



Ombudsman Toronto Enquiry Report

Review of the TTC's Investigation
of a February 18, 2018 Incident
Involving Transit Fare Inspectors

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Susan E. Opler, Ombudsman

Genevieve Currie, Ombudsman Investigations Counsel

Luke Brown, Ombudsman Investigator, Interim Director

Kwame Addo, Director of Investigations & Conflict Resolution (former)

EXECUTIVE SUMMARY	1
INTRODUCTION	4
The Incident	4
TTC and Toronto Police Service Investigations	4
Focus of the Ombudsman Toronto Enquiry: the TTC's Investigation	5
BACKGROUND.....	7
The Transit Enforcement Unit.....	7
Ombudsman Toronto's Past Investigation of TTC Oversight of the Transit Enforcement Unit.	7
The TTC's Investigation of the February 18, 2018 Incident.....	8
OMBUDSMAN TORONTO'S ENQUIRY	9
Focus	9
Method	9
OMBUDSMAN TORONTO COMMENDS THE TTC FOR SOME ASPECTS OF ITS INVESTIGATION	9
PROBLEMS WITH THE TTC'S INVESTIGATION	10
1) The TTC investigation should have asked more questions.....	11
2) The TTC investigation should have identified the important facts in dispute and made clear factual findings	16
3) The TTC investigation applied the wrong standard of proof in some of its analysis	18
4) The TTC investigation did not clearly analyze two important issues	19
5) The TTC's expert witness was not independent and his written opinion was not based on an adequate review of the evidence	22
6) There are not enough structural safeguards to ensure the Unit Complaints Coordinator's independence and impartiality	24
SUMMARY OF FINDINGS.....	27
RECOMMENDATIONS.....	28
Ensure that Unit Complaints Coordinator Investigations are Independent and Impartial	28
Clarify the Standard of Proof	28
Use Expert Opinions Appropriately.....	28
Investigator Training.....	29
Timeframe for Implementation.....	29
TTC MANAGEMENT'S RESPONSE	29
FOLLOW UP	29
THE BROADER CONTEXT.....	29
CONCLUSION.....	32
Appendix A.....	34

EXECUTIVE SUMMARY

The Enquiry

On February 18, 2018, three Toronto Transit Commission ("TTC") Transit Fare Inspectors forcibly detained a young Black man on a streetcar platform at St. Clair Avenue West and Bathurst Street. Witnesses, the media and members of the public wanted to know why the fare inspectors detained him, whether they used unnecessary force and whether anti-Black racism was a factor.

The Ombudsman called on the TTC to investigate the incident and pledged that her office would ensure that the TTC's investigation was appropriately thorough, fair and transparent and that its conclusions were reasonable.

The TTC's public investigation report concluded there was insufficient evidence to support any allegation of misconduct (with one exception, that one fare inspector inappropriately smiled at the young man).

The Ombudsman Toronto team conducted a detailed review of the TTC's investigation report, the contents of the TTC's investigation file, media reports, video documentation from various sources, and relevant corporate documents, policies, and procedures. We also interviewed the two TTC investigators.

We did not investigate the underlying incident. Because the facts of the February 18, 2018 incident are now the subject of a court action, we have not made findings about what happened that day, including whether any of the fare inspectors discriminated against the young man or did anything else wrong.

Findings

Our Enquiry revealed that while the TTC's investigation had many good features, it fell short in several important ways. In particular, we found that the TTC's investigation did not:

- ask enough questions
- make clear findings of fact
- apply the correct standard of proof in some of its analysis
- transparently analyze the evidence in light of the TTC's expectation that fare inspectors will disengage from potentially difficult situations
- transparently analyze evidence that could have supported a finding of unconscious racial bias
- ensure adequate independence for the internal investigator for fare inspector complaints

Overall, we found that the TTC's investigation into this incident was not adequately thorough, fair and transparent. We therefore could not find that its conclusions were reasonable.

Ombudsman Toronto made six recommendations to improve the TTC's ability to conduct investigations in a fair and effective way and to enhance public trust in the process.

Ensure that Investigations are Independent and Impartial

- 1) The TTC should develop a plan to strengthen the independence of its internal investigations of the Transit Enforcement Unit.
- 2) The TTC should strengthen its documentation of the Unit Complaints Coordinator's terms of reference and their role and mandate.
- 3) The TTC should also consider creating a protocol for retaining external investigators in appropriate cases.

Clarify the Standard of Proof

- 4) All relevant TTC policies and training should clearly state that the standard of proof that applies in investigations of complaints about Transit Fare Inspectors is proof on a balance of probabilities.

Use Expert Opinions Appropriately

- 5) The TTC should document in its investigation policies and procedures that any expert witness it retains should not have ties to the TTC. The expert witness should provide written confirmation that they understand they are being asked for a fair, objective and non-partisan opinion. Furthermore, the TTC should demonstrate that the expert witness prepared their opinion without the TTC's assistance.

Investigator Training

- 6) The TTC should develop a plan to provide additional training to its internal investigators to equip them with the necessary tools to conduct an investigation fairly and independently.

TTC management agrees with the recommendations and has committed to implementing them by December 31, 2019.

Follow Up

Ombudsman Toronto will follow up until we are satisfied that implementation is complete.

The Broader Context

This is not the first time Ombudsman Toronto has reviewed the TTC's oversight of its Transit Enforcement Unit. Beginning in 2015, Ombudsman Toronto conducted a large systemic investigation, followed up on recommendations made in that investigation and looked into additional complaints and concerns about the unit. After four years of work,

we remain concerned about the TTC's oversight of this unit, and have broader questions about the structure and culture of the unit.

We raised these issues with the TTC, and we emphasized how important it is to be proactive in addressing the public's concerns in order to maintain public trust and confidence. In response, the TTC has decided to implement a broad and comprehensive anti-racism strategy, aimed directly at preventing racial profiling. It also plans to implement changes to shift the structure and culture of the Transit Enforcement Unit from a culture of enforcement and compliance to one based on rider security, service, respect and dignity.

INTRODUCTION

The Incident

1. On February 18, 2018, three Toronto Transit Commission ("TTC") Transit Fare Inspectors forcibly detained a young Black man on a streetcar platform at St. Clair Avenue West and Bathurst Street.
2. A member of the public posted video footage taken near the end of the incident, showing the young man pinned face down on the ground by both fare inspectors and Toronto Police Service officers who came to assist. In the video, the young man can be heard crying "I didn't do anything though" and "you're hurting me, you're hurting me, you're hurting me."
3. The media reported that witnesses believed fare inspectors had detained the young man for not paying his fare and that police had found the young man had not committed any offence and immediately released him.
4. Witnesses, the media, members of the public and the Ombudsman expressed concern about reports of what had happened and wanted to know why fare inspectors detained this young man, whether they used unnecessary force and whether anti-Black racism was a factor.

TTC and Toronto Police Service Investigations

5. On February 21, 2018, Ombudsman Susan Opler wrote to the TTC's Acting Chief Executive Officer¹ requesting information about the TTC's plans to investigate the incident.
6. On February 23, 2018, the TTC publicly confirmed that it would investigate the incident, including allegations of racial discrimination, unauthorized use of force, and acting in a manner likely to bring discredit upon the reputation of the TTC.
7. Also on February 23, 2018, the Toronto Police Service told the TTC it would investigate the incident and decide whether any criminal charges should be laid against the fare inspectors.
8. In March 2018, the young man started a lawsuit against the TTC, the fare inspectors and police officers involved in the incident and the Toronto Police Services Board.

¹ On July 10, 2018, the TTC's Board of Directors selected Rick Leary, then Acting Chief Executive Officer, to become Chief Executive Officer.

9. On April 23, 2018, the Toronto Police Service told the TTC it would not lay criminal charges against the three fare inspectors.
10. On July 4, 2018, the TTC publicly released its 95 page investigation report² and video footage of the incident from two cameras inside the streetcar, with faces blurred to protect privacy.
11. The TTC investigation concluded there was insufficient evidence to support any allegation of misconduct with one exception. It found that one of the three fare inspectors involved (referred to in this report as "Inspector 1") had smiled at the young man "during a tense interaction." The investigation found this smile was inconsistent with TTC and community expectations and found to be discreditable conduct.
12. The TTC also announced that Inspector 1 had left his employment with the TTC for unrelated reasons.

Focus of the Ombudsman Toronto Enquiry: the TTC's Investigation

13. On the same day the TTC released its investigation report, the Ombudsman announced that Ombudsman Toronto would review the TTC's investigation to examine whether it was appropriately thorough, fair and transparent and whether its conclusions were reasonable based on the evidence.
14. We committed to reviewing the TTC's investigation but not the underlying incident. Because the facts of February 18, 2018 are now the subject of a court action, we have not made findings about what happened that day. Specifically, we have not determined whether the fare inspectors engaged in racial discrimination or misconduct of any other kind.
15. It was important for the TTC to get this investigation right. There was widespread concern about this incident and the TTC needed to answer the public's questions about what happened and why. More broadly, the TTC had to show the public it is capable of investigating concerns about its employees' conduct, identifying any problems and fixing them.
16. A thorough and fair investigation was particularly important in this context, where fare inspectors exercise legal authority to issue tickets at their discretion and, in certain limited circumstances, may also use force and arrest people in the course

² Toronto Transit Commission, *Toronto Transit Commission Investigation Report: Investigation into Incident dated February 18, 2018 Involving Transit Fare Inspectors* (June 28, 2018) [TTC Investigation Report], online: Toronto Transit Commission [https://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2018/July 27/Reports/16 Investigation into Incident Involving Transit Fare Inspec.pdf](https://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2018/July%2027/Reports/16%20Investigation%20into%20Incident%20Involving%20Transit%20Fare%20Inspector.pdf)

of their work. The TTC must hold its employees accountable for any misuse of these powers.

17. The importance of this public accountability was heightened by the public concern that this incident may have involved anti-Black racism.
18. We know that anti-Black racism exists in the City of Toronto.³ We also know that anti-Black racism is extremely damaging – particularly to people who experience it personally but also to organizations in which it exists and to society as a whole.
19. All City of Toronto organizations, including the TTC, must demonstrate that they stand against anti-Black racism, by proactively working to eradicate it and by thoroughly investigating allegations of anti-Black racism when they arise. Where they find that anti-Black racism was a factor in an incident, it is essential that they take steps to address it and to prevent it from happening again.
20. Ultimately, the TTC exists to serve the public and its effective operation relies on public co-operation, confidence and trust. Part of this depends on the public knowing that the TTC properly investigates concerns about use of authority, force and racism.
21. After a comprehensive review, we found that the TTC's investigation of this incident, while commendable in many respects, fell short in several important ways. This report sets out the basis for this finding and makes recommendations to improve future investigations.

³ See for example City of Toronto, *Toronto Action Plan to Confront Anti-Black Racism* (December 2017), online: City of Toronto <https://www.toronto.ca/legdocs/mmis/2017/ex/bgrd/backgroundfile-109127.pdf>, *R v. Brown* (2003), CanLII 52142 (ON CA) at paras. 7-8, online: CanLII <https://www.canlii.org/en/on/onca/doc/2003/2003canlii52142/2003canlii52142.html?resultIndex=6>, *Elmardy v. Toronto Police Services Board* (2017), CanLII 2074 (ON SC), online: CanLII <https://www.canlii.org/en/on/onscdc/doc/2017/2017onsc2074/2017onsc2074.html?autocompleteStr=elmardy&autocompletePos=1> and *R v. Parks* (1993), CanLII 3383 (ON CA), online: CanLII <https://www.canlii.org/en/on/onca/doc/1993/1993canlii3383/1993canlii3383.html?resultIndex=2>

BACKGROUND

The Transit Enforcement Unit

22. The TTC's Transit Enforcement Unit is responsible for protecting the safety and integrity of the third largest transit system in North America, which provides more than 530 million passenger trips annually.⁴ The unit employs both Transit Enforcement Officers and Transit Fare Inspectors.
23. Transit Enforcement Officers are designated special constables by the Toronto Police Services Board. They have powers similar to police officers to enforce laws on TTC property and are authorized to carry and use handcuffs, batons and pepper spray.
24. Transit Fare Inspectors inspect rider proof of payment and have the power to issue provincial offences tickets. They are not special constables. They carry no weapons.

Ombudsman Toronto's Past Investigation of TTC Oversight of the Transit Enforcement Unit

25. Sparked by a different incident captured on social media in 2015 involving Transit Enforcement Officers, Ombudsman Toronto spent more than two years informally gathering information and eventually conducting a formal Investigation into the TTC's training, oversight and public reporting relating to the Transit Enforcement Unit.
26. In April 2017, we released a comprehensive Investigation report⁵ making 26 recommendations to the TTC about its oversight of the unit, including that it:
 - amend policies and training materials to clearly outline the importance of de-escalation as an alternative to the use of force
 - ensure both Transit Fare Inspectors and Transit Enforcement Officers receive regular training on responding to people affected by mental illness or in emotional distress
 - improve public reporting about use of force incidents

⁴ TTC's 2017 Operating Statistics, online: Toronto Transit Commission https://www.ttc.ca/About_the_TTC/Operating_Statistics/2017/section_two.jsp

⁵ Ombudsman Toronto, *An Investigation into the Toronto Transit Commission's Oversight of its Transit Enforcement Unit* (April 2017), online: Ombudsman Toronto <https://www.ombudsmantoronto.ca/Investigative-Work/Investigative-Reports/Investigation-Reports>

- confirm that the TTC may investigate the conduct of Transit Fare Inspectors and Transit Enforcement Officers even where there has been no complaint by a member of the public
- consider developing a TTC policy on the exercise of discretion by Transit Fare Inspectors and Transit Enforcement Officers.

27. The TTC accepted all 26 recommendations and we continue to monitor their implementation, which is not yet complete.

The TTC's Investigation of the February 18, 2018 Incident

28. The same day that videos of the incident surfaced online, the Head of the Transit Enforcement Unit asked the TTC's internal investigator, the Unit Complaints Coordinator, to investigate whether one of the Transit Fare Inspectors involved (Inspector 1) used unauthorized force during the incident.

29. The Unit Complaints Coordinator promptly expanded the scope of the investigation to include the public's expressed concerns about racial discrimination as well as the conduct of the two other fare inspectors involved.

30. The Unit Complaints Coordinator also promptly asked for a Human Rights Consultant from the TTC's Diversity and Human Rights Division to help with the investigation.

31. The Human Rights Consultant and the Unit Complaints Coordinator told us that the Human Rights Consultant's role was to "provide a consultation" to the Unit Complaints Coordinator about only the allegations of discriminatory or harassing conduct contravening the TTC's Respect and Dignity Policy. As the Unit Complaints Coordinator explained to witnesses, however, the findings in the report would be his.

32. To provide this consultation, the Human Rights Consultant actively participated in the investigation process, including the fact gathering, analysis and report-writing phases.

33. Collectively, we refer to the Unit Complaints Coordinator and the Human Rights Consultant as "the TTC investigators."

34. In undertaking this investigation, the TTC investigators:

- identified the issues to be investigated
- identified the persons involved and several witnesses to the incident and requested information from them
- obtained relevant documents, including video evidence, records generated by the TTC about the incident, and training materials
- sought and obtained an expert opinion about Inspector 1's conduct
- personally interviewed the three fare inspectors and some other witnesses

- considered the evidence
- prepared a report setting out their conclusions.

OMBUDSMAN TORONTO'S ENQUIRY

Focus

35. In reviewing the TTC's investigation, the Ombudsman Toronto team focussed on two questions:
- Was the TTC's investigation appropriately thorough, fair and transparent?
 - Were the TTC's conclusions reasonable, based on the available evidence?

Method

36. The Ombudsman Toronto team reviewed:
- the TTC's investigation report, dated June 28, 2018
 - media reports of the incident and TTC investigation
 - video documentation of the incident, from the TTC and media sources
 - the TTC's relevant corporate documents, including policies and procedures
 - the TTC's extensive investigation file and related emails, including:
 - notes, reports, and statements
 - training and personnel records
 - correspondence with their expert
 - correspondence with witnesses
 - recordings of witness interviews
37. The Ombudsman Toronto team also interviewed the two TTC investigators.

OMBUDSMAN TORONTO COMMENDS THE TTC FOR SOME ASPECTS OF ITS INVESTIGATION

38. The Ombudsman Toronto team found that the TTC's investigation had many good features. We commend the TTC for the following:
- Even before there was a decision to investigate, the TTC retained all video evidence from its cameras relating to this incident.
 - The TTC promptly initiated an internal investigation.
 - The Unit Complaints Coordinator promptly reviewed the information available and exercised his authority to broaden the scope of the investigation to include additional issues.

- The Unit Complaints Coordinator promptly requested special assistance from the TTC's Diversity and Human Rights Department with respect to allegations of discrimination and harassment.
- The TTC investigators diligently attempted to obtain all available TTC records relating to the incident and the fare inspectors involved.
- The TTC investigators carefully identified all TTC employees who might have information relevant to the incident. They required each of these employees to provide a written statement and also interviewed many of them.
- TTC investigators made efforts (ultimately unsuccessful) to locate a member of the public who had posted video of the incident to social media and had spoken to journalists about witnessing the incident.
- The TTC devoted considerable resources to this investigation.
- The TTC investigators prioritized the investigation and completed it quickly.
- The TTC investigators acted diligently and in good faith throughout the course of the investigation.
- The TTC publicly disclosed the report and video evidence of the incident.
- The TTC maintained detailed records of the investigation.
- The TTC, including the TTC investigators, regularly updated the Ombudsman about the status of its investigation and co-operated fully with every request by Ombudsman Toronto during the course of our review.

PROBLEMS WITH THE TTC'S INVESTIGATION

39. Despite all of the above, however, Ombudsman Toronto found that the TTC's investigation fell short in six important areas:
- It should have asked more questions
 - It should have identified important facts in dispute and made clear factual findings
 - It applied the wrong standard of proof in some of its analysis
 - It did not clearly analyze two important issues: the TTC's expectation that TFIs disengage and evidence of possible unconscious racial bias
 - The TTC's expert witness was not independent and did not adequately review what happened

- There are not enough structural safeguards to ensure the Unit Complaints Coordinator's independence and impartiality

40. We address each of these areas below.

1) The TTC investigation should have asked more questions

41. The TTC investigation should have more thoroughly probed what actually happened during this incident and why. Also, it should have sought out more sources of information.

It did not probe how the event began

42. The incident began on a westbound St. Clair streetcar about 4:30pm on a Sunday. The three fare inspectors had finished their shift and were riding the streetcar, returning to their headquarters at the Hillcrest Yard (on Bathurst St. south of St. Clair Avenue West) before heading home. They were not checking proof of payment.

43. The young man stepped onto the streetcar at a middle door at St. Clair West station and stood directly across from where Inspector 1 was standing, facing him. The other two fare inspectors were standing farther back in the streetcar.

44. One key question the investigators needed to answer was: How did this incident begin? They needed to determine how and when Inspector 1 and the young man began to interact. This was critical to determining whether Inspector 1 unfairly singled out the young man for extra attention.

45. The TTC investigators did not do enough to critically evaluate the evidence Inspector 1 provided about how the incident began.

46. According to Inspector 1, the incident began with the young man entering the streetcar, standing directly across from Inspector 1 and staring at him for a prolonged period of time before Inspector 1 reacted. According to Inspector 1, he spoke to the young man simply to try to break the tension, because the young man had been staring at him non-stop.

47. The video shows otherwise. It clearly shows that Inspector 1 spoke to the young man *within two seconds* of the young man stepping on the streetcar.

48. After briefly looking away, Inspector 1 then continued to look directly at the young man for more than a minute and spoke to him five more times.

49. The TTC investigators did not address this key discrepancy. They should have asked Inspector 1 more questions about why he almost immediately began speaking to the young man and they should have analyzed the implications of this, if any.

50. Evidence about how quickly Inspector 1 formed any perceptions about the young man and acted on them was relevant to several important issues the TTC investigators had to investigate:

- whether racism – conscious or unconscious – was a factor in Inspector 1's actions
- whether Inspector 1 acted in a manner consistent with TTC and community expectations
- whether Inspector 1's stated perception of the young man as intimidating or threatening was objectively reasonable
- whether Inspector 1's version of events was credible and reliable

TTC investigators did not ask Inspector 1 enough questions about opportunities to disengage or move away

51. Transit Fare Inspectors are trained to disengage from people they perceive as threatening or uncooperative and it is the TTC's clearly understood expectation that they do so. Inspector 1 did not do that here. The TTC investigators did not ask Inspector 1 enough questions to explore whether he complied with this training and expectation and if not, why not.

52. For example, Inspector 1 told the TTC investigators that the idea of moving away from the young man during the first few minutes on the streetcar never entered his mind. They did not ask him why not.

53. The TTC investigators said in their report that Inspector 1 did not move away because he found the young man's behaviour "unusual," "threatening" and "intimidating", which made Inspector 1 "very uncomfortable." He was therefore afraid to turn his back to the young man because "he had concerns for his safety."

54. The TTC investigators should have asked Inspector 1 more questions to explore whether, when and why he became afraid to turn his back on the young man, before the investigators made these statements in their report.

55. Further, the TTC investigators should have asked Inspector 1 whether he could have moved away from the young man without turning his back and if not, why not. Before Inspector 1's interview, another fare inspector told the TTC investigators that disengaging from a potentially threatening situation and "not turning your back" are not mutually exclusive; they can be done at the same time.

56. The TTC investigators also did not adequately explore:

- Why Inspector 1 allowed a number of other patrons, including an elderly woman and some young children, to remain in the immediate area, if he

perceived a potentially dangerous situation which he believed made it unsafe to turn his back or move away

- Why he did not call for help from Transit Enforcement Officers, an option he said was available in such situations

57. Prior to interviewing Inspector 1, the TTC interviewers had already interviewed a Transit Fare Inspector supervisor. Based on the supervisor's understanding of the incident (which came from the fare inspectors involved), the supervisor raised questions about whether there were things Inspector 1 could have done to avoid the situation escalating, like going to the back of the streetcar to create distance or getting off earlier. The supervisor also said that if Inspector 1 felt unsafe, the supervisor did not know why Inspector 1 did not call for help from a Transit Enforcement Officer and/or clear the area.
58. Exploring why Inspector 1 did not disengage or move away was important because if Inspector 1 had moved away from the young man at the outset, the incident might have ended there. It is very possible that the violent interaction that followed would have been avoided entirely.

The TTC investigators did not explore evidence of other possibilities about how the incident started

59. A thorough investigation requires investigators to consider the evidence with an open mind, considering different possibilities or theories of what happened in order to determine the facts. The TTC investigators did not do so in the following areas.

The young man said he was listening to music and not paying attention to the TFIs

60. After the TTC investigators had interviewed the fare inspectors and other witnesses, the young man gave the investigators a written statement explaining what happened from his perspective. He said that he was listening to music on his headphones and not paying much attention to the fare inspectors since he had paid his fare. This suggests he may not have answered Inspector 1's questions at least in part because he did not hear them. This contrasts directly with Inspector 1's evidence that the young man was "emotionally disturbed" and/or "trying to intimidate" Inspector 1 with a "dead stare."
61. This evidence from the young man also directly conflicted with Inspector 1's evidence that he saw the young man wearing headphones around his neck (i.e. not on his ears).
62. The video does not clearly show where the young man wore his headphones. It shows only that he was wearing a hooded jacket with a high collar that covered his head and neck.

63. The TTC investigators did not ask any follow up questions of the other fare inspectors or Civilian Witness 3 about whether they were able to see if the young man was wearing headphones and, if so, where they were positioned. The TTC investigators similarly did not ask any follow up questions of Inspector 1 to explore his ability to see where the young man was wearing headphones.

Inspector 1 might have behaved as he did to show that he would not be intimidated

64. A TTC witness who heard about the incident from Inspector 1 and other witnesses soon after it happened told the TTC investigators that he believed the young man was trying to intimidate Inspector 1. This TTC witness believed that Inspector 1 had spoken to the young man to show that he was not intimidated. This TTC witness said Transit Fare Inspectors and Transit Enforcement Officers need to project an aura of not being intimidated; their job requires it.
65. Other witnesses from the Transit Enforcement Unit also provided evidence consistent with this theory to the TTC investigators.
66. Despite this, the TTC investigators did not address this possible interpretation of what happened in their report. If they did not accept it, they should have explained why.

The TTC investigators did not give the young man an adequate opportunity to respond to Inspector 1's evidence or to allegations about the young man's own past conduct that they considered during the investigation

67. In cases where there is conflicting evidence, particularly between the accounts of an alleged victim and an alleged perpetrator, it is important for investigators to give each person an opportunity to know what the other says about key aspects of what happened, and to respond. This is a matter of procedural fairness.
68. The TTC investigators did not give the young man an adequate opportunity to respond to Inspector 1's version of events, including Inspector 1's evidence about how events initially unfolded, which differed from what the video shows.

69. Further, other fare inspectors not involved in this incident gave the TTC investigators information about allegations concerning the young man's past conduct. The TTC investigators did not inform the young man about these allegations or give him an adequate opportunity to respond to them. They referred to these allegations in their report, which was unfair to the young man and contrary to TTC policy.⁶

The TTC investigators should have made more efforts to gather evidence from anyone with relevant information and should have considered all the information they had

70. Given the seriousness of the allegations, the number of witnesses seen in the videos and the level of public concern, the TTC should have publicly invited members of the public to come forward with information. Both TTC investigators told us they thought someone had done so. Unfortunately, this did not happen.
71. The TTC investigators should have made more efforts to gather evidence from a member of the public that can be seen on video watching the initial encounter between Inspector 1 and the young man and remaining nearby while Inspector 1 spoke to the young man. This person was travelling with a witness the investigators spoke to (Civilian Witness 3) and was well known to that witness. The TTC investigators made no attempt to try to contact this witness. They should have done so, because of the crucial need to determine what actually happened during the early part of the incident.
72. The TTC investigators also should have more clearly documented and referred to evidence that a different member of the public provided. If they felt they needed more detail, they should have made additional efforts to follow up with this witness.
- This person told the Unit Complaints Coordinator by telephone what they did and observed while the fare inspectors were detaining the young man and afterwards, when this person stayed with the young man. This witness described injuries suffered by the young man and criticized the behaviour of TTC employees. In particular, this witness said the fare inspectors did not say what they were doing or why they were on top of the young man. The witness also said "I think he was twisting his arm or something."
 - The Unit Complaints Coordinator asked clarifying questions of this person during their call and saved an audio recording, but did not make any written

⁶ Section 10 of the TTC's *Transit Fare Inspector Complaints Procedure*: "...Complaints shall be investigated on the merit and substance of the evidence and shall not involve inquiry into the background of the Complainant for the sole purpose of undermining the credibility of the Complainant." Online: Toronto Transit Commission https://www.ttc.ca/PDF/Riding_the_TTC/Complaints%20Procedure%20for%20Transit%20Fare%20Inspectors%20-%20Oct.%2011%2C%20.pdf

notes as he did when he spoke to another witness by telephone. The Unit Complaints Coordinator asked this witness to provide him with a written statement of their evidence and followed up with an email providing his contact information. The witness said they would try to provide a written statement but could not do so for at least a week and that they found it "hard to write these things." When this person did not send him a written statement as requested, the Unit Complaints Coordinator made one follow up call, leaving a voicemail. He did not hear further from this person.

- Despite the absence of a written statement, the TTC investigators had this person's evidence recorded in their file, from the telephone call. This evidence was relevant because if it was found credible and reliable, it could have corroborated the young man's evidence, including his evidence that a fare inspector held and twisted his left arm. However the TTC investigation report makes no mention whatsoever of this evidence.

73. The TTC investigators should have requested the Toronto Police Service officers' notes. The notes would have provided important detail about what participants and witnesses told police immediately following the incident. The Unit Complaints Coordinator told us that police routinely share these records with the TTC when he is investigating an incident involving Transit Enforcement Officers. These records would be equally useful for Transit Fare Inspector investigations and the TTC should at least try to obtain them in cases like this one, where there are serious allegations of misconduct.

2) The TTC investigation should have identified the important facts in dispute and made clear factual findings

74. In conducting their investigation, the TTC investigators' task was to gather information/evidence, make findings of fact (i.e. determine what happened) and then make a decision on each of the ultimate issues they had to decide, namely whether the fare inspectors:

- discriminated against the young man on the basis of race;
- used unauthorized force; and/or
- otherwise acted in a manner likely to bring discredit upon the reputation of the TTC.

75. They also needed to provide reasons for their decision on each issue.

76. To do this, it was necessary to first identify the factual "what happened" questions required to decide each issue. Where the evidence on a relevant fact was in dispute or was unclear, they needed to state and explain their factual finding, with reference to the evidence. Once they determined what the facts were, they could then decide the issues before them.

77. In this investigation, however, the TTC investigators did not consistently identify the facts in dispute and make clear findings of fact.

78. When we asked the Unit Complaints Coordinator what findings of fact he made about particular areas of disputed evidence, he told us he did not make clear findings about what happened and when. He said that in his investigations, he only makes findings about the ultimate issue of whether employees have breached their code of conduct and does not make findings about "the specifics of things."
79. In response to our questions about particular events, he said "the video is my findings with respect to what happened". However, the video directly conflicts with what Inspector 1 told the TTC investigators about the first few minutes of the encounter. Despite this fact, the investigation report repeats Inspector 1's version of events without any explanation.
80. Specifically, in both the "Background" and "Analysis" sections,⁷ the report appears to adopt as fact Inspector 1's evidence that as soon as the young man got on the streetcar, the young man began staring continuously at Inspector 1. The report states that Inspector 1 looked away to try to break the stare and did not speak to the young man until the streetcar was en route to the Bathurst Street platform. According to the video and the TTC investigators' summary of it, the streetcar did not leave St. Clair Station, or was not "en route," until two minutes after the young man boarded the streetcar. This is consistent with their summary of Inspector 1's evidence that he did not speak to the young man until after "almost a minute of non-stop staring."
81. The video clearly shows however that Inspector 1 started to speak to the young man within two seconds of the young man boarding the streetcar. The TTC investigation report does not squarely address this important conflict and does not resolve it with a clear finding of fact.
82. As another example, the TTC's investigation report contains conflicting findings about why the young man left the streetcar. On page 61, the report rejects the young man's evidence that he got off the streetcar to go to a restaurant and states that he "appears to take purposeful steps forward off the streetcar to bring him face-to-face with [Inspector 1]." However, on page 67, the report says "There is no available evidence that [Inspector 1]'s act of smiling led or contributed to the outcome of this incident. At the approximate time [Inspector 1] smiles, the [young man] states he was exiting the TTC streetcar to go to a restaurant."
83. In other words, instead of making the required finding of fact about why the young man got off the streetcar (since it was a fact in dispute on which there was conflicting evidence), the investigation rejected his evidence that he was going to a restaurant for one part of its analysis, and accepted it for another part. This made no sense.

⁷ TTC Investigation Report, *supra* note 2 at pages 8, 66, and 75 to 78.

84. The TTC investigation also did not make findings of fact on the important factual questions of whether, why and when Inspector 1 was afraid to turn his back to the young man, or whether such a fear was reasonable in the circumstances.
85. This required assessing Inspector 1's credibility with reference to other relevant evidence. The TTC investigators should have made clear factual findings on these important points, and should have provided reasons for those findings.

3) The TTC investigation applied the wrong standard of proof in some of its analysis

86. Before making a finding of fact, an investigator must consider how much proof is required to make that finding.
87. Different amounts of proof are required in different settings. How much proof is required is called the "standard of proof."
88. Two different TTC policies applied to this investigation, each one appearing to require a different standard of proof.
89. Under the TTC Respect and Dignity Policy, the TTC investigators were required to make findings about whether the evidence established discrimination or harassment on a *balance of probabilities*. In other words, they needed to decide whether discrimination or harassment was more likely than not to have occurred.
90. This is the usual standard of proof for cases other than criminal cases, which require proof at a higher standard, *beyond a reasonable doubt*.
91. The investigators used the balance of probabilities standard of proof in their discrimination analysis, which was correct and appropriate in the circumstances.
92. According to the TTC Transit Fare Inspector Complaints Procedure, however, the Unit Complaints Coordinator was to determine whether there were *reasonable grounds to believe* that misconduct had occurred.
93. Reasonable grounds to believe is a lower standard of proof than the balance of probabilities. Courts have described it as requiring an honest belief supported by objective facts, or more than a suspicion or opinion, based on evidence. It requires less evidence than the balance of probabilities standard.
94. The reasonable grounds to believe standard of proof is commonly used when a regulatory body is deciding following investigation whether to lay a formal misconduct charge against a member, for example in the police context. We are not aware of any disciplinary context in which the reasonable and probable grounds standard is used to make a finding of misconduct.

95. The Unit Complaints Coordinator told us he applied the reasonable grounds to believe standard of proof, as specified in the Transit Fare Inspector Complaints Procedure.
96. He was confused, however, about what it required. He told us that as he understood it, the reasonable grounds standard is "generally higher" than the balance of probabilities, although he also said it all depends on the case. He was mistaken. As a matter of law, the reasonable grounds standard always requires less proof than a balance of probabilities, not more.
97. In any event, it does not make sense that the policy would require only reasonable grounds to make a positive finding of misconduct, in the absence of a two-stage process like the one in the police context. The Transit Fare Inspector Complaints Procedure should require proof on a balance of probabilities for a finding of misconduct.

4) The TTC investigation did not clearly analyze two important issues

The importance of the TTC expectation that Transit Fare Inspectors will disengage

98. The TTC investigation report only discusses TTC expectations of what fare inspectors should do when they cannot avoid physical conflict. It does not clearly address the TTC expectation and Transit Fare Inspector training that fare inspectors must avoid physical conflicts in the first place.
99. As mentioned above, the TTC investigators had clear evidence that fare inspectors are expected to disengage from people they perceive as threatening or uncooperative. The fare inspectors involved, their supervisor and the person responsible for the training for Transit Fare Inspectors all confirmed this.
100. The TTC investigation report omitted much of this evidence. Instead, the investigators should have included it and analyzed whether in this case, the fare inspectors met this TTC expectation or if not, why not.

Evidence that could have supported a finding of unconscious racial bias

101. The TTC committed to investigate whether the young man's race was a factor in how the TFIs treated him. This was a question of whether racial profiling occurred.
102. The Ontario Human Rights Commission defines racial profiling as "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin –

rather than on reasonable suspicion – to single out an individual for greater scrutiny or different treatment."⁸

103. The TTC investigation report correctly notes that to make a finding of discrimination, there is "no need to establish an intention or motivation to discriminate" and "[t]here need not be direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference."⁹
104. The TTC investigators had to consider not only whether there was evidence of *intentional* racism, but also whether there was evidence of *unintentional* racism. As observed by the Ontario Human Rights Commission in its 2003 racial profiling inquiry report, "practical experience and psychology both confirm that anyone can stereotype, even people who are well meaning and not overtly biased."¹⁰
105. One way unintentional racism can occur is through *unconscious bias*. This term refers to the phenomenon that can occur when, upon seeing certain physical characteristics like someone's skin colour, an observer's brain sends them messages that this person is more likely to be or act in a certain way.
106. For example, upon seeing certain skin colours, the observer's brain may signal that the person they are looking at is more or less likely to be violent, angry, intelligent, or mentally stable or to engage in criminal behaviours. Because it is unconscious, the observer will be entirely unaware their brain is making such judgments and will have no intention of doing so.
107. Someone's lack of awareness of their biases does not however excuse any acts of discrimination they commit because of them. Investigators must therefore examine all evidence of possible unconscious bias and determine whether it was a factor in what happened.
108. In this case, there was evidence that could have supported a finding of unconscious bias on the part of Inspector 1 and others. The TTC investigators did not identify or analyze this evidence in their report.

⁸ Ontario Human Rights Commission, *What is Racial Profiling? (fact sheet)*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/what-racial-profiling-fact-sheet>

⁹ *TTC Investigation Report*, *supra* note 2 at p.75.

¹⁰ Ontario Human Rights Commission, *Paying the Price: the human cost of racial profiling* (2003) online at <http://www.ohrc.on.ca/en/book/export/html/2472>. See also *R v. Brown*, *supra* note 3 at para. 8 and *R v. Elmardy*, *supra* note 3 at para. 16.

109. We find the TTC investigation should have clearly analyzed whether the following evidence could have supported a finding of unconscious racial bias:
- Did Inspector 1 immediately form a perception of the young man that he was "not ok" when he got on the streetcar (since Inspector 1 asked the young man if he was ok approximately two seconds after the young man entered)? If so, why? Was Inspector 1 forming such a perception so quickly circumstantial evidence of unconscious bias?
 - Was it objectively reasonable for Inspector 1 or anyone else to form the perception that the young man was "not ok" because he did not immediately answer a question about whether he was ok? What assumptions underlie the statement by the TTC investigators at p.78 of their report that "Information questions require attention and reasonable answers"? Is a young Black man required to answer such a question from a uniformed fare inspector within two seconds of stepping onto a streetcar in Toronto, without any objective basis for the question being asked?
 - Why did participants and witnesses claim to see the young man doing threatening things that the video shows he was not doing?
 - Inspector 1 and another fare inspector on the streetcar both gave evidence that one or both of the young man's hands were clenched both on and off the streetcar. In fact, the video shows the young man's fingers hanging down at his side or extended off the Presto machine, not clenched.
 - Inspector 1 and Civilian Witness 3 both said the Customer's hands were in his pockets or otherwise out of sight on the streetcar, while the video shows that in fact they were dangling below his sleeves or off the Presto machine.
 - Why did Inspector 1 and Civilian Witness 3 both fear the Customer might have a weapon?
 - Civilian Witness 3 told TTC investigators that they were afraid the young man might have a weapon because he looked angry, had his hands in his pockets and because of "the social context we are in."
 - When asked to explain "social context", Civilian Witness 3 said: "Social context of, like, individuals who have weapons in public areas, it happens throughout the world. You become hyper aware of this."
 - In response to a question from the investigators about the young man's skin colour, Civilian Witness 3 described the young man as being of "maybe" Middle Eastern origin, and that "I'm like 50%, can't remember exactly, don't think he was dark dark Black."

- Why did several witnesses describe the young man's body position as unusually motionless despite the fact he can be seen to be moving several times in the video?

110. We have included references to Civilian Witness 3's evidence because, in addition to assessing whether the evidence supported a finding of unconscious bias on the part of the fare inspectors, the TTC investigators also should have considered whether unconscious bias might have affected the reliability of the evidence of other witnesses.
111. This was particularly important with respect to Civilian Witness 3, because the TTC investigators said in their report that they gave "much weight" to Civilian Witness 3's evidence, in particular, the description of the Customer's stare as "angry and threatening" and "intimidating." On the other hand, the three fare inspectors described the young man's expression during the same time period as "neutral," "blank," "emotionless" and in a "dead stare."
112. We repeat that Ombudsman Toronto did not make any findings about what conclusions the TTC investigators should have reached after analyzing and weighing this evidence. Our finding is that the TTC investigators should have transparently disclosed the evidence in their report and explained how they assessed it.

5) The TTC's expert witness was not independent and his written opinion was not based on an adequate review of the evidence

113. We identified several concerns about the expert opinion the TTC investigation relied on in determining that Inspector 1's use of force was appropriate.
114. Generally speaking, witnesses can provide evidence about their observations and experiences but cannot express opinions. The exception to this rule is that a qualified expert witness may give an opinion on relevant matters outside the decision maker's knowledge and experience.
115. Arguably, there was no need for an expert opinion in this case. There was ample evidence available about the TTC's policies on use of force and the training fare inspectors get on the subject. The current Unit Complaints Coordinator has extensive experience with use of force and told us that he does not always seek an expert opinion when he investigates complaints involving use of force.
116. Presumably because of the seriousness of the allegations here and the extent of public concern, the Unit Complaints Coordinator nonetheless decided to seek an expert opinion about the use of force. This was not unreasonable.

117. Having decided to seek an expert opinion, however, it was essential that the Unit Complaints Coordinator:
- obtain an independent and impartial opinion, having considered any issues of possible bias; and
 - ask the expert to consider all the relevant evidence before reaching and expressing a conclusion about the appropriateness of the use of force.

Concern that the expert was not independent or objective

118. The TTC's expert opinion came from the owner of the company on contract with the TTC to develop and deliver training to Transit Enforcement Unit members on use of force, among other things. His company has continuing contracts to provide training and consultation to the TTC.
119. That fact raises concerns about this witness's ability to independently and objectively provide an expert opinion about whether fare inspectors trained by his company acted properly and in accordance with their training.
120. The Unit Complaints Coordinator told us he did not consider the issue of bias with respect to his expert witness.
121. While this witness could and did provide factual evidence about the training his company developed and delivers to fare inspectors on use of force, the TTC should not have relied on him to provide an opinion about what happened in this case without directly addressing his ability to be impartial and objective.

Problems with the expert opinion

122. The expert witness also had insufficient evidence upon which to base an opinion.
123. The Unit Complaints Coordinator asked the expert witness for his opinion about Inspector 1's use of force based only on Inspector 1's written statement and video evidence. He did not provide the expert witness information about what other witnesses, including the young man, said had happened or the additional evidence that Inspector 1 gave during his interview with investigators.
124. The Unit Complaints Coordinator told us he knew the expert had reviewed some video evidence before providing an opinion, but he did not know whether the expert had reviewed all the available video evidence.
125. Instead of asking the witness to write an opinion, the Unit Complaints Coordinator drafted the opinion for the expert after meeting with him, and sent it to him for review. The witness responded and asked for minor changes to the wording of the first paragraph. The Unit Complaints Coordinator should have asked the expert to draft his own opinion.

126. The expert opinion drafted by the Unit Complaints Coordinator did not identify the evidence the expert had reviewed or the facts or assumptions on which it was based. Further, it did not clearly identify what actions Inspector 1 took that the witness thought were proportional and within the scope of his training, or address whether the witness considered whether Inspector 1 followed his training to disengage.

6) There are not enough structural safeguards to ensure the Unit Complaints Coordinator's independence and impartiality

127. When an organization investigates incidents involving its own people, the public needs to have confidence that the investigation will be fair and impartial. Personal and professional ties between investigators and those they have to investigate may call this into question. We therefore considered whether the TTC has taken adequate steps to ensure the independence of its internal investigators.
128. We found there were significant differences between the Human Rights Consultant and Unit Complaints Coordinator roles that could affect their ability to conduct impartial investigations.
129. The TTC needs to do more to ensure the independence of the Unit Complaints Coordinator role.

The Human Rights Consultant

130. The Human Rights Consultant is an employee of the Diversity and Human Rights Department, which reports to a different member of the TTC executive team than does the Transit Enforcement Unit. Having an investigator report to a different executive than the unit they investigate helps avoid potential conflicts or opportunities for an investigation to be influenced by those with an interest in the outcome.
131. The Human Rights Consultant's team works in a different location from the TTC employees they investigate.
132. The Human Rights Consultant has no work or personal ties to the employees he investigates. He told us that before undertaking this investigation, he had had almost no contact with any members of the Transit Enforcement Unit.
133. The Human Rights Consultant told us he avoids socializing or interacting with TTC employees except for work-related purposes, in order to maintain his impartiality.

The Unit Complaints Coordinator

134. Like the Human Rights Consultant, the Unit Complaints Coordinator reports to a different member of the executive team than does the Transit Enforcement Unit. He told us that no member of the TTC management team has ever challenged or attempted to influence his findings.

135. In contrast to the Human Rights Consultant, however, the Unit Complaints Coordinator's office is on the same floor as the Transit Enforcement Unit, whose members he investigates. He shares common space with its members and sees them at work on a daily basis.
136. The current Unit Complaints Coordinator also has a long history of employment within the unit he investigates. He was the Acting Head of the Transit Enforcement Unit for over a year in 2013 and 2014, at the time when the Transit Fare Inspector role was developed. Before that, he had been a member of the unit for more than a decade.
137. Inevitably, the Unit Complaints Coordinator knows many members of the unit and has developed relationships with some. He told us he does not regularly socialize at work, but acknowledged he very occasionally will have lunch with certain members of the unit or attend retirements. We saw during our document review that the Unit Complaints Coordinator and some members of the Transit Enforcement Unit management were on friendly terms and called each other by nicknames.
138. This absence of structural independence raises concerns of actual and perceived bias on the part of the Unit Complaints Coordinator in favour of the Transit Enforcement Unit. Even if the Unit Complaints Coordinator is scrupulously careful not to let his relationship with the unit and its members affect his objectivity, the perception of possible bias is harmful to public trust.

Interactions with Legal, Executive Management and Others

139. The TTC investigators provided information to and received information from the TTC legal department, TTC management and insurance adjusters throughout the course of their investigation.
140. Some of the information exchanged made its way into the investigation file and some did not.
141. Some communications between the Unit Complaints Coordinator and Legal were marked as privileged and we understand Legal was providing advice to the Unit Complaints Coordinator. Given the limited nature of our Enquiry and the context of litigation between the young man and the TTC, we did not ask about the details of these interactions.
142. We asked the TTC investigators if anyone from these areas attempted to influence their findings and they said no. Nonetheless, such communications with investigators whose job is to be impartial can raise concerns about actual or perceived bias. For this reasons, investigators need clear and documented boundaries for such communications.

Possible Evidence of Confirmation Bias

143. If there are insufficient structural safeguards to ensure that an internal investigator's role is independent and impartial, there is a risk of confirmation bias.
144. Confirmation bias occurs when an investigator starts an investigation with a preferred outcome in mind and then filters the evidence through that lens, emphasizing the evidence that supports that outcome and minimizing the evidence that does not support it. In the case of internal investigators, the concern is that they may filter the evidence in a way that exonerates their colleagues or employer or implicates or ignores the complainant and their evidence.
145. As in the discussion of unconscious racial bias above, confirmation bias can occur unintentionally, without the investigator realizing it is happening. The TTC investigators told us they take their impartiality very seriously and we accept that they try very hard to be objective and impartial.
146. In this case, however, we found some signs of possible confirmation bias:
 - The Unit Complaints Coordinator did not document in his investigation file the evidence obtained from the witness who was at the scene during the young man's detention, who criticized the fare inspectors and said "I think he was twisting his arm or something." The Unit Complaints Coordinator also made no reference to this witness' evidence in the report. To the contrary, the report specifically stated "... there is no evidence to support that the [fare inspectors], while waiting for [police] to arrive, did anything other than hold the Customer in place by leveraging their own body weight and muscle."
 - The Unit Complaints Coordinator asked for a written expert opinion supporting Inspector 1's use of force before he had interviewed Inspector 1 and other witnesses about what happened. He told the expert witness at the time that he wanted the expert opinion to give "more weight" to his report.
 - The TTC investigators accepted Inspector 1's evidence about the timing of his interaction with the young man over the video evidence which shows that Inspector 1 spoke to the young man within two seconds, without looking away. This occurred despite the Unit Complaints Coordinator telling us that he relied heavily on the video.
 - The TTC investigation report omitted reference to the evidence from the expert trainer and the Transit Fare Inspector supervisor that fare inspectors are taught and expected not to engage customers in volatile situations.
 - The report included two pages of evidence of alleged past conduct of the young man. This evidence was entirely irrelevant to the issues in this case and prejudicial to the young man. The fare inspectors involved all told the TTC investigators they did not know the young man at the time of the

incident, so any alleged past incidents were irrelevant to their conduct at the time.

- The report critically analyzed the young man's credibility in detail, but did not apply the same level of rigour to the analysis of the credibility of the fare inspectors and Civilian Witness 3.

SUMMARY OF FINDINGS

147. The TTC had a difficult task in conducting this investigation. We appreciate that investigators must make many judgment calls in a real world setting with timing and practical pressures. After the fact, it is easy to suggest that something could or should have been done differently. As an oversight body, we therefore do not require a standard of perfection, but of reasonableness.
148. In isolation, some of the problems we identified with the TTC's investigation might not have compromised the overall fairness of the process or reasonableness of its conclusions.
149. However, some of the problems were very serious. We are particularly concerned that the TTC investigation did not:
- ask enough questions
 - make clear findings of fact
 - apply the correct standard of proof in some of its analysis
 - transparently analyze the evidence in light of the TTC's expectation that fare inspectors will disengage from potentially difficult situations
 - transparently analyze evidence that could have supported a finding of unconscious racial bias
 - ensure adequate independence for the Unit Complaints Coordinator
150. Taking all of these problems into account, we conclude that the TTC's investigation into this incident was not adequately thorough, fair and transparent. We therefore cannot find that its conclusions were reasonable.
151. Not having investigated the incident, we are not able to say what the conclusions of an adequately thorough, fair and transparent investigation would have been. The incident itself is currently the subject of litigation between the young man and the TTC and many of the issues the TTC's investigation considered are raised in that litigation. A court is being asked to decide them.
152. It is important for the TTC to be able to investigate complaints and concerns about the Transit Enforcement Unit and its employees and it should continue to do so. Based on our findings, however, some changes are necessary. By implementing our recommendations below, the TTC will enhance its ability to conduct these investigations in a fair and effective way in which the public can have confidence.

RECOMMENDATIONS

153. In consideration of our findings, we make the following recommendations:

Ensure that Unit Complaints Coordinator Investigations are Independent and Impartial

- 1) The TTC should develop a plan to structurally strengthen the independence of its internal investigations of the Transit Enforcement Unit. This plan should include moving the Unit Complaints Coordinator away from the unit's physical location and reducing or eliminating personal and professional ties between the Unit Complaints Coordinator and support staff on one hand and the unit on the other.
- 2) The TTC should strengthen its documentation of the Unit Complaints Coordinator's terms of reference and their role and mandate. It should include what kind of information, if any, the Unit Complaints Coordinator will exchange with TTC management and/or the TTC legal department and for what purpose(s).
- 3) The TTC should also consider creating a protocol for retaining external investigators in appropriate cases, for example where there is intense public interest or where senior staff members are involved in the incident(s) under investigation.

Clarify the Standard of Proof

- 4) All relevant TTC policies and training should clearly state that the standard of proof that applies in investigations of complaints about Transit Fare Inspectors is proof on a balance of probabilities.

Use Expert Opinions Appropriately

- 5) The TTC should document in its investigation policies and procedures that:
 - As a best practice, when the TTC engages an expert to provide an opinion in an investigation, it should select someone without ties to the TTC.
 - The TTC should also require any expert witness to provide written confirmation that they understand they are being asked for a fair, objective and non-partisan opinion.
 - The TTC should provide all relevant evidence to the expert witness for their review and should have the witness prepare the opinion without assistance

from investigators. The opinion itself should reflect that these steps were taken.

Investigator Training

- 6) The TTC should develop a plan to provide additional training to its internal investigators, in particular with respect to:
- identifying the issues and the facts in dispute
 - procedural fairness
 - preventing unconscious confirmation bias
 - investigating unconscious bias/racial profiling
 - making and explaining factual findings by considering and weighing all relevant evidence
 - the standard of proof
 - effectively communicating the results of an investigation in a report

Timeframe for Implementation

154. The TTC should implement all of these recommendations by December 31, 2019.

TTC MANAGEMENT'S RESPONSE

155. As a matter of procedural fairness, we shared a draft of this report with the TTC investigators and TTC management and gave them an opportunity to make representations on it.
156. TTC management agrees with the recommendations in this report and has committed to implementing them by December 31, 2019. See Appendix "A."

FOLLOW UP

157. Ombudsman Toronto will follow up until we are satisfied that implementation is complete.

THE BROADER CONTEXT

Ombudsman Toronto started examining the TTC's oversight of its Transit Enforcement Unit in early 2015 in the wake of a violent incident at Union Station involving two Transit Enforcement Officers and two members of the public. In the four years since, we have conducted and publicly reported on a large systemic investigation into the TTC's oversight of the Transit Enforcement Unit, followed up on recommendations we made in that investigation, and investigated additional concerns and complaints about the unit, including this one.

After four years of work in this area, we remain concerned about the TTC's oversight of this unit. Our findings and conclusions in this report outline some of the basis for this concern.

We also have broader questions about the structure and culture of the unit and its ability to deliver truly fair and equitable public services as currently organized.

In February, 2019 we began a series of informal discussions with TTC leadership to discuss these concerns. We have found the TTC leaders we have worked with to be open to looking at these issues and to our constructive approach to holding them accountable in doing so.

TTC Management has informed us that they plan to take action in the following areas:

Demonstrating Fair Treatment and Ensuring Public Trust: Developing a Comprehensive Anti-Racism Strategy

The TTC is one of the largest transit organizations in North America. It operates in the City of Toronto, whose motto is "Diversity Our Strength." The TTC can and should be a leader in ensuring and assuring the public that racial profiling has no place in how its staff treat people.

While we did not make any finding of racial profiling in this case (we did not investigate the incident), we did find that the investigation did not transparently analyze possible evidence of racial profiling.

What is clear is that following the incident, there was broadly expressed public concern that racial profiling may have played a role in what happened. We have heard the same concern expressed in other cases involving the Transit Enforcement Unit.

A public perception that racial profiling exists in an organization, even if unfounded, is deeply harmful to that organization and to the public's trust in it.

The TTC has decided to implement a system-wide anti-racism strategy, aimed directly at preventing racial profiling. We discussed the fact that such a strategy should cover all aspects of the TTC's operation and should be woven into key areas including strategic leadership, research (including data collection and analysis), human resources management and stakeholder engagement.¹¹

¹¹ Bobby Siu, "Ending Racial Profiling" in L. Foster, L. Jacobs, B. Siu and S. Azmi, eds, *Racial Profiling and Human Rights in Canada: the New Legal Landscape* (Toronto: Irwin Law Inc., 2018) 299 at 308

The TTC has enthusiastically welcomed our suggestion that it engage outside expertise to help it develop and implement this strategy and that it consult with the City's Confronting Anti-Black Racism Unit. We understand that this work is already underway.

We applaud the TTC's stated commitment to take bold and proactive steps to ensure and show the public that its employees treat all people equitably, with dignity and respect. We encourage it to move quickly on this important initiative.

Changing the Transit Enforcement Unit's Structure and Culture

The TTC told us during our investigation of its oversight of the Transit Enforcement Unit that the unit was in the process of a broad culture shift, away from a traditional policing model towards a model based in security and customer service. Based on our observations since then, however, it appears that this shift has stalled or stopped. In our view, the result has been harmful to the TTC and to its relationship with the public.

Employees of the Transit Enforcement Unit have very difficult jobs and the continuing lack of clarity about what is expected of them only makes their jobs harder.

The TTC says it is considering our suggestion that it rename the Transit Enforcement Unit, to align with its stated goal to adopt a service-based posture rather than an enforcement or compliance-based posture and to make the TTC's expectations clear to both unit members and the public.

In moving the Transit Enforcement Unit to a service-based focus, we understand that the TTC intends to review and revamp all aspects of the unit's operations, including staff recruitment, training, policies and procedures and complaints process. Currently, the unit's operations are all based on examples drawn from the world of policing.

We strongly reiterate the recommendation we made in our 2017 Investigation report that the TTC consider developing a policy to guide Transit Fare Inspectors in the exercise of discretion.

Every day, Transit Fare Inspectors use discretion in deciding whether to issue a ticket to someone who cannot produce proof of payment. Treating people fairly and equitably will usually require consideration of why someone did not pay their fare. Irrelevant and/or prejudicial considerations must play absolutely no role.

The TTC has told us it is committed to selecting, training and holding accountable all members of the Transit Enforcement Unit to do their work with an emphasis on strong communication and de-escalation skills, treating all people with respect and dignity, always starting with the position of trying to help and using force only as an absolute last resort.

It is also looking at ways to move away from considering complaints about TFIs through a police-like lens of "misconduct" to a customer service and fairness lens.

CONCLUSION

158. This report has set out how the TTC's investigation of the February 18, 2018 incident fell short of what the public should reasonably expect. The TTC needs to take concrete steps to improve future investigations.
159. As this report has also discussed, the TTC has decided to seize an important opportunity to be a leader among transit agencies in two areas which we believe are essential to earning and maintaining public trust:
- Developing a broad and comprehensive anti-racism strategy to address public concerns about racial profiling, and
 - Changing the structure and culture of the Transit Enforcement Unit from a culture of enforcement and compliance to one based on rider security, service, respect and dignity.
160. In our view, based on our extensive work with the TTC, the need for all of these steps is compelling. The time for action is now.

(Original signed)

Susan E. Opler
Ombudsman

Appendix A



Toronto Transit Commission
1000 Yonge Street, Toronto, ON M4B 1Y2
416-393-7000

June 21, 2019

Ms. Susan Opler
Ombudsman
City of Toronto
375 University Avenue, Suite 203
Toronto, Ontario M5G 2J5

Dear Ms. Opler:

Re: Ombudsman Toronto Enquiry Report: Review of the TTC's Investigation of a February 18, 2018 Incident Involving Fare Inspectors

I have reviewed your report on your review of the TTC's investigation of the February 18, 2018 incident. The TTC agrees with the recommendations in your report and have set out a timeline to implement all recommendations by December 31, 2019. Attached is our management response outlining in more detail the implementation plan for each recommendation.

In addition to the recommendations, we appreciate the opportunity that you have identified for the TTC to become a leader among transit agencies in developing a comprehensive anti-racism strategy for the organization.

Thank you for the opportunity to comment. We would also like to thank you and your staff for the many helpful comments and suggestions throughout this process.

We will consult with your office prior to finalizing and implementing the recommendations in the report and we look forward to working in partnership with your office to advance work on the anti-racism strategy.

Sincerely,

Richard J. Leary
Chief Executive Officer
Toronto Transit Commission

Jays Robinson, Chair
Ann Hickey, O.C., Vice-Chair
Richard J. Leary, Chief Executive Officer

Brad Bradford, Commissioner
Shelley Carroll, Commissioner
Joanne De Laurentiis, Commissioner
Jim Karygiannis, Commissioner

Ron Lalonde, Commissioner
Jennifer McKeivie, Commissioner
Denzil Minnan-Wong, Commissioner
Jule Osborne, Commissioner

Ombudsman Toronto's Enquiry Report
Review of the TTC's Investigation of the February 18, 2018 incident involving Transit Fare Inspectors

Rec #	Section	Recommendation	Agree	Comments	Implementation Timeline
1	153(1)	TTC should develop a plan to structurally strengthen the independence of its internal investigations of the Transit Enforcement Unit. This plan should include moving the Unit Complaints Coordinator away from the unit's physical location and reducing or eliminating personal and professional ties between the Unit Complaints Coordinator and support staff on one hand and the unit on the other.	Agree	TTC will be developing a plan to structurally strengthen the independence of its internal investigations of the Transit Enforcement Unit.	December 31, 2019
2	153(2)	The TTC should strengthen its documentation of the Unit Complaints Coordinator's terms of reference and their role and mandate. It should include what kind of information, if any, the Unit Complaints Coordinator will exchange with TTC management and/or the TTC legal department and for what purpose(s).	Agree	TTC will be implementing the recommendation to strengthen its documentation of the Unit Complaints Coordinator terms of reference and mandate.	December 31, 2019

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3	153(3)	The TTC should also consider creating a protocol for retaining external investigators in appropriate cases, for example where there is intense public interest or where senior staff members are involved in the incident(s) under investigation.	Agree	TTC will be revising its Transit Fare Inspector and Transit Enforcement Officer investigation procedures to include provisions relating to retaining external investigators as recommended.	December 31, 2019
4	153(4)	All relevant policies and training should clearly state that the standard of proof that applies in investigations of complaints about Transit Fare Inspectors is proof on a balance of probabilities.	Agree	TTC will be implementing the recommendation to ensure that standard of proof applied to investigations of TFIs is based on a balance of probabilities	July 15, 2019
5	153(5)	The TTC should document in its investigation policies and procedures that: <ul style="list-style-type: none"> As a best practice, when the TTC engages an expert to provide an opinion in an investigation, it should select someone without ties to the TTC The TTC should also require any expert witness to provide written confirmation that they 	Agree	TTC will be implementing the recommendation in its investigation procedures.	December 31, 2019

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		<p>understand they are being asked for a fair, objective and non-partisan opinion.</p> <ul style="list-style-type: none"> The TTC should provide all relevant evidence to the expert witness for their review and should have the witness prepare the opinion without the assistance from investigators. The opinion itself should reflect that these steps were taken. 			
6	154(6)	<p>The TTC should develop a plan to provide additional training to its internal investigators, in particular with respect to:</p> <ul style="list-style-type: none"> identifying the issues and the facts in dispute procedural fairness preventing unconscious confirmation bias investigating unconscious bias/racial profiling making and explaining factual findings by considering and weighing all relevant evidence the standard of proof 	Agree	TTC will be implementing the recommendation and developing a plan to provide additional training to its internal investigators.	December 31, 2019

Rec #	Section	Recommendation	Agree	Comments	Implementation Timeline
		<ul style="list-style-type: none"><li data-bbox="695 423 1003 511">effectively communicating the results of the investigation in a report			