SUBMISSIONS TO - The Royal Commission
on
The Conduct of Police Forces
at
Fort Erie on the 11th of May
1974

FROM - The Canadian Civil Liberties Association
per
A. Alan Borovoy, General Counsel

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INTRODUCTION

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than 3000 individuals, 8 affiliated chapters, and more than 50 associated groups, which, themselves, represent several thousand people. Our membership roster includes a wide variety of callings and interests - lawyers, writers, housewives, trade unionists, minority groups, media performers, business executives, professors, etc.

Among the objectives which inspire the activities of our organization is the desire to promote legal protections against the unreasonable invasion by public authority of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and the Fort Erie raid. The forcible searches and strippings which accompanied this raid represent a substantial invasion of the freedom and dignity of a large number of people.

To what extent is the power of the police in such matters reasonable or unreasonable? How adequate are the existing safeguards for the citizen? What, if any, improvements might be made? These considerations represent the central concerns of the brief which follows.

THE RAID AT FORT ERIE

and

THE RIGHTS OF THE CITIZEN

In justification for the searching and stripping of so many people, one of the police officers who led the raid reportedly pointed to the alleged extent of drug activity in the Landmark Hotel. According to a press report of his testimony, "the use of drugs was so blatant" that the police believed all the customers must have been aware of it.[1]

The Canadian Civil Liberties Association submits, however, that even if the hotel's reputation among the police were warranted, this could not justify the magnitude of the May 11 raid. Such a rationale makes no distinction between those who attended the hotel on frequent occasions and those who may have been there for the first time. It fails also to distinguish between guilty participants and innocent bystanders.

If the object of this raid was the drug, heroin, the mind would boggle to believe that all or even most of the people searched could reasonably have been suspected of harbouring it. Such a belief would require the incredible assumption that large numbers of pushers and addicts of so contentious a substance are disposed to assemble in hotel lounges for the purpose of collective recreation.

If the object of the raid was marijuana, one might ask why it was necessary to conduct vaginal and rectal inspections. Surely, a drug as normally bulky as marijuana is not likely to be stored in such regions.

If the object of the raid, as one press story reported, was "to catch marijuana users"[2], the question of unwarranted discrimination must also be examined. The simple possession of marijuana is considered a minor offence. Another minor offence, the consumption of alcohol in certain public places, rarely precipitates such large scale police action. When, for example, was the last time the police engaged in a massive crackdown against unlawful drinking at a professional football game? The difficulty is that many suspected alcohol users at football games are clean-cut, socially respectable, and middle-aged. Many suspected marijuana users at places like the Landmark Hotel, on the other hand, are

long-haired, socially rebellious, and young. To whatever extent, therefore, this Commission were to find that marijuana users constituted the basis for the Landmark raid, the issue would involve nothing less than our society's professed commitment to equality before the law.

It is not our function, however, to evaluate, in any comprehensive way, the conduct of the parties to this raid. Such an exercise is more appropriate for those who have observed the demeanor of the witnesses and studied the transcripts of their testimony. For the Canadian Civil Liberties Association, however, the primary concern in this matter is the state of the law. In our view, the events at Fort Erie have served to dramatize the existence in Canadian law of a number of apparent imbalances between the powers of the police and the safeguards for the citizen. So long as the law perpetuates such imbalances, it will be difficult to exact higher standards from the police. For this reason, the ensuing submission is directed essentially to the issue of amending the relevant legislative enactments and administrative directives which regulate the police-citizen relationship.

Of course, some of the enactments in question have never thoroughly been litigated. In consequence, there is no settled or definitive interpretation of the existing law. It is conceivable, for example, that the Canadian Bill of Rights could yet exert a profound influence on the interpretation and application of the law as it now stands. But such considerations, at the moment, are hypothetical. On the surface, at least, the existing law appears in a number of ways to be out of balance. The better part of wisdom, in our view, is to correct such defects today so as to avoid needless and onerous litigation tomorrow.

In the first place, evidence adduced at the inquiry has already disclosed that one of the drug searches at the Landmark Hotel was carried out under the authority of a writ of assistance.[3] This incident reminds us that even our homes are not the legal sanctuaries that many believe them to be. The Narcotic Control Act contains a provision that allows the forcible search of private dwelling houses, including hotel rooms, without a specific judicial warrant:

Such invasions are made possible by the preservation in our law of these writs of assistance which are general search warrants carried by certain RCMP officers. While the officers who possess these writs need to have a reasonable belief that the homes they enter, in fact, contain illicit drugs, they need not demonstrate this to a judge in advance. Prior to the search, they need to persuade only themselves.[4]

Yet the forcible search of private homes for evidence of most crimes in the Criminal Code requires the police first to persuade a judge or justice of the reasonableness of what they are about. There has been no suggestion of which we are aware that such a requirement has obstructed unduly the battle against the crimes in the Criminal Code. Why, then, should it be dispensed with in the battle against unlawful drugs?

Why, for example, should the hunt for illicit marijuana give the police more power to impose upon the privacy of the citizen than the hunt for the proceeds of a robbery or the evidence of a murder? In other words, what justification is there for the retention of these intrusive writs of assistance? Accordingly, the Canadian Civil Liberties Association asks the Commission to recommend that the Ontario Government petition the Federal Government for the removal of this anomaly from the Narcotic Control Act.

Second, while it appears that the police had obtained a warrant for the general raid at the Fort Erie hotel, a further glance at the Narcotic Control Act tells us that this may not be necessary. The Act says a police officer may enter and search a place, other than a dwelling house, at any time and without any kind of warrant.

In the quest for evidence of most crimes in the Criminal Code, on the other hand, the police need specific judicial warrants to search all places, whether or not they are dwelling houses. In view of this, there can be no conceivable justification for such extraordinary powers under the Narcotic Control Act. Accordingly, the Canadian Civil Liberties Association asks this Commission to recommend that the Ontario Government petition the Federal Government to amend the Narcotic Control Act so as to require specific and prior judicial warrants for the forcible searching of all buildings. In the meantime, the Commission should also recommend that the Ontario Solicitor General incorporate this principle in an administrative directive to all police departments in the Province.

Third, the Narcotic Control Act appears to give the police the power to search any person found on such premises, whether or not the person, himself, is the object of individual suspicion. We have already expressed our objections to the practice of dragnet searches. In a democratic society, absent a dire emergency, the security of the person should be regarded as sacrosanct unless he, personally, is a party to unlawful conduct. The misconduct of other people should not render him susceptible to such intrusions.

In any event, however, why would the police need such immense powers to search individuals? Why wouldn't it suffice if, upon entering suspected premises, the police were confined to searching only those persons, who, there were reasonable and probable grounds to believe, had unlawful drugs in their possession? Beyond this, no need has ever been demonstrated.

Of course, the recent case of Regina v Jaagusta[5] has purported to confine the scope of the personal searching powers conferred by the Narcotic Control Act. But in view of the fact that this judgment was rendered by a Provincial Court, it remains vulnerable to reversal and modification by the higher courts. In our opinion, therefore, the safest solution lies in the direction of statutory and administrative amendment. Accordingly, the Canadian Civil Liberties Association asks this Commission to recommend the enactment of amendments to the Narcotic Control Act and the adoption of administrative directives in the Province to ensure police compliance with the following principle.

> Notwithstanding the power of the police to enter and search any premises for drugs, no person found on such premises may be subject to a forcible search, unless, at a minimum, there are reasonable and probable grounds to believe that the person to be searched is in possession of illicit drugs and the search to be conducted will yield evidence of such possession.

A fourth problem in the Fort Erie affair concerns the very establishment of this Royal Commission. Had there not been such a public outrcy, it appears that the matter would have been kept within the confines of the Ontario Police Commission.

Indeed, this is what happens to the bulk of citizen grievances against the police. Apart from the few who have the resources and fortitude to involve themselves in court battles, the only avenue of redress for aggrieved citizens generally is to complain to the police departments themselves or to the police commissions which administer the police departments.

But the chiefs and commissioners responsible for such investigations have a vital interest in the protection of their departments. They are responsible for the efficiency, reputation, morale, and legal liability of the officers under their supervision. How, then, can an aggrieved citizen expect them simultaneously to protect his interests? Regardless of the individual qualifications and integrity of the various chiefs and commissioners, the concept of self-investigation is, to say the least, structurally uninspiring.

Of course, not every complaint against the police need culminate in this kind of public inquiry. But every complaint should involve at least an independent investigation. Accordingly, we would ask this Commission to recommend that the Ontario Government create a new structure, independent of police commissions and police departments, with sufficient power and resources to investigate, conciliate, and where necessary, convene public hearings into the complaints of citizens against the police. (For more details on this proposal, see the appendix)

Reports and allegations of police abuse on the scale of Fort Erie are neither common nor unique in Canada. Compared to their counterparts in many other countries, Canadian police have a generally good record. But this record has been marred by a number of other unfortunate incidents in recent years. Just a few summers ago, for example, at the entrance to a rock festival in Ancaster, the police conducted a massive search. They are reported to have forced thousands of young people to pull off their boots, remove their socks, and empty their pockets, cigarette packages, wallets, and purses. Apparently, mere attendance at a rock festival was considered ample basis for such a large scale intrusion.

But even a more unblemished record could not justify a complacent response. History has demonstrated repeatedly the perils of excessive police powers and inadequate citizen safeguards. In our view, such an imbalance characterizes the present state of Canadian law. It is on this basis that we urge the adoption of the foregoing proposals. We believe that such structural changes would represent the wisest response to the unfortunate incident at Fort Erie.

Footnotes

1. The Toronto Globe and Mail - 24 July 1974
2. The Toronto Star - 26 July 1974
3. The Toronto Globe and Mail - 26 July 1974
4. See Levitz v Ryan 1972 3 OR 783, where it was held that writs of assistance are not rendered inoperative by the "due process" provisions of the Canadian Bill of Rights
5. 1974 3WWR 766

SUMMARY OF RECOMMENDATIONS

The Canadian Civil Liberties Association respectfully requests this Royal Commission to recommend legislation, at both federal and provincial levels, and administrative directives to the police in Ontario, so as to achieve the following objectives.

1. The removal of writs of assistance from the Narcotic Control Act.

2. A requirement that in order to conduct a forcible search for drugs in any place, the police must first obtain a specific judicial warrant.

3. Notwithstanding the power of the police to enter and search any premises for drugs, no person found on such premises may be subject to a forcible search, unless, at a minimum, there are reasonable and probable grounds to believe that the person to be searched is in possession of illicit drugs and the search to be conducted will yield evidence of such possession.

4. The establishment of a new structure, independent of police commissions and police departments, with sufficient power and resources to investigate, conciliate, and, where necessary, convene public hearings into the complaints of citizens against the police.

APPENDIX

A PROPOSAL FOR INDEPENDENT REVIEW OF POLICE - CITIZEN CONFLICT

We believe that new legal machinery is required to deal with the disturbing problem of citizen grievances against the police. This machinery must function as expeditiously as the police commissions, as impartially as the courts, and more flexibly than both.

In this regard, we propose the establishment, throughout the province, of an independent citizens' committee on police relations. In the interests of public acceptance, this committee should be composed of citizens representing a wide cross section of community involvements and concerns. In the interests of public credibility, most committee members should have no connections with the police department or its administration. In the interests of effectiveness, the committee should be given a staff and budget adequate to perform their functions with independence and vigor.

We seek to impose the independent citizens committee between the police commissions and the public. When complaints and conflicts arise, the committee could act between the police interests and the citizen interests. Now, let us consider its functions and procedures.

Upon receiving a complaint from a citizen who claims to have been mistreated by the police, the independent citizens' committee, through its staff, would conduct, as expeditiously as possible, a thorough investigation into all of the facts. Once the complaint has been filed, the committee should be empowered to follow it through, with or without the complainant's support. This should minimize the attempts to pressure the complainant into withdrawal. Moreover, such an approach recognizes that not only the aggrieved citizen but also the entire public has an interest in the investigation of charges concerning police misconduct.

The committee's investigation could produce a variety of alternatives.

One possibility is that the committee investigators might uncover facts which reveal no fault whatsoever on the part of the accused police officer. If that be the result, the role of the independent citizens' committee would be to make a statement to the complainant in full explanation and exoneration of the police officer's conduct. It may be that there will be some difficult legal issues which require clarification.

A proper role for the committee is to interpret police behaviour under such circumstances. The significant point to observe here is that exoneration of a police officer emanating from an independent citizens' committee will carry greater public weight than if it had emanated from the internal administration of the police department. Such a body is more likely than a police commission to preserve the police-citizen relationship when the facts require exoneration.

Another possible result of investigation is a finding of partial or total fault on the part of the accused police officer. At this point, a proper function for the independent citizens' committee would be to attempt conciliation of the dispute. This might take the form of an apology or the payment of a damage claim from the police department to the complainant. It is not difficult to imagine how such expeditious settlements could preserve intact the police-citizen relationship. Again, we believe that the attempt to settle would be more successful where there is a mediator between the police and the citizen.

The third alternative resulting from the investigation would be a finding of total or partial fault on the part of the police officer and a failure on the part of the committee to effect a satisfactory settlement. In response to this set of circumstances, we believe that the independent citizens' committee should be empowered to convene a public hearing to inquire into the entire matter.

In view of the fact that, at this stage, the committee would have formed its own view of the case, the members of the Board of Inquiry which is established to conduct the hearing, should be independent both of the police department and the citizens' committee. The Board of Inquiry should allow all parties to present their case in a public forum. Everyone concerned, including the complainant, the police officer, and the citizens' committee should be entitled to counsel and to a thorough presentation of their evidence and arguments. In the result, the Board of Inquiry should make a finding on all of the facts in the dispute.

At this point, it is important to note that, under our proposal, neither the citizens' committee nor the Board of Inquiry would have the power to impose a binding decision. The citizens' committee is confined to investigation and conciliation;

the Board of Inquiry is confined to determining the facts. The decision as to what to do about the facts that are found, would remain where it is today, in the hands of the police commissions. But the police commissions would make their decisions under the influence of an independent inquiry. We do not seek to divest the police commissions of their responsibility to administer police departments. We seek only to create a fact-finding mechanism which will enjoy greater public confidence.

As an additional measure to strengthen these processes, we would recommend that the independent citizens' committee have a right of access to jails, police stations, and police vehicles. These are the places which give rise to the most serious allegations of police misconduct. Again, we do not seek for the citizens' committee a power to control or interfere with police activities. We seek only an effective opportunity to observe these activities. The mere knowledge on the part of the police that they could be observed at any time by such independent witnesses would act quite often as a deterrent to the commission of misconduct and impropriety.

With the growth of police-citizen contact and conflict, we can expect an increase in the number and intensity of grievances against the police. It is important, therefore, that we establish the kind of grievance machinery which will enjoy public respect. Such machinery would accrue to the benefit of the police-citizen relationship in all its aspects.