THE ROYAL COMMISSION INTO METROPOLITAN TORONTO POLICE PRACTICES

THE HONOURABLE MR. JUSTICE DONALD R. MORAND,
COMMISSIONER.

TO HER HONOUR THE LIEUTENANT GOVERNOR OF ONTARIO

MAY IT PLEASE YOUR HONOUR

I, the undersigned Donald Raymond Morand, one of Her Majesty's Justices of the Supreme Court of Ontario was appointed Commissioner by Order-in-Council No. 2789/74 pursuant to the provisions of The Public Inquiries Act, 1971, S.O. 1971, Chapter 49, and approved by Your Honour on the 23rd day of October A.D. 1974, to inquire into the following matters:

1) allegations made against certain members of the Metropolitan Toronto Police Force respecting mistreatment and the use of excessive force in relation to the apprehension, arrest or detention and/or the allegations of the use of force in interrogation of certain persons named in the said Order-in-Council.

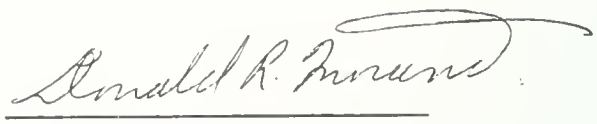
2) to inquire into the allegations of such other persons as I should determine are necessary for the purposes of this Inquiry.

3) to determine whether or not the alleged mistreatment or use of excessive force is a tendency or practice in the said Police Force.

4) to inquire into the necessity of the use of force in the apprehension, arrest or detention of persons and the degree of such force that may be used, if force is determined to be necessary.

5) to make such recommendations as I may deem fit.

I beg to submit to Your Honour the following report.



Commissioner

June 30, 1976

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Ontario

Executive Council

O.C. 2789/74

Copy of an Order-in-Council approved by Her Honour the Lieutenant Governor, dated the 23rd day of October, A.D. 1974.

The Committee of Council have had under consideration the report of the Honourable the Solicitor General, dated the 23rd day of October, 1974, wherein he states that,

WHEREAS allegations have recently been made respecting the mistreatment of and use of excessive force towards persons apprehended, arrested or detained by members of the Metropolitan Toronto Police Force.

AND WHEREAS the Metropolitan Toronto Board of Commissioners of Police has requested that this Government cause an inquiry to be made into these allegations.

AND WHEREAS such matter affects the administration of justice in Ontario and it is thought fit to refer this matter to an inquiry instituted pursuant to the provisions of The Public Inquiries Act, 1971, S.O. 1971, Chapter 49.

The Honourable the Solicitor General therefore recommends that pursuant to the provisions of The Public Inquiries Act, 1971, S.O. 1971, Chapter 49, a Commission be issued to appoint the Honourable Mr. Justice Donald Raymond Morand of the Supreme Court of Ontario, a Commissioner:

1) to inquire into recent allegations made against certain members of the Metropolitan Toronto Police Force respecting mistreatment and the use of excessive force in

relation to the apprehension, arrest or detention of the following persons, and the allegation of the use of force in the interrogation of such persons:

Name	Date of Occurrence
Robert Ethier	January 10, 1974
Patricia Murphy	January 25, 1974
Tom Henderson	February 9, 1974
James Hyland	March 3, 1974
Danny Howell	March 11, 1974
John Thomas Swaile	March 11, 1974
Richard Hemmingway	March 28, 1974
Brian William Garlick	May 25, 1974
Delroy Carlton Tomlinson	July 7, 1974
Roy Bonner	July 9, 1974
Daniel Ethier	July 9, 1974
David Clarke	October 12, 1974
Sheldon Starr	October 12, 1974

and of such other persons as the Commissioner shall determine are necessary for the purposes of this inquiry,

2) to determine whether or not the alleged mistreatment or use of excessive force in the apprehension, arrest or detention of persons is a tendency or practice in the said Police Force,

3) to determine whether or not the use of force in interrogation is a tendency or practice in the said Police Force.

4) to inquire into the necessity of the use of force in the apprehension, arrest or detention of persons and the degree of such force that may be used, if force is determined to be necessary, and to report thereon and to make any recommendations to the Lieutenant Governor in Council as the Commissioner may deem fit.

The Honourable the Solicitor General further recommends that all Government Ministries, Boards, Agencies

and Commissions shall assist the Honourable Mr. Justice Morand to the fullest extent in order that he may carry out his duties and functions, and that he shall have authority to engage such counsel, investigators and other staff as he deems it proper at rates of remuneration and reimbursement to be approved by the Management Board of Cabinet.

And the Honourable the Solicitor General further recommends that Part III of the said Act be declared to apply to the forementioned inquiry and Commission.

The Committee of Council concur in the recommendations of the Honourable the Solicitor General and advise that the same be acted on.

Certified,

Clerk, Executive Council.

INTRODUCTION

Pursuant to the Commission, I appointed Earl A. Cherniak, Q. C. as Senior Counsel and Robert P. Armstrong as Assistant Counsel. I also appointed R. Archie Ferguson as Executive Secretary of the Commission and Barbara Betcherman as Research Assistant. As it was necessary to make an independent investigation into the cases referred to the Commission, six investigators were retained. My counsel, in conjunction with the investigators, immediately commenced preparation for the hearings by making an extensive investigation into each allegation referred to by the Order-in-Council. An office was opened at 151 Bloor Street, West after efforts were unsuccessfully made to secure accommodation in existing Government buildings. At a later date, this office was closed and spare rooms in the Court House were used. Advertisements were placed in the local newspapers advising the public that complaints against the police could be made to our office, which was opened on the 4th day of November, 1974. Suitable accommodation for the hearings was secured in Court Room No. 20 of the Court House located on University Avenue. Due publicity was given as to the time and place where such Inquiry was to be held and the Inquiry opened on Monday, December 2nd, 1974, and continued (with suitable adjournments) until the 15th day of January, 1976.

Throughout the period of the Commission's existence, extensive research was done concerning police forces with particular emphasis on the problems which the Commission was required to examine. In addition to a perusal of the literature on the subject, interviews were held with professors, scientists, sociologists and experts of numerous branches of the sciences in order to obtain the proper background to understand and evaluate the evidence as it came before the

Commission. Commission counsel and staff and your Commissioner were required to read literally dozens of books and hundreds of articles as well as a multitude of rules, regulations and statutes in order to do a proper job. The Criminal Code has numerous sections dealing with powers of police and all of these sections as well as many cases arising therefrom were perused by the Commission and staff.

Commission counsel and I travelled to London, England and met with many individuals and representatives of various groups and organizations who have had experience with policing in the United Kingdom. We also met with representatives in the Home Office responsible for municipal police forces in England and Wales. In addition we attended at Scotland Yard and met with Sir Robert Mark and other senior officers of the Metropolitan London Police Force. Our meetings in London were extremely helpful in the formulation of some of my ideas on the task before me and I extend my thanks to all in London who were so generous in giving their time to meet with us.

I wish at this time to express my appreciation and gratitude to my counsel and the Commission staff for their assistance not only in doing the necessary research and adducing the necessary evidence, but also for their assistance in writing my Report.

I shall deal with the evidence heard in Part I of the Report, and in Part II, I will discuss the problems encountered by the police and by the general public in the use of force in arrests, detentions and interrogations, and in Part III make some recommendations which I hope will be of assistance in minimizing confrontations between members of police forces and the general public. For the sake of brevity I may, after the initial introduction of persons, thereafter refer to them by their surnames only.

The terms of reference in the Order-in-Council required me to inquire into and report on thirteen named allegations against the Metropolitan Toronto Police Force and such others as I determined necessary for the purposes of this Inquiry.

In addition to the thirteen above referred to allegations, the Commission called evidence on four other complaints made to the Commission, which were selected to be heard because they, along with the thirteen cases, fairly represented the types of complaints made to the Commission.

In addition transcripts of court cases and briefs were filed without oral testimony concerning three other complaints.

In each case heard, it was necessary to obtain all of the material in the hands of the Metropolitan Toronto Police Force and to have our investigators interview many people. In addition, the staff at the Centre of Forensic Sciences Laboratory of the Solicitor General was of assistance to us in examining certain documents and other matters.

It is an unfortunate aspect of Royal Commissions that the Commissioners must report disparagingly of some persons and expose unhappy situations which, but for the necessity of this Inquiry, might have remained unknown to the general public. As most of the persons by whom complaints were made and some of the police officers against whom complaints had been lodged were facing criminal charges, it was necessary to be careful not to prejudice the rights of those persons to a fair trial. However, as the interests of the community at large must take priority over individual rights, it was

necessary to bring forward all of the evidence relevant to each case in which we called evidence. Under The Public Inquiries Act, 1971, Section 9(1), a witness at an inquiry is deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate or may tend to establish his liability to civil proceedings at the instance of the Crown or of any other person. No answer given by a witness at an inquiry can be used or received in evidence against him in any civil trial or other civil proceedings thereafter taking place against him, other than a prosecution for perjury in giving such evidence. Section 9(2) requires that each witness be informed by the Commission of his right to object to answer any question under Section 5 of the Canada Evidence Act. If the witness asks for the protection of the Canada Evidence Act, he is entitled to it in any subsequent criminal matter to which the Canada Evidence Act is applicable. Each witness before the Commission was given a copy of the relevant section of the Canada Evidence Act and some witnesses did ask for and obtain the protection of the Canada Evidence Act.

Under the Public Inquiries Act, 1971, each person who had a substantial and direct interest in the subject matter of the Inquiry had a right to be present, to retain counsel and to give and to call evidence, as well as to examine witnesses on evidence relative to that person's interest. In addition thereto, each person against whom a finding of misconduct might be made by the Commission was entitled to reasonable notice of the substance of the misconduct alleged against him. The Commission was careful to ensure that all persons were granted those rights. The Metropolitan Toronto Police Department was represented by counsel, and, in addition, some officers chose to retain their own counsel. Through the co-operation of the authorities of the Legal Aid Plan, each person making a complaint was assisted in retaining legal counsel and most of them were so represented.

Certain community groups also wished to take an active part in the daily operation of the hearings, but as I held that these groups had no substantial and direct interest other than the interest of the public at large, they were not permitted to call evidence or to question witnesses in the individual cases heard. However, Commission counsel were accessible to representatives of these groups throughout the hearings in order to allow them the opportunity of making suggestions as to witnesses or lines of enquiry.

The Public Inquiries Act also allows the Commission to state a case to the Divisional Court under certain circumstances. One such case was stated involving one of the witnesses whose counsel objected to answering certain questions. The court ruling was in favour of the Commission and the witness reattended and answered the questions.

The complainants in the thirteen cases upon which the Commission was required to call evidence, had been examined by a polygraph expert and in each case, had "passed" the test. A Commission may hear all kinds of evidence which would not be admissible in a court of law. In order to determine whether the Commission should hear the polygraph evidence and to determine what weight should be applied to it, it was necessary to extensively investigate the validity of the polygraph test. No review in depth had ever been done on the polygraph in Canada, and for that reason, a number of experts were called dealing with this subject. This evidence and my conclusions concerning the polygraph test will be dealt with in a separate chapter and will not be mentioned in the chapters concerning the individual cases heard by the Commission.

In Commission hearings, hearsay evidence may be received. The generally accepted definition of hearsay evidence was stated by the Privy Council in Subramanian v.

Public Prosecutor, [1956] 1 W.L.R. 965, at page 970:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

Many Royal Commissioners considered this issue. The purpose of this and many other Royal Commissions is to arrive at the truth concerning certain allegations made by members of the public. Very briefly I should state that while hearsay evidence may be heard by a Commission, it ought not to be acted on. Rather it is useful in that it leads the Commissioner in the direction of other direct evidence. The findings of impropriety which I shall be making are not based upon hearsay evidence, but upon direct evidence of witnesses before the Commission.

I should also point out at this time, there are additional differences between a Commission hearing and a trial at which the regular rules of evidence would be applicable. While a finding of a Royal Commission may adversely affect the reputation of some parties, it does not deprive a party of any right. In a court of law, an accused person must be proven guilty beyond a reasonable doubt. A Commissioner may come to a conclusion of facts upon a balance of credible testimony. This distinction is often extremely important in a complex situation involving much conflicting evidence. The lower standard of proof permits the Commissioner to assess the evidence and make recommendations without being unduly hampered by legal difficulties, without prejudicing any persons because legal rights are not determined by his findings.

A total of 152 allegations against the police were

received by this Royal Commission, from citizen complaints, the Order-in-Council, and research done by Commission counsel and staff, during the period from November, 1974 to January, 1976.

Out of this total, 55 cases clearly did not come within the terms of reference. Some were complaints about other police forces. Some were complaints of rudeness by police officers and some were completely frivolous.

All of the 97 complaints which appeared to come within the Commission's terms of reference, received a preliminary investigation, during which complete copies of police files, if any, were obtained. Detailed statements were taken from the complainants and lengthy interviews held with them. In addition, some or all of the witnesses were interviewed.

Some of these cases turned out to be unfounded. Some of the complainants subsequently refused to co-operate with the Commission, and some had left the country. After a thorough review by Commission counsel, Commission investigators and myself, a further number of cases were not proceeded with for the following reasons:

(a)	Complaints were too old. (In one case, ten years ago)	2
(b)	Cases arising out of the Artistic Woodworking labour dispute which the Commission decided not to hear as a matter of policy	2
(c)	Complainant would not co-operate	15
(d)	Complainant wished complaint withdrawn	9
		28

Of the remaining 69 cases, the following disposition was made:

(a)	Heard at the hearings	17
(b)	Transcript of Court cases and briefs filed	3
(c)	No evidence	10
(d)	Force used was legal	8
(e)	Cases of similar kind heard at hearings	31
		69

While in only 17 cases was evidence publicly called, there were many other cases which might have warranted such a hearing. The 17 cases heard were representative of the cases which came to our attention.

Of the 97 cases fitting within the terms of reference of the Commission, the following statistics emerged:

1. 25 complaints alleged that excess force was used during interrogation, generally during oral interrogation rather than during the taking of a written statement.

2. In 82 cases the force complained of occurred during arrest and in ten of these complaints, also during detention.

3. 90 of the complaints were made by male persons and seven of the complaints were made by female persons.

4. 51 of the complaints were against uniformed officers; 32 of the complaints were against plainclothes officers and five against a combination of plainclothes and uniformed officers. Nine of the complaints were against police officers who were not designated as either being

in uniform or in plainclothes.

5. The age of the complainants were as follows:

16 - 21 years	- 27 complaints
22 - 31 years	- 35 complaints
32 - 41 years	- 13 complaints
42 - 51 years	- 7 complaints
52 - 65 years	- 2 complaints
Age Unknown	- 13 complaints

6. The complaints were made against different divisions and squads as follows:

11 Division	- 1 complaint
12 Division	- 2 complaints
13 Division	- 3 complaints
14 Division	- 13 complaints
21 Division	- 5 complaints
22 Division	- 1 complaint
23 Division	- 2 complaints
31 Division	- 3 complaints
32 Division	- 4 complaints
33 Division	- 1 complaint
41 Division	- 2 complaints
42 Division	- 1 complaint
43 Division	- 2 complaints
51 Division	- 8 complaints
52 Division	- 21 complaints
53 Division	- 1 complaint
54 Division	- 1 complaint
55 Division	- 9 complaints
3 District Plainclothes	- 2 complaints
4 District Plainclothes	- 2 complaints
1 Traffic Division	- 1 complaint

3 Traffic Division	-	2 complaints
5 Traffic Division	-	1 complaint
Hold-Up Squad	-	2 complaints
Unknown location of officers	-	7 complaints
Combination of officers from different groups	-	5 complaints

It is interesting to compare these statistics with the number of arrests and community contacts made by police officers in the performance of their duty.

In 1975, the Metropolitan Toronto Police Force made the following arrests:

Criminal Code Offences	59,491
Narcotic Control Act Offences	4,358
Other Federal Statutes	1,812
Liquor Control Act:	
Drunk Offences	19,879
Other Offences	7,748
Other Provincial Statutes	1,064
Total	94,352

In addition to the above arrests, the police came into contact with the public on at least 1,200,000 other occasions.

The Metropolitan Toronto Police Department polices an area of 243 square miles containing approximately 2,700,000 people. There are 3100 miles of roadways. There are approximately 5500 police personnel and 800 civilian employees in the Metropolitan Toronto Police Department.

When we compare the number of complaints made to the Royal Commission complaining about excessive use of force with the total number of arrests, it quickly becomes apparent

that on a percentage basis the number of complaints are an extremely small percentage. Even that percentage may be reduced when one considers that a substantial number of complaints were without merit. There were undoubtedly however other incidents about which no complaint was made to the Royal Commission. No estimate can be made as to the number of such incidents.

Of course, one occurrence is one too many, but so long as policing is done by human beings dealing with other human beings, perfection will never be achieved. If the recommendations made in this Report help to reduce the number of instances of the police exceeding their authority then the Inquiry will have served a useful purpose.

It should be noted that 51, 52 and 14 Divisions encompass downtown Toronto where there is, of course, more work for the police to do than there is in the other divisions.

In Part I, I propose to deal with the particular cases in which evidence was called before me. Following this, Part II will deal with matters which came to our attention during the course of the Inquiry, relevant to the general purposes of the Commission, and in Part III, I will attempt to formulate specific conclusions and recommendations.

PART I

Chapter I

THOMAS GORDON HENDERSON

The complaint of Henderson concerned force used upon him by police officers during the course of an arrest which took place on February 9th, 1974.

Henderson at the time, was eighteen years of age and had been married for less than one year to Saada Henderson. He was an employee of the Post Office and lived at an apartment in Willowdale.

Henderson testified that at approximately 2:00 a.m., on February 9th, 1974, Officers Rusk, Jilek, Mantle, Davenport and Cook attended with a search warrant on his apartment. At the time, Henderson was watching television with his wife and his brother-in-law, Samuel Wizman, fourteen years of age, was visting them. Wizman had fallen asleep on the living-room floor. The door burst open and a number of officers ran into the apartment. Henderson testified that the lights were out and when the officers broke in, his wife, afraid, began to run across the livingroom.

Henderson testified that three of the officers, Cook, Jilek and Rusk took him into the bedroom immediately. He had previously smoked one cigarette of "hash", but had used no other drugs that day. As he was taken into the bedroom he noticed two of the officers nudging his brother-in-law with their feet, presumably to wake him up.

Henderson stated that the officers did not show him a search warrant. The officers demanded to know where "the

stuff was". Henderson stated that he wanted to speak to his lawyer, but when he made the request Rusk punched him in the chest and knocked him onto the bed. The officers continued to ask where "the stuff was" and Henderson alleged that Rusk grabbed him around the throat, started to choke him and threatened to kill him several times. Rusk allegedly stated that if Henderson did not give them the drugs, when the officers found them, they would make it much more difficult for Henderson. Henderson testified that he was dragged by the hair toward a closet from which he produced some hashish and L.S.D. Officer Cook made Henderson identify the L.S.D. Henderson stated that he was again pulled by the hair and asked, "Where did you get it?" He was also asked why he wanted to "screw up kids' heads". He was once again pushed onto the bed and two of the officers spread his legs. One of the officers, probably Rusk, grabbed his testicles and squeezed them for about ten seconds. Henderson screamed. His wife entered the bedroom, at which point the officers who were holding his legs kicked him in the knee. Mrs. Henderson refused to leave the room stating that she knew that the officers were beating up her husband. Officer Davenport stated that Henderson did not look beaten at that time. Henderson testified that he told his wife, "Yes, they have been hitting me". Henderson alleged that as the entire group left the bedroom, Officer Jilek made a statement to his wife, which he took to be a threat against her.

Henderson stated that approximately thirty to thirty-five minutes after the officers had first entered the apartment, the Hendersons and Wizman were taken to No. 3 District Headquarters arriving there at 2:50 a.m. Henderson denied abusing or resisting the officers. Both he and Wizman were handcuffed and the handcuffs were removed shortly after they arrived at a room on the second floor of the station. Henderson was immediately taken to another room by Officer Rusk, as Cook, Mantle and Davenport brought his wife in.

Henderson testified that he was taken down a hall and into a small room. The door of that room was shut and from a briefcase, Rusk produced a claw-type device known as a mechanic's claw. Henderson alleged that Rusk threatened him, telling him that he would talk if it took three hours. Henderson once again requested to speak with a lawyer and stated that he had a right to make a telephone call. Rusk allegedly replied that Henderson had been watching too many Yankee movies. Henderson was told that he would be able to make a telephone call before being put in the cells.

At this point, according to Henderson's testimony, Officer Jilek entered the room. Henderson alleged that one of the officers, probably Rusk, said, "What is this, a game we are playing? You have been told to talk and you have not said anything." Jilek punched Henderson on the left side of the head. Rusk then put the claw in his left nostril, locking it closed and then took it away, leaving one small puncture mark. Henderson was ordered to take down his pants, at which point Jilek took the claw. Henderson stated that he asked them whether he would be let alone if he talked. He was told "yes" and he pulled his pants on. Officer Jilek tried to put the claw on his leg through the pants, but it did not cut through the material. Jilek then pulled the pant leg up and attached the claw to Henderson's leg, again leaving puncture marks. When Henderson tried to move the claw away, Jilek told him not to touch it and hit him across the hand with it. They again took down Henderson's pants and handcuffed his right hand to the chair. Rusk indicated Henderson's penis and said, "Hold it out for us, so that I can put it on". Henderson stated that Jilek then put the claw on his penis and pulled it off, after approximately five to ten seconds, causing a tear in the skin. Henderson was very frightened and was crying. At about this point, Davenport entered the room and said, "Oh, you are using the claw". He then left the room.

Henderson testified that Rusk then took a pair of vise grips from the briefcase and told Henderson, "Wait and see what else we have in there for you". Henderson was blindfolded and one of the officers stated, "Let's get one of the nuts in there". Henderson pretended to faint and the blindfold was taken off. The officers questioned Henderson about the source of the drugs and Henderson testified that because he was so afraid, he gave them the information. He was threatened that if he told anyone what had occurred in the room, they would take him to the Humber River and drown him.

Henderson stated that he was then taken briefly to the room in which his wife and brother-in-law were sitting, and then to another room where Officer Rusk typed out a statement and forced him to sign it. He stated that Rusk asked him questions and if he showed any signs of hesitation, Rusk would ask if Henderson desired to return to the small room. Feeling that he had no choice, Henderson signed the statement.

Henderson stated that during the giving of the statement, his wife began to cry and he was taken back briefly to see her, so that she could reassure herself of his safety. Following this, the statement was completed. At this point, Henderson was offered a telephone call, but because he had been informed that he would be let out on bail, he saw no point in making one.

Henderson's wife and brother-in-law also testified before me and in general, they confirmed Henderson's evidence in most details. The brother-in-law, it should be noted, was a fourteen year old boy, who saw very little of what was alleged to have taken place. He was apparently asleep when the officers arrived and in view of his age, I placed very little reliance upon his testimony. He was released in the early hours of the morning from a police cruiser some distance from his home. It strikes me as very unusual conduct to treat a fourteen year old in this way. I would

have expected that the officers would see that he got home safely.

I found the evidence of Mrs. Henderson to be unreliable in many respects and I, therefore, placed very little reliance upon it, with the sole exception of her testimony on the physical condition of her husband after the evening in question.

The officers involved in the raid gave testimony and their evidence conflicted in virtually every material particular with that given by Henderson, his wife and his brother-in-law. The officers testified that they obtained a key to Henderson's apartment from the manager of the building and upon opening the door with the key found that there was a chain lock. They broke the chain lock, ran into the premises and shouted that they were police officers while holding out their badges. The officers denied that Jilek was in the bedroom with Henderson and testified that the three with him were Rusk, Cook and Mantle.

The officers denied that excessive force was used in the bedroom. Officer Rusk testified that he had seen Henderson attempt to swallow something. In order to preserve the evidence, the police grabbed Henderson, threw him down on the bed and Rusk put his hands around Henderson's throat to prevent him from swallowing it. The officer explained that in drug raids it was not uncommon that an attempt to swallow the evidence was made. On cross-examination, the matter was canvassed thoroughly. Rusk testified that it was his view that, in order to preserve evidence, it was permissible to choke a suspect even to the point of risking his life.

The officers denied that anyone grabbed Henderson's testicles or that any other force was used. They stated that after demanding the drugs, they commenced searching the premises and at that time, Henderson voluntarily produced

drugs from a coat pocket in the cupboard.

They then took all parties to No. 3 District Headquarters and separated Henderson from the other two in order that a statement could be taken from him. The usual warning was read to him and a statement which was filed in evidence was taken and signed. Once again, the officers denied that any force or threats were used.

It became obvious to me during the course of the hearings that Henderson was exaggerating the events that had occurred on the evening in question. However, I reluctantly came to the conclusion that certain portions of his testimony were the truth.

I am satisfied that Henderson substantially exaggerated the amount of force used in the apartment, although I find also that with one exception, the officers did use the maximum legally permissible force in the incidents that occurred in the apartment.

That exception concerned the choking incident. I am satisfied that Henderson did not attempt to swallow anything and I very much doubt that Officer Rusk believed he saw him do so. According to Rusk's evidence at the time of the choking incident the officers already had the drugs, and therefore the choking of Henderson would appear to have no reason other than one of possible intimidation. I am satisfied that this incident did take place and was an unjustified and excessive use of force.

Although it is difficult to believe that conduct such as that alleged by Henderson could occur in this city, I have come to the conclusion that Henderson's allegations concerning the violence and threats made upon him at the police station did, in fact, occur.

The incident must have taken place between 2:50 a.m. and 3:05 a.m., a period of fifteen minutes. Henderson had estimated a substantially longer period of time, but did testify that he had had no watch and that it was merely an estimate. The police had a solid case against Henderson before arriving at the police station and required no additional information concerning the charge against him. The only reason that can be imagined for the improper actions of the officers would be to obtain evidence as to the source of Henderson's drugs. The officers denied that they made any attempt to determine Henderson's supplier after he told them that he got it at Rochdale. I find it impossible to believe that they would not attempt to determine the source of the drugs. I received the distinct impression that the officers involved felt very strongly about drugs and in particular, about L.S.D.

When Henderson was examined by a doctor on February 9th, 1974, he was described as a fit, young man in no distress. A note was made of the fact that Henderson had a scratch on his penis and a slight hole in the side of his left nostril at that time. Despite conflicting medical evidence, I am satisfied that the mark on Henderson's penis was consistent with the application of the type of device that he described in evidence.

It is with a great deal of regret that I have come to the conclusion that Henderson's allegations concerning his treatment in the police station were true. I am satisfied that Officers Rusk and Jilek placed the vise grips and the claw upon Henderson when he stripped in the police station and that Officers Cook and Davenport must have been aware of what was taking place. The probable purpose of this was to intimidate rather than to injure Henderson. This is, of course, far from being a justification.

Henderson also testified that after being released, he

attempted to make a complaint to the Police Complaint Bureau and was told that it was closed on Sundays. He did reattend on the Monday following and made a formal complaint. At that time, he had pictures of his injuries taken by the Complaint Bureau. Henderson's treatment by the Complaint Bureau was less than satisfactory. I will not deal in depth with it at this time, as the Complaint Bureau procedures are relevant only to the second part of my task, namely, to the formulation of recommendations and it is at that point in this Report that I shall deal with these comments.

Chapter II

GARY BAIN

Gary Bain's complaint arose out of an incident occurring on the evening of February 19th, 1975.

Bain was a university student, attending school in Kitchener. At the relevant time, he was visiting his family in Toronto for a few days.

Bain had had some experience with police officers on two previous occasions. On one of those occasions, he was charged with theft of a book and on the other, he had given a statement to the police as a witness.

Bain testified that he had bought a pound of marijuana and was selling some of it in order to obtain the rest for himself at no cost. Bain frequently visited a pool hall in his neighbourhood. On February 19th, he attempted to speak with another customer in the washroom, concerning the sale of some marijuana. He knew that this person was a drug user and he hoped to make a sale to him. While Bain was showing the marijuana, the proprietor of the pool hall entered the washroom and accused him of attempting to sell drugs. The proprietor ordered both men out of the premises and stated that he was going to call the police. Bain did leave and apparently the police were called.

Bain testified that he had bought the marijuana in Kitchener. He testified that while at the pool hall, he had three 1-oz. bags with him, along with another one 1-oz. bag in his underwear. The balance of the marijuana was in a cupboard in his bedroom in his parents' home. He placed

three ounces in the trunk of his mother's car, which he had driven to the pool hall, and walked around for some time because of his fear that the police had been called. He eventually drove his mother's car home, at approximately 11:30 p.m. While putting his parents' cars in the garage, he was apprehended by police officers and was told that he was under arrest on a charge of conspiracy to traffic in marijuana.

Bain testified that he was put into the police car while two officers, whom he identified as Everdell and Rusk, searched his house with the consent of his parents. They discovered the marijuana in a cupboard and found a notebook and a set of scales in the family-room.

The four officers then drove Bain to the police station. Upon arriving at No. 3 District Headquarters, Bain was taken up the stairs and into a room at the end of a hall. The door to that room was locked and Officer Jilek went to get the key. At some time between 12:00 a.m. and 12:15 a.m., Bain was taken into this room, was told to strip and did so. Officer Cook kicked his clothes across the room, but did not search them and so missed the 1-oz. bag of marijuana contained in them. Bain was physically searched. While Bain was still undressed, Rusk commenced questioning him. At this point, Officer Rusk was sitting across a desk from Bain and Officer Cook was standing behind him. The notebook found in the house was produced and Bain was asked if he had seen it before. He denied having done so. In the book, Bain had listed certain first names of persons who had purchased marijuana from him along with the amounts that they had paid. The officers questioned Bain as to the identity of these people and as to Bain's source of the marijuana. Bain told them that he did not remember any last names. After denying that he had marijuana, Bain testified that Officer Cook hit him in the kidneys with a closed fist. Bain testified

that as he continued to deny having knowledge, Officer Rusk called him a liar and hit him in the kidneys. Bain testified that during a period of approximately thirty minutes, he was hit from six to ten times.

Eventually Sergeant Rusk crossed to the corner of the room and picked up a black stapler. Rusk then took hold of Bain's penis and said, "This will make you talk". He closed the stapler on the penis and one prong of a staple entered it. Bain reached down and pulled out the staple, causing the injury to bleed. Bain testified that blood dripped onto the floor and Officer Cook stated, "Disgusting, get him to clean it up". Cook gave Bain a tissue and told him to wipe up the blood. The injury did not bleed for more than thirty seconds. Bain was again placed behind the desk and again asked where the rest of the marijuana was. Bain stated that he told them at that time, that he had hidden it under some bushes. At this point, Officer Everdell was in the room, although he had not been there during the staple incident, and said, "It better be there". Bain, in fact, had placed the drugs under the rug in the trunk of his mother's car.

At this time Everdell and Cook left the room and Officer Rusk continued to query Bain about the source of his drugs. Cook returned with a billy and each time Bain denied knowledge or gave false answers, he was struck on his rear. He testified that the blows were hard and that he was crying because of the pain. He stated that his rear was very red for a day or so, but did not have any welts. Eventually Bain gave Officer Cook a false address.

When Officer Everdell returned, he was angry because the marijuana had not been where Bain had said it was. Bain was threatened again and eventually told Officer Everdell that the marijuana was in the trunk of his mother's car. At approximately 2:30 a.m., Officer Jilek returned to the room

and stated that there was no house at the address Bain had given them for the source of his drugs. Cook then threatened to strike Bain's penis with the billy and Bain decided to give them the correct address. At this time, Bain was allowed to dress, a statement was typed up by Officer Rusk, and Bain signed it.

While Bain was sitting in the room, Officer Rusk opened a cupboard and pulled out a pair of vise grips which were "sort of v-shaped". He described them as consisting of an arc with two metal bars which formed a "v" inside the outer bars. The instrument was approximately three feet long by two feet wide. At that time, Officer Rusk stated to Bain that "we usually use things like this on jerks like you". Officer Rusk then took out a vial which he said contained speed and threatened to give Bain some. Following this, Everdell took out a front-opening automatic knife and opened and closed it rapidly near Bain's throat and ear. Bain was then warned to tell no one what had occurred in the room and was advised that the officers knew many dangerous junkies who would happily kill him on the officers' orders in order to avoid drug charges. Officer Everdell then took Bain to No. 32 Division.

Bain was brought to trial where he pleaded guilty to two drug-related offences.

The four police officers involved in this incident testified before me and contradicted the evidence of Bain. Each denied any mistreatment of Bain throughout the interrogation. They testified that Bain was completely co-operative in the course of this investigation, except for the location of the three ounces of marijuana in the trunk of the car.

Bain contacted a lawyer three or four days after the incident and on legal advice was examined by Dr. Edward Mednick who testified that there was a lesion on Bain's

penis. The doctor was unable to state how the lesion was caused.

Bain admitted in his evidence, to having stolen three books from a bookstore at the University of Waterloo concerning which he pleaded guilty. He further admitted that on a previous occasion, he had lied to the police to protect a fellow student.

The four police officers' evidence was diametrically opposed to the evidence of Bain with respect to the events that transpired that evening. Each denied that any mistreatment of Bain occurred and stated that Bain was completely co-operative with them, with the one exception of the location of the three ounces of marijuana in the trunk of the car. They testified that Bain's co-operation included full details as to his source of supply in Kitchener.

The office which Bain described was the same office to which the complainant Henderson had alleged he was taken. It was not the usual statement room.

The evidence of the large vise grip described by Bain was of considerable interest. All of the officers who gave evidence were asked if they were aware of anything which resembled the device which Bain described being in or around the station. All of the officers denied knowledge of any such instrument and that there was ever any such device used.

Evidence had been previously given in the Starr case by Constable Jackson, who had been stationed at No. 32 Division, about a Use of Force Report concerning an allegation by one Malmholt. Malmholt had complained that in May of 1973 he had been threatened with a similar device, which was described as a vise-like chest expander, while being detained

at the same station. According to Jackson's evidence, the device had been on the station premises for at least a year and one-half including the period when Bain was at the station. Jackson said in response to the complaint by Malmholt that Everdell had been using this device as an exerciser in the plainclothes office. Everdell was described by Jackson as a physical fitness buff. Jackson denied that Malmholt had ever been threatened with the instrument. The device, as described by Jackson in his evidence, was very similar to that described by Bain.

Everdell's response, when confronted with Jackson's evidence, and the Use of Force Report, was interesting. He continued to deny that he had ever seen such a device. He denied that he had used it at the time described by Jackson in his evidence and in the Malmholt Use of Force Report. He became very agitated and visibly upset in the witness box. His demeanour changed. I am satisfied that there was such a device as described by Bain on the premises and that Everdell deliberately misled me about it, and that the other officers, Rusk, Cook and Jilek must have known of its existence.

Many of Bain's estimates as to the time periods and as to the course of events were clearly guesswork. Furthermore, Bain admitted in evidence that he had lied to the police on numerous occasions during the course of the evening and indeed on a previous occasion. It was apparent to me that Bain believed that the laws relating to marijuana were improper and he was disdainful of the police. Bain complained to his family and to his lawyer, but did not make a complaint to the Police Complaint Bureau and indeed, had to be subpoenaed before he would testify before me.

Nonetheless I am satisfied that he was stripped and kept stripped for some considerable length of time. I am satisfied that threats were made to him and that these threats could have and did have no other effect but to

terrorize Bain. I am further satisfied that while in the police station, a stapler was applied to Bain's penis.

In my view of the evidence, I must reluctantly hold that on the evening in question, Bain was subjected to excessive force and to threats of force which were unjustifiable. During the course of the Commission's Inquiry, it became obvious to me that some police officers believe that they are the only remaining barrier between the public who hired them and the anti-social persons who break society's laws. They apparently believe as well that it is necessary for them not only to investigate crimes, but to act as judge and jury. No police officer who testified before the Commission stated this position and I am convinced that the vast majority of police officers do not take this position. Where, however, this view is held by police officers, it cannot be tolerated. It is the sole duty of the police officer to arrest and prepare a case for presentation to the court regarding those persons who break society's rules. It is for the courts to determine guilt and innocence and it is for the courts to determine punishment. If society tolerates the police usurping the position of judge and jury and administering punishment for them, then society is no better than the persons who have broken its rules.

Chapter III

DELROY TOMLINSON

Delroy Tomlinson's complaint arose from events occurring on July 7th, 1974.

In the early morning hours of July 7th, 1974, Delroy Tomlinson was driving an automobile with two passengers, Mr. and Mrs. McNish. A police officer observed him driving in an erratic fashion and when Tomlinson stopped, the officer got out of his car and went over to talk to him.

Tomlinson then drove off at a high rate of speed and was chased by the officer in his police car. Tomlinson had been at a party prior to the incident and had consumed some alcohol. The officer chasing Tomlinson called for assistance over his radio and before the chase was concluded, a number of police cars were involved in it. The cars travelled some considerable distance across northern Metropolitan Toronto, reaching speeds of 130 miles per hour. During the course of that chase, the vehicle went through stop signs and red traffic lights. Eventually a tire on the Tomlinson vehicle blew out, and the car skidded to a stop leaving skid marks of 230 feet from the right rear tire, and 190 feet from all four tires. The automobile hit a curb, knocked down a stop sign, crossed a grassy verge and ended up in the parking area of a gasoline station. Both front tires were flat and the front wheels were badly damaged. The right rear tire was completely shredded and was apparently the tire which had blown out immediately before the termination of the chase.

Tomlinson testified before the Commission, and alleged

that he suffered from amnesia and had little or no recollection of the events that occurred that evening. Tomlinson had given statements concerning these events to his lawyer, to an investigator from this Commission, to a reporter from the Toronto Star and to John Jurens, who administered a polygraph test to him. Tomlinson testified that the information which he had given to these people was hearsay evidence, in that his version of the evening's events were not his own recollections but were the details communicated to him by observers of the incident. He first testified that he did not remember who told him of the events of that evening, but later stated that he had spoken to Mrs. McNish and to one, Courtenay Edwards, who had witnessed Tomlinson's arrest.

Courtenay Edwards testified that he visited Tomlinson at the hospital on July 7th, 1974, and that he did not give Tomlinson any information about the incident. Mrs. McNish saw Tomlinson at the hospital on the same day and stated that as Tomlinson apparently could not recall what had happened, she related her recollection of the events to him. Tomlinson had, however, previously given a statement.

I am satisfied that Tomlinson did not suffer from amnesia but chose this method of avoiding cross-examination before the Commission.

Once the Tomlinson vehicle had stopped, officers involved in the chase arrested him and the allegations of excessive force arise out of this arrest.

There were many independent witnesses who testified before me as to the events in question. One group of people who had ostensibly seen the arrest had been partying in the apartment of one, Leonard Mahoney, causing a considerable amount of noise. One of their number, Ronald Spencer, claimed that he saw the Tomlinson vehicle before it struck the curb and that he witnessed the first blow struck by the

officers. Spencer stated that he was standing on the north-west corner of Epic and Wilson Avenues. The evidence of two other occupants of the apartment, however, was that at the time they heard the impact, Spencer was sitting in the window of the apartment and was not outside. A statement given to Commission investigators by Spencer indicated that he did not leave the apartment until after hearing the sound of the impact. Spencer admitted that he had been drinking all evening and was "feeling no pain". In his evidence at the hearings, he stated he was drunk at the time he gave the statement to the Commission investigators. The Commission investigators contradicted this. It became clear that Spencer heartily disliked police officers.

Other witnesses from this party also testified that they had seen Tomlinson struck by a police officer. The occupant of the apartment, Leonard Mahoney, also had a very strong bias against police officers. In response to a question by myself, one of the witnesses testified that most of them had not seen anything, but had discussed it afterwards and that two of their group insisted to the others that they had seen blows struck. The others were really testifying as to what was alleged by these two witnesses rather than upon what they, themselves, saw.

I was satisfied that none of the party in the Mahoney apartment actually witnessed the events and that their testimony reflected entirely the adverse views Mahoney and Spencer had of policemen.

The occupants of another apartment, that of Courtenay Edwards, also testified as to having seen blows struck by the police when they were removing Tomlinson from the car. I was impressed by the character and testimony of these witnesses although Courtenay Edwards testified that he believed that members of the Metropolitan Toronto Police Force have on occasion meted out unfair treatment to the

black citizens of our community.

Earl Edwards, a member of this party, testified that Tomlinson was placed on the hood of the car and punched by police officers. He stated that he subsequently observed Tomlinson on the ground. His brother, Courtenay Edwards said that before being placed on the hood, Tomlinson was on the ground from three to five minutes and that while he was on the ground, a beating was administered by three or four officers all of whom used objects in their hands in beating Tomlinson. Telford Malcolm said that he saw a single vertical blow struck, causing Tomlinson to fall to the ground, and that while on the ground Tomlinson suffered from two kicks by the officers. Earl Edwards described the first blow as a horizontal motion by police officers and he stated that he could not see what happened while Tomlinson was on the ground.

The window from which these witnesses observed the events was several hundred feet away from the car and the lighting was not of the best.

Another independent witness, Terrence Finn observed part of the incident through binoculars from the balcony of his apartment. He stated that Tomlinson resisted the officers and he also confirmed that Tomlinson walked unaided to the police cruiser and was not unconscious.

It was submitted on behalf of the police that Tomlinson's injuries occurred in the impact of the car with the curb and the stop sign. The officers testified that P.C. Foley was the first officer to approach the vehicle, although some evidence from other witnesses indicated that P.C. Mahood was the first officer on the scene. Foley stated that after pulling open the door, he told the driver to get out, grabbed the driver's left arm and dragged him out of the car. P.C.

Foley stated that he was not gentle in removing the driver from the car. He advised Tomlinson that he was under arrest for criminal negligence. Foley testified that Tomlinson resisted him and P.C. Mahood took hold of the driver's right arm, whereupon Tomlinson went limp and fell to the ground. Mahood and Foley, each holding one arm, raised Tomlinson to his feet and endeavoured to put handcuffs on him. They stated that Tomlinson would not put his hands behind his back and they, therefore, pushed him over the hood of the car to keep him still in order that he might be handcuffed. Mahood stated that he put his forearm on Tomlinson's back pushing him downward. Another constable was able to clamp a pair of handcuffs on Tomlinson's wrists and they stated that they then walked Tomlinson to a police cruiser and he was taken from the scene by P.C. Foley shortly thereafter.

P.C. Foley and others testified that they were not excited at the time. I find such composure rather difficult to credit in view of the high speed chase with speeds up to 130 miles per hour on a major thoroughfare in Toronto. The police had no knowledge as to why Tomlinson was making such efforts to escape and surely must have wondered whether or not they were chasing a bank robber, a murderer or some dangerous person.

Tomlinson testified that he received five stitches to the left side of his head, and that he also suffered a cut on the back of his head, bruises to his chest, left elbow and left upper arm and a scratch on his chin. He had pains in his neck and across his shoulders for approximately three months after the incident. His face was swollen and he lost a tooth about four or five days after the chase. He testified that at the time of the hearing, he still suffered pain in his lower back and had difficulty with headaches and pain at the front of his head.

Tomlinson was examined by a number of doctors who testified before the Commission. Dr. Bart, the first physician to see Tomlinson, did not observe evidence of any injuries beyond a small insignificant cut on Tomlinson's chin and a cut to his forehead which required only three sutures. He had no knowledge of any bruising and stated that Tomlinson did not complain of pain or injury to any other part of his body. He described Tomlinson as being conscious and fully oriented. Dr. Bart was of the opinion that Tomlinson's condition was consistent with having received one blow to his head and inconsistent with a man who had been a victim of a number of blows to his head and body.

Dr. Johnston, a consultant in general surgery on the staff of North York Branson Hospital, also examined Tomlinson. Dr. Johnston observed no injuries other than the wound on Tomlinson's forehead, the small cut on his chin and some pain when flexing his neck. He said such injuries were consistent with a motor vehicle accident. Dr. Johnston saw Tomlinson daily during his hospital stay and observed him to be conscious and alert. He stated that later on, Tomlinson did complain of aches and pains in his lower back.

Dr. Lloyd-Smith, a consultant neurologist, also examined Tomlinson. He found him to be alert, oriented and capable of replying verbally. He stated that his memory was functioning well and the subsequent memory loss alleged by Tomlinson would be unusual and highly unlikely. Tomlinson spent a period of seven weeks in recuperation. Dr. Lloyd-Smith found this to be a prolonged period and stated that he did not observe any injury to Tomlinson's mouth and found it remarkable that Tomlinson lost a tooth. He also stated that Tomlinson's injuries were consistent with involvement in a motor vehicle accident.

Dr. Alwyn Rose testified that Tomlinson visited his clinic four times during the month of July. He complained

of headaches and was seen by Dr. Dubicki. Dr. Dubicki recommended that Tomlinson return to work on August 6th, 1974, but Tomlinson did not do so until three weeks later. Dr. Rose stated that Tomlinson's only complaints were of headaches and some lower back pain.

I am satisfied that Tomlinson grossly exaggerated his injuries.

There can be no doubt, however, that he did suffer a split in the scalp at the hairline. There is also no doubt that he did have some other injuries.

On the evidence before me, there were conflicting explanations as to where and when the injuries were obtained. I was satisfied that there were blood stains on the hood of the car, the front left fender and a small amount of blood on the driver's seat. P.C. McLenaghan observed a small amount of blood on the door frame on the driver's side of the car. This blood must have, in my view, come from the injury to Tomlinson's head.

I am satisfied that the main injury to Tomlinson was the cut on his forehead.

I am further of the opinion that P.C. Foley and the other officers were considerably more excited than they stated in their evidence before me.

It is my belief that the injury to Tomlinson occurred while he was in the automobile and I am inclined to the belief that while being pulled out of the car by Foley, he hit his head on the door frame causing the cut in the scalp which had to be sutured.

I am satisfied that the officers did not have anything in their hands with which they beat Tomlinson, although I

believe that the witnesses in the Edwards' apartment sincerely believed that Tomlinson was severely beaten by the police. The actions of Mahoney, Spencer and Courtenay Edwards added to the confusion at the scene and caused people to believe that they had seen things which they had, in fact, not seen.

I am inclined to the belief that the officers were rough in their treatment of Tomlinson, as a result of the tensions of a high speed chase. I find that the officers did use considerable force in arresting Tomlinson and placing the handcuffs on him, and that Tomlinson resisted arrest. In the ensuing arrest and resultant rough handling by the police, a number of the witnesses honestly believed that Tomlinson was receiving a severe beating by the police. In fact other than the injury to the scalp, the injuries to Tomlinson were minor.

I am satisfied that the officers were justified in arresting Tomlinson and that force was used in effecting this arrest. I am of the opinion that P.C. Mahood was quite excited and his actions assisted in upsetting the witnesses who arrived on the scene. The officers were justified in using some force to arrest Tomlinson who was resisting. The question I have to determine is whether this force was excessive.

It is clear that Tomlinson acted in a completely irresponsible manner in fleeing from the police and not only imperiled the lives of his passengers, Mr. and Mrs. McNish, but the lives of many other citizens of the community and also of the policemen who were chasing him. From a calm objective viewpoint, it would be easy to say that the officers did not need to use as much force as they did in arresting Tomlinson. I must however view the actions of the police in the context of what took place at the time in question.

It is my view that any human being would have been

upset after such a high speed chase. Under the circumstances, I cannot find that the officers used excessive force. The officers could not know how dangerous the man was. The force used, in view of Tomlinson's actual history, may have been greater than absolutely necessary, but the officers, in the heat of the moment, need not, and cannot be expected to, measure the amount of force to a nicety.

I am satisfied that the officers in fact could have effected the arrest by using less force, but this is not the sole test to apply as it overlooks the circumstances under which the police officers were operating. The situation at the scene was highly aggravated by the actions of Mahoney and Spencer.

I am entirely satisfied that the witnesses from the Edwards' apartment were clearly of the opinion that Tomlinson had been the victim of excessive force used by the police and that they were testifying as accurately as they could remember as to what went on in the time in question. Their distance from the scene and the highly charged atmosphere taken together with the manner in which the arrest and subduing of Tomlinson took place caused them to be mistaken in some of their observations.

I am satisfied that the officers were excited and did use more force than they remembered in testifying before me, but that in their view, such force was necessary to subdue Tomlinson. I, therefore, am unable to find that the force used by the officers was excessive under the circumstances.

Chapter IV

PETER LINKA

The complaint of Peter Linka arose out of an incident that occurred on July 30th, 1974.

Linka had been involved with the police on one occasion a long while before the incident in question, and at the relevant time, had a good white collar job.

On July 30th, 1974, Linka went to lunch and had a few drinks. He did not return to work and continued to drink in various establishments in downtown Toronto.

Linka's recollection of the events of the evening was fragmentary; he could remember only portions of the evening. This might have been occasioned by the amount of liquor he had imbibed or by the fact that he did not wish to remember the events in question. He had either a poor memory or a selective memory.

During the evening, Linka drove his vehicle on a pedestrian mall in Toronto in a completely reckless fashion. In addition to forcing many people to run to avoid his car, he actually hit one pedestrian, fortunately causing no serious injury. He struck a number of large cans and sent them spinning into the crowd. He carried one person on the hood of his car for some distance before that person fell off. There can be no doubt that his actions were completely irresponsible and could very easily have caused serious injury or death.

The police became apprised of these antics, and numerous police cars responded in an attempt to capture Linka before

he injured himself or other persons. As police cars converged on the scene, Linka attempted to evade them and drove west to Bay Street and then north at a high rate of speed, racing through a red light. As Linka drove along Bay Street, three police cars were chasing him, while other squad cars were approaching from different directions. Linka entered the circular driveway of a hotel and was blocked in by police cars. He then drove onto the sidewalk, crashed into a parked car, and escaped again. As he turned onto Charles Street his car was hit in the rear by a police cruiser, and came to a stop. Within seconds, several police cars were on the scene and within two minutes, there were five or six squad cars present.

Linka testified that he got out of his car with his hands in the air, shouting "Okay, Okay". He alleged that he was then beaten to the ground, kicked repeatedly by a number of officers, beaten during his ride to the station and further assaulted at the station. No other evidence was given concerning these latter allegations, and I was unable to make any findings concerning them.

The medical evidence did not indicate that Linka was highly intoxicated. It did confirm that Linka suffered certain injuries. There was no serious injury, but there is no doubt that he had a number of bruises, that his toe was swollen and that he had scrapes on his wrists and his back. There was a haemorrhage in one eyeball but no swelling, and Linka complained of various areas of tenderness. Some injuries, of course, were to be expected following Linka's three collisions and some may have been suffered as a result of the scuffle that undoubtedly occurred when he was arrested.

There were numerous witnesses to the arrest of Linka, and a great many testified before the Commission. These witnesses might be conveniently divided into three groups. One group denied that Linka resisted arrest and stated that

two or three police officers severely beat him. The second group of witnesses said that the police used force in arresting Linka, and although they were unable to state whether or not he resisted, were of the opinion that if he had, the force used was reasonable. The third group of witnesses testified that the arrest was entirely in order and no excessive force was employed by any police officer.

There was considerable newspaper, radio and television coverage of the incident, and a number of the independent witnesses joined together to ensure that their complaints concerning the behaviour of the police were properly handled.

The incident occurred late at night and many of the independent witnesses were awakened by the sirens and the crash of vehicles or were diverted from other activities. Their testimony conflicted considerably both as to what took place and as to the period of time involved. There was no way of reconciling their various reports. The incident was probably very confusing to many witnesses, taking into consideration the many sirens, police cruisers with flashing lights, crashing of motor vehicles, their distance from the scene and the fact that it was night, although the scene was reasonably well lit.

Notice as required under the Public Inquiries Act was served upon four police constables who were at the scene: Constables Oliver, Duriancik, Shields and Clarke.

There can be no doubt the police officers were in an agitated state of mind when Linka was arrested. They were aware of Linka's dangerous drive along the mall. The high speed chase in the city and the collisions would naturally result in a highly emotional response. Officers involved in high speed chases become excited and keyed up. A great deal of adrenalin is produced by the human body in such a situation

and this can cause violent and excited action. Police officers are expected to control this normal reaction, but they are merely human and this tension should be borne in mind when viewing their actions.

All of the officers involved testified before me, and denied that excessive force was used. P.C. Shields testified that when he reached the driver's side of the Linka vehicle, Linka violently kicked out at him. P.C. Duriancik joined him, and both officers placed Linka against the side of the vehicle with his hands on the roof. P.C. Duriancik began to search Linka, and while he was bending to search below Linka's hips, Linka allegedly kicked him in the thigh. P.C. Oliver apparently arrived at the side of the vehicle and assisted in subduing Linka. He testified that he pushed Linka against the car to prevent further resistance by pressing his arm against Linka's back and neck. P.C. Duriancik had been holding Linka's leg and once P.C. Oliver had controlled the prisoner, Duriancik turned around to observe the arrival of other officers. When he turned back, Shields and Linka were on the ground and Shields and Oliver were attempting to handcuff Linka. The officers testified that Linka was flailing around in order to resist this procedure. P.C. Shields stated that he struck Linka's face on two occasions with the open palm of his hand in order to assist the handcuffing. P.C. Clarke was present at this point, and snapped the last handcuff on Linka's arm. Linka was then taken to Scout Car 5206 and placed in the rear seat with P.C. Shields, while Constables Birse and Clarke sat in the front seat. Linka was then taken to No. 52 Division.

Many of the civilian witnesses said that they saw little or no resistance from Linka, but that they did see a number of police officers viciously punch and kick him over a comparatively long period of time, estimated to cover as much as thirty minutes. It was clear from the tapes made of the police radio calls that the entire incident on Charles

Street took no longer than 100 seconds. This suggested that many of the witnesses were either mistaken or grossly exaggerated what they saw, a common phenomenon where eye witnesses have experienced a dramatic event. I am satisfied that there was no intention on the part of the independent witnesses to deliberately prevaricate or exaggerate their testimony.

Linka made no complaint at No. 52 Division police station as to any physical injury or mistreatment by the police officers, although he did see a doctor on the evening of August 1st after having consulted with his solicitor. He did not complain to the Metropolitan Toronto Police Complaint Bureau but was approached directly by Sergeant Creighton of the Bureau, to whom Linka gave a statement.

Between 3:00 a.m. and 4:00 a.m. on the morning of the arrest, an eye witness called No. 52 Division and complained about the incident to Sergeant Lewis. Lewis spoke with Linka at the station and took note of his injuries. Lewis stated that the injuries, in his view were consistent with a motor vehicle accident and a reasonable amount of force utilized by officers in effecting the arrest. Linka did not complain to Sergeant Lewis of any injury or police misconduct by the arresting officers. He was offered an opportunity to go to the hospital and refused to do so.

An investigation was commenced by the Complaint Bureau but because of the many complaints from citizens, it was decided to charge the police officers in the criminal courts with assault. This was done and after lengthy hearings, the Provincial Judge dismissed the charge against all officers.

It should be pointed out that a criminal charge must be proved beyond a reasonable doubt, whereas I need only be satisfied on a balance of probabilities. Despite this, after hearing the evidence, I found that P.C. Duriancik did not use any excessive force.

I was satisfied that considerable force was used by Constables Oliver, Shields and Clarke. The issue remaining is whether or not this force was excessive under the circumstances. There can be no doubt that the officers were rough in their handling of the complainant, Linka. Linka had a badly swollen toe and I was satisfied that this, in all probability, was caused when the cruiser door was slammed on Linka. It was my view that this and other force was used, and that there was no actual necessity for it in order to effect the arrest, particularly in view of the number of officers on the scene.

In fairness to the officers however, it should be pointed out that the actions of Linka prior to the time of the arrest would justifiably lead to considerable concern on the part of the police officers as to how he would react at the time of the arrest. He had attempted to evade arrest, had placed many lives in danger, and had disobeyed police orders. They had no way of knowing whether he was armed or why he was evading arrest. For these reasons, I could understand their reluctance to chance further danger.

In view of this and of my finding that the evidence of a beating was greatly exaggerated, I do not believe that the officers should be censured for their actions, or that this arrest should reflect upon their careers. I would however recommend that special training be given to police officers concerning high speed chases and the danger of emotional overreaction.

Chapter V

DANIEL ETHIER

Daniel Ethier alleged that he was the victim of police brutality in the early morning hours of July 9th, 1974.

At that time, Ethier was nineteen years of age. He had completed Grade 9, had no criminal record, and had an unstable employment history.

Ethier testified that he was driving around the New Toronto area on the evening of Monday, July 8th, 1974, with three other persons, only one of whom he had known previously, James Longworth. He had met the other two men only that evening. These men were in possession of a pellet gun.

While driving around, Ethier saw his brother, Robert, also known as "Poncho", turning into a donut shop. He followed and parked his car beside that of his brother. Conversation was going on between the occupants of the two cars when a police cruiser pulled in. Ethier stated that everyone got out of his car and locked it. Two uniformed policemen asked to search the car and the search disclosed the pellet gun. As a result, Daniel Ethier, James Longworth, Richard Cross and Don Lang were taken to No. 22 Division for investigation.

At the station the case was assigned to Sergeant Gary Donovan and P.C. Howard McKeown who arrived shortly after 1 a.m. and proceeded to investigate the incident. Ethier gave at various times three versions of his complaint. The first version was given to a reporter from the Globe and Mail newspaper. He stated that one of the officers grabbed him

by the ears and hair, pushed him backwards in a chair and smashed his head against the windowsill four or five times. He alleged that the beating occurred because he did not know who owned the pellet gun. When he told the officers that he thought the pellet gun belonged to one of the two strangers, one of the detectives called him a liar and hit him across the face. He stated that he was hit in the face four times. An officer grabbed him by the hair and dragged him into another room. Longworth was brought in and Ethier saw a detective punch Longworth in the stomach. Longworth was then taken to another room and the detectives returned with a statement signed by Longworth which they showed to Ethier. A few minutes later, one of the detectives ran into the room, said, "You are a liar" and slapped Ethier in the face. He was then turned over to the uniformed men, charged and allowed to leave the station.

Investigators from this Commission had difficulty in arranging an interview with Ethier, but finally were able to take a statement from him on March 3rd, 1975. In that statement, Ethier gave a different version of the evening's events.

He stated that the four young men were taken to a room on the first floor of the station. The officers took their names and addresses and questioned them about the pellet gun. Later two detectives walked into the room, one of them being Sergeant Donovan. Sergeant Donovan stated that they would see the driver of the car first. Ethier was led downstairs to a private room, and was seated in a chair facing a desk.

He was questioned about the ownership of the gun and denied knowing anything about it, saying that it belonged to one of the other three and that he had not seen it before. Sergeant Donovan was standing over him and the other officer was sitting on the desk. Ethier stated that Donovan hit him

with his right hand, knocking his glasses off. The officer hit him again four or five times. After the first blow, Ethier had put his glasses back on, but Sergeant Donovan reached over, took them off and put them on the desk. Then Sergeant Donovan allegedly grabbed him by his ears and hair, and bounced his head against a windowsill behind his chair. During this, Ethier was asked about the gun, and was told that he was lying. Ethier stated that he told Sergeant Donovan that he had arrived at the station without any bruises or cuts, and that there were witnesses to this; Sergeant Donovan became angry and hit him again. At the time, another detective and a redheaded uniformed man, who had first searched the car, were in the room. Sergeant Donovan then dragged Ethier by his hair into another office and sat him in a chair between the doorway of two rooms. Ethier was rubbing the back of his head, which was bruised, as were both sides of his face and his nose. He heard some talking in another room, and saw Sergeant Donovan hit James Longworth in the gut at which time Longworth fell to the floor. After more quiet talking, Longworth was taken away. The redheaded officer was still with Ethier when Sergeant Donovan ran in, slapped him hard and called him a liar. Sergeant Donovan told him to stand up because he was going to be worked over. A statement of Longworth was shown to Ethier, wherein Longworth stated that Ethier had seen the gun and knew that it belonged to Longworth. Ethier stated that he said, "O.K. you want me to tell you, I seen it and who it belonged to, I was telling you the truth that I did not know who it belonged to." Ethier was then taken to an upstairs office by the other detective, charged with possession of an offensive weapon and released.

At the hearing before me, Ethier disagreed with many of the statements alleged to have been made by him in the story written in the Globe and Mail. He denied that he had stated that he was beaten by two detectives and that he had been smacked in the face four times. The evidence of Ethier

before me not only conflicted with the statement alleged to have been given to the reporter from the newspaper but also diverged from the statement given to the Commission investigators.

Sergeant Donovan testified that he questioned Ethier about the pellet gun. He had received certain information from the arresting officers and had taken Ethier to the Investigation Services Office with P.C. McKeown. During the course of the questioning he pointed out to Ethier that he was the owner of the automobile in which the gun was found, that Ethier was wearing dark sunglasses at night and that there were suspicious circumstances indicating that Ethier must have known something about the gun. He testified that Ethier denied any knowledge. Sergeant Donovan was suspicious of the circumstances and believed that the occupants of the car might have been planning to commit a robbery using the gun. Donovan verified that as he was holding the pellet gun in his left hand, Ethier sprung up at him, and Donovan swung his right hand striking an open-handed blow to Ethier's jaw to prevent Ethier from hitting him. At the same time, Donovan pushed Ethier with his left hand, and Ethier fell back into the chair, striking his head on a windowsill behind the chair. Donovan testified that this was the only violence that occurred during the evening in question. This evidence was confirmed in the testimony of P.C. McKeown.

After Ethier left the police station, he went to Queensway General Hospital where he was examined by Dr. Crainford. Ethier stated to the doctor that he had been grabbed by the ears while lying on the ground and had hit his head against the sidewalk. The only mark found by the doctor on Ethier was a very small bruise on the back of his head over the occipital area. Apparently Ethier complained that his jaw was sore, but Dr. Crainford testified that he saw no evidence of external or internal injury or tenderness. The injury seen by the doctor was very slight and was entirely consistent

with the evidence of Sergeant Donovan and completely inconsistent with that of Daniel Ethier.

I found the evidence of Daniel Ethier completely unreliable. I was unable to believe any of the statements made, and am of the opinion that he lied to the newspaper reporter, to the doctor, to his parents and friends and to the Commission, with respect to the allegations of force used upon him and as well, concerning the assault upon Longworth. I was entirely unable to accept Ethier's explanation for the variances in his versions of the events in question.

I am satisfied on the evidence that on one occasion, Sergeant Donovan slapped Daniel Ethier across the face and pushed him back in the chair. If this action were not justified, it, in itself, would constitute an excessive use of force. I accepted the evidence of Sergeant Donovan and P.C. McKeown and am satisfied that this was justified in the circumstances and was not an excessive use of force. It is interesting to note that Sergeant Donovan is approximately 6' 4" and outweighs Daniel Ethier by 100 lbs. Had he assaulted Ethier in the manner alleged one would have expected to find more than one small bruise on Ethier's person.

Sergeant Donovan was rigorously cross-examined. There were a few minor points wherein the evidence of McKeown conflicted with the evidence of Donovan. I did not find these minor differences relevant and, in fact, would have been surprised had their evidence coincided on every point.

In conclusion, there was no evidence that would sustain a finding that excessive force was used. On the contrary, I accept the evidence of Sergeant Donovan and find that the story told by Daniel Ethier was untrue.

Chapter VI

ROBERT ETHIER

Robert Ethier's complaint concerned his arrest and detention on a minor offence on the night of January 10th, 1974, at No. 21 Division.

Ethier alleged that during questioning, he was assaulted and that furthermore he was subsequently harassed by police officers. His parents also complain that they were threatened on the telephone by a police officer.

Ethier testified that he had attended a party at the home of one Cheryl Jansen, on the evening of January 10th, 1974, during which he consumed a beer and a small shot of rye. There is no direct evidence that he had consumed more than this quantity. An acquaintance, one, Harold Penney, was also at the party and had been consuming copious quantities of whisky. Harold Penney and Ethier left the party at approximately 10:00 p.m. and walked down 7th Street. They separated, when Ethier began talking to another acquaintance called "Al". Penney crossed the street and started beating on a car, causing damage including a smashed window. Robert Ethier ran across the street and restrained Penney from further destruction.

Ethier started to walk down 7th Street as a police cruiser arrived on the scene. The officers in the cruiser picked up Ethier and Penney and after placing them in the cruiser, questioned Ethier as to why he and Penney had broken the car window. Ethier denied that they had broken the car window and after a short digression, apparently involving a car chase, both were taken to No. 21 Division.

Ethier was held at the station for one hour and then was questioned by Sergeants Smith and Jackson for approximately twenty minutes.

Ethier denied breaking the window and referred to the arresting officers as "cops". At this point, according to Ethier, Sergeant Smith stood up and suddenly smacked him in the face. Sergeant Jackson walked around his desk, punched him in the back and stomach, and pounded his heel on Ethier's toe. Ethier slid from the chair to the floor, was picked up by the hair and re-seated in the chair, at which time Sergeant Jackson stated: "Call me, 'sir' from now on you fucking little puke". Ethier testified that he suffered a sore scalp, and noticed hair falling out of his head and blood coming from his mouth. He was then permitted to go to a room in which there was a sink in order to clean himself up. Ethier was asked if he would like to use the telephone, and in fact, he did call his father's place of residence. The telephone was answered by his brother, Daniel Ethier, who asked whether anything was wrong and whether Ethier had been "thumped", to which Ethier replied "yes". Ethier was then taken to the holding cells, where he complained about the beating to another prisoner, Paul Monette, who was in an adjoining cell. Shortly thereafter, Ethier was released.

He walked over to 7th Street to check on his car which had been parked on that street and then returned to Cheryl Jansen's apartment. Penney was at the apartment and an altercation apparently occurred between Penney and Ethier. Ethier stated that Penney was upset because he believed that Ethier had informed the police that Penney had broken the car window.

Ethier then returned home and reported the incident at the police station to his father, Mr. Joseph Ethier. His father took him to the hospital, where he was examined by Dr. Hugh Morrison.

After the examination, Ethier and his father went to No. 21 Division and spoke with the desk sergeant, Sergeant James Pollard. At this time Ethier's injuries were pointed out to the sergeant.

Subsequently Joseph Ethier contacted a lawyer and complained about the treatment of his son. An appointment was arranged with a newspaper reporter of the Toronto Globe and Mail, Gerald McAuliffe.

As a result of the incident, Robert Ethier was charged with public mischief and came before a provincial court judge. At the time the Crown Attorney advised the court that a juvenile person, one Harold Penney, had committed the offence for which Ethier was charged and indicated that they had evidence that Ethier had attempted to stop Penney. He, therefore, recommended that the charge be withdrawn against Robert Ethier and it was withdrawn.

The police officers against whom the allegation is made, Sergeants Smith and Jackson, were served with notice and gave testimony before the Commission. They categorically denied that they used any force upon Robert Ethier.

A great deal of evidence was introduced in this case. There were certain parts of the evening upon which I feel comment should be made. It was clear that both Penney and Ethier attended the party at Cheryl Jansen's and left at approximately 10:00 p.m. It was also clear that Penney had consumed an excessive quantity of whisky. Ethier's uncontradicted evidence was that he had consumed only one beer and one shot of whisky.

An independent witness to the breaking of the window in the motor vehicle, whose evidence I accept, one, Barbara Rochford, testified that it was Penney who had inflicted the damage on the automobile and that Ethier attempted to calm

Penney. She stated also that she had informed the police of what she had seen.

When the police arrived on the scene, there was some discussion between the officers and Penney and Ethier. Constable Brown apparently arrested Penney for mischief and as a drunk. Constable Brown noted in his book that there were cuts and dried blood on Penney's right hand. His note ended with the words "and on Penney's hand". Before me, Constable Brown testified that he had intended to write "and on Ethier's hand". An expert witness was called from the Centre of Forensic Science regarding the notation in the notebook. Although he was unable to make a certain determination, he stated that there were indications that the words "and on Penney's" had been written at a different time from the rest of the notes on the page. After Constable Brown had been advised by Staff Sergeant McKnight that Ethier had made an allegation of brutality, Brown stated that Ethier had slight fresh cuts on his right knuckle.

It appeared to me that the original notation by Constable Brown was to the effect that Penney admitted that he alone did the damage and that at that time, the officer noticed scrapes on Harold Penney's hands which he recorded in his notebook. At a later date however, Brown declared that there were cuts on Ethier's right hand.

The other officer at the scene was Constable Taylor who told the Commission that in his discussion with Miss Rochford, he concluded that Robert Ethier had caused the damage, because Ethier was the only one that fit the description given of the man who broke the window. Taylor returned to the cruiser, after which Penney admitted that he alone had broken the window. This is noted in Constable Taylor's notebook. Taylor, in talking to Sergeants Smith and Jackson, stated that he had noted a cut on Ethier's hand.

The only conclusion that I can reach regarding the evidence of the two police officers, is that at a later date, when they were aware that an allegation of brutality had been made, they each attempted to reconstruct the matter and in an attempt to protect their brother officer, either concocted evidence or convinced themselves that they had seen things they had not, in fact, seen.

The evidence concerning the events in the police station was conflicting. At different times, Ethier gave different versions as to the alleged assault by the police officers. Before me, he testified that one of the officers smacked him in the mouth, that one punched him in the back and that he was both picked up by the hair and put back on the chair. In another place and at another time, he said that Sergeant Smith suddenly stood up, moved across the room and started smacking him in the face, and that when he put his head down, Sergeant Jackson came quickly around the desk and he felt a punch in the back causing him to slide half off the chair. At that time, he was unable to state who punched him. On yet another occasion, he stated that Sergeant Jackson had punched him in the stomach and thereafter, he was punched in the back. He stated that Smith had smacked him in the face two or three times, and that someone ground a heel into his toe. He added that his hair was actually falling out and that he had a large lump on his head. In this version, Ethier alleged that the two arresting officers had entered the room. Both of the arresting officers as well as Sergeant Jackson denied this.

Before me, Ethier testified that when Sergeant Jackson took him to a room containing a sink he had difficulty finding the light switch. It was a janitor's room with many papers and a sink in it. The room was, in fact, a bathroom with a sink and toilet, but also contained papers and filing cabinets.

Ethier was taken to the Jarvis Street station, before being released, for photographing and fingerprinting. He made no complaint to the desk sergeant nor to anyone else in the police department that night. The booking officer, John Powell, testified that he observed no sign of injury and that one of his duties was to make a note of injuries. Sergeant Pollard also stated that when he saw Ethier he made no complaint nor did he see any sign of injury. As well, Cheryl Jansen testified that when Ethier returned to her apartment, she noticed no injury and saw no marks on him of any kind. Penney testified that when Ethier was being booked, he was approximately ten feet away. Ethier was grinning and did not appear upset. Penney saw no marks of any brutality or pushing around. Photographs were taken of Ethier when he was booked shortly after the interrogation by Sergeants Jackson and Smith, and a close examination of the photographs did not disclose visible injuries.

Dr. Morrison, who examined Ethier after the altercation with Penney had occurred, had no personal recollection of the incident and testified from his notes which were silent as to damage, bleeding or lacerations of the facial structure, lips, mouth or teeth. Sergeant Smith apparently wears a ring on his right hand and the doctor testified that had Ethier been hit by that fist, one would have expected to see evidence of a blow. The doctor did recall a dull reddening to part of Ethier's back, but there was no swelling, bruising or significant injury.

Ethier testified that while in the cells, he had complained to another prisoner, Paul Monette. Monette was in the adjacent cell. Monette testified before me that he did not see blood on Ethier's lip, but did notice that Ethier had a "fat lip". He stated that Ethier had complained of being smacked around, but that he was not interested and proceeded to fall asleep. Later that evening, a desk sergeant

came in and spoke with Monette about the complaint; Monette apparently denied that he had talked to Ethier. In his testimony before me, Monette gave no reason for this, except that he had not thought it important, and at that time he had had problems enough of his own. I was not impressed by the evidence of Monette.

There was a good deal of reliable evidence which indicated to me that Ethier had no visible signs of injury up to the time he left the police station. Further, the evidence of the doctor indicated that the actual injuries were substantially less serious than those alleged by Ethier.

There was also some question of what damage occurred during the altercation between Ethier and Penney when the former returned to the Jansen apartment. Clearly, Penney took a swing at Ethier.

One witness at the Jansen apartment, Anthony Smith, had stated in a previous statement that Penney had been punching Ethier when he, Smith, and a friend entered the Jansen apartment. At the hearing, Smith testified that "I couldn't see him punching him, just wrestling him more or less". He stated that he had seen no sign of injury on Ethier's face that night. This witness added that he had heard things being thrown around, and was told that there was a fight which had been in progress for some few moments before his arrival.

Cheryl Jansen described the fight as the two pushing and grabbing at each other. She said that it appeared that Penney hit Ethier as they went to the floor, but that she was not sure whether the punch, directed at Ethier's face, landed.

Penney, himself, could not remember whether or not he

had actually hit Ethier but he did state that it was probable he had. In a statement given to one of the Commission investigators, Penney stated that he hit Ethier in the side of the face. Before me, he denied saying that, alleging that the Commission investigators were mistaken. It is my view that Penney was attempting to assist his associate, Ethier, at the hearings, and in view of his poor memory and the drinking he had done, I can place very little reliance upon Penney's evidence.

When Joseph Ethier, and his son, Robert, lodged a complaint at approximately 4:35 a.m. on January 11th, Sergeant James Pollard did note three small cuts to the inside of the top and bottom lips and a reddening of Ethier's back between the shoulder blades.

It is safe to say that, at that time, there were some injuries evident upon Robert Ethier. However, it is my view that it is more likely that the injuries were suffered in the fight with Harold Penney than that they were inflicted at the hands of police officers at No. 21 station. Consequently, I find that the allegation of physical assault upon Robert Ethier by Sergeants Smith and Jackson is not substantiated.

Robert Ethier has subsequently complained that he has been subject to harassment at the hands of the police. He alleged that he had been stopped by police officers and taken to No. 21 Division for questioning on numerous occasions. Ethier complained primarily about officers from No. 21 Division, but alleged that on occasion, he had also been stopped by officers from other divisions. The evidence further disclosed that he and two other persons have been charged with three offences since January 10th, 1974. It is worth noting that on most of these occasions, he was stopped during the late hours of the night or early hours of the morning in industrial areas some distance from his residence. Ethier further admitted that prior to January 10th, 1974, he

had been stopped by police officers on a number of occasions.

I do not believe that there was evidence which would indicate that Ethier was the subject of harassment by the police. It appeared to me that what did happen was that when he was stopped, upon giving his name, the officers who stopped him would recognize it. Considering the publicity given to this complaint, this is understandable and no adverse inference can be drawn from it.

Mr. Robert Ethier and his wife alleged that an unknown police officer from No. 21 Division threatened them over the telephone, stating, "we will get him" and "I would not want a Toronto cop on my back if I were you people. If I were you people, I would get out of town". There is no way of ascertaining who might have made these statements and there is no way of determining in what manner the comments were made. However, it did appear to me that words similar to these were used on the telephone to the Ethiers and even though they might have had a more sinister connotation attached to them by Mr. and Mrs. Ethier, Sr. than the police officer intended, it is clear that such statements should not be made to citizens by the police and were the identity of the officer known, disciplinary procedures would be the proper action under the circumstances.

I find that no improper use of force by the officers at the police station has been proven.

Chapter VII

BRIAN GARLICK

The complaint of Brian Garlick arose out of an incident that occurred on the 25th day of May, 1974. On that day, he was standing in an alcove of a bank building at the corner of Spadina Avenue and College Street, arranging his clothing with his back to the street. He complained that he was arrested without reason, and that during the arrest, his mouth and chest were injured by Constable Shaw.

Garlick further alleged that while being placed in a police car, he received kicks on the back of his calves and finally, that while being taken up the stairs at No. 52 Division, police officers hit him three times in his back. The police denied that any excessive force was used.

The evidence of Garlick and his friend, Timothy Shireman, indicated that they had consumed approximately a pitcher of beer in a tavern on Spadina Avenue prior to the incidents in question. Garlick stated that his condition was normal and that he was in a rational frame of mind and not drunk. Shireman said that they were tipsy but indicated that he meant that they were in a happy frame of mind.

The bank building at the corner of Spadina Avenue and College Street is built in such a fashion that the doorway and windows are recessed, so that there is an alcove, approximately three feet deep, for the door and each window facing Spadina Avenue.

There is conflicting evidence as to whether Garlick was standing in a doorway alcove or a window alcove. The reporter

from the Globe and Mail newspaper stated that Garlick told him that he was standing in the doorway, as did the supplementary record of arrest, Exhibit 309. That document was prepared at approximately 7 p.m. on May 25th, 1974, shortly after the incident in question, by P.C. Ashton. Despite Garlick's testimony before the Commission that he was standing in a window alcove, I was satisfied that he was in the doorway.

Police Constable Ashton and Auxiliary Officer Shaw were driving north on Spadina. Ashton was a regular police officer and was in charge of the squad car. Constable Shaw was an auxiliary constable. The auxiliary force consists of volunteers who are trained to assist the full-time police without pay. They wear a uniform very similar to police constables but do not have the powers of regular police and are not armed.

As a result of seeing Garlick at the bank, the police car was brought to a stop and Auxiliary Constable Shaw got out of the car to make some enquiries of Garlick. The officers testified that they were suspicious of Garlick in that he was facing a bank door and had his hands in front of him. There was some question as to whether they were suspicious that he might be arranging a break-in at the bank or that he might be relieving his bladder.

Garlick testified that after some discussion, he ran down Spadina Avenue. The officers stated that before any discussion could occur, Garlick began to run. Shaw pursued him, and according to Garlick's evidence, Ashton drove after them in the squad car to cut off his escape. The evidence of the officers however was that both Shaw and Ashton pursued Garlick by foot and that some other officer must have driven the squad car down to the scene of the arrest.

There is no doubt that Ashton and Shaw caught up to Garlick approximately one and one-half blocks down Spadina, and an altercation took place. Garlick's friend, Shireman, also arrived on the scene.

I am satisfied from all the evidence that, in fact, Shaw pursued Garlick on foot and Ashton drove the police cruiser down Spadina to cut off Garlick's escape.

Garlick alleged that during the arrest he was knocked to the ground and that Shaw, who weighs 260 lbs., knelt on his chest and forced his billy club into his mouth when Garlick called out for help and asked why he was being arrested. The officers denied that any more force than that necessary to effect the arrest was used. They testified that Garlick was in a hysterical state.

Garlick indicated that he had been "hassled" by the police on other occasions. He stated that he was tired of this occurring, and it was for this reason that he took flight from what he perceived as an unjustifiable interrogation. Garlick appeared to believe, as do some other people, that the police look with disfavour upon people with long hair, and in effect treat them differently from other citizens.

When Garlick was searched at No. 52 Division, a small piece of hashish was found in his possession. Garlick stated that he had placed it in his pocket at an earlier time and did not take flight by reason of this possession and indeed, had completely forgotten that he had it with him.

From the testimony before me, there can be no doubt that Garlick was in a highly excitable and, in my view, an hysterical frame of mind at the time of his detention and arrest.

During the arrest, Ashton concerned himself with Shireman and Shaw was busy with Garlick. Shireman exercised a cooling effect upon the incident which was taking on major proportions. Shaw denied using his night stick on Garlick, but did state that while attempting to control Garlick, it was necessary for him to sit across Garlick's chest with his knees astride his body.

A taxi driver, Solly Winnick, observed part of the incident and stated that the officer was having a hard time holding Garlick down. He testified that he did not see any object in Shaw's hands while he was sitting on Garlick's chest. Shireman stated that Shaw did have his night stick out, and that Garlick's shirt was torn. He added that there was blood on Garlick's face and shirt.

The emergency record at Toronto General Hospital revealed that the diagnosis of the examining physician was "contusions to the left chest and some swelling on the right wrist." There was no mention in the record that Garlick suffered an injury to his face or mouth nor is there any record of Garlick complaining of such an injury.

There is no doubt in my mind that Garlick was resisting arrest by the officers and that he not only objected strenuously to being put in a police car, but wedged himself between the door and the roof of the car and refused to enter it. Shireman advised the officers that he could help to calm Garlick and they prudently allowed Shireman to persuade Garlick to enter the police cruiser rather than continuing to use force to put Garlick into the cruiser. Shireman was complimentary when commenting on the manner in which Ashton conducted himself during the arrest.

While in the squad car, Garlick was shouting "help me, help me". Shireman was allowed to ride with Garlick in an attempt to calm him down. Normally, this would not have

been permitted and it indicated to me that Garlick was hysterical and that the police were trying to avoid using force on Garlick whenever possible.

At the station Garlick was unco-operative, answered questions in French and used language uncomplimentary to the police.

This incident illustrated the difficulties of a citizen asserting his rights to a suspicious police officer and the dilemma of the officer attempting to investigate possible criminal activities faced with an unco-operative citizen.

This incident involved a number of matters which require some comment.

There was evidence that Shaw had made an erasure in his notebook and written something over it. The evidence was admitted as clearly relevant to the question of credibility. It is clear that Shaw breached regulations in so doing. Police regulations require that if there is to be a correction it shall be crossed out so that the original writing can be read and the correction entered thereafter. The erasure in this case concerned the number of a police car at the scene.

There was no legal duty owed by Garlick to explain himself to the police officers. Police officers have the power to arrest only in certain circumstances. Under Section 25 of the Criminal Code:

> "25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
> (b) as a peace officer or public officer,
> (c) in aid of a peace officer or public officer, or
> (d) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds,

justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner."

While the officers may have had their suspicions when they approached Garlick at the corner of Spadina and College, they had no legal authority to detain or arrest him and any actions they took to detain or arrest Garlick were illegal. Garlick had a perfect right to refuse to talk to the police officers and indeed to run away. The officers, of course, construed this to be an admission of guilt of some kind and proceeded to use force to arrest Garlick. Clearly, force used to effect an unlawful arrest is, although perhaps understandable in some circumstances, illegal.

I was satisfied on the evidence that Shaw did not use his night stick on Garlick, but I was equally satisfied that force was used in arresting and detaining him. I also determined that Garlick's complaint of being assaulted on

the stairway at the station was unfounded.

Garlick testified that he had forgotten that he was in possession of a small amount of hashish. I find this evidence to be impossible to believe. I am satisfied that the reason he ran away was because he was in possession of this small amount of hashish. Garlick was subsequently charged and convicted for possession of the hashish. This did not, however, retroactively justify the arrest for which the officers had no reasonable grounds nor could it legalize the force used in carrying out the arrest, although in practical terms, it might save Shaw and Ashton from criminal or civil liability in a court of law.

What followed from the illegal arrest was, in my opinion, considerably more disturbing than the errors made by the officers in deciding to arrest Garlick. The officers laid charges against Garlick of assault causing bodily harm and common assault upon Officer Shaw. Both charges were subsequently dismissed by a Provincial Court Judge without even calling upon defence evidence. I was satisfied that these charges were laid in an effort to cover up their illegal arrest, a thoroughly improper procedure.

Even more importantly, the evidence of Shaw and Ashton was unsatisfactory and deviated significantly from the facts. Ashton testified that he chased Garlick and this statement was, in my view, untrue. It would appear that this evidence was given because Shaw, as an auxiliary constable, should not have taken the lead and made the arrest, particularly in view of the fact that the arrest was illegal. Furthermore, Officer Shaw changed entries in his notebook regarding the number of the vehicle in which Garlick was eventually placed, again in order to cover up the fact that Ashton had driven the police cruiser to the scene. Both officers then gave an edited version of the events to their superior

officers in order to cover up their misconduct. Supporting my view of the facts, there were contradictions in the evidence of Constable Shaw in the hearing before the Provincial Court Judge and in the evidence before me.

Ashton made notes in his notebook that supported his statement that he had chased after Garlick on foot. I am satisfied that he drove his vehicle after Garlick and that the entries in the notebook were made solely in an attempt to protect himself. Ashton testified that after Garlick was apprehended and placed in the second scout car, a Sergeant Hudson gave him the keys to scout car #5210 and that he and Shaw walked up Spadina where they found scout car #5210 parked with the engine off. Sergeant Hudson denied that he gave anything to Ashton or Shaw that night.

During the course of his testimony Ashton stated that Garlick had not complained to anybody in his presence about his or Shaw's conduct. However, in another part of his evidence, he testified that while reporting on the incident to Sergeant Milne at No. 52 Division, Garlick ran over, disagreed, and began to tell his side of the story. Sergeant Milne confirmed that the incident took place.

There were a number of other contradictions in the testimony and I can only come to the conclusion that when Shaw and Ashton realized that they had illegally arrested Garlick, in an attempt to evade liability, they concocted a story which they thought would cover the circumstances.

I find that the original arrest was illegal, even though understandable in that Garlick elected to run away, and that the force used to effect it was also unlawful. Although Garlick was under no duty to remain on the scene or to explain himself to the police officers, had he co-operated with the police he would not have been, in all probability, arrested. The possession of hashish by Garlick would in all

likelihood have protected the officers from repercussions, had they elected to tell the truth to their superiors and to me. It was the subsequent conduct of these officers that most concerned and alarmed me, and that was, in my view, by far the most serious aspect of this entire unfortunate incident.

Chapter VIII

DAVID V. CLARKE

David Clarke complained of his treatment by officers of the Metropolitan Toronto Police Department concerning an incident which occurred on October 11th, 1974.

Clarke was born twenty-three years ago in England, went to Australia as a child and moved to Canada in 1957. In 1967, he was in Singapore and Australia, returning to Canada in 1968, although he travelled extensively in the United States during the year 1968. He was employed at a number of different jobs over the years including as an auto mechanic, as a truck driver and working at child care.

He had three criminal convictions in the years 1970-1972. One was for theft in which he received two years suspended sentence, one was for a breach of probation and the third for possession of a soft drug. He studied child care during part of the year 1973-1974 at Humber College, and is presently married with one child.

On the evening of Friday, October 11th, 1974, Clarke attended at Humber College. He had previously taken a tranquilizer known as valium, and as well had had a number of drinks in the campus pub.

After the pub closed, when most of the people in the building had left, a noise was heard by security personnel who were on duty. Upon investigating, they noticed that someone appeared to have kicked in the glass covered by wire mesh in three doors of the College. The guards noticed Clarke in the area of these doors, and became suspicious

that he had caused the damage. As a result, the police were called and it was thus that the incident occurred.

Clarke testified that he had gone to the washroom and was proceeding to the foyer when he noticed the broken doors. He continued down the hall to a water fountain, and was met by a Humber security officer who asked him if he had broken the windows. Clarke denied having done so and was taken to the front foyer of the building where he met with the senior security officer on duty that night.

As a result of a discussion between Clarke and the security officers, Grujic Simich and Brenda Polley, during which Clarke continued to deny that he had broken the glass, a telephone call was made to the Metropolitan Toronto Police. Clarke testified that he refused to pay for the damage on the ground that he was not guilty of causing it, and it was on his urging that the police were called.

Constables Randall Hicks and Uriel Whyte attended at the College, and as a result of Clarke's complaint, both were given notice under The Public Inquiries Act.

The two officers joined the security personnel and Clarke in the foyer of the building. There are certain discrepancies in the testimony as to what happened thereafter.

It is agreed by everyone that the two officers, together with Clarke, inspected the damage. It is further agreed that Clarke was arrested and handcuffed in the area of the broken windows. Clarke was then taken to the police car in front of the building and was placed in the rear seat with his hands cuffed together behind his back.

Clarke makes no complaint about the arrest at the College, admitting that he was belligerent in his attitude.

I am satisfied that when Clarke was put under arrest, a scuffle occurred as he attempted to resist arrest, all the while denying that he was the culprit. There is a difference of evidence between Mr. Clarke and the two officers as to what happened at this time. The officers indicated that there was a considerable scuffle and that Clarke's face came in contact with the floor causing the injuries to him.

After Clarke was placed in the police car, at approximately 2:00 a.m., the two officers drove him to the police station. Clarke was sitting in the back seat while the two officers were sitting in the front. P.C. Whyte was driving.

It was on the drive to the station that the facts of the complaint before me took place. Clarke testified that he had brought his handcuffed arms to the front of his body, by drawing his feet through his arms. Upon arriving at a deserted spot, Officer Whyte suddenly pulled the car over to the right side of the road. Clarke testified that Whyte said something which Clarke did not hear, and then punched him in or just below the right eye. Clarke stated that as a result, he became semi-conscious.

Clarke denied casting racial slurs upon Whyte, who was black, and stated that the sole reference he made to the officer's colour was "I don't understand what is going on here, brother". He stated that it was meant as a slang expression, not as a racial slur. Clarke denied calling Officer Whyte "a fucking black man", testifying that he had no prejudice against black people and that many of his friends were black. Clarke stated that he believed he received other blows in the car, although being semi-conscious, he could not recall them specifically. He did describe injuries, other than the one that presumably resulted from a blow to his eye.

In cross-examination, Clarke stated that the words

which Officer Whyte had spoken and which he did not hear were something to the effect of "I will show you", or, "I'm going to show you what it's like".

At the conclusion of the night's events, Clarke attended at the Emergency Department of the Etobicoke General Hospital and was seen by Dr. Bennison. The record made at the time indicated that Clarke had marks on his face which looked like five fingernail scratches. He had some dry blood on his nose with a bruise on his right cheek and right eye. Clarke complained as well of tenderness to his right jaw and left cheek. There was some redness to his wrists and a slight abrasion on the back of his left hand. He was seen again later that day at the Emergency Department of Etobicoke General by Dr. Leonard Sadinsky.

P.C. Whyte testified that while driving to the station he looked in the rear vision mirror and saw Clarke lying in the back seat with his feet in the air as though he were going to kick P.C. Hicks or himself in the back of the head. He immediately brought the car to a stop and leaned back to slap backhandedly at Clarke's feet over the front seat.

P.C. Hicks testified that P.C. Whyte brought the car to a quick stop, swung his arm over the back seat and struck Clarke. He did not turn around to see whether Clarke was hit or not, but was certain Whyte made contact with Clarke. According to the noise heard, Hicks felt that Officer Whyte made contact with Clarke two or three times. Hicks, however, stated that he did not see the blows land, but only heard them. When he did turn around several seconds later, he saw Clarke leaning in the back corner of the seat with his hands handcuffed in front of him.

On Tuesday, October 15th, Hicks was called into Inspector Gaskin's office and asked to explain what had happened on the Saturday night. Detective-Sergeant Boyle was also

present. Hicks gave a statement, which was filed in evidence as Exhibit 271. In it, Hicks mentioned that Clarke was getting very belligerent, and was making loud remarks about the number of friends he had that could make trouble for us. Hicks also recalled that remarks were made similar to "man, the black-white scene sure is clear now". Hicks stated that Whyte was called, "A fucking black man" and accused of racial prejudice. In his opinion, it was these remarks that caused Whyte to lose control. Clarke made another racial statement to Whyte, which Hicks could not recall, after which Whyte leaned over the seat and, Hicks assumed, slapped Clarke about the head about three times. Hicks used the word "assume" because he did not turn around to see what was happening.

P.C. Whyte submitted a written statement to Inspector Gaskin a few days after the incident and did not admit that an assault occurred in the cruiser. When told by Inspector Gaskin of Hick's statement, P.C. Whyte again denied that he had assaulted Clarke.

I am satisfied on the evidence before me that P.C. Whyte did slap Clarke across the face two or three times with, an open hand, using some force.

It should be made clear that there was no justification for P.C. Whyte assaulting the complainant, Clarke, in the manner that he did. It is only fair, however, to point out that Clarke had resisted arrest and caused minor damage to the uniforms of the officers, was abusive to both officers and, in particular, to P.C. Whyte. We expect our officers to be above reproach and yet sometimes forget that they are human. This does not, however, justify police officers in losing their temper and assaulting a prisoner, but merely makes it more understandable.

What was more disturbing about this case than the fact that P.C. Whyte struck Clarke across the face was that he did not admit it in front of the Commission. I was also disturbed by the fact that both officers attempted to cast a distorted view upon what happened. It may be understandable that officers working together would tend to protect one another. However, where an incident of this kind takes place, one would expect of our policemen that they would admit an error caused by gross provocation and immediately lay the full facts before their superior officers. While I do not condone the actions of Officer Whyte in striking Clarke, they are understandable. What I find far more difficult to condone is what appeared to me to be a cover-up.

In fairness to P.C. Hicks, I should perhaps state that he seemed to be uncomfortable in the witness box and limited his answers to the literal questions.

On the testimony before me, I am satisfied that when arrested, the officers had to use force to arrest him. There was a difference in the evidence as to what took place during the arrest, but I am satisfied that Clarke suffered some injuries at the time of arrest because of his attitude and struggles to resist arrest. All of the witnesses at Humber College indicated that Clarke was intoxicated, obnoxious and belligerent.

I am satisfied that Clarke heaped racial abuse upon Officer Whyte and at one time did bring his handcuffs from behind his back to the front which would have involved him lying on his back and putting his feet through the handcuffs. Even after the event had taken place, Clarke was attempting to bargain with the officers by alleging to have information about a wanted man and the location of machine guns.

The actions of Clarke throughout the evening were reprehensible and there was certainly gross provocation prior to the incident which took place in the police car.

Nonetheless, I am satisfied that excessive force was used in the car, and that the officers were involved in covering up and protecting their brother officer.

Chapter IX

ROY BONNER

This complaint arises out of an incident occurring on July 9th, 1974.

Bonner is a sixty-one year old man, who is alleged to have had two heart attacks and three strokes. He is divorced and has custody of a severely retarded son, with whom he lives. On occasion, Bonner has had difficulties with his son and indeed, has had some physical altercations with him.

The son, who is twenty-seven years of age, had shortly before the incident in question, taken to chasing after police cars. On July 9th, 1974, the son fell from his ten speed bicycle and scraped his arm, following which he commenced to chase a police car. Mr. Bonner testified that the police picked up the boy and took him to the Queen Street Mental Health Centre where he was admitted. A police sergeant then came by to drive Mr. Bonner to the hospital.

Bonner testified that at the hospital he was not allowed to see his son, although the boy was close by and was visible through a window. Bonner stated that he was seated in a chair and was unable to determine what was happening to his son. He decided to find out for himself and alleged that upon standing up, two policemen sitting on either side of him kicked him on the shins and stood on top of his feet with their boots. Bonner testified that he was angry and told them that he was going to see his son. The officers according to Bonner's testimony continued to kick him and a fight broke out between him and the two men. Handcuffs were then put on Bonner and kept on for approximately

twenty minutes causing pain to Bonner's wrists.

Bonner stated that each time the police sergeant appeared the officers would stop hitting him. Bonner's first complaint was to the effect that the two police officers stood on his toes, handcuffed him and kicked him on the ankles. At the Commission hearings he added to this that they had taken turns pounding him in the ribs and stomach with their fists. He stated that the kicking lasted approximately fifteen minutes and resulted in a broken bone in his left ankle. He stated that he was punched dozens of times for approximately twenty minutes.

Bonner testified that he was also hit in the face and that the handcuffs on his wrists were tight enough to break a bone. He stated that he had attended upon his doctor the next morning and complained about the beating and a few days later, he had x-rays taken at the Toronto General Hospital.

On cross-examination, it appeared that Bonner went to see his doctor two days later and advised him that his son had kicked him. The Toronto General Hospital records indicated that the x-rays took place two or three months after the incident.

Bonner was extensively cross-examined about multiple claims that he had made against insurance companies for injuries received at the hands of the Toronto Transit Commission, various trucking concerns and many stores. The evidence disclosed that Bonner had made multiple fraudulent claims and indeed had made claims for three separate injuries alleged to have occurred on the same day.

My impression of the witness while he gave evidence was one of complete mistrust. I was of the impression that the witness was not as sick as he alleged to be. He generally walked with a very halting gait but, on one occasion in the

court room, he moved very quickly and without any sign of a limp or distress. During much of his testimony, he alleged that he could hardly speak and yet on occasion spoke clearly and vigorously. It was my impression that this witness evaded the truth on many occasions and indeed lied outright.

The admitting clerk at the hospital on Queen Street testified that while she had Mr. Bonner under observation the police treated him gently. On one occasion, an officer put his hands on Bonner's shoulder to keep him in his chair because Bonner insisted on seeing his son, who was undergoing a mental assessment. The clerk testified that there were neither shouts, screams nor scuffles as described by Bonner when she was present and that if such a fight had occurred, she would have heard it. A nurse at the hospital stated as well that she heard neither loud noises nor indications of a scuffle but that she did notice a slight redness on Mr. Bonner's wrists. Dr. Aranita confirmed that there was neither shouting nor loud noises. She stated that Bonner was in handcuffs when he was brought into her office for mental assessment. They were removed at her request, at which time the police informed her that they had been put on in order to restrain Bonner. Dr. Aranita also noticed a slight reddening of the skin, but there were no ridges or other signs that the handcuffs had been too tight. A psychiatric nurse who had been with the son during the course of the assessment also testified that he heard no loud noises indicative of a scuffle.

Neighbours of the Bonners testified that they had seen Bonner and his son fighting on the lawn outside their home prior to the incident in question. The neighbours also testified that when Bonner was returned to his premises after the incident, he walked to his door without a limp or signs of distress.

Other evidence was called indicating that Bonner was

not a reliable witness. One police officer testified concerning an incident that had occurred previously at Bonner's home, during which Bonner attacked the police officer with a baseball bat. As a result of this, Bonner was convicted and sentenced to ten days in gaol on a charge of assaulting a police officer.

It became evident to me during Bonner's testimony that he was not only an unreliable witness, but an untruthful one. The evidence given by the officers against whom Bonner made the allegations of excessive force was completely at variance from the evidence given by Bonner. They testified that they took Bonner's son to the Queen Street Mental Hospital because they considered it to be in his best interest. When they attempted to speak with Bonner, he was abusive to them. Sergeant Ross Prasky voluntarily took Bonner to the hospital at about 8:10 in the evening. Bonner was seated with Police Constables Wilson and Torrens who had taken his son to the hospital earlier. The officers stated in their evidence that at approximately 8:30 p.m., Bonner became abusive and they asked him on at least three occasions to calm down. They stated that Bonner kicked at them frequently and connected at least once. Bonner ripped off the "clip-on" tie of one of the officers and eventually he was handcuffed in order to restrain him. The officers denied threatening him or putting the handcuffs on tightly. Bonner was driven home by Sergeant Prasky at approximately 9:20 p.m. At that time he made no complaint of injury and Prasky noticed only that Bonner was rubbing his wrists which appeared to be red.

I am completely satisfied with the evidence of the officers and accept their version of what happened on this occasion. It is my view that the evidence of Bonner was not corroborated in any material respect and further that if Bonner had been beaten as he alleged he was, he would have been extensively injured, which is not supported by the evidence.

It is my finding that there was no excessive force inflicted upon Bonner and that the allegations of Bonner against the two police officers are completely without merit.

Chapter X

PATRICIA MURPHY

Patricia Murphy was one of a group of four women who attended at the Brunswick Tavern on January 5th, 1974.

The Brunswick Tavern is a licensed establishment in the City of Toronto where the entertainment is very often provided by the patrons. For this purpose a stage is supplied with a loud-speaker arrangement.

During the course of the evening, the group of women became involved in an altercation with a male patron who was also attending at the tavern. The four women, Patricia Murphy, Heather Byers, Susan Wells and Adrienne Potts had consumed some alcoholic beverages at the premises and two of the women, Patricia Murphy and Heather Byers, had consumed some drinks earlier.

The altercation between the women and the male patron involved throwing some beer apparently both by Potts and by the man as well as the use of abusive language. The man apparently called the women "dikes" and it was alleged that Potts told him "to fuck off". Apparently both the man and the four women were requested to leave the premises, but the man did not do so. It was after that, during an intermission of the entertainment, that two of the women ascended the stage and sang what Potts described as a "lesbian feminist song", consisting of words set to the tune of "I enjoy being a girl". It appeared that Potts was "ticked off" that the management had permitted the man to remain on the premises and that was one of the reasons that caused her to sing the song. The song started out with the words "I enjoy being a

dike" and included the word "fuck". These words were offensive to the management and to some of the patrons.

When the women refused to leave the premises at the request of the management, the police were called and a number of police officers arrived.

Section 56 of The Liquor License Act, R.S.O. 1970, Chapter 250 places a statutory duty on a holder of a license to prevent quarrelsome, violent and disorderly conduct taking place in the licensed premises. Persons requested to leave the premises and who do not comply, may, under this section be forceably evicted.

The evidence was clear that when the police arrived, they politely asked a number of times that the four women leave the premises, It would appear that some five to ten minutes were spent by the police in trying to persuade the women to leave voluntarily. The women continued to refuse to do so and they were then advised that if they did not leave voluntarily they would be arrested for causing a disturbance. The women again refused to leave and were physically removed. It required four police officers to remove Byers and two police officers escorted Potts outside. Both of these women were physically struggling with the police in a rather violent manner. Murphy was removed by two police officers, one holding each arm. Wells left without the necessity of the police using any force. The language used by the women at this period of time was very abusive.

I am satisfied on the evidence before me that no excessive force was used by the police officers. It is clear that the police officers were faced with a tense, volatile situation and had no recourse but to remove the women physically from the premises. This was done quickly and without any unnecessary force.

On the evidence before me, I am satisfied that the four women were antagonistic to the police and acted in an obstinate manner. Wells admitted that she assumed that they had been treated unfairly by the management of the Brunswick Tavern because the management was taking an anti-lesbian position. Murphy testified that she had been previously involved in political efforts on behalf of homosexuals and that she had negative feelings towards a number of police officers as a result of their attitude towards homosexuals.

The women were removed by the police to No. 14 Division. They were kept there approximately thirty to forty minutes in a sally-port or garage adjoining the main building of No. 14 Division and were then informed that they were free to leave.

There was a difference of opinion between a number of the police officers and Sergeant Pitts as to whether or not the women should be charged with causing a disturbance in a public place. Sergeant Pitts was mistakenly of the view that a beverage room was not a public place. During the stay at No. 14 Division, there was a good deal of verbal abuse exchanged between the women and some police officers. I should point out at this time that the actions of the women in abusing the police for doing their duty was reprehensible. That, however, does not excuse the police officers from also abusing the women by calling them names. After the women were told that they could leave and that there would be no charge, there was further disagreement between the women and the police and it was necessary for the police officers to escort them from No. 14 Division station.

During the departure of the women from the police station, it was alleged that a police officer struck Potts on the back of her head with his fist, causing her to fall to the ground. This allegation was not in front of me as Potts had left the jurisdiction and did not attend to

register her complaint. It is interesting to note that as a result P.C. Hall was charged with assault and Patricia Murphy clearly identified him as the officer who had struck Potts. At a later date, before me, Murphy identified P.C. McLean as the officer who had struck Potts. Testimony in both cases was under oath and was without qualification. It is, of course, possible to make a mistake and subsequently correct it, but I was unable to ascertain by what course of reasoning she made the change in her testimony. P.C. Hall was acquitted of the charge against him.

After leaving the premises of No. 14 Division, the four women took a taxi cab back to the Brunswick Tavern. On the testimony before me, it was clear that the women were angry and gave the explanation that they wished to return to the tavern to look for witnesses. At the tavern, the women were stopped in the lobby by the manager and police officers who were present on the premises. An altercation again arose as the women attempted to force their way into the premises and three of the women, Murphy, Potts and Byers were again taken to a police cruiser and returned to No. 14 Division. Wells took no part in the second altercation and was not taken to the police station.

I am satisfied that on this second occasion abusive language was again used by Murphy and Potts. The police were required to use force to arrest the women. Again, I find that this force was reasonable under the circumstances.

Upon arrival at No. 14 Division for the second time, the women were taken to the second floor. At the tail-end of the procession were Murphy and P.C. Manns. Patricia Murphy stated that P.C. Manns administered a blow to her lower back which she described as being very hard. She stated that this blow caused her to fall to the floor hitting her head against the wall, and that the side of her head was swollen and sore for a few days. This alleged incident took

place out of the sight of the other two women and the other police officer with them.

On January 8th, Murphy was examined by a Dr. Gerald Green who made no notes of any bruises and agreed that it was probable that he had not observed any bruises. P.C. Manns denied the allegations of Murphy and stated that she continually hung back behind the others, although he kept asking her to speed up. He stated that he was worried about being out of sight of the other witnesses in view of the attitude of the women and the danger of allegations being made against the police.

I do not accept the evidence of Murphy and do accept the evidence of P.C. Manns concerning the assault.

I am satisfied that on no occasion throughout the evening did the police officers use excessive force. I am further satisfied that the attitude of the four women, particularly Patricia Murphy, was very antagonistic to the police who were only carrying out their duties. It became clear from the evidence that the women considered that they were making a declaration to the public on behalf of homosexuals and desired to make an issue of this situation with the management at the Brunswick Tavern and with the police. It may be that they felt that the management and the police were discriminating against homosexuals, but on the evidence before me the management was entirely justified in calling for the assistance of the police and the police were justified not only in requesting the women to leave the premises but also in forceably removing them when they refused to leave.

The only fault that I find with the conduct of the police during the whole evening is that some of the officers, the identity of whom it is impossible to determine, did use abusive language in addressing the women. This was in response to the abusive language used by the women to the

police. As previously stated, this does not excuse the police who should have been professional enough in their approach to maintain a dignified silence and not descend to the level of the people whom they were arresting.

Chapter XI

RICHARD HEMINGWAY

The complaint made by Richard Hemingway and Susan Wells concerned an incident on March 28th, 1974. Hemingway was eighteen at the time of the incident in question and was residing with his co-complainant, Susan Wells, who was then twenty-two years of age.

Both Hemingway and Wells were born in the United States. At approximately eight years of age, he had moved to the City of Detroit in the State of Michigan. He held odd jobs in Detroit after having left school at the age of sixteen. At the age of seventeen, after being charged for the second time with being in possession of marijuana, he was given an option of being tried on the second offence or of joining the American army. He joined the army and the second charge was apparently dropped.

After some nine weeks in the army, Hemingway found that he did not like being in the army, so he deserted and came to Canada. In Canada, he married with the purpose of obtaining landed immigrant status and after obtaining landed immigrant status in February, 1974, separated from his wife.

While in Toronto he did odd jobs and lived for a time at Rochdale College. At the time of the incident he was living with Susan Wells and had been a social services assistant at the Rochdale free clinic. At the relevant time, he was working for another free clinic advising people regarding drugs.

Susan Wells was born in Ohio and had moved to Grand Rapids, Michigan. She spent one year at the University of Michigan studying fine arts, moving to Toronto in June, 1971. In 1971, she married and obtained landed immigrant status the following year. She never lived with her husband and the apparent reason for the marriage was to help her obtain landed immigrant status in Canada. She was working for the Hassle-Free Clinic, dealing with people involved in drugs, at the time of the incident. Miss Wells had previously been convicted in California of theft under $50.00. She explained that it involved the theft of an avocado.

On March 28th, 1974, both Hemingway and Wells had been at Rochdale College for different reasons from about 2:00 in the afternoon. They left the College together at approximately 6:00 p.m.

Hemingway had smoked some hashish in the afternoon and Miss Wells had purchased herbal tea, which was subsequently found to contain marijuana.

As a result of the complaint made concerning the incident that followed, notices under The Public Inquiries Act were served upon P.C. Neagle and P.C. McCall of the Metropolitan Toronto Police Department. These two were plainclothes officers attached to the drug squad of the Metropolitan Toronto Police.

The officers testified that they noticed Hemingway and Wells leave Rochdale, which they had under observation, and that they were acting in a furtive manner. Wells was carrying a large purse and Hemingway was carrying a shopping bag. For this reason, they felt that either or both Hemingway and Wells would be in possession of drugs, and determined to stop and search them.

The Narcotic Control Act, R.S.C. 1970, c. N-1, reads, in part, as follows:

"S. 10(1) A peace officer may, at any time,

(a) without a warrant enter and search any place other than a dwelling house, ... in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;

(b) search any person found in such place;"

In my view of the law there were insufficient grounds for stopping and searching Hemingway and Wells without arresting them. Consequently any force used upon Hemingway and Wells would be illegal force. However I am informed that at the time in question, a few Provincial Court Judges in Toronto were approving searches of persons leaving Rochdale College in view of the reputation of the College. Since this was a practice accepted by some of the courts in Toronto, the officers felt justified in stopping and searching Wells and Hemingway.

When they attempted to search Hemingway, he took violent exception to their actions and resisted the officers, although they had shown him a police badge. There is some dispute as to what happened immediately thereafter, but there can be no doubt that Hemingway and Wells were then arrested.

I am satisfied on the evidence that Hemingway resisted the search and then the arrest, and that force was used to place him under arrest. Hemingway alleged that during the course of the arrest, one of the officers, McCall, kneeled on his chest and inflicted injury upon him causing a serious injury to his ribs and breast bone.

During the course of the arrest of Hemingway, Miss Wells became involved to some extent and was told that she

was also under arrest.

Hemingway and Wells were then taken by police car to No. 52 Division where they were separated. Miss Wells sat in an outer room, while Hemingway was taken to an inner room. Miss Well's sole complaint was that she was hit in the face with a bag of herbs, which was subsequently found to contain marijuana.

At a trial held in December, 1974, both Hemingway and Wells were charged with possession of cannabis (marijuana). The charge was dismissed as regards Hemingway. Wells was found guilty and given a conditional discharge.

Hemingway's account as to what happened to him in the station has varied over the period of time since the occurrence itself.

He alleged that he was taken to a room on the fourth floor of No. 52 Division and was thrown into a chair. He was then thrown to the floor, hitting his face as he was still handcuffed. He underwent a physical search and was verbally abused by such comments as "dirty hippie", "you stink", and "how often do you bathe?". Hemingway complained that physical abuse at the subway station caused the dislocation of one of his ribs, and that the hearing in his right ear was temporarily impaired from a blank pistol being fired two feet from his ear while at the station. Sawdust was forced into his mouth and a barrel of a gun was placed to his forehead by the officer threatening to shoot him.

On another occasion, he was alleged to have said that he was thrown into a chair where he sat in a yoga position, and an officer tipped the chair over causing him to fall onto his face and causing the chair to flip upside down. Another detective picked him up, slapped him in the mouth

cutting his lip and another officer kicked him from the chair to the floor again. He was alleged to have stated that a detective took out a loaded service revolver, placed the barrel between his eyes and threatened to shoot him and that that detective removed a fistful of sawdust which he was carrying for his guinea pig and forced it into his mouth.

On yet another occasion he said that it was P.C. McCall who picked him up and put him back in the chair and who then slapped him around the face knocking him to the floor again. It was P.C. Neagle who came into the office with a handful of sawdust and pushed it in his mouth and all over his face. Hemingway said that he was then asked to undress for a search which he did, and that unfavourable remarks were cast about the size of his penis. On this occasion, Hemingway stated that it was after he dressed that an officer pointed a pistol at the centre of his forehead and said, "Do you know I can blow your fucking head off?". Another officer standing by an open locker stated "You are nothing but a fucking American". The pistol was held about three or four feet from him, pointing at his head. He stated that the officer fired twice and he nearly died of fright. He said the pistol must have fired blanks.

His evidence before the Commission varied again from his previous statements. He stated that he was put in a chair just behind a table in the northwest corner of the room and was sitting in the "lotus" position. Both, McCall and Neagle were out of the room and another officer put his feet on the chair and flipped him over onto the floor. Hemingway stated that he fell on his face, but caused no real injury. McCall came into the room while he was on the floor, put him back in the chair and hit him with his open hand, again knocking Hemingway to the floor. A number of other officers in the room made uncomplimentary remarks to him, and asked him questions. Neagle took a handful of

sawdust and shoved it into Hemingway's face when he would not answer questions.

When he was undressed to be searched, officers, including Neagle, made uncomplimentary remarks about the size of his penis. Another officer was alleged to have rested the barrel of a 38 revolver between Hemingway's eyes and stated twice, "You know I can blow your fucking head off". Another officer twice fired a pistol three or four feet from his ear, and Hemingway assumed it was a starting pistol because the noise was not too loud.

I was not impressed with the evidence of Hemingway and indeed felt that it was unreliable. I do not believe he received the rib separation on this day, but that it was a pre-existing injury. At the request of the Commission, a medical specialist, Charles Zaltz, examined this injury. The doctor examined Hemingway and reviewed the medical report which had been filed before the Commission. From his evidence, I arrived at the opinion that this injury was not caused at the time stated by Hemingway, but had occurred long before.

Despite the fact that I did not accept much of the evidence of Hemingway, there were certain segments of evidence which appeared convincing to me. I am satisfied that an unknown officer flipped him out of the chair in which he was sitting in a lotus position. I am also satisfied that some uncomplimentary remarks were made to him and that some sawdust was either thrown or pushed in his face and hair. I am also satisfied that Susan Wells was tapped in the face with a bag of herbal tea containing marijuana. I am unable to determine on a balance of probabilities which officer or officers did these things.

I disbelieve Hemingway's evidence concerning the firing of the pistol. Commission staff performed certain tests,

and had a starting pistol been fired, much more than a ringing in Hemingway's ears could have been expected.

Hemingway gave the officers considerable difficulty and was very unco-operative. This, however, does not excuse the officers and allow them to make personal uncomplimentary remarks about a person or allow them to dump him out of a chair.

During the course of this investigation, it was disclosed that P.C. McCall had kept the herbal tea in his locker for some ten or eleven days before turning it over for analysis at headquarters. The regulations at that time required him to do so as soon as possible and I understand that it has now been changed to specify that it be submitted within twenty-four hours. It is important that the seized material be turned over for analysis as soon as possible, so that this sort of delay does not occur.

I find that P.C. McCall and P.C. Neagle had insufficient cause to search Hemingway and Wells and that therefore, the force used in the attempt to search Hemingway was an excessive use of force. I further find that the arrest of Hemingway and Wells was not justified at the time that they were arrested and consequently, any force used in the pursuance of that purpose was an illegal use of force. It is my view that P.C. McCall and P.C. Neagle would normally have been liable, both criminally and civilly, for the force used in effecting the arrest and in the treatment of Hemingway and Wells at the police station. However, the fact that marijuana was found in the herbal tea and Wells was found guilty of the criminal offence would in all probability as a practical matter, have saved the officers from such legal proceedings.

The conduct of police officers in the treatment of the prisoners at the station was highly improper and not what

would have been expected from properly trained police officers. P.C. McCall stated that he did make a comment as to Hemingway's body odor. This is not a serious enough action to warrant criticism if it was done in the fashion suggested by the officer. If it were done in the fashion suggested by Hemingway and was part of a series of demeaning actions, then it is worthy of severe criticism.

The treatment of Hemingway at the station was in my view highly improper.

Chapter XII

JAMES HYLAND

The complaint of James Hyland concerned an incident which occurred at his home on March 3rd, 1974.

Hyland and a woman with whom he was living, Bonnie Lee McNeil, had been out to dinner with McNeil's child prior to the incident. They were at the home of a friend, one Tibano, who testified that they ate a heavy roast beef dinner and that during the course of the visit, which was over a period of some three or four hours, Hyland had had two drinks before dinner and one or two drinks after dinner. This witness testified that he dropped Hyland, McNeil and the child off at their home on his way to work and that Hyland was sober. This evidence was confirmed by Hyland and McNeil.

McNeil testified that on arrival home, she wanted to open a window and in doing so, lost her balance and hit the side of her hand against the window, breaking the window and cutting her hand. Hyland decided to telephone the police with the expectation that the police would drive her to the hospital and have her attended to. He stated that he did not have sufficient money to get her to the hospital himself.

McNeil testified that they had had a party the night before and that the premises had not been cleaned up after the party. The evidence of what happened thereafter diverges between the story told by Hyland and McNeil on the one side and the police officers on the other.

P.C. George Smith, of the Police Communications Bureau testified that at approximately 9:15 p.m., he received a

telephone call from an unknown male who stated, "my wife cut herself, get a cruiser over here fast". From the way the information was given to him, Smith presumed that this was a possible stabbing. This information was passed on to John Douglas Sheridan, a civilian radio dispatcher, as a possible stabbing, and went on the air as a stabbing. As a result, a number of police cars arrived on the scene. McNeil testified that there was some adverse comment by police officers on the condition of the home and the bringing up of a child in such conditions. She testified that she saw P.C. Selwyn Fernandes backing Hyland into a corner where he eventually fell into a space between the bed and the wall, at the head of which space was a table. She stated that Jim Hyland was lying on the floor on his back when the officer rested his left arm on the dresser which was to the right of the door, brought his right leg around and dropped it down on Hyland's abdomen.

Hyland testified that he was pushed in the chest and landed on the floor behind the bed. He stated that P.C. Selwyn Fernandes came around the bed and he, Hyland, looked up and saw a boot coming down which hit him in the area of the stomach. He stated that thereafter he recalled nothing until he woke up in the intensive care unit at Wellesley Hospital.

It should be remembered that this was shortly after Hyland and McNeil had returned from the home of Peter Tibano and that they were in good physical condition when he left them off at their home.

The officers' evidence was quite different. P.C. Fernandes stated that he approached Hyland and another officer spoke to the child, Heather McNeil, apparently saying to her that she would be taken to the Children's Aid Society. Fernandes testified that upon entering the bedroom at the Hyland residence, he observed Hyland striking Bonnie

McNeil, grabbing her by the throat and choking her. He pulled Hyland away and told him not to assault the lady. Hyland replied "I will do what I want and I will do you in too". Hyland then grabbed the officer by the collar and swung at him with his left hand, striking him on the shoulder. Hyland took another swing which the officer blocked and then Hyland directed a blow at Police Cadet Ball which was also blocked. Fernandes pushed Hyland away with his open hands and Hyland fell on the bed and then into the space between the bed and the wall.

Police Cadet Ball confirmed this version of the events and added that as Hyland fell, he dislodged several articles from a dresser or bookshelf.

Other officers who attended on the scene corroborated the events following Hyland's fall, indicating that Bonnie McNeil requested that the police arrest Hyland as she was frightened that he might beat her. According to their testimony, she indicated that this was his practice when he was drunk. P.C. Hill and P.C. Giel testified that they lifted Hyland onto the bed. There were a number of inconsistencies between the testimony of McNeil and Hyland, none of which were major and could be due to the lapse of time and failure of memory. Both Hyland and McNeil denied that they had been fighting prior to the arrival of the police officers. They did admit that there had been a disagreement with respect to the necessity of a trip to the hospital for McNeil's cut hand.

McNeil testified that she heard no conversation between Hyland and any of the police officers, whereas Hyland stated that he attempted to tell Fernandes about her injury and that Fernandes had made several remarks to him before his fall.

McNeil indicated that Hyland's first fall onto the bed occurred prior to any physical contact with the police officers, but later said that there may have been contact and then later again denied that there was contact.

After the police officers departed, apparently fairly quickly, McNeil testified that Hyland was lying on the bed and moaning. She went upstairs for approximately one hour with her daughter and then telephoned to the police with respect to a suspected prowler in a garage behind their residence. The police constable who attended was unaware of the previous incident. He checked out the premises and the garage at the rear, found no prowler and reported to McNeil, who made no mention to him of the previous incident or of Hyland's condition. In view of her testimony as to Hyland's condition, this is most difficult to understand.

McNeil had some fourteen years' experience in clinics and hospitals as an x-ray technician. She testified that Hyland was in bad shape and yet she waited one to one and one-half hours before calling for an ambulance. She did not mention anything about Hyland's condition to the police constable who responded to the prowler call and yet shortly thereafter, called for an ambulance.

One thing is clear and that is that Hyland suffered a serious internal injury on that evening. Hyland was taken to hospital where a diagnosis was made of a "perforated viscus". An operation was performed at which time an internal laceration of four centimeters in length was discovered in the abdominal cavity. The operation took place on Monday, March 4th, 1974 at 3:00 a.m. It was the doctor's opinion that the injury had occurred approximately six to eight hours prior to the operation.

The medical evidence indicated that a significant force would be required to cause the injury for which Hyland was

treated. However, two doctors testified that less force would be required if the intestine was full as a result of eating a large meal. Dr. Provan indicated that it would be possible for such an injury to be caused by the falling of a large book or some other object onto Hyland's stomach as long as the object was a large one or was falling fairly fast.

On the testimony before me, there was no indication that anything fell on Hyland that was large enough or falling fast enough to cause such an injury. The doctors testified that such an injury could be caused by rapid acceleration or deceleration but that the individual would have to be moving fairly fast at the time he came to a stop. It did not appear to me that the fall by Hyland onto the bed or the floor would have been sufficiently violent to cause the injury. There was no evidence as to any external injury such as an abrasion or a contusion, although the doctors agreed that given the forceful blow described by Hyland, one might have expected to find some abrasion or other external finding over the site of the injury.

Dr. Provan testified that the injury would have involved a great deal of pain. The doctor stated that nonetheless it would have been extremely unusual for Hyland to have been unconscious immediately after the kick and not to have revived until he was in the Intensive Care Unit. Both he and Dr. Toguri commented that they would not have expected this type of injury to effect Hyland's level of consciousness.

I was not satisfied with the evidence of either Hyland or McNeil concerning the events that they alleged took place on the evening in question. There were too many inconsistencies in their evidence and I was of the distinct impression that I was not getting a true story or the whole story of what occurred.

As a result of the clear differences between the evidence of Hyland and McNeil on the one hand and the police officers on the other, considerable evidence was brought forward dealing with the credibility of the parties.

Hyland had a background of alcohol and psychiatric problems. By his own admission, Hyland had received psychiatric treatment and had been confined to mental hospitals on three or four occasions prior to 1971 at which time, he was convicted of manslaughter. The pre-sentence report dealing with that incident stated that Hyland was an alcoholic and that he was aware of that condition. After Hyland was paroled in 1972, he had continuously participated in some form of psychiatric treatment. Evidence was given concerning an incident which took place in 1966 at Scarborough General Hospital at which time he became enraged and threw bottles at the hospital staff.

Hyland's ex-wife testified that after he had three or four drinks, he became a different man. She testified that on three or four occasions between 1965 and 1969, she required treatment at East General Hospital as a result of beatings administered by Hyland. Recalling the Scarborough General Hospital incident, she said that Hyland became enraged because he felt the doctors were not moving fast enough. She testified that he threw a chair at her and an empty bottle at a doctor. She further testified that after drinking bouts, he would bring strange men home and force her to have sexual relations with them while he watched. She testified that in 1969, Hyland, while under the influence of alcohol, held her baby daughter down an incinerator chute by the ankles.

Detective Middleton of the Durham Regional Police stated that on May 28th, 1971 when he arrived at Hyland's apartment in Whitby to investigate a death, he observed that Hyland had been drinking. He stated that Hyland picked up a

vase, smashed it and threatened the police officers with the broken vase.

While testifying, Hyland repeatedly denied that he exhibited a propensity towards violence after consuming alcohol. He also stated that he had a great deal of respect for the Metropolitan Toronto police and that his dealings in the past with the police had been favourable ones.

Tibano whose evidence was not challenged indicated that Hyland and McNeil were not impaired or under the influence of alcohol in any way. Yet shortly after Tibano dropped Hyland and McNeil off at their residence, the officers all testified that both were intoxicated.

The ambulance driver endorsed upon his record the initials, "H.B.D.", which indicated to him that Hyland had been drinking. The records of the hospital had apparently been mislaid and we were therefore unable to determine what that record might have said about drinking.

P.C. Selwyn Fernandes observed that upon his arrival at the Hyland home, Hyland was unsteady on his feet, that his movements were uncoordinated and his speech was slow; in his opinion, Hyland was highly intoxicated. He also testified that Mrs. McNeil was intoxicated but not to the same extent. P.C. Giel stated that he smelled a distinct odor of alcohol on Hyland's breath and observed twenty to twenty-five beer bottles strewn around the apartment.

P.C. Pearson stated that McNeil had a strong smell of alcohol on her breath and from that and her hesitant speech, he was of the opinion that she had consumed a considerable amount of alcohol. P.C. Hill stated that both Hyland and McNeil exhibited evidence of intoxication.

The evidence in this case is, in these respects, impossibly nonsensical. There is nothing in the evidence other than the testimony of Hyland and McNeil and the serious injury to indicate any improper actions by P.C. Fernandes.

On Hyland's evidence, Fernandes would have had to stomp him in the stomach within a matter of minutes after his arrival at the apartment for no real or apparent reason, except that he had received a call of a suspected stabbing. Were the injury caused by a substantial blow by Fernandes because he found Hyland fighting with McNeil and as a result of the telephone call, the incident might make some sense. However both Hyland and McNeil testified that Hyland was not assaulting McNeil when the officers arrived and what is more, testified that the injury occurred by Fernandes deliberately stomping upon Hyland.

There can be no doubt that Hyland received a serious injury resulting in an operation. Such injury, according to the doctor's testimony, must have occurred within a two-hour time period, during part of which the police were undoubtedly present. If, however, the incident took place as described by Hyland and McNeil, all of the officers who were present at the time must have been lying in their testimony, and P.C. Fernandes' behaviour was, to say the least, incomprehensible. I accept the evidence of P.C. Fernandes that he did not kick Hyland in the stomach and I reject the evidence of Hyland and McNeil.

It is, therefore, my finding that no use of excessive force in this case was exercised by P.C. Selwyn Fernandes.

Chapter XIII

SHELDON STARR

Sheldon Starr alleges that during his attendance at No. 3 District Plainclothes Office in the early morning of October 12th, 1974, he was the victim of a beating consisting of a number of punches to his shoulders followed by a blow to his face which broke his nose.

There is no doubt that upon Starr's arrival later in the morning at North York Branson Hospital, he was found to have a fractured nose. The question which I am required to determine is whether that injury resulted from a blow administered by a police officer at the station, or whether it occurred as a result of a previous incident for which he had been arrested.

Starr testified that earlier in the evening he had consumed six pints of beer. He described himself as a bit "high", and agreed that his faculties were affected by the consumption of alcohol. His companion, Tom Saltais, testified that he was "partially drunk" after drinking eight or nine bottles of beer at home. The two men ended up at the Newtonbrook Tavern. Starr was unclear as to the time at which he and Saltais had left the tavern, although he believed that they had left at closing time which was midnight. Other evidence proved that the incident in question commenced at approximately two o'clock in the morning, and Starr is unable to account for the time discrepancy.

Starr and Saltais decided to hitchhike to the latter's home to continue drinking. While going north on Yonge

Street, near the intersection of Cummer Avenue, a vehicle driven by Patrick Doyle stopped in order to allow a passenger to get out.

Starr and Saltais apparently asked the driver, Doyle, for a ride, but he refused to take them in his automobile. Doyle stated that the passenger's door was closed and that he began to accelerate the car. He heard a dragging sound and stopped the vehicle. At this point, Saltais opened the door on the passenger's side, entered the vehicle and was followed by Starr. According to Doyle, Saltais grabbed him and accused him of attempting to kill his buddy. Starr removed the keys from the ignition and Starr and Saltais then left the car, and walked around to the driver's door. Doyle testified that they continued to yell at him, informing him that he would be charged with assault. Starr allegedly wiped blood over Doyle's jacket and shirt.

Doyle testified that he was told that the incident would be forgotten if he gave them a "sawbuck", and stated that the two slapped him in the face. He stated that Saltais pointed to Starr's face and shouted in order to direct Doyle's attention to a facial injury.

Starr's testimony differed from that of Doyle. Starr testified that his jacket was caught in the door of Doyle's car and that he was dragged by the car when it left the intersection. As a result, he was knocked off balance and fell, apparently scraping his chin on the ground. Starr denied that any part of his face came into contact with the car or that his nose struck the pavement.

There is a good deal of conflicting evidence as to the amount of blood that was on Starr's face at the time of the incident. Doyle stated that he observed a cut on Starr's chin and blood on his face in the area of his cheeks and mouth. Another independent witness, Dennis Dunn, said he

observed blood coming from what appeared to be a cut on Starr's cheekbone beside his nose.

Police Constables Pert, Ast and Hutchinson attended at the scene. All of these officers indicated that there was some blood in the area of Starr's nose. Pert stated that at one time he was sitting on Starr's chest and observed that blood was trickling from his nose, some of which stained the officer's sleeve and coat. P.C. Ast was unable to say that blood was trickling or running from Starr's nose, but did state that there was "quite a bit of blood around the upper part of his lip, his nose and his chin". Both Pert and Hutchinson commented that the blood was smeared as if Starr had attempted to wipe his face.

The automobile driven by Doyle was a rental car and when the car was returned, blood was observed on the front seat between the driver's and passenger's sides. John Garrity, a tow truck driver inspected the vehicle along with P.C. Taylor before towing the car to the pound. He observed blood on the roof of the car by the driver's side, on the left rear bumper, on the dashboard near the steering wheel and also on the passenger's side of the front seat.

Starr was quite clear in his recollection of the evening up to the time of asking for a ride in the car driven by Doyle. Thereafter, he had considerable difficulty with his memory. It is my view that he had consumed considerably more than six beers and was inebriated, as was his friend, Saltais. There can be no doubt that Starr and Saltais were hostile to Doyle, and their actions were those of persons under the influence of alcohol. Both Starr and Saltais admitted yelling and swearing at Doyle until the police arrived. Saltais stated that he may have grabbed Doyle, but had no recollection of having done so. Both young men testified that the cut to Starr's chin was minor, and that no other facial injury was apparent.

There can be no doubt that force was used by the officers in arresting Starr. However that force was justified as Starr was resisting arrest and indeed was creating a considerable public disturbance.

Starr made no complaint against the police at this stage of the incident, but did complain about being injured while at the police station.

Starr alleged that his nose was fractured by a blow administered by a police officer. He described the officer as being heavy-set with fair hair and large hands. He attempted to identify the officer who punched him, but said that he wanted to be absolutely sure and while he tentatively pointed out Sergeant Dennison, he stated that he could not be certain. Sergeant Dennison clearly recalled the weekend in question, as it was the Thanksgiving weekend, and since his annual leave had commenced on the preceding Thursday, he was not in Toronto at the relevant time.

When Starr was brought into the Plainclothes Office, one, Marilyn MacDonald, was being questioned by P.C. Delaney and P.C. Nowitski. MacDonald was subsequently removed to an adjoining office. She testified that she heard some swearing and yelling and then through an open door observed Starr being carried out by his hands and feet. She stated that she observed more blood on him than was previously present and that it was running downwards from his nose. The officers who were involved with Miss MacDonald testified that the door to the office which she occupied was closed and that she would have been unable to see Starr as she claimed.

MacDonald also testified that P.C. Delaney had remained in the room with Starr for a short time and that upon returning to the office in which she had been placed, he appeared upset and had scratches on the back of one of his hands in

the area of his knuckles. These scratches had not been evident earlier in the evening.

This testimony is the only independent testimony confirming the evidence of Starr. Miss MacDonald had previously given a statement to Commission investigators, which was filed with the Commission and marked as Exhibit 445. She had also had a discussion with Gerald McAuliffe, the reporter for the Toronto Globe and Mail, approximately one month after the alleged incident. She made no mention to either McAuliffe or the Commission investigators of any injury to P.C. Delaney. She stated that she had first recalled the scratches in January, 1975, after she had given her statement to the Commission investigators.

P.C. Delaney denied that he had any scratches on his knuckles and denied that he had struck Starr. It is interesting to note that Delaney had long hair and a full beard, whereas all of the other police officers had short hair and were clean-shaven. In attempting to describe the officer who had struck him, one would have expected that Starr, if the officer were Delaney, would have noticed and remembered his long hair and beard. Furthermore, as MacDonald had been charged with a criminal offence by Delaney, her evidence against the officer must be scrutinized with great care.

Starr was taken to the North York Branson Hospital in order to receive medical care for his nose. Two nurses who worked at the hospital gave evidence of a telephone conversation between Starr and Saltais that indicated the two may well have fabricated the allegations against the police.

Maureen Campbell was and is a registered nurse. At the time in question she was on duty in the emergency department at the North York Branson Hospital. She testified before the Commission and stated that the events of the morning of

October 12th, 1974 were impressed upon her memory, both because of the extraordinary nature of those events and also because during that year, she only worked two midnight shifts in the emergency department. At about 6:30 a.m., another nurse, Miss Koldenhoff received a telephone call for Starr. Maureen Campbell woke up Starr and directed him to the telephone in the secondary emergency ward. Miss Koldenhoff told Maureen Campbell that she had overheard a remark about changing their story. Campbell stated that she picked up the receiver and heard Tom Saltais saying something to the effect that "we have got to change our story". Starr said that they would change their stories to indicate that his injuries were sustained while at the police station. She testified that Starr repeated several times that they had been "screwed" and that they could build up a "big story" of police brutality based on his injuries. About two minutes before the end of the conversation, Campbell became aware that Starr had realized that someone was listening to the conversation, stating that his tone of voice changed from that point onward.

Miss Campbell briefly mentioned the conversation to Dr. Crystal and may have spoken of it to the morning staff. She testified that she was concerned about the seriousness of eavesdropping upon a telephone conversation. She mentioned the conversation in her statement to the Commission investigators in January, 1975. That statement, Exhibit 446, was made while she was hospitalized, and due to the sedation given her, the statement was brief and lacked certain details given in her oral testimony.

Jantje Koldenhoff testified that after Starr began talking on the telephone, she had moved to a position across the hall from Starr and heard him say something about changing his story. She stated that at that point she drew the conversation to Miss Campbell's attention.

Dr. Crystal saw Starr speaking on the telephone that morning. He recalled that Miss Campbell had informed him that she had overheard the conversation and that Starr and a friend were in the process of making up a false story. Crystal could not recall being given any other details.

Starr testified that shortly after he began his conversation with Saltais, they became aware that someone was listening. He was outraged, and as a result, both he and Saltais spontaneously decided to give them a story they would never forget. They apparently began talking about committing robberies and their next "job". He testified that nothing was said about changing their stories, but merely that they wanted to get each other's story clear.

Saltais testified that he became aware of another person on the line midway through the conversation or even slightly later. Starr had stated that he heard a click shortly after the conversation began. Saltais denied any conversation concerning concocting a story. His explanation for the conversation was the same as Starr's, indicating that without consultation, spontaneously and in concert, they decided to put on a show for the eavesdropper. Saltais testified that he and Starr had done this a number of times, although both admitted that they had not seen each other for two years prior to this night.

Starr testified that two weeks prior to his attendance before the Commission, his lawyer had informed him that his conversation at the hospital had been overheard by a nurse and that the nurse's evidence could be damaging.

There can be no doubt that Starr was in a hostile mood and was highly intoxicated on the night in question. The police officers in general found him to be unco-operative and abusive. While at North York Branson Hospital, he was described by the nurses and by Dr. Crystal as being unco-

operative and abusive.

It appears to me that the amount of blood at the scene was in excess of the amount that would have come from a small cut under his chin, indicating that there was, in all likelihood, a greater injury at that time than that described by Starr and Saltais.

In view of Starr's condition on the evening in question, I was able to place very little reliance upon his evidence. If, however, the injury occurred on Yonge Street, I must ask myself why Starr was not taken immediately for medical attention. This, in conjunction with Miss MacDonald's testimony cast suspicion on the testimony of the officers concerning the events at the station. However, in view of the evidence of the nurses at the hospital concerning the telephone conversation, and because I was not entirely satisfied with Starr's explanation for it, I cannot find on a balance of probabilities that the complainant's evidence is true. Mere suspicion is not sufficient for a finding that excessive force was used by police officers.

In conclusion, it is my finding that Starr's allegation as to the use of force upon him in the police station is not proven to be true on a balance of probabilities.

Chapter XIV

DANNY HOWELL,
JOHN SWAILE.

The complaints of Howell and Swaile involved an incident which occurred on March 11th, 1974 at No. 52 Division.

The two complainants each alleged that they suffered an unjustified use of force at the hands of four or five unidentified police officers in the elevator of 52 Division.

The two complainants and a number of their friends drove to Toronto from a rural section of Ontario with the intention of attending a rock concert being held that night at Maple Leaf Gardens in Toronto. The group attending were all young people. On the trip to Toronto, considerable drinking took place. It was impossible from the evidence to determine just exactly what type of beverage was consumed by whom, but there was certainly beer, whisky of some type which may have included rye whisky, Bacardi rum and vodka. Upon their arrival at Maple Leaf Gardens, their vehicle was parked in a nearby parking lot and it was obvious from the evidence that some of the party were at least feeling good, if not substantially under the influence of alcohol.

There was some discrepancy in the evidence as to the sequence of events that took place thereafter. It was clear that a police officer in a white raincoat noticed some of the party with alcoholic beverages in their hands outside their vehicle. This officer, P.C. Southward was on duty at Maple Leaf Gardens that night. Due to the weather, he and some other officers were wearing white raincoats.

P.C. Southward attempted to place certain of the people who arrived in the vehicle under arrest. There was an attempt by a number of the youths to escape from P.C. Southward and a struggle broke out. It was obvious from the evidence that P.C. Southward received the worst of the injuries at this location and could have been seriously injured had not two Toronto Transit Commission employees come to his rescue. Southward was justified in attempting to arrest Howell and Swaile and the actions of Howell and Swaile and a number of their friends were completely improper and constituted an assault upon an officer in the performance of his duty. In fact a near riot resulted and a large number of police officers arrived on the scene in order to control the situation.

Howell and Swaile were arrested and taken to No. 52 Division. I am satisfied that Howell and Swaile received injuries during their assault upon P.C. Southward at Maple Leaf Gardens.

The evidence of Howell and Swaile varied in some respects at different times. They did not vary in their statements that each was the recipient of violence on the part of police officers while on the elevator at No. 52 Division.

It became obvious that nearly all, if not all, of the officers at No. 52 Division very quickly became aware that P.C. Southward had been injured during the incident at Maple Leaf Gardens and a number of the officers saw him in his dishevelled and injured condition. He was taken to hospital and was unable to work for a period of approximately one week after the incident.

Independent tests were run and it became clear there were only eleven seconds from the closing of the door of the elevator on the first floor to the opening of the elevator door on the third floor so that any violence to occupants of

the elevator would have to take place within that eleven seconds. The injuries to Howell and Swaile were not serious and indeed required very little treatment.

It is my belief that Howell exaggerated the number of blows which he says he received while on the elevator, but I am satisfied that he was the recipient of more than one punch during that time. If I were in any doubt as to whether an improper assault on Howell occurred in the elevator which I am not, that doubt would have been resolved in Howell's favour by reason of the fact that extensive inquiries failed to produce a single police officer who admitted to taking Howell up in the elevator. There were at least two or perhaps as many as five officers on the elevator with Howell and yet no officer will admit that they were on the elevator with Howell. There were other items of evidence which convinced me that Howell was assaulted on the elevator, but in view of the findings of credibility which I have made, no purpose is served in going over that evidence.

In listening to the evidence of Swaile I came to the conclusion that he first became aware of the allegation of Howell when they were walking away from the police station and decided that he also would state that he had been assaulted by the police. Having made that allegation, I concluded that he then reluctantly was forced to continue making the allegation thereafter and indeed may now believe that it actually took place. There was other evidence that confirmed my view that Swaile was not assaulted in the elevator, but, again, I feel that it is unnecessary to itemize that evidence.

There were a large number of people and police officers involved in this incident and I am satisfied that a number of witnesses were mistaken in what they alleged they saw and indeed, I am satisfied that some of the police officers who testified mistook Howell for Swaile and Swaile for Howell during some of the testimony they gave. An attack was made

upon P.C. Southward's credibility because he failed to put in his notes that he struck Swaile and Howell and did not file a Use of Force report as should be done when a police officer uses force upon a person in their custody. P.C. Southward impressed me as a sincere young officer who was attempting to do his duty. He apparently felt that he might get into trouble if he put in his notes that he had struck both Swaile and Howell at the time of the incident in the parking lot near Maple Leaf Gardens. It is my opinion that he had no alternative but to strike Howell and Swaile at this time and indeed probably would have been justified in using considerably more force. I will discuss the Use of Force reports and notebooks in more detail in a later chapter.

The hearing in this case was complicated by the fact that the investigation made by the police gave me the impression that it proceeded from the point of view that Howell and Swaile, if assaulted, received only what was due them. This attitude, of course, cannot be tolerated and the illegal and anti-social attitude of Howell and Swaile during the incident at the parking lot is no justification for police officers taking the law into their own hands. It perhaps should be stated here that as a result of the evening in question, Howell was tried in a criminal court and was convicted of assaulting a police officer namely, P.C. Southward, in the performance of his duty, and was fined.

In conclusion, I am satisfied that Swaile was not illegally assaulted on the evening in question, but that Howell was the recipient of unjustified force by some of the officers.

Chapter XV

BERNARD ROY MARKELL

Bernard Roy Markell alleged that he was illegally assaulted by police following his arrest at 12:30 a.m., March 12th, 1974.

Markell was thirty-five years of age and had a long criminal record, including five convictions for theft, two convictions for breaking and entering and robbery, two convictions for malicious damage and one conviction for assault.

Markell also had a long medical history indicating that in recent years he has suffered from delusions and hallucinations, perhaps arising from a long-time abuse of alcohol.

On the evening of March 11th, 1974, a store known as "Silent Tone Radio and T.V." on Danforth Avenue was broken into by two persons who smashed the front window. A taxi driver observed the break-in and watched Markell walk down the street to his rooming house at 80 Ellerbeck Avenue, carrying a television set. The taxi cab driver had notified the police and Police Constable Greg Osborne arrived at Ellerbeck Avenue at approximately the same time as Markell entered his house. A few minutes later, Osborne was joined by other officers.

Osborne saw Markell enter the house carrying the television. Markell was arrested and taken to the police station. At approximately 6:00 a.m. he was taken to a hospital with a severely injured testicle. On April 8th, 1974, Markell

returned to the hospital at which time his testicle was removed.

There can be no doubt that Markell received a severe injury to his testicle at some time and that he was suffering from this injury after his arrest on March 12th. The question in issue is whether the police inflicted this injury to the testicle or whether he was suffering from it at the time he was arrested.

Markell gave a statement to the Commission investigators on January 23rd, 1975. He stated that when he was placed inside a police car, following his arrest, he was repeatedly hit by police and questioned concerning the identity of his partner in the break-in. He alleged that once inside the garage at the police station, he was assaulted by police officers for a period of twenty minutes during which he was punched in the stomach and kneed in the testicles. He further alleged that a Sergeant Warriner assaulted him inside the station, kicking him twice in the testicles, on his legs and shins, and punching him in the stomach.

Markell's version given in evidence at the hearing was somewhat different. He denied being hit in the squad car and stated that he was hit while on the sidewalk beside the car. This was confirmed by his sister who watched the arrest from inside the rooming house. He testified that he was kneed in the testicles in the police garage by one officer while another held him, but denied that Sergeant Warriner either kicked or kneed him inside the station.

The taxi cab driver, Mr. Margwardt, stated that Markell was carrying the television and in describing Markell's walk home, he stated that:

> "he went very slow, he was having difficulty, he was labouring, staggering, he was awkward."

The doctor who treated Markell stated that the injury would cause a victim to move with discomfort and with an uneven gait. The taxi driver also testified that Markell was having far more difficulty than one would normally expect in a person carrying a 16-pound portable T.V. set. At one time, he testified that:

> "for a while it looked like he was lugging a piano behind him, you know".

Constable Osborne stated that Markell proceeded up the stairs with difficulty and that when he was coming down, he was limping noticeably. There was no notation in any of the officers records about Markell's physical condition and he made no complaint about his condition at that time.

Markell's first complaint was made to the officers who took him for fingerprinting shortly before 5:00 a.m., at which time the officers noted that his testicles were black in colour. Dr. Abbey, who saw Markell that morning in the emergency department, confirmed that the testicles were four times their normal size and bluish in colour. The doctors who testified agreed that a bruise in its earliest stages would be reddish. Their evidence was that the injury had reached a static state at the time they examined him. Dr. Ainslie confirmed that the injury did not appear recent to him and that far more medication would have been required had the injury been recent. All of the doctors confirmed that the force which caused this particular injury must have been severe and would have totally incapacitated Markell for a period of time. Markell himself admitted that he walked out of the garage unaided without collapsing or being incapacitated to any extent. During the first several hours in the police station, Markell sat in a chair in an interview room.

There was evidence that Markell had been drinking that night and on his own admission had consumed at least four pints of beer prior to the break-in.

The evidence of the taxi cab driver, Margwardt, was given in a straightforward manner and in my view, was reliable. He denied that the officers hit or assaulted Markell on the sidewalk in front of his rooming house before he was put in the police cruiser. He stated that the police actions were unobjectionable and that they, when required by Markell's actions to use force in putting him in the police cruiser, did so "gently with force".

Markell testified that he was beaten in order to obtain a confession and the name of his confederate. In fact, the police had eye-witnesses to the break-in and thus did not need a confession, and had already arrested his accomplice prior to Markell's arrival at the police station.

The evidence disclosed that Markell had a history of hallucinating. On one occasion he believed that he was being attacked by rats at which time he locked himself in a bathroom for a number of days. On another occasion, he was firmly convinced that he had seen his brother murdered by five men. During recent years he had suffered a number of injuries, including a fractured arm and a fractured leg, many of which were not medically treated. On one occasion, he had fallen from a ladder, fracturing his ribs and badly cutting his head. He did not seek any medical attention from this fall.

In September, 1975, he alleged that he was threatened and attacked by Sergeant Warriner, who had allegedly assaulted him in the police station in the incident investigated by this Commission. As a result of that allegation, Markell was charged with public mischief and was convicted.

While there can be no doubt that Markell had suffered a severe injury to his testicles, all of the police officers denied that any beating was inflicted upon Markell and in

particular that force was used on his testicles. The police officers gave their testimony in a straightforward manner and appeared to me to be telling the truth.

Markell might have believed that he was kneed by the police officers, occasioning the injury to his testicles. I am entirely satisfied however that the officers did not inflict the injury to his testicles and that it existed prior to this arrest.

It is my finding, therefore, that the police used no excessive force upon Markell on the night in question and did not cause the injury to his testicles.

Chapter XVI

ANDRE JOSEPH PETROFF

Andre Joseph Petroff complained that unnecessary force was used upon him by the police on November 1st, 1971, resulting in a nasty eye injury.

Petroff was twenty-seven years old at the relevant time. He was a very tense young man who came to Toronto when he was twenty-two years of age. He now speaks fairly good English, but did not when he first came to Toronto and in 1971, was considerably less fluent than he is today. At the time of this occurrence, Petroff was under considerable pressure. He was in financial difficulty with his fencing business and had been working extremely hard in an attempt to take care of the business. Petroff admitted being very hard-up and testified that he was on the wagon because he could not afford to drink.

Petroff testified that on the evening of November 1st, 1971, he left his home at approximately 7:30 or 8 o'clock with the intention of visiting a friend by the name of Knowlton. He was with this friend for approximately one-half to three-quarters of an hour.

Petroff stated that he was driving south on Sherbourne Street at approximately 11:00 p.m. when he was stopped by P.C. Servos who asked him to produce his license and insurance papers. Petroff stated that he did so after some difficulty as some of the papers were in the glove compartment of the automobile. He accidentally produced some Canadian Tire money, thinking that he was producing his papers, at which

time he was advised that he was under arrest for impaired driving.

Petroff was unhappy about this, and felt that he should not have been arrested. He testified that although there was nothing unusual about P.C. Servos' actions when he was first stopped, Servos became increasingly aggressive. P.C. Servos attempted to search Petroff which added to his irritation. He then took Petroff by the arm in order to place him in the cruiser, and a fight developed. Other police officers arrived and Petroff was handcuffed, thrown into the cruiser and taken to the police station.

Petroff testified that when he was taken out of the police cruiser at the station, still handcuffed, a police officer grabbed him by his left wrist and hair, bent him down and P.C. Servos brutually kicked him in the eye. He stated that he was rendered semi-conscious by this assault.

Petroff had had some contact with the police earlier in the evening. At approximately 8:00 p.m., he had received a summons from P.C. Bond in the same area of the city as his subsequent arrest. Bond testified that he had noticed a mild odor of alcohol on Petroff's breath at that time. At approximately 8:50 p.m., Bond had seen Petroff again, at the same spot and he filled out what is known as a "172" card to record this. It is not clear why Petroff was at this spot as it is not on a direct route between his home and that of his friend, Knowlton.

Records were introduced into evidence that satisfied me of Petroff's presence in the area at 8:00 p.m., 8:50 p.m. and again at 11:00 p.m. Petroff testified that he had returned to the locale at 11:00 p.m. because he did not feel that he was guilty of the offence for which he had earlier received a summons, and wanted to re-examine the scene to see if he had committed a driving offence. He did not

satisfactorily explain his presence at 8:00 p.m. or at 8:50 p.m.

Petroff testified that at no time prior to the alleged kicking in the parking lot of the police station did P.C. Servos strike him with a closed fist. He adamantly denied that the injury to his eye might have occurred during his arrest.

Independent witnesses who had observed the arrest gave evidence of a substantial scuffle between Petroff and Servos at 11:00 p.m., and there was ample evidence that at one point the two were rolling on the ground. Petroff admitted that at least one bystander requested him on several occasions to go into the cruiser peacefully. One witness requested a security person at a nearby hospital to call the police, saying that someone was killing a police officer. During the scuffle, one handcuff was attached to Petroff's right wrist, and the other unattached handcuff was apparently flailing around.

All of the independent witnesses testified that there was blood on Petroff's face when he was eventually placed in the police car, and Petroff himself confirmed this. One bystander stated that he had noticed, early in the scuffle, a cut over Petroff's eye.

P.C. Servos testified that he first noticed the injury to Petroff's eye when P.C. Scharfe drew his attention to it in the cruiser. The two officers stated that Petroff continually rubbed his eye with his shirt in the car, although they told him that he was aggravating the injury. Petroff himself testified that he removed his shirt in the cruiser in order to prevent it becoming bloody.

The officers denied that Petroff was kicked in the yard at the station. An officer by the name of Eames, who arrived

at the station at the same time as Petroff, Servos and Scharfe confirmed that no assault occurred in the yard and testified that when he first arrived at the yard, Petroff had already suffered a cut to his eye. All three officers, as well as a Sergeant Beckett in the station, denied that Petroff was semi-conscious and testified that he walked unaided and fully conscious into the station.

From the evidence of the independent witnesses, it was obvious that Petroff was forceably placed into the police cruiser, the police stating that this was the only method by which they could get him into the car. Police regulations require a suspect to be searched before being placed in a cruiser when the suspect is under arrest. Although prisoners need not always be handcuffed, it is usual that they be handcuffed, particularly when they have resisted arrest. There can be no doubt that Petroff reacted violently to the search and to the handcuffing incident. The force used to effect the arrest was clearly lawful and I find that P.C. Servos was acting within the scope of his duty, although it may well be that an older officer might have used more discretion in the handling of Petroff, who was obviously highly upset at being arrested.

I heard considerable evidence concerning the alleged assault in the yard at the police station. In addition to the kick, Petroff alleged that he had been the recipient of two hard punches. Petroff was photographed and taken to the hospital for treatment for his eye approximately two hours after he arrived at the police station.

Petroff was unco-operative at the police station and was also unco-operative with the doctor when he was taken to the hospital. There was no evidence that Petroff made a complaint at the station, although he talked to many police officers. Nor did he make an immediate complaint at the hospital. Had he been kicked in the eye as he alleged, I

would have expected him to complain about his treatment to the doctors, and probably to the breathalyzer operator, the fingerprint officer and the identification officer as well.

Doctors MacRae and Keyzer testified before the Commission. They stated that discolouration and swelling in the area of the eye socket are not necessarily an indication of a severe trauma. The insertion of a local anaesthetic in the area of the eye can cause a great deal of swelling, as would stitches in the area of the laceration. The type of cut sustained by Petroff could have been caused in any number of ways. If it had been caused by a hard kick, other injuries such as a fracture of the orbit bone, a blow-out fracture or some impairment of vision would have been expected. Dr. Keyzer was of the view that the laceration was not caused by a powerful kick, although it could have been caused by a kick. All pain and discomfort apparently disappeared within a week, although the discolouration of the eye lasted for some time after. Petroff was last examined by Dr. Keyzer four or five days after the incident and received no further medical attention. While a nasty looking injury, the doctors agreed that this was not a very serious injury, and indeed Dr. Keyzer stated that it might be described as an ordinary black eye.

I had no doubt that Petroff was firmly convinced that the injury to his eye was caused in the manner he described. I am unable to find that the injury was not caused in the scuffle at the time of the arrest, nor am I satisfied that P.C. Servos assaulted Petroff in the yard at the police station.

In my view, the use of force during the arrest was lawful, and the injuries suffered by Petroff arose from his resistance to the lawful arrest. Nevertheless, the evidence satisfied me that this matter escalated into a serious affair not only because of Petroff's actions but due to the

manner in which P.C. Servos handled the arrest. It should be remembered that P.C. Servos was a very young officer at that time and was operating in strict compliance with police regulations. However, a more senior officer using tact and diplomacy could probably have effected the arrest without any difficulty or conflict. In a number of the incidents investigated by the Commission, the police actions were unnecessarily authoritarian. Tact and courtesy were frequently missing and in many of the cases it was probable that a softer approach would have avoided the unpleasant conflicts that arose. Although some people can only be dealt with in an authoritarian manner, most citizens will comply with requests of police officers, particularly if the request is explained to them or is put in a properly courteous fashion.

It is my finding that the complaint of Petroff of the improper use of force by P.C. Servos and other officers has not been proven.

Chapter XVII

REPORT ON OTHER CASES FILED WITH THE COMMISSION BY WAY OF TRANSCRIPT OR BRIEFS

In addition to those cases in which public evidence was called and upon which I have previously reported, other complaints which were followed up by action in the Courts came to our attention.

I did not wish to duplicate the efforts of the Courts by hearing the evidence, particularly in view of the availability of transcripts. I, therefore, decided that I could comment upon these cases without calling evidence myself.

The first case upon which I wish to comment arose out of a complaint by one, Jeffrey Berman. As a result of Mr. Berman's complaint, two officers, Eric Birse and Robert Campbell, were charged in Provincial Court with having assaulted Jeffrey Berman on August 30th, 1973, causing him bodily harm contrary to the Criminal Code of Canada. Both officers pleaded not guilty to the charge.

Jeffrey Berman was twenty years of age and suffered from epilepsy. He had a slight co-ordination problem. At the time of the incident, Berman was a freelance photographer. He applied for a press pass to attend at the Canadian National Exhibition grounds. There were two different types of passes and the pass issued to Mr. Berman did not allow him to attend at the Grandstand area, but it was agreed that the staff quite possibly would allow someone with that type of pass to be admitted to the Grandstand area.

The entertainers putting on the show were the Osmond Brothers and there were approximately 20,000 young people present in the Grandstand area. Berman presented the pass and was apparently permitted to enter the Grandstand area, no-one having told him that the pass was not good for that purpose. While taking pictures near the Grandstand, Berman testified that certain officers approached him and told him that his pass was no good for that area and that he would have to leave. It is clear that as a result, an altercation took place, although there is a difference of testimony as to what actually occurred. Subsequently, charges were laid against the officers, Eric Birse and Robert Campbell, and Berman as well was charged with assault.

The evidence was heard by His Honour Judge Hogg. The Court found that Jeffrey Berman received an injury to his eye and some other minor injury to his lip and face as a result of the contact he had with the police officers on the evening of August 30th, 1973, and that these injuries constituted bodily harm. The Court found that Berman twice approached officers for their assistance and that on the first occasion, he had been treated courteously. On the second occasion, he asked an officer to assist him by holding a light. The second officer enquired about the pass and told him that he did not have the right to be present in the area. Berman left the area after informing the officer that his equipment, valued at approximately $1,000.00, was on the ground about twenty feet away. He was told that he could pick up the equipment once he had obtained a letter of authorization from the Assistant General Manager of the Exhibition. Berman realized that his chances of obtaining such a letter at that time of night were very slight, and decided that he ought to return to retrieve his equipment. Berman was refused permission to do this. He again left, spoke with a security officer who could not assist him, and returned. It was then that the altercation took place.

Berman was arrested and taken to the police station. The evidence disclosed that a complaint was made to the Toronto Police Complaint Bureau within one or two weeks. In addition, there was extensive coverage of the incident in the communications media. His Honour Judge Hogg found that the Crown had not proven that Berman's injuries were caused by the two officers charged and therefore, found them not guilty of the charge as laid.

The Court also held that Berman had acted in a proper manner and that he was unlawfully arrested. Because it was an unlawful arrest, the Court found that the force used was excessive and went far over the line. Both officers were therefore found guilty of the included offence of common assault. In sentencing these two officers, His Honour Judge Hogg had the following to say:

> "You have both been found guilty of an offence of common assault. I think one of the most disturbing matters involved here is the fact that, to add insult to injury, this man Berman was himself charged with assault.
>
> Mr. Cooper had made representations on your behalf and I have listened to what the Crown has to say and their submissions are in line with my own thinking. There is no dishonesty involved in this case or greed or lust. I think probably what contributed to this situation was a lack of realization that times are changing and not everyone who wears a sloppy set of blue jeans and long hair is necessarily a hoodlum or drug addict.
>
> I might say it is distasteful to me to have to register a finding of guilt on a police officer. I know as well as anyone the problems and the pressure that they are under but you are sworn to uphold the law and so am I and I intend to do it. The evidence established the finding that I have made."

This and other cases indicate that it is possible to charge and convict officers who improperly exercise their authority. It is admittedly difficult to convict an officer

because the persons in many cases lodging the complaint of improper actions by the officer are persons who, by virtue of their background, do not make credible witnesses. Secondly, of course, the usual onus in a criminal case of proof beyond a reasonable doubt is a high standard and is properly exercised in a case involving a policeman as well as in other cases.

Thirdly, His Honour Judge Hogg must have been of the view that the two officers were prejudiced against persons who did not have short-cropped hair and dressed in accordance with the views of the officers. We have a free society and police officers must be aware that they are not arbitrators of people's lifestyles provided no law is broken. It is clear that had the officers allowed Berman to retrieve his photographic equipment, this incident would not have taken place. It must be emphasized that all police officers and not just most must become aware of their duty to serve and protect the public.

In a second case, of which a transcript of court proceeding was filed in evidence before me, Alexander C. Joseph alleged that in June, 1974, he was physically assaulted by two police officers. Mr. Joseph claimed that this beating took place in the course of his arrest and again at the police station. His allegations were uncorroborated other than by evidence of physical injuries.

The case was heard by His Honour Provincial Judge Vanek. The two accused officers gave evidence which conflicted almost entirely with the evidence given by Mr. Joseph.

Judge Vanek did not believe the testimony of the complainant, Mr. Joseph, and accepted the evidence of the police officers. As a result of his findings, the charges against the two police officers were dismissed.

Mr. Joseph, who was black, alleged that the beating was motivated by racial prejudice. His allegations were dealt with extensively by Judge Vanek.

The police officers testified that they stopped Mr. Joseph because he was driving a motor vehicle at night in the city with his lights on high beam and because he had made a right turn at a red light without stopping. On investigation, it was found that the address on his driver's license differed from that on his ownership permit. In addition, there were outstanding fines totalling $79.00 against him for driving offences, for which there were warrants out for his arrest. At the time of his arrest, Mr. Joseph had approximately $1,000.00 cash on his person.

Although Judge Vanek dismissed the case against the two officers, he had the following comments to make:

> "Although I hold that there was never any deliberate beating, nevertheless I am concerned that a person who is arrested for a minor offence or series of offences by two police officers should be brought in to the police station in a condition wherein his upper lip was severely bruised, swollen, and lacerated, and two of his teeth were fractured and had to be extracted the following day. The question I have posed for myself is whether almost necessarily there must have been an excess of force on their part if such injuries are the result of the whole process of arrest and bringing him to the station."
>
> "The complainant was resisting arrest and I so find."

Judge Vanek added:

> "There is one further subject that I would like to mention by way of an addendum to these reasons. It does not concern the question of guilt or innocence, but it does relate to the conduct of the police.
>
> I am very concerned that when a person is brought to a police station under arrest bearing the signs of obvious injuries that

the officers in charge at the station or who have some duties in connection with the care and custody of that person make the appropriate inquiries and do what is reasonable in all the circumstances relative to such injuries. In the present case the officer in charge at the station stated that he asked the complainant 'Where did you get the injury to the lip?' He received the reply, 'It must have happened when I was arrested'. He stated that he made no further inquiry and did nothing further with regard to this matter. It seems to me that he should have made further inquiries as to how this would have come about, and on his part not merely wait for a complaint. In addition, apparently the booking officer has the duty of making an appropriate notation about injuries on the record of arrest which he is required to make up in a number of copies. In the present case the booking officer inserted in the appropriate blank a remark that the arrested person had 'swollen lips', but singularly that remark appears only on the copy that is kept at the police station. Now I am not suggesting that there has been a cover-up of anything at the police station. I gather that you can only cover up something where there has been something to cover up. There must have been an offence committed that is subject of the cover-up. However, these proceedings at the police station are suggestive of an attitude or tending to seek to protect fellow officers who might be in some difficulty.

There should be not the slightest suspicion attaching to the conduct of the police in any job that they have to do anywhere. Where a prisoner is brought into a police station who has sustained an apparent injury, the officer in charge at the station and the officer in charge of the booking should perform their duties in a fair and objective way. It seems to me that amongst the first of those duties is to arrange for treatment of the injuries, to record the same properly, and to make a proper inquiry at that level immediately as to how it comes to pass that a prisoner should be brought into the police station in such physical condition."

His Honour Judge Vanek recited in detail the injuries suffered by Mr. Joseph and what action was taken when he arrived at the police station. He then stated:

> "I recommend that when a citizen is brought into a police station suffering from any injury, the officer in charge of the station should not only make a note of the injury which is apparent, but should make inquiry as to how the injury occurred not only from the officers but also from the person being arrested. Notes should be kept of the explanation given as to how the injury occurred. There should be a duty upon the officer in charge of the station or the booking officer to forward information to the Complaint Bureau immediately should there be an allegation of the use of excess force by the person arrested. Treatment for the injuries suffered by the person arrested should be arranged for at the earliest possible time."

If this procedure is followed there will be a record of injuries suffered made at a very early date and as the matter will be referred to the Complaint Bureau immediately, an immediate investigation will be commenced. This not only protects the rights of the citizen who might have been subjected to undue force, but also will protect police officers from untrue allegations.

A second point worth mentioning arose in this case. The officers were under a duty to arrest Mr. Joseph because there were warrants outstanding against him. Later in the Report, I shall make a recommendation concerning the collection of unpaid fines.

A third case, handled by the Courts, arose on Sunday, August 11th, 1974 at approximately 5:00 a.m. Police Constables McAdam and Winter were transporting two male prisoners and a female prisoner to police headquarters to be fingerprinted and photographed.

Upon arriving at 590 Jarvis Street, they were informed that there would be a delay. The officers then drove to the rear of a restaurant named "Julie's" at 515 Jarvis Street for a smoke.

The officers got out of their vehicle without locking the front doors. The two male prisoners climbed from the back seat into the front seat and out the front door. A short distance away, they climbed onto a fire escape and apparently fell asleep. The two officers returned to the vehicle and were advised by the female prisoner that the two male prisoners had escaped.

After an unsuccessful search, the two officers decided to fabricate a story that the prisoners had escaped after inflicting injury upon one officer. It was alleged that one officer struck the other officer on the head with his billy in order to cause him to bleed. As a result of this, a large number of police officers arrived in the area to search for the prisoners. After locating them, some officers allegedly assaulted them. It was further alleged that the prisoners were again assaulted by Constable McAdam while in the station. An immediate investigation was commenced and as a result, Police Constables McAdam, Winter, Fletcher, Rivers, Bennett, Campbell and Sergeants Reynolds and O'Neil were charged with offences under The Criminal Code or under The Police Act, or under both.

It is to be noted that this event began at 5:00 a.m. on Sunday, August 11th, 1974 and by 2:00 p.m. of the same day, the two original officers had been suspended from duty. By 10:50 a.m. on August 11th, 1974, senior officers had commenced their investigation. A full-scale investigation was ordered by Chief Adamson on Monday, August 12th, 1974. This investigation produced the following results:

1. Constable Dwight McAdam (1975)

(a) Under The Criminal Code:-

1. One charge of Public Mischief

Pleaded Guilty, January 30, 1975, sentenced February 3, 1975 - Fined $400.00 or 60 days.

2. Two charges of Assault causing Bodily Harm

Pleaded Not Guilty and Acquitted of both charges by His Honour Judge Honsberger on June 16, 1975. (The Crown Attorney is presently appealing this dismissal).

(b) Under The Police Act:-

1. Three charges of Neglect of Duty;

2. Three charges of Deceit;

3. Two charges of Unlawful Exercise of Authority;

4. One charge of Discreditable Conduct.

Pleaded Not Guilty to all charges on March 18, 1975, and found Guilty on all charges. Dismissed from Force.

2. Constable Ian Winter (3506)

(a) Under The Criminal Code:-

1. One Charge of Public Mischief.

Pleaded Guilty January 30, 1975, Sentenced February 3, 1975 - Fined $200.00 or 30 days.

(b) Under The Police Act:-

1. Three charges of Neglect of Duty;

2. Three charges of Deceit;

3. One charge of Discreditable Conduct.

Pleaded Guilty to all charges on February 10, 1975. Dismissed from Force.

3. Constable David Fletcher (486)

(a) Under The Police Act:

1. Two charges of Deceit.

Pleaded Not Guilty on April 28, 1975, and both charges dismissed.

4. Constable Robert Rivers (3176)

(a) Under The Police Act:-

1. One charge of Neglect of Duty;

2. Two charges of Deceit.

Appeared April 28, 1975. The charge of Neglect of Duty was withdrawn. Pleaded Not Guilty on both charges of Deceit, but found guilty, on both charges. Fined 2 days off on each charge.

5. Constable Roger Bennett (3453)

(a) Under The Police Act:-

1. Two charges of Neglect of Duty;

2. Two charges of Deceit.

Resigned from Force before charges heard.

6. Constable Kenneth Campbell (3427)

(a) Under The Police Act:-

1. Two charges of Neglect of Duty;

2. Two charges of Deceit.

Resigned from Force before charges heard.

7. Sergeant George Reynolds (628)

(a) Under The Criminal Code:-

1. One Charge of Common Assault.

Pleaded Not Guilty and found Not Guilty. May, 1976.

Sergeant George Reynolds (628) - Cont'd

(b) Under The Police Act:-

1. One charge of Neglect of Duty;

2. One charge of Unlawful Exercise of Authority.

These charges are pending.

8. Sergeant Terrance O'Neil (2317)

(a) Under The Police Act:-

1. One charge of Neglect of Duty.

This charge is pending.

I have given these details because it indicates that the Metropolitan Toronto Police Department in this case made a complete investigation and immediately laid charges against all police officers who, in their opinion, had breached either The Criminal Code or The Police Act.

The Force and the officers involved in this investigation are, of course, to be commended in upholding the rights of the public against improper or illegal action by members of the Metropolitan Toronto Police Department.

This case exemplifies the importance of the desk sergeant or officer in charge making an immediate note of injuries suffered by arrested persons. I am satisfied that, if the recommendations which I have made concerning this had been in force at the relevant times, a number of other incidents would have resulted in the laying of charges. I am equally satisfied that a number of other officers would have been, in short order, exonerated of wrongdoing. It is my view that both the public and the police officers are entitled to an immediate investigation in every case where an arrested person is brought into a police station suffering injuries which he alleges were caused by the officers.

PART II

Chapter XVIII

THE POLICE AND THE COURTS

Some Problems of Proof, Attitude and Credibility

I have heard it said that the police feel that they are the last thin line protecting the citizen from the barbarian hordes who wish to destroy society, that they are frustrated in that they make arrests and the courts either render inadequate sentences or let the accused go free.

To the extent that this belief is held, police therefore feel it is necessary and justifiable to take the law into their own hands, to decide the question of guilt, and then to administer the punishment.

From the statistics quoted elsewhere in this Report, it is obvious that this inference is not true. I am sure that at some time during their careers, police officers feel frustrated when a person they believe to be guilty is acquitted or punished lightly. It is trite, but deserves to be reiterated, that a policeman's duty is to gather evidence and submit that evidence to a court of law. It is not for them to determine guilt or innocence, beyond the point of deciding that there is sufficient evidence to lay a charge. It is solely the function of a judge or a jury to decide guilt or innocence. This point is essential to our system of justice and cannot be repeated too often. Periodically, police officers should be reminded that it is their duty to gather evidence, and that it is the duty of the court to determine guilt. They should also be reminded that sentencing is not an easy job, involving many principles, interests and considerations which fall outside the scope of the police

function.

There is an old saying which is true and necessarily the basis of a democratic system of justice: It is better that ninety-nine guilty persons go free than that one innocent person be convicted". This, of course, does not mean that it is good that ninety-nine guilty people should go free, but that if the law must err, it must err on the side of freedom, so that no innocent person suffers.

Credibility

One of the matters that has concerned me deeply has been the matter of credibility. Our system of justice depends upon sworn evidence. Judges know that a good deal of perjury is committed in the Courts, and it is their job to evaluate witnesses and evidence and decide who and what to believe. To a very large extent in criminal cases and to a lesser, but significant, extent in civil cases, the proof of the facts depends upon evidence given by the police. There is a natural tendency among Judges, as among the public generally, to accept the sworn testimony of a police officer, particularly when it contradicts the words of a person whose credibility is suspect by the very reason of his involvement with the law. It is therefore of fundamental importance that the trust placed by the Courts in the testimony of police officers be justified.

It is with considerable regret that I am bound to report that one of the most disturbing things which came out in the hearings was the extent to which I found the evidence of police officers mistaken, shaded, deliberately misleading, changed to suit the circumstances and sometimes entirely and deliberately false. Having said that, let me hasten to add that by no means all or even the majority of the officers who testified before me did any such thing, but those who did were in sufficient number to impress upon me the need to

carefully scrutinize police evidence rather than to accept it without question. Let me add, as well, that there was considerable perjury by many other witnesses and complainants. In not detailing it in the same way that I have detailed that of police officers, I am not merely singling out the police for comment. It must be kept in mind that this Commission was formed to investigate the Metropolitan Toronto Police, not the complainants.

I will give some examples of what I found. The following cases do not exhaust the list, but they are representative.

In the Garlick case, there were significant discrepancies in the evidence. Garlick said that he was chased on foot down Spadina Avenue by one officer, Shaw, while the second officer, Ashton, drove his scout car to the location where Garlick was apprehended, at which time Ashton joined the fray. The evidence of Shaw and Ashton was that they both chased Garlick, abandoning the scout car at the corner of Spadina and College Avenues. Since credibility was the key to the case, this difference was important. If the police evidence was correct, the scout car, number 5210, could not have been at the scene where Garlick was arrested.

Ashton's own notebook said that Garlick was put into car 5210 at the scene of the arrest. In his notebook, he described this car as "my car". At the hearing, he testified that his notebook was in error and that Garlick was put into car 5214.

Shaw's notebook indicated that Garlick was put in scout car 5214, but it was clearly demonstrated by Mr. Duxbury, a documents examiner with the Centre of Forensic Sciences, that this number had been changed, and in my view, it was probably changed from "5210" to "5214". Shaw, in his evidence, denied that the book had been changed.

Officer McLean was one of the first officers on the scene in response to the call to assist an officer in trouble. His notebook indicated that when he arrived, scout car 5210 was parked at the scene, approximately where Garlick had said it was, and further that Garlick was placed in its back seat and was later transferred to car 5205. Car 5210 was mentioned three times in his notebook. McLean gave evidence after Ashton and Shaw. He first said that car 5210 was at the scene when he arrived, and Garlick was inside it. Later he said in his evidence, that he presumed Garlick was in 5210 and then he said he had doubts about whether it really was car 5210.

There can be no doubt from the evidence that Ashton and Shaw were not telling the truth about the sequence of events. Ashton was probably trying to protect Shaw, who was an auxiliary constable and as such had no power to arrest Garlick. Shaw clearly altered his notebook and stuck to the same story. McLean indicated that he would like to have denied or watered down the effect of the entries in his notebook, which were inconsistent with the evidence of Ashton and Shaw, but in the end, he was unable to do so, and he finally confirmed that car 5210 was indeed at the scene of the arrest.

In the Tomlinson case, the evidence was that there was a high speed chase, approaching 125 m.p.h. for several miles. Tomlinson alleged he was brutally beaten when being taken out of the car by the first officers at the scene, and his evidence was supported by a number of independent witnesses. One can easily imagine the state of mind and body of the officers involved in this terrifying chase as they screeched to a halt beside or around Tomlinson's car. They would not have known why he was evading them, and for all they knew he might have been a dangerous criminal, armed, or under the influence of drugs. They could have been excused if they

were less than polite and gentle in their initial dealings with Tomlinson.

Constable Foley, who initiated the chase and had been almost run into the ground before the chase started by the Tomlinson vehicle indicated that when he approached the Tomlinson car, he was neither nervous nor upset. He said that he told Tomlinson to get out, and then pulled or dragged him out of the car. Although he had testified at the Provincial Judges' Court that the Tomlinson vehicle hit the pole at about 10 m.p.h., Foley estimated the impact to have occurred at about 40 m.p.h. when giving evidence before me. This had some significance because the theory of the police at the Inquiry was that Tomlinson's injuries, were caused by the collision, and not by police mistreatment.

Mahood, the second officer at the scene, estimated the speed of the car in the collision at 55 to 70 m.p.h.

The version of the officers as to what happened during the arrest, varied significantly from that of the other witnesses. I was left with the distinct impression that the officers were not being frank with me as to the actions that they took, having regard to the wildness of the chase, their ignorance about Tomlinson and the fact that he did not stop voluntarily. I found their evidence unsatisfactory, and I considered that they attempted to justify their conduct, rather than giving factual evidence as to what had transpired.

In the Clarke case, the evidence of Hicks who was Whyte's partner that night, went through several stages. In his notebook, no mention was made of the incident on the way to the station at all.

In the Use of Force Report, which he signed on October 12th, 1974, the same day as the incident, he made no mention of an assault, and in that report, attributed Clarke's

injuries to the struggle, at Humber College. His entire description of the trip to the station was "the officers finally managed to get handcuffs on him, and then transported him to 23 Station".

After the complaint was published by the Toronto Star, Hicks gave a statement to his superior officers, Exhibit 271, in which he said:

> "Once in the car, about 2:00 a.m., we began to transport the accused to the station. P.C. Whyte was driving, I was in the passenger seat with the accused sitting directly behind me. While enroute, the accused had managed to step through his arms, so that his hands were now cuffed in front of him.
>
> Clarke was getting very belligerent at this point making loud remarks about the number of 'friends' he had in the law system that could make trouble for us. He also made remarks similar to 'Man, the black-white scene sure is clear now, isn't it?' He called P.C. Whyte a 'fucking black man,' accusing him of racial prejudice. These last remarks apparently got P.C. Whyte very upset who pulled the car over to the side of the road on John Garland Blvd. and stopped. The accused made another racial statement to P.C. Whyte, although I can't recall the words exactly, after which P.C. Whyte leaned over the seat and I assumed slapped Clarke about the head a few times (about three times). I say 'assumed' because I did not turn around to see what was happening.
>
> We then continued to the station without making any conversation to Clarke, although Clarke continued to rant and rave about police brutality. At the station, Clarke was turned over to Sergeants Metheral and Spratt for investigation."

At the Inquiry before me, Hicks did his level best to minimize the effect of what he had witnessed and reported in this statement. He testified that Whyte swung his right arm over the back seat and came into contact with Clarke two or three times. He denied that Whyte leaned over the seat, notwithstanding that his statement said that he did. He said the contact was "small", "minor", "light", "insignificant".

He testified at pages 9560 - 9564 of the transcript:

> "Q. You knew Gaskin and Boyle were investigating an allegation of brutality against Whyte. Surely you knew that?
>
> A. Yes, I did. They made that clear.
>
> Q. And if what you are telling us now that you considered this action by Whyte an insignificant sort of a minor thing that you didn't even really think of after that, why didn't you say that in your statement if that is what you really felt?
>
> A. I can't explain my actions at that time. I don't have a good answer for you on that particular remark.
>
> . . .
>
> Q. And if one were to read those last two sentences and come up with the inference that when you say: I say assumed because I did not turn around to see what was happening. If one were to read that and say what you meant there was: I didn't see what was happening because I didn't want to see I just kept looking straight ahead. I didn't want to see anything, that would be a wrong inference, would it?
>
> A. No, I could see where someone would draw that inference from what I said, sir. As I have said, sir, it was very poorly written and I have no excuse for that.
>
> . . .
>
> Q. Would you say that inference is totally wrong?
>
> A. Yes, it is."

Hicks did not think to change or qualify his statement until the Inquiry, or in preparation for it, notwithstanding that he knew Whyte had been charged.

Inspector Gaskin confirmed that Hicks read the statement after making it on October 15th, and agreed that the statement was as close as he could come to the events.

Clearly, at the hearing, Hicks was trying to protect Whyte as best he could, notwithstanding what he had said in his statement to his superiors.

In the Linka case, Sergeant Rout was the first officer on the scene, except for those actually involved in the chase. His evidence was important to the investigation, because he was the only officer who could identify the men involved in Linka's arrest.

The statement given by Rout on July 31st, (Exhibit 768) was as follows:

> "On Wednesday July 31st 1974 at approximately 1.30 a.m. I was on duty on supervisory patrol in No. 5 District and responded to a call on the police radio regarding a vehicle wanted for condition of the driver in the area of the Yonge Street pedestrian mall.
>
> I proceeded north on Yonge St to Dundas St. W. and west to Bay St and upon turning north on Bay St I observed the suspect vehicle travelling northbound at a high rate of speed. I travelled north on Bay St following to the rear of the wanted vehicle by approx-mately 1/2 mile. I turned east on St Joseph St and then north on Yonge Street to assist should the chase proceed in an easterly direction. As I approached Yonge & Charles Sts I heard that the wanted car had turned east into Charles St. so I proceeded west on Charles St. towards Bay St.
>
> I arrived on the scene of the arrest a few seconds after the cars came to a halt at the south side of Charles St. W. near the west edge of the 1st lane east of Bay St. I parked within 25 ft of the arrest location, left my car on the north side of the street and made the following observations.
>
> I saw a male in civilian clothes lying on the pavement on the south side of Charles St. W. and two officers who appeared to be putting handcuffs on the person. One of the officers was Constable Donald OLIVER the other was Constable SHIELDS (1668) of #52 Division. Oliver (3314) was the investigating officer from #5 District Traffic. Numerous other police units arrived on the scene and the accused was assisted to his feet and walked to a police car the number I am not aware of which stopped adjacent to my car alongside the south curb of Charles St. W. and put into the rear seat

of this unit. I looked through the closed window of this police car and viewed the accused. I then advised the arresting officer to take the man to Number 52 Division that I would assist Constable Oliver at the scene and that we would come to #52 Division to complete the investigation."

The significance of this statement in the context of the other evidence was that Rout had come from the east opposite to the way the other officers came. He arrived after the vehicles came to a halt, parked and walked over to the scene, at which time Linka was on the ground. This was the first view that he had of Linka. By this time, whatever assault which might have occurred while Linka was getting out of the vehicle, or spread-eagled over it, had already taken place. Rout could therefore be used as a witness to identify Oliver, Shields and Duriancik as being involved in the arrest, without jeopardizing the Crown's case against them concerning their actions before he arrived. Rout was really the only officer who could give such evidence since none of the other witnesses were able to identify the officers involved by name or face.

On August 17th, 1974, after the four men had been charged, Rout made a further report to the Complaint Bureau (Exhibit 767) in which he described what he saw in this way:

"As I arrived at Charles St. West I heard that the wanted auto was turning east on Charles St and seconds after the police radio reported that the vehicle had been apprehended on Charles St. W. just east of Bay Street. I continued west on Charles St. to the first lane east of Bay Street a distance of a block and a half arriving on the scene in approximately five seconds after learning that the vehicle had been stopped.

I parked my unmarked police vehicle at the north curb of Charles St. W. approximately fifty feet east of the accused mans auto. I saw three police officers on the left side of the accused mans car which was facing south east the front end a few inches north of the south curb of Charles St. At the rear of this auto facing east was a marked police unit number 5208 and on the right of it was unit 5004 which was adjacent to the

south side of Charles St. facing east. Upon leaving my car I had only walked a short distance when another police vehicle arrived on my left stopping adjacent to my vehicle on the south side of Charles St. I saw that the three police officers on the scene were struggling with a citizen who was kicking and swinging his arms. The three constables were P.C. Oliver (3314) Duriancik (3205) and Shields (1884). A fourth officer rushed past me and assisted in getting the handcuffs on the accused. Prior to the fourth constable arriving at the accused he was put to the pavement in an attempt to get the handcuffs on him.

I observed the accused being assisted to his feet by two police officers, one being the arresting constable PC. Shields of number 52 Division. The accused was walked to the police unit just east of his car and placed in the rear seat. I walked over to the passengers side of this unit and looked through the right rear window at the accused man LINKA. I then spoke to Constable Shield the arresting officer advising him to take the accused LINKA to the station, that Constable Oliver (3314) would do the accident investigation and reports required. The accused was then transported to number 52 Division."

At the hearing before me, Rout indicated that he arrived at the scene as the Linka vehicle came to a sliding stop. He testified that he saw the three officers, Duriancik, Shields and Oliver just east of the Linka vehicle, and that he saw a terrific struggle going on. Linka was kicking and kneeing the officers, ending up on the ground at the end of the struggle. He said his attention was focused on Linka from the time he got out of the car until the time Linka was placed in the police cruiser. Rout denied any of the violence described by the witnesses, including that Linka was spread-eagled across the left side of the car. He described Linka's trip to the police car as being done "very gingerly" by his men. Rout attempted to deny that his first report had been made on July 31st. The only explanation that he gave for the discrepancy between that report and both the later one and his evidence was as follows:

"Q. Officer, will you give me your explanation now as to why in this whole two-page report made on July 31st, 1974 there is not the slightest hint of this

terrific struggle that you said you saw, you clearly saw?

A. Well, as I mentioned, these are reports requested by the Complaint Bureau. These differ quite - from a statement, in my opinion.

When I submitted this report I put down what I felt I should put down. To satisfy the Complaint Bureau. And as I mentioned, they didn't appear to be satisfied with my first report. I recall that. They wanted more detail. Everything I had seen. I was not prepared and I didn't wish to tell them everything that I had done, observed and had seen. This was a report in my opinion, a brief synopsis, as to some of the events of the evening.

Just trying to search my mind and recall the time or whether I predated this, like did it some other time and put July 31st on it." (Pages 21,342 - 21,343 of the Transcript).

It was clear to me that Sergeant Rout's recollection of what he saw became much clearer as he learned that four officers were going to be charged, and that he would be the principal identification witness against them.

I have already detailed my findings in the Robert Ethier case as to the evidence of Brown and Taylor and their notebooks. This evidence disturbed me as an example of the willingness of police officers to alter their notebooks and evidence in order to buttress their case against an accused they believe to be guilty.

In the Howell and Swaile case, Sergeant Beaven arrived on the scene at Maple Leaf Gardens when Officer Southward was holding Howell on the ground and Swaile was trying to remove Southward. Beaven quite properly pulled Swaile off, swung him around and bent him face forward against a parked car. This ended Swaile's involvement in the fracas. Sergeant Beaven filed a report to this effect with the Complaint Bureau on March 29th, 1974. He made no mention of any injuries to Swaile. He said in that report:

"At no time during my contact with Swaile was any force used other than a restraining action to keep him away from P.C. Southward and the youth he was holding. He was not struck or pushed in any way. I did not see Swaile or the other persons arrested again till my return to 52 Division. On my arrival, the processing of these persons had been completed and they were being taken to the cell area of the Division."

His notebook was consistent with this, and contained no mention of injury. He was asked by the Complaint Bureau for a further report which was made on April 10th, 1974 (Exhibit 134). In context, it appeared that this report was required in order to confirm that Swaile's very real injuries had been received in the struggle on the street before coming to the station. In fact at the time of making this latter report, Sergeant Beaven was shown a photograph of Swaile by Sergeant Mitchell, in which the injury to his eye was clearly shown.

Sergeant Beaven said in part in this last report:

"I pulled Swaile off the officer, as stated in my first report and as he attempted to get at him again, I turned Swaile around and bent him over the hood of a 1966 blue Plymouth, face down to restrain him and place handcuffs on him. I had arrested him at this point.

It is very possible that in bending him over the hood of the car to restrain him, he could have hit his face on the hood, causing an injury to his face, around the eye. If this did in fact occur, it was caused by his violent actions in the struggle and was NOT as a result of any actions on my part, that is direct actions."

In his evidence before me, Sergeant Beaven did his best to deny that the Complaint Bureau or he had had an exculpatory motive but he finally concluded his evidence by saying:

"Q. In other words, the Complaint Bureau was asking you to assist them with your opinion for the proposition that the injuries were caused at the scene? That is what the Complaint Bureau wanted from you?

A. Yes, sir, they asked for my opinion.

Q. And you gave it to them?

A. Yes, sir." (Page 5473 of the Transcript).

I have already detailed my findings in the Henderson and Bain cases. No purpose would be served in repeating the facts here. I disbelieved the police officers who denied that these complainants were mistreated at the station, and found that the other officers who were in a position to know the truth gave false evidence as well. The incident that I described in the Bain case involving the chest exerciser, which looked like a large vise grip, is indicative of the lengths to which some officers are prepared to go in order to deny the existence of misconduct. The records of the police proved that there was such a device and that for a long time, it was to be found at No. 32 Division Station. Yet every officer who had been at that station over the relevant period of time denied knowing of it, including Officer Everdell who clearly knew of its existence.

There is one other case which I wish to discuss which I shall call the case of Mr. K. This matter was brought to our attention during the course of the hearings. The complaint itself did not fall within my terms of reference and therefore was not the subject matter of a public hearing. For that reason, I do not propose to use the names of the individuals involved. What our investigation revealed however is quite relevant to the issue being discussed in this chapter.

K. was charged with careless driving. The main issue at trial was the speed of the car. He was chased and clocked by two investigating police officers travelling together in one scout car.

At the trial before a Justice of the Peace, the two officers gave evidence in examination in chief that the speed of the accused was 55 m.p.h. Under cross-examination, one officer admitted changing the notation in his notebook

from 30 m.p.h. to 55 m.p.h. The other officer denied under cross-examination that he had made any changes in his notebook although later investigation involving a photographic enlargement of the notebook confirmed that in fact a change had been made, probably from 30 m.p.h. to 55 m.p.h. This officer's explanation to the Complaint Bureau investigator for the failure to admit such a change was:

> "Although the speeds were changed in my book, I am sorry I did not directly answer (Counsel's) question under cross-examination. I was confused and concerned as to what the outcome may have been had I admitted the speeds were changed. Under no circumstances, did I intend to mislead the Court."

Counsel for K. complained promptly and vociferously about what he characterized as an extremely serious matter. The Complaint Bureau Officer who investigated, confirmed both changes in the notebooks, confirmed the failure of the one officer under oath to admit the change, but found that neither officer intended to mislead the Court. His conclusion was that the officers were guilty of failure to comply with the regulations concerning erasures in memo books. He made a finding that the complaint was "not substantiated".

Counsel for K. inquired by letter on two occasions as to what disposition was made of his complaint. He was finally advised by telephone that the two officers were counselled by a senior police officer concerning this matter. He was <u>not</u> told that the complaint had been treated as "not substantiated".

In fact, according to the Complaint Bureau records, the two officers involved were counselled by that senior police officer in the presence of the Complaint Bureau investigator and an inspector <u>"with respect to the use of their memo books and the changing of entries made in them"</u>. (Italics my own).

This is another glaring example of the inadequacy of the present Complaint system, but what is truly shocking is the total failure of the very senior police officer in question to recognize and deal with a clear case of lying by a police officer on a material issue. This state of affairs was only compounded by the misleading way in which the disposition of the matter was communicated to the lawyer who made the complaint.

THE NATURE OF THE PROBLEM

It can be seen that this problem surfaces in a variety of situations. The three most common are (1) for the self-preservation of the officer, (2) to make a case stronger against an accused person, and (3) to assist a fellow officer.

Self-Preservation of the Officer

By the very nature of their job, it is, on occasion, essential that police officers use force to protect the lives and property of citizens of the community. For this reason police officers more than other segments of our society become accustomed to the use of force. It also follows from this that there is a continual danger that the force used will be excessive. It is necessary to be ever-vigilant that the use of excessive force does not occur, or if it does, to demonstrate that it will not be tolerated.

The mere use of excessive force is bad enough, but when it necessitates perjury in the courtroom, the effect is far-reaching. When excessive force is used, it is all too easy and tempting to lie to a superior officer and thus escape penalty. When the case comes to court, it then becomes necessary for the officer to commit perjury, to continue the denial which he has already made to his superior officers. Not only do the persons involved in the case, who know of the officer's perjury, lose respect for the administration

of justice, but the officer himself becomes more prone to ignore the law in other matters.

While we have generally been fortunate in the high standard of integrity of our Police Force and we have had very little evidence of police officers committing perjury, our system cannot tolerate any perjury by police officers. The use of perjury which could arise from the illegal use of force will surely ultimately lead to the conviction of innocent persons or of guilty persons on false evidence. This not only results in the loss of respect for our courts by the accused persons, but also by their family and friends who are witness to the use of perjury and its effect. Our Courts punish wrongdoers for having broken our laws. The right of a society to do so must be founded on the necessity of those laws for the protection of all in the community, and on their inherent justice and impartiality. It is as important that the public servant obey the law as that the private citizen do so. False evidence by police officers in our courts will destroy the confidence which the public places in the police and lead to such skepticism on the part of judges and juries about the evidence of policemen that the administration of justice will be seriously affected.

Assisting Another Officer and the Problem of Supervision

Insofar as the problem relates to the colouring of evidence to assist a fellow officer, the problem runs very deep indeed. There is, without question, a feeling among many officers particularly but not confined to the lower ranks that it is wrong to give evidence that will reflect poorly on a fellow officer.

There is a tendency among policemen to cover up each other's errors and to keep silent concerning improper actions of brother officers. Police officers often find themselves in dangerous situations and most rely upon their

"back-up" officer. It has been said that they fear that this back-up man may not be available when needed, if they have reported questionable activities of their fellow officers. In addition there is a natural alliance among the members of a group that frequently receives abuse and contempt from the sector of the public with which it is most often concerned.

It is my view that the control of this problem starts and is most effective at the first-line supervisory level, that is, with the sergeants and probationary sergeants. The sergeants, having recently been promoted from the ranks, are closest to the men on the street, and should very soon become aware of any questionable practices of the officers under their supervision. Any sergeant who does not become aware of what his men are doing is not competent to lead and supervise. Such questionable activity cannot continue to occur unless the sergeants either approve of it or tacitly condone it by omitting to take action to stop it. Special efforts therefore should be made by the Force to ensure that sergeants receive training in management and supervision immediately prior to or immediately after their promotion.

The appointment of a sergeant is probationary for one year. Clearly, these appointments must be made with an eye to managerial and supervisory abilities. At the end of the year, the probationary sergeant is either confirmed in his rank or sent back to the rank of police constable. Provision exists for the review of the sergeant's work during this probationary period. I cannot stress too highly the need for a very thorough review of his work, particularly as it concerns his ability to supervise the officers under him, before deciding to confirm him or not in the position of sergeant.

There is a great deal of stress involved in being a police officer. The officer is regularly provoked by both

the lawless segment of our population and the good citizen who has overly imbibed. This continual stress undoubtedly causes the officer a great deal of difficulty and indeed on occasion unfortunately leads to a loss of temper. It is here that the importance of the first-line supervisory officer, the sergeant, is seen. He must exercise control and good judgment; he must be understanding of human failings and yet, for the good of the Police, he must be intolerant of improper actions on the part of his men.

It is therefore of the utmost importance that the training of probationary sergeants emphasizes the necessity for the exercise of this supervision.

One particular situation came to my attention as a prime example of the dangers of inadequate supervision. The drastic increase in drug-use in the community has led to an equally drastic increase in the number of "plainclothes" or "old clothes" officers. Unfortunately, the persons involved in this type of work were not adequately trained or supervised.

I am pleased to say that the Metropolitan Toronto Police Department in their final submission to this Commission acknowledged that we had uncovered a dangerous situation and as of April 30th, 1976, a new procedure was introduced dealing with drug enforcement personnel. The "drug squads" are now receiving specialized training and a reorganization has been effected to improve their supervision.

Furthermore, a document entitled "Guidelines for Execution of Search Warrants and Seizure of Evidence for Drug Enforcement Personnel" has been drafted and, as the name suggests, it provides some guidance for these officers in the execution of their duties. Copies of these guidelines have been distributed to staff superintendents in charge of districts, to inspectors in charge of divisions and district criminal investigation branches, to sergeants in charge of

drug squads and to duty inspectors. It is still necessary, of course, to establish procedures to ensure that these guidelines are being followed.

Prior to these new procedures, we had received complaints about police officers not identifying themselves in drug raids. It is, of course, self-evident that plainclothes police should immediately identify themselves as police officers when making a raid. Otherwise, the occupants of the premises might well believe that they were intruders and tragedy could easily result. We have also received complaints that drug officers had unnecessarily broken down doors and destroyed the interior of premises while making a search. It is to be hoped that under the new guidelines, these actions will not occur.

CONCLUSIONS

Remedial Changes: Notebooks

It is apparent that remedial measures are needed. It is difficult to formulate these measures in terms of specific recommendations. Notebook changes would be eliminated if it were required that all books be written without erasures in pen and that changes could only be made by a single striking out so it could be determined what it was that was stroked out. When an officer's statement in an investigation into his conduct, or that of his fellow officer, differs from his notebook, such differences should be explored in a searching fashion especially where the changes tend to exonerate an officer under suspicion. Such examination would undoubtedly take place in an investigation made by a properly-constituted complaint department supervised by an independent commissioner as discussed elsewhere in this Report.

Attitudes and Policies

The main solution to the problem is to be found in the adoption of the proper philosophy, policies and attitudes of the Police Force.

While the conduct of police officers described in this Chapter may be understandable, such conduct cannot be tolerated in a professional calling whose sworn duty it is to uphold the law. Policing today is undoubtedly a profession, and the high quality of recruits, the demands placed upon policemen and the standard expected for promotion all serve to emphasize this. There is a corresponding duty upon all members of the Force and in particular, the Chief and senior officers who make the policy and set the example, to instill in themselves and in the Force generally the proposition that misconduct of its members whether in the use of force, the giving of evidence, corruption or otherwise, will not only not be tolerated but will be swiftly and surely dealt with in order to rid the Force of those officers who do not meet professional standards.

I regret to report that such an attitude is not presently unanimously held in the Metropolitan Toronto Police Force. While prompt police action is sometimes undertaken, as is the admirable handling of the investigation in the "Julie's" incident, such action is unfortunately not representative of all cases. After the hearing of evidence in the Henderson case, two of the principal officers involved, Rusk and Jilek, were confirmed in their probationary promotions as Sergeants, even though to the knowledge of the police, the Royal Commission was actively investigating the Bain case which involved similar serious accusations against the same two officers. Such a situation, combined with the almost total failure of the Complaint Bureau to adequately investigate serious allegations can hardly go unnoticed by the members of the Force. New recruits in particular may form the

impression that earning a promotion involves taking expedient short cuts to obtain evidence or manufacture it, and protecting their fellow officers, no matter what the circumstances.

The implementation of the philosophy which I advocate depends upon the co-operation and fervor of the Chief of Police and of those under him. It is important therefore that the Chief frequently reiterate his position on these matters. He must impress that policy upon all members of the Force and particularly upon the supervisory personnel.

There can be no doubt that Chief Adamson has stated that he will not tolerate any manner of corruption. He must make his position equally clear regarding the use of excessive force and giving of false evidence. This policy must be stated and restated so that all ranks, supervisory and other, will continuously have it in mind. This must be uppermost in the minds of those who select the recruits for the Force. It must be a determining influence in the choice of candidates for promotion and in the confirmation of probationary appointments. First-line supervisory personnel, the sergeants, must enforce it thoroughly and conscientiously.

At one time, police forces were considered to be para-military forces and military discipline was exercised in police forces. While the necessity for this no longer exists, strong discipline is still required in police forces, not only for the protection of the public by ensuring that policemen do not exceed their authority, but because it has been proven that persons who exercise discipline must understand discipline and be themselves, subject to it.

All policy and procedures for its implementation must be developed by creative and flexible people who understand not only the need for law and order, but also the need for civil rights, public trust in the Courts and indeed the entire system of checks and balances built into our judicial

system. Management in the Force must be continually searching for bright and innovative young officers to replenish the upper levels and to develop a constantly changing Department that can respond sensitively to the needs of a fast changing society.

In short, what is required is that from the Chief of Police through the senior and middle rank officers to the station sergeants, through to the lowest ranking constable in a patrol car, or on foot, there must be instilled a true sense of professionalism and public duty. The power and trust which is presently reposed in our police demand nothing less. To the extent that such a standard is not reached, the public and judges must rigorously examine and scrutinize police conduct and evidence to ensure that justice is being done.

Chapter XIX

THE POLICE AND THE PUBLIC

> "The Police, like laws, reflect the nature of the society in which they serve. Corrupt societies deserve, and get, corrupt Police. Totalitarian societies acquire omnipotent Police. Violent societies get violent Police. Tolerant societies get tolerant Police. Wise societies bridle Police powers."[1]

The Metropolitan Toronto Police Force has for many years enjoyed an excellent reputation both in the City of Toronto and throughout Canada. I am satisfied that a great majority of the public in Toronto has confidence in its Police Force. Indeed, many civilian witnesses, including some complainants who testified before me expressed their general admiration of Toronto's policemen and the job they do. However, there were a number of indications in the evidence tendered in the hearings and in my other research which led me to believe that there is need for a better understanding between the police and the public. It is not enough that the police enjoy a good reputation in the community generally. It is also important that they not take this reputation for granted. I did observe among some policemen with whom I came into contact, a tendency to believe, perhaps too strongly, in the often quoted statement that "Toronto has the best Police Force in North America". This may well be true but it is important that our police force in Toronto not be lulled into a false sense of security. To use a hackneyed phrase: there is always room for improvement. Once any organization starts to believe all the good things it hears about itself it tends to become smug and self-satisfied and eventually it will begin to decline.

While the Toronto Force does have a good reputation, it has not been free from a fair amount of public criticism. I do not propose in this Report to comment on the details of such public criticism. However, I have observed in some cases a misunderstanding on the part of some members of the public concerning the role of a policeman. Similarly, I think the policeman in Toronto sometimes fails to appreciate the position of an individual member of the public and his assertion of certain fundamental rights.

In some cases this mutual misunderstanding has led to conflict between the police and the public which has resulted in the use of force which might have been avoided altogether. To a great extent this conflict is attributable to the clash of two competing social principles. On the one hand, the public expects criminal activity to be prevented and suppressed in order to preserve an orderly and peaceful society. On the other hand, our democratic tradition places a high priority upon individual liberty and freedom of action. When the policeman pursues the former principle and comes into contact with an individual who pursues the latter, there is a great possibility of conflict if each fails to appreciate the other's position.

Every law is an infringement upon the liberty of the subject. Law is necessary, however, to enable the twenty-three million people of Canada to live together in a reasonably safe environment, and to set out for them their individual rights and duties.

The extent to which laws should infringe upon the liberties of the individual, in the attempt to protect the lives and property of all, has always been and will continue to be a much-debated and disagreed-upon issue.

The basic rule must be that the civil liberties of the citizen should be encroached upon no further than is necessary

for the orderly preservation of society.

This problem has been with us for thousands of years. An early example is the case of Socrates. Many people recall that Socrates committed suicide by drinking a cup of hemlock. Very few recall that he did so because he did not agree with the laws of his society, and could not live with them, but had such respect for those laws that he could not disobey them.

A comparatively recent example was the case of Mahatma Gandhi. Gandhi believed that many of the laws governing life in India were unjustly imposed upon the people of India by England. He felt that civil disobedience was necessary to bring the inequities to the attention of other Indians and the World. It should be noted however that his acts were peaceful, and Gandhi was prepared to accept the decisions and punishment of the Courts. In this way, Gandhi expressed his disagreement with the laws but demonstrated his respect for the necessity of law in the government of men's affairs.

It should also be pointed out that the conflict between law and order on the one hand and civil liberties on the other is frequently impossible to reconcile and our law represents an ongoing attempt to balance these competing interests. This balance is one which the Courts are often required to determine, and invariably they have great difficulty in so doing.

Unfortunately, it is also one that the police officer on the street must determine instantaneously. All too often, the officer who must make this decision is young and inexperienced. It is, of course, impossible to put a forty year old head on the shoulders of a twenty-one year old policeman. I cannot stress too strongly the difficulty of many decisions that police officers must make on a moment's notice.

This must be borne in mind when one is reviewing the actions of individual police officers, and when a police officer has made an error in judgment, it should be taken into consideration when determining whether punishment is due and again in determining what that punishment should be.

On the other hand, when misconduct is obviously a deliberate act of an experienced officer, punishment should be that much greater. I adopt the old aphorism: "to whom much is given, much is expected". We give a great deal of power to our police and insofar as they are concerned, the aphorism might be put: "to whom much power is given, much restraint is expected".

Like many matters in a democratic society, I doubt that we can ever expect perfect harmony between the police and the public. However, I think we can strive to achieve a better balance between the desire for the preservation of social order and the protection of individual liberties. In my view there are a number of areas which merit consideration:

(i) THE POLICE OFFICER ON THE BEAT

In Toronto we have a highly specialized police force operating for the most part from the scout car. The scout car is hooked into one of the most modern police communication systems in the world. I had the opportunity of touring the Communications Centre at Police Headquarters and came away with great admiration for the ability of the police to receive citizen's calls and transmit them to the officers in the field. The community is indeed fortunate to have available a system which can direct a police officer in a scout car to an area of need within seconds. The community relies upon this system and expects it to operate as it does. However, as the police themselves are the first to admit, the Force is in a sense a prisoner of the motorcar. The policeman on the beat is largely an institution of the past, although it

should be noted that there are still officers who serve on foot patrol in such areas as the Yonge Street Strip and other parts of the downtown area.

Unfortunately, in a Force exceeding 5,000 in number, there are only 57 officers assigned to foot patrol. No. 52 Division, in the heart of downtown Toronto, has 35 officers assigned to foot patrol. Two other Divisions, numbers 14 and 51, have 16 and 6 officers respectively assigned to foot patrol. Due to a shortage in manpower, the other Divisions have had to abandon area foot patrol.

What we have lost is the neighbourhood policeman who walked along the street and spoke to the members of the public, calling many by name as they passed by. The "cop at the corner" was an institution loved, revered and respected by all. He knew his people and they knew him. They built up a permanent bond of mutual trust. If for example a young lad was given a dressing-down for throwing stones at windows or fighting with an acquaintance he quickly accepted the reprimand of the local officer and went home embarrassed. Today such an incident can, through the modern communications system, cause several squad cars to converge on the young lad and attract the attention of many members of the public. Thus a relatively minor incident can escalate into a major confrontation between police and public, each group misunderstanding and over-reacting to the presence of the other.

It is interesting that an opinion expressed by many people with whom we spoke in London, England indicated a similar viewpoint. A senior official in the Home Office, which is responsible for the municipal police forces in England and Wales, suggested that modern police communication is too good and the English tradition of "a people's police force" has suffered. He was supported in this opinion by a representative of the National Council for Civil Liberties.

I do not suggest or recommend in this Report that we turn the clock back and take our policemen out of the motor car, although I am of the view that where possible, it would be most advantageous to have more of our officers out on the street, mingling with the public. I understand that in at least one large American City, there has been a return to the beat with a large measure of success.

What is important is that the Force be aware of the fact that they are much more distant from the public they serve than they once were. They must strive to increase the number of personal contacts with the public. In my view one of the best ways to achieve this is through increased support for the activities of the Community Services Bureau.

The Community Service Officer Program originated in 1967 with the placement of two officers in an Ontario Housing Development in the core area of the City. This was followed by the placing of officers in the Yorkville area and in the west end of the City to mingle and work with the community. These officers worked with tenant groups and social agencies of various types. By 1970 the aforementioned experiments in community involvement proved to be so successful that a program was established on a metro-wide basis.

A memorandum of the Toronto Police Department describes the development and objectives of this program:

> "In May of 1970, 22 police officers were selected to become involved in a community police program. Each of these officers received an intensive course at the Metropolitan Toronto Branch of the Ontario Police College. They received training from such professionals as psychiatrists, social workers, sociologists, psychologists, family counselling services and many other concerned agencies.
>
> At the completion of the course, the officers returned to their respective divisions and became involved with community problems. Their duties were not easily defined and their activities were

flexible. They worked with the established as well as street level agencies, these included drop-in centres, youth organizations, set up sports activities (between police officers and youths) and organized other youth oriented programs opening up a communication with the whole of their divisional community.

In November of 1971, the Community Services Bureau was formed to co-ordinate the efforts of the Community Service Officers. A seminar was held in December 1971 to define and evaluate the role and effectiveness of the Community Service Officer program.

The Community Service Officers were in complete agreement that they should continue to work with the community and maintain or establish a credibility within the divisional community. They should build greater confidence in the police with all ethnic and cultural groups in order to alleviate any fear, mistrust that may exist between these groups and the police.

At the seminar the officers defined their role in the following manner:-

> 'IN LIGHT OF RAPID SOCIAL CHANGE, THE CONTEMPORARY POLICE OFFICER, WHO IS FACED WITH CHANGING ATTITUDES AND SOCIAL VALUES, MUST TAKE AN ACTIVE PART WITHIN THE COMMUNITY, TO EFFECTIVELY SERVICE THAT COMMUNITY. THE COMMUNITY SERVICE OFFICER IS A POLICE OFFICER WHO SERVES AS A LIAISON BETWEEN POLICE AND COMMUNITY, SO THAT POLICE REMAIN A PART OF AND NOT APART FROM SOCIETY'.

The mechanics for accomplishing this are:

(a) Working at street level in conjunction with agencies, drop-ins, hostels, ratepayers associations and other community organizations.

(b) Educational programs involving classroom discussions (i.e. the policeman in the community).

(c) Assists in referrals of community problems to the appropriate agency, such problems having been brought to the attention of the Police Department.

> The involvement of the Community Service Officer within his community is constantly undergoing change. When his community's attitude and problems change, his participation must change out of necessity. He must also keep his fellow officers aware of these changes so they soon adjust to the changing attitudes of the public."

I commend the Metropolitan Toronto Police Department for the foresight to establish such a program. I only regret that the requirement that two officers must patrol in each scout car between 8:00 p.m. and 8:00 a.m. and general manpower shortages have reduced the availability of policemen for this important work. Also, unfortunately, some policemen regard such work as mere public relations, removed from their traditional role as the preventer of crime and apprehender of criminals. My own view is that an increased Community Service function would reap many advantages in the suppression of crime in the community by enlisting support for many police activities which are now misunderstood by or unknown to many members of the public.

(ii) THE FRUSTRATION OF THE MODERN POLICEMAN

My impression is that many Toronto police officers feel frustrated by their jobs. Many believe that they are unfairly criticized by the press, that they are expected to do far too much. In many instances, they serve as doctor, social worker and marriage counsellor. Even if they succeed in such tasks, they frequently receive little thanks and are subjected to undeserved criticism and abuse. Thus a sense of alienation from the public develops.

A young man who had left the Metropolitan Toronto Police Force testified as to his reasons for resigning from the Force. He indicated that the constant shift work was the primary reason for his resignation. However, he elaborated at some length on the other determining factors. A brief quotation from his evidence serves to illustrate what I

believe to be the view of many Toronto police officers:

> "But, you know, outside of wanting to buy a house, to get out of the city and going where it is not too big and too dangerous for the children I hope to have - it was a mixture of these reasons, plus the fact that I was a policeman at one time and firmly believed that it was not only my sworn duty but my moral responsibility to serve and protect the decent Metropolitan citizens of this city.
>
> You know, sometimes they didn't appreciate it, but I really morally felt that. I was not a fanatic about it, but I felt if I was called upon to do something that I should do it, then I should do it not because I was getting paid for it but because I had taken an oath to do it, and it was becoming a great concern of mine.
>
> You can look at the employment record of the Metropolitan Toronto Police Department, and if 14 Division is any indication of it, young officers with good education - and I hope I can classify myself in this lump - young men who are intelligent, who are progressive, and have some kind of moral upbringing are leaving it by the droves because they are continually being confronted when they are out there trying to do their job as best they can with people who make their lives difficult and worrisome by making, in many instances - certainly not all of them but in many instances, complaints which have no basis in fact."

I think many members of the public are not fully aware of the difficult conditions under which some of our police officers are required to carry out their duties. However, I am further satisfied that some police officers fail to take the time to communicate on a reasonable basis with the public. An example of this arose during the Linka incident. One of the residents of a nearby apartment building telephoned No. 52 Division to voice her complaint as to what she had observed. She was dealt with in a cursory fashion by an officer who told her to have a cup of tea and calm down. I have already mentioned the unfortunate telephone call to a police station by one of Robert Ethier's parents which is a further disturbing example of poor communication between the police and the public.

It is important that the police make an effort to explain themselves to the public when legitimate complaints and requests for information are made. During our visit to London, England, I was much impressed by the easy manner in which the Metropolitan London Police appeared to communicate with the public. I was staying at a hotel in the immediate vicinity of a restaurant in which a number of the staff were being held hostage by a group of robbers whose efforts to flee the restaurant with the day's receipts had been frustrated. The so-called "Spaghetti House seige" received great publicity in the British press. The nearby streets were blocked off and large crowds were attracted to the area. I was naturally interested to observe how the English police performed their duties. I observed that they took great pains to answer questions from members of the public as to what was happening when they might well have been tempted to suggest that the curiosity-seekers move along and mind their business. The London police appeared to understand the desire of the public to know and understand what was being done even though the situation was extremely tense and the lives of several persons were at stake. Often a friendly and brief word of explanation goes a long way to create a climate of sympathy and understanding.

This point was made by the Chief Constable of Liverpool when he addressed a group of new recruits in 1852:

> "Kite-flying in the streets is a very dangerous practice; and if the string breaks and the kite flaps in the face of a horse, it will frighten it; the horse may injure himself, kill his rider, and seeing how crowded the crossings of our public thoroughfares are, cause great danger to many. The kite is almost always in the hands of a very little boy or girl, bought probably with a penny given by a next-door neighbour. To bring such a creature before the magistrates would never do, although it is an offence against the bye-laws. To put a stop to flying kites, one constable of rough disposition, snatches the kite, snaps it in two, at which every person passing will say, 'What a horrid fellow that is; the police are not at all

> a good sort of men.' Another constable, seeing the same thing, will call out in a pleasant voice, 'My little lad (or lass) go to the fields and fly your kite there, it may cost a man his life flying it in the street'; thus showing the public that, while a constable has his duty to do, he has some regard for what people think of him. The opinion of the public is often formed by the single act of the single individual, whether rough or smooth."[2]

(iii) PUBLIC PARTICIPATION IN THE POLICE FORCE

During the last days of our public hearings, I was most grateful for the assistance of a number of thoughtful briefs presented by individuals and organizations. The Parkdale Community Legal Services Organization indicated in their submission that many persons in the lower-income group, whom the Legal Clinic of that organization serves, believe that the Metropolitan Toronto Police Force employs excessive force on a more or less regular basis. While the spokeman for this organization did not offer any concrete evidence of this statement he submitted that what was important was that a certain segment of the community, rightly or wrongly, held such a belief. The Parkdale submission emphasized that even if the Police Force does not regularly employ excessive force, a significant segment of the community is forming a bad and damaging impression of it. He further submitted that in order to alleviate such an unfortunate situation, the public should be given an active role in the administration of the Police Force at the local community level.

The Parkdale organization has, itself, had some experience with involving the public in the administration of its Legal Aid Clinic. The spokesman for the organization made the following submission:

> "Finally, in our respectful submission, there is a great need for community involvement in police direction and management at the local level. We believe that it should be possible to introduce an element of local responsibility in the management of the local police station and the

policing of a local community. In the Parkdale office itself we are experiencing and experimenting with community involvement in the management and direction of our laws. We have a board of governors, 14 members, 7 of whom are elected from the community at public meetings called for that purpose; 2 of whom are representatives of the office itself and 5 of whom come from the profession at large, 2 from Osgoode Hall Law School of which Parkdale is a clinical training project.

We have on that board of governors a strong representation from the community and an effective representation from the other interested elements and the idea of a local board of governors managing a law office is perhaps in some eyes regarded I'm afraid by many in the profession as unusual and potentially troublesome in a lot of ways.

So far we have found that it has worked very effectively and it involves the professionals getting to know the community through representatives of that community on the board of governors which assumes responsibility for the direction and management of that activity in that community.

The other way in which a closer community police interaction can be instituted is through the employment of local citizens in police stations. There are many advantages that we experience in our law office through the use of what we call lay advocates and other people referred to as para-professionals, community legal workers or what have you.

These people build an important part of the bridge that we are trying to build between the office on the one hand and the community on the other. They bring into our deliberations and thinking and our whole attitudes a local input on a regular and continuing basis. They are a source of interpretation of the office to the community in which they live and they create an environment which the local community people find more acceptable and hospitable because of the participation of people like themselves in that activity...

Our suggestion is a board of governors at the local level and the employment of para-professionals from the community in the policing activity."

I am sure that such a suggestion would at first blush meet strong opposition from many sectors of society and probably from the Police Force itself. The obvious criticism of such a scheme is that the business of the Force is of necessity surrounded by strict security requirements and there is a limit to the public's right to know about the day-to-day operation of its work. While I recognize certain obvious security requirements I am not convinced that the Police Force needs to be as secure from public exposure as some police officers believe. Indeed my contact with some officers left me with the impression that they were far too sensitive to public scrutiny of matters which were often of little consequence.

While I do not perceive a member of the public actually becoming involved in the detailed administration of a Police Division, I can see some merit in his playing a meaningful advisory role. Professor Brian A. Grosman in his book, Police Command, describes two examples of such a role in Berkeley, California and North Vancouver. His description of the North Vancouver system is worth noting:

> "In North Vancouver, which is a community of approximately a hundred thousand residents policed by a Royal Canadian Mounted Police detachment, a community policing concept has become operational. Six policing zones have been created and in each of these zones a small police force has been set up under individual commanding officers. There are advisory councils in each zone, composed of representative groups from the community. These groups include youth organizations, tenant associations and other service organizations. The advisory council meets once every month with the police zone leader, who listens to the needs expressed by community leaders. In this way he feels accountable to the community in which he functions as well as to his superior officer. Community problems are brought to light in this atmosphere and may be solved by other members of the advisory council as well as by police services. Both the police officer and the

> community leaders participate in police decision making related to their community in a democratic and effective way."[3]

I find the Parkdale proposal and the North Vancouver project sufficiently attractive in principle to warrant further exploration. For me to recommend in detail some new structure would require much more research and study than I am able to give this subject and I am sure many would say that it is beyond the scope of my mandate. However, I would recommend that those responsible for the administration of the Police Force give further consideration to such community involvement. I can do no better than again quote Professor Grosman:

> "There is a growing demand on the part of the public and recognition by police leadership that there must be more community involvement in police services. The Berkeley and Vancouver projects are commendable attempts to integrate policing as part of a community responsibility, not just a police responsibility. Citizen participation can be further expanded. Different models of citizen involvement in policy formulation and police decision-making directly related to community interests are appropriate to different jurisdictions. What must develop, however, is police leadership which is conscious of the need to more effectively involve a representative cross-section of citizens. If this is not done, police will find that their activities continue to be viewed by community groups with hostility, suspicion and mistrust. The modern police force must view the community as an environment for creative opportunity, rather than as a separate solitude."[4]

(iv) THE POLICE AND PUBLIC OPINION

During the course of the Commission, it became obvious that some police officers believe that the public does not understand the nature of their work, and that only the police understand the problems in society and only they can

deal with them. Accordingly, some police officers seem to feel that the public should support everything done in furtherance of the ultimate goal of keeping the streets safe.

Public opinion has often swung between extreme positions. In my view, we are emerging from one extreme, which has frequently been described as the "permissive society". Those people involved in the administration of justice, and particularly the police, were faced with the difficult task of reconciling the liberal views of the public with the need for an orderly and peaceful society. A short five years ago, the public and the media were vilifying the police for attempting to enforce law and order. If we carry our minds back, we will remember the many civil rights disturbances in Canada and the United States.

It appears to me that the public has swung over to the support of law and order. There are now complaints that the police and the courts are not sufficiently strict, that more people should be incarcerated and that sentences should be longer. This is the inevitable reaction to the past twenty years of ever-increasing permissiveness. It is important, however, for the public to appreciate that the police and the Courts cannot operate by reference to the latest public opinion poll. That is not to say that the police should not be aware of the needs, aspirations and opinions of the public they serve. However, we operate under a system which has as its first principle the "Rule of Law". This simply means that each and every one of us is governed by laws passed for the protection and benefit of all. These laws prescribe the manner of conduct of citizen and law enforcement alike. The actions of the police and the Courts are governed by these laws. It is the duty of the police to enforce the laws in a lawful manner as they are passed by the properly elected officials. It is the duty of the courts to administer justice in accordance with those laws.

It is my view that the system under which we operate is not properly understood by the general public. In particular, the distinction between the American system and ours is apparently confused in the minds of many because of our proximity to that country and the dissemination in Canada of information relevant only to the United States, through the media.

While it is clearly beyond the scope of this Commission to make recommendations in this area, it is my view that insufficient information about our system is taught to the citizens of Canada in our schools. Indeed, I often feel that nothing about our system is taught prior to the university level and perhaps not even there.

I wish to emphasize as well that some police officers operate under misconceptions of their duties. I have already stated in my chapter on the Bain case that we cannot tolerate a policeman who perceives his function as extending beyond the apprehension of a criminal to acting as Judge and jury in respect of a person he has arrested. I recommend that it be constantly emphasized to all officers in their training and by their supervisors that their role does not extend that far.

(v) POLICE POWERS AND THE PRIVATE CITIZEN'S POWERS

Before I embarked upon this Inquiry, I decided that I should examine the powers of the police under the Criminal Code and other Statutes with a view to ascertaining whether or not such powers were sufficient to cope with the preservation of an orderly society. I was of the tentative view that police powers were outdated and inadequate for the task of coping with the complex problems of today's society. I am now satisfied that their powers are sufficient for the task at hand.

It should not be overlooked in considering the powers of the police to preserve order in our society that individual members of the public have certain rights and duties in this regard as well. Chief Justice Laskin, in an address to the graduates of Simon Fraser University in May 1975 made the following comments:

> "Let me begin by adapting a well known aphorism to my use - you recall the saying that war is too important to be left to the generals - and I adapt it to say that law is too important to be left to the lawyers, too important even to be left to the law schools. This does not mean that it is not a special art, that it does not require special skills and special training or that there is an unnecessary elitism involved in restricting representation in the Courts to a qualified class. What it does mean is that all of us - lawyers and non-lawyers alike - have a continuing interest in the quality and effectiveness of our legal system, particularly because our form of political organization, through which we give expression and force to our law, is based on public participation in political and social processes, on freedom to debate public issues, freedom to examine and evaluate public institutions, including the Courts."

I have included this quotation because I wish to make my own adaptation of the well-known aphorism and the words of the Chief Justice as follows:

> "Policing is too important to be left to the police, too important even to be left to the police schools. This does not mean it is not a special art, that it does not require special skills and special training or that there is an unnecessary elitism involved in restricting the policing of the community to a qualified class. What it does mean is that all of us - police and non-police alike - have a continuing interest in the quality and effectiveness of our police system, particularly because our form of political organization, through which we give expression and force to our law, is based on public participation in political and social processes, on freedom to debate public issues, freedom to examine and evaluate public institutions, including the policing of the community."

This indeed is recognized by the Criminal Code of Canada. It is my view that effective policing depends upon the co-operation of the entire community not only in supporting police actions, but in actively assisting them in their police work.

It should be remembered that the police force as we now know it, is historically less than 175 years old.

Police forces are hired by the community to do the work which was formerly the duty of each and every citizen of the community. Needless to say, this work is very often dangerous distasteful, and thankless. It often appears to policemen that it is those people whose work they are hired to do, who are most critical of them when they actually do the job. It is, however, a necessary job and one which should be approached by the police as a community service.

The general public has a duty to assist its police force. Section 449 of the Criminal Code gives certain powers of arrest to every citizen and every citizen should be familiar with this section:

"449. (1) Any one may arrest without warrant
(a) a person whom he finds committing an indictable offence, or
(b) a person who, on reasonable and probable grounds, he believes
(i) has committed a criminal offence, and
(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

(2) Any one who is
(a) the owner or a person in lawful possession of property, or
(b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer."

Section 29 delineates the duty of a person making an arrest and I quote it:

"29. (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of

(a) the process or warrant under which he makes the arrest, or

(b) the reason for the arrest.

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility."

Section 30 gives certain power to each citizen regarding breaches of the peace:

"30. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace."

Section 31 gives a further power to any person who lawfully assists a peace officer in making an arrest for a breach of the peace:

"31. (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting

any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable and probable grounds he believes has, witnessed the breach of the peace."

Section 32 deals with suppression of riots and two subsections give certain protections to those who assist a peace officer in using force to suppress a riot:

"(3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if
(a) he acts in good faith, and
(b) the order is not manifestly unlawful.

(4) Every one who, in good faith and on reasonable and probable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,
(a) is necessary to suppress the riot, and
(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

(5) For the purposes of this section the question whether an order is manifestly unlawful or not is a question of law."

Section 27 spells out what force a person may use to prevent the commission of an offence:

"27. Every one is justified in using as much force as is reasonably necessary
(a) to prevent the commission of an offence
(i) for which, if it were committed, the person who committed it might be arrested without warrant, and
(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a)."

Section 25 is a section which extends certain protection to persons who carrying out their duties in the administration or enforcement of the law:

"25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
(a) as a private person,
(b) as a peace officer,
is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner."

Section 26 then places certain sanctions upon the use of excessive force:

"26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

There are many other sections in the Criminal Code dealing with the rights and duties of private citizens in enforcing the law. I do not propose to itemize all of these, but have included the foregoing in order to make it clear that the powers which citizens of Canada have given to the police are a delegation of the duties which lies upon each citizen.

It is also clear that each citizen has a duty to assist the police in enforcing the laws which have been passed for the protection of the lives and property of the members of the community.

Conversely, having delegated such extraordinary powers to the police, it is equally important to scrutinize carefully their use.

(vi) SOME SPECIFIC PROPOSALS FOR MINIMIZING CONFLICT BETWEEN THE POLICE AND THE PUBLIC

There are many ways in which potential conflict between police and public can be minimized and every effort should be made in this direction. Several concrete suggestions have come to my attention and I wish to make certain recommendations regarding them.

In the City of Toronto, more than one million dollars of fines remain uncollected. Warrants for the arrest of many people have been issued in connection with this, and most have not been executed. Periodically, officers are detailed to collect these fines and if necessary, execute the warrants of committal.

Needless to say, the police do not enjoy this work. The policeman is required to attend at a person's residence or elsewhere and arrest him if the fine is not immediately paid. People frequently do not have ready cash and if the policeman carries out his duty as he is required to do, that person must be arrested and taken to the police station. On other occasions, when a driver is stopped for some minor offence, the normal check made on the police radio indicates that the driver has unpaid fines and an outstanding warrant for his arrest. Again, the police officer is required to arrest that person and faces a confrontation over a comparatively minor matter.

In many cases, the failure to pay the fine was an oversight on the part of the citizen and frequently, the citizen is not aware that there is a warrant out for his committal.

I recommend that this matter be taken out of the hands of the police and that the unpaid fines be collected by the Licensing Bureau charged with the duty of issuing and renewing driving licences.

The computer of the Licensing Department can be programmed so that upon application for a licence or ten weeks before the due date of a licence renewal, the relevant material on unpaid fines will be retrieved. Within two weeks, a letter should go out from the Licensing Bureau to the citizen advising him that there are unpaid fines and that no licence or renewal will be issued until such time as the fines have been paid. The letter should further state that if the fines are not paid within an eight week period, the matter will be referred back to the Police Department for action. This would place the onus for the payment of fines where it belongs, namely, upon the citizen, and would eliminate a large number of potential conflicts between police and citizen.

When a police officer stops a citizen for [illegible] offence, he runs a check on the driver over the [illegible] radio. In addition to information as to fines and [illegible] of committal, other information is available. [illegible] occasions, the police are not satisfied that the [illegible] the vehicle is the person concerning whom they have [illegible] information.

I have received various estimates of the number of people driving in Toronto with licences which are not there or licences which have been obtained in names other than the proper names of the licencee. These estimates have ranged as high as thirty thousand. I have been told that many of our worst drivers who have had their licences suspended immediately obtain another in a different name.

I recommend that on each driver's licence there be a picture of the person to whom that licence was issued. This will readily enable the police officer to determine whether the person he has stopped has a proper driver's licence.

I anticipate that this recommendation might be objected to, particularly by civil liberties groups. This system has been introduced in other jurisdictions and after the initial period of objection, it was found that the public were perfectly satisfied with the procedure. Indeed, many people found that it assisted them in purchasing things by cheque or in the extension of credit.

Any law is, of course, an infringement of the liberty of the citizen. The question is whether the liberty of the citizen should be interfered with. It is a matter that is constantly under review. The liberty of a citizen should not be interfered with unless the larger right of the majority makes it necessary.

I am satisfied that the deaths, injuries and property damage arising out of unqualified persons driving improperly justify the further encroachment upon the liberty of the citizen of having his photograph attached to his driver's licence. Indeed, this does not seem to me to be a further encroachment. Each driver is now required to have a driver's licence, and the adding of a picture to that licence does not in my view in any way further restrict his liberty.

Another area involving unnecessary potential conflict between police and public is the enforcement of minor offences. Many laws require police to issue a summons but do not empower him to arrest the person suspected of having committed an offence. It has been estimated that there are as many as four hundred such offences, including all summary conviction offences under the Criminal Code, unless the person is actually found committing the offence, in which case an arrest may be made.

When issuing a summons, the police must ask for the name and address of the suspect. The police have no right to demand proof of identification, regardless of the answer. In many cases, the police officer is given a patently false name and address. He is then placed in the position of issuing a summons which he is reasonably confident will go to a non-existent person or to a non-existent address. This entails filling in the necessary forms, attempting to serve these documents and wasting hundreds of hours of time of police officers and Court personnel.

This is wasteful of taxpayers' money and leads to much frustration for an officer attempting to enforce the law. As well, it contributes to the citizen's contempt for the law. If an offence is considered sufficiently grave to warrant a summons and the expenditure of Court time, it is sufficiently grave to authorize the police to demand proper

identification or to make an arrest.

It is my recommendation that in every offence for which a policeman is required to issue a summons, he should also have the authority to demand satisfactory proof both of the identity of the person involved and his address.

Should satisfactory identification not be produced, the police officer should be entitled to detain that person until such time as satisfactory proof is forthcoming.

Some complaint might be made that this would, in effect, grant the police the power of arrest for a matter considered minor by the Provincial Legislature or Parliament. However, any other procedure makes a mockery of the law, and if the offence is not seen to warrant such powers of enforcement, it should be removed from the statute books entirely.

Footnotes

1. J. C. Alderson, The Principles and Practice of the British Police in the Police We Deserve, Alderson & Stead (Eds.), Page 39.
2. T. A. Critchley, "The Ideal of Policing in Briton: Success or Failure?" New Community Journal of the Community Relations Commission, Volume III, Number 3, Summer, 1974, Page 156.
3. Brian A. Grosman, Police Command (Macmillan of Canada, 1975), Page 137.
4. Ibid., Page 137.

Chapter XX

THE CITIZEN COMPLAINT PROCEDURE

It became apparent, at an early stage of the Inquiry, that it would be necessary to become familiar with the citizen complaint procedure in the Metro Force. In many of the cases that I heard, a complaint was filed with the Complaint Bureau, and an investigation undertaken. This investigation was relevant to me in that it revealed statements and facts, and, as well, the attitudes of the officers involved and their superiors. Most importantly, during the period relevant to the Inquiry, the Complaint Bureau was, in practical terms, the only recourse for a citizen complaining of police misconduct and efficient investigation is crucial to the control of that conduct as well as to protect slandered police officers.

As outlined elsewhere in this report, the practical difficulties in the investigation of allegations against police are immense. There are seldom independent witnesses; the complainant's credibility is, because of his involvement with the police, often suspect particularly compared with that of the police officers, and the police tend to support each other to defeat allegations against a fellow officer. Misused force can only be uncovered by a prompt, thorough, impartial investigation of complaints.

SCOPE OF THE EXAMINATION OF THE COMPLAINT BUREAU

I did not undertake a complete review of the Complaint Bureau. Prior to and concurrently with this Commission, a complete review of the citizen-police complaint procedure

was made by Arthur Maloney, Q.C. On May 12th, 1975, he reported his findings to the Board of Commissioners of Police in a long and detailed Report. During his investigation, he and his staff examined the evidence in several cases before me as it related to the workings of the Complaint Bureau, and extensive reference was made to that evidence in his Report. (See Chapter V, pages 64 to 93.)

I did not attempt to duplicate Mr. Maloney's wide-ranging investigation concerning the existing Complaint Bureau in Toronto and police complaint procedure generally elsewhere.

However, the cases I examined uncovered certain problems in the existing complaint procedure as it related to the improper use of force. The following instances do not exhaust the evidence in the cases I heard, and of course, those cases themselves may represent only a small percentage of the serious complaints made against the police.

THE PRESENT SYSTEM

I was provided with a document entitled "Report to Police Chief Harold Adamson on the Functions of the Complaint Bureau" by J. A. Ward, Inspector, Complaint Bureau. This Report described the existing system, the method of receiving complaints, the complaint investigation procedure, the reporting of the investigation, and the method of advising the complainant of the findings. According to the Report, the investigator assigned to the case was to discuss it with the complainant. A full investigation is contemplated, including obtaining of statements from witnesses, preservation of physical evidence, obtaining background evidence to determine credibility, examination of all records relating to the original offence, including memo books, case books, duty registers, use of force reports, records of arrest, etc. The Investigator is then required to report his

findings in writing to the Commander of the Complaint Bureau. The following, from the report, lists the possible findings:

"

F I N D I N G S

UNFOUNDED: ALLEGATION FALSE, INCIDENT NEVER OCCURRED, (POSSIBLE PUBLIC MISCHIEF HAS BEEN COMMITTED)

EXONERATED: THE INCIDENT OCCURRED, BUT THE MEMBERS ACTION WAS LAWFUL AND/OR PROPER IN THE CIRCUMSTANCES.

NOT SUBSTANTIATED: INSUFFICIENT INDEPENDENT AND/OR CIRCUMSTANTIAL EVIDENCE TO DECIDE THE ISSUES IN FAVOUR OF EITHER OF THE PRINCIPALS INVOLVED.

SUBSTANTIATED IN PART: THIS MEANS THAT NOT ALL PARTS OF THE ALLEGATION ARE PROVEN NOR ARE ALL THE OFFICERS NAMED IN THE ALLEGATION AT FAULT.

SUBSTANTIATED: PROVEN AT FAULT BY ... ADMISSION OF FAULT ... OR BY -

INDEPENDENT EVIDENCE -

i) WITNESSES (SECOND FLOOR WINDOW WATCHER)
ii) MEDICAL EVIDENCE
iii) EXPERT EVIDENCE ... CRIME LAB.

CIRCUMSTANTIAL EVIDENCE - THIS IS OFTEN THE STRONGEST EVIDENCE."

The Commander, when he accepts a report from the Investigator, forwards it to the Executive Officer, who is to review the report carefully, and then recommend one of a variety of forms of discipline, including "counselling" or charges under The Police Act.

The foregoing is a much abbreviated summary of the procedures laid down in the report.

Practical difficulties and weaknesses were pointed out by the evidence heard. The allegations involved criminal acts on the part of the officers. At least some officers in

the Complaint Bureau interpreted the procedures to mean that if the complainant chose to lay a criminal charge, a Complaint Bureau investigation would not be undertaken, or if underway, would be suspended. Secondly, the investigation and report end up in the office of the Executive Officer. There is provision for, but no requirement for a regular review of Complaint Bureau allegations by the Chief of Police or a Deputy Chief.

Mr. Maloney, in his Report, after a detailed review of the complaint procedure in theory and in practice said (at page 61):

> "Obviously, one cannot help but be struck by the relatively few instances in which meaningful disciplinary actions resulted from findings of culpability on the part of an officer complained against".

The Henderson Case

Much of the Complaint Bureau evidence was summarized and referred to in the Maloney Report. Thomas Henderson made a complaint promptly, and in considerable detail. The complaint would have been made sooner, had the Complaint Bureau been open nights and weekends. The allegations were of the most serious nature. They demanded swift, complete, and impartial investigation. Instead, an effort was made to dissuade Henderson from pursuing the complaint in the course of advising him of his right to sue the officers or to lay a criminal charge against them, and warning him of his exposure to a charge of public mischief if his allegations were groundless. It is no doubt important that a complainant's rights be explained to him, but the manner in which it was done in Henderson's case left no doubt that an attempt was made to frighten him so that he would not pursue the allegations. Henderson was being legally advised at the time, as the Complaint Bureau personnel knew, and the advice concerning his legal rights could have been left to his lawyers. No

matter what course Henderson chose to take, the investigation into this kind of allegation should have been vigorously pursued by the Complaint Bureau or by senior police officers. In fact, the investigation which was done was totally and hopelessly inadequate. The locker of only one officer, Rusk, was searched and even this was not done until February 12th or 13th. In addition, some unassigned lockers, drawers and unlocked briefcases in the detective office were searched. No attempt was made to ascertain the names of the other officers involved or to search their lockers. No other investigation of any kind was made. No officer was interviewed or asked for a report until late in February when Rusk filed a report. The interdepartmental correspondence shows that on February 18th, 1974, Inspector Ward submitted a request to Acting Staff Superintendent T. Cook, the officer in charge of No. 3 District, that P.C. Rusk submit a report to (not appear in person at) the Complaint Bureau. This can hardly be called investigation. Staff Sergeant Lewis, the Investigator assigned to the case, took the position that nothing should be done until after the criminal proceedings were concluded against Henderson, or at least until Henderson, who had already made a detailed complaint, insisted that the investigation be pursued. The result was that this serious complaint was in effect buried. Staff Sergeant Lewis did nothing else and when he left the Department in June, 1974, no one took up his investigation. It was unclear whether the decision to do nothing was Lewis' or that of his superiors but wherever the fault, it indicated a total lack of appreciation of the proper function of a citizen complaint procedure.

The Howell and Swaile Case

The Complaint Bureau evidence in this case has been fully dealt with by Mr. Maloney. It will suffice to say that the Complaint Bureau Investigator was less than efficient in pursuing the investigation. In addition, he clearly suggested to the officers that were interviewed, that they

make second statements containing paragraphs, which the investigator dictated, that supported the conclusions that no undue force was used, and that the complainants' injuries stemmed from the struggle in the street, rather than from anything that occurred at the station house. The evidence satisfied me that the procedure fell far short of a fair and impartial investigation into serious allegations. The Complaint Bureau report termed the Swaile complaint "unfounded" and the Howell complaint "substantiated". The Chief personally reviewed this report and arbitrarily changed the finding in Howell's case to "unfounded". (See Exhibit 153). Howell and Swaile were subsequently told that their complaints were unsubstantiated. Altogether, the handling of these complaints was totally unsatisfactory.

The Tomlinson Case

Tomlinson's complaint involved allegations of a serious assault which was witnessed by a number of independent observers, one of whom was so incensed by what he saw, that he went down to the police station the following morning to complain. He gave his name and address and informed the police that there were other witnesses known to him. The police were therefore being asked to investigate an assault causing bodily harm witnessed by independent citizens. The Complaint Bureau's response as given in evidence before me, was canvassed by Mr. Maloney. It was shocking in its ineptitude. Between July 15th and July 18th, Staff Sergeant Goff received copies of pertinent reports from two of the participating officers forwarded by their Inspector, along with a report of the complaint made by the independent witness, a copy of the arrest form and a copy of the report of Constable Mahood. Nothing further was done by the Complaint Bureau until September when Sergeant Goff made enquiries as to Tomlinson's trial date, and attempted to obtain medical reports from the Branson Hospital based on an authorization which had been obtained from Tomlinson on July

18th, 1974. These reports were not actually obtained until October, after the newspaper story concerning the complaint. Sergeant Goff did not interview the independent witness who first complained or any other persons alleged to have witnessed the incident. He made no attempt to find other witnesses, although they were there to be found. He made no attempt to interview the passengers of the Tomlinson car, on the ground that one of the officers involved in the arrest had told him that they made no complaint. It did not occur to him that witnesses are unlikely to complain about police violence to one of the officers accused of it. The police officers involved were not interviewed and their memo books and records were not examined. In short, Staff Sergeant Goff did nothing, taking the position that because Tomlinson's lawyer did not seem interested in pursuing the complaint, nothing need be done, notwithstanding that a complaint had been made by an independent citizen involving allegations of a serious assault.

The Hyland Case

Hyland's complaint involved a life-threatening injury allegedly caused by an intentional act of a police officer. This was an allegation of a serious crime. The formal complaint was made by Bonnie McNeil on March 27th, 1974, and was followed by a statement from the victim, Hyland, shortly thereafter. Apart from obtaining the names of the officers involved in the arrest, the Complaint Bureau investigation amounted to nothing. Sergeant Brown of the Bureau gave evidence that notwithstanding the serious nature of the allegations, Hyland wanted only the names of the officers involved and no further action was warranted, nor taken. According to Brown, Hyland was "the boss of the situation". To say that this view of the function of the Complaint Bureau was inadequate is to be charitable. Sergeant Brown in effect suspended the investigation. I quote from his evidence (page 9039-9040):

"Q. If that is correct sir, why did you write in the last paragraph of your report and I am quoting, 'it is my decision to suspend further contact with the complainants or their representatives but to, when time permits, continue my inquiries into this matter for the purpose of being prepared for any eventuality that the future presents with my inquiries motivated in the best interest of the force and the officers concerned'.

A. That is correct.

Q. What do you mean by that?

A. If time permitted I would continue the investigation but time never did permit.

Q. I am not talking about the part about time permitting, sir. I am talking about your inquiries being motivated in the direction of the best interests of the force and the officers concerned.

A. That is what I have here.

Q. Doesn't that mean that you were going to suspend an investigation until or unless you needed to further investigation to protect the officers against any claims made against them?

A. By that I meant I could have been called upon by the staff counsel at any time to assist them in any inquiries they wished to make and I would have gladly done so.

Q. For the protection of the officers, for the defence of their case?

A. Yes."

Mr. Maloney characterized this exchange as follows:

"Clearly, the attitude expressed in this extract is inappropriate for a Bureau charged with the responsibility to investigate impartially complaints against police officers by members of the public without regard to where the fault may lie. To label the Bureau's response to Mr. Hyland's complaint as disappointing is an understatement."

I concur with this view.

The Linka Case

Several citizens who witnessed the events on Charles Street promptly reported their version of the events to the police. The Complaint Bureau was brought into the matter on July 31st, 1974 at 7:20 a.m., by Staff Sergeant Lewis, (the same Lewis who was involved as a Complaint Bureau Investigator in the Henderson case). Lewis informed the Complaint Bureau Investigator, Sergeant Creighton, that he had investigated the matter himself and had spoken to the alleged victim who had made no complaint. Lewis also prepared a report on the incident (Exhibit 780) outlining what he had learned from some of the officers involved and from some of the civilians who had telephoned to complain. The report concluded with the words:

> "P.C. Shields had been advised to be conscious of people watching his activities from upper windows of premises and to avoid any questionable action. Sergeant Rout has been requested to convey this message to his men."

Staff Sergeant Creighton was assigned to investigate the matter for the Complaint Bureau. By August 15th, he had made a substantial investigation. He interviewed approximately twenty-five civilian witnesses and two of the policemen. On August 12th, Police Constables Duriancik, Oliver, Shields and Clarke were charged with common assault and all evidence gathered by the Complaint Bureau was turned over to Superintendent Telford for the prosecution of these charges. Subsequently, Creighton prepared a handwritten report (Exhibit 788) in which he made a finding that the allegations against the officers were substantiated in full by the Complaint Bureau. In his evidence before me, Creighton, while not denying that he had made the report testified that he could not understand how he could have made it and that he, did not intend it to be the official report of the Complaint Bureau. He even denied that the finding was his opinion. Once the criminal charges were laid, the matter was taken

out of Creighton's hands although an open file was kept by the Complaint Bureau. Sergeant Creighton testified at page 21,954:

> "Q. What did you mean?
>
> A. I was advised that the matter by the Chief, had been taken out of the Complaint Bureau's hands and placed in the hands of the Criminal Courts and as a result of that information I then had to finalize our file because it was now being stopped as far as the Bureau was concerned. I then had to sort of end up our investigation in this matter by a report and that's what this culminated in."

This case illustrates a very real problem with the existing Complaint Bureau procedure. Notwithstanding that there may be excellent grounds for disciplinary action against officers, once they are charged with a criminal offence, the Complaint Bureau involvement is effectively terminated or at least suspended. The Complaint Bureau Investigator takes no part in the preparation of the prosecution. There are often lengthy delays in the matter reaching the criminal courts. For reasons outlined later in this chapter, convictions are rare. Disciplinary action which might be warranted entirely apart from the prosecution is not undertaken. The criminal prosecution, instead of being an adjunct to the Complaint Bureau and disciplinary procedures, effectively terminates them.

Conversely, I received the impression that many police officers were unhappy with the Complaint Bureau. They felt that insufficient investigation was made to properly exonerate them, or that adverse findings were made against them based on insufficient investigation.

OTHER AVAILABLE PROCEDURES

Before detailing the conclusions at which I have

arrived, I should mention the alternatives available to an aggrieved citizen apart from the citizen complaint procedure.

Criminal Prosecution: In appropriate cases, charges may be laid against a police officer, either by the police or by the complainant. In practice, such prosecutions rarely succeed. For instance, in the three year period, 1972 to November 8th, 1974, there were 211 charges of common assault or assault causing bodily harm laid against Metropolitan Toronto police officers. Seventy-two of these were withdrawn before reaching trial; 138 were dismissed, and there was one conviction. There are a number of reasons for this. Many prosecutions are unfounded; in even well-founded cases there are difficulties of proof, and there is a natural reluctance on the part of the judiciary to convict police officers, when the consequences to their future are so drastic.

Civil Actions: An aggrieved person can, of course, sue the officers civilly. If he does, and is successful, he is assured that the damages will be paid by virtue of the operation of Section 23 of The Police Act, R.S.O. 1970, Chapter 298, which makes the Chief of Police liable for torts committed by an officer in the performance or purported performance of his duties. It further provides that the municipality shall pay damages and costs awarded against the Chief. Civil actions are lengthy, expensive, and in many, perhaps most, of these cases, the damages awarded are very small. In cases similar to those of Henderson and Bain, physical disability and pain caused by the police was minor or non-existent, and the Plaintiff could resort only to punitive damages, in respect of which his own conduct would be relevant to reduce damages. Civil actions are a useful remedy for persons who are badly injured by police misconduct, but much less useful in cases where there is only minor injury which form the bulk of citizen complaints against the police.

Disciplinary Proceedings Under The Police Act: This is not a remedy available to a citizen, but these proceedings may be instituted by the Chief of Police based on information which comes to him from any source. The Regulations made pursuant to The Police Act set out a Code of Discipline and procedures for the trial of offences under the Code. These offences may be designated by the Chief as major or minor, with different procedures and penalties for the two categories.

There is no independent element in this procedure, since both major and minor offences are heard internally, or in rare cases, if so designated by the Chief of Police, by the Board of Commissioners of Police where there is one, or by the Municipal Council where there is no Board. The proceedings are governed by a six month limitation period under Section 11 of The Public Authorities Protection Act, R.S.O. 1970, Chapter 374. Therefore, in cases where the misconduct is not brought to light before the expiration of that period (as it may not be in many serious cases investigated by the Complaint Bureau examined in criminal or civil proceedings), no disciplinary action can be taken.

The Ontario Police Commission: Section 56 of the Ontario Police Act, R.S.O. 1970, Chapter 351, reads as follows:

> "56. (1) The Ontario Police Commission or any member therefore designated by the chairman may investigate, inquire into and report upon the conduct of or the performance of duties by any chief of police, other police officer, constable, special constable or by-law enforcement officer, the administration of any police force, the system of policing any municipality, and the police needs of any municipality,
>
> (a) at the request of the council of any municipality, in which case the municipality, unless the Minister otherwise directs, shall pay the cost of the investigation, including the cost of reporting and transcribing the evidence; or

(b) without the request of the council of a municipality, in which case the cost of the investigation, including the cost of reporting and transcribing the evidence, shall be paid out of the Consolidated Revenue Fund.

(2) The Commission may inquire into and report to the Minister on the advisability of amalgamating the police forces of any two or more municipalities and any question, matter or thing relating thereto.

(3) The Commission or person holding an investigation under this section has and may exercise all the powers and authority that may be conferred upon a person appointed under The Public Inquiries Act.

(4) The Minister may, upon the request of the Commission, appoint counsel to assist the Commission in an inquiry or investigation under this section.

(5) The Commission shall communicate its report of an investigation under subsection 1,

(a) to the Minister upon his request or if the Commission considers it advisable;

(b) to the council or, where there is a board, the board of the municipality for which the police force is maintained upon its request or if the Commission considers it advisable; and

(c) to such other persons as the Commission considers advisable.

(6) The Commission may grant to a person attending to give evidence at an inquiry or investigation under this section such fees and expenses as are set out in the Schedule to The Crown Witnesses Act."

Presumably, this permits a citizen to complain to the Commission that his complaint against the police was not being properly handled. If the Commission decided that it was a proper matter to investigate, it could do so and report to the Solicitor General.

CONCLUSIONS AND RECOMMENDATIONS

I drew several conclusions from the Complaint Bureau

evidence before me.

First, the present system is not effective. For a variety of reasons, the investigation of serious allegations of excessive force, are incomplete, not impartial, and largely unsupervised. I was not impressed with the calibre of some of the officers assigned to the Complaint Bureau who appeared before me. There does not appear to be regulation, inspection or direction of their efforts and the Investigators appear to be left largely to their own devices.

Secondly, there is no apparent policy in force as to what happens to recommendations and findings of the Complaint Bureau. The reports are often ignored or reversed by superior officers, sometimes without notice to any of the people involved.

Thirdly, when criminal charges are laid, the Complaint Bureau Investigator, who often has the best knowledge of the circumstances of the complaint, is left out of the prosecution and all Complaint Bureau activity ceases. The investigation and preparation for trial is carried on by regular force officers who may have conflicts of interest and loyalty.

A system must be developed for the prompt, impartial, vigorous and independent investigation of such complaints, incorporating appropriate safeguards for the rights of police officers. Such a system must be highly visible and manned by personnel who command the respect of the force and of the public. The design of such a system is beyond the scope of this report.

Considerable thought is being given to this problem both here and abroad. Along with my counsel, I had the opportunity to examine the solutions tried in England, where the matter of police complaint procedure is under considerable review. A Bill is presently before the English House of

Commons which proposes changes in the law relating to police disciplinary procedure in England and Wales. The most important provision is the introduction of an independent element into the procedure; for that purpose the Bill establishes a Police Complaint Board to whom the reports of investigations of complaints are to be sent. The Board is empowered in certain circumstances to require that disciplinary charges be preferred, or that they be heard by a disciplinary Tribunal on which the Board is represented. The Tribunal would be composed of the Chief of Police of the relevant force, and two members of the Board who had no connection with the case. In cases where criminal proceedings were contemplated, no action would be taken by the Board until such time as the Director of Public Prosecution decided whether or not to bring criminal proceedings. Any case involving a complaint against the police which amounts to a criminal offence, must be referred to the Director of Public Prosecution. At the present time, if he decides not to bring a criminal action, no further steps of any sort are taken. The new Bill, if passed, would modify this, and as well, would introduce an independent review element to the disciplinary proceedings.

Sir Robert Mark, the Commissioner of the London Police, has formed a special investigative squad to investigate complaints made against the police. Involvement in this squad is considered a stepping stone to promotion.

I have had the benefit of reading a great deal of material on the subject including some published and unpublished papers of Professor Alan Grant of Osgoode Hall Law School.

In a paper entitled "Citizen Complaints Against the Police from Canadian Initiative" presented to the Seminar of Police and Discipline, Manitoba Police Commission on October 4th, 1975, soon to be published, Professor Grant reviews the

Report of Mr. Maloney and the British Columbia legislation which introduces the element of independent supervision of investigation and hearing of complaints. He then concludes as follows:

> "What is needed in Canada, are more provincial and federal initiatives in producing schemes in co-operation with interested parties which make sense for the particular area involved. There is no magic wand to be waved to produce universally acceptable answers. When these initiatives have been taken, there must be honest appraisals following experience with them, to see if it is not time for further change and development. There are many ways of looking at this problem, only by a review of a succession of different working models will we be able to make progress. It calls for hard work, and some courage, to venture into this field in a highly visible way and then let the experience, in action, decide whether the structure created is doing the job it was intended to do. That is the nature of our task. The future will tell whether we were equal to it."

Recently, the Report of the Commission of Inquiry into the Royal Canadian Mounted Police, His Honour Rene G. Marin as Chairman, has been published. This Report reviews a variety of suggestions for citizen complaint procedures, and comes out in favour of investigation and adjudication within the force, with an external review by an independent person who could consider the entire conduct of the case to ensure that justice and fair treatment was received by both the complainant and the officer.

I gave particular attention to the Report of Mr. Maloney. It is the product of considerable research and thought and his recommendations are specifically tailored to the problems peculiar to the Metropolitan Toronto Police. Solutions which might be practical for the force of a smaller city or for a city with different problems might be totally unworkable in Metropolitan Toronto and vice versa.

The recommendations contained in Mr. Maloney's Report are a system for citizen complaint procedures in Toronto. They are untried, and no doubt will involve experimentation in the initial stages, but this can be said of any new system of police complaint procedure. Initiative is needed, and some risk is inevitable. Under Mr. Maloney's recommendations most complaints of a minor nature will be dealt with at the Divisional Commander level in an informal way. The Investigative Branch which he envisages, subject to review in three years as to the efficacy of using police officers, is along the lines of Sir Robert Mark's experiment which he finds to be working so well. Around the clock accessibility will avoid some of the problems which were evident in some of the cases I heard.

The control of the Investigative Branch by the civilian appointed Commissioner of Citizen Complaints with the powers suggested by Mr. Maloney would ensure the impartiality and thoroughness of the investigation. In the investigations made for this Commission, police investigators, directed by my counsel, were employed and the system proved workable.

The bulk of the cases not settled at the Divisional Commander level would be settled by the Commissioner, either informally or by hearings before him.

For those relatively few cases involving major offences that require a trial tribunal, the procedures and safeguards suggested by Mr. Maloney seem adequate and reasonable. There are rights of appeal and safeguards against placing officers in double jeopardy.

The principal objection offered by the police to this system is that it takes disciplinary matters out of the hands of the Chief of Police. The second objection is that the procedures laid down were cumbersome and potentially costly.

Neither of these objections commend themselves to me. In the system envisaged by Mr. Maloney the Chief retains the right of assigning the penalty in every case. It is only the determination of the validity of the complaint which is removed to another tribunal. In my view it is fundamentally important that the public be confident that a full and impartial investigation has been carried out and that the adjudication had been made by an independent person or tribunal. Justice does not appear to be done when the entire procedure is in the hands of the very body against which the complaint is made and as I have pointed out, in some cases not only is justice not seen to be done, it is not being done. These considerations must be paramount in any decision made concerning citizen complaint procedure.

After giving the matter anxious study and consulting with many others in and out of the field of law enforcement, it is my considered view that the overriding consideration must be the introduction of an independent element into the investigation and hearing of citizen complaints. No one has a monopoly on wisdom in this field. It is apparent that there are different views as to the appropriate handling of citizen complaint procedures. The problem, however, exists and the present system cannot be allowed to continue. I think that the time has come for an initiative to be taken and to use the words of Professor Grant to "venture into this field in a highly visible way and then let the experience in action decide whether the structure created is doing the job it was intended to do."

I therefore recommend that a Citizen Complaint Procedure, having as its central aspect an independent investigation and review of police conduct and independent tribunal for the hearing of complaints, be implemented by appropriate provincial legislation forthwith. In my view, the scheme recommended by Mr. Maloney in his Report meets the criteria

which I have discussed and should commend itself to the Government as a workable model.

I have been advised that since the tabling of the Maloney Report, some parts of the recommendations have been adopted, particularly with regard to the receiving of complaints and some changes made in the staff of the Complaint Bureau. However, the bulk of substantive and procedural recommendations require provincial legislation, and therefore have not yet been implemented.

I further recommend that Section 11 of The Public Authorities Protection Act, insofar as it provides for a six month limitation period for disciplinary proceedings against police officers, be repealed.

Chapter XXI

RECRUITMENT AND TRAINING

Recruitment

All Police Forces are greatly concerned with the issue of recruitment.

It is often been suggested that authoritarian people are attracted to police work and that this type of person does not make the best police officer. My investigation led me to believe that this is greatly exaggerated.

It is however a legitimate concern of Police Forces that they attract the proper types of persons to police work. The training of a policeman is expensive and no Force wishes to expend that money upon men who will not make good police officers. Along with my counsel, I have studied this facet of police work to see if excessive use of force by policemen could be eliminated by careful recruitment practices.

As might be expected, neither we nor police management have been able to find the perfect system, despite extensive review of recruitment procedures. The best recruitment is effected by police officers of many years' experience who have long specialized in the personnel field. I have considered the possibilities of psychological testing and have had the opportunity to review a critical study done by Dr. Reva Gerstein, a study entitled "The Use of Psychological Testing in the Selection Process" issued by the Ontario Provincial Police, a document entitled "Psychological Testing" by Peter Moon and have had the opportunity of discussing the matter with a psychologist, W. Clements, who

along with Maurice Barker assisted Dr. Gerstein. From my studies, I am satisfied that psychologists have not developed a satisfactory test to determine whether or not a potential recruit will make a good police officer.

Dr. Gerstein in her study had the following to say:

> "For the selective use of police departments, psychological tests are at the present time very much in the developmental stage. The long search for an unique 'police personality type' has not been fruitful and this fact weakens the possibility of a battery of tests based upon the theoretical psychological profile becoming a feasible reality in the near future".

In conclusion, Dr. Gerstein stated as follows:

> "In summary the selective procedures of the Toronto Police Force are adequate and the present personnel making use of these procedures appear to be experienced, sensitive and competent to make judgments. Supplementation with psychological tests in this instance could possibly strengthen their position, but to my mind at the present stage of their development would not significantly affect their ability to weed out persons with undesirable behaviour characteristics beyond those they already recognize."

While psychological testing is undoubtedly useful for certain purposes, I do not feel that it is sufficiently effective to recommend for police officers or recruits to Police Forces.

During the course of our Inquiry, it was suggested to us that one of the problems in maintaining the Police Force was the number of officers who left it for higher paying jobs in industry and for jobs in police forces outside Metropolitan Toronto where the cost of living is substantially lower. We were also told that senior officers like to retire early and then supplement their pension by a well-paid job in industry as a security officer.

There is probably some truth in these allegations, but on the opposite side of the picture, we were advised that in

1975, 11,266 people applied for employment with the Metropolitan Toronto Police Force. 291 officers resigned, of which 79 resigned for failure to pass the physical examination, etc. but not for misconduct by the officer. 52 retired and seven died. It is true that those persons retiring on pension in 1974 and 1975 were double the number of those retiring in the preceding years. The number of officers who resigned in 1973, 1974 and 1975 are triple those in the preceding two years. However, approximately the same number of officers left the Force in 1966 and 1967 as in the past two years. These figures indicate that the turnover and loss of personnel in 1975 was approximately 7% and the average was 6.6% over the last ten years. I am advised that the rate in industry is 12% per year and consequently the loss of personnel does not appear to be a major problem.

In addition, of the 11,266 applicants to the Force in 1975, only 778 were accepted as probationary constables and it would therefore appear that the Force has every opportunity of staying up to strength and of picking the very best recruits for its number.

All the material available to me leads me to the conclusion that the present methods of recruitment are entirely adequate and that adequate precautions are taken to see that the persons accepted as probationary constables are the proper types of individuals to serve on this Police Force.

Training

One of my prime concerns during the course of this Inquiry was to determine whether adequate training was given to new police officers and whether good retraining was given to existing police personnel regarding the use of force in the performance of their duties.

By its very nature, police work often involves force. Each year in Metropolitan Toronto approximately 600 police

officers are assaulted by members of the public. Of this number, between 125 and 150 receive a bodily injury of some type. Approximately 300 working days are lost due to these injuries. It is interesting to note that these statistics declined in the year 1975. In addition, the Metropolitan Toronto Police responded to 926 "gun calls", that is incidents when someone is reported to be carrying or using a firearm. Despite this, no complaint was made to me concerning the use by Toronto Police personnel of service revolvers.

In order to properly assess police training, Commission counsel and I attended at the Metropolitan Toronto Police College and at the Ontario Police College at Aylmer, Ontario. I had the opportunity of sitting in on a number of courses and lectures dealing with the use of force. In addition, I received copies of the material used in instructing police officers at these two schools. I was impressed with the calibre of the teachers and with the instructions given to the police officers. The material which we perused was adequate and I am satisfied that officers who subsequently use excessive force cannot excuse themselves by saying that they were not adequately trained.

In addition to lectures, audio-visual training aids are used, and these are of great assistance in teaching the officer methods of handling difficult situations. Unfortunately, most of these aids are produced in the United States and some do not entirely suit Canadian situations. This does not in my view cause a great deal of difficulty because the instructing officers point out these matters to the students. I was pleased to discover that one of the important aspects of police work which is stressed is the role of the officer as a peace-keeper rather than a law-enforcer.

The Police College for Metropolitan Toronto is in a small remodelled school. The staff is located in a neighbouring house. To say that these facilities are inadequate is to

understate the case. They are not only inadequate, they are primitive. The dedicated officers running this school are to be congratulated in putting up with their atrocious accommodation.

Plans are underway to construct a new Police College in the Scarborough area. Unfortunately, shortage of funds has delayed the construction of this College for a number of years.

I am aware that in these days of government restraint, it is difficult to recommend the expenditures that are needed to construct an adequate school. In my view however, this must be done and if funds are not available for a new school, some thought should be given to acquiring suitable accommodations in another fashion. I would recommend that the proper officials review their budget requirements and make every effort to find the funds to improve these conditions as soon as possible.

The Provincial Government has just completed a new school at Aylmer, Ontario, which is very impressive and which will materially aid the police forces of Ontario in training officers. However, this does not answer the need for a police school in Metropolitan Toronto.

It has already been determined that the Metropolitan Toronto Police Force should have their own police college. I concur with this decision. There are many reasons why Toronto should have their own school even though they do take advantage of the training and facilities at the Provincial Government police school at Aylmer, Ontario. Should all of the Toronto officers take their training at Aylmer the school would, of course, very quickly become too small. In addition thereto there is considerable extra expense involved in sending not only the recruits, but all of the officers taking retraining to Aylmer for their course. In addition

to the travelling expenses, there is the cost of keeping the officers while they are in school. There would also be many days of service lost to the Metropolitan Toronto Police Force by the time taken by the officers to travel to and from Aylmer. Toronto being a Force exceeding 5,000 uniformed men justifies having their own school. The number of citizens contained in the area covered by the Metropolitan Toronto Police Force exceeds 2,700,000 people and this concentration causes problems which are peculiar only to large urban districts. For that reason special courses must be devised for these special problems which are peculiar to the Metropolitan Toronto district. Since the courses will be primarily for Toronto policemen, it therefore makes sense that these courses be taught in a school in Metropolitan Toronto for the only Force which will be taking these courses.

It is my view that every police officer should have a two or three week course to update his training every three years. This, unfortunately, has not been possible due to the shortage of space in the schools. At the present time, each officer who is promoted attends a course tailored to fit his new duties. However, the law is always changing, as are the problems and conditions of our society and the practices and procedures of police work, and therefore constant retraining and upgrading of police officers is essential to good policing.

I was interested to learn that 56 of the officers of the Metropolitan Toronto Police Force have university degrees and another 147 have some university training. 358 of the officers have Grade 13 certificates. 2,022 have graduated from Grade 12 and the balance of the Force has at least completed Grade 10. Members of the Metropolitan Toronto Police Force attend out-of-town seminars and courses given by the Ontario Police College, the R.C.M.P. and many other organizations. Approximately one out of every six officers presently receives some formal training each year. In my

view, this should be expanded and in some cases, the courses should be lengthened.

It has been suggested that, despite the excellent approach taught at police colleges, the real training of an officer comes from experienced partners and supervisors, and that this "retraining" tends to be contemptuous of the high-sounding and law-abiding principles taught formally. I saw no evidence that this occurs.

However, if it happens that some police officers tell the recruit that his training is not adequate for the "real" world, and that the rules of conduct taught him are ridiculous, I am satisfied that their advice is unjustified and improper. In my view, although lectures can never replace practical experience, the courses and instructions given at the colleges are entirely practical and useful.

It would do no harm to point out to the supervisory personnel in the courses given to them that such advice is not constructive, but indeed destroys the effect of the training received at the schools and that they should not allow such "retraining" to be carried on.

In conclusion, I wish to recommend that every effort be made to increase the retraining and upgrading of police officers on the Force with the hope that every police officer will attend a refresher course for two to three weeks every three years.

I wish to further recommend that the Metropolitan Toronto Police Academy's physical facilities be drastically improved at the earliest possible date.

Chapter XXII

USE OF FORCE REPORTS

The reporting of the use of force by Metropolitan Toronto Police is dealt with in the Rules, Regulations and Procedures of the Force, Chapter VI, Section 12, subsection 5. I set this out below:

> "Report of Force (5) A member who during the performance of duty uses force and during which an injury is sustained by any person or where a complaint is then made or may later be made, shall forthwith:
>
> (i) Notify his Duty Sergeant;
>
> (ii) File a report in duplicate of all the relevant circumstances of the incident for his Commanding Officer, who shall immediately forward one copy to the Staff Superintendent and one copy to the Chief of Police, who shall report the incident to the Board."

Subsection 5 quoted above is clear, precise and unambiguous. It requires that the report be filled out and submitted where force of any kind is used and an injury is sustained, or where force is used and a complaint is made or contemplated.

It was evident throughout the hearings that this regulation was not being followed and that there was some misunderstanding or misinterpretation of its effect. Some officers thought that a report need be made only when requested by a superior officer. Some thought that the seriousness of the injury dictated when a report was required. Some thought it was only the unjustified use of force which

had to be reported. For example, no Use of Force Report was filed by any officer in the Linka case. Sergeant Eric Hudson said in an official report dated August 27th, 1974:

> "He had a small amount of blood coming from his nose, his clothes were up his back and I noted a scuff mark on the shoulder blade area. I questioned the officers re the injuries and I was told that there had been a brief but violent struggle on Charles Street and that the only way to have gotten the accused, LINKA, out of the car was by dragging him out and that the marks on LINKA were that consistent with a reasonable amount of force being used in that application. I therefore did not request a use of force report at that time. Injuries consistent also with the minor P.I. accident in which he had been involved."

It should be the duty of the Sergeant in charge of a station to require prompt compliance with this regulation, and make a note in the appropriate book of record in the station of the name of the person injured, a brief description of the injury, the name of the arresting officer, and the fact that the required reports were in fact made and forwarded as required by the Regulations. The Regulations should be amended to codify this duty of the Station Sergeant, and I so recommend.

Another aspect of this sort of situation came to my attention during the hearings. On occasion, a person arrested would make an initial complaint of an injury at the police station. The injury may have occurred during the arrest, in which case a Use of Force Report should have been completed, or it may have arisen during the course of the commission of the offence prior to arrest, in which case the report is not required.

Regulation V(2)(16) now provides:

> "(16) When a person in custody becomes unconscious or appears to be in acute distress from illness, injury, intoxication, reaction caused by insulin or any drug, he shall immed-

iately be taken to the nearest hospital.

(i) Any person charged with being intoxicated and who requests or on whose behalf a request is made for medical attention, shall be given every assistance in this regard, but informed that the Department will not be responsible for the selection of the Doctor or any fee charged by him.

(ii) When a Doctor has been called, pursuant to the foregoing, the Duty Sergeant may call any other Doctor to examine the prisoner, and his fee shall be paid by the Department."

It is not uncommon that these persons subsequently complain that their injuries were caused by misconduct of the police. The original records of the complaint and of the circumstances of the injury are critically important in determining the validity of such claims. It would be advisable for the protection of both police and complainants, if records were required to be made of the circumstances under which all persons arrested were taken to hospital, or otherwise given medical treatment. I accordingly recommend that Regulation V(2)(16) be amended so as to require that the arresting officer or the station sergeant make out a Medical Attention Report detailing the nature of the injury and the circumstances surrounding it, the names of the arresting officers, and any other pertinent information, in all such cases in which a Use of Force Report is not completed.

The original notes in the memo book made by the investigating officers are often very important. Those persons who investigate the complaints, or who have a duty to report them, such as the Complaint Bureau investigator or the station sergeant, should be instructed to obtain immediate copies of the memo books in cases of a serious nature in order to ensure that they are preserved in their original state for purposes of the investigation or hearing, if necessary.

If the Chief of Police, the Board of Commissioners of Police, and the head of the citizen complaint review procedure receive immediate reports of all use of force involving injury or complaint, and of all persons in custody who required treatment for injury, no cases which require further investigation, whether a Complaint Bureau matter or not, can be overlooked or hidden from public view.

I therefore recommend a further amendment to Regulations VI(12) and V(2)(16) to provide that copies of the reports be distributed to the chief officer of the reconstituted citizen complaint procedure, as well as to the Chief of Police and the Board of Commissioners of Police.

Lastly, I recommend that immediate steps be taken to ensure that all personnel are made familiar with these Regulations and that their provisions be strictly observed in the future.

Chapter XXIII

THE POLYGRAPH EVIDENCE

The complainants in the first fourteen cases heard by the Commission, namely those specifically listed in the Order-in-Council appointing the Commission, had taken polygraph tests. These cases had been reported in two Toronto newspapers, which had mentioned the results of the polygraph tests. I had to determine, therefore, whether the evidence of the polygraph should be heard, and if so, what weight was to be given it.

ADMISSIBILITY OF POLYGRAPH EVIDENCE

Under The Public Inquiries Act, 1971,[1] the Commissioner is granted broad powers of determining what evidence he shall hear. Subsection 7(1) states:

> "A Commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry;
>
> or
>
> (b) to produce at an inquiry such documents and things as the Commission may specify,
>
> relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11."

Section 11 simply states:

> "Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

These sections have been interpreted as giving the Commissioner wide powers of determining admissibility and it would seem that save for the criteria of relevance and privilege, legal rules need not necessarily limit what the Commissioner will admit in evidence. This was the historical view stated by Wigmore and by Thayer. The function of an inquiry, being radically distinct from that of a court, does not require the same niceties of evidence and precision of legal rules as does a trial. This distinction is clearly founded on policy considerations concerning the functions of public inquiries as compared to those of trial courts. A much quoted statement of The Honourable Chief Justice Mulock in In re The Children's Aid Society of the County of York, summed up this principle:

> "...the rules of evidence have no application to such an inquiry. The Commissioner should avail himself of all reasonable sources of information, giving a wide scope to the inquiry."[2]

The Honourable J. C. McRuer, examined the applicability of the rules of evidence in the report of The Royal Commission Inquiry into Civil Rights. He stated:

> "Unless otherwise provided in the statute conferring the power, a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied on by reasonably prudent men in the conduct of their own affairs. The nature of proof should go to the weight of the evidence, not to its admissibility."[3]

Although I was not hampered by strict judicial rules, I found it useful to examine legal precedent in order to evaluate the dangers and limitations of this evidence. Polygraph evidence is in some respects analogous to scientific evidence, such as that of the breathalyzer or radar machines, and in other respects, similar to expert evidence such as that given by psychiatrists. In effect, two questions are asked in this area of the law. First, is the evidence

admissible at all and secondly, if so, to what use may it be put?

Canadian courts have not dealt frequently with the polygraph directly. We have generally admitted scientific evidence if it meets the tests of scientific acceptability and precision. The basic rule is stated by Wigmore as:

> "all that should be required as a condition ...is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indication."[4]

As scientific progress was made, Canadian courts began to accept the admission of various types of scientific evidence. Ballistics for example were not considered to be a matter of scientific knowledge until 1933.[5] Similarly, blood tests were originally admitted only for the purpose of corroborating evidence of physical symptoms,[6] until 1962 when a British Columbia County Court stated:

> "Since 1943...considerable advances had been made in the scientific knowledge of the relationship between the amount of alcohol in the blood and impairment...".[7]

In view of this, the evidence was allowed to stand on its own.

The witness who testifies concerning scientific evidence must be established as an expert who has acquired expertise through a course of special study or through experience. He need not have a university degree or be from a professional faculty. The court must merely be satisfied that the witness has knowledge of the particular aspect of the subject under scrutiny, and that that subject is not a matter of common or public knowledge. The weight of the scientific evidence once admitted will therefore depend to a great extent upon the skill of the witness introducing it. It is clear that the finder of fact may evaluate the expert evidence and may

choose to disregard it.

Today, many different types of scientific evidence are admissible in Canadian courts. Not only are blood tests and ballistics a proper matter for opinion evidence, but handwriting,[8] breathalyzer,[9] x-ray photographs,[10] radar tests,[11] speedometers,[12] fingerprints,[13] palm prints,[14] infra red photograph[15] and even tracking dog evidence[16] are acceptable in our courts of law. In all of these areas, the courts have been concerned with the reliability of the scientific method, its acceptability in the scientific community, and the objectivity of its standards.

The major decision in Canada on the polygraph is Regina v. Phillion in which Mme. Justice Van Camp of the Ontario Supreme Court refused to admit direct evidence of the polygraph test and was upheld by the Ontario Court of Appeal.[17] The learned Trial Judge outlined the prerequisites for the admission of expert evidence. First the jury must be able, on the basis of the scientific criteria adduced by the expert, to form their own opinion and test the accuracy of his conclusions. Secondly, the jury must be assisted and not misled by the evidence given by the expert. Where the jury might be tempted to blindly accept the witness' opinions by reason of the technicality of the evidence, it is important that the opinion be free from all possibility of error. Lastly, the opinion must be based upon criteria that are objective as possible and be subject to as few subjective variables as possible. In view, therefore, of the weight that would naturally be put upon the "lie detector" by a jury, and of the many factors that influenced its accuracy, the evidence was not found to meet the requisite standards for scientific evidence.

American courts originally refused to admit the polygraph as scientific evidence. In an important early decision,

Frye v. The United States, The Court of Appeals for the District of Columbia stated:

> "Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."[18]

Since that time American courts have received the polygraph evidence more kindly. Generally speaking however, they refuse to admit the results unless under "agreement and stipulation", whereby defence and prosecution agree to have the accused person tested by a specified examiner, and stipulate that regardless of the outcome, subject to the trial judge's discretion, the results will be admissible. The American courts have felt that this arrangement protects against the dangers of surprise and of biased or competent examiners.

United States v. Ridling was a landmark decision in which the polygraph evidence was accepted.[19] The Court stated that the scientific psychological basis for the polygraph examination was well-established and that the techniques used, as well as the machine itself, had improved markedly in the past ten years. The Court analyzed the

development of the acceptance of scientific evidence:

> "When opinions interpreting the results are first offered in court, the underlying premises require a great deal of proof, as well as the proper use of these premises, the necessary controls used in the specific cases and the appropriate qualifications of the expert. On proper proof, the evidence becomes admissible...
>
> Finally, the underlying principles and premises become so well established and known that the only real issues for determination in connection with the reception of evidence is the proper use of adequate controls in the specific case to assure good results. In other words, at this stage the Courts judicially notice the basic theories and premises. They need no longer be proved."

In the same year, a California Superior Court ruled that the science of polygraphy was much improved, that recent research established a generally recognized reliability in excess of 90% and that the polygraph now enjoyed general acceptance among the scientific authorities. The court took judicial notice of the fact that many security and governmental agencies in the United States rely upon the polygraph. In that case, the evidence was admitted.[20]

However, even in the United States, many courts have refused to admit the polygraph in evidence or have admitted it only for limited purposes. Whenever the evidence is heard, generally upon agreement and stipulation, admission in each case depends upon a searching inquiry into the qualifications of the examiner, the fitness of the particular defendant for the examination and the methods employed in conducting the tests.[21] All American decisions favourable to the polygraph have been premised on its scientific reliability and acceptance which have been the concerns of Canadian courts dealing with other forms of scientific evidence.

Even if this evidence is heard in an inquiry or in court, it may be that it is properly limited to certain specific uses. In this regard, we may analogize the polygraph evidence to expert evidence given by psychiatrists. Canadian and English courts have considered in great detail the admission of psychiatric evidence that goes to the issue of credibility of witnesses or accused persons. Psychiatric evidence may, like all other evidence, be led concerning a central issue. Originally however, the courts held that extrinsic evidence might be adduced only in three examples of collaterial issues, namely, proof of prior inconsistent statements, previous convictions, and general reputation for lack of veracity.[22] In both England and Canada that position has since been modified. In Toohey v. Metropolitan Police Commissioner, the House of Lords admitted psychiatric evidence for the purpose of attacking the credibility of the Crown's chief witness, where the attack concerned itself with a "defect of mind" that affected the reliability of his evidence.[23] The Ontario Court of Appeal and the Supreme Court of Canada have agreed with this position.[24] Psychiatric evidence may be adduced either if it goes to a main issue such as the capacity of the accused to form the necessary intention, or if it goes to a collateral issue such as credibility only when it indicates a disease, defect or abnormality of mind of a witness. Psychiatric evidence as to credibility cannot be used to buttress the credibility of one's own witness, although it is available to impeach an opponent's witness' credibility within the above limitations.

The courts have been concerned over the use of psychiatric evidence on the "very issue" that the trier of fact is called upon to determine. The better view is probably that psychiatric evidence will very often touch closely upon the very issue, and if the trier of fact understands that it is his sole responsibility to weigh the evidence and to determine the central issue, this ground of objection will not in itself be sufficient to exclude expert evidence.[25]

The admissibility of psychiatric evidence is premised on the reliability and acceptability of the science of psychiatry. Although psychiatry is not an exact nor entirely objective science, it is at least based on objective tests that may be weighed by the trier of fact. As a result, it is the law in Ontario that the grounds for a psychiatrist's opinion should be given to the jury in order that they may weigh his opinion. Although some of the grounds of his decision may well be inadmissible in themselves, it has been held that this will not render his opinion inadmissible, but will go to the weight given his opinion by the trier of fact.[26]

Psychiatric evidence, therefore, because it is considered reliable by the scientific community is admitted in court for limited purposes and its weight will depend upon the trier of fact's view of the expert witness and of the grounds upon which he relied in coming to his opinion. If it can be shown that the polygraph is scientifically accepted and reliable, it will not be inadmissible only because it goes to the "very issue" that the jury must determine or because it is based on hearsay. In both cases, the trier of fact must be aware of his duty to determine the issues for himself, and of his right after weighing the expert evidence, to disregard it or to accept it in whole or in part. It may not be proper to hear polygraph evidence even if generally admissible to attack or to bolster the credibility of a normal witness, when that is a collateral issue.

I have the power under The Public Inquiries Act, 1971 to hear any relevant evidence that might prove useful to the inquiry which I am required to undertake. I determined to hear the evidence of the polygraph, because if reliable, it was relevant to the matters before me in that the credibility of the complainants was a major issue in the hearings of this Commission. It was my duty to hear all possibly

useful evidence. Furthermore, in view of the fact that a great deal of publicity was given to the polygraph tests in the newspaper reports of the complaints of police treatment, it appeared to me that I should hear the evidence and in addition, should hear sufficient general evidence on the polygraph to determine its reliability, its scientific acceptability, its limitations and the weight which I should attach to the test results.

There had not been, so far as I was able to determine a thorough examination of the scientific premises and practices of the polygraph industry in a Canadian forum. A great deal of research and investigation was done by the Commission staff, in order that I might have before me sufficient evidence to determine these matters. Evidence was presented at the public hearings by many experts in relevant scientific fields.[27]

THE POLYGRAPH TEST

The standard field polygraph is an instrument designed to monitor several physiological variables by means of separate pens independently recording certain measures on a moving paper chart. The usual instrument has four "channels". Two of these record breathing movements picked up by pneumatic tubes strapped around the subject's chest and abdomen. Another, the "cardio" channel, is connected to a standard blood pressure cuff around the subject's upper arm. The pen attached to the cuff produces a record of pulse waves from which the operator can determine the heart rate and some indication of changes in pulse pressure. The "electrodermal" channel is connected to a pair of metal electrodes usually attached to two fingers of one hand and measures wave-like changes in the electrical resistance of the skin associated with sweating of the palm, a phenomen commonly known as the "galvanic skin response."

This machine is similar to those used by clinical psychologists in laboratories except that it is considerably more primitive and has fewer channels. The responses that the machine seeks to measure are known as "autonomic" responses. They are traditionally considered to be involuntary as opposed to the nervous and muscular movements known as "voluntary", such as limb movements. The machine, therefore, does not measure "lying". Rather it indicates variations in physiological responses that are, in theory at least, not subject to the control of the person being tested. The field of science which concerns itself for various purposes with machines similar to the polygraph is known as "psychophysiology", a subdivision of psychology concerned with the study of physiological responses reflecting psychological processes or emotional states. The physiological changes are of interest to psychologists because, in part at least, they are related to "psychic events", which is the term used by psychologists for the sum of emotional, conscious and unconscious responses.

The history of lie detection through some form of mechanical test is not a new one. One of our witnesses, Dr. David Lykken, a foremost psychophysiologist and psychologist at the University of Minnesota, reviewed this history for me.[28] In ancient India the veracity of witnesses was tested by a "rice test". After some incantations, a witness took a mouthful of rice, chewed it and attempted to spit it out. If he was lying, according to the theory of the test, the rice would stick to his palate. The premise of this is that lying induces anxiety, which causes the mouth to be dry. It was of course essential that the witness had great confidence in this test, so that if he were lying, he would be sufficiently concerned about the test to be anxious. In the nineteenth century, various machines were developed by Lombroso and others to record physiological responses. There was some use of blood pressure measurement by the American army in World War One. In the 1920's, a young

medical student, Larson, developed a portable polygraph machine and his apprentice, Leonard Keeler, later developed a modified portable polygraph that was the prototype of today's machine. In 1930, Keeler joined the newly developed Scientific Crime Detection Laboratory affiliated with Northwestern University's School of Law in Chicago, subsequently taken over by the Chicago Police Department. Another person affiliated with the Laboratory was John Reid, who had been a police officer and was a law school graduate. He became involved with the polygraph while working with Professor Fred Inbau. Mr. Reid developed the modern polygraph technique and today he and his firm, John E. Reid and Associates in Chicago, are the foremost polygraphists in the United States. Most modern day operators trace their methods and machines back to Larson, Keeler and Reid. Mr. Reid gave evidence before me[29] and was the operator that Madame Justice Van Camp in Regina v. Phillion was requested to hear, and about whom she stated:

> "I am satisfied that the examiner who gave these tests was as skilled as could be produced."[30]

Since the Second World War, many federal agencies in the United States have made extensive use of the polygraph for the purposes of employment screening, periodic check-ups on their employees and criminal investigations. American security departments, such as the Federal Bureau of Investigation, the Central Intelligence Agency and the Department of State use the polygraph. The Army runs a large polygraph school which was opened in the mid-1960's. There are presently approximately 14 American polygraph schools, whose courses range in length from a few days to a few months.

By and large, this field is filled with nonpsychologists and with people who have a law enforcement background. Dr. Lykken estimated that there are from four to five thousand full-time practising polygraph operators in the United

States giving an estimated 250 thousand to 2 million polygraph tests annually.

Dr. Lykken also stated that the polygraph test is, for various reasons, the most difficult, subtle and complex of psychological tests and more than any other, requires the expertise of trained scientists. Unlike other psychological tests which involve a standard test format or a standard set of questions, this test requires that the operator evolve a separate and unique set of questions for each individual test. It calls for considerable psychological insight, sensitivity, skill, ingenuity, as well as good judgment, psychological and test-giving training. The Reid technique, followed by most of the operators in the United States, commences the polygraph test with a pre-test interview. This interview varies from a few minutes to more than one hour in length and during it, the operator obtains the necessary personal history of the subject and as well attempts to convince the subject that the machine cannot be "beaten". The subject is familiarized with the machine, and is generally hooked up to it before the tests are run.

As well, the examiner must ensure that the subject is sufficiently relaxed to permit the machine to give an accurate and meaningful record of his physiological responses. For example, blood pressure may be affected by tension in arms or legs. The operator must identify and relieve this tension. Mr. Reid has developed an instrument to record invisible muscle tensions and movements in order to alleviate this problem. Although these instruments are used in his laboratory, they are seldom used in tests performed elsewhere. On the other hand, an individual without tension is not a good subject and therefore the examiner must ensure that some median level of tension is maintained.

The pre-test interview serves a screening function as well. The examiner determines if the subject is mentally or

emotionally capable of taking the test, and evaluates his intelligence.

During the pre-test interview, the operator develops a set of questions for the purposes of the polygraph test. The subject is apprised of these questions, and has an opportunity to develop fear, or if innocent, to relax. If the wording of a question concerns the subject, the matter can be resolved at this time.

The operator assesses the subject during the pre-test interview for truth-telling or deception on the basis of behavioural indications. Mr. Reid and his people have studied this area and have published their findings concerning what is indicative of deception and what is consistent with truth-telling.

The original technique of the polygraph test was developed by Leonard Keeler and consisted of comparing responses to relevant and irrelevant questions. At least 25% of the tests were found to be inconclusive and it was this that prompted Mr. Reid to search for the perfect polygraph test. He developed what is known today as the "control question technique", followed by most of the major polygraph outfits in North America.

In the Reid tests, there are three sorts of questions. First, there are irrelevant questions such as "Is your name John?" which space out the emotional responses to a test and grant the subject some relief from tension. There are of course "critical" questions dealing with the matter at hand. Lastly, there are "control" questions which are fundamental to this type of testing. A control question might be "Have you ever stolen anything in your life?" The operator works the subject up in the pre-test interview to be extremely concerned with his answer to the control questions. He will tell the subject that an innocent person can fail the test

only if he does not accurately answer the control questions. The physiological responses to the control questions shown on the graph are compared to those of the critical questions and in theory, a truth-telling person will have been "psychologically set" to be more concerned with the control questions than with the critical questions. A guilty subject, on the other hand, will see the control question for what it is, namely a red-herring. He will be primarily concerned with the critical questions and will show a stronger reaction to them on the chart than to the other.

The development of the control question is, therefore, crucial to the Reid technique. The subject must be worked up to a real anxiety about the accuracy of his answer to that question. At the same time, he must be forced into a "no" answer before he is entirely sure that he has been accurate. The graph will evidence an emotional response representing at the very least, confusion in the mind of the innocent subject, greater than his emotional response to the critical questions. It is important that the question be tailor-made for the matter in issue and for the individual subject. The success of the control question technique will necessarily depend on the operator evolving a control question which is of at least equal arousal value to the subject as is the critical question. Theoretically then, the response to the control question will be the same or greater than the response to the critical question, unless the latter involves, in addition to the basic arousal value, the factor of the subject's guilty answer. It is equally crucial that the examiner convince the subject of the importance of the control question. If the innocent person is not certain in his mind that the answer to the control question may cause him to fail the test, he is unlikely to be more concerned with the answer to that question than with his answer to the question concerning the allegations made against him.

There is as well, in the Reid technique, a "card test" in which the subject is asked to pick one from a number of possible cards. He then returns it to the deck and is asked whether he chose each card in turn. He is instructed to answer "no" to all of the questions, even though one response will certainly be untrue. This test has three ostensible purposes: one, it shows the examiner a "lying" response of the subject, secondly, it "stimulates" the subject, and lastly, it convinces the subject of the efficacy of the machine, because after the test is run the examiner informs the subject which card was chosen. It is worth noting first, that the very fact that the lie is sanctioned by the examiner establishes a different stimulus from an undesired lie and is therefore of dubious comparative value. Secondly, the cards are marked and the examiner does not rely on the graph to determine which card was chosen.

The test questions are run through three or four times generally in the same order, and the card test is run at least once. The physiological responses are recorded on the moving paper chart. Other techniques, such as the "guilt complex question" or altering the order of the questions to avoid anticipatory responses, are often employed as well.

After running the tests, the operator analyzes the results on the graph, compares them to his tentative opinion arrived at during the pre-test interview and makes a finding of truth-telling, deception or inconclusive. The examiners and experts that gave evidence at the Commission hearings were asked how the pre-test interview observations affect the interpretation of the graph. Ideally the conclusions that the polygraphist comes to on the basis of his observations in the pre-test interview should be consistent with those indicated on the graph. If they are, he has a fair degree of certainty that he is correct in his diagnosis. If they are not, the test will be read as inconclusive or will be rerun. It became evident to me and I shall discuss this in

more detail at a later point, that, in fact, the interpretation of the graph itself is a highly subjective process and that it is unrealistic to assume that the observations based on the pre-test interview play a small role in this.

A more complete discussion of the "control question" technique may be found in the Bible of the polygraph business, a textbook written by Mr. Reid in conjunction with Professor Inbau.[31]

Other testing techniques exist, but the experts and literature examined by the Commission made it clear that the Reid technique is the best available and provides the greatest number of safeguards. As well, the fact that the bulk of the complainants whose allegations were heard by the Commission had been tested by Reid's chief examiner, Mr. Robert Cummins, caused me to devote most of my investigation of the polygraph to this technique.

In order to assist me in determining first, the essential validity of the polygraph and secondly, the reliability of an individual polygraph examination, thirteen experts testified at the hearings, including scientists and polygraph operators.

THE THEORY OF THE POLYGRAPH TEST

The basic assumptions of polygraphy are that there is a regular relationship between lying and certain emotional states and that there is similarily a regular relationship between these emotional states and changes in the body. Physiological response may be voluntary, for example shifting in a chair, or it may be classed involuntary, such as a rise in pulse rate. The machine is connected to four "involuntary" response measures and purports to record changes of those measures. These involuntary responses are known as "autonomic"

responses and traditional wisdom has it that they cannot be consciously controlled. As a result of certain stimuli, one's heartbeat will increase and this despite every effort to inhibit its response. The fact that we do respond physiologically to stimuli, both emotional and physical, is undoubtedly true. One problem is that we respond to many stimuli and no matter how controlled the environment, more than one stimulus is likely to exist at any given time. The response shown on the polygraph is relevant only if it comes from an attempt to deceive. If it does not arise from this stimulus, it is irrelevant and perhaps misleading. Individuals vary in how they respond to the same stimulus and each person may respond in similar ways to various stimuli. It is, therefore, essential to the validity of this technique that a controlled environment is created, such that it is reasonably safe to say that a particular response was engendered by a particular stimulus, or, in the alternative, that there was no response indicating that a certain situation does not serve as a stimulus to this individual.

The machine can tell us only that at a particular point in time the subject showed a response that indicates some form of arousal, but whether that arousal was due to fear, guilt, anger, amusement, a sudden draft or a quick unrelated thought is not determinable.

Dr. John Lacey, a psychophysiologist and much published psychologist of the University of Louisville and the Fels Research Institute in Ohio, has done a great deal of research on autonomic response.[32] He testified that autonomic response is constantly occurring in response to many stimuli and that individuals may vary as to which measures show their responses. Furthermore, an individual may react on different measures depending on what stimulus was administered to him. Another witness, Dr. Gilbert Heseltine, a Canadian psychiatrist at the University of Western Ontario, with considerable research background, called this the "target organ" phenomenon.[33]

All individuals show stress on a particular system, but not all show it on the same systems. Some people, for example, develop ulcers under stress; others get headaches.

Both Dr. Lykken and Dr. Lacey emphasized that "lability", the amount of physiological change in response to a stimulus, varies from person to person. Some people show very little lability, regardless of the stimulus and others appear to react greatly to all stimuli. There is, therefore, no objective standard or point at which we can say that responses greater than this amount is indicative of some major emotional response. Individuals' responses cannot be compared. Furthermore, each of us may respond to the same stimulus differently at different times, and may respond differently at the beginning of a test than twenty minutes later.

Dr. Lacey's studies have proven that few people respond on all measures shown on the polygraph machine. Many respond on only one of the four and many others will respond on none of the particular measures shown, but would indicate response on a more sophisticated machine that had ten or twenty channels. Responses on the different measures may, in fact, be contradictory indicating that various stimuli are causing several reactions. On one question, a subject might respond considerably on the cardio channel and little, if at all, on the respiratory channel. At another point the same individual might reverse his responses. If the first question were a control question and the second a critical question, it is problematic for the examiner to decide which pen reflects the response to the test questions. Polygraph examiners have "preferred" measures, and therefore would interpret the chart accordingly, although it is possible that the real question is not which channel is most reliable, but on which is the subject reacting to the polygraph test. Scientists have proven that each individual has a preferred physiological channel of response, and that therefore reliance on one

channel or another must depend not on the examiner's preference, but on the "target organ system" of the subject. A corollary to this is, as Dr. Lacey's studies indicate, that correlations between measures is very low. It is rare to find one variable accounting for 50% of the variation of another variable.

Under great stress, "specificity" of response, the preferred individual response on only the target organ system, breaks down and more widespread physiological change is found. In general however, psychophysiologists have found that preferred patterns of response are produced over lengthy periods of time. Furthermore, in a large number of subjects, it was found that the pattern of response was the same or similar in a single individual for many different types of stimuli. Nonetheless despite the high proportion of reproducible reaction for a particular individual, only a very small proportion of the population are so rigidly physiologically organized that they will invariably react on one channel, rather than on another to a given stimulus. Many, if not most, have at least some period of random response.

The environment affects the channel on which the individual will respond. Blood flow, measured primarily by the cardio channel, is affected by humidity as is the sweat gland activity and to some extent, respiration. In order to maintain any confidence in the interpretation of the records, such factors as temperature, humidity, season, noise level and so on, must be rigidly controlled.

Genetic and environmental factors enter into the determination of differential responsitivity, reactivity and lability with respect to different physiological measurements. For example, obesity in the upper arm will affect the recorded accuracy of the cardio channel. Dark-skinned persons have diminished skin resistance response as compared

to light-skinned persons, apparently due to the structure of the skin. Similarly, callouses on hands will diminish skin resistance responses. Sweat gland activity is determined biologically as well. Blood pressure lability appears to be genetically influenced. The evidence I heard and the literature presented to me made it clear that neither quantitative nor qualitative analysis is possible, either as between individuals or with respect to a single individual at least in connection with a test which is, at the most, two hours in length from beginning to end.

It is indisputable that no single physiological response can be characterized as lying. Scientists are agreed that the reaction of different individuals in a given situation will vary, and as well, "lying" is itself a subjective and variable state. Dr. Kenneth McKnight, a psychiatrist at the Clarke Institute of Psychiatry in Toronto, and a trained polygraph examiner testified:

> "I would point out that with respect to lying I don't think there is a single emotion involved with lying, with one person. It may be simply the guilt associated with either the act under question or the guilt associated with lying about a significant thing. In another circumstance it may be simply fear of consequences, the stress that is involved, and I would add a further dimension, it may be the kind of emotion experienced in lying would depend on whom the lying is being done to, a parent, a policeman, a judge, a priest, may prompt different types of emotion for the same -- I don't think it's even reasonable to expect constant emotions between individuals with respect to lying. What one is clearly doing is measuring varying degrees of arousal or stress or stimulation of part of the nervous systems ..."[34]

Naturally, any of the emotions that might be involved with lying, might also derive from other causes. The physiological response indicated in clear ink on the chart does not tell

us what emotion motivated the response, whether that emotion was aroused by lying, or if the stimulus involved an emotion in the first place. For example, Mr. Reid admitted that anger will affect the results of the graph. The burden on the examiner is heavy to ensure that anger is recognized and either delay the test or alleviate the anger.

Dr. Lacey discussed the problem of the connotative values in words themselves that evoke unconscious response. In a laboratory, the clinical psychologist attempts to make provision for this by employing frequency count tests, associative experience tests, reaction time measurement and so on. It can never be done to perfection, but no clinical psychologist in his opinion would derive meaning from tests involving physiological response where such protection had not been attempted.

Dr. Lacey pointed out that the question, "Is your name John?" will evoke a greater response than "Is 2 + 2 equal to 4?". As a result the words and concepts used in the questions will themselves determine the strength of the response. To know whether a particular word or a particular sound triggers off a response in a subject requires considerable refining and experimentation. This is not a matter that the polygraph operators are trained to consider nor in fact, do they perceive it as a real problem.

The studies done by clinical psychologists indicate that it is not the lying response, but, in fact, the question that acts as the stimulus. Listening to the question triggers the same response as verbally responding to it. If this is so, then whether the subject answered "yes" or "no" would be immaterial. The phrasing of the question, its inherent emotive content and the tone in which it was uttered are the determining factors. If the same response is possible to the question "Is your name, John?" when it is

not answered, as would occur if it were answered either "yes" or "no", it is not theoretically possible to distinguish between emotional arousal and deception or truth-telling.

Dr. Martin Orne, a psychiatrist and professor at the University of Pennsylvania who has worked with and is an admirer of John Reid has done much research in this field.[35] His studies indicated that a passive listener did not react to the questions, but subjects who were emotionally involved with the tests, in particular, who tried to control their responses to "fool" the machine, produced easily detectible physiological response by merely listening. An Israeli study done by Dr. Sol Kugelmass employed a card test in which the subjects were told to answer "yes" to each question. The subjects therefore "lied" each time except to the question concerning the card that they had actually chosen from the deck of cards. The subjects responded physiologically on giving the truthful answer.

Even if the environment can be so controlled that the only stimulus is the test question, the evidence overwhelmingly supports the conclusion that the mental processes resulting in physiological change are prompted by complex and often unconscious reactions to a many-dimensional stimulus that is in part the arousal value of the question, in part the words in the question, the test itself and, of course, the tensions and fears concerning the situation that has required the subject to take the test in the first place. In order to determine whether a response is significant, the operator must perform a complicated psychological analysis of the many influences at work and this, of course, includes the particular mental makeup of the individual subject.

The comparison of the responses to the control questions with those of the critical questions involves not only these difficulties, but the more basic problem that the theory is

premise upon standard psychological [illegible] effective for all subjects.

The control questions must have an equal emotive value as the critical questions, in order to justify the conclusion that the graph will show or could show a greater response to the former than to the latter. The development of questions with "equal arousal value" involves considerable psychological complexity, in that account must be taken of the actual words used, of the subject's instinctive responses to the concepts in the questions, as well as of the threatening situation in which the subject finds himself. Even if the examiner were sufficiently skilled to have a good chance of arriving at a control question of high emotive value, it would appear to be a matter of common sense that many people wrongfully accused of a serious crime will never be concerned about a control question concerning a lesser matter. The control question is formulated to cause the subject considerable anxiety. The examiner will press the subject in an attempt to get him to answer "no" to the control question before he is quite satisfied with his answer. Having told him that it is extremely important that the answer be completely accurate, the theory assumes that the subject's residual anxiety will cause embarrassment, shame, or a "known lie reaction". Dr. Orne testified that uncertainty looks the same as deception on the graph and it is not material which emotion is aroused by the control questions. It is critical that the control question be tailored to the specific individual being tested in the situation with which the critical questions are concerned. It is not proper practice according to the text, Truth Deception, to have a standard control question. From the evidence before me, it appears that standard questions such as "Have you ever stolen anything?" and "Have you ever cheated anyone?" are [illegible].

The "psychological set" of the subject that is, in theory at least, established by the examiner in the pre-test interview was criticized by the psychiatrists and psychologists whose evidence I heard. They pointed out that people do not react identically in a given situation and that it is, therefore, a dubious proposition that all persons, if innocent, can be programmed to a greater concern for a certain set of stimuli than for another. Of course, if the subject is not aroused, little or no reaction will show on the graph and it will be possible and even likely that a comparatively greater response will be indicated on the critical question. Mr. Reid was asked how a lack of response to a control question would be interpreted. In general, this would be an indication of deceptive behaviour. However, he admitted that it might simply be that a good control question for that individual had not been developed. If there is no reaction to the control questions, a good examiner would attempt to find a question where some arousal is indicated. This is a theoretical answer to one criticism of the polygraph technique, but unfortunately, such a standard of perfection and individualism does not appear to be met in the tests given by even the best examiners.

When the polygraph operators were asked at the hearings whether a person accused of a serious crime might well refuse to concern himself about some minor matter, their response was invariably that this simply does not happen, that all persons can be programmed in the necessary way. Dr. Heseltine pointed out that a sophisticated person is less prone to be "psychologically set" than an naive subject, and that even the latter, although believing that the control questions are very important, might be so threatened by the accusation implicit in the critical questions that his unconscious reaction would override his conscious concern.

Dr. Frank Horvath, an erst-while polygraph examiner with John Reid who subsequently did graduate work at Michigan

State University in a related field, testified that it is always possible to set effective control questions although on occasion it may be more difficult than at other times.[36] He stated:

> "I know from the research that has been done that the control question theory in essence is accurate...we do know that truthful people, people who regardless of the offence they are accused of, whether it is a theft of $10,000 or it's a homicide, if they are indeed telling the truth on those issues they become much more concerned about control questions during the testing than they do about relevant test question."[37]

The polygraph examiners had many opportunities to answer the problems and criticisms suggested by psychiatrists and physiologists. Unfortunately, their response was invariably that the criticisms were not valid because, in their experience, the test worked. I have come to the conclusion that I must accept the evidence of the psychiatrists and physiologists, which is consistent with both my common sense and my personal experience, that all individuals do not react in identical ways in a given situation, and that programming human responses is at best imperfect. In my opinion there is a real possibility that many innocent persons accused of crime would be unconcerned with what has been suggested to me are good control questions in comparison with the actual accusation. I have no doubt that some people do react as polygraph operators insist they must, but I am not convinced that this latter group of people would be an overwhelming proportion of our population.

Certain problems raised by theorists and scientists are answered by polygraph experts with specific techniques. In order to avoid "spot responders" at least one series of test questions during the polygraph test is asked in an order different from the other series. This also avoids the problem of anticipatory response which sometimes occurs when a subject knows that the critical questions are about to be

asked and responds to that knowledge.

The person who might react to any accusation is, in theory, protected by a "guilt complex" question, whereby the examiner develops an accusation similar to that actually levelled against the subject. For example, if the subject is accused of a rape, he is questioned about another rape. As this second crime is purely hypothetical, a response to it indicates a guilt complex. In fact, of course, it is frequently not possible to establish a plausible and similar allegation and it is also a matter for some concern that not all innocent persons will necessarily be "psychologically set" in the pre-test interview to be more concerned with a hypothetical crime than with the crime that stands them in very real peril. This type of question is not used routinely by many polygraph operators and therefore its use depends on the discretion and perception of the individual examiner. However, the concept of the guilt complex question is interesting in that whether it is effective or not, it indicates that examiners perceive the possibility of truthful persons being more aroused by an accusation than by a typical control question, although they flatly denied the possibility in giving evidence before me.

There is another form of polygraph test known as the "Guilty Knowledge Test". In this test, the questions are phrased to give the subject alternative facts concerning the crime, the truth of which only the police and the perpetrator know. For example, the question might be asked, "Was the murder weapon - a gun, a stone, a knife or poison?" If no publicity had been received on this point and if only the investigating team and presumably the guilty person know which was used, then an innocent person is unlikely to respond on the right choice (though there will be a one in four chance that he does), but the response of the guilty person should occur at the naming of the actual instrument. If several items such as this can be put on a test, then the

chances that an innocent person will react to all of the guilty-knowledge items is lessened and the chance that a guilty person will be detected is increased. Unfortunately, although the literature and the evidence I heard indicates that this is a more reliable method of testing, the real world does not very frequently lend itself to the use of this test. Furthermore, it is unsuitable for tests used for the purposes of employment screening and periodic check-ups of employees.

It was stated to me time and time again, that a belief in the efficacy of the polygraph machine is closely related to its accuracy. This belief must be created by the polygraph examiner and this is one of the major purposes of the pre-test interview.

In one experiment of Dr. Orne, the detection rate in a card test of uninstructed subjects proved to be very low, only slightly better than chance. With a second group who had been instructed that this was an experiment in lie detection and that the machine was very difficult to fool, the detection rate was in the area of 72% - 80%. Other studies that Dr. Orne was involved in proved the same thing, namely that the belief of the subject in the efficacy of the polygraph is crucial to its success and furthermore, that another major factor is whether or not the subject wanted to be detected. Dr. Orne concluded from these experiments that the polygraph which is usually presented as a physiological test of deception using various psychological inputs is, in fact, a psychological test, because psychological emphasis affects it radically.

Another issue in which the experts concurred was that unless there is something at stake for the subject in taking the test, accuracy rates cannot be high. Even Dr. Horvath, a strong supporter of the polygraph, agreed that the test might theoretically be beaten if the subject did not care

about the results. However, Dr. Horvath later stated that the "myth of the machine" namely, that the machine is infallible, is not a crucial factor in the accuracy of the polygraph. He testified that persons who know something about the machine, such as police officers, are excellent subjects. It is worth noting here that in view of the increased reliance placed upon the polygraph by law enforcement agencies, it might well be that police officers in fact are those persons most convinced of its accuracy, rather than vice versa. At any rate, despite this unconcern, polygraph operators expend considerable effort in the pre-test interview to convince the subject that the machine is effective by use of the rigged card test and verbal "reassurance".

At best, the polygraph indicates only whether the subject believes what he is saying. A subject who has convinced himself of the truth of his statements will not react physiologically and will pass the test even if those statements are untrue. In the cases at the Commission, we had an excellent example of this. Mr. Bonner, whose evidence I was entirely unable to believe, passed the polygraph presumably, among other reasons, for the fact that he may have been convinced of the truth of his allegations, and perhaps also due to his history of heart disease. It is loosely stated that "psychopaths" cannot be tested, although there is some controversy over whether psychopaths exist and if so, what a "psychopath" is. Dr. McKnight gave his opinion that delusional, paranoic and psychotic subjects may be untestable. Various studies in the literature have proven that persons with mental disorders frequently exhibit the same behavioural characteristics as deceptive persons and furthermore, may react in "abnormal" ways not taken into account in traditional polygraph theory. For this reason, the studies show many "false positives", that is false findings of deception. Alternatively, it is theoretically

possible that some of these people might pass a polygraph although lying.

Dr. Horvath stated that it is his opinion and that of Mr. Reid, that the more educated the subject, the better the test. He could give no reason for this, nor any data other than their accumulated expertise. Furthermore, this runs contrary to good common sense and the evidence of Dr. Heseltine that it is difficult to program sophisticated and intelligent people. Other theories were placed before us that certain racial groups were poor subjects and again, inadequate research has been done to justify any firm conclusions. The examiner must screen his subjects in the pre-test interview in order to weed out untestable persons, obviously a matter requiring some considerable psychiatric expertise.

The research done by several physiologists in recent years leads increasingly to the conclusion that the traditional theory of "autonomic" response is not correct. Studies are showing that the so-called involuntary system is, although not as easily controlled as the voluntary, controllable to some extent. If this is so the polygraph can be defeated. Dr. Burke Smith, a clinical psychologist teaching and on staff at the University of Virginia Hospital and School of Medicine testified concerning various studies in the control of the so-called autonomic system.[38] The most important early studies were made by Professor Joseph Kubis at Fordham University. His subjects picked a number out of a hat and subsequently were tested about which number was chosen. In the first run-through, the polygraph operator was successful in identifying the number chosen 75% of the time. The accuracy rate did not decrease when the subjects were told to completely relax. In this experiment however, when the subjects were attempting to deceive the operator, on occasion the graph indicated an incorrect number and at other times, one channel would indicate one number and another, a second

number. The third test involved the subjects flexing their toes unobstrusively. This led to a false conclusion by the examiner in 90% of the cases; the accuracy rate had dropped from 75% to 10%. When the subjects were asked to think of something exciting or stimulating, the accuracy rate was 25%.

I was given the opportunity of hearing the evidence of Dr. George Heseltine who has been involved in research in the field of bio-feedback. He explained the theory of controlling the autonomic system by analogy to a small child learning to move his arm through space in order to feed himself. He is rewarded by the food he receives and by parental approval. Similarly, by connecting subjects to a polygraph machine, or rather the more sophisticated laboratory machine, the subject obtains "feedback" concerning his autonomic responses. In this way, scientists have discovered that people can learn to control these systems. Some people instinctively grasp how to control the autonomic system. Other persons can learn to do so. This study has aided the treatment of psychosomatic disease, which frequently persists after the underlying anxieties and emotional disturbances have disappeared. Dr. Heseltine stated that people learn habits of both voluntary and involuntary response and that through bio-feedback, both sorts of reactions can be relearned. Clearly, if the measure can be controlled, the premises on which the accuracy of the polygraph depend are not invariably correct. Dr. Heseltine's work indicates that the great majority of people are able to learn to control these measures. Furthermore, in attempting to reduce stress measurable on one channel, it is feasible and not uncommon for people to "displace" this stress and if it is evidenced on another measure, the machine must record that measure in order to detect the existence of the stress.

Dr. McKnight and Dr. Horvath were skeptical of an individual being capable of controlling all of the recorded

measures at one time. Furthermore, Dr. McKnight stated that if a subject consciously depresses or regulates his respiration, the graph will give him away because natural respiration is not even. Dr. Heseltine nonetheless disagreed; when the successful subjects properly controlled their autonomic responses the graph reflected normal physiological activity. The time necessary to learn this control varies from individual to individual, but on the average it is short. One experiment requiring control of several muscle fibres took less than fifteen minutes and heart rates are even easier, taking less than two minutes. This science is in its infancy, but even now poses a real problem to the polygraph industry in that it suggests that people can be taught to beat the machine, and a few can do it instinctively.

VALIDITY AND RELIABILITY

Determining the reliability and validity of the polygraph test has been a source of difficulty. The experts generally agree that there are limitations to drawing an analogy between laboratory and field results. For example, in the laboratory, the galvanic skin response is the most effective and accurate channel. The polygraph operators, however, claim that it is the least reliable in the field, although several studies of field tests disagree with this contention. Various reasons were offered for the difficulties examiners have with the "GSR" channel. Dr. Orne suggested that it is the only electrical channel on what is otherwise a very primitive, mechanical machine. Many of the polygraph experts may not understand it and are not sufficiently versed in electrical engineering to maintain it. In one study of government machines, fully 90% of the GSR equipment was out of order. The other channels are in Dr. Orne's words "absolutely foolproof". This would naturally have a bearing on the utility of the GSR in the field. Dr. Lacey mentioned that due to the extreme sensitivity of the GSR channel, the intrusiveness of the extremely uncomfortable

"blood pressure cuff" would have a great effect on the reading. He quoted an Israeli study by Dr. Kugelmass which suggested that when the pain, discomfort and interference of the blood pressure cuff was not present, the skin resistance response was an excellent indicator, at least insofar as polygraph accuracy extends. When the skin resistance was measured concurrently with the blood pressure cuff, the skin resistance accuracy went down. Subsequent work by Dr. Kugelmass indicates that the GSR is influenced by a great many factors. The necessity of a controlled environment, important to the accuracy of each measure, is even more necessary to this channel. Dr. McKnight suggested that one could never have, except in the laboratory, a sufficiently controlled environment to justify reliance on the GSR. This may be true, but it also evidences the danger that although the other measures are not as volatile as the GSR, they as well may be reacting to environmental and other stimuli, but are not being interpreted in that way due to their less dramatic responses.

The studies concerning the accuracy of the polygraph are few and far between. The polygraph operators criticize the laboratory results which generally do not reflect phenomenally high rates of accuracy by stating that in a laboratory the subjects have nothing at stake and that a valid comparison cannot, therefore, be made with real subjects. Furthermore, the laboratory studies involve different populations, generally speaking students, rather than persons in the criminal justice system and it may well be that psychological or emotional differences exist. In the field, however, there is very little chance of determining whether or not the polygraph reading was correct. The only reasonably safe standard of truth would be the situation whereby after a polygraph reading, the subject confessed and through information in that confession the police were able to verify the confession itself. This, of course, is the ideal situation and one that occurs in a minute percentage

of the tests given. Generally speaking, the figures given for accuracy by polygraph experts reflect the number of their polygraph examination results that have been proven wrong. Another witness compared their estimates of validity to a surgeon who performs one hundred operations, sends ten samples to the laboratory and is found to have unnecessarily operated once. The proper statistic is that he was wrong in 10% of his cases. If he states that he has only a 1% inaccuracy rate on the basis of this data, his figures are simply not reliable. It is unfortunate that the evidence I heard from witnesses such as Mr. Reid involved this latter type of reasoning in support of extraordinarily high claims of accuracy. Mr. Reid testified that,

> "We estimate that we have a possibility of 1% error, but that is far above what we have discovered over these whole years of something like 34 years I have been in this field."[39]

He added that the discovered error is one-tenth of 1%, and that this reasoning is all the more convincing in view of the fact that subjects never return to complain that an error was made. His firm has tested over 6,000 police officers of the Chicago Police Department and on the only occasion when a subject complained that he had been improperly interpreted, when the Reid laboratory attempted to check the result, the man was suspiciously non-cooperative.

Dr. Lykken outlined three field studies that were the most adequate, and agreed that laboratory studies are not a good approximation of the validity of the machine in the field. The first was made by P. J. Bersh and was published in 1969. It used army files of personnel investigated for the purposes of court martials. Four experienced army prosecutors were given completed files of the cases and asked to decide whether the person involved was guilty or innocent. Each looked independently at the files. For that group of files on which all four prosecutors agreed, Bersh

compared the diagnosis of the original polygraph expert who had made his decision on the basis of the charts and the facts in the file. The concurrence of the polygraph examiner with the "judges" was determined to be 92%. However, when only three of the four prosecutors agreed, the polygraph expert's judgment agreed with the majority view in only 75% of the cases. When the information available in a file left room for doubt, as one would expect, consensus decreased. This study indicated that the judgment of the polygraph operator was to some extent influenced by the facts of which he was aware.

In 1971, Horvath and Reid published a study that had been made on the basis of data in files of a private polygraph company. All of the cases had been verified by a subsequent confession, either of the subject or of another person exonerating the subject. A group of trained polygraph operators reviewed the charts and determined whether the person was deceptive or truthful. The results showed 91% accuracy.

The most recent field study was accomplished by Dr. Horvath as his doctoral dissertation at Michigan State University in 1974, using files of polygraph tests given by an unidentified mid-western state police department. One hundred and twelve files were obtained, half of which were verified by confession and half of which were not. Ten experienced polygraph experts evaluated the charts independently of the other available data. Reliability, that is the agreement between the judges, was approximately 87%.

Validity however, was not so impressive. In the verified cases, the judges were correct on an average 63% of the time. Different categories, however, showed remarkably different results. Over 78% of the judgments of the judges in the cases of persons verified to be guilty of a crime against the person were correct. Over 75% of the subjects

verified to be guilty of a property crime were detected by the ten experts. But only 52% of truthful persons verified to be so, accused of property crime, were cleared by the judges, and a shocking 50% of truthful persons accused of a crime against the person were properly called that by the judges. In other words, half of these truth-tellers were diagnosed as deceptive by the average polygraph expert in the experiment. This is no better than chance.

The opinions of the judges in the unverified cases were measured against that of the original polygraph operator, although, of course, there was no means of determining the truth. The judges agreed with the original polygraph expert's assessment in 80% of the cases in which the original assessment had been "deceptive" concerning a crime against the person. The lowest figure for the unverified files arose in the cases of persons originally assessed to be truthful, concerning crimes against the person, where the judges agreed with the examiner only 37.9% of the time. These subjects had a chance of only one in three of being called truthful by the judges on the basis of the polygraph chart alone.

Dr. Horvath's study found that the difference in experience of the examiners did not have a significant effect on the accuracy of their interpretations of the records.

Dr. Horvath, who is a strong supporter of the polygraph, was asked about his findings. He pointed out that the experiment involved interpretation of only the physiological data and in his opinion, because the field polygraph operator has considerable psychological input from his observations of the subject's behaviour, the validity of the field test would be vastly better. The study made by Dr. Horvath in conjunction with Mr. Reid in 1971 was cited to support this thesis. In that study, results were much higher and the examiners had the benefit of the facts in the files in addition to the actual charts of the test.

Mr. Reid quoted a test run in 1958 by Warren Holmes in Miami, Florida. The accuracy rate on the basis of the chart alone was 75%. The examiners were then given the evidence available including the observations of behavioural signs and accuracy increased by 8% to 83%. Another study made by Hunter and Wicklander for Mr. Reid indicated 88% accuracy on the charts alone and 92.5% after all other data was made available to the examiners. This is an increase of only 4% in accuracy. These studies offer little support for Reid's and Horvath's theories concerning the Horvath dissertation. Even if accuracy increases from 4% to 8% on the basis of the examiner having all available information, a truthful person accused of a crime against the person according to Dr. Horvath's study, would have a 42% - 46% chance of being incorrectly identified. It is also worth noting that the figures for the validity of the chart alone in these studies are vastly different from those found by Dr. Horvath, and all witnesses were agreed that the latter was probably the best and certainly the most careful work done in the field to date.

Dr. Horvath denied that this study accurately reflects the validity of the polygraph, on the ground that only the physiological data was available to the examiners. At the same time, he is of the opinion that non-physiological factors such as behavioural symptoms, factual knowledge, knowledge of the opinion of the investigating officer and so on do not affect the conclusions drawn by a polygraph examiner to the extent that some of the other expert witnesses suggested it must.

It is impossible for me to understand how it is that Dr. Horvath can arrive at this conclusion. The fact that the original assessment, at least in certain categories, was so vastly different from that of the "judges" acting on physiological data alone can only mean that a vast proportion of the data upon which the determination is made must be psychological. In the cases of persons accused of a crime

against the person and verified to be truthful, and it must be remembered that the original assessment was correct in all of the verified files chosen for the study, decisions based on the physiological data alone were no better than chance. In the unverified group of the same category the original assessment differed in almost two out of three cases from that based on the physiological data alone. In view of the fact that the ten judges employed in the study agreed among themselves on the basis of the chart in such a large percentage of the cases, the disagreements between their consensus and the original assessment is persuasive evidence that the psychological data, the interpretation of behavioural indications, the knowledge of the views of the investigators, the knowledge of facts in the case and other similar factors played a large role in the assessment of the original expert, perhaps more so than did the charts themselves. In my view, Dr. Horvath's conclusion that his study disproves the suggestion that the prior information available to an examiner might dramatically alter the nature of the test and its results is altogether untenable, particularly, in view of his somewhat contradictory opinion that the accuracy rates indicated in his study are far lower than those actually existing in the field.

Dr. Orne commented that the fact that these were police files is relevant. It is reasonable, in his opinion, to assume that investigating policemen would believe that the persons tested were guilty and that this belief would be transmitted to the police polygraph operator. The expectation of an examiner affects the results of psychological tests as every clinical psychologist and psychiatrist knows. Expectation of the tester is communicated subtly to the subject and has been shown to affect "objective" test results. This expectation would cause some innocent persons to react in a "guilty" fashion. This explanation is consistent with the very low accuracy rates concerning truthful persons in comparison to those rates for deceptive persons. Dr. Orne pointed out

that one is more likely to detect liars in the field than in the laboratory, but by the same token, due to the extra pressures upon the subject in the field, one is also more likely to arouse an emotional reaction unrelated to veracity and to therefore make false positive findings, that is, to call truthful persons deceptive.

Another psychologist that testified before me, Professor William Krossner of the University of Minnesota, performed a laboratory test in conjunction with Dr. Kubis.[40] This test involved a simulated theft in which all subjects were either thieves, look-outs for the thief or innocent persons. Four examiners determined the status of each subject on the basis of the charts alone. The examiners had a psychophysiological background and were trained to read the polygraph charts by an instructor from the F.B.I. When given the charts in groups of three, in which one was a thief, one a look-out and one was innocent, the examiners were accurate with female subjects approximately 65% of the time, and correct 83% of the time with respect to male subjects. This, of course, is far better than chance. However, when they were simply given the individual charts not divided into groups of three, the accuracy rates fell substantially. The records of female subjects were found no more difficult to evaluate than those of male subjects. Two judges were used, and one was correct 52% of the time and the other 61%. Both results are significantly better than chance which in this test is one out of three, but do not meet the claims of the polygraph industry.

Upon the completion of the questioning, the examiners and an observer were asked to evaluate the subjects purely on interpretation of behavioural indications. Again there was a considerable variance between male and female subjects. The average examiner validity rate was 65%. The non-involved observer varied between 48% accuracy with respect to men and 72% accuracy with respect to women, giving an

average rate of 55%. The significantly higher accuracy of the examiners indicates that examiners do, in fact, pick up clues from the records during the examination despite their assertions that attention to the mechanical aspects of the test preclude any in-process analysis of responses.

In passing, I would like to mention that although I did not examine the psychological stress evaluator (P.S.E.), the voice-stress machine, because it was not relevant to the cases before me, the evidence that I heard indicated that it is no better than chance.

All scientists who testified agreed that no physiological or psychological test approaches 99% accuracy. It is clear from the studies done that the polygraph is probably better than chance. It is also clear that the results of personal observation of a subject is remarkably better than chance. However, with the exception of Horvath's field study, no data was presented to me that appeared to validly establish the accuracy figures suggested by Messrs. Reid and Cummins.

Evidence was presented on the polygraph machine itself. It is a very primitive version of the machines used in laboratories today by clinical psychologists, psychophysiologists and psychiatrists. Dr. Orne stated that the field machine is essentially a 1930 model. Dr. Lacey analyzed the machine in some detail. The respiration channel measures the timing and regularity of changes in the rhythm of movements of the thorax and the abdomen. Irregularities along the respiratory curve are easily misread as nervousness. However, to some extent irregularities are normal in respiration and furthermore, if the belt transmitting the movements is tight, irregularities will necessarily result. In many cases if the belt were loosened, "nervousness" would disappear. It is not difficult to see on the chart that respiratory changes have occurred. It is not the practice of polygraph operators to measure the changes; they simply form an impression

that changes have occurred and it is unfortunately difficult on many occasions to determine the causes of those changes, many of which may be purely physical. In order to quantitatively measure changes in respiration, a machine of some precision or at the very least, a machine with faster paper speed than that used by commercial polygraph experts would be required.

The so-called "cardio" channel is operated by a cuff on the upper arm of the subject and is the subject of some controversy. Blood pressure, of course, changes in response to a wide variety of physical and mental stimuli. For example, blood pressure response will be seen if the subject is asked to perform an arithmetical operation and the more intelligent the subject, the more his blood pressure will increase. Any unexpected question or hyper-ventilation causes blood pressure to soar. Furthermore, proper measurement of blood pressure is quite uncomfortable and can be done only intermittently. As a result a psychophysiologist early in the twentieth century devised the notion of measuring "relative blood pressure". He took it from the ankle, a less painful operation than using the upper arm and attempted to set the cuff mid-way between the level of "diastolic blood pressure" namely, the "resting-stage" blood pressure, and "systolic blood pressure", that produced by the contraction of the heart. These measurements bore some vague relation to a properly determined blood pressure. The polygraph experts say that they do the same thing using the upper arm and for a long time called it "relative blood pressure". In fact, that is a meaningless term and what is actually being measured by the polygraph is a very poor variation of a test which if properly conducted would measure the rate of blood flow. This too is very painful, and as a result the test cannot be maintained for more than four to five minutes at a time. Although the "cardio" channel is not a scientifically accepted measurement, it is probably a crude measurement of forearm blood flow, and as the forearm is primarily muscle,

probably muscle blood flow. A preferable technique would be to measure the blood flow in a finger. This channel shows each cardiac beat, because each beat sends blood into the arterial tree which results in a change in volume of the arm itself. For any degree of accuracy in determining changes in heart rate, one would have to meet superior technical requirements and apply a quantitative analysis to the documents produced. As commercial polygraph operators merely form a subjective impression of the entire record, and as it is difficult if not possible to evaluate what has happened to the heart rate from this display, they rarely discuss heart rate which might, in fact, be a sensitive indicator of stress. What, in fact, they are measuring, and this is, as I have discussed, extremely complex and uncertain, has not been proved to relate to the sort of stimulus relevant to a polygraph test. The channel measures some complex physiological resultant in the cardiovascular activity, consisting of a mixture of blood pressure, heart rate, pulse volume, blood flow to the muscles and blood flow to the skin, and is then displayed in a relatively crude but very graphic manner. Such a confusion of bodily activity is a dubious indicator at best. The cardio channel may, on occasion, even be hazardous for the subject in the sense that it cuts out blood flow to the active organs. It is uncomfortable and for some people, extremely painful. As a result the tests taken are limited to a short period of time, four or five minutes, and even throughout this time the cuff itself is intrusive and is itself a factor in physiological change.

The "GSR" channel measures wave-like changes in the electrical resistance of the skin which are associated with sweating of the palms. This channel is very sensitive and scientists have found it extremely reliable and useful in clinical research. Dr. Lykken, in particular, did much research on the "Guilty Knowledge Test" and achieved great success with the electrodermal channel, although, as I have already discussed, this channel is not commonly found to be

useful in the field except in the card tests.

Much of Dr. Lacey's work has been with differential response of individuals and he has discovered that few people are responsive on all measures, rigid patterns of reactions are not universal, and therefore, the channels used in the conventional polygraph machine may well not cover the measures on which many people react. Alternatively, if reaction is shown, it may be that that reaction is due to causes other than stress and that the channel on which stress is evidenced for that individual is not measured by the machine. The machine used for bio-feedback training and the study of somatic disease in the laboratories has many more channels and considerably more sophistication. The growing acceptance of the polygraph is generally stated to be premised on the improvements made in the machine and the testing techniques, but in Dr. Lacey's opinion, concurred in by other scientists, the field machine has not changed significantly in thirty years. However, Dr. Orne pointed out that as the operators are unable to adequately master the GSR channel, if the machine were more sophisticated, all channels would be unreliable in their hands. Dr. Orne's claims for the polygraph do not approach those of Mr. Reid but in his opinion, its utility such as it is, is no less with the machine actually used than it would be with a laboratory instrument.

Mr. Reid agreed with Dr. Orne and testified that the field machine presently in use is excellent for the purposes of the polygraph test. He added that although he has experimented with other parameters, none have proved to be useful and the field machine covers every effective measure of physiological response.

Nonetheless, the polygraph machine is clearly crude and its operators unsophisticated in using it as a scientific instrument. Even if polygraphy is based on valid principles,

I am unimpressed with the primitive standards and lack of progress in the performance of what is called by its proponents a "science".

The factors influencing the accuracy of an individual test are many. The polygraph test begins with a pre-test interview. Various purposes are attributed to this, including the need to convince the subject of the accuracy of the machine, the requirement that the subject be relaxed, weeding out untestable subjects and obtaining data required to establish the test questions. The adequacy of the pre-test interview depends entirely on the skill, training and perceptivity of the examiner. The various schools have differing approaches to the pre-test interview. Reid's interviews are no more than twenty or thirty minutes. Richard Arther, a Reid graduate, now considered to be a foremost polygraph expert in the United States, has a school of polygraphy in New York City and teaches that it is necessary to spend at least one hour in the interview. Dr. McKnight agrees with this and he, in fact, often spends considerably upwards of that.

The problem of examiner-bias is one familiar to all persons trained in psychology, sociology and the social and medical sciences. The interviewer's expectation has a strong effect on his results. The interviewer must attempt to understand his own biases and to be as neutral as possible. Most polygraph experts have a law enforcement background which naturally results in a police bias. The best evidence is that such a bias will have a strong influence on the results and, in fact, it was a reason offered by one of the witnesses for the very low results in the Horvath study. Dr. Lykken pointed out that frequently the polygraph test is used for "investigative" purposes and that it is not uncommonly followed by a confession. Its utility as an investigative tool however, is not what concerns me at the moment. If many or most police polygraphs involve a confession, it is

not unlikely that the interviewer is implying to the subject in some way that he is not believed. This will affect the polygraph results. As Dr. Lacey expressed it, a person believed to be innocent by the polygraph operator is subjected to a different testing environment than the person presumed to be guilty. It is extremely important that the test be an arms-length transaction. There should be neither a sense of friendship and subjective co-operation nor adversarial interrogation. The polygrapher must present himself as a neutral, independent authority figure. His attitude will necessarily affect the phrasing of the questions. Dr. Orne gave an example of one study that involved inexplicable results until someone noticed that some interviewers asked "Were you dreaming?" and the rest asked "What were you dreaming?". A subtle change of tone, the skill of the interviewer at forming a relationship, the information available to the interviewer upon which he determines his unconscious opinion, all affect the results. Dr. Lacey testified that other poor testing practices are employed in the polygraph technique. Convincing a subject that the machine is infallible which is certainly not true and using a rigged card test for this purpose is a formula no competent scientist would accept.

The pre-test interview influences both the examiner's choice and phrasing of the test questions and the "objective" physiological data put out by the subject. As well, the actual interpretation of the latter appears to be grossly affected by the examiner's opinions of the subject formed during the interview. Reid and Inbau in Truth and Deception advise that the interview begins when the subject enters the outer office. They suggest that the receptionist or secretary take notes of the subject's behaviour in the ante-room. The interpretation of the behavioural indications noted by the interviewer and presumably his receptionist is discussed in the text and in articles written by other examiners. In one written by Dr. Horvath, verbal and non-verbal clues to truth

and deception are outlined. General statements about behaviour are made classifying certain acts as truthful and others as evidencing deception. It is suggested that a truthful subject is usually straightforward:

> "I didn't kill John Jones I had nothing to do with it, but I sure hope you catch the guy who did."

On the other hand, a response such as:

> "I can't understand this whole thing, I hardly knew John Jones, I don't know why anyone would want to kill him."

is evasive and hence indicative of lying. When a truthful subject is asked if he has any suspicion as to who committed the offence he will usually identify someone. A lying subject typically refuses to blame anyone. Similarly the truthful subject will vouch for persons whom he feels did not commit the offence, but a liar will not. Robert Cummins, who worked for Dr. Reid and actually did the testing of certain complainants whose cases were before me, elaborated other helpful principles of detecting falsehood.[42] A subject who has not informed his family that he was to take a polygraph test is probably guilty. A person who states that he does not like the idea of taking the test but knows "that it must be done" is more likely to be truthful than he who merely states his dislike of being tested and leaves off the qualifier. Asking how one's test is going is indicative of deception as well as having a "pat" answer for questions concerning the subject's whereabouts at the relevant times.

I was amazed at the naive and dogmatic pronouncements by polygraphers concerning interpretations of behaviour, many of which were founded on the assumption that a reluctant subject or an opponent of the polygraph is probably a liar. Little or no account was taken of the variations in psychological reactions which require great flexibility in assessment of individuals.

The polygrapher makes notes of his observations during the pre-test interview and these will result in a tentative opinion as to the veracity of the subject. This opinion is checked against the ruling made on the basis of the physiological record, and the polygraph operators testified that if a disparity is shown there will be a reassessment, a re-examination or a finding of inconclusiveness. All of the operators emphasized that if in doubt they do not find the subject deceptive. If mistakes are made, and few were admitted, these mistakes are invariably in favour of the subject.

This theory would be plausible if one person conducted the interview and another ran the test, after which they compared their opinions. In fact, however, the studies discussed above, particularly the Horvath study, and the evidence I heard led me to the inescapable conclusion that a more subtle process is occurring, whereby the reading of the graph itself is affected by the opinions of the experts formed from the pre-test interview. As Dr. Lykken stated, traditional schools of polygraphy teach that the decision or the diagnosis should be a global judgment made at the end of the entire process and based on everything learned about the case including the results on the polygraph tape and the observations of the subject. There is no way of deciphering such a diagnosis and determining how much of the decision is influenced by the charts and how much by other more subjective factors, including unconscious prejudices, likes, dislikes and even racial biases. A modern school of thought is developing that emphasizes a blind reading of the charts whereby the examiner who gives the test does not score it. Since 1970, the American army has encouraged this approach and has attempted to standardize the format of the questions so as to facilitate blind analysis. However, the vast majority of polygraph tests given in the United States are still of the first sort. Furthermore, the various studies conclude that a blind reading though better than chance,

does not approach the high accuracy rates claimed for the polygraph by its proponents and without which the tests are of no judicial assistance. Dr. Lykken states that the army obtains a high degree of "reliability", that is consensus among the readers of the charts, due partly to the good training in the same system available to all of their polygraph experts, but there is no means of determining the validity of these agreed judgments. Moreover, the machines used are inadequate for a scientific qualitative and quantitative blind reading. On a global reading, the test is clearly not a physical or physiological one. It is psychological and highly subjective; in Dr. Lykken's opinion, it is as subjective as the unreliable Rorschach ink block test.

The evidence given by the polygraph operators was confused on the classification of the test as a physiological or psychological test. The examiners prefer to consider it to be the former, as the widespread belief in the "lie-detector" is premised on its objective and physical nature. However, even Mr. Reid admitted that the evaluation of the individual subject is a large, if not the largest, factor in the accuracy of the examiner's decision. Mr. Reid stated:

> "This is a big part of our course, much more than running charts, they don't mean anything, almost. You can put some small boy in to do that, that is unimportant."[43]

Mr. Reid subsequently retracted this and testified:

> "Okay, the charts are the things that take precedent."[44]

If an individual manifests a physiological reaction or contradictory reactions on two or more channels, the operator must decide which pen "seeks the truth". Different schools of thought exist as to which channels are the most reliable. Reid prefers respiration and a reaction on one respiractory channel suffices in his view for a finding. Other operators prefer the cardio channel and unlike Reid will make a decision

based on the reaction of a subject on only that channel. Both views are inconsistent with psychophysiologists' studies indicating that individuals have preferred channels of reaction and for each subject, it is that channel which must be relied on.

The average test has several control questions as well as several critical questions. If a reaction to one critical question is greater than the responses to the control questions, but the other critical questions do not show the same response, problems of interpretation arise. In the Reid school of thought, it is acceptable to read such graphs, although I was not given an explanation why the positive reaction, rather than the other "neutral" reactions, is decisive. If no irregular response is shown on the graph, then in the opinion of Dr. Horvath, the subject must be non-responsive, although it is theoretically possible that the control questions are inadequate and therefore that should be kept in mind by the examiner. I am slightly skeptical about this, as from the evidence I heard, it appeared unlikely that many polygraph operators would consider that their control questions might be inadequate.

Most polygraph operators do not have the training or skill to interpret the graph through a quantitative analysis, nor is their machine adequate to the task. Even though the chart itself is influenced by subjective factors introduced in the pre-test interview, a scientific qualitative analysis would be less open to subtle and perhaps unconscious biases than an "impressionist" view. This point is fundamental to an acceptance of the polygraph. Assessing the veracity of a witness by means of a subjective and common sense impression of his behaviour is exactly the task that our system of justice has laid on the shoulders of judges and juries. If the "polygraph" means no more than this, it is of no assistance to a trier of fact and may actually be misleading.

The polygraph cannot be compared to a scientific test. In the words of Dr. Orne:

> "It's like a blood test that is dependent on the belief of the subject that it works and on the competence of the technician."

Although its results may be more accurate than chance, its accuracy is almost entirely dependent upon the skill, training, perceptivity and good faith of the individual operator and furthermore, the theory of the machine involves many theoretical difficulties.

I heard evidence from the polygraph operators about the commercial use of the machine in the United States. Both Messrs. Reid and Arther test primarily for criminal law purposes, but as well, they do employment screening and periodic tests of employees both of which are rapidly expanding fields. Police departments are increasingly interested in forming their own polygraph units, and both the Reid and Arther schools have turned out "in-house" polygraphists for many forces. Mr. Reid's course involves a six-month internship at the Reid laboraties while Mr. Arther gives a six-week lecture course followed by a field service internship during which examinations performed in the field are returned to Mr. Arther for grading. Both experts criticized the training programs of other schools and emphasized that without legislative controls the field is vulnerable to incompetent and even unethical operators. Some programs, such as that in the Keeler School, turn out operators who are primarily interrogators, who in Mr. Reid's opinion do not conduct a proper test but merely use so-called reactions on the chart to induce confessions.

Sergeant Larry Proke, a Royal Canadian Mounted Police Officer, who was trained in 1971 at the Arther School and who is presently a senior polygraph operator for the R.C.M.P. testified at the hearings. The R.C.M.P. have eight full-time polygraph operators with a ninth now being trained.

The program is used strictly as an aid to the criminal investigation and is not intended to replace proper investigation. Before the polygraph department will become involved in a case, the investigation must be completed. The subject is usually a suspect in a crime or a complainant in a sex offence. Occasionally witnesses are tested, particularly alibi witnesses, as well as informers prior to an operation being put into effect. The test is entirely voluntary and no one is coerced in any way to undergo it. From the time the program commenced in 1965 until March 31st, 1974, a total of 1,401 examinations were administered, resulting in 1,021 truthful opinions, 290 deceptive opinions and 90 indefinite opinions. From April 1st, 1974 to March 31st, 1975, in British Columbia alone, 372 examinations were administered. There were 249 truthful opinions, 69 deceptive opinions and 54 indefinite opinions. In 346 verified cases, two errors only have been found, both of which were "false negatives", that is liars called truthful.

Sergeant Proke admitted that the polygraph procedure is a psychological test. The most important factor is that the subject be properly "psychologically set" for the examination. The instrument is merely a recording device, recording what the subject puts into it. Errors come not from the machine, but from the examiner who may make mistakes by misinterpreting the records. As long as the polygraph is used only as an investigative aid, it is in Sergeant Proke's opinion a useful tool for the investigator.

Sergeant Proke agreed with many of the criticisms levelled at the polygraph by some of the expert witnesses heard at the Commission hearings. He recognizes that there is a very real danger that some subjects may be more concerned with the critical questions than with the control questions because of the problems discussed above. He made it very clear that the examiner must establish the subject's mental capacity and consider his physical condition. The R.C.M.P.

will not test a person with a serious heart ailment, a schizophrenic or a pregnant woman. An extremely detailed history of the subject is taken in a pre-test interview that may take as long as one and one-half hours. In general, the examiner attempts to assess the individual in as many areas as possible, such as his medical and psychiatric history, his relationships with family, hobbies, drug and alcohol use. This appeared to be the most thorough and conscientious interview that any polygraph expert performed, but the danger remains, and is recognized by Sergeant Proke, that the bias and expectations of the interviewer can affect the test and may even be a more likely eventuality when the interviewer has so much information about the subject.

THE POLYGRAPH TESTS OF THE COMPLAINANTS

After hearing evidence on the polygraph concerning both its theoretical aspects and the practice of good polygraph examination, evidence was put before me of the examination charts and test results of the complainants whose cases had been heard at the public hearings. Most of the complainants had been tested by Robert Cummins and these charts had been reviewed by both Mr. Reid and Dr. McKnight. Sergeant Proke had been asked to examine and comment on the work of Mr. Cummins, but the Royal Canadian Mounted Police took the position that one examiner cannot properly evaluate another's work. This received some criticism from other witnesses. Dr. Lykken disagreed fundamentally with this approach and stated that any test with sufficient objective basis to be a valid psychological test let alone a physiological test should be reviewable by other experts trained in the same school of thought. Other complainants had been tested by John Jurens, a polygraph examiner situated in Toronto. Although Dr. McKnight did not examine the results of these tests, he was asked to and did comment on the technique used by Mr. Jurens which was somewhat different from that discussed previously in the evidence.

The tests had in common certain difficulties, namely that the critical questions were answered "yes" rather than "no", that only one "side" of the allegation was tested, that insufficient or at any rate, incomplete data was available to the examiner, that there may have been too little at stake for the complainants to ensure good results, all of which were generally agreed to increase the difficulties in performing good tests.

Mr. Reid was questioned about the possibility that the complainants in these cases on being asked "Did you ever cheat anyone?" might well think of some offence that they had committed in their lifetime more serious to them than their allegations against the police. In such a situation a complainant might react more to the control than to the critical questions and yet be lying about the latter. Mr. Reid's response was merely that this does not occur, but he does not have studies supporting this view. Mr. Reid had previously reviewed the charts and in some cases questioned Mr. Cummins for a few more details concerning the questions asked. At the Commission hearings, Mr. Reid again examined the charts. He did not have notes concerning his original examination of these charts and therefore, was in a sense working "cold", a fairly difficult test of his expertise. He analyzed the charts for us indicating where a response was shown or where a disturbance did not qualify as a significant response.

On several occasions what appeared to me and to my counsel to be a disturbance on the chart, was discounted and on the other hand, on certain occasions, quite regular chart results were interpreted as significant physiological response. At no time was Mr. Reid able to explain to my satisfaction the difference between his perception of the lines on the graph and mine. I am fully cognizant of the fact that considerable expertise and training is considered to be necessary in order to interpret the polygraph results

and I do not for one moment claim to have this expertise. Nonetheless, common sense tells me that if a line shoots upwards, then given some basic knowledge of the principles of the polygraph test, even a layman such as myself could comprehend the explanation for its importance or unimportance. I was not impressed with the fact that any queries along this line were answered by the fact that it is simply self-evident to any trained polygraph operator that one line is significant and that another is not. In general, Mr. Reid testified that the result was not determined on the basis of any one response or lack of response, but rather on the consistency of response throughout the recordings. He therefore, in effect, stated that a particular reaction which at first blush appeared inconsistent with Mr. Cummins' findings was not a hindrance to that finding because it was justified on the basis of an overall reading of the charts. It became clear to me that considerable subjectivity is used in interpreting the charts which are not examined quantitatively but in Mr. Reid's words, "by overall interpretation". On many occasions, conflicting responses existed on different measures of a graph. The choice of which response was decisive appeared to be based largely on the impression of the subject that the examiner had formed after the pre-test interview. Mr. Reid did not have the benefit of seeing the subjects at the pre-test interview, but knew, nevertheless, that all of the graphs had been read as evidencing truth-telling by his associate and colleague. Listening to Mr. Reid's analysis of the charts, I was unable to accept that their interpretation was a matter of objective expertise and analysis based on what were stated to be the scientific premises of the polygraph examination. The very facts that the charts are a mere approximation of response and that the analysis is made by eye and estimation alone negate the possibility that the polygraph test is a physiological procedure.

Robert Cummins gave evidence at the public hearings for

over two days. During this time he was questioned in great detail concerning the information available to him and the tests of each complainant that he tested. Mr. Cummins had informed the reporter for the Toronto newspaper who had hired him to make these tests that ideally both sides of an issue should be tested and that furthermore "yes" question tests are weaker than "no" answer tests. Furthermore, Cummins informed the reporter that it is important for the accuracy of the test that the subject feared detection. As a rule, of course, complainants have less fear of detection than for example, suspects in a crime. Furthermore, Mr. Cummins was aware that if the polygraph did not bear out the complainant's allegation, the newspaper would not report on it, and that alternatively, if the polygraph proved that there was merit to the complainants' stories a story would be published. Nonetheless, the tests were done and Mr. Cummins was able to make unqualified findings on the veracity of the complainants.

In theory, Mr. Cummins supported the evidence given by John Reid and Richard Arther on good polygraph practice, and was actually the most conservative of the three. He testified that he would be prepared to make a ruling on a chart in which three out of five run-throughs of the questions showed a consistent set of responses only if the other charts were not contradictory. However, if three charts showed truth-telling and two deception, he would call for a second examination.

Mr. Cummins would not give a figure for the accuracy of the polygraph, although he stated that he has never called a innocent person deceptive. However, he responded to the criticism of certain experts such as Dr. Orne, Dr. Lykken and Dr. Heseltine by commenting that as they are not polygraph examiners in the same sense that he is, they are not qualified to speak on the accuracy of his field. He reiterated that if there is any doubt at all, or if the behavioural signs and the chart do not coincide, he will not make a ruling.

In analyzing the Henderson chart, where the two control questions were "Have you ever cheated anyone in your life?" and "Have you ever stolen anything from anyone in your life?", Mr. Cummins was asked if it was not possible that these questions aroused guilty reflections in Henderson's mind that would preoccupy him more than his concern about the critical questions concerning his allegations against the police. Mr. Cummins admitted it was a possibility, a danger, something that might occur, but that it was unlikely. Mr. Cummins ruled that all of the complainants heard at the Commission that he tested were truthful; he did not qualify his rulings, nor state that this "danger" existed.

In the case of Roy Bonner, Mr. Cummins had been instructed by the newspaper reporter that the complainant was a "little leprechaun-like" old man, an unemployed sickly person, separated from his wife and taking care of a retarded son. During the pre-test interview, Mr. Cummins made notes concerning his evaluation of the subject. He obtained certain objective data and noted as well that Bonner constantly shook his leg and that "he looks and talks like a good old boy". In Mr. Cummins' view, he was "a good old harmless guy with no apparent axe to grind. Basically a sound citizen". When Mr. Bonner stated "there are two courts, one for police and one for civilians", Mr. Cummins interpreted this to be the natural observation of a cynical and skeptical man. The fact that Mr. Bonner expressed faith that the polygraph would show him to be perfectly truthful impressed Mr. Cummins. Mr. Cummins was also impressed by Mr. Bonner's comment that he would rather do without than steal or cheat. Mr. Bonner rambled considerably during the pre-test interview, but this did not affect Mr. Cummins' evaluation; he was more favourably than unfavourably impressed. In light of my observation of Mr. Bonner, I cannot credit the interpretation and evaluation of Mr. Bonner as having been made with much perceptivity.

Mr. Bonner's charts were interpreted with what was, even by Mr. Cummins' evidence, scanty evidence of truthful response. Mr. Cummins evaluated the second test as truthful on the basis of one question. In fact, Mr. Cummins and Mr. Reid differed in the particulars that each used to support their individual conclusions that Mr. Bonner was truthful. Mr. Cummins testified that he was more satisifed with calling Mr. Henderson truthful than Mr. Bonner, but he did not indicate that in his report to the Globe and Mail. Mr. Cummins agreed eventually after considerable questioning that in the Bonner case, he relied more than usual on the polygraph results and that the polygraph in that case was very weak as polygraphs go.

The graph of Roy Bonner was clearly different from all other graphs seen by this Commission. It was highly erratic and several times broke off and recommenced, indicating that Mr. Bonner was unable to understand or to follow instructions. After examining the chart, Mr. Reid did ask for the information that had been available to Mr. Cummins concerning the subject's physical capacity to take the test. The information included the fact that Bonner had had two heart attacks and two strokes. Despite this, the test was run and both Mr. Cummins and Mr. Reid, without qualification, stated that Mr. Bonner was telling the truth. It was clear to me that Mr. Bonner epitomized the untestable subject in that he was ill physically, appeared disoriented in conversation and clearly was the sort of person who believed whatever he said no matter how improbable his allegations might have been. I was unable to credit any part of Mr. Bonner's story. Mr. Bonner is a person who is simply not credible on five minutes acquaintance. His graph looked to a layman to be exactly what one would expect it to be, namely, erratic and evidencing an inability to comprehend the instructions necessary for the test procedure. The fact that Mr. Cummins did not determine that Bonner was not testable after a thirty minute pre-test interview and that both Reid and Cummins read his chart without qualification

does not commend the polygraph to me.

As well as the reports of Mr. Cummins, a report prepared by Dr. McKnight in which he commented on the testing done by Mr. Cummins was entered as an exhibit. Dr. McKnight qualified his comments with a few general remarks about the limitations of the polygraph and the difficulties in interpreting test charts of other examiners. The polygraph operator should carry out a structured pre-test interview that assists him to design clear and highly relevant questions for the tests. This cannot be reviewed by another examiner who was not present at the interview. The lie detector will only test a subject's genuine belief in his version of the facts. It will not distinquish a genuine mistake of fact, misinterpretation of an action, fault of perception or understanding, or errors induced by a faulty memory. Furthermore, drugs, mental retardation and mental illness will interfere with the accuracy of the test results if not render a subject completely untestable. Individuals vary as to their suitability to polygraph testing and the various factors lead to varying degrees of confidence in the test results. Nonetheless Dr. McKnight puts a much greater weight on the charts than on the behavioural symptoms and uses the pre-test interview to relax and familiarize the subject with the process as well as to obtain necessary medical and factual information.

Dr. McKnight reviewed the graph, the question sheets and the notes in Mr. Cummins' files for each examination that he performed. In certain respects, Dr. McKnight varied from Mr. Reid and Mr. Cummins' opinions. Although he read Mr. Bonner's chart as indicating truth-telling, he would have qualified this opinion because the chart was far from ideal and the erratic response indicates that there was a possibility that Mr. Bonner could not distinguish between accidental and malicious force. Dr. McKnight questioned the suitability of at least one other subject for the testing due to an apparently deliberate attempt to control respiration.

Another case involved an indecisive worrying personality which resulted in difficulty in distinguishing between extreme nervousness and lying.

Other tests were conducted by John Jurens. In these cases, I did not need to trouble myself with a sophisticated examination of the polygraph theory and practice. Mr. Jurens was trained at the Keeler School in 1956. He testified that he has tested approximately 5,000 subjects and is aware of only two errors made in that time. Mr. Jurens commences with a card test in order to determine the responses of the subject to the machine. If the individual chooses the card with the number 4 on it, the question "Did you pick card 4?" becomes a control question. Other control questions were used as well in the tests of these complainants, but in his analysis of the charts, Mr. Jurens admitted that the responses to the other control questions did not support his conclusions. In his opinion, the card test question is an effective control, although it is worth noting that his was the only such opinion given in evidence before me. Mr. Jurens did not repeat the charts, and in each series of questions, different questions were asked. This technique does not meet any of the requirements established by any known school of polygraphy and is entirely unsupported by the experts or the literature canvassed by the Commission. Mr. Jurens did not appear to have the most basic physiological or psychological knowledge. Even assuming that the polygraph can be an effective means of determining falsehood in expert hands, I would under no circumstances rely on findings of Mr. Jurens.

CONCLUSION

After listening to much evidence concerning the polygraph both generally and as it affected the fourteen complainants before me, I was considerably less than impressed with either the accuracy of the polygraph or the validity of the assumptions on which it is founded.

Psychophysiological research indicates that a scientific analysis of physiological response for the purposes of the polygraph industry is not feasible. Individuals vary as to the measures on which they indicate arousal; they do not react on all measures; the correlation between measures is low; lability of physiological response differs between individuals. A comparison between individuals in order to arrive at standards against which response may be measured is clearly impossible. Furthermore, each subject may react differently to the same stimuli at different times, and often reacts identically to several stimuli. It is virtually impossible to ensure that only one stimulus is operating at any given time, and therefore, it becomes a matter of great difficulty to determine the cause of any particular arousal. The subject may be reacting to non-emotional occurrences such as his physical surroundings including the presence of the machine and in particular, the blood pressure cuff, a sudden irrelevant thought, a draft or a noise. Other emotions may be causing the arousal, such as anger, nervousness or embarrassment. He may be responding to the interviewer's attitudes and tones of voice, or to the connotations that the questions hold for him. He may simply be undergoing the normal fears and hostilities that one would expect many people to feel in the test situation. Not only do we not understand psychology sufficiently to rule out such possibilities, we do not know what "lying" is, what emotions it conjures up in the particular subject, and there is much evidence to suggest that it is not the "lying" that causes arousal, but the question itself.

The autonomic system has only recently been the subject of thorough research, and there is now ground for believing that that it is not "involuntary" to the extent previously believed. Other tests have indicated various techniques for "beating" the polygraph.

The machine used is an unscientific tool with what is

probably an insufficient number of measures to examine arousal in all persons, although I am not convinced that the laboratory model would improve the technique, particularly in view of the fact that crude though the machine is now, at least one of its channels appears to be too sophisticated for its operators.

These factors prevent an accurate qualitative or quantitative analysis of the physiological data which would at least precisely inform the examiner whether the subject was aroused, although the cause of that arousal would remain problematic.

The control question technique assumes that the examiner, relatively unskilled in the difficult science of psychology, can develop good control questions that involve an arousal value equal to the unknown amount contained in the critical questions. Even if he should manage to do this, he must then prepare the subject to react according to a rigid theory of behaviour that is somewhat unrealistic. Highly trained personnel have great difficulty programming people and yet these operators, with considerably less expertise, must "psychologically set" the subjects to a greater concern for certain stimuli than others more naturally stimulating, and to a blind faith in the infallibility of the polygraph machine. Reliance on the polygraph is actually reliance on the operator's skill, perceptivity and lack of bias.

There is no credible data that supports the high claims for accuracy on which the growing acceptance of the polygraph in the United States is based. The best research was done by Dr. Horvath and succeeded in proving two things. First, a blind reading of the chart is not highly accurate, and secondly, if the input of other data and the interpretation of the subject's behaviour changes the rulings sufficiently to raise the accuracy rates significantly, the test is primarily psychological and the so-called analysis of the

charts is merely a pro forma exercise designed to confirm the "reading" made by the examiner in the pre-test interview. If this is the case, the "polygraph" is only an assessment of credibility based on observations that jurists have been making for years, by persons who are untrained in conducting psychological examinations and who apparently accept naive and simplistic criteria of what is deceptive behaviour and what is not.

I had the benefit of hearing at least three examiners who are generally considered to be at the top of their field. The tests run in the cases that I heard showed that even these did not meet the theoretical standards of good testing, such as individualizing the control questions, informing themselves of the relevant facts or screening out untestable subjects. The tests were weak as polygraph tests go, in that only one side of the story was heard and tested, the questions were answered "yes" rather than "no", and there was a real possibility that not enough was at stake to create sufficient stress in the testing. Many of the charts did not indicate any response to control questions, and the interpretation of those charts was not justified on the basis of the evidence given to me. Despite all of this, the findings were submitted without qualification, and as I have previously noted, are truly incomprehensible in at least one case. It does not require great perception, skill or training to determine that Mr. Bonner is not suitable for this type of examination. That one of the best polygraph operators in the United States did not conclude this from his pre-test interview and declared him truthful without qualification speaks for itself.

Although the use of the polygraph in employment screening and periodic employment testing is not within the scope of this Commission, the evidence that I heard caused me such concern that I would be remiss in not mentioning it in passing. The American experience should be examined carefully.

The polygraph industry was well-established before a close scrutiny of it was undertaken. Because of the dangers and abuses implicit in denying a person the right to earn a living on the basis of this test, Minnesota has legislated a prohibition of the use of the polygraph in the sphere of employment. Other states have legislated standards for polygraph operators, and in an attempt to restrain unethical practices, have established licensing requirements. Unfortunately, except in those jurisdictions that have forbade employment testing, the scope of such tests is enlarging at an alarming rate. In Canada as well, employment testing is increasing, and in view of the conclusions one must take from a close look at the polygraph industry, it is to be sincerely hoped that our legislators will concern themselves with this issue before the regrettable American experience becomes ours.

The polygraph test may be better than chance, and it may be that individual examiners are perceptive and skillful in examination and interview techniques, although on the evidence of the operators themselves, most are not. Nonetheless, there is great chance of error mainly because in my view, all the test amounts to is a subjective interpretation of behaviour and conduct. It is no more useful than other psychological tests, and may be even less helpful in view of the fact that it is one of the few without so much as a standard test format. It might have a place as an investigative aid or in the hands of a psychiatrist or psychologist, but it does not meet the standards for judicial use: it is neither scientifically reliable nor scientifically accepted. The American courts that have accepted it have, in my opinion, done so on a faulty premise; in view of its shaky foundations even agreement and stipulation merely legitimizes trial by ordeal. One American jurist stated:

> "I would not base the admissibility of the test on the concept of 'general scientific acceptance'. Rather, in my opinion, the requirement for

> admissibility is evidence that the tests are reasonably reliable, reasonably precise and evidence that the tests are substantially accepted by experts whose competence includes the subject matter of the test."[45]

In my respectful view, even these moderate standards are not met and have little likelihood of being met.

A Commissioner appointed under The Public Inquiries Act, 1971 has a right to hear relevant evidence whether admissible in a court of law or not. It may be that he has not the right to act on evidence that is neither probative nor cogent in law. I need not comment on this, in view of my finding that the polygraph is neither scientifically valid nor accurate and that I should give no weight whatsoever to this evidence in making my determination of the individual cases.

Footnotes

1. S.O. 1971, c. 49
2. [1934] O.W.N. 418 (C.A.), at page 419
3. Royal Commission Inquiry into Civil Rights, 1968, Volume 1, at page 216
4. Wigmore on Evidence, 4th ed., Volume 3A, at page 922
5. Pitre v. The King (1933), 59 C.C.C. 148 (S.C.C.)
6. Earnshaw v. Dominion of Canada General Insurance Co. (1943), 80 C.C.C. 35 (Ont.C.A.)
7. R. v. Servello (1962), 40 W.W.R. 306, at page 307
8. Pitre v. The King, supra
9. R. v. Bunniss, [1965] 3 C.C.C. 236 (B.C.Co.Ct.); R. ex rel. Buck v. Hann (1968), 4 C.R.N.S. 42 (N.S.Co.Ct.)
10. R. v. Ashe (1922), 39 C.C.C. 193 (N.B.C.A.)
11. R. v. Grainger (1958), 120 C.C.C. 321 (Ont.C.A.)
12. R. ex rel. Neely v. Tait, [1965] 1 C.C.C. 16 (N.B.Co.Ct.)
13. R. v. Wiswell (1934), 63 C.C.C. 94 (N.S.C.A.); R. v. Buckingham and Vickers (1943), 86 C.C.C. 76 (B.C.S.C.); R. v. Pressley (1948), 94 C.C.C. 29 (B.C.C.A.); Dufresne v. The Queen (1967), 50 C.R. 208 (Que.C.A.)
14. R. v. Nickel (1956), 24 C.R. 342 (Alta.S.C.)
15. R. v. Barrs (1946), 86 C.C.C. 9 (Alta.C.A.)
16. R. v. Haas (1962), 132 C.C.C. 362 (B.C.C.A.)
17. (1974), 20 C.C.C. (2d) 191; aff'g (1972), 10 C.C.C. (2d) 562
18. 293 F. 1013 (1923), at page 1014
19. 350 F. Supp. 90 (Mich. Dist. Ct., 1972)
20. People v. Cutter 12 Cr. L. 2133 (1972)
21. There are far too many American decisions to list them all here. However some of the more important are: Henderson v. State 230 P. 2d 495 (Okla.C.A., 1951); Marks v. United States 260 F. 2d 377 (U.S.C.A. 10th Circ., 1958); State v. Valdez 371 P. 2d 894 (Ariz.S.C., 1962); State v. Watson 278 A. 2d 543 (N.J.Co.Ct., 1971); United States v. Hart 344 F. Supp. 522 (N.Y.Dist.Ct., 1971); United States v. Zeiger 475 F. 2d 1280, reversing 350 F. Supp. 685, (U.S.C.A., 1972) Romero v. State 13 Cr. L. 2152 (Tex.C.A., 1973); State v. Alderete 521 P. 2d 138 (New Mex.C.A., 1974); State v. Stanislawski 216 N.W. 2d 8 (Wisc.S.C., 1974); Commonwealth v. A Juvenile (No. 1) 313 N.E. 2d 120 (Mass.S.C., 1974)

22. R. v. Gunewardene, [1951] 2 K.B. 600; Steinberg v. The King [1931] S.C.R. 421

23. [1965] A.C. 595.

24. R. v. Lupien, [1970] S.C.R. 263; R. v. Dietrich, [1970] 3 O.R. 725 (C.A.); R. v. Rosik, [1971] 2 O.R. 97 (C.A.). For three very recent Ontario Court of Appeal cases see:
R. v. Robertson (1975), 21 C.C.C. (2d) 385;
R. v. Hawke (1975), 22 C.C.C. (2d) 19;
R. v. MacMillan (1975), 23 C.C.C. (2d) 160

25. R. v. Lupien, supra; R. v. St. Pierre, [1974] 3 O.R. (2d) 642 (C.A.); Fisher v. The Queen, [1961] S.C.R. 535

26. Wilband v. The Queen, [1967] S.C.R. 14

27. See the Transcript of Evidence at the Royal Commission into Metropolitan Toronto Police Practices, Volumes 86 to 97

28. See Transcript of Evidence, Volume 86

29. See Transcript of Evidence, Volumes 91 and 92

30. R. v. Phillion, supra, at page 562

31. John E. Reid and Fred E. Inbau, Truth and Deception: The Polygraph ("Lie-Detector") Technique (Baltimore, 1966)

32. See Transcript of Evidence, Volume 87

33. See Transcript of Evidence, Volume 94

34. Transcript of Evidence, Volume 97, at page 18,113

35. See Transcript of Evidence, Volume 89

36. See Transcript of Evidence, Volume 88

37. Transcript of Evidence, Volume 88, at page 16,647

38. See Transcript of Evidence, Volume 90

39. Transcript of Evidence, Volume 91, at page 17,072

40. See Transcript of Evidence, Volume 89

41. See Transcript of Evidence, Volume 92

42. See Transcript of Evidence, Volumes 94-96

43. Transcript of Evidence, Volume 91, at page 17,102

44. Transcript of Evidence, Volume 91, at page 17,102

45. State v. Alderete 521 P. 2d 138 (New Mex.C.A., 1974), per Lopez, J.

PART III

Chapter XXIV

SUMMARY OF RECOMMENDATIONS

The Order-in-Council required me to hear certain evidence and to determine if there was a tendency or practice on the part of the Metropolitan Toronto Police Department to use excessive force in the arrest, detention or interrogation of suspects. After hearing all of the evidence summarized in Part I of this Report, I came to the clear conclusion that there is no such tendency or practice.

There are however indications of certain disturbing problems concerning the use of force. I have described these problems in the preceding chapters and detailed my recommendations therein. These chapters and especially those contained in Part II should be consulted for the basis of these recommendations. The following is a summary of them. After implementation, they will, in my view, improve and regulate the conduct and procedures of the Force and hopefully will act as deterrents to the problems discussed in the body of this Report.

1. The Chief of Police must make it absolutely clear to all ranks of police, supervisory and other, that excessive force and the giving of false evidence will under no circumstances be tolerated. This consideration must be uppermost in the selection of recruits, in the choice of candidates for promotion and in the confirmation of probationary appointments.

2. To ensure prompt investigation in hearing of complaints of improper use of force and other abuses by the police, it is essential that there be a properly functioning Citizen Complaint procedure. The present system is inadequate. A

Citizen Complaint procedure, having as its central aspect an independent investigation and review of police conduct and independent tribunal for the hearing of complaints, should be implemented by appropriate provincial legislation forthwith. In my view, the scheme recommended by Mr. Maloney in his Report meets these criteria and should commend itself to the Government as a workable model.

3. The Rules, Regulations and Procedures of the Metropolitan Toronto Police should be amended to require the sergeant in charge of a station to enforce compliance with the Use of Force Report Regulation by seeing that police officers fill it out whenever force is used during the performance of duty and when an injury is sustained by a citizen or when a complaint is or may be made.

4. The Regulations should be amended to require the station duty sergeant to make a note in the appropriate book of record in the station of the name of the person injured, a brief description of the injury, the name of the arresting officer and the fact that the required reports were made and forwarded as required by the Regulations.

5. Regulation V(2)(16) should be amended so as to require that either the arresting officer or the station duty sergeant makes out a Medical Attention Report whenever an injured person is brought into the station, taken to hospital or otherwise given medical treatment and a Use of Force Report is not completed. The Medical Attention Report should detail the nature of the injury and the circumstances surrounding it, the names of the arresting officers and any other information pertinent to the situation.

6. Copies of all Use of Force Reports and the Medical Attention Reports should be forwarded to the Chief of Police, the Board of Commissioners of Police and the head of the Citizen Complaint Review Procedure in order to ensure that

no cases requiring investigation are overlooked or hidden from public view. Regulations V(2)(16) and VI(12) should be amended to so provide.

7. I found a problem relating to changes being made in memo books and case books and the real danger that they could be and sometimes were tampered with. This problem would be eliminated if police officers' memo books and case books were required to be written in pen and the Regulation should be so amended. The Regulation requiring that changes in a notebook are to be made by striking out words with a single line, so that what has been stroked out can be read, must be stringently enforced.

8. Officers investigating complaints against police or officers who have a duty to report such complaints, such as the Complaint Bureau investigator or the station duty sergeant, should be required to obtain copies of the memo books of the officers involved immediately upon learning of the complaint in order to ensure that the books are preserved in their original state for the purposes of investigation or a hearing.

9. Immediate steps must be taken to ensure that all police personnel are made familiar with these Regulations and that their provisions will be strictly observed in the future.

10. Funds should be provided to build and staff an adequate police academy in Metropolitan Toronto.

11. Police training and supervision must emphasize that the function of a police officer is that of peacekeeping, prevention of crime and law enforcement and that it does not extend to acting as judge and jury in the administration of punishment to suspects.

12. Every police officer on the Toronto Force should receive a two or three week course to update and refresh his training

every three years. The present courses should be expanded.

13. In my view some of the special squads and in particular, the drug squad of at least one of the divisions were not properly trained in the investigation and arrest of suspects and in particular, in regard to the use of force in such investigations and arrests. The special squads, such as the drug squads in the divisions, should receive specialized and thorough training and should be supervised closely by experienced personnel.

14. The police raid is a delicate and dangerous operation. Often the suspect is not sure that it is the police who have burst in upon him. The circumstances of a raid lend themselves to the possibility of a violent confrontation. I think some of the problems would be alleviated if police officers engaged in a raid identify themselves as police immediately.

15. Two of the complaints which I heard involved high speed chases prior to the allegations of violence which followed. The incidents which resulted in the complaints might have been avoided by officers who had been given adequate training in a procedure for such chases and the arrest which follows. Such training should be given to every officer who undertakes cruiser patrol.

16. One of the keys to curbing improper police conduct lies with the supervisory personnel. In my view some of the supervisory staff who appeared before me, while good policemen, were uninformed and inadequately trained in simple management skills. Also some of the problems concerning use of force may have been avoided if the sergeants had more familiar knowledge of the activities of their men and also if they had made it clear that improper use of force would not be tolerated in any circumstances. First-line supervisory personnel, the sergeants, should receive training in management

and supervision, either immediately prior to or immediately after their promotion. The appointment of a probationary sergeant whose duties will involve supervision of other officers must be made with an eye to managerial and supervisory abilities.

17. The decision to confirm or not to confirm a probationary sergeant in his rank should be based on, among other things, his ability to supervise the officers under him, to win their respect and to find out how his men perform their jobs.

18. Officers under a cloud must not be promoted in order that the rank and file police officers do not receive the impression that results, however obtained, will result in promotion.

19. Police officers must be taught that even during tense and difficult situations, they should make explanations to an inquiring public in a friendly fashion concerning the events. Police officers must realize that the public has a right to know what is happening and that tact, friendliness and courtesy will alleviate conflict and create a climate of sympathy and understanding.

20. One of the problems with the modern Police Force that I have referred to is that the police car and modern communications technology have removed the police from the man on the street. Members of the Force should be made aware of the fact that they are much more distant from the public they serve than they once were, and they should be encouraged to become increasingly involved in community activities.

21. The Community Service Officer Program should be enlarged and broadened.

22. The administrators of the Police Force should consider

and study suggestions for a formal community involvement in the police function, such as those suggested in the Parkdale proposal and the North Vancouver project.

23. Unpaid fines should be collected by the Licensing Bureau charged with the duty of issuing and renewing driving licences, rather than by Metropolitan Toronto police officers.

24. Each Ontario driver's license should have a picture of the person to whom that licence was issued attached in order that the police can properly identify the holder of that licence.

25. Whenever a police officer is required to issue a summons for an offence, legislation should provide that he has the authority to demand satisfactory proof of identity and address or if these are not provided, the power of arrest. Present statutes that do not so provide should be repealed or amended to include these provisions.

26. Disciplinary proceedings against police under The Police Act are often delayed for a number of reasons, usually having to do with the need for the disposition of charges. The present six-month limitation period for such disciplinary proceedings is too short. Section 11 of The Public Authorities Protection Act, insofar as it provides for a six-month limitation period for disciplinary proceedings against police officers, should be amended to provide for a two-year limitation period.

27. The polygraph test has been referred to extensively in this Report because the complainants named in the Order-in-Council underwent polygraph examinations. I have formed definite opinions as to the validity and utility of the polygraph and while I have not been specifically asked to make recommendations in regard to the polygraph, I have decided to do so in any event. The polygraph test, which in my view is neither scientifically valid nor accurate and which is not a physiological test but

rather a dubious psychological test, should not be used in the criminal law process for other than investigative purposes.

28. The Legislature should study the use of the polygraph in the area of employment screening and should consider either prohibiting this use or strictly regulating it.