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Le lundi 6 décembre 2004

Chair

The Honourable Paul DeVillers

Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile

Le lundi 6 décembre 2004

● (1535)

[*English*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): We'll call to order this meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We're here to review Bill C-13, an act to amend the Criminal Code, the DNA Identification Act, and the National Defence Act.

We have with us the Honourable Irwin Cotler, Minister of Justice, who is here to give us the government's perspective on the bill.

As usual, we'll start with an opening statement from the minister and then go to questions.

Mr. Minister, would you introduce the officials you have with you?

[*Translation*]

Hon. Irwin Cotler (Minister of Justice): Thank you, Mr. Chair.

I am accompanied by two witnesses who are experts in today's topic. Mr. Michael Zigayer is Senior Counsel,Criminal Law Policy Section and Mr. Stanley Cohen is Senior General Counsel,Human Rights Law Section.

Mr. Chair, as always, it is a pleasure for me to appear before you to discuss Bill C-13, an act to amend the Criminal Code, the DNA Identification Act and the National Defence Act.

[*English*]

Canada's DNA databank legislation was enacted in December 1998 and came into force on June 30, 2000, when the national DNA databank, which is located at RCMP headquarters here in Ottawa, was opened for business. It includes a crime scene index,

[*Translation*]

—known in French as a “fichier criminalistique”—

[*English*]

containing DNA profiles derived from bodily substances found at a place where an unsolved crime was committed. It also includes a convicted offenders index,

[*Translation*]

—or, in French, a “fichier de condamnés”—

[*English*]

containing the DNA profiles of persons who have been convicted of designated offences.

The national databank has proved itself to be a valuable investigative tool, identifying suspects where there has been a match between a DNA profile in the crime scene index and a DNA profile in the convicted offenders index; eliminating suspects where there is no such match; and where there are matches within the crime scene index, linking crimes involving a serial offender.

As of November 22, 2004, investigative leads generated by the national DNA databank have assisted in more than 2,400 criminal investigations, including 173 murders, 414 sexual assaults, 57 attempted murders, and 333 armed robberies. In the four and a half years of its existence, therefore, the national DNA databank has materially contributed to public safety, materially contributing to making Canadians feel safety in this regard.

[*Translation*]

The bill before us here illustrates the government's wishes to continually review and improve the act. In fact, the provincial ministers responsible for criminal justice and the commissioner of the RCMP have asked for a number of improvements they consider a high priority. We believe that instead of waiting for the results from the parliamentary review next year, these proposals should receive a response without delay.

The Supreme Court of Canada has not yet given its opinion on the act, but its constitutionality has been confirmed by dozens of lower court and appeal court decisions.

● (1540)

[*English*]

In that sense, the constitutionality of the matter before you has effectively been looked at in a number of lower court and appellate court judgments.

The committee will particularly want to note that Canadian courts have found that the DNA data bank legislation does strike an appropriate balance between the privacy rights of the offender and the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest, and conviction of offenders.

The remainder of my remarks today will focus on the proposed amendments to the legislation that governs the making of DNA data bank orders. I also intend to address a legal issue that I believe will be raised by some of the witnesses who will appear before this committee. Indeed, it has also been raised by some members of this committee in other contexts. I'm referring to the issue of whether the police ought to be given the authority in legislation to take DNA samples at the time charges are laid, similar to the authority they have to take fingerprints.

However, before launching into a consideration of the proposed amendments, I'd like to make reference to the forthcoming parliamentary review of the entire DNA regime. This review, which is anticipated to occur in 2005, was requested by parliamentarians and agreed to by the government during the proceedings leading up to the enactment of Bill C-3, the DNA data bank legislation.

[*Translation*]

It will be an opportunity to have an overall look at methods of taking samples and using genetic data within the justice system. Without denying their importance or urgency, I should say that the measures you are currently studying do not entirely correspond to the concerns expressed regarding the use of genetic profiles in police investigations.

[*English*]

Parliament, therefore, has reserved for itself the opportunity to consider a more ambitious, indeed a more holistic reform in a special process that is focused and comprehensive.

[*Translation*]

I will now speak about the proposed amendments. At present, the government is proposing a small number of legislative amendments to the DNA data bank, because we believe it is necessary to deal with certain urgent problems that have been pointed out by the provincial attorneys general and the commissioner of the RCMP.

[*English*]

Bill C-13 builds on the legislative changes proposed in Bill C-35, which addressed all of the priority issues identified by the Uniform Law Conference at the time, in 2001, and the matter of facially defective DNA data bank orders identified by the commissioner of the RCMP.

I will now just summarize the main amendments before you. Specifically, Bill C-13 proposes: the addition of 13 new primary designated offences to the list of designated offences, including the procuring offences, as well as the Internet alluring of a child;

[*Translation*]

the addition of nine Criminal Code offences, including criminal harassment, to the list of secondary designated offences;

[*English*]

the movement of the child pornography offences, robbery, and break and enter into a dwelling house from the secondary designated offences list to the primary designated offence list;

[*Translation*]

the possibility of making a DNA data bank order against a person who has committed a designated offence, but who has been declared not criminally responsible by reason of mental disorder;

[*English*]

a significant expansion of the retroactive scheme for persons convicted prior to June 30, 2000. This expansion will involve the broadening of the definition of sexual offences to include three historical offences repealed in 1983—for example, indecent assault female, the offence of break and enter, and committing a sexual offence.

Second, a new class of offender would be made eligible for the retroactive scheme—an offender who had been convicted of one murder and one sexual assault committed at different times before June 30, 2000. Already, 1,881 offenders have had their DNA profile placed in the data bank under the existing retroactive provisions.

[*Translation*]

We should also mention the development of a method to oblige an offender to appear at a specific time and place to provide a sample of bodily substance, as well as the possibility of making a DNA data bank order after sentencing.

● (1545)

[*English*]

There is the creation of a procedure for the review and destruction of samples taken from offenders under a DNA bank order who were not in fact convicted of a designated offence. And it is to make changes to the National Defence Act to ensure that the military justice system remains consistent with the civilian justice system.

[*Translation*]

As you can see, Bill C-13 is not a substitute for the parliamentary review of the DNA Identification Act which will take place in 2005. Any points that are missed here can be dealt with then.

All the provincial ministers responsible for justice believe these amendments are urgently needed and of highest priority. More specifically, they insist that we do not wait until the end of the parliamentary review of the DNA Identification Act, scheduled for 2005.

[*English*]

Simply put—and I'm referring here to my own discussions with my counterpart provincial attorneys general—they do not want these amendments, which they see as priorities, to be postponed until such time as a more holistic and comprehensive review, as I indicated, takes place in 2005.

These amendments are consistent with the original intent of the DNA Identification Act. Changes to the present DNA data bank legislation that went beyond those set out in this bill and that modified its essential elements would therefore require a more thorough study of their possible impact on the costs of operating the system, their potential benefits, and their compliance with constitutional requirements. We should not jeopardize the excellent system we have now by making premature changes.

I understand the committee has been invited to tour the DNA data bank. I'm sure the members will be impressed by the technology employed by the data bank and the professionalism of the personnel. I expect many of the proposed technical amendments in the bill will be more understandable after the tour.

[*Translation*]

I should say that taking a tour will help me as well, since I will be better able to grasp more of the details of the amendments proposed in the bill.

[*English*]

I am hopeful, therefore, of making a similar examination of this data bank.

Let me turn now to the issue that I indicated has been raised by people outside this committee and that has been raised by members of this committee in other settings, and that is contrasting

[*Translation*]

the difference between a fingerprint and DNA sample.

[*English*]

You are aware that some people would want the police to be given the authority in legislation, as I indicated, to take DNA samples at the time charges are laid, similar to the authority they have to take fingerprints without judicial authority under the Identification of Criminals Act. The proponents of this approach to the taking of DNA samples argue that the collection of bodily substances for forensic DNA analysis is no more intrusive of the suspect's privacy than the collection of fingerprints.

However, it is my position and the position of the Government of Canada that the taking of DNA samples from suspects is not analogous to the taking of fingerprints, though I understand the considerations that have been raised in that regard. It is not analogous to the taking of fingerprints for the following reasons.

In its judgment in the 1988 Beare case, the Supreme Court of Canada described fingerprinting as insubstantial, of short duration, leaving no lasting impression, and involving no penetration of the body or removal of substances from it. In short, the taking of fingerprints from a person charged with an indictable offence who would have a reduced expectation of privacy in any event has been regarded by the courts as minimally intrusive and has been recognized in statute and practice for such an extended period of time that it does not implicate constitutional protections.

In contrast, the Supreme Court of Canada, in its 1994 decision in Borden and in its 1997 ruling on Stillman, concluded that the taking of blood or other bodily samples from a suspect is an intrusion of a different order of magnitude than that occasioned by fingerprint procedures. They characterized it as an invasive procedure that would not come within the scope of a search incidental to an arrest. It is a true search that must conform to constitutional requirements.

● (1550)

[*Translation*]

Remember that in Canada, in order to respect the appropriate balance between the public interest—according to which the state must allow citizens as much freedom as possible—and the interest of the state—according to which the state can interfere with privacy while pursuing certain goals such as law enforcement—we rely on a system of prior authorization in the form of a warrant granted by an impartial arbiter capable of weighing the legal interests involved.

[*English*]

In that connection, in a decision in the S.A.B. case, a decision that was handed down in late 2003 that upheld the constitutional validity of the DNA warrant scheme, the Supreme Court of Canada stated that:

> ...the DNA provisions appropriately balance the public interest in law enforcement and the rights of individuals to dignity, physical integrity, and to control the release of personal information about themselves.

In particular, and I'm referring to a particular excerpt from the court judgment, the court had this to say about a suspect's privacy:

> The informational aspect of privacy is also clearly engaged by the taking of bodily samples for the purposes of executing a DNA warrant. In fact, this is the central concern involved in the collection of DNA information by the state. Privacy in relation to information derives from the assumption that all information about a person is in a fundamental way his or her own, to be communicated or retained by the individual in question as he or she sees fit. There is undoubtedly the highest level of personal and private information contained in an individual's DNA.

In summary,

[*Translation*]

from a legal point of view,

[*English*]

the taking of DNA samples from a suspect is considered to be a search under Canadian law, whereas the taking of fingerprints is not so considered because it is deemed not to be a penetration into the body and no substance is removed from it. There is important significance attached to the bodily intrusion required in taking DNA samples, as we've seen from the court decisions I've just reviewed, and a high degree of protection under the law for bodily integrity and the control of one's bodily substances and their informational content.

In conclusion, Mr. Chairman, it is my hope that the members of this committee will give this legislation, as they normally do, the full consideration it deserves, and ultimately that they will give it their approval. These proposed amendments will substantially improve DNA data bank legislation, they will contribute to the safety of all Canadians for the reasons I mentioned—and the data is supportive in that regard—and, I might add parenthetically, they would even aid with respect to the wrongful conviction review process.

Mr. Chairman, this concludes my remarks.

I would be pleased, with the assistance of my officials who are here, whom I identified at the opening, to respond to any questions the committee members might have. Indeed, given the technical nature of the subject matter and the amendments themselves, the expertise of my officials will be particularly relevant and helpful. I would tend to defer to them with respect to the subject matter before you and the technical character of the amendments that are being put before you for your consideration.

Thank you, Mr. Chairman.

The Chair: Thank you, Mr. Minister.

Now we'll go to Mr. Toews for the first round, which is seven minutes.

Mr. Vic Toews (Provencher, CPC): Thank you, Mr. Chair.

Mr. Minister, thank you for your attendance.

Mr. Minister, in listening to your comments, it appears to me that the government's focus in drafting this legislation has more to do with the concerns that judges may have with the legislation rather than the concerns of effective law enforcement. Police across this country have stated that we should be much more expansive in the power to take DNA. The statistics indicate that. You've indicated that Canada's DNA database has solved 2,400 cases, or has been instrumental in the solving of 2,400 cases. By contrast, England's database has more than two million DNA profiles, and each week there are 1,700 hits to their database. So ours is a very minuscule amount of what it could be, even given that the British have twice the population we do.

Let's leave aside the issue right now about whether it should be pre-conviction or post-conviction. What I'm very, very concerned about—and there are a number of things I'm concerned about—is the issue that after there has been a criminal conviction—someone has been found guilty beyond a reasonable doubt—we still have an administrative burden on the Crown to actually prove that in the case of the secondary offences it wouldn't be contrary to the interests of the public before we can get DNA.

Mr. Minister, let's assume that the same scheme we have for fingerprinting, that is, prior to conviction you are entitled to fingerprints, is in the context of DNA too intrusive to the personal interest of the accused. But in this case we're talking about an accused who has been convicted. What we're doing is setting up all kinds of administrative hurdles to have hearings not only in respect of these secondary offences but even in respect of the primary offences. How could there be any constitutional argument that it is too intrusive to ask a convicted criminal of these primary or secondary offences to give DNA?

We're not talking necessarily of very intrusive. I notice the quote you read said “blood samples”. It didn't indicate any other samples, but we know that these DNA samples can be as non-intrusive, if I can use that expression, as fingerprinting—a simple swab in the mouth, as simple as that. When you take fingerprints, you have all this ink all over your hands. You put them down on the pad and you have to wash that off. With the swab of DNA, it's a swab in the mouth and that's it. There's no messy needle. There's nothing that is in any way permanent.

Here we have, even when there is a conviction, this reluctance to address the legitimate needs of law enforcement; rather, there's a speculation that judges might find it unconstitutional. Why don't we give the police, in this situation at least, where there has been a conviction, the power to take DNA in all indictable offences, never mind primary and secondary offences, just the way we do with fingerprinting? I go back to that question: how can it be unconstitutional when we have a convicted person, convicted of an indictable offence? It's not a summary conviction offence, but an indictable offence. How can it be in any way unconstitutional? If there are judges who think this should be unconstitutional, rather than sitting down and taking it from them, why don't we stand up in the courts and say, look, this is nonsense?

Look at what the British are doing. It's much broader, much more effective, and it protects not only innocent victims who need those crimes solved, but also people who have been wrongly accused, and get that out of the way right away.

● (1555)

Hon. Irwin Cotler: Thank you for your question.

I'm going to, just for contextual reasons, answer your first question, that we appear to be more concerned with what the judges may be saying than law enforcement officials. I will ask my colleagues to address specifically the concern you raised, that even after there has been a criminal conviction there still are a number of hoops we want to put people through before we can get the DNA, and why we should not be saying this is the will of Parliament rather than taking the statements of the courts.

I just want to recall the reference I made to Supreme Court decisions, the 1994 decision in Borden and the 1997 ruling in Stillman. If you read those cases, the courts are very clear in their conclusions that the taking of blood or other bodily samples—this is what they are addressing in this regard with DNA—is an intrusion of a different order of magnitude from that occasioned by fingerprint procedures. They characterize it as an invasive procedure.

● (1600)

Mr. Vic Toews: I understand that, but we're talking about post-conviction.

Hon. Irwin Cotler: One of the benefits we have here today, apart from our two counsels, is that this is one of the matters my colleague Mr. Cohen, whom I've missed sorely the last year because he's been on leave, has been able to look at during the leave. So we will turn to him.

Let me go to the first thing, the notion that whatever we put before you appears to be an undue deference to judges rather than law enforcement officials. As I said, I wanted a contextual....

The changes in this bill were the result of resolutions that were adopted by the Uniform Law Conference. As members here know, the Uniform Law Conference provides an opportunity for federal and provincial officials who are involved in the criminal justice system to meet with representatives of the defence bar, judges, and law enforcement officials to discuss possible changes in the criminal law. You have a valuable forum here, a really evolving representative expression of stakeholders.

In 2001, the Uniform Law Conference adopted resolutions that called on the Department of Justice to consider, in consultation with the provinces, the territories, and other interested stakeholders—which we did—seven proposed amendments on a priority basis. I will just identify them, summarize them, and turn it over to my colleague.

One is the inclusion of the historical offences of indecent assault female, indecent assault male, gross indecency, and the list of designated offences.

Two is the inclusion of those individuals found not criminally responsible by reason of mental disorder within the DNA data bank scheme.

Three is clarification of the method of compelling the offender's attendance in court at a hearing to determine whether a DNA data bank order should be made.

Four is creation of a process that would permit a judge to make a second—

Mr. Vic Toews: Mr. Minister, I understand that.

Perhaps we should move on to the officials, because maybe they can give us the answer I'm looking for.

Hon. Irwin Cotler: But I do want to put it in context.

In other words, the seven priorities they identified are the priorities we have in the amendments before you. They have been recommended not by judges, but by a representative forum. I just wanted to contextualize the background for the legislation.

Mr. Vic Toews: They were recommended by lawyers.

Hon. Irwin Cotler: It's not just lawyers. There's a whole group of....

I don't want to take more time on that. Let me turn it over to my colleagues.

The Chair: I'll ask Mr. Cohen to give a brief response.

We're at eight minutes now. It took Mr. Toews five minutes to ask the question and the minister three minutes to put it into context. If we can get the information....

Mr. Stanley Cohen (Senior General Counsel, Human Rights Law Section, Department of Justice): I hope I can do justice to the question.

It's always possible to conceive of and to construct a scheme that does not necessarily, as I take your question, rely on judicial discretion but becomes automatic upon conviction. You say we shouldn't be so concerned with the courts, but I think you're obviously concerned with the courts because they may rule and say something is not constitutional, and then that's just an unnecessary reverse.

Courts will be concerned with whether or not the existence of discretion has been a substantial hindrance to the scheme. The courts will be asking whether or not the ability to apply for a warrant, or the necessity to demonstrate, with the advantages the Crown has on the application, really is something that is forming a barrier to the efficient administration of justice.

The minister has referred to the Borden and the Stillman cases, which go back to 1994 and 1997 and are a temporal indication of where we are starting this dialogue from.

In those days, we didn't really have a regime. We had the situation where the police were attempting to take DNA and attempting to justify it on the basis of what the situation was at common law—whether it could be taken incidentally to arrest and the like. Notwithstanding the fact that people believed DNA would be effective and efficient and helpful to the system, we had these efforts being rebuffed by the courts.

What we saw in Bill C-104, the warrants scheme, and in Bill C-3, the data bank legislation, was a cautious and structured approach to trying to bring in legislation that would adhere to constitutional norms. It was never believed this was necessarily the last step along the way. In fact, a parliamentary review, which is upcoming, was built into the process.

What was built into the process as a way of ensuring constitutional integrity to the legislation was this aspect of discretion that we find in the legislation. What may prove to be unnecessary as we become more comfortable with these things is.... It may be possible for us to alter the legislation and secure the kinds of objectives that perhaps you're talking about today. But I don't believe the case law at this stage yet supports that without some reservation. This is more art than science.

● (1605)

Mr. Vic Toews: All I want to know is that it doesn't preclude an after-conviction DNA sample that is done automatically.

Mr. Stanley Cohen: That would be a speculation, obviously, because we don't have that scheme.

Mr. Vic Toews: We don't have any decision on that.

The Chair: On that note, we have to move on to Monsieur Marceau.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you for being here, Mr. Minster, Mr. Cohen, Mr. Zigayer.

Like Mr. Toews, I am trying to understand the logic behind the distinction you have made between primary and secondary designated offences, especially when I look at the list. Internet luring, for instance, is a primary offence, but assault is a secondary offence. And yet assault is very serious because a person's physical being has been affected.

My first question therefore is: why are you making this distinction? I am not convinced, Mr. Cohen, by the explanation you have given about judicial discretion, that is, that there absolutely must be some in order for it to be considered constitutional. We are talking—and I agree with Vic Toews on this—about post-conviction.

My second question is this: what criteria were used in establishing the lists of primary and secondary offences?

Hon. Irwin Cotler: I will ask Mr. Zigayer to answer.

Mr. Michael Zigayer (Senior Counsel, Criminal Law Policy Section, Department of Justice): Thank you. This question was raised several times during examination of Bill C-104 and Bill C-3. A number of criteria can be used to include an offence on the list of primary offences. First, it may be a sexual or very violent crime. Second, it may be a crime in which it is likely that a sample of bodily substances will remain at the scene of the crime or on the victim. Let us stop and look at these two possibilities. These, objectively, are very serious Criminal Code offences. We are talking about violence, sexual offences and probabilities that samples of bodily substances were left by the aggressor at the scene of the crime.

Mr. Richard Marceau: Let us look at the criteria you have just listed. Internet luring may obviously be sexual in nature, but in such cases there is no violence and no substance left by the aggressor. On the other hand, assault—which you have classified as a secondary infraction—involves violence and a substance left behind. According to your own criteria, these would appear to be two examples of mis-classification.

Mr. Michael Zigayer: Simple assault is on the list of secondary infractions. Simple assault may include shoving or spitting on someone. That is an assault. In such cases, it is up to the crown prosecutor—because this is a secondary offence—to ask the court to make an order. In a very serious case, the crown can make this request.

Let us now look at the issue of sexual luring on the Internet, which means that the guilty party had the intent of committing a sexual offence against a young person. This is a good example of the kind of crime that should be included on the list of primary offences, because it should be entered into the national DNA data bank, instead of resorting to DNA search warrants.

Mr. Richard Marceau: You make a distinction between primary and secondary offences because you fear that if it were automatic, the courts might declare it unconstitutional under the Charter. Do I understand that correctly?

● (1610)

Mr. Michael Zigayer: Could you repeat that?

Mr. Richard Marceau: I will repeat my question. Usually, when a person is found guilty of something, we could expect that a DNA sample would automatically be taken. As I understand from Mr. Cohen's remarks, you have made a distinction between a primary and secondary offence because you want the crown prosecutors and ultimately the judges, to have some discretion. If it were automatic, it would violate the Charter, in your opinion. Do I have that right?

Mr. Michael Zigayer: That is one of the factors. We think it reasonable to classify this new offence, which did not exist at the time the DNA data bank was created, with other crimes of a sexual nature in the list of primary offences. It is logical, from that point of view, to include it with other sexual crimes. We are saying that Internet luring is a sexual offence.

Mr. Richard Marceau: Consequently, fearing that your bill would be declared unconstitutional under the Charter, you created the primary and secondary infractions. You also arranged that the samples would be taken not when charges were laid, but on conviction. Finally, you also started from the principle that taking DNA samples was more invasive than taking fingerprints.

I come back to a question that was asked in another way. I am just trying to understand, because I am not an expert in police work. Why is asking a person to spit into something a worse intrusion than taking fingerprints? I am not talking about blood here. This is strictly from a general-public point of view. If I talk to someone, why is using ink to take his fingerprints considered less invasive than asking him to spit into a little glass or a piece of paper?

Mr. Michael Zigayer: That is a question Mr. Cohen can answer. But first I would like to clarify something. For the samples used in the national DNA data bank, we prefer blood samples to those taken from saliva or swabbed from inside the mouth. First of all, they are easier to preserve. In other countries where they have taken saliva samples, conservation has become a problem. The RCMP has done studies and compared our methods to those of the FBI in the United States. After consulting the provinces, the RCMP decided that it was better to use blood samples, that is, a few drops of blood on special paper. It keeps better.

Mr. Richard Marceau: Explain that, please, because we have not yet toured the bank. Perhaps my question is naive. I am a fan of the *CSI* shows on television.

Suppose it is feared that saliva itself does not keep well. The paper on which the black spots appear, and that is examined under a light —doesn't it keep well? Can that be compared to another sample taken later?

Please enlighten me.

Mr. Michael Zigayer: What is our reason for keeping the sample? After doing the analysis and obtaining the genetic profile—which is essentially a series of numbers—we keep the sample.

I am only talking about the data bank and not about the *CSI* shows, which are not at all like the data bank, because they are about investigations.

Why do we keep the physical sample in the data bank? Because the technology we are using now to obtain the genetic profile will be improved in the future. It has already improved in the past 10 years.

It is like when I was young; there were 45 rpm records.

● (1615)

Mr. Richard Marceau: I didn't have those.

Mr. Michael Zigayer: All right; I am much older than you.

A while ago, we had 8-track tapes. We had video cassettes in Beta and VHS formats. The Beta format was abandoned and we all adopted VHS. Something better is bound to come along. It may be more efficient, faster, easier, and it may be as simple as taking fingerprints.

But we are not there yet.

The Chair: Thank you, Mr. Marceau.

Mr. Comartin, you have about seven minutes.

[*English*]

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

Thank you, Mr. Minister, for being here.

I want to pursue this more on the use of the swab. I'm hearing here that the preference is for blood. Was that considered in the two cases, Mr. Minister, that you referred to? If we were taking the sample by way of a swab, in the analysis of those cases as to whether that would be seen as offensive, as being too intrusive, would it in fact be as acceptable as taking fingerprints?

Hon. Irwin Cotler: My understanding of those cases was that the issue of the swab was not a matter before the court at the time.

Mr. Joe Comartin: I'll jump to another point. You're including now the defence department in the convictions under the National Defence Act. Do we have any indication of how many charges this will on average include? Secondary to that, is the system large enough to take on those additional cases?

I think the bill provides that the material will be transferred, as it is in regular courts, to the RCMP. Is there any issue as to capacity within the RCMP to take on the additional workload?

Mr. Michael Zigayer: First of all, the legislation has applied to National Defence since 2000. Amendments were made to the National Defence Act in 2000 that gave to the military justice system both the DNA warrant scheme—or a DNA warrant scheme similar to the one in the civilian system—and also the ability for military judges, following a conviction for a designated offence within the military justice system, to make the same type of DNA data bank order. Following the collection of the sample, it would be forwarded to the DNA data bank, just as any other offender's sample would be if it had come from a province or the territories.

Mr. Joe Comartin: Is there any issue of capacity here? By expecting that this is going to expand, judges are going to be much more in a position to be able to order more but also in a position to expand the capacity. That's obvious for this.

Mr. Michael Zigayer: I think the officials from the national DNA data bank would be best placed to talk about capacity. My understanding is that they have enough capacity now to handle the existing scheme and what is being proposed in Bill C-13.

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

The Chair: Thank you, Mr. Comartin.

Mr. Macklin, you have seven minutes.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much, Chair, and thank you, Minister, for being with us.

One of the things you mentioned parenthetically as you went through was aiding in the wrongful conviction process of DNA. There have been a number of high-profile cases recently that deal with this issue. I wonder, first, could you, or through you your officials, help us understand how the DNA registry really plays into the wrongful conviction process?

Second, how will the amendments we have in this bill assist in any substantial way to aid in this process?

Third, if we are talking about other states that have interests—that is, DNA registers—and we seek information from them on DNA, when they share that information, and I assume they would share it under certain circumstances, what rules would govern that information once we had received it? In other words, would it be our standards that would govern whether or not it would be admissible?

I think maybe that would give me a better understanding of how our system would work and interrelate with another state's system that didn't necessarily meet the same tests or requirements we have here.

● (1620)

Hon. Irwin Cotler: Thank you, Mr. Macklin.

You're correct that I referred to the wrongful conviction process in a rather parenthetical way. It's been my experience, if you look at the process for wrongful convictions review, that effectively one has to come to a finding, almost on some kind of finding of fact or conclusion of law, that there is a reasonable basis to conclude, when an application is made for a review of a wrongful conviction after all other legal remedies are exhausted and a study is made by the Minister of Justice, aided and assisted by any such reports as there were in the Truscott case—an investigative report by Mr. Justice Kaufman—as well as aided and assisted by an independent judicial adviser such as I have in the person of Justice Bernard Grenier....

But the central threshold question is whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred. In the absence of any DNA evidence, this of course involves a hearing, an appreciation of all the witness testimony and documentary evidence, and very often competing submissions made by the Crown and made by counsel for the wrongfully convicted, as well as the processes of independent reviews, as I indicated. The Criminal Code gives the Minister of Justice and Attorney General—under the amended section 696.3, I believe, of the Criminal Code—two remedies.

First, if I find there is a reasonable basis to conclude that a miscarriage of justice likely occurred, I can either refer the matter to the appropriate appellate court in that jurisdiction to make a determination on the admissibility of the new or fresh evidence, and, having made that determination, to make such directions as the court determines or quash the conviction and order a new trial.

If you have DNA evidence that can conclusively point to the accused's innocence and therefore to the wrongful conviction, then you can move to the remedy of quashing the conviction and the ordering of a new trial. If, however, you don't have the DNA evidence, and therefore that kind of clear determination cannot be made because of the competing considerations before you in the matter of the witness testimony and documentary evidence, including whether a determination has to be made as to whether the fresh evidence is indeed admissible to begin with, then the preferred remedy is by way of a reference to an appellate court.

So the availability of DNA evidence would clearly establish the innocence of the accused and allow the minister, whoever he or she might be at a particular moment in time, to quash the conviction and order a new trial—in other words, to utilize that remedy.

Both remedies are exceptional remedies, but the particular one of quashing conviction and ordering a new trial, which is one of the two remedies the Criminal Code gives the minister, could be acted upon with DNA evidence.

Hon. Paul Harold Macklin: The second point is, how will these amendments assist us in this process? How do we deal with state to state? For example, it was stated earlier here that in fact Great Britain has a system that is much enlarged over our system. How would that system cooperate with us in terms of DNA recognition that could be requested by our state with respect to an international crime? What rules would apply in the case of that DNA record being brought here? Would there have to be conformity with our law, or what would be the ruling that would take place at that time?

● (1625)

Hon. Irwin Cotler: I will ask my officials, whose institutional memory on these matters is greater than mine, to respond. I can only say with regard to the legislation that, to the extent it enhances the investigative and detecting approaches and the ability to secure a match, to which I referred earlier, it would facilitate the use of it with regard to wrongful conviction reviews.

But I will turn it over to my officials.

Mr. Michael Zigayer: It can happen that for some reason the police in Canada suspect the person who has perpetrated one of these designated offences is from another country, let's say the U.K. In a case like that, the DNA Identification Act—not the Criminal Code, but the DNA Identification Act—which governs the operation of the national DNA data bank, contains provisions that allow for the forwarding of a DNA profile from that unsolved crime to another country. There has been an agreement concluded by the Commissioner of the RCMP, who manages the national DNA data bank, with INTERPOL, and it serves as the controlling mechanism. There are provisions in that agreement that ensure that our rules with respect to privacy, under the Privacy Act, are respected.

The reverse is possible as well. Let's say they have an unsolved crime and have a DNA profile from that unsolved crime. They can ask the commissioner to run that DNA profile against the contents of our DNA data bank. It may be either that it will match up with another DNA profile in the crime scene index, so we'll know that the person who has committed a crime in the U.K. has also committed one here, or it could match someone in our convicted offenders index, in which case we would provide the name of that individual to the U.K. and they could pursue their investigation further.

If you need to check—you'd probably want to—the provision in the DNA Identification Act is section 6. There are three subsections there in particular that are of interest.

Mr. Stanley Cohen: I'm not going to try to speak to this in anything but the most general terms, but just on the issue of admissibility, obviously if it comes from a jurisdiction that has rules and procedures that are similar to ours, there is less of a concern. But where the provenance of a sample and the means for obtaining it are real issues, then the courts in Canada could have a supervisory role to play, and that could affect admissibility, and if not admissibility, weight that's given to evidence. That's as far as I'd take that.

Hon. Paul Harold Macklin: But that has not been judicially dealt with yet?

Mr. Stanley Cohen: Not in terms of DNA, but we have had it in terms of confessions and other kinds of evidence.

The Chair: Thank you, Mr. Cohen and Mr. Macklin.

Now we'll go to Mr. Moore for three minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you.

My question is on the retroactive provisions we have here. We see the expansion now, where if someone has been convicted of one murder and one sexual offence committed at different times, there is provision now for a retroactive sample to be taken. We've seen the benefits a DNA database can have, both for making a connection between a crime and a perpetrator but also in clearing someone's name. We've also seen a recognition here of the difference between a primary and secondary offence and what the department apparently has seen as more serious versus less serious offences.

My question is, why the distinction? Why should someone have to be convicted? Why are we walking this trail of now having to have been convicted of one murder and one sexual offence? Why aren't we taking a look at retroactive sampling for anyone who has been convicted of a serious offence, in light of the fact that we have this tool that can clear someone's name and of the fact that we have thousands of unsolved crimes? Why don't we take a broader look at this? I'm wondering what criteria the department was looking at when making what seems like a narrow determination as to where we would take that look back.

● (1630)

Hon. Irwin Cotler: I gather that each of my departmental officials who are here as witnesses today has something to say on that, so I'll begin with Mr. Zigayer on this point.

Mr. Michael Zigayer: I was hoping you were going to say Mr. Cohen.

As you know, there has been an evolution in the development of the retroactive provisions. When this DNA data bank legislation was first submitted to Parliament, it only contained two classes of candidate for the retroactive scheme, the serial sex offender and the dangerous offender. In the case of the dangerous offender, the court has heard psychiatric evidence and determined that the individual represents a continuing risk to society, a danger. The serial sex offenders are the individuals with the highest recidivism rates, and when this legislation was being developed back in 1996-1997, recidivism was the key factor that was going to be relied upon as justification should these provisions be challenged constitutionally. The bill was before Parliament, and another class or category of offender was added.

To make it simple, I'll just refer to Clifford Olson, a person who has committed more than one murder at different times prior to the coming into force of the legislation. That type of individual has a higher recidivism rate than the person who has only committed one murder prior to the coming into force of the legislation. Indeed, that individual, the person who has only committed one murder, has one of the lowest recidivism rates. So it would have been difficult to justify the reasonableness of that provision if it had been broader.

Mr. Rob Moore: That's what I'm wondering about, the criteria. We're talking about a tool that allows us to find out that someone is a multiple sex offender or a serial sex offender or that someone is a Clifford Olson. Someone who has committed one murder in the past that we know of and been convicted might be a Clifford Olson, but we don't know that, as we can't link them to a crime, because we haven't take a retroactive sample perhaps. That's what I'm wondering. Why aren't we expanding this so we can catch the Clifford Olsons and the serial sex offenders before that criterion comes into being with a case we know through our traditional methods? We may be able to find these people right now, the information may be there, but because this is taking place at a slower pace and isn't being expanded as fast as perhaps it should be, it's still a mystery.

The Chair: Anyone?

Mr. Stanley Cohen: I can carry on dealing with the points, and hopefully I'll at least partially address what you're trying to get at.

Mr. Zigayer and I go back perhaps to the first show on DNA in parliamentary history. We were concerned about the principle against retroactive legislation and about what the constitutional ramifications were of making the legislation retroactive. In fact, what you have here is really not retroactive in a pure sense. These people we're looking at within the legislation are still in some sense within the system. They are under sentence; their sentence has not yet expired. A purely retroactive scheme would say anyone who has a record out there and is of interest to the state can be sampled. The concern in the development of the legislation was that it should survive and that it should become an effective tool. When it was constructed, we had to have regard to what was in paragraph 11(g) of the charter, which says you can't be found guilty of an offence that wasn't criminal at the time of its commission, or paragraph 11(h), which basically says you shouldn't be punished a second time. Those were just two of the elements in the charter that could have had application.

Mr. Rob Moore: I don't see how they could have application. Most of these offences we're talking about have always been offences—murder, for example—before those provisions came into being. The matter is one of linking someone we know to be an offender to these other offences. That's where I think this can be a great tool. I'm just wondering why we haven't expanded this.

● (1635)

The Chair: You may make a very brief response, and then we'll have to move on. We're way beyond the time.

Mr. Stanley Cohen: There is an issue of whether or not this is an aspect that the charter does cover in terms of retroactivity. There is a potential existence of a principle of non-retroactivity that extends beyond just simply these notions in section 11 that I was talking about.

I should point out again, in conclusion, that the features of restraint that went into the building of the legislation are what gives this committee the confidence it has to talk about expanding the legislation. We'd be in a much different situation if we had overreached and been met with judicial rulings that forced the reconstruction of the legislation.

The Chair: Thank you, Mr. Cohen.

Madame Bourgeois.

[*Translation*]

Ms. Diane Bourgeois (Terrebonne—Blainville, BQ): Thank you, Mr. Chair.

Mr. Cotler, gentlemen.

There are four questions I would like to ask you. I will ask them as a group, and would appreciate some very precise answers.

First of all, if I understand the law correctly, you have created primary and secondary offences. According to the legislative summary provided by your offices, for each of these added offences, a court will be obliged by the Criminal Code to make an order for the taking of samples from a person for DNA analysis. This obligation can be overridden by an argument that the impact on the person's privacy and security of the person is grossly disproportionate to the public interest.

If I understand this correctly, it means that the obligation of a order for samples —DNA analysis for instance—can be overridden if it is deemed to be harmful to someone's privacy. I will remind you that we are talking of offences under the Criminal Code and sexual offences. If that is the case, how can we explain that to the women's movement?

My second question is on Bill C-10, which this committee has already studied and which deals with mentally disordered accused persons. It is indicated that, if a person is found not criminally responsible on account of mental disorder for a designated offence, he or she may be ordered to provide a sample of a bodily substance for DNA analysis. I do not have a lot of experience in this field, not being a jurist, but what happens in the case of someone unfit to stand trial? Is the sample taken regardless? I am trying to make the connection between Bills C-10 and C-13.

My third question is this: have you asked for a comparative analysis between the sexes? The Minister may resent this, as I ask him the same thing every time he comes here. I hope that I will not always get the same answer. If there is no comparative analysis between the sexes, when will there be one in connection with this bill? There are provisions concerning mental disorder and we know that women with a mental disorder are more likely to be incarcerated for committing offences.

Finally, what is criminal harassment? Could you explain that for me? I believe harassment is always criminal. What is more, it would be criminal if we did not legislate on this. I await your response, Mr. Minister.

Hon. Irwin Cotler: Thank you for your four questions. I will ask my experts to provide answers to each.

Michel, would you start, please?

Mr. Michael Zigayer: In response to the first question, I must clarify that it is only for the purposes of the national DNA data bank and not for DNA orders. After conviction for a primary offence, the judge is under obligation to issue an order unless the individual can prove a serious impact on his privacy. There would be a very heavy burden of proof in such a case. In fact, when the bill was being drafted, we expected it would be a rare thing for an order not to be issued.

One example of an exception could have been the case of Mr. Latimer, who killed his daughter. According to this legislation, this was a primary offence and the judge would have been obliged to issue the order. Mr. Latimer or his counsel, however, could have tried for an exemption.

Second, in a case where a person has been found to have committed a criminal act but could not be found guilty because of mental disorder, the Uniform Law Conference of Canada and the provincial attorneys general have recommended discretionary powers for the judge. such a case, if this were a primary offence, it would be exactly as in the case of Mr. Latimer, the judge would be obliged to issue an order unless the counsel for the defence could convince him that this was an exception. This would be a person who had committed a criminal act but could not be found guilty because of mental disorder.

As for your third question, I was unfortunately not involved when Bill C-10 was being examined. This legislation does, however, apply to young offenders, boys and girls both. Was your question about just the ones found not to be responsible, or all cases?

● (1640)

Ms. Diane Bourgeois: All cases.

Mr. Michael Zigayer: Let us take the case of a woman who kills her husband. Unless mental disorder were involved, she would be in the same situation, as far as the Charter is concerned, as a man if found guilty.

My colleague, Mr.Cohen, may have a comment on this. Section 15 of the Charter obliges judges to treat all those who appear before him equally.

[*English*]

Mr. Stanley Cohen: What I could say on the issue of the impact in terms of matters of gender and possible adverse effects of the legislation is that every piece of federal legislation with charter implications is evaluated by the department.

The section of the Department of Justice I work in is called the human rights law section, and specific evaluation of any aspect of legislation with those kinds of implications would be taken on and considered within the work that's entrusted to our section in the Department of Justice. So I can say it would be looked into. Furthermore, the Minister of Justice, of course, has an obligation under the Department of Justice Act to report back to Parliament if there is anything unconstitutional in the legislation. In other words, the minister has a duty to certify legislation.

So, yes, those matters are attended to as part of the ordinary and routine work that is carried out within the department.

With respect to your first question, on grossly disproportionate, I would just augment Mr. Zigayer's answer by saying that grossly disproportionate, the standard you were focusing on, is the highest and the most onerous standard found in the criminal law, and it's the offender who bears that burden in this process. In doing that, as Mr. Zigayer has indicated, we expect it would be a rather rare instance where specific relief against the provision would be found.

● (1645)

[*Translation*]

The Chair: The last question was on criminal harassment.

Mr. Michael Zigayer: Section 264 of the Criminal Code defines criminal harassment. It is stipulated in 264(2):

> (2) The conduct mentioned in subsection (1) consists of:
>
> a) repeatedly following from place to place the other person or anyone known to them;
>
> b)repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
>
> (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
>
> d) engaging in threatening conduct directed at the other person or any member of their family.

Ms. Diane Bourgeois: And that has now become a secondary offence!

Mr. Michael Zigayer: This means that, in the appropriate circumstances, the Crown can ask the court to issue an order. While not wishing to tell you how to do your work, if your committee finds this ought to be a primary offence, it has the possibility of bringing in an amendment later on.

It was our feeling that the Crown ought to have the opportunity to decide whether to ask the judge to issue an order for this type of offence. The judge will then have the opportunity to decide whether or not to do so.

The Chair: Thank you, Mr. Zigayer and Ms. Bourgeois.

[*English*]

Mr. Maloney, three minutes.

Mr. John Maloney (Welland, Lib.): I have two questions, one in the area of backlog of analysis. There has been some suggestion that there is a backlog and it's taking longer to analyse these samples. This legislation, obviously, will generate more samples for testing. Do you have the resources to deal with what you have and with what may be generated from this legislation?

Second, I recall that when this came before this committee several years ago, there was considerable desire to have a larger retroactive application. Concerns about the charter implications were very narrow. Now we've opened the door a little wider, but again, there's a narrow application. Are we crawling before we walk? Are we going to see something in the legislated analysis review in 2005? Are we going to see something a little wider yet? Can we not go for that now? Everybody will agree that it's been a wonderful policing tool, and there have been certain benefits, for both the defence and the prosecution. We have now primary designated offences included, and secondary ones possibly as well. Why can't we go a little further—perhaps start running in this area—by including primary designated offences or even possibly secondary designated offences?

Hon. Irwin Cotler: I'll turn it over to Mr. Cohen, but I will say the approach we have taken is to deal with the proposals now in the amendments before you as a priority concern, as recommended to us by the Uniform Law Commission and public consultation in light of that with stakeholders. They have been identified as priority concerns to be addressed urgently, whereas a more comprehensive and holistic approach that would take into account either constitutional concerns or the views of other stakeholders on some of those matters, as well as costs and resources involved, ought to await a more comprehensive review in 2005.

I'll turn it over now to Mr. Cohen.

● (1650)

Mr. Stanley Cohen: I can understand—and I use the term advisedly—the frustration that must be felt that we aren't moving as fast as we might in certain areas of the law. But to be fair, the issue of retroactivity has not as yet made its way to the Supreme Court of Canada in any significant fashion. There are some appellate decisions now that have shown us that we have not transgressed the charter standards. It is, of course, open to the parliamentary review to get into that issue more fully.

Some of the suggestions that have been on the table today don't simply stop at retroactivity, they broaden out to say, let's have it fully retroactive, let's have it without regard to whether they're primary or secondary, let's make all of these offences that are indictable offences part of it. Once you start to do that, you are certainly going to trigger a challenge that involves the notion of unconstitutional excessive breadth, where the means the legislature has chosen to achieve a legitimate objective are not sufficiently tailored, they cut too broadly, and therefore the law becomes arbitrary or disproportionate. If we do that, we risk, essentially, destroying the work that has been done to make the legislation an appropriate and effective tool. I'm not saying that would necessarily be the result, but I think the matter has progressed in a way that does show the wisdom of the approach that's been adopted.

And if you go back to your first question, which has to do with whether the system is capable of dealing with the backlog and whether we have resources—Mr. Zigayer, I'm sure, will answer this question more fully for you—there may be implications there as well. You may end up with a tool that is very large, very broad, but a system that cannot properly absorb what you've provided for at this stage in its development.

The Chair: Mr. Zigayer.

Mr. Michael Zigayer: There is no backlog at the national DNA data bank—that's a black and white, bold statement. There's plenty of capacity to handle what is presently coming in and more.

Where there is a concern—and you may have heard concern expressed by some of the police associations, I don't know—it has to do with the capacity of the operational labs that do the investigative work, the casework analysis, as opposed to what the data bank does. They are two separate operations. For example, there is a provincial lab in Montreal with the Sûreté du Québec, there's a provincial lab in Toronto for Ontario, and there is a series of six labs, I believe, with the RCMP across the country. Those labs do the casework analysis. If there has been a murder or a break and enter, they handle the investigative analysis of whatever has been found at the crime scheme, the CSI work, whereas the data bank itself only deals with things that are sent to it accompanied by one of these post-conviction DNA data bank orders. So on that side there's plenty of capacity. The operational side is a matter to discuss with others, not us, but my understanding is that they're fine at the data bank.

The Chair: Thank you, Mr. Maloney.

Mr. Breitkreuz.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Thank you.

Thank you very much for coming before the committee. Just as a little aside here, if you have a lack of resources, I think I know where you can find some that are really not being very well utilized at this point. I'm referring to the rather ineffective gun registry.

● (1655)

Hon. Irwin Cotler: We'll take official notice of your reference.

Mr. Garry Breitkreuz: Thank you.

I think my question reflects what a lot of Canadians would feel. I'm coming back to this whole issue of why the taking of saliva is more intrusive than the taking of bodily oil from fingerprints. I am very familiar with the system implemented back in 1995, where the gathering of all kinds of information—financial history, sexual and marital history, mental history—had to be provided to the government. It was put on a database. It was available across Canada. That is not regarded as a serious invasion of someone's privacy, but the taking of a saliva sample is?

I just can't see how you can defend that one system, which applies only to law-abiding firearms owners, and this other system, which is potentially for someone who has committed a criminal act. It seems like you're turning yourself inside out to defend the privacy rights of individuals who have been charged or convicted but you don't respect the rights of law-abiding people to be protected through an enhanced crime-fighting tool.

That's really the concern that most Canadians are trying to raise through their elected representatives. In the charter, isn't there a right to the security of person? And why isn't there a better balance of rights between criminals and their victims? Isn't this a matter of balance?

Mr. Stanley Cohen: The point you raise about the distinction between fingerprints and DNA is one that has bedevilled the discussion since this legislation first came forward. On the one hand, it does seem to be a simple comparison. On the surface, it seems to be that way. But when it was examined...and I'll remind you of the discussion we had in 1997-98, when three opinions, independent opinions, were solicited from three eminent jurists in this country. Each of them independently came to the conclusion that taking DNA at the time of charge would be a constitutional affront.

I think the cases they were canvassing are still the cases that are leading the jurisprudence today, and they were concerned not so much about the aspect of physical intrusion. So when you speak about saliva versus oil on the finger, that's a valid observation. The degree of offence to physical integrity, the cases say, is relatively modest. And the Supreme Court of Canada said that.

The court has gone on to say, in the most recent statement, in the case of S.A.B., that the same cannot be said about concerns that arise with respect to informational privacy. The minister, in his opening remarks, did quote from the S.A.B. case, that:

> The informational aspect of privacy is also clearly engaged by the taking of bodily samples for the purposes of executing a DNA warrant....There is undoubtedly the highest level of personal and private information contained in an individual's DNA.

So it's not so much that there's a physical intrusion and assault on physical integrity involved here, but it's a question of essentially taking the whole life story. This may not be fixed in time. It's something that has to evolve as we become more comfortable with technology and its effects.

Mr. Garry Breitkreuz: But don't you grasp the point I'm trying to make? There are people out there who are potential victims. Don't we need to balance their rights to proper protection, to security of person, against what you're trying to defend right now?

Mr. Stanley Cohen: I'm not trying to suggest that the need to protect society is not of superordinate importance. In fact, the courts have said that as much as anything else. They also have said that in doing a constitutional calculus, if you wish to put it that way, societal interests are part of the consideration. They're not put to the side. We're not simply estimating whether a right has been infringed, pure and simple. So it's not a matter of that; it's a matter of trying to strike the appropriate balance.

We must remember, there are DNA warrants in existence that allow for, in individual cases, obtaining the DNA sample that you're concerned about. In a case where there are reasonable and probable grounds, there is the scheme itself, which takes these samples from everybody who has been convicted of primary and secondary designated offences, as expanded in this legislation. There is also the retroactive tool, which has also been expanded in this legislation.

So it's not a case of protection versus no protection.

● (1700)

The Chair: Thank you very much, Mr. Breitkreuz.

Mr. Minister, I wonder if I could ask for, on behalf of the committee, provision of the opinions that Mr. Cohen referred to.

Hon. Irwin Cotler: I'd just like to make reference to the fact that this debate actually arose as well in 1998, when our officials appeared at that time before Parliament. Justice Canada officials told the standing committee that the taking of bodily samples from a suspect constituted a search. Now, while the federal government was confident in the constitutional position we took at the time, the Minister of Justice then, in order to resolve this issue and perhaps expedite the legislation through the House of Commons, sought legal opinions—this is what Mr. Cohen referred to—from former Justice Martin Taylor of the British Columbia Court of Appeal, former Chief Justice Charles Dubin of the Ontario Court of Appeal, and former Chief Justice Claude Bisson of the Quebec Court of Appeal. What's interesting is that each of them concluded independently that the taking of a DNA sample, such as fingerprints, at the time of the charge would not survive a charter scrutiny.

I'm delighted to make these opinions available. They were made available to parliamentarians at the time. We are pleased to make these opinions available today. I think you will find they address the exact questions and conceptual issues you asked about with regard to security and privacy. The approach taken independently by the three chief justices refer to those issues on a more general level and on the particularities with regard to the impact on the protection of victims.

Mr. Garry Breitkreuz: From the comments and answers you gave me, is there a chance that this can begin to evolve and to change, that these opinions will change, that maybe we should be starting to pursue this? Things in the last six years could have substantially changed.

Hon. Irwin Cotler: I think that's a good question. Let me try to answer it this way. I have no hesitation in certifying that the changes we are proposing in the legislation before you are constitutional. Moving to the fingerprint model, for the reasons that have been discussed, would be a considerable departure. In order to do that—and I'm not precluding that option—we would need to have further consultation with the various stakeholders. We may have an opportunity to do that at the upcoming federal-provincial-territorial conference of attorneys general. We need to canvass the views of various stakeholders in this regard.

I would think that the five-year review, in 2005, is the proper forum to canvass the points that you have brought up in the context of the consultations that would be undertaken. Perhaps then we would have a more informed appreciation of how we can proceed. At the present time, I wouldn't be able to be in a position to certify it as to constitutionality.

The Chair: For the time being, perhaps we could be provided with those opinions through the clerk.

Hon. Irwin Cotler: Yes. I have copies with me here today.

The Chair: Then they can be distributed. Thank you.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Thank you very much.

When we are talking of DNA sampling, the information these samples contain is very important and very specific. It is agreed that these will be taken solely in order to fight crime and prevent potential recidivism.

Are you convinced that there is sufficient protection against any misuse of DNA evidence? Are laboratory security measures sufficiently stringent to ensure that the data is used for the appropriate purposes and limited to only those purposes set out in the bill?

● (1705)

Mr. Michael Zigayer: The protections are important. There are clearly stated prohibitions in the act , along with some major sanctions. That is about all we can say.

During the discussions on the reasonable character of this law overall, the courts had comments to make on these aspects of the present law. Protecting the DNA is a very vital issue for the courts, on the international level.

Mr. Richard Marceau: In your opinion, Minister, is there sufficient funding for the databank?

Mr. Michael Zigayer: As I have said on several occasions already, this is a primarily a question for the Commissioner of the RCMP, he being the one responsible for administration of the national DNA databank.

It is my understanding that the RCMP has sufficient resources to analyze samples sent to the national DNA databank subsequent to a court order and conviction for a designated offence.

Mr. Richard Marceau: I will be pleased to ask the RCMP' opinion on this.

I have not read the article myself, but this is the gist of an article that apparently appeared in the *National Post* in 2003. According to this article, Joe Buckle, the RCMP's assistant commissioner in charge of forensic laboratory services, 74% of the RCMP's most serious DNA cases failed to meet the Mounties' own 15-day analysis deadline in 2003. It is alleged that in October 2004, the backlog had reached a total of 1,733 cases. Retired RCMP Staff-Sgt. Dave Hepworth has been quoted as saying that the DNA backlog can be cleared up with just $5 million.

Mr. Michael Zigayer: As I have already pointed out, this article is not about the national DNA database. I think it mainly refers to what is done with samples and to the analyses required within an investigation.

It is a bit like what is done on the program *CSI* , has no connection with the national DNA databank. When individual investigations are concerned, break-ins, burglaries, murders and the like, the investigation and the analysis of samples are carried out in the regional laboratories.

There are such labs, as you know, in Montreal and Toronto, plus the RCMP has a whole series of them all across the country. I think that may be what the article is referring to.

Mr. Richard Marceau: Now, for my final question.

In his initial presentation, the minister indicated that Bill C-13 expanded the scope of the national DNA databank. Expansion means more cases, and that has to mean more money.

Mr. Minister, do you plan to add more operating funds to correspond to the planned expansion of the role of the DNA databank?

[*English*]

Hon. Irwin Cotler: I would think this consideration would have to be addressed by the Minister of Public Security, whose responsibility relates to questions of law enforcement through the RCMP and the like, and by government as a whole. If the needs warrant and resources are required, then we need to ensure that those resources are commensurate with the needs as the legislation authorizes in the matter of enhanced orders.

I want to say, just for the benefit of the committee, that there are two cases, both in the Ontario Court of Appeal, R. v. Briggs and R. v. Hendry, that deal with a number of issues that have been raised today. Time does not permit me to go into it, but we can make those two cases available. I think the cases provide guidance on how these provisions of the law are to be interpreted and applied, and address, as I say, some of the questions.

● (1710)

The Chair: Thank you. We'd appreciate that.

Merci, Monsieur Marceau.

Ms. Neville, for three minutes.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you. I will be very brief.

I understand a number of DNA samples have been received by the national database that were taken from offenders not convicted of a primary or a designated offence. What has happened to those samples, and will the legislative process address these?

Second, Mr. Maloney touched on this, and I think, Minister, you responded. I too am wondering why there's not more inclusiveness put in this bill, rather than waiting for the review that's coming up, why you're not including more matters and making additional changes in Bill C-13.

Hon. Irwin Cotler: Let me take the first question. I think I tried to answer your second, but maybe I didn't do it that effectively, so I'll ask my colleagues to respond to that.

As of November 22, the national DNA data bank had received 506 samples of bodily substances taken from offenders on what appeared to be defective DNA bank orders, which is what I think you were referring to, where the offender does not appear to have been convicted of a designated offence. The national DNA data bank, in accordance with the intent of Parliament, has not analysed these samples but has carefully stored them. When you take the tour of the national data bank, as I hope you might be in a position to do, you'll be able to see how carefully it deals with orders, to ensure that it respects the legislation and the intended legislation in this regard.

Bill C-13 proposes the creation of a process that would result in either a corrected order being made, for example, in the case of a clerical error by the court, or destruction of the bodily substances in a case where there is no statutory authority to make the order to begin with. It is the provincial attorney general who has the responsibility for the administration of justice in the province with respect to these corrective approaches.

On the second question, why we do not deal with more in this bill, Stan.

Mr. Stanley Cohen: I will speak briefly, but I think your question goes to the matter of policy. What I advise on is the charter viability of legislation. I would return to a point I made earlier. The more things you bring together as part of your legislative reform, your legislative overhaul, the more complex the constitutional calculation becomes. So if we talk about full retroactivity, if we talk about automatic rather than discretionary decision-making, if we talk about any number of additions, we end up with a variety of different models. Also what you have is a departure from what the courts have recognized as—and this is important terminology—a carefully tailored scheme that does not overreach, and once you start to change the basis upon which you're proceeding and go to a different model, for instance, one that's based upon a fingerprint approach rather than the kind of approach we have here, then the constitutional complications mount. From my perspective, I'd leave it there, but I'm sure, from a policy perspective, Mr. Zigayer has some other remarks.

Hon. Irwin Cotler: Maybe I'll jump in here, because it might somewhat contextualize it for response purposes.

As I mentioned earlier, the Uniform Law Conference in 2001 adopted resolutions that called at that time on the Department of Justice to consider, in consultation with the provinces, territories, and other interested stakeholders, seven proposed amendments. I won't go into the matter, other than to say that we then consulted Canadians on these proposed changes in 2002. Admittedly, the consultation was somewhat delayed because of the 9/11 Anti-Terrorism Act and organized crime legislation. The consultation having been undertaken with respect to these seven identifiable priorities and the resolutions of the Uniform Law Conference, Bill C-13 makes all the recommended changes. The consultation paper from the time set out a series of five questions that were intended to relate to the Uniform Law Conference's priority issues, but they were phrased in a fairly broad way to allow for more extensive remarks.

I'm not going to go into detail, but I'll identify the questions, because in response to this, the legislation before you was developed. They were as follows: whether there is a need to amend the current lists of designated offences in section 487.04 of the Criminal Code, which we have done; whether there is a need to amend the Criminal Code to allow DNA samples to be taken from individuals found not criminally responsible by reason of mental disorder for inclusion in the DNA data bank; whether there is a need to amend the Criminal Code to expand the scope of the retroactive aspect of the DNA data bank legislation; whether there is a need to amend the Criminal Code to address certain procedural issues; whether there is a need to provide for resampling in some cases where access to the offender's DNA profile has, by operation of law, been permanently removed from the national DNA data bank.

The response to the questions was quite positive. There was support for the addition of certain offences to the list of designated offences, and that's why we responded in that manner. Providing courts with the authority to order the taking of a DNA sample from a person found not criminally responsible from the DNA data bank is in it as well. With the expansion of the retroactive scheme to cover historical sexual offences, that's where it came back and that's how we responded. We were to address certain procedural issues and deal with the potential problem of a convicted person's DNA profile being removed even though he has subsequently been convicted of another designated offence.

The changes we've put before the parliamentary committee admittedly fall within the more restricted scope of the consultations undertaken in relation to the seven priority recommendations of the Uniform Law Conference. They build on the existing legislative framework, they address operational issues that have arisen, and we are able to certify their constitutionality. In our view, it would be premature now to go beyond the seven recommendations of the Uniform Law Conference and the wide consultation process, which clearly identified the recommendations we ought to act upon as being urgent. For the reasons we've discussed earlier, we are not precluding more changes; we're saying such changes have not yet met the test of certifiability from a constitutional point of view and the requirement of consultation from a process point of view. We could not come in now with those recommendations; they would not necessarily be invalid, but premature at this time.

● (1715)

The Chair: Thank you very much, Mr. Minister.

Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chairman.

I'd like to thank the minister and the witnesses for being here.

I was reading the brief that was provided to each of the committee members. The Minister of Public Safety and Emergency Preparedness said the DNA bank has proven itself to be an extremely valuable investigative tool, and I believe, Mr. Minister, you said the same thing, and it has materially contributed to public safety. The information that was provided was very valuable, and there were some recommended questions. As I was reading them, I was thinking this would be a very difficult time, but hopefully the minister could answer them satisfactorily. To be honest, Mr. Chairman, I'm not totally happy with the answers we've received, but I appreciate the attempt to answer them.

It was said it was a constitutional affront, based on decisions from the Borden and Stillman cases, that taking a blood sample was intrusive. Did I understand correctly that it was deemed that a blood sample was intrusive?

Hon. Irwin Cotler: Yes, from the cases, you're correct.

Mr. Mark Warawa: I think from the comments and questions that have been coming from around the table, Mr. Chairman, there is an interest in taking full advantage of this technology. It's wonderful technology that, with a high degree of accuracy, could determine whether or not the accused's DNA was the DNA from a crime scene. It would be a very valuable tool to determine a person's guilt or innocence. Taking advantage of that technology to assist in determining a person's guilt or innocence I think is what we're achieving. I think a reasonable person on the street would say, yes, it's technology, but let's take advantage of it. I think that's why a reasonable person would say, what is wrong with having a person's DNA, in a non-intrusive way, being taken when a person is charged, as with fingerprints? I think a reasonable person would say that is reasonable. The reason it was deemed to be possibly a constitutional affront was that it was intrusive. If there is a non-intrusive way of getting that DNA sample, we should seriously look at that. There is technology today that allows the DNA sample to be taken in a non-intrusive way.

Do we feel the security is adequate in protecting that DNA sample? We're responsible for making sure that DNA sample is secure. We have legislation, and we also need adequate funding, as has already been mentioned by my colleague. The answer is that for the samples that are taken by the RCMP, the police dealing with casework, there may not be adequate funding. Some 74% of the RCMP's most serious DNA cases have failed to meet the RCMP's own 15-day analysis deadline. The minister said those high-profile DNA cases would receive priority status, but the comprehensive cases would have to wait. But we're told that 74% of the time they're not being dealt with in a timely fashion. That's a real concern, and we need to look at adequate funding for technology. I would agree with my colleague to my right that there are places where we can say, where do we get the biggest bang for our taxpayers' dollar? I think the technology that gives us such a high degree of accuracy is where we should be focusing more dollars. There are some places where there are huge inefficiencies with little effect, and we could look at some of those dollars.

● (1720)

The Chair: Can you go to your question, Mr. Warawa?

Mr. Mark Warawa: There are non-intrusive ways of getting that DNA. We want to protect that person's private and personal information. They have a right to appeal before a DNA sample can be taken, so they are protected.

Do you feel the DNA legislation provides adequate safeguards for Canadians?

Mr. Michael Zigayer: I think there's a danger that two schemes are being confused, the DNA warrant scheme and the DNA data bank scheme.

The taking of samples at the time of charge is a matter that's totally apart from the DNA data bank. There is a possibility now for the police to obtain a DNA sample from a suspect, for its use in the prosecution of that suspect for a designated offence. It's a simple matter of applying to a provincial court judge for a DNA warrant. In an appropriate case, it's there, it's available. I'm not aware of DNA warrants being denied to the police.

The process of taking the sample is the same as for the taking of a sample for the purposes of the data bank, but there is a procedure. It's in the Criminal Code, and it has existed since 1995. In S.A.B., the Supreme Court of Canada unanimously held that it's an appropriate balance between the interests of society and law enforcement on the one hand—protection of society—and the interests of the individual, the suspect who is presumed innocent and whose privacy interests are being affected by the state, since the state wants access to the person's body.

The procedure is a requirement for a judicial authorization, a warrant, because there has to be an impartial arbiter between the interests of the state and the interests of the individual. We leave it to the judge to make that decision. The taking of a sample at the time of charge without prior judicial authorization is what would be violative of the Constitution. You're taking a sample of a bodily substance from an individual, and allowing that to happen is the intrusion. Up until now, it is our understanding that a judicial authorization is required to do that.

Post-conviction, you get that after the person's been convicted of a designated offence. The judge is in the position, at the time of sentencing—you've been convicted—to decide at that point, yes or no, whether he should make the order to have you included in the data bank. If the judge decides yes, he issues the order and out you go. And the procedure for the actual collection of the sample is the same as for the warrant. It's just that it will go to a different place. In the case of the warrant, it will go to the local crime lab or the regional crime lab. In the case of the DNA data bank sample, it will come to Ottawa, to the national DNA data bank.

● (1725)

The Chair: Thank you, Mr. Warawa.

Mr. Macklin, you had a question.

Hon. Paul Harold Macklin: Yes, thank you, Chair.

Just to comment on the ongoing discussion here, I don't think there's anything more fundamental at play here than our genetic engineering blueprint. We're not giving up just some lines on our hand on a fingerprint. I think it's really fundamental to who we are, as we are now unfolding.

Members had an opportunity recently to see what Genome Canada is doing with genetic research. That was presented to parliamentarians in the last couple of weeks. It really indicates to us and brings home the importance of this. I don't know if there's any other way to express it than as a genetic engineering blueprint of who you are as a person. What they're able to find from that—that is, they who investigate—is quite incredible. I think there really isn't a comparison in trying to equate a fingerprint with a genetic blueprint.

But that isn't my question. My question goes back to the beginning, when you made your initial remarks, Minister. You indicated that the provincial attorneys general were relatively eager to have us adopt these measures with some degree of speed. I wish you would tell us what degree of urgency we should take from the attorneys general of the provinces so that we can guide ourselves accordingly in going forward with this legislation.

Hon. Irwin Cotler: I can only share with you what they have themselves stated, and that is in the report that goes back three years now from the Uniform Law Conference. Namely, they identified the seven proposed amendments at the time—they are in our legislation—as being priorities, and the attorneys general recommended their adoption on an urgent basis. In other words, we are speaking now three years after they were first characterized as being urgent.

I would recommend to this committee...and that is the reason why we have come now rather than awaiting the parliamentary forum in 2004 to consider these things in a more holistic, comprehensive way. We can now identify and certify, as to their constitutionality, seven specific amendments that are being recommended on a priority basis and as having an urgent consideration.

I might add as well that I referred you earlier to the case of R. v. Briggs, which is quite interesting because it goes into the purposive nature of this type of legislation. It says that the state's interest in obtaining a DNA profile from an offender is not simply the value of law enforcement by making it possible to detect further crimes committed by the offender. Rather, as the case put it—and maybe it's an appropriate time to do this as we move to a close—the provisions have much broader purposes.

I'm just going to identify what they characterize as being the purposive nature of the legislation, which ought to be appreciated in terms of the specific recommendations that we are putting forward on that priority basis:

> (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

I spoke about the wrongful conviction process. We should not forget that taking a DNA sample in an early stage of the investigative process can exonerate a suspect at that time. That is very important for purposes of validating the innocence early in the process, as well as the wrongful conviction that comes later on, after all appeals have been exhausted.

So we should appreciate the broad, comprehensive purposive nature of this legislation, which we are seeking to address by seven specific recommendations that we put before the committee.

● (1730)

The Chair: Thank you, Mr. Minister.

Mr. Breitkreuz assures me he has one brief question that he's going to put directly.

Mr. Garry Breitkreuz: This comes from some law enforcement people.

In 1995, the executive of the Canadian Police Association struck a backroom deal with the justice minister. They agreed to support the Liberal gun registry, and in return the justice minister promised the government would introduce DNA legislation allowing them to take DNA samples at the same time they're taking the fingerprints of accused criminals.

The executive of the Canadian Police Association kept their side of the bargain. Why didn't the government keep theirs?

Hon. Irwin Cotler: My response to your question is that I don't know of any backroom deal. I've come here today to put before you legislation to be considered by you on an urgent basis. I can't comment on any alleged backroom deal of which I have no knowledge.

The Chair: Thank you, Mr. Minister.

Thank you very much for your attendance here today, to you and your officials.

Thank you to the committee for their work today. We will be adjourning. We will meet again tomorrow morning at eleven o'clock,

[*Translation*]

in room 701 of the La Promenade Building. This is a meeting with the mayors of the Eastern Townships region.

Thank you.

Meeting adjourned.

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