbitration hearing concerned with the worker's discipline or discharge. Why, then, this exceptional solicitude for police officers? In view of the special vulnerability of police officers to allegations of a criminal nature, there might be some basis for protecting them against such use of coerced statements in the context of criminal trials where they are the accused. In this connection, it would be advisable to seek appropriate amendments to the federal criminal law. But, no such immunity should apply in the disciplinary hearings contemplated by this Bill.

Modifying The Powers Of The Chiefs Of Police

After the final investigation report on a complaint is made, the Chief of Police is given a wide number of options in determining what course of action to take. Some

of these options create difficulty. One of them allows him to "cause disciplinary proceedings to be taken under the Police Act". Unlike hearings before the Police Complaints Board, the proceedings under the Police Act might be able to exclude the participation of the complainant and PCC. In our view, such options ought not to be available. The Act should provide that, whatever forum the Chief chooses, should include the right of both the complainant and PCC to participate as parties.

The Bill also provides that, if the Chief decides against taking any action, he must provide reasons therefor. If, however, he were to decide on a mild sanction such as a rebuke or caution, no such reasons would be required. To whatever extent the Chief embarks on a course which is likely to find disfavour with the complainant, he should be required to account for it. On this basis, we would propose an amendment which would require the Chief to furnish reasons for any decision he makes which will not involve a subsequent hearing.

Broadening The Powers Of The New Independent Agencies

In section 7, there is a requirement to inform accused police officers regarding the substance of complaints which have been filed against them. Understandably, such notice need not be given in circumstances where compliance with it might adversely affect an investigation. But, under the Bill, this judgment can be made only by the person in charge of the department's internal Bureau. Unfortunately, the PCC is nowhere given a comparable power. In view of the fact that the PCC is supposed to have some scope to investigate complaints at the outset, he should also have some power at that point to withhold such information from the accused officer.

One of the most crucial decisions which the Bill reposes in the Public Complaints Commissioner concerns whether or not to order a hearing of the Police Complaints Board. This is the decision he must make at the request of a complainant who is dissatisfied with the police chief's disposition. Unfortunately, the criteria which are supposed to guide the PCC appear to be overly narrow. He is mandated to order a hearing by the Board "if he believes that, in the public interest, such a hearing is required". Our concern is that this terminology may impel the PCC to opt, where possible, against such Board hearings. It may appear rare that the

public interest could be said to require such hearings. Yet, there might be many circumstances where the public interest would benefit from such a hearing. In our view, the criteria should be broadened accordingly. The PCC should be mandated to order such hearings if he believes simply that they would be in the public interest.

For some reason, the authority to resolve complaints informally appears to arise only before and not after a complaint has been investigated. In our view, there is no reason to maintain such a distinction. In some circumstances, it might be easier and more productive to seek an informal resolution, once the facts were known. In this regard, we believe that it might be useful also to mandate the PCC to attempt the conciliation of complaints in those circumstances where he believes it would be propitious to do so. Very often, the complaints of aggrieved citizens are amenable to this kind of solution and, very often, it requires a skilful outside party to bring it about.

Moreover, we believe that the PCC should be required to approve even those informal resolutions which have been effected by the police department itself. Without the PCC's involvement, such internal resolutions will always be vulnerable to the suspicion, rightly or wrongly, that a hapless complainant was unfairly pressured by the police bureaucracy. It will not suffice to provide, as the Bill now does, that the PCC "may review" such matters. His involvement should be mandatory.

In a case of serious misconduct, among the penalties which the Police Complaints Board may impose upon the officer are discharge and the forfeiture of pay for five days or less. The former represents the employment guillotine and the latter represents a hard slap on the wrist. Surely, there must be many more options between these extremes which are not provided in the Bill. We believe the Board should also be empowered to impose varying levels of suspension without pay. This would permit a wider variety of penalties to fit the varying degrees of misconduct which are likely to emerge in real life.

Expanding The Safeguards For Complainants

Very often, those with grievances against the police are among the most vulnerable people in our society - ethnic minorities, criminal suspects, sexual non-conformists, the poor, etc. Any conflict between such persons and the police department is a conflict of gross unequals. In view of the kind of matters involved, this situation generates inevitable suspicions that improprieties will be committed. Numbers of allegations have already been made, for example, that officials of the department's internal Bureau have tried to pressure aggrieved people into withdrawing their complaints. The fear has also been expressed that complainants who are facing charges themselves might be induced into making irreparably incriminating statements.

These considerations impel us to recommend that the legal aid plan be sufficiently modified so that a larger number of complainants will be eligible for such assistance. With legal counsel at their sides, complainants are much less likely to succumb to coercive pressures. Indeed, such a reform is likely to invest the entire system with a greater appearance of fundamental fairness.

In this regard, we believe that section 6(2) should also be amended so as to explicitly require the department's internal Bureau, when it receives complaints, to advise complainants of their right to file their material with the PCC and to seek legal aid. Such rights are so basic to the exercise of all other rights in the Bill that they should be made the subject of an express obligation in this way.

Expanding The Safeguards For Police Officers

Where the Bill might have been more accommodating to police interests, it has failed to do so. It would leave intact many of the unfair working conditions which police organizations in this community have legitimately protested. Despite their public service and sacrifice, police officers do not have the minimum level of job security enjoyed by most unionized employees. Constables are not entitled, as of right, to outside arbitration of their internal discipline and discharge grievances. If a police officer wishes to challenge the discipline which has been imposed upon him, he is virtually confined to appeals within the police structure - first to the Metro

Police Commission and ultimately to the Ontario Police Commission. In view of the OPC role in police management, it can hardly be regarded as independent of police management. And the Metro Commission, of course, is police management. Thus, where most unionized employees can appeal disciplinary action to independent arbitration, police officers are at the mercy of those who share their employers' interests.

Significantly, this community has removed from the police the most potent instrument of self-help, the right to strike. Elementary equity requires that, in view of the demands made and the rights removed, our society should ensure to police officers the minimal protections available to most unionized employees. Considerations of morale also require it. Accordingly, the Canadian Civil Liberties Association believes that police officers should be given the right to independent arbitration of their internal discipline and discharge grievances.

Frequently, working constables are required by their superiors to furnish full and detailed reports regarding various aspects of their activities. While such a practice may not be generally impeachable, there are occasions when it is unfair to the officers concerned. Sometimes these reports are required of officers in situations where, unknown to themselves, they have been accused of some misconduct. Since the requirement to report in full could become a way of extracting self-incriminating evidence, the officer concerned should enjoy safeguards at least comparable to those which protect other unionized employees in similar situations.

At a minimum, the officer should first be told whether there are accusations against him and, if so, of what they essentially consist. This would enable his report to make the most effective possible defence at the earliest possible moment. Corroboration, for example, could be sought while the events were still fresh. It is not difficult to anticipate how an early and competent defence could forestall further and needless complications. Moreover, timely disclosure of accusations could spare the officer from needless intrusions and harassment. If he first knew the substance of the complaint, he could confine his response to the relevant issues.

Another safeguard which usually accompanies such coerced statements in the industrial sector is the right of the imougned employee to prior consultation with an agent or

union representative. This safeguard recognizes that periodically innocent people tend to incriminate themselves through incompetent or inadequate presentations. Untrained or perhaps nervous, such people might be injudicious about what they emphasize, minimize, or overlook. The most effective possible defence at the earliest possible moment entails the most effective possible presentation. Accordingly, the officer's duty to reveal should be predicated on a prior right to consult.

Improving The Integrity Of The System

The Bill does not specifically designate anyone to have the carriage of the complaint at hearings of the Police Complaints Board. In view of the possible expense and pressures involved, it is hard to believe that the government would have intended for the complainant to be burdened with this responsibility. The most plausible person to assume this role is the PCC. Unfortunately, however, the PCC is supposed to be a member of the very Board which will be adjudicating the complaint. While he may not sit on the panel in question, he is the chief officer of the Board and thus might be seen to be exercising some degree of influence over those who are sitting. Moreover, he is empowered to choose which members of the panel shall preside in any given case.

In the interests of enhancing the appearance of fairness, we believe that the PCC should be structurally separated from the Police Complaints Board. The PCC should exercise no such adjudicative functions; his role with respect to the Board should be confined to activating it and pursuing complaints before it.

In an attempt to protect transactions conducted under this Bill, section 22(3) provides that "no record, report, writing or document" arising in these proceedings may be used in any other proceedings which the Legislature is entitled to regulate. Surely, the rationale for such protections would apply also to oral statements. We would recommend, therefore, that the Bill be amended accordingly.

Summary Of Recommendations

In summary, the Canadian Civil Liberties Association calls upon this Committee to amend Bill 68 as follows:

1. Provide that all civilian complaints against the police are to be investigated, in the first instance, by the independent Public Complaints Commissioner (PCC).
2. Provide that a finding of misconduct against a police officer, for employment purposes, need not require the criminal standard of proof beyond a reasonable doubt.
3. Delete the right of the Metro Police Commission and Police Association to recommend members for the independent Police Complaints Board.
4. Delete the requirement that the PCC must notify the Chief of Police before he or his complaint investigators enter a police station and examine documents on the premises.
5. Confer on complainants, as well as police officers, the right to examine any written material which is slated to be produced in evidence at the hearing.
6. Delete the provision that statements which police officers are required to give may not be used in evidence at these disciplinary hearings.
7. Provide that, to whatever extent the Chief of Police may initiate disciplinary hearings under the Police Act, both the complainant and PCC must be allowed to participate as parties.
8. Provide that the Chief of Police must furnish written reasons for any disposition he makes of a complaint which will not involve a subsequent hearing.
9. Empower the PCC, as well as the department's Bureau, to waive the requirement that police officers be immediately informed about complaints against them.
10. Provide that, on a review of a complaint investigation, the PCC's power to order a hearing depends not on his assessment of what the public interest requires but on what he believes would be in the public interest.
11. Provide that complaints may be informally resolved not only before but also after they have been investigated and that such resolution may be effectuated not only by the police department but also by the PCC.
12. Require that any such resolutions by the police department must be approved by the PCC.
13. Provide that, in cases of serious misconduct, the Police Complaints Board will acquire the power to impose varying levels of suspension without pay.
14. Liberalize the legal aid plan so that a larger number of complainants will be eligible for such assistance throughout the complaint process.
15. Provide explicitly that, when the department's internal Bureau receives complaints, it must advise complainants of their right both to file their material with the PCC and to seek legal aid.

16. Provide for police officers, regarding their internal relations with police management, the following additional safeguards:
    a) as a condition of being required to furnish reports and answer questions, they should be given prior notice concerning the substance of any accusations against them and a reasonable opportunity for prior consultation with an agent or counsel;
    b) they should be entitled to independent arbitration of all their internal discipline and discharge grievances.
17. Provide explicitly that the PCC shall have carriage of complaints at hearings of the Police Complaints Board and provide, in consequence, for his structural separation from the Board.
18. Provide for oral statements the kind of protections which section 22(3) currently provides for written documents.