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Chair

Mr. Garry Breitkreuz

Standing Committee on Public Safety and National Security

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● (0905)

[*English*]

The Vice-Chair (Mr. Jack Harris (St. John's East, NDP)): I call the meeting to order. This is the fifth meeting of the Standing Committee on Public Safety and National Security. We are here, as I believe you all know, to deal with the statutory review under section 13 of the DNA Identification Act.

I want to welcome our witnesses here this morning. We have Mr. Ronald Fourney, director of national services and research for the Royal Canadian Mounted Police. Good morning, sir.

We also have, from the National DNA Data Bank Advisory Committee, the chairperson, Richard Bergman, and the member....

When you're called Peter Cory, I can't, as a lawyer, call you Peter; I have to call you former Justice Cory, formerly of the Supreme Court of Canada. Welcome to our committee, Justice Cory.

From the Department of Justice we have David Bird and Greg Yost, who are legal counsel for the Department of Justice.

Our procedure would be to hear from our witnesses first, and then we have a procedure of questioning by members. Some of you, I'm sure, are familiar with our operations. I understand that each of you will have something to say and that you've organized yourselves as to the order of presentation.

I believe, Mr. Fourney, you are going to lead off or tell us how you're going to present your evidence.

Dr. Ronald M. Fourney (Director, National Services and Research, Royal Canadian Mounted Police): Yes, thank you.

Let me say on behalf of the group here that we're happy to be here and look forward to the discussion. The way we're going to organize today's session is that Mr. Yost will lead off from the Department of Justice, followed by my colleague David Bird of RCMP legal services, who is also with Justice, followed then by me, and then by members of the advisory committee, Mr. Bergman and then Mr. Cory.

The Vice-Chair (Mr. Jack Harris): I neglected to introduce myself. The sign that was in front of me is for the actual chair. I'm one of the vice-chairs of the committee. My name is Jack Harris, member of Parliament for St. John's East. I believe there is a name card for me somewhere, but that's who I am.

Thank you, Mr. Fourney.

Mr. Yost, would you like to proceed?

Mr. Greg Yost (Counsel, Criminal Law Policy Section, Department of Justice): Mr. Chairman, members of the committee, it's a pleasure to be here.

Let me begin by pointing out that all of the panellists have worked closely together for many years on DNA issues. I've been counsel on the DNA file in the criminal law policy section since 2002 and lead counsel since 2006.

Mr. Bird has for more than 10 years advised the RCMP and the national DNA data bank regarding practical issues that arise from day to day in applying the legislation. Like me, he attends DNA advisory committee meetings as an invitee. Dr. Fourney has been involved in DNA science since the 1980s and was in a sense the creator of the national DNA data bank. Like Mr. Bergman and the Honourable Peter Cory, he is a member of the advisory committee.

The issues paper that has been distributed is based essentially on matters that have arisen over the years as the science and technology have evolved. These issues have been discussed, often with international experts attending, by the DNA advisory committee. The paper was first written in 2005 and was considered by the advisory committee in December 2005. It has been repeatedly updated since then to reflect developments in the jurisprudence and the science, and successive versions have been shared with the advisory committee. As the committee considers the legislation, I believe it should remember that DNA evidence was being used in courts long before the Criminal Code was amended in 1995 to create the DNA warrant scheme. The warrant provisions are very effective when the police have a suspect.

Where does the DNA data bank scheme fit in? The data bank legislation is intended to identify persons who have left DNA at a crime scene where there is no suspect. If a crime scene sample uploaded to the data bank matches a DNA profile in the data bank's convicted offenders index, the police will be advised of the identity of the offender and they can focus their investigation. It must not be forgotten that when a crime scene profile does not match anyone in the convicted offenders index, all 150,000 persons whose profiles are in the COI are exonerated. If the police thought one of them was the perpetrator, they will know they have to look elsewhere. Obviously the effectiveness of the data bank depends on the number of crime scene profiles uploaded and the number of profiles of known persons against which those profiles can be matched.

Strictly speaking, the legislation does not affect the amount of crime scene analysis being done by the forensic laboratories. That depends on the number of police officers who are trained in finding likely sources of DNA at crime scenes, and also on the capacity of the forensic laboratories to analyze the exhibits that are submitted by the police. If there is a match with a crime scene profile uploaded to the DNA data bank, the police must also have the resources to follow up on that lead.

With respect to DNA warrants and uploading crime scene samples, the legislation initially focused on a relatively short list of mainly very violent crimes. The coming into force of Bill C-13 and Bill C-18 greatly expanded the list by adding all indictable offences punishable by five years or more under the Criminal Code and the Controlled Drugs and Substances Act.

With respect to the convicted offenders index, the present legislation, although expanded by Bill C-13 and Bill C-18, remains narrowly tailored. The police can only take a DNA sample when a court has authorized the taking of the sample upon conviction of a designated offence. Although the list of designated offences was expanded, the legislation requires that for secondary designated offences the crown must apply. Moreover, in the case of the generic offences punishable by five years or more, the crown must proceed by indictment in order to be able to apply for the order. In Canada, the taking of a DNA sample is therefore a judicial process.

In most other jurisdictions, including the majority of states in the United States and most European states, the legislation makes the taking of a DNA sample automatic upon conviction. Most American states began with convictions for a short list of offences, mainly homicides, sexual offences, violent assaults, and burglaries. They then expanded the list to make the taking of a sample automatic on conviction of all felonies. In these jurisdictions, the taking of DNA is a correctional process.

In the United Kingdom, the legislation authorizes the taking of DNA on arrest for any recordable offence roughly equivalent to indictable and summary conviction offences. Some seven American states are now taking DNA on arrest for all felonies, and another seven American states are taking DNA from persons arrested for the most serious offences. In the European Union, eight states take DNA when a person is charged with certain serious offences. The effect of the different systems is dramatic. On page 6 of the issues paper is a very rough estimate.

The present system is producing about 36,000 convicted offender profiles per year. Taking a DNA sample on conviction for the current designated offences would lead to about 113,000 profiles. Taking the sample on arrest of those offences would yield about 195,000 profiles. Therefore, a key issue for consideration is whether to continue to work within but improve the present court-based system or to change the system more fundamentally.

In that regard, the committee should be aware that there appears to have been an overwhelming acceptance by the courts of the utility of DNA and a greater openness to accepting it than may have been anticipated 11 years ago when Parliament was considering the legislation.

● (0910)

[*Translation*]

In conclusion, I can assure the committee that the Supreme Court has commented favourably on the procedures used by the data bank to safeguard privacy. In particular, in the 2006 Rodgers decision, Charron, J. wrote:

> In addition to the statutory safeguards in respect of the informational privacy of individuals, the Criminal Code mandates a detailed procedure for collecting DNA samples. In S.A.B., Arbour J. described in considerable detail the relevant provisions governing the execution of a DNA warrant obtained for investigative purposes. Most of the provisions apply equally to the taking of a DNA sample from a convicted offender for data bank purposes. The procedure is not in issue and need not be described again here. It is not disputed that the taking of DNA samples involves a minimal intrusion on the physical integrity of the offender.

With respect to the utility of the legislation, she also wrote:

> There is no question that DNA evidence has revolutionized the way many crimes are investigated and prosecuted[...] The importance of this forensic development to the administration of justice can hardly be overstated.

In my view, in considering the purpose of the DNA data bank provisions, the appropriate analogy is to fingerprinting and other identification measures taken for law enforcement purposes... The DNA data bank provisions contained in the DNA Identification Act and the Criminal Code are intended to put modern DNA technology to use in the identification of potential and known offenders. The DNA Identification Act is a modern supplement to the Identification of Criminals Act.

Clearly, we will have to ensure that any change continues to respect the charter and the privacy rights of Canadians.

Thank you.

[*English*]

The Vice-Chair (Mr. Jack Harris): Thank you.

Mr. Bird.

Mr. David Bird (Counsel, Department of Justice): Mr. Chairman and committee members, thank you for allowing me to be here today.

As my colleague Mr. Yost indicated, I would like to briefly describe some practical problems that I have encountered in the application of the DNA legislation. Police and prosecutors who I've worked with on DNA issues have been universally positive in their praise for the usefulness of forensic DNA evidence and the value of the national DNA data bank in providing links to serial criminals and in identifying new crimes that are committed by the previously convicted. However, they have been less positive on the required process to obtain DNA samples as it is often administratively burdensome and error prone, and the legislation restricts what DNA information the data bank can accept and report.

There are five main administrative problems that need to be resolved to obtain DNA samples from convicted offenders for submission to the national DNA data bank.

The first is, at the end of a trial the police and prosecutors and courts have the burden of deciding whether a conviction qualifies as a designated offence for the purposes of issuing a DNA data bank collection order. It is often difficult to identify the relevant Criminal Code section under which to issue the order, properly complete the required DNA data bank order, and, finally, to transmit the order to the police for execution. It is not always obvious whether a conviction qualifies for a DNA data bank order, especially for historic offences that use older Criminal Code sections that are not directly listed or that require interpretation of punishment sections that determine whether a conviction qualifies. I am told that the requirement to consider issuing a DNA data bank order is often simply overlooked by all concerned.

Secondly, if errors are made in completing the court forms, the national DNA data bank must return the defective order and the police must then ask prosecutors to obtain new corrected orders or the national DNA data bank must obtain a legal interpretation on whether the offence qualifies for acceptance in the data bank.

Thirdly, after a conviction the police must execute the order by finding the person in the correctional system, or if the person is out of custody and fails to appear in relation to a DNA appearance order, seek and execute a warrant for the purpose of collecting a DNA sample. The police do not always have the resources available and in some cases simply forget to pass the orders on so that this is done. In addition, some courts set conditions with respect to where and what type of DNA samples shall be taken and time limits for the execution of the order. Often the police cannot locate the offender in time to carry out the order as a result of the conditions set.

Fourthly, before executing an order the police must verify on CPIC whether the person's DNA is already contained in the data bank. If the DNA is already in the data bank, another form must be completed and forwarded to the national DNA data bank to explain why the new order was not executed. It is always necessary to report back to the court. Substantial police time is required to deal with this process.

Fifthly, the national DNA data bank also spends considerable resources to verify the information it receives, to request corrections to orders, to seek legal confirmation, and to remove DNA profiles and destroy the DNA samples when DNA orders, convictions, or criminal records are quashed or required to be set aside. There are legislative restrictions. These create two problems that relate to what can be submitted to and accepted by the data bank and four problems that relate to what can be reported from the data bank. The most important submission limitation is that victims' and deceased persons' DNA profiles cannot be sent to the national DNA data bank for identification or possible linkage to unsolved crime scenes. With respect to victims, the DNA data bank legislation does not allow the uploading of a known victim's DNA profile to the crime scene index. Whatever the reasons may have been for this restriction, there are circumstances where police investigations are hampered. The most obvious is when the police cannot upload the DNA profile of a victim of a murder to the crime scene index when they are unable by other means to identify the victim. Without the victim's DNA in the national DNA data bank, the opportunity to link serial crimes together may be missed.

As an example where this linkage was made at the local level, it involved the case where a serial rapist put the first person's sweater over his subsequent victim's head so she could not see him. The sweater was left at the second crime scene. The sweater contained hair with DNA evidence from the first victim. Under the present rules that govern what can be kept in the crime scene index, none of the victims' DNA profiles from the various crime scenes could be uploaded or kept in the data bank. Therefore, no national linkage could be made to identify that these victims were linked to the same offender.

● (0915)

The other submission limitation is that not all crime scenes qualify as designated offences. As a result, the DNA profiles from non-designated offence crime scenes cannot be added to the national DNA data bank's crime scene index for comparison with other crime scene profiles or suspect identification by comparison with the convicted offenders index.

There are four problematic legislative restrictions on what the national DNA data bank can report.

The first is that convicted offender index profiles cannot be provided by the DNA data bank to police to be used to confirm identity where no other source of DNA for that person can be obtained.

Secondly, the DNA data bank is prohibited from informing the police of the identity of a person who is a close match to a crime scene index profile that is being compared to the convicted offender index. Although a match is close and likely a relative of a convicted offender, once it is determined that the convicted offender's profile is not an exact match to the crime scene profile, nothing further can be reported. The current legislation only permits the DNA data bank to communicate the identify if there's an exact match or if the person's DNA profile cannot be excluded as a possible match due to a technical limitation on the completeness of the DNA profile that was obtained from the crime scene. However, it is known that parents, siblings, and cousins statistically share more DNA profiles in common than do strangers. For example, even if the DNA data bank were to have a near perfect match so that it was close to being a genetic certainty, for example, that the offender was the brother of a person in the data bank, the data bank cannot report to the police that they should be looking for a close relative of the offender. Nor can the data bank do any further forensic DNA analysis on possible convicted offenders from existing DNA samples, to narrow down the list of the offenders who may have relatives who might be the actual perpetrator of the crime under investigation.

Thirdly, the legislation requires a specific request from a Canadian law enforcement agency to the national DNA data bank to provide DNA profiles to foreign states, to be able to compare them with profiles in their data banks. Foreign states must first enter into an agreement prior to any international sharing of DNA information with the Canadian DNA data bank, to undertake that the DNA information exchanged will be solely used for the investigation or prosecution of a criminal offence. The G-8 countries and Interpol have been considering ways to make greater use of DNA among states, given the complexity, sophistication, and reach of organized crime and terrorism. Canada has participated actively in these discussions.

The G-8 countries have agreed on the concept to develop a direct electronic system to compare DNA profiles among databases. If developed, each country would be asked, as a condition of participation, to agree on the restrictions imposed on the retention and use of the DNA information exchanged. Agreement would be required to use matches only for the investigation of criminal offences, unless other purposes, such as missing persons or mass disaster identification, are specifically agreed upon. Unless the current legislative requirements are changed, Canadian law enforcement agencies will not be able to benefit from a routine exchange of unsolved crime scene DNA. At the present time there are no blanket authorizations from any police force to be able to upload all crime scene DNA samples internationally.

And fourthly, with regard to international exchanges of DNA information, the national DNA data bank is under the same domestic restrictions as to what it can report concerning matches in the DNA data bank. The result is that DNA profiles of convicted offenders who may be internationally linked to sexual predators, organized criminals, or terrorists, or any possible connection to relatives of those suspects could not be reported.

That concludes my remarks. I would be pleased to respond to any questions you may have.

Thank you.

● (0920)

The Vice-Chair (Mr. Jack Harris): Thank you.

I don't want to restrict other speakers because the first two have used up a lot of time, but I am mindful of the time. We do need to have time for questions from our members. Perhaps you could be as succinct as possible in your remarks, please.

Dr. Ronald M. Fourney: Thank you. I'll try to be succinct.

The National DNA data bank is a program that falls within the scope of the national services and research directorate of the RCMP, which is part of Forensic Science and Identification Services. I'm the director of the national services and research group.

It is my pleasure to come before you to talk about the successes of the national DNA data bank. First of all, I'd like to point out that it's the national DNA data bank's very dedicated enthusiastic professionals who make this program work. Beyond the laboratory group in Ottawa, the data bank itself and the administration of the act represent a true partnership across Canada, with provinces—certainly with the provincial laboratories in Ontario and Quebec—and the RCMP laboratory sites contributing samples that go into what we call the crime scene index. Some of you may be familiar with that. We call that CSI.

I think credit is also due to the law enforcement and government members who make the process work in the interest of justice. The national DNA data bank assists law enforcement agencies in solving crimes by linking crimes where there are no suspects, helping to identify suspects, eliminating suspects where there is no match between the crime scene DNA and the profiles contained in the national data bank, and determining whether or not there is a serial offender.

It is important to understand that the national data bank consists of essentially two indices: what we call the convicted offender index, or the COI, and the crime scene index, called the CSI. The convicted offender index is an electronic database containing DNA profiles developed from biological samples collected from convicted offenders under court order or authorization. These biological samples are submitted to the national DNA data bank for processing, right here in Ottawa, and the resulting profiles are uploaded and entered into the convicted offender index, or the COI.

The crime scene index is a separate electronic index comprising DNA profiles recovered from crime scenes from designated offences. The biological samples are collected at the crime scene by police and are analysed in forensic laboratories operated by Ontario, Quebec, and the RCMP Forensic Science and Identification Services. We are now well into our ninth year of operations. We have more than 154,807 DNA profiles in the convicted offender index and more than 47,135 DNA profiles in the crime scene index. Comparisons between the DNA profiles contained within these two indexes can result in matches, or what we call “hits”, that are investigative aids for law enforcement agencies at both the national and the international level. The data bank is a tool that has improved the administration of justice by helping to focus investigations, linking investigations across Canada, and sometimes reaching back in time to provide that crucial piece of evidence in previously unsolved cases. This ensures that those who have committed serious crimes are identified, while the innocent and the wrongfully accused are protected.

I would remind the committee that it's equally important to remember how this tool provides tremendous exoneration potential when DNA profiles from convicted offenders do not match the DNA profiles obtained from crime scene evidence.

One direct measure of the DNA data bank's success is the more than 11,126 investigations assisted by hits to the convicted offender index. This includes more than 704 murder investigations and more than 1,490 sexual assault investigations. In addition, we have many forensic hits in the crime scene index that link crime scenes together and assist investigations in more than 1,730 cases.

The work of the national data bank extends well beyond our borders. The international sharing of DNA information from the national DNA data bank is managed through an international agreement with Interpol. The information that can be shared internationally is subject to this agreement, which limits its use to the investigation and prosecution of a criminal offence while maintaining the same strict requirements for data integrity and privacy as would be applicable domestically.

To date, as a result of this agreement, the national DNA data bank has provided assistance in four investigations at the international level. We do many searches as well.

An important milestone for the national DNA data bank was the full proclamation of Bill C-18 and Bill C-13 last January 2008, which added in excess of 172 designated offences to the list of those eligible for inclusion in the national DNA data bank. The results have been dramatic, with an increase in the number of convicted offender collection kits received by the national data bank from 18,467 the previous year, 2007, to a current 32,326 in the 2008 calendar year. This represents a 75% increase in the number of collection kits received in the first year that Bill C-18 and Bill C-13 had been fully proclaimed.

● (0925)

The automated technology and the processes employed by the data bank have been envied by many forensic laboratories in the world. The effectiveness and the efficiency of the automated protocols utilized by our national DNA data bank’s highly experienced and qualified scientists and technologists are demonstrated by the fact that there is no delay in processing samples for entry into the national data bank, even with a 75% increase in the number of samples we received in the past year.

In many ways, our protocols are unique in the ability they give us to track each sample, while at the same time ensuring the complete privacy and security of all samples and data. It gives me great pleasure to report that the data bank itself is recognized as a quality system, having passed the highest accreditation standard for a laboratory of its kind.

I hope that my presence here before the committee will help you and that I can answer any questions you may have. Thank you.

● (0930)

The Vice-Chair (Mr. Jack Harris): Thank you, Dr. Fourney.

Mr. Bergman is going first.

Deputy Commissioner Richard Bergman (Chairperson, National DNA Data Bank Advisory Committee): Thank you, Mr. Chairman.

I'll be as quick as possible. I know you're pressed for time.

The Vice-Chair (Mr. Jack Harris): Please take your time. I don't want you to have anything less to say than your other colleagues.

D/Commr Richard Bergman: Okay, thank you.

I'm appearing here today with two fellow colleagues from the National DNA Data Bank Advisory Committee: the Honourable Peter Cory and Dr. Ron Fourney. Due to previous commitments, other members of the committee were not able to attend.

The National DNA Data Bank Advisory Committee was established through regulations in early 2000, several months before the actual data bank opened in June of that year. The committee was composed of eight members, consisting of a chairperson, a vice-chairperson, a representative of the Office of the Privacy Commissioner, and up to six other members, who may include representatives from the police, legal, scientific, and academic communities.

Committee members are appointed by the Minister of Public Safety and the committee reports directly to the commissioner. The role of the committee, as stated in the regulations, is that the committee shall, when it considers it necessary, or upon the request of the commissioner, advise the commissioner on any matter related to the establishment and operations of the national DNA data bank.

The committee generally meets for two or three days at a time, normally twice a year in Ottawa. The meetings have also been held in Vancouver, Toronto, and Halifax.

Seven of the eight present members have served continuously on the committee since its establishment nine years ago. The representative of the Office of the Privacy Commissioner has changed from time to time since Mr. Bruce Phillips retired in late 2000.

The committee is fortunate to have Dr. Ron Fourney, who is an adjunct professor at Carleton University; Dr. George Carmody, a retired associate professor of biology at Carleton University; and Dr. Fred Bieber, an associate professor of pathology at Harvard University, as members, each of whom are internationally recognized experts in their fields and have published extensively on human forensic DNA issues.

During my tenure as a director of the labs, Dr. Fourney joined the RCMP as a civilian member in 1988 to lead the development of DNA technology and ultimately to build the national DNA data bank. His technical stewardship ultimately led to the creation of that data bank. Also, Dr. Fourney was the first Canadian expert to actually appear before a Canadian court on a DNA issue.

Dr. Carmody, the vice-chair of our committee, recently chaired a subcommittee of the U.S. scientific working group on DNA and local methodology, which published an important paper on moderate matching techniques. He's considered to be one of North America's leading experts in population genetics.

Dr. Bieber has published extensively on familial searching and has served on several expert DNA committees in the U.S. and internationally. He was a member of the Kinship and Data Analysis Panel at the U.S. Department of Justice to assist in the identification of those lost in the World Trade Center tragedy.

Dr. William Davidson, a professor and former dean of science at Simon Fraser University, has published extensively on molecular evolution, population genetics, genomics, and human genetics. He is currently a principal investigator on the Atlantic salmon genome project.

Madam Gisèle Côté-Harper, a professor from Laval University, has served on the Canadian Human Rights Tribunal, the Quebec human rights commission, the RCMP public complaints committee, and is an independent expert on the United Nations Human Rights Committee.

The most senior and highly respected member of our committee is, of course, the Honourable Peter Cory, a retired Supreme Court justice and presently the chancellor of York University. His distinguished background is well-known to all of us and his accomplishments are simply too numerous to detail this morning; however, our committee has profited immensely from his wise counsel during our many meetings.

We have also benefited from the information and guidance provided by Mr. Greg Yost and Mr. David Bird, both legal services. We're grateful for their timely advice.

We were recently advised that Mr. Raymond D'Aoust, our recent representative from the Office of the Privacy Commissioner will be retiring. Madam Chantal Bernier, now the Assistant Privacy Commissioner, will be joining the committee.

Our meetings include extensive briefings by the officer in charge of the data bank, the manager of the data bank computer systems, the DNA research office's field training coordinators, and a retroactivity project representative. Also included are briefings from the Ministry of Public Safety, the Ministry of Justice, and a representative from the DNA components of the six RCMP regional labs. The Centre of Forensic Sciences in Toronto and the Laboratoire de sciences judiciaires et de médecine légale de Montréal also attend our meetings.

From time to time we are also able to meet with senior officials from the United Kingdom DNA data bank and the FBI's national DNA data bank in Washington.

We also profit from advice provided through telecom links with directors of state laboratories in the U.S.

In meetings outside of Ottawa, the committee also meets with senior crime investigators from local police forces and provincial crown attorneys.

In addition, committee members have participated in national and international scientific meetings and several provincial and judicial conferences here in Canada. Examples of the issues discussed include topics from sample kit and documentation design through exhibit receipt, processing within the national data bank, and the ultimate inclusion of the profile within the data bank itself. Specific subjects include procedural adherence to the DNA Identification Act and regulations, privacy concerns and methodology, exhibit handling, protocols for sharing information, new technology development, budgets and staffing issues, legislation, and discussion concerning developing issues such as a missing persons index for Canada, victim sampling, and familial or kinship searching.

● (0935)

The committee has made numerous suggestions and recommendations to the commissioner during the past nine years. They've always been received and acted upon in a constructive and progressive way. Our annual reports are publicly available on the Internet.

On behalf of the committee, we're pleased to state that in our opinion the national DNA data bank is a significant success story. I thank you for the invitation and would be pleased to answer any questions.

The Vice-Chair (Mr. Jack Harris): Thank you, Mr. Bergman.

Justice Cory, would you like to say a few words?

Mr. Peter Cory (Member, National DNA Data Bank Advisory Committee): I have very, very little to add, Mr. Chairman.

If I were a member of this committee, I'd like to know if I were getting money's worth from it. I think you are.

There are all sorts of attributes to it. First of all, the dedication of the members who are in the scientific field is impressive. They've read every paper, their clarity of thought and of expression is first-rate, and the work the committee does is worthwhile.

There's an American statistic that shows DNA testing indicates that in 26% of cases the prime suspect is eliminated. That alone pays for itself when you think of wrongful convictions and the amount that's paid with regard to cases like Sophonow and all that it does to destroy the reputation of the justice system. That alone makes it worthwhile.

The aids to solution of crime are also there and are shown.

What would I say if I were asked what would be an improvement? There are two very simple things. One is an automatic requirement of the taking of samples in all the offences that are now designated. Sometimes, even in the most serious cases, judges do not order the taking of samples. I don't know why that happens. It shows the obduracy and the narrow-mindedness of judges generally, and I'll take full responsibility for that. It just shows how necessary it is to do something like some of the other systems do. This is the crime. It's taken automatically at the penal institution. It's taken away from judges and lawyers and gets down to sensible people doing what's required in order to supply the necessary samples to the bank.

Here is the second thing, if I had my druthers. Sometimes it's so frustrating when you see the report that indicates, no, there isn't a match, but the wrongdoer must be a brother of, father of, or son of someone in the convicted offenders index. Why tie the hands of the investigating forces with something as clear as that? Yet we cannot do anything with regard to that advice without legislative changes.

There are other things, long-range things that I think have to be considered. At some time there should be complete independence of the data bank from the RCMP, to take away any indication or taint of undue influence, just the perception of it. And at some time we're going to have to deal with the missing persons index. It's probably best taken care of through the data bank, with these facilities now, but with the proper safeguards, privacy. The committee does wrestle with the correct balance between proper investigation and the privacy issues that are always there, and the balance has to be kept.

That really is it, other than to say it's one of those things where it's a pleasure to serve on the committee, with the colleagues on the committee. It's a very small amount that I can help you with. I'm probably better at answering questions than anything else.

● (0940)

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): Thank you very much for your presentations. Unfortunately, I didn't get here on time for all of them.

I'd also like to thank Mr. Harris for filling in for me.

Without any further ado, we look forward to the comments and questions, beginning with the official opposition.

Mr. Kania, please.

Mr. Andrew Kania (Brampton West, Lib.): Thank you.

I think it's a very worthwhile program. I think we can all agree that we're here today to see what we can do to make it better.

I'll put my first question as a lawyer to Justice Cory. I'd like to hear about what you think the wisdom is in terms of eliminating the DNA samples of young offenders when their records are to be expunged, in contrast to, as I understand it, keeping the fingerprints of young offenders on file. I'd like to hear from you on that point.

Mr. Peter Cory: It was something that the committee discussed and debated. As you know, in Canada, we have always recognized that there are special safeguards that are necessary for young offenders, with their vulnerability and the desire to show themselves as big and tough. They're hardly that, but they believe they are.

In the same way, I think probably the wisest thing to do is to maintain that approach with regard to DNA samples. It's so easy to destroy the future of a young person and so difficult to get the young person back in a way that will serve society and that individual. It isn't an easy question. It was debated and that was the conclusion we came to within the committee.

Mr. Andrew Kania: In terms of a general question, since this act came into force in 2000, what scientific developments and advances would actually require the changing of this legislation at this stage?

D/Commr Richard Bergman: Perhaps that should be answered by the scientific staff.

Dr. Ronald M. Fourney: Since I began dealing with DNA in 1988, when I first started with the RCMP, I think there's been a major change every few years. The technology has to evolve to the sophistication of the ability to discriminate individuals, that is, the identity. We also are becoming very good at getting a lot of information from a very small sample and some of the most challenging of those samples.

Essentially, this technology is always moving quickly. I would think the responsibility for the national data bank under the custodianship of the commissioner is to ensure that our best technologies are always being put forward to provide the highest-quality result with the most amount of information and discrimination.

From that perspective, it is a considerable challenge. As scientists, we enjoy change. But that's not so for all the individuals we deal with, such as the courts, for instance, and the legal community that has to serve the courts. They've become used to one technology, and we've switched it on them. I can remember when testifying in the Legere trial, they suggested that we should be licensed, or something along those lines, with the changes in technology.

I would think we're doing very well in the data bank. The automation that we put forward in early 1999 and 2000 is serving us well. But as scientists, we're going to change that technology. There's going to be a faster, quicker, and better means to determine identification.

From the World Trade Center, we know that the technology utilized in some of those most difficult samples is just now entering into the forensic community as a routine process. There are technologies involved, such as what we call Y-STRs. It is essentially the ability to zero in on the discrimination of the Y chromosome that is found in all males. It becomes a very significant technology if we have a sexual assault, where there are multiple donors of the sample, for instance, a semen sample. It's a way of discriminating that. We fully envisage that many of these technologies that are just being explored today will become in vogue with forensic scientists all over the world.

The data bank will have to maintain that pace. You have to realize that the national data bank is truly a national service. Although it falls under the custodianship of the RCMP, it is a library of information that is provided not only to the RCMP forensic laboratories but to those laboratories serving Ontario and Quebec. If those laboratories want to change the technology, for instance, to improve the information they can get from the crime scene index, we're obligated to have a look at that as well if it's in the national DNA data bank.

● (0945)

Mr. Andrew Kania: With the proclamation of Bill C-13 and Bill C-18 you've had a lot more work to do. I'm wondering how you're coping with the additional workload and how that relates to the budget you have. It says here it's $2.6 million in the last fiscal year. I'd like to know how you're coping with that and frankly, to be blunt, whether you have enough money.

Dr. Ronald M. Fourney: We've done very well with what we have, and obviously with every change of legislation. The last one in particular—a 75% increase in the number of DNA samples. That's with a staff of 24 individuals. Our full budgeted staff would be 32.

Originally when this data bank was created it was envisaged at around $5 million a year. What we're averaging is between $2.5 million and $2.8 million, and that's just on supplies, equipment, and basic payroll. There's a lot of other infrastructure that the RCMP provides with regard to security, the building, maintenance, and other things that aren't counted in that annual report estimate. I would think that if there was any change in this legislation, such as time of arrest, we would definitely have to hire more individuals and equip our facilities a bit differently. It's like anything else.

The way the DNA is processed is with a standardized kit. When we first started this technology way back in 1988, some of us were the creators of what is now in the kit internationally. I find myself actually using technology that we helped create. I think it's important to realize that once this becomes commercialized, it also has a price associated with it. So more samples are going to cost more money to process.

The long and short of it is—I think I'm on record—we're pretty good up to about 60,000 samples as long as we escalate our staff numbers and keep upgrading our equipment. Beyond that we will have to very carefully consider the changes that are necessary to absorb more information to develop those DNA profiles.

In terms of the funding, the national data bank has not received any external funding since 2005. It's all money associated through RCMP internal resources at this time, so there is no A-base funding for the national data bank. I think that's one of the issues that certainly the advisory committee has pointed out on a few occasions.

Overall we're doing well, but any changes with technology are going to cost more money, and I think we would have to handle that with more staff and more equipment.

In terms of the estimated cost of change, it largely depends on how big the sample collection and processing umbrella would be. At time of arrest, I think my colleague Mr. Yost has indicated that perhaps 195,000 more samples would be envisaged.

In view of that, depending on the safeguards put in place with such an event, we would also have to take out a number of samples. Potentially 32% of what goes in would have to come out at time of arrest for reasons such as the courts have found the person exonerated, or what have you. With the system we've developed and the privacy and security surrounding it, no one in the national data bank actually knows the identity of the individual they're processing. Because of the number of walls and privacy shields that are put in place, you can imagine what would have to happen to take a sample out. That's an awful lot of work. In some ways, and I don't want to guesstimate on the cost, it could be as expensive to take it out as it is to put in.

● (0950)

The Chair: Thank you very much.

We'll now go over to the Bloc Québécois. Monsieur Ménard, please.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you, Mr. Chairman. I would like you to give me a 30-second notice before the end of my questioning, so that I may ask a small question. You will not regret it, I swear.

I also practised law for years. Justice Cory, it would seem that you answered the first question I wanted to ask. We are here to do a five-year statutory review of the act. Do you not believe that, at least in the name of the appearance of justice but also for other reasons, it would be preferable for this type of data bank not to come under a police force, but rather fall under an independent arm's length organization within a department? You can just imagine, for instance, what a communist regime could choose to do with these types of data banks. Do you not believe that, in the type of democracy we live in, we believe that not only is justice important, but the appearance thereof as well?

[*English*]

Mr. Peter Cory: Forgive me if I respond in English. Following the Sophonow case, I spent two years in England and Ireland on their collusion inquiry into the six murder cases, and there wasn't

[*Translation*]

no newspaper, no radio station, no French-language television station. You'll have to excuse me—and so will my mother.

[*English*]

You said something that's very important, but appearances are also extremely important, particularly with regard to matters judicial and legal. And by that I mean the appearance of complete independence. Sometimes that difficult issue has to be dealt with for the sake of the ongoing reputation for independence and reliability of the national data bank, which has become such an important and integral part of crime investigation and for seeing that the innocent are acquitted.

How is that going to be done? With difficulty. You have heard of the assistance that the data bank receives from the Royal Canadian Mounted Police: security of the building, security of the samples and everything that has gone into that. That represents a great deal of extra funding that is right there, which would have to be replaced to give that independence that I think is eventually going to be essential to the operation of the data bank.

So I remain committed to the importance of appearance, so that every layperson can say, yes, it is a reliable and independent organization. But it's going to have to take into account funding in these difficult times, which we all realize are a real problem—an emergency. If you take away the RCMP assistance that the bank now receives in so many ways, the bank will require a significant amount of additional funding. That is something that has to be taken into account in arriving at the balance.

[*Translation*]

Mr. Serge Ménard: The idea, however, of having it come under another major organization may be a disadvantage from a financial standpoint. If this other organization has a number of priorities and has to use its limited funds to address all of them, in the end, there may not be enough funding for the data bank.

I have noted that, despite a stated 30-day turnaround time to deal with current investigative requests, the average response time is now 118 days in 99% of cases. That seems to be what is indicated in the notes that have been circulated to us.

We all believe, and I'll be the first to say it, that Ms. Arbour underestimated the significance of the data bank when it comes to fingerprints. Extraordinary progress has been made for the advancement of justice and we now have the assurance that many fewer innocent people will be convicted, which is already quite something, but victims may also be able to track down their abusers, specifically in cases of rape but also in other cases.

My question is for all of the witnesses. Do you indeed need more money to reduce your turnaround time from 118 days to 25 or 30?

● (0955)

[*English*]

D/Commr Richard Bergman: Thank you for the question.

In fact, the word “backlog” has come up in the past, and the issue of 180 days relates to the actual time taken for samples to be analyzed by the regional laboratories, the six RCMP labs, the Centre of Forensic Sciences, and the Montreal lab, all of which are backed up and take time to process samples from crime scenes. The data bank actually has no backlog. It never has had a backlog, and in fact every case goes through the data bank in less than a week. So there are two separate issues here, sir.

Mr. Peter Cory: Your issue is demonstrated to us in Halifax, when police were advising us that it often took too long—90, 180 days—and as a result they weren't even submitting DNA samples.

Those issues for the local data banks and laboratories are something distinct from the DNA data bank itself, but for the use of DNA, all I can say is that I found it extremely worrying and something that should be of general concern because it can help with regard to the investigation, the identification of a wrongdoer, and the exoneration of the innocent.

The Chair: You have 30 seconds.

[*Translation*]

Mr. Serge Ménard: I have a very brief question. My wife and I knew that our daughter was pregnant. Yesterday she had her first ultrasound and was able to find out whether she was having a boy or a girl. We learned that not only was she expecting a girl, but rather two girls. Each one has her own placenta, so they will not be identical twins.

I would like you to confirm something for me. Identical twins have the same DNA whereas non-identical twins have different DNA, is that correct?

Mr. Réal Ménard (Hochelaga, BQ): I am an identical twin, but I do not have a criminal record.

[*English*]

Dr. Ronald M. Fourney: Yes, there are two types of twins. Fraternal twins, which is what you described, would just be like having a brother and a sister born at different times. They will have similarities to the parents, but they're quite distinct and different.

On the other hand, there are identical twins, of which we have, I believe, 72 pairs right now. It's in the annual report in the national data bank. One of the safeguards that we employ here is that the fingerprints are taken at the same time as the samples collected, even though the data bank doesn't know the individual by name or identity. The fingerprint is associated through the criminal history files and acts as a safeguard.

As a scientist myself saying that no two people in the world have the same DNA profile, and then immediately finding out that we have a number of these individuals in the national data bank, you can imagine that can be a bit disconcerting. Fortunately, fingerprints are able to distinguish between identical twins, and that's actually a quality assurance that we've built into the process right at the beginning.

● (1000)

The Chair: Thank you, Mr. Ménard.

Those of us who watch *CSI* would have already known this information.

Dr. Fourney, did you have any comments? I did not give you an opportunity to comment on the independence of the DNA data bank. Do you have any view on that?

Dr. Ronald M. Fourney: I'm a member of the RCMP, so I'm caught there, I guess.

The Chair: That's why I asked you.

Dr. Ronald M. Fourney: We truly are a national service, a component of the RCMP that delivers service throughout Canada, not just with the RCMP members but through all our laboratories as well as other federal requirements as necessary.

Although the paycheque comes from one source, I would think that the safeguards and certainly the procedures we use and how we serve have a certain amount of independence. You're right. There's always that optic associated with this.

The Chair: Thank you.

Mr. Harris, please, for seven minutes.

Mr. Jack Harris: Thank you, Mr. Chairman.

Both Justice Cory and Mr. Bird indicated the concern that the statute did not permit the use of familial relationships. I'm wondering whether or not paragraph 6(1)(c) is adequate.

It allows information to be shared or communicated if the profile is, in the opinion of the commissioner, similar to the DNA profile that is already contained in the data bank. Information related to that can be released. When I saw that there in reading the act, it seemed to me that it might be broad enough to cover that. Somebody obviously has concluded that it's not, from both of your comments.

Would you care to reflect on that?

Mr. David Bird: The issue of a similar match is really to deal with cases where it can't be excluded on the first time through. In other words, I believe in the data bank there are 13 loci kept in their convicted offenders index. Sometimes they get crime scene profiles from police agencies, either in Canada or abroad, that use a different system, and they have nine or seven loci.

The problem there is that they match up to a certain point, and then they'll continue on. The data bank would then have several matches at what they call a moderate stringency, which says that these are close and there are these further matches—we match up to this point, but beyond this there are other DNA profile loci that we have, which could be those. They could give those profiles abroad and ask for further analysis to see whether or not it can be narrowed down to this list, so that they can further go back and get the identification information and determine whether they have a real match or not.

The whole purpose is to determine whether or not we have an exact match. Once you get to the point where it's scientifically proven that the person doesn't match, no other information can go ahead. If you get to the point where you have a degraded DNA sample from a crime scene that has limited DNA profiles, it's possible that it matches a number of convicted offender profiles, and the data bank can report up to that point that it has those matches. That's as far as it can go. But as soon as it's excluded, no other information can be given, even though it might be very apparent to the people doing the analysis that there are enough similarities in the DNA profiles that they have to conclude this is probably a relative of that person, which is familial searching. That familial searching report cannot be given. All they can do is report that they have a match or not, until they can get it down to a scientific certainty that there's enough loci in common to not exclude—in other words, if the DNA profiles in the data bank are largely the gold standard, but at the crime scene they're less than that, then up to a certain point you can say yes, we match to this point, but we match four, five, or six convicted offenders, because the completeness of the DNA profile from the crime scene isn't there. It allows them to do further research into narrowing down the possibility that the crime scene matches a convicted offender. If it doesn't, then that's excluded. But it could be in the process, as I said, of knowing that these different loci are close enough that the inheritance would suggest that the loci that are in common, but different, suggest a close relative.

● (1005)

Mr. Jack Harris: I'm not certain about what I'm hearing, but am I right in saying that, for example, with my brother and me, you would determine that it's definitely not a match between the two samples, because we have different DNA and you have very good samples for both? You could say, as you just did, that my brother's profile and mine would be similar, but that doesn't qualify as being similar in the opinion of the commissioner under this particular section of the act.

Mr. David Bird: No, it doesn't.

Mr. Greg Yost: I would just add that what paragraph 6(1)(d) talks about cannot be excluded. That's where the difference comes. The data bank advisory committee, as you've heard, has some international experts on this.

My understanding—and every time I talk about the science, Dr. Fourney winces—is that each loci has two, so there are 26, and when you get around 18 or 20, the geneticists will tell you those are going to be brothers or sisters, that sort of thing. But if one or two of them are off, they're simply not allowed because that person has been excluded. So they could not tell the police they're probably looking for the brother of Joe Blow.

Mr. David Bird: If I could add, it's a specific offence under subsection 6(7) of the DNA Identification Act to report information not permitted by the section itself. All the information you can report is set out in 6(1), and we have to advise the police that they cannot be given this information or else it would be an offence. That's usually not very well received by police forces.

Mr. Jack Harris: I understand that, but my concern was the interpretation of subsection 6(1) in terms of what “similar” means. Apparently it means something very specific, having to do with the number of matches in a particular sample.

Thank you.

Mr. Bird, I believe you were talking about the concern regarding restrictions on international use of the data banks. You seem to be complaining that the restrictions are too serious, at least in your opinion. Am I overinterpreting your remarks in section 3, where you are maybe not complaining but are talking about how you would expect a direct electronic system to compare DNA profiles between databases to work?

Your last sentence there reads that at the present time there are no blanket authorizations from any police force to be able to upload all crime scene DNA samples internationally.

Is that a complaint of yours? Do you think we should be throwing all these DNA samples that we've collected into the international milieu and allow police forces or other countries to use it, or misuse it, despite potential agreements to the contrary?

The Chair: Mr. Harris, that will have to be your final question.

Go ahead, Mr. Bird.

Mr. David Bird: Thank you.

My concern here is that in order to efficiently exchange DNA profiles, it should be done electronically on a largely bulk basis of the unsolved crime scene profiles that the data bank has. Otherwise there isn't any personal information attached to this. It's evidence that's been left at a crime scene that may have come from the prime suspect. It can't be sent abroad routinely in a bulk way to see whether it might fortuitously match a convicted offender or other crime scene in a foreign jurisdiction.

Obviously we would expect closer transfers of DNA suspects from closer countries, such as the U.S., but it's possible that given the rapid mobility of certain offenders, they may be European or from somewhere else in the world, and that by exchanging our DNA profiles routinely from our crime scene, which is anonymous and for which we have no identifying information largely, we could solve those crimes.

It's particularly significant when you have international connections. You are dealing with an international criminal in some form who is committing crimes here and abroad, and if they link together, you may be able to disrupt or prevent a serial offence from happening further somewhere in the world, whether that's terrorism or sexual predators, or just international organized crime.

I think the G-8 countries have recognized that this cooperation would be very useful. There are a lot of technical hurdles, because of the different systems involved, to make this work, but as a matter of routine, we would have to get a specific request under the current legislation from the police force involved to send their crime scene profiles abroad. That is logistically difficult for us, because we can't simply send our crime scene index and say, “Would you search this routinely abroad?” We would have to go through and find out which of those samples we have a specific request for and international search for, which is a logistical problem.

● (1010)

The Chair: Thank you.

Mr. Yost, did you have a brief comment? No.

Mr. Harris, your time is up.

Mr. Jack Harris: I realize that, but you don't make the distinction in your remarks between the crime scene investigation and the whole data bank itself, because that's a different issue entirely.

Mr. David Bird: It would only be allowed by the crime scene, the DNA profiles.

Mr. Greg Yost: Mr. Chair, I did have a brief comment.

The Chair: Oh, you did have one. Okay.

Mr. Greg Yost: It's just to keep drawing the attention to what we tried to do in Bill C-13 and Bill C-18, the reference to samples being sent abroad. Mr. Bird refers to profiles. We're talking here about the computers comparing numbers. We're not talking about the bodily substances we have gathered here being shipped to another country for them to do that. That would not be part of it. It's just the computer numbers, the profiles.

The Chair: I appreciate that clarification. Thank you.

Mr. Norlock, please.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you.

Thank you, gentlemen, for being here today to talk about this very important subject. It's way far overdue. We should have been dealing with this several years ago.

Listen, one of the things I do, especially when we have witnesses, is to think about the average Canadian who's sitting at home, who may want to look at the committee work, who may be listening or watching or reading what has gone on here, who is trying to understand. Most people don't look at the complexities. They look at what they've heard and seen on television. And I'm not referring to *CSI*, I'm referring to the news reports.

I am getting to a question here.

People just want things to get better. They expect the police, the scientists, and the forensic laboratories to work toward catching the bad people and protecting the innocent victims—in other words, protecting society as a whole. Sometimes the complexity of our legal lobby, as I call it, or the legal machinery, tends to almost turn the public against the very thing they should have faith in.

Often I and my friend here, with whom I share caucus, will discuss the separation between the police and forensic labs, etc. Then I hear the suggestion that the police somehow taint things because of their association with them, that the police cannot be close to the scientists, that the police cannot be close to judges and lawyers, that they bring a.... I know there needs to be a separation, but we need to have some faith that the right men and women are there.

This leads me to the next point—namely, not being able to use some of the samples or not being able to use information that is gleaned from other countries. Criminals and crime don't know boundaries and don't know borders. I can't speak about a specific case—I believe it's still on the go—but we have people who abuse children internationally. Because of the great abilities of our system, whether it be fingerprints or DNA or being able to descramble photographs, we can identify criminals. My alarm bells go off when I hear that this country does not accept or cannot assist investigators in identifying the perpetrators of horrific crimes against our children—or against any person in society, also including terrorism.

I don't know who should answer this, Mr. Bird or Mr. Fournier. I think you've talked about it, but in simple terms, why can't we just use information from external forces and let our police know, or the police in other jurisdictions know, so that they can solve crimes and protect people?

Mr. David Bird: Perhaps I could make a first stab at that.

I think this comes back to the original concerns that Parliament had about DNA in the hands of the police. Going back to the very beginning of the DNA debates back in 1998, and before that, there was certainly a lot of debate around how much information the police would be allowed to have concerning DNA taken from citizens—how it was kept, how it was transmitted. The end result was a very restrictive regime about the keeping, using, and transmitting of information that the police had from DNA that is kept in a database nationally.

I believe that's why we're seeing restrictions imposed by the legislation on what can be reported abroad and shared with respect to DNA specifically.

● (1015)

Mr. Rick Norlock: Would you feel brave enough, or would the group of you feel brave enough, to make some suggestions with regard to loosening those restrictions, and maybe share them with our researchers so that we could draft appropriate legislation or amend the current legislation to permit the common-sense use of this information?

Mr. Yost.

Mr. Greg Yost: That rather touches policy.

The simplest way, in my view, would be to amend the DNA Identification Act so that the commissioner—or an independent body, if we end up with one—would be allowed to transmit any information they have that may be of assistance to a law enforcement investigation. Let them work out whether this moderate match or kinship analysis is going to be worthwhile in that investigation. Rather than have these blankets of "it's in" or "it's out", it would be simpler to do it that way. Obviously, safeguards can be put in—requirements for annual reporting as to what's been done, etc.—so that Canadians will know that nothing's going on.

I was at a conference in the United States at which some of these issues were being discussed. The scientists down there were quite incensed by suggestions that they would be manipulating the DNA. They run it through there: "This is the profile that we derive and this is how we did it." The suggestion that they could change that in some way in order to assist the police, when it has to be rechecked and submitted to the defence so that they can get their own experts to check their analysis, if they wish.... They were quite incensed at the suggestion that they could twist things for the police.

Mr. Rick Norlock: Thank you.

I suppose I'm going to go to Judge Cory with this question. Do you think it would assist those in the legal community, especially adjudicators, if there were a national separation, as there is in Ontario and Quebec, of forensic labs, making them a stand-alone agency? It goes to the question of sharing information internationally. In your opinion, would that somehow relieve the worry that somehow, in some way, the association with the police taints or influences the work of the folks in the forensic field?

Mr. Peter Cory: The answer is yes. It's something that doesn't have to be done quickly or overnight, but yes, the appearance of independence is important to everybody involved in the judicial process. Somewhere down the line, it's something that has to be considered and that I think should be done.

With regard to amendment to the act, why shouldn't something as simple as specifically giving permission, where there is not a match but every likelihood that it's a sibling or fraternal...be disclosed, so that there can be further investigation? It's a relatively small amendment that might prove to be of great assistance to the investigative forces, without in any way jeopardizing privacy or anything else of concern.

D/Commr Richard Bergman: Can I comment on that?

My background is 35 years in the RCMP, and I was a forensic scientist. Ultimately, I became a deputy in charge of the National Police Services, under which the data bank falls. Within that service, there is the national fingerprint repository, the criminal records repository, the DNA data bank, the firearms registry.... Several federal registries fall within that particular area of the RCMP, and they serve all Canadian police forces across Canada.

While I was in the laboratories, we took great pride in the fact that we felt we were independent in some ways from the RCMP, even though we were in the RCMP.

If the data bank were to be moved out, then why not the fingerprint repository and the other repositories that serve Canadian police forces?

● (1020)

The Chair: That will be final.

Mr. Rick Norlock: The thrust of the question was about hiving off the forensic work, similar to the way it has been done in the province of Ontario and, I suspect, the province of Quebec, making it a stand-alone agency, which can be done gradually. I don't think it would be a huge expense.

I see Mr. Fourney wanted to comment.

Dr. Ronald M. Fourney: I was just going to make some observations. You asked what the average person on the street thinks about how we could improve certain components. For me, I'm kind of a common-sense individual. Even though we're surrounded by high technology, the reality is this: what do we do with it, and where should we go with it?

The legislation is the rule book. Of course, we develop the science to abide by the rules. I would like to suggest a couple of things that are interesting to me and puzzling at the same time, having been in this program for over 20 years—from the beginning—developing DNA.

A very simple one, for instance, as was mentioned by my colleagues here, is not being able to include a victim's sample in the crime scene index. In reality, there are a lot of privacy and security issues to be concerned about. Certainly, if the person were living, there would be the issue of getting proper consent. Once again, it would essentially be another sample that's sequestered and used in some manner we could abide by within the data bank. We can abide by those rules, but the rules are just not there.

I'll give you an example. We've had instances when a torso—a headless, armless, legless individual—has been found somewhere. It is obviously a victim, but at the same time, the blood that comes from that individual goes back to another crime scene, so we're enabling a link. We can't put that in the crime scene index and search it. That's an incapacity on which we should be going forward.

The comment was made with regard to evidence left at the scene of the crime that is transferred. That's the basics of forensics. It's called Locard's principle: you can't go into a room and come out without leaving a trace.

I think the case they were talking about was a series of sexual assaults. The sweater of the first victim was pulled over the head, the victim was sexually assaulted, and that sweater was transferred. The perpetrator took it to several crime scenes, and at the last crime scene the sweater was lost. The key piece of evidence there was the hair on the sweater that did not belong to the last victim and did not belong to the perpetrator. It belonged to another victim somewhere else. It took a lot of experience and investigative skill to put it all together. If that sample had been allowed to go into the crime scene index, you would have had your answer right away.

In some ways, I respect the fact that we're walking before we're running. I was before the Senate committee when the green light was given for royal assent to create a national data bank. I would remind the members here that it took 10 years to get to that point.

I think we've made a lot of headway with regard to how we use this technology, certainly in terms of privacy and security. I hope this committee considers where we should be taking this. We've taken it for a test drive. Now we can do far more.

The Chair: Thank you.

Dr. Ronald M. Fourney: Having been involved with things like Swissair and the identification of those victims, we know the responsibility involved with familial searching and kinship analysis, but there are also ways to deal with that.

The Chair: Thank you.

We'll go to Mr. Oliphant, please.

Mr. Robert Oliphant (Don Valley West, Lib.): Thank you, Mr. Chair.

I have three questions, if I have time to do this. The first is on judicial discretion, the second is on expansion of the dragnet, and the third is on error rates.

I would always want to give judges more discretion rather than less. So I was a little surprised that Justice Cory was less willing to do that. Remarks made at a judges' conference—

Mr. Peter Cory: It's just as well that I retired.

Mr. Robert Oliphant: —by Mr. Bergman, I believe, and Mr. Davidson, from your committee, and I believe the justices as well, scolded judges, really, for not having used their discretion more on secondary offences.

We've also seen an increase in the number of samples taken since then. I'm wondering whether your scolding worked, whether we needed to take away the judicial discretion, and whether it's working. Is there any sense of that?

The judges felt scolded. I'm not sure that you scolded them.

● (1025)

D/Commr Richard Bergman: We didn't intend to scold them. At the time, I think it was a matter of trying to provide more information to the judicial community, and we were invited to do so.

Would you like to answer the question on discretion?

Mr. Peter Cory: Yes. Some things I cannot comprehend. If you take the original designated offences, very serious crimes, there should be an automatic 100% filing of the sample on the conviction of the individual, and there isn't. I don't know how to explain that. It may be a working of judicial independence, I don't know, but that sort of thing is worrisome. That's why if there were to be something done that would be helpful, it would say that once there is a conviction there would be an automatic taking in those offences that are referred to, and that it would be done probably at the penitentiary. It shouldn't rest in the courtroom, or with the judge or the crown to make sure that he or she requested that the sample be taken. It should be something that's purely automatic.

Justification, if that should be needed, is other independent democratic countries that follow the system, certainly Britain, France, Germany, and the European community, and most of the states in the U.S. It's something that could improve, because the magic is the more samples within the data bank, the more hits that are obtained, the more crimes solved.

Mr. Greg Yost: With respect to judicial discretion, I've never fully understood why we are getting so few orders in, not just in primaries but particularly in secondaries. In 2001, in a case called Hendry, the Ontario court of appeal concluded—they were looking at four appeals where orders weren't made:

> On balance I would expect that in the vast majority of cases it would be in the best interests of the administration of justice to make the order under s.487.051(1)(b)....

—which was the secondary designated offences—

> This follows simply from the nature of the privacy and security of the person interests involved, the important purposes served by the legislation and, in general, the usefulness of DNA evidence in exonerating the innocent and solving crimes in a myriad of situations.

When that decision came out, I was expecting a flood of decisions to come in, and yet we're getting 15%, 17% of secondary designated offences. I don't know if the crowns aren't appealing or the judges are turning it down, but with this judgment I was expecting we were going to get about 100% of them, but we aren't.

Mr. Robert Oliphant: This would be moot if Toronto's police chief, Mr. Blair, has been advocating that we expand the dragnet to include all those at the point of being charged with a crime. You've alluded to that. It's similar to Great Britain. I'm fairly quickly wondering where you stand on that as people who are experts on this question.

Mr. Greg Yost: I'll take the first shot at it. I referred to the fact that this paper we've distributed has been changed frequently, and there's a reference to a Marper case in there. The United Kingdom's House of Lords unanimously upheld their system of "take it from everybody for just about anything and keep it forever", and they did it on the grounds that there were a lot of people who were picked up who were found guilty of very serious crimes in due course, and they wouldn't have been found because they weren't charged, etc.

That went to the European Court of Justice last December. There is now in the paper that they struck that down. They felt that taking it from people as young as 10, having the police decide whether you can come out as opposed to a judicial process, and taking it for crimes that you can't even go.... Recordable offences cover a remarkable range of offences. There's a regulation that I have at the office. Besides everything that you can be sentenced for, which would be our summary convictions as well as indictables, it also includes offences like racial chanting at a football game—that's my favourite example of what it covers. So they said that was just beyond all the limits. Even though other countries in Europe do take it from some people on arrest, they don't take it for every offence and they don't take it from young offenders, etc. There's a margin of manoeuvre that they talk about, but the British system had gone too far.

So I think with proper safeguards we could—particularly as we already have, in my opinion, the finest protections for privacy in the world for this information—design something that's appropriate to take it there. It has enormous advantages for the police. They have the person right there; they can do it right then and there.

● (1030)

Mr. Peter Cory: A lot of the wording is very similar to Justice Dickson's in some of the early cases with regard to our charter and with regard to search warrants. When I looked at the decision of the European Court of Human Rights from Stavros, it's a very good, thorough decision and it represents or reflects some of our early charter decisions. And if there was an independent type of entity that could review what was being done, that might have been a solution. But it's very clear, and it's fascinating to compare that to Justice Dickson's reasons with regard to search warrants.

The Chair: Mr. Bird.

Mr. David Bird: Mr. Chairman, could I add something? This follows up with the question by Mr. Norlock as well. I think this committee's recommendations are going to be important to the way we proceed forward with any potential bills to amend the legislation. I believe it's been an issue that all of these issues have been parked pending the completion of the five-year review with respect to the government's policies to be developed respecting many of these issues. And I would also point out that the Supreme Court of Canada, in the case of Rodgers, had commented in its dicta that they thought it a good idea to have judicial oversight on the issuance of convicted offenders orders, but that it wasn't necessarily legally required given the privacy protections that had been instituted around DNA samples in the DNA data bank.

So it is now my opinion, at least, that the way is open for us to consider amendments to the legislation to allow it to be considered to be taken at time of arrest or charge, depending on which way we have to go with fingerprints as well, and that potential as there, but that debate could now be put forward to Parliament for further consideration.

The Chair: Thank you.

Mr. MacKenzie, and then we'll go to the Bloc Québécois.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair, and thank you to the panel.

Dr. Fourney, I wonder if you could answer the first part and perhaps Mr. Bird or Mr. Yost could answer the second part of my question.

The first part would be so that people understand what it means to have a sample for your purposes, a sample taken from an individual. I'm wondering if you could explain to everybody here what that really means. Is it taking of saliva, blood, whatever?

Dr. Ronald M. Fourney: There's provision within the law to take either a hair sample, a saliva sample, or a blood sample. This was discussed extensively over a long period of time. In fact, just as we were designing the kit that we currently use today, we had the unfortunate circumstance of Swissair 111 going down off the coast of Nova Scotia. The test kits that we were just evaluating were put into service at that time throughout the world to collect controlled samples for identification of those victims through relatives. At that point I guess we did a pretty good job, because every single kit came back, and we got a perfect result. So we knew we had a good idea of what to take.

The principal sample is a blood sample, which is essentially a finger prick onto a special type of card. The card itself is kind of our secret weapon. It looks like a normal piece of paper, but it was developed in the outback of Australia. They put chemicals on it to preserve the DNA so you do not have to refrigerate this, and as a result it also prevents viral and various agents like hepatitis and bacteria from impregnating the DNA and breaking it down, so it's a natural preservation material that you can store at room temperature. It also became a very nice way of collecting the sample with a small finger prick. Of all our samples, 98.5% are blood samples.

Buccal swabs, which are collected by putting a delightful-tasting piece of styrofoam in your mouth and then putting it onto the same FTA-type card or this type of paper collection card, account for only 1.3% of the samples in there. Samples are technically blood. There is discretion to take a buccal sample if you need to, or if there's a concern over an individual with regard to a disease or a hemophiliac situation. I can tell you about problems we've had with the buccal swabs, as interesting as that may sound. We've sometimes had mixtures show up in the actual DNA profile, indicating two individuals. You could imagine seeing DNA for two individuals on a card and wondering what the heck's going on here. As a scientist, you immediately think something's wrong. As it turned out, the people that we collected these samples from had mixed saliva. They had had a donation of saliva from another individual and had deliberately done this to try to confuse us in the national data bank, so the next time we went back we would take another type of sample. It would be hard to do that with blood unless you had a blood transfusion right before we took a sample. But blood tends to be the one we use.

It goes on a piece of white card. There's an associated form with that card that has all your personal information. There's a link with a bar code, essentially like a supermarket code on it, that ties this personal information, including fingerprints, to the donor card. That has no direct identification of the individual on it, but the name of the police officer who took the sample, as well as where he or she is from, would be on the card. It comes into the national data bank. We have a kit reception area. Those people are trained to know fingerprints, so they match up the personal information on a separate sheet, called a 3801, with our card to make sure there have been no mix-ups, or what have you, that they hadn't collected two individuals at the same time and mixed up the cards. So it's a quality assurance procedure. At that point, the cards themselves, which are anonymous, and have essentially a special number that we encode in them, go through the entire database. They are uploaded, and there's no identity attached to them. You just become a number in the national DNA data bank.

We often have people phone up and ask if a specific person is in the data bank. The only way they would know that is by checking the files from CPIC, the Canadian Police Information Centre, to see if there's a flag there that says a sample has been collected for that individual. The form itself, with all the personal information, goes to a completely different registry where it's entered and verified and the criminal history is checked out. At that point there's a clear, distinct division between the personal information and the genetic or DNA information. So that's essentially how our process works.

● (1035)

Mr. Dave MacKenzie: Okay. I just wonder if either Mr. Bird or Mr. Yost would answer. What would it do if the Identification of Criminals Act were amended so that it didn't say that we just take the measurements by the Bertillon system, but we also took a DNA sample? Would that not fit the criteria we're talking about?

Mr. David Bird: I'm not sure that where the requirements are kept, in which legislation—whether it's the Identification of Criminals Act, the DNA Identification Act, or the Criminal Code—will change the process. In essence I think where it's up to the discretion of the police as to what type of sample to take, they can take blood, buccal, or hair. Hair, I believe, has a 5% error rate, and its use is discouraged, but there are cases when the police at the time should use their discretion to determine whether or not it's appropriate to take blood. There are medical conditions, such as for people who have had blood marrow bone marrow transplants, or there could be a contamination aspect.

Mr. Dave MacKenzie: But would that not fit the criteria of individuals from whom we want to collect the samples, more than what type of sample we collect? That would be my question.

Mr. David Bird: Oh, if the issue is whether we should be collecting from people post-conviction or at time of arrest, then it would be from the Supreme Court of Canada's decision in the Rodgers case. They could make very little distinction between DNA and fingerprints for the purposes of simply revealing identification information, and that's what it's used for. So, in essence, we could treat them both the same.

● (1040)

Mr. Greg Yost: Strangely enough, the Identification of Criminals Act allows persons to be fingerprinted, photographed, or subjected to such other measurements, processes, and operations having the object of identifying persons as are approved by order of the governor in council. In theory, we could have brought in DNA on arrest by a regulation under the Identification of Criminals Act, but that is not a move we're prepared to do without parliamentary direction.

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: Thank you, Mr. Chairman.

I would like to ask a few brief questions necessitating brief answers which I think will be very useful in our deliberations on possible changes that could be made. I should say that I've taken good note of Justice Cory's very specific recommendations.

It would be difficult for you to explain the method you use for codification. However, I would imagine you could provide us with written material on how this is done which we could look through in our free time, as to whether this process is international in nature and whether it is possible to draw comparisons with other jurisdictions.

The cost for the RCMP of one DNA analysis has already been assessed. Could you tell us how much it costs, on average, for the RCMP to analyze one DNA sample?

[*English*]

Dr. Ronald M. Fourney: From the national DNA data bank point of view, I can give you pretty well exact costs. I believe copies of our annual report have probably been provided to the members of the committee. There's always a table included in this with regard to the costing; so for instance, in 2007-08 it was $2.627 million.

Now those costs are direct costs. It doesn't include additional costs such as Mr. Cory and others have mentioned: the security of the building, the maintenance, and everything else that goes on. Those are the bare-bones costs and each year they go up. For instance, in 2006-07 it was $2.6 million, whereas projecting the additional samples for next year, it will be a little bit more. So those costs are readily available.

I think where it may be often confusing is that the national data bank is a prescribed protocol where the samples are essentially controlled. They're controlled from the point of view of the samples collected from an offender in a designated condition, brought in, processed. It's very efficient, the automation works extremely well, and what we've been doing over the last few years is developing the automation technologies that would be potentially useful for crime scene samples.

I think there's ongoing review right now of the costs you requested from our colleagues in Public Safety Canada. So there are actually two reports out in the past. I believe they're in the process of doing a report of that nature, which may be forthcoming, with the cost and also the capacity issue of what the future might be.

[*Translation*]

Mr. Serge Ménard: Do you have information on how much it costs, on average, per investigation? I think it was $1,800 a few years ago. Is that still the case or is it more expensive?

[*English*]

Mr. Peter Cory: Per sample. How much does it cost to...?

[*Translation*]

Mr. Serge Ménard: If you do not have this information, could you provide it to the committee at a later date?

Mr. Greg Yost: I'd like to make a comment. The problem is that you can carry out all sorts of analysis on all sorts of things found by the police to try to find DNA without managing to do so or establishing a profile. It is possible to spend a great deal of money without obtaining any result.

We could ask the lab to tell us how many profiles it has obtained for how many crime scenes and how much that cost. However, it is done through Canada's National DNA Data Bank. Dr. Fourney's budget did not increase by 75% although he's analyzing 75% more profiles. There are always going to be some basic costs, for instance to heat the building. Whether you have 1,000, 15,000 or 30,000—

● (1045)

Mr. Serge Ménard: I understand. I would now like to deal with another issue.

In 2006, the Minister of Justice allocated funding for a joint study with Public Safety Canada and the RCMP to respond to the concerns and desire of the National DNA Data Bank Advisory Committee to measure the data bank's effectiveness.

Publication of the study findings was scheduled for late summer or early fall 2008. We're now in 2009. Are the findings of that study available? If so, could you table a copy of the report with the committee?

Mr. Greg Yost: It may seem surprising, but when I read this question, I did not know what study they were referring to. I did not even know that the Department of Justice was researching effectiveness. We have had discussions, but it's not something we've done to date. I cannot speak for Public Safety Canada.

Mr. Serge Ménard: Do you have statistics on how many innocent people's DNA has been analyzed? In how many cases was someone exonerated? In how many cases did the evidence obtained through DNA identification lead to convictions?

[*English*]

The Chair: Please give as brief a response as possible.

Thank you.

Dr. Ronald M. Fourney: Unfortunately, we can't tell you that information, from the national data bank perspective, because the very safeguards in place for encoding the samples for privacy and security prevent us from actually knowing the individual who may be involved. To be honest, we can't tell you the number of times we've exonerated an individual based on DNA.

I can tell you that we have a quality assurance questionnaire that is provided each year to all our end-users. And we have had a number of occasions where the police have indicated that the data bank has focused an investigation and that in fact who they thought might have been the perpetrator turned out not to be.

There are very few places I know of that have this kind of information.

[*Translation*]

Mr. Serge Ménard: Is this information kept confidential? If not, could we get a compilation of answers to these questions?

[*English*]

Dr. Ronald M. Fourney: We'd be happy to provide a copy.

[*Translation*]

Mr. Serge Ménard: Thank you very much.

[*English*]

The Chair: Thank you.

Mr. Rathgeber.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair. I'm going to be sharing my time with Mr. McColeman.

Picking up from where Mr. Oliphant asked some questions regarding judicial discretion, my first question is for Mr. Justice Cory.

In the Rodgers case, or elsewhere, is there precedent for a test as to what the judge ought to consider as to whether he's going to order a DNA sample?

Mr. Peter Cory: I thought Rodgers was helpful generally with regard to that.

Mr. Brent Rathgeber: Can you explain the test that a judge ought to consider?

Mr. Peter Cory: Well, it's a little difficult. They said you might take into account the nature of the crime and the past criminal record of the individual as two factors that would have significance with regard to the order.

Mr. Brent Rathgeber: Is the decision to grant or not to grant an order—and, Mr. Yost, maybe you can help me with this—something that is routinely appealed?

Mr. Greg Yost: I'm not sure the word "routinely" is there. There have been appeals.

One of the things that's happened with Bill C-13 and Bill C-18 is that we've provided for a 90-day window, when people forget to make the application. It's my understanding, through an ad hoc federal-provincial group of prosecutors we consult with as to how it's going, that most provinces have developed standard procedures. They set a whole bunch of these down for hearing on one day and they generally get their orders.

There are a few cases, particularly involving young offenders, that are subject to appeal, but there are not very many with respect to adult offenders in recent years, because of cases like the one I quoted. The question is why the applications are not being made by the crown in the case of secondary designated offences.

It's my understanding as well that removing the discretion for the 16 offences in Bill C-13 and Bill C-18—the most serious offences—has led to a fairly significant increase in the number of those coming into the national DNA data bank. Those were all offences where discretion was extremely limited in the first place. The onus was essentially on the convicted offender to convince the court not to make the order. We were only getting about 70% or 75% of orders in those cases. That's gone up fairly sharply.

● (1050)

Mr. Brent Rathgeber: Does the test differ for primary and secondary offences, in terms of judicial discretion?

Mr. Greg Yost: It does, very significantly.

Under the primary designated offences, the court is not required to make the order if it is satisfied that the person has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interests and the protection of society and the proper administration of justice, whereas if you are in the secondaries, it says:

> In deciding whether to make the order...the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person

There is much more to be considered, but the really significant difference is that the crown must apply for the secondary, whereas a judge shall make the order for primary "unless...".

Mr. Brent Rathgeber: Thank you.

Mr. McColeman has a couple of questions.

Mr. Phil McColeman (Brant, CPC): I'd like to pick up on Mr. Ménard's train of thought concerning cost.

Does the number of $2.6 million that you gave us for 2006-07 factor in any amount for the offsetting cost of investigation that was not necessary because of positive identification?

Maybe it's my business sense that tells me to ask—the sense that if you extrapolate this, we would be less restrictive and could actually be saving money with this system.

Dr. Ronald M. Fourney: That's something we've always liked to try to do, because in the average murder investigation.... I've heard differing comments on it, but if there is such a thing as an average murder investigation, it could be millions of dollars.

I can tell you one instance that I know of, a murder in Toronto that remained unsolved for nine years. Significant investigation time was put forward, there were hundreds of samples taken and screened, and the individual who was the perpetrator came forward through the retroactive provision. And they had solved that case 20 minutes after the sample came into the national DNA data bank.

I have no idea what that particular murder case would have cost over nine years, but you can understand there would have been substantial savings.

Mr. Phil McColeman: From a managing point of view, then, it may work out, although it is very difficult to measure, to be the reallocation of resources rather than anything else—other than adding to budgetary requirements.

Dr. Ronald M. Fourney: It's always a double-edged sword.

Remember, as forensic scientists we provide investigative aids to the investigator, and if that individual is not out there doing the work that they do—and, I might add, it is a lot of hard work and it's fine work.... The issue of science and, for instance, the national data bank is no excuse for not doing absolutely good police work.

I would like to think they're in tandem. The more we provide investigation assistance to enable those samples to come in, in a timely manner and provide the information back to them, the more we can help focus an investigation and provide significant assistance.

For the committee, my understanding is that there is going to be a speaker to this effect, perhaps from the Canadian Association of Chiefs of Police, on Thursday, and I think that's a very good question to ask them.

The Chair: Mr. Rae.

Oh, I'm sorry. Before Mr. Rae we'll hear Mr. Bird.

Mr. David Bird: Mr. Chair, let me follow up with a comment on Mr. Rathgeber's question about the difficulties in getting secondary offences and about applications not being made for them.

In my conversations with some prosecutors, they've indicated to me informally that one of the problems prosecutors face in their jurisdiction is that judges are reluctant to issue secondary orders for DNA for convicted offenders and that as a result of that the prosecutors are discouraged from making these applications. They already don't want to upset the judge before them with respect to sentencing considerations they have and they are basically imposing a limitation on themselves from making the applications.

● (1055)

The Chair: Mr. Rae, you'll have approximately three minutes.

Hon. Bob Rae (Toronto Centre, Lib.): I suppose I could ask Mr. Justice Cory this question, but somebody else might also want to answer—perhaps Mr. Yost.

As I understand it, there are, roughly speaking, 32,000 samples in the machinery now. If we were to go to a broadly expanded system that looked at the time of arrest, as has been requested by many chiefs of police across the country, that could potentially expand the number to close to 200,000. Is that right?

Mr. Greg Yost: Those are very rough calculations, I would point out. In fact, they're based on the current designated offence list, and if we went to the same as on arrest, it would be all indictable offences. So the number would be higher, but we'd have a lot of people who were recidivists, etc.

It's a rough ballpark number. If Parliament wants us to go that way, I assure you that we have a lot of work to do to figure out the exact numbers.

Hon. Bob Rae: And the question would then be, Mr. Justice Cory, that you would recommend that we obviously take into account the Marper decision from the European Court of Human Rights in assessing what balance we would ask to be put in place to deal with such an expanded use of the registry.

Is that right?

Mr. Peter Cory: Yes, it would be very helpful.

Hon. Bob Rae: Okay.

That's it. Thank you.

The Chair: Thank you very much.

We'll have to wrap up here because there's another committee waiting to take this room.

I just want to give the committee a heads-up that we're going to spend the last 15 minutes of our next meeting on Thursday deciding the future business of the committee. There have been a couple of witnesses who are unable to come here. I'll just warn you that's what we're going to be doing.

Thank you very much to our witnesses. We appreciate the excellent input and information you've given us.

This meeting stands adjourned.

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