



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
OTTAWA, CANADA
K1A 0A6

The Standing Committee on Justice and Human Rights has the honour to present its

FIRST REPORT (INTERIM REPORT)

The Committee was given an Order of Reference from the House on April 25, 2006 to study sections 25.1 to 25.4 of the *Criminal Code*, known as protection of persons administering and enforcing the law. This review is being carried out pursuant to section 46.1 of Bill C-24, An Act to amend the Criminal Code (organized crime and law enforcement), which calls for a review after three years. The relevant sections of the *Criminal Code* were proclaimed in force on February 1, 2002.

Sections 25.1 to 25.4 of the *Criminal Code* are known as the “law enforcement justification provisions”. They provide a limited justification in law for designated law enforcement officers, and others acting at their direction, to commit acts and omissions that would otherwise be offences against the law. These sections of the Code arose out of the Supreme Court of Canada decision of *R. v. Campbell*¹, released in 1999, which held that the police were not immune from liability for unlawful conduct committed in good faith in the course of an investigation. The Court held that, if immunity were necessary, it was for Parliament to provide for it in statute.

The principle behind the law enforcement justification provisions is that it is in the public interest to ensure that public officers, as defined in the legislation, may effectively carry out their law enforcement duties in accordance with the rule of law. To that end only, it is also in the public interest to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences. Parliament has decided what law enforcement officers “reasonably and proportionally” need to be able to do in order to investigate and enforce the law and to ensure that these activities are brought within the law. This principle is disputed by some, who argue that it places public officers above the law. The argument on the level of the basic principle of the law enforcement justification provisions is that they are an attack upon the fundamental premise of the rule of law, which is that all persons, including the police, are subject to the law.

The Committee heard from the RCMP, which works with the law enforcement justification provisions on a day-to-day basis. The RCMP has imposed upon itself certain limits

¹ [1999] 1 S.C.R. 565

in the use of the provisions that go beyond what can be found in the *Criminal Code*. Firstly, there are only three senior officials designated by the Minister of Public Safety and Emergency Preparedness, who is the “competent authority” for the RCMP. To maintain tight control over the use of the provisions, two senior officials are only used in the absence of the third. Secondly, the only police officers who may be designated are those who have received training in undercover work and in the law enforcement justification provisions. Thirdly, designations are made for a three-year term in order to ensure that designated members undergo a re-certification process and remain current with the legislation. Fourthly, all acts or omissions by a designated member of the RCMP that would otherwise constitute a criminal offence must be reviewed in advance by the Criminal Operations Officer of the RCMP responsible for the province. This officer reviews and confirms that the designated member is justified in using the provision, and that the reasonable and proportional test for use of it has been satisfied.

The RCMP witnesses were very positive about the use of the law enforcement justification provisions, and wished them to continue in force without amendments. Other witnesses expressed some concerns, which can be grouped into a number of themes.

One concern of some witnesses with the provisions is that the use of them is left in the discretion of the police. A suggestion to reform sections 25.1 to 25.4, therefore, was that prior judicial authorization be required before the police or their agents are permitted to commit what would otherwise be criminal offences.

A related concern of some witnesses was that, under the current regime, it is left to the police to determine whether their actions are, in the circumstances, “reasonable and proportional”. One witness was concerned that this was too broad a discretion and the police should be required to demonstrate that a breach of the law was “necessary” in the circumstances. To aid in this determination, it was suggested that the voluntary measures taken by the RCMP should be adopted and each “breach of the law” should be approved in advance by a superior officer, where this is possible.

In the same vein of narrowing the use of the provisions, it was suggested by some witnesses that the use of them be restricted to their intended target of organized crime and undercover operations. As its title suggests, Bill C-24 was directed towards organized crime but, as they are currently written, the law enforcement justification provisions may be applied to any investigation of any offence by any designated officer.

A suggestion by some witnesses to further restrict the use of the provisions was that the exemption from criminal liability they offer should be restricted to public officers, and not be extended to the commission of acts or omissions by other persons. These “other persons” will often be people with criminal records who continue to live a criminal life. Some witnesses felt that they may too readily disregard the constraints of law or any direction from the police.

Finally, a general area of concern of some witnesses related to the public reports that are furnished by police agencies. The reports as written only detail certain extraordinary uses of the law enforcement justification provisions. The Committee heard many suggestions for how the public reports could be changed, ranging from the inclusion of all “breaches of the law” in them

to their more timely production. Some witnesses said that there does not appear to be any statutory sanction for a failure to produce an annual report in a timely fashion. Another suggestion was that there be one report on the use of the law enforcement justification provisions for the whole country, to aid in public scrutiny of them.

Following the hearing of its witnesses and the receipt of certain written information, the Committee realized that it lacked sufficient evidence to come to any firm conclusions as to whether, or not, sections 25.1 to 25.4 of the *Criminal Code* should be amended. At this stage, only one law enforcement agency has testified and so details on the daily experiences of those who use the sections is lacking. Thus, the Committee does not believe it can make any recommendations at this time.

The Committee does, however, wish to fulfill its mandate to study comprehensively sections 25.1 to 25.4 of the *Criminal Code* and so it will continue its work until a final report, with recommendations, can be produced. In order to give greater substance to such a report, the Committee will require more information. Over the coming months, it is the Committee's intention to solicit this information and then determine whether further hearings are necessary. Given the potentially sensitive nature of any testimony, the Committee may decide to hold some hearings *in camera*. This will be determined at a later date.

LIST OF WITNESSES

<i>Organizations and Individuals</i>	<i>Date</i>	<i>Meeting</i>
Department of Justice Erin McKey, Senior Counsel Criminal Law Policy Section Shawn Scromeda, Counsel Criminal Law Policy Section Michael Zigayer, Senior Counsel Criminal Law Policy Section	2006/05/09	2
Department of Public Safety and Emergency Preparedness Canada Barry MacKillop, Senior Director National Strategies Division	2006/05/30	5
Royal Canadian Mounted Police Thomas Bucher, Director Organized Crime, Federal and International Operations Raf Souccar, Assistant Commissioner Federal and International Operations	2006/05/30	5
Criminal Lawyers' Association Peter Copeland, Representative	2006/06/01	6
As an Individual Grégoire Webber, Trudeau Scholar Pierre Elliott Trudeau Foundation, Oxford University	2006/06/06	7
Canadian Bar Association Gregory DelBigio, Chair National Criminal Justice Section Tamra Thomson, Director Legislation and Law Reform	2006/06/08	8

<i>Organizations and Individuals</i>	<i>Date</i>	<i>Meeting</i>
Ligue des droits et libertés Denis Barrette, Legal Counsel Pierre-Louis Fortin-Legrís, Case Officer	2006/06/08	8
Canadian Civil Liberties Association Ken Swan, Representative Brooke Wagner, Intern Alexi Nicole Wood, Director Program Safety Project	2006/06/13	9
Canadian Council of Criminal Defence Lawyers Jeanine LeRoy, Representative Criminal Law Chambers	2006/06/13	9

LIST OF BRIEFS

Organizations

British Columbia Civil Liberties Association

Canadian Bar Association

Ligue des droits et libertés

Toronto Police Service

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 2 and 5 to 12](#)) is tabled.

Respectfully submitted,

Art Hanger, M.P.
Chair