House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 012 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Thursday, April 15, 2010

Chair

Mr. Ed Fast

Standing Committee on Justice and Human Rights

Thursday, April 15, 2010

● (1105)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order. This is meeting number 12 of the Standing Committee on Justice and Human Rights. Today is Thursday, April 15, 2010. Members, you have before you the agenda for today. We're continuing our study on organized crime in Canada.

We have with us a number of witnesses to help us with our review. First of all, we have the Public Prosecution Service of Canada, represented by François Lacasse, as well as Yvan Poulin. We also have FINTRAC, with Hélène Goulet, Paul Dubrule, Denis Meunier, and Chantal Jalbert. Welcome to all of you.

I think you've heard what the process is. Each organization has ten minutes to present, and then we'll open the floor to questions from our members.

Who wants to start? Why don't we start with the Public Prosecution Service of Canada? Mr. Lacasse.

Mr. François Lacasse (Senior General Counsel, Supreme Court Coordination, Public Prosecution Service of Canada): *Bonjour.* Good morning.

I am François Lacasse. My colleague Maître Yvan Poulin and I will split our presentation. I will make a brief overview of the law of disclosure, and my colleague will address the issue of disclosure in the context of a mega-case against organized crime.

In R. v. Stinchcombe—a case that you have heard of before, the 1991 leading case regarding disclosure obligations in criminal cases—the Supreme Court of Canada stated that there is a general duty on the prosecution to disclose all relevant information in possession of the crown. Prior to Stinchcombe, the disclosure procedures varied across the country from region to region, even from prosecutor to prosecutor. Basically, Stinchcombe changed all that by crystallizing a unified approach to disclosure.

The prosecution's disclosure obligations are a component of the right of every accused in Canada to make full answer and defence, a right that, as you know, is protected by section 7 of the Canadian Charter of Rights and Freedoms. Many rules govern disclosure, but I will address only the few key ones that are necessary to understand the impact of disclosure on prosecutions involving organized crime, which usually qualify as mega-cases.

The first key rule, the most important one that governs the nature of what must be disclosed, is the concept of relevance. In short, the courts have taken a very generous view of what relevance is. It is not restricted to evidence that can be adduced in court. It includes information that may be useful to the defence, whether inculpatory or exculpatory. If, in short, the information may have some use to the defence, it is relevant and thus must be disclosed. For prosecutors, it is basically defined in a negative way: only what is clearly irrelevant should not be produced, and in case of doubt, the case law tells us that we must err on the side of disclosure.

Finally in that regard, I should mention that information that is privileged need not be disclosed. This, in the context of organized crime, comprises essentially information protected by the privileges protecting informers' identities and investigative techniques.

As to timing, the obligation is triggered by a request for disclosure made by the accused or made on his behalf. Disclosure should be made before the accused is called upon to elect a mode of trial, or in summary cases, before the accused is requested to plead. That's very important as well in the context of megacases.

The law does not provide for a universal mode of disclosure. Although providing paper copies of the material is the means most resorted to, it is not the only form in use. Electronic format is a useful tool, especially in megacases, as will be discussed by my colleague.

Finally, costs and resources necessary to fulfill disclosure obligations are borne by the state. This aspect, you will guess, is also very important in the context of megacases.

In conjunction with disclosure, another very crucial factor must be taken into consideration when assessing the complexity of current criminal prosecutions; that is the challenges made by the defence to the investigation itself pursuant to the charter. This possibility entails that before assessing or determining guilt or innocence a criminal trial may and often is preceded by pretrial motions, the purpose of which is to determine the investigators' actions and to scrutinize those actions to determine their legality and constitutionality. In case of a charter breach, the law provides for remedies that can be fatal to a prosecution, including exclusions of evidence as well as stays of proceedings.

The meeting of these two aspects of modern criminal trials in Canada, disclosure and investigative review, has fundamentally changed the paradigm of criminal prosecutions in Canada. They are now focused basically on process.

That being said, I would submit nevertheless that Stinchcombe disclosure has undoubtedly served to promote fairness, transparency, and more accurate outcomes in criminal trials. However, disclosure comes with a price. It poses very significant challenges to the prosecution of organized crime cases, as will be discussed by my colleague, Maître Poulin.

● (1110)

[*Translation*]

Mr. Yvan Poulin (General Counsel, Quebec Regional Office, Public Prosecution Service of Canada): Thank you, Mr. Lacasse.

Whenever we are dealing with organized crime, that automatically means there will be a mega-case. The ultimate objective of the more and more frequent investigations into organized crime is to dismantle the organizations and, more importantly, to neutralize the leaders. Over the last few years, experience has shown that the leaders generally operate by surrounding themselves with a buffer zone, such that detection and evidence-gathering involving them are very difficult.

It is thus that the gathering of sufficient evidence generally, and more often than not, requires very lengthy investigations involving the use of a whole gamut of tools, that go all the way from simple shadowing to electronic surveillance, including work by undercover agents. The use of these investigation methods, given their nature and the duration of the investigations themselves, will necessarily generate a tremendous volume of evidence that must be collated, classified and disclosed in accordance with the principles Mr. Lacasse has just outlined.

The challenge therefore is to respect the principles set out in the Stinchcombe decision in a context in which the volume of evidence is, in every case, absolutely gigantic. I am the prosecutor responsible for the Project Colisée that you have probably heard talk of and the aim of which is to deal with the Montreal mafia. The Colisée case in my view very well illustrates the volume of evidence that can be gathered during the course of an investigation.

Between 2002 and 2006, the RCMP and other police forces led an investigation targeting the Montreal mafia. During this period, close to 1.2 million conversations were intercepted by the police. More than 50% of these 1.2 million conversations took place in a language other than French or English, such that we had to call upon translators during the entire duration of the investigation. We used the services of more than 30 translators. Approximately 8,000 conversations were chosen and transcribed in order to be included in the disclosure and, in fact, in the evidence adduced in the proceeding. A large number of these conversations, often some of the most incriminating with regard to the leaders, were of poor sound quality, for having been picked up by microphones placed in very noisy places, which only added to the complexity of the whole affair.

On top of electronic eavesdropping, approximately 120,000 videotape hours were filmed surreptitiously and had to be disclosed. At the height of the investigation, more than 100 investigators were involved in one way or another, several of them in the preparation of the disclosure. Three public prosecutors were assigned full time as legal advisors during the investigation. Towards the end of the investigation, the number of prosecutors assigned to the Project Colisée had climbed to 10, in preparation of the legal phase.

As you are aware, in November 2006, following all of this investigative activity, the police proceeded simultaneously to the arrest of 101 persons. We disclosed to some of the accused most heavily implicated the equivalent of more than a million pages of documents in the days following the arrests.

In the case of investigations of this level, the objective looms large. The challenge is considerable. Indeed, the challenge consists in disclosing a very large volume of evidence in as complete a fashion as possible and in the least possible amount of time. Given the volume, you will not be surprised to learn that we made use of the electronic format, that offers several advantages and, more particularly, that is now recognized by the courts as being a method we are free to use for the disclosure of evidence. Here are some of the advantages: costs are considerably reduced, because disclosure is done electronically; the research capability both for the defence and for the Crown and the police, are much greater; the volume is obviously smaller and electronic documents lend themselves much better to disclosure in the case of phone-tapping and electronic surveillance.

● (1115)

We have the tool, in other words electronic disclosure. During the disclosure, we followed what I call three guiding principles, with a view to disclosing the evidence as efficiently as possible. These principles are foresight, focus and management.

We talk of foresight in the sense that disclosure must be planned for as soon as the investigation begins. It is not at the end of the investigation that we should be asking ourselves how to proceed with regard to those elements to be disclosed. If we do not plan, the quantity of information is such that it will be impossible to disclose in an opportune and readable way. As you are perhaps aware, we now assign prosecutors in order for them to help the investigators plan the disclosure of evidence as pieces of evidence are gathered. The policies of the Public Prosecution Service of Canada recommend this practice.

The second guiding principle is focus. What we tell investigators and what Crown prosecutors attempt to do is to restrict the breadth of investigations and to avoid what I call a scattered approach. It is inappropriate for the police to carry out an investigation that generates a useless volume of evidence and that does not allow for the attainment of the set goals.

The third principle is management. In order to fulfil the requirements, disclosure must be understandable and readable. One must be able to sort it out. Therefore, we classify and categorize the pieces of evidence according to their usefulness, and we do so from the very start.

In conclusion, I would say that the healthy management of the disclosure of evidence pertaining to organized crime requires the use of electronic media. It also requires the respect of the guidelines that I have just outlined. Our experience, with the Colisée case and others, has shown us that this is in the realm of possibilities. It is however evident that this requires important resources and that these resources must be used very judiciously.

[*English*]

The Chair: Thank you.

We'll move now to Hélène Goulet. You are presenting on behalf of FINTRAC.

Mrs. Hélène Goulet (Deputy Director, Strategic Policy and Public Affairs and Chief Review and Appeals Officer, Financial Transactions and Reports Analysis Centre of Canada): Thank you, Mr. Chairman.

I would first like to convey the regrets of the director, Jeanne Flemming, who is unable to be here today.

I would like to introduce Chantal Jalbert, who is the assistant director of regional operations and compliance; Denis Meunier, the assistant director of financial analysis and disclosures; and our general counsel, Paul Dubrule.

Let me now turn to our mandate and what we do. Our mission is to contribute to the public safety of Canadians and to help protect the integrity of Canada's financial system through the detection and deterrence of money laundering and terrorist financing activity. FINTRAC was created by the proceeds of crime money laundering legislation, in 2000, as an independent agency reporting to Parliament through the Minister of Finance. The Department of Finance is the legislative and policy lead for the government on Canada's regime against money laundering and terrorist financing activity. In 2001, after 9/11, the Anti-terrorism Act added terrorist activity financing to our mandate.

FINTRAC is Canada's financial intelligence unit. We have slightly over 300 staff, and we have three regional offices in addition to our main headquarters.

We are a unique agency in Canada. Our mandate is to analyze financial transaction information and disclose certain information to investigators within the thresholds that our act provides. Our act stipulates that we can only release information to police where we have reasonable grounds to suspect that the information would be relevant to an investigation or prosecution of a money laundering or terrorist activity financing offence. Where we have reasonable grounds to suspect that the information we can disclose would be relevant to threats to the national security of Canada, we must disclose it to the Canadian Security Intelligence Service.

In short, we provide financial intelligence leads to law enforcement and national security investigative agencies. We are a resource for every police department in Canada, with the unique ability to follow the criminal money trail across the country and around the world. We also disclose information to the Canada Revenue Agency, the Canada Border Services Agency, and the Canadian Communications Security Establishment when specific statutory tests in relation to these agencies are met. Finally, we may disclose information to foreign financial intelligence units.

To give you the most accurate picture of our mandate, it is worth noting what FINTRAC is not. We are not an investigative body, and we do not have powers to gather evidence, lay charges, or seize and freeze assets. FINTRAC does not investigate or prosecute suspected offences. Rather, we are an analytic body that produces financial intelligence to be disclosed, if appropriate, to help further investigations conducted by law enforcement and security agencies.

● (1120)

[*Translation*]

Daily, FINTRAC receives reports on several kinds of financial transactions from a variety of businesses, what we call reporting entities. The most prominent of these entities are the banks and we also receive reports from casinos, credit unions, life insurance companies and money service businesses, not to give you an exhaustive list. We are authorized by law to receive suspicious transaction reports and reports of attempted suspicious transactions, large cash transaction reports of $10,000 or more, casino disbursement reports and reports of international electronic funds transfers of $10,000 or more.

Over the years, we have built a very large database of transaction reports, and through sophisticated computer programs and the skills of highly trained analysts we can analyze this data in combination with information from other sources, such as law enforcement databases, commercially or publicly available databases and, sometimes, information from foreign financial intelligence units. Simply put, we take in financial transaction data, combine it with other information to which we have access, analyze all this and disclose our analytical product in the form of a case disclosure. Without getting into the tradecraft of what we do, we specifically look for financial transactions and patterns that make us suspect money laundering or terrorist activity financing.

As you can imagine, the movement of illicit funds is often a well-hidden and complex affair, involving hundreds, sometimes even thousands of transactions, as well as dozens of individuals and companies. Sometimes, crime organizations will use over a dozen different financial institutions across the country and around the world to launder their profits. As you can see then, this is far beyond the resources of any single police force to track, hence the need for FINTRAC.

As we progressed from the start-up development phase to a mature experienced organization, we have been able to increase considerably our output of financial intelligence. FINTRAC's most recent annual report, tabled last fall, summarizes a number of the criminal investigations that were assisted by its financial intelligence during the year. One of the 556 cases disclosed was an international investment fraud which involved thousands of transactions and hundreds of millions of dollars.

[*English*]

The increase in output in the last year continues a trend that began when we became operational. We are now able to produce more financial intelligence more quickly than at any time in our past. Demand for our financial intelligence is growing, especially when police agencies are investigating criminal networks with many possible suspects. Following the money trail has become an important part of investigative work. Financial intelligence sheds light on the transactions that are sometimes related to criminal activity. It can assist investigators in making decisions about where to seek evidence, whom to include or exclude as part of the investigation, how the targets are connected, and where the assets may be hidden. This is true of investigations of fraud, drug trafficking, and many other criminal offences in which proceeds of crime are involved.

The true measure of our success is and always will be our ability to add to the effectiveness of those who are investigating serious crimes.

There is also increasing demand for strategic intelligence. As we have matured and gained experience, we have been able to expand our capability to do strategic analysis. By explaining trends in money laundering, looking at the big picture, we can inform our reporting entities so that they are positioned to provide the best front-line detection and deterrence. An example is furnished by a recent report we did for the banks—it is on our website as well—entitled *Money Laundering and Terrorist Financing Typologies and Trends in Canadian Banking*.

To conclude, I would like to turn to a key issue for us, the protection of privacy.

Our act was carefully crafted to provide the highest possible protection for personal information while also making it possible for some information to be disclosed to law enforcement. We are the only federal agency whose mandate includes an obligation to ensure the protection of personal information under its control. Our mandate entrusts us with a considerable amount of personal information. Protecting it is a responsibility that we take very seriously. Our security measures are rigorous and thorough, our data banks cannot be accessed by any other outside body, and the act provides for serious criminal penalties to be applied to the unauthorized disclosure of information. As you may know, our legislation also provides for a mandatory review every two years by the Privacy Commissioner of our operations in terms of privacy protection. The first review, completed last fall, found that we are protecting the information very well.

Finally, you will have received, at the end of my statement or maybe afterwards, a chart that illustrates our business process. I realize that I have already taken up enough time, but we would certainly be more than willing to come back to explain that business process to you and perhaps illustrate how we build our cases.

Thank you, Mr. Chair.

● (1125)

The Chair: Thank you to all of you.

We'll move on to questions now.

Mr. Murphy, you have seven minutes.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chair, and thank you, witnesses.

I want to ask about disclosure first, Monsieur Lacasse and Monsieur Poulin. We hear that out there in the legal community, there is some work going on of a collaborative nature between the defence bar, the Canadian Bar Association, the prosecutors' association, and so on to, if not codify this, at least come up with protocols for best practices with respect to complying with disclosure requirements under Stinchcombe.

First of all, my question is whether that is taking place. As has been said by a number of people here, it would probably also be in the defence counsel's interest to have an idea of what the protocol is or what the nature and breadth of disclosure and timeliness for disclosure should be. You want to avoid arriving at trial and hearing, "Oh, I didn't know you had that," and having a whole trial adjourn forever because of some pyrrhic document search.

Has that been happening, to your knowledge, among other associations?

Second, and perhaps more germane to our work here, do you see any way we can codify this and somehow take the elements of Stinchcombe and put them into some form of a law, in the broadest of bases, that would help?

Mr. François Lacasse: To answer your first question, yes, I have been informed that there is work being done by various associations regarding codification of disclosure. Neither Mr. Poulin nor I have been directly involved in that work. We are doing more work in the trenches. As you may have understood from our presentation, what we have tried to do is work with the existing rules to make the system work.

That is the first point. In relation to your second question, as to what kind of policy, I'll resume your question in that direction.

As crown prosecutors, it is not our bailiwick, if I may say so, to determine what kind of policy should be adopted and whether it would be in the best interest of the administration of justice to basically codify what the case law has been telling us for the last two decades, almost. We thought that the usefulness of our intervention would be to show that by developing policies and by insisting on cooperation among the investigative agencies, even in major cases involving organized crime, it is not impossible to comply with disclosure principles.

Mr. Brian Murphy: I understand your reticence to get into policy, or God forbid, politics. I understand. But you're a lawyer. You deal with this every day. You read decisions. I'm asking you to comment not on what it would look like but on what it could look like.

It's a very general, amorphous concept, this concept of relevance. What is and what isn't? Beauty is in the eye of the beholder. Relevance is in the eye of the framer. Can it be codified, or can it be made part of a policy or protocol?

● (1130)

Mr. Yvan Poulin: Parliament has decided to codify various common law principles in the past. We've seen that. The sentencing aspect of criminal law has been codified in sections 7, 18, and the following sections of the Criminal Code. It's possible to do that. Common law has been codified in the past.

Is it necessary to do it for the disclosure aspect of criminal law? It is for Parliament to decide and for the Department of Justice to study the feasibility of that.

Mr. François Lacasse: If I may add, Parliament has already legislated in relation to disclosure regarding sexual assaults. There are provisions in the Criminal Code that have been enacted following decisions rendered by the Supreme Court of Canada that have been declared constitutional. So yes, it can be legislated.

Mr. Brian Murphy: Just to follow up, you said that other groups are working on this. Our staff might be interested in getting access to that. There's an annual criminal law conference that involves prosecutors and defence attorneys. It isn't the Canadian Bar Association. Is that what we're talking about? What are you talking about?

Mr. François Lacasse: I am aware that the Department of Justice is doing some work and is consulting with other stakeholders. Exactly the kind of work the Department of Justice does.... We're independent now. We're the Public Prosecution Service of Canada. I am not aware, exactly, of who they are consulting or of what kind of work they're doing.

Mr. Brian Murphy: We could make our inquiries, I suppose.

Briefly, this is just a quick run-through of questions for Madame Goulet. How many analysts do you have? You're very careful to say we don't investigate, we analyze, but how many analysts would you have? And you talk about reports. That's the bodies, like banks, etc., reporting to you, right? There's an obligation to report. In a general sense, how many would you be dealing with on a daily, monthly, weekly basis, whatever timeframe you're comfortable with? How many employees do you have? How many analysts, that is? What's the volume?

Mrs. Hélène Goulet: I'll ask Mr. Meunier to talk about the analysts and Madame Jalbert to talk about reporting entities.

Mr. Denis Meunier (Assistant Director, Financial Analysis and Disclosures, Financial Transactions and Reports Analysis Centre of Canada): Thank you.

We have about 40 to 50 tactical analysts and probably about 10 to 15 people working on strategic analysis in FINTRAC.

If you want an explanation, tactical intelligence is basically looking at specific cases, names, addresses, that kind of thing, information that would form part of a case that we would disclose to police, as opposed to strategic intelligence, which would be looking at trends and patterns and no names mentioned, just very generic typologies.

Mr. Brian Murphy: And the number of reports?

Mrs. Hélène Goulet: Do you mean reports coming in to us from our reporting entities?

Mr. Brian Murphy: Yes. You used the term a report from a bank, etc. There's a long list here. Reporting entities report. I've just taken the verb from the....

Mrs. Chantal Jalbert (Assistant Director, Regional Operations and Compliance, Financial Transactions and Reports Analysis Centre of Canada): Thank you.

As part of the anti-money-laundering and anti-terrorism-financing act, reporting entities covered by our legislation must provide reports to us, reports of the kinds of suspicious transactions or large cash transactions. How many? Last year it was 24 million.

Mr. Brian Murphy: Twenty-four million. And there are 40 people dealing with 24 million reports?

Mr. Denis Meunier: We have systems, of course, that help us do this analysis. We receive about 6,500 reports a day, and as my colleague has mentioned and as Madame Goulet has mentioned, there are a variety of them. They include suspicious transactions, large cash transactions, cross-border transactions, international wire transfers—international wire transfers are the largest body of information we receive—and casino dispersement reports, etc. We have systems that allow us to review these reports.

Mr. Brian Murphy: Just briefly, 6,500 a day is not 24 million, but maybe we'll come around to that again.

The Chair: We'll come back to that again.

Mr. Denis Meunier: Sixty-five thousand a day.

Mr. Brian Murphy: So that is 24 million.

The Chair: All right, we'll move on to Mr. Ménard for seven minutes.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you, Mr. Chairman.

Frankly, we have before us several witnesses with whom we could talk for days and days. For my part, I practiced criminal law for more than 25 years before the Stinchcombe decision. This is a little known fact because I was elected for the first time in 1993. I intend to put but a few questions to you, but I would have liked to have been able to ask you a hundred questions, including on the Stinchcombe decision, of which I had only limited knowledge, but that I had already heard talk of.

One thing is certain, the Stinchcombe decision brought about a considerable increase in the cost of police investigations, even if I understand why it came about. If I am not mistaken, this principle came to us from England, following the case of the Guildford Four.

● (1135)

Mr. François Lacasse: That certainly is one of the elements that influenced the court, but the disclosure principle could also be traced back to the civil domain.

Mr. Serge Ménard: Yes, but it is based upon that incident and the investigation that followed that this was legislated in England. There have therefore been decisions that the Supreme Court relied upon.

Could you give us an assessment of this tremendous increase in the costs of police investigations that might be compensated for thanks to more frequent guilty pleas, given the clear evidence that can more often bring lawyers to file guilty pleas?

Mr. Yvan Poulin: I believe that a good management of the evidence and its disclosure at the outset have this effect. Without going into the details, because not everything has yet been tallied, for 101 accused persons, I believe that approximately 70 files are now complete, as we speak. The disclosure of organized evidence has had this impact. The accused see the evidence held by the prosecution. This evidence is organized so as to be readable, despite its large volume. This is what convinces those accused that, in the end, the best thing to do is to admit their guilt and negotiate in other areas, for example pleas and sentences. The effect is most certainly direct.

Mr. Serge Ménard: We only have seven minutes each.

If I am not mistaken, this great initiative began in England. The Supreme Court drew its inspiration from English decisions. Are there many countries that do this? I imagine that Commonwealth countries and those of British tradition have adopted this process: Australia, New Zealand, the United States. But as for the other way of doing things, is there an equivalent, in France or in Germany?

M. Yvan Poulin: The international aspect falls under my colleague's area of expertise.

Mr. François Lacasse: There is a general move in this direction and I would point to the case of Italy which, in the 1980s, experienced the very first major trials brought against the Italian mafia. As you know, Italy functioned within the framework of a system that was inquisitorial in nature. Based on the experience of these trials, the government completely transformed its criminal process, rendering it more accusatorial in the early 1990s. That of course brings with it consequences, namely the disclosure of evidence and a greater role for the prosecuting attorneys, but also for the defence. You are probably aware of the fact that France is at present considering abolishing the role of the *juge d'instruction* or examining magistrate. As recently as last week, Haitian attorneys contacted me to sound me out and to inform me that they too are considering moving to the accusatorial mode, which necessarily means an evidence disclosure system of the type we now have.

Mr. Serge Ménard: In summary, this is a worldwide trend and we must learn to live with it. The administration of justice has become incredibly complex compared with when I started practicing.

I would like to move now to FINTRAC, that intrigues me. We hear talk of, and there is certainly use of, certain money laundering techniques. A rather famous lawyer made no secret of it. He was probably one of the richest in the profession. He boasted about his luck at the casino. Every time he went on holiday, he always went to the casino and came back with hundreds of thousands of dollars. Everyone saw through his little game and imagined him buying tens of thousands of dollars' worth of chips and gambling. After a bit, he would go back to the cashier and have the casino issue him a cheque. What can you do in that type of situation?

● (1140)

Mr. Denis Meunier: It so happens that the information we get is provided by the casinos, that are required to report on the purchases that gamblers can make. Furthermore, since September 28, 2009, we have been receiving the casino disbursement reports. This is an instrument that now allows us to collate the purchases, the disbursements and also to analyze them. With regard to foreign countries, it is always possible for us to obtain intelligence. If the police has information and willingly provides it to us, it is always possible for us to obtain intelligence with regard to investigations that could be undertaken in another country.

Mr. Serge Ménard: You realize that in today's world there are casinos all over the place. Numerous countries consider that it is a way for them to make money. There are casinos aboard ships. Are your relations as broad as that?

Mr. Denis Meunier: At present, we have with our international partners 62 memorandums of understanding relating to intelligence sharing and this allows us to extend our detection network to the international scale.

[*English*]

The Chair: Thank you.

We'll move on to Mr. Comartin for seven minutes.

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

Let me start with FINTRAC, just to follow that up.

Mr. Meunier, you told us about the 24 million reports you get a year. Does that include the international ones?

Mr. Denis Meunier: That includes the international wire transfers.

Mr. Joe Comartin: In terms of the analysis that you do, do you break it down? I'm asking whether it is your office, Ms. Goulet, that breaks it down between what you suspect is terrorist financial activity versus what you suspect is crime or organized crime. Do you break that down yourself, or do you leave that up to police forces?

Mr. Denis Meunier: The information that comes to us is basically on financial transactions, and we have the capability to make judgments about those financial transactions. And when we reach reasonable grounds to suspect money laundering or terrorist financing, there are different patterns that are used in those that we have come to recognize and that other financial intelligence units across the world have more or less agreed are red flags, patterns that are associated with terrorist financing and/or money laundering, but to be frank with you, there is a commonality between those methods in many cases.

If you take a look at our annual report last year, you'll see that there's a good proportion of cases we've disclosed to police that include both terrorist financing and money laundering.

Mr. Joe Comartin: If I can pursue that, when you transfer that information to police, do you say you believe this is combined, or it's exclusively terrorist-originating, or exclusively straight criminal-originating?

Mr. Denis Meunier: We would disclose to police on the basis of the various sections of the law that basically identify reasonable suspicions for one and the other, and if it was information that came from us, we originated the case, we would provide the information to a police force as well as CSIS and we would let them figure it out.

Mr. Joe Comartin: So I'm assuming that at times the information you're transferring will go both to CSIS and to a police force.

Mr. Denis Meunier: Yes. CSIS would get it in those cases where we believe there's a threat to the security of Canada.

Mr. Joe Comartin: In terms of the police force, is it exclusively RCMP, or is it other police forces as well?

Mr. Denis Meunier: "Appropriate police forces" is what the legislation says, and that would mean the police force of jurisdiction where we believe the suspected activity is taking place.

Mr. Joe Comartin: So if it's national, it would automatically go to the RCMP?

Mr. Denis Meunier: It would go to the RCMP in those cases where, let's say, the RCMP has provided us with voluntary information about a particular investigation. We would provide that to the RCMP, and if we felt it was important for the Toronto Police Service to get it, we would ask the RCMP for permission to share it and we would go back to the RCMP and ask them for that, or the Sûreté du Québec or whoever.

● (1145)

Mr. Joe Comartin: In terms of the information that is being transferred, the files that are being transferred to the police forces or CSIS, the intelligence services, is there a breakdown as to what percentage is going to the intelligence side, if I can put it that way, the public security side, and what is going to traditional criminal activity? Do you break that down, either in absolute numbers of dollars or in percentages?

Mr. Denis Meunier: We have a breakdown actually that doesn't identify CSIS, or whatever, publicly. We've published the percentage that would go to.... Yes, I have it here. I can tell you that last year—

Mr. Joe Comartin: This is 2008 or 2009?

Mr. Denis Meunier: This is 2008 and 2009—our fiscal year. These are packages, disclosures packages. So the totals do not add up to 100%, but 68% went to the RCMP, 27% to the Canada Revenue Agency, 27% to municipal police forces, 17% to foreign financial intelligence units, 14% to the Canada Border Services Agency, 10% to CSIS, 10% to provincial police services, and 1% to the Communications Security Establishment of Canada.

Mr. Joe Comartin: So there's a substantial overlay where more than one agency is getting it.

The Auditor General did the report, I think it was in 2005, critical of not your offices, but of both the RCMP and CSIS, for not pursuing the information you gave them. I saw subsequent reports where it seemed that they had picked it up.

In your opening remarks, Madame Goulet, you put out that the test here is how many prosecutions, how many investigations. In terms of the transfer of information, can you tell us how much is in fact followed up with either investigations or prosecutions?

Mrs. Hélène Goulet: I think I'd have to ask the RCMP for that information. What we do know is that we receive more requests for information from them and we have disclosed more and more to them. We have become more timely. We do our work faster, and with the last piece of legislation that came in, Bill C-25, we can give them a lot more information. So our information is seen as much more valuable than it was in the past. So we know that they follow up on more, and the fact that they ask for something means they're already investigating. When they ask us for information, it means they're already looking at something, so we have to assume that they look at most of what we give them.

Mr. Joe Comartin: In that same report she made the specific comment—again, being critical of the intelligence services and police—that they weren't coming back to you. So can I conclude from what you just said that you are having that exchange now, which you weren't having at that time?

Mrs. Hélène Goulet: Yes. We have been very deliberately talking to the RCMP and CSIS more and more to see what their priorities are in terms of what they're looking at so we can be more and more helpful to them. So we have those conversations with them on a regular basis, while respecting, of course, our different mandates.

Mr. Joe Comartin: How much time do I have, Mr. Chair?

The Chair: You have 15 seconds.

Mr. Joe Comartin: As a quick question, then, on the tactical versus strategic, who are these people? What are their backgrounds?

Mr. Denis Meunier: With respect to tactical, we have a lot of people who have come from the private sector, from banking institutions. We have people with post-graduate degrees in economics, business analysts, people in government, people who are experienced investigators—

Mr. Joe Comartin: No lawyers?

Mr. Denis Meunier: Yes, we do. Actually, most of my managers are lawyers.

And with respect to tactical, we have PhDs in mathematics and economics. On the strategic side....

Mrs. Hélène Goulet: On the strategic side we have engineers, statisticians, people who are experts with quantitative data, and others who are experts in analyzing that and making sense out of it—very highly qualified people.

The Chair: Thank you.

We'll move on to Mr. Woodworth, for seven minutes.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much.

Thank you to the witnesses for being with us today. I want to begin by apologizing for arriving a few minutes late. I like to give people the opportunity, at least once in their lives, to hear a politician apologize when it's appropriate.

I have appreciated your comments.

I'd like to direct some questions particularly to our guests from the Public Prosecution Service. One of the recommendations I have heard and am considering has to do with case management, particularly in organized crime, with the lengthy trials. This of course relates to disclosure issues as well as other things. The recommendation or proposal would be to amend section 645 to allow judges who are not going to actually hear the trial to make pre-trial rulings.

I can think of some benefits and some disadvantages to that, but I would be grateful to hear from the point of view of our prosecution service—if you can tell me succinctly—what would be the benefits and the disadvantages of that, and on balance, whether you think that would be a good or a bad thing from the prosecution's point of view.

● (1150)

Mr. Yvan Poulin: I believe personally that it would be a good idea to do that. For instance, if we take the case of Colisée, a wiretap case, we divided the case into separate court files to make it easier to manage before the courts. We didn't want to have the trial of 101 accused before the courts at the same time. So different judges made rulings in Colisée, and theoretically it could be a situation where a judge would decide that the wiretap evidence wouldn't be admissible in one trial and a different judge could arrive at a different conclusion. So for the prosecution, it would be easier to get one judge to decide all the pre-trial motions, one being the admissibility of the wiretap evidence and admissibility of other kinds of evidence, and then we could move on with the real issue of the guilt or not of the accused.

Mr. Stephen Woodworth: Monsieur Lacasse, do you have anything to add to that, as to advantages or disadvantages of the suggestion that I have proposed?

Mr. François Lacasse: Of course I concur with my colleague, who has had recent direct experience in managing probably the biggest case so far in Canada on organized crime.

That said, another advantage that I can see is of course saving of time. You deal with one issue once for the purpose of all the related cases that will be handled by the court system.

One disadvantage that I have heard would be to say that then it's not the same judge who is aware of the evidence in relation to the pre-trial issues and the trial issues per se. My answer to that is they're different issues and there is no necessity to hear evidence in relation to what I call the trial of the investigation, which those pre-motions are all about, and the trial proper, which is about innocence or guilt. That's why I would say it would be advantageous.

Mr. Stephen Woodworth: The other question I would really like to come to grips with is the question on disclosure of the threshold of relevance. We have heard, of course, that following Stinchcombe, the threshold is that the crown must produce anything that is "not clearly irrelevant". I've heard other phrases regarding evidence that is potentially relevant. I wonder if you two fine legal minds would care to suggest what you think might be a threshold that would be both fair to the accused and more manageable for the prosecution than is the existing Stinchcombe threshold of "not clearly irrelevant".

Mr. François Lacasse: One comment I will make in that regard is that disclosure obligations apply not only to mega-cases but to the vast majority of cases for which disclosure will often be covered by a 10-page document. That would account for at least 80% if not 90% of the cases throughout Canada. So I wouldn't see that there is a huge problem, and I've prosecuted in the Yukon, and I've prosecuted organized crime in Montreal as well.

The difficulty in trying to restrict the scope or the parameters governing disclosure is deciding exactly where you put the line and how you define it.

● (1155)

Mr. Stephen Woodworth: That's what I'm asking you.

Mr. François Lacasse: From my own practical experience, at least now we know that when we're in doubt, we simply disclose. From an analytical perspective, I would submit, that's the easiest threshold to find. It's when you have to apply it and what it brings as far as managing the costs and resources that go into major prosecutions.... I am not convinced I would be able to provide you with a threshold that would allow one to do that, that would deal strictly with those cases that we could qualify as mega-cases. And what is a mega-case? What were mega-cases ten years ago are now probably run-of-the-mill cases. In my mind—and I'll let Mr. Poulin talk about it—it's more an issue of management than of defining the proper threshold to apply.

Mr. Yvan Poulin: I agree, and in Colisée, just to give you an example, we didn't define as relevant all the 1.2 million calls that were intercepted by the police. We established a procedure so that we disclosed 8,000 conversations we chose in the evidence that the crown wanted to put before the jury or the trial of fact. We disclosed the transcripts of those, and then we shifted the burden to the defence and said to them, "If you want any other calls that were intercepted in the investigation, ask us and we will give you the logs of those calls"—not the calls of everybody, because there are expectations regarding privacy issues that come into play, because one accused is not allowed to have the call to the doctor of the other accused. So there are big expectations regarding privacy issues that come into play, but that is the procedure we applied in Colisée to meet the test that was defined by Stinchcombe.

The Chair: Thank you.

We're going to do a very quick round of two minutes for Liberals, for the Bloc, and for the government, and then we're going to have to move to Justice LeSage.

Ms. Mendes, you have two minutes.

Mrs. Alexandra Mendes (Brossard—La Prairie, Lib.): Thank you, Mr. Chair.

[*Translation*]

Thank you to everyone for your presence.

Very quickly, I would like to ask you a question regarding the entities that report to you. With regard to the list you have provided us here, in other words the definition of the entities that report to you, do you believe that others could be added, for example Internet service providers? There is the example of online casinos. Should these types of entities have to report to you? That is my question. Let us try to deal with this quickly.

Mrs. Hélène Goulet: Very well, thank you.

Chantal.

Mrs. Chantal Jalbert: Casinos are presently covered by our law, and that includes online casinos. Therefore, if they fall under the law and hold a provincial licence to operate legally in Canada, they are covered.

Mrs. Alexandra Mendes: And what about those that are illegal?

Mrs. Chantal Jalbert: Those that are illegal are obviously not covered.

Mrs. Alexandra Mendes: Do you believe that there are other entities that should be required to report to you?

Mrs. Chantal Jalbert: We have at present a long list of entities. We certainly have the banks, the casinos, money service businesses, credit unions, real estate agents. We have a very complete list. Therefore, for now, we consider that the list is working quite well. It supplies us with 24 million reports and when applicable, we regularly review the law with the Department of Finance. It is in that context that we could envisage encompassing other sectors.

Mrs. Alexandra Mendes: Last week, we heard a forensic accountant who talked of the difficulty in identifying the owners of certain numbered companies and how, when the time comes to take legal action against them, it is sometimes very difficult to track down the true owner of the company. Would you have any suggestions as to a way to improve the identification requirements on the part of company owners?

[*English*]

The Chair: This will require a very short answer.

Mrs. Alexandra Mendes: That's it. Yes.

[*Translation*]

Mrs. Hélène Goulet: That would fall under Industry Canada's Canada Corporations Act, for example, which sets out what must be made public. When we have this information, much of it can be disclosed to the police.

● (1200)

Mr. Yvan Poulin: When dealing with legal action against organized crime, one must recognize that fake identities or front men are common place in this milieu. It is therefore very difficult to link individuals to goods that you attempt to confiscate. Several years ago, it was the major problem and I would say that the problem has remained unchanged. No matter to what extent the burden has been reduced or in some cases transferred to the accused, you still must establish a link between the asset and the individual in order to be able to confiscate it. That is a problem we face.

[*English*]

The Chair: Thank you.

[*Translation*]

Mr. Lemay, you have two minutes.

Mr. Marc Lemay: Forgive me for having so often left the room. Indeed, what you are telling us is extraordinarily interesting.

Contrary to my colleague, I am very familiar with Stinchcombe. I even lived with it for 15 years. I can therefore tell you that in criminal law, it is true that it created a lot of work, but it was very well done.

In the beginning of an investigation, do you know that you will have to table such and such a document? I heard say that you prepare yourselves at the very outset.

Mr. Yvan Poulin: Absolutely. Now, this practice is recommended in the guidelines of the Public Prosecution Service of Canada, namely that the prosecutors commit to this at the very start. In some cases, at the beginning of an investigation, we think that we will go in one direction and we realize in the end that the direction chosen was a very different one.

Therefore, both at the beginning and during the process one must know how to adapt and work hand in hand with the police in the management of the disclosure of evidence that will go on for the entire duration of the process.

Mr. Marc Lemay: It is with great interest that I read FINTRAC's 2009 report, which I found very enlightening.

Do diamonds, emeralds, rubies and all of this very valuable merchandise fall under your jurisdiction?

Mrs. Chantal Jalbert: There are 7,000 products that are covered. We call these people precious metals or precious stone dealers or jewellers.

Mr. Marc Lemay: For example, in Belgium, we know that there is a tremendous diamond trade. Do you for example have an agreement with Belgium, or with its police forces? How does that work? For example, an individual could go to Belgium and come back with a little bag of diamonds.

Mrs. Chantal Jalbert: I will answer the first part, concerning compliance. Let us take the case of a jeweller who should be providing us with a report because he, for example, executed a transaction worth more than $10,000 or that could be linked to a suspicious operation. In such a case, the report would be reviewed by my colleague responsible for analysis, and this could entail disclosure, but this work is done in Canada. Unless police services or our international colleagues make a request. With this condition, our memorandums of understanding will apply.

[*English*]

The Chair: Merci.

We'll move on to Monsieur Petit. Make sure your question is short; otherwise you might not get an answer. Two minutes.

[*Translation*]

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

I have a question for Ms. Goulet.

We talk about white collar criminals and all of the people who have committed fraud throughout Canada. We had great examples of this in Quebec, in Alberta and elsewhere. A lot of transactions are done through public and sometimes even government organizations.

Do you receive, process or analyze documents that might originate from government institutions where large sums of money are managed? For example, there is the Caisse de dépôt et placement du Québec, Teachers' and all of the organizations where transfers of funds are carried out. In fact, we have seen organized crime infiltrate some of these areas. Do you receive or analyze documents of this nature?

Mr. Denis Meunier: If I am not mistaken, these public or parapublic organizations are excluded from the law as reporting entities. They are nevertheless free to send reports to us if they so wish.

Mr. Daniel Petit: You receive no information from them?

Mr. Denis Meunier: They are not required to supply any to us.

Mr. Daniel Petit: They carry out billions of dollars worth of transactions throughout Canada, but you have no analysis nor document coming from them?

Mr. Denis Meunier: They are not covered by the Act.

Mr. Daniel Petit: Very well.

That is all. I have no further questions.

[*English*]

The Chair: That was great. That was exceptional, actually.

Thank you to all of our witnesses. Your testimony will form part of the record. As well, we will be taking that testimony and preparing a report, which will likely be quite long. We spent longer than a year on this study, so we thank you again for the work that you've done this morning.

We're going to suspend for two minutes and then we're going to move over to Justice LeSage by video conference.

● _____ (Pause) _____ ●

● (1205)

The Chair: I will reconvene the meeting.

Members, we have the honour of having with us as a witness the honourable Justice Patrick LeSage, former chief justice of the Ontario Superior Court.

Justice LeSage, welcome to our meeting. I think you know the process, which is that you have ten minutes to present, and then we'll open the floor to questions from our members. You're welcome to proceed.

Mr. Patrick LeSage (Former Chief Justice of the Ontario Superior Court, As an Individual): Thank you.

Thank you for inviting me. I have to say at the outset, though, I'm not sure exactly why you did. I am not an expert in organized crime. I really don't have anything to speak of in an opening statement. I have no particular agenda, other than perhaps to make some references to a report by Professor Michael Code, who's now a Superior Court judge in Ontario. And by the way, I should have mentioned at the outset, I'm no longer Justice LeSage. I retired from the court about six and a half years ago, and so it's just Pat LeSage or Mr. LeSage, as you should choose, but we do not carry that honorific with us.

In any event, Professor Code and I, a couple of years ago, prepared a report on complex criminal cases for the Attorney General of Ontario, the purpose of which was to see if we could come up with some recommendations that would make them more efficient and effective.

We did our report and we came up with a number of recommendations. Some of them are topics that I overheard—I was online or able to hear your discussion for about the last 15 minutes—and some of the topics that we covered have already been made reference to, both by questions and by comments from the earlier presenters, who I believe were from the Public Prosecution Service of Canada, although I'm not sure. In any event, I'm not sure I really have much new or original thought to bring you.

I heard some questions and some responses about amendments to the Criminal Code. Professor Code and I—better not get my codes mixed up here—came up with a lot of recommendations in our report about process and administration, but very few recommendations about amendments to the Criminal Code. One of them has already been referred to, and it's an amendment to section 645 of the Criminal Code.

Just to give you a little background, the issue has often been a disputed one as to when a trial begins, but basically, it used to be that a jury trial, in which I was frequently involved, only began after the jury was empanelled. Then in about 1985 an amendment was made to the Criminal Code to permit the trial to commence before the jury was empanelled, and the reason for that was so that pre-trial rulings could be made in advance before you empanelled a jury and then sent them off for some considerable time.

That was a very, very helpful amendment. In those days I was on the court. We believe that a further amendment to simply allow any judge of the court to make pre-trial rulings apply to the actual trial would enhance the efficiency of the trial process. In other words, very early on rulings could be made about a disability, and I heard some reference earlier made to this in matters such as wiretaps or search and seizure, in matters such as disclosure. There are a lot of issues that could be determined in advance.

It would be logical, in many ways, to ask, why couldn't the trial judge do that in advance? Well, the problem is—and it probably seems hard to understand—it presents very significant logistical problems, because sometimes we would like to make the rulings very early in advance. That particular judge would probably go on and be engaged in another trial, and then when the trial is ready to begin, he or she may well be in another trial.

We see no disadvantage in having any judge being permitted to make the rulings, and many advantages. Not only that, it may as well allow the courts to utilize better some of the expertise that exists on the courts. There are judges who are very expert, for instance, in matters of wiretap.

● (1210)

So that is an amendment. It could be a very simple amendment. It could simply say that “judge” includes any judge of that court.

There is another amendment we thought would be useful. There are provisions in the Criminal Code now where affidavit evidence can be used for matters that are not highly contentious or particularly controversial: ownership of property, for instance, in a theft case; also a certificate that money is counterfeit; a certificate that the breathalyzer gave a certain reading; or bank records or business records, which can go in under the Canada Evidence Act. We suggest there should be a review and an exploration of other areas where the evidence could be used by affidavit, always with the caveat, of course, that if the opposing side—that would be the defence—wished to cross-examine the affiant, the person who produced the affidavit, they could, with leave of the court, cross-examine them.

The only other area where we would recommend a review is in section 38 of the Canada Evidence Act. That's the one that deals with national security issues. As you know, the administration of law is a provincial responsibility, and criminal trials are all held in the provincial courts or the superior courts of the province. What happens now, as you probably know, is that if an issue of national security comes up, section 38 of the Canada Evidence Act comes into play and that issue must be determined by the federal court. It results in going from one court to another. In addition to that, not only the delay that may result—and I say "may", and sometimes does.... Those rulings are appealable, unlike ordinary trial rulings, which are not appealable until the conclusion of the case.

So in our report we also suggest that the federal, provincial, and territorial ministers of justice look at this issue to try to come up with a more efficient and effective way of conducting trials.

Those, I think, are my only comments on specific Criminal Code or Evidence Act recommendations.

● (1215)

The Chair: Thank you very much.

Mr. Patrick LeSage: I also want to add one more thing.

Although there was a time when I might have known a little bit about criminal law, I've been out of the court now for more than six years, and I am not up to date on current amendments to the code. So I will plead my ignorance at the outset. I also plead my ignorance and my apology that I do not speak Canada's other official language, and my paternal language.

The Chair: Thank you.

The reason we did ask you to appear today is simply because of your experience in large and complex criminal cases. And there are a number of members of this committee who wanted to draw on that experience. So we're certainly looking forward to your evidence.

Mr. Patrick LeSage: Thank you.

The Chair: We will now move to questions. I'm seeking agreement of the members here that we go with five-minute rounds rather than seven-minute rounds, just so that we can get more questions in. Accepted?

Some hon. members: Agreed.

The Chair: Perhaps I could very quickly also identify who is at the table with me, Mr. LeSage. We have Brian Murphy and Alexandra Mendes, representing the Liberal Party. We have Serge Ménard as well as Marc Lemay, representing the Bloc Québécois. We have Joe Comartin, from the NDP. On the government side, we have Bob Dechert, Rick Norlock, Stephen Woodworth, Brent Rathgeber, and Daniel Petit.

Mr. Murphy, you have five minutes.

Mr. Brian Murphy: Thank you.

Mr. LeSage, if you insist—or Justice LeSage—as a lawyer for some 20 years and a member of the Ontario and New Brunswick bars for all those years, it's my great pleasure to welcome you here too. We've had other retired judges before committees—two in my four years here: the former chief justice in Alberta, Mr. Wachowich, and the late Antonio Lamer. It's invaluable. So I want to compliment you and thank you for taking the time to do this.

I have two rather precise questions. One deals with disclosure and the other with representation, and they relate to criminal trials, because those two aspects have an effect on large or mega-trials and organized crime trials.

First, on disclosure, is it your opinion that we need to relax the requirements? We're looking here for a way maybe not of codifying it in the Criminal Code, but at least of recommending that it be a best practice or a policy or a protocol that disclosure be made—perhaps beyond election or plea, and somewhere along the way—so that we don't arrive at the courtroom steps and have the inevitable plea for an adjournment when everything is geared up, with costs, delays, etc. That's the first question.

The second question deals with representation. Many times lawyers arrive, either by accident or deliberately, not prepared or else not capable frankly of handling the cases they've either been chosen to do or have chosen to do. This comes from the idea that perhaps in some cases some lawyers are beyond their abilities. We know this is in Parliament, being swamped by things beyond our abilities quite often, and every day it's on the news.

In such a case, do you think a judge would have the right or should intervene to say, as in an *amicus curiae* type of situation, thaty he thinks this litigating lawyer with two years' experience should not be handling a triple homicide case with three tons of disclosure documentation? Would that be out of place for a judge to say?

● (1220)

Mr. Patrick LeSage: Let me respond in the reverse order, responding to your last question first.

Professor Code and I dealt with this issue in our report. We both believe that the judge presiding has the authority to tell a lawyer that they are not capable of conducting the trial and must get another person either with them to carry the trial or to take over the case. There are two cases we are familiar with in which that has happened, and probably many more we're not familiar with. Both cases were murder cases, and superior court judges in Ontario simply told the lawyers, after some pre-hearing motions, that they were not capable, did not have the experience to conduct the trial, and had to get a senior, experienced lawyer either with them or to take it over.

Both of those two cases went to appeal. I've forgotten specifically whether that was an issue on appeal. It was not a major issue on the appeal, if it was one. But there was no comment. They brought in senior lawyers in both cases.

Professor Code and I both believe that there is the authority to do that.

There is a little more difficult issue, and that is one in which the accused insist on representing themselves and are conducting in a way that is not only totally disruptive of the trial but oftentimes very harmful to their own case. We suggest—actually, this is another recommendation in our report—that the Criminal Code perhaps be amended to take into account that case.

On the first situation, that of an inadequate lawyer, we believe the judge has the right to direct them to get another. If they refuse, I think you can simply say, “I'm not going to continue the trial with you”.

In the more difficult one, and we saw a bit of this in that case in Montreal a few years back—the professor from Concordia who represented himself and was so disruptive throughout the trial—we believe there should be a provision in the code to permit the judge to say that you cannot continue representing yourself, and to even go beyond an *amicus curiae*. We believe the judge has the right to appoint an *amicus curiae*, but we're thinking of a situation wherein you become more than an *amicus curiae*: you become the counsel.

The Chair: Thank you.

Mr. Patrick LeSage: I'm sorry for the long answer.

The Chair: No, that's fine. Thank you.

We'll move on to Monsieur Ménard for five minutes.

Mr. Patrick LeSage: Oh, I'm sorry; I didn't respond to disclosure.

Let me say simply that I heard comments earlier from the Public Prosecution Service with which I agree. We believe, and I think the time is coming, that it will be electronic disclosure, which makes it much easier. Once you have electronic recording of information—and you usually have that on the major organized crime cases—then you have electronic disclosure by simply handing over a hard drive.

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: Welcome, Your Honour.

We would have liked to chat with you for much longer. Unfortunately, we will have to hold off on many of the questions that we would have wanted to ask you.

I practiced criminal law for 25 years before getting into politics, in 1993. I practiced in Montreal and I knew Judge Lamer very well. I had for him, first when he was a lawyer, and then when he became a judge, immense respect.

As a young lawyer, I was already scandalized by the number of witnesses that we pointlessly subpoenaed before the court. In drug cases, for example, to establish that drugs were found in the accused's residence, we had the caretaker appear as a witness, etc. At the time, I made a suggestion, but it is so long ago that I no longer remember in what journal it was published. The idea was to create a process consisting in issuing a notice to the other party in order for it to recognize those facts which are never contested, for example the fact the accused lives at the address where the drugs were found. There was also continuity in the possession of an article that the police officer eventually handed over to a laboratory and that was then returned. As a matter of fact, in English, we had called that a notice to admit. As far as I know, this is in place nowhere. We nevertheless continue to call witnesses to provide evidence that is purely technical in nature. However, in their minds, that completely discredits the administration of justice.

● (1225)

[*English*]

Mr. Patrick LeSage: I agree that it does not help the image of justice, and yes, I think it hurts it. Whether it's to the extent of disrepute.... I'm not sure I'd go that far, but it certainly is harmful to it.

I think yours is a very interesting suggestion, and it's one that I think should be considered and explored. I have to tell you, I'm a traditionalist. As is apparent to you, I'm old, and it's hard for someone my age to change views and look at new ways of doing things, but I think your suggestion is an excellent one that should be considered.

You're absolutely right: we spend too much time on basic, fundamental matters that at the end of the day are not in dispute. We try to overcome this with very aggressive case management prior to trial. An experienced, persuasive judge can often accomplish it in pre-hearings, but I think it's an area that's well worth examining for legislative change.

[*Translation*]

Mr. Serge Ménard: That certainly was the case of Judge Lamer. I handled a trial with jury before him that lasted less than half a day, including deliberations. However, it was a very clear case. It is surprising that this idea, put forward more than 20 years ago — when I was a young lawyer —, has never been put into practice. Is it because if one writes in French, one is less read than if one writes in English? In any event, you are not aware of cases that proceeded in this way.

Often, when I think of the evolution of criminal law since the Stinchcombe case and since the Charter, I seriously ask myself what would happen if we were charged with helping an emerging country build a criminal law system. I wonder if there would be many countries with the means to afford this type of complex process that we have developed over the last 20 years. We talked earlier of the fact that Haiti wanted to set up a system. Would we be successful in selling these disclosure of evidence procedures, these processes and these motions that precede them to countries that are not as rich as ours?

[*English*]

Mr. Patrick LeSage: That is a very good question. I suspect that some of it, if not maybe much of it, would not or could not be available to them.

Our system developed over a long period. I became a crown attorney about 47 years ago, and when I first became a crown attorney, we disclosed nothing—nothing. The indictment or the information was there, and that was it. Gradually that changed, and it was a change for the better. There's no question about it.

Sure, we're having what I suppose are hard to call growing pains, because Stinchcombe was 1990, I believe, but I don't think there'd be as many problems with Stinchcombe today as there were maybe even five or ten years ago. There has to be some control in determining relevance, and the public prosecution people earlier mentioned that, but if you think it's relevant, then produce it.

The big problem is that it's not just the production, but the fact that investigations today are so much more sophisticated than they were in my day. I prosecuted dozens of murder trials, none of which ever went more than a week, but the evidence was simple and straightforward. There'd be little, if any, forensic evidence, other than what came from the pathologist. There just wasn't all the investigative material produced then that is produced today.

● (1230)

The Chair: Thank you.

We're going to move to Mr. Comartin for five minutes.

Mr. Joe Comartin: Welcome, Justice LeSage.

I know Mr. Woodworth and Mr. Murphy both raised this matter with our earlier witnesses. The idea is that we, as parliamentarians, could be looking at codifying the definition of relevance or trying to work more specifics into the code or into the Canada Evidence Act around Stinchcombe, and I think the direction would be to try to limit its scope somewhat.

I have two questions. First, do you think that's possible? Second, if it is possible, is it appropriate that as legislators we should look to do that?

Mr. Patrick LeSage: I think relevance is very hard to codify. It seems simple, and if one took a very simple codification and looked at some of the evidence text, they will have, maybe in a short sentence, their definition of relevance. Maybe that would be fine, but....

I grew up and I was a prosecutor in the days before we had the rape shield laws. There's only one thing in my life that I've ever vowed to try to see changed, and that was the way rape victims used to be treated in the 1960s and 1970s. That did get changed with the rape shield laws, but they're very complex and complicated, I think. All that was required was something to tell the judges and make the judges rule on relevance, because all the rape shield laws are trying to do is say that irrelevant evidence is not admissible, yet when you look at that, you see how complex those sections are. I think it's difficult to legislate something like that; it'd be like legislating what is good and what is bad. You can take specific instances as to what is bad and make it a crime, but to legislate relevance is difficult.

I think that there could perhaps be some prompts that it doesn't mean a semblance of relevance, for instance, or a hint of relevance, but clear relevance. Beyond that, my experience tells me that it would be difficult to draft such legislation.

Mr. Joe Comartin: Thank you for that.

With regard to the proposed amendment—I think it's to section 645—to allow any judge in the pre-trial stage to rule, could you give us some perspective from the defence side? Would they be objecting to that? Having done criminal trials, I'm thinking in terms of being maybe three-quarters of the way through the trial, and then there's a dispute over whether evidence is going to come in. The trial judge has an advantage at that point, because he or she has heard all the rest of the evidence, evidence that a pre-trial judge probably would not have heard.

● (1235)

Mr. Patrick LeSage: That's a very good question.

Generally speaking, the defence bar have generally accepted the broad recommendations that Professor Code and I made, some of them with considerable reservation. But, yes, I think there's general acceptance.

What we say in our report is that the person actually presiding at the trial may revisit the ruling if there is evidence, clear evidence, that is now available and/or before the court that wasn't before the motions judge who heard it. So that's one thing we say.

We also say that there are some things like, for instance, in my view, similar fact evidence.... I always found that difficult to rule on until you had a sense of the trial. I never liked similar fact evidence, I almost never let it in, but that's quite aside. But you have to have a bit of a flavour, maybe even the confession, if there's a confession that there's a wish to introduce. But for things like wiretaps, searches and seizures, there should be nothing that arises in the trial that isn't available pretrial. That can help speed up resolution of cases so much. If the wiretaps go in, you end up often getting a lot of pleas of guilty; if the wiretaps go out, you often end up with the crown withdrawing charges.

So we see not much, if any, downside, and we would have the flexibility that the trial judge would have the discretion to revisit it, but only if it was clearly on different and new evidence available.

The Chair: Thank you.

We'll move on to Mr. Dechert, for five minutes.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

Good afternoon, Mr. LeSage.

Maybe I can call you Pat, since we were previously colleagues at Gowlings. It's good to see you again.

Mr. Patrick LeSage: That's right. I was going to say it's the first time I've been cross-examined by a partner.

Mr. Bob Dechert: We won't talk about the financing.

Mr. Patrick LeSage: Okay.

Mr. Bob Dechert: I hope everyone is well at Gowlings and I hope you'll give them my regards.

Mr. Patrick LeSage: They are, thank you.

Mr. Bob Dechert: Very good.

Welcome, and thanks for being here with us today.

A lot of us have asked you questions arising from the Stinchcombe decision, and I'm going to go down a similar path, because it's something we've had a lot of discussion about as we've travelled across the country.

A number of police organizations have represented to us that the disclosure requirements of Stinchcombe have actually in many cases resulted in their investigative techniques being compromised and that they feel some criminal organizations are actually using the disclosure to learn more about police investigative techniques so that they can then change their practices to avoid detection in the future.

Earlier this morning we heard from the federal prosecutors that there are some exceptions to Stinchcombe for privileged information, one of which is information about investigative techniques. I didn't have a chance to ask them the question about how far that privilege can go in terms of protecting investigative techniques used by the police, but I was wondering if you had ever run across that issue, and what your thoughts on that issue might be in terms of how far does the privilege go as it currently exists with Stinchcombe, and what, if anything, might we do as legislators to better protect the privilege that police have in terms of their investigative techniques? And it's not just the personnel they employ, but also the types of technology they employ these days, because, as you pointed out, it's a very sophisticated world these days.

I wonder if you have a view on that.

Mr. Patrick LeSage: I'm not sure I can be very helpful on that. I believe that there have been individual rulings as to the breadth of disclosure that have gone further than I might have, if I were making the rulings. But by the same token, I would be reluctant.... I guess I just don't know enough about how this practice might be curtailed.

My own view is that I would find that rarely is it relevant, and therefore it's not disclosable. Nevertheless, there may be a case where some particular aspect of it is going to be relevant, and then it should come in. I was going to use an analogy, of DNA and how the DNA system operates. Clearly, that has to be something that can be explored—or the system of handling evidence. But investigative techniques...? Clearly there's a recognized privilege of informer; that is a long-recognized privilege, and the courts, as far as I know, never have any hesitation in applying it.

If I were a judge I would be looking at asking first of all whether it is irrelevant, and then second of all, whether it would come into.... The informer is privileged and protected not only to protect the informer but to some extent to protect the method that is used. I have presided on many cases in which there have been many undercover police officers who have done a lot of the work in the case and I haven't seen a particular problem, but I know there can be some, and I don't have an answer as to how you deal with them.

● (1240)

Mr. Bob Dechert: There has been reference in some cases to techniques of electronic surveillance that they're now using, both in wiretap and perhaps using computer technology—Internet surveillance, that sort of thing—to catch international criminal organizations. But obviously the prosecutors seem to believe that the privilege exists and that in most cases the prosecuting attorneys could argue that such information was privileged and therefore not disclosable.

Mr. Patrick LeSage: The one thing I always remembered throughout my many years as a prosecutor and as a judge is that the first question is, is it relevant? It's amazing how many questions that answers: is it relevant? Someone would have to convince me, if I were the judge, why it is relevant to consider what the technique is. What is it that you're disputing about this? Is it the volume, or...? I don't see how the technique really matters. I probably would rule it inadmissible as being irrelevant, in that the technique cannot be helpful to the accused in forwarding his case.

I agree with the concern. I just don't have a simple answer.

The Chair: Thank you.

We're going to move again over to Mr. Murphy.

Mr. Brian Murphy: Just as a follow-up to this bit about Stinchcombe, trying to allow disclosure to be made after the election and plea, the theme of all of this—and I hear Mr. Ménard on requests to admit and I hear issues around representation, so that you don't end up on the courtroom steps getting an adjournment because of an inexperienced counsel.... It's all around that theme of avoiding the cost and delay, because a delayed criminal trial is a cost to everyone. I'll add on to the question you didn't answer about reforming Stinchcombe to allow disclosure along the way, as a bit of a provocative question in light of what you said about the capability of lawyers: are there some judges who aren't quite cut out to handle mega-trials?

I know that the Federal Court deals with federal jurisdiction, but many of those judges are specialists in certain areas, and I know that the Ontario court has such a plethora of judges that they more or less specialize. Is there a need to have a specialization amongst the judiciary in Canada to handle mega-trials, or is a mega-trial just a bigger normal trial?

There are three questions wrapped up in there, Judge.

● (1245)

Mr. Patrick LeSage: Well, you've touched an old, old, softer, delicate part in my psyche.

First of all, let me tell you, I believe very strongly in the jury system, and it's because I believe in the wisdom those twelve people bring to their task. However, when you're looking at what almost become the mechanics of some of the complex trials today, maybe my old views about generalist judges and the non-specialization of judges don't hold as much weight as they used to.

I think if you went across the country and asked defence lawyers and crowns, “Do you want specialist judges?”, they would probably say yes. On the other hand, if you then said, “What about Judge X or Judge Y? They are specialist judges in criminal law. Would you like to have them?”, the answer will be no. That's the advantage of the generalist aspect of it.

Certainly in Ontario, during my 29 years on the bench, I think for the most part—90% of the time—we had experienced judges and would assign experienced judges to the complex cases, just as we assign experienced judges to our commercial list to deal with the complex commercial issues, particularly at the motions or the insolvencies.

We have the cadres of specialist judges, and I would like to think that a good chief justice would assign an expert to a complex case. Beyond that, I'd rather not have designations per se so that only certain judges can do certain things, because there are lots of non-complex cases. I, who had a criminal background, have presided in every area of the law—maybe not well, but I've presided in every area—but I wouldn't do the complex ones. I wouldn't go into the commercial list and do a $100-million restructuring.

So I say specialists if necessary, but not necessarily specialists.

The Chair: Thank you.

We'll move on to Monsieur Lemay.

[*Translation*]

Mr. Marc Lemay: Thank you Your Honour. Allow me to address you in that way, because I did know you when you were still a judge. Even if I lived in the Abitibi region, I had the opportunity to read your decisions. As a criminal lawyer, I always preferred to have experienced judges, knowledgeable of criminal law.

[*English*]

Mr. Patrick LeSage: Could the interpreter keep her voice up, please?

The Chair: We'll ask the interpreter to keep up her voice.

[*Translation*]

Mr. Marc Lemay: Usually, my voice really carries, Your Honour. I do not know if you are hearing me.

[*English*]

Mr. Patrick LeSage: It's just the hearing. It's fine now.

[*Translation*]

Mr. Marc Lemay: Let me begin again.

Your Honour, we criminal lawyers much appreciate experienced judges who know how to guide and direct debate towards the central issue, especially in criminal law. My colleague, Mr. Ménard, talked about what I wanted to underscore. We could perhaps eliminate certain things.

I would like to hear your thoughts with regard to affidavits relating to non-contentious issues. Generally, we deal with them by admission. Your recommendations go a little further. For example, with regard to precise issues, the ownership of the house in a criminal case, for example, could be established via affidavit. Is that correct?

[*English*]

Mr. Patrick LeSage: Yes. That's the owner of property, yes.

[*Translation*]

Mr. Marc Lemay: There are other similar issues. For example, a document from the Société de l'assurance automobile du Québec regarding the ownership of a vehicle could, in your view, be dealt with via affidavit.

● (1250)

[*English*]

Mr. Patrick LeSage: Yes, if it went in under the business records section of the Evidence Act.

[*Translation*]

Mr. Marc Lemay: There is one thing I did not fully understand. In one of your recommendations, you talk about judges from the same jurisdiction. In your view, what is the problem? Indeed, you talked of judges from the same court. Did I misunderstand? Could you come back to this point relating to the judges of the jurisdiction where the trial is taking place?

[*English*]

Mr. Patrick LeSage: We made a couple of recommendations about judges, and one of them refers somewhat to the earlier question by Mr. Murphy, that the administrative judge should assign very experienced judges to do the pre-hearing conferences. That's one of the things we say about judges.

When it comes to section 645 of the Criminal Code, the section requires that the judge who is going to be conducting the trial must be the one who hears and determines all of the motions, which we refer to today as pre-trial motions. We are recommending that it can be any judge of that court. If the trial is going to be in the la Cour du Québec or the provincial court of Ontario, then it could be any judge in that court who hears the pre-trial motions and makes rulings on them. If it's in the superior court, then any superior court judge could make those pre-trial rulings.

[*Translation*]

Mr. Marc Lemay: Instead of it being the trial judge or the judge who will be hearing the case, it could be any other judge of that jurisdiction.

[*English*]

Mr. Patrick LeSage: Yes.

[*Translation*]

Mr. Marc Lemay: That could be accomplished very quickly through an amendment to the Criminal Code.

[*English*]

Mr. Patrick LeSage: Yes, it's a very simple amendment—

[*Translation*]

Mr. Marc Lemay: Therefore, if...

[*English*]

Mr. Patrick LeSage: —to section 645.

[*Translation*]

Mr. Marc Lemay: If I understand correctly, Judge LeSage, if, for example, during the course of a trial, there is a motion to exclude a piece of evidence, one could call upon a judge from the same court without necessarily having to wait for the judge conducting the trial.

[*English*]

Mr. Patrick LeSage: Exactly. *C'est correct*.

[*Translation*]

Mr. Marc Lemay: Thank you.

[*English*]

The Chair: Thank you.

We'll have one last question by Mr. Rathgeber, and then a very brief in camera discussion to determine who our witnesses are going to be on Tuesday. I think we've had confirmation from one and we need approval of another.

Mr. Rathgeber.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair.

Thank you, Mr. Justice LeSage, for your attendance here today.

I want to pick up on a line of questioning commenced by my friend Mr. Murphy regarding the competency of judges and experience in certain matters.

I understand that since your retirement from the bench you've been with Gowlings, a major Canadian law firm. Certainly the major law firms are very specialized in terms of their litigation departments, their corporate commercial departments, etc. Do you see it as a natural evolution on the bench that judges will become more and more specialized? Certainly in my province of Alberta and other provinces, we've created drug treatment courts. Of course we have family and youth divisions in the provincial courts. Is this the natural evolution of the bench, in your view?

Mr. Patrick LeSage: I believe it is. As I say, I still have some slight reservations, because I'm old and set in my ways, but I think that really is the evolution.

Let me just say this one thing about that. I probably sat 25% of my time doing family law when I was a judge, and if there were any area of adjudication that I found most wearing, it was family law. We have a unified family court, and I therefore think that judges who are there should have an opportunity occasionally to go out and do other work. It's like a refresher or a sabbatical to do something else. I think judges in any specialized area should, on occasion, do other things.

But the reality is that in a big city like Toronto, we have specialized judges, to a very considerable extent, including in the areas you mentioned. We are very similar to Alberta.

● (1255)

Mr. Brent Rathgeber: Getting back to solicitor disclosure, I was a civil litigator for a couple of years, as was my friend Mr. Murphy, and we believe there are some lessons to be learned from civil procedure with respect to pre-trial applications and interlocutory applications, sworn affidavits on production, to limit the disputes at trial. It seems to work very well in the civil process. I am curious, in the 60 seconds we have left, if you think there are lessons to be learned from the civil process and what one or two of those might be.

Mr. Patrick LeSage: I think you've touched on them. I hadn't thought before about something like the request to admit, but it does make sense, and it is something that should be explored and some work should be done on it. Maybe there has been, but, yes, we need to update our process. We need to change a number of things to update it.

There's Lepp, from Alberta; I'm not sure, I've forgotten if he's a judge or a deputy attorney general, but I was at a conference recently where he had some really interesting ideas about fundamental changes. There is no harm in looking at fundamental change.

The Chair: Thank you, Mr. LeSage, for appearing by teleconference.

Before you go, I have one last question. Concerning the report you and Mr. Code prepared in 2008, was there ever a response from the provincial government, more specifically from the attorney general's office?

Mr. Patrick LeSage: Yes, they have implemented most of the things, if not all the things. Certainly they have implemented most of the things we recommended. I am pleased to say that the legal aid system has also, to some extent, implemented. The Law Society has implemented recommendations, but concerning the attorney general specifically, yes, they have.

The Chair: All right, thank you for that information.

Mr. Patrick LeSage: Thank you very much.

The Chair: Yes, Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: Mr. Chairman, perhaps you could tell the judge that the francophone members of the Committee are of the view that he wears his name very well.

[*English*]

The Chair: All right, thank you.

Mr. Patrick LeSage: Merci.

The Chair: Members, we're going to suspend for a moment while we go in camera.

[*Proceedings continue in camera*]

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

SPEAKER'S PERMISSION

Additional copies may be obtained from: Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5
Telephone: 613-941-5995 or 1-800-635-7943
Fax: 613-954-5779 or 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Also available on the Parliament of Canada Web Site at the following address: http://www.parl.gc.ca

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

PERMISSION DU PRÉSIDENT

On peut obtenir des copies supplémentaires en écrivant à : Les Éditions et Services de dépôt
Travaux publics et Services gouvernementaux Canada
Ottawa (Ontario) K1A 0S5
Téléphone : 613-941-5995 ou 1-800-635-7943
Télécopieur : 613-954-5779 ou 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : http://www.parl.gc.ca