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Chair

The Honourable Paul DeVillers

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (0900)

[*Translation*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): The meeting will now come to order.

[*English*]

This is the meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We're continuing the study of Bill C-13, an act to amend the Criminal Code, the DNA Identification Act, and the National Defence Act.

We have a witness this morning from the Criminal Lawyers' Association, Mr. Rondinelli; and from the Canadian Bar Association we have the senior director,legal and government affairs, Ms. Bercovitch, and Mr. Weinstein, the chair of the Manitoba branch.

I would ask Mr. Rondinelli to lead off, approximately a 10-minute submission, then we'll go to the Canadian Bar. Then there'll be questions from the members.

Mr. Rondinelli, for roughly 10 minutes.

Mr. Vincenzo Rondinelli (Representative, Criminal Lawyers Association): Good morning. I'm the representative for the Criminal Lawyers' Association. I'd like to thank the committee for the invitation to submit our views specifically on Bill C-13, although with the upcoming five-year review of the DNA data bank legislation as a whole, we would appreciate it if we were to have further opportunity at that time to give more extensive submissions on the legislation as a whole.

For the purposes of today, I'll try to restrict my submission to comments on Bill C-13, but there might be some questions later from committee members, dealing with the legislation as a whole.

Before I get into my main submissions, I just want to begin by saying that I'm not here to criticize the DNA data bank. That will never be a position of the Criminal Lawyers' Association. We applaud the success of the DNA data bank, just like every other Canadian. As we've seen, it has been quite successful to date. Having said that, due to the sensitive nature and serious privacy implications associated with the DNA data bank, we remain steadfast with our position that we have to keep great checks and balances in place as we move forward with the data bank.

My submissions will be dealing with two areas of Bill C-13. One is a more general and more cautionary submission dealing with the inclusion of new designated offences whose addition to the list is being proposed. The second is on a procedural matter dealing with the defective warrants. Those are the brief written submissions that I submitted, but I'm not going to limit my submissions to the brief.

Dealing with the new designated offences whose addition to the designated lists is being proposed, I'm taking a position that it's "legislation creep". At least, this is the term I've been using in my talks—and I've spoken at a DNA symposium recently. It's legislation creep in the sense that where legislation starts off with one purpose and intention to deal with certain offences and offenders in mind, it then slowly starts chipping away and starts adding further offences and further offenders. By the end of the day, we then have this whole new legislation that really has developed into a creature that was never the intention or the purpose of the legislation when it was first enacted.

If we look at the timeline and the progression of DNA legislation in Canada, we're seeing signs of this legislation creep, and I'm going to explain how. And it's not really unique to Canada; we're obviously seeing it in the U.S. and U.K. Limiting it to Canada, though, in 1995, when the DNA warrant scheme was first passed, at that time we didn't really have two lists of primary and secondary designated offences, we really had one big list. The list generally was dealing with serious offences, and mainly those in which the likelihood was quite high that you'd find a sample at the crime scene. Here you're really dealing with violent offences—and sexual assaults in particular—because obviously there would be a good chance that you'd find some bodily samples at those crime scenes.

We then fast-forward to five years later, to the year 2000, when the DNA data bank legislation was passed. We now see that it was broken down into two lists, primary designated offences and secondary designated offences. Again dealing with the gravity and the likelihood, it seems that was what Parliament had in mind in terms of separating the two into different tests that go along with getting DNA data bank orders.

But we also saw more offences added to those lists. A primary example that I'll point out is that driving offences started creeping into the legislation. In the secondary designated offences, we started seeing the dangerous operation of vehicles in a manner causing bodily harm or death, and impaired driving causing bodily harm or death. There were also a number of other offences added to the list as well, but again it was that creep that I keep talking about.

And now we're here with Bill C-13 and we've noticed that it's proposing to add a whole new laundry list of offences to the list. Of course, with the review coming down, I'm sure there'll be a further push to add more offences, to have one category, or what have you.

Again, we foresee the addition of offences like living on the avails of prostitution. I just use that as an example, but there might be others on the list.

● (0905)

If we take that offence as an example, harking back to 1995 when we first passed it, about the serious offences and the likelihood that there would be some sample found at the crime scene, when you look at living on the avails of prostitution—and it's dealing with individuals under the age of 18—whether there's a likelihood of a bodily sample left in connection to that offence is arguable. I think it's extremely low. So again, I don't know if it fits into this primary category of how you choose the offences that go into the list.

But apart from the offences, we actually see that now we've expanded it to even include different offenders—the not criminally responsible due to mental disorder. So again the creep is moving not just into the offences, but also the offenders, and slowly but surely it will be trying to include further offences.

Again, I use that as a cautionary tale. And I don't want to use police data, at the end of the day, or a surveillance society, but it has to be kept in mind that we're trying to balance the rights of individuals and the protection of society.

Again, this legislation creep isn't unique to Canada. In the U.K., of course, they're light-years ahead in terms of what they put in their data bank and how they collect it and so forth. In the United States we're seeing that on a state-by-state basis, where originally they really dealt with serious offences, sexual assaults, and now it's almost across the board—it's all felonies to begin with.

There's even some push, upon arrest, because it's a topical thing.... At the ballot measure in the last presidential election, in California there was proposition 69 passed, which was to collect DNA samples on arrest, although that part of the proposition won't come into law until 2009. Nevertheless, we see the legislation creep.

Moving more to the meat and potatoes, I guess, part of Bill C-13 that I find quite useful in the day-to-day practice of things, the procedural aspects of it, some of the things that have been added to Bill C-13 really have been going on as a matter of course anyway, but it's good to have it in the legislation itself, for example, on application to the crown in dealing with the secondary designated offences. That was happening anyway in the court, but now it's been legislated.

One area I would like to point out is the defective warrants situation. There was obviously a gap in the legislation, because the last numbers I've seen from the DNA data bank is that there were 522 samples that were submitted to the data bank that actually shouldn't have been submitted to them. So in essence there were orders made that shouldn't have been made, because for one thing they weren't designated offences. I know of some examples of drug offences. I know some colleagues of mine have complained that judges have given DNA data bank orders on drug offences, and it's not even in the Criminal Code. Those are the things that they sort of stop at the gate, before they get into the DNA data bank.

There have been, I think, five that were actually on consent of the accused or the offender, again on a non-designated offence that they've stopped at the gate. So the provision in Bill C-13 to deal with that is that they want to make sure how they can deal with these samples once they get them—and they shouldn't be getting them. Right now the commissioner, as I understand it, is holding these 522 samples somewhere in the data bank. Again, because there is no legislation on it I'm not exactly sure what is being followed to keep them, but they are still in existence.

So the provisions in the new bill basically allow the commissioner to give notice to the Attorney General of the province where the order came from to look into it a little further, see what the issue is, whether it's just a clerical error or whether it's a fundamental error in the sense that it shouldn't have been authorized in the first place. Then if the commissioner gets notice from one of the Attorneys General that the order should be revoked, there's a whole procedure that goes into place and the commissioner destroys the sample and any information related to it.

Now, we acknowledge that this is just a procedural provision, and it's presumed to have retroactive effect. However, I would submit that it would be more beneficial to have it explicitly mentioned in the Criminal Code to avoid any litigation that may take place regarding its retroactivity application, and mainly to deal with those samples that are in existence right now. Because if you look at the DNA Identification Act as it stands, you'll see there actually is a section—section 10—that does state that the commissioner may at any time destroy any or all of the stored bodily substances if the commissioner considers that they are no longer required for the purpose of forensic DNA analysis.

● (0910)

Now, my submission would be that the commissioner should, under that section, have destroyed those 522 samples, but they're still in existence and they're still there. So again, if there were an explicit mention of the retroactivity application of this section, the 522 samples would be dealt with promptly and accordingly.

A second aspect of the defective warrant scheme proposed in Bill C-13, one that I think would go further in making it a better provision if corrected, is the lack of a notice provision in Bill C-13. By “notice” I mean to the offender whose DNA sample was taken when at the end of the day it was decided it should be destroyed because it was for a non-designated offence or for whatever defect. There should be a reasonable effort made to give notice or inform the offender that the sample has in fact been destroyed.

Now, I appreciate that sometimes with these offenders there are obviously difficulties in tracking them down. That's why I mentioned there should be “reasonable” efforts, because some are transients and it's very difficult to maintain any sort of fixed address for them. Obviously, it would be difficult to find them. Again, reasonable effort should be made to inform these individuals of what has happened to their DNA samples. That's just in accordance with the types of ideals Canadian society has come to expect with respect to their personal information.

We saw recently the passing of PIPEDA, the Personal Information Protection and Electronic Documents Act, which really emphasizes the importance of letting Canadians know how their personal information is collected, used, disclosed, destroyed, or what have you. In keeping with those principles, notice should be given to the offenders once it is determined that their DNA samples are no longer required for the DNA data bank and have in fact been destroyed.

I know there will likely be other questions, and I don't want to delve into areas prematurely. I'll limit my submission to that for now and I'll await any questions at the appropriate time.

● (0915)

The Chair: Thank you, Mr. Rondinelli.

Just before we go to the Canadian Bar Association, I'll say something for the benefit of members. Mr. Gary Rosenfeldt of the Victims of Violence Centre for Missing Children is on the orders of the day and on the agenda but is not able to attend. The clerk will be working with him to see if there's an opportunity to reschedule.

Now we'll go to the Canadian Bar Association, and I believe Ms. Bercovitch will start off.

Ms. Joan Bercovitch (Senior Director, Legal and Government Affairs, Canadian Bar Association): Thank you, and thank you on behalf of the Canadian Bar Association for the opportunity to present our submission on Bill C-13.

The Canadian Bar is an association comprising over 38,000 jurists across the country.

[*Translation*]

The Association's primary objectives include improvement in the law and in the administration of justice. Our comments today tie in with these two objectives.

[*English*]

Our submission will be presented by Joshua Weinstein, who is a member of the national executive of our national criminal justice section. This section comprises both defence counsel and prosecutors, so the view that is in our submission and the comments Josh will make today are consistent with a consensus view of the bar, of defence attorneys, and of crown attorneys. Josh practises criminal law in Winnipeg, and he will make our submission and respond to your questions.

Mr. Joshua Weinstein (Chair, Manitoba Branch, Canadian Bar Association): Thank you.

Thank you, Mr. Chair and honourable committee members.

At the outset I want to thank the other members of the criminal justice section who have helped in putting together this submission, as well as Ms. Bercovitch, and also Ms. Gaylene Schellenberg, who helped in its drafting.

As Ms. Bercovitch indicated, this is a submission that's really composed of submissions or ideas from both crown counsel and defence counsel. We think it's a balanced view; there's a lot of back and forth. And at the end of the day, when you hear the submission, in essence what I'm going to be talking about is finding a balance, how to deal with some of these issues. In any context, in terms of these types of things, there's always a weighing of the needs of the police trying to solve crimes and the need to protect society, against the need to try to respect individual privacy at the same time.

At the outset I want to say we've had opportunities in the past to provide submissions—and we thank you again for them. We did so in 1996 and 2002. The position we give you today is consistent with those previous positions.

I'll outline the general principles that have guided us with respect to our previous and present submissions. First is the recognition that inclusion in the DNA data bank and the taking of a sample is an intrusion into the bodily integrity of an individual. There are really two issues here: the taking of the sample, and the retention of the sample. It is our submission that the retention of the sample is the more significant intrusion in terms of retaining it and keeping it in the DNA data bank.

Second, there should be a recognition that the right to privacy should only be infringed to the least extent possible, and should only be done to justify the objectives. We obviously want to know what the issue is that needs to be addressed and why—let's say a list of primary designated offences—and whether the objective is achieved by expanding that list, and what effect it has on individual liberty.

Again, we caution that you should always be guided by the charter in considering these amendments. There are certainly charter issues at stake, and ultimately there will have to be a test as to whether the legislation meets charter scrutiny. Also, you're going to hear later in the submission about the need for compelling evidence to justify certain things—to justify amendments in terms of the expansion of the list, in terms of justifying the expansion of which individuals to seek orders against. Also, we have concerns about retroactivity in terms of a certain scheme of offences committed before the coming in of the legislation in June 2000.

We recognize that the DNA data bank is not just an effective tool for finding those who have committed the offences but also for absolving those who haven't and for protecting the innocent.

On the timing of this proposed amendment list, we submit that it should be done after the comprehensive review is done in terms of the DNA national data bank. This is going to be dealt with, as we understand, this year; and if there are difficulties, you will know that first from the comprehensive review. We would ask then that you look at the amendments afterwards to see whether they're necessary.

I will deal first with the expansion of the list of the primary designated offences, clauses 2 through 6. My friend from the Criminal Lawyers' Association talks about legislation creep. I'll use another word for what is happening, and that's gene grab. This is essentially becoming a gene grab in this ever-expanding list.

When looking at those types of offences, they're of the type in which in the grand scheme of things on the sentencing, a broad spectrum of types of punishment can be imposed. We've always held the view that the DNA provisions are part of the punishment scheme. If you at least can recognize that there is a whole spectrum of potential sentences an individual can receive, then that, we say, is the argument for why these offences should not be included in the primary designated offence regime.

● (0920)

I'll give you an example. Something that attracts a lot of attention is the child pornography provisions and possession of child pornography. One would have to wonder with respect to the offence that, first of all, there is no minimum punishment. That may change, but there is no minimum punishment and it ranges from a discharge to actual imprisonment.

There are a number of circumstances where you could say an individual with a large collection has catalogued child pornography and has a previous record of indecent assault. Compare that to an individual, an 18-year-old, who had collected ten pictures and downloaded them the previous day. The courts are obviously going to take a different view of those two individuals, but at the end of the day, under the regime proposed, it is absolutely mandatory that a sample be taken of both. There is no differentiation.

We're asking that if you were to include them in any list, they be included only in the list of secondary designated offences, which provides for a weighing by an independent arbiter who will determine, given the nature of the offence and given the nature of the offender, whether one should be imposed.

In terms of quotes, we have said the “consequent risk of future violence may be so low that the invasion of privacyof that individual greatly outweighs any future risk to society”. That can be found on page three in English and page four in the French. We guide ourselves with that when we say the offences proposed in clauses 2 through clause 6 should not be included in the primary designated offence list.

Again, with respect to that, if one were to argue that we have a serious problem and it deals with offences against children or the vulnerable, these are still offences for which the crown could seek an order if you put them under the secondary designated offence list, but ultimately it would be up to a judge. There is added protection in terms of weighing everything in the circumstances and weighing everything in light of the fact that these offences are the type that again have a broad spectrum in terms of the likely outcome.

Obviously, that is why we say the secondary designated offence regime should be preferred. For serious violent offences, murder, we still agree that those should be included in the primary designated offence regime, but for those proposed, with respect, we do not.

With respect to the next area, it deals with not criminally responsible by reason of mental disorder. We find this troubling in terms of some of the proposed amendments. Here is a regime already present in the Criminal Code that deals with the not criminally responsible by reason of mental disorder in which an individual ultimately would not receive a conviction. That has been in the Criminal Code and continues to this day. Ultimately, a person can be discharged. Having committed an offence, that person is deemed not to have committed that offence and is not convicted.

Yet the proposal in terms of what is proposed in the amendments would include them under the regime that deals with youth and those who are discharged under the Criminal Code. In doing that, what we say is consistent with our last position. If you were to treat them as if they had not been convicted, then you should not include them in a scheme that is for those who are convicted. It's troubling in terms of including these groups of people under that regime.

Again, we recognize there are goals in terms of solving crimes. Again, if it was with respect to serious violent offences, murder or serious sexual offences, other than not including them at all in any regime in terms of DNA, the alternative argument is to include them under the secondary designated offence regime.

Under that regime, in terms of youth and those who are discharged, not only is it a discretion on the part of the judge, but under those provisions there is the added test, the added safeguard that deals with this weighing. It deals with the impact it would have on the individual, the nature of the offence, and the seriousness of it. Ultimately, dealing with the impact on the offender is the most important with respect to someone who has been found not criminally responsible by reason of mental disorder.

● (0925)

Just imagine this. This also plays into the issue of having to re-sample, or the retroactivity scheme in having someone who had been previously found not criminally responsible by reason of mental disorder, or having committed an offence in the past when they weren't mentally ill and now are and then wanting to take the sample. How many times have we probably heard of certain offenders who are found not criminally responsible by reason of mental disorder and the mental disorder may be paranoid delusions? Of what? Of governments having some intrusion into their private lives. Imagine the effect on those individuals who have gone through treatment and are now discharged under the provisions and found not to be convicted and who are then told that they have to have a needle stuck in them or have a swab taken. Not only that, but if the sample couldn't be taken—there's a scheme now proposing re-sampling—imagine the individual who is now treated, who has received the benefit of that and now is told that the government has to stick in a needle or take some sort of bodily sample.

It is for that reason we've always maintained that the “not criminally responsible by reason of mental disorder” should be an alternative route under the Criminal Code, and it should be treated that way.

In terms of quoting, page 5 in the English, page 6 in the French says:[T]he onus should always be on the Crown in these limited circumstances

—and this is if proposed under the designated offence regime, in the alternative—

and the offences should be part of the list ofsecondary designated offences for which a discretionary ordermay be obtained. When asked to make such an order, judgesshould consider the same criteria as that currently listed in s.487.051(1)(b) and (3)3 of the Criminal Code. In addition, theyshould give careful consideration to future risk presented by theoffender and its impact on public protection under thecircumstances.

I want to talk about retroactivity in general. I'll be very brief on this. We have always maintained in terms of the retroactive scheme that only for the most serious violent offences—sexual offences and murder—should that take place. Our strong position is that there should be no further interference with these individuals. Anything should have been addressed at the time of the sentencing. Just because of the change in the provisions, you should not then go back to those who have already been punished and who have received their punishment prior to the amendment dates.

I don't know if I'm running out of time. I am.

I will wait for any questions afterwards. Thank you.

[*Translation*]

The Chair: I'd like to thank the witnesses for their presentations. We will now go to questions.

You have seven minutes, Mr. Thompson.

[*English*]

Mr. Myron Thompson (Wild Rose, CPC): Thank you, Mr. Chairman, and thank you, ladies and gentlemen, for coming today.

I have one particular thorn in my side in regard to our justice system and to some of the problems we're having in our country with certain areas. The one that I think is taken so lightly and that is so underestimated in terms of the seriousness of the problem, and which you've referred to in your submission, is child pornography. These offences are nearly an everyday occurrence somewhere in this country. There are even more than one or two cases of trying to break this up. It has become an organized event; they know that now gangs and other people are quite involved in the distribution, and whatever, to get this garbage out into the hands of those people in our society who are interested.

As critic in the justice area, I spent quite a bit of time visiting penitentiaries. I spent a lot of time visiting with inmates who are in the prisons mainly because of sexual offences against children. I wanted specifically to talk to that. There's hardly a case that I ran across in which any of them said to me that child pornography had not played a role in leading them to do what they did—that they're actively engaged with it.

When I look at the vulnerability of small children and the exploitation by adults of these small children through child pornography, and I see a submission that suggests that it's not a serious offence because of the circumstances being different... We have pretty good evidence in this country that anyone in possession of or who becomes addicted to or uses child pornography for their own personal interest... Sooner or later some child will be hurt.

For ten years now, there's been a push by various groups, including myself, to get this thing addressed. And it is still not addressed today. I find it very disturbing that people in your positions would come forward with a submission that would suggest that we have to be very cautious about those offenders who are arrested or who are being charged with the possession or whatever, however minimal it may be, of child pornography. It is a serious thing in this country that is putting our children at risk.

I'm sorry, but I think our children's safety is far more important than the right of any individual who spends their time enjoying child pornography, whether it's violent or there is no intent and nothing will ever come of it. We can't play that gambling game with the lives of our children.

I really find it hard. Could you please explain to me, what is it that causes submissions of this type to put so little emphasis on the dangers of what's happening in our land today because of child pornography? Why does it not seem to loom out as being one area that really needs to be addressed? I don't see that in your submissions and I'd like to know why. Please explain to me and make it clear in my mind why I'm wrong.

● (0930)

The Chair: Mr. Weinstein.

Mr. Joshua Weinstein: Thank you, honourable committee member. I do take your point.

I want to say at the outset with regard to the issue, and you're dealing specifically with child pornography, we are saying that it cannot be subject to any sort of regime in terms of the DNA sampling. We have to distinguish in terms of the DNA sampling in and of itself. While we say it is part of the punishment provision, there is really only one issue: does it get ordered or not?

There may very well be those cases you talk about. There's distribution and there may be production, and it may be so serious and have such aggravating features that the court punishes that accused quite severely. But then the issue becomes whether a DNA order is in effect. If it's included under this secondary designated offence regime, it may very well still be ordered. In the types of circumstances you're talking about where there are those aggravating features present, you just look at the provision under secondary designated offence and whether it's in the best interests of the administration of justice to do so. Under the circumstances you outlined, where it is so aggravating, it may be.

But there may be those circumstances that are of a less serious nature. By that we mean that is just the nature of some of the offences that come before the court. The court has to distinguish between the individual who possessed five or ten pictures and had seen them for one day and the individual who has amassed a collection and has taken it maybe to the next level—for example, has started a business distributing them or has started to produce them on their own. I can't say what would happen. All we're saying is have an independent arbiter decide that. If there are merits to being ordered in that certain circumstance, it will be ordered.

● (0935)

The Chair: Mr. Rondinelli, did you have a response to Mr. Thompson's question?

Mr. Vincenzo Rondinelli: I didn't raise child pornography in my submission. The example I used was living off the avails of prostitution. But I take your point.

With driving offences on the designated list in the current legislation, I think it would be difficult to argue why child pornography shouldn't be on the list. Dealing with the two-pronged test of the seriousness of the offence, obviously it is serious. With regard to the likelihood of some samples being found at the crime scene, arguably, I can see how that has some merit in it, too, because there might be some bodily samples associated with the child pornography. I can see that being in the regime better than I can see the dangerous operation of a vehicle causing bodily harm or death. That is the main legislation creep I'm talking about. It's not that it shouldn't include the serious offences and probably the ones that were overlooked originally either because they didn't exist at the time or because society has now had more experience to deal with certain issues. It should add them to the list. So again, seeing what's on the list now and putting it against child pornography, I think it is a difficult task to try to debate why it shouldn't be on the list.

Mr. Myron Thompson: Thank you for that. I agree with that.

How much time do I have?

The Chair: Minus 53 seconds.

Mr. Myron Thompson: I just want to point out that I find it really sad that of all the offences—and I agree with you on driving and some of the other things—mentioned the most in the media and based on submissions made by various people, child pornography would dare enter a section of our criminal activities that may not be that violent or that serious a risk. We have to change that attitude. I think everybody responsible, whether lawyers, judges, or the courts, has to start stressing that the protection of our children is of the utmost importance, and we have to stop this nonsense.

The Chair: Thank you, Mr. Thompson.

Monsieur Marceau, pour cinq minutes.

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you very much, Mr. Chairman. I'd also like to thank the witnesses for sharing their views this morning with the committee.

Mr. Weinstein, if I understood you correctly, you stated, to my surprise , that in your opinion,

[*English*]

“the DNA grab is part of the punishment”.

[*Translation*]

or something to that effect. I want to understand where that statement is coming from.

How would the taking of a DNA sample, whether saliva or a drop of blood, constitute part of the punishment? We visited the bank. In high school, we pricked our fingertip to draw blood in order to determine our blood group. That wasn't any kind of punishment. I fail to see how this would be part of the punishment.

[*English*]

Mr. Joshua Weinstein: Perhaps the better way of phrasing it is that it's still part of the sentencing regime. It's all part and parcel of the same thing. I think we've had courts in the past that have said restitution orders, which came into effect in terms of getting a separate civil restitution order...that the payment of restitution is considered part of the punishment. So there are a number of what may appear to be administrative matters dealt with in terms of the sentencing, but they are all part of the sentencing —weapons prohibition orders, whether they should be ordered; DNA orders, whether they should be ordered. In terms of the gene grab, that comment was made more in answer to a legislation creep comment made by my friend.

But it has been our position, and I think it's consistent with positions that have been held by the courts, not necessarily with respect to DNA orders, but just in terms that the things that happen at the sentencing are all part and parcel of it.

To get slightly technical, dealing with the retroactivity scheme, if we happen to take a sample for someone who was convicted before June 2000 of a certain offence, section 11(i) of the charter says that if there are provisions put in place that now provide for more serious punishment to an individual between the time that he committed the offence and the time of sentencing—if you you look at something like that, the standard answer is you can't change the rules in the middle of the game. To then have these individuals come back after they've been sentenced, that's when I say, in terms of this DNA order being part of the sentencing, that's how we'd take that into—

● (0940)

[*Translation*]

Mr. Richard Marceau: There's a fundamental distinction between being part of the sentencing process, as you say, and being part of the punishment.

Getting back to my question, which I may not have worded quite right, when an accused person is convicted, and hence labelled a criminal, and then sentenced, the State sends a message to society that punishment is being meted out and that if someone else commits the same offence, there will be consequences to face. A message is also being conveyed in the process to the offender. This is all part of the philosophy behind the criminal justice system.

In what way does the requirement to give a blood sample affect this person's attitude or impact society in general? In what way does this constitute a punishment?

[*English*]

Mr. Joshua Weinstein: Again, just to clarify, I say it's more part of the sentencing regime. If someone were to argue that, let's say, they're being punished more severely because the DNA sample was taken, our submission is much more basic than that. It's on the basis of intrusion into bodily integrity and respecting the right of the individual.

If the argument is that person doesn't have any rights with respect to invasion into their personal privacy or bodily integrity, then that's one issue, but the submission in general is based more on a weighing of this certain offence. What has happened in this certain offence? Let's take a look at the offender and whether or not it should be ordered.

All I would say, in general, is that when we're looking at some of the offences, what is the problem that we're trying to address? Is it that the police aren't able to solve child pornography cases because they are without DNA—that a number of cases remain unsolved, and that DNA would solve it all? If that were the case, then maybe there's the argument, but we haven't obviously seen that—

[*Translation*]

Mr. Richard Marceau: If I have time, I'll get back to the list. There are certain inconsistencies in the way in which the list has been drawn up, particularly as concerns primary and secondary offences.

I'd like to focus for a moment on the question of invasion of privacy. Yesterday, when we visited the bank, it was interesting to see how this facility was run. I'd like you to explain to me why it is you believe that taking a saliva, hair or blood sample constitutes a greater invasion of privacy than the act of fingerprinting someone? What's the difference between drawing blood once, twice, three or even four times, and dipping a person's fingers in ink ten times?

In your opinion, is it the act itself that constitutes an invasion of privacy, or is it the fact that the bank keeps a sample of this genetic material for a rather extended period of time?

[*English*]

Mr. Joshua Weinstein: Thank you for that.

It brings me back to one of the first points mentioned at the outset of the submission. The privacy interest is with respect to both. It's with respect to the taking of the sample and to the retention, but the more significant intrusion with respect to the right to privacy is the retention of the sample.

I would agree: there may be certain circumstances. If I open a door somewhere, I may leave DNA right now, but it's the retention of the sample that we say is the more serious of the privacy interest issues of the individual.

● (0945)

[*Translation*]

Mr. Richard Marceau: Thank you.

The Chair: Thank you, Mr. Marceau.

[*English*]

Mr. Comartin for seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair, and thank you all for coming.

Mr. Rondinelli, on the issue of the retroactivity, you say your source of information is the website of the bank. Is it clear they are still retaining those 522 samples?

Mr. Vincenzo Rondinelli: The information I got is technically hearsay. I haven't read it or seen them myself. The information I got was from the first meeting this committee had when the justice minister and the two members of the Department of Justice were here. They mentioned that the commissioner was hanging onto them, that they were still being retained. So as far as I know, they're still in existence somewhere, but I couldn't find anywhere in their literature where it actually said they were still being retained. Again, it's just through informal discussions with people.

Mr. Joe Comartin: In terms of clause 10 of the bill, are you satisfied the procedures are okay? It's just that you want to make them retroactive to those 522 samples.

Mr. Vincenzo Rondinelli: Yes. At the symposium we held at Osgoode Hall Law School in December there was a crown attorney on my panel as well, and we were discussing the DNA data bank. In their perspective they thought it was a bit onerous because of the time delay and the adding of another layer of bureaucracy on top of it.

We believe, though, that it's definitely a better position to have legislation in place than to have the non-regulated scheme that's in place right now. For example—and it goes back to your first question—I'm not sure where the 522 are, but at least with the legislation in place I would know there was a process in place, although I do still recommend that the notice provision, for example, be added to it, as well as the retroactivity aspect of it.

Mr. Joe Comartin: This is for all of you.

We've been getting evidence, including some we got yesterday at the bank, that in effect up to this point the sections have not been used in more than about 50% of the cases. There was no breakdown for the 50% that hasn't been asked for—whether it was asked for, whether the crown didn't ask for it, or whether the court, the judge, declined to make the order. So I don't know what the percentage is.

With the indication being from several sources now that there's been a real lack of training on the part of the judiciary—on the part of the prosecution also, I'm thinking—in the use of these sections of the code, do you have any comments on what your experience has been?

Mr. Vincenzo Rondinelli: I agree with your last point. It really is a training or an educational issue at this point. I produce a monthly DNA net letter, and I have monitored the cases dealing with the data bank orders definitely from the beginning, or the inception of the legislation. It never ceases to amaze me that in some of the decisions I read on a monthly basis the judge doesn't even consider any of the sections on the secondary designated offence and what to do. He basically goes on his own whim with “I'm going to give Mr. X a second chance here, and I'm not going to make the DNA order.” Again, that's not really part of what the decision-making process should be.

I'm not placing blame on the crown attorney, because it's really everyone in the courtroom. It's the defence that has an obligation to deal with the best interests of the client and to know what the law is, and the crown attorney as well, and then ultimately the judge. But reading from these decisions, it's really a lack of knowledge of what the sections actually allow you to do and basically tell you to do that's really the thing. We're seeing a trickling to the appellate level now that cases are finally getting to the appellate level where they're dealing with these off-the-cuff remarks from judges and appellate courts, particularly, in Ontario and Alberta, where they're coming down and saying.... It's pretty much rare that if it's a primary designated offence...it's mandatory that you give it. Once there is more appellate discussion on the matter, I've noticed that the judiciary is listening and will mention those cases as they deal with their data bank orders. I think it's getting better. I don't think it's done intentionally by the judiciary, the crown, or the defence. It's just a matter of a learning curve.

It might be a bit steep for police associations and with some of the media attention that the judiciary has been given as of late. But I think that helps the discussion. If they see the headlines, and if they hear all the participants, they know that they should be looking at this more seriously. And at least in the numbers I see on an ad hoc or monthly basis, I see that they are being granted on a much more frequent basis than they were originally. It could only get better as there's more education and training out there.

● (0950)

Mr. Joe Comartin: Thank you.

Mr. Joshua Weinstein: I have nothing further to add. I think that's an accurate statement of what's going on in our province.

The Chair: Thank you.

Mr. Comartin, you still have two minutes.

Mr. Joe Comartin: On the NCRs, Mr. Weinstein—and again, we heard from the Schizophrenia Society of Canada earlier this week—if I understand the CBA's position, it's that you are prepared to agree. I suppose I'm looking for the logic of this, that even though an NCR order has been made you are prepared to agree that they go into the secondary category rather than primary.

Could you take me through the logic of that? The argument we heard from the Schizophrenia Society of Canada was it doesn't follow how we treat those accused of that, and who are so found.

Mr. Joshua Weinstein: That was in the alternative position. Our first position is they should not be subject.

Mr. Joe Comartin: That's still your position?

Mr. Joshua Weinstein: It is absolutely still our position. They should not be subject to any regime because of probably the same reason that the Schizophrenia Society of Canada had told you. There is a reason why they are proceeding through a different route through the justice system. If they have not received a conviction they should not be proceeded in the fashion under the primary or secondary designated defence regime. It's only in the alternative. We obviously leave it to people like the Schizophrenia Society of Canada to talk about the effects that would have on an individual.

From our point of view, the only reason why we said in the alternative it should be included under the secondary designated offence regime is because there is that balancing. If you look under the proposed subsection, 487.051(1), it includes those who are found not criminally responsible by reason of mental disorder. What we propose is to put them under the secondary designated offence regime, which allows for, first, the test that it is in the best interests of the administration of justice to do so. The test for what is in the best administration of justice to do so indicates:

> In deciding whether to make an order under paragraph (1)(b), the court shall consider the person's criminal record, whether the person was previously found not criminally responsible on account of mental disorder for a designated offence,

—we take issue with that part of it—

> the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

The issue of security of the person, not criminally responsible, will be of utmost importance. At least there's that weighing that happens under this section. That's why if we had to choose, we would say that even offences of a serious violent nature, serious sexual nature, murder, should be included under a secondary designated offence regime.

Mr. Joe Comartin: I just have one more quick question, Mr. Chair.

Are you aware of any studies of the rate of recidivism of people who have been NCR?

Mr. Joshua Weinstein: I'm not. Absent any compelling evidence that there are those issues, if they're treated and the rate of recidivism is low, then again I think it further fuels our submission in terms of not including them, or including them under the secondary designated offence regime.

[*Translation*]

The Chair: Thank you, Mr. Comartin.

You have seven minutes, Mr. Macklin.

[*English*]

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you, Mr. Chair, and thank you, witnesses, for being here today to help us in this investigation and process.

Today, when I reflect on what I see from you as the CBA, I guess I have some concern with the five principles you establish at the beginning of your brief, that they don't appear to take into account the decisions the courts have made concerning the data bank and its objectives.

I refer to the Briggs case in the court of appeal, which basically set out the uses, as they saw it, for the data bank. They said that "...the purpose of obtaining a DNA profile from an offender was not simply to detect further crimes committed by this offender. Rather the provisions have much broader purposes, including the following: to deter potential repeat offenders; to promote the safety of the community; to detect when a serial offender is at work; to assist in the solving of what could be called cold crimes; to streamline investigations; and to assist the innocent by early exclusion for investigative suspicion or in exonerating those who have been wrongfully convicted."

Moreover, I think that the courts have held repeatedly that convicted offenders do have a reduced expectation of privacy, and that the interference with privacy and security of a person is minimal. Bearing that in mind, I'd like to get your comments on what appear to me to be quite restrictive principles you're setting forth here and that appear to be based on, if I'm drawing the right conclusion, trying to determine whether the particular offender is likely to commit a serious crime in the future.

Could you give me your interpretation of that relationship between what the courts have identified and what you have identified as your principles? As I said, it seemed to be extremely restrictive.

● (0955)

Mr. Joshua Weinstein: Thank you, and thank you for outlining that case.

I think it's still consistent with the principles, as we've outlined. Most notably, I think it was the third principle we talked about, that whatever steps are taken they should always be guided by the Charter of Rights and Freedoms. I'll deal with the issue of whether our proposals are restrictive, but we're not saying that the objectives are not laudable goals or are not proper; we're just saying that they have to be guided by the charter.

In talking about it being restrictive and that we have to realize the nature of why the DNA data bank was established, there are a number of offences in which we say—and for those ones that are proposed as primary designated offences—it may still be ordered. It still may be ordered under the secondary designated offence regime. It's not restrictive if you give the judge the power and the judge has the discretion to make the order or not. Again, if the application for a DNA sample has merit, it will be given. If it does not have merit, it will not. All we're saying is that the mandatory scheme under primary designated offences doesn't provide for that balancing. It's its own test, and it also takes into account the charter.

In talking about other goals of the DNA data bank, it has a broader purpose, of deterring repeat offenders. I won't speak about deterrence. There's that argument, and anyone with 25 cents can hear that argument later on.

You're also talking about safety of the community. At the end of the day, judges have that at the top of their minds when making those orders under the secondary designated offence regime. They are not powerless; they've been given certain powers. All we're saying is let them exercise those, as opposed to putting in a mandatory regime, which may include the taking and retention of samples from those where it really should not be warranted, given the nature of the offender and the nature of the offence.

Hon. Paul Harold Macklin: Let me pick up on one point from that, and go back to Mr. Marceau's comment earlier about.... You talk about charter compliance in this regime, and yet in dealing with this concept of punishment, a term that you use frequently in reference to this particular bank process... Surely the courts have clarified that if it were a punishment, it couldn't be retroactive, and yet the courts have approved of the retroactivity and said that our scheme for retroactivity is charter compliant. Wouldn't that clearly assist in saying that it is not a punishment?

Mr. Joshua Weinstein: As we've said before, in terms of the retroactivity, I don't know and I'm not aware specifically of cases that have dealt with the retroactive scheme, whether it's charter-compliant or not.

But first, in dealing with retroactivity there's the charter issue—that's number one—which in finding other cases I could comment specifically on. Also it's with respect to what is the void that is needed to be addressed regarding the certain type of offence that was committed in the past and affording evidence or stopping some future crime.

I think the best example we could say is if at birth we all had DNA samples retained and there was a DNA data bank sample of all of us. We would potentially solve a lot of crimes, I imagine, but we don't do that, and we don't do that because, I would submit, of a privacy interest.

So then we really need to address an absent compelling evidence if the police were to say there are a number of these types of unsolved crimes and we need DNA to solve them and DNA would afford that—DNA would prevent this type of crime. Remember, the police still have the power to get samples of individuals who they consider suspects. There are warrant provisions in the Criminal Code for someone who they believe has committed an offence, so they still have that power.

It's just that when you look at certain provisions—and I know it attracts attention, but again I bring up child pornography—where is that evidence that says the police have been trying to solve hundreds or thousands of these pornography cases and they can't do it because they have no suspects, there is absolutely no other evidence, they can't track them down by the IP address, so they need their DNA? That's the issue with respect to retroactivity with a number of these offences where, we submit, it's not justified.

● (1000)

Mr. Vincenzo Rondinelli: Sir, if I can just add something about the punishment aspect of it, again, it's not a novel issue. Even before Canada had their legislation in place, the debate was raging in the United States, and they unanimously found there really wasn't punishment when it comes down to the DNA data bank. In the Briggs case they actually talk about section 11(i) and how it's not punishment, especially with the minimal intrusion, as we've heard from Mr. Marceau.

However, there is one case in which the application of leave to appeal was granted by the Supreme Court of Canada, and that's the case of R. v. Rodgers. That's a case out of Ontario that the court is specifically going to deal with. It deals more with the *ex parte* issue of retroactive applications, but the court is also going to be dealing with the punishment aspect of retroactive applications.

They dealt with it briefly at the Ontario Court of Appeal level, but because Briggs had decided it wasn't punishment, they didn't really want to deal with the issue again, saying that it's been decided. But because leave has been granted at the Supreme Court, you will be getting more assistance in that area shortly. I don't think it's been listed for a date yet, but they will be dealing with that issue. As it stands now, there has been no case defined that it has been or is punishment.

The Chair: Thank you.

Thank you, Mr. Macklin.

Now to the three-minute rounds and Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chairman, and I'd also like to thank the witnesses for being here today.

My first question is for Mr. Rondinelli and Mr. Weinstein. Have either of you had a tour of the RCMP data bank?

Mr. Vincenzo Rondinelli: I wish, but no, I haven't. I've seen the Centre of Forensic Sciences in Toronto and how they deal with the investigative side of things. But no, speaking for myself, I haven't seen the operations. I have only read about it.

Mr. Joshua Weinstein: Again, other than reading about it as well, I've not been there.

Mr. Mark Warawa: My comment on that would be I think you'd find it very informative and it would help provide additional expertise in your presentations and recommendations. You are here today as witnesses, and we're not here to argue with you but to receive information from you. If you're speaking on a topic on which you don't have available information, it restricts your ability to give us full information. So I'd highly recommend that you take a tour to see how the DNA samples are managed.

I think every one of us was very appreciative of the tour and was informed on how the samples are handled and the administrative program to ensure that the name of the person who provided the sample is not there. It's handled on a bar code and the information—

● (1005)

The Chair: If I could just interrupt for a moment, I don't think it's entirely fair to the witnesses to be suggesting something that I don't think is within their capabilities. I don't think just anyone can get a tour; you need a certain pre-arrangement and privilege.

Just for the record, I don't think we should be chastising the witnesses for something that's beyond their control.

Mr. Mark Warawa: Mr. Chairman, my intent is not to chastise.

If that opportunity is there, I strongly encourage you to take it. It's very informative to see how those samples are managed.

On the question that was brought up by Mr. Comartin, the comment about the 50% of designated offences, actually over 50% of those DNA samples were not taken.

You acknowledged it's a learning process. Were you aware of those 50%?

Mr. Vincenzo Rondinelli: I've seen the headlines, especially in the *Globe and Mail*. I think it was Christie Blatchford who originally wrote on the topic in late 2004, or maybe even in the summer. Regardless, it was around the time of the Holly Jones investigation in Toronto. That was the murder of a young girl in Toronto that was garnering a lot of attention with the DNA, especially because there was a DNA dragnet going on in Toronto at the time. There was that headline saying that judges just aren't ordering the samples when they should be, especially on the primary side of things, when it's really in a sense mandatory. As Briggs says, it's really...or Hendry, another case from the court of appeal, where it says it's only on a rare occasion it shouldn't be.

I was aware of the... I mean, 50% is probably a ballpark figure. I don't know if anyone can ever really come down to an exact number, but I know it was relatively high. I'm not sure who's tracking the numbers at this point or how they're tracked. But yes, I was aware.

Mr. Mark Warawa: I would have found it helpful, when you mentioned the 522 cases where samples were taken but were not on the designated list, to balance that off with the 50% that should have been taken but weren't.

Mr. Vincenzo Rondinelli: I want to qualify that. I don't know if they should have been taken. We don't know the exact reasons they weren't taken. There might very well be reasons they shouldn't have been taken in the first place. It's not an automatic taking, even on a primary designated offence. Although it's very rare that it shouldn't be, there still is that safeguard in there that if it's disproportionate to the privacy interests of the individual and it outweighs the public security interests, then it shouldn't be taken.

I don't want to say that those 50% should be in the data bank. That's not my position.

Another difficulty is that in some of the cases that do come out, judges don't give reasons for why they do or do not. Again, that's another mandatory section in the Criminal Code that seems not to be followed...I wouldn't say on a routine basis, but there are a lot of occasions when it's not.

Again, because they say they're not ordering it, it doesn't necessarily mean it shouldn't have been ordered in the first place.

Mr. Mark Warawa: Do I have a moment?

The Chair: No, your two minutes have passed now. Thank you, Mr. Warawa.

[*Translation*]

Ms. Bourgeois, for three minutes.

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

I want to thank the witnesses for coming here this morning and for cautioning us, each in his own way, about the difference between power and abuse of power. At least, that's how I interpreted the presentations. Establishing a data bank is a reflection of authority, but it's quite another matter when it comes to using, or abusing this authority.

Mr. Rondinelli, you talked about “legislation creep”, about the fact that the list was being expanded to include additional offences. I've been concerned about something from day one, namely that other countries could have access to the data bank. Canada has close ties with the US, as you know. We even share a common border.

Could the use of this data bank create problems? I'd like to hear your views on this subject.

Since I don't have a great deal of time, I'll ask my questions in sequence. This next one is for Mr. Weinstein. You used the example of persons suffering from a mental disorder. It's a well known fact that when these individuals take their medication as prescribed, they are less likely to engage in aggressive or criminal behaviour. Often, the victims in such cases are immediate family members.

The Schizophrenia Society of Canada shed some light on the subject, but I'd appreciate it if you could give us a few more concrete examples. That's what we really need. How does the existence of a data bank affect the everyday lives of persons suffering from mental disorders?

● (1010)

[*English*]

Mr. Vincenzo Rondinelli: I guess I'll go first, since the first question was directed to me.

In terms of cooperation among other countries, more specifically the U.S., because we share borders with them, obviously, and to a small extent the U.K., I'm not aware of any investigations that have gone across the pond, so to speak. But I am aware that there has been some cooperation with the U.S. in tracking down suspects or in effect, I think, actually getting convictions.

Under the legislation as it now stands, under the DNA Identification Act, there is a section that allows for this cross-border communication. Subsection 6(3) I think deals specifically with that issue and how other countries' data banks or investigations can piggyback on ours and vice verse.

It has only been used very rarely at this point. Again, I think it's a handful of times. I personally believe there are going to be a lot more or there will be a start of litigation in this area, especially because our data banks aren't the same. You toured our data bank and basically saw how we do things, but that's not necessarily how other countries are going to do things.

We hear almost on a daily basis how other countries are starting theirs. I think the Slovaks opened up their data bank last month. China has decided to use a data bank. Although we're not too sure exactly what they're doing with their data bank, we know that they want to start one. Again, depending on the technologies they use and depending on how many probes at the data bank, that can open up a whole Pandora's box with partial hits, depending on how many probes they use in the U.K. compared to Canada or the U.S., and so forth. I think they would have discussed the probes issue with you yesterday

I think it's ripe for litigation because there are a lot of novel issues, especially when you're talking about different jurisdictions and stuff. There is that capability already built into the section. Obviously, if it has been working already, it's a good capability, but there are many legal issues that still have to be determined in that area.

The Chair: Thank you.

Mr. Weinstein.

Mr. Joshua Weinstein: I only wanted to get clarification that you wanted concrete examples in terms of those with mental disabilities, but concrete examples of what in terms of the DNA? Could I get clarification?

[*Translation*]

Ms. Diane Bourgeois: I was referring to the problems that some people with mental disorders have encountered in connection with the taking of DNA samples. Have any such problems been reported?

[*English*]

Mr. Joshua Weinstein: In my experience, I can speak of one individual who actually threatened the Prime Minister and was charged. Those are individuals who almost on a daily basis think that the government is doing something in their lives in terms of intrusion, listening to their conversations, coming to their houses, and going through their stuff in the middle of the night.

That person is now well. I don't like the thought of having to tell that person who is now well, at the time of being disposed, that there's only one more thing—the government is now going to take a swab or take a blood sample. To me, while that has not specifically come up, knowing how those types of clients think in terms of the government, it would not really instill much confidence in the administration of justice on their part. For them, it's probably more the taking of the sample than the retention of the sample, but it could be both in terms of those individuals. They're trying to get well. They're trying to be convinced that the government is not trying to go after them, but at the time of being well they are going after them.

The Chair: Thank you.

[*Translation*]

Thank you, Ms. Bourgeois.

[*English*]

Mr. Comartin.

Mr. Joe Comartin: Thank you, Mr. Chair.

Mr. Rondinelli, with regard to the 50% figure that you were asked about, it's actually in the data bank.

● (1015)

Mr. Vincenzo Rondinelli: It's in the year-end report. Okay.

Mr. Joe Comartin: It's the year-end report in 2003-04.

Mr. Vincenzo Rondinelli: All right.

Mr. Joe Comartin: There's no breakdown, though, as to how they got that.

Mr. Weinstein, and perhaps Mr. Rondinelli, has one of your associations actually gone clause by clause through the additional offences that are being put into both the primary area and the secondary area and pointed out which ones seem to be inconsistent?

Mr. Weinstein, I'm asking you particularly. You've set out some criteria. Have you gone through, section by section, which ones you think are inappropriate?

Mr. Joshua Weinstein: We didn't want to sit there and start pigeonholing as to why this one and why this one not. One of our main concerns was just the ever-expanding list, that this has happened now a couple of times—adding offences, adding them again, and then adding them again. That's the legislation creep we heard about before.

In terms of certain types of offences, we've looked at those proposed to be under the primary designated scheme. They are the types of offences from a broad spectrum of type of conduct. You cannot say, well, that second-degree murder was...you know, it might be dissimilar to another second-degree murder, but we agree that it's a second-degree murder; it's a serious violent offence.

In terms of assault with weapon, now moved, I think there was a time... I remember having cases of someone throwing a dishtowel, and someone throwing a little figurine of a squirrel. Those are cases of assault with weapon, and hitting someone over the head with a baseball bat is an assault with weapon. So when we look at the nature of the offences, our biggest concern is around those being moved up to the primary category. There is no discretion in an area of offences where there is a lot of discretion.

In terms of the secondary, we're obviously concerned about always adding and adding these offences, but at least in the secondary designated offence regime, there is the balancing. If it's in front of an independent arbiter, and there's defence, and there's crown, then they can make their case. Whether there's merit or not, that will be determined at that point.

With regard to all of the offences proposed in clauses 2 through 6, they can encompass a broad range of activity, and that was our major concern. It applies to all of them, including that list, in clauses 2 through 6.

Mr. Joe Comartin: I guess the answer to my question is no, your association has not done that.

Mr. Joshua Weinstein: In preparing the responses, we have gone through it clause by clause in terms of what those offences are. We looked at them and said these are a broad range of offences. Every time we sit down to do these submissions, we are going through clause by clause.

Mr. Joe Comartin: So are you saying that from clauses 2 to 6, you would not have any of those in the primary category?

Mr. Joshua Weinstein: That's correct, clauses 2 through 6.

Mr. Joe Comartin: Okay.

Mr. Rondinelli.

Mr. Vincenzo Rondinelli: I just want to echo Mr. Weinstein's earlier comments about the timing of this legislation. When we're dealing with the expansion and the inclusion of offences.... I mean, I can see the rationale for why these are on the list, or why they were proposed, but I think it really is probably better suited, when you're dealing with a more comprehensive review of the legislation... Again, to go back to a comment I made to Mr. Thompson, it's hard to argue that one of these shouldn't be on the list when we already looked at the list and at the types of offences that are already included. So I think it's a broader issue that has to be dealt with, exactly what prongs we're using to put offences on the list. But we haven't necessarily gone through clause by clause on the offences listed here.

The main concern was just that there was more added, really, and it shouldn't be a band-aid-solution type of thing. Maybe after a more comprehensive review—the good points on it were highlighted by Mr. Weinstein—a decision can be made on whether or not it really is a secondary offence or a primary offence. That's a broader issue that has to be dealt with in more detail, I would submit.

The Chair: Thank you, Mr. Comartin.

Ms. Neville, for three minutes.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you.

Three minutes isn't very long, so I too am going to ask my questions up front and see what discretion the chair gives me.

To Mr. Rondinelli, perhaps you would expand on your comment—and I apologize, I came in late, so I may have missed some of this—that the U.K. was light-years ahead of us. I would be interested in hearing more on that.

We've talked a lot about the 50% of the primary designated offences resulting in inclusion in the DNA data bank, and we've talked a lot about judicial discretion. I have a number of concerns there.

First, we also talked about the fact that many of the judges are not using that discretion, because they don't have the training, the wherewithal or whatever, to use it. To me, it is a concern, when we talk about shifting from the secondary to the primary list, that judicial discretion is in fact not being used.

We also heard yesterday that many of the samples taken in secondary offences actually resulted in findings in much more serious offences. I thought that was an interesting finding yesterday.

I guess the CPA talked about the importance of adding whether both the offence and the offender were sufficiently serious to justify seizure. Isn't the test to consider both the offence and offender actually the test of the secondary designated offence, and Parliament, by putting the offence on the primary designated offence list, is basically saying the offence is so serious that, barring extraordinary circumstances, the DNA should be taken?

Comments?

● (1020)

Mr. Vincenzo Rondinelli: Regarding your U.K. question, when I say they're light-years ahead, I mainly mean they're really the pioneers in this area. If you look at Sir Alec Jeffries, in the late eighties he was really the one who invented this DNA profiling that has become the du jour standard of investigations using DNA, and the British were the first to implement their data bank. By “light-years ahead”, I mean they have well over two million samples in their DNA data bank at this time. They take samples for a range of everything under the sun, it seems, even upon arrest in certain circumstances, and they get to keep their samples indefinitely.

If the charge is something that is a recordable offence in the sense that there is imprisonment attached to it, they're allowed to take the sample, upload it, and so forth. They're getting a huge number of hits per week. I don't even want to guess what it is, because it changes on a daily basis as their data base numbers grow.

That raises an issue I want to bring to the attention of the committee. There is a non-profit organization in the U.K. called GeneWatch UK, and its website is www.genewatch.org. In January, GeneWatch released a very comprehensive study on the DNA data bank in the U.K. It's available for download on the website, and I would urge committee members to read it. It's a fascinating study. And it looks at things on a global basis, it doesn't just confine itself to the U.K.

At the end of the day, GeneWatch is suggesting, the U.K. is sleepwalking into a big-brother state because of some of the different nuances of their data bank. Their study is a very good study on potential issues coming down the road, whether they're on the technology side or the privacy infringement side. Maybe not so much for Bill C-13, but definitely for the bigger review process, the report is fundamental reading. It's a very good report.

So when I say “light-years”, I just mean they're the pioneers in the area and they've definitely had a lot more experience than Canada.

The Chair: Thank you.

Mr. Weinstein.

Mr. Joshua Weinstein: Thank you.

I'll address the issue in terms of moving some of these secondary offences onto the primary list, and whether that's a signal that we're going to leave the offender out of it because these offences are so serious they must be included.

Again, look at some of those offences. I'll take robbery as an example. On first glance, everyone can conjure up images of some horrible event. It can be as easy as an individual, some 19-year-old, who is walking on the street while intoxicated and says to a passerby, “Do you have a cigarette?” “No.” “Give me a cigarette!” He then slaps the passerby across the face and takes his cigarettes. That's serious, but there are obviously a lot more serious robberies that can occur, such as robberies with a weapon, for which there's a mandatory minimum of four years.

What we're saying is that there is a broad spectrum with those types of offences, and they should include taking the offender and the offence into account, again leaving it to the discretion of the judge. Fine, if there are difficulties with the judges' training and their imposition of these things, then further training is what's needed. But the move should not be to move these things to the primary designated list, because these are offences in which we say there is a broad spectrum of conduct.

There could still be an order put in place. There may still be the deterrent factor if that's one of the purposes. The judges will say the offence in question is of such a serious nature that they're imposing it under the secondary designated offence regime.

We're also going back and forth here with respect to whether or not it's punishment. Some of the committee members said we can't consider it to be punishment, that it's not part of the punishment scheme. Now we're saying this is an offence of such a serious nature that we should put it under this primary designated scheme so that it sends the message that it's a serious offence, and that is the deterrent aspect.

We have to really ask ourselves what we want with respect to this. I'm submitting that with respect to the issue of deterrence—I have arguments on that—it should be left to discretion. There is a broad spectrum of possibilities in terms of conduct and what types of sentences would be imposed. For robbery, you could get a suspended sentence. You may be spared jail time. By doing that, there's a recognition of that, and what we submit is the greatest balance that can be achieved.

● (1025)

The Chair: Thank you, Ms. Neville.

Mr. Myron Thompson: Mr. Chairman, may I ask Mr. Rondinelli to repeat that address for GeneWatch?

Mr. Vincenzo Rondinelli: It's www.genewatch.org. The report is about 55 pages or so, but it's very good reading.

The Chair: Thank you.

Mr. Breitkreuz, for three minutes.

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

Again, I appreciate you coming before the committee.

A lot of the concerns you are expressing and a lot of the discussion around this table has been in regard to charter issues. You began your presentations with the statement that charter issues are one of the key things at stake here, that retaining samples is a problem, and I think I even heard the statement that this is becoming a “gene grab”.

One of the things the charter does—and this is where I'm coming from—is protect the security of the person. I would submit that this should apply to society generally. That includes potential victims.

We don't have good statistics on this. We have a lot of anecdotal evidence that some extremely violent criminals also commit other crimes. In the U.K., they have found that someone charged with impaired driving might have also committed murder, so they collect a lot of these samples at the time the person is charged.

I think this would also address some of the concerns you have about, well, we take a sample before they're released, so they feel that this is part of their punishment. If it was taken at the time of charge, it probably wouldn't have that effect.

I feel that we have gone so far in trying to protect the criminal that we forget that the charter is also there to protect society generally. I am puzzled as to why this balance has not taken place.

The DNA bank, according to what we have read, has proven to be one of the most extremely valuable investigative tools that the police have. So I begin with the premise that we should use this tool in the most effective way possible to protect society. Shouldn't our legal system ensure that, to the extent possible, society should be protected?

Please don't go to the extreme and take DNA samples at birth. That's going way overboard. If you commit a serious crime, we should be able to take a sample. I don't see where my reasoning is at fault.

Could you please comment?

Mr. Vincenzo Rondinelli: I don't see your reasoning at fault either.

I would submit that the balance is taking place, not that it's not taking place. If anything, the DNA legislation in Canada should act as a poster statute for the thing.

I've been impressed since day one on the legislation, if you look at its history and stuff, the numerous hearings such as this, even the extraordinary measures when Bill C-3 was going through, getting outside opinions from three eminent jurists to make sure it's charter-protected and all of that. If anything, the judiciary's review of the legislation has only been glowing in all their remarks.

On the DNA warrant scheme, which we saw just recently in the case of R. v. S.A.B.just at the end of 2004, it was nine to nothing, with glowing remarks on the scheme. The data bank as well was untouched on constitutional grounds, except the *ex parte* issue that's still before the courts, on the retroactive part of things, but other than that, courts have seen the balance drawn nicely with the legislation. We're just trying to keep that balance in place. I started my submission by saying yes, it has been a great boon for crime solving on the exoneration side of things as well.

You used the extreme of at birth. That's the total extreme, but to maintain the balance, there still are other extremes that we don't want to get to.

So I think the balance is being maintained quite nicely, and if you look again at all the decisions coming out from the judiciary, it has only had good things to say about the legislation. The main part is because there's that judicial check in place at this point, whether it's on the DNA warrant scheme of things, where there's a judicial aspect of it that you still have to have reasonable grounds and get an authorization from a judge—and it is a judge, not a justice of the peace.

On the data bank side of things, again there's that judicial check. It's not an automatic thing, trying to keep with charter protections as best as Parliament saw it to be, so there's that judicial check. If there is any underlying theme through all the cases, you'll see that this is the main part that they really look at.

Mr. Garry Breitkreuz: Let me become more specific. Do you think we should go in the direction of the U.K. and include a lot more crimes and include also that, at the time of charge, the sample be taken, and if they are dismissed or found not guilty, of course, that sample is destroyed?

● (1030)

The Chair: Could we have a brief response?

Mr. Vincenzo Rondinelli: As a brief response on the issue of arrest or charge, I would submit that is definitely going too far. I've left a paper with the clerk for the committee, which I presented at the DNA symposium in December, dealing with the "upon arrest" and why I think it's a bad idea. I would invite you to read it if you have the opportunity.

Whether or not to include more offences is not an easy yes or no question, and that should be part of the review. I think on a broad level, no, but there should be a re-examination of the offences that we do have.

The Chair: Thank you.

Thank you, Mr. Breitkreuz.

[*Translation*]

You have three minutes, Mr. Ménard.

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

I presided over the Association des avocats de la défense de Montréal for five years. I believe it's the oldest association of defence counsel in Canada. It was founded in 1970 and I believe its first president was Antonio Lamer. Therefore, it's a pleasure for me to welcome the representative of a criminal lawyers association from Toronto. I have also co-operated on numerous occasions with the Canadian Bar Association. I served as president of the Quebec bar for one year.

You've already given answers to many of the questions that I had planned to ask, but I would like to call upon your expertise. To my way of thinking, this list is a dangerous offender list of sorts, by virtue of the way in which it is drawn up. The individuals on the list are considered dangerous because they have committed crimes and are deemed likely to re-offend. It's also possible that they are considered dangerous because even though they may have been found not guilty by reason of mental incapacity, either because they took the wrong medication or failed to take their medication regularly, their illness could cause them to behave in a way that would be considered criminal, if not for their mental disorder.

However, setting aside for a moment the infamy or humiliation of having one's name appear on this kind of list, I see that the legislation contains a number of provisions designed to ensure that this list does not circulate freely. Yesterday, we heard witnesses argue that this list would not be used for other purposes. For example, someone like you or me can't just ask if our name is on the list. Nor is the list shared with the United States or with other countries. The list is cross-referenced only when a person's DNA is found at a crime scene.

Are these safeguards respected? Aside from the humiliation factor, what other inconveniences are associated with having one's name appear on this list?

[*English*]

Mr. Joshua Weinstein: First of all, you mentioned that certain people who haven't committed these types of offences, but which we are proposing be placed on the list, could be dangerous people and could commit future crimes. To address that, there are a couple of things. Again, under the secondary regime it could still be ordered if that was in the best interests of the administration of justice, so there's still that provision. If they are of such character that they do pose that future risk, it may be that there are provisions to watch them in the community under probation orders, under conditional sentence orders, or in jail.

● (1035)

[*Translation*]

Mr. Serge Ménard: That's not what I was asking. I understand that it's humiliating to have one's name on this list, but what other inconveniences does this present? Have you noticed whether persons are adversely affected by this, one way or the other?

[*English*]

Mr. Vincenzo Rondinelli: If I can just mention....

[*Translation*]

Mr. Serge Ménard: Can you give us some examples?

[*English*]

Mr. Vincenzo Rondinelli: Continuing with the legislation creep theme, there's also the theme of function creep. We've already seen this in the United States, in particular in Alabama. It was not supposed to be used for anything else. It was only supposed to be used as a crime-solving tool. But Alabama now has opened up their data bank for medical research. They said, "We have all this DNA. Why can't we use it for something else?" Again, it's that check we have to maintain. As long as it's being used for what it was originally meant to be used, that's fine, and we can continue that process. But the more that is in there, the more there might be an opportunity, for example, to try to see if there's something in the DNA that can predict future behaviour.

Apart from that, there's also the chance of false hits. This isn't just sci-fi we're talking about. I know we're talking about extraordinary numbers, but we have already seen a false match with the data bank used in the U.K. They were investigating a burglary, and the person they matched, who was in a wheelchair, was 200 miles away from the scene and couldn't have done it. Obviously, the alibi was tight. When they finally redid the test, they found that it wasn't in fact him.

In the U.S. we just saw in the last couple of months a partial hit being found. The person they linked with the data bank was in jail at the time. Once they redid the test and used more stringent positions, it was found that the person didn't match.

What happens in the intervening time? We know that it helps exonerate the person, but if you're fighting for those four, five, six, eight, ten months you're in custody because of the partial hit.... DNA, as people have come to expect, is really strong, so if there's a hit, obviously this person is going to be considered to be guilty. There is that chance, depending on what kind of testing is used at the crime scene, and it's a real issue.

The Chair: Thank you very much.

We have twenty minutes left. There are five more members on the list, so I'm going to be very strict with the three-minute limit from here on in. We also need members to stay to pass a budget for a subcommittee.

Mr. Comartin, briefly.

Mr. Joe Comartin: What is the practicality of keeping the offences designated at the secondary level rather than at the primary level? Are we likely to see that a number of the crowns around the country, just because the onus is on them rather than on the defence side, simply won't make the applications? Is that a likelihood?

Mr. Vincenzo Rondinelli: I don't believe so. It's a matter of course. It's just understood that the crown does it. Even when they make the application, it's still quite in their favour. It's generally granted if it is made. It's a very difficult burden to get over for the defence. So I don't think that has any impact on crowns deciding to make it.

Mr. Joe Comartin: When asked for, it generally is granted. But what I'm asking is, are we going to see that because of the extra workload, the prosecutors will not make the application?

Mr. Vincenzo Rondinelli: There really is no extra work involved. It's generally done at the time of conviction. The crown usually just stands up and mentions the DNA data. It's not a formal notice that has to be given on application. So it doesn't add to their workload.

Mr. Joshua Weinstein: I would absolutely agree. The workload is nothing. Let's say the matter was proceeding to trial and suddenly there was a guilty plea on the day of trial. It literally takes them two seconds. They're going to stand up and say, "We're seeking a DNA order. This is a secondary offence." My experience also is that for the most part they're granted. That may also be a function of the fact that defence lawyers need to be trained on whether or not it should be ordered. They should be standing up on behalf of their clients in terms of the balancing as well.

● (1040)

Mr. Joe Comartin: Thank you, Mr. Chair.

The Chair: Thank you, Mr. Comartin.

Mr. Maloney.

Mr. John Maloney (Welland, Lib.): Mr. Weinstein, you mentioned the gene grab. Mr. Rondinelli, you mentioned the gene watch and the Alabama situation. Are you currently aware of any situations where our collection system has been compromised or may anticipate being compromised, other than the use for which it's intended under the Criminal Code?

Mr. Vincenzo Rondinelli: In terms of the DNA data bank, no. That's the good news. However, there are informal data banks being held by police around the country, and we're not sure how they're being used, whether they're giving off partial hits and they do their own investigation or don't do an investigation because of the hit and decide to go full-blown with one suspect. But in terms of the national data bank, I haven't heard or read about any compromise or false hit that has occurred at this point.

Mr. John Maloney: Have you heard of any compromise with any other police authority that may be holding information that happens to be in the DNA—

Mr. Vincenzo Rondinelli: That would be more difficult to find out. If it has happened, it's definitely—

Mr. John Maloney: Are you aware of it?

Mr. Vincenzo Rondinelli: I'm not aware of it.

Mr. John Maloney: Thank you.

Mr. Weinstein.

Mr. Joshua Weinstein: I'm also not aware of it, but in general our position is not necessarily where it's kept or how it's kept. We're obviously concerned with that, but our concern is really the fact that an order is made and how it's made, and that a sample is being retained, not necessarily the manner in which it's being retained. That is really our concern.

We are concerned also in terms of that potentially slippery slope. We have legislation creep in terms of the way certain offences are being added. It is our concern in terms of what the use could be, that potential possibility for legislation creep with respect to the uses of that DNA. Once that happens, it's too late for me to argue that point because it's already been done, and obviously that's why we're putting it on the record today.

Mr. John Maloney: You also referred to legislation creep and the types of offences that can or will be included. The statistics Ms. Neville referred to that we received yesterday found that 14% of all convicted offender hits are hits where the convicted offender sample was taken for a secondary offence and matched to an unsolved primary offence case.

This would suggest to me that perhaps this legislation creep, if we're balancing protection of the public and rights of the individual, is perhaps not a bad thing. Your comments, please.

Mr. Joshua Weinstein: I don't know what the statistics are with respect to offences designated as primary—they took the sample and nothing was found for an individual who, let's say, received a fairly lenient sentence. If you don't have those statistics, fine, we can recognize that in the offences designated secondary, there may be 14% of those that hit for a primary. It's the other way around that we're concerned about in terms of the balancing, being designated as a primary designated offence—the intrusion into bodily integrity, the retention of the sample.

But still we say that under the secondary designated offence regime, you may still be able to get the sample and you may still be able to figure out those crimes that comprise that 14%, so it's still not impossible to achieve the objectives of what the data bank was established for.

It's just that ultimately there will be a weighing by the judge. If the crown can convince them that this type of thing is in the best interests of the administration of justice because here are statistics to show how these crimes are being solved, and this is why we're seeking the order under the secondary designated offence, then if that's a convincing argument, the judge is going to order it.

The Chair: Thank you, Mr. Weinstein.

Mr. Rondinelli, do you have a brief response?

Mr. Vincenzo Rondinelli: I think that covers it. That's fine.

The Chair: Good. Thank you, Mr. Maloney.

Mr. Warawa for three minutes.

Mr. Mark Warawa: Thank you, Mr. Chairman.

Mr. Weinstein, you talked about the intrusion, that taking a sample and retaining a sample were both intrusions, and you wanted to focus on retention. At the tour yesterday we were told that taking the sample is very similar to diabetics taking a sample, and I haven't heard that being considered an intrusion.

Focusing on the retention of the sample, we were also told that taking of the sample will eliminate suspects. The example was that if a person was charged with a criminal offence...the person who made the presentation said that if I were to be charged with a criminal offence and I was innocent, I would very eagerly provide a blood sample so that I would be eliminated as a suspect from that charge. Having retention of the sample as an intrusion...it will eliminate that person as a suspect, it will identify suspects, it will identify serial offenders, and it will link crime scenes, so I think it's a very valuable tool.

It is the government's responsibility to ensure the safety and security of all Canadians. That is our responsibility, and this balancing of an individual's rights and the rights of Canadians in general is a very important issue. I see retaining the sample not as an intrusion, but as something that guarantees safety and eliminates suspects who need to be eliminated.

Regarding NCRMD, not criminally responsible, that person was found not criminally responsible because of the mental disorder, but, as has been pointed out, if that individual goes off their medication, they could then present a risk to the community. To have that taken at the time of charge eliminates the scenario that was shared by Mr. Weinstein, the embarrassment of having it taken at the time of charge, so I would agree with my colleague.

Any comments?

● (1045)

Mr. Vincenzo Rondinelli: I want to deal mainly with the comment about exonerating as well as implicating. I would agree that obviously that's one of the tools it can be, but it shouldn't be considered a silver bullet for crime solving in the country or the world. At the end of the day it's just one piece of evidence that just puts someone at the crime scene.

For example, yes, I'm innocent of whatever happened at this party. There were six people there. We're learning more about the transferring of DNA, whether it's through a handshake or through dandruff or something. Yes, maybe something of mine actually is on the victim of that sexual assault, so if I'm going to go and give my DNA sample to clear myself, all of a sudden it may implicate me even though I am 100% innocent.

So it shouldn't be seen as a silver bullet for the ills of community, because it really is at the end of the day strong circumstantial evidence, and there might be other explanations involved with it. Because of that, to use that idea to justify taking DNA on a charge would, I think, be a bit misleading.

The Chair: Thank you.

Do you have a brief response on the NCR?

Mr. Joshua Weinstein: I can address it briefly with respect to the issue of taking the samples. When someone is a suspect, there is another regime that deals with that. The police can get one if they have grounds to believe something, and you can certainly offer one by consent under those provisions, but we're still dealing with the issue mostly at the sentencing stage.

I'll respond quickly on the issue of being not criminally responsible and the issue of going off the medication. I imagine most provinces have mental health legislation that deals with someone who poses a danger to themselves or others or with situations where their health will deteriorate to such an extent that it poses a health risk. There are already statutes in place to deal with the type of person brought into custody on a warrant because of their health deteriorating. To me, there is still an absence of compelling evidence to show that, with respect to the not criminally responsible going out and committing criminal acts when no one sees or knows anything about it but DNA is left, it affords evidence in solving the crime. Even if it did, you'd still have to balance that against the health risk to that individual, a matter that was, again, probably more eloquently dealt with by the Schizophrenia Society.

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

[*Translation*]

You have three minutes, Mr. Marceau.

Mr. Richard Marceau: Thank you, Mr. Chairman.

Are you aware of the decision handed down by the House of Lords in the Marper case?

[*English*]

Mr. Joshua Weinstein: No.

[*Translation*]

Mr. Richard Marceau: Let me read to you the synopsis that appeared in The Lawyer.com, as well as an excerpt of the ruling. It specifically addresses the issue of collecting and preserving DNA samples.

[*English*]

> ...the House of Lords fully supported the current systems for retaining DNA profiles....
>
> In relation to the use of DNA Lord Steyn

—who wrote the decision—

> said that as a matter of policy it was a high priority that police forces should expand the use of such evidence where possible and practicable.
>
> The court emphasised that it was not in doubt that taking fingerprints and samples from people who were suspected of having committed relevant offences was a reasonable and proportionate response to the problems of crime....
>
> Lord Steyn took a robust view over the allegation that the retention of DNA information infringed the right to respect for private life enshrined in Article 8(1) of the European Convention of Human Rights. In his view the retention of fingerprints and samples did not infringe Article 8(1). In any event, he found that even if it did so the purpose of retaining this material (for the prevention of crime and the protection of their right of others to be free from crime) fell squarely in the infringements which could be justified under Article 8(2).

That article is similar to section 1 of the charter.

● (1050)

[*Translation*]

Lord Brown goes a step further and says this:

[*English*]

> I find it difficult to understand why anyone should object to the retention of their profile (and sample) on the database once it has lawfully been placed there. The only logical basis I can think of for such an objection is that it will serve to increase the risk of the person's detection in the event of his offending in future. But that could hardly be a legitimate objection, nor, indeed, is it advanced as such. Such objections as were suggested, however, seem to be entirely chimerical. First, the fear of an Orwellian future in which retained samples will be re-analysed by a mischievous State in the light of scientific advances and the results improperly used against the person's interest. If, of course, this were a valid objection it would apply no less to samples taken from the convicted as from the unconvicted and logically, therefore, it would involve the destruction of everyone's samples. But no such abuse is presently threatened and if and when it comes to be then will be the time to address it. Sufficient unto the day is the evil thereof.
>
> The second suggested objection is to the retention of profiles obtained from those at one time reasonably suspected of crime but subsequently acquitted or not proceeded against, the objection being that they are thereby stigmatised as properly belonging to the same group as the convicted. This to my mind is an equally unrealistic objection.

And he goes on and on.

[*Translation*]

I'd like to hear your views on this ruling which I invite you to read.

[*English*]

Mr. Joshua Weinstein: I will. I want to thank you for that. That's something I want to read.

To be very clear, I think we've maybe wrongly given the impression that we're against the taking of samples. We're not. We're very much advocating for the taking of samples in this circumstance or this list on a discretionary basis by an independent arbiter. If we have faith in our judges, and if we have faith in our crown and that the defence will represent their clients, ultimately the independent arbiter at the end of the day will decide that it may very well be retained.

We are not coming here today to say that with respect to all of this stuff you cannot take a sample of people charged with or convicted of these types of offences. There is still that possibility.

On the issue of the retention of the sample, I don't know what the common man in England would think, but I'm happy to say that I live here and that the people in society would want a balancing, which again is what we are advocating for, which would ultimately be done by a judge.

I would agree that position, what you're reading, is probably the argument against even taking a sample at all. But we're not closing the door to the possibility of taking a sample; we're just saying the way it should be done is through the means under the secondary designated defence regime.

The Chair: Thank you, Mr. Weinstein.

Mr. Macklin.

Hon. Paul Harold Macklin: Thank you very much. I see our time is quickly drawing to a close.

The Chair: It's pretty much there.

Hon. Paul Harold Macklin: I'll try to skip the preambles and go right to the questions that I'd like to ask.

First, having examined what we're doing here in Bill C-13, I want to know if the CBA has any concerns with respect to the protections of privacy that are currently provided in our DNA data bank legislation and its charter compliance. If you do have any concerns, what are you suggesting or proposing we might add to this legislation in that regard?

Second, I'd like you to comment, because there was one point in your principles using the terminology “a compelling public interest” for the addition of additional offences. First, I would like to know what you mean by “compelling public interest”. In particular, the CBA, as we've already discussed here, is opposed to making child pornography offences primary designated offences, yet we know from the Holly Jones case that some persons fuel their fantasies with child pornography and then kill. Is it not a compelling reason in that case for change?

What about other offences? Victims groups, for example, asked us to include in the primary designation the classification of criminal harassment.

I 'd like you to comment on those. I know I'm asking a lot of questions in a short period of time, but they are questions I'd like answers to, if I could, please.

● (1055)

Mr. Joshua Weinstein: In terms of the charter concerns, just briefly, in terms of the not criminally responsible by reason of mental disorder, we have proposed how to deal with those individuals in our submission. We think there would probably be a section 7 issue, the right to security of person. There are issues there.

There may be down the road an issue on section 11(i), in terms of whether or not this is considered punishment. The more I hear from committee members that we should include this because it should deter others, the more I think it advances the argument that this is punishment.

However, in terms of your wanting to know what is compelling public interest, that idea, what the CBA is asking is this: no matter what, we want a balancing. That's number one. Number two, we want to know what is the issue that needs to be addressed that can be achieved only by including them in a primary designated offence regime. Is it that criminal harassment, which.... Let's say you have offences that are done over the telephone. How is that going to be addressed by the mandatory taking of a sample from that individual? If, let's say, they're into criminal harassment chronically, and it's always the telephone, how does putting them under the primary designated offence regime afford evidence?

Again, what we are saying is that obviously these offences can be serious, but there can be ones that are less serious. If there's a recognition of that, then the best—not the most convenient—way of dealing with it is in a manner in which there is a balance, where someone is going to look at it, weigh the scale, and come out with one that balances out evenly in favour of protection of the public and recognition of the rights of the individual privacy.

Hon. Paul Harold Macklin: How do you answer the Holly Jones argument?

Mr. Joshua Weinstein: The question is not only how do you answer the Holly Jones argument, but it's also how do you justify the bodily intrustion of the person or individual who does, let's say, have a small collection, has no record, and who comes before the court?

There are cases like Holly Jones, but there are also cases like the clients who I may have where the courts recognize in their submission, and the judge's decision says, in the grand scheme of things they find this not to be the most serious offence and give them a fine and maybe some probation. It's a question of justifying it for that individual as well. We're saying that under the secondary designated offence regime, it can be justified for both.

In Holly Jones, it will be ordered, and with respect to this 18-year-old, it may not.

Hon. Paul Harold Macklin: Thank you.

The Chair: Thank you, Mr. Macklin.

Thank you very much to our witnesses. It's been a very productive session.

I would ask members to stay, as we have budgets to approve for the subcommittee on solicitation laws. We'll suspend for two minutes to allow our witnesses to leave.

[Proceedings continue in camera]

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