

SUBMISSIONS TO:

The Honourable Mike Farnan
Solicitor General of Ontario

RE:

The Improvement of Police
Accountability

FROM:

Canadian Civil Liberties Association

DELEGATION:

Walter Pitman
(former CCLA President;
Director, OISE)

A. Alan Borovoy
(CCLA General
Counsel)

Harish Jain
(CCLA Vice-President;
Co-Chairman, Hamilton
Mayor's Committee on
Race Relations)

Catherine Gilbert
(CCLA Research
Director)

John McCamus
(CCLA Vice-President;
former Osgoode Hall
Law Dean)

Terry Meagher
(CCLA Secretary;
former Secretary-
Treasurer, Ontario
Federation of Labour)

Joy Kogawa
(CCLA Board Member;
Author)

Joseph Wong
(CCLA Board Member;
former President,
Chinese Council on
Racial Equality)

Toronto

February 13, 1991

Introduction

The Canadian Civil Liberties Association is a national organization with the paid support, across the country, of more than 7,000 individuals, more than 50 associated groups, which themselves represent several thousands of people, and 8 affiliated chapters. Our membership roster includes a wide variety of callings, constituencies, and interests - lawyers, writers, homemakers, clergy, 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, and
- to promote fair procedures for the resolution and adjudication of conflicts and disputes.

It is not difficult to appreciate the relationship between these objectives and the issue of police accountability. 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. Unfortunately, our community has failed to provide sufficiently fair and effective procedures for deterring, detecting, and correcting any abuses of such police powers.

Ontario's new Police Services Act is no exception. We are particularly concerned that a statute enacted as recently as last June should fail so dramatically to address the racial tensions that have been ignited by the recent shooting incidents involving the police and certain members of the black community. The prospects of further conflicts and tensions have impelled us to come forward during this period of relative calm.

Our concerns are compounded by the continued existence of endemic problems that could erupt at any time. In the aftermath of the last shooting incident, it became clear that, in significant sectors of the community, there is a widespread perception that the police are quick to harrass and slow to assist people of colour. Such perceptions have been repeated time and again in one forum after another. They have been expressed not only by those who are identified as radical but also by those who are seen as moderate. Moreover, according to the Race Relations and Policing Task Force appointed by the previous government, there is "ample evidence" of police impropriety and discrimination.

Like all Canadians, the citizens of this province were shocked by the revelations at the Marshall inquiry in Nova Scotia, the Aboriginal Justice inquiry in Manitoba, and the Mt. Cashel inquiry in Newfoundland. In Nova Scotia, there was evidence that blacks and native people were being treated to a different kind of justice than were affluent whites. Indications of similar patterns emerged in Manitoba. In Newfoundland, the Roman Catholic Church appears to have received a level of solicitude that was not available to many other sectors of the population. There is no reason to believe that Ontario is significantly more immune to such problems than are these other regions of the country. Only the foolishly complacent would continue to ignore the deeply felt expressions of grievance that are being voiced by blacks and other people of colour.

The time, therefore, to act is now - before this community faces another tragic incident. While no government action can provide guarantees, a change in institutional machinery could nevertheless help. It could reduce the risks of recurring incidents and, to the extent that there were recurrences, it could generate increased confidence in the justice of the outcome. In the final analysis, tensions will not be significantly reduced unless those affected believe in the fairness of the institutional machinery that is available to deal with their grievances.

Toward the Relocation of the Special Investigations Unit

One of the welcome features of the new Police Services Act is the establishment of a Special Investigations Unit. The function of this unit will be to conduct criminal investigations and, if appropriate, initiate criminal prosecutions of any police officers who cause death or serious injury. The virtue of this new operation is its structural removal from the police departments in this province. That should help to inspire public confidence in the fairness and independence of its activity.

Unfortunately, however, the Act has not gone far enough in this respect. The unit is a part of the Ministry of the Solicitor General. So long as investigations emanate from that ministry, they will be vulnerable to the perception of having been influenced by the Solicitor General's political interests. Those interests include the good public relations of the police departments for which the Solicitor General is accountable and responsible.

Indeed, it is conceivable that the Special Unit might find itself investigating some allegations of criminal wrongdoing that relate to a guideline or policy established by the Solicitor General. Suppose, for example, police officers are accused of committing serious assaults during the course of a raid against a gaming house after the Solicitor General promulgated a policy that the police should crack down on gaming houses? It is not hard to imagine, in such circumstances, how those who work in the Solicitor General's ministry would be suspected of conducting their investigations so as to minimize the risks of embarrassment to the Solicitor General.

We are sure that those who know the recently-appointed director of the new unit will share our confidence in his fairness and integrity. Unfortunately, however, in a province of Ontario's size, no one could be well enough known to overcome the appearance of bias inherent in the office itself. For these reasons, the

Canadian Civil Liberties Association urges the government to provide for the relocation of the Special Investigations Unit. One possible solution would be to locate it in the office of the independent Police Complaints Commissioner. Another possible solution would be to locate the unit on its own in much the same fashion as was done with the Police Complaints Commissioner. We are not wedded to any specific arrangements; we are wedded to the general principle that the unit must appear independent of the police and the government.

Toward an Expanded Mandate for the Police Complaints Commissioner

As far as disciplinary matters are concerned, the new Act perpetuates the primary flaw in the Metropolitan Toronto complaints system - the vast majority of investigations will be performed by the police themselves. Even if outsiders to the affected police department periodically review complaint investigations, insiders, in the first instance, will generally conduct the investigations. It is not necessary to be a critic of the police in order to recognize that this system is fundamentally unfair. Investigations should not be conducted by those with departmental interests to protect or collegial relations to maintain. No matter how fair any such investigations may be in fact, they simply cannot appear fair.

Indeed, this system is unfair both to police and to civilians. To civilian complainants, the investigations will be vulnerable to the suspicion that fellow officers will "cover up" to protect their colleagues. To respondent police officers, the investigations will be vulnerable to the suspicion that collegial rivalries and departmental politics will prevail over scrupulous fact finding. Since our community has been attempting to eliminate conflicts of interest in government generally, there is no excuse to perpetuate this conflict of interest in policing specifically.

Moreover, there is good reason to fear that this system will not receive anywhere near the number of complaints that actually exist. People may well be reluctant to complain if they know they have to confide their grievances to the very police force that they are impugning. In this connection, consider the case of the Metro police officer who was recently jailed for assaulting a prisoner in his custody. That outcome was made possible largely by the testimony of one of his fellow officers. Subsequently, however, the officer who testified was reportedly "cold shouldered" out of the department. According to the press, his fellow officers punished his good citizenship by refusing to talk to him.

It is not reasonable to expect members of the public - particularly vulnerable minorities - to trust the integrity of those who would behave in this fashion. It is important, therefore, that the Act be changed. It should provide that the independent Police Complaints Commissioner be mandated to handle all civilian complaint investigations from the outset.

Independent Audits - An Idea Whose Time Has Come

But, whether or not complaints have been filed, the Police Complaints Commissioner or some other independent agency should be able to initiate audits of police practices and policies. There is no other way, for example, to get a handle on the allegations of racism. Complaint investigations are simply not adequate for such purposes. There is a need to look at patterns and to make comparisons. What differences, if any, are there in the policing of the Jane-Finch area and the streets of Rosedale? To what extent, if at all, would such differences be justified?

It is obvious that the problems involved could well transcend the possible misconduct of individual officers. Audits provide a more

effective method for addressing police policies than do complaint investigations. Our society knows very little about who and what determines the matters the police investigate, how they conduct their investigations, which parties they decide to charge, and with what offences. Every day, judgments of this kind are being made in the bowels of our various police departments. The public is entitled to know a lot more than it does, and to say a lot more than it has, about how this awesome discretion is being exercised. The prerequisite for such public participation is knowledge of what is going on. In our view, a system of independent audits provides one of the most reliable ways for the public to get this information.

Moreover, even if the office of the Police Complaints Commissioner were empowered to investigate all civilian complaints, there would still be many it would never get. Imagine, for example, the terrified youngsters at Mt. Cashel having the courage, on their own, to launch complaints. We could expect comparable paralysis from others. Immigrants from dictatorial regimes might well feel too intimidated by the prospects of public conflict with the police. Numbers of native people in the north might simply be unaware of what redress is available or, even if aware, they too might fear the retaliatory wrath of police officers they accused of wrong-doing. Not many years ago, for example, the Canadian Civil Liberties Association gathered some twenty affidavits from native people in Kenora who had grievances against the police. In all cases, we had to undertake not to disclose their names to the authorities. They candidly acknowledged that they were afraid.

But, sooner or later, a system of independent audits would be likely to uncover the misdeeds that the victims lacked the awareness or the courage to complain about. For such purposes, the office of the Police Complaints Commissioner or some other independent agency must be empowered and equipped, on its own initiative, to examine records, places, and witnesses. With that

kind of mandate and those kinds of powers residing in an independent official, the concealment of misconduct would not be likely to endure for very long. Indeed, there would be a significantly enhanced prospect that such misconduct could actually be deterred. Police officers will be increasingly less likely to misbehave as they become increasingly aware that their practices can be observed and their records inspected by independent officials engaged in self-initiated audits. Had such a system been in force in Nova Scotia and Newfoundland, there is a good chance that the police would never have mis-performed in the way they did. Alternatively, if they had, there is a good chance that there would have been much earlier detection and, therefore, much earlier rectification.

While independent audits might be a novel concept in Canadian law enforcement, it is not new to Canadian government. The Security Intelligence Review Committee (SIRC) exercises such a function with respect to the Canadian Security Intelligence Service (CSIS). SIRC reports based on audits have already been instrumental in changing some of the questionable practices associated with Canada's national security operations. The counter-subversion unit of CSIS, for example, was disbanded in the wake of a critical SIRC report. What SIRC has done for CSIS, a system of ongoing independent audits can do for all policing. Virtually every jurisdiction in this country has a system of independent audits for the expenditure of public money. There is no reason for our society to be any less solicitous of its people's freedom.

Summary of Recommendations

The Canadian Civil Liberties Association urges the Solicitor General of Ontario to take the steps necessary to adopt the following measures:

1. Transfer the Special Investigations Unit so that it is no longer located in a ministry of the government.
2. Require that the Police Complaints Commissioner handle all civilian complaint investigations from the outset.
3. Provide for independent audits of police policies and practices.