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SUBMISSIONS OF JULIAN FALCONER TO THE STANDING COMMITTEE ON SYSTEMIC RACISM IN POLICING SERVICES IN CANADA

(for more information, see www.falconers.ca)

“Plus ça change, plus c’est la même chose”¹

My name is Julian Falconer. I am a human rights lawyer and I have dedicated my 30-year career to advocating and writing on issues of racism in policing. I am the founding partner of Falconers LLP, a law firm with offices in Toronto, Thunder Bay, and Manitoulin Island, with a long history of representing victims of police racism and violence in Ontario.² I am honoured to attend before this standing committee of the Committee on Public Safety and National Security as part of its sessions on “systemic racism in policing in Canada.”

Of course, the recognition of the existence of systemic racism in policing in Canada means little more than accepting that racism pervades all corners of Canadian society and that it should hardly be a surprise that our policing institutions are no exception. As a Bencher for the Law Society of Ontario, I am embarrassed to admit that there remain many leaders in our profession (a significant number of my fellow Benchers at the Law Society) who continue to deny the existence of systemic racism in the legal profession. Obviously, there is no prospect of change if those in a position of power and privilege deny the existence of a problem.

The George Floyd tragedy in the United States has given rise to an awakening in this country. The very fact that these committee sessions are dedicated to the topic of “systemic racism in policing in Canada” represents an important breakthrough in the level of dialogue in Canada. While I feel it is incumbent on me to recognize the dialogue that now exists where simple denial was long the norm, I wish to state from the outset that dialogue is not enough. What plagues us is a lack of change, a lack of progress, and an inability of agents of change to influence outcomes.

My life’s work has been legal advocacy in the battle against racism and social injustice in its many forms. At Falconers LLP, our body of work spans three decades and we have provided services to a diverse range of clientele whose differences span race, ethnicity, mental health and culture.

I would like to think of myself and my team as agents of change. I have had the honour of working on cases such as those involving the shooting deaths of Lester Donaldson, Wayne William, Edmond Yu, and Sammy Yatim. I have represented the family of Ashley Smith. I have represented Maher

¹ Famous epigram of Jean-Baptiste Alphonse Karr.

² Please see the appended Biography for more background about Falconers LLP



Arar. Since 2008, I have had the honour of representing various levels of Indigenous governments, members of Indigenous communities, and Indigenous police services.

In all this time, in all of these battles, I have learned that the famous and undeniable French expression, “Plus ça change, plus c’est la même chose”, applies perfectly.

I do not appear here to waste your time and attempt to simply create a specter of negativity when so much potential exists to make inroads today. What I do wish to do is to remind you, and remind this country, that while we may be at a crossroads as a result of the death of George Floyd and the resulting awakening of people across the world, we have blown important opportunities in the past. Empty apologies, platitudes, sincere expressions of support without more, all threaten to rob us of an important opportunity for transformation.

I travel the provinces of Ontario, Quebec, and Manitoba under my own steam in a small, four-seater plane that we like to call Falconair. As a lawyer and a bush pilot (much of my time is spent flying in the north), I have seen firsthand the highs and the lows of the battles against systemic racism, not only in policing, but its manifestations through the justice system as a whole, education, health, child welfare, and other key structures in our society.

Even when the ugly truth of systemic racism is seen, and agents of oppression are held accountable, there is no mechanism to enforce change. I had the honor of representing Rainy River First Nations and Brad DeBungee in respect of the death of Stacy DeBungee in Thunder Bay, as well as Nishnawbe Aski Nation in relation to the seven lost youth in Thunder Bay, most of whom who were discovered, dead, in the rivers of Thunder Bay. Following Stacy DeBungee’s death and a shoddy investigation by the Thunder Bay Police Service, we filed two complaints with the Office of the Independent Police Review Director. One focused narrowly on the investigation into Mr. DeBungee’s death, and the other alleged systemic issues with how the Thunder Bay Police Service investigates Indigenous deaths more broadly.

We alleged and proved that the Thunder Bay police investigation into Mr. DeBungee’s death was deeply flawed as a result of a racist and incompetent police service. The OIPRD’s 2018 Report on its systemic review, *Broken Trust: Indigenous People and the Thunder Bay Police Service*,³ concluded that systemic racism against Indigenous peoples operated at all levels of the Thunder Bay Police Service and that there was no other way to explain the shoddy and incompetent death investigations that left so many families traumatized.

This was a historic moment. I was there when Indigenous people from across the north gave a standing ovation to Gerry McNeilly, Director of OIPRD (who has since been removed from his post by the Ford government) for the content of this report. I can categorically and unequivocally state that the report constituted the broadest condemnation of an entire police service I have ever seen by way of a formal report.

But what change has been made?

³ <http://oiprd.on.ca/wp-content/uploads/OIPRD-BrokenTrust-Final-Accessible-E.pdf>



And therein lies the problem. Yes, we now know how to say the words systemic racism, but we are lacking concrete steps to fix it.

As an agent of change and a partner to racialized and Indigenous victims of racist policing, I see that being able to say the words “systemic racism” may be a start, but that is all it is. Actual concrete steps are essential. The opportunity is now, but we have to be willing, with an open mind and open heart, to adopt real change.

Taking Concrete Action to Adopt Real Change

At this stage, it is imperative that we bridge good intentions with concrete action. I can think of no better example of an issue requiring change as the chronic inability of our police services to de-escalate crisis incidents with individuals living at the intersection of race, Indigeneity, gender identity, sexual orientation, class, and mental illness, who are experiencing crisis.

I reflect on our firm’s work over the last 30 years and I end up pondering what might have been had we taken action sooner.

In 1992, 28 years ago, I had the honor of representing the Urban Alliance on Race Relations in the Inquest into the death of Lester Donaldson, a black Jamaican man who suffered serious issues of mental illness, was shot to death by Constable David DeVinney, who was ultimately acquitted at a high-profile criminal trial in relation to the fatal shooting.

Since then there have been many others. Wayne Williams, Edmond Yu, Sammy Yatim, all individuals whose cases have received an extraordinary amount of public coverage in respect of the needless and preventable loss of life that occurred. My work for Indigenous community members has the sad same pattern. In Timmins, the more recent deaths of Fort Albany First Nation community members Joey Knapaysweet and Agnes Sutherland (we act for both families) in February 2018 both speak to the reality that Indigenous people struggling with serious mental health issues are equally in jeopardy at the hands of police.

In the south, the recent deaths of Regis Korchinski-Paquet⁴ and Ejaz Choudry⁵ in the cities of Toronto and Mississauga are further examples of a constant and recurring theme of how community members of colour experiencing a mental health crisis are truly vulnerable to death at the hands of the police.

The intersectionality of these deaths at the hands of police reinforces that the underlying issues are multi-layered and do not lend themselves to single solutions.

So what to do? The risk is that we become paralyzed from the sheer enormity of the task at hand. Is the need for change so great and so complex that we are incapable or unwilling to initiate real change?

⁴ Shanifa Nasser, “Security footage retrieved from highrise where Toronto woman fell to her death” (CBC News, June 1, 2020) <https://www.cbc.ca/news/canada/toronto/regis-korchinski-paquet-toronto-1.5593718>

⁵ Shanifa Nasser, “Officer who fatally shot Ejaz Choudry refuses to speak with investigators, police watchdog says” (CBC News, July 23, 2020) <https://www.cbc.ca/news/canada/toronto/ejaz-choudry-shooting-investigation-1.5660703>



No.

No, because there are concrete steps that can be taken, and if you will allow me, I will put three items out there now for you to get behind and get right.

First, listen to the experts on mobile crisis intervention teams. This is an issue in policing that political leadership seems, for whatever reason, to only be waking up to now. The call for defunding the police, when understood holistically, is a call to reallocate resources from militaristic responses by police to people living at the intersection of race, ethnicity, gender identity, sexual orientation, physical ability, age, and mental health. Simply put, where interactions between the police and people living at those intersections occur, they too often end in violence and death. The jury in the Lester Donaldson case recognized this 28 years ago, when they recommended the establishment of a crisis intervention unit with 24-hour on-scene response capacity to respond to cases of emotional crisis.⁶ And yet here we are today, no further forward. *Plus ça change, plus c'est la même chose.*

A perfect example is the death of 20 year-old Beau Baker, a mentally ill Caucasian individual whose inquest is set to take place over the next year. On April 2, 2015, Beau called the police in the midst of a suicidal episode. This was not the first time he had called the police when suicidal, and dispatch clearly communicated this to the officers who responded to the call. Despite the fact that the Waterloo Region Police Service has access to Specialized Crisis Teams trained to assist adults in emotional crisis, those services were not summoned to assist Beau. The officers that did arrive ultimately shot Beau 7 times, causing his death. No information was provided by the police as to why a mobile crisis team was not called, and no charges were laid against the officers that shot and killed Beau.⁷

The reason we have not moved forward despite the lessons learned from the death of Lester Donaldson 28 years ago is we have a police culture that feeds its officers the idea that only *they* can handle dangerous situations, only *they* can de-escalate people in mental health crisis. However, the police are not the best at handling these critical situations. We know this, because people keep dying. In comparison, when people in mental health facilities are experiencing mental health crisis, and need to be brought under control because they are a danger to themselves or others, they do not end up dead. Mental health professionals manage to de-escalate situations everyday without the loss of life. These are the professionals who should be being brought to scenes of mental health crisis. These are the professionals who we should be entrusting with the lives of people who are at their most vulnerable, people for whom a militaristic force that communicates through violence and coercion represents not assistance but, rather, a potential death sentence.

Whether it's the RCMP who have been intransigent in the face of recommendations from their oversight body,⁸ or municipal services who continue to suffer from a lack of resources and political

⁶ Office of the Chief Coroner, Verdict of Coroner's Jury in the Lester Donaldson Inquest (July 1994), Recommendation #21-26

⁷ CTV Kitchener, "No charges for WRPS officer who fatally shot Beau Baker" (October 20, 2015) <https://kitchener.ctvnews.ca/no-charges-for-wrps-officer-who-fatally-shot-beau-baker-1.2618648>

⁸ Catharine Tunney, "RCMP watchdog says force isn't listening to its recommendations on use of force in wellness call" (CBC News, July 24, 2020) <https://www.cbc.ca/news/politics/systemic-racism-policing-study-1.5661662>



will to allocate those resources, or a provincial government who will not invest in de-escalation to the same level as use of force training ---- we need to break the logjam around how we respond to those in crisis.

It is true that this is not a frontal attack on racism. In other words, it appears that the appropriate de-escalation teams I am speaking about are focused on issues of mental health. So what about racism? I am here to tell you after 30 years of doing this work that there is little or no doubt in my mind that the most vulnerable community members who end up facing police while experiencing mental health crises are disproportionately represented in Indigenous and racialized communities.

A commitment in terms of real dollars and reconsideration of mandates so that these mobile crisis teams are activated earlier and more often will save lives, and in particular, will mitigate the racist and biased policing that has victimized Indigenous and racialized people.

Second, we need to improve processes of accountability. Processes that lead to recommendations without implementation are useless and foster cynicism and disrespect for the institutions we are trying to change. Coroner's inquests in Ontario have stood as a surrogate for real inquiries. They produce recommendations that seldom get acted on; they reflect what's wrong with our system. Huge amounts of family emotional investment, community trauma, and public dollars go into convening these inquests, and yet there exist no means for ensuring credible monitoring and implementation of recommendations they create.

Take the Seven Youths Inquest as an example. At the conclusion of that high-profile, 10-month inquest into the deaths of the seven Indigenous youths in the rivers of Thunder Bay, in which my team and I had the honour of representing Nishnawbe Aski Nation, 145 recommendations were issued by the jury.⁹ NAN called for the intervention of the Auditor General of Canada to do a Performance Audit to track the implementation of the recommendations. It is the role of the Auditor General to provide Parliament with fact-based information and advice on government programs and activities, gathered through audits. Parliamentarians use these reports to oversee government activities and hold the federal government to account for its handling of public funds.

We were right to request this audit. As community statement after community statement has observed in the last three years in the north, little has changed since the release of these 145 recommendations, of the OIPRD's historic *Broken Trust* report, and of the report by Justice Murray Sinclair (now Senator Sinclair) on the Thunder Bay Police Board,¹⁰ which collectively indicted the entire police service. When the Office of the Auditor General declined to exercise its discretion to assist NAN, the hope created by this work was replaced with an ongoing disillusionment, because nothing has changed in Thunder Bay. *Plus ça change, plus c'est la même chose.*

⁹ Office of the Chief Coroner, *Verdict of Coroner's Jury in the Seven Youths Inquest* (June 2016): <https://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCVerdictsSevenFirstNationsYouths.html>

¹⁰ Senator Murray Sinclair, *Thunder Bay Police Service Board Investigation: Final Report* (November 2018): https://slasto-tsapno.gov.on.ca/ocpc-ccop/wp-content/uploads/sites/5/2018/12/TBPSB_Investigation_Final_Report_-_EN-FINAL-1.pdf



We are mired in this country in our collective failure to achieve real change for our racialized and Indigenous brothers and sisters. Just this week, the Ontario Human Rights Commission (“OHRC”) released a second interim report in its inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service (“TPS”). The report, entitled, *A Disparate Impact*, affirms something that has been well-known to the Black community for years: Black people are more likely to be arrested, charged, and struck, shot, or killed by the TPS than non-Black people.¹¹ TPS data ranging from 2013-2017 revealed that Black people are 5 times more likely than any other group to be the subject of violence at the hands of the police, and *20 times* more likely to be involved in a fatal shooting by the TPS.¹² This is despite controlling for factors which might be argued to be non-discriminatory, such as living in a high-crime area, lower income, or single-parent households.¹³ Generally speaking, the odds that a Black person in Toronto will face violence at the hands of the TPS are 55 times greater than the odds of a White person.¹⁴

While legislators have made attempts to create oversight bodies to correct these issues, police officers continue to circumvent them. The Office of the Independent Police Review Director (“OIPRD”) recently released its report regarding a complaint made on behalf of Dafonte Miller against former TPS Chief of Police Mark Saunders.¹⁵ Mr. Miller was brutally assaulted by TPS Police Constable Michael Theriault and his brother in December 2016, with the Durham Regional Police eventually called to the scene. The OIPRD report revealed that Chief Saunders was kept in the dark for five months about the brutal beating of Dafonte Miller and indicated that Chief Saunders was not made aware of the incident until May 2, 2017, when the Special Investigations Unit (“SIU”) advised that it was invoking its mandate – after *our office* informed the SIU of the attack.

As the case of Dafonte Miller shows, the criminal justice system and police accountability bodies such as the SIU and OIPRD are not up to the task at hand. Criminal proceedings, where instituted, are unable to hold individuals fully accountable for their acts. And police officers are retiring out of reach of oversight bodies: TPS and Durham Police Chiefs Saunderson and Martin, respectively, have both retired, as have SIU inspector Ed Boyd and the father of the Theriault brothers, John Theriault, who at the time of the attack served as a member of the Professional Standards Bureau of the TPS. By retiring, these individuals have all avoided professional accountability for the events that resulted in the attack on Dafonte Miller and, perhaps more importantly, the police cover-up of the actions of PC Theriault.¹⁶ Dafonte Miller’s experience is a case study of how racism operates on every level to enable and cover up police violence, and that even when such violence is exposed, the systems in place to hold officers accountable have no teeth.

When you look at all this, it becomes clear that nothing meaningful is being done. *Plus ça change, plus c’est la même chose*. The oversight tools aren’t working. The honour system isn’t working.

¹¹ Ontario Human Rights Commission, [*A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*](#) (August 2020), at page 2

¹² *Ibid*, at page 3 and 8

¹³ *Ibid*, at page 11

¹⁴ *Ibid*, at page 11

¹⁵ <https://falconers.ca/wp-content/uploads/2020/08/Investigative-Report-Dafonte-Miller-TPS-Chiefs-complaint-FINAL-Police.pdf>

¹⁶ Adam Carter, “Assault victim Dafonte Miller blasts Toronto police after OIPRD report release” (CBC News, Aug 7, 2020) <https://www.cbc.ca/news/canada/toronto/dafonte-miller-oiprd-report-1.5677419>



We need to deliver on change. What does that look like? How? You need to build your implementation tools to stop the nonsense.

When your RCMP Complaints Commissioner tells you that the RCMP isn't listening to its recommendations, where are the repercussions? When an officer refuses to speak to the SIU, or an entire police force conspires to conceal a violent attack by one of its own from the SIU's knowledge, where are the repercussions? When Police Chiefs state publicly that they have no intention of making use of mobile crisis teams, where are the repercussions? Where is the enforcement power? Where is the money being spent?

My team and I are on the front lines. We are doing battle. And I am here to tell you that, collectively, we need to do better.

Third, and finally, if we are to make inroads to change, it is high time that we hold bad officers and their superiors who deliberately mislead (in order to cover their tracks) criminally accountable.

The story of the beating of Dafonte Miller is one which communities are paying close attention to. He is a young Black man who had the misfortune of being targeted by an off-duty TPS police officer and the officer's brother for a brutal beating while out for a walk in a residential area – a beating which resulted in the loss of his left eye and various facial and other fractures.

The two white males, the Theriault brothers, had no visible injuries of any kind. Despite coming upon a scene where a young black male is severely injured (his left eye literally dislodged) and two individuals with no injuries are standing over him purporting to effect an arrest, it never occurred to the Durham Regional Police Service officers present that the white males may have been the assailants and the black youth the victim. In fact, as a gesture, the first Durham officer on the scene actually offered PC Theriault their handcuffs to permit him to complete the arrest of this severely beaten black youth. None of these facts are in dispute and all of these facts have been the subject of evidence at the criminal trial.

The extent of public interest in this case was such that, on the day judgment was issued by the Court in the criminal trial of the Theriault brothers, over 19,000 viewers logged in to listen to the Judge read out his judgment. The public was able to view the rendering of the judgment on the Court's YouTube channel, set up to permit electronic public access during the pandemic.

Dafonte Miller's case is about senior police officials for two services (Durham Police and Toronto Police) covering their tracks for months on end; it's a case about cover-up at both the rank and file and leadership levels; and it's a case about vigilante justice exercised by two white men on a black youth.

Addressing the fabrication of stories by bad police officers intended to conceal the commission of atrocities against racialized and Indigenous people is key in my opinion. The recent OHRC report tells us that Black community members in Toronto face a disproportionately high number of police-laid obstruct justice charges, even comparative to other charges. Black people in Toronto represent



42.5% of people charged with obstruct justice, while White people are proportionally under-represented in such charges. This is reflective of the extremely discretionary nature of this charge, and how systemic anti-Black racism shapes policing.¹⁷

Notably, it is rare that police officers face obstruct and/or perjury charges. Bad police officers are chronically permitted to retire out of accountability (thereby dodging internal investigations) and, though fabrications are common as a means of covering one's tracks, it is a rarity to see charges of obstruct justice or perjury laid in respect of cover-ups.

Simply put, bad police are not accountable the same way the rest of the public are.

What you see in the post-Floyd world is a rejection of this double standard being applied to police. When officers lie about how they handles the scene, they are rarely charged with obstruct justice, and never convicted.

In my opinion, one of the most important means of deterring the misrepresentations by police officers who cross lines is to start relying on obstruct justice and perjury charges in the same way these charges are used with members of the general public. The double standard I speak of has pervaded my work through 30 years. It is high time police officers and other justice officials who lie about their actions face actual criminal sanction.

Make no mistake about it, people know and understand that misleading narratives under oath by police officers simply do not receive the same scrutiny and consequences as the rest of the public. These double standards do nothing to enhance community confidence in policing.

Seizing this Moment

I am aware that much of what I have described here paints a very dark picture. However, I am not here to be negative or to lecture. I am here to inspire you to seize this moment and take action to impact concrete systemic change. The reaction we have seen from the public to the death of George Floyd shows that people are tired of the lack of change. They are rejecting leadership that gives platitudes, issues apologies, but is unwilling to take concrete steps to ensure that racialized communities are no longer subject to violence at the hands of the police. The calls to defund and abolish the police demonstrate this.

I happened to be in Thunder Bay on June 5, 2020, when close to 1,000 protestors marched into Waverly Park to rally against police violence in the wake of the death of George Floyd.¹⁸ The people of Thunder Bay were mobilized in a way I've never seen; it brought tears to my eyes, it felt like a validation after decades of work. But I know where it goes next. You wait for it to die down and go back to business as usual. And I'm calling you out on this. The disconnect that exists between the community and police is a result of leadership being tone death to the cries of the community, and

¹⁷ OHRC, "Disparate Impacts" Report, at page 6

¹⁸ CBC News, "Large crowd gathers for Black Lives Matter rally in Thunder Bay" (CBC, June 5, 2020) <https://www.cbc.ca/news/canada/thunder-bay/black-lives-matter-thunder-bay-1.5600740>



the needs for real change – to date, you have been unwilling, or unable, to affect it. I urge you to reverse this pattern. You have a public that is galvanized over this issue. Seize this moment to do something about it.

Thank you for your time.

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