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Thursday, June 1, 2006

Chair

Mr. Art Hanger

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● (1530)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): It being 1530 hours, I'd like to open the meeting of the Standing Committee on Justice and Human Rights. The orders of the day, pursuant to the order of reference of Tuesday, April 25, 2006, are for a review of sections 25.1 to 25.4 of the Criminal Code.

Today the witness appearing before the committee is a representative of the Criminal Lawyers' Association, Mr. Peter Copeland. Please, Mr. Copeland, carry on. We have about one hour, and we will go through a series of questions after your presentation.

Mr. Peter Copeland (Representative, Criminal Lawyers' Association): Thank you very much. On behalf of the Criminal Lawyers' Association, I would like to thank the committee for giving us an opportunity to appear before you this afternoon in relation to the review of the law enforcement provisions of the Criminal Code.

Our organization had an opportunity to address the committee when these provisions were first being considered. Mr. Koziebrocki and Mr. Lomer appeared, and in general terms—

The Chair: Excuse me, Mr. Copeland. There is a problem with translation.

Would you like to try again?

Mr. Peter Copeland: When these provisions were first being considered prior to adoption by this committee, our organization had an opportunity....

[*Technical difficulty—Editor*]

The Chair: Okay, I think everything's in order now. Thank you for your patience, Mr. Copeland. You may continue.

Mr. Peter Copeland: Thank you.

When these provisions were first considered by this committee prior to adoption, our organization had an opportunity to appear and in general terms opposed the introduction of this law enforcement justification regime on the basis that it was not necessary, that it was overly broad, and that the general effect of these provisions was to place police officers above the law. It remains the position of our organization that these provisions create that very risk.

Obviously the provisions themselves are legal provisions, so in a technical sense police officers acting under these provisions are acting under a legal regime, but our position is that the police are above the law under this regime, in the sense that as they themselves are the ones who determine when the state's law enforcement interest outweighs the rights and entitlements of other individuals in society, they are placed outside of the general provisions of the concept we have of the rule of law.

One of the fundamental notions of our system of law is that it is the courts and not individuals that determine the balance to be struck between competing rights and interests. Where the state seeks to interfere with somebody's rights or with somebody's property, the preferable scheme under our system is a system of prior judicial authorization, and where prior authorization is not feasible due to exigent circumstances, subsequent judicial oversight of the conduct.

What is troubling with these provisions is that the police, whether it's done by a public officer or a senior officer under the scheme, make the determination of what appropriate conduct should be undertaken, and they make that determination from their own perspective, caught up in an investigation, without oversight from an independent body and without an appropriate, in our view, system of review.

● (1535)

The Chair: I apologize, Mr. Copeland. There seems to be a lot of activity on the committee side. Please bear with us for a couple of minutes until everyone finds a seat.

Thank you, Mr. Copeland. Go ahead.

Mr. Peter Copeland: In our view, there's an absence of an appropriate system of review to ensure that the balance being struck by the police under this regime is an appropriate one, and one that is ultimately in the public interest.

Just to compare the difference between the most standard system of prior judicial authorization—the search warrant provisions under section 47 of the Criminal Code—and the law enforcement justification power, search warrants require prior authorization from an independent judicial officer. Under the law enforcement justification, the police make the determination, and there's no prior recording of it in general terms, except under certain exceptional circumstances where a senior officer has to give written authorization in advance; rather, there is an after-the-fact reporting system.

The justification under the search warrant regime is based upon information on oath. The justification for the acts is disclosed in advance. The extent to which the state seeks to be interfering with the rights of individuals is particularized in advance, and clear limits are set upon the conduct of the state, which reflects the balance that an independent officer sees as being justified.

After a search warrant is executed, the courts maintain jurisdiction and supervision over the search. There's a system in place where reports have to be made promptly after a search, where property seized must be reported to a judicial officer, and where the courts maintain control.

In the law enforcement justification scheme, the justification is not set out in advance. Indeed, under the reporting provision in section 25.2, the public officer who commits an act or omission that would otherwise be an offence has to file a report with a senior officer describing the act or omission but is not required to describe the justification for that act or omission. In terms of the creation of a record as to why the state interfered with individuals, the law enforcement justification regime provides very minimal reporting requirements.

One of the most important differences in accountability between the search warrant regime and the law enforcement justification regime is that search warrants ultimately become public documents. The information sworn in support of a search warrant is a public document. There may be sealing orders, and there may be editing of information to protect an ongoing investigation or to protect the identity of confidential informants, but the general rule is that this information will become public when those interests no longer need to be protected or where certain information can be edited out.

Under the law enforcement justification regime, there is minimal public scrutiny. The press will generally not have any access to the information, unless it is somehow disclosed in the course of a criminal prosecution and becomes the subject of evidence at a criminal trial, perhaps years down the road.

An individual affected by a search warrant receives notice in some form that the state is interfering with their rights. Generally, people are entitled to see a copy of a warrant before the police enter their premises. In the case of interception of private communications, individuals will receive notification at some period of time after the interceptions have ceased.

Under the law enforcement justification regime, the only case where there's notification of individuals affected is where there's a loss of or serious damage to property. If the police assault an individual in the course of an investigation or commit other offences, the individual—an innocent third party, a member of the public—may never know that it was the state that committed that offence against them.

● (1540)

All of the protections that I've outlined in relation to search warrants are in place to protect a very limited category of rights—property rights and privacy. In my view, what is disturbing with respect to the law enforcement justifications is that there is an incredibly broad range of conduct that may be justified under these provisions.

The limitations on the justification scheme are set out in subsection 25.1(11), which says:

> Nothing in this section justifies
>
> (a) the intentional or criminally negligent causing of death or bodily harm to another person;
>
> (b) the wilful attempt in any manner to obstruct, pervert or defeat the course of justice; or
>
> (c) conduct that would violate the sexual integrity of an individual.

What would be permitted if those are the only exceptions? Robbery would be permitted. Extortion, uttering death threats, kidnapping, or forcible confinement could be permitted. The infliction of pain short of intentional bodily harm could be permitted, and notwithstanding paragraph 25.1(11)(a) prohibiting the intentional or criminally negligent causing of death or bodily harm, conduct that results in death or bodily harm could be justified. The offence of assault causing bodily harm and the offence of aggravated assault do not require that the consequences be the result of intentional action. So if the police engage in conduct where there is objective foresight of the risk of bodily harm, or indeed death, that could be justified under these provisions, as long as the police were not criminally negligent in the sense of wantonly and recklessly disregarding the risk to the public.

In preparing for today, I didn't have the benefit of reviewing the evidence of the witnesses who testified on Tuesday. Hopefully, the committee has received some information from those witnesses with respect to the actual functioning of these provisions on a day-to-day basis.

What I have been able to review, and what's publicly available—at least online—are certain reports from the federal government in relation to the RCMP's recourse to these provisions and the British Columbia reports from certain years. From reviewing at least those reports, it appears that there has been limited recourse to these provisions, which provides some comfort in light of the concerns that had been raised about the import and over-breadth of these provisions. But at the same time, questions are raised with respect to what had been the purported necessity of these provisions. In 2002 and 2004, for example, British Columbia reports no recourse to these provisions.

With respect to the RCMP, what is reported for 2003 are five instances in investigations involving the Immigration and Refugee Protection Act, where what was authorized was the possession and/or purchase of identification documents; in other instances, violations of the Customs Act relating to the purchasing, possessing, or making of false customs declarations were authorized; and in one instance, the possession of a firearm that otherwise would have been an offence under the Criminal Code was authorized.

I pause to note that one of the concerns that had been raised before this bill was adopted was that such a broad justification power was not necessary, and that in response to the Campbell and Shirose decision of the Supreme Court of Canada, for example, regulations had already been promulgated under the Controlled Drugs and Substances Act that would authorize reverse sting situations, and that narrower justification provisions could be created that wouldn't allow such over-broad resort to otherwise criminal conduct.

What is interesting and somewhat comforting with respect to the 2002 report in relation to the RCMP is that the conduct that has been justified and authorized really, in a general sense, relates to victimless crimes, where law enforcement officers have been authorized to possess things in the course of an investigation that were never being possessed for an improper purpose.

● (1545)

So for the purchasing of identification documents, the possession of false identification, the possession by agents of the state of contraband liquor or tobacco products, there are no citizens who are actually victims of those offences. The making of a false customs declaration form is the state lying to itself, which in my view is a victimless crime.

Similarly, in the 2003 report, in relation to the RCMP, there were two instances of justification of possessing forged passports; two instances of offences under the Excise Act, relating to the possession of improperly stamped tobacco; one instance of buying and receiving counterfeit documents and uttering counterfeit documents; then one case of possession of stolen goods, a theft over $5,000—there may have been a victim of the theft who might be a member of the public, but it's not clear from the report; and conspiracy to commit an indictable offence, although the indictable offence is not identified in the report.

From the information I had that I've been able to review prior to today, it's not clear how much the other provinces are resorting to these provisions and whether the limited resort available or reflected in the RCMP report is something that has also been carried out across the country.

The Chair: May I interject for a moment?

Is there a concluding statement that you can make in reference to your presentation here today?

Also, I know you reflected the number of incidences that this particular section has been used for or that enforcement has been used. Can you recall, or refer to the committee, any violations or complaints that were registered against the RCMP or the policing agencies that used the section they violated?

Mr. Peter Copeland: To answer the second question first, I'm not aware of any instances of complaint.

Perhaps this will be the concluding portion of my initial comments. One of the real concerns is that the way in which these provisions are structured—the way in which authorization is granted and the limited way in which reports from public offices are made and the annual reports created—shields the conduct of the police from real scrutiny.

Individuals who may have been the subject of police-justified "crimes" may never know that they should be complaining about police conduct. If someone has been assaulted or threatened under these provisions, they may feel that they were the victim of a true criminal, rather than a justified criminal.

The press cannot scrutinize the conduct of the police in any meaningful way. Indeed, based upon the type of information that the annual reports contain—the limited information that is statutorily required—in my view, those reports do not provide sufficient information to Parliament to meaningfully review the necessity of these provisions, to determine whether resort to these provisions is being undertaken in an appropriate manner, or to determine the effect of these justified crimes upon members of the public.

In this sense, it remains the view of our organization that these provisions unacceptably place the police outside of the usual scheme of the rule of law.

● (1550)

The Chair: Thank you, Mr. Copeland.

We'll have questions now.

Ms. Barnes, for seven minutes.

Hon. Sue Barnes (London West, Lib.): Thank you.

Thank you very much for coming, Mr. Copeland.

On the reporting mechanisms that were set out in the legislation, the reason the limited information was there and you have so little is because it was supposed to not disclose any information that would compromise investigations or sensitive law enforcement identities, and it takes consideration of the life and safety of the people involved or whether it's going to be prejudicial to an ongoing legal proceeding or be in any other way that's contrary to public interest.

I understand what you're saying to us about limited information. Having the knowledge that is the rationale behind this section, how would you suggest that any of the information currently provided could be widened if these are the areas of concern? It's all well and good to say you don't get enough information, but if you don't come with some concept of a solution to that problem that doesn't compromise the very real reasons why that reporting mechanism was set up in this way, it isn't as helpful.

Do you have some suggestions of what we should be trying to do if we were going to do more, or do you concede that the rationale originally was well intentioned and probably correct for what it's intended to do?

Mr. Peter Copeland: Perhaps I can say this as a starting point. I recognize the concerns with respect to protecting ongoing police investigations and the identity of confidential informants. These aren't novel concerns raised by the justification provisions under the Criminal Code. These are concerns that are dealt with day in and day out in our criminal courts in relation to the obtaining of search warrants, the sealing of "informations" to obtain search warrants, the editing by the Crown with judicial oversight of those "informations" to protect ongoing investigations and to protect the identity of informers.

What does come out of reviews of "informations" to obtain search warrants, even relatively early in the stage of an ongoing criminal investigation, is much more information that becomes available to the public than is at all contained in these reports. Simply identifying that offences of a particular type under a particular statute were committed without any factual context provides, in my view, a completely inadequate basis for evaluating the justification for resort to those provisions. So while the reporting provisions have instruction in a way to protect certain information, what's left is really an entirely unhelpful report.

Hon. Sue Barnes: Thank you very much for that answer.

The whole reason why we set up review provisions after we've enacted legislation, especially where we've heard what would be considered realistic concerns voiced by organizations such as yours, is that we want a period where it's in effect, and it's now been around four years.

I want to go along the same line of questioning that Mr. Hanger, our chair, was asking you. Your answer was you haven't heard anything officially from any jurisdiction that there is a concern on this section. Have you heard anything anecdotally, or is it just the potential for abuse of this section?

Mr. Peter Copeland: I haven't heard anything anecdotally; I haven't heard anything officially. As far as I'm aware, there aren't any judicial decisions at this point reporting on or considering the effect of these provisions.

Hon. Sue Barnes: That's the main thing I was wondering about. Sometimes before there are cases coming out, lawyers are aware of these things and it's not out in the public domain yet. So that was my main concern.

Thank you very much.

The Chair: Thank you, Ms. Barnes.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Good day.

If I understand you correctly, you're opposed to these provisions on principle, since you admit that no specific cases of abuse have been brought to your attention. No court of law has ruled on the unconstitutionality of provisions of this nature. I can understand that as far as criminal lawyers are concerned, any justification regime that would allow people to commit a recognized criminal act is unacceptable.

However, when we met with senior officials from organizations responsible for law enforcement, they made it very clear to us that this justification regime had mainly been employed in conjunction with investigations involving infiltration techniques, specifically but not exclusively in fighting organized crime.

Basically, a parallel can be drawn with the situation of informers. They can pose a problem, democratically and even ethically and also from the standpoint of the healthy administration of justice. However, without informers or a justification regime, certain police investigations would never have produced any concrete results.

Would you go so far as to recommend that these provisions not be extended, or are you prepared to reconcile yourself to the fact that, even though you likely view them as a necessary evil, these provisions can prove be useful in connection with the conduct of investigations?

● (1555)

[*English*]

Mr. Peter Copeland: It would be my submission that the provisions should not be renewed in this broad form. While I recognize, particularly in the area of undercover operations relating to organized crime, there may be very specific concerns and needs that arise in those types of sensitive investigations, what we have instead is a very broad power that is not limited to undercover investigations, is not limited to the investigations of criminal organizations, and is not limited in terms of the types of offences that can be committed, except for the very narrow limitations contained in subsection 25.1(11).

I'm not sure I understood the initial portion of your question, but with respect to the permissibility of conduct that would otherwise constitute an indictable offence, it's not our position that anything that would constitute an offence cannot be justified and law enforcement shouldn't do it. It happens all the time with search warrants. Police officers who don't have a search warrant would be committing an offence if they walked into a private home and started taking property out of it. It happens—

[*Translation*]

Mr. Réal Ménard: You have to agree though that this is somewhat different from search warrants. If a search warrant is executed in violation of a judge's orders, section 24 provides for the exclusion of evidence and can even result in a stay of proceedings. There are a number of legal precedents whereby evidence has been excluded because search warrants were improperly executed. I don't think comparing the improper execution of a search warrant to a legally authorized justification regime is a valid comparison.

I'd like to move right along to my second question, since the clock is running and our chairman is a stickler for time.

What additional safeguards would you like to see in place? Let's assume for the moment that no recommendation to do away with these provisions will be forthcoming, given that they are a useful law enforcement tool. What additional safeguards would you recommend? As you know, the regime provides for the designation of officials and their actions must be authorized by a senior official. Furthermore, as you know, the minister, or competent authority, must authorize their actions, except in case of emergency for a 24-hour period. What additional safeguards would you like to see in terms of resorting to this scheme?

[*English*]

Mr. Peter Copeland: Fundamentally, it's our view—and it's the reason I keep coming back to the search warrant comparison—that what raises the concerns are the manner in which justification is given, the manner in which the justification and intent for resorting to such conduct is recorded, and the scrutiny of resort to these provisions that the public is ultimately going to make.

The regime ought to be subject to judicial oversight. For example, in a large organized crime type of investigation, while the search warrant analogy isn't a perfect one, one could certainly, at a certain stage in the investigation, put information before a justice of the peace or a provincial court judge explaining the nature of the investigation and explaining why, in order to move further into the organization, one has to put an undercover officer in posing as a member of the gang or posing as an underworld individual—someone who, in order to have credibility, must be permitted to engage in certain types of conduct.

● (1600)

[*Translation*]

Mr. Réal Ménard: Do I have any time remaining, Mr. Chairman?

[*English*]

The Chair: You may have one very quick question.

[*Translation*]

Mr. Réal Ménard: Could you be more explicit about how you plan to reconcile that? I'm not thrilled with the idea of judicial oversight. But at the same time, it's important to bear in mind the confidentiality of certain information. How do you reconcile judicial oversight with confidentiality. It's an interesting concept.

[*English*]

Mr. Peter Copeland: Judicial oversight is not irreconcilable with confidentiality. It happens very often in large, complex investigations that search warrants are obtained and the "informations" to obtain those search warrants are sealed and will remain sealed for a lengthy period of time—until the investigation is complete, until all the arrests have been made, until all the suspected proceeds of crime have been seized, until all the relevant evidence has been collected. Simply resorting to the usual provisions of the Criminal Code in relation to sealing, in relation to judicial oversight of disclosure of that information—the editing of sensitive information so that it's not made public until such time as it's not going to compromise the investigation—is the scheme that, in our view, would properly balance the interests of law enforcement against the right of citizens to have their interests protected and to hold the state accountable for its conduct, ultimately.

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair. Thank you, Mr. Copeland, for being here.

Are there any other jurisdictions similar to Canada—England, Australia, New Zealand—where a similar process has been gone through, where they introduced this kind of amendment to their existing criminal code and police procedures? If there are, has any one of them used judicial oversight?

Mr. Peter Copeland: I'm aware that Australia has a similar regime in place. I'm not familiar with the specifics of it or any difficulties that have been encountered. I don't believe the United States has a similar scheme at all, though.

Mr. Joe Comartin: Thank you, Mr. Chair. That's all.

The Chair: Thank you, Mr. Comartin.

Mr. Thompson is next.

Mr. Myron Thompson (Wild Rose, CPC): Thank you, and welcome.

The court decision made in 1999 is what brought it in to undercover work for a number of years—I think it was three years—before this legislation came into place to allow undercover work to take place. It's my understanding through testimony that during that period of time absolutely no undercover work was being done, and crime rather flourished, in the sense that it was on the rise. They didn't have to fear that particular part of it; now we have the legislation that enables them to go back to work.

I want to follow Mr. Ménard's line. I'd like to hear directly from you. If sections 25.1 to 25.4 were taken out of the Criminal Code, how would you suggest the undercover people work?

Mr. Peter Copeland: Going by the RCMP's experience in 2002-03, there would have been some false passports that weren't investigated, some tobacco-type and alcohol smuggling offences that weren't properly investigated, and some counterfeit documents that weren't properly investigated. Given the limited recourse that has been made to these provisions, at least by the RCMP, it's difficult in my view to see the pressing need these provisions were meant to fill.

Campbell and Shirose, the Supreme Court of Canada decision, presented a very narrow problem for the police in relation to reverse sting operations in drug cases. In part, it turns upon the very expansive definition in the Controlled Drugs and Substances Act of the offence of trafficking, because it's an offence not simply to sell drugs but to offer to sell drugs. Before these provisions were introduced into the Criminal Code, that's a problem that had been rectified by regulations under the Controlled Drugs and Substances Act.

It appears that, at least from the RCMP's conduct, the types of investigations justification is relied upon for are those where there really are victimless crimes, where it's a question of possessing contraband or a question of creating false documentation that's being uttered to the government, rather than crimes that generally have an effect upon third parties, like most of the other offences under the Criminal Code.

So I question the pressing need for these provisions. Given the manner in which they've been resorted to, it's difficult to see that they are a necessity at this time.

● (1605)

Mr. Myron Thompson: Obviously they were a necessity at one time, because they operated under cover for years without this kind of legislation, and then of course a court decision brought that to an end. So things changed. Things are different at this time.

I'm not sure you answered my question. Undercover work is essential, according to the witnesses we've seen, on a number of cases. Now the drug act, of course, covers that operation, but other types of activities aren't covered, and that's why there was none until this legislation came into being. I don't think you really clarified for me how you would see undercover police working if this legislation were to be taken out of the Criminal Code.

Mr. Peter Copeland: This legislation is not directed towards undercover operations, and without these provisions I am certain that from 1999 to 2002 undercover operations were ongoing. What these provisions relate to is not undercover operations, but justified conduct that otherwise constitutes a criminal offence.

Mr. Myron Thompson: If I may clarify, did we not hear a witness just say that all operations ceased? You said you were sure they kept going, and I believe we heard testimony to the opposite. Maybe I wasn't hearing things right.

There's another point I would like to make. Working undercover is a pretty massive deal with different things. Let me try to give you one situation.

You are going to infiltrate a gang, because if you get inside you're going to be able to do something about their activities. Maybe it isn't with drugs, so forget that part of it. You go through the initiation period and you've pretty well passed all the tests. But for a final final test, they say, “My friend, if you want to be part of this gang, there's a corner grocery store down here. We'll give you 10 minutes. If you go and rob that store and come back with the cash, you're in.”

What do you suggest they do?

Mr. Peter Copeland: First of all, I believe I've recognized in my comments or in response to an earlier question that the investigation of organized crime and large criminal organizations presents special problems, and these provisions are not directed towards organized crime or undercover investigations of organized crime. A more focused provision relating to the investigation of those types of offences would certainly be more palatable and in my view could also be reconciled with a scheme of judicial oversight.

In terms of the initiation period, and I don't mean to sound indelicate in relation to this comment, given the restrictions in subsection 25.1(11), which presumably members of criminal organizations can read, if they were to add a minor sexual assault into part of their initiation requirements it would be, in accordance with paragraph 25.1(11)(c), sufficient to weed out undercover officers, who would not be justified in committing such an offence.

So I'm not sure it's realistic to say the initiation period is the only thing these provisions are directed at.

Mr. Myron Thompson: I'm not sure either, but I believe the police unit whose job that is do an excellent job of it, and I think they know how to deal with those kinds of things. This added protection is apparently very satisfactory to them. That's why I support this legislation.

Last, if I have time for one quick one—

● (1610)

The Chair: If it's very quick.

Mr. Myron Thompson: You mentioned the word “balance”. Balance always troubles me when we talk about law and order: “What's the balance? We have to strike a balance.”

Well, what is balance? Is it fifty-fifty? I've been dealing with crimes against children for years. I'll tell you what I think the balance is. I think it's 5 to 95. Five per cent is, with the criminal activity, that you're going to have your basic rights, and they will be described to you right from the beginning; 95% of the effort is going to be toward the victims, potential victims, and children, and the protection of society.

I don't even know why we use the words that we have to “strike a balance”. I don't know what it means. Can you tell me what you meant when you said we have to strike a balance?

Mr. Peter Copeland: What I meant with respect to balance is the consideration that an independent judicial officer would make between competing rights and competing values that we as a democratic society hold dear to our hearts.

The right to privacy is certainly one interest; the right to bodily integrity; the right to be free from threatening conduct—these should be balanced against the state's legitimate interest in law enforcement. As part of that balance, an independent judicial officer ought to be reviewing the evidence in advance that the police seek to rely upon to justify the illegal conduct they wish to engage in.

It's not a question of the police making the decision themselves, which somehow comes to someone's attention, and stepping back saying, “What I was doing is justified under the Criminal Code.” There are real safeguards in requiring the state to ask in advance for permission and to justify what it is they seek to do, against the harm that may be inflicted upon other values we hold as important in our society.

The Chair: Thank you, Mr. Copeland and Mr. Thompson.

Mr. Maloney.

Mr. John Maloney (Welland, Lib.): What is the frequency of use of these provisions? How often are they used? Can you give me a rough idea?

Mr. Peter Copeland: It appears they are used about a dozen times a year by the RCMP—never in the years 2002 and 2004 in British Columbia, and I was not able to obtain reports in relation to other provinces.

Mr. John Maloney: You would be more comfortable with some judicial oversight, but do these situations not occur with a sense of immediacy—fresh pursuit, or whatever—where judicial oversight just isn't practical?

Mr. Peter Copeland: Given the limited information in the annual reports regarding the RCMP, from the types of investigations where acts were justified under these provisions, and just applying my experience, it would seem to me these are not cases where a last-minute decision would have to be made by an officer who all of a sudden found himself in the middle of a criminal conspiracy that he had no prior notice of.

In the investigation of criminal organizations, whether it's in the drug context, in the migrant smuggling context, the tobacco or alcohol smuggling context, information is obtained, relationships are cultivated over a lengthy period of time, and there is ample time in the general course to put together a brief affidavit to provide to a judicial officer saying: “This is the type of investigation we are undertaking; these are the targets of the investigation; this is what we understand the nature of the offences they are committing to be. We propose making recourse to these provisions, including committing the following types of offences: possessing materials it would otherwise be illegal to possess, or fabricating false passports, to the extent that it appears to have been done in other investigations.”

It may be that in the course of a particular justified investigation, the designated officer or the person authorized after the judicial authorization to be engaged in that justified undercover operation may find himself or herself in a circumstance where criminal conduct has to be performed, or a decision made whether to engage in it or not, on the fly. There could be, in addition to the prior judicial authorization scheme, an exigent circumstances exception—that's also something that is not foreign to our system of prior judicial authorization—where the police are involved in an investigation and exigent circumstances exist such that they can't obtain a warrant without risking harm to individuals or the loss of evidence. They may act and then explain their conduct afterwards.

● (1615)

Mr. John Maloney: In relation to those exigent circumstances you refer to, should these clauses be left in to cover those situations, or should these clauses be tightened up with an exception that would allow the immediacy situation to be addressed?

Mr. Peter Copeland: In my view, as a matter of accountability and in accordance with the principles of the rule of law, the more information that is required to be presented beforehand in terms of the nature of the investigation and the types of illegal conduct contemplated, the better, because then the limits to which the state is anticipating violating the rights of others or perhaps engaging in victimless crimes—as seems to be the case in some of these investigations—are clear.

Then when something arises in the course of that investigation a day or 10 days later, depending upon the nature of the undercover operation, the individual comes forward, reports to a superior officer, and then reports to the court that circumstances existed and the offence had to be committed. Reasons are then given. That system would foster accountability and would foster appropriate scrutiny of police conduct. Parliament could then be certain that these exceptional powers could be reviewed and would be resorted to appropriately.

If somewhere down the road they needed to be changed—greater exceptions or, to prevent abuses, greater supervision—Parliament would have adequate information in order to make that decision.

Mr. John Maloney: Thank you, Mr. Chair.

The Chair: Thank you, Mr. Maloney.

Ms. Freeman.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): This week, we welcomed a group of individuals who shared with us their experiences in terms of enforcing sections 25.1 to 25.4. We observed that they proceeded very cautiously and that there had been no abuse. You yourself said that sections 25.1 to 25.4 had not been improperly enforced in British Columbia.

Having said that, even though everything seems to be in order, these provisions can be applied very broadly.

Mr. Thompson mentioned that these provisions have been invoked extensively in connection with the infiltration of organized crime. If we were to draw two distinctions with respect to sections 25.1 to 25.4 — emergency situations and search warrants, as mentioned earlier — would that address your concerns, since these provisions are used primarily to deal with organized crime? Aside from this, they are not used much.

[*English*]

Mr. Peter Copeland: I believe, as I indicated earlier, if the provisions were focused upon fighting organized crime by providing undercover officers with appropriate credibility to successfully infiltrate criminal organizations, it would be a much more focused, narrower, and more palatable regime. Just by focusing in on a specific problem, the justification becomes more obvious.

[*Translation*]

Mrs. Carole Freeman: If I understand correctly, as far as you're concerned, it wouldn't be a problem provided there is a connection with organized crime.

[*English*]

Mr. Peter Copeland: I'm saying that in principle there's nothing wrong with focusing in on a specific problem, and doing so makes the legislation much more limited in the harmful effects it could have. It reduces the discretion of police officers in other investigations, investigations in which we as a society may not feel that what would otherwise be criminal conduct would be justified. It reduces recourse to criminal activity in those types of circumstances.

At the same time, even if it's focused just on the infiltration of criminal organizations, there's nothing about a narrow provision of that sort that is irreconcilable with judicial oversight. The concerns with respect to confidentiality of informants and protection of investigations can be readily addressed, as they are in the search warrant context and in the wiretap context.

● (1620)

[*Translation*]

Mrs. Carole Freeman: Therefore, you recommend some kind of judicial oversight with regard to the enforcement of these provisions.

[*English*]

Mr. Peter Copeland: Judicial oversight, prior judicial authorization, is a constitutional preference, and where exigent circumstances exist such that prior authorization is not feasible, then there should be subsequent judicial oversight via more particular reporting requirements to the court in a timely manner. In that way real scrutiny can be made somewhere down the line of the conduct the police engaged in.

[*Translation*]

Mrs. Carole Freeman: Thank you.

[*English*]

The Chair: Thank you, Ms. Freeman.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair, and thank you, Mr. Copeland, for appearing here as a witness.

From the testimony we've heard on some of the restrictions, I know sometimes people say this is a licence to break the law, but as you rightly said, these officers who are acting under this provision are in fact acting within the law that we as parliamentarians set out. We've provided these enabling sections of the Criminal Code to allow them to do their job.

From some of what you've provided on the RCMP study, I take that as a bit of a two-edged sword. On the one hand, most of the items you've listed are, as you describe them, victimless—improper labelling of tobacco and passport offences perhaps. My thought is if you use that, perhaps there's a reason why this section shouldn't exist, and I look at that perhaps as a reason why we should consider maintaining the section, because with respect to those types of crimes that are being targeted, if the offence is truly victimless, then I don't see the problem. On the other hand, what comes to mind when I read the act is this isn't a 007-licence-to-kill type of thing. There are limits dealing with inflicting bodily harm or interfering with the sexual integrity of another person. When we look at some of the investigations and the evidence we've heard when it comes to child pornography, human trafficking, biker gangs, organized crime—those types of offences—it's easy to contemplate situations where someone would be in a situation that they would need the recourse, and perhaps the timely recourse, of this section.

I know you've touched on this. But if there were a narrowing of this provision, what do you envision? As Mr. Thompson said, we do talk of balance at times, and there is the real interest of seeing these investigations in some of these very serious areas carried out. What would you propose?

Mr. Peter Copeland: With respect to my comment that police officers under these provisions are acting under the law, just to be clear, technically they're acting under a legal provision, but they're acting largely as autonomous actors not subject to meaningful review or to serious accountability, given the way the scheme is structured.

With respect to your comments about the types of recourse that have actually been made to these provisions, if the concern here is to allow law enforcement agencies to engage in victimless criminal conduct—possessing contraband, falsifying documentation, and that sort of thing—then a narrowing of the provisions through subsection 25.1(11) could make that clear and thereby remove the justification for conduct that could involve serious bodily harm. As I said earlier, paragraph 11(a) prohibits “the intentional or criminally negligent causing of death or bodily harm to another person”. It doesn't eliminate death or bodily harm from the justification regime.

Manslaughter, for example, is an offence that does not require the intentional causing of death or the criminally negligent causing of death. If the police are entitled to threaten people, apply force to people, and an unforeseen consequence occurs—they're forcibly confining somebody or they're hitting somebody without intention to cause bodily harm and the person suffers a heart attack—it's classically a manslaughter if the underlying act is actually an assault. And these provisions, because of the very narrow restrictions in paragraph 11(a), would provide justification for such conduct.

● (1625)

Mr. Rob Moore: Thank you for that, but are we not operating almost completely in the theoretical? The evidence before us is that the actions the police have taken and that have been disclosed have been, as you described, victimless, and we haven't had a serious challenge, constitutional or otherwise, to these provisions. We have no evidence that there have been those kinds of harms. So I'm wondering, what is the harm that we're trying to prevent? Obviously we want to prevent harms. But what's the harm we're trying to prevent and to whom? For some of these—as I mentioned, human trafficking, biker gangs, organized crime, child pornography—we know the harm from the criminal investigative side that we're trying to prevent on that end. In acting under this provision, where is the evidence that there's some wrong that we as parliamentarians have to correct?

Mr. Peter Copeland: I would start with the premise, instead, that before creating an exception to the principle that everyone is subject to the rule of law—this is a remarkable exception—Parliament ought to have compelling evidence of a need by law enforcement to resort to such extreme conduct as committing assaults, engaging in threatening conduct, forcibly confining individuals, or engaging in firearms offences that could pose, although not an intention to cause bodily harm, real risk to individuals.

An additional harm is to the very concept of the rule of law, in that the state ought to be setting an example to citizens. When the state engages in unlawful conduct or conduct that we as a society view as morally reprehensible, it undermines in a fundamental way the respect of society for those norms.

The Chair: Thank you, Mr. Moore.

Mr. Copeland, thank you.

Mr. Lee—oh, Mr. Lee is not prepared.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Hold on, hold on. It's not that I'm not prepared; I just don't have any questions.

The Chair: Sorry, I'll correct that.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit: Good day, Mr. Copeland.

You're suggesting that sections 25.1 to 25.4 are different. Sections 25(1)(*a*) and 25(1)(*c*) refer to a private person assisting a police officer, not just to police officers. You consistently bring the conversation around to police officers. Yet, sections 25(1)(*a*) and 25 (1)(*c*) clearly refer to someone authorized to do something, and I quote:

> (a) as a private person;and
> (c) in aid of a peace officer [...]

Therefore, sections 25.1 to 25.4 could apply to me, a private person. Sections 25.1 to 25.4 protect the average citizen who has an obligation at all times to prevent the commission of a criminal act. For instance, if someone breaks into my home and I'm forced to get into a fight with that person, I could potentially hit him with a baseball bat. Under the circumstances, I'd like to be protected by the legislation. That's my first point.

Secondly, have you given any thought to following Quebec's lead? In that province, when someone is dissatisfied with the behaviour of a law enforcement officer, that person can file an ethical conduct complaint against him. This goes much further than the provisions of sections 25.1 to 25.4. The problem is addressed by invoking Quebec's code of ethical conduct which has been in place for at least 20 years. There is no need even to invoke the provisions of the Criminal Code. This approach is direct, easy and quick and the rulings are far more interesting than those handed down under the Criminal Code, for some rather unusual reason.

Are you calling for an amendment strictly because of law enforcement officers or because you want to prevent anyone who may have witnessed a criminal act from benefiting from sections 25.1 to 25.4?

● (1630)

[*English*]

Mr. Peter Copeland: Just to be clear, my understanding of sections 25.1 to 25.4 is that they do not apply to private individuals, except to the extent that under subsection 25.1(8), justification and direction can be given to a private individual—for example, to a police agent—to commit conduct that would otherwise be a criminal offence. In those circumstances, that can only occur if a senior officer authorizes it in writing in advance.

With respect to the broader comments of justification and self-defence, and with respect to citizens acting to prevent the commission of an offence, if sections 25.1 to 25.4 were entirely eliminated from the Criminal Code, the right to self-defence would still exist. The right to use force to eject a trespasser from your property would still exist. The right to use force to prevent a continuation of an offence or breach of the peace would still exist. Those provisions apply in various forms to peace officers and to individuals. So it's really not a question of necessity in self-defence.

These provisions are dealing with a very different problem, which in some circumstances may simply have to do with the unlawful possession of contraband. In the narrow circumstances of organized crime investigations, it may deal with providing a credible cover for someone to infiltrate the organization. But they don't have anything to do with the general self-defence types of provisions of the Criminal Code.

[*Translation*]

Mr. Daniel Petit: When law enforcement officials behave toward citizens in a manner that is highly questionable, isn't it simpler to file an ethical code of conduct complaint, as is done in Quebec? This is a much quicker and more straightforward approach, one that produces more concrete results. Have you considered this in the case of provinces which deal with numerous ethical conduct cases associated with sections 25.1 to 25.4?

[*English*]

Mr. Peter Copeland: I certainly support and think the greater degree of civilian oversight of police forces and the dealing with police overstepping the lines in a discipline context and an ethical review are commendable.

I'm not sure this really answers the issue here under 25.1 to 25.4, because the citizens who are affected—the people who would be complaining to police complaints commissions and the like across the country—are unlikely to know, except in the narrow circumstances in which there has been loss or destruction of property, that it's the police they've been dealing with.

It may be that the person who's the victim of this justified crime is one of the targets of the criminal organization. It may be that it's a completely innocent third party who has no idea that the police are engaging in what would otherwise be unlawful conduct.

Because the provisions don't contemplate judicial oversight and therefore subsequent public scrutiny, because the reporting provisions are so narrow that the public officer doesn't even have to give the justification in the report he provides under 25.2, and because the annual report is so threadbare in terms of the information that one can't evaluate whether these circumstances were justified or not, in my view individuals would be hard-pressed to figure out who and what they should be complaining about.

The Chair: Thank you, Mr. Copeland.

The time is now up for this witness. We appreciate very much your point of view in this review. It's interesting to hear a criminal lawyer's position. Of course, we have listened to police officers, and we'll be listening to more of both over the next couple of meetings.

I guess in the context in which we talk about this, such as organized crime—and I know that questions have come up about it—these sections really, really assist in those types of investigations more than any other type. Even though you may see what is on your reports there, that's just a little part of a bigger scheme. We've been advised that's the way it works. It doesn't necessarily reflect the whole picture, but it does reflect a portion of the picture, and a very essential part of it.

As has been pointed out to us, police officers have utilized this particular activity in the past by justifying it through common law and precedent. It was acceptable until the most recent court case, and now it's in legislation, which is basically where we're at.

That's what's been before our committee at this point. So we're looking at it not only from the point of view of the Criminal Lawyers' Association or of a criminal lawyer, who may also be somewhat narrow in their examination of what's happening, but as a committee we have also received a much broader scope for this application.

I want to thank you. It's been a very interesting discussion here this afternoon.

● (1635)

Mr. Peter Copeland: Thank you very much.

The Chair: I would ask that the rest of the committee remain. We are going to discuss some business in camera. So I'll just suspend for one minute and we will get into an in camera session.

[*Proceedings continue in camera*]

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