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Chair

Mr. Garry Breitkreuz

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• (1105)

[English]

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)):
I would like to bring this meeting to order. This is meeting 46 of the Standing Committee on Public Safety and National Security.

This morning we are dealing with a review of the witness protection program. From the Commission for Public Complaints Against the Royal Canadian Mounted Police, we have Mr. Paul Kennedy, the chair, and Mr. Brooke McNabb, the vice-chair. We welcome you and we look forward to the information you will be giving us.

I would like all portable media to please vacate the room. I would like to advise the committee that we had very short notice here from the CBC that they would like to tape this session, so I'm just advising you of that.

Without further ado, Mr. Kennedy, are you going to lead off with a statement? You have approximately ten minutes, if you wish.

Mr. Paul E. Kennedy (Chair, Commission for Public Complaints Against the Royal Canadian Mounted Police):
Thank you very much, Mr. Chairman. With your kind indulgence, I would like to make a brief opening statement of approximately ten minutes.

The Commission for Public Complaints Against the RCMP was created by Parliament in October 1988. Under part VII of the RCMP Act, a member of the public may file a complaint regarding the conduct of either a regular member or a civilian member of the RCMP in the performance of any duty or function under the RCMP Act or the Witness Protection Program Act. The bulk of the commission's work concerns complaints. If we look at more general issues such as programs, operations, operational policies, guidelines, and training, it would be to the extent that they are intertwined with the substance of the complaint.

Since its creation in 1988, the commission has received 27 complaints concerning the witness protection program. It had occasion to conduct nine reviews of the disposition by the RCMP in the first instance of those complaints. By the way, under the statute the RCMP does the investigation and then they make the resolution in the first instance.

One individual complainant was the source of three of the reviews. The majority of the complaints and reviews related to denial of access to the program, dissatisfaction with compensation provided, and perceived improper disclosure of information by the

RCMP relating to a person in the program. Overall the commission was satisfied with the RCMP's disposition of the complaints.

Two cases resulted in comprehensive recommendations relating to the program. The first such case resulted in a public hearing held by the commission in 1992. I should point out that the program has been in place since 1984 but legislation was not passed until approximately 1995, I believe. This case was dealing with the program, not with any instance that was post-introduction of legislation. The individual who had testified on behalf of the Crown in a number of trials expressed dissatisfaction with the financial award and claimed that the RCMP had told her that she would be dropped from the program if she did not accept this offer.

The commission made 21 recommendations concerning the program. Those included assessing the ability to relocate and protect sources prior to exposing their identities; analyzing relocation and re-establishment potential from the time it becomes apparent that exposure is likely and danger is probable; informing the source of difficulties in protecting or relocating him or her and documenting conditions of relocation and protection in writing; providing training to handlers to recognize indicators of the changing needs of relocated witnesses; and providing counselling, as required, to relocated witnesses.

The second case arose in 1992. A woman who had been relocated complained that the RCMP demonstrated a lack of attention and concern in her regard. The commission found that the RCMP had mishandled the woman's relocation and name change. It recommended that RCMP policy relating to relocations be addressed, that a clearly defined memorandum of understanding be established between affected parties, that assistance of various social agencies be solicited, that the need to be circumspect and discreet be reinforced, and the maintenance of a diary date system to ensure that action is taken in an expedited manner.

Review bodies such as our commission are creatures of statute. The nature and scope of the review we perform is dictated by the powers given by Parliament. The mandate of the commission is expressed in a 1988 act of Parliament. Its powers are less robust than those provided to other review bodies such as the Privacy Commissioner in 1981, or the Security Intelligence Review Committee in 1984.

•(1110)

Some of the difficulties encountered by the commission, particularly as they relate to access to sensitive information held by the RCMP, are directly attributable to weaknesses in its legislative mandate. By operation of law, the RCMP may deny the commission access to a range of documents that fall into the following categories: significant damage to ongoing investigations; confidential human sources; investigative techniques not known to the public; solicitor-client privilege; litigation privilege; and section 38 of the Canada Evidence Act, which is a protection where there's a perceived harm to national security, national defence, or international relations.

There is a myriad of other statutory prohibitions. There's the Youth Criminal Justice Act. There can also be part VI of the Criminal Code dealing with wiretaps; that's protected. So there are other recognized privileges.

In the majority of cases, the commission does not require access to such information to discharge its review function. Where information is withheld, the RCMP, pursuant to a directive from the former commissioner dated February 15, 2006, is required to advise us of that fact and to state upon which legal basis it is denying access. I merely point out that this was in February 2006. The commission has been in place since 1988, but the directive was issued in 2006. I would then discuss with the RCMP an approach to address our needs while meeting their concerns about unauthorized disclosure. The former commissioner urged his members to afford the commission large and liberal disclosure and to avoid limiting disclosure unless there are substantive reasons that can be articulated for so doing.

As a matter of principle, however, I believe that an effective and credible review body ought to have access, as of right, to all information in the possession of the RCMP, but for cabinet confidences. There would be a need for checks and balances to ensure that such access did not result in the waiver of any existing privilege. I believe that the need to protect sensitive information from unauthorized disclosure and the need for an effective and credible review body can be accommodated.

There has been much focus recently on the RCMP's activities in respect of national security investigations. We've heard reference to the fact that there are some 300 regular members engaged in such investigations. There are, however, over 18,500 regular members, maybe even approaching 20,000, throughout Canada, and in a host of criminal investigations at the national, provincial, and municipal levels.

Some of the work at those levels would, for example, include investigations of national and international organized crime and crimes on the Internet. Some of those crimes would be investigated through joint force operations with other police forces or through standing integrated units such as the integrated border enforcement teams, IBETs; the integrated market enforcement teams, IMETs; and the integrated proceeds of crime teams, IPOCs, just to name a few. These units are multi-jurisdictional and multi-departmental in nature and employ long-term covert investigative techniques not unlike the cooperation and investigative techniques that characterize national security investigations.

In my opinion, there is a need to enhance the current legislative review model for activities undertaken by the RCMP generally. Following my appointment on October 24, 2005, I called for such action. I have provided the clerk with copies of speaking notes for a presentation I made to Justice O'Connor on November 17, 2005.

In my annual report for 2005-06, I restated my call for an enhanced legislative mandate to address not only national security investigations but all RCMP investigative activities. In October 2006, at the annual meeting of the Canadian Association of Civilian Oversight of Law Enforcement, which is called CACOLE, I outlined the key attributes of civilian oversight of policing.

It is important to provide Canadians with a national standard of civilian review of policing activities. As the RCMP is present throughout Canada, from sea to sea to sea, such a standard is all the more important. I have provided as well a copy of a deck that I used at that time, giving details of the presentation I made.

•(1115)

I fully realize the difficulties of envisaging what legislation embodying those key elements would actually look like. Accordingly, I have taken the liberty of having a proposed draft legislative model prepared that would be a straw man for further public discussions in this important area. I've provided you with a copy of that legislative model. I do not pretend that it is a perfect solution; however, based on over 33 years of experience in public safety issues, I believe it is balanced, effective, credible, and cost-efficient.

Features of the draft legislation that will be useful in examination of the witness protection program would be those that provide unfettered access, as of right, to all information but for cabinet confidences subject to the appropriate safeguards; create a positive obligation on law enforcement officers to account for their actions; enlarge the scope of review to include actions of retired law enforcement officers and non-officers who act under the direction or supervision of such officers; create a new audit review power and a new right of complaint about the inadequacies or inappropriateness of the policies, procedures, guidelines, and the ability to respond or provide a service or training program; provide the Minister of Public Safety with the right to request special reports concerning any matter; and allow for the creation of more than one report, i.e. a classified and a non-classified report.

The draft legislative model, I believe, has all the powers required to provide effective and credible civilian oversight review of RCMP activities and would be of great use to the minister and to members of Parliament in the discharge of their respective duties to the Canadian public.

Thank you.

The Chair: Thank you.

Before we go to the official opposition here, there's one thing you have omitted from your presentation: the number of cases that are pending right now before the commission. And are you able to provide any details on those? It seems you've omitted that.

Mr. Paul E. Kennedy: There is one case currently that has been appealed to our commission for review. The ruling was given, I believe, in 2006 at the first instance, and we're currently conducting discussions with the RCMP in terms of access to the information relevant to hearing that appeal.

There clearly are difficulties. You're aware, from other witnesses who appeared before you, that there are secrecy provisions. I talked about statutory bars. There would be a bar. So in theory you can appeal or complain to us; however, section 11, I believe, says it's a limited offence to disclose. So for some of the information, what they're doing at the current time is speaking with the individual to see if the individual will consent to the disclosure of information.

So that's where we're at. That is the only active file we have. We had one recently that was disposed of, but that's the only active file.

The Chair: Thank you.

The usual practice is to begin with the official opposition, with a round of questioning for seven minutes.

Ms. Barnes, please.

Hon. Sue Barnes (London West, Lib.): Thank you very much. I appreciate your attendance here.

As you know, we are studying the witness protection program, and a lot of your presentation today focused on broader issues. Perhaps I'll just start with the broader issues here.

You have asked for a new legislative model to expand your mandate. I just wonder, at this point in time, what reaction you have received, either from the minister or the authorities inside his department, on this model.

Mr. Paul E. Kennedy: I've shared that with everyone. I have not at this point in time, obviously, received any feedback on my model. I think I've appeared before numerous groups and talked about it. A lot of people seem to be supportive of that theory, but clearly the minister will have to speak for the department in terms of the policy initiative and what his plans are.

Hon. Sue Barnes: Okay.

Let's go back now to the subject matter here, which is the witness protection program—twenty-seven complaints. One of the things that I couldn't get from this material was the geographic distribution. Were there any anomalies? Did they come from one area of the country in particular, or was this widespread?

• (1120)

Mr. Paul E. Kennedy: I'd have to look and see. We didn't analyze it for that purpose. I pointed out that the cases go back prior to this legislation being put in place. As a matter of fact, the two that I referred to in specific were both, I think, in 1991 and 1992. Regarding the 27 that are complaints, we could undertake to get back to you to see if we can identify what part of the country they came from and possibly break it down for you chronologically, if that would be of assistance.

Hon. Sue Barnes: I'd appreciate that, and if it could go to the clerk of the committee, then it could be distributed to everybody, please. It's important to know, because obviously the RCMP operate differently in different areas of the country.

As for the 21 recommendations the commission made regarding the program, you've outlined some of the areas in the brief here, but that was done some time ago, and I'd like your comments. What actions were taken with respect to any of these recommendations? You can make recommendations until the cows come home, and if nobody acts on them, they're not very useful.

Mr. Paul E. Kennedy: Yes, it's fair to say. And I indicated that the recommendations were made in 1992—the legislation was 1995—and part of the challenge at that time was the articulation of criteria and so on. In June 1996, the legislation was passed. It mapped out criteria and so on. That certainly helped a bit, and I think it's fair to say that over time policies have been put in place to regularize it a bit.

The formal response at the time, and certainly of the nature you have indicated, which is that recommendations are not binding, they're merely advisory.... We could give you an edited version of the response that came back with reference to the recommendations itemized in detail, but it was very much that they were to be taken under advisement.

Hon. Sue Barnes: Again, Mr. Chair, perhaps I could ask that those get tabled with the clerk and distributed to all members of the committee.

The Chair: To clarify, we're looking for the recommendations and the response.

Hon. Sue Barnes: Absolutely. The recommendations he's briefly outlined here, but—

The Chair: Just to be clear.

Mr. Paul E. Kennedy: Part of the challenge we have is that some of them were obviously generic in nature. I pointed out in my submission that we don't have an audit or review power generally, so for you to find out if they've been implemented, you would have to go and look in a broader base to see if those policies were put in place and, if so, how they are being distributed. So when we make those things, they're one-off to that case, but we can at least tell you what they were.

Hon. Sue Barnes: You have argued that to be an effective and credible review body, you should have as a right an access to all information in the possession of the RCMP except for cabinet confidences. I'd like you to enhance that statement: your reason for so saying and potentially some of the arguments that were made or are contra to that position.

Mr. Paul E. Kennedy: One of the ironies is that this legislation was put in place in October 1988, which was six years after the access and privacy legislation was in place and four years after SIRC was put in place. Their powers are quite similar. As a matter of fact, SIRC's powers were almost copied from those of the access and privacy commissioners.

Ours came later, and for some reason or other those powers were not put in there. It has been a point of frustration. It actually resulted in the commission going to the Federal Court to get access to information. The court in the first instance held that, yes, the RCMP had to provide access to the commission. They went to the Federal Court of Appeal, and the court said, no, unfortunately, your statute is weaker and doesn't provide that; the RCMP is allowed, in respect of any information to which privilege applies, to raise that privilege and to prevent access to it.

There actually was a ministerial directive issued, as I pointed out, by the former commissioner, that says try to cooperate, obviously, and give full and frank disclosure. But then it has an appendix, and the appendix is a good page long, with an itemized list of all the things that would be subject to privilege.

The only advantage we got, I think, from the decision of the court was that they at least had to tell us they were holding something back. So we knew that there was something we weren't getting and what the rationale was for not getting it.

In my experience, I have found that the RCMP in many instances want to cooperate with us. They will say to me, for example, "Paul, I'd like to share that with you because it would be to our advantage to have you more informed, but part VI of the Criminal Code dealing with wiretaps says you can't disclose information." So they're not able to share the information and we're all caught in this catch-22. Even on an ad hoc basis, to the extent that they want to cooperate with me, if there is some other kind of statutory prohibition, it's used. So in my experience, I have found goodwill but a statutory impediment.

The other challenge is that if you look at SIRC's legislation, they can hear information in camera. They can protect information in camera. People would be concerned if they gave information to us that is classified and then someone else could access it from us under ATIP or privacy or subpoena, and the privilege might be waived.

I also spent five years as general counsel to the intelligence agency, and I know the dynamic in terms of concerns of the institution vis-à-vis oversight. So when I put this model in place, I learned the lessons of all the things that worked or didn't work in that venue. I have put in here that we have to have access to that information, but our access in law does not constitute a waiver of that privilege. Conversely, if information is given, if it's identified as being privileged, we will look at it and consider it, but we will not disclose it necessarily in our decision. But at least the public would know that we'd had access to everything.

I put a model in place that has those checks and balances in it that would give the RCMP comfort that there would not be damage to ongoing investigations nor a waiver by sharing it with us that would in fact constitute public disclosure. I have also talked in terms of being able to make two reports—a confidential report, classified when it needs to be, to the minister and to the commissioner, as well as one that would be public. Sometimes, by not having that detail in, it would be hard to persuade the commissioner or the minister that action should be taken.

The whole thing is put in there as a series of safeguards. I've done the same thing vis-à-vis witnesses. One of my arguments is that

witnesses have to account for their actions. Police officers have unusual powers. In a lot of jurisdictions across this country, they have to account for the usual powers. Our model doesn't provide that. I'm saying that you have to, but conversely, for whatever you tell us, there is a privilege. It cannot be used in any other administrative, criminal, or civil proceeding. The reason is that our purpose is different. That way, a compulsion to testify would be with accompanying protection for the officer.

• (1125)

The Chair: Thank you.

Before we go to the Bloc Québécois, you referred to an RCMP directive. Can you give a copy of that to the committee or not?

Mr. Paul E. Kennedy: Yes. I have it with me. As I read my notes this morning, I thought somebody was probably going to ask for that.

The Chair: Okay, I asked for it. You are able to provide it?

Mr. Paul E. Kennedy: Yes. We have copies in both official languages that we'll share with you.

The Chair: Okay.

Monsieur Ménard.

[Translation]

Mr. Serge Ménard: I am pleased to hear from you here. It is not the first time, either; I heard you recently at the Press Club.

You are not happy with the law that sets limits on your power and your responsibilities, and you make an eloquent case that changes should be made. But you are here primarily to provide evidence on the RCMP's witness protection program. You say that you have obtained sufficient authority to conduct your inquiries under the program and that, in the vast majority of cases, you were satisfied with the RCMP's conduct. But in two cases, you made specific recommendations to improve the witness protection program.

Could you sum up those recommendations for us in a few words? Could you also send us a copy of the recommendations, unless those documents are protected by one of the countless confidential privileges that you referred to in your brief?

• (1130)

[English]

Mr. Paul E. Kennedy: I wasn't merely speaking in terms of the need for enhanced powers just for that purpose. I spoke to those powers because I think it relates directly to the efficacy of the commission to look at the program you're looking at.

When I look at the Hansards back in 1995-96, when the legislation was put forward, there was all sorts of discussion at that time as to whether we could look at the program and whether there would be in camera hearings before committees and things of that nature, because parliamentarians were concerned about making sure of the efficacy of the program.

What I'm indicating to you is that when there's a complaint to us, the nature and scope of our inquiry is dictated by the complaint. So if a person says that he or she has a concern about financial compensation, the issue that is looked at and investigated is strictly the issue of financial compensation. And most of the complaints tend to be of that narrow nature. You cannot tell how the program is working, even vis-à-vis that individual, because you're only looking at the subject matter of the complaint and the relevant material concerning that particular complaint.

Therefore, the indication of our satisfaction with the resolution was in the context of the person complaining about money and what the information was relative to whether the person got the money over the promises in terms of compensation. It had nothing to do with how the program itself functioned or anything else that might have come out in terms of the uniformity of application of that program across the country. They are very narrow in terms of scope. That was the only context in which I put my comment.

In terms of the recommendations we made in the two cases I responded to—those are the ones I indicated were back around 1991-92—they're very detailed in terms of guidance as to whether they should have assessed the person for suitability for the program and things of that nature. I've undertaken that we will provide you with our specific recommendations and the response we got in both of those cases.

The current case I have before me, clearly, I can't discuss, because we don't yet have the relevant information that allows us to go ahead and make a determination. That's the one case I indicated was outstanding.

I wanted to contextualize that.

[Translation]

Mr. Serge Ménard: I understand.

When you ask the RCMP for information, how long does it take on average for them to give you an answer?

[English]

Mr. Paul E. Kennedy: That has improved through the years. It has improved recently, relative to the history of the organization, and I'll put that in the following context. The organization had historically had a backlog, and when I came on board, the first case I signed was in the commission for six years and was a ten-year-old fact situation.

We have changed that. We have no backlog and we handle our cases with a service standard of 120 days on average. We set a target this year that we would get 80% of our cases dealt with within 120 days.

With my vice-chair—we've been there for 16 months—we've eliminated that backlog entirely. It's been the most productive year in the past 15 years of the commission. What it has identified for us is that on average we're taking about 97 days from the time we get a complaint to the time we get a resolution, and about 60-some-odd days within that cycle would be to get the information from the RCMP, on average.

There are other cases that are more complex. A case dealing with the witness protection program falls into that area of complexity,

because now you're looking at information that is protected, and you have to get the consent of the individual.

So at this point in time, I can tell you that we deal with 80% of the files within 120 days, and it takes about 60 days to get material from the RCMP. The other 20% is more complex and can take more time, particularly if there's anything that is covered by any kind of privilege that requires a discussion.

• (1135)

[Translation]

Mr. Serge Ménard: Do I understand that all your requests for information to the RCMP must be made in writing?

[English]

The Chair: That will have to be your final question. Go ahead.

Mr. Paul E. Kennedy: The process is that when we receive a request for a review by us, we notify the RCMP that we have gotten a request, and we ask them then to forward to us any of what's called the relevant material that would have been considered by the RCMP in the first instance when they were adjudicating on the appeal. We ask them, and then they will forward it to us in due course.

As I said, the nature and the scope of it could be fairly extensive. We have the authority by law to conduct our own investigations or to order further investigations if we're not satisfied. Our concern traditionally is clearly about the adequacy of the investigation in the first instance and whether the material is sufficient.

One of the concerns I have is the ambiguity of the current legislation as to who decides what is relevant. There have been discussions in the past in which the RCMP has taken the point of view that they decide what is relevant and provide to us that which is relevant.

I have a different point of view. I think for credible civilian oversight, the civilian oversight agency decides what is credible and what is relevant to our determination. That is still an ongoing issue in troublesome cases.

The Chair: Thank you very much.

We'll now move over to the NDP, to Mr. Comartin, please, for seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Mr. Kennedy and Mr. McNabb, for being here.

Mr. Kennedy, your predecessor was publicly highly critical of the lack of cooperation she got from the RCMP in her role. Have you run into similar problems? Expanding that question, could you also comment on what you see? Is it better than it was when your predecessor was there, is it the same, or has it gotten worse?

Mr. Paul E. Kennedy: I'd say it's better. I'm very familiar with the comments of my predecessor. I think it's different.

What I've endeavoured—and this is not to make a contrast, because I just prefer to speak for myself—is to professionalize the relationship with them and to find out, if someone is not giving me information, whether it is just because they're being obstreperous or because there is a reason for it.

I think, actually, the Federal Court of Appeal ruling was effective, in the sense of saying that they have a legal right to do it. What I prefer to say, rather than saying the RCMP is being difficult, is that I have a legislative mandate that causes a problem for both of us in terms of, do I have a right or not? If I say I have a statutory right to that information, the same information that I might ask for, the Information Commissioner, or Privacy Commissioner, or the Auditor General can ask for and get it because they've got a statutory power. You either give it to me, or I'll issue a summons to you to appear and testify under oath, or I'll issue a subpoena to you to produce the documents. I can only use those powers if—if I call a public hearing, and those are extremely expensive things to do. So I need to have the power, as these other federal review bodies do, short of that.

So I'd say the relationship is productive, but it's hindered by the current legislative mandate, where if they have something they don't want to share because it's a confidence and they're concerned about disclosure, it's problematic.

To show how we do have cooperation, one of the serious issues in the public domain is clearly the police investigating the police, the issue of whether it is, and can be, impartial. I've had serious cases in British Columbia, currently in the paper, where I have outstanding complaints. In response to that, the police and RCMP in British Columbia—and there are some 7,200 RCMP officers providing 70% of the policing in B.C.—have worked with me on an ad hoc basis to create what we call an observer program, where we will go at first instance with them, if there is a police shooting or homicide, to look at it and make sure that the criteria and everything put in place are such that they are impartial. We're not to be there when witnesses are being investigated, but to make sure, though, that the team has no connection with the individual who did the shooting, that it is at the right level of experience, that the response is appropriate, and things of that nature. That is something new—the commissioner's directive to afford, to the extent that you can, full and liberal cooperation with us, subject to the statutory problems.

We've had issues in terms of policy. We have a concern about the use of tasers. We have a concern about the use of police dogs, in terms of the lack of clarity for the police about when you use these things in terms of the use of force. I've found cases where the taser is being used in stun mode, I think, as a come-along tool—and it is quite painful. So in those areas, they have sat down with us and are now giving us access to some of the operational policies and are getting some advice from us.

I do have a serious problem, though, with one issue that I think would be important to you. I do two things: I can make factual findings, and I make recommendations. Currently our factual findings are increasingly being challenged by the commissioner. If I find a credible complainant over an officer, I make certain findings based upon that. I have encountered in that one area a significant push-back in terms of their saying, we disagree with you. And there's a re-weighing of credibility, and things of that nature.

Again, the commissioner has taken the view, from her legal advice in terms of the interpretation of statute, that she can do that. To me, that is highly problematic in terms of the credibility of civilian review in this country, because under our model, if you complain as a member of the public, the complaint in the first instance goes to the RCMP. The RCMP conducts the investigation. The RCMP generally

makes the first ruling, and then only if the person is dissatisfied do they come to us. We do a review and we can have further information. It then goes to the commissioner, and if the commissioner substitutes or reassesses the findings, you're undermining the credibility of the organization, as you don't then have to follow our recommendations because you have disagreed with our findings.

● (1140)

The Chair: I just have to remind you we're dealing with the witness protection program today.

Mr. Joe Comartin: I was just about to bring him back to that, Mr. Chair. Thank you.

Specifically on the witness protection program and the act, and the restrictions in there on disclosure of information, you get specific claims when you're dealing with complaints about the witness protection program that they can't disclose the information, and they use the legislation as their basis for refusing to disclose information to you.

Mr. Paul E. Kennedy: I indicated that I have one right now where that is a problem. But they are actually working with us and trying to get the individual to waive...in other words, to get the individual to consent, and therefore, they would say there's no problem with the statutory prohibition because the individual has consented.

Mr. Joe Comartin: That is the individual who's in the program, not the complainant.

Mr. Paul E. Kennedy: In this case, the individual in the program is the complainant.

Mr. Joe Comartin: This investigation that's going on from this committee at this point, Mr. Kennedy, was triggered by a case in British Columbia. The family in that case want additional information. Have you had complaints of that nature; that is, from family members of victims of crimes committed by somebody who was in the program?

Mr. Paul E. Kennedy: I have had none brought to my attention of that nature. I can have our people review the files we have to see whether there is anything of that nature.

Mr. Joe Comartin: Would you do that and provide it to the committee, one way or the other—whether you find it or not?

Coming back, historically, since the act has been in force, has the claim that “we can't disclose” altered in any way, or have they consistently taken the same position as to what they can disclose to you or to your predecessors under this particular program?

Mr. Paul E. Kennedy: I can't tell about the past, because I haven't consulted with my predecessors.

But I think the case that went to the Federal Court probably brought to light that there may have been information that was not being shared—and maybe not identified as not being shared. It's like not knowing what you don't know. You get what you think is the relevant material, but if someone has held back information because they believed it was privileged or confidential or would damage an ongoing investigation, you may never see it. The assumption would be that you're getting all the relevant material.

That case, I think, threw light onto the idea that there perhaps is a concern there. The court ruled as a quid pro quo that the RCMP can claim their exemption, but they have to identify that they have information in respect of which they're claiming exemptions. That brought clarity to the problem.

• (1145)

Mr. Joe Comartin: How recent was that decision?

The Chair: We'll have to move on to the government side here right away.

Also, when you answer this question, what's the name of the court case?

Mr. Paul E. Kennedy: It was two years ago. I have the case here; it's in English and in French. It's the Federal Court of Appeal. It was heard in May 2005, with judgment in June 2005. I brought along English and French versions. They are published reports in the *Canadian Journal of Administrative Law and Practice*.

The Chair: And the name?

Mr. Paul E. Kennedy: It's just the Royal Canadian Mounted Police Public Complaints Commission v. Attorney General. The identity of the individual obviously is not disclosed.

The Chair: Right.

Mr. Comartin, did he answer your last question?

Mr. Joe Comartin: I just wanted to know when the decision was, so yes, he did.

Thank you.

The Chair: We'll move over to the government side now.

Mr. MacKenzie, please.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair.

Thank you, Mr. Kennedy and Mr. McNabb, for being here.

I only want to deal with the witness protection program, because that's what we're studying and that's what the researchers are trying to get the information on.

In your presentation to us this morning, you have indicated two particular complaints that pre-date the legislation, so I don't think they really have a great deal of effect upon what we're looking at. Would that be a fair assessment?

Mr. Paul E. Kennedy: That is correct.

Mr. Dave MacKenzie: Now, in that more recent time since the legislation, we've been told, I think, that there are upwards of 1,000 cases of people under the witness protection program, the majority of which are RCMP cases and some of which are for other bodies, provincial bodies. Dealing with the RCMP ones, which are the only ones you would have the complaints on—which would be, I think we were told, somewhere in the area of 600 a year since the legislation came in—is it a prevalent situation that you have complaints dealing with the witness protection program, or are they very rare?

Mr. Paul E. Kennedy: Just to make two points, I think the split in the numbers is 700 and 300, but to clarify, we wouldn't only be dealing with the RCMP. You are right in terms of that being where we have everything, but there may be people from the other 300 who

are introduced into the program, and to the extent that the RCMP would have anything to do with them, their conduct would be subject to a complaint.

I indicated that there were 27, I think, in the entire history, so clearly it's not prevalent.

Mr. Dave MacKenzie: Yes, exactly. I think that's my point. But some of the 27 actually pre-date the legislation itself, going back to 1988, correct?

Mr. Paul E. Kennedy: That is correct.

Mr. Dave MacKenzie: In addition, I think you've indicated that you've had nine reviews of the disposition by the RCMP—not you particularly, sir, but the organization. Would some of those nine also have pre-dated the legislation?

Mr. Paul E. Kennedy: Yes.

Mr. Dave MacKenzie: If I can ask you for a guesstimate—or maybe you have the correct answer—how many do we average per year?

Mr. Paul E. Kennedy: I think we've just had two since my appointment. I was appointed in October 2005, so if you do the math —

Mr. Dave MacKenzie: Is one a year kind of average?

Mr. Paul E. Kennedy: Yes.

Mr. Dave MacKenzie: It's not a major part of the complaint process.

Mr. Paul E. Kennedy: No.

Mr. Dave MacKenzie: Would it seem unreasonable to have a complaint when you consider the people we're dealing with? I'm not belittling them, but we're dealing with people who travel in criminal networks. From a police perspective, they are the people we need as witnesses. One per year is certainly not an exorbitant number of complaints.

Mr. Paul E. Kennedy: No. We do reviews on about 190 complaints per year out of the 2,000 that come through the door annually.

Mr. Dave MacKenzie: Okay, so it's half of 1% or less.

Mr. Paul E. Kennedy: Yes.

• (1150)

Mr. Dave MacKenzie: What would those complaints be about witness protection? Would they deal with misunderstandings or differences of opinion about money, by and large?

Mr. Paul E. Kennedy: Yes.

Mr. Dave MacKenzie: We're not talking about misconduct, particularly with the RCMP.

Mr. Paul E. Kennedy: If you're doing a statistical analysis, I think you're right. Clearly some have more serious allegations, and we have to look to see if the allegations are serious or not. It could be on whether or not you've improperly disclosed information about the individual. But the vast majority are what you would call commercial in nature—the understanding as to how much compensation a person will receive, and things like that.

Mr. Dave MacKenzie: Would you agree it is a normal situation, even in other commercial ventures, for half of 1% of people to disagree with the retailer on price, or whatever the case may be?

Mr. Paul E. Kennedy: Yes.

Mr. Dave MacKenzie: My last comment is that although we need to be concerned, from the perspective of your office this is certainly not a major function of the office.

Mr. Paul E. Kennedy: I agree with you on that point. The issue I put to you—and it's been part of my concern since my appointment as chair—is what is the profile of the commission? Who knows about it? Who knows what their rights are? We've been having outreach to various marginalized communities, whether they're aboriginal or new immigrants to the country. What is people's sense that “there it is and I should use it”, and are there any inhibitors?

Mr. Dave MacKenzie: But does that increase the number of complaints in dealing just with the Witness Protection Act? That's what we're studying.

Mr. Paul E. Kennedy: I can tell you that since my appointment there has been a 20% increase in requests for review. There's been an overall increase in complaints. That doesn't include your area, which is still a small one. I'm just saying there's a correlation between raising awareness and people using the process.

The Chair: I have nobody else on my list, but we can ask more questions.

Ms. Barnes, do you have another question?

Hon. Sue Barnes: First of all, Mr. Chair, I would like the case material you brought today to be given to the clerk so it can be distributed. We'd like to look at that case.

I'll also point out for the record that I think it will be a mistake if we try to minimize the number of complaints. The fact is that in 2005-06 there were only 53 cases nationwide under the witness protection program, so I would not like to see getting one or two from a very small body minimized as an issue. I just want to put that in perspective, because you're getting complaints on a much broader range that involves actions of the RCMP on everything. I also want to point out the very small pool that goes into the witness protection program. That is factually correct, and I think the way it was phrased a couple of minutes ago might be misleading, as if there were thousands of cases to take from, and that's not true.

On your final page you list areas where, if you had a mandate that had more teeth or more investigative power, it would assist you with witness protection. Perhaps you would like to go over some of those specific points.

My final question is whether or not you think the RCMP Act itself, with the prohibitions on disclosure from RCMP officers, in any way inhibits your work. I'm not advocating for wide-open disclosure, obviously, but I'd like to have that on the record.

Mr. Paul E. Kennedy: If you look at the list of powers I pointed out here, the challenge if you have a statute that doesn't have statutory prohibitions in terms of disclosure of information, disclosing directly or indirectly the identity of people in the program...clearly there is a very high public interest in the RCMP protecting those people.

•(1155)

Hon. Sue Barnes: Absolutely.

Mr. Paul E. Kennedy: And that will not be given way to unless there is a statutory requirement for them to do so.

So what you have to do is provide a statutory vehicle that says you have to provide that, and then conversely, you have to put safeguards in place that say our access does not mean public access.

And by the way, as for the powers I'm asking for, you'll find exactly that same language in the CSIS Act for national security materials—access to everything except cabinet confidences. I think even the Auditor General can access cabinet confidences.

For a positive obligation on an officer to account for his duties or actions, currently under part VII, public complaints, the officer has no obligation to speak to us. He has no obligation to speak to the RCMP officer investigating the complaint. And the practice varies. I've seen officers—We have this complaint and we sit them down and say, just as you would do almost, unfortunately, with a criminal, “By the way, you have the right to remain silent. You don't have to provide any answers”, which I find remarkable in this day and age.

So I'm saying you have to create a positive obligation—you have unusual powers—to answer the questions that are put to you, otherwise we never know how the police are discharging their functions. That's why it should be there. So if you are doing any investigation to any program, it doesn't matter what it is, tell me, what did you do?

And I said you have to enlarge the scope of the review for retired officers or non-officers, because right now if someone retires before a complaint is filed, they're not subject to a part IV complaint. They're not even subject to a disciplinary complaint under part IV or part VII—none.

The nature of policing has changed as well. There are a good 5,000 or 6,000 civilians in the RCMP now—not civilian members, public servants. If you are doing a proceeds of crime case, you might need an accountant. So to get the true picture you have to find out from other people what they are doing, not to punish them but so that you can have a proper factual basis.

I said a new audit power. Ours is complaint-driven, so a specific complaint then constitutes the trigger to go and do an inquiry. If you really want to find out if the program is healthy, what you have to do is a periodic review. What are the national standards? How are they being trained? How are they used? Is it being properly applied or not? That does not exist currently. If I launched a complaint of that nature, because I can launch some complaints, the first thing I'd run into is, “We can't give it to you because it would disclose the identity of all these 700 other people who are part of the program.” So you'd be stopped in the water before you even started.

There are things beyond the work we normally do as a commission, which is complaint-driven, and what we think is appropriate to look at. There may be issues that come up with the minister. It may be helpful for the minister to say, "Well, I want to turn to that vehicle over there. It's a statutory vehicle. I want the commission to go and look at that and bring me back a special report." And the minister then could table that with a committee of Parliament, because there is information you cannot get because it will be classified. Someone has to look at it. If no one is looking at it, nothing happens.

And then I pointed out that there have to be maybe two reports—classified and non-classified.

The Chair: This round is just about done. Have you anything else?

Mr. Paul E. Kennedy: I think I answered all the questions that were asked of me there.

Hon. Sue Barnes: Yes, thank you.

The Chair: Okay.

Monsieur Ménard, did you have a further question? You have not indicated.

Mr. Serge Ménard: Not really.

The Chair: No? Okay.

Mr. Norlock.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): May I have just a succinct answer? As precisely as possible, how many cases have you investigated since the legislation was enacted?

Mr. Paul E. Kennedy: I don't have that number. I can get it for you.

Mr. Rick Norlock: Thank you.

The Chair: Okay.

Are there any further questions from anyone? Mr. Comartin.

Mr. Joe Comartin: Mr. Kennedy, in terms of who can make a complaint—that is, who you can entertain a complaint from—again, I will come back to the B.C. case. If the family members wanted more information—or let's assume they were complaining about this individual ever having been allowed into the program. So if they wanted to make a complaint of that nature—"We don't believe this person who ultimately killed one of our family members should have been allowed into the program"—would you entertain that complaint?

Mr. Paul E. Kennedy: Currently under the legislation anyone can complain, including a third party. So if the family wanted to complain about the program or activities, they could do so.

Mr. Joe Comartin: I just want to pursue that a bit. So their lawyer, who has been quite upset by this, could have complained?

Mr. Paul E. Kennedy: Yes. The legislation says any person can complain. It doesn't require that they be particularly involved in some things. That will raise the issue, though, of what we can access, depending on what the complaint was and what we could get to respond to it.

Mr. Joe Comartin: Going to that point of what you can access, the complaint is of a nature that—they're saying this to you—they

want you to conduct an investigation because they don't think this person should ever have been allowed into the witness protection program. Are you limited in what you're going to be able to get access to?

Mr. Paul E. Kennedy: We'd have to look at whether or not the complaint dealt with the conduct of a member, because that's how the statute is currently crafted. Anyone in the country can complain. It has to be about the conduct of a member. So what was the conduct in question? We'd have to tie in that conduct to what you're talking about. Letting a person into the program—

Mr. Joe Comartin: Let me interrupt you in that regard, then. They don't know who the individual RCMP officer was who made the decision to allow this person into the program. Are you going to be able to get access to that information for them?

Mr. Paul E. Kennedy: Yes, we do have cases where they talk about "unknown members", and we'll work with the RCMP. They would do it in the first instance because they have to respond in the first instance. They would identify who the people were. Yes, we've had that. We've gone back and identified who the people were.

● (1200)

Mr. Joe Comartin: All right. Do you see any other constraints that would be put on you in terms of conducting that particular type of investigation?

Mr. Paul E. Kennedy: No.

Mr. Joe Comartin: I want to go to the other end of the spectrum where, under the act, the authority is in effect to dismiss somebody from this program. You have a complaint, and again the same type of fact situation. There's been a serious injury or even a murder of a family member. The family member or somebody else from the public comes forward and says they want you to find out why this individual has not been kicked out of the program. Would you entertain that complaint?

Mr. Paul E. Kennedy: We could, because an officer would be running the program. They would assign responsibility for that, and we'd have to know what facts there were and whether or not the member considered those facts—they may or may not have—and if they did, whether or not they exercised their decision-making pursuant to their policies and procedures. It depends on how it's fashioned, but we could look at some of that.

Mr. Joe Comartin: Going back to the information I'd asked for before, I would like to know whether you've had complaints historically in those two areas. What was the screening process, and why was somebody admitted when we don't believe they should have been, and why weren't they dismissed when they should have been?

Mr. Paul E. Kennedy: I have no personal knowledge of facts. It's more the case of somebody wanting to get into the program and not getting in, or some individual who was put out of the program as opposed to a third party complaining about that. I don't believe so. I could find out.

Mr. Joe Comartin: If you get any of that information, you'll provide it to the committee?

With regard to the point you made earlier, I think in response to Mr. MacKenzie's question about the—I don't want to say public relations around it or promotion of a program—general public education of availability of this, what do you do in that regard? I'm thinking again specifically not of individuals who might be in the program or who wanted to be in the program, but individuals from society who are concerned about how the program is operating.

Mr. Paul E. Kennedy: To my knowledge, we're doing nothing vis-à-vis the witness protection program. I'm endeavouring at this stage to raise the profile of the commission itself so people know it's there and can generally hear complaints we can conduct on their behalf. Because we are a small commission in terms of resources, we've looked at the most vulnerable and marginalized right now, who we think are aboriginals and newer immigrants to this country. We're now trying to put our products into nine different languages beyond English and French. So clearly we haven't targeted this as an audience. What we try to do, obviously, is make active use of our website, but part of your challenge is that it requires people to be computer literate and to use the website, and for us to be picked out of that spectrum of dust that's there. Everyone's on the web these days.

So that's the challenge we have.

The Chair: Your five minutes are up. Are you just about finished?

Mr. Joe Comartin: I have just one quick question in terms of facts.

If you ascertain that you've had complaints from individuals who either wanted to be in the program or were in the program, and if you have anybody outside that, will you also indicate in a summary fashion what the results were of those complaints?

Thank you, Mr. Chair.

The Chair: Thank you.

I have only one more name on my list of questioners. Mr. Volpe, you had a brief question?

Hon. Joseph Volpe (Eglinton—Lawrence, Lib.): Thank you, Mr. Kennedy.

I'm not sure I heard you correctly. A few moments ago, you indicated that while people are not compelled, not required, to speak to you—I thought you made an editorial comment. You said it's kind of difficult to imagine that this would still be the case in this day and age. First of all, did I hear you correctly?

Mr. Paul E. Kennedy: Oh yes.

Hon. Joseph Volpe: Why is that such a shock to you, that people would not be compelled to talk to you if they didn't want to?

Mr. Paul E. Kennedy: Because if you're going to have civilian oversight of policing, and we've given police extraordinary powers, then I think there is a quid pro quo in terms of accountability for those powers.

Historically, as members of society, we enforced public safety. Then we moved to institutionalize policing, and we've given police

powers that citizens don't have. You, as a citizen, can't intercept private communications. You, as a citizen, cannot break the law to enforce the law as per subsection 25(1) of the Criminal Code. There are all sorts of things out there that are unusual powers. They get to use deadly force, if need be, to administer the law. These are unique powers. If you have them, you have to account for them.

What I'm saying is that an officer then has to account, but conversely, the officer has to be given protection. So he's accounting, because I have to find out if there is a behaviour problem with the individual officer, or is there a systemic problem or a lack of clarity, and so on?

The public, to have faith in the powers given to police, has to have a sense of transparency and accountability. So when I ask what you did and how you did it, I will never find out if it's a systemic problem or a policy or training problem unless someone tells me what they've done and why.

But as I say, the officer has to be protected. He cannot be used in any other administrative procedures and so on. We should be able to make remedial recommendations to improve the officer's behaviour and ensure that others don't have to in the future.

But these are unusual powers people have.

● (1205)

Hon. Joseph Volpe: I agree with you.

The officer in question might quite legitimately say, "That's fine. I'll give you all the information you need, and I'll be protected." What kind of guarantee does the public have that your recommendation will have the same power of enforcement that, let's say, a judge's decision would have in court?

Mr. Paul E. Kennedy: Well, there's a difference between us and judges, and I say this as a former prosecutor. The rules are very tight if you want to do a criminal prosecution. There are rules of evidence, there's admissibility, and there's proof beyond a reasonable doubt. If our focus is remedial, we get to hear an awful lot more and see an awful lot more that would not necessarily be legally admissible but would be relevant. So you don't apply the same standard.

In terms of recommendations, with our key decisions, we're taking them now and depersonalizing them in the sense of removing the names of officers and witnesses, and we're putting that up on our website. So if people can get out there and look at it, that's how we think we have to bring pressure, through transparency.

The Chair: Thank you very much.

I'd like to thank our witnesses this morning, Mr. Kennedy and Mr. McNabb, for coming and giving us this information.

We're going to suspend for a moment and move in camera. Thank you.

[Proceedings continue in camera]

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