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Chair

Mr. Ed Fast

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• (1100)

[English]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order.

This is meeting 25 of the Standing Committee on Justice and Human Rights. Today is Tuesday, May 26, 2009. This is a special meeting called to study the desirability of declaring certain groups criminal organizations.

On today's agenda you will note that we have before us a number of witnesses to assist us in our study. I'll go through the list.

Representing the Sûreté du Québec, we have Serge Vandal, who is the officer in charge of the organized crime intelligence unit; Francis Brabant, legal counsel; and we have Jocelyn Latulippe. Welcome back.

Representing the Public Prosecution Service of Canada we have Christopher Mainella.

We also have Kent Roach, Pritchard-Wilson chair in the faculty of law, University of Toronto.

The Criminal Intelligence Service Canada of the RCMP is represented by Gary Shinkaruk, officer in charge of Project E-Pandora. Also, we have Detective Sergeant Len Isnor, national intelligence coordinator. Finally, we have Superintendent Michel Aubin of the federal and international operations of the Royal Canadian Mounted Police.

I welcome all of you.

I believe we have a speaking order agreed to. Most of you know that you have ten minutes to present, and then we open the floor to questions. Please don't feel that you have to use up all of the ten minutes. Generally I find that the most productive part of the meeting is when we get a chance to ask you questions and ferret out the information we need to provide a report.

We'll begin with Superintendent Aubin, please. You have the floor.

Superintendent Michel Aubin (Director, Federal and International Operations, Royal Canadian Mounted Police): Thank you, Mr. Chair.

Good morning, and thank you for inviting us here to speak today about this important issue. I had the opportunity to appear before your committee on April 1 to discuss Bill C-14, and I appear before you again today on behalf of the RCMP organized crime program. Fighting organized crime, as we previously testified, is a strategic

priority for the RCMP. As a partner in the fight against organized crime, we appreciate the fact that the committee has undertaken this study.

Many of our federal, provincial, and municipal units of the RCMP prioritize the investigation of organized crime where it intersects with their respective areas of responsibility. As well, through our combined forces special enforcement units, the investigative teams target criminal organizations that represent the highest level of harm in their communities.

The position of the RCMP in relation to listing criminal organizations is that we are supportive of this move. We believe that such a measure would increase our efficiency in the fight against organized crime and contribute to building safer communities. I must add that the RCMP believes that any listing of a criminal organization should be done through a criminal trial process.

While my colleagues from CISC and the Sûreté du Québec will discuss details specific to the Hells Angels, the RCMP's view is that this committee should consider applying this concept across a wider range of well-established criminal organizations. Prior testimony before this committee stated that organized crime is present all over Canada, as well as in many other countries.

Our greatest concern is that there are well-established organizations that have been in existence for decades, if not longer, and that continue to have a impact on all Canadians. Frequently, these organizations rely on the use of intimidation, violence, and corruption of public officials as part of the tools of their trade.

Many of these organizations have become transnational in nature, not only because they peddle their illegal wares in other countries, but also because they work with established cells in other countries to facilitate their activities. Furthermore, in many cases, improvements in technology and globalization have allowed these organized crime groups to remain one step ahead of law enforcement.

An emerging trend that is of concern to us is that organized crime groups are now moving parts of their operations to countries that may not have the legal and/or the law enforcement framework or capacity to adequately address a threat.

Beyond the well-documented violence and crime that threaten the safety and emotional well-being of our citizens, the economic impact of organized crime on our country is staggering and affects everyone. As an example, auto theft alone costs us \$1 billion. These are real costs that are incurred by private businesses, which then pass them on to Canadian consumers through higher insurance premiums and banking fees.

I have another example. The World Customs Organization and the Organisation for Economic Co-operation and Development estimate that 7% to 10% of global trade is derived from counterfeit products alone.

In some instances, organized crime has contributed to the destabilization of governments and infrastructure of foreign countries.

To be more specific, currently in Canada when the RCMP engages in an investigation of a criminal organization, we have to structure the investigation, the case management, and disclosure into three areas: one, proving that a substantive offence or offences have taken place; two, proving that the group itself is a criminal organization; and three, proving the link between the individual or individuals and the organization itself.

Our experience with the legislation has shown that it can be of value when it is applied. An example I would like to mention is Project Colisée in Montreal, which targeted or focused on the activities of traditional organized crime. The investigation lasted five years and resulted at the very end, or very recently, in the top six members of traditional organized crime pleading guilty.

More particularly, these individuals pled guilty to offences such as benefiting from the activities of criminal organizations or participating in the offences of a criminal organization. Since then, a number of other individuals also have pled guilty. However, to reach these results, the Colisée investigation required a tremendous amount of work, resources, and time dedicated to the investigational and disclosure preparation stages. This was required to demonstrate the existence of the criminal organization itself over and above the substantive offences investigations.

• (1105)

The cost of this investigation right up to 2006 was around the \$40 million mark. Under the current legislation, if we were to go after this same organization, we would have to repeat much of the same work. This operation clearly reveals the applicability of the current legislation. Having to deploy significant resources to meet the three elements of the investigation would be very challenging and very taxing to our resources. In our view, this would result in a duplication of large amounts of work that has already been completed through the investigation and preparation disclosure.

The threat of organized crime is a challenge not only for Canada, but one that is faced by many other countries. Just as we are doing here, other countries are also looking at ways to address the same issue. As an example, approximately a month ago I met with an assistant commissioner from the South Australia Police, who explained that Australia had recently enacted legislation to better deal with organized crime, to provide courts and law enforcement with better tools to pre-empt the activities of the members of criminal organizations.

I'm not at liberty, and I don't think it would be appropriate for me to speak on the details of their legislation; however, we could facilitate this committee meeting, by video link or whatever, with the resources from Australia.

In conclusion, the RCMP is of the view that the listing of criminal organizations is a measure that would be of great assistance to law

enforcement in our fight against organized crime. The current reality facing the law enforcement community is that organized crime is evolving rapidly and expanding its influence, and we must find ways to quickly adapt.

Addressing this reality will require bold moves and prompt action if we wish to gain ground on these criminals. The RCMP is more than willing to be a participant in the elaboration of appropriate measures to address this problem, while at the same time ensuring that the rights of all individuals, as guaranteed through our charter, are respected. The tentacles of organized crime have now extended beyond traditional boundaries and reach more and more into legitimate business. Any new tools that lawmakers can provide to the law enforcement community, such as the listing or scheduling of criminal organizations, to enhance our ability to investigate, disrupt, and prosecute these individuals and organizations would be welcome.

Thank you, sir.

• (1110)

The Chair: Thank you.

Next we'll hear from the Sûreté du Québec. Mr. Vandal, you have the floor for ten minutes.

[*Translation*]

Lt Serge Vandal (Lieutenant, Officer in Charge, Organized Crime Intelligence Unit, Sûreté du Québec): Mr. Chairman, honourable members of the Justice Committee, my name is Serge Vandal and I am a Lieutenant and Operational Assistant with the Criminal Intelligence Projects Service at the Criminal Intelligence Branch of the Sûreté du Québec. I am appearing today as an expert on criminal biker gangs, at the request of the Canadian Association of Chiefs of Police. My expertise in this area has been considered to be just that by various courts of law before which I have been called to testify in recent years.

With me today is Chief Inspector Jocelyn Latulippe, from the Sûreté du Québec, who is the Joint Chair of the Organized Crime Committee of the CACP, as well as Mr. Francis Brabant, Legal Advisor to the Assistant Director General of Criminal Investigations at the Sûreté du Québec. I would also like to take this opportunity to convey the greetings of the President of the CACP, Mr. Steven Chabot, who is the Assistant Director General with responsibility for the overall criminal investigations function at the Sûreté du Québec.

Under a Memorandum of Understanding with the various police services, the Criminal Intelligence Branch of the Sûreté du Québec is responsible for collecting and analyzing information relating to criminal biker gangs, as active sources of organized crime across Quebec. So, I am an enthusiastic participant in this study that has been undertaken by the Committee, with a view to seeing certain groups declared criminal organizations.

I think it is appropriate to state, right at the outset, that I share the concerns expressed by Chief Inspector Jocelyn Latulippe when he appeared before this Committee. In order for the various parts of our judicial system to work as they should, there is now a need to find a solution which would reduce the endless proceedings aimed at establishing the criminal nature of an organization, when that exercise has already been carried out successfully.

Our position on this—and we are certainly in favour of developing a list and automatically including at least five recognized criminal biker groups on that list—rests on a rationale that addresses three separate themes.

First of all, we will talk about the context in which these criminal organization came to set up shop here in Canada and the disputes generated by criminal expansion plans. Second, we will outline the method of operation of such organizations, and finally, look at the question of membership in an organization as a tool of intimidation.

In terms of the establishment here in Canada of biker gangs that operate on an international scale, it was only in the late 1970s that Canada saw the internationalization of regionally-based biker gangs. It was through the merger of existing gangs that international organizations gradually set up operations here in Canada. Taking advantage of dissent within the Satan's Choice biker gang, the Outlaws group, originally from the United States, became the first biker gang of international scope to have an official base in Canada. That breakthrough took place in the summer of 1977 with its establishment in Ontario and Quebec. Composed of members of Satan's Choice, that group was to completely disappear from Quebec in the early 1990s following a bloody offensive against them by the Hells Angels.

The American Hells Angels organization, founded in 1948, made its official entry into Canada in December of 1977. Bringing in 30 or so members from the Popeyes, they formed their first Canadian chapter in Montreal. That organization, which now has branches in six Canadian provinces, is also responsible for the disappearance of the Quebec Rock Machine gang. That criminal group, which was established in September of 1990, would be responsible for the arrival in Canada of the Bandidos ten years afterwards.

When the Rock Machine saw its organization weakening, following some arrests as well as multiple attacks against its members by the Hells Angels, it decided to approach the Bandidos with a view to merging with that international organization.

So it was that in November of 2000 the Rock Machine and the Bandidos officially formed an alliance. However, that attempt to establish themselves in Quebec was to be short-lived. Indeed, less than two years after it became a reality, the two Quebec chapters were dissolved in June of 2003.

• (1115)

Through the violence provoked by their expansion plans, the Hells Angels in Quebec had achieved their goal: to retain supremacy in Canada among criminal biker gangs. Recently, the American biker organization the Mongols has shown an interest in expanding into Canada. Recent intelligence supports that assertion. Therefore, in the wake of this brief overview of these criminal organizations, it is very important for the Committee to understand the need to target a limited number of international biker gangs through legislative amendments.

I would now like to move on to address the criminal biker gangs themselves and their sense of democracy. Beyond the rituals and certain observable characteristics associated with its method of operation, the Hells Angels biker gang demonstrates, in a vast amount of documentation, a clear consistency across its sub-groups,

which are designated as “chapters”. These individual groupings or chapters constitute an indissociable part of the whole—in other words, the international organization. More than once, police actions undertaken in various countries have resulted in the discovery of documents showing that chapters of the Hells Angels, located in 30 or more countries across the globe, are governed by a certain number of rules that have been adopted by their members over the years. In themselves, these rules show not only that we are dealing with a single organization, wherever it may be located in the world, but also that the individual member is part and parcel of the process, and personally participates in all the decisions made collectively by the group. Although this is not stated in their minutes of meetings, it is clear that all the members are asked to vote on criminal plans and projects, whether it is how the territories are to be divided up or murders to be committed.

Based on that reality and considering court rulings that could, at the very least, be called ambiguous, there is reason to wonder about the relevance of requiring, in cases involving members of such organizations, that an exercise intended to demonstrate the essentially criminal nature of the group's activities be repeated over and over again. In that connection, I will be pleased to answer any of the Committee's questions by providing factual examples, if the Committee deems that appropriate.

I would now like to talk about insignia and symbols of terror. The main advantage of becoming a member of a criminal biker gang is the right to wear an emblem that inspires terror.

That fact, well-known in police circles for many years now, was confirmed in a recent decision on a motion to confiscate property seized by law enforcement officers.

In his decision, the judge states that, in 2007, “the evidence clearly shows that individuals who wear them (jackets and emblems) use them as a means of intimidation, to show their connection with the Hells Angels organization, which is renowned for its strength and its violence”. That investigation, which was completed in 1997, allowed police to confiscate a building used as a fortified club house that belonged to the Hells Angels.

In criminal circles, this is a reality that the players have to deal with when they decide to get involved.

That is certainly not the case for the population as a whole. At the same time, situations have arisen that show that bikers do not hesitate to use their methods—namely, intimidation and violence—to convince any one and every one who presents an obstacle.

• (1120)

In Quebec in particular, that strategy has been used against individuals, merchants and business people who were competing with bikers seeking to gain a monopoly in certain legal markets.

Some cases indicate that the use of one's membership in a criminal gang, with a view to facilitating the commission of a crime, goes even further. An example of that is a sexual predator, with no known connection to the gang, who claimed to be a member of the Rock Machine in order to force his victims to remain silent.

These examples are part of only a brief overview of some of the benefits of belonging to, and identifying with, a criminal organization. Multiple incidents that have occurred in Canada lend credence to that argument. Additional details can be provided about these factual situations, if required.

On behalf of the Canadian Association of Chiefs of Police, I would like to thank Committee members for their kind attention. I am now available to take your questions.

[English]

The Chair: Merci.

We'll move now to Criminal Intelligence Service Canada. Gary, you'll be leading off? Okay, please go ahead. You have ten minutes.

Inspector Gary Shinkaruk (Officer in Charge, Project E-Pandora, Royal Canadian Mounted Police): Good afternoon.

My name is Inspector Gary Shinkaruk of the RCMP. I'm currently the officer in charge of the British Columbia outlaw motorcycle gang enforcement unit.

I spoke previously, briefly, on the scheduling of criminal organizations to the Standing Committee on Justice and Human Rights in Vancouver on April 30, 2009. I thank you for this honour and privilege to speak to you in a bit more detail on this extremely important and timely topic. I and my colleague, Detective Sergeant Len Isnor from the Ontario Provincial Police biker enforcement unit, are speaking on behalf of Criminal Intelligence Service Canada.

Honourable Justice Michael Moldaver concisely stated the following in an address to the chief justices in 2006:

With every passing day, more and more judges are voicing concerns about the length and complexity of criminal trials and the urgent need to address the problem now, before it's too late.

The concerns that they express relate to both process and substance.

On the substantive side, many trial judges complain that the criminal law has taken on complexities and subtleties the likes of which are truly mind-numbing. Few feel confident in their ability to complete a criminal trial from start to finish without committing reversible error.

And that, as we all know, translates into new trials and more delays and more expense and more stress on a system that is already overburdened, if not overwhelmed.

My message to the Criminal Defence Bar was that the problem was not solely, or even primarily, one of their making. Rather, it was a collective one for which all of the major stakeholders bore responsibility.

Law enforcement, the justice system, and Parliament share this responsibility to appropriately and effectively respond to the threat of organized crime in Canada. The discussion of scheduling of criminal organizations is recognized by this committee, as well as by the law enforcement community, as necessary, timely, and relevant.

It must be noted that the discussion regarding criminal organization legislation is a complex issue that cannot be examined independently of the many other necessary judicial reforms that are needed. I will only be addressing the scheduling issue in my statement today.

Scheduling is not unique in Canada. For example, scheduling occurs with certain drugs in the Controlled Drugs and Substances Act. However, there is a considerable difference between the scheduling of an inanimate object—a drug—as opposed to

scheduling membership in a criminal organization. Membership is an extremely complex issue, ripe for charter challenges. Considerable discussion and study is required prior to proceeding with the scheduling of any criminal organization. However, I firmly believe that in certain, albeit rare, instances, Parliament should give serious consideration to scheduling certain groups as being criminal organizations and to deeming membership to those criminal organizations as being illegal.

As an experienced investigator in the area of outlaw motorcycle gangs, I will present my recommendations using the Hells Angels as an example.

Speaking on behalf of CISC, it is our belief, which is supported by investigations, intelligence, and our collation of evidence, that the Hells Angels are a criminal organization. Our assertion is supported by three justices' decisions.

On September 30, 2008, Justice McMahon stated, in rendering his verdict, the following:

I am satisfied beyond a reasonable doubt that the Hells Angels Motorcycle Club of Canada is a criminal organization as defined by section 467.1(1) of the Criminal Code. I am satisfied beyond a reasonable doubt that one of the main purposes or main activities of the Hells Angels Motorcycle Club of Canada is the facilitation or commission of serious offences including but not limited to trafficking in cocaine and other drugs, extortion, and trafficking in firearms. Further I am satisfied that the facilitation of these offences has resulted in the direct and indirect receipt of the material benefit by the Hells Angels Motorcycle Club in Canada and the individual Hells Angels members who have benefited.

Prior to this decision in 2007, Justice Scurfield stated, in rendering his verdict on the Hells Angels:

I am satisfied that the Crown proved that the Manitoba Chapter of this club is a criminal organization. The evidence on this point was simply overwhelming... Consequently, I am certain that the jury would have had no difficulty in concluding that the Manitoba Chapter of the Hells Angels Motorcycle Club was a criminal organization.

● (1125)

Prior to this decision, in 2005 Justice Fuerst stated in her reasons for judgment:

I am satisfied beyond a reasonable doubt that during the time period specified in count two of the indictment, the Hells Angels Motorcycle Club as it existed in Canada was a criminal organization.

As evidenced by these three separate court proceedings, the Hells Angels had to be proven to be a criminal organization three separate times. The evidence presented in each trial was independent of previous proceedings and evidence. The judges in each case made independent decisions based solely on the evidence of that case. It would appear that the determination of a criminal organization carries no weight outside that particular case. Further, it undermines the public's confidence in the judicial system when a group is declared a criminal organization yet is permitted to operate within Canada.

Further to my belief, there are particular situations when the evidence clearly proves that a criminal group is a criminal organization, making it undeniable to try to disprove that fact. Again using the Hells Angels as an example, I will outline major police investigations that have occurred after 2001 following the well-documented deadly drug turf war between the Hells Angels and the Rock Machine.

The biker war resulted in hundreds of violent incidents and over a hundred murders. It was the death of a young innocent youth that acted as the impetus that resulted in Parliament passing the current criminal organization legislation. Since 2001 there have been 28 major police investigations across Canada, specifically targeting members of the Hells Angels criminal organization. It is important to note that other criminal organization investigations and court proceedings have occurred, but I will only be discussing Hells Angels cases.

In the 28 investigations, 241 members of the Hells Angels were charged with various offences, including criminal organization offences. The 241 charged Hells Angels members account for nearly half of the Hells Angels active in Canada. Of the 28 investigations, 22 of the investigations resulted in criminal organization charges. As evidenced by these statistics, police investigations are making use of the legislation, demonstrating over and over that the Hells Angels and its members meet the criminal organization offence criteria.

The criminal organization court proceedings have ranged in duration from seven months to 48 months, and the average length of a court proceeding is approximately 25 months. In addition to the lengthy duration of these trials, the financial burden is also substantial, generally costing many millions of dollars. These investigations and trials are taxing law enforcement financially as well as draining human resources, due to their duration and evidentiary requirements.

The Hells Angels continue to learn from every court proceeding and adapt their methods of operation to keep ahead of law enforcement. Disclosure during court proceedings has given the Hells Angels a clear understanding of law enforcement processes, techniques, policies, and regulations. They are keenly aware of our limitations

In an attempt to proactively gather evidence required for courts, police now actively recruit members of criminal groups to work as police agents and obtain the necessary evidence to support prosecution. Police agents, while being an effective tool for law enforcement, also come with high costs. Agents require an increase in human resources during investigations, as well as incurring financial consequences. Recent investigations that have utilized agents have given awards ranging from \$525,000 to \$1 million. This does not include ongoing protection and witness relocation costs.

It is a costly venture for law enforcement and the taxpayer to continually present the same evidence to the courts to get the same desired outcome. The current reality is that each criminal organization ruling has no bearing on other cases. There comes a point at which the overall cost of continuously proving that the same groups are criminal organizations is increasingly hard to justify.

There is a need to continue studying the scheduling of criminal organizations. Other considerations of scheduling include making it illegal to be a member of a scheduled criminal organization. As I said, this is a very complex topic, and there is much to consider regarding regulations, including which body or bodies are able to schedule a group, the level of evidence required for a group to be scheduled, and the appropriate appeal, to name but a few of the issues.

● (1130)

Thank you for your time. Detective Sergeant Isnor and I will be pleased to answer any questions the committee may have.

The Chair: Thank you.

We'll move on to Christopher Mainella, who is representing the Public Prosecution Service of Canada.

Mr. Christopher Mainella (Senior Counsel, Public Prosecution Service of Canada): Thank you, Mr. Chair. And thank you, members of the committee, for inviting me here today.

I have been a federal prosecutor in western Canada for almost my entire career and have handled several large organized crime cases involving street gangs, outlaw motorcycle gangs, and members of other organized crime groups. I have seen just about every type of organized crime criminal, from the unsophisticated street criminal to people in suits in office towers.

Today I'd like to give the committee some insight into how prosecutors deal with organized crime laws and the challenges they present. Because I'm in the middle of conducting several of these prosecutions for the Public Prosecution Service of Canada, I will speak in some generalities today.

The organized crime investigations we receive from the police tend to be very long investigations, often over a year in length. By the time we get them from the police, the police have spent hundreds of thousands of dollars, if not millions of dollars. The investigations tend to have lots of voluminous and complex evidence derived from wiretaps and unsavoury witnesses such as civilian agents or turncoats inside a gang.

Major organized crime investigations often lead to charges against several dozen accused. The cases typically take two or three years to get through the trial stages. Such cases often tie up at least two senior prosecutors during the investigation stage, dealing with wiretaps and other covert matters, and two or three senior prosecutors as well as junior lawyers and support staff once charges are authorized. The files are very resource-intensive for prosecutors.

We often run up against institutional capacity issues. We do not control the pace of an investigation or when it concludes, and like most things in life, timing is everything. As a result, an investigation may be ready to proceed to prosecution at a time when senior prosecutors are otherwise occupied. There are not enough prosecutors to handle these cases across Canada, both in terms of numbers and experience. Inadequate resources to deal with these cases are a reality. We currently survive by charge screening, plea bargaining, and sometimes luck. We cannot prosecute all the cases we currently receive, nor could the courts likely handle all the cases going to trial.

I have prosecuted organized crime cases under the old Bill C-95 legislation brought in 1997 and the current law based on Bill C-24 in 2001. There are two important things in common under the legislation in the last decade that I wish the committee to take into consideration. The first point is something I call gang dynamics. The second point is how much court time is spent on proving a group is a criminal organization.

First, there are the dynamics of a gang. Gang members face internal pressures that, even if the criminal organization can be proven by the crown, the accused and his lawyers won't admit the gang is a criminal organization for fear of retribution. This is not how the criminal courts typically work. Most experienced criminal defence lawyers know that wasting the court's time is a bad idea for their client; thus they admit parts of the crown's case based on disclosure and focus the trial on discrete issues. That general practice, however, does not often play out in these organized crime cases, through no fault of the defence bar.

• (1135)

The Chair: Mr. Mainella, could you please slow down a bit for the interpreters? Thank you.

Mr. Christopher Mainella: The effect of this is to increase the cost and length of these prosecutions. Many times I have to prove the equivalent of water being wet, but that is because of gang dynamics. For some groups there is an unwritten rule that you cannot plead guilty to organized crime charges. Recently I had a case where a member of a biker group had a ten-minute trial by simply allowing the crown to read in the allegations and make no submissions against conviction. Normally that is a guilty plea, but the dynamics of the gang would not allow such a plea. Canadian law does not allow a plea of no contest, but that is effectively what we did in that case, and it took me and the defence counsel months of negotiations to come up with that solution to deal with the realities of the gang.

In terms of my second point about how costly these cases are, the law in this country requires the crown to prove each time a particular group is a criminal organization, and absent an admission by the accused, there are no shortcuts.

I wish to read you a passage of the Manitoba Court of Appeals decision in a case called Kirton, delivered on April 5, 2007, which dealt with the issue of whether a decision of a trial court in Ontario that had held that the Hells Angels were a criminal organization could be relied on by other courts in other provinces:

However, a careful reading of Lindsay leads me to the same conclusion as in Ciarniello, namely, that the findings in Lindsay are very much based on the evidence before the court in that case, and cannot be automatically applied as if it was an "in rem judgment" (at para. 67), that is to say, a finding affecting the world at large. Needless to say, a court cannot take judicial notice of the fact that the Hells Angels is a criminal organization, tempting as that might be.

That is a correct statement of the present law in Canada. And what that law means is that for each case the police must gather evidence about a particular group, which the crown presents, often taking days or weeks of court time. The crown also has to go to the expense of finding expert witnesses. An expert witness is a person with special knowledge beyond the jury, or the judge where there is no jury.

A properly qualified expert can give a court opinions. This type of witness is very important to explain to a judge or a jury how a criminal organization operates and why it meets the definition in section 467.1(1) of the Criminal Code. Practically, with organized crime groups the crown must rely on experienced police officers for their pool of expert witnesses. The problem is there are very few organized crime experts in Canada. To know a lot about these groups you have to police them for a long time. To be accepted as independent before the court you can't be involved in the particular investigation. Thus an expert witness has a short shelf life. I have

found in my experience many expert witnesses are policemen at the end of their career, so the passage of time and retirement also take their toll. One of the first questions I ask the police when they bring me a potential organized crime prosecution is "who is your expert?" If they don't have one, I often say thanks, but no thanks; don't bother with criminal organization charges. The police are often upset by that advice. That's a hard choice to make, but I have to consider the broader public interest and the rights of the accused.

These cases often therefore leave the crown with being forced to prove a particular group is a criminal organization because the accused wants to save face in the gang. That requires lots of resources and experts. In a case I did two years ago involving a member of an outlaw motorcycle gang, the jury heard over a week of evidence about the gang and thousands of dollars were spent bringing in witnesses from all over Canada. That was the abridged version. My colleague who had the file before me thought that it might take a month to prove the criminal organization aspect of that case. When it came time for closing addresses to the jury, defence counsel didn't take issue with whether the particular biker group was a criminal organization, but his client could not admit that due to gang dynamics. That is a reality you need to appreciate. The dynamics of a particular gang are always going to be a backdrop in any prosecution.

I know the criminal law policy section of the Department of Justice is studying the issue of reforming the evidentiary requirements of proving a criminal organization. I wish to impress on the committee that there are no easy solutions to the current shortcomings of the law. Any reform must be designed to comply with the charter and also be flexible enough to deal with the vast array of criminal organizations, both today and over the foreseeable future.

The organized crime laws Parliament passed in the late 1990s were born of the biker conflict in Quebec. However, they also are intended for sophisticated international telemarketing fraud, stolen car rings, Ponzi schemes, and countless forms of illicit drug networks.

• (1140)

How Parliament deals with the evidentiary requirements of proving criminal organizations must be flexible. There are possible reforms that have been raised before, such as allowing as evidence a previous judicial finding about a particular group. Such a system would allow a judge to consider as evidence the findings of a previous judge or jury. Defence counsel could try to convince the judge not to place any weight on that prior decision. That prior decision would not bind the judge; it would just be a piece of evidence to weigh.

Another alternative is having Parliament declare that the issue of whether a group is a criminal organization is a question of law, so that at least a jury would not have to be tied up listening to such evidence for days or weeks. Such matters could be decided by a judge prior to trial under subsection 645(5) of the Criminal Code. Reserving types of issues for judges only is already part of our criminal law for difficult questions like attempts.

Reforms can be tailored to ensure a fair process to accused persons to withstand judicial scrutiny under section 7 and paragraph 11(d) of the charter. Any reform will breed litigation for those on the front lines, as members of criminal organizations will resist any attempts to threaten their livelihoods.

The practical reality today is that many prosecutors deal with the current state of the law by advising the police to keep their organized crime investigations small and keep them simple. A one-week investigation where you can put a covert camera in someone's house to watch them packaging drugs and then arrest two to three gang members is often far more effective than two years of wiretaps and the possibility of 50 accused. The latter type of case may collapse under its own weight, which is what we want to avoid. Not every police investigation needs to be a re-creation of the Normandy invasion in 1944. A small commando-type raid will often do the trick.

Thank you, Mr. Chair and members of the committee.

The Chair: Thank you.

Now we have Kent Roach, representing the faculty of law, University of Toronto.

Professor Kent Roach (Pritchard-Wilson Chair, Faculty of Law, University of Toronto, As an Individual): Thank you, Mr. Chair.

Thank you for inviting me to speak to the committee today. I would like to acknowledge the assistance of the David Asper Centre for Constitutional Rights, and in particular Kerry Liu, a law student at the University of Toronto faculty of law, who assisted with research for this presentation.

I want to start with an acknowledgment that organized crime is a serious problem. As you've heard today, there have been serious obstacles with many organized crime trials in many parts of Canada. It is imperative that the criminal justice system be able to prosecute and punish organized crime.

That said, I do not believe that the listing of organized crime groups will be an effective, practical, or constitutional means of shortening organized crime trials. It could start a process in which novel concepts that were adopted in the terrorism context will start to seep in and arguably infect other areas of the criminal law.

•(1145)

First, let's start with some background. The processes for listing terrorist groups are provided in section 83.05—

The Chair: Folks, there's a fire alarm. We have to evacuate the building.

• _____ (Pause) _____

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•(1200)

The Chair: Okay, we're reconvening the meeting.

We'll go back to Mr. Kent Roach. Please continue from where you left off.

Prof. Kent Roach: As I was saying, the provisions in sections 83.05 to 83.07 of the Criminal Code, which provide for the listing of terrorist groups, were enacted in 2001 as part of the ATA to comply with UN Security Council resolution 1373. They construct an elaborate structure for the cabinet, on recommendation of the Minister of Public Safety, to list terrorist groups, with reviews every two years. They also provide for the protection of secret intelligence used to support the listing and for judicial review of the listing in Federal Court.

In theory, groups can challenge the listing after it's made, but this has not been done by the 40-odd terrorist groups that are currently listed. So the ability to bring a judicial review application for listing has proved to be somewhat illusory. Indeed, it might not be too much of a stretch to say that if a group wanted to challenge the listing, the challenge itself might be seen as evidence of participation in the activities of a terrorist group or criminal organization. It might be thought that the challenge was brought in order to enhance the ability of the group to commit a crime. In the Criminal Code, these are crimes under sections 83.18 and 467.11—for terrorism and organized crime, respectively.

From the state's perspective, a challenge to a listing decision could expose general intelligence about a criminal organization. If the Hells Angels or another group were listed as a criminal organization, the intelligence that would support that could be exposed through judicial review. Under section 467.1, however, a prosecutor could choose to define a criminal organization fairly narrowly. A criminal organization is defined as any group of three or more persons that has as one of its main purposes or activities the commission of serious offences.

So even if listing were desirable, I'm not sure that it would be practicable or advantageous from the state's perspective. You have to recognize that the definition of "criminal organization" is so broad that it can encompass almost all criminal conspiracies, and any list of organized crime groups could be an administrative nightmare. It would either be excessively long or under-inclusive. Listing is always going to lag behind developments on the ground and the permutations of organized crime. Indeed, this has been the case even in the terrorism context. There are fewer terrorist groups than there are organized crime groups. In both the Khawaja case and the ongoing Toronto terrorism prosecution, prosecutors have not been able to rely on the listing decisions under sections 83.05 to 83.07, so the indictments in both of those cases allege an ad hoc group, essentially the criminal conspiracy. I think the same might occur if criminal organizations were listed.

It is inevitable that a listing provision will be challenged under the charter. I'll say something about the merit of that challenge later, but why give defence lawyers another target, especially when, to judge by the Lindsay case and the Terezakis case, the developing consensus in the case law is that the existing provisions are constitutional. To introduce something that is only going to attract charter challenges could actually prolong criminal trials.

• (1205)

Similarly, I think there's a danger here of fragmenting criminal trials. Let's say that you list a criminal organization à la the terrorist group model. Does this mean that the criminal trial will have to be held in abeyance while that group challenges the listing provisions in the Federal Court? Generally, it's not desirable to fragment criminal trials.

So let's come to the merits of a charter analysis. I actually think that listing probably could be upheld as a reasonable limit on freedom of association, given that there would be no immediate consequences that would follow from the listing. Courts might, however, look at alternatives under the proportionality test, alternative means that are less rights-evasive, to deal with the problems of trial delay and trial complexity. To me, that is really the issue we're talking about: trial delay and trial complexity.

I would even go so far as to say that listing might also be upheld under section 7 of the charter if there were regular judicial reviews. Nevertheless, these reviews will be *ex post*, and some thought should be given to allowing *ex ante* challenges before the listing is made.

It seems to me that the most serious charter concern with listing is that I think it may very well violate the presumption of innocence in section 11(d) of the charter. What listing would do is essentially substitute a cabinet decision that a criminal organization is a criminal organization for proof beyond a reasonable doubt of an essential element of a crime, if the crime involves a criminal organization as an enhancement.

The Supreme Court of Canada has, in cases such as *Regina v. Whyte*, 1988, 2 Supreme Court Ruling 3, held that the substitution of one element of an offence for another element of the offence will violate the presumption of innocence unless the essential element follows inexorably from proof of the substituted element. In English, what I'm trying to say is that listing would be an administrative shortcut around proving an essential element of the criminal offence.

Indeed, we even find this in our sentencing jurisprudence. As you know, even if a criminal offence is not charged, the fact that a crime was committed for the benefit or at the direction of or in association with a criminal organization is rightly deemed to be an aggravating factor in sentencing. But under paragraph 724(3)(e)—and this has been the law since Justice Dickson articulated it in the *Gardiner* case in 1982—the prosecutor has to establish beyond a reasonable doubt such aggravating factors. So it seems to me that listing would be a legislative and executive shortcut around the reasonable doubt proposition, which is a fundamental element of our Criminal Code.

Finally, I would suggest that listing is a practice that challenges the separation of powers we've long had in our democracy, and I don't think it should be expanded beyond the terrorism context. Listing fuses together legislative powers, executive powers, and

judicial powers. Essentially, listing allows the cabinet to take an issue away from the trial and to deem that an essential element of the criminal offence has been established. There are some dangers that wrongful listing will not be undone by judicial review. There has been at least one example in Canada of an individual being wrongfully listed under the UN Act regulations.

Finally, I would suggest that listing would represent a seepage of anti-terrorism law into the criminal law. We're not here to debate the ATA, but I think it is important to remember that this is how the right to silence was undermined in the United Kingdom. Parliament first made an exception to the right to silence in the terrorism context, and it then spread to the rest of the criminal law. For that reason, I have concerns about the spreading of the listing concept.

• (1210)

Having said that, I think the problems that police representatives have identified of complex, lengthy trials in the organized crime context are very real problems, and I agree with them that there is a problem. But it seems to me there are many other remedies we can look at rather than listing, and that listing might turn out to be cosmetic and problematic.

Some of those remedies have recently been recommended in Ontario by Justices LeSage and Code. They include real powers for pre-trial judges to make rulings that will be binding on the trial judge; enhanced severance powers that would allow binding rulings on criminal organizations or on a wiretap issue to be made and then the subsequent conspiracy to be severed out into smaller and more manageable trials; improvements for electronic disclosure; and improvements in electronic surveillance and witness protection.

I would submit that these are some of the bread-and-butter issues, not listing, which I fear may not be practical and will for sure be challenged under the charter and will strain our traditional idea of the separation of powers between the judiciary, the legislature, and the executive.

Thank you very much.

The Chair: Thank you to all the witnesses.

We'll open the floor to questions. I'm going to use my discretion to reduce the question period to five minutes, because we've lost some time due to the false alarm.

Mr. Murphy, you will start with five minutes.

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

I'm intrigued by this comparison between section 83 and section 467. Just for review, section 83 in its breadth consumes over 30 pages of our Criminal Code, and Section 467, in its breadth on organized crime, consumes four pages.

There's no doubt in my mind, having come back from our sojourn in the west, that it is time we addressed the issue of organized crime, and that maybe we are facing, to use Mr. Mainella's analogy, a Normandy situation, and a beachfront needs to be made. Knowing a lot of Dieppe veterans in the past, I can say that didn't work, and commando raids don't work, so maybe it is time for a Normandy invasion.

I want to take some issue, Professor Roach, not only with the fact that your words in discussing terrorism launched a fire alarm in the building, but also because I tend to disagree with many of your points. One is that judicial review hasn't been tried by groups that have been so named and therefore it's illusory. Those groups have the right to come forward and say they're not terrorist groups, but they haven't. I'm sorry, but to me that means that maybe they think they would be declared terrorist groups. In the case that individual people have been misnamed, that is wonderful. That is what it is there for, and that has worked once.

That the judicial review is lugubrious and slow—the Federal Court is an itinerant court, with judges falling out of the sky to hear anything on quick notice, particularly environmental obstruction cases. The judicial review by its nature means relatively swift, 60 to 90 days. So I don't buy that argument. Of course you're permitted rebuttal in this democratic society, Professor Roach, but it seems to me those are frivolous arguments, and the fragmentation through delay wouldn't work.

My bigger issue is that we can't take the words. It seems to me that reasonable people would read Justice McMahon's wording and say that HAMC, Hells Angels Motorcycle Club, is a criminal organization, and that should be able to apply throughout Canada. We understand it's not an *in rem* thing, and we can't take judicial notice of it. But if enough judges, pile upon pile, say that HAMC is a criminal organization, what would be wrong with Parliament using its prerogative through a Governor in Council regulation and declaring them such? How could that be a bad thing?

My final comment or question is for the police officers, and particularly the line that the HAMC continue to learn from every court proceeding and adapt their methods of operating. If section 83—that's ATA talk—is used, it talks about entities associated with the declared group, and it gives very wide power, I think, for the cabinet to decide who is and who is not a group, and therefore later on in interpreting the list of groups the judge can interpret who is associated with those groups. What's the problem with that?

• (1215)

The Chair: Mr. Roach, maybe you could do your rebuttal.

Prof. Kent Roach: I could, yes, briefly.

On judicial review, as I tried to explain, one of the reasons groups will not come forward to challenge is that the very act of challenging may then itself be a criminal offence, so it seems to me that judicial review.... I mean, to my knowledge there hasn't really been any attempt to have judicial review.

Mr. Murphy's right that in the Liban Hussein case, the error was eventually corrected. The government deserves credit for taking steps, but to be named falsely as a terrorist or an organized crime group does, I think, cause some real harm.

On the issue of fragmentation, I think it is important that trial judges be able to decide all the issues in criminal trials. It's very much our tradition, and the ATA, by introducing the Federal Court.... The Federal Court is a perfectly fine administrative law court that does its work in an efficient way, but the reality is that the Federal Court has not been a traditional criminal justice court, and I think that expanding its activities over the criminal law is not desirable.

The Chair: Does anyone else want to comment briefly? We only have fifteen seconds.

All right; we'll move on to the next question.

Go ahead, Monsieur Lemay.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I would like to pursue the line of questioning initiated by my colleague, Mr. Murphy.

I practiced as a criminal lawyer for 30 years. It was not the fact that the Hells Angels or individuals were committing crimes that posed a problem. Parliament passed subsection 467.1(1) of the Criminal Code, which defines a criminal organization. You outlined the kinds of criminal offences that could come under this subsection. Now, police forces are asking us to draw up a list of these so-called criminal groups. Justice McMahon of the Federal Court of Appeal has defined the term “criminal organization”.

Professor Roach, if Parliament decided to draw up a list which included the Hells Angels, for example, would the burden of proof not be reversed? At that point, would it not be up to the Hells Angels to prove that they are not a criminal group, if they want to be removed from that list?

• (1220)

[*English*]

Prof. Kent Roach: Where would the group go to discharge that burden of proof? Would the group go to the Federal Court on judicial review, or would the group be able to challenge it in a criminal trial? Hence my concern about fragmentation.

If you take the terrorism model as your template, “terrorist group” is defined in section 83.01 either as a group that has terrorism as its aim—very much like section 467.1—or as “a listed entity”. The concern is that you are substituting cabinet's decision to list for what is essentially a highly aggravating factor when it comes to the individual's criminal trial.

[*Translation*]

Mr. Marc Lemay: All the police forces are telling us that Crown prosecutors do not want to be forced to spend four, five, six or seven days, or even weeks, producing evidence that the four individuals concerned are members of the Hells Angels.

So, what is the solution? As I see it, making a list is not a problem. They would have to come before the Federal Court and prove that they are not a—

[English]

Prof. Kent Roach: It seems to me the solution is to improve the mega-trial process throughout. It may be that in some cases it is going to take a week to prove that there is a criminal organization, but that's the price of having trials and proof beyond a reasonable doubt. My friends from the police organization did not cite any cases where a prosecution has been ended because they could not prove that it was a criminal organization. Judges and juries have a certain degree of common sense, and it isn't all that unusual that Justice McMahon and others would come to a conclusion that the Hells Angels is a criminal organization.

Even if you had the listing—and even if they did not challenge it to the Federal Court of Appeal or under the charter—you would have to establish that this particular accused was acting for that criminal organization, in addition to the crime.

I believe one of the representatives talked about three things that have to be proven in most organized crime cases. What I'm suggesting is that this solution only addresses one and may open up more problems and more charter challenges than it actually closes. If there is empirical evidence that most organized crime trials are being consumed with 40%, 50%, or 60% of the time spent proving that it is a criminal organization, then yes, we may have a problem and there may be a section 1 justification.

• (1225)

The Chair: I'm going to have to cut you off there.

Mr. Comartin, you have five minutes.

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

Thank you, witnesses, for being here.

Mr. Mainella, I'm going to start with you. I would like to follow up on this point, which I was going to raise before Professor Roach did, but he beat me to it. What about the practical problem? If we went ahead with this concept we would list the groups. We don't list individuals. So how practical is it going to be for shortening the trials? Because we're still going to have to prove in each case that those individuals who are charged as being members of the organization are in fact members of the organization. That's question number one.

On the comment on the Lesage and Code report, do you see that as going reasonably successfully, if those changes were implemented, to resolving the difficulty with the lengthy trials?

Finally, Professor Roach, if I understand Mr. Ménard's approach, he is looking not at duplicating the ATA listing approach but in fact using a judicial model. I don't know if you've conceived of that kind of an approach. So you wouldn't have this blurring of responsibility and separation of powers. Also, it seems to me that it would do away with any of the charter arguments if it was in fact, say, a panel of three Superior Court judges gathered from around the country on a periodic basis to have a trial as to whether this group being charged as a criminal organization would in fact meet that test.

Mr. Christopher Mainella: I'll deal with the practicality question first. In terms of practicality, there are two responses. The first thing is you need to understand that when people think about criminal

organizations they tend to use an analogy to corporations. They think they operate that way.

The better way to think of them, particularly outlaw motorcycle gangs, is as a medieval guild. They tend to be a band of brothers of like-minded individuals, but they commit their own crimes in their own way. Oftentimes they're in rivalry with each other. So when you think of a criminal organization you have to understand that once you get past the label of it, they don't operate the way corporations tend to operate. There's no one bank account in Switzerland where all the money goes and then there's a payout of shareholders at the end of the year.

The other part of practicality is that juries and judges need to understand context. If an outlaw motorcycle gang tells a person they are going to take them on a ride out of town, that has a particular context, a meaning in the outlaw motorcycle world. A jury doesn't understand that unless you call expert evidence and some background to put that in. So the crown is still going to have to call evidence about the organization and how it works in the trial to understand certain facts. A fact may be innocuous to you watching, like hearing on a wiretap that they're going to take you out of town. But it could mean the end of that person's life in the biker context.

Mr. Joe Comartin: Excuse me, Mr. Mainella. It's just that we don't have much time. I think we generally do understand that. What we're really asking, given what you've just said, is this: is it in fact going to shorten the trial?

Mr. Christopher Mainella: You're still going to have to call evidence about how the group operates. It will depend on the specific case.

In terms of your second question on the pretrial powers, more powers to the judiciary to manage trials is a good thing. Right now, we still operate on a bit of an Edwardian criminal procedure. There aren't those very firm deadlines and there are a lot of judges who want that. It would assist in the structuring of trials.

Prof. Kent Roach: Just quickly, the judicial model would deal with the separation of powers, but I would worry that it would have a lot of resources. So why do we need to have these trials at periodical intervals, when the definition of criminal organization itself is so wide that I think it's open for prosecutors to say they don't have to prove that the Hells Angels is a criminal organization, that all they have to prove is that these five guys who hang out at this clubhouse are a criminal organization?

Mr. Joe Comartin: Do I still have time?

The Chair: Mr. Comartin, you have about 40 seconds.

Mr. Joe Comartin: Just to go back to deciding code, is that report being looked at by the justice department in terms of actually coming forward with some recommendations to amend the evidence act or the code?

• (1230)

Mr. Christopher Mainella: I'm not aware of that.

Mr. Joe Comartin: Thanks, Mr. Chair.

The Chair: We'll move on to Mr. Rathgeber. You have five minutes.

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

Thank you to all the witnesses for your attendance here this morning.

I'm inclined to support the listing of criminal organizations. Following up on my friend Mr. Murphy's line of questioning a few minutes ago, I guess I don't have a very good appreciation for exactly what the problem is, notwithstanding that I at least theoretically support the listing.

We've heard that it takes days and sometimes weeks for a court to determine the existence of a criminal organization. As I look at the definition of a criminal organization in the code, when you break it apart, it's very simple: three or more individuals acting in concert and one of their objectives is the commission of criminal offence. I'm going to ask the prosecutor from western Canada: what part of that is so troublesome that it takes courts days and sometimes weeks to establish that proof?

Mr. Christopher Mainella: Criminal organizations don't have written constitutions that say "this criminal organization is a money-laundering shop", so we tend to have to rely on hundreds of hours of wiretaps. Members of organized crime groups know they're being wiretapped, so you have to play a lot of them. You often have to rely on insider witnesses—agents or turncoats. Their testimony often will take days and weeks. They'll be cross-examined at length because they tend to have unsavoury backgrounds.

Just to meet the definition requires a lot of evidence. That's the difficulty. We have to prove it beyond a reasonable doubt. As well, a lot of these groups will also have facades. They will try to do legitimate activities, such as toy runs and that sort of thing. They'll say that they're just a bunch of guys who hang out in a house, drink beer, and play cards.

You have to go beyond that. That's the difficulty. It's the covert evidence that takes a long time to get out.

Mr. Brent Rathgeber: For some of the real famous gangs, such as the Hells Angels and the Bandidos, why... I haven't read the Queen and Kirton in the Manitoba Court of Appeal, but why can't a trial court take judicial notice of a criminal organization that operates *in rem*? I mean, the Hells Angels operate in more than one jurisdiction and more than one country. You've obviously read the Manitoba Court of Appeal decision. Why did the court hold that you cannot take judicial notice of the existence of those organizations?

Mr. Christopher Mainella: Whether a group is a criminal organization is an element of the offence. It has to be proven by the crown beyond a reasonable doubt each and every time. Because it's an element of the offence, the way the charter works you can't simply apply one decision into another fact pattern currently. It's just the nature of our criminal process.

If there were reform in that area, for example, where a decision could be put before a court and then defence counsel could make submissions on it, that might be a way to assist in the process, but this happens because it's an element of the offence. It would be no different from being charged with a criminal offence: the crown couldn't rely on a conviction of another person to prove my guilt.

Mr. Brent Rathgeber: Just so I'm clear on this, the fact that it's a crime to be a member of a criminal organization precludes the court from taking judicial notice of that membership when that individual is charged for a specific Criminal Code infraction as a member of that organization.

Mr. Christopher Mainella: It's not a crime in Canada to be a member of a criminal organization; it's an element the crown has to prove.

The crown has to prove that I'm a member of the particular group. For example, if it's a section 467.12 offence, the crown has to prove that, let's say, an extortion occurred. Then the crown has to prove the nexus between the gang and my extortion—that I did an extortion to recover, let's say, a drug debt of another member. So the crown has to prove those three things that were talked about earlier.

Mr. Brent Rathgeber: Okay.

You've indicated that rarely in these complicated organized crime trials will the defence concede or admit anything; they put the crown to strict proof on every element. Did I understand that correctly?

Mr. Christopher Mainella: No, not on every element, but there is this gang dynamic where accused persons, because they are still a member of the gang and they fear retribution, don't want to do any particular act that may look bad on the group, so they won't make an admission about the group itself.

• (1235)

Mr. Brent Rathgeber: I understand that. I know very little about gang culture, and I say that with pride, but don't some of these organizations wear their colours with pride? They wear jackets. They have uniforms. Aren't some of these members proud to be part of these organizations, and wouldn't they admit it under certain circumstances?

Mr. Christopher Mainella: Again, it's their choice. Section 655 of the code makes it their choice. They have an absolute veto. So, yes, they are proud to be members, but they still make the crown prove it.

The Chair: We'll move on to Monsieur Lemay, for five minutes.

[Translation]

Mr. Marc Lemay: I will let Mr. Petit have a turn and come back later on.

[English]

The Chair: Sure. That's fine.

Monsieur Petit.

[Translation]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Good morning, and thank you for being with us today.

The questions raised by the motion before us today arose many years ago in Quebec. I am a defence lawyer. I am just about the same age as Mr. Lemay, and we were both there for the infamous megatrial in Montreal, the aftershocks of which are still being felt and where the defence lawyers were better paid than the Crown prosecutors. You are certainly aware of that; there was talk of that in the newspapers. We have already heard from your colleagues, but I would be interested in your own comment in that regard.

Mr. Serge Ménard, who was the Minister of Public Safety in Quebec at the time of the gang wars, recently expressed his opinion on this motion. He said that this is not something that will enable us to successfully combat organized crime, because they will just have to change their name and start all over again. That is a valid argument, even though I do not necessarily agree. That is why I would like your opinion.

We cannot list the Hells Angels Inc. or Bandidos Inc. in the Quebec or Ontario Corporations Act or in federal legislation. Those groups would simply take different names. As long as we are unaware of those names, their activities cannot be prohibited. That is another problem.

How did you hear about the Mongols? Well, it happened one day when you arrested an individual wearing a coat that said “Mongols” on it. Without that inscription, you would not have known they existed. And yet, this is an organized crime group. Members of the mafia do not wear a name emblazoned on their chest, but they wear a tie, a nice hat, a double-breasted suit, and that sort of thing. Should we be thinking about including the “mafia” or “Cosa Nostra”, “Hells Angels” and “Bandidos” on the list?

We need to know whether the instrument that would be created by Parliament would help a Crown prosecutor talk about certain things. Let us not forget that the defence lawyer or, at least, others representing one part of the House of Commons, said something different. Why do they want this to be included in the anti-terrorist legislation? We believe it should be part of the Criminal Code.

Mr. Aubin, could you take that question?

Supt Michel Aubin: Mr. Petit, I will try to answer you to the best of my ability. Those who are more familiar with the Hells Angels than I am could perhaps add to my response.

There are two things that come to mind. First of all, certain large criminal organizations, such as the mafia, will not necessarily incorporate, as you say, or wear items of clothing that could identify them. In that case, it is more of a lifestyle, a culture or a cult that is involved. I do not think, however, that simply because an organization appears on a list, it would necessarily change its name. It is important to understand that, for many criminal organizations, such as the mafia and other groups that originated in Asian countries, it is a question of pride and membership in a particular circle. I do not think an organization would change its name, to call itself Mafia 1 or Mafia 2, just because we have taken action.

For many of its members, it is really a question of personal pride and membership in a group. Personally, I do not see it that way. However, I cannot speak for the Hells Angels. Nor do I want to address the legal question, because that is not part of my expertise. I think we could go forward and consider the possibility of technical variations in organizations. That is the way it works with the drug legislation. If we add a drug to the list, we will also add its derivatives. There are technical terms available to ensure that criminals cannot use just any derivative or polymer. In terms of the precursors, we will obviously use the derivatives of the precursor itself.

• (1240)

[English]

The Chair: Monsieur Lemay, did you want to follow up on that?

[Translation]

Mr. Marc Lemay: My question is addressed to Mr. Mainella.

You heard the questions I put to Professor Roach. A little earlier, I was re-reading sections 467 and following. There must not be much missing there, because you said there is a need to reduce, that the evidence has to be different, that we should perhaps consider making things a little easier and that there has to be more focus on electronic surveillance. And yet, collecting the evidence takes just as much time when electronic surveillance is involved.

I want to try and understand. How would a listing of organized crime groups help you, more so than what is currently in sections 467 and following, and if it would help you, how? What is your response to Professor Roach's argument? Are you not concerned that the Hells Angels could take you to Federal Court to have their name removed from the list?

[English]

Mr. Christopher Mainella: I'll answer that two ways. First, when you're designing legislation it's not just for one particular group. The one thing about motorcycle gangs is they have trademarks; they have very clear indicia. Most criminal organizations are amorphous and they're very difficult to list. It's a very unwieldy and inflexible tool.

Secondly—and this goes back to my answer to Mr. Comartin—the trier of fact, whether it's a judge or a jury, needs context. They need to understand that if Mr. X is the president of the chapter of a particular outlaw motorcycle gang, what powers does that mean. It's not like the Canadian Constitution, where the powers of a branch of government are listed in a document. You have to explain that through evidence. So in terms of answering your question, I'd still have to call several days of evidence to explain the context of facts.

I may have a document that you may think nothing of when you read it, but in the gang culture it may be a very significant document, so I would have to call one of the very few experts in Canada who knows about that document. So the evidence would probably have to be repeated.

[Translation]

Mr. Marc Lemay: Thank you.

[English]

The Chair: All right, our next round would be Liberal and Conservative. Are you okay, Mr. Murphy?

Mr. Brian Murphy: Yes, for fifteen minutes or so.

The Chair: I'm going to take the liberty of just asking a question myself. I think all of—

[Translation]

Mr. Daniel Petit: Mr. Chairman, pardon me for interrupting. I asked a question, and Mr. Aubin answered. Would someone else like to respond? Perhaps the other witness could answer. I think you were waiting for a chance to comment.

Mr. Francis Brabant (Legal Counsel, Sûreté du Québec): Thank you.

In terms of organizations such as biker gangs, they are, in fact, international organizations devoted exclusively to criminal activity. This is a phenomenon that has been observed everywhere in the world. It has been noted in Europe and elsewhere that disputes have arisen between international criminal biker gangs whose sole aim was to exert total control over a specific criminal territory. There I am referring to narcotics trafficking, prostitution and all the other types of criminal activity that can benefit a group.

Members of these organizations use their image when they make contact with members of another organization, or even the same organization. I could give you the example of the Hells Angels. Members of the Hells Angels group in Quebec and in British Columbia use the same selection process. That means that they are all loyal to the organization. That being the case, they can collaborate for the purposes of their illicit trade without having to worry about protecting themselves, as opposed to dealing with members of another organization or with independent criminals who are not part of a criminal organization. The partnering process would not occur without a certain amount of mistrust. Wearing its colours and identifying with an organization, including obeying its rules regarding the wearing of those colours, authenticates the members and facilitates their criminal activity.

I am talking about the Hells Angels here. However, at the international level, there are also such groups as the Outlaws, the Bandidos, the Rock Machine, and the Mongols, which are governed by the same principles and operate in the same way.

Faunting one's membership in such an organization becomes a tool. In some cases, it can even act as a deterrent to people, in both the civilian population and among local criminals or members of other organizations who oppose a takeover by the organization that is out there showing its colours. Being out there for everyone to see or using the name of one's organization elicits a certain image in people's mind, just as the words "Hells Angels" do. Things immediately come to mind and suggest that this is a criminal organization, because there have been prosecutions, media coverage in other countries, and so on. These things are well known to people in the criminal justice system, because they have been acknowledged in Canada.

A little earlier, statistics were mentioned, reference was made to days or weeks. Just to give you an example, on the Software project, the R. v. Lindsay case, Mr. Cameron spent 10 days proving the act of extortion. Six months were needed to prove the existence of criminal organizations in Canada. That is really a very lengthy and significant period of time, compared to the offence.

It is also important to understand that a member of the Hells Angels who is in charge of a narcotics trafficking network is contributing to the overall welfare of the group. Part of the criminal revenues are spread around to improve the organization and make it more powerful. When a member like that is arrested, those things are often lost.

I see that Mr. Latulippe may want to add something. However, I do think that shows the impact that these images can have.

In closing, I would like to raise one final example. In 2004, there was a gathering of Hells Angels members in the Sherbrooke region

to celebrate an anniversary. Members of the organization from across Canada travelled to Sherbrooke on that occasion. About 25 members of the organization from British Columbia decided to fly in economic class and to show their colours. Complaints were made during the flight by the airline staff. Subsequently, passengers also complained, saying that the fact these individuals were showing their colours had upset them. I was asked to meet with a security manager for the airline company in Montreal. He asked me what steps could legally be taken under the legislation. He wanted to know what he could do and what the law allowed him to do in such cases.

• (1245)

I had to tell him that any action fell within the purview of the airline company itself, which could possibly ask such individuals not to show their colours, because it upset their clients.

Thank you.

[English]

The Chair: Thank you.

I'm going to give Mr. Comartin a chance, but before I do, I have two short questions.

Mr. Mainella, in your earlier comments you quite correctly stated that being a member of a criminal organization is not an offence, it's simply an element of an offence. Is there any merit to actually making a membership in a criminal organization an offence? Would that assist the police?

Mr. Christopher Mainella: You buttress right up against freedom of association. You'll find—and I'm just thinking of certain outlaw motorcycle gangs that I can talk about—that some members commit no crimes. You can have rare individuals in some groups that commit no crimes. They may have a particular function that facilitates other members doing that. It's probably sort of an asp nest type of solution. I don't know if that will withstand charter scrutiny.

• (1250)

The Chair: Professor Roach, I think Mr. Lemay had asked earlier about rebuttable presumption. Is there a way of strengthening the ability of the courts to take judicial notice without necessarily impacting the presumption of innocence?

Prof. Kent Roach: I think for the reasons that Mr. Mainella said, judicial notice is really not possible when you come to an element of an offence. You could have a statutory presumption that X organization is a criminal organization. The onus could be put on the accused to prove on a balance of probabilities that it's not a criminal organization. That would violate section 11(d) of the charter, but it could perhaps be upheld under section 1. The Supreme Court has in a variety of cases—when it has looked at drunk driving and prostitution—accepted these as valid grounds for saying that a violation of the presumption of innocence, a reverse onus on the accused, violates the accused's rights but nevertheless has been justified as a reasonable limit.

The Chair: What you're saying, really, is that judicial notice is really not an option for us at all.

Prof. Kent Roach: No, I mean for the reasons that have already been expressed, I don't think you can have judicial notice of an essential element of an offence. With the reverse onus that I talked about, we would not know if it was justified under section 1 until that issue was finally litigated. That goes back to my issue: I think there are other reforms that can be done that will not raise any arguable charter issues but that could also deal with the issues of trial length and trial complexities that you've heard of.

The Chair: All right.

Mr. Comartin, one last question.

Mr. Joe Comartin: I have two.

Mr. Mainella, perhaps...

[Translation]

Mr. Vandal, it may be the same thing for you.

[English]

Regarding the problem with getting enough expert witnesses, we heard this at the public safety committee about three years ago from Le Sûreté at that time, so Superintendent Aubin, you may comment too. Is there not some way we can develop a larger group of expert witnesses?

I have just a quick second question, and this is to you as well, Superintendent. You made some reference to the Australian act in your notes. Have you looked at it in detail? Our understanding is it doesn't go into listing. Can you give us a quick look at where it does help police work and prosecution?

Supt Michel Aubin: On the issue of expert witnesses, it is a challenge. Maybe Mr. Latulippe can address it from the Quebec front. That would probably be helpful.

The RCMP recognizes it, and we are challenged on it due to human resource issues. I'm not going to hide that from you. It is a challenge, and we are trying to address it. We do have a program that we're trying to rebuild at this time.

On the issue of Australia, what I've learned through the assistant commissioner, who visited us approximately a month ago, is the fact that the enacted legislation and the measures they have are not necessarily listing the organization, but they're recognizing the threat that these criminal organizations, bikers, are posing to society. This followed an incident at an airport where there was a shootout. I understand that the courts and law enforcement were provided with extra powers that go against their legal structure. I'm not sure what the document is, and I apologize for that, but it provides these extra measures to be able to deal with criminal organizations.

Our pitch to you, sir, is basically to recognize the problems that these organizations are causing and the amount of work that's required by law enforcement to deal with them, and that it's probably time that we had some additional measures to deal with them.

From our perspective, it's an issue that's very costly, and it affects our capacity to address other measures.

[Translation]

chief Jocelyn Latulippe (Chief Inspector, Director of Criminal Investigation Services, Sûreté du Québec): I simply want to say that, as regards expert witnesses, training costs and human resources are not the only things to be considered. There is also the length of time. This is an occupation that one gets better at through experience, over many years. However, it is not easy to retain people in these positions for many years, so that they can become real experts. It is a constant challenge to have enough experts available, because of the way people's careers and criminal cases evolve.

Just to follow up on a question posed earlier by Mr. Petit, I want to point out that the number of criminal organizations being targeted through such a measure is very limited. And this really refers to international organizations with a solid base in Canada which, based on intelligence reports we have in our possession, threaten the economic stability of Canada, as well as stability, peace and public safety in certain areas of the country.

These 53 criminal biker gang organizations, which we cited as an example, are recognized around the world and are not the type of organizations that would want to change their name. Indeed, the culture of these organizations is such that changing their name would be an affront to their pride, their reputation and their strength in terms of their capacity for violence and intimidation. Based on our experience, that is not something that is likely to happen.

● (1255)

[English]

The Chair: Thank you.

Mr. Joe Comartin: Could we just have a comment from Mr. Mainella on the expert witnesses, please?

Mr. Christopher Mainella: They tend to be officers who have policed an area for a long time, so they have that background. They tend to be at the end of their careers. Again, in every case I have ever done involving organized crime, that's the first dispute with the police—in terms of who their expert is and what they know about the group. It comes down to what the superintendent said: it's simply the training and resources.

You can do it for only a brief window of time and then you become stale-dated because you're away from policing it. The difficulty is that you constantly need them.

Mr. Joe Comartin: Is it hard getting them qualified?

Mr. Christopher Mainella: No. When they go into this particular line of work there's a whole routine in terms of developing a curriculum vitae, testifying, going to groups across Canada and serving. But it's very resource-intensive.

The Chair: Thank you.

Thank you to all of our witnesses. Your testimony has been helpful, and it will certainly form part of the public record as well as the report that we'll be issuing eventually.

Thank you to all of you.

This meeting stands adjourned.

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