

SUBMISSION TO: Commission on Systemic Racism
in the
Ontario Criminal Justice System

FROM: Canadian Civil Liberties Association

DELEGATION: A. Alan Borovoy
(General Counsel)
Catherine Gilbert
(Projects Director)

Toronto

November 2, 1993

Introduction

The Canadian Civil Liberties Association (CCLA) is a national organization with 8 affiliated chapters across the country, more than 7,000 paid individual supporters, and more than 50 groups which themselves represent several thousands of additional people. The roster of support includes people from a wide variety of occupations, callings, and interests: writers, lawyers, broadcasters, trade unionists, homemakers, ethnic minorities, etc.

Among the objectives which inspire the activities of the Canadian Civil Liberties Association are 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 terms of reference for this Commission. To whatever extent racial origin motivates infringements on freedom and dignity committed by those in the administration of justice, the mandate of this Commission and that of our organization are immediately engaged.

No single presentation can hope to adequately address the panoply of issues that this Commission must consider. We have attempted to focus on an area where we believe our experience will be helpful - the relations between racial minorities and the police. It was that relationship that triggered the creation of this Commission and it is that relationship that has provoked so much public concern.

Perceptions of Police Racism

After certain recent police shootings of black people in Toronto, it became clear that, in significant sectors of the community, there is a widespread perception that the police are quick to harass 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.

In the late spring and summer of this year, the Canadian Civil Liberties Association embarked upon an effort to determine the extent to which such perceptions exist among high school students. We wanted to look at the experiences of younger people because we expected that the school authorities would have made some effort to instill in their students an appreciation of what the police can do for them and a respect for the general role the police play in our community. Another reason for our interest in the experiences of these young people stems from the fact that they will be the citizens and leaders of tomorrow. The attitudes they have today are very likely to influence their behaviour in later life.

A Survey of Relevant Experiences

Accordingly, we conducted a survey among more than 150 teenagers that we found in the Eaton Centre, the Scarborough Town Centre, a student employment centre, and a Metro high school. Our interviewers approached these young people in these centres, without knowing anything about them except for their skin colour, gender, and approximate age. In some cases, the interviewed people would be standing alone, and in some cases, in small groups. In a couple of situations, our interviewers circulated questionnaires

among students in classrooms.

Of the 148 completed questionnaires that we have been able to use, 73 recorded the experiences of white people and 75 referred to those of visible minorities. Ninety-two of those surveyed had contact with the police during the last two years: 48 whites and 44 visible minorities - not a substantial difference.

Unfortunately, the similarity of experience tends to end at that point. Many people, of course, have contact with the police. In a large number of such cases, these people would experience the contacts as generally pleasant. In many quarters, police officers in Toronto are seen as polite, courteous, and helpful. Indeed, a good number of the contacts people have with the police are initiated by such people themselves.

We asked our interviewees, therefore, to indicate whether they viewed any of their contacts with the police during the last two years as having been unpleasant. Of the 48 white people who had had contact with the police, 23 (48%) reported unpleasantness. In the case of the 44 visible minorities, 31 (71%) reported unpleasantness in their contacts. There was no material difference in these figures among the interviewees in the various places that we found them.

While it is not possible to eliminate all variable factors from such surveys, we attempted nevertheless to weed out some of the more obvious ones. One factor, for example, that could trigger an unwanted and unpleasant contact with the police - apart from race - is a previous criminal record. People with such records often complain that they are the victims of unfair police harassment. Accordingly, we questioned our interviewees about this too. The replies would indicate that this factor was obviously

insignificant. Of the 23 whites and 31 visible minorities who reported unpleasant contacts with the police, only 3 said they had sustained previous criminal convictions that the police knew about. Thus, unless otherwise indicated, any examples which appear hereafter will be confined to those who said they had no criminal record whatsoever.

Whatever the factor that may have initially provoked the unpleasant contact, it appears that, in many cases, race became an exacerbating factor during the course of the contact. One 15 year old Chinese female reports, in the course of being questioned about the arrest of some friends, that the police were screaming and swearing at her, "Chinese chinks always getting into trouble". A 15 year old male of Chinese and Vietnamese extraction reports being taken to the police station and strip searched. One of the apprehending officers allegedly made the following comment: "You Orientals are all trouble". A 16 year old black male, intercepted during the Yonge Street mêlée, alleges that the police called him "nigger" at the station. He also claims that he was punched three times and choked during a custodial interrogation. He says that he obtained subsequent medical treatment for bruises that he sustained on that occasion.

While there are no allegations of racial invective accompanying some of the other reportedly unpleasant encounters, there must nevertheless be concern, in a number of such cases, about the relevant police conduct. A 19 year old black male says he was taken to the police station because of what appeared to have been mistaken identity. Yet the police reportedly said that they "don't want to see [his] face downtown". A 19 year old black male says he was ordered by the police to pull his car over as he was en route to a basketball game. He says that a group of police officers surrounded his car. Despite this frightening experience, it

appears that the police let him go without either laying charges or apologizing.

A black male (17 years old) says that, while he was working as a door-to-door salesman, he was stopped by the police and asked to identify himself after a neighbour reported a suspicious person nearby. On another occasion he claims that he called the police after having been "ripped off at a store". He says that the police put him in a car and drove him home telling him that the store owner claimed that he had made threats with a knife. He says the police saw that he didn't have a knife.

An 18 year old Somalian female, stopped in a car, alleges that the police forced a friend of hers to kneel on the ground with hands up and answer unpleasant questions. When it finally emerged that this was a case of mistaken identity, the police reportedly told them to go but made no apology. An 18 year old Korean female complained that she was "frisked" by a male officer.

Of course, a number of white students also claimed to have been mistreated in situations apparently devoid of racist connotations. One white student, for example, says that the police stopped him because he looked like someone else. According to him, the apprehending officer would not even listen to his story; instead, the officer reportedly said, "Move and I'll blow your head off". This student claims the police pushed and dragged him down the street. Still other young white males, some with and some without previous reported convictions, claim that the police handled them with unnecessary roughness.

In some respects, however, this survey may underestimate the racism in these unpleasant encounters. The 23 whites included people of non-Anglo Saxon origin, including Iranians, Greeks, and an

Armenian. Among the epithets the police reportedly used against these people were "fucking Greek" and "Persian terrorists".

It's bad enough for young people to be the targets of apparent mistreatment by the police; it's even worse when nothing is done about it. Of the 54 in our survey who complained of unpleasant contact with the police, 42 (approx. 78%) told us that they took no retaliatory action. Indeed, apart from telling friends or parents, only 4 reported having taken the kind of action that had a possibility of producing some kind of practical result. Two consulted a lawyer, one complained at the station, and another to the "police complaints board". Among the explanations that were made for the refusal to take action, most (19) claimed that it wouldn't do any good. Some said they wouldn't be believed, others thought that complaining would create more trouble for them, and others expressed a fatalistic view that what they experienced is the way things are. Eleven said that a complaint was "not necessary" and another 11 claimed that they "didn't care". These replies could include a mixture of minimizing the seriousness of what they experienced, expressing a sense of futility, and general indifference.

Sadly, in our complaints-driven system, our society has no way of adequately determining the facts in such situations. We won't find out how many of these contacts were genuinely provoked by racism, and we won't be able adequately to assess culpability as between our interviewees and the police. What we can safely assume is that a significant proportion of these young people reasonably perceived themselves to be innocent victims of police racism. This is the factor, above all, that requires some structural changes in the machinery by which our society attempts to ensure police accountability.

Toward A System of Independent Audits

This is also one of the major reasons why the Canadian Civil Liberties Association began a few years ago to promote the idea that an 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, an agency with audit power might unearth problems that would otherwise not come to light and allegations that might otherwise not be made. While the public interest would be generally served by such an audit system, race relations would especially benefit. That is because racial and ethnic minorities appear to be disproportionately prejudiced by the status quo.

Consider, for example, the recent controversy over the behaviour of Metro police officers in the aftermath of the police shooting of Hispanic immigrant Luis Vega. According to the director of the Special Investigations Unit (SIU), Metro police officers were "totally insensitive and inappropriate" in their treatment of the Vega family. The SIU director alleges that the police insisted on questioning Vega's brother before he could be treated for his own injuries and without even telling him that Luis had died. Indeed, the police reportedly refused also to allow Luis' wife to accompany her dying husband to the hospital. In the opinion of the SIU director, the insensitivity of those Metro police officers was compounded by the fact that they had no role to play in a police shooting; investigations in such circumstances are supposed to be conducted by the SIU itself. In the wake of the SIU report, the Metro police chief undertook to launch an investigation to hear both sides of the issue.

If it hadn't been for the conscientiousness of the SIU director,

this issue might never have surfaced. Indeed, at least one member of the Police Services Board - Metro chairman Alan Tonks - argued that the SIU director had exceeded his jurisdiction in making any comments whatsoever on the way Metro police treated the Vega family. But, even those who disagree with Mr. Tonks must realize that there was nothing inevitable about this report. It's quite conceivable that another SIU director would have chosen not to make a public comment on the behaviour at issue. Moreover, no member of the Vega family filed a complaint over the incident. Indeed, as already indicated, most people in such circumstances would be unlikely to complain.

Thus, unless there were an audit system, our community could not count on even learning about situations like this one.

A Special Focus On Policy Issues

Moreover, complaint-based investigations often overlook issues of structural significance. 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 may have produced the incident in question.

Recently, for example, there was an SIU investigation into the possible culpability of a Metro police officer who shot and killed a black Metro resident. But there was little indication that the relevant departmental practices would be examined. It appeared, for example, that the officer in question was 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? At the moment, there is no on-going system for subjecting such questions to independent scrutiny.

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 a paper prepared for the Metro Toronto Police Services Board, the current state of police training in this regard leaves something to be desired. At the 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.

Moreover, a system of independent audits may be the only reliable way to get a handle on the direct allegations of racism that are recurringly 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 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 survey is 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.

The Detection and Deterrence of Misconduct

Sooner or later, a system of independent audits would be likely to uncover misdeeds that aggrieved people lacked the awareness or the courage to complain about. For such purposes, an 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 also 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.

Relationship To Other Agencies

It would not be appropriate to confer this audit function on the Solicitor General, the Ontario Civilian Commission on Police Services, or any of the police services boards. In one way or another, they all exercise supervisory and disciplinary powers over the police. It is conceivable, therefore, that some of the very policies that need to be questioned would be ones that originated with them. Moreover, there is a tendency among people to make life as easy as possible for themselves. Thus, those who have decision-making powers over the police will find life easier if they don't find the police at fault.

For this reason, we believe that those performing the audits should not exercise any such decision-making powers. The function of an audit office would be to disclose and propose, not to decide. In that way, it would create on-going and informed pressures on those who must decide. The effect would be to ensure that the decision makers could not wriggle off the hook.

It should also be pointed out that the proposed Race Relations and Policing Monitoring and Audit Board, currently being considered by

the Solicitor General, will not adequately address what we are recommending. An audit focused so narrowly could easily miss material within its sphere of interest. Not infrequently, issues of racial importance will emerge from an examination of practices that are seemingly unrelated. In order for audits to be adequately helpful to race relations, they must have a general mandate to probe police policies and practices. Moreover, the proposed audit board is designed to set standards for what are essentially internal government audits. Our idea is that an audit agency must itself perform the audits and it must be independent of the police and government.

Precedents

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. And where the redress of racism is concerned, independent audits could provide one of the most effective devices conceivable.

Recommendation

The Canadian Civil Liberties Association calls upon the Commission to recommend that an independent agency be empowered - through ongoing access to police facilities, records, and personnel - to conduct and report on self-generated audits of all police practices and policies.