House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 002 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, May 9, 2006

Chair

Mr. Art Hanger

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● (1530)

[*English*]

Mr. Shawn Scromeda (Counsel, Criminal Law Policy Section, Department of Justice): With me today is Erin McKey, with the criminal law policy section. I'm with the criminal law policy section as well. Also here is Michael Zigayer, also in the criminal law policy section, currently seconded as the deputy director of the Justice Canada legal services unit at the Canadian Nuclear Safety Commission.

The Chair: Thank you. I understand your presentation is approximately 30 minutes long. Feel free to begin. I know there are some questions afterwards, so if you would care to remain and take those questions from the committee, I would appreciate it.

Mr. Shawn Scromeda: Okay. We look forward to the questions.

I'm pleased to be here today to discuss sections 25.1 to 25.4 of the Criminal Code, frequently referred to as the law enforcement justification, which provide a limited justification in law for designated law enforcement officers and others acting at their direction for acts and omissions that would otherwise be offences.

The purpose of my remarks today is just to provide an overview of these provisions—their origin, their purpose, and how they operate—in order to offer a background on them for your preparations for review of the sections.

As stated, my name is Shawn Scromeda, and I'm with Michael Zigayer and Erin McKey. Michael Zigayer actually led the development of these provisions in the Criminal Code and has had previous experience as a criminal law prosecutor and many years of experience at criminal law policy section. Erin McKey also has experience as a prosecutor and has worked in the Justice Canada international assistance group and at the RCMP legal services unit before joining criminal law policy section. I worked for the Royal Canadian Mounted Police external review committee and the Department of Solicitor General, and now I'm with criminal law policy section.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Sorry to interrupt. Will a brief be tabled? We will get the translated version later, but has the department prepared a brief?

[*English*]

The Chair: Excuse me just one moment, please, Mr. Ménard. I will be with you in a second.

Go ahead.

[*Translation*]

Mr. Réal Ménard: As the presentation may last half an hour, I want to know if a brief will be tabled by the department. We have the explanatory notes, but I wanted clarification about the logistical support we will get.

Mr. Shawn Scromeda: Are you asking whether there will be a French translation of my remarks?

Mr. Réal Ménard: No. Will your presentation come in the form of a brief? This is a summary of the various sections, but as your presentation may last half an hour, I want to know whether a brief will be tabled which we do not have right now because it has not been translated, or whether the only supporting documents for your presentation are these notes?

Mr. Shawn Scromeda: For the time being, this is the only document.

Mr. Réal Ménard: Okay. Thank you.

[*English*]

Mr. Shawn Scromeda: This statement of principle could be viewed as a somewhat unusual provision to find in law, but it is really core to what the law enforcement justification is about. Certain references to this justification, especially by critics of these provisions, refer to the police as “breaking the law”, or “being above the law”. From the government's perspective, this is incorrect. The principle underlying the justification is that it is for Parliament to decide what law enforcement officers reasonably and proportionally need to be able to do in order to investigate and enforce the law, and to ensure that these activities are brought within the law.

To conclude my introduction, Michael, Erin, and I were extensively involved in the development and delivery of training on the law enforcement justification as well.

The policy origins of the law enforcement justification arose from a decision of the Supreme Court of Canada in the case of R. v. Campbell and Shirose. In that decision, which was issued in April 1999, the Supreme Court ruled that the police were not immune from liability for unlawful conduct committed in good faith in the course of an investigation. In particular, the Supreme Court ruled that the police do not share in the Crown's immunity when engaged in this function because they have status independent of the Crown when engaged in law enforcement. The Supreme Court also found that police do not have any common-law law enforcement justification. It ruled instead that if immunity were necessary, it was for Parliament to provide for that in statute.

In the Campbell and Shirose case, the police had offered to sell narcotics to suspected drug traffickers during the course of an undercover drug investigation. It was the legality of that conduct that was under consideration by the Supreme Court.

Now, ironically, the fact pattern of Campbell and Shirose had already been addressed—prior to the Supreme Court of Canada ruling, though obviously after the investigation had taken place—through regulations adopted under the Controlled Drugs and Substances Act. Those regulations, the police enforcement regulations, provide exemptions for certain drug offences when engaged in by police officers for the purpose of investigation enforcement. However, due to the breadth of the reasoning adopted by the Supreme Court in Campbell and Shirose, in which general statements of principle were made indicating that no law enforcement justification existed in common law, these regulations did not provide adequate justification for other investigative and enforcement situations.

The result was that the ruling affected law enforcement investigative practices that had been used for many years by law enforcement officers. Enforcement officers sometimes find it crucial to an investigation to operate under cover, posing as criminals in order to most effectively investigate criminals. You can just take facts analogous to those of the Campbell and Shirose case as an example. Police may sometimes pose as purchasers or sellers of contraband commodities, tobacco or alcohol, in order to infiltrate groups who are engaged in such practices. In order to pose convincingly in this way, sometimes they will make an offer to buy or sell the contraband in question. If the sale or purchase of this contraband constitutes a criminal offence, this police enforcement activity would be restricted in the absence of a legal justification.

The law enforcement justification enacted in 2001 in Bill C-24 responded to the need for a statutory foundation for this activity. The introduction of this legislation had been preceded by the development of a white paper tabled in the Senate in June 2000. The government had sought to obtain public comment on a legislative proposal before bringing it in as actual legislation. That legislative proposal set out in the white paper became, with certain modifications, the basis for what is now the law enforcement justification.

That is a basic introduction of where they came from. I now want to take some time to actually go through, a little bit technically in some ways, how this law enforcement justification works. The first thing I want to address is a technical aspect that is actually a statement of principle. It's a statement of principle that's contained in the law itself.

At subsection 25.1(2) it states as follows:

> It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

● (1535)

There are also substantial practical considerations underlying this principle. In particular, it is appropriate for officers who are expected to investigate crime and to act reasonably and proportionately in doing this not to be subject to criminal liability for doing so; otherwise, officers would legitimately refuse to engage in such conduct.

Further, from a practical perspective, the law enforcement justification protects prosecutions from being jeopardized in situations where law enforcement has used such techniques. This was in fact the issue in the Campbell and Shirose case. The defence in that case had made a motion for stay of proceedings on the ground that there had been abuse of process by the police.

I will now address the particular method by which the law enforcement justification operates.

There are three fundamental requirements for a law enforcement officer to be able to employ this justification. First, a public officer, as they are referred to in the statute, must be designated; second, engaged in an investigation or in enforcement; and third, follow a requirement of reasonable and proportional conduct.

Public officers must receive an individual designation in order to do it. When the provisions were first introduced, there was a possibility for group designations. That was part of the statute originally. While it was going through the parliamentary process, this was amended. Group designations were taken out; only individual designations were left. That amendment underlined the importance placed on the designation requirement and on ministerial responsibility for these designations.

One other amendment with respect to designations was made when it was before Parliament. Before a police officer can be designated, subsection 25.1(3.1) requires that there be a public oversight body that can review the public officer's conduct. These public oversight bodies exist for police right across Canada. For the Royal Canadian Mounted Police, it's the Commission for Public Complaints Against the RCMP. This provision puts this requirement directly on a statutory foundation, requiring that designations for police, under this justification, cannot go forward in the absence of an oversight body.

The provisions define the public officers who are eligible for designation. Subsection 25.1(1) states that for the purpose of these provisions a “public officer” means a peace officer, or an officer having the powers of a peace officer. We're effectively talking about law enforcement officers here.

With respect to who can make the designations, for the Royal Canadian Mounted Police it's the Minister of Public Safety Canada. For police under provincial authority, the competent authority is the minister responsible for policing in the province. For other public officers, such as federal customs, fisheries, or environmental officers, the competent authority is the minister responsible for the acts these officers have the power to enforce.

There is also a possibility for emergency designations. Normally, designations have to be made by a competent authority; that is, the minister responsible for the officers. In some limited cases, a senior official responsible for law enforcement may designate a public officer, but the emergency designation can only apply for 48 hours and must be brought to the attention of the competent minister without delay. The senior officials responsible for law enforcement who may use emergency designations and who give special authorizations for certain acts or omissions must also themselves be designated by the competent minister.

That is the basic framework for the designation and who can do it. I'll turn now to the general circumstances under which an individual officer can employ the justification.

In specific terms, the provisions specify that the public officer must be engaged in the investigation of an offence under, or the enforcement of an act of, the Canadian Parliament, or an investigation of criminal activity more generally. That is, they have to be operating within their functions—a fairly common-sense, straightforward requirement, but it's put into law. This includes all offence investigations and enforcement under federal law. The investigation of provincial offences, however, is not included under this justification regime.

I'm really coming now to the core of the entire provision; that is, when you can do it in general when you're engaged in enforcement, but what the particular circumstances are, what the particular test is, under which the law enforcement justification can be employed. That's provided in paragraph 25.1(8)(c), which specifies that the public officer must believe on reasonable grounds that the officer's acts or omissions are reasonable and proportional in the circumstances.

There are also substantial practical considerations underlying this principle. In particular, it is appropriate for officers, who are expected to investigate crime and act reasonably and proportionally in doing this, not to be subject to criminal liability for doing so. Otherwise, officers would legitimately refuse to engage in such conduct.

Further, from a practical perspective, the law enforcement justification protects prosecutions from being jeopardized in situations where law enforcement has used such techniques. This was in fact the issue in the Campbell and Shirose case. The defence in that case had made a motion for a stay of proceedings on the ground that there was an abuse of process by the police.

I will now address the particular method by which the law enforcement justification operates. There are three fundamental requirements for a law enforcement officer to be able to employ this justification. First, the public officer, as they are referred to in the statute, must be designated; second, he must be engaged in an investigation or in enforcement; and, third, he must follow a requirement of reasonable and proportional conduct.

Public officers must receive an individual designation in order to do it. Actually, when the provisions were first introduced, there was a possibility for group designations. That was part of the statute originally. While it was going through the parliamentary process, that was amended and group designations were taken out; only individual designations were left. That amendment underlined the importance placed on the designation requirement and on ministerial responsibility for these designations. One other amendment with respect to designations was made when it was before Parliament.

Before a police officer can be designated, subsection 25.1(3.1) requires that there be a public oversight body to review the public officer's conduct. These public oversight bodies exist for police right across Canada. For the Royal Canadian Mounted Police, it is the Commission for Public Complaints Against the RCMP. This provision puts this requirement directly on a statutory foundation and requires that designations for police under this justification cannot go forward in the absence of an oversight body.

The provisions define the public officers who are eligible for designation. Subsection 25.1(1) states that for the purpose of these provisions:

> "public officer" means a peace officer, or a public officer who has the powers of a peace officer under an Act of Parliament.

We're effectively talking about law enforcement officers here.

With regard to the person who can make the designations for the Royal Canadian Mounted Police, it's the Minister of Public Safety. For police under provincial authority, the competent authority is the minister responsible for policing in the province. For other public officers, such as federal customs, fisheries, or environment officers, the competent authority is the minister responsible for the acts these officers have the power to enforce.

There is also a possibility for emergency designations. Normally, designations have to be made by a competent authority, who is the minister responsible for the officers. In limited cases, a senior official responsible for law enforcement may designate a public officer, but the emergency designation can apply for only 48 hours and must be brought to the attention of the competent minister without delay.

The senior officials responsible for law enforcement who may use emergency designations and who give special authorizations for certain acts or omissions must also themselves be designated by the competent minister.

That is the basic framework for the designation and who can do it.

I'll turn now to the general circumstances under which an individual officer can employ the justification. The provisions specify that the public officer must be engaged in the investigation or enforcement of an offence of an act of the Parliament of Canada or, more generally, an investigation of criminal activity. That is, they have to be operating within their functions. It is a fairly common sense, straightforward requirement, but it's put into law.

This includes all offence investigations and enforcement under federal law. It does not, however, include the investigation of provincial offences under this justification regime.

I'm really coming now to the core of the entire provision, which is when you can do it. What are the particular circumstances and what is the particular test under which the law enforcement justification can be employed? That is provided in paragraph 25.1(8)(c), which specifies that the public officer must on reasonable grounds believe that his acts or omissions are reasonable and proportional in the circumstances.

● (1540)

Now, there are three types of conduct that we refer to generally in our training that may be justified under this regime. First, there are types of conduct not justified at all. There's conduct that's justified only with an authorization from a senior official. And there's conduct that's justified without authorization from a senior official.

Now, three factors are set out as relevant in determining reasonableness and proportionality: the nature of the act or omission, the nature of the investigation, and the reasonable availability of other means for carrying out law enforcement duties. Those factors are not necessarily listed as exhaustive under the statute, though.

This reasonable and proportional test is the key provision that describes the essential nature and quality of otherwise illegal acts and omissions that may be justified under the justification regime. It is based both on subjective and objective elements. The officer must himself or herself believe that the act or omission is reasonable and proportional; however, this belief must be based on reasonable grounds. And it is important to emphasize that conduct that falls outside of the reasonable and proportional test, or indeed outside of any of the other requirements of the regime, does not enjoy the legal justification offered by the section and can therefore be subject to the relevant offence provisions provided by law.

Now, this last point is an important point and was one that we strongly emphasized in training courses given across the country on the law enforcement justification. As I've explained and will further explain, the law enforcement justification does not advance a broad, unqualified immunity to law enforcement officers. Rather, it is a justification to which numerous restrictive conditions apply, including the fundamental requirement that for each act or omission the officer consider the reasonableness and proportionality of the act or omission, and further, that the officer's evaluation on those grounds be based on reasonable grounds, thus making it reviewable on that basis.

Now, this is a weighty responsibility and one that has led to considerable caution, and I would say appropriate caution, in the application of this justification. A misevaluation by law enforcement officers on the reasonable and proportional test can mean that their actions, even if undertaken in good faith, will not receive the justification. There are a number of potential consequences for this. It could lead to prosecution of individual officers, public complaints, disciplinary proceedings, and the possibility of civil liability as well. As well, in the case of a failure to comply with any of the central terms of law enforcement justification, the protection offered by the justification regime for investigations and prosecutions will be absent, opening up the possibility of stays of proceeding based on arguments of abuse of process.

Returning to the justification itself, note that subsection 25.1(8) provides not only a justification for the commission of otherwise illegal acts or omissions by designated public officers, but also for a justification for the direction by public officers for others to commit such acts or omissions. Such a direction may occur when an officer is not infiltrating a gang himself or herself, but is instructing a person who has agreed to cooperate with law enforcement—and as a practical matter, that happens in undercover operations.

For the public officer to be justified to give such a direction, however, all the requirements of the justification regime still must be complied with, including the requirement of reasonableness and proportionality. In addition, a public officer making such a direction is subject to a requirement of prior authorization from a senior official responsible for law enforcement.

Now, at subsection 25.1(10), a justification is also extended to the person who acts “at the direction”; otherwise, you'd find that person would equally be subject to the law, and the legal proceedings that may flow from that investigation also may be subject to abuse of process. However, the person receiving that direction does not have to be satisfied himself or herself of the reasonability and proportionality of the conduct.

Now, that may seem strange originally, but you have to understand that in this situation the assessment of reasonableness and proportionality has to be a matter for the public officer who gives that direction, because the person receiving the direction, not being a trained enforcement officer, will not be in a position, in either training or full knowledge of the investigation, to conduct the necessary balancing test underlying the reasonableness and proportionality. Standards, nevertheless, do apply to the person receiving the direction. In particular, the person receiving it must believe on reasonable grounds that the public officer has authority to give that direction, and that the act or omission is for the purpose of assisting the officer with law enforcement duties.

● (1545)

The first of the categories, conduct not justified at all, is set out in subsection 25.1(11), which provides that “Nothing in the section justifies...causing of death or bodily harm to another person”, obstruction of justice in any manner, or “conduct that would violate the sexual integrity of an individual”. That exclusion is absolute regardless of whether the other terms of section 25.1 have been complied with; the law enforcement justification will not extend a justification for those types of conduct.

There are other exclusions in addition to that core exclusion. Subsection 25.1(13) provides that “Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence”. In particular, this is intended to refer to, or prevent, section 25.1 from being an alternative source of authority or a justification for evidence gathering such as wiretaps, searches, or DNA. Basically, where you had to get a warrant before, you still have to get a warrant, as nothing in section 25.1 removes that legal requirement.

Also, on a more technical note, subsection 25.1(14) states that the section does not provide a justification for conduct that would constitute an offence under drug legislation. As I've alluded to earlier, that conduct is covered under a separate regime under the Controlled Drugs and Substances Act.

I mentioned authorization from a senior official. Under paragraph 25.1(9)(a), written authorization from a senior official is required in certain circumstances. Essentially these are two circumstances: one, for conduct that would be likely to result in loss of, or serious damage to, property, and two, where a person other than a designated law enforcement officer is engaged in such conduct and the officer gives a direction for that conduct.

It's important to emphasize that this authorization requirement on the part of a senior official is in addition to all the other requirements of the scheme; it's not in substitution for them. The individual officer must still be satisfied with the reasonableness and proportionality and must still be designated. On top of that, he must receive authorization for those particular types of conduct.

It's also important to note that the senior official who gives that written authorization must also be designated by the competent minister. Now there are certain circumstances where you can proceed in the absence of the authorization requirement normally required. Essentially those are exigent circumstances, or emergency circumstances. In particular, it would not be necessary if there were grounds for getting the authorization but it was not feasible in the circumstances, including where the act of omission was necessary to preserve life or safety, prevent the compromise of the identity of a public officer or of a confidential informant, or prevent the imminent loss or destruction of evidence of an indictable offence. Nevertheless, special reporting requirements apply in those circumstances where you proceed without authorization.

That is the essence of the technical aspect of applying the law enforcement justification itself. I'll now turn to the reporting requirements themselves. These were a notable addition to the law enforcement justification after the white paper was introduced. After that original legislative proposal, there were a number of comments calling for greater accountability under the provisions. The reporting requirements that were added after the white paper but before the legislation was introduced responded to those concerns about accountability.

The first of the requirements is an internal reporting requirement. Officers must, as soon as feasible, file reports describing certain acts or omissions to senior officials responsible for law enforcement. These are the acts or omissions that would have required prior written authorization, and also those that would have required that authorization except for emergency circumstances. As a detail, this applies to conduct that would likely result in loss of or serious damage to property, or situations where the public officer is directing another person to commit otherwise illegal acts or omissions.

The second reporting requirement is that the senior official receiving a report must, as soon as feasible, notify any person whose property was lost or seriously damaged. There was a concern that if police officers were employing the law enforcement justification and sometimes had to cause damage to property or destroy property, third parties who had no connection with the investigation would not know how that damage had taken place and would not be able to seek compensation from the government.

● (1550)

The requirement in section 25.3 responds to this concern.

A competent authority may, however, authorize delay of—not dispense with, but authorize delay of—this notification until the competent authority is of the opinion that the notification would not cause adverse effects, including compromising or hindering an investigation, compromising the identity of an undercover officer, endangering life or safety, or otherwise be contrary to the public interest.

Finally, section 25.3 provides for a public reporting requirement. Competent authorities—that is, ministers—must release a public annual report on the activities of public officers and senior law enforcement officers whom they have designated.

The public annual report must include information about the law enforcement justification in situations in which emergency designations were made, in situations in which prior written authorization was granted, and in situations that would have required special authorization, except for exigent circumstances. Again, the report shall not disclose, however, information that would compromise investigations, reveal sensitive law enforcement identities, endanger life or safety, prejudice a legal proceeding, or otherwise be contrary to the public interest.

That is the essence of the law enforcement justification regime.

After the regime came into force, extensive training was provided to law enforcement officers who may have been in a position to be designated under the justification regime and to others for whom detailed knowledge was essential.

I'll defer discussion of this designation process to the responsible officers of departments responsible for designations, which at the federal level is Public Safety and Emergency Preparedness Canada.

One of the essential requirements imposed on the designation process is that eligibility for designation is dependent on receiving that training. You can't receive a designation until you've been trained. Training was also provided to federal and provincial crown counsel who may have been in a position to advise law enforcement officers on application of the law enforcement justification. All of this was done further to a commitment made by the Department of Justice at the time these provisions were enacted.

That being said, it still must be acknowledged that these provisions were a matter of some concern to Canadians when they were passed. In broad terms, these concerns can go along two separate themes. The first, it was argued by some commentators, was that the law enforcement justification was wrong in principle, as it was putting law enforcement officers above the law, contrary to what some saw as previous legal standards in Canada. Second, it was argued that law enforcement justification opened the way for legalized abusive conduct by police enforcement officers. It can be argued that in neither case are these legitimate concerns borne out by the underlying legal regime that was adopted at the time.

The law enforcement justification does not put law enforcement officers above the law. The purpose and effect of the law enforcement justification was to codify in statute the basis for long-standing and crucially important law enforcement investigative and enforcement practices, to explicitly bring these activities within the law and subject them to explicit legislative standards and accountability mechanisms.

With respect to the potential for abusive conduct, which was the other main theme of concern, it has to be underlined that the fundamental legal requirement of the law enforcement justification is one of reasonableness and proportionality. It may be argued that there is a broad gulf, a large distance, between abusive conduct on the one hand and conduct that is reasonable and proportional on the other. Therefore, in applying this legal standard, the law enforcement justification did not open the door for abusive conduct on the part of enforcement officers. Instead, it recited in law fundamental standards that apply to the conduct of law enforcement.

That is the essence of my presentation. I thank you for your patience during it. I know there are some technical aspects. I would be happy to provide any clarification, as would my colleagues, about these technical aspects, or to answer any other questions you may have.

● (1555)

The Chair: Thank you very much, Mr. Scromeda.

I will now turn to the official opposition.

Mr. Bagnell, I understand you have some questions to ask. You have seven minutes.

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

In that we're doing a statutory review, I'll ask three questions. You might want to write them down, but I'll get them over quickly.

One concerns whether you might want to give us any advice on things that aren't working or you think we should change, etc. The other two questions are in the context of those very rare occasions when you get a police officer—I think there was one yesterday, actually, in this city—who has gone against the law, actually working inside the police station.

Under that scenario, have you seen any evidence or potential evidence under the way the law is written for one of two things to happen? One would be a couple of people with signing authority who are not working in the best interests of everyone else, who are criminals, using their authority to advance what they were doing related to corruption.

The second question, related to the same scenario, is this. If there were such a person in a police station, is there any possibility that the actors, being identified by having these permissions, being trained, being on the lists, would have their names leaked to—and this is very dangerous business we're talking about on occasion—organized crime so that the investigator is put at risk by having this more bureaucratic system? With more paper available to let the criminals somehow find out if they've got someone embedded in the police station, does that not identify the person they might suspect of infiltrating their organization?

Mr. Shawn Scromeda: I can answer questions two and three. The first question regarding areas not working, or potential issues for amendment, is beyond my capacity to respond to today. I'm here to give an overview and I don't have a specific government position to put forward about potential amendments, but I can certainly respond to the second and third questions .

The second question—and I wasn't 100% sure about your example—I take it you were talking about a situation that was in the press yesterday or today about a—

● (1600)

Hon. Larry Bagnell: I wasn't actually referring to that situation. I was asking, if there are a couple of bad people in a police station, if they work together and use these provisions to advance their criminal activity—

Mr. Shawn Scromeda: No, that would not be possible under these provisions. They would not receive any justification. There would be two fundamental requirements of the justification provisions that prevent that.

With respect to the law enforcement justification, the two requirements are addressed in the handout we've provided, on page 2, in the second and third requirements there. First, they must be engaged in an investigation or enforcement. An enforcement officer who would use the justification to justify personal conduct, engaged in a lark of his own, engaged in his own personal criminal endeavour, would receive no justification whatsoever under this scheme. And if that weren't enough, I don't think there'd be any chance that conduct where a police officer was using it for his personal benefit would be viewed as reasonable or proportional under the scheme. I don't think there is much, or any, scope for such conduct to be justified under the law enforcement justification regime.

On the next question you had about the potential for lists of undercover officers who had received designations, the possibility that they would be leaked or come into knowledge of organized crime and therefore compromise investigations, my colleague Erin McKey will respond.

Ms. Erin McKey (Senior Counsel, Criminal Law Policy Section, Department of Justice): Without actually responding to the query, perhaps I could sidestep it a little bit. I'm sure it is a concern of the police, certainly, that any sort of information about those engaged in undercover practices could come to light and be disclosed and endanger the personal safety of those investigators, and to the extent that there may be practices that have been put in place to address that, or policies to ensure that it doesn't happen, I think it really is the police or the designating officials from Public Safety Canada who could speak to that in detail for you.

Hon. Larry Bagnell: Are there any instances you're aware of where the provisions did not work as anticipated, in the period we're reviewing?

Ms. Erin McKey: Again, to the extent that you want information about the operational side of things, we, as Justice officials, are here to speak about the law itself and the details of the law in legislation, the jurisprudence and the background, but as for operational detail and information about how in practice they are working for law enforcement, I think you need to ask those questions to the witnesses from the law enforcement side—the police, the public safety officials.

Hon. Larry Bagnell: Do I have any time left?

The Chair: You have, Mr. Bagnell. You have time for one question.

Hon. Larry Bagnell: I'll let Sue use some.

Hon. Sue Barnes (London West, Lib.): I'm just going to follow up on your answer a little bit.

You are the officials in the department dealing with your counterparts in the provinces and territories of the various jurisdictions. Have you had any input from the federal-provincial-territorial meetings that you constantly have? Is there any pressure for strengthening or weakening or tightening some of these provisions? Usually some jurisdiction has a situation where they make it known to the Justice officials that there needs to be an advancement on this or we have to pull back.

I'm not asking by province or territory. Is this a situation where you're up for review and you've not heard a thing, and bingo, it's just pro forma, or are we here because there has been some input? I know it's because it's statutory, but has there been input saying we need revisions or changes?

Mr. Shawn Scromeda: I'll preface that by saying the law enforcement justification was the subject of a fair bit of controversy when it was enacted, and there has been a fair bit of press commentary on it since. In general, since that time, it is not something that has received a lot of complaint or attention. The regime itself overall seems to be working well. It hasn't been the subject of a lot of controversy since it was introduced.

That being said, aside from our provincial counterparts, there are still those who take a fundamental objection to it, and those objections are along the lines that I outlined in my opening remarks. As far as I know, those people who have those opinions, who feel that it's fundamentally contrary to Canadian legal tradition—that it puts police officers above the law—still have those views. Fairly recently, the CBA took a position in front of our parliamentary committee calling for the repeal of the law enforcement justification, and you may be hearing from them as witnesses. There are people who are still against these as a matter of principle.

Turning to your question about provincial views, I don't want to put words in their mouths or words in the mouths of the police. I will say just generally that the regime is detailed. It has a number of detailed requirements in order for it to apply, and there have been some general concerns voiced about whether it is excessively detailed and excessively difficult for law enforcement officers to fall under this regime.

● (1605)

The Chair: Thank you, Mr. Scromeda.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chair.

I was a member at the House when Bills C-95, C-24 and C-36 were studied. This was time when there was confrontation between various community groups and organized crime was wide-spread. In the city where my riding is located, Montreal, there were major concerns.

I have a broad question to ask you, and a more focused one. Could you share information with us on the presence of this provision in the Criminal Code? Putting aside questions of principle, I can understand that there are some people who believe this provision should not exist and others who think it is crucial to carrying out investigations. I would like to know just how useful this provision has been in conducting police investigations and what effect it has had on law enforcement officials' ability to foil organized crime. Has it really been worthwhile?

I know that in the 1990s, apparently 33 organized crime groups existed throughout Canada. Of course, there were the Hell's Angels, the Rock Machines, and others you are familiar with. The Canadian Association of Chiefs of Police was quite convinced it did not have all the necessary tools to fight organized crime. The police chiefs were very upset with the Stinchcombe decision which made the disclosure of evidence mandatory. We can come back to that.

Could you tell us about the impact this provision has had on the ability to conduct police investigations and defeat organized crime?

Mr. Shawn Scromeda: I will ask my colleague Michael Zigayer to answer your question.

Mr. Réal Ménard: He is from Atomic Energy Canada, is he not? I cannot say that I quite understand, aside from the fact that you may be an explosive official, the link between atomic energy and...

Mr. Michael Zigayer (Senior Counsel, Criminal Law Policy Section, Department of Justice):

I will try and control myself.

I am from the Canadian Nuclear Safety Commission.

Mr. Réal Ménard: You are from the Canadian Nuclear Safety Commission?

Mr. Michael Zigayer: I work for their legal services department.

Mr. Réal Ménard: Oh, okay. It was hard to understand, Mr. Chair.

Mr. Michael Zigayer: But I am still a colleague of the two witnesses here.

I think there are two ways of answering your question. First, I cannot give you the answer you are looking for, insofar as we cannot tell you how useful this tool or protective mechanism has been in protecting police officers working undercover. We do not have that information. As my colleague Mr. Scromeda pointed out, law enforcement officers would be in a better position to respond to that question.

However, you will perhaps recall that when we appeared before the committee a few years ago for consideration of Bill C-24, several representatives from the police force came to tell you about the impact of the decision in the Campbell and Shirose case. I think it was the Toronto Chief of Police, Mr. Fantino, and probably the RCMP Commissioner, who said that several investigations had to be stopped or put on hold because police activities may have led to offences. The decision was made that it was better to stop or suspend the investigations.

To a certain extent, it is up to the police to answer. Nevertheless, the police were given back the authority to engage in that sort of investigation after the situation in question.

● (1610)

Mr. Réal Ménard: Okay.

I may have another two or three questions to ask you. Basically, what I am hoping is that this will convince us we need to get the Canadian Bar and the top-echelon police chiefs back before the committee.

For argument's sake, let's say I authorize an investigation, for example in east Montreal; I am a designated officer and I give a policeman the go-ahead to launder money in order to infiltrate an organized crime group. The provision in question may apply, from what I understand, because money laundering or drug trafficking would have been involved. What I am interested in knowing about are other cases when, due apparently to some sort of emergency, a designated person has not given authorization for such an offence to be committed. Those that are opposed to such a provision fear a reduction in accountability; they are afraid that practices may be engaged in which break the law.

There is one thing that would have been useful this afternoon. Usually, the Department of Justice provides the committee with a helpful information kit before the meeting. The department has previously given us copies of decisions handed down or annual reports. I am not complaining, you are all fine folk. I imagine it is because you were asked to appear at the last moment and that your ability to bounce back may have you headed for the senior public service. No one knows what the future holds.

Can you give us any examples of emergency situations which have been invoked which may reassure or give cause for concern to those who would challenge the provision? Was my example very relevant? If it were an exam, what would you give me out of 10? Remember, I can always get it reviewed.

[*English*]

Mr. Shawn Scromeda: I'll address the last one, with respect to materials. The purpose of today's presentation is just to get this kick-started in the sense of providing an overview, to give this committee a chance to assess its own direction with respect to their review. We certainly will discuss and be responsive to further requests for materials, as are frequently provided for the course of review, but we have handed out very little today just for the purpose of giving an overview of the provisions themselves.

With respect to the specific examples you raised, actually, in each case, in some ways they are not, because separate legal provisions other than the law enforcement justification apply to each of those examples. To both money laundering and to drugs there are separate provisions. With respect to drugs, there are, as I mentioned, the Controlled Drugs and Substances Act police enforcement regulations. With respect to money laundering, there are specific separate exemptions granted under the code for those. They were granted before the law enforcement justification came into place.

So the particular fact situations you mentioned are covered by other provisions and would not be subject to the example you raised of emergency—-

[*Translation*]

Mr. Réal Ménard: Could you give us a generic example?

[*English*]

Has my time expired?

The Chair: Your time has expired, thank you.

Mr. Scromeda, please conclude your response.

Mr. Shawn Scromeda: With respect to other hypothetical situations that would be covered under the law enforcement justification sections, the requirement for pre-authorization applies to only two circumstances: when there's a likelihood that property will be destroyed or damaged seriously, or when the law enforcement officer is giving direction to agents in the field. The emergency situations in which you would normally have to require that authorization, but don't, are essentially the exigent circumstances I mentioned.

● (1615)

The Chair: That's fine. I believe you covered that point.

Thank you, Mr. Scromeda.

Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you for your presentation.

I'm going to be rather blunt. I studied this legislation a bit before coming here, and you guys are on a short notice for being here. I have to say your presentation was really good. The only trouble is I'm not the sharpest knife in the kitchen. If I retain five per cent of what I heard, it will be a miracle, because you went through it quite rapidly.

Getting to the point of this legislation as far as I'm concerned, Canadian citizens really want to see good laws, safety, and protection. My question is, in your opinion, with the changing of criminal activity and its increasing intensity in terms of becoming more technical and sophisticated—I'm thinking of the Internet with regards to child pornography, the explosion of that horrible industry, and people who are going to be investigating and fighting these new activities, which make the news regularly—is the legislation we have here going to protect our enforcers to the extent that they're going to be able to do a good job while dealing with these new things? It seems I read more complaints in a lot of these cases against authority than the criminals.

I'm speaking as a ordinary guy in the street who says, what's going on? Do you think this law as written is sufficient to deal with what's happening in today's society, or do we need to look at it closely and consider changes?

I would like your response.

Mr. Shawn Scromeda: I certainly encourage this committee to look at it closely. Certainly ideas for changes are among the things that could come up in the course of this review.

To respond directly to your question, the types of investigations you're talking about are exactly those for which this law enforcement justification was designed. In general, this law enforcement justification is not something that the ordinary police officer on the street will be using.

It's most useful for complex investigations into organized crimes from the examples you give: terrorism and other related complex undercover operations. It is a subset of police officers and other law enforcement officers who will receive the designation. It was especially designed to be used in those circumstances. I hope it's proven to be a useful tool. I'll certainly leave it to the law enforcement officers, who will likely be providing testimony, to further inform you about how useful they feel it is, whether they feel there are gaps, and whether on an operational basis it requires further assessment.

I think that's as far as I can go in responding to that question.

Mr. Myron Thompson: Go ahead.

Mr. Michael Zigayer: I was going to add that Shawn, Erin, and I have been engaged in training undercover police officers and prosecutors across the country. Their reaction to us lets me conclude they find this very important. This is something they need as a tool to get out there and do the type of work you've been talking about.

Perhaps the very important work your committee will do is not through us today, but through those in the law enforcement community identifying other gaps in the legislation. We did bring it forward three years ago. The purpose of the review is to see if we've missed anything, and hopefully we can improve it in the future.

Mr. Myron Thompson: Thank you. That would have been my next question.

I would think there has to be some extensive training. Just based on what I've heard today, good grief, you're going to have to put some people through some pretty strenuous training exercises to fully understand what they're capable of and what they're not capable of. How is that going? You are one of the responsible people for that, so how is it going? Is it successful?

Mr. Shawn Scromeda: We did provide extensive training.

Just to respond to your opening comments about the complexity relative to the speed over which I went over the law, the presentation that I provided in essence was an abbreviation of a two-hour lecture. I felt that perhaps two hours would be a bit too long for my opening remarks.

● (1620)

Mr. Myron Thompson: I agree.

Mr. Shawn Scromeda: When we have provided this training to police officers—and we have done it across the country; Erin, Michael, and I, and others went across the country for months to provide the training—it was a two-day training course. The opening part of it was two hours. We went through questions and answers on individual aspects of it for the remaining part of the day.

Mr. Myron Thompson: Do you have follow-up with the people you're training on a regular basis? Once they get into the field, are there any conversations that take place so that you could ask the people how it is going? You're saying we have to wait for these officials to come in order to answer the questions a couple of members over there asked and that I'm asking. I'm just wondering if there isn't any ongoing following of the training sessions when they actually get into the field and work.

Mr. Shawn Scromeda: That was an aspect addressed in the training. In our training, even for the two days, we only presented it as an overview really of operating in this section.

I'll just go into the second day. The second day was taken up with the police forces themselves undergoing operational scenarios under that, but a point we emphasized during training was that even after training was finished, that didn't mean that when questions came up about the law enforcement justification they should just proceed and say they think they knew it. We strongly encouraged any operations using the justification to be done in consultation with counsel to answer any specific questions relating to that. We are just the central Justice counsel who are providing the general training. There are other Justice counsel across the country to whom questions may be addressed about individual operational circumstances.

Mr. Myron Thompson: Thank you.

The Chair: Mr. Scromeda, maybe it would benefit the committee if you could present the training module or package to the committee members. Also, it would be beneficial to the committee to receive any feedback you have had from the different agencies in reference to this particular legislation on how it impacts their investigations. Obviously there is some feedback coming back from the different agencies across the country.

Mr. Shawn Scromeda: We have both, actually.

The Chair: We would like you to table those here in the committee. It would be beneficial too if we could get them as soon as possible. I'm not sure what your timeframe would be like, but we do have the operational side coming in to present, and it would be beneficial if we had some of that information.

Mr. Shawn Scromeda: Certainly.

The Chair: Mr. Lee, for five minutes.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chair.

In terms of the breadth and scope of the act, can I ask if it would in any case apply to officials who work with the military, the Department of National Defence, with the Communications Security Establishment, with CSIS, or with the Canada Border Services Agency, either for immigration removals or for customs? I suppose here I'm asking in theory and in practice whether it would apply to any of these. Those persons would have to be peace officers or acting as peace officers, I presume.

If you're not sure, we can move on. If you're sure, I'll take the answer right now.

Mr. Shawn Scromeda: In a sense, you've answered your own question. The essential requirement and the central limitation there is that the persons be peace officers.

Mr. Derek Lee: Are there any peace officers within CSIS or in the military?

Mr. Shawn Scromeda: In the military there are military police. In fact, we made an inquiry with them just recently. Military police officers have not so far been designated under this.

With respect to CSIS, they are not peace officers, nor do they have the power of peace officers in accordance with this legislation.

For CBSA, I'm not aware of any designations. They have not approached us on this issue. I cannot tell you with absolute certainty whether individual officers there would—

● (1625)

Mr. Derek Lee: There could be CBSA officers who are peace officers, who are public officers.

Mr. Shawn Scromeda: Who would qualify, yes, but I can't tell you whether there have been any designations.

Mr. Derek Lee: Okay. We can look at that more closely later.

I have another question. It concerns subsection 25.1(14), which has to do with the exception for the Controlled Drugs and Substances Act. Is that subsection saying that this designation and exemption under the law doesn't apply to a controlled buy, under the Controlled Drugs and Substances Act?

Mr. Shawn Scromeda: That's true. That is because Parliament—and further regulations pursuant to what Parliament had done—had already provided for exemptions under the CDSA, specific exemptions that predated the law enforcement justification. It was felt that we shouldn't get into an either-or situation with respect to those.

Mr. Derek Lee: In section 25.2 there's a requirement to file a report as soon as possible. Since there's no deadline, is it possible that a public officer or a person in charge would not file a report but just wait and wait until the issue came up? What's the incentive for filing the report? What if the act happened, the paperwork was done, but no report was filed for five years?

This would mean that in the public report we see annually, Parliament wouldn't get a chance to see the full array of designations. Am I correct in that?

Ms. Erin McKey: It's just a matter of interpretation to the extent that the requirement is "as soon as is feasible after the commission of the act or omission". It really does put an obligation on the designated public officer, but in terms of operational constraints, clearly if they're in the middle of an undercover investigation they're not going to trot out with their notebook and make a report. However, barring, I would think, extenuating circumstances as the result of operations, the obligation is in the legislation.

Mr. Derek Lee: But I'm right that it could happen. There's no penalty in the act, there's no statute barring the—

Mr. Shawn Scromeda: It's subject to the interpretation of "as soon as is feasible".

Mr. Derek Lee: Yes. In other words, it's not feasible quite yet—which blurs to six months, which blurs to a year, which blurs to a year and half. Then, when somebody says, "We'd better forget about this sucker, because if we record it now, it's going to look really bad," it's gone. So then we just leave it.

That could happen, right?

Mr. Michael Zigayer: It is a possibility, but there is a sanction. I think that's what we need to advise you of.

Mr. Derek Lee: What is the sanction?

Mr. Michael Zigayer: Ultimately, if your investigation is successful, you're going to bring charges against the individual. At that point, I suppose, as part of disclosure, the defence could ask, did you make such a report? I understand there's a description of the conduct of the police officer in the course of the investigation, and it appears he's engaged in an offence or has done something that triggers section 25.2.

So if it's not there, then I suppose it's possible, as Shawn was saying earlier, to ask the court to stay proceedings for an abuse of process. Again, it'll always be a question of the court weighing the conduct against the whole of the circumstances.

This is one thing that is stressed very much in the course of training. And I quite agree with you that it—

Mr. Derek Lee: I'm just talking theory here. You don't have to take responsibility for the whole statute.

The Chair: Mr. Lee, your time is now up.

Thank you, Mr. Zigayer.

Ms. Freeman, five minutes.

[*Translation*]

Ms. Carole Freeman (Châteauguay—Saint-Constant, BQ): First, I would like to thank you for your presentation. I would otherwise have needed a training session. You've given a session which normally takes two days and managed to fit it into 20 minutes, which is quite short, very succinct and not comprehensive enough, as far as I'm concerned.

There are a number of things I'm not sure of and I would like to get some information. You mentioned something about disclosure of evidence. It there were a trial, would every action taken in accordance with these sections of the act be disclosed, or would there only be a right to limited proof, as is the case with the Anti-Terrorism Act? Would the act provide for full disclosure?

● (1630)

[*English*]

Mr. Shawn Scromeda: In response to that, the normal rules of disclosure would apply, and the rules of disclosure under Canadian law, pursuant to the decision, especially of the Supreme Court in Stinchcombe, are extremely broad. The standard, essentially, is one of relevance.

There are limited exceptions. There's no generalized exception created here, otherwise a statute or a common law, that says things that are subject to the law enforcement justification receive any exception from the disclosure requirement. In fact, the circumstances underlying the law enforcement justification would normally be subject to disclosure.

[*Translation*]

Ms. Carole Freeman : So, there would be unfettered, full disclosure. I see. Okay.

[*English*]

Mr. Shawn Scromeda: There are privileges attached to disclosure, informer privilege, for example, that could relate to certain aspects of this, but there is no exception under our laws of disclosure for activities taken pursuant to section 25.1.

[*Translation*]

Ms. Carole Freeman: Thank you. I have no further questions.

[*English*]

The Chair: Again, for the benefit of the committee, it indicates with the legislation here that there is an annual report filed. Is it possible to table that report or at least tell us where we can obtain the report?

Mr. Shawn Scromeda: We can ensure that you have copies of the annual reports filed.

The Chair: Where is it filed?

Mr. Shawn Scromeda: They have been filed in Parliament, at least the federal annual reports. The annual reports relate to each competent authority, so there have also been annual reports filed by provinces as well. The federal ones have been tabled in Parliament. Though there's not a direct requirement for tabling, the ones filed so far have been tabled.

Yes, we can ensure that you get those.

The responsibility for tabling those annual reports is for the competent minister who designates the officers, who.... Once again, at the federal level, as Minister of Public Safety, you may, of course, at your discretion, be hearing from public safety officials. They would be most appropriately placed to provide you information with respect to the annual reports.

The Chair: It would be advantageous, actually, to have the report before we meet with him.

Mr. Shawn Scromeda: Certainly. They are available on the website, but we can ensure that you get them.

The Chair: Very good.

Mr. Derek Lee: On a point of order, Mr. Chairman, I find it odd that we would be asking a witness to provide us with a copy of a report that the witness's organization has already tabled in Parliament.

We are Parliament, so could we not just obtain this from our journals?

The Chair: We wanted to know where they had it, Mr. Lee.

Your knowledge of where some of these reports are may be greater than that of the rest of us, but it would be certainly advantageous for the committee to all have access to it.

Now, Ms. Smith.

Mrs. Joy Smith (Kildonan—St. Paul, CPC): Thank you, Mr. Chair.

I want to thank the presenters very much. As the mother of an RCMP officer, I can tell you that I like to hear some of these things. Also, I do have some questions I want to ask about this provision, and I don't at all have the background that you do, but I've just heard about and done some reading and pulled some things off the website.

There were a couple of things I wondered about. There was a question earlier about what police officers this jurisdiction would involve. I think it was Mr. Lee who asked that question. I pulled a report off the website we were just talking about. In that report, it referred only to the RCMP. So I did have a concern about extending that to joint forces units that were not in the RCMP, because when I read this I thought to myself that it is a relatively narrow jurisdiction. This wouldn't be the ordinary police officer; this would be the joint forces unit. This would be something that comes from senior management down. It's not something where a police officer would just say he is going to investigate a drug unit and he needs special consideration. A lot of process goes into place before this actually would occur.

I think it is so important to have, because it does protect our police officers who are under orders—and not only orders, but I know they want to do it too, because they get very involved in this—to protect our streets. I haven't read the whole Criminal Code, but has there been consideration in here for other police officers and for careful backup for them, so there can be no mistakes made? When you're on the ground and something happens, you might have to get this permission very quickly because you might have to be on the scene very quickly, or if there's a narc or somebody undercover. These things happen. Does it serve this need?

● (1635)

Mr. Shawn Scromeda: With respect, I think there was more than one question there.

Mrs. Joy Smith: Yes, there was. I have only five minutes.

Mr. Shawn Scromeda: I think the first question was maybe a concern about reading the annual report and seeing it referring only to RCMP officers, and that's true. That is the report that was issued by the Minister of Public Safety in respect of the RCMP. That is the minister responsible.

I would like to clarify that the law enforcement justification is available to other law enforcement officers across Canada, not just the RCMP. In fact, there have been designations of other law enforcement officers.

You brought up the specific example of joint forces operations. That would be an example of where the RCMP may be working with others. I would leave them to go into any details of this, but they often do work with other police forces if they are engaged in the complex sort of investigations to which you are referring. This is perhaps not a tool so much for the ordinary police officer on the street to use in just an ordinary patrol; it is for the complex investigations, ones that receive extensive pre-authorization, and concerning other police forces, you would see in other annual reports issued by ministers of public safety or solicitors general across Canada reference to their police officers and what has been done.

I think the last concern you had was what happens if, however, what you might refer to as a general police officer on the street comes across this situation and suddenly needs to be able to take advantage of these provisions. That's a fair question.

The provisions do have a requirement for designation, so an undesignated officer would not beforehand be able to take advantage of these provisions.

There is a provision for emergency designation of such an officer. Such an officer might suddenly find himself, even through an ordinary routine patrol, I suppose, in a situation where he might suddenly have an opportunity to go undercover the next day. I suppose there would be a possibility that he would receive that designation from a senior official without having to go the ministerial route, the ordinary method of designation.

But yes, it is normally a regime that applies for pre-designation of officers who are normally working in those circumstances where they would come across this.

The Chair: Thank you, Ms. Smith.

Mr. Ignatieff.

Mr. Michael Ignatieff (Etobicoke—Lakeshore, Lib.): Thank you.

I had a question relating to the unfortunate circumstances in which citizens are killed by the police. It's a three-part question.

I'm just trying to understand what is implied here when it says "Nothing in the section justifies...the intentional...causing of death". Does that leave the matter of prosecution discretionary in cases where a police officer causes the death of a civilian with his firearm? That would be question number one. I mean, what happens? Nothing in this section justifies the intentional causing of death, but does prosecution follow in these cases, or is it discretionary, and to what degree should it be discretionary?

The second question I have, and this relates to paragraph 25.1(8)(c), is whether the belief that a police officer's reaction was reasonable and proportional in the circumstances constitutes a defence or implies that it creates a defence in these unfortunate circumstances.

Third, relating to the public reporting requirements in sections 25.2, 25.3, and 25.4, what obligations by the police to report to the public and to public authorities are implied in these cases? There have been widespread concerns that the police take far too long to report to the public in cases where police officers shoot a civilian in the course of duty.

Let me make it perfectly clear to members that I make no presumption of guilt in the current cases that are discussed in the press. I have a strong disposition to support the police in these unfortunate cases. I have a strong understanding that they have to make second-by-second life choices here. I'm not trying to prejudge any of the investigations that are currently under way. I'm simply trying to understand what sense is implied by this section of the code in these cases where police officers kill a civilian in the line of duty.

● (1640)

Ms. Erin McKey: I will try to take your questions in order, and hopefully I've understood them correctly.

Subsection 25.1(11) excludes from this regime the intentional or criminally negligent causing death or bodily harm. It excludes that. If that happened, you don't get to look to section 25.1. You might look elsewhere. It may be that the officer has the use of force provisions in section 25 available to him, but this regime excludes that right off the top.

We discussed the three categories of conduct generally. That's the first category, conduct that's excluded. That's not to say other defences might not exist elsewhere, but section 25.1 just doesn't come into play.

I think that takes you through paragraph 25.1(8)(c), because again, once you get into the criminally negligent or intentional causing of death or bodily harm, you're not going to look to subsection 25.1(8). And you're not looking at the reporting requirements, because this is conduct that's simply outside the regime.

Mr. Michael Ignatieff: I just have one supplementary then.

What requirements are there with respect to reporting in these cases where the police shoot a civilian? There's a current case in B.C., and I don't want to prejudge or comment on the case or make any presumptions about what happened, but there is substantial public anger about how long it has taken for the RCMP to report on this case. I want to know what statutory requirements the RCMP has in such cases.

Mr. Michael Zigayer: I'll leave to my colleague Erin McKey the discussion of that matter from British Columbia.

I just want to complete an earlier response that she made when she referred to section 25 of the code. What they call it is protection of persons acting under authority. I'll just read that, as it's very short:

> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private citizen,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

I'm not suggesting that this is self-defence.

Your question was very difficult because it pointed us to section 25. My colleague has suggested looking at section 25, which is basically the reasonable use of force in the carrying out of duties, but your question is somewhere else again, I think. It's a report on a shooting. It's not as though someone has hidden the fact that there was a shooting, but the completion of a police report or the laying of charges...? I'm not actually very clear what it is when you say it's taking a long time to make a police report.

● (1645)

The Chair: Mr. Ignatieff, if you'd like to clarify that point with them, then we'll move on to Mr. Brown.

Mr. Michael Ignatieff: In the situation in question, upon which my question was based, a young man is killed as a result of an RCMP action in October. By May there is still no public report as to what happened. My question was whether there is any statutory obligation to simply report. Again, I make no presumption about what did or did not occur. I'm just asking if there's an obligation on the RCMP, or can they just roll it out as long as they want?

Mr. Shawn Scromeda: We will have to defer an answer to that question. This is a question outside of the section 25.1 regime. It's not a question that I'd want to give an off-the-cuff answer to right now.

I understand the question now, and we can undertake to provide you with something in writing on that issue.

Hon. Sue Barnes: Anything provided in writing will be circulated to the full committee, I take it, right?

The Chair: I trust that's the way it works, yes.

Would you provide that for the whole committee then?

Mr. Brown.

Mr. Patrick Brown (Barrie, CPC): Thank you, Mr. Chair.

Moving back to the issue of subsection 25.1(11) on the non-justified conduct, could I ask you if there has been any common law growth in terms of what can be interpreted as non-justified in terms of other abhorrent behaviour or behaviour that wouldn't be considered becoming, such as torture or anything else within those realms that is not already mentioned in the provision? Has there been any judicial interpretation that would enhance what's already in the provision to that effect?

Mr. Shawn Scromeda: There hasn't been, actually. There has been essentially minimal judicial interpretation of this specific provision. Really this case has not been extensively considered, in any judgment, so far. It simply may be too early. Some of these complex investigations involving such techniques take years to complete, and further court proceedings sometimes take years to proceed.

Has there been specific judicial interpretation of that term, enlargement of it, or consideration? No, we're not aware of it.

The terms used there, however, independently, aside from section 25.1, are matters of judicial interpretation, such as what constitutes intentional causing of death or bodily harm. Quite outside this context there are judicial interpretations, because those are referred to in other offence provisions in the act. But to answer your question itself, no.

Mr. Patrick Brown: I have another question.

We paid some attention earlier to a question you asked with regard to disclosure, and obviously the relevance issue that was enhanced with Stinchcombe is quite broad. Are there any concerns in the justice department that this will enhance the delays we're seeing in terms of disclosure? Obviously court dates aren't set until disclosure is complete, with people before the courts being given sometimes two to one or three to one dead time. One of my initial concerns would be, if we're enhancing that, there would be a cause for pause. Is there any anticipation that this could enhance the delay?

● (1650)

Mr. Shawn Scromeda: I don't think the provisions themselves are what would enhance or cause additional delay. It's the fact of the police using complex investigational techniques in ongoing investigations that sometimes themselves take years and generate a great deal of documentation, whether inside here or outside, or whether these provisions exist or not, that is an issue. Complex investigations create a great deal of information.

That information, as you referred to earlier, is subject to the rules in Stinchcombe and broad definitions of relevance that the courts have put in. Certainly, that is an issue. It is the exact issue that you raised, that when you have this amount of information, the requirements of conveying it to the defence further to the disclosure obligation sometimes has taken a great deal of time.

I'm not sure it's one that is caused by these provisions or made worse by these provisions, but yes, certainly it is an issue in the justice system.

Mr. Patrick Brown: Is there any opportunity within the provisions—and I guess this would be more common law in interpretation—to not make this a necessary piece of disclosure before the setting of the trial date? If this is complex and it is one of the stumbling blocks towards providing complete disclosure, is there a way to separate the evidence and disclosure, aside from what would be the rationale for utilizing this clause?

Mr. Shawn Scromeda: Then you're really talking about the requirements under the rules of disclosure. Stinchcombe was a constitutional case; there is a constitutional right for disclosure. So if you were to take an approach statutorily excluding certain information that met the standard of relevance, you might be restraining what is in fact a constitutional right of a defence to receive disclosure at that point.

That particular suggestion hasn't come up. There has been a Justice Canada document with respect to disclosure reform. It was published in November 2004, discussing issues with respect to disclosure reform—how disclosure could be made more effective and efficient. That particular idea was not part of it, but there are some guidelines. If you would like us to ensure that the committee gets a copy of that consultation document, I could ensure that you get it.

Mr. Patrick Brown: I would appreciate that.

In your initial assessment, do you think this would have any—

The Chair: Mr. Brown, excuse me, your time is up.

To allow every member to speak once, we'll go to Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Mr. Chair, many of my questions have already been answered regarding the training, and I'm expecting the handout will provide some more light on that.

First, I'd like to thank you for your very thorough presentation. I think every member of the committee has found it informative.

I do have a couple of outstanding questions on training.

You mentioned that there would be no designation received without first receiving the training. You've also mentioned that you've gone across the country a number of times providing this training.

Who is receiving the training? Is it senior officials? Is it undercover officers? Is it both? Is it members of this public oversight body? I'll be asking for some more detail on the training, and the second part of the question is to get a little bit more information on this public oversight body.

The effectiveness of the legislation will be based on the quality of the training. You've said you provide a two-day overview. When we get to the nuts and bolts of the legislation, to make sure it's being used properly, who provides that additional training? There is a turnover of officers who are dealing with this, so how often is the training provided?

Do you understand my questioning? A little bit more information on the training and on the public oversight body, I think, would be helpful, .

Thank you.

Mr. Michael Zigayer: We began our training of various criminal justice participants, prosecutors and law enforcement, very shortly after the legislation came into force, early in 2002.

In June 2002, in fact, we had an opportunity to speak with prosecutors from across the country. We invited them to Ottawa for a four-day session, two days on Bill C-24 and two days on Bill C-36. Since then we've hit the road. I've spoken to provincial prosecutors, local police, and RCMP. And it's not just the three of us; quite a large group of prosecutors and counsel within the Department of Justice has been involved in this. The last time I gave the course—about a year ago in Montreal to RCMP undercover—one of our Justice colleagues from the Montreal regional office presented along with me. As you heard from Mr. Scromeda, it was a two-day course. Our participation was limited to the first day. The second day involved mostly scenarios, and we didn't need to be there for that part of the program.

So in terms of training, up until January 2003 I believe more than 1,700 individuals, almost 2,000, were trained. This included municipal prosecutors, federal law enforcement, federal prosecutors, provincial law enforcement, municipal law enforcement—basically a good cross-section of law enforcement.

I remember very well training some Fisheries Canada investigators in Vancouver. I don't know if they had been using the techniques or if they had recourse to this scheme, but in the investigation of illegal fishing, for instance, one thing you might do is buy a fish. In those sorts of activities, you never know; when you're offered the fish, you might be offered an illegal firearm of some kind that was stolen or unregistered or whatever. The undercover officer who has received this type of training and has received the designation may say, "Thanks, I will take that." You've just expanded the investigation, and you can pursue it.

So it's not just pure organized crime. Sometimes it's smaller things. You never know when they might come up. You're not dressed in your police uniform and someone offers you something, some kind of contraband, and because you have this law enforcement justification protection, it helps you.

Sorry, I went off on a tangent there.

Since the beginning of 2003, as I indicated, there has been more training. Perhaps when officials from the RCMP appear before you, they can tell you what the totals are now.

Erin.

● (1655)

Ms. Erin McKey: I just wanted to add something that I don't think we've mentioned yet. Closely after the entry into force of section 25.1, the Department of Justice created a training video as well on not just the law enforcement provisions but generally on Bill C-24 as a whole. This has been widely distributed to crowns and police officers across Canada.

To the extent that you're talking about refreshing training, or turnover, there is also a CD-ROM available that does a brief run-through. It is not as extensive, obviously, as the on-site training we provide, but it is available to law enforcement crowns.

Mr. Shawn Scromeda: We can ensure that you get a copy and an example of that training video as well. That can be distributed as part of the materials.

The Chair: That's fine. Thank you.

I have a list here still.

Ms. Barnes, I will start with you. I do have others who would like to get in before the end. Since you've already been up once, perhaps you wouldn't mind keeping it short. Thank you.

Hon. Sue Barnes: Thank you, Mr. Chair. My question is very simple, actually.

Usually when we see new provisions come into effect like this, they don't come in isolation, in just one jurisdiction. Often other Commonwealth jurisdictions or democratic jurisdictions have something comparable. I would like you to tell us whose we are close to and whose we are disparate from. Have any of these jurisdictions subsequently retracted these provisions, or are they all relatively new?

Perhaps you could also let us know if any of you were personally involved in the drafting of these provisions or when they came into effect here.

● (1700)

Mr. Shawn Scromeda: Just to answer your second question first, both Michael Zigayer and I were directly involved in the development of these. Drafting is done by specialized legislative drafters—

Hon. Sue Barnes: I realize that.

Mr. Shawn Scromeda: —but we were actually the instructing counsel for those legislative drafters on this provision.

Your first question is a longer one and is perhaps a broader one with respect to other international jurisdictions and how they handle an analogous situation. I can give you a roundup of some other countries. I can't do a complete around-the-world tour, as in fact I don't have the legal knowledge.

I preface all of this by saying I am a Canadian lawyer, so any assessment of other legal systems has to be viewed with a little bit of caution.

I can tell you the jurisdiction we are probably the most analogous to in respect of our law enforcement justification is Australia. That is because Australia faced a situation very similar to ours. They faced it before we did in the case of Ridgeway, where their supreme court actually made a ruling very similar to the one our Supreme Court ruled in Campbell v. Shirose, and they were left in a similar situation, looking for statutory authority for what had been expected to be long-standing police activities that were thought to have been justified under common law.

They proceeded with a justification regime along somewhat similar lines to ours. Ironically, it was actually in part based on discussions that went back and forth between us when they had seen what we were in the midst of doing with the police enforcement regulations. Their overall statutory scheme, which I emphasize is one that's shared because criminal law in Australia is shared—it's mostly a state law matter and is dependent on individual states—is a generalization of our police enforcement regulations to broader circumstances. That was their approach, but it is broadly analogous to what we have done in its ultimate legal purpose and effect. That is effectively because they faced a similar situation and there is commonality between our legal systems and even policy exchanges between us.

Another interesting country, of course, would be Great Britain, the United Kingdom. To the best of my assessment, the situation in the United Kingdom is probably best analogized to the situation Canada was in prior to the judgment in Campbell v. Shirose, where there has been no judgment that I'm aware of. I would like to update my research on this, and certainly this is something we can come back to, but there's been no judgment I've been aware of where their House of Lords has indicated that a common-law law enforcement justification doesn't exist. They had an opportunity I think in a 1996 case, Latif, to look at this, the House of Lords.

It's a similar situation in many ways to what happened in Campbell v. Shirose in that it's also a drug situation, and I think there was, similarly, a motion for exclusion of evidence rather than abuse of process. But it might have been abuse of process as well. I would have to double check on that. But once again, the general allegation was that the police, or customs officers in that case, had broken the law in enforcing the law. Their House of Lords, without adopting a similar approach to ours, rather than a broad discussion of the principle of police justification, simply said, “We do not consider this case to be an abuse of process”, leaving it open.

The Chair: Mr. Scromeda, thank you.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: I have two quick questions to ask you, if I may. First, let's pretend we are at a training session. For purely educational purposes, could you give us a general example, without referring to a specific investigation? We understand that you are bound by rules of confidentiality. But, for the sake of the rookie members of Parliament, who weren't around for Bill C-95, Bill C-24, or for Bill C-36, give us a general example of how these Criminal Code provisions have been useful to police forces or to law enforcement organizations.

Second, earlier, Mr. Derek Lee asked a question about defence. Do you think it would be possible for you to table with the committee a list of public organizations which have designated officers, so that we get a sense of the scope of this section?

We can see you're not used to working for the usual corporate attorney's fees, because you take your time.

● (1705)

[*English*]

Mr. Shawn Scromeda: Both those questions, unfortunately, are perhaps better addressed through further witnesses. Perhaps we can undertake to help provide the information in cooperation and consultation with them, but I do not have a list right now to share with you of all the different organizations for which the law enforcement justification has been used. That would include municipal police forces across the country. I don't have a list of police forces in Quebec, for example, nor are they obligated to give me such a list of situations in which designations have been done.

[*Translation*]

Mr. Réal Ménard: But what about federal investigations? You said...

[*English*]

Mr. Shawn Scromeda: Do you want just federal at this point? Just to make it clear, the law enforcement justification is available to police forces under provincial jurisdiction as well. Designations are possible, and in fact have been made, but we don't have a list of every single municipality.

[*Translation*]

Mr. Réal Ménard: It would be useful in order to get an understanding of the scope of this section.

[*English*]

Mr. Shawn Scromeda: Do you want just federal, or are you actually looking for a complete list?

[*Translation*]

Mr. Réal Ménard: I would like the list to be as complete as possible.

[*English*]

The Chair: Is that it, Mr. Ménard?

[*Translation*]

Mr. Réal Ménard: There was no generic example, I guess that will have to wait until next time.

[*English*]

Mr. Shawn Scromeda: I did give generic examples in my overview. I would prefer to leave the question of operational scenarios and how this happens operationally to police witnesses who may appear. I think they would be in the best position to answer.

The Chair: Thank you, Mr. Scromeda.

Mrs. Smith is next.

Mrs. Joy Smith: Mr. Chair, my question has been answered.

The Chair: Then Mr. Lee is next.

Mr. Derek Lee: On the scope of the act, the parties that may have the benefit of the act will include, as you said, police under provincial and municipal jurisdictions. As we go to look for the annual reports of the designations, I assume we can cover off the federal—which is rather easy, because the public safety minister has tabled the report—but we have to look to each provincial attorney general for reports made public in those jurisdictions. Then, because it can involve any peace officer in a federal jurisdiction, we've got to look to each separate federal minister whose ministry includes peace officers. That could include Fisheries and Oceans Canada and Parks Canada and...I don't know what to list.

That is not to say any of those ministries has actually used designations yet, but some may have, and we're unaware of those public reports—at least, I'm not aware of them.

So we will have to look there, or at least ask there. Is that correct?

Mr. Shawn Scromeda: We can assist in that process. I do have with me some of the provincial reports. I'm not sure I have every single one, but I think I have most of them. There was a question earlier about materials we'll be sharing with the committee; I think we can gather most or all of that together for you.

Mr. Derek Lee: Has the system evolved to the point that in the case of any federal minister whose officials would have made use of this section, a report would have percolated to the top and the federal minister would have made an annual report?

Mr. Shawn Scromeda: The only other federal—

Mr. Derek Lee: An example is Fisheries and Oceans Canada. I believe they have powers of arrest there.

Mr. Shawn Scromeda: In fact, Fisheries and Oceans Canada is the example, and Michael Zigayer gave it. It is the only federal department that I know has proceeded toward a designation process. I actually can't confirm that it made designations and I'm not sure yet if the department's minister has issued a public report, but it is the only one we're aware of that has approached us. That will be part of the further information.

● (1710)

Mr. Derek Lee: I suppose that if we were to recommend an amendment, we might want to consider, in terms of public reporting, trying to consolidate some of the reporting. But we can get to that later.

My last question is along the same lines. These designations would also be available to peace officers present in the integrated border enforcement teams and the integrated national security enforcement teams, the IBETs and INSETs, which would have multi-jurisdictional connections and their own undercover operations, but I'm not sure who we would look to for reporting. Have you given any thought to that?

Ms. Erin McKey: The reporting requirements are set out relatively clearly in the legislation.

Just so that people aren't caught by surprise with respect to an annual report, there is only a need for an annual report if the provisions that trigger the requirement for senior official approval have been triggered. There may be a force that is designated that hasn't had to avail themselves of those provisions, and there wouldn't be a requirement for a report. It's where the particular conduct that was of concern during the passage of the legislation comes into play and the senior official is implicated that triggers reporting requirements.

With respect to who files reports, it's the minister responsible. It is the competent authority responsible for the police officers who were engaged in that conduct who has the obligation to file a report. And yes, to the extent there are police officers participating in integrated units, such as IBETs or INSETs, they would be eligible for the designation.

Mr. Derek Lee: Once they've been designated, they could authorize a third party who could take advantage of the provision...?

Ms. Erin McKey: In accordance with the statutory requirements.

Mr. Derek Lee: Of course, yes.

The Chair: Thank you, Mr. Lee.

Mr. Thompson.

Mr. Myron Thompson: In regard to the training of regular citizens, I'm thinking there is a pretty broad spectrum out in my riding. With Rural Crime Watch, we've come upon some very interesting situations. Would there be any need, in your view, to think about them as part of this training exercise?

Mr. Shawn Scromeda: In terms of who the police forces and other law enforcement agencies have suggested for training, we have responded to their own assessments of training needs. I don't think I could provide an answer to that. We would be responsive to their own assessments of whether they are likely to need training to take advantage of these provisions and to ever be designated under them. I'm not aware of anything having been done along that line.

Ms. Erin McKey: As far as I'm aware, the Department of Justice has responded positively to every request for training that we've received.

Mr. Michael Zigayer: I have one last little word.

For community groups, which is where I think you were coming from, we could provide our CD to the community group. It's essentially a briefing or an explanation of the whole of Bill C-24, the organized crime bill that was enacted at the end of 2001. It provides a sketch of what you've seen today.

Mr. Myron Thompson: I think they would probably be interested in getting something like that. If I can get a double order of it, I'll spread it around.

The Chair: Are there any other questions for the Department of Justice? I have one that I would like to put, since these are the folks who actually drafted this legislation.

In years past, a police officer would be rated on his act, or his judgment, on reasonable and probable grounds. This terminology doesn't seem to exist anywhere in this legislation—although maybe that's intended, I don't know. But if a police officer believes he's acting on reasonable grounds, his act has to be “reasonable and proportional” in the circumstances.

Could you explain that to me? I guess I'm having a problem understanding how a judgment can be made on a police officer acting in good faith, if he is judged on these grounds. Who is to do this judging or examination of his act? Obviously there was some thought given to that. Having been in the position of an undercover investigator at one time, I can see that this would be a substantial issue in a court.

● (1715)

Mr. Shawn Scromeda: I can say there was considerable thought given to the exact wording, including extensive consultations with the police themselves. In terms of the wording “reasonable and proportional”, we did endeavour to ensure they were comfortable with that. As I understand it, when this was last before the committee, the RCMP commissioner told the justice committee that the words “reasonable and proportional” have always defined the essence of ongoing police responsibility. That's the essence of what police officers have to do; they have to act reasonably and proportionally in the circumstances.

In respect of who will evaluate that, there is a question of who's looking over the law enforcement officers' shoulders and second-guessing them. There had to be standards enacted in the legislation, and as soon as there are standards there are people who are going to potentially second-guess those standards.

Those are issues that can come up in court. In situations where it is found that an enforcement officer did not believe, on reasonable grounds, that it was reasonable and proportional, there could be consequences for that individual officer, for the investigation. Nevertheless, it is a standard that is analogous to one that has always been in law. Police officers have always had to.... Part of the challenge of being a law enforcement officer, I suppose, is that people are going to be examining your conduct, and your conduct will be subject to law.

The Chair: Ms. Barnes.

Hon. Sue Barnes: I think earlier you said there wasn't much jurisprudence on these sections. But are you aware of anywhere in Canada where courses are now making their way through the court system with respect to any of these provisions?

Mr. Shawn Scromeda: I'm not aware of one right now.

Hon. Sue Barnes: Could you check on that and get the information to the clerk of the committee, so all of us will know?

Thank you.

The Chair: As there are no closing comments, I would like to thank the Department of Justice for making their presentation here.

The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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