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Chair

Mr. Art Hanger

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● (1530)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I call to order the meeting of the Standing Committee on Justice and Human Rights, keeping in mind that we are still reviewing sections 25.1 to 25.4 of the Criminal Code on protection of persons administering and enforcing the law.

We have the good fortune today of having a videoconference from London, England, with Mr. Grégoire Webber. He is a scholar at Oxford University who has studied these sections and probably is one of actually a few people who have some knowledge on this legislation. It's somewhat different and new.

Mr. Webber, welcome to the committee. How's everything over in London?

Mr. Grégoire Webber (Trudeau Scholar, Pierre Elliott Trudeau Foundation, Oxford University, As an Individual): Very good.

Thank you, Mr. Chairperson.

The Chair: Good.

Our process here is that you will have an opportunity to testify for about 10 to 12 minutes, and it will be followed by a series of questions from all parties sitting at this committee table.

If you would like to begin, we would be pleased to hear what you have to say.

Mr. Grégoire Webber: Perfect. Thank you very much.

[*Translation*]

Good afternoon. I would like to begin by thanking the Committee for giving me this opportunity to speak today and for facilitating my testimony through video-conferencing.

I am a member of the Ontario Bar, and am currently pursuing a Doctorate in Constitutional Law at Oxford University, as mentioned by the Chair. My testimony here today, however, is my own alone. In other words, I do not purport to represent Oxford University or the Trudeau Foundation, of which I am a member.

The crux of my presentation flows from a paper that I wrote which is entitled: *Legal Lawlessness and the Rule of Law: A Critique of Section 25.1 of the Criminal Code*. This paper examines the constitutionality of the regime set out in clause 25.1 and following, and concludes that this regime raises significant constitutional issues. This study was published in 2005 by the *Queen's Law Journal*, volume 31, and can be downloaded from the Trudeau Foundation's website under the heading « News ».

With your permission, I would like to give a brief overview of the three points I intend to cover in the 10 to 12 minutes available to me. Following that, I will make detailed comments on each point. Before I do that, though, I wish to point out that in principle, I support the exemption regime currently under review. My comments are really intended to identify specific difficulties with the way this regime is framed and to suggest alternatives.

Let's move now to my first point.

The justification for clauses 25.1 and following of the Criminal Code relies mainly on the need to provide police with new, exceptional powers so that they are in a better position to fight organized crime through undercover operations. However, nowhere in this legislation does it say that these exceptional powers can be used for the sole purpose of fighting organized crime and for undercover operations.

Second, the process for designating a “public officer” within the meaning of the law is inadequate, in that the designation authorizes that person to commit criminal offences subsequently that were not specifically authorized by the minister or by a senior official. Once designated, the public officer relies on his own authority for the purposes of committing criminal offences. In English, we would say he becomes a law onto himself.

Third, two previous points are important not only in themselves, but also from a constitutional standpoint. The Supreme Court ruling in *Campbell and Shirose* does not seem to lend itself to an interpretation that would support the regime as it is currently framed. In other words, the scope of the regime as it is currently proposed is too broad, and the rules for authorizing criminal offences, too loose to be deemed constitutional, in my opinion.

There is a fourth point that I will not have time to comment on as part of my presentation, but we could perhaps discuss it afterwards, if you're interested. It has to do with ways of increasing protection against abuse of these exceptional powers through changes in civilian oversight and annual reports, as well as through the addition of a more general requirement for disclosure.

I would now like to make more detailed comments with respect to my first point, regarding the justification or the exemption regime and fighting organized crime.

When clause 25.1 and following of the Criminal Code were passed into law in 2001, they were part of Bill C-24, an Act to amend the Criminal Code (organized crime and law enforcement). Today, the title of your study refers to "protection of persons administering and enforcing the law". The reference to organized crime is no longer there, and that is appropriate, because the legislation under review makes no reference to organized crime. However, in the testimony that you heard, much of the focus was on organized crime, fighting terrorism, and undercover operations. The use of these powers was not mentioned in connection with police investigations that are unrelated to organized crime or undercover operations, with the exception, I believe, of an example dealing with a boat or plane that has to engage in a chase at night with its lights off, in order to avoid detection.

This leads me to my first recommendation for the Committee: to amend the law to limit its application to investigations related to organized crime and undercover operations, as well as a few other targeted areas of police activity. In that way, the scope of the law will be in keeping with its justification.

● (1535)

I move now to my second point: the lack of a procedure for authorizing the unlawful behaviour itself.

There are two regimes set out in the Code for the purposes of authorizing a public officer to commit a criminal offence. The first is the general enforcement regime. It is set out in section 25.1, subsection (8). This provision requires that the public officer be designated by the minister, but it does not require that this designation have attached to it specific conditions, such as the term of the designation or the offences the public officer is authorized to commit. Once designated, the public officer is justified in committing an act if he or she believes, on reasonable grounds, that committing the act is reasonable and proportional. In other words, there is no oversight prior to the commission of the act itself.

However, there is also a second regime. It is under section 25.1, subsection (9), and applies only in cases where an offence is likely to result in loss of or serious damage to property, or if the public officer is directing a third party to commit an offence. In this case, the two criteria associated with the first regime are stated again: the public officer must be designated, and he must believe, on reasonable grounds, that the act is reasonable and proportional. However, there is a third criterion: before committing the offence, he must personally have been given written authorization by a senior official. The senior official must also believe, on reasonable grounds, that the act is reasonable and proportional. There are certain exceptions to the requirements for prior written authorization, namely in emergency situations as laid out in subsection 25.1(9).

I am suggesting that this second regime be the only regime for justifying the commission of criminal offences by a public officer. I am suggesting this on the basis that no individual, not even a public officer, should be able to decide on his own whether he can commit a criminal offence. Before committing such an offence, he must receive specific authorization.

Although my objection is a conceptual one, I was very pleased to hear that the RCMP has in fact established a requirement for prior authorization in the context of its own operations. The Assistant RCMP Commissioner, Mr. Souccar, confirmed in his testimony before the Committee that no public officer can commit a criminal offence without receiving written authorization from a senior RCMP official. In other words, the RCMP has adopted a version of the prior authorization regime for all its operations, even though the Code does not currently require that.

My recommendation is therefore to amend the Criminal Code to require, with the exception of emergency situations, that a public officer obtain written authorization from a senior official before committing a criminal offence.

● (1540)

[*English*]

I have one more point, which I'll address in English.

Having established that the framework for these powers does not limit them to the investigation of organized crime and undercover operations, and having evaluated the scope of the authorization given to public officers to commit acts that would otherwise constitute a crime, I now turn to my third point, which deals with the constitutional question.

You might ask why we should incorporate the changes that I have suggested rather than leaving these matters to the good judgment of the police forces. There are, I think, two answers, neither of which questions the integrity of our police forces. The first is to recognize that the powers granted to our police forces under section 25.1 and following are important—indeed, they are exceptional. And to the extent that we authorize any person to commit acts that would otherwise be criminal, we should strive to provide an adequate framework for its exercise and for the supervision of its exercise. And this framework should be provided for by law. In other words, it must have the force of law, and not merely the force of a guideline internal to a police force.

The second answer is as important. If the framework for these exceptional powers is not sufficiently circumscribed, the constitutionality of the very framework may be in question.

Allow me to read one short passage from the judgment of the Supreme Court of Canada in Campbell and Shirose, which, as you know, is the judgment that largely served as the impetus for this legislation: "General 'law enforcement justification' would run counter to the fundamental constitutional principles." And here the Supreme Court of Canada was referring to the constitutional principle of the rule of law, the very principle outlined in section 25.1(2) of the sections under study.

The concern with the sections under review is that they indeed constitute the very general law enforcement justification that the Supreme Court of Canada warned against, "general" in the sense that they are not limited to the investigation of organized crime and other targeted criminal activities but rather apply to the investigation of any criminal activity, and "general" also in the sense that in the normal case a public officer need not seek prior authorization before committing an act that would otherwise be criminal.

Hence, I move to my conclusion, mentioning only that there is a fourth point, which I would be happy to discuss in the course of your questions, regarding increased protection against potential abuse.

I thank you for your attention, and I look forward to your questions.

The Chair: Thank you, Mr. Webber.

You made some interesting points. I will ask one question, for the benefit of the committee. How familiar are you with organized criminal investigations? You brought some points up that would certainly impact on some of those investigations, were they to be enacted. When you looked at the examples that were presented, the reports that were submitted by police officers—RCMP officers in particular, I believe—reflecting certain investigations that went on, are you aware of how those investigations were conducted and if your suggestions would impact on any of those particular points?

Mr. Grégoire Webber: In reference to that question, I have as much information as the average Canadian citizen in that respect. However, I am comforted to know, having reviewed the testimony of the lawyers from the Department of Justice that you had in your first meeting and the testimony of the RCMP members who came to your second meeting, that they both focused on the importance of this law for the purposes of organized crime and undercover operations.

My suggestion therefore draws on their testimony as to the importance of this legislation for those purposes and the absence of any mention of the use of this legislation for other purposes.

The Chair: Thank you, Mr. Webber, for that answer.

I would like to go to questions now from Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): Could you give us the citation of where we can find your paper again? Did you say it was *Queen's Law Journal*?

Mr. Grégoire Webber: Yes, that's correct. It's in the 2005 *Queen's Law Journal*, volume 31.

Hon. Larry Bagnell: You said in your opening that you wouldn't have enough time to finish something. If we gave you time during one of our questions, would there be more that you would want to say?

● (1545)

Mr. Grégoire Webber: I had a couple of suggestions regarding how to increase protection against potential abuse of these sections that I would be happy to discuss.

Hon. Larry Bagnell: Okay, we'll give you some time later in one of our questions.

My first question is related to not a specific act...there's not enough specification on what they're investigating. There are two things. First, obviously, because they have to report annually and the reports are public, if they were doing something that was frivolous or unintended, wasn't a serious crime, then that would become obvious to everyone reading the reports and I don't think the police or anyone would want to be open to that type of transparency and criticism for not investigating something serious.

Secondly, does the nature of the crime they charge the person with really matter, especially if they were most likely to be after serious criminals? For instance, was Al Capone not eventually charged with income tax fraud, as opposed to something serious that might have been specified, in specifying an investigation that you are talking about now? I think people were very happy that Al Capone was put in jail.

Mr. Grégoire Webber: Right. I definitely won't question that last conclusion.

You had two questions. The first was respecting the public reports and the second respecting the potential difficulties with restraining this solely to organized crime. Let me address each in turn.

The public reports, as you may know, don't require the disclosure of every use of these sections. Indeed, they only require the use of certain exceptional provisions of these sections, namely, when the police authorize the use of these sections that would cause important damage to property and where the police authorize a non-police member to use these sections.

In the normal course, if neither the use of these sections for property or the use of these sections to authorize a third person are at issue, there is no obligation of reporting. Indeed, one of the recommendations I would have for your committee is to increase the reporting requirements to all activities, not merely to those two.

Secondly, as for limiting this to organized crime, I think there would be ways of addressing your concern in the manner in which the exception could be built into the law. In fact, we wouldn't have to specify specific legislation as such. We could include a provision that said that in the opinion of the senior official, it is necessary for the purposes of this particular investigation. Currently, there is no such restriction on the use of these provisions.

Hon. Larry Bagnell: So you're saying that if a police force used this exemption and broke the law, unless it was in those two conditions that you specified—one was that they allowed a witness... and the other that they damaged property—we would never hear about it. So they could have broken the law numerous times and no one would know.

Mr. Grégoire Webber: That's correct. We can look at this section together, and I can pull it up right here. We're looking at "annual report", section 25.3. We have three areas, paragraphs 25.3(1)(a), (b), and (c), and we have to disclose:

> (a) the number of designations made under subsection 25.1(6) by the senior officials;

That's emergency designations. In other words, where the minister hasn't already designated a public officer, a senior official—for example, the member that you had from the RCMP—may, for a period of 48 hours, designate that person. So that has to be disclosed.

Under paragraph 25.3(1)(b)—

> (b) the number of authorizations made under paragraph 25.1(9)(a) by the senior officials;

—that is the property damage I just mentioned.

And 25.3(1)(c):

(c) the number of times that acts and omissions were committed in accordance with paragraph 25.1(9)(b) by the public officers;

And again, that's delegating to an informant.

So in the normal course of these provisions, there is no obligation of disclosure under the annual report.

Hon. Larry Bagnell: I assume that you're happy that the RCMP, on their own, have limited the designation to a three-year term. You're suggesting there should be a term?

Mr. Grégoire Webber: In fact, I'm very comforted by the way the RCMP is taking its responsibility under these provisions. I'm suggesting that we should take the example of the RCMP and provide the very guidelines it has provided for itself in the act.

● (1550)

Hon. Larry Bagnell: Again, in relation to limiting what's investigated, once a person is designated and involved in a number of serious operations, wouldn't they very often not be aware of when that person would have to break a law? He wouldn't necessarily be aware of what criminal acitivity was going on and how he would do it, so he couldn't get this type of pre-authorization or limitation that you're talking about.

Mr. Grégoire Webber: The pre-authorization is only for the truances that have to be disclosed in the annual report, namely important damage to property and delegating the authority to break the law to a non-police member, such as an informant. The difficulty I have is that with the exception of these two examples, there is no obligation of prior authorization from anyone. In other words, once the minister has designated a member of the police force, it is up to that individual member to use his or her good judgment to find out when it would be reasonable and proportional under the circumstances to break the law. I'm suggesting that we should add a requirement of prior authorization from a senior member.

Hon. Larry Bagnell: I was just saying, as incidents come up, he may not have time to be pre-authorized. It may happen quickly in these things.

Mr. Grégoire Webber: You're absolutely right. That's why in those cases where the law currently provides for prior authorization and makes exceptions in urgent circumstances, I would wish to maintain those.

The Chair: Thank you, Mr. Bagnell.

Mr. Ménard.

[*Translation*]

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

I would like to discuss two aspects of your testimony with you. As we sought to gain an understanding of the scope of the current law and the circumstances in which this justification regime is used, of course, much of what we were told focussed on organized crime and undercover operations, which is understandable. In fact, we were also told about immigration-related operations.

As you know, there is a great deal of debate at this time in both Canada and Québec regarding the human trafficking, despite the fact that we passed Bill C-49. Why do you think that we should rigourously limit the scope of the law to activities related to organized crime? Are you not concerned that this would be unduly restrictive in relation to the goal being pursued?

Mr. Grégoire Webber: That's a very good question.

I'd like to come back to the recommendation I made in my testimony, which is to amend the law to restrict its application to investigations related to organized crime and undercover operations, as well as several other targeted areas of police activity.

I am not saying that we must limit this to organized crime and undercover operations, and turn a blind eye to all other requests. However, let's ascertain the circumstances in which these provisions are really necessary and limit the scope of the law to those specific circumstances. The difficulty I see is that the law, as currently drafted, assumes that these powers are necessary in all cases. In the testimony you heard from the Department of Justice and the RCMP, they did not claim that these powers were necessary in all cases. I agree with you — and annual reports demonstrate this — that they can often be needed in immigration-related cases. I would be very pleased to see the law being enforced in such circumstances.

Mr. Réal Ménard: I see. One of your colleagues was very concerned about civil liberties and human rights. He spoke to us about an accommodation involving judicial review.

Now you did not use that term; instead, you expressed the desire that public officials receive authorization under all circumstances. But have you thought of the possibility of requiring judicial review per se? In other words, the requirement to put the matter before a judge in very specific circumstances and have a court of law validate the kind of operations covered in these sections. Have you considered that option?

Mr. Grégoire Webber: Well, I believe it is within your authority to extend the scope of the law in such a way as to require prior authorization from a judge. But first, there is a need to determine whether such a requirement is necessary and following that, whether it is desirable. Do we really want judges to be involved at that level in police operations related to organized crime, undercover investigations, and so on?

I don't know whether you are in favour of this or not. But I think it would probably be necessary to consult the RCMP on this. However, such authorization is not always necessary, in that the Supreme Court of Canada's decision in *R. v. Campbell and Shirose*, referred to the Regulations respecting the Controlled Drugs and Substances Act.

The Supreme Court ruled that there was an established regime that did not require the prior authorization of a judge, but rather a certificate issued by a senior police official. This is an example of Parliament requiring a certificate issued by a senior official under regulations made by the minister. The Supreme Court looked at this, even though this was not a matter on which it was being asked to comment. As a result, its opinion could be deemed to constitute a ruling on the constitutionality of these provisions. At the same time, it did not take the time to state that it did not agree. It simply noted the existence of this regime. This is another regime that would be available.

● (1555)

Mr. Réal Ménard: As a law student pursuing a doctorate — which is no small thing in the life of an individual — you are seeking to strike a balance, just as this Committee is, between the powers needed by police to dismantle organized crime networks and the necessary accountability that we consider to be desirable, as elected Members of Parliament.

What I found interesting about the idea of judicial review is that a third party — possibly a judge — becomes involved in the process to ensure that there is no abuse. Is that consistent with the confidential nature of some police investigations? Do you believe that as currently worded, these provisions are too generous and thus do not jibe with the ruling handed down by the Supreme Court of Canada, because of their imprecise nature.

Is that not an example of a judicial review that would have the effect of closing a door? There is a potential risk of abuse or the risk that people will rely on a public officer, and specifically a member of the RCMP, to be acting in good faith. In the final analysis, what's you're concerned about is abuse, is it not?

Mr. Grégoire Webber: There is not only the matter of abuse, but also the constitutional difficulty that this raises if these powers are not adequately framed. You referred to the matter of confidentiality and the role of judges. Judges already order search warrants, and there is a whole regime in place that strikes a balance between the confidentiality required for a police investigation and the need to involve judges for the purposes of obtaining a warrant.

The tools are there. It is up to you to decide whether it is appropriate to involve judges. If you believe it to be appropriate, there will be no problem protecting the confidentiality of police investigations.

Mr. Réal Ménard: Mr. Chairman, I don't know whether I have time to ask one last question.

[*English*]

The Chair: You may ask a very short one.

[*Translation*]

Mr. Réal Ménard: If there were to be abuse and they led to the collection of evidence that should never have been collected, do you believe that section 24, which relates to the regime for excluding evidence, would apply to these provisions of the Criminal Code?

Mr. Grégoire Webber: Sections 24.3 or 21.4 of the Criminal Code state that this bill — no, it's not a bill since it's already been passed into law — or rather, these sections in no way affect the collection of evidence. The same rules of evidence will apply, whether these powers are used or not.

Mr. Réal Ménard: I wish you good luck. I hope you get a chance to go the pub from time to time.

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I was going to ask the same questions, Mr. Webber, with regard to judicial overview, but you've answered those already. So if you want to proceed with those additional two points you wanted to cover, feel free to use my time.

Mr. Grégoire Webber: Okay. Thank you very much, Mr. Comartin.

I wanted to speak about certain other recommendations concerning increasing protection against abuse.

Now, the first two recommendations that I made are going to be among the more important: first, let's narrow the scope of the act, so that it speaks only to instances where it is necessary for police work; and second, let's oblige prior authorization by way of a senior police official, a judge, or perhaps by way of another person. Maybe we could think of giving it to a member of another police force that is not as involved in investigating the crime itself, so we would have some form of independence there. Those two would go a long way in protecting against abuse.

A second suggestion I have would perhaps be to prepare, or have the public officer who uses these exceptional powers prepare, a written report every time the powers are used. Currently the law only provides subsection 25.3(2): that there's an obligation to disclose only where exceptional use of these provisions are used, namely damage to property and authorizing a non-police officer to make use of these provisions. Let's extend that to every use, and let's have the public officer outline why he or she thought the use of these provisions was justified as reasonable and proportional, according to the standards set out in the law. So that's point number two.

For point number three, I think there should be a way to increase the responsibilities of the civilian oversight body. Currently under subsection 25.1(3.1), it provides that a civilian oversight body "may review the public officer's conduct" prior to the minister designating that officer. I think your committee could consider extending the powers of the civilian body by obliging it to review—in other words, by making it imperative, rather than permissive, so it would read, "shall review the public officer's conduct" prior to the minister designating that officer.

Finally, I've already touched on my fourth suggestion in response to a question from one your colleagues, which would be to extend the obligations of disclosure under the annual report to all instances of the use of this act, whereas currently it's limited to important damage to property and to authorizing a non-police officer to use these provisions.

So these would be some of my suggestions for increasing protection against abuse.

● (1600)

The Chair: Do you have anything to add to that, Mr. Comartin?

Mr. Joe Comartin: No, thank you, Mr. Chair.

Thank you, Mr. Webber.

The Chair: Mr. Thompson.

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

I listened quite intently to what you were saying, and I have to ask the question: do you really understand the involvement of the police, what they go through during these major operations, of finally coming to making an arrest and bringing forward a charge?

I've talked with police officers in the past, and I find that the activities that are involved trying to get to the bottom of whatever they're doing involve a number of events, a whole range of events. It could bring about a cause to immediately react in some way that makes it difficult for the police officers to do such a thing without the proper legislation—which I understand the RCMP are quite happy with and are able to operate under.

But if you look back to the times before there was legislation, these undercover operations took place quite often. There were huge amounts of investigation. The police knew what they were doing, and they got engaged in numerous types of events that led to the arrest and conviction of certain individuals. It was only when the courts intervened on behalf of one complaint, or something, that this whole legislation came about, just a few years ago, but they operated for years before without that.

I'm not accusing you of this, but I get the feeling that some people actually believe the police aren't capable of doing their job without the good guidance of judges and politicians. I disagree with that, point blank.

I think this is a great group of people who know what they're doing. Sure, they're capable of making a mistake, but we'll deal with those things. But we constantly look for more legislation to put into a huge book that already has so much legislation that it's difficult to follow. We want to put more in and possibly tie the hands of these people who are doing a great job of fighting crime and are trying to get to solving a lot of major issues. I think we need to do a whole lot more relying on their abilities and capabilities, and a lot less on input from people such as yourself—I don't mean anything bad about that—or people like ourselves, the politicians. Let the police do their work.

I'm not sure what you mean by should judges get involved. Involved in what? I thought judges were to listen to evidence and make a decision. I didn't know they were supposed to get involved beyond that.

I'm wondering where all this is going. If the police are happy with the legislation the way it is, and they can operate within that and they're comfortable—in fact, they even said they wouldn't like to see it expanded much further—I don't know what it would be that they would do.

When are we, as a group of people in this country, going to start relying on a great force that knows what they're doing, and quit suggesting that, "Well, before they do this, or if they do that, they have to have these written reports and make sure you clear it here and clear it there."

I'm hearing all kinds of things that almost make me feel that we don't have confidence in the police force. Well, I'm one person who has 100% confidence in them.

You can respond any way you like, sir.

● (1605)

Mr. Grégoire Webber: Thank you.

At the very beginning of my presentation, I said that I was favourable in principle to the scheme outlined here, but rather, I sought to provide a greater framework. In fact, Parliament has already provided somewhat of a framework. For example, certain acts are altogether excluded: murder; wilful attempt to obstruct or pervert the course of justice; any conduct that would violate the sexual integrity of an individual. So there's one example.

Moreover, we've decided to exclude any use of these provisions to run counter to the collection of evidence. And finally, we've excluded the use of these provisions for the purposes of the Controlled Drugs and Substances Act. There's a whole separate set of provisions that address those.

Therefore, my concern is not so much that we can't trust the police officers—not in the least. In fact, I'm taking my guidance from the testimony that you yourselves received from police officers, namely the RCMP. I'm saying they've set up internal guidelines that they feel are important to make sure that this functions properly. Let's take their example and let's include that within legislation, not because we don't trust them but because they're good ideas, ideas that they're using anyway. Perhaps this can provide a framework for—let's not forget it—the other police forces that are entitled to use this, such as the provincial police forces.

So let's take the example of our police officers, as you suggest, and let's pay heed to them. That's my suggestion.

Mr. Myron Thompson: I don't have anything else.

The Chair: Thank you, Mr. Thompson.

Ms. Barnes.

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

Thank you very much for coming today. I appreciate it. There aren't very many people—in fact, you're probably the loner—doing research in this area, so we appreciate the time that you've taken and the work you're doing.

I was listening with interest. I do believe we have to let the police do their work, but also, in hearing those comments from my honourable colleague, it went through my mind that it's amazing we don't hear that about the judiciary—let the judiciary do their work without interference too. You can't have it both ways, you know.

I would like to ask a couple of things.

We had some evidence earlier on and the witnesses before us told us they were not aware of any cases making their way through the court system on anything to do with this. I imagine in your PhD research you would have to be very careful and be aware of anything on the ground. I asked the RCMP and the police the other day whether they had heard anything anecdotally or factually about any incidents of abuse under this section, or any other, in working.

Mr. Grégoire Webber: My answer, unfortunately, would be the same as theirs. I haven't heard anything that could be of assistance to your committee.

Hon. Sue Barnes: Quite frankly, it wasn't about being fortunate or unfortunate. I was just trying to see whether there was any more information out there than we already have on that point.

Part of what's happening here is that Parliament in its wisdom gave these powers and did so over the concerns of some of the stakeholders and over some of the advice coming to us. We're now three years out. It's pretty normal when you're uncertain about a piece of legislation...well, not uncertain—I think that's going too far—but when you want to be cautious on a piece of new legislation, especially when you're giving powers like this that are unusual, to put in the three-year review.

I just want to run something by you. This committee will have to draft some recommendations that we'll put forward to Parliament. Other people have talked about ways of delineating, and you've certainly given some suggestions. I'd like to hear your thoughts about a recommendation from this committee for the government to go to the enacting legislation for a review in another three-year time period. In other words, maybe not a constant review, but one more review when more time has elapsed in the use of this. We have noted that some jurisdictions in Canada haven't used this section at all at this point in time.

Can you give us some thoughts on that? I'm not advocating for or against it; I'm just laying it on the table.

● (1610)

Mr. Grégoire Webber: Thank you for that.

There'd obviously be no objection to including such a review provision three years down the road. I think the necessity of recourse to that type of provision would in part depend on how much we want to restrain the legislation as it exists currently. If we put in a sufficient number of guidelines, there may be a way of providing for ongoing supervision by way of more public reporting, by way of a senior official, or perhaps, as some of your colleagues suggested in prior discussions, through a judge. This way we could be getting day-to-day, month-to-month, or year-to-year reporting, rather than waiting three years.

If we decide to leave the legislation as is, I'd be tempted to agree with your suggestion—not to suggest that you are leaning in favour or against. But it might be important to look three years down the road again, because as many of the witnesses who have appeared before you, such as the persons from the RCMP, have suggested, we actually have very little right now by which to judge this legislation

Hon. Sue Barnes: One of the things I thought I heard you say early on in your testimony was that you wanted a prior authorization for each criminal offence. I'm thinking of the practicality and the safety of the officer on the ground who might have that split-second hesitation because he's thinking of the legalities as opposed to doing his undercover work. Even if it's a momentary lapse, it could endanger a life or an operation. I'm just thinking of the practicality of that suggestion and whether you've thought of a way around it.

What are your views?

Mr. Grégoire Webber: No; indeed, I completely agree with you.

There's currently a regime in place that obliges prior authorization, as I mentioned to some of your colleagues, respecting damage to property and authorizing a non-police member to make use of these provisions. There we require prior authorization, but also in the provision we say that in certain cases or situations of the kind you mentioned—urgency, saving a life, not compromising the identity of an undercover police officer, for example—you don't need prior written authorization if you're a police officer.

The recommendation I'll be making is in part already in the legislation, and the legislation already has the exceptions that I think would address your concern. Moreover, in terms of the practicalities, the RCMP testified, as I understand it, that they were using prior written authorization to support every act, as I would recommend, and I'm sure that they're providing exceptional circumstances as well.

Hon. Sue Barnes: All right; thank you very much. I did mishear you, then. Thank you.

The Chair: Thank you, Ms. Barnes.

I have one question for you, Mr. Webber. You have spent some time examining these sections. They've been in our code now for three years; you've obviously studied them quite well and looked at a lot of what could happen, but obviously you have drawn some conclusions, I would hope, from other jurisdictions. What other jurisdictions have similar legislation, and what are the complaints?

Mr. Grégoire Webber: I'm afraid I won't be able to provide much more information than you received from the Department of Justice or the RCMP on that. I'm aware, as they are, that Australia has some provisions similar to this one. That's the only one that I'm aware of, but I don't have any information as to how it is working in practice over there.

The Chair: I'm sorry. I thought you were studying this particular issue. Were you crafting a thesis or a report in reference to these sections?

Mr. Grégoire Webber: In fact, the report itself is already out and has already been published. My thesis is in the same area, constitutional law, but it doesn't draw on these particular provisions themselves.

The Chair: Okay, thank you.

Ms. Freeman is next.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): First of all, I want to thank you for your presentation.

I have just one comment to make in response to what my distinguished colleague, Mr. Thompson, said earlier. Like you, I believe that section 25.1 is extremely broad in scope and that the members of the RCMP whom we met have shown tremendous wisdom by setting parameters around the way in which they carry out their duties. That is very much to their credit.

However, I believe it us up to us, as parliamentarians, to exercise the power that we have. It is up to us to pass laws and regulations. They're wise enough to enforce them properly, but it is our responsibility to establish the appropriate parameters.

● (1615)

Mr. Grégoire Webber: I fully agree with you, Ms. Freeman.

[*English*]

The Chair: Thank you, Ms. Freeman.

Mr. Petit is next.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you, Mr. Chairman.

Mr. Webber, the question I have for you is quite a simple one. As a lawyer, I know that this material is often used in legal practice, and I can tell you that over the three years that sections 25.1 to 25.4 have been used, defence lawyers have generally shown courts of law that there was a problem regarding the collection of evidence. If any mention is made of the fact that this discredits our justice system, all the evidence is automatically set aside.

So, parameters already exist. There is a great deal of case law setting out parameters for sections 25.1 to 25.4. As soon as a police officer in any way tries, with or without authorization, to collect more evidence than what has been asked of him or authorized, the judge generally sets aside the evidence, and very often, the accused is acquitted.

Have you considered that aspect? In reviewing section 25.1 to 25.4, it's important to consider the fact that all judges use that method to ensure proper control over the enforcement of section 25.1 to 25.4.

Mr. Grégoire Webber: Indeed, sections 25.1 to 25.4 have no effect on matters relating to evidence. They stay the same, whether we discuss section 25.1 or not.

On the other hand, if I were a defence lawyer and my client had been accused of an offence under the Criminal Code or the criminal law, and I knew that the police used these sections, the question would be why the police officer believed the act to be reasonable and proportional. The issue then would be the police officer's credibility, perhaps three or four years after he had committed the act in question, because these undercover operations can take a long time. You can spend a lot of time collecting the evidence you need where organized crime is concerned. That police officer would testify before a judge and his credibility could be questioned, because the events had taken place three or four years earlier.

However, if the police officer had prior written authorization, that would constitute evidence. The Crown prosecutor could then say that he was allowed to commit this act because it been authorized by a senior official or by a judge.

If I were a criminal lawyer and had to defend a client, I would really like these sections, either way. Once the trial was underway, I could say that these sections pose major problems and do not adequately limit police powers. I would attack the credibility of the police officer who committed the act under these sections — in other words, the very constitutionality of the regime. I would say there are so few conditions laid out in these sections that just about anything goes, and that that is unconstitutional.

I believe that for the proper conduct of operations carried out under these sections, Parliament should consider limiting the scope of the law to avoid the kind of attack that a defence lawyer could mount under the current regime.

[*English*]

The Chair: Thank you, Mr. Petit.

Mr. Lee.

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

Let me first say that it's great to have some informed public policy feedback from a Canadian-based foundation, such as this one, founded in memory of the late prime minister, former Prime Minister Trudeau.

This particular area of law was enacted because we are a rule-of-law jurisdiction, and the court found that police officers didn't have the right to break the law when they were enforcing the law. I suppose we can all recognize that for centuries police have had to indirectly break the law in order to enforce the law, such as when they speed or go through a stop sign or use an assault to detain someone in an arrest, and we've accepted that. In many other rule-of-law jurisdictions around the world, that's ongoing. I don't believe they've tried to codify this particular area of law.

Mr. Thompson made this point. How much codification are we going to have to do here before we codify ourselves into a library and we forget about law enforcement itself?

One of your suggestions is that these sections apply just to organized crime. Can I suggest to you that it's really difficult to define what organized crime is? I mean, in theory, it's a minimum of two people working together to break the law for the purpose of profit. But given the difficulty of defining organized crime, as you think we might like to consider here, isn't there enough constraint in the use of these sections, buried in the section I'm going to cite here? You'll recognize it; it's 25.1(8)(c). In other words, it says that the means used by police, under these sections, have to be proportional to the nature of the offence or the criminal activity being investigated.

That section is intended to impose constraints on police in the use of these sections. So do you feel that it's too weak? Should this stuff come before a judge for scrutiny at some point in some case, don't you think these sections provide enough constraint?

● (1620)

Mr. Grégoire Webber: Thank you for your question.

I should clarify one thing to start off ,and that is that I'm not here as a delegate of the Trudeau Foundation. I am a proud member of the Trudeau Foundation, but I don't pretend to speak for it today. I just wanted to clarify that.

You mention speeding, going though stop signs. You're absolutely right to identify that on a daily basis, more than we'd be willing to recognize on any given day, police do break the law. In fact, they have to do so. If someone is speeding, the only way the police are going to be able to catch them is by speeding themselves.

What concerns me is that if we don't restrain this act to exclude examples like that, in other words to leave that to say it's currently being regulated by the common law, we don't think the Shirose and Campbell judgment goes as far as to exclude those types of instances. What you might have is as follows:

If I'm a criminal defence lawyer, I'm going to say my client has been caught for speeding. The police officer followed him and was speeding and went through a number of red lights. The police officer was not designated under section 25.1. Therefore, not only have the police broken the law in speeding and in running through a red light, but the police have broken the very law that would have authorized them to do so.

So perhaps we're going to be using this law in designating traffic cops, which we might choose to do, but I don't think that's what is currently going on. The testimony of the Department of Justice and the RCMP suggested, in fact, that's not what they're using it for. So my concern is that if we're not going to be limiting the scope of this act, it might be seen as a necessary condition for all sorts of things we wouldn't otherwise think it is meant to apply to. That is one part of my answer to your question.

For the second part, you refer to section 25.1(8)(c). You're absolutely right, that will provide important constraints. My concern is that we're asking the officer himself or herself to make that judgment call. They should, but someone should make that judgment call with them before they're faced with that very situation.

In answer to your colleague's question, I allow that there will be urgent situations in which the police officer will have to make that call by himself or herself. In the absence of those urgent situations, let's look at section at 25.1(9), which requires not only the officer himself or herself committing the acts, but also a senior official to authorize him or her in writing beforehand. That would be setting up a second constraint, which would assist the police officer. The police officer certainly wouldn't have to think of these tests and legalities at the very moment, which we might not want. He'd say, “I've already been authorized. I can go ahead and do this without worrying that after the fact I might be judged to have not been acting on reasonable grounds.”

● (1625)

The Chair: Thank you, Mr. Lee.

Mr. Bagnell, you have time for one quick question.

Hon. Larry Bagnell: I have another question. I sympathize with your feelings on after-the-fact reporting. I still have two concerns about the pre-authorization, in light of the conversation I just had with my colleague.

A crime is a crime, and we want to stop crime. The Supreme Court didn't say the police need authorization for serious crimes before they commit them. They said they need authorization to deal with any crimes. So why would we not want to stop crime and leave that open?

My other concern about the pre-authorization—and I mentioned this when the police were in—is in the case of dealing with something serious like organized crime. There have been instances in the past of an infiltrator in a police force. This law doesn't apply just to the RCMP; it's a lot broader than that. But any information, any sense of pre-authorization, can be a tipoff to organized crime. If you have a high-ranking official embedded, then they're going to have a lot of access to a lot of information and be able to find this out and then put our undercover people in jeopardy.

Mr. Grégoire Webber: Indeed, that's a concern. I'm certain the RCMP, in its current operations, has devised certain safeguards in that respect. I won't be able to speak to that, obviously, not having worked for the RCMP, and especially not having worked at the levels where this type of information is available.

I do know, however, in the testimony provided by the RCMP, that there are only three senior officials who have been designated, so already they, themselves, have decided, “There are going to be only three of us, and potentially only three of us who we can mutually trust”. Therefore there's already a restriction there, and I'm sure they've implemented certain safeguards in terms of the collecting and safeguarding of that information.

With respect for your point that the Supreme Court said there's no justification to commit crimes and Parliament must authorize it, it's a fair point. In fact, we'd have to study together the judgment in more detail to say how much exactly do you want it authorized. Do you want us authorizing high-speed chases? If so, I think we have to look at every instance together of where the police would have recourse to breaking the law in order to better enforce it, and identifying those.

My difficulty here is that the provisions say pretty much anything goes as long as you, public officer, or you, police officer, think that it's just and reasonable under the circumstances. I think there'd be a way of not taking away the importance of this act for their operations but at the same time of restraining its scope, at least as it appears on the statute books, to reflect how they're using it in practice.

Part of it is to say, listen, it's not a practical problem, because in practice, the police are using this only when necessary. The other difficulty, I think, from a constitutional perspective, is that when this is going to be challenged, if it is going to be challenged, the courts are going to be more interested in what the law says than in the way it's being applied.

There have been many instances when lawyers stand up before the court and say, “Don't worry, court, I know it looks like it authorizes everything, but we're only using it under these circumstances”, and the court said, “If you're only using it under those circumstances, let that be reflected in the act”.

The Chair: Thank you, Mr. Bagnell.

Mr. Lee, one quick question, please.

Mr. Derek Lee: Are you concerned—I think you made reference in your comments to this—that although we have a public record, through annual reports, of designations and authorization, and acts or omissions by public officers, we don't have a public record in those annual reports of acts or omissions committed by persons designated or directed by public officers. In other words, all of the stuff that happens at the hands of third parties directed by a public officer, properly authorized, those acts or omissions do not show up in the public report.

Should we be concerned about that, or should we just regard it as the flotsam and jetsam and the slush of this area of activity? Or should we be focusing on it as something that we really do need to know?

Mr. Grégoire Webber: Perhaps I was unclear before. There are three areas that require reporting under the annual reports: the first is that in an emergency designation, in other words, where the minister hasn't designated someone, a senior official can for 48 hours; the second one is where there's a prior authorization to commit crime, or what would otherwise be crime, effecting serious property damage; and the third one is where there's an authorization to allow a third party, in other words a non-police force member, to commit this. So this is your example of an informant.

What I'm suggesting is that every other case—in other words, every other case of acts that would not be crime that don't involve an informant and that don't involve serious property damage—is excluded from public reporting. We have no idea how many of these have happened.

● (1630)

Mr. Derek Lee: Yes. I'm referring to, in the public reports, the annual report. Section 25.3 requires the listing of the number of designations—

Mr. Grégoire Webber: That's correct.

Mr. Derek Lee: —the number of authorizations, and the number of times that acts or omissions were committed by public officers, but it does not contain the number of times acts or omissions were committed by persons directed by public officers. The absence of that statistic may put us in a position where we're not able to colour what's really happening out there.

I don't want to tie the hands of law enforcement, but it's not clear to me why acts and omissions committed by persons directed by public officers are omitted from the annual report. Maybe you hadn't noted that, or maybe you're noting it now, I'm not too sure. But having—

Mr. Grégoire Webber: I'll take you right now to paragraph 25.1 (9)(a), so I'm reading:

> (a) is personally authorized in writing to commit the act or omission—or direct its commission

In other words, this would be directing another person to commit the commission, so let's remember that, and now let's go to paragraph 25.3(1)(b), as you were referring to:

> (b) the number of authorizations made under paragraph 25.1(9)(a)

So currently there has to be reporting for the authorization of a non-policeman, in other words, an informant, as in your example. That is currently reported.

The Chair: Thank you, Mr. Lee.

Mr. Derek Lee: All right, thank you.

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

This brings to a conclusion our questions and presentation today. I appreciate your taking the time from your studies to address this committee.

The next session of the committee now will be in camera, so I would ask that the—

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, I have a point of order, and I would like to raise it in committee of the whole, rather than in camera. I would therefore ask to be given an opportunity to speak.

[*English*]

The Chair: What's your point of order, Mr. Ménard?

[*Translation*]

Mr. Réal Ménard: Three weeks ago, the minister appeared before the Committee on the matter of interim supply. As you undoubtedly recall, I had made a point of...

[*English*]

The Chair: Just to interrupt your point or order, Mr. Ménard, we still have our witness observing the affairs, and I don't think he's really interested in what we're doing here.

I want to thank you again, and all the best.

Mr. Grégoire Webber: Very good. Thank you, Mr. Chairperson.

The Chair: All right.

Now, Mr. Ménard, your point of order.

[*Translation*]

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

You undoubtedly recall that three weeks ago, the minister appeared before the Committee on the matter of interim supply. Although I was extremely courteous, as always, I made a point of asking that we be provided with the statistics he has regarding crime rates in Canada. The clerk was going to try and obtain those statistics as quickly as possible. She did a good job, and I thank her for that.

However, I received a note today, and I have the impression that the Department of Justice is in the process of reviewing, tampering with or commenting on all of this. I have a hard time understanding, when we are being told about accountability and transparency in the context of a specific piece of legislation, that it should take weeks to provide us with a table that the minister himself had when he appeared before this Committee. I'm concerned that he may have instructed officials to review some statistics, so that they are presented to us in a way that will prompt a specific interpretation. I would like the parliamentary secretary and yourself to insist on the minister's making those available to us.

In the note that the clerk so kindly sent, we are told that this involves a great deal of work. I don't understand. The minister had a table that he pledged to send to us. As a result, I would like that to be made available before our next meeting, failing which, if the minister is acting in bad faith, we should take whatever steps are available to us. I must say, however, that it would break my heart to have to do that.

[*English*]

The Chair: You've made your point, Mr. Ménard. We'll check that out and report next meeting.

The public part of this meeting is now adjourned.

[*Proceedings continue in camera*]

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