

**SUBMISSIONS TO:**

The Honourable Allan Pilkey  
Solicitor General of Ontario

**RE:**

Improving Police Accountability

**FROM:**

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(CCLA)

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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.

Our objectives include the following :

- 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 this statute 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 recent shooting incidents, 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.

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 fairness of the resolution efforts. 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.

The Special Investigations Unit - The Need for Relocation

One of the welcome features of the new Police Services Act is the establishment of the Special Investigations Unit. The function of this unit is to conduct criminal investigations and, if appropriate, initiate criminal prosecutions of any police officers who cause death or serious injury in the course of exercising their duties. The virtue of this new operation is its structural removal from the police departments in the province. That was designed to inspire public confidence in the fairness and independence of the unit's activities.

During the past year, however, a development occurred that has served to dramatize a residual defect in the way this unit is structured. The unit entered into a protocol with certain police departments which appeared to give those departments a primary role in a number of the investigations that were supposed to be conducted by the unit itself. According to the press, for example, the Metro Toronto police, rather than the Special Investigations Unit, had taken over the lead role in the investigation concerning the Jonathan Howell shooting a few months ago. While we are aware that there are conflicting versions as to what was actually happening in the investigation, there is little doubt that there was a wide-spread perception that the Metro police had usurped the role of the Special Investigations Unit in that matter. The situation was not helped by the fact that the deputy solicitor general had presided over the meeting which forged the arrangement with the police.

The Canadian Civil Liberties Association welcomes the current action by the director of the unit to amend the contentious protocol. Indeed, we appreciate the wide-spread consultation that is accompanying the exercise. The draft that has been circulated appears to be a significant improvement over its predecessor.



Unless certain structural changes are made in the relationship between the unit and government, however, we believe that the unit is likely to be plagued with perpetual problems concerning the perceptions it generates. The unit remains 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 Investigations Unit might find itself investigating some allegations of criminal wrongdoing that relate to a guideline or policy established by the government of which the solicitor general is a member. Suppose, for example, police officers are accused of committing serious assaults during the course of a raid against a gaming house, after the government promulgates 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 investigation so as to minimize the risks of embarrassment to the solicitor general.

The integrity of the incumbents is not the issue. What is at issue is the structural relationship between the office and the government. 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 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.

Recommendation No. 1

The Special Investigation Unit should be removed from the Ministry of the Solicitor General so that it will be structurally independent of the police and the government.

The Complaints Machinery - The Need for Independent Investigation

For some years, the Canadian Civil Liberties Association and a number of other community organizations have urged that all civilian complaints against the police be investigated initially by the independent complaints commission and not, as is currently the case, by the police themselves. In our view, the existing system cannot command sufficient public confidence to induce a significant number of those who are aggrieved to come forward with their complaints. Recent developments strengthen the case for reform.

In 1992, the Canadian Civil Liberties Association conducted a survey (without recording names) among 69 people who were facing criminal charges in Metropolitan Toronto. Even allowing for the fact that the survey involves a modest sample and consists only of the reported perceptions of the accused people themselves, there is cause for disquiet over the patterns suggested in our findings. In this regard, it should be noted that our interviewers had no advance knowledge of the people they approached for questioning. Nor is there any reason to regard Metro Toronto police as being significantly different from other police in the province. In fairness, there is also no reason to regard the police in general as being significantly different from many other constituencies. But, because of their exceptional powers, there is reason for a special response where police are concerned.

In view of the recurring allegations of racism that have been made against the police and the bitter denials that have been made by

representatives of the police, we asked our interviewees to tell us whether they had been subjected to racial or ethnic invective. In this connection, it will be remembered that Art Lymer, President of the Metro Police Association, was quoted not long ago to the effect that he had "never seen racism exhibited by any ... police officers in all [his] 36 years on the Metro police force". Indeed, he insisted that he had not heard the word "nigger" in police circles.

On the basis of the stories told to us, it would appear that Mr. Lymer has led an excessively cloistered life. A number of our interviewees reported being subjected to racist epithets. A 19-year-old black man, charged with possession for the purposes of trafficking, alleged that the police called him "nigger" as they ordered him to drop his pants when they apprehended him in a donut store. According to a black woman, who was facing drug, assault, and mischief charges, the police used the same epithet on her. Another woman, charged with obstructing justice, claims that the police called her a "disgrace to white people" and labelled her black boyfriend a "pimp". A white woman, charged with trafficking, said that the police called her a "nigger lover". Another white woman, charged with theft, claims the police said that the more she associated with black people, "the stupider she would get". It appears that blacks are not the only targets of the reported ethnic hostility within the constabulary. A 29-year-old Italian man, charged with possession, claimed that the police called him a "stupid wop". In some cases, our interviewees said that the racial invective used by the police went beyond such name-calling. A 26-year-old black man reported, for example, that a police officer said, "immigrants are the reasons why we have to get a new fingerprinting machine".

In January of 1989, Art Lymer was quoted again warning Torontonians that, if these allegations of police racism persisted, "police officers will be reluctant ... to arrest black people". At least in our survey, not only have the police shown no reluctance to



arrest blacks (25 of 69), but, according to these blacks, the police were not at all reluctant to mistreat them. Of the 25 blacks in our survey, 12 (or 48%) complained that they were threatened or physically abused by the police.

Racial conflicts, however, comprise only a part of the findings in our survey. Indeed, on the basis of what was told to us, it would appear that the police reached certain levels of egalitarianism: they reportedly mistreated many persons without regard to race, creed, or color. Of the 69 people in the survey, 29 said that they were "threatened or physically abused or hurt by the police" during the course of their arrest or pre-trial confinement.

Of course, the police are entitled to use force - but no more force than is reasonably necessary to perform their legal duties in the circumstances at issue. While we did not - and could not - evaluate the reported incidents from the standpoint of this criterion, the accounts provided to us by the accused people appeared to represent the use of excessive force. In the main, those who complained of physical harm seemed to believe that they were the victims of police misconduct. Consider, for example, the following situations. A 23-year-old robbery suspect of Asian origin, for example, complained that the police placed a telephone book on his chest and then punched and kicked him. This application of force was apparently designed to ensure that he would sign a statement concerning his alleged involvement in the incident under investigation. He reports that he did indeed sign an inculminating account of what happened. A 36-year-old black man charged with trafficking said that he was thrown to the ground and "booted" by the police on the head and ribs to such an extent that he was left with a swollen head and ribs. A 19-year-old white man, charged with theft and obstruction, claims that the police punched him in the face and stomach, kicked him in the groin, twisted his arms, and stepped on his fingers.



Another problem worthy of identification concerns the allegations of sexist behaviour that our interviewees made against the police. There were not many women in our survey. But, of the 13 we interviewed, 10 said that they had been "subjected to name calling or otherwise mistreated by the police" because of their gender. Among the epithets that the police allegedly used against them were: "nigger", "bitch", "fucking bitch", "slut", and "cunt". One white woman declared, "they called me a whore and how could I be so dirty when I'm pregnant". Another woman claims that the police said to her "show us your tits". Another woman, charged with trafficking, complained of physical abuse, as well. She said that the police slapped her, pulled her hair, and smashed her head against the wall. She also said that, at the time of her arrest, she was dragged on the ground, handcuffed, for two blocks. A 20-year-old woman, charged with possession of stolen property, complained that the police threatened to call the Children's Aid Society and report that she was an unfit mother because she would not talk to them about the alleged offence.

Perhaps even more relevant for purposes of assessing the existing complaint process, was another finding of our survey. Of those who had complained of mistreatment, 23 declared that they had no intention of doing anything about it. While 3 of these people said that their experience was "not serious enough" to warrant retaliatory action, 16 replied in some combination of the following: "would do no good", "can't prove it", and such action would "cause us problems". This should not be surprising. Under the most favourable circumstances, it would be difficult for most people to challenge the police. It stands to reason that such a challenge would be substantially more difficult for those who have any kind of record of law breaking. People with criminal records will not readily be believed. Moreover, most reported abuses occur, not in open places where there are corroborating witnesses, but in secluded police facilities where the only other witnesses are police officers. It would take extraordinary courage - perhaps

even some bravado - for aggrieved people in such situations to seek redress for what the police did to them.

No doubt, this general reluctance would be exacerbated by the fact that, in the greatest number of cases, complaint investigations are initially conducted by the police themselves. No matter how fair any such investigations may be in fact, they simply could not appear fair. To the civilian complainants, the investigations would be vulnerable to the suspicion that fellow officers would "cover up" to protect their colleagues. Indeed, there is the appearance of unfairness even to the respondent police officers. To them, the investigations would be vulnerable to the suspicion that collegial rivalries and departmental politics would prevail over scrupulous fact-finding. Thus, investigations should not be conducted by those with departmental interests to protect or collegial relations to maintain. 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.

Recommendation No. 2

The Police Services Act should be changed to provide that the independent police complaints commissioner be required to handle all civilian complaint investigations from the outset.

Beyond the Complaints Machinery - The Need for Independent Audits

Unfortunately, however, even a progressive amendment of this kind could not be expected to elicit a significant proportion of complaints from those who feel aggrieved. The greatest number of aggrieved people will likely continue to feel too intimidated to complain. Imagine, for example, the terrified youngsters at Mt.

Cashel in Newfoundland having the courage, on their own, to launch complaints. We can expect comparable paralysis from others. Immigrants from dictatorial regimes might well feel over-awed by the prospects of public conflict with the police. Because of physical distance from the centres of service and cultural alienation from society's mainstream, 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. A few 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.

This is one of the major reasons why the Canadian Civil Liberties Association began a few years ago to promote the idea that the police complaints commissioner or some other independent agency should be able to initiate audits of police practices and policies. Without having to wait for complaints to be filed and with ongoing access to police personnel, places, records, and files - as well as to accused people - an agency with audit power might unearth problems that would otherwise not come to light and allegations that might otherwise not be made.

In this connection, consider another finding of our recent survey. While at least 26 of our interviewees claimed to have consulted a lawyer while they were in custody, only 5 said that they did so before they were questioned by the police. A possible explanation for this is that as many as 36 in the survey said that they were never told that they could speak to a legal aid duty lawyer by telephone. An additional 7 who were told of this right said they did not receive the information until after they were questioned by the police.



On the basis of the recent Brydges case in the Supreme Court of Canada, it appears that such an omission by the police must be seen as an infringement on the constitutional rights of accused people. Yet very few of these apparent transgressions will ever be challenged. In a small number of the cases, it is possible that the accused people will attempt to have their custodial statements excluded from the evidence in court. It is probably safe to predict, however, that the greatest number of people who have made incriminating statements while they were in custody will not challenge the evidence in court. In all likelihood, a high proportion of such people will simply plead guilty at their trials. Apart from the number who have occasion to raise these matters at trial, there is not likely to be any redress for the unconstitutional failure of the police to tell those they arrest of their right to an early consultation with legal aid. If accused people are so reluctant to complain when they are assaulted by the police, they are likely to be even more reluctant when the transgression appears to be as seemingly esoteric as the failure to tell people their rights. Only through an audit, therefore, could the magnitude - and even the examples - of such infringements be reasonably expected to come to light.

Nor is there any other way to get a handle on the recurring allegations of racism and sexism that are made against the police. Complaint investigations are simply not adequate for such purposes. There is a need to look at patterns and to make comparisons. While our survey is suggestive in this respect, a power of audit could be more comprehensive in its scope, more precise in its comparisons, and more frequent in its use.

Moreover, 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, judgements 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 potent 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.

There was another development during this past year that exposed the need for a system of independent audits. We refer to the Junger Inquiry. This inquiry was initially triggered by allegations that, in an attempt to prevent a public scandal over Constable Junger's escort service, the police allowed the officer to resign rather than face public charges. But the inquiry gave rise to a collateral probe into the activities of the internal affairs department of the Metro police force. The upshot of that probe conducted by retired Ontario Justice Richard Holland was a finding that, in at least 138 cases, the internal affairs officials had failed to inform the office of the public complaints commissioner about civilian-instigated matters that belonged within its jurisdiction. Indeed, it appears that this failure to disclose represents a violation of the Police Services Act.

If the system depends upon complaints to be filed and if the people who filed them don't know - and are not told - about the independent complaints commission, the grievances at issue could well be concealed from the commission in perpetuity. Without an ongoing power of independent audit, there is no reliable way to ensure that the intentions of the Act would ever be fulfilled.

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 in the Donald Marshall case and at Mt. Cashel. 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 to be any less solicitous of people's freedom.

Recommendation No. 3

An independent agency should be empowered - through on-going access to police personnel, facilities, and records - to conduct self-generated audits of police practices and policies.

Summary of Recommendations

The Canadian Civil Liberties Association requests the Solicitor General to take whatever steps are necessary to achieve the following:

Recommendation No. 1

The Special Investigations Unit should be removed from the Ministry of the Solicitor General so that it will be structurally independent of the police and the government.

Recommendation No. 2

The Police Services Act should be changed to provide that the independent police complaints commissioner be required to handle all civilian complaint investigations from the outset.

Recommendation No. 3

An independent agency should be empowered - through on-going access to police personnel, facilities, and records - to conduct self-generated audits of police practices and policies.