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Thursday, June 8, 2006

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.

We are continuing our review of sections 25.1 to 25.4 of the Criminal Code, pertaining to the protection of persons administering and enforcing the law.

Today we have witnesses appearing from the Canadian Bar Association and la Ligue des droits et libertés. Welcome.

Who might be beginning the presentation?

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): I'm with the Canadian Bar Association and will say a few words, and then Mr. DelBigio will continue on.

The Chair: Please go ahead, Ms. Thomson.

Ms. Tamra Thomson: Thank you, Mr. Chair, and honourable members.

We're very pleased to appear before you today on your review of sections 25.1 to 25.4 of the Criminal Code.

The Canadian Bar Association was very active in commenting on the original Bill C-24 before this committee, so we are very happy to get another opportunity to share our views with you.

The Canadian Bar Association is a national association, representing 36,000 lawyers across Canada. Our statements today are specifically on behalf of the criminal justice section of the Canadian Bar Association. I should point out that the members of that section include both defence and crown lawyers, which makes it unique among criminal law groups.

The mandate of the Canadian Bar Association is to improve the law and the administration of justice, and it is in that optic that we make our comments before you today.

I'd like to ask Mr. DelBigio, who is chair of the criminal justice section, to speak to the substantive parts of our letter, which you have before you.

Mr. Gregory DelBigio (Chair, National Criminal Justice Section, Canadian Bar Association): Thank you.

The Canadian Bar Association recognizes the public interest in having well-funded law enforcement. The Canadian Bar Association recognizes the importance of public safety. However, the Canadian Bar Association also recognizes the critical importance and fundamental importance of the respect for constitutional rights and the rule of law.

We say that sections 25.1 through 25.4 are inconsistent with the rule of law. There's a risk of misuse. As you are well aware, the provisions permit, for example, an assault by a police officer or agent. And there's a fine line between assault and assault causing bodily harm. There is heightened concern because of the use of agents and because of inadequate mechanisms of accountability.

When we had the opportunity to comment upon Bill C-24, we expressed various concerns, which included that the bill was not restricted to organized crime or terrorist-related offences. That concern continues today. The provisions apply to the enforcement of any act of Parliament.

We continue to be concerned with the rule of law. Our Supreme Court of Canada has made it very clear that the ends do not justify the means, that the evidence or convictions may be obtained at too high a price, and that there are inherent limits on policing and law enforcement. The CBA continues to have these concerns.

We believe that section 25.1 is antithetical to the rule of the law and undermines the integrity of the administration of justice and public confidence in the fair and proper administration of justice by condoning intentional and calculated violations of law by agents of the state. We recommend that the provisions be repealed in their entirety, or, at a minimum, that they be amended so as to not apply to agents, so that they would apply only to public officers.

If the sections are not repealed we would recommend that the use of the provisions be dependent upon prior judicial authorization. And further, we would recommend that there be more detailed reporting and record-keeping requirements to allow for transparency and effective oversight.

With respect to the rule of law, it's not sufficient to simply ask whether there exists a law that permits certain acts on the part of the state or its agents. That is a part of the rule of law. But the rule of law demands scrutiny of the content of law as well. Is the law fair? Is it just? Does it comply with constitutional norms? Are there adequate mechanisms of control and oversight over investigative techniques?

When the sections in question are used to investigate or gather evidence against an individual, the individual's rights, as protected by section 7 of the Charter of Rights, are engaged. However, the investigative techniques in question go far beyond the rights of the individual or the interests of the individual. All people in Canada have an interest in effective policing, a safe society, and maintenance of the rule of law and the accountability of police.

With respect to the use of non-police officers or agents, we are concerned because of the inability to effectively control such persons. It is well recognized in common experience and also in the courts that agents are often themselves criminals, as was recognized in a decision of the British Columbia Court of Appeal, which said that informants or agents will often be persons of questionable character who are involved in the very operations that are the subject of a proposed investigation, and for that reason a skeptical attitude with respect to the information that is supplied by such persons is necessary.

We say that police agents may too readily disregard the constraints of law or any direction given by a police officer, and the skeptical attitude that was referred to by the British Columbia Court of Appeal in accepting information supplied by an agent should apply equally when considering whether an agent will willingly and scrupulously follow the direction of a police officer.

● (1535)

We are concerned that the section operates without prior independent judicial authorization. The Criminal Code provides for the authorization of many investigative techniques, including the interception of private communications, search warrants, general warrants, production orders, warrants to take bodily substances for DNA analysis, warrants to take impressions such as foot or hand impressions, or tracking devices. All of those may be used only with prior judicial authorization.

The constitutional importance—indeed, the constitutional requirement—of that was recognized by the Supreme Court of Canada, who held in a case called Hunter v. Southam that it is only when it is demonstrated that the interests of the state are superior to the interests of the individual that certain investigative techniques can be used, and that this determination can only be made by a person who is at a minimum capable of acting judicially, and that there must be an independent judicial officer.

We say the duties of a police officer are such that they are constitutionally incapable of conducting the required delicate and objective balancing of competing interests. A police officer is not an independent judicial officer and should not be making the decisions that are required for the operation of these provisions.

We are also concerned with the adequacy of the existing reporting requirements. On page 4 of the letter that has been provided, I refer to some of the language that is used in an annual report of the RCMP. It states:

> In one instance, the RCMP was conducting an investigation into a drug distribution network. Justified acts or omissions that would otherwise constitute Criminal Code offences relating to the possession of stolen goods, theft over $5,000 and conspiracy to commit an indictable offence were committed.

This description is simply inadequate. It is impossible to know the nature of the drug distribution network in question and impossible to know what is meant by the “acts or omissions” relating to theft over $5,000 or relating to a conspiracy to commit an indictable offence.

Meaningful review and accountability can only be achieved if the required report provides enough detail to understand what has occurred and whether it complies with statutory and constitutional requirements.

We suggest that the reports include, at a minimum, a brief description of the offence or offences being investigated and the act or omission committed by the police officer or agent, along with a brief description of that act for omission. Further, the report should include whether an investigation resulted in charges being laid. That's important in order to determine whether these provisions are being used in a way that is of any value. If these provisions are being used and there are never any charges, it is reasonable to ask: why are there no charges resulting?

Finally, we recommend that there be parliamentary reviews conducted every three years to ensure ongoing accountability. It is our understanding that no court has yet had the opportunity to consider these provisions or the circumstances in which these provisions have been used. The insights that might be offered by a court will, of course, be of interest to subsequent reviews that might be conducted.

Thank you.

● (1540)

The Chair: Thank you, Mr. DelBigio.

Your Canadian Bar Association represents, as you point out, 36,000 lawyers, and others. I wonder if I might ask, on a point of clarification: have there been any complaints about these particular sections from any of the 36,000 lawyers, prosecutors, articling students, or notaries?

Mr. Gregory DelBigio: Has the Canadian Bar Association received any complaints?

Well, the Canadian Bar Association expressed the concerns it did with respect to the previous bill and the Canadian Bar Association has seen fit to be here today.

More importantly, though, the instances in which the provisions have been used have not been before the courts and in that way have not been made public, to our knowledge. So really, there is very little basis upon which to make complaints.

We are here with ongoing concerns.

The Chair: Thank you, sir.

Now, Mr. Barrette.

[*Translation*]

Mr. Denis Barrette (Legal Counsel, Ligue des droits et libertés): My name is Denis Barrette and I represent the Ligue des droits et libertés. I am going to turn it over first to my colleague, Pierre-Louis Fortin-Legris.

Mr. Pierre-Louis Fortin-Legris (Case Officer, Ligue des droits et libertés): Good afternoon, Mr. Chairman.

Allow me to begin by introducing the organization we represent. The Ligue des droits et libertés is an independent, non-partisan and non-profit organization. It was founded in 1963 by a number of legal scholars and intellectuals concerned with the protection of human rights in Canada, notably Professor Frank Scott, Mr. Pierre Elliott Trudeau, and Mr. Jacques Hébert.

The goals pursued by the Ligue des droits et libertés are the defence and promotion of the rights recognized in a variety of international human rights treaties, as well as in charters that apply here in Canada.

We are a member of the International Federation of Human Rights Leagues. From time to time, we appear before UN committees charged with oversight and enforcement of international human rights treaties.

I would like to know whether I can provide you with a short brief in the form of notes which, unfortunately, could not be translated into English. With your permission, I will distribute it to Committee members.

● (1545)

[*English*]

The Chair: I believe your brief is only in French?

Mr. Pierre-Louis Fortin-Legris: Yes. It will be translated as soon as possible.

The Chair: Once the translation is done, then we will certainly distribute it.

Mr. Pierre-Louis Fortin-Legris: Okay. I will ask your permission, then, to distribute a text we brought that is in English and French.

The Chair: Sure, that would be acceptable. Certainly.

Mr. Pierre-Louis Fortin-Legris: Thank you.

I'll let my colleague, Denis Barrette, present now.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Mr. Chairman, on a point of order, we have these witnesses here and I think they would prefer to engage the committee *en français*. I would encourage them to do that immediately, without speaking English. We're fully capable of operating in both languages. French is our language. It's your language. Let's get on with it.

The Chair: I think, Mr. Lee, they were concerned about a distribution that they wanted to make.

If there is one that you might have in French and English, certainly feel free to distribute that. We'll wait for the main one until it's translated. I know that process is taking place.

Please continue.

[*Translation*]

Mr. Denis Barrette: I will be very pleased to follow Mr. Lee's suggestion.

First of all, we fully agree with the Canadian Bar Association. At the Ligue des droits et libertés, we have essentially the same concerns and find ourselves confronted with the same legal structure which, unfortunately, is not well known to the public. Very few people are aware of section 25.1 of the Criminal Code. I am certain that nobody who has spoken to you on the street—none of your actual constituents—has ever asked you what is going on with this section of the Criminal Code.

I would just ask you to imagine the following scenario. Imagine an unnamed country or State where the laws allow the police to engage in assaults, wiretapping and a whole series of violent offences, such as threats, kidnapping, hostage taking, forcible confinement, and searches which, in actual fact, turn into break and entry for the purposes of committing theft—and those are just a couple of examples. The police would have complete immunity. Such acts would be deemed justified for investigative purposes. Imagine that in that society, human rights are respected, but since that law exists, there is always the possibility that someone will use it, because of the way it's drafted.

That is precisely the situation in which we find ourselves. Even if we want to believe that the police generally act in good faith, how could we ever forget, particularly in Quebec—at least I hope not—what occurred during the 1970s, when RCMP officers burned down barns, stole political party lists and committed a number of offences that led to the inquiry with which you are certainly familiar, the MacDonald Commission of Inquiry in the 1980s.

Nor should we forget that in the 1980s and 1990s, a guy by the name of Boivin was with the CNTU but was working for CSIS at the same time. He had encouraged one of his union colleagues to blow up a hotel in Saguenay—Lac-St-Jean, an area located north of Quebec City. Of course, CSIS did not agree with these acts, but the fact is one can very quickly find oneself in such a situation.

I forgot to mention an important aspect: imagine a country where all these acts can be committed without any judicial review. In that regard, the Ligue des droits et libertés fully agrees with the Canadian Bar Association: judicial authorization is absolutely necessary for the commission of these kinds of acts. The police cannot engage in wiretapping without judicial authorization and without strict prior conditions having been met—in other words, without having demonstrated that other investigative means were attempted and that no other means is available to ensure a successful investigation, etc., before being given a warrant specifying a specific period of applicability. We're talking here about people's private lives, and therefore, the judge issues a warrant.

One may wonder how it works with section 25.1. Could an undercover police officer or a double agent engage in wiretapping to boost his image with certain criminals? Could a police officer commit a series of assaults or thefts, once again in order to boost his undercover image? To what extent will a police officer understand the difference between common assault, assault with bodily injury, and so on? What will happen in cases where common assault becomes assault with bodily injury or aggravated assault?

As lawyers, we are well aware of the fact that common assault can, when an incident occurs, quickly become aggravated assault. In some cases, it may go even further. We also know that there is a principle in criminal law that says you take the victim the way he is.

In these situations, we believe it is extremely dangerous to allow the police to commit offences against the integrity of the person. We also find it very dangerous and worrisome that people would not be advised when their property has not been destroyed. Indeed, someone who has been threatened with forcible confinement but has not been advised by the police will not complain to his lawyer or a judge, because that person does not know that a policeman was responsible.

● (1550)

The police officer who engages in breaking and entering, or kidnaps or forcibly confines someone is not wearing a police badge. This is often done by a police officer in civilian clothes working undercover in a criminal group who wants to establish a reputation in order to collect evidence.

I do not intend to read my entire brief. It is only five pages long, but the CBA has already covered many of our points. However, I do want to address another theme, which is compensation. It is practically impossible for a victim—in other words, someone whose property has been destroyed or who has been physically assaulted by a police officer wearing civilian clothes who committed a criminal offence, to actually sue that police officer. First of all, it often happens that the victim does not know. Furthermore, if the victim does not have the wherewithal to proceed with a lawsuit, it would be illusory to believe that such an individual could go through all the steps required to be compensated.

If Parliament decides to maintain these provisions, an automatic victim compensation mechanism is absolutely essential. If Parliament decides to maintain these provisions, judicial authorization will also be required, as well as an external monitoring mechanism—in other words, a mechanism for impartial judicial review—and political accountability. That could take the form of a committee composed of Members of Parliament that would sit in camera, but there must be a political body with the authority to take a close look at what police officers have done.

I have provided you with a paper by Ms. Shirley Heafey in which she very clearly explains that even the RCMP's existing mechanisms are not effective. They are inadequate given the reality, and especially the current reality. They are even more inadequate for dealing with offences that practically no one knows have been committed by public officers.

I have referred to hearings in camera, and although I readily admit that in camera discussions may be necessary at times, most of the committee's work should be carried out in public, because it is important for members of the public to know what police officers are doing. In fact, over the next ten years, it would be just as dangerous, in terms of the police's image, for people to be unaware of what police officers are doing, as to gradually discover what kinds of offences have been committed, the detailed reasons for their commission and, as my colleague stated, what the results of those actions were.

We have another suggestion to make. If reports are prepared by all provincial solicitors general and by the Solicitor General of Canada, we would suggest that a Canada-wide report be prepared that would include all the provincial reports, because an individual who wants to know who did what has to go and ask the provinces individually. For a number of years now, there have been integrated task forces in place that include municipal, provincial, and federal police officers, as well as members of federal agencies—since we are talking about agencies as well, and not only the police—and foreign agencies such as the FBI, more generally, and certainly the CIA. The Arar Inquiry has provided ample evidence of that up until now.

So, when task forces such as these are acting together, who does what and under whose orders? In these cases, it's important to have a report that provides an overview of the situation as a whole.

I don't have much time left, but the final point I would like to make may surprise you, since it has to do with torture. Indeed, you may be surprised to know that the offence of torture set out in the Criminal Code is similar to the offence of torture found in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Canada signed in 1987. The immunity granted public officers does not exclude the offence of torture. The basic definition of torture is that it is carried out by a public officer or authority. All the police officers I spoke to told me that they cannot engage in torture because they are not authorized to commit bodily harm.

● (1555)

According to our definition, that is an incorrect interpretation of the term “torture”. I'm not talking about Washington's definition, but ours. We believe in that regard that there is no requirement to commit bodily harm. Assault with bodily injury means that there must be injuries which are neither permanent nor inconsequential. Our definition of torture is based on the presence of severe pain.

Indeed, it is possible to suffer severe pain or suffering without actually sustaining any injury whatsoever. The human imagination and the techniques in that regard are quite well developed. We have only to think of those cases involving sensory deprivation, where people are shut away in a room deprived of light, where people lose all sense of time, or where music is used. You have only to think of Guantanamo. All of these techniques were developed specifically to cause suffering without causing injuries. The cartoon image of the police officer with his telephone book comes immediately to mind. But it is basically the same principle. However, the situation today is that technology is far more refined.

In that sense, torture would be possible under section 25.1. The current debate has to do with whether or not that is included in assault with bodily injury. It's an interesting legal debate, but what we must consider is the police officer who may be told that there can be no torture when there are no injuries. In such cases, he might make an individual suffer for the purposes of intimidating him, given that intimidation is allowed. He could supposedly do this without this constituting torture. But that is absolutely untrue. Police officers, who are not legal experts, are being given the wrong message.

In closing, I want to emphasize that these provisions raise two major problems. We can only repeat what we stated in 2001. At the time, the Ligue des droits et libertés was opposed to this legislation. It has had the effect of encouraging a culture of silence among police officers and, in particular, trivializing torture and the violation of fundamental rights globally. Granting this type of immunity to police is of tremendous concern to us. That all citizens, without exception, are equal before the law is a fundamental principle of the rule of law, and one which is the very foundation of a democratic society.

Like the Canadian Bar Association, we are asking that section 25.1 be withdrawn.

[*English*]

The Chair: Thank you, Mr. Barrette.

We'll now go to questions.

Mr. Lee, for a seven-minute round.

Mr. Derek Lee: Thank you, Mr. Chairman.

Thank you to both groups of witnesses.

In order to enforce the law, the police sometimes or even often have to commit an act that might otherwise be an offence. For example, in order to physically detain or arrest somebody, you've got to do what otherwise would amount to an assault. In order to catch somebody who's fleeing, you might have to speed in a car. All kinds of scenarios can develop.

I put this question to the Canadian Bar Association. Doesn't your group recognize that this new section of the Criminal Code is an attempt to codify that murky grey area? It's a good-faith attempt imposed upon us by the courts to try to codify it in some way and record it. Couldn't you simply recognize that this police methodology has to be there? We're simply looking for a way to record what's going on at the behest of the courts.

● (1600)

Mr. Gregory DelBigio: If that's correct, that certain techniques of this sort have to be there, then it is much, much better that it be codified, rather than having techniques decided upon by police officers on the spur of the moment or on an ad hoc basis. That is certainly so, and this is clearly an attempt to codify it.

The criminal law is filled with recognition of instances in which the police are given permission to use certain investigative techniques in support of certain ends. This, I would suggest, is unlike the use of what would otherwise be assault to effect arrest. These are investigative techniques more akin to the use of a search warrant or a wiretap, and they will likely be deployed in circumstances considered in advance as part of a plan, and they will rarely arise on the spur of the moment.

So if the provisions are not repealed—and I'll get to that in a moment—then there is really no reason that there cannot be prior judicial authorization. We live with prior judicial authorization with respect to all of the investigative techniques that I set out earlier, without interference in the effective enforcement of law. Indeed, it enhances the proper administration of law. So that should occur here.

Now, the question of necessity is always a difficult one. What is necessary for the fair or effective enforcement of law? Fair enforcement of law means that law enforcement will conform with constitutional norms, the society's standards of decency, and the rule of law. Is it necessary, or has it been demonstrated now through the data—which can be assessed—that law enforcement is right now, or has been, falling down in the absence of these provisions?

Well, it's difficult to make that assessment. One way of making that assessment, though, is to ask: three years later, how many charges have there been? How often has this law been used and how many charges have been placed before the courts? Once those are known, you can ask, if there is not a charge in each and every instance in which these provisions have been relied upon, why not? So that goes to considerations of necessity.

Mr. Derek Lee: I guess that's why Parliament is debating this now, and why we did it when we first passed it.

My sense is that we haven't had a lot of experience with these sections. We haven't even had a lot of data come in.

I think that's still the case, Mr. Chairman, that the 2005 data report hasn't come in. Is that correct? That is correct. This is 2006.

No, even the 2004 data hasn't come in yet. So I'm not so sure we have a lot of data. But if we did have good data coming in, what additional data do you think we should be looking at to make a good assessment in this review?

Mr. Gregory DelBigio: Firstly, the statutory language is “annual report.” It should be an absolute requirement that an annual report be tabled by a specified date, or in its absence there should be some good justification for failing to meet that date. Accountability requires at least that—compliance with statutory language of an annual report.

Secondly, I suggested the type of information that might be mandated by statute. As I read the reports, the language in some of them really provides no basis for this group, or any other group, to know what the police did and why they did it. You have to refer back to the statutory language and the balance that is required by the statutory language.

Was this justified in the circumstances, having regard to what the police were doing? It's impossible to know from the language that is being used in the reports. There should be more concrete and more detailed language required. That's at the very least.

● (1605)

[*Translation*]

Mr. Denis Barrette: I would simply say, in answer to Mr. Lee's question, that there is also the fact that many offences are not discussed in the report, for a number of reasons stated in the law itself. Either police officers are still conducting the investigation and want to avoid the disclosure of evidence, or they are trying to protect a double agent or informant.

That is all well and good, but who is going to be checking to see whether the investigation is actually still ongoing? Who will be checking to see whether there is a real risk that evidence will be lost? No independent person and no one who is not part of a police organization actually monitors any of these criteria. Police officers are the ones who decide that the investigation is ongoing and that in any case, they still need more information.

This kind of process is extremely risky. One should always be aware of simple data, even if they're incomplete. The way these acts were committed has to be analyzed. People have to be able to question police officers and their superiors and get answers to their questions in order to ascertain what really happened. In that sense, senior police officials should be subject to a judicial test and a committee test.

[*English*]

The Chair: Your time is up, Mr. Lee.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): I have to admit that I'm quite swayed by the testimony of the two groups that we have just heard. I just want to be sure I understand. As regards judicial authorization, the argument made to not consider this kind of control mechanism is the need to keep the data confidential.

It's quite true when you look at the parallel drawn by the CBA to interceptions of private communications, search warrants, production orders, and so forth, that information is not necessarily disclosed as to the stage that has been reached in the investigation. I'm not questioning the fact that some police investigations can be very complex, particularly when the heads of organized crime groups are being targeted. They need to carry out investigations. But like you, I am relatively favourable to the idea of judicial control.

However, what do you think about this idea that some information needs to remain confidential? Do you think that is something that could be problematic?

I will come back to the matter of in camera meetings and the two mechanisms that you have recommended. I don't know whether it was Mr. Barrette or our other witness who raised these points. My advanced age prevents me from seeing your name, but I do know that you are a member of the Bar.

Mr. Denis Barrette: Personally, I no longer know when to take my glasses off or when to put them on.

Are you referring here to confidentiality as a means of protection the victims, or rather, for the purposes of protecting informants or double agents?

Mr. Réal Ménard: I'm talking about confidentiality for the purposes of protecting the victims of an inquiry, and protecting information about the work that is underway.

Mr. Denis Barrette: In my opinion, it's the same issue that arises with a search warrant or a wiretap warrant. Indeed—and this is the actual wording in the Code—no detailed information is to be disclosed regarding the reasons for the search or the wiretapping.

In fact, counsel for the person who is the subject of the search doesn't even know about it until the search has already been carried out. Counsel for such an individual, just as for someone subject to wiretapping, does not know, unless he or she has been advised in another fashion, that his phone is being tapped until 90 days or some time after the wiretapping has already been carried out. The person doesn't know that his phone is being tapped and is unaware of the reasons why it's being done; they may be secret. It goes before a judge and the judge is the one who decides whether or not the wiretapping will be authorized. If the application is dismissed, no one knows why it was dismissed, and no one knows the reasons that were given.

● (1610)

Mr. Réal Ménard: So, as far as you're concerned, the confidentiality argument doesn't hold water.

Mr. Denis Barrette: In cases where people suffer damages, for example, or are victims of assault, I believe that both they and members of the public have the right to know. When the police get involved in this kind of activity, it's fairly serious. We're not talking about speeding on the highway, as Mr. Lee was saying. When police officers commit offences that are a direct attack on the integrity of the person, in principle, the public has a right to know. At the same time, some information can remain confidential.

That brings me to the matter of in camera meetings. One certainly understand why, in certain cases, parliamentary committees may need to sit in camera. An independent oversight group could also examine these issues in camera, much like the Security Intelligence Review Committee, for example. I just thought I'd mention that example in passing.

Mr. Réal Ménard: Let's hear from your colleague. Then I will have another question for Mr. Barrette.

Would you like to comment on the matter of confidentiality? I find Mr. Barrette's arguments quite convincing.

[*English*]

Mr. Gregory DelBigio: I would simply add that the provisions in the Criminal Code recognize the need for confidentiality. There are provisions for sealing documents that are used in support of warrants to search, or wiretap authorizations, so those documents remain confidential and under the protection of a court and are unavailable until somebody applies to unseal them. That is typically done after there has been a criminal charge where the rules with respect to disclosure of such information for the purpose of making a full answer in defence become applicable. Typically, if there is no charge it might well be that those will remain forever sealed.

[*Translation*]

Mr. Réal Ménard: I see.

Let's look at command mechanisms. We know that this is in the public domain, even though the number of designated officers is not disclosed, but we are told that it's primarily the Department of Public Safety and Emergency Preparedness, the Department of the Environment, and Fisheries and Oceans that use these provisions. There is a chain of command and certain officials are designated to authorize officers conducting an inquiry to commit certain acts, either for the purposes of an undercover operation or because they're acting as an informant. And there are the constraints that you are well aware of with respect to bodily harm, sexual assault, and murder.

In your testimony, I had the impression that you do not agree with the idea that a police officer is not acting of his own volition, except as regards those provisions relating to emergencies for a 48-hour period. As far as the rest goes, there is a line of authority for authorizing such acts, particularly by senior officials with the RCMP and within the departments. Even here, you feel these mechanisms cannot be reconciled with the imperative of individual freedom that your respected organizations defend and promote.

I'm sorry; it's gotten to the point where I, too, am starting to talk like a lawyer. I don't know what's come over me.

Mr. Denis Barrette: You're right; that is dangerous.

Mr. Réal Ménard: Yes, especially since I'm not getting the corporate rate!

Mr. Denis Barrette: Yes, if we're talking about cigarette smuggling, that's one thing. However, if we're talking about forcible confinement, assault, or hostage taking, we're talking about something quite different, all the more so when threats, intimidation, and possibly even torture are involved.

In 1970, at the time of the events involving the RCMP, there were chains of command. I was saying earlier that when the events surrounding the Arar affair occurred, there was also a chain of command. There always is. There is always a structure in place that should normally act as a safeguard by preventing abuse or the slippery slope. However, there are often innocent victims, there is often abuse, and this is a danger that we know exists. I'm not saying there has been any abuse under the current legislation, but it is clearly a risk for us in the coming years.

Mr. Réal Ménard: You won't hear me giving a wholehearted defence of the RCMP. Although I have never experienced that—I believe I am a few years younger than you—I have a clear recollection of the statement that René Lévesque made in the National Assembly which aborted the trial regarding membership lists seized from the Parti québécois and the barn fire. However, what we're dealing with here is a regime that aims to justify such acts.

In the 1970s, we questioned investigative methods for which there was no justification regime. But now there is one. What would serve people best—in any case, this is probably what the Bloc québécois would do—would be judicial control. As far as I'm concerned, the answer you gave earlier, along with the comments made by the Canadian Bar Association were both convincing and rigourous. We are not questioning the fact that...

I represent a riding where organized crime is rampant. You may recall that in 1995, young Daniel Desrochers was killed as a result of a car bomb attack...

● (1615)

[*English*]

The Chair: Mr. Ménard, please finish your question.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, I don't want to be too autobiographical here, and rightly so.

As regards judicial control, we understand your arguments. As for creating a parliamentary committee and having it sit in camera, I have yet to be convinced, because that strikes me as a little less operational.

Mr. Denis Barrette: Excuse me, can I answer first?

[*English*]

Mr. Gregory DelBigio: After your answer, I would like to make an answer with respect to the issue of the chain of command, if I may.

[*Translation*]

Mr. Denis Barrette: I would just like to make a very brief comment with respect to in camera sittings. Although we talked about a parliamentary committee, perhaps we used the wrong term. During the Arar inquiry, I worked with Warren Allmand on developing a policy to provide oversight on matters involving national security. We suggested a committee made up of parliamentarians, which is perfectly feasible, to consider certain matters in camera. However, we would need to ensure that in camera sessions were infrequent.

[*English*]

Mr. Gregory DelBigio: I would make a brief answer to the question with respect to the chain of command.

The chain of command does not answer the important issues. A police agency that has vested resources in a particular investigation may be particularly poorly suited to make important decisions with respect to whether or not proper balances have been met. The law now requires that if the police wish to take the impression of a hand from an individual, or install a tracking device on an individual's car, both of which seem relatively innocuous, prior judicial authorization is required for both of those.

The independence of the judiciary enables them to make proper decisions about when to use and when not to use these techniques. If prior judicial authorization is needed before the police can follow a car through electronic surveillance, then presumably it should also be used before it is determined that the police are permitted to commit an assault because the demands of a particular investigation might require it.

The Chair: Mr. Comartin, seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair, and thank you to the witnesses for being here.

Mr. DelBigio, if I can start with you, in your brief you proposed the judicial oversight as a second or third alternative when the legislation originally came forward. I have heard the arguments for it, and like Mr. Ménard, I am attracted to that as an alternative. If you can play devil's advocate for a moment, what was the argument against allowing the judiciary to play that oversight role?

I'm sorry, I wasn't here at the time, so I'm just wondering if you can help us with that.

[*Translation*]

My question is also addressed to you, Mr. Barette, if you wish to add something.

[*English*]

Mr. Gregory DelBigio: I don't know if I'm in a good position to recall the arguments, or at least I don't recall any convincing arguments to the contrary.

Mr. Joe Comartin: Any practical reasons where...?

Mr. Gregory DelBigio: I don't think so. It is tried and it is a requirement that is used every day in provinces and territories in this country, and it does not interfere with policing. Telewarrants, for example, are one provision where attending before a judicial officer is impractical. And again, I go back to the types of investigations where many of these provisions might be relied upon. It will generally be anticipated in advance, well in advance, because it will typically be—my guess—for major investigations.

Will there be an exigent circumstance? That's the question. Will there be an exigent circumstance ever, such that it is simply not possible to get prior judicial authorization? The law recognizes some instances—for example, what is called hot pursuit, for the police to enter a premise without a warrant—but they're very, very limited circumstances. Might there be such limited circumstances that would apply here? Maybe, but I would suggest it would be rare and they should be carefully spelled out if exigent circumstances are recognized at all.

● (1620)

Mr. Joe Comartin: Monsieur Barrette.

[*Translation*]

Mr. Denis Barrette: First of all, the Ligue des droits et libertés is very reluctant to support the idea of a judicial warrant for anything involving crimes against the person. We are quite concerned about the notion that a judge could authorize assault, forcible confinement, hostage taking, and other such acts.

However, we have less trouble with the idea of a judicial warrant—and this is only a possible scenario—in order to be able to pinch somebody who was plotting to sell ammonium nitrate. I could also cite property offences or any other crime, whether it's gambling, fraud, etc., which are not crimes against the person.

So, as we stated in our brief, we would like these offences against the person to be removed. This is a societal choice that we're asking you to make. Does the integrity of the person come before the tools police officers need to have?

Indeed, assault could prove to be a very useful tool for police, as could torture. That sounds cynical, but I'm being perfectly objective: in some cases, torture could be a tool. I doubt that, however, because torture always leads to lies about the people we want to arrest. Just because there are tools available that can make the job easier doesn't mean they are acceptable. As far as we're concerned, anything that attacks the integrity of the person is unacceptable. Privacy is another matter. In some cases, such as wiretapping, if it is done properly and if the officer is required to report on it subsequently, that could in fact be acceptable.

As my colleague said, we are slowly but surely providing parameters for police officers and their agents to commit certain acts. In a way, we're providing them with a corridor within which they can act.

[*English*]

Mr. Joe Comartin: There's no practical consideration here in terms of the number of applications that would be made to the judiciary, in the sense of swamping the labour of our judges, given the few that are being reported.

Mr. Gregory DelBigio: There are many judges in many provinces. I do not understand that they are presently unable to attend to search warrants and wiretap authorizations. I am certain that they would be able to attend to applications of this sort.

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

The Chair: Thank you, Mr. Comartin.

Mr. Brown, from the Conservative Party.

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

Thank you, Mr. DelBigio, for being here today.

I want to ask you a question. In terms of your methods in coming up with the position that you brought forward today, what attempts have you undertaken to survey the membership? The number that you state of 36,000 members is certainly a significant amount. What attempts have there been to survey the membership of the Canadian Bar Association or even more particularly those involved in criminal justice?

Mr. Gregory DelBigio: Ms. Thomson will answer this question; it's a procedural question.

Ms. Tamra Thomson: Yes.

All statements by the CBA, first of all, are based upon principles that have been adopted by our council, which is like the parliament of the CBA, if you will. Resolutions may be brought forward to the council and voted upon by the representative body, which has members based roughly in proportion to our membership in each province, and it meets twice a year. The basic principles of criminal justice on which all of our statements on the Criminal Code are based have been adopted by that council.

Secondly, when we have a particular bill or, in this case, a review of a law that has been in place, it goes before our criminal justice section, the members of which have been elected to their positions in the executive by members of their provinces and territorial groups, as well as the chairs of each of the sections within each province and territory. There's a second representative process in place within the section. The statement is then reviewed by a standing committee of the CBA and finally approved by the executive officers. There are third and fourth levels of review and procedure by elected members.

Parliament doesn't survey all Canadians each time it passes a law. It uses representative systems, as does the CBA.

● (1625)

Mr. Patrick Brown: Similarly, when there are discussions in Parliament based upon the election that follows, when the members were elected to the CBA board, was this one of the things that was discussed in that election, in terms of the review of section 25? Was that something the persons who were reviewing this would have been involved in? Would they have been advertising or expressing their positions on this to the membership?

Ms. Tamra Thomson: The principles on which the position is based are published and known, and the review of section 25.1 would not have been an election issue because it wasn't in a review at the time of the last elections.

Mr. Gregory DelBigio: But it's also important to be clear that the criminal justice section is made up of both people who practise criminal defence work and prosecutors. It is at that starting point that the position goes forward, and has gone forward with agreement.

Mr. Patrick Brown: That dovetails into my second question, if there's still time, Mr. Chair.

You made mention that there's no process for complaints so you aren't able to give us a barometer of whether any members have complained about the use of the section. In terms of your conversations at conferences or congresses, have there been any complaints made to you as a person in a leadership position in the CBA? Have there been any comments in any of the continuing legal education sessions that occur with CBA in terms of concerns people have with this section?

Mr. Gregory DelBigio: Once again, one of the difficulties is that there is simply an absence of data. I can tell you that I'm aware of some cases in British Columbia—which have not yet been before the courts, but will be before the courts—in which this provision was utilized by the police.

It's before the courts, so no further comment is appropriate, but that might be the first full airing of at least a single instance in which this provision has been used, and it presumably will be informative in the sense of informing the public and members of the legal profession about how these provisions were interpreted and applied in one particular investigation.

Mr. Patrick Brown: But as of yet there have not been any complaints?

Mr. Gregory DelBigio: Nobody has complained to me, but at the same time I am here today on behalf of the CBA voicing these concerns.

Mr. Patrick Brown: I appreciate that. As a member of the CBA, I'm certainly curious about how that proposition was formulated.

● (1630)

[*Translation*]

Mr. Barrette, how many members do you have in your organization? Like the Canadian Bar Association, are you able to get your members' input on various issues?

Mr. Denis Barrette: First of all, Mr. Brown, I want to say that what distinguishes us from the Canadian Bar Association is that the Ligue des droits et libertés does not represent a single group within the community. The Ligue des droits et libertés is a policy- and action-oriented organization whose members have a variety of backgrounds. Unlike the Canadian Bar Association, which is made up of people working in the legal profession, the Ligue des droits et libertés includes legal scholars, social workers, non-legal practitioners, workers, unemployed, and so on.

Historically, lawyers have been members of our organization, but our membership is not made up solely of lawyers. Mr. Jacques Hébert was one of the founding members, as were Mr. Bernard Landry and others. I don't believe either Mr. Landry or Mr. Hébert are lawyers.

The positions taken by the Ligue des droits et libertés reflect the outcome of discussions that have taken place at the board and committee level. In this case, it was the Civil Liberties Oversight Committee. Our positions are adopted by the committee and then by the board of directors. It's as simple as that. Positions are developed following discussion.

One thing is quite striking. Like the Canadian Bar Association, our position is the same as it was in December 2001, I believe, when the legislation received royal assent. We even organized a press conference at the time to publicly announce our opposition and draw attention to what we saw as the dangers associated with these provisions.

[*English*]

The Chair: Thank you, Mr. Brown.

Mr. Bagnall is next, for five minutes.

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

Thank you for coming. It's great to have your experience and views.

I'm going to tell you the first part where you haven't convinced me, and then the part where I'd like to do some further study.

I'm not so convinced by what was said before, and just repeating the same arguments. As Mr. Thompson said at one of our meetings, if it's not broke, don't fix it. We haven't really had any evidence from any witnesses that I can remember that there are problems. But we did discuss at an earlier meeting—one of you brought it up—having another review after this one, because there is not that much evidence in it. I'm quite sympathetic toward having that in another three or five years, or whatever.

I think there is possible jeopardy at the beginning and at the end process for infringement on civil rights. At the moment I'm not convinced that we should do it at the first of the project, as I mentioned in other meetings, because organized crime can be so insidiously infiltrated and I wouldn't like to have any more options for them to actually find out what's happening.

I have the same problem with reporting at the end of the process. Good intelligence just helps them prepare, but we don't know how many people are designated. Most of the events aren't eligible to go in the report, so we don't know a lot.

I was intrigued, Mr. Barrette, by your idea of having an in camera session of parliamentarians. The other thing I liked was the idea of having a consolidated report, because we have to go to all the agencies in the country—I think we had this problem in one of our earlier meetings—all levels of government, and all the police forces to find all the reports. That's a little work.

So if we were to make a little progress and have an in camera committee of parliamentarians to look at all of those things that are not actually in the reports now—the number of designated officers, the actual identification of every event—to see how it's working, would you find that at least a small step forward?

[*Translation*]

Mr. Denis Barrette: Yes, except that in camera meetings should be restricted to matters relating to the protection of informants and the conduct of investigations following review of the situation by MPs and experts. In other words, they should be the exception, rather than the rule. Having a small committee of politicians conducting ongoing overview of the way in which these sections are enforced could indeed be useful.

Politicians may have some reservations about holding in camera meetings, and I understand that, since I have some of the same reservations. On the other hand, in the circumstances, one should be able to expect, not necessarily control, but some political responsibility or accountability. That's how I feel.

Of course, I am using the word “control” in the sense of monitoring or oversight, as opposed to decision-making. It goes without saying that politicians cannot decide the reasons for the investigation. That is not their role. On the other hand, they can act as watchdogs to a certain extent.

● (1635)

[*English*]

Hon. Larry Bagnell: One thing you said in your remarks was that this could lead to an increase in torture. In that torture is one of the few things they have to report—personal injury—I can't imagine any force in Canada using it, because it has to be in the report. So how could the provisions of this law increase the use of torture?

[*Translation*]

Mr. Denis Barrette: First of all, I invite you to read the definition of “torture”. It can be found in section 269.1. The exact same definition can be found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Just to summarize, it refers to severe pain or suffering intentionally inflicted on a person for the purposes of intimidation, with a view to obtaining a statement or something else from him.

Another characteristic of torture is that it is carried out by a public official or someone acting on behalf of the State. If you read the clause of the Canadian Human Rights Declaration that deals with torture, you will see that nowhere is there any mention of assault or bodily harm. I also am of the view that bodily harm is not necessary if the aim is to inflict severe pain or suffering on an individual. That is partly the difference between the Canadian and American definition of “torture”. I believe that in the American definitions, it does refer to bodily harm and consequences. That is the focus there.

What you say is interesting. In the absence of any real study of what torture is or a decision to use the international definition, as opposed to the American definition, things rapidly become confused. That can easily be the case for a police officer or public official, who is not even a police officer, entrusted with this task. I believe the distinction may not be clear.

An individual could thus commit torture while believing himself to be protected. And, in actual fact, it is not only possible, but even probable, that he would be. That would be a strong argument to make before a judge.

[*English*]

The Chair: Thank you, Mr. Barrette.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair, and I thank the witnesses for their testimony.

I want to pick up a bit on what my colleague Mr. Brown said. I think I've had this discussion in the past with Ms. Thomson on some other committees.

Mr. Barrette, you made the distinction between the CBA and your group. Your group is maybe an action group, or so on. You're promoting a certain view, and that's understandable. But I've struggled with this in the past, and I see the CBA as a professional representative organization of which I'm a member.

I've sat on a number of committees of justice where we've received from the CBA statements that are more value ones. I was on the committee studying the child protection legislation, the committee studying the definition of marriage, and now this committee, and the CBA has taken positions that are very much what I would call in some cases personal opinions, value judgments, or so on. They have made statements like:

> Any suggestion that this exemption better enables police officers to investigate criminal offences is an unsatisfactory basis to justify such a radical departure from the rule of law.

We had that statement from the CBA. I'm a member of the CBA and I don't agree with that.

I don't want to get bogged down in this, but I'd like to know what your mission statement is. You're the professional organization I belong to. We have group insurance and that type of thing. We promote the interests of the legal profession by weighing in on decisions that would impact lawyers specifically. But some of these things seem to be more like value judgments. I want to get your opinion on this.

● (1640)

Ms. Tamra Thomson: The mission of the CBA is indeed multifaceted. It does have that member interest facet to it that gives the wonderful insurance rates you talk about from the CBIA. It also has a public interest element to it that is well established in the mission statement adopted by Parliament.

It has the elements of improvement of the law in the administration of justice, equality in the justice system, and promoting the rule of law. All of these general principles, to which many of the statements the CBA makes before parliamentary committees relate, fit into that public interest mandate of the association.

Mr. Rob Moore: I think a precaution I would bring is that when there are positions that are diametrically opposed to many of what your card-carrying, paid-up members hold, I would think it could be problematic. If I wanted to join an advocacy group, I would do that. I might take out a membership in some advocacy group that's pushing one world view or another. I view a professional association differently. I'll just leave it at that.

To the witnesses, specifically on the use of agents rather than police officers, what about in a small town where you have a police force of ten people and everyone knows them? If we do keep these provisions, how could they do some of this work when everyone in that town knows those police officers? They may want to do some work that would involve this section.

Mr. Gregory DelBigio: The police are remarkably good at what they do, and that includes police officers acting in an undercover capacity. Sometimes there might be obstacles that they will have to carefully consider. The question really is, if there are obstacles they have to carefully consider, does that justify the alternative?

You give the example of the small town. Does that justify the alternative of the police enlisting the services of the thug, the thief, the drug addict, the drug trafficker from the small town, and asking that individual to commit an assault on behalf of the police because the police are not able to do it, but that's what they believe their investigation warrants? In plain language, that can't be right

[*Translation*]

Mr. Denis Barrette: I just want to add that unlike police officers, drug traffickers and pushers, along with pimps, as referred to by the person sitting next to me at the table, are not subject to a code of ethics. That is an important distinction to make. Indeed, it is increasingly the case that under current law, policing responsibilities are conferred upon agencies or officers that are not subject to the same code of ethics. In such cases, this could almost be considered contracting out. Indeed, these responsibilities could even be entrusted to a federal public officer, for example, who is not subject to a code of ethics. Of course, he is not a pimp, but he has neither the experience nor the same code of ethics as a police officer. We believe that is another issue we will soon be facing.

Finally, as for your comment about small towns, I believe the provincial police have teams of undercover officers that generally move around. When there is a need to infiltrate a specific group, that can be done effectively.

[*English*]

Mr. Rob Moore: Parliament, in its wisdom, put this in place. I know the police are tasked with protecting society. I mean, it's not a perfect system, but the job we've given them is to protect us, and they're going to do that. We have these different situations that have been contemplated, for example, when someone is in hot pursuit and there's a need for an instant reaction and you can't go to a judge and get clearance. You have to have been given a mandate to go and do what you've done in the first place. I'm wondering how we would protect society and how we are going to enable our police to do that in an open way.

I think we want these things in the open. The statement was made that we don't want a culture of silence. My fear is that if we take away these provisions in the code that we've provided for, rather than preventing a culture of silence, as I feel it does, we would be promoting a culture of silence because things may be done that aren't in compliance with the law. When they're acting under these provisions, these individuals are not in reality breaking the law; they're acting under the law. If the provisions weren't in place, and if they did take these steps, they truly would be breaking the law. I think that would lead to a culture of silence.

I want to get your comments on that.

● (1645)

Mr. Gregory DelBigio: I go to one of my earlier remarks in saying that the rule of law has to be concerned both with the existence of the law as well as the content of the law. You need to ask, is it good law to include agents within this? Is it good law to allow assaults or perhaps extortions to occur?

Part of openness is public trust. Public trust will be found through prior judicial authorization. Public trust, if these provisions continue to exist, will be found in transparent and comprehensive accountability mechanisms, the types of mechanisms that don't now exist.

[*Translation*]

Mr. Denis Barrette: By way of reply, I would like to refer to the interception of private communications. This is referred to in sections 181 and following of the Criminal Code. It is surprising to see that a whole section of the Criminal Code deals exclusively with interceptions of private communications. That is a good indication of how important they are.

At the beginning of this part, it states that listening illegally to private communications is a crime and an invasion of privacy. It then strikes a balance by referring to the conditions under which wiretapping can, in some cases, be permitted. It talks here about a warrant to which certain conditions are attached and the need to report to a judge.

The fact that, under the Criminal Code, a judge is the one to issue a search warrant is an example of a specific rule which ultimately reassures police officers. They feel reassured at the idea of remaining within these rules when they take initiatives. Otherwise, our society's appreciation for the law could be diminished. Abuses would then be entirely possible.

[*English*]

The Chair: Thank you, Mr. Moore and Mr. Barrette.

I might add, as a former police officer and major crimes investigator, I had occasion many times to use everything that we talk about here, from wiretaps, to warrant applications, to various forms of interception, and even what this legislation permits right now. At that time there was no legislation that permitted it, but we needed the use of agents frequently, always tightly controlled by the police.

I can't recall in my time how this legislation, which would permit police officers to do the same thing as they did before and the controls.... There were always elements of problems with controls, and that's not going to change, whether you have legislation or not, when it comes to agents or the use of agents. But to repeal this and not allow the police to utilize these investigative tools actually does harm to society because so many investigations require a complete toolbox full of such things as we talk about here.

To have to run to a judge every time a decision is made in an investigation to comply with what you're suggesting would hamper an investigation. I would suggest that even in this last on-the-record initiative that is now taking place with the arrests of several alleged terrorists in this country, such rules and such applications of the law were applied.

And here, if you want to talk about protection of evidence and people.... And I can name other situations where organized criminal activity takes place where the life of even an informant hangs in the balance and where the release of any of this information to the public would be absolutely detrimental, whether it's now, at the time, or even years in the future after the case is all over with.

So I fail to see how the repeal, as you have suggested right at the onset, might be beneficial to our society.

● (1650)

Mr. Gregory DelBigio: Allow me to address that in two parts.

First, it is well known and it is the public experience that courts are sometimes asked to consider whether a search warrant or wiretap—it is a search warrant, much more commonly—has been properly obtained, and for the courts to conclude that it has not been and then to set it aside. That is an indication that even with prior judicial authorization, there are problems, in some instances, with the understanding of the law on the part of police officers who apply for these. Prior judicial authorization is important because it will stop some of these processes in advance. Right now there is no such way of stopping them. It is a public officer who is tasked with determining whether or not it's proper to go forward.

Second, I will respond to the comment about the tools that are necessary for the trade.

It's true that police require certain tools in order for them to do their jobs effectively, but it is absolutely incorrect, I say with respect, to suggest that each and every conceivable tool imaginable would comply with Canadian society—with our law, our standards of decency, and our constitutional standards.

I'll ask this rhetorically. These provisions permit the use of assault as part of an investigative technique. Is it really the case that we want police or their agents to commit assault, because it somehow is thought that it will advance an investigation?

And think about investigation. Some cases are investigative in the sense that they are simply intelligence-gathering, and they never go before the courts. These provisions would permit the commission of an assault as part of intelligence-gathering.

I suggest to you that not every tool should go into the toolbox.

The Chair: I would have to suggest that when a police officer is acting in the line of duty, fulfilling his commitment to the people he serves, sometimes those things occur—I think Mr. Lee even alluded to that—in an arrest, or in a matter leading up to an arrest.

Be that as it may, Ms. Barnes is next.

● (1655)

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

Obviously there's a divergence of philosophy around the table. Anyway, I welcome all of you here today. I think your considered opinions are valued highly in this room and I hope our researchers are compiling all the lists of suggestions, so that when we sit down together to do our report, we'll have that in a very easy-to-understand format. I'm sure that with their competence, they're doing it on an ongoing basis.

It's true that this committee can do a review of anything it wants at any point in time without having a legislative enactment for its review, but the reality of the situation is that usually there are many pieces of not only government legislation coming at justice, but also private members' bills, and this committee gets busy very quickly—so I'm most enamoured of the idea of an ongoing review of this. I feel quite strongly that at this point in time we have insufficient material before us to properly evaluate. We would have a recommendation, but the reality is that the government would have to put an enactment, a change in their legislation, to mandate that review on an ongoing basis of, say, every three years.

I'd like to know from this side of the table, from our witnesses, whether you're in agreement with that concept of an ongoing three-year review, first off the bat. While you're responding to that, since you said you didn't get to all the material in your five-page document, if there's anything you want to put on the record, I'm prepared to give you the time to do so.

[*Translation*]

Mr. Denis Barrette: If the legislation is renewed, a periodic review would be necessary in the shortest timeframe possible. I fully agree with you there. Indeed, today's exercise is not a societal debate. In fact, most Canadians are not even aware of this statutory justification. In our opinion, there has not been really substantive public debate on this, except within certain organizations and among legal experts. Debate has been extremely limited, because people are unaware of the situation.

In that sense, there should indeed be periodic debate, if these provisions are retained, as well as ongoing review of the legislation. I would even go so far as to suggest that public consultations be held, as there have been with respect to identity cards, for example. I took part in public consultations on that very matter. When this project came forward under Mr. Coderre, at the time he was minister, he was deemed to be an important issue. In our opinion, allowing people to commit offences as part of an investigation is also an important issue that relates to the rule of law. So, I would go that far.

I fully agree with you that there needs to be ongoing, but more in-depth review of this legislation than what the tools we currently have available to us would allow.

[*English*]

Hon. Sue Barnes: Do you need time, Mr. Lee?

The Chair: Just to inform the committee, Mr. Lee will take the chair here very shortly, and we'll conclude this session.

The time is now five o'clock. I would ask the committee—these witnesses have been sitting here for an hour and a half—do you want to continue your line of questioning?

Yes, for a few more minutes?

Mr. Ménard has a question, Mr. Petit has a question, and Mr. Thompson will be next, but Ms. Barnes, you still have some time.

I'm sorry for the interruption.

Hon. Sue Barnes: It's no problem.

It's interesting that the enforcement officers have set up their internal protocol in response to their not having one. None of you has really talked about the protocols inside. You've talked about judicial oversight as an alternative, but does either of you have any comments on prior testimony about protocols that are in existence? If you have not read the committee Hansard from the earlier meetings, that's fine too. Just let me know.

Mr. Gregory DelBigio: I don't have enough familiarity to make a detailed comment, but I would reiterate that protocols are of course important, having regard to the present scheme. It is of course the case that we hope and expect police officers will use care in reliance upon these provisions, but a well-crafted protocol does not adequately substitute for prior judicial authorization.

● (1700)

[*Translation*]

Hon. Sue Barnes: Mr. Barrette, please.

Mr. Denis Barrette: I am not aware of the details of the police protocol. However, I imagine that such protocols are, indeed, in effect. I just want to sound a cautionary note with respect to protocols. Such protocols are indeed necessary.

I represented an intervenor in the Arar inquiry. The matter of protocols was extremely important in the context of that inquiry. At the time, there were information-sharing protocols in place with foreign countries, including the United States, of course. I should say, however, that under political pressure in the post-911 period and the context of integrated teams and operational forces that many different police organizations were involved in, including the FBI and possibly police forces from other countries, protocols were easily ignored.

It is important to remember another point with respect to protocols, and it relates to what police officers know about human rights. It's great to have protocols laying out all sorts of fine principles with respect to human rights, but although an officer may know something about human rights—since it can happen that officers are more aware of these issues—the involvement of a person outside the police is often beneficial. In other words, having a judge there to witness the action, as is the case with search and wiretapping warrants, is a way of more easily guiding police action and ensuring it respects rights and freedoms, laws and fundamental rights in this country.

Protocols may well talk about fundamental rights, but it's possible police officers will not fully understand the meaning of the word “torture”, for example. Even if we tell them it is prohibited under section 269.1 of the Criminal Code and that there does not have to be bodily injury or assault for torture to have been carried out, in actual fact, I'm not certain that there won't be torture.

[*English*]

The Chair: Thank you, Mr. Barrette and Ms. Barnes.

Mr. Thompson, five minutes.

Mr. Myron Thompson (Wild Rose, CPC): Thank you. It's been an interesting afternoon.

Mr. Ménard related a while ago that he's talking lawyer talk and it might be difficult to understand. Well, I'm not a lawyer, and I believe you may have a hard time understanding a lot of lawyer talk.

I listened to the conversation a minute ago between you people and the chairman, Mr. Hanger, who's a police officer, and that attracted my attention more than anything. Because here we have a person who's in the profession, and we have people out there in the profession. We've had witnesses here who are in the profession of protecting people through the police force. They seem to be quite happy with the legislation the way it is; in fact, they don't want it broadened, but they want it left there so they're enabled to do a better job.

Mr. Hanger said you need lots of tools in your toolbox if you're a police officer. You're suggesting a lot of tools shouldn't be allowed in there. We get to tossing around things like that, and then I recall a comment made, I think it was by Mr. Lee, a while back, that we don't expect to have a whole bookful of codes: you can't do this, but you can do that, and you can't go here and you can't go there. When does that all end?

I believe that I represent the average Canadian on the street as well as anybody. I've been a farmer, I've been a teacher, a principal in a school. I've been involved in a lot of different things, and I'll tell you that 95% of the people out there want the police to get their job done, and that is, to protect society. They do not want any hindrance. I think most of them would agree with me in saying we trust our police with good common sense to do those things that will protect those rights that need to be protected when so needed, but the bottom line is we're going to do a better job of protecting society.

I'm sick and tired of seeing 11-year-old girls taken off a skateboard when they're going to a movie or to buy a video, and then later raped, and there could be a problem of some technicality—maybe not particularly in that case. I'm just saying that we are sick and tired of hearing comments such as when you arrest an alleged terrorist and somewhere in the background on TV somebody says something to the effect that, well, there's a possibility there could be some entrapment. What?

The police did an excellent job. They've done something that's really opened the eyes of Canadians. I'm cheering them on. The old 95% average guy, I'm saying "Good on you". Wait a minute, did they do something wrong? Did the police do something wrong? Well, frankly, I don't give a hoot, and neither do most Canadians. They don't really care. They want the job done. And within the ranks of those people who are professionals who do the job, the authorities above them, they will take care of their own. They know the difference between good common sense, good law protection, and abuse. They know the difference. They'll look after it.

Why do we need to come up with something in the Criminal Code to say this is right and that's right, and this is wrong and that's wrong, and you people better listen to us because we know better? Well, I don't know better than the police force.

I would really like you to comment on what I had to say.

● (1705)

Hon. Sue Barnes: A point of information, Mr. Chair. Is this the position of Mr. Thompson's government, also, or is he speaking for himself?

The Vice-Chair (Mr. Derek Lee): Mr. Thompson has left the witnesses with a question.

Mr. Myron Thompson: I always speak for myself. Don't ever be confused about that.

Mr. Rob Moore: A point of order, Mr. Chair.

The Vice-Chair (Mr. Derek Lee): Yes, Mr. Moore, a point of order.

Mr. Rob Moore: Ms. Barnes, when has anyone ever asked that question?

Every member is an individual member of the committee. Every time a member makes any statement I don't think we have to say: "Is that the position of the Liberal Party? Is that the position of the Bloc? Is that the position of the Conservatives?" That's not helpful.

The Vice-Chair (Mr. Derek Lee): Let's get back to business.

Mr. Thompson left a question for the witnesses.

Mr. Gregory DelBigio: I'm happy to answer Mr. Thompson's question.

I have not read in the papers or otherwise heard that the people of Canada want the police to be able to use wiretaps, as they see fit, or to kick down doors and enter residences, as they see fit, or to conduct arbitrary detentions of individuals on the street, to frisk them, to have them empty their pockets, to open the trunks of their cars, or to attend with the police at police stations for questioning just because it assists the police.

The people of Canada, I would suggest, recognize that along with good policing, there is constraint—that is, constraint of law and constraint of the Charter of Rights. So while the police want effective policing, the police also want rights that we recognize and cherish in Canada to be maintained and upheld.

Mr. Myron Thompson: I agree they do, I'm not denying that, but there are changes of events that happen during operations of investigation. You don't know in the next second what's going to be confronting you; you may have to get into that trunk, you may have to do this.

Let them be the judge. I trust their common sense to know when and when not to. I really am reluctant to change any legislation that they are comfortable working under and operating, which apparently hasn't caused a great number of problems. I don't think we have the reports, as Mr. Lee said, but I haven't heard of great problems in regard to that, so I'm....

I think I'm hearing that you'd like to see the section gone.

Mr. Gregory DelBigio: That's correct.

Mr. Myron Thompson: I disagree fully, and I think the police disagree with you. I just think...to each their own, I guess.

Mr. Gregory DelBigio: Sometimes the police might be required to act on the spur of the moment, but not always. I would urge you to accept, particularly when the police are acting in anticipation, with forethought, that then they go for prior judicial authorization.

Mr. Myron Thompson: When they do it on the spur of the moment—

The Vice-Chair (Mr. Derek Lee): That's time.

Monsieur Ménard, for five minutes.

[*Translation*]

Mr. Réal Ménard: First of all, I want to say that I don't trust anyone unconditionally: either elected officials, the police, judges, or lawyers, even though it's not a flaw to have a legal background. I studied law myself, so I know that. However, we do need to be concerned about the effectiveness of police investigations, particularly when they target organized crime. At the same time, there are freedoms that we must cherish, and nothing can justify abuse.

I have two questions. Some witnesses have told us that if these provisions were to remain in place, even though you are in favour of their repeal, they should apply only to investigations dealing with organized crime. It's primarily the RCMP that appeared before the Committee with respect to the work of law enforcement organizations. It informed us that these provisions have been used in two types of situations: investigations relating to organized crime, narcotics and drugs-related investigations, and immigration-related cases.

Do you share the view that these provisions should only be used where investigations relate to organized crime? That my first question.

And I'll move directly to my second question. In your view, what are the major, generic offences that would be authorized under the existing provisions, in light of what it says in subsection 25.1(11)? For the last little while, we've been talking about assault being authorized, but subparagraph 25.1(11)(a) states the following:

> (a) the intentional or criminally negligent causing of death or bodily harm [...]

Yet bodily harm and assault are two different things. Those are my two questions.

● (1710)

[*English*]

Mr. Myron Thompson: A point of order, Mr. Chair. It's not a big deal with me, but I do believe that the rules of this committee are that everyone will have an opportunity once before somebody has an opportunity twice. Is that correct?

The Vice-Chair (Mr. Derek Lee): Actually, yes. If it's not actually written down, that would be the intent of the chair.

Mr. Myron Thompson: Mr. Petit has been on the list for quite a while and he hasn't had an opportunity, and this is the second time for Mr. Ménard. Go ahead and do what you want, but I'm offering a reminder.

[*Translation*]

Mr. Réal Ménard: On the same point of order, we really have to resolve this issue. Without wanting to deprive Mr. Petit of the opportunity to ask his question, I would point out that the Bloc Québécois is entitled to ask two questions. We cannot be relegated to the status of the NDP. Whoever asks them, we are entitled to two questions. I would have been quite happy to listen to what Mr. Petit has to say, as he is a true source of inspiration for me at all times, but at the same time, I don't want the rules to be ignored.

[*English*]

The Vice-Chair (Mr. Derek Lee): Everybody will get a chance here.

Mr. Petit, if you would like to jump in here, we'd be delighted to hear you.

Do you want to finish off, or do you want Mr. Petit?

[*Translation*]

Mr. Réal Ménard: Mr. Petit, is that all right? Thank you, Mr. Petit.

In that case, could you please answer my two questions?

Mr. Denis Barrette: As for allowed offences, I want to say right from the start that any and all offences against the integrity of the person should not be authorized.

Mr. Réal Ménard: That's not what you would like, but that's the way it is under the legislation. For some time now, you've been talking about assault.

Mr. Denis Barrette: Yes. Assault is not exempted in the paragraph you read out earlier, because it refers to assault with bodily harm, something that a police officer cannot be authorized to do. However, he can be authorized to commit assault. Common assault can be authorized. But, as I say, assault causing injuries that are not just temporary injuries or are detrimental to a person's health, may not be authorized.

Mr. Réal Ménard: The term “assault” means pushing somebody, for example. That is the term that's used when there are no injuries.

Mr. Denis Barrette: That term is used if there is no temporary injury which is detrimental to a person's health. Here we're talking about assault with bodily injury. Assault with bodily injury is more than just an ordinary injury; it's an injury that is prejudicial to one's health and is not of a temporary nature. For example, it could be a scar or a large bruise. As you say, it could involve pushing someone, or making him fall, but without actually hurting him. If the person is not hurt, there is no bodily harm. Often, it's a matter of coincidence whether a person has injuries or not.

We can certainly discuss the differences here, but as far as the police are concerned—and I want to make it perfectly clear that I am not criticizing them—it's different. When the police arrest someone for assault, it doesn't matter whether it's common assault, assault with bodily injury or aggravated assault. The important thing is to stop the assault. For the investigator, that may be more important, but as far as the police officer is concerned, that difference is not so important. His responsibility is to prevent someone from hitting someone else, for example.

As regards authorized offences, I would limit them to offences with a judicial warrant that are clearly framed. The police asked that section 25.1 be added following the Campbell ruling by the Supreme Court, which said that the controlled sale of narcotics is illegal and constitutes a crime, even if it is carried out by police officers. The police reacted by requesting general immunity, when Parliament had already passed specific provisions relating to the controlled sale of narcotics. In fact, those provisions still exist.

● (1715)

Mr. Réal Ménard: Mr. Chairman, I do hope our research staff can prepare a little table. I would really like to have a better understanding of the difference between bodily harm, assault and common assault, because it is important. I'm very grateful to you. I sense in you a calling as a teacher that has found expression here. I would like to have a table, Mr. Chairman, before we complete our work.

Mr. Denis Barrette: I should say that the case law also provides nuanced definitions of the various offences. So, we do have definitions in the case law. In this context, there is no clarity, and that is the danger.

[*English*]

The Vice-Chair (Mr. Derek Lee): Our research staff will get right to that, Monsieur Ménard .

Mr. Thompson, you're 100% correct about the lineup for questioning.

Monsieur Petit, you're next.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): I will address my first question to the Canadian Bar Association, then to Mr. Barrette, and finally to the person seated next to him, whose name I'm unaware of.

To begin with, I would like to draw your attention to the fact that in Quebec, we're afflicted with the scourge known as “drinking-and-driving”. When a traffic accident occurs where there are people injured or where criminal negligence is involved, for example, a police officer arriving on the scene of the accident must obtain authorization before taking blood samples. So, right there, authorization is required.

If they state they're unable to obtain a warrant, well, there are two types of searches—one that results in a trial, and another which is authorized by a justice of the peace. In this latter case, since there is no follow-up, there is no envelope containing the relevant documents or anything of that nature. However, if someone goes to the Court House in Quebec City, for example, and he has any reason to believe that *[Inaudible—Editor]*, he has the right to try and get it. If he does not do so, then he cannot claim that he was unable to obtain one.

Now let's talk about search warrants. Personally, I have a BlackBerry, but have you seen what police officers have? They all have computers. They can easily apply for a search warrant—in about 30 seconds, if they have reasonable grounds to believe that something is going on. In that case, they receive an electric warrant. In this way, they are able to obtain a lot of authorizations.

Your arguments for amending sections 25.1 to 25.4 are nevertheless quite solid. However, I would like to point out that every indictable offence is different. So, the judge has to take an individual, as opposed to a collective, approach. As this gentleman mentioned, nobody knows about sections 25.1 to 25.4. In Quebec, when somebody wants to prove that a police officer made a mistake, he will tend to rely mainly on the Quebec Police Officers' Code of Ethics. Rarely is reference made to sections 25.1 to 25.4 of the Criminal Code, which are a little harder to work with.

You say that it makes no sense to have them, that they cause a lot of problems and can lead to abuse. But can you tell me just how the police are supposed to mount an undercover operation against a group like the one in Mr. Ménard's riding? A young boy was killed there in a bomb attack carried out by a gang of thugs.

Imagine that it was discovered at some point that an informer at the Auto Insurance Board of Quebec was providing information to the Hell's Angels. Under the circumstances, how could the police obtain a warrant? They couldn't do anything. In certain situations, you feel as though you may have to bypass the system. Mr. Barrette, you probably won't agree with me, but what do you think should be done in a situation where you can't even get a warrant?

In the case of police officer Marc Saint-Germain who killed four of his colleagues in Trois-Rivières, the officer that arrived on the scene needed a warrant. He had to apply for a telewarrant, but it worked. We are seeing that in some cases, this kind of system is a success. We shouldn't be totally negative.

In any case, you're putting me in a delicate position; you're talking about torture, whereas in 33 years of practice, I have never handled that kind of case. You have provided us with a definition of torture. However, if I use the word “torture” in the current context, I could say that Parliament, as an agent of the State, is forcing the Bloc Québécois to sit in this forum. By forcing the Bloc to vote for Canadian laws, it is inflicting severe pain.

Mr. Réal Ménard: It is my contact with you, Mr. Petit, that gives rise to the severe pain you refer to.

Mr. Daniel Petit: I'm trying to present this in such a way that you will understand that there comes a time when you have all the necessary authorizations. As a regular legal practitioner, I can tell you that I rarely had problems relating to sections 25.1 to 25.4.

● (1720)

In fact, when there are problems, it's because certain police officers disregard the law. And they disregard it in a number of specific cases. In the Matticks case in Quebec, we dealt with that kind of situation. We put the entire Quebec Provincial Police inside, and questioned their members for almost a month. Such cases are extremely rare and don't happen very often.

That's the reason why I'm asking you to try and convince me that sections 25.1 to 25.4... With all the arguments you have presented, you still have not managed to convince me. Yet I will have to make a decision. I find your arguments to be very solid, but I'm not living in the United States. That's the problem.

[*English*]

The Vice-Chair (Mr. Derek Lee): Thank you, Monsieur Petit. You've gone well past your five minutes. It was a great series of questions.

We can allow the witnesses a comment, if they feel it's necessary.

[*Translation*]

Mr. Denis Barrette: First of all, as regards torture, I've rarely seen people tortured in public the way parliamentarians are in front of the television cameras.

I just want to say that as crimes go, it is the most odious of all crimes internationally. If you consider the crimes that are prohibited under emergency measures ordered under the International Covenant on Civil and Political Rights, it is one of the ones that are absolutely forbidden. It is an obligation on the part of signatory States that cannot be breached under any circumstances, given the gravity of actions taken by a public official who inflicts suffering on another individual for the purposes of intimidating him, and so on.

What I'm trying to say, with respect to torture... I understand that you may not agree with my reading of torture or of the connection between torture and assault with bodily harm. At the same time, I find it interesting that you yourself have said that it is an interesting argument.

To what extent will a police officer who is given authorization to commit offences, such as assault, for example, not inflict torture without injury, without bodily harm? To what extent do we have any assurances that he could not go as far as to do the unthinkable. That is the danger with torture.

Of course, that is not what we hope will happen. And the fact is we have no cases to report in that area, nor do we hope to have any to report. However, as I often say when I come here, parliamentarians have a responsibility to consider all possible applications of the law, even when they don't have concrete examples in front of them. That is your responsibility.

As regards the Hell's Angels or other organized crime groups, I believe that so far, we have been able to infiltrate them in Quebec, even before section 25.1 came into force. The fact is that we were able to infiltrate the Hell's Angels, put them on trial and convict them in most cases.

However, as you were saying, this was a big job, particularly for the Quebec Provincial Police and police officers in Quebec. However, I should say that the whole matter of the tools available to them arises once again when we say that some people should be allowed not to obey the law, without judicial authorization, in order to arrest members of organized crime groups and prevent them from committing heinous crimes. That is where the danger lies, because there are always good reasons for letting things slip and engaging in abuse; that's when we get the kind of results that we don't want.

Once again, we have seen that happen, perhaps more often in Quebec than elsewhere. I talked about the 1970s. Unfortunately, these kinds of crimes are always committed for a good reason. Voltaire said that hell is paved with good intentions. That may well be the case as regards section 25.1.

● (1725)

[*English*]

The Vice-Chair (Mr. Derek Lee): Now we're really close to our time.

Mr. Bagnell, you had a question. You're on the list. If it's really short....

Hon. Larry Bagnell: It's just back to torture. If “torture” were added—the international definition of it, I guess—to the list of things that were prohibited, like causing bodily harm, would that help?

[*Translation*]

Mr. Denis Barrette: I can answer that question.

In our opinion, the best solution would be to set aside any offence against the person or a person's physical integrity. Of course, if we specifically include torture in the exceptions, that is already a better solution. But there are also other offences—and we have named them—that relate to the integrity of the person. I would say that this a slight sign of progress.

[*English*]

The Vice-Chair (Mr. Derek Lee): Thank you.

Let us wrap up, then, if there is nothing else procedural or substantive.

I thank both groups for appearing. There was some comment earlier about representation from both groups, but I know the Canadian Bar Association has been a robust contributor to public policy debate here on the Hill for decades, and the Ligue as well, I know, makes a contribution to pubic policy debate, particularly on legal issues.

None of us here would want to do anything to discourage that. Their contributions are, in some respects, invaluable—in not being able to put a value on them, perhaps, but just “invaluable”—and we thank you for them in this particular area as well, which is I guess some post-charter unfinished business, twenty-some years later.

Thank you for appearing.

If there's no further business, we'll adjourn.

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