

SUBMISSIONS TO:

Metropolitan Toronto Police
Services Board

RE:

Accountability for Police Use
of Force

FROM:

Canadian Civil Liberties Association
(CCLA)

DELEGATION:

A. Alan Borovoy
(General Counsel)

Catherine Gilbert
(Special Projects Director)

Introduction

The Canadian Civil Liberties Association (CCLA) 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 for the use of force. 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.

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 Use of Force Beyond the Use of Weapons

While it is vitally important to address those incidents in which the police employ firearms or other weapons, it is no less important to examine other allegations concerning their use of force. At least the shooting incidents are likely to attract substantial media and public attention. It is likely, therefore, that they will become the centre of significant public scrutiny. Commensurately less attention is paid, however, to those incidents and allegations of excessive force that don't involve firearms or other weapons. Yet such allegations are a recurring feature of police-citizen relations. In an effort to learn something of these allegations, the Canadian Civil Liberties Association conducted two surveys of accused people during 1992.

While names were not recorded and even allowing for the fact that the surveys involved modest samples and consisted only of the reported perceptions of the accused people themselves, there is cause for disquiet over the patterns that emerged. 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.

The First 1992 CCLA Survey of Accused People

The first survey involved 69 people who were facing criminal charges in Metropolitan Toronto. 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 Metropolitan Toronto 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 what appeared in this 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 incriminating 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.

Perhaps even more important for purposes of assessing the existing remedial machinery, 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. Aggrieved people in such situations might well feel that it would take extraordinary courage - perhaps even some bravado - for them to seek redress for what the police did to them.

In this connection, consider another finding of the 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 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 of 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.

The Second 1992 CCLA Survey of Accused People

Some weeks later, we repeated the survey. This time, we interviewed a total number of 45 accused people. Regrettably, the responses in the second survey were remarkably similar to those

that had emerged in the first one. Of the 45 people interviewed, 15 said that they had been "threatened or physically abused or hurt by the police" during their period in pre-trial custody.

Eleven of the 15 who complained of such treatment were black males. (There were 26 blacks in the survey.) A 38-year-old black man, charged with theft, alleged that the police hit him in the mouth and knocked some teeth out. A 21-year-old black man, charged with possession for the purpose of trafficking, claims that the police punched him, threw him to the ground, and twisted and bruised his arm. A 39-year-old black man said that he was "choked with a baseball bat". A 22-year-old Italian woman said that the police banged her head on a car at the time of her arrest and then kicked her in the ribs while she was sitting in the holding room. During this interaction, this woman, who had been romantically involved with a black man, claims that the police frequently called her a "nigger lover". A 41-year-old Chinese man, charged with obstruction, said that the police threatened to put "bullets in [his] head".

In common with the earlier survey, a number of allegations were made (by 16 of those who answered this question) that the police engaged in racial and ethnic name-calling. The terminology included the following: "fucking Chinese", "black scum", "smells like nigger in here". The word "nigger" emerged several times in the reports that these accused people made to us.

Again, many of those who responded further about the physical abuse they experienced, said that they would take no action over it (7 of 11). And, once more, most of these people said that such action "would do no good" or that they simply were unable to prove their claims.

In this survey, only 6 of our interviewees said that they spoke to a lawyer while they were in custody. And most of these had this

consultation after they were questioned by the police. This time, only 16 of our interviewees claimed that they were told that they could talk to a legal aid lawyer by telephone; 29 said that they never received such advice while they were in custody. The second survey asked an additional question: whether the accused persons were told while in custody that they had 24-hour-a-day access to legal aid lawyers. Of those answering, only 4 said they received such advice; 35 denied any such thing.

The Surveys in Perspective

These surveys are not presented in order to convey a definitive statistical account of the material they contain. Our purpose is a more modest one: to indicate that the problem of police abuse cannot be dismissed as merely an isolated phenomenon. When so many accused people, without consulting each other, say such similar things, it is clear that there is a problem here worthy of serious consideration.

Nor should this material be read as a general condemnation of the Metropolitan Toronto police. That would not be fair to the hard working and fair-minded police officers who provide this community with first class protection and service. It is our hope to avoid both unfair condemnation and unwarranted complacency.

Our major concern about this kind of material is that, apart from exceptional situations, nothing is likely to be done about the improprieties that occur. As indicated, there is a wide-spread reluctance to complain on the part of those who have grievances against the police. No doubt, this reluctance is 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.

Unfortunately, however, even if all complaints were investigated by outsiders to the police department, we could not expect a significant proportion of complaints to be initiated by those who feel aggrieved. The greatest number of aggrieved people will likely continue to feel too intimidated to complain. People in trouble with the law often feel especially vulnerable. But even generally law-abiding people are reluctant to take on the police. They want to avoid what they perceive as the inevitable "hassle". We can also expect comparable paralysis from certain special constituencies. Immigrants from dictatorial regimes might well feel over-awed by the prospects of public conflict with the police. Because of their cultural distance from society's mainstream, numbers of native people 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 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.

Towards a System of Independent Audits

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.

The latest police shooting in Toronto dramatizes once more the need

for the mechanism we seek. The issue of such structural redress is too often overlooked in the public controversies that inevitably accompany these tragic shootings. From the standpoint of long term rectification, the guilt or innocence of a particular police officer may not be nearly as important as a careful examination of the policies and practices that produced the incident in question.

While the Special Investigations Unit will be conducting an investigation into the possible culpability of the officer who shot Raymond Constantine Lawrence, our concern at the moment is whether the relevant departmental procedures will be properly examined. We note, for example, that the officer in question was reportedly working undercover. This gives rise to a number of questions. At what point, if at all, should an officer change roles from evidence gatherer to law enforcer? To what extent does such a transition in roles increase the risks that a suspect would resist arrest? What is the department's policy regarding the use of undercover officers for the purpose of making arrests? Is such a policy a proper one? Should alternatives be considered?

Inevitably, the sheer number of shootings in recent years generates considerable public disquiet. This too gives rise to important questions. To what extent are the police trained in defusing potential crisis situations without resort to guns? Are the training and procedures in this regard adequate? According to the Andreopoulos paper, the current state of police training in this regard leaves something to be desired. At the recent trial of the officers who shot Michael Wade Lawson, the Court heard disturbing evidence from a police official to the effect that the shooting skills acquired by police on the firing range are of little use in high stress situations on the street. More than one witness criticized the state of police training on the use of firearms. These issues require comprehensive, on-going scrutiny by people who have no particular axe to grind or interests to protect in the existing police administration.

The Canadian Civil Liberties Association is encouraged by the fact that the Police Services Board has on its current agenda a number of very useful recommendations for improving the accountability of both individual police officers and the department itself. The problem with the recommendations, however, is that the review mechanisms they propose are confined to internal ones. As useful as such reforms are likely to be, they are no substitute for a system of completely independent audits. For such purposes, it is important to have a fresh point of view that is not unduly slanted by the day to day experience of policing. And, for purposes of public credibility, an independent mechanism is indispensable.

Moreover, a system of independent audits may be the only reliable way to get a handle on the recurring allegations of racism 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. Are the police as quick to respond to requests for assistance from predominantly black as well as from predominantly white neighbourhoods? Are people from one race more likely than those from another to get traffic tickets? Are the members of one group more likely than those of another to be arrested when there is an alternative to the power of arrest? Where there is a discretion, are some people more likely than others to be its beneficiaries? By themselves, complaint investigations will rarely be able to address such matters. While our surveys are suggestive in these respects, a power of audit would be more comprehensive in its scope, more precise in its comparisons, and more frequent in its use.

As indicated, 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 determine 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 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.

Detection and Deterrence

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 Police 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.

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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.

The Relationship to Existing Agencies

It would not be appropriate to confer this audit function on the Police Services Board. As the administrator of the Metropolitan Toronto Police Force, the Board would not have the requisite concomitants of independence. Indeed, it is conceivable that some of the very policies that need to be questioned would be ones that originated at the Board itself. Similarly, this function should not be exercised by the Ontario Civilian Commission on Police Services. As a body exercising supervisory and disciplinary powers over various police departments, the Commission would not be perceived as an independent agency for such purposes. Again, a proper audit could well be required to review a ruling or policy promulgated by the Commission itself. At this stage, members of the public cannot know what disclosures will be made by the audit

currently being conducted of the Metro police by the Metro auditor. In any event, that exercise is simply a "one-shot" audit into only one problem area: race relations. What is needed is a power of on-going audits into all areas of policing. Indeed, comprehensive audits are more likely than restricted ones to turn up useful information even in select areas such as race relations. Moreover, effective audits require statutory powers of access to police facilities, records, and personnel.

The power of decision, however, would not change. According to our proposal, the solicitor general, the civilian commission on police services, the police services boards, and police chiefs would continue to exercise the relevant decision making powers. But they would make their decisions under the impact of the publicity generated by regular independent audits. In our view, this would enhance and very likely improve the quality of those decisions.

A Useful Precedent

While a system of 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 and intelligence operations. The counter-subversion unit of CSIS, for example, was disbanded in the wake of a critical SIRC report. There are also indications that, as SIRC has criticized additional areas of CSIS activity, the number of questionable CSIS investigations appears to have declined. The Canadian political agenda appears to be devoid of any serious argument impugning the importance of SIRC's contributions.

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

The Canadian Civil Liberties Association requests the Metro Toronto Police Services Board to enact a resolution calling upon the Ontario government to ensure that an independent agency will be empowered - through ongoing access to police facilities, records, and personnel - to conduct self-generated audits of police practices and policies.