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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.)): I declare this hearing of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness open. We are continuing our study of Bill C-13, an Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act.

Today, we will be hearing from Ms. Jennifer Stoddart, the Privacy Commissioner, and her colleagues. Ms. Stoddart, would you mind introducing your colleagues?

Ms. Jennifer Stoddart (Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada): Thank you, Mr. Chairman. Allow me to introduce Mr. Raymond D'Aoust, who is the Assistant Privacy Commissioner, and Ms. Patricia Kosseim, General Counsel.

The Chair: Let us get started. Firstly, I believe that you are going to make a presentation, and then we will proceed to the question period. You have the floor.

Ms. Jennifer Stoddart: Thank you very much, Mr. Chairman. Members of the committee, I will begin by reading my statement. I will be speaking both in French and English. Then, we will answer your questions.

[*English*]

Thank you very much, honourable members, for inviting us to comment on Bill C-13, which amends the Criminal Code, the DNA Identification Act, and the National Defence Act.

We, the Office of the Privacy Commissioner of Canada, are here today to express our deep concern about the implications of further expanding the scope of the DNA data bank. Simply put, in our opinion, there is no demonstrable evidence at the present time to show how collecting DNA samples for the proposed new offences will help us achieve a safer and more just society.

Let me begin by stating clearly that the Office of the Privacy Commissioner, like all citizens, is concerned about public safety, and particularly in protecting the most vulnerable members of society from the most heinous of crimes. Reconciling the integrity of the justice system with law enforcement needs is the first topic I would like to broach.

As Canadians, we have chosen to live in a free and democratic society based on fundamental rights and freedoms of individuals. We have chosen to limit, within bounds of reasonableness, the extent to which the state can infringe those rights and freedoms in the name of law enforcement. Privacy is being recognized as among those rights and freedoms, and it is my role as Privacy Commissioner to remind the committee of its prime importance, particularly in a context involving the DNA of individuals.

The information contained in a DNA sample poses a profound privacy threat to individuals and thus merits the strongest protection. In the 2003 Supreme Court of Canada decision of R. v. S.A.B. concerning the DNA warrant provisions of the Criminal Code, then justice of the Supreme Court of Canada, Madame Justice Arbour, recognized this explicitly. I refer you to her words:

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

One may ask, how is this different from the current practice of fingerprinting? While a fingerprint can identify who a person is, DNA can tell you everything about them. Moreover, because of its assumed predictive value, DNA can be used to draw inferences about a person's genetic tendencies, yet such inferences are based only on a probability that may or may not actualize.

However, we also clearly recognize the vital role that DNA can play in supporting and enabling Canada's criminal justice system. Modern DNA matching techniques can be effective in identifying persons who have committed violent and sexual offences, as well as in exonerating the innocent who have been wrongly convicted.

We are not here, Mr. Chair, to argue against the existence of a DNA data bank. In fact, the Office of the Privacy Commissioner has actively participated in the debate for some time and did not oppose the creation of the data bank in 1998. We continue to contribute to dialogue on the operations of the data bank through Assistant Commissioner Raymond D'Aoust's participation as a member of the DNA Data Bank Advisory Committee. There are clear controls and conditions in place for collecting DNA samples from those convicted of designated offences, and the processes for including DNA into the data bank and limiting its use are well-defined.

But the Supreme Court of Canada has clearly stated that effectiveness alone cannot provide sufficient justification for unfettered invasion of individual rights. In order for us to feel safer from crime, we must first and foremost have continuing confidence in the reputation and integrity of our criminal justice system, which includes the respect of individual rights.

And again another judge of the Supreme Court of Canada has written:

> ...we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance.

I'm going to continue now in French and talk about a fundamental shift in underlying criteria for inclusion into the DNA data bank that concerns us with this bill.

[*Translation*]

I would now like to talk about the fundamental shift in underlying criteria for inclusion into the DNA data bank.

> The rationale for collecting DNA samples for the purpose of data banking is twofold: the serious nature of the offence and the likelihood that DNA samples would be found at the crime scene.

That is how the Honourable Andy Scott, Solicitor General at the time, explained the rationale for creating the data bank when he appeared before this committee on February 4, 1998.

The Supreme Court of Canada subsequently confirmed, in R. v. S. A.B. that the DNA data bank:

> ... applies only to designed offences (set out in s. 487.04), which consist primarily of violent and sexual offences that might involve the loss or exchange of bodily substances that could be used to identify the perpetrator through DNA analysis.

We have seen a fundamental shift away from this rationale toward what appears to be a growing national registry of convicted criminals. This is a marked move away from the underlying philosophy of the DNA data bank scheme as it was originally conceived and approved by Parliament. New offences were added with the adoption of then Bill C-36, the Anti-Terrorism Act, in 2001, and more offences are now being proposed in this bill that do not appear to meet these criteria of violent and sexual offences involving the loss or exchange of bodily substances.

We urge committee members to question this creeping expansion of the DNA data bank program and to insist that demonstrable justification and firm criteria be set out and met before including new offences.

I would now like us to consider the proposed expansion and reclassification of the DNA data bank offences.

Although the matter of taking DNA samples from all individuals charged with a serious offence is not contemplated in the bill, we are aware that there is support for such a measure. We would like to commend the Honourable Irwin Cotler, Minister of Justice, for the position he articulated before this committee on December 6, 2004, against expanding the data bank to collect DNA from individuals at the time they are charged.

We believe that, in principle, the number of offences for which DNA samples can be taken and included in the data bank should be kept to a minimum, and that the inclusion of offences must be based on a clearly articulated and demonstrably justifiable rationale.

In our view, this bill fails to make a compelling argument either for the inclusion of the new offences in the DNA data bank provisions or for the transfer of some offences from secondary to primary status.

Moving beyond the question of whether or not the proposed additions meet the original rationale, there is also an apparent lack of documented research demonstrating a clear correlation between the commission of some of the less serious offences that are being added and the subsequent commission of more serious and violent offences.

For example, while it may be true that many offenders who commit sexual offences also commit offences such as break and enter, it is clearly not the case that everyone who commits a break and enter offence goes on to commit more violent offences. Nor have we been provided with any evidence about the likelihood that someone who commits a crime such as accessing child pornography is likely to go on to commit a sexual offence or any offence where there is a likelihood of DNA being found at the scene of the crime which can be used for matching purposes.

This is a very serious omission. I am surprised and deeply concerned at the seeming lack of scientific evidence which anyone can marshal to support these changes.

● (0905)

[*English*]

I'd now like to conclude, Mr. Chair. I wish to be clear. We are concerned about the safety of our children, our neighbours, and ourselves. We are not insensitive to the victims of crime. We are not opposed to preventing crimes and punishing those who commit crimes.

The concern of the Office of the Privacy Commissioner is that we are moving away from the DNA scheme that was set out in the 1998 act and approved by Parliament. We are moving away from a limited data bank that only contains DNA samples from those convicted of the most serious violent and sexual offences where the nature of the crime is such that it is likely to leave DNA at the crime scene. I fear that we are moving toward a registry of all convicted offenders. And we are doing this without regard to the original rationale for the legislation and without any compelling evidence that would justify the inclusion of these new offences.

We are here today to urge this committee to think carefully before taking this step. If the purpose of the DNA data bank is to prevent and solve crimes, then before we create a bigger data bank by adding new offences, we should focus on creating a better data bank. Do we even know if the existing DNA data bank is operating as efficiently as possible? Does it have the resources it needs? According to the 2002-03 annual report of the National DNA Data Bank of Canada, the data bank was only receiving slightly more than half of the expected samples as of mid-2003. We also understand that there is a significant backlog at the regional level in the processing of samples.

Unless and until the committee is provided with a clear rationale and empirical evidence supporting the inclusion of the new offences being proposed, we would recommend that these provisions not be adopted at this time. Rather, consideration of these provisions should be deferred until the DNA Identification Act is reviewed a few months from now, as per section 13 of the act, which calls for a review within five years from the time it came into force in June 2000. Then there will be the opportunity to consider the legislation in a more holistic and coherent manner than is possible, I submit to you, at this time.

Thank you very much for your time today.

● (0910)

I would be pleased to answer any questions you might have.

The Chair: Thank you very much, Ms. Stoddart.

We'll now go to Mr. Thompson for the first round of seven minutes.

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

There's only one particular part of your presentation that really troubles me, and it troubles me because I've heard this before from other witnesses. It seems that when we talk about the added offences to this particular data bank that probably should not be there, the very first one that always seems to be mentioned is child pornography. Child pornography, in my view, is probably one of the most evil things in existence out there, and it has triggered a horrendous amount of crime and problems against those who are the most vulnerable in our society.

I travelled the country two years running, visiting penitentiaries as a critic for the Solicitor General at the time. One thing I did at every one of those penitentiaries was take as much time as I could to spend with individual perpetrators who were in prison for some violent criminal charge against a child. I cannot tell you how many of them said to me personally that probably the main reason they ended up in the mess they were in was that they got hooked on child pornography, and they got hooked on it at a fairly young age.

That's been repeated a number of times, yet I see once again that your proposal, like other proposals, is taking this child pornography issue very lightly. By even putting it in the very first one and to be suggesting it is maybe not a crime and there is no proof to indicate there is a serious problem here..... Yet I am quite positive that if you were to talk to every police department across this country that has people working on that particular issue, they'd tell you it's becoming a very major concern. It has entered into organized criminal activities and has become a billion-dollar industry. That's putting those particular individuals in our society at the most urgent need of protection, the highest type of protection we can possibly provide.

If we're going to talk about rights and protecting the rights of individuals, I certainly hope our emphasis will be, number one, to do everything we can to protect the right of a child to be protected from being harmed. If child pornography is a contributor to this—and it's pretty well known that it is—then I find it very discouraging that people can come before this committee...or that anyone on this committee could even suggest that it is an insignificant criminal offence. As a grandfather of many grandchildren, I personally take offence to that even being suggested.

Seldom do I have an opportunity to applaud the Liberal government. When they included this in their bill—child pornography—I did applaud them, and I would encourage them to continue fighting to keep it where it belongs.

Having said all that, I would like to know exactly what leads people like you, the bar association, and other groups that have presented to this committee to say that child pornography should not be on this list. I would like better rationale than there is no proof that it is a dangerous thing. I believe there is significant proof. I wonder to what extent you have gone to determine that.

● (0915)

The Chair: Ms. Stoddart.

Ms. Jennifer Stoddart: Thank you, Mr. Chair.

I would like to begin by assuring the honourable member that I and all the members of my office share his great concern about the issue of child pornography. As a mother, as someone who, if you look at what I did before I became Privacy Commissioner, worked in the area of children's rights, I am extremely concerned about the growing trend towards sexual offences against children, as a person, as a citizen, and as a lawyer. So, honourable member, I totally agree with your concern and your horror about the various practices that are abusive of children.

The point that I and I gather others are trying to make is not that the possession of child pornography is not a very serious issue. The point we want to make is that before using a DNA bank as a crime-fighting tool, we have to know that it is effective. You'll see that the thrust of our submission is to say this is a very privacy-invasive technique. This has great consequences, given the power of genetics, genetic medicine, genetic forensic techniques, and so on. Let's think carefully before we do this.

The honourable member asked us what proof we had that there was no link. Indeed, I must share with this committee, and I have tried to reflect it in my formal presentation, our very, very great concern and astonishment that there seems to be, from what we can see in Canada on the Internet, virtually anywhere-and I had staff working for several weeks on this, phoning criminologists—no published scientific studies about the use of DNA banks and the likelihood of those having committed one series of offences to commit another.

I am amazed by this. I'm amazed that we are going forward on no scientific evidence that a reasonable search can turn up. While I believe the honourable member's testimony is what people said to him, it is very significant that there seems to be no formal, more consistent study of this trend that he remarked about.

So we are saying to you not necessarily that you should never go ahead with this, but before you do, let's just check that this will be an effective tool in fighting issues like crimes against children.

● (0920)

Mr. Myron Thompson: I guess my major concern is simply the fact that your statement says, "Nor have we been provided with any evidenceabout the likelihood that someone who commits a crime such as accessing child pornography...."

Why couldn't you have put in "such as a serious driving offence", or some other offence? Why is it that child pornography always, on every submission I've seen, is the very first thing that's mentioned as not being serious enough of an offence to be included in the data bank?

Surely we must recognize that in daily news reports across this country there are reports of child pornography and offences affiliated with that. We know how serious it is.

The Chair: Thank you, Mr. Thompson. Your time is up.

If you wish, Ms. Stoddart, you can respond briefly to that last intervention.

Ms. Jennifer Stoddart: Well, there are other examples, honourable member—for example, intimidating a participant in the justice system or a journalist.

Perhaps we use that example because it shows us the danger, because we are all particularly concerned about that crime. Our concern may outweigh the necessity in our democratic society to think, would this really help us prevent crimes against children?

I am submitting that at this time we have not seen the rationale. There may be a rationale, but we have not seen it.

The Chair: Thank you very much.

Thank you, Mr. Thompson.

[*Translation*]

Mr. Marceau, you have the floor.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you very much, Mr. Chairman.

Madam Commissioner, I would like to welcome you to the committee. Thank you very much for your testimony.

First of all, I would like to clarify something. You are recommending that these provisions not be passed for the moment. If I understand correctly, you do not want the bill to pass.

Ms. Jennifer Stoddart: That is correct. We are suggesting, sir, that the committee ensure that there is a rational link between this expansion of the National DNA Data Bank, the identification of persons who have committed crimes, and public protection. We have to make sure that there is a contribution to our criminal justice system. We respectfully remind you that you must begin a statutory review of this bill in June. We hope that at that time, you will have studies and data that both you and society seem currently to lack, data that would justify this addition.

Mr. Richard Marceau: Have you visited the National DNA Data Bank recently?

Ms. Jennifer Stoddart: Yes.

Mr. Richard Marceau: In your text one finds the following questions:

> Do we even know if the existing DNA Data Bank is operating as efficiently as possible? Does it have the resources it needs?

When the committee visited Data Bank premises last Wednesday or Thursday, administrators answered these questions in the affirmative. We obviously asked those questions, and they told us that the National DNA Data Bank was indeed working very well. In fact, they provided us with rather impressive statistics proving its efficiency.

Are you challenging these statements made by the directors of the National DNA Data Bank, who claim that it operates efficiently?

Ms. Jennifer Stoddart: No. We are raising the issue of the functioning of the entire system, which also includes samples from the National DNA Data Bank. If I may, sir, I will ask my colleague, who is a member of the Advisory Committee of the National DNA Data Bank, to enlighten you.

Mr. Raymond D'Aoust (Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada): Thank you, Ms. Stoddart.

I was appointed to this committee following my appointment to the Office of the Privacy Commissioner in October of 2003. I went to two or three meetings. We are generally pleased with all of the measures that have been put in place to protect personal information. An extremely stringent process has been implemented. In this respect, this system is very robust and of great integrity. The people managing the system are highly competent. They are scientists of a very high calibre.

I think we would like to stress that within the system—and some of this information has been published in the media recently—there may sometimes be a lack of efficiency and a backlog of files. It would seem that there is a problem in the regions. Nationally there is none, but there seems to be one on the regional front. There are problems. Do we have optimal administration of this system across the country?

● (0925)

[*English*]

If I may synthesize what I just said, the issue here is that we are certainly quite impressed—just through the work we've been doing on the advisory committee—by the robustness of the system; it really guarantees the integrity and protection of personal information contained at the bank and in related files.

The issue is whether or not the national system is operating at an optimal level. Recently there have been a few articles—actually, one is as recent as a couple of days ago—indicating that perhaps there was a backlog of files that needed to be processed regionally. The assurance we got from the national level, certainly, is that they have strong operational capacity.

[*Translation*]

Performance is excellent at the national level. There may be some things we need to review regionally. That is one of the comments I wanted to make, sir.

Mr. Richard Marceau: Thank you, but I don't see how this concerns the Office of the Privacy Commissioner of Canada if we are talking about a backlog. If it's working well, then the message the committee should be putting out is that they agree with the way in which it works and that we should be allocating more funds and resources to it.

Madam Commissioner, you know that you have influence. Your organization is recognized beyond our borders. The House of Lords, in a recent decision last July, quoted the Office of the Privacy Commissioner of Canada on an issue related to DNA and the Marper decision. Indeed, I congratulate you for having been quoted by such a prestigious institution.

Ms. Jennifer Stoddart: It was actually my predecessor, Commissioner Phillips.

Mr. Richard Marceau: True enough, but your organization was mentioned. That is something which deserves to be highlighted.

The House of Lords spoke candidly about the balance which has to be reached between, on the one hand, privacy protection, individuals rights and freedoms, and on the other hand, protecting society as a whole. Lord Brown said that it was a question of details. He said that, not me. Allow me to quote him:

[*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.

[*Translation*]

He seems to place considerably more emphasis on protecting society as a whole. He seems to be saying that some people are a little too quick to cry wolf.

What is your reaction to this judgment?

Ms. Jennifer Stoddart: Although we are being referenced by the British, for several generations now, our own justice system has been increasingly moving away from English criminal law. The Canadian way forged by our Supreme Court, and based on courts of appeal around the country, sets itself apart from others in this way. However, it should be borne in mind that the House of Lords' role in this matter was to say whether they endorsed an act adopted by the British Parliament.

The role of the Supreme Court of Canada was to endorse the system currently in force under our Criminal Code, while confirming, in stronger terms perhaps than the British House of Lords, the importance of individual rights and freedoms. It is therefore not an appropriate comparison to make today. Rightly so, we base ourselves on the dictates of our own Supreme Court.

Mr. Richard Marceau: The...

The Chair: Thank you, Mr. Marceau. Unfortunately, your time is up.

Mr. Richard Marceau: I had so many things I wanted to say.

[*English*]

The Chair: Mr. Comartin for seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Mr. D'Aoust, I want to go back to the issue of what's happening at the national level in terms of processing the samples versus what is happening at the regional level. Are there any reports out on what the situation is at the regional level? The reports we got last week I think were exclusively on what's happening here in Ottawa and not on what's happening in the other five or six labs.

● (0930)

Mr. Raymond D'Aoust: Thank you very much.

It's a really good question. Unfortunately, I do not have the information to provide you with a response to that. I know the RCMP are looking at this issue. They are having sustained communications with their regional colleagues on a great number of operational issues, including the one we just referred to.

I would certainly defer the answer to this question, which is extremely relevant, to the Commissioner of the RCMP because I think it is truly an administrative and management issue.

The advisory committee per se doesn't really look at the day-to-day management of the databank. We are considering more of a macro-level type of policy issue. I'm sorry if I cannot answer your question.

Mr. Joe Comartin: I guess the difficulty we had is that the commissioner was in front of this committee, and Mr. MacKay asked him and got absolute assurances that there was no backlog, and we got the same thing last week at the national level.

Is there anybody other than the RCMP who is studying the backlog ? They seem to believe there isn't a problem. There may not be; I just wonder if there's any other independent assessment being made here.

Mr. Raymond D'Aoust: I do not know of any such assessment.

Mr. Joe Comartin: The other issue that's come up along the same lines, Madam Commissioner, is the report you mentioned, which states that in only about half of the cases are samples being ordered by the courts. This is after conviction. Is there any analysis as to why that's happening? There are some indications it's a lack of education. But is there any analysis from your office as to why we're only getting half of them done at this point?

Ms. Jennifer Stoddart: No, honourable member, our office hasn't done that analysis. But I must say that we do not oppose those measures in the present bill, which would go toward a more efficient administration of the system as it now is. So we had not commented on those in our presentation, instances where the judge forgets or the crown neglects to raise it.

I don't know to what extent all judges in Canada, who may have the power to order these samples be taken, have had the training or the education necessary and are familiar with the procedures. This may be something that is relevant to the fact that samples are not taken when they should be. I don't know about the training of the crowns who are supposed to ask for these.

Mr. Joe Comartin: Are you aware of any analysis, perhaps in the academic sphere, of what would happen—based on getting only 50% on these serious offences—if we included all these other ones? Have you seen any analysis of that?

Ms. Jennifer Stoddart: No, we haven't.

Mr. Raymond D'Aoust: No, I haven't.

May I add an information supplement to what Commissioner Stoddart just answered? The issue was discussed at the September 2004 advisory committee meeting, where there was a presentation from the Canadian Judicial Council, represented by Mr. Richard Thompson, a former associate deputy minister of justice. The idea was to develop a bench book for judges to ensure they fully understood and appreciated the requirements of issuing DNA warrants and so on.

I know that project was discussed with the Canadian Judicial Council. I cannot offer you a status report on what the project is.

Mr. Joe Comartin: That was going to be my next question. Perhaps we can get that from Justice at some point.

How much time do I have?

The Chair: You have three minutes left.

Mr. Joe Comartin: To meet that initial test of a serious offence, its usefulness, the initial test that was enunciated when the bill was originally passed by Minister Scott.... Have you done an analysis of how many of these sections that were proposed to be added would meet that test?

Ms. Jennifer Stoddart: No, we haven't. Given the capacity of our office, unfortunately, we don't really have that capacity. What we do is raise the question. What we did was write to the minister. We did not, from the minister's response, understand that there had been any empirical study that was available at that time.

● (0935)

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

The Chair: Thank you, Mr. Comartin.

Now Mr. Macklin, for seven minutes, sir.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much.

With respect to some comments you made a few moments ago, I'm a little bit concerned, because you drew conclusions in your report, I think at page 6, and you said you're questioning whether the bank is operating as efficiently as possible, whether it has its resources, and you understand there's a significant backlog at the regional level. Yet when I asked on what basis you formed this opinion, I think I heard that you referred to newspaper articles.

Are newspaper articles the standard for raising issues of inquiry to bring these matters to our attention?

Ms. Jennifer Stoddart: No, they're not, honourable member, but in fact, newspaper articles are, if I may say, among the most reliable evidence we have about the functioning of this whole system.

Our main thrust has been to suggest to the honourable members that we don't have empirical evidence for expanding the inclusion of perpetrators of different types of offences in the bank. We are surprised and amazed that there don't seem to be empirical studies about the usefulness. There may be lots of anecdotal ones. There may be horrible criminal cases across Canada where DNA has been very successful, but there's not seen to be systematic study. Nor have we seen, in spite of research, systematic study of how since 2000 the whole data bank system has functioned across Canada.

It's in that context that we relied on a newspaper article. I agree with you it's not ideal, but it was a lot better than nothing, which is the only other thing we found.

Hon. Paul Harold Macklin: I would have hoped you would have used the argument that you just made, that there are no empirical studies going on, and therefore you raised, at least, the questions. I'm just a little concerned when that is the basis upon which you want us to change our legislation—a series of newspaper articles.

Ms. Jennifer Stoddart: They're just questions, honourable member. We're just saying we've read this, and we suggest this committee look at what the alternatives are before taking such a privacy-invasive step. It's just in that context that we raised it.

Hon. Paul Harold Macklin: Let's pick up on your last comment about a privacy-invasive step, because I think it is, in some respects, a question each and every one of us asks. As you go to the basic theory of how this whole system exists and what its purpose is, it appears to be that it's not a penalty; it's an identification tool. That's what we're working on.

The questions asked in here are.... For example, on page 2 of your report you say, “One may ask how this is any different than the current practice of fingerprinting?”

Let's look at that. When we were at the centre and saw how this is processed, we came away with an impression that although they hold DNA samples that, as you say, can tell everything about us, have they not, in effect, put in place protections that simply have limited the use of those samples to being simply markers—and those markers alone are just identifiers? Are you suggesting here, about being able to draw inference about a person's genetic tendencies, that we don't have those protections in place—that in fact it is open to that right now?

Ms. Jennifer Stoddart: Honourable member, could the assistant commissioner, who is on the advisory committee, answer that?

Hon. Paul Harold Macklin: Certainly.

Mr. Raymond D'Aoust: Thank you, Madam Stoddart.

This is a very good question. No, we're not suggesting that at all. In fact, the procedures the RCMP have put in place to clearly dissociate the DNA sample from the personal identifier are extremely robust and solid. The system has a series of checks and balances, and definitely an accountability regime, that at face value, based on our observations—and we haven't audited the National DNA Data Bank, I must say—seem to be quite robust.

The issue is not that the information will be abused, and right now, as you know—you have visited the data bank—the match is actually carried out on certain components of the DNA that do not present any predictive value. In other words, the 13 loci they use to do the match are considered by genetic scientists as junk DNA; ergo, those 13 elements of information do not have any predictive value. One could not say if a particular criminal or a particular person would develop Huntington's disease five or ten years from now. That's the rationale, and I think they are very robust and focusing on those 13 loci only.

As a system, it certainly seems to be very robust. It is being studied by other countries. We are told by our colleagues that, indeed, other countries are trying to emulate the Canadian system for its robustness. Canadian scientists went over to Southeast Asia to help with the identification of bodies resulting from the tsunami disaster. I just wanted to add that assurance.

● (0940)

Hon. Paul Harold Macklin: That having been said, why should we differentiate it, in looking at the changes we're proposing here, as being different from fingerprinting, considering that the protections you're suggesting are in place are robust and that the public shouldn't have a reason to be concerned?

Ms. Jennifer Stoddart: We're concerned because this is a very significant step. We are here as the Office of the Privacy Commissioner to remind you that Canadians have very important informational rights. What is at issue is not how DNA has been handled. We think it has been handled according to the highest international standards. The issue is, are we on a slippery slope towards constituting a databank of more and more Canadian citizens without first asking ourselves the question, why are we doing this? How will this help make our society more just, more crime free?

Once DNA is collected I understand it can be kept virtually, if not forever, for a long period of time. Right now it is handled according to a very strict protocol, but that DNA still remains collected. It can be subject to what we call function creep. That is, at some other time we could decide that we could use it for something else. Instead of those 13 or 11 indicators that are presently used, we could take other ones. This has happened with other types of information collected about citizens, so this is not unthinkable.

We're not saying don't do this ever. We are simply saying to you, if you read our submission, that this is a very important and significant step. You are changing the parameters of the existing DNA bank. Just let's be sure that as a society we know exactly why we're doing this and how this is going to help us.

The Chair: Thank you.

Thank you, Mr. Macklin.

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

Mr. Peter MacKay (Central Nova, CPC): Mr. Chair, thank you.

Madam Stoddart and officials, thank you for being here.

I want to pick up on Mr. Macklin's line of questioning.

But first I want to come back to a point you made about the use of DNA in identifying missing persons. I think this is an area that could be pursued to expand the use of DNA to identify missing persons. There are over 100 unidentified remains in the province of British Columbia alone and probably 1,000 or more across the country.

You indicated that DNA can be used to exonerate. Further to that, you asked the rhetorical question, what is the future use of DNA? If the purpose is prevention, apprehension, and using DNA in some cases to exonerate an individual....

I have to take issue with your reference to break-and-enters, for example, not being included as one of the primary offences. There is all kinds of anecdotal and statistical evidence to show that when a person has their home invaded, the propensity for violence is very real. Each and every time somebody comes into a house, if that house is occupied, there's a very good chance there's going to be a struggle and violence may ensue. So that would be the rationale for including it in the offences.

With regard to child pornography and sexual assault, I'm not going to reiterate what my colleague Mr. Thompson has said, other than to say I completely agree that linkage is there.

You indicated in your presentation that DNA can tell everything about them, much more than a fingerprint can, because it has a genetic nature to it. But if these safeguards are in place, which I think is what Mr. Macklin was referring to, and if we guarantee a system with the highest degree of security and that it's a robust system and the protection of the information is there.... Isn't what we're talking about here the use of DNA to put a person at the crime scene? It's for a very limited purpose. It's only accessible by scientists and peace officers. This is what the DNA data bank is currently being used for.

Some have raised the spectre that this is somehow going to lead to other uses, such as indicating a person's illness for insurance purposes, which we've been hearing from time to time, but there doesn't appear to be any indication it's moving in that direction. I agree that this idea of function creep is very prevalent in a lot of governments. We've seen it with the EI fund, for example, where money is gathered for one purpose and used for another. But here the safeguards around DNA and the charter challenges that would ensue are significant safeguards.

The next item is with regard to the protection of the public. Currently, if a person is arrested for a relatively minor offence on the east coast, the system would allow that person to be released without taking DNA, and the fact that they are linked to a serious crime on the west coast would not be known. That linkage would never be made. When we're talking about individuals involved in serious violent offences, such as aggression toward women and children, the preventive nature of having that DNA and making that linkage, I would suggest to you, on balance far outweighs the intrusive nature of simply taking a person's DNA. And the way in which it's taken now is very non-intrusive, I would suggest to you.

● (0945)

The Chair: Mr. MacKay, you're well over your three minutes.

Mr. Peter MacKay: This is a ludicrous system, of course, of three minutes.

The Chair: But it's the system we have. We're going to have to revisit it, obviously, because it's not working.

Perhaps we could have just a brief response.

Ms. Jennifer Stoddart: I share the goals you've expressed in terms of making our police, our criminal justice system, more effective.

What I can say to the honourable member is that our submission is not that what is proposed in the present law should never come to pass. My position as Privacy Commissioner has always been that privacy is a right that must adapt. Privacy is a right that is a fundamental right, but it has to coexist with other rights. The foremost right, I guess, is security of our persons.

We are saying to you in our submission today that the example that the honourable member gave.... We find it interesting that there is no huge body of work by criminologists, by specialists, that we can access—and we've had people working on this literally for weeks—to document the effectiveness of DNA in crime-fighting. We find that remarkable.

Are we going forward with this very important step because it is useful or because it is part of a trend whose utility and significance are unproven? We are saying to you that if you can prove that link, or if this link can be proved by others for you, then you would have our support.

We supported the original data bank in 1998, but I submit to you that as a society we do not have the evidence that says there is a rational link between this intrusive procedure—intrusive in a metaphorical sense, as the procedures are not now intrusive, and the Supreme Court has said that—to justify this infringement on Canadian citizens' informational rights. Assure yourselves that you have this information before taking this important step.

● (0950)

[*Translation*]

The Chair: The Commissioner will be with us for a further 8 minutes. I have Ms. Bourgeois, Mr. Cullen, Ms. Neville and Mr. Comartin on the list. I would ask that you keep your questions concise.

Ms. Diane Bourgeois (Terrebonne—Blainville, BQ): Good morning, Ms. Stoddart. I was very happy to note the word of caution which appears on page 6 of your document: "... we would recommend that these provisions not be adopted at this time." I think that it is very wise to find out why some offences have been transferred from secondary to primary status.

I have two short questions. In the second paragraph of page 6 you say that: "I fear that we are moving towards a registry of all convicted offenders." I share your concern, and I'm worried for those who suffer from mental illness. Am I wrong to do so?

Lastly, on page 4, you speak about "creeping expansion". I am worried about what could be done with the data bank. Is it possible, for example, that information could be exchanged with the United States in the context of the war on terror?

Ms. Jennifer Stoddart: Thank you, Mr. Chairman, and thank you, Ms. Bourgeois. The issue of transferring offences committed by people found non-guilty by reason of mental incompetence to primary status is not one which we have studied in depth. I do not believe that we have the requisite expertise in my office. We are not specialists in this field.

I have, however, had the opportunity to read the presentation made by the Canadian Bar Association, which does have the necessary expertise. In short, the Canadian Bar Association states that such punishment ought not to be imposed on people suffering from mental illness given that they are unable to assume responsibility for what they do, and that, therefore, to a certain extent, they cannot be held to blame. Why then would we impose a double penalty? There is no issue pertaining to privacy which would lead me to contradict the Canadian Bar Association's position.

Your second question concerned the possible exchange of information with the United States. I appreciate that Canada has a fairly extensive system of cooperation with other countries, in particular with the Americans because of our long border and the daily movements of goods and people. As far as I am aware, it would be possible to exchange genetic profiles with the American authorities in the context of the war on terror or other crimes. I wonder whether my colleague has had more experience of this in his work.

Mr. Raymond D'Aoust: Thank you, Ms. Stoddart.

In fact, we asked ourselves this very question, and so far, as far as I can gather, such sharing of information has not occurred.

There is, however, room to wonder whether such information sharing would be possible were the legislative framework amended. Personally, I think that it would be possible, and I think that many experts would say the same thing. You recently visited the data bank, and as you know, samples are kept on a blotter in their original form. They can be kept for a very long time. Theoretically, it is therefore possible, but it is not current practice.

● (0955)

Ms. Diane Bourgeois: Thank you.

The Chair: Thank you, Ms. Bourgeois.

[*English*]

Mr. Cullen, Ms. Neville, and Mr. Comartin.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair.

Thank you, Madam Stoddart, and to your colleagues. I'm a little perplexed in a couple of areas. One—and it's not your issue—as elected people we have to balance off privacy issues against the need to keep a secure society. I'm a little puzzled. When you say you're flagging an issue, we don't have the benefit of that. We have to deal with a piece of legislation in front of us. So are you suggesting that we should reject that proposal or do more research, or are you saying we should let it go but be mindful of what we're doing here? I'm a little confused. We have to deal with a piece of legislation in front of us.

Secondly, I'm amazed that we can't find evidence of the importance of DNA in police work, because all one has to do is pick up the paper. Certainly they're more notorious with respect to people being let off from crimes that they were previously convicted of. They're notorious. It seems to me that DNA work was instrumental in that. But then on the other side, I know from just my cursory understanding, the police make enormous use of DNA in solving crimes. So I'm staggered by that.

Thirdly, it's unfortunate you weren't at the DNA centre when we went there, because the precise questions with respect to backlog, with respect to privacy concerns, were put very clearly to the chief officials there, and they answered very clearly, I thought, very categorically, and they made us feel a lot better. In fact, none of us challenged those notions that they presented because I think they were very sound. On the privacy issues...the DNA is sitting there and it's not attached to a name. So it's a bunch of DNA in a very abstract way.

We asked the director that question very specifically and he very eloquently responded. I can't repeat it all here today, nor would I have the qualifications to do that, but I know I felt very convinced that there was such a remote chance of privacy rights being invaded that I felt better. I don't know how other colleagues felt, but no one challenged those assertions. I'll just throw that out and you can comment if you want. Those are just some comments from me.

The Chair: As briefly as possible.

Ms. Jennifer Stoddart: Thank you, honourable member.

As Raymond D'Aoust is on the advisory committee of the DNA bank, if we had real problems with it we wouldn't be there. Our submission is not a critique of the DNA bank. In fact, we too have the impression it's very capably run and it's very respective of Canadians' privacy rights.

What we are saying to you here is in terms of the whole system of Canadian law enforcement to expand the contents of that DNA bank has, looking at Canadian society as a whole, profound privacy implications, especially if there doesn't seem to be a body of empirical evidence that shows how this has been useful to the police.

The honourable member's colleague rightly asked me, do we rely on newspaper reports for scientific conclusions? I submit to you our understanding of DNA is based on what we may read in popular media. I think before we expand this bank we need an objective, scientific study that makes the link, the link that is in our Charter of Rights and Freedoms, between a social good and the restriction of a person's rights and freedoms.

What do we suggest you do with the law? We suggest that you pass those housekeeping provisions that would allow for more efficient application of the scheme as it is. We suggest that in terms of expanding the bank you stay the passage of this law until you can look at it in the context of the review of the bank, which is scheduled for three months from now, which is June 2005. That, concretely, would be our suggestion, Mr. Chair.

The Chair: Thank you very much.

Our time is up. We still have three on the list.

Ms. Neville, do you have a precise question?

Ms. Anita Neville (Winnipeg South Centre, Lib.): I'll come back.

The Chair: Okay.

Mr. Comartin.

Mr. Joe Comartin: I'll speak to this later.

The Chair: Okay.

Mr. Breitkreuz, you had one brief question.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): I only want to put one question on the record.

Reflecting on everything that you presented before the committee, a question comes to me. Doesn't committing a criminal offence affect your privacy rights to some extent? When you are arrested, you have to undergo a complete search of your person, and that includes body cavities and all that. It's very invasive, more invasive, I think, than taking a blood sample or a swab of your mouth.

I have a lot of experience with the registry known as the firearms registry. Your same office didn't seem to be raising the concerns there of a complete sexual history, psychological history, and financial affairs history being submitted, as well as some of that possibly being privatized and falling into other hands.

I come back to my question. Doesn't committing a criminal offence affect privacy rights? On the one hand, you had people who had not committed any crime having to reveal all of this information. Here we have someone who is potentially causing a risk to society being asked to reveal something, which I think has been made clear, that would be kept quite secure.

How do you answer that question? To me, that's a very key question.

● (1000)

Ms. Jennifer Stoddart: Yes. First I'd like to say that we did historically share, I think, and still do share, many of the honourable member's concerns about the intrusive questions in the context of the firearms registry. I would like to assure him of that.

The honourable member has rightly underlined the fact that once one has committed a criminal offence or one is reasonably suspected to have committed a criminal offence, that person is subjected justifiably to procedures that are far more intrusive.

However, the fact that one's privacy rights are infringed upon, and justifiably in the context of existing criminal proceedings, does not necessarily mean that, before going on to have additional infringements of privacy rights, Parliament should not attempt to see how these additional infringements would be justified. I think we're clear about frisking, strip searches, and so on. This has been gone over by our courts on how they're to be done and why they're justified, and so on.

We're simply saying this to you. Make sure we know how this is going to be effective before you pass this measure.

The Chair: Thank you. We'll have to leave it at that.

Thank you very much, Madam Stoddart, and your officials, for being here.

We will suspend for the time it takes to have the new witnesses move in. We'll be resuming in 30 seconds to a minute.

Thank you.

● (1003)

(Pause)

● (1004)

The Chair: We will resume the hearing.

From the Canadian College of Medical Geneticists, we have Ms. Diane Allingham-Hawkins. From the Canadian Council of Criminal Defence Lawyers, we have Mr. Joseph Di Luca.

We'll proceed with a presentation from each of you of approximately ten minutes, if that's okay. Then we'll follow with questions from the members.

We'll start with Ms. Allingham-Hawkins.

● (1005)

Mrs. Diane Allingham-Hawkins (President, Canadian College of Medical Geneticists): Thank you, Mr. Chairman, and good morning.

I would like to thank the committee for this opportunity to address you on behalf of the Canadian College of Medical Geneticists concerning the proposed amendments to the DNA Identification Act as detailed in Bill C-13.

By way of introduction, the Canadian College of Medical Geneticists is the accreditation body for clinical and laboratory geneticists and genetic centres in Canada. The mission of the Canadian College of Medical Geneticists is to establish and maintain high-quality professional and ethical standards in medical genetic services in Canada and to help ensure that the highest quality of service is delivered to the Canadian public. This mission is achieved through the credentialling and examination of individuals trained in the sub-specialties of clinical genetics, medical genetics, biochemical genetics, cytogenetics, and molecular genetics, and through the accreditation of genetic centres for service and training in medical genetics. There are currently 214 CCMG members across Canada and around the world.

The issues that most concern the CCMG with respect to Bill C-13 and the DNA Identification Act are those related to maintaining the privacy of an individual's genetic information and to ensuring the quality of work done by labs submitting information and specimens to the database or data bank. One of the most common arguments in the literature in favour of expanding criminal DNA data banks to include samples from not only those convicted of designated violent crimes but also from those charged with or even suspected of an increasing list of violent and non-violent offences is that DNA fingerprinting should be considered no different from traditional fingerprinting. Indeed, if the information extracted from the DNA sample goes no further than the panel of anonymous markers currently used by most forensic laboratories, the analogy to fingerprinting is understandable. Both methods provide unique identifying information and nothing more.

In their 2004 article entitled "'Wonderment and Dread': Representations of DNA in Ethical Disputes about Forensic DNA Databases", authors Robin Williams and Paul Johnson coin the term "genomic minimalism" to characterize this point of view. However, as the authors point out, it is the potential of obtaining additional private genetic information about an individual, and indeed their family members, that distinguishes DNA technology from other less sensitive methods of identification, such as fingerprinting. There must be stringent regulations in place to ensure that specimens are used only for the purpose collected to establish forensic genetic profile and not for any form of research activity or testing unrelated to forensic application, such as paternity testing or disease susceptibility. As pointed out by Robert Williamson and Rony Duncan in their 2002 article "DNA testing for all", the only way to ensure this completely is to discard specimens once the profile has been established and entered into the database.

Subsection 10(1) of the DNA Identification Act allows for retention of specimens once the forensic genetic profile has been established. The rationale for retaining specimens is to allow further testing should the technology to establish profiles evolve over time. However, given that forensic DNA testing is essentially standardized throughout the world, it is unlikely that major changes would be made without serious consideration of the consequences to the existing criminal DNA databases. Indeed, although the technology to produce the profiles may change, it is unlikely that the chosen markers would change, thus any existing profiles would remain valid.

The CCMG agrees that the only way to ensure the genetic privacy of individuals whose forensic genetic profiles are contained in the criminal DNA database and to reassure the Canadian public that their genetic privacy cannot be violated by this legislation is to discard specimens once the profile has been established. We would strongly support changes to the legislation to reflect this.

Another area of concern is the potential for profiles from innocent individuals to be retained in the database. If, as was discussed extensively in the proceedings of this committee on December 6, 2004, individuals could be compelled to provide a sample when charges are laid rather than upon conviction, and given the lengthy delay that often occurs between charging and trial, it is possible that profiles from individuals who are ultimately acquitted of their charges will be in the database for several years. It is imperative that processes are in place for the prompt removal of the profile upon acquittal or discharge of the original offence. As indicated in subsection 9(2) of the DNA Identification Act, such removal is to occur without delay, although an exact definition of this provision is not given.

However, another issue to consider would be whether an unrelated match that occurs in the interim between charging and acquittal or between acquittal and removal of the profile would be considered admissible. That is, when a profile is present due to a charge of which the individual is ultimately acquitted, does it violate that individual's right to privacy if a match from an unrelated crime is made? The CCMG does not have the legal expertise to answer this question, but we believe it is an issue to which serious consideration must be given.

● (1010)

The final issue I would like to address is the accreditation of laboratories that perform forensic DNA testing and the qualifications of the technologists and scientists responsible for the testing.

Two of the core functions of the CCMG are the accreditation of laboratories to provide service testing and the credentialling by examination of MD and Ph.D. laboratory directors in charge of such laboratories. Very stringent requirements are in place to ensure the quality of the work performed and the qualifications of those individuals providing interpretation.

In addition, although requirements differ across the country, laboratory technologists are accredited and regulated by organizations such as the Canadian Society for Medical Laboratory Science and the provincial College of Medical Laboratory Technologists.

And finally, many provinces have specific guidelines in place for the licensing of laboratories to provide molecular and other medical laboratory testing. Typical requirements by provincial accrediting agencies for any laboratory offering molecular genetic testing include a comprehensive peer assessment a minimum of every five years. Assessments include an evaluation of records for consent, storage, and confidentiality of genetic information; result reporting; quality assurance measures, including proficiency testing; and qualifications of laboratory personnel.

From a quality assurance perspective, it is imperative to ensure that any laboratory providing forensic DNA testing be subjected to the same rigorous assessments related to qualifications and certification of staff and accreditation of the laboratory. Such requirements would certainly help to alleviate the second of the two most common fears associated with criminal DNA data banks, that laboratory errors could contribute to a wrongful conviction.

In summary, the Canadian College of Medical Geneticists supports the use of DNA technology to aid in the rightful identification and conviction of individuals responsible for violent crimes; however, it is important that any legislation protects the genetic privacy of the Canadian public and ensures quality in the forensic laboratories performing DNA analyses and data storage.

That concludes my comments. Thank you, again, for the opportunity to address these issues, and I will be happy to answer any questions the committee may have.

The Chair: Thank you very much, Ms. Allingham-Hawkins.

Now, Mr. Di Luca.

Mr. Joseph Di Luca (Representative, Canadian Council of Criminal Defence Lawyers): Thank you, Mr. Chair and committee members.

The Canadian Council of Criminal Defence Lawyers welcomes the opportunity to appear here today to make submissions on Bill C-13. The council acknowledges the many benefits the DNA legislation and in particular the National DNA Data Bank have had in terms of the effective administration of justice in Canada.

However, we maintain that the collection of DNA samples remains an exercise that significantly intrudes into the spheres of bodily integrity and privacy, both being key and important values protected by the Canadian Charter of Rights and Freedoms. We take the overarching position that the changes to the current DNA legislative scheme must be undertaken cautiously and, most importantly, in a manner that respects the constitutional protections so very central to our system.

We note, as have others, that the DNA provisions are up for a more comprehensive review within a period of approximately five months. It's our view that the current provisions being considered today are perhaps best assessed within the context of the more comprehensive review that is just around the corner.

That being said, we agree with the concerns that have been expressed by the Criminal Lawyers' Association, by the Canadian Bar Association, and this morning by the Privacy Commissioner. I won't repeat them. Instead, what I propose to do is very briefly review the various clauses and offer some of our comments in relation to them.

Clause 1 addresses the reorganization of the primary and secondary designated offences. Once again, we second the comments that have been made in relation to the need to have a principled and articulated basis for the inclusion of offences within either the primary or the secondary scheme or the movement of offences from the secondary up to the primary designation.

The issue of child pornography is one I don't care to enter into at this point. It is obviously a very difficult question, but the point can be equally demonstrated by reference to other offences. One example can be that of gross indecency. The historical offence of gross indecency is an interesting example and perhaps an archaic throwback to different days. If you examine the case law surrounding what could be construed as an act of gross indecency...I would just bring to the committee's attention that a consensual sexual act such as oral sex or anal sex between two consenting adults can be deemed to be an act of gross indecency and hence a criminal offence.

Now, the provisions as constituted right now would place an historically prohibited act as a primary designated offence. So in effect, while the label itself of gross indecency conjures up an image of a very serious criminal offence, the conduct that can potentially be captured and placed under that label is now obviously no longer criminal. This raises serious concerns about the actual categorization of that offence.

I'll offer another example in terms of the secondary designated offences, the inclusion of participation in organized crime. It's our respectful submission that obviously there is a societal and pressing need to address the issue of organized crime, but let's not forget that it is the predicate offences underlying the criminal activity that are really of concern. In all likelihood the fact of participation in the criminal organization in and of itself would lack any sort of forensic or statistical link to DNA evidence. It would be the constituent acts the group undertakes, such as extortion, which has now been entered, murder, or any of the other listed acts. Those are the acts that are of concern and those are the acts where there may actually be a statistical or a valid forensic link between the DNA found at a crime scene and the purposes of the DNA data bank.

I cite those two examples in furtherance of submissions made by other participants before this committee that the decision to include or exclude offences must be done (a) in recognition of the delicate balance that goes on between the rights of accused individuals and those of society as a whole, and (b) it must be done on a principled and informed basis.

● (1015)

Moving on, clauses 3 and 4 include not criminally responsible findings as predicate offences for DNA samples. That's an issue of significant concern. Obviously, the mentally ill, assuming they've been found criminally responsible, are deemed to have not intended the act. The act itself has been committed, and remains as a committed act, but the intent to commit the act is no longer there, and they are acquitted.

The difficulty from our point of view is that there are fewer groups within the criminal justice system that are more marginalized than the mentally ill. Placing offences committed by mentally ill individuals into the primary designated category removes the application of the more expansive judicial balancing process that is found in the secondary designated offence group.

Our submission in that respect would be that if there is the need to include not criminally responsible findings as predicate offences for DNA samples, a category should be established to leave all of those findings within a secondary designated offence listing. That would leave with the judiciary expanded leeway in terms of assessing the particular needs of the person before them and dealing with the issue in a more contextual fashion.

Turning to clauses 6 and 7 and the timing of the samples, we accept that it may not be possible in all circumstances to have the samples taken right at the time of sentencing. Obviously, there needs to be some statutory mechanism for permitting people to be brought back, in the event that the sample can't be immediately taken.

The only issue we would raise with this is that there should be some requirement, even where a date is to be set in the future for attendance to provide the sample, for the date to be as soon as practicable. There are some very practical reasons for that. Individuals who are being sentenced will be transferred from a detention centre to a correctional centre, or potentially to a penitentiary if they are getting a jail sentence. If, for whatever reason, there is a lengthy delay in taking the DNA sample, they will not be moved to a facility where they can start serving their sentence and have access to rehabilitative programs and the like. So it may be important to provide for a date in the future, subsequent to the sentencing date; nonetheless, that date should be as soon as practicable to bring an element of finality to the process.

Last, in terms of the review of improper samples, this is a bit of a difficult issue. We would ask for the inclusion of some notice provisions in terms of ensuring that accused persons whose sample is subject to this type of review will be given notice and can appear to make submissions on the issue.

With regard to clause 11 of the proposed bill, this permits clerical errors to be brought to the attention of the respective attorneys general. Our position is that if an attorney general ultimately sees fit to refer the matter to a justice for clarification on whether it is a clerical error or not, notice ought to be given to an accused person to attend at that point. What is a clerical error to one person may well not be a clerical error; it may in fact turn out to be an error in substance, which would invalidate the DNA order.

This is particularly pressing when you consider the number of cases that are dealt with rather summarily through the guilty plea process, where justice is meted out in perhaps expedient ways, and the court paperwork may not always accurately reflect what happened in court. So notice is vital, in our submission, to the accused person.

● (1020)

The policy reason for not giving notice in those cases is absent because the sample has already been taken. So it's not as if by giving notice you're allowing an individual to flee the country, thereby prohibiting the state from capturing or gaining their DNA. The sample has been taken. If the individual chooses not to appear, so be it. But out of fairness, they should be given the opportunity to appear.

Finally, on proposed subsection 487.0911(4), if what appears to be an error on the face of the order is referred to the minister for review and the minister decides there is in fact no error, the order is simply sent back to the DNA data bank and the sample is processed.

Our submission in relation to that particular clause is that it's highly problematic. In effect, if the DNA data bank staff have identified a facially invalid order and the minister or the attorney general for the particular province decides there is nothing invalid about the order facially, there are obviously two conflicting versions of the same document. Ultimately it's our position that notice should be given to an accused person, who may be able, in that circumstance, to provide assistance and offer submissions to clarify it.

Mr. Chair, I've probably exceeded my time. I thank you for your patience.

Those are my submissions in relation to Bill C-13.

The Chair: Thank you very much, Mr. Di Luca.

We will now go to Mr. Moore for seven minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you both for your submissions and for appearing. Certainly, we're hearing some of the same things. I want to, as someone who has been hearing this testimony and as someone who has visited the databank, put my perspective and then get some of your comments on it. You've raised some of the same issues.

I think what we have here is a highly effective tool, and you've acknowledged that, which can be used not only to connect two crimes together but to prove that there is no connection between two crimes or to exonerate someone.

I think I fail to see some of the concerns now. We've heard, when we visited the database, that a DNA strand, as it was explained to us, is like a library. It gives all kinds of information. They are looking at essentially one book in that library, which does not reveal the full breadth of someone's being, which, if you looked at the whole library, you would see.

In looking at that one book, they can connect samples that were taken at two different crime scenes. These samples are taken from someone who has committed an offence at the time of conviction.

So we have someone convicted of an offence. It was interesting that the council's concern is this is an intrusion on bodily integrity and is invasive. What we've seen so far, and what I'm increasingly convinced of, is that when we're talking about a crime when someone else may have been really violated or someone else's rights may have been tremendously impacted, we have someone who's been convicted of that crime and we're subjecting them to a pinprick.

We've heard some other examples of what happens at the time of arrest such as body cavity searches and all those unpleasant things. Everything I've seen so far would indicate to me that this is not an invasive thing. But once that pinprick takes place, we have a tool to connect two crimes.

What we're hearing is that even in the primary designated offences—and I'd like your comments on this—the process is only proceeding 50% of the time. It appears that what was originally contemplated as an exception to a rule is now becoming the rule in 50% of the cases, where even for a primary designated offence the sample is not being collected.

I wonder if this is extraordinarily good work on the part of criminal defence lawyers, or is it that things are falling through the cracks, or the judiciary has to be educated on it more? I'm wondering what your take is on that.

I'd like to know some of the arguments that are being used. I, personally, have a problem with the exception becoming the rule in this case. We have to remember that, from what I've seen, this is not a punishment, that is, being put on the DNA database.

That also goes to your comments on NCR. When someone has been found under our criminal justice system to be not criminally responsible for an act, but the act was committed, there may be then a link between that person who has been found NCR, just as there may be for someone who is convicted of a criminal offence, to other activities that have taken place. This is a way of making that connection.

I fail to see the real intrusion on Canadians' rights when weighed with the balance of either exonerating someone or connecting someone to a crime where someone has been very much violated, especially when we hear all of these things that could happen with a DNA strand. But even in the context of this new bill, that's not really being contemplated. We're just looking at that one book.

Again, there's the issue of child pornography. Even if there was only one case where someone was linked to having a conviction under one of these child pornography offences and that was linked to the actual abuse of a child, I think Canadians would feel it is worthwhile to include as a designated offence, offences involving child pornography.

● (1025)

When we weigh pricking someone's finger and including just one portion of that in a database against potentially protecting some child or solving a crime involving a child, I think Canadians would feel that was a worthwhile effort.

Perhaps you could comment on the inclusion rate and the balance between taking a sample and your perceived impact on privacy rights.

● (1030)

The Chair: The question was five and a half minutes long, so that leaves a minute and a half for the answer.

I'm going to suggest that we revisit our procedures, because it's just not fair to witnesses and other committee members. That's not a criticism of Mr. Moore. It's the way we all operate here. So we need to review that.

Mr. Rob Moore: This is my first term. I just do what everyone else does here.

The Chair: You're learning very well.

Some hon. members: Oh, oh!

Mr. Joseph Di Luca: I'll give it my best shot and try to keep it under a minute.

On a personal level, as a practising criminal lawyer in the province of Ontario, I've done my part by losing the vast majority of the DNA applications I've attempted to fight.

Having said that, if there's an issue in terms of "under-inclusion", part of that will be a resistance to change in the system, which will in all likelihood weed its way out with the passage of time. The Court of Appeal has given very clear direction to lawyers, at least in Ontario, in a number of decisions that the rule is indeed a rule and not an exception. In many cases, if the order is not made, my guess as to why it's not made is that the proceedings at times can be rushed. People could benefit from more detailed instruction in terms of the exact scope and nature of the provisions and the like. With some further education and the passage of time, I think the inclusion rates will increase, especially in relation to primary designated offences.

In relation to the secondary designated offences, a more flexible balancing process is involved in those cases. If the inclusion rate in those cases is only 50%, I think it warrants a review of the reasons. The code specifically mandates that the judges are to provide reasons and articulate a basis for ordering or not ordering the taking of a DNA sample.

In terms of the intrusion, the only point I will make is that it's not the actual pinprick in and of itself we all complain about in terms of being a massive intrusion on the bodily integrity. It's the taking of a substance that potentially can reveal a person's life book. It's the intrusion on that sphere of privacy in the broadest sense that causes the complaint.

I realize we have a very circumscribed use for the DNA. That's at this point in time. Like many provisions, once the ball has started to roll, it's very difficult to stop it . We want to bring to everyone's attention that there is a potential misuse down the road that could in a different set of circumstances be easily and perhaps irretrievably justified.

The Chair: Thank you.

Ms. Allingham-Hawkins, did you have anything to add to that?

Mrs. Diane Allingham-Hawkins: I'd just like to agree with Mr. Di Luca that the issue is not the physical invasion but rather the taking of the DNA. As you point out, we are only looking at a certain set of anonymous markers. Where we take issue is the retention of the samples, because it does leave us open to the misuse of these specimens down the road. You have to admit that a refrigerator full of specimens from accused or convicted criminals would be very tempting to someone who was doing research on criminal genes. So I think the potential is there as long as the specimens exist.

The Chair: Thank you.

Mr. Garry Breitkreuz: But those specimens cannot be linked to—

The Chair: I'm sorry, Mr. Breitkreuz, you'll have to wait your turn.

Next is Mr. Marceau for seven minutes.

● (1035)

[*Translation*]

Mr. Richard Marceau: Thank you, Mr. Chairman. Thank you to the witnesses for appearing before us.

I have a technical question for you, Ms. Allingham-Hawkins. I am a lawyer, not a scientist. When we visited the national DNA data bank, we were told that it was impossible to remove the code found on a [*Editor's Note: Inaudible*]. In fact, I believe that there are 96 genetic profiles per data record. Several genetic profiles are recorded simultaneously, and we were told that it was technically impossible to remove an individual profile. Somebody who would expect to no longer appear in the data bank has to make do with there being only restricted access to his bar code, although I am not sure if that is the proper term for it. People would no longer have access to it, but with today's technology, it would be reasonable to expect that it would be possible to completely remove it.

Man landed on the moon over 30 years ago. Given today's technical know-how, how do you explain it being impossible to entirely remove someone's genetic profile from the data bank once he has been found innocent? Why do people have to make do with restricted access?

[*English*]

Mrs. Diane Allingham-Hawkins: Thank you, Mr. Marceau.

I'm not familiar with the technology that's being used as far as production of the profiles at the data bank is concerned. I would think it should be a rather simple process to remove a given genetic profile from the database as opposed to blocking access to it.

[*Translation*]

Mr. Richard Marceau: We were told that it is practically impossible. I will have to ask a scientist, I cannot understand why it would be so.

[*English*]

Mrs. Diane Allingham-Hawkins: I do not understand myself why that would not be possible.

One of the issues you raised was that if 96 samples were analyzed at the time...then I would think there would be 96 pieces of information entered into the database. The point that was made about connection of a DNA sample to a person is that somewhere there must be the ability to connect a given DNA sample to a given person.

But to answer your question, I don't understand why you could not simply remove the profile upon acquittal or a discharge.

[*Translation*]

Mr. Richard Marceau: Thank you very much.

Mr. Di Luca, you mentioned that DNA samples can be taken from individuals suffering from mental illness. Correct me if I am wrong, but it seems to me that you are basing your explanation on the premise that DNA sampling constitutes a punishment. You appear to believe that individuals who are not criminally responsible for their actions should not be subject to the punishment of having a DNA sample taken.

Am I mistaken in saying that you consider DNA sampling to be a form of punishment? If that is the case, why do you consider it to be so?

[*English*]

Mr. Joseph Di Luca: On a personal level, I think I would be joined in great company by defence counsel in submitting that it is a form of punishment. That said, we are very aware that the courts have repeatedly indicated that it is not a form of punishment, and if our position was that it was indeed a form of punishment, then my submission in relation to "not criminally responsible" individuals would be an outright prohibition against getting a DNA sample against them, because they are not to be punished if that's the case.

But my submission at this point is that, accepting as it is that it is not interpreted as a form of punishment, and also accepting the realities the mentally disordered offender faces in the criminal courts, our position is that it should, at its highest, be a secondary designated offence, which would permit some added flexibility to take into account the particular circumstances faced by the mentally disordered offender.

[*Translation*]

Mr. Richard Marceau: Thank you.

I do not know if I have misunderstood you, but I got the impression that, in your view, it is not so much taking a sample, be it of blood, saliva or hair, that constitutes a violation of privacy, but the fact that the sample is kept. Do you have a problem with the sample being kept, with the existence of a genetic profile, or with both?

● (1040)

[*English*]

Mr. Joseph Di Luca: In my submission it is difficult obviously to rank the various degrees of invasion, and clearly there's a distinction between keeping the profile *simpliciter* versus the actual sample. Keeping the sample itself carries with it the added danger that it could be put to an improper use perhaps in the future. So in terms of categorizing it, it may be further down the path in terms of intrusion. That is something I think that is picked up on in the Marper decision, which you referred to from the English House of Lords. They draw a distinction between keeping the sample itself or the profile.

Ultimately, seeing as this is a science that has not yet completed its course of exploration, so to speak, even keeping the DNA profile itself would leave us with significant concerns in terms of the degree of privacy invaded. While we could rank them, it still remains a concern nonetheless. But we would be obviously more concerned with maintenance of the actual sample.

[*Translation*]

Mr. Richard Marceau: I have one last question.

I would like to have your opinion on the following: one of our colleagues suggested adding a missing persons section to the DNA data bank. For example, if a child had been missing for several years, the mother or father could provide a DNA sample in order to try to make a connection with bodies which had been found but never identified.

Would you be comfortable with such an addition to the DNA data bank?

[*English*]

Mr. Joseph Di Luca: From a criminal law defence perspective, if it's not relating to, in effect, the prosecution or defence of a criminal charge, it's beyond the scope of our opinion in the strictest sense. But assuming that the purpose was restricted to identifying remains for the purpose of notifying an aggrieved family, at this time, without having thoroughly thought it through, I can see no position against it from our perspective.

The issue then would change obviously if the dynamic changed into it being a defence of a case following that type of issue.

[*Translation*]

Mr. Richard Marceau: Thank you.

[*English*]

The Chair: Merci, monsieur Marceau.

Mr. Comartin, seven minutes.

Mr. Joe Comartin: Thank you, Mr. Chair, and thank you both for coming.

Mrs. Allingham-Hawkins and perhaps Mr. Di Luca, I don't have a sense of how available labs are to do independent testing. If you get a sample from the police or prosecution and you want it tested yourself, how available are the labs across the country?

Mrs. Diane Allingham-Hawkins: I believe there are private companies that do forensic DNA testing on behalf of a defence position, but perhaps Mr. Di Luca has more information about that.

Mr. Joseph Di Luca: Anecdotally, the availability of private scientific testing is well known. The issue, quite frankly, from a criminal law defence perspective is the cost of undertaking private testing. For individuals who are legally aided in their defence, the cost can be prohibitive, or for individuals of modest means, the cost can be prohibitive. But in terms of the availability of it from a private perspective, it is there. I've seen it. I haven't personally engaged those services, but it is available.

Mr. Joe Comartin: It's still a developing science. We're fairly much in the infancy of this technology. Do you have any concerns about the fact that, as I understand it, in most cases the DNA goes unchallenged, that is, the defence normally does not bring in its own expert, having done independent testing?

Mr. Joseph Di Luca: Right. I take it your question is in terms of the actual trial itself.

● (1045)

Mr. Joe Comartin: Yes.

Mr. Joseph Di Luca: There's a residual fear, and this is not born out of any scientific basis, that we will one day learn that the science in and of itself is fallible and that the wrongful convictions we are happy to have corrected today by virtue of DNA may replicate themselves down the road at the behest of DNA. There's no scientific basis for us to say that at this point. It's just a fear and an understanding that science is always an ever-changing and evolving state of knowledge, so we may well come to a point down the road where our knowledge is different. Ultimately, I think, we have to be open to that possibility.

In terms of the practical side of it, in cases where the evidence is being marshalled by the crown prosecutor, generally the evidence will come from, at least in Ontario, the Centre of Forensic Sciences, which, despite some troubles it's gone through in the past, is a reputable, independent testing body. It's not as though the courts—and this is not a blanket rule—are being misled in any open fashion over it. The science is usable and provable.

Mr. Joe Comartin: Mr. Di Luca, with regard to the NCR situation, are you aware of any charter argument that could be made that would challenge the sections being proposed? We've heard from the Department of Justice that they've done an analysis and believe it would survive a charter challenge. Are you aware of any contrary opinions?

Mr. Joseph Di Luca: In terms of an actual formal opinion that we're in possession of, no. Having said that, I think it would be open to challenge, for example, the offence of gross indecency as a primary designated offence.

Ultimately the courts will in all likelihood defer to Parliament on the issue, but having said that, in cases such as the primary designated offences, where the judicial discretion is severely curtailed, the likelihood of success from a charter perspective in a case where it doesn't typically follow the "serious, violent offence/high likelihood that DNA will be located at the scene" type of profile is probably a lot higher.

Mr. Joe Comartin: I'm sorry, I was asking more specifically about the "not criminally responsible" sections being challenged under the charter.

Mr. Joseph Di Luca: I'm not aware of any position at this point involving anyone challenging that provision, and ultimately the difficulty is that within the Criminal Code itself there is provision for considering the act *simpliciter* where a person is found not criminally responsible, as it relates, perhaps, to sentencing them on a future offence, as it relates to parole and probation considerations, and as it relates to bail conditions. The act itself already contemplates consideration of it, so I'm not certain it would attract charter scrutiny or be defeated by it at this point. But it's something that would need further consideration.

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

The Chair: Thank you, Mr. Comartin.

Ms. Neville, you have seven minutes.

Ms. Anita Neville: Thank you.

What I'm interested in, Ms. Allingham-Hawkins, is what the Privacy Commissioner spoke about, the issue of function creep. I'm wondering if you could expand on it. You certainly alluded to it. You also referenced a number of articles you've read. Can you anticipate for us how this function creep could happen and what safeguards should be in place for it?

Mrs. Diane Allingham-Hawkins: Yes. Thank you, Ms. Neville.

I think the issue here is that with the existence of what potentially could be hundreds of thousands of specimen samples present in the DNA databank, there will be the possibility down the road that they could be used for a purpose other than a forensic profile, which is the purpose for which they've been taken. As I suggested, the existence of such a bank would be very tempting for someone doing research along the lines of criminal activity, or even looking at specific ethnic groups.

There is a group in the U.K.—the Forensic Science Service—that will now tell the police whether their suspect is likely to have red hair, based on the analysis they do of the crime scene sample. In order to know that information, there needs to be research done on specimens to determine how you could make that prediction. There are other examples of that as well.

The concern from our point of view is not the profile; it is the existence of the specimens and the possibility that things we haven't even thought of at this point in time could be done with those specimens in the future.

The other issue, regarding the profile itself—and I think Mr. Di Luca alluded to this—is that right now we consider these 10 or 11 markers anonymous markers of no clinical significance. In fact, we know there is a group of disorders that are caused by expansions of exactly the same type of markers, so it's possible as we learn more about human genetics that those markers could cease to be anonymous and actually be predictive of a genetic disease or condition.

● (1050)

Ms. Anita Neville: Your concern is that this legislation does not protect against function creep. Is that what you're telling us?

Mrs. Diane Allingham-Hawkins: Yes. As long as the specimens are present somewhere and there must be a database that will connect a given specimen number to a given offender, there is the potential for misuse of these specimens, and that is what we are concerned about. As long as the act allows the retention of the samples, there is that potential, and it actually extends not only to the persons whose profiles are there, but to their family members as well. There could be information about their family members that could be extracted from those samples.

Ms. Anita Neville: That's fine. Thank you.

The Chair: Thank you, Ms. Neville.

Mr. Thompson, for three minutes.

Mr. Myron Thompson: Hopefully I won't need three minutes.

First, I want to thank Mr. Di Luca for not mentioning child pornography right off the bat, like all the other witnesses have, because that really irritates me. So thank you for that moment of peace.

I'm surrounded by quite a few lawyers, and I listen to submissions by people practising law involving themselves, in some nature, with the criminal aspect of law. Yet I'm not a lawyer, and a lot of times I don't understand what some of you fellows are even talking about.

Mr. Joseph Di Luca: Nor do we.

Mr. Myron Thompson: Nor do you.

There are a lot of people who make up our society—farmers, teachers, and truck drivers—but I think one thing that all Canadians would really agree on that's a duty of this place, one of the most elemental duties, is to do everything within our scope and power to protect society from harm and danger, especially those most vulnerable. That's a pretty elemental duty.

I find it rather frustrating at times when I hear legal opinions that this is going to interfere with the rights of the criminal, while we seem to neglect that one particular purpose for being here. We have many purposes, but that's a major one, in my view, and I think most of my colleagues would agree. We want to do the very best we can in this place to protect society, particularly the most vulnerable. I think one of the things that does that is creating deterrents.

When I heard the bar association the other day talk about an 18-year-old who may have a half dozen child pornography pictures in his possession and that he shouldn't be required to enter the data bank, I have to question that. I believe if we're going to deter that 18-year-old from continuing this practice, we had better come down rather stringently, rather hard, on this individual.

I don't believe sending anybody to jail solves a lot of problems. I really don't. Although a lot of people would think I'm a redneck who would like to lock them up and throw away the key, that is not the case. But I would really like to have them seriously consider the consequences of their actions through strong deterrent measures, and I believe a data bank is providing that as a deterrent.

You're going to be there, my friend, if you want to engage in child pornography, regardless of the extent.

This is something about which the society I talked about, which is not made up of lawyers, would probably say, "You're right, that's what we need."

Could you respond to that comment?

● (1055)

Mr. Joseph Di Luca: Certainly. The fundamental tension, in effect, that you highlight so eloquently is perhaps the animating feature of the criminal justice system, in that we strive to protect those who are vulnerable in this society, absolutely, without a doubt, but ultimately a great number of the vulnerable are also the ones who are at the receiving end of the criminal justice system for a variety of reasons, including the fact that they may have committed a criminal offence.

We attempt to strike a delicate balance that doesn't turn its back on legitimate policing concerns but attempts to address those concerns, accept them, acknowledge them, yet also deal with the competing interests on the other side, and I know it's difficult to draw the line. Child pornography is a very difficult one, and I agree with you in terms of the moral outrage that surrounds that type of offence. There can be no debate about that, but when we talk about using the DNA data bank for a deterrent purpose, we border into a discussion dealing with whether in fact the DNA orders are a form of punishment, because if we accept for a moment that the DNA data bank should be used as a deterrent, then we need to acknowledge that it is a form of punishment and sentence and deal with it that way.

I know that the Court of Appeal for Ontario in Briggs noted the fact that there is a deterrent value to the creation of the DNA data bank, but if we're going to go that extra step, then I think an acknowledgment that it is a type of punishment and dealing with it as a form of punishment needs to be done, but ultimately, a delicate balance is what is needed in this case, especially given the privacy interests and the very pressing concern to have a safe society. No one here I think is saying otherwise on that issue, but it's a tough balance to strike and we just hope to provide at least a counterbalance.

The Chair: Thank you. We're going to have to cut it off there because there's another committee that will be coming in and using the room.

[*Translation*]

There is still the question of Mr. Marceau's motion. The clerk is going to try to find us a room for this afternoon. Oh, we have one, room 269. Very well, we will entertain Mr. Marceau's motion at 3:30 p.m.

I also wanted to discuss procedure. We seem to be having a lot of difficulty with our procedure. We have to try to work that out. We also have to discuss future business. If everyone is in agreement, we could reconvene at 3:30 p.m. in room 269 of the West Block.

[*English*]

Ms. Anita Neville: No, another committee, sorry.

Mr. Joe Comartin: I have a House leaders meeting.

The Chair: There isn't time. We have to vacate. The other committee is waiting.

Hon. Roy Cullen: Mr. Chair, why wouldn't we just defer it to our next regular meeting?

The Chair: Which is Thursday. We could start earlier on Thursday, maybe 8:30 on Thursday morning instead of 9?

Mr. Joe Comartin: We have our strategy meeting on Thursday.

[*Translation*]

Mr. Richard Marceau: Let us start at 9 a.m. We can first entertain my motion, and we will hear from the witnesses a little later.

[*English*]

The Chair: Okay.

Sorry about that, witnesses. We had to clarify that before we adjourned. Thank you very much to both witnesses. We appreciate your time.

Merci. We're adjourned.

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