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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'd like to call the meeting to order.

This is the sixth meeting of the Standing Committee on Public Safety and National Security of the second session. Thank you for coming.

We have some special guests today. We are continuing our review of the DNA Identification Act, a statutory review in accordance with section 13 of that act.

We wish to welcome today our witnesses, and I will introduce them to you.

First, my name is Jack Harris. I'm the vice-chair sitting in for Gary Breitkreuz, who will appear at some point and take over his usual duties.

We have, on behalf of the Canadian Association of Chiefs of Police, Chief Constable Derek Egan. Thank you for coming, sir.

And we have Vincenzo Rondinelli, defence counsel with the Criminal Lawyers' Association. Thank you for coming, sir.

Also, from the Office of the Privacy Commissioner of Canada, we have Chantal Bernier, Assistant Privacy Commissioner; and Lisa Campbell, acting general counsel, legal services.

Thank you all for coming.

We have a normal procedure of offering witnesses ten minutes for their presentations. In your case today, we have three groups, and I'm assuming in this regard that the Office of the Privacy Commissioner will share their time. We're not overly rigid, but we don't like to get too far out of our bounds, so I hope you'll help us in that regard. We will then have questions from members of the committee.

Without further ado, we can start in the order of our agenda here, and ask Chief Constable Derek Egan of the Canadian Association of Chiefs of Police to begin his presentation.

Welcome, sir.

Constable Derek Egan (Chief Constable, Canadian Association of Chiefs of Police): Thank you.

Good morning, Mr. Chairman and committee members.

The Canadian Association of Chiefs of Police is very pleased to be invited to make submissions to this committee regarding the statutory review of the DNA Identification Act. DNA testing has become an indispensable tool in the fight against crime, and we are committed to participating in any process that can make it more effective.

It is an overarching proposition of the CACP that the effectiveness of this tool relies upon the size of the data bank and the timeliness of submission. The sooner and the greater the number of samples that go into the bank, the better the chances of finding a match, helping to solve and prevent crime and eliminate an innocent party. We strongly believe that legislation should, as much as possible, support this proposition with reasonable limits and safeguards that respect privacy.

We note that the DNA data bank holds approximately 153,000 DNA profiles on the convicted offender index, equivalent to less than 0.5% of the population of Canada, as opposed to the U.K. scheme, which has approximately 7%. The crime scene index is also underpopulated, with a current volume of approximately 47,000 profiles. This is largely attributable to the DNA analysis capacity, of which I will speak later.

The application of science to identification through DNA is undoubtedly the most significant aid to police investigation to date. It is the most positive identifier of victims and suspects alike, and provides courts with irrefutable proof of identity as an aid to the conviction of the guilty and the exoneration of the innocent.

The Canadian Association of Chiefs of Police was founded in 1905 and incorporated as a non-profit organization. The association is dedicated to the support and promotion of efficient law enforcement and to the security of the people of Canada. The CACP is national in character. Its interests and concerns have relevance to police at all levels, including municipal, regional, provincial, and federal. Our board of directors includes chiefs, commissioners, and directors of police services who are representative of the widespread regions of Canada and who are elected by the membership.

Our association has long been a proponent of the effective use of DNA as a means of identifying viable criminal suspects and eliminating innocent people. During the 1990s the association strongly advocated for and supported the government in the creation of a national DNA data bank. Since then, we have taken all opportunities to participate fully in any process that would improve the scheme and enhance public safety

In August 2000 the CACP adopted resolution 2000-04, which expressed concerns that if no peace officer were available to escort convicted persons, and those persons chose to leave, there would be no ability to compel them to re-appear to give a sample. The government recognized this omission, and corrected it under Bill C-13.

In October 2002, pursuant to the DNA data bank legislative paper 2002, we also took the opportunity to advocate for the list of designated offences in the Criminal Code to include those offences known to be precursors of more serious crimes. For example, serial murderers and serial sex offenders do not begin at that level, but start with offences such as trespassing at night and stalking. We were pleased to see this was acted upon in Bill C-13.

However, we believe that the government should also have given consideration to including other precursor offences, such as prowling or trespassing at night, and indeed offences related to the possession of prohibited and restricted weapons. Certainly the ability to obtain samples arising from the illegal possession of weapons would be of great assistance to us in British Columbia in the investigation of gang crime.

We also took the position that the DNA samples should be collected from individuals deemed not responsible at the time the offence was committed. Such a finding really means that they did commit the offence, but simply were unaware of the nature and circumstances of it. Clearly, the possibilities existed that they had previously committed offences, and if released in the future they could do so again. Again, we are pleased to see this was included in Bill C-13.

● (0910)

Finally, Bill C-13 also brought us to the point where all murders, including a single murder, would be included, as would be a single sexual assault, rather than the previous requirement of two or more. Again, that allows us to put into the data bank people who have shown a propensity to a crime and may have done others previously.

In sum, the CACP is grateful and honoured to be given the opportunity to provide a perspective and to work with the government to find ways to use DNA to enhance public safety.

With the committee's indulgence, I'd now like to comment on several issues connected with the act that concern the members of our association and police officers in general. My comments will be somewhat global in nature and will not deal with specific legislative amendments. I will leave that discussion to subject-matter experts and the legislative drafters.

In general, police view DNA quite literally as a biological fingerprint, and they naturally seek congruence with the Identification of Criminals Act. Amendments to the act over the years have led to significant progress in achieving this congruity, but gaps remain. The comments that I will make are within this context and build toward this congruity.

Section 4 of the DNA Identification Act declares as a first principle:

> The protection of society and the administration of justice are well served by the early detection, arrest, and conviction of offenders, which can be facilitated by the use of DNA profiles.

It is the CACP position that earlier sampling and the greater the number of profiles in the data bank, the earlier and greater the likelihood of solving and preventing crime. Limitations on designated offences, on authorization processes, on the point at which a sample is taken, and on retention rules serve to frustrate this aim. We believe that an alignment of the DNA Identification Act with the Identification of Criminals Act would remedy these shortcomings and include the necessary safeguards.

We would contend that maintaining convicted-offender profiles and the acquisition of DNA by buccal sample is a little more invasive than fingerprints, and that the rules governing the taking and retention of fingerprints are easily transposed to the DNA samples. Indeed, as science and technology evolve, the practical securing of suitable DNA from a person fingerprinted without ink seems a very real possibility.

Congruency with the Identification of Criminals Act would extend the list of designated offences to include those that could be proceeded by way of indictment or summary conviction, and thus capture precursor offences, such as trespass by night, stalking, and other offences currently excluded where DNA would facilitate identification and prosecution, such as dangerous driving.

As important as the above is when the samples are taken, many jurisdictions, such as the U.S., U.K. and Australia, follow a model of on-arrest sampling. This, or at-charge sampling, significantly increases the volume and timeliness of profiles placed in the data bank, leading to greater detection and prevention of subsequent offences. The taking of at-charge samples is congruent with the Identification of Criminals Act.

Congruency with the Identification of Criminals Act would also permit the DNA sampling of deceased persons. This, again, would aid in the identification of missing persons, the solving of crime, and the bringing of closure to victims of crime.

The Vice-Chair (Mr. Jack Harris): You have about a minute and a half left in the official time here, so govern yourself accordingly.

Constable Derek Egan: Retention also plays a role in the data bank. Currently, access to the profile is disabled when a conviction is overturned on appeal. Congruency would allow these to be kept. The U.K. experience is that 15% of matches occur in this category.

Congruency with the identification act would also move the approval process from a court-ordered one to an administrative one, and by doing so improve submission rates, and indeed reduce error rates.

We also strongly advocate for additional indexes. We believe a human remains index would assist in identifying missing persons, a deceased offender index would assist in solving crime, and a voluntary live victims index could provide linkage to other victims, human remains, crimes, and offenders.

Though it's possibly not within the scope of this committee's review, some comment regarding capacity must be made, given our wish to see the data bank grow. It is our contention that while capacity and expansion are linked, they should be addressed separately. Capacity will continue to be an issue as the science evolves and the ability to detect and retrieve samples increases, regardless of an expansion of designated offences and retention rules.

In 2007 the CACP passed resolution 2703 calling on the federal government to fully fund DNA analysis to meet demand, and we continue to work towards this. We believe legislation should support capacity growth rather than restrict it.

I have two final points I would like to make. One is with respect to search limitations. Currently the legislation does not permit the searching of the bank with evidence of human remains that we believe to be a person convicted and on the index, so it's necessary to obtain a production order for this information. Nor does the bank permit a data bank search for familial matches where this would also aid the investigation focus and eliminate non-involved persons.

Finally, I'd like to talk about the administrative burden caused by the endorsement process for repeat offenders. Currently fingerprints must be taken each time a person on the index is arrested for a designated offence, causing a significant administrative burden in the case of prolific recidivist offenders. We would recommend that persons provide one full sample of one endorsement set of fingerprints only. This will remove this burden.

To conclude, the CACP has historically taken all opportunities to provide input into legislative reform, policy improvements, and innovative solutions, and in regard to the use of DNA as an aid for identifying criminals and exonerating the wrongfully convicted has strongly advocated and supported the government's proposal for the creation of a national data bank through the 1990s. We were consulted and we rendered opinions all through 2002 with respect to the legislation. In respect to Bill C-13, we suggested a number of amendments that were subsequently legislated.

We acknowledge and are very gratified by the level of responsiveness the government has shown. We continue to advocate for the expansion of DNA legislation with a view to making it consistent and parallel with the Identification of Criminals Act. We would ask the government to give consideration to the issues I've raised herein.

Thank you, Mr. Chairman.

● (0915)

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

We'll move right along now to Mr. Rondinelli. Go ahead, sir.

Mr. Vincenzo Rondinelli (Defence Lawyer, Criminal Lawyers Association): Good morning.

I'm here this morning on behalf of the Criminal Lawyers Association. I'll give you a bit of a background. Our organization is comprised of about 1,000 defence lawyers across Canada. One of our mandates is to provide some missions to committees such as this, and also to sit in advisory capacities with the judiciary and crowns. As well, and like crown attorneys across this country, our members are really on the front line of the criminal justice system, and obviously legislation of this sort impacts our members quite drastically.

Before I begin my submissions, I just want to mention that due to short notice for me to attend today, it was a bit of a challenge to get written material in time to have it translated. I understand that the material I did provide is in the process of being translated, and you should be receiving it in the near future. In terms of my submissions, I'll keep them in a more brief compass for the purposes of the ten minutes I have this morning.

One of our main concerns, and it has been a concern since the inception of the data bank, is what we've called for a long time this concept of legislation creep. If we look at the history of DNA legislation in this country, we see that we have gone from a very restricted type of individual or offender whom we were looking at putting into the data bank to a much broader spectrum of offenders. In 1995, when the first piece of legislation that dealt with DNA warrants came out, it was really restricted to the most violent of offenders, and those of sexual offences.

Then, when we moved to the year 2000 and the data bank was created, the spectrum evolved again into a broader picture of offenders that not only included these primary and secondary designated offences, as they were categorized, but also included offences such as driving offences, where dangerous or impaired driving causing bodily harm made its way into the legislation.

Then we see a much broader sweep, in my submission, with the introduction of Bill C-13 last year. Not only were there a number of new offences listed but an even broader category of offences where if it's preceded by indictment then the punishment is at least five years were also able to be put into the data bank. We see that a different type of offender and those being found not criminally responsible due to mental disorder were also in the realm of being able to be put in the data bank.

Again, in our submission, you're seeing the trend where it really started off as a very limited scope. The balance we struck as society with the obvious privacy concerns and the civil liberty issues that were on the table from day one is that if we are going to take something that has been termed the blueprint of life, we're going to restrict it to those members of society who really have a lower expectation of privacy because of what they've done and what they're capable of doing in the future. The balance was struck that we're going to restrict it to the murderers and the sexual assault type of offenders, and then, as I mentioned, the pendulum seems to have swung to a much broader area.

Leaving aside the civil liberties scope or basic arguments that have been there since day one in terms of the privacy interests engaged in all of this and the information can be gleaned from a DNA sample and all that, I wanted to focus more on a practical aspect of what we're saying.

We're fortunate because the U.K. is well ahead in this area, as you've heard. Their data bank is close to five million now, and obviously a large percentage of their population is in there. The U.S. as well has a long experience with DNA data banks. We can learn things from their history in what has and has not been working.

One of the areas in our submission that should be paid close attention to is that the legislation creep isn't unique to this country. You've obviously seen in the U.S. and the U.K. in particular, they're getting DNA not only upon arrest but whenever an offence is recordable or arrestable and they're able to keep this in the DNA data bank, with some limitations.

● (0920)

If I have time, I'll get into the European Union decision that came out in December, which was quite a blow to the U.K. database as it is today.

What we see, at least in some of the empirical evidence that came out of there, and again in the two practical areas that I'd like to deal with briefly, is the following. Can we handle any expansion? When we're dealing with it, yes, it sounds great to include all these new offenders in the database, but on a practical, technical, and financial basis, can we handle the expansion? Secondly, is there really any value-added to expanding? Are there results being seen with a larger database?

Dealing with the first point, then, all of you may be aware of the 2007 Auditor General's report that found some issues dealing with backlog in our database. Samples not being processed in time created some backlogs.

Again, this is not unique to this country. The U.S. is plagued with database logjams, to the point that they have put federal legislation in place that is called the DNA Analysis Backlog Elimination Act. I can't remember the criteria off the top of my head, but states can apply for federal funding to help them deal with the backlog they've generated in their own states because of expanding a DNA data bank to include more types of offenders. Obviously that's going to create more work, more budget constraints, and everything else that goes into that type of decision.

The U.K. isn't without their issues of backlog either. While the U.K. is close to five million, the U.S. is probably closer to four million these days. As I understand it, our data bank is at about 155,000.

This leads me to the second point in terms of whether further expansion may actually yield results. Again, it's helpful to look at some of these studies coming out of the U.K. and the U.S. A lot of the stuff I mention is mentioned in my materials, so at some point you will be getting the references for where these studies can be found.

A recent study in the U.K. found that even though their database was expanding by about 650,000 profiles a year, they were getting crimes solved in only one in eight hundred cases. Basically, they're not really getting as much value-added from the database as they did at the beginning, when it was restricted to the most violent and sexual assault types of offenders.

In our submission, that should come as no surprise. When you look at the database and whether it's going to plateau at some point, where you're really not going to get much more bang for your buck in terms of solving crimes, you look at the types of offenders. Statistics in the past have always demonstrated that it is the most violent or the sexual offenders that are the highest recidivists, so having them already in the data bank....

A lot of good things have been done in terms of tweaking the data bank, even in a retroactive aspect, as we've heard already this morning. Before, they would have had to commit two or more murders, but now that has changed to one, and rightly so in terms of how the legislation was put in place. Anyone who commits murder should be in the data bank. That's obviously been justified on a charter basis. But when you start including all these other offenders and at the end of the day you're not getting results, it shouldn't be a surprise, because the recidivists, as I've said, have always fallen into the category of the most violent or sexual offenders.

One of the difficult things for us in Canada, I guess, when we look at the statistics, or at least at what is provided at this point, is to see what sort of value we're getting. All I can really go with is what's on the website of the national data bank, or, as they term it, the "National DNA Data Bank Investigations Assisted". They have a total of 11,126 as of February 13, 2009. It's broken down into some of the offences where they say they have been assisted.

● (0925)

Now, the question we usually have is what does that really mean? There are no statistics that we've been able to find in terms of which ones actually lead to convictions. Of those statistics, if you try to break those down with any types of statistics, depending on how you use them, they mean different things to different people. Did any of those investigations result in guilty pleas? Did they even result in convictions? Was there any other evidence that was first used to then use DNA? It's those types of questions. Again, as the statistics stand there's nothing really there to demonstrate that there really is a value added to expanding it any further, a value added in the sense that when you're looking at what the data bank was meant to do, and that is detection of crime and solving crimes and so forth, I think there should be more research done on the actual statistics.

I see I am running out of time. I'll end. I have it more fulsomely in my written submission.

As it stands and what it was meant to do in detecting crime and solving cold cases from the past, one glaring thing with the data bank is that there really is no opportunity or provision for access for exoneration. On what can be done and what can't be done with the crime scene index and the convicted offender index, there's nothing legislated in there that allows access to, for example, an innocence project, where they have some sort of file where they would really get some use out of accessing the data bank to see if there's some sort of match in whatever capability they can make of it. This is unlike some states in the U.S. As mentioned in the paper, there is the New Jersey database. They do have specific mention and provision for an innocence project, to be able to access it. If we look at what we want from the DNA data bank—and solving crime is obviously in everyone's best interest—exonerating the wrongfully convicted should at least play a part as well. Thankfully we don't have the type of track record that the U.S. does, but that doesn't mean wrongful convictions don't happen in Canada. We unfortunately have seen that.

Even in speaking with Alan Young, who is the director of the innocence project at the Osgoode Hall Law School in Toronto, he mentioned that he does foresee a problem in the future. He has some files coming down the pipe where he thinks that he may have to somehow try to get access to the DNA database. As it stands right now, there is no access.

Those are our overall more over-reaching submissions. Thank you.

● (0930)

The Vice-Chair (Mr. Jack Harris): Thank you very much, sir.

We now have a presentation from the Office of the Privacy Commissioner of Canada.

Ms. Bernier.

[*Translation*]

Ms. Chantal Bernier (Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada): Thank you. My name is Chantal Bernier. I am the Assistant Privacy Commissioner.

Today, our presentation will be given by Ms. Campbell, our Acting General Counsel. Fortunately for us, she is an expert in the field of biometrics and the author of many articles on the subject. So, she is going to give you the details of our position.

As for me, I would like to remind this Committee of the principles on which this discussion should be based.

[*English*]

Before I pass the microphone to my colleague, I would like to make some broad points that underpin the position of the OPC.

The first point that I think we need to keep at the forefront is that, in principle, a DNA data bank entails a deep invasion of privacy. It does not mean that it should be prohibited. It means that it should be managed with utmost respect for fair balance between security and privacy. This balance is dictated in Canadian law by a few principles that I would like to remind us all of.

First, it is recognized in Canadian law that security may trump privacy. However, it must be done according to some strict conditions. The first one is that the invasion of privacy must be proportionate to the security need it serves. The second one is that the necessity of such invasion must be proven, established, and verifiable in the context of a free and democratic society.

It must also be kept in mind that the information gathered through such invasion of privacy must be used, collected, and retained in a manner that constantly protects its strict proportionality to the objective that the invasion of privacy served in the first place.

[*Translation*]

Based on the criteria that I have just mentioned, the position of the Office of the Privacy Commissioner of Canada is that the legislation, as it is presently, is justified and that the management by the RCMP meets the criteria of a balance between security and privacy. In other words, we are for the status quo.

I shall ask my colleague to describe our position in detail.

[*English*]

Mrs. Lisa Campbell (Acting General Counsel, Legal Services, Policy and Parliamentary Affairs Branch, Office of the Privacy Commissioner of Canada): Good morning.

The Supreme Court of Canada has recognized on numerous occasions that privacy interests are worthy of protection under the charter and that the Privacy Act has quasi-constitutional status. The privacy of citizens goes to the essence of a democratic state, and it's essential for the well-being of individuals. It also allows for the exercise of many of our other fundamental rights and freedoms. As my colleague said, human genetic data is fundamentally different from other data.

Ever since the science of heredity and variation in living organisms discovered that specific sequences of nucleotides relate to specific inheritable traits, our individual genetic codes have become better understood as a powerful and valuable form of personal information in need of protection.

Genetic information raises privacy concerns because of the limitless amount of information that can be gathered, the unlimited timeframe as regards availability of samples once guarded, and the likely use of information for economic benefit, as well as the potential impact on individuals, third parties, and communities. So the making of a DNA order clearly engages two aspects of privacy that are protected by the Canadian Charter of Rights and Freedoms. The first relates to the person, but the second arises in what's been called the informational context.

In particular, our Supreme Court has observed that DNA contains information of the highest privacy, since it's capable of revealing the most intimate details of a person's biological makeup. Thus, taking and retaining a DNA sample is considered a grave intrusion on a person's privacy. That's the first point I want to make.

The second point is our office's views on the current DNA data bank and its management. In the years since the DNA Identification Act was passed, the scope of the scheme has been expanded, first by Bill C-36, the Anti-terrorism Act, then by Bill C-13. With the addition of the terrorist offences and the Bill C-13 offences, the logic of the program seems to have shifted, and it's important to be mindful of that at this juncture, I think. Instead of primarily being a means of linking the DNA of offenders who've committed serious violent and/or sexual offences with DNA found at the crime scene of similar offences, the data bank is being populated with the DNA of offenders who have committed a much wider range of offences.

We're cognizant of the pressure this committee faces to recommend expanding the database to include more offences, to allow for familial searches, and to increase information sharing. We caution against these measures, given their incursion on privacy interests, and quite frankly, their potential for undermining the overall viability of the DNA database.

Familial searching would allow the data bank to search for near matches, namely close blood relatives who are likely to have similar profiles. But be careful. Familial searching will also produce false positives and false negatives—samples that look like relatives but are not, and close blood relatives whose DNA profiles do not suggest kinship. For these reasons, as well as because of the privacy interests of the individuals affected, we recommended against familial searches.

The Council for Responsible Genetics notes also that keeping an arrested person's DNA on record can threaten their presumption of innocence in future investigations. It highlights the disproportionate number of arrests of persons in visible minority racial groups in the U.S. and the U.K., many of whom are released due to a lack of evidence. Thus, keeping a record of every arrested person would have an imbalanced effect on the privacy of racial minorities. As we know, in Canada the arrest rate for visible minorities and aboriginals is several times higher than that for other Canadians, as is their incarceration rate.

Our act allows for sharing of information from the DNA data bank on a case-by-case basis with foreign jurisdictions, provided there's an agreement in place with that jurisdiction in accordance with the Privacy Act. We caution against the routine comparing of Canadian DNA data bank profiles with international databases. Similarly, it would be inadvisable to link the Canadian database to a central system that would allow foreign states to routinely carry out searches.

This brings me to my third and final point: the international context. It's important to look at what we're doing here in the international context.

Canada is a signatory to several international instruments that stress the seminal importance of privacy. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both speak to the right of the protection of the law against arbitrary interference with privacy. We aspire to live in an open and democratic society that shows respect for fundamental human rights, but increasingly the highly interrelated environment in which we live means we need to be vigilant in order to ensure that Canadians' privacy and other constitutional rights are protected in our interactions with other countries.

● (0935)

It's important to remember the impact on individuals when federal government institutions collect, use, and disclose personal information about them. We may frequently consider the actions of government as simply administrative, but those administrative actions can have profound effects. A recent example of this is what happened to Mr. Arar, as well as to the men whose cases were reviewed by the Iacobucci inquiry.

[*Translation*]

International cooperation depends in part on negotiations aimed at establishing governance standards for personal information on which all parties agree. However, these government standards are far from being uniform in the case of DNA banks.

The progressive expansion of DNA profiling of sexual offenders to all categories of offenders from convicted criminals, to offenders, to suspects is a serious concern. It is part of the measures adopted in most Western countries, starting with the U.S. and U.K., that have allowed interfering with a number of rights protected in international legislation and in the fundamental law of these countries. However, this progression is not unavoidable and uniform. In Canada, in spite of our proximity to the United States, we have decided to restrict DNA profiling to convicted criminals.

● (0940)

[*English*]

Soon Canadians suspected of offences at the U.S. border will be ordered to provide DNA samples. The new U.S. policy will require that DNA swab samples be taken from anyone arrested in the United States and from foreigners detained at the border who are not legal U.S. residents. Critics of the U.S. databases have pointed out that although all states have a DNA database, the manner in which it's collected and the basis for collecting it varies widely. A majority of the states authorize the retention of samples following profiling and several allow the collection of DNA from those merely arrested for an offence. U.S. law enforcement officials have also resorted to so-called genetic sweeps where they approach family, neighbours, and friends of a victim in a violent crime and ask for a buccal swab. This situation has led many observers to conclude that the differing technical standards and varying criteria as to which circumstances result in a DNA sample being collected adversely affects the validity of eventual results.

The prevalent concern of function creep is particularly relevant in the context of DNA data banks, most notably as the classes of participants expand. Initially dubbed as criminal databases, the probable incorporation of arrestees across more states necessarily questions the purpose of these data banks. There are also serious deficiencies contained in many of the U.S. states' legislative provisions. The DNA databases are not subject to the same genetic privacy safeguards that are applied to samples taken in other situations such as medical examination. Several states also allow the DNA profiles in the databases to be used for other purposes.

I'm talking to you about the international situation just so that we can situate Canada in respect to other countries. If we look at England and Wales, anyone arrested on suspicion of a recordable offence must submit a DNA sample, the profile of which is then stored in the DNA database. England just recently was heavily criticized for this approach in the December 2008 decision of the European Court of Human Rights. It made an important ruling on the privacy of a person's unique genetic information. Importantly, the European court also cited a Supreme Court of Canada decision with approval and they determined that it was an illegal violation of a person's rights to keep a person's DNA sample when they had no prior conviction. They referred to the Canadian Supreme Court's decision in R. v. R.C. of 2005, where our Supreme Court stated that keeping someone's DNA records would have a disproportionately negative impact on their privacy compared to the benefit to criminal justice.

I understand you've already heard about the European case. It was two English suspects. Local police had retained their DNA samples after arrest even though they'd been cleared of criminal wrongdoing. The court commented on the scope of DNA records noting that police retained the sample regardless of the gravity of the offence for an indefinite amount of time without any independent review of their decision-making process. The European court came pretty much to the same conclusion as our Canadian courts and said that the court found that a blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples, and DNA profiles of persons suspected but not convicted failed to strike a fair balance between the competing public and private interests and that the respondent state had overstepped any acceptable margin of appreciation.

The influence of other jurisdictions weighed heavily in the European court's decision. Along with Canada, several member nations of the Council of Europe were cited in contrast to England's indiscriminate practices. This illustrates, in our view, the responsibility democratic countries have to one another when setting policy in a new and controversial area such as DNA sampling and retention.

To conclude, we support continued sound management and oversight of the data bank. It should be used only for the forensic purposes for which the DNA was collected, and we urge this committee to ensure that crucial privacy interests are protected in the storage and use of DNA in the data bank.

Thank you for your attention.

The Vice-Chair (Mr. Jack Harris): Thank you very much, Ms. Campbell, and thank you all for your most interesting presentations. If you have anything further to leave with the committee, that would certainly be appreciated. I know some of you have given us remarks, and we'll have them translated.

We have members of the committee now who will commence questioning of the witnesses, starting with Mr. Oliphant.

● (0945)

Mr. Robert Oliphant (Don Valley West, Lib.): Thank you to all of you. I think I've got the best job in the world. I get to listen to smart people with differences of opinion. That's even better.

My first question is for Mr. Egan. Your association and my own chief of police in Toronto, Mr. Blair, have been requesting an expansion of the DNA process and the collection of data. Today you separated the expansion from the capacity—financial, etc.—as though they're two separate questions. But at your annual meeting in 2007 you passed a motion requesting that the federal government increase funding for the DNA registry analysis. I'm wondering whether you communicated that to the government and how they responded. How much money were you looking for, and what would you say that money was to be used for?

Constable Derek Egan: Thank you.

The capacity issue has been a longstanding issue with the police. The processing of samples is not done in as timely a fashion as we would want. The resolution did call upon the government to fund to an adequate level. I believe the estimate of that was in the range of $20 million.

Mr. Robert Oliphant: Was it tied to the expansion that you have been advocating, or was it just to do what you now do better?

Constable Derek Egan: It was to do what we now do better.

Mr. Robert Oliphant: Ms. Bernier suggested that the criteria that we use for these kinds of incursions into privacy have to do with proportionality and necessity and also how that information is used. That was very helpful for me. When I read the chief of police's statement, it sounds like convenience is the overriding desire. Could you comment on that? I wonder if you really think it's about proportionality and necessity and how you would prove that, in light of what Mr. Rondinelli said about the actual effectiveness, or the diminishing returns on this kind of expansion.

Constable Derek Egan: I'm not absolutely familiar with Chief Blair's paper, but in a general sense we view this as a tool. So as a tool, the wider it can be applied, the better. I made reference to the ability to have people who have been convicted of weapons offences placed on the index. It's possible that offence—the possession offence—doesn't in and of itself seem to be that serious, but undoubtedly these people are possessing these weapons for a purpose. And later on, of course, when these weapons are abandoned at the scene of a shooting or whatever, the fact that DNA is in the databank and possibly on the weapon leads very well to the issue of proportionality.

Mr. Robert Oliphant: All right, we'll have to leave that there.

I have a question for Mr. Rondinelli. I'm not a lawyer, and that's both a plus and a minus in this work. One of the things I was left with from our witnesses on Tuesday, who were mostly from the police sector, was that the DNA analysis in the databank was a helpful tool in exonerating the innocent. There have been some media reports about some wrongfully convicted people recently being exonerated because of DNA evidence.

Is it only accessible to the crown? Is it accessible to defence attorneys? Can you explain that to me a bit, because that's the only reason I would actually favour an expansion, to help the wrongly accused. And if it's not working, I need some help on that one.

Mr. Vincenzo Rondinelli: Firstly, there's no doubt that DNA has gone tremendous ways in getting exonerations. In the U.S., they're now past 200 wrongful convictions exonerated by DNA, apart from other cases they've had that didn't deal with DNA. Just with DNA, they've had over 200 exonerated.

In Canada, obviously, in Guy Paul Morin being exonerated, the main issue was DNA. But even in that case and other cases where it has been DNA, it's not because of the use of the data bank that they've been exonerated. It's the use of DNA and how it has played into the file, how they end up finding it and how they do their testing, and so forth. It's not with the help of the data bank.

As to how it's legislated presently, obviously there are very strict controls. Again, dealing with the proportionality, the privacy interests, and all of that, when it was passed we were going to keep very strict controls on the data bank. All that can be done is that crime scene samples can be run against convicted offenders' samples. So there are, technically, two silos in the data bank that they run against each other and match.

In terms of access, there is no legislation in play where it can be accessed by the crown or by the defence. Basically, if you're convicted of this offence, it is then sent to Ottawa. They upload it into the criminal offenders index, and then on whatever basis they do it, whether it's daily or every second day, they run it to see if it matches against the crime scene index. There's no access available to anyone, other than the sample being uploaded to the database.

● (0950)

Mr. Robert Oliphant: My last question is for Ms. Bernier.

I'm probably running out of time.

The Vice-Chair (Mr. Jack Harris): You have about a minute.

Mr. Robert Oliphant: You suggest that the OPC is satisfied with the current management system in its ability to protect privacy. Do you see any advantages? Has your office discussed any advantages of moving the registry out of the RCMP into an independent arm's-length agency, perhaps along with other things, such as fingerprints and the gun registry, into an agency separate from the law enforcement side?

Ms. Chantal Bernier: I'll pass the microphone to my colleague. I have been at the OPC for only two months, so the briefings I have received so far are too superficial to give you a fulsome answer.

What I have been told so far is that the separation that the RCMP keeps between the DNA data bank and identifiable information satisfies us, but I would like Ms. Campbell to answer more fully.

Mrs. Lisa Campbell: It forms part of our recommendations on oversight of the RCMP as a whole. We have recommended stronger oversight of the RCMP's activities in general. So while we're satisfied that there has been good, sound management—my colleague is part of an oversight committee that's comprised of academics, jurists, and law enforcement who oversee the management of the data bank—we would advocate for continued sound management. If part of that meant separating it, so that there could be some separation from the investigative arm versus the arm that manages the data bank, that could only be a good thing, in our view, although to date we have been pleased with the way that samples are kept separate from identifiers and with the good, strong oversight.

Does that answer your question?

Mr. Robert Oliphant: Yes. Thank you.

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

Monsieur Ménard, it's your turn.

[*Translation*]

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

As with my colleague who spoke before me, I wish to tell you that I have very much appreciated hearing your comments this morning. Your presentations are illuminating and they show you are very knowledgeable. I am very pleased to have that discussion with you. As I don't have much time, I shall ask my first question. But I wanted first to tell you of my appreciation.

My first question is for Mr. Egan.

In her 2007 report, if I am not mistaken, the Auditor General mentioned that DNA analyses could be done very quickly in urgent cases which represented 1 per cent of the caseload. In other cases, which represented 99 per cent of the whole caseload, the average processing time was 114 days, which is about three months and a half, even if the goal was a maximum of 30 days.

Would you agree that the maximum processing time should be 30 days? Do you think that having to wait for three and a half months to get the results of a DNA match interferes with the work of investigators?

[*English*]

Constable Derek Egan: Thank you.

That question, sir, goes to the very heart of the issue of capacity. The delay in getting samples turned around is a problem. It causes investigations to become stalled. It causes investigations perhaps not to move in the right direction, particularly early on in investigations.

We have worked very hard with the labs in trying to develop a triage system so that, indeed, the most serious offences do get a greater turnaround. You referred to 30 days for those that are urgent or for those that affect a matter of public safety. This has been done through a system called PROOF.

The direct answer to your question is that we would clearly like to see much quicker turnaround times. That is at the heart of our issue with regard to capacity.

● (0955)

[*Translation*]

Mr. Serge Ménard: I do not know how my remarks were translated, but I mentioned a 30-day period as being the average acceptable treatment time for all DNA cases. It is faster for urgent cases.

Would you agree that a maximum time of 30 days should be the goal for all cases?

[*English*]

Constable Derek Egan: Yes, I would.

[*Translation*]

Mr. Serge Ménard: You will realize—and Mr. Rondinelli did explain it very well—that expanding the access to the data bank would increase delays. Do you agree with me that we have to make a choice, even in terms of police efficiency? In fact, we can choose to expand the data bank, which would have the inconvenience of delaying the analyses and slowing down the progression of investigations. Personally, I think that we should choose timeliness rather than expansion.

[*English*]

Constable Derek Egan: Again, sir, we see these as two separate issues.

We believe the ideal world, of course, would be an expansion of the data bank to capture those offences that I referred to previously as well as an expansion of lab capacity. It's a tool. All cases do not require immediate turnaround. Indeed, many cases do not require turnaround within the 114 days, because there is sufficient evidence to take someone to court and convict them. In those cases, the evidence of DNA perhaps becomes evidence that's just a little more compelling. In other cases, where you have a violent offender on the street and you need to identify this person, you would want that type of turnaround to be virtually immediate.

[*Translation*]

Mr. Serge Ménard: Thank you.

Mr. Rondinelli, I have practised criminal law during the whole part of my career preceding my election in 1993, and even when I was Minister for Public Safety and Justice Minister in Quebec. For the major part of my career, I was on the defence side even after having been on the Crown side in the beginning.

As I stopped practising 15 years ago, I would like to know if defence lawyers generally agree that DNA evidence brings certainty beyond a reasonable doubt, which is an important factor in a case.

[*English*]

Mr. Vincenzo Rondinelli: There is no doubt that DNA plays a big role now, even in terms of files that come across your desk. Five or ten years ago, when it was very expensive to test, you wouldn't get many DNA cases except in murders and very serious sexual offences. I think now our members understand. We have a lot more programs in forensics. It does play a big role. You get them in a number of cases.

That said, I don't think we're at the point where we just throw up our hands and say, every time there is DNA in a case, that we give up. A number of defences still come into play. Even in sexual assault cases, they may have DNA, but consent may be a defence that you still run. It does play, obviously, a big role.

[*Translation*]

Mr. Serge Ménard: My last question is for Ms. Campbell or Ms. Bernier.

In the Province of Quebec, our understanding has always been and still is that the organization responsible for forensic science should be seen as having more independence if, even under the same ministry, it would in fact be independent.

Conceivably, communist countries could have a DNA bank managed by the police. In a democratic country, within the context of the criminal justice system, we attach as much importance to the appearance of justice being done as to the fact which points to the independence of justice. Another advantage would be that the budget for the data bank is located within the RCMP general budget. Thus, the RCMP would decide, based on its priority, which part of its enormous budget would be allocated to the data bank.

Would you agree that there should be both justice and appearance of justice and that this should fall under the responsibility of an independent organization?

● (1000)

Mrs. Lisa Campbell: It is a very good question.

We strongly believe in accountability, that is that an organization should be held to account for its activities. As has already been stated, the RCMP should be more closely supervised by Parliament especially to increase control on the use of personal information on Canadians, particularly at the international level as I already said.

So, even if we are satisfied with the undertakings to date, if this Committee or Parliament finds it necessary to place this area under the authority of an independent agency, they would have no problem with this. I agree with you that when it comes to matters of supervision and accountability more is always better than less.

[*English*]

The Vice-Chair (Mr. Jack Harris): You have both exceeded your time, and we will have to be fair to everybody.

Who is going to go first on the government side?

We'll go to Mr. Norlock.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you very much for coming this morning.

I reiterate the comments made with regard to your expertise and your ability to lend that to the discussions here.

My first question would be to Chief Constable Egan. Chief Egan, we heard this morning, or I think you basically said, that pursuant to the Identification of Criminals Act, the taking of DNA samples is akin to the taking of fingerprints. Is that not correct?

Constable Derek Egan: That's correct, sir.

Mr. Rick Norlock: So it's just to identify the person charged. It is part of the identification.

Constable Derek Egan: Agreed. It's another mechanism.

Mr. Rick Norlock: Would it not also be true that when a person is subsequently found not guilty or is actually not a suspect any more—the charge is withdrawn or he or she is found not guilty—and there is no prior criminal record, the person's fingerprints are then destroyed?

Constable Derek Egan: They may make application to have that done.

Mr. Rick Norlock: If we are going to say that the DNA data and fingerprints are the same, would it not make sense that if the person was found not guilty, or if the charge was withdrawn, that the person could have the DNA data expunged from the databank?

Constable Derek Egan: That would bring about congruity with the act, yes, sir.

Mr. Rick Norlock: Criminals, of course, we know, know no bounds, either interprovincially or internationally. In your opinion, as an investigator and as someone representing the vast majority of chiefs of police, who supervise investigators, to do your job properly and to protect the people of Canada and your communities, would sharing information with regard to data collected vis-à-vis a data bank enhance your ability to identify the perpetrator of a crime and at the same time to exonerate someone who is a suspect because the DNA evidence removes that person as a suspect?

Constable Derek Egan: Yes, sir, absolutely.

One of the shortcomings we have with respect to the international drug trade, for example, is that the information on Canadians who are arrested in the U.S. for being involved in the drug trade and have their DNA taken cannot be entered in the Canadian database.

● (1005)

Mr. Rick Norlock: Thank you.

Mr. Rondinelli, you mentioned the length of time it takes for processing. You also mentioned that DNA evidence has been instrumental in exonerating people who have been charged and convicted.

We also have to take into account, Mr. Rondinelli, that this compilation of data has been in Canada for roughly only nine years; therefore, any data, and any percentages or analysis thereof, would be premature. Because we now rely so heavily on fingerprint data, would you not agree that because DNA data is so definitive, it is as likely to remove a person or an accused person from the suspect list as it is to convict him or her; therefore, it would be a good tool in the interest of justice because the likelihood of convicting a person of a serious charge would be less likely? In other words, we wouldn't have as many wrongful convictions if we had sufficient data.

Mr. Vincenzo Rondinelli: There are a number of parts to that question.

I don't think the data bank alone does all of the suggestions you've made. One of the reasons I mentioned the U.K. was that they do have a longer history, and obviously a larger database. That's why the experience and statistics coming out from that country are helpful to us.

Another thing to keep in mind is that as a database grows—and on a statistical basis, this is called the cold-hit paradox—the bigger the database becomes, the chances of false matches grow.

Very quickly, just to give you an analogy, I'm probably the only Rondinelli in this room. Let's say that Rondinelli is my DNA profile, and the database is comprised only of us. Let's say we're all murderers and sexual offenders in here. There's going to be a chance that my Rondinelli will not match with anyone in here in a smaller base. But let's take the phone book for the Ottawa area. If you flip through it, there's probably going to be a better chance that you're going to get a hit with Rondinelli, because there are probably some cousins I have out here that I don't know about. So expanding a database has a whole host of other issues on a statistical basis as well.

DNA definitely plays a role in the criminal justice system in exonerating suspects, but it's not from the data bank that this happens. Police surreptitiously take samples from suspects all the time, then they match them to the crime scene sample. If they don't come to a match, they're struck off their list. That happens, and it's useful, but it's not from the data bank.

Mr. Rick Norlock: No, it's not from the data bank. But it could very well be that a person's DNA would exonerate or strike him from the suspect list, or, if he is accused, would result in a withdrawal, because the police or the investigative agency would have access to the data bank.

Mr. Vincenzo Rondinelli: Yes, I'd like to see a scenario of how that would happen.

Mr. Rick Norlock: If I go along with your thinking, we might be left with the impression that the police wouldn't use DNA information if they thought it was going to remove a person from their suspect list. Having worked in that for 30 years, I have never in those 30 years known a police officer—and it would be a criminal offence—not to use evidence that would exonerate the accused.

Mr. Vincenzo Rondinelli: Again I ask, how can the data bank be used for that right now? You get a crime scene index sample, or you get a crime scene sample, you upload it to Ottawa, and you don't know who's in the convicted offenders index unless it comes back as a match. You don't know I'm in there unless I come back as a match. So how is that going to...?

Mr. Rick Norlock: Well, if you're the charged person, it comes back. It's like fingerprints, the way I understand it.

Mr. Vincenzo Rondinelli: No, that's not how it would work.

Let's say that I am in the convicted offenders index, that I have been uploaded. There's also a crime scene sample that the police find. And they upload it to Ottawa in the crime scene index. Say it doesn't come back as a match. How do they know not to deal with me as a suspect any longer? They don't know I'm in the index.

Mr. Rick Norlock: But it shows that you're not the accused—

● (1010)

Mr. Vincenzo Rondinelli: How?

Mr. Rick Norlock: Because the evidence doesn't connect. There's no match.

Mr. Vincenzo Rondinelli: But they don't know I'm in the convicted offenders index.

Mr. Rick Norlock: I have to go back to our previous witnesses from the other day. I think the testimony we gleaned there doesn't match what you've said. It's something that I think the committee will have to look at a little more closely.

Mr. Vincenzo Rondinelli: Yes.

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): That is really over. We can come back to you.

I want to thank Mr. Harris for sitting in for me. I will now give him an opportunity to go ahead with his round of questions.

Go ahead, sir.

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

I thank you for your very interesting presentations.

I'm interested, of course, in the balance you talked about between the security need and the important invasion of privacy this represents.

Mr. Rondinelli talked to us about legislation creep. I don't want to be an alarmist, but there is a big brother scenario that looms over this type of thing. There is 7% of the U.K. population now in a data bank. Legislation creep could conceivably lead to somebody deciding in five or ten years' time that this information is very useful for other reasons.

Does that loom anywhere in your concerns from a privacy perspective? It sounds to me like you're taking a minimalist approach, with only as much invasion of privacy as is required by the functions we're talking about. Would you care to comment on that?

Ms. Chantal Bernier: That is really a principle of Canadian law. That is how our courts have stated the fair balance to be and that is how, for example, the Privacy Act is constructed: that the invasion of privacy may be justified. We know that for governance, policing, and security purposes, a certain gathering of information is essential. So it must be allowed, but it must be allowed strictly as necessary for the objective it serves. That is the limit that must be met.

In fact, I think the examples you've been given today by my colleague and by Mr. Rondinelli show that without this type of vigilance you could go way beyond what is actually necessary. Not only that, but you actually undermine your security measures. Anyone who works in the field of security will tell you that you can actually diminish security by increasing security measures. At some point, for example, you can have so many locks on your door that maybe nobody can get in and you think you're safe, but you're unsafe because you can't get out quickly.

Absolutely, our premise in principle is that we must constantly ascertain whether any new measure of invasion of privacy is justified by the objective it serves in the context of a free and democratic society.

Mr. Jack Harris: Mr. Rondinelli, we've heard the suggestion, not just today, but also in our last meeting, that DNA samples are just another form of identification, although obviously we've heard contrary evidence from the Privacy Commissioner. The suggestion has been made that it would be more efficient and better if everybody who was arrested for an indictable offence were to have their DNA sample taken at the same time as fingerprinting.

I'm not sure if other members know, but I've practised criminal law, although not as extensively as Monsieur Ménard, and I'm also aware that when we talk about indictable offences at the time of the arrest they include offences that can be prosecuted by summary or indictment. So some offences that are almost always prosecuted as summary conviction would be considered indictable offences at the time of arrest for the purpose of the Identification of Criminals Act.

This isn't a legal quiz, but are there any examples of the kind of identification that has been used in certain circumstances improperly?

● (1015)

Mr. Vincenzo Rondinelli: Speaking about the upon-arrest issue, this isn't a new issue before Parliament. When this whole scheme was first developed, there was a big topic that was for obvious reasons on the table as well. And if you recall, there were opinions gathered from three former chief justices of provinces, one being Ontario, the other being Quebec, and I don't recall the third. But independently they did a legal analysis as to whether it would survive charter scrutiny, and they all came to the conclusion that it wouldn't. When we now look at the European Union's case where they come to the same conclusion, upon arrest is too wide a blanket thrown on proportionality. We come back to that. Justice Fish made clear in the R.C. case in 2005, which my friend mentioned, that DNA isn't like a fingerprint. Its information component has a much broader scope to it than a fingerprint.

So to expand it to the arrest scenario, and leave apart all the practical situations I put out there in terms of how much it's going to cost to do it and the resources, on the charter scrutiny, I don't think it would survive.

Mr. Jack Harris: I have one final question.

It's been suggested, and I don't know how seriously, that the more people you have in your data bank, the more people can be exonerated by a no-match sample, so we haven't found the criminal but we've exonerated 156,000 people every time we run a match. Do you think that has any value as a statement of principle in terms of the value of a data bank of this nature?

Anybody care to comment on that?

Mr. Vincenzo Rondinelli: The flip side is the comment I made that the more you increase it, the greater the chances of false positives and false matches. And this isn't science fiction. You're seeing a new wave of cases in the States and challenges coming to databases. They want to get their independent research of the databases. For example, in Arizona they found that at nine loci, and I know we have 13 in ours, there were a number of false matches in that system. And on the basis of that, there have been a lot of challenges to different state databases where they want access to it to see what the chances are that there are false matches. So it does happen, and statistically it's always going to happen if you don't test the whole DNA strand, which isn't going to happen for many years.

Mrs. Lisa Campbell: If I may also add to that, you've heard the adage “junk in, junk out”, and that's what I was talking about earlier, the critics of the U.S. system, where the 50 states all have different standards for which DNA is collected. They use different techniques and even different technology. So it's hard from a scientific perspective to say the results come from a standard approach. And the more data you amass, the more you run into this problem. If you compare countries, they're going to have different approaches. So it means that statistically your results start to become more and more unreliable.

Constable Derek Egan: I would also comment, please.

The Chair: By all means.

Constable Derek Egan: I would leave the issue on reliability of testing to scientists, but with respect to the exoneration, clearly exonerating people early in investigation is good for them, it's good for the system. There are examples coming up in the U.K. where people have been convicted on the basis of confessions and then exonerated as a consequence of the DNA testing. So it's very easy to imagine that, and certainly we've had our share of wrongful convictions in this country that, had DNA been present at the front end, the system would have been saved from all that distress, as well as the individuals involved.

Mr. Jack Harris: I think my time is up, but I don't know how that works. We have seen DNA being used to exonerate people when their personal samples don't match that of the criminal. But if you're not in the DNA bank, the crime scene investigation data are going to be matched with yours. That should be available as a defence technique already, should it not?

Constable Derek Egan: Yes. What I'm saying is—

Mr. Jack Harris: Without a massive data bank of arrested suspects.

Constable Derek Egan: I'm saying that the more samples in the bank, the earlier you can exonerate as that crime scene sample is run through the bank.

The Chair: I think we have to move on here now.

Mr. Kania, please, for five minutes.

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

I'm a strong supporter of the system for three major reasons: first, because it helps to exonerate persons; secondly, because it helps convict persons who are truly guilty; and thirdly, because I believe, at least until what I've been hearing now, that it's essentially foolproof. So I'm concerned when I hear the phraseology false positive, false matches. I'd like to know more about that in terms of what is actually occurring and what the science is, and if the reason for a false positive or a false match is due to any methods we can control because of the system or insufficient methods or storage or whatever it may be that can be corrected.

First, is the science foolproof, or is this something people should be worrying about, that they may be convicted as an innocent person because of this DNA system?

● (1020)

Mrs. Lisa Campbell: Thank you for your question.

The false positives I was talking about related to familial searches. This is a practice that happens in the U.K., where searches will be run against a convicted offender index from a crime scene and they look for close matches. That's a less precise form of search, so that is more likely to turn up false positives, or conversely, false negatives. I was talking about that context specifically, not matching of samples.

The technology has much improved since it was first initiated, so it is scientifically much closer when you're talking about a precise match. So I was talking about familial searches, which we recommend against.

Mr. Vincenzo Rondinelli: It's a bit of a combination of both the science being not able to test the whole DNA strand, and that's why... because 99.9% of all our DNA is the same, it's only that 0.1% that differentiates us all. And on the strand they look at—and you've probably had this presented by other speakers in earlier days—loci, in terms of how many.

When the system first came out, they were looking at six, and they said, “It's impossible, you won't find another of six”, and then there was a false match in the U.K. on six. Then they went to nine, and they said, “With nine, you're not going to have any problems”. And again, the Arizona thing I mentioned, there are a lot of false matches in nine. Now they're saying the same about 10 and 11. I know at the last Promega Conference this past October, where DNA scientists all around the world get together, they said yes, they have seen false matches at 10 and 11. And that's why there are all these challenges of state databases now in the U.S., because they want to see what the chances are that 13 is going to have false matches.

So until the whole strand can be tested, and that's when it will be absolutely foolproof, there's always that chance. It's just like subway cars. We all have 20 cars, and if you're only testing four, there might be a chance unless you go to five. And that's why I say the bigger the database, the more chances of false matches.

Mrs. Lisa Campbell: May I just add one additional point? The most reliable samples come directly from blood and other bodily fluids, but if DNA is collected from discarded facial tissues or postal stamps.... So it depends on where you've collected the DNA.

It also depends on the method of testing. DNA is currently the most precise biometric measurement possible, but because of the finely tuned nature of the testing there are also risks of error.

It is much more reliable now than it was when it started, but it depends on the testing method used. The most commonly used is short tandem repeat—you've probably heard this from other witnesses in the forensic science context— and it involves counting the number of repeating sequences in a given DNA sample. And then you do a statistical analysis of the probability of that showing up in the other sample that you've collected.

Mr. Andrew Kania: I am also a lawyer, but not a criminal lawyer. In criminal trials, do you have experts who are being called to say “No, that's incorrect. That's the wrong analysis and we're fighting this”, and on that basis, depending upon what the trier of fact finds, you could actually have innocent people convicted? Is that what's happening?

Mr. Vincenzo Rondinelli: In the U.S. there's a lot more movement in terms of calling experts on databases. I haven't seen it in Canada yet, but again, as more evidence comes out from the U. S., I'm sure those challenges will come.

DNA in a case really is fact-based. Depending on what the issue is, sometimes you don't have any issue with it being the link between the client and the DNA, but there's some other defence that comes into play. Because at the end of the day, there are very few for which you'll get a conviction just on DNA alone. I don't know many crowns who would go on just DNA alone.

The Chair: Thirty seconds.

Mr. Andrew Kania: With the expansion of the legislation and the additional categories and more samples, is this actually going to help or hurt with this problem of false positives?

Mr. Vincenzo Rondinelli: I think you know my view.

Mr. Andrew Kania: I'm looking for the science. And then, depending upon what the answer is, I'm looking for solutions for how you would fix this. We need a system like this, but we need it to be foolproof. I don't want to start hearing of people 20 years from now who are now being released from prison because they've been convicted and it was false. Because we all believe that this is accurate. People are relying upon this to be accurate.

● (1025)

Mr. Vincenzo Rondinelli: The British mistake, as it's called, and it's a good example, is where they had a match at six from the database and they went to arrest the individual—they were all ready to take him to trial—but when they got there he turned out to have Parkinson's disease, he's in a wheelchair, can't move more than ten feet, can't brush his own hair. And they think, well, obviously he couldn't have, because the commission of the offence would have been that he scaled two floors up to get into an apartment for a break and entry. So when they tested it past the six to nine, it excluded him.

Now the question that everyone poses is, what if he wasn't in a wheelchair? What if he didn't have Parkinson's disease, didn't have that alibi? He would have been toast.

The Chair: Thank you very much.

Mr. Rathgeber, please.

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

Thank you to all the witnesses for your excellent and very helpful presentations.

Following up on an answer, Mr. Rondinelli, that you gave to my friend Mr. Norlock with respect to the police not having any idea or any access as to who is and is not in the data bank, my question is actually for Police Chief Egan. On the CPIC computer system, which is fairly sophisticated and accessible by all police forces and is often in patrol cars, if a suspect's name is run through CPIC and that individual is located in the data bank, is there not a flag or some sort of positive result that the person who is under suspicion is in fact in the data bank?

Constable Derek Egan: Not to the best of my understanding.

Mr. Brent Rathgeber: My next question is also for you.

In your presentation you talked about the inclusion of the offences of stalking and dangerous driving as potential primary designated offences. I was wondering, specifically, of those offences, why you believe they ought to be so designated. The purpose of my question is that they're not the types of offences that necessarily leave traceable data at the crime scene.

Constable Derek Egan: Well, as the science, of course, improves, all offences leave traceable data. Nobody can enter an environment without leaving traceable data. To go back to one of the earlier questions, when the act first came out, the science was very much about getting those obvious bodily fluids that would occur in the cases of murder and sexual assaults. As the science and technology progress, the ability to obtain smaller amounts of data has improved to such a degree that the application of that science to identity, to all crimes, is seen to be a very good thing.

So the offences to which I referred—I believe it was trespassing by night and stalking—we see these as precursor offences. People who are arrested later for more serious offences, serial murders or sexual assaults, typically have started out stalking and trespassing by night. So there can be evidence left at a scene by someone trespassing by night—cigarette butts, handkerchiefs, and so on.

Mr. Brent Rathgeber: I might accept that, but why dangerous driving?

Constable Derek Egan: Well, dangerous driving is an offence, and of course one of the critical components is who was actually behind the wheel. DNA will provide evidence of who was actually driving the car, or it could provide evidence to that.

Mr. Brent Rathgeber: Right. But you're suggesting that people who are convicted of dangerous driving ought to be compelled to provide samples to the data bank. I'm wondering about what investigative purpose that provides in the future.

Constable Derek Egan: Well, having people in the data bank, of course, allows later on, as I say, the searching of the data bank.

Mr. Brent Rathgeber: Thank you.

Mr. Rondinelli, you talked about the lack of exoneration purposes for the data bank. We heard from retired Mr. Justice Cory earlier this week that 26% of prime suspects are in fact exonerated through DNA evidence. I'm assuming you've heard that or are familiar with that statistic.

Mr. Vincenzo Rondinelli: Well, statistics, I'm not sure what that would mean. On a practical level, as Mr. Harris mentioned, it really comes down to your client providing a sample and it is cleared from whatever was left at the crime scene. Just as other wrongful convictions have been cleared in this country, it hasn't been from the data bank. I'm still not clear in terms of how the data bank really leads to exonerations. As I mentioned, there's no access even provided to the innocence project. So if there happens to be some procedure in place where the police are able to cite that they're exonerating suspects, it would not make sense that the innocence project wouldn't then have the same ability.

● (1030)

Mr. Brent Rathgeber: I don't mean to speak for Mr. Justice Cory, but I think what he meant was that DNA access to the data bank actually resulted in another individual being charged and convicted, and therefore having it ultimately exonerated the original crime suspect. That's what I think he meant.

Mr. Vincenzo Rondinelli: Yes, and I can't argue with that. I can see how that happens.

Mr. Brent Rathgeber: But on your comments where there's no legislation for exoneration—and I accept that to be true—this is not really a data bank question, this is more a criminal defence question. If I am a suspect in a serious offence and I obviously believe that I'm innocent, can I not submit to DNA testing—and obviously having my sample in the data bank would be of no use to my defence—for comparison to anything that might be collected at the crime scene? Now, do I have to hire my own experts as a defence to do that?

Mr. Vincenzo Rondinelli: First of all, I don't know if I'd ever advise a client to do this that early in the investigation. Leaving that aside, let's go down the hypothetical road that you do get to that point that, yes, you probably would get your own independent expert as well.

The CFS in Toronto is open to both defence and crowns, and they do a very good job of being independent in all of that. But generally speaking, for any sort of DNA testing that I've been involved in in our practice, the bill's been footed by the client.

The Chair: Your time is up, I'm sorry.

Mr. Brent Rathgeber: Thank you, Mr. Chairman.

Thank you for those answers.

Constable Derek Egan: If I may, Mr. Chairman, earlier I responded to Mr. Rathgeber's question with an incorrect answer. Perhaps I could correct that.

With respect to CPIC, I said that to the best of my belief it wasn't flagged. My belief was incorrect. It is flagged on CPIC for the particular purpose of allowing for endorsements.

Mr. Brent Rathgeber: Yes, that was my understanding, and I thank you for that correction.

The Chair: Thank you very much. That's helpful.

We're going to go over to the Bloc Québécois, and then to Mr. McColeman. That's probably going to take us just about to the end.

Mr. Vincent.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Thank you.

I thank you for coming here today.

While on the one hand DNA tests are important, on the other hand they create an opportunity for litigation. Let me give you two examples.

Let us say that we do DNA tests and that we have 5,000, 10,000, 100,000 or even one million names in the data bank. Could someone wishing to accuse an innocent party use this bank for this purpose? Suppose that I decide tomorrow to take a hair sample from you and drop it on a crime scene where fingerprints would not be available. The only evidence we would have is that hair sample. With this data bank, we prove beyond any reasonable doubt that this hair sample belongs to someone arrested for vagrancy a long time ago. Twenty-five years later, he finds himself implicated in a murder case in which he had no involvement.

Might this not create an opportunity for criminals who would like to use this type of evidence? Might the police also use this to get rid of somebody they would prefer to see in jail?

I would like to know what you think about this, Mr. Rondinelli.

[*English*]

Mr. Vincenzo Rondinelli: Well, it sounds like a TV show episode, what you're mentioning, but in reality it has happened.

As we've heard, criminals are very smart. They're always trying to stay one step ahead of the law. There have been cases in the U.S. where, for instance, some criminal will provide his DNA sample in some form and will give it to someone to leave at a crime scene. The only way they found out in the U.S. that...because it did match in the data bank. I can't remember what state it was; I'm thinking it was Illinois, but I could be wrong. At any rate, it did match. But when they went back to arrest the person, they realized that the guy had been in jail for the last two or three years. He couldn't have committed the crime.

It turns out that this guy had been selling his DNA samples in little ketchup packets and getting them through the jail for $50 each or something like that. Then at the crime scene, they could sprinkle semen or whatever else he was putting in these ketchup packages.

So it does happen, and that's why DNA by itself shouldn't be the only thing that investigations and convictions rely on. It's only one piece of evidence.

Let's look at exonerating, at being able to exonerate suspects, as they claim. Let's say they run the sample that they find at a party where someone was murdered. It doesn't match up with my DNA in the criminal offenders index. But they have ten other people, including my parents, who saw me at the party and said, “You know what? We saw him stab him.”

Are they not going to follow me any more because they didn't get a hit from the DNA data bank? What does exoneration mean, and how do they use it? Again, statistics without further use of how.... I can't see how any police would give up the trail in that situation just because DNA exonerated me through the DNA data bank.

● (1035)

[*Translation*]

Mr. Robert Vincent: It is easier to get a conviction on this basis than with any other type of proof. Fingerprints may place somebody at the scene of the crime, but this may not be sufficient proof in itself. If there are fingerprints on a glass, there must be fingerprints elsewhere in the room. On the other hand, if there are no fingerprints, a hair sample might be found. This would allow police just as easily to continue with the investigation.

This seems to be again problematical. The situation is not clear. The situation is not clear enough to allow us to fully approve obtaining DNA samples from people.

I concur with the Privacy Commission's position in favour of the status quo, because there is yet another issue which bothers me. We don't know to whom we could confer this mandate to be the guardian of this DNA bank. Allow me to draw a comparison between the Privacy Commission and the CRTC. We can ask to have our name on a no-call list. Yet, these lists have been sold. The responsibility of managing this list has been given to government employees but they did not manage to be good guardians of that list. In whom could we place our trust? To whom could we confer this responsibility and not fear that they might be bought off to sell DNA data?

I would like to have the thoughts of Ms. Bernier as well as Ms. Campbell on that subject.

[*English*]

Mr. Vincenzo Rondinelli: We share the same position as the Privacy Commissioner in terms of not expanding it further. And your example of the "do not call" list is good.

But again, we are seeing this in the U.S. experience. Originally it was built as a criminal database, and then a state legislature said there's a lot of information there and why can't we start using it for medical research? There are some states that now have allowed that because there is a wealth of information there.

So again, we share the same concerns as the Privacy Commissioner on that.

The Chair: Very briefly.

[*Translation*]

Mrs. Lisa Campbell: Yes. You referred to the situation in the U. S. DNA is collected and the information is shared for research and statistical purposes. As Mr. Rondinelli has just said, it is a very rich source of information. It is important to apply a very strict control considering the extent of the information contained in DNA. It should be noted that under a privacy legislation, the protection given to medical data banks is now more important than that given to criminal law data banks.

[*English*]

The Chair: Thank you very much.

Mr. McColeman, please.

Mr. Phil McColeman (Brant, CPC): I'd like to direct my question to Mr. Egan and Mr. Rondinelli jointly. My question relates to the business case for the DNA data bank.

It seems to me, as a former businessman, that once the DNA match is made to a potential criminal, the investigative requirements would be greatly reduced for law enforcement. Some of these cases can be very complex. They can cost millions of dollars to investigate and go through court.

From a very simplistic point of view, I'm wondering whether you would agree with me, because when I asked the question of the last group of witnesses, that was never factored into the cost of this program. In other words, the cost savings were never factored in for a conviction that happened very quickly versus a lengthy investigation.

Do you have any comments regarding that, in terms of policing and investigation and court time and lawyers' costs? Is there a cost savings associated with the DNA data bank?

Constable Derek Egan: Yes, sir, there's no question about that. The complexity of investigations today brings about an enormous cost, particularly on those investigations where a suspect is not readily available. When you have a murder and there are no suspects, you are into a very long and difficult process in trying to identify suspects and focus the investigation. That means you are going off in many different directions. It costs a lot of resources, money, and time.

Certainly when you have crime scene data you can run through the data bank and it points at an individual, it's for the court to decide on the value of that evidence in the totality of the investigation. It certainly enables you to focus your investigation, and that focus will lead to considerable savings in time and money.

● (1040)

Mr. Vincenzo Rondinelli: Again, on proportionality, murder investigations are obviously costly, and there is great utility in that. But I come back to diminishing returns. What value added do you get by expanding it to dangerous drivers who cause bodily harm? Again, I'll look to the research done in the U.K., in terms of their diminishing returns. They found that the cost to get those extra 600,000 profiles into their database for that year—and they only ended up getting one in 800 convictions out of it—could have hired 60 more police officers, including training, salaries, and all of that.

If you asked the public whether they'd want a dangerous driver in the data bank, who you'll probably never see in the court system again, or a police officer at the high school where their children attend, I'm pretty sure I'd know the answer to that.

Mr. Phil McColeman: As a comment on that, it appears to me that the management of investigations and policing—police chiefs, police service boards, etc.—would be to reallocate certain budgetary amounts in the current system for doing this. In fact maybe at the end of the day, although it would be complex, if a proper business case could be made it would cost us very little.

But there's another point I want to make, and that is on a comment Justice Cory made when he was our witness. He said that through their study, in 26% of the cases in the United States the prime suspect has been eliminated.

How do you react to that, Mr. Rondinelli?

Mr. Vincenzo Rondinelli: I haven't seen the study, so I'm in a sort of vacuum from the standpoint of seeing exactly what eliminating the prime suspect means. I gave an example in which I said that even in a case where the database doesn't show a link, but where they have this other great evidence against me, that gap wouldn't eliminate me from the case.

I can say that because of the backlog in the U.S., there have also been cases in which they haven't been able to use the database because it still hadn't been uploaded. Many cases are coming out of that type, in which the person would have been caught many years ago, if that violent offender had been put into the database rather than opening it up and having to deal with all these other processes. You still have to balance it with what happens on the other end of things. I'm sure that statistically there are some people who get exonerated, but value added is what I come back to all the time—proportionality.

The Chair: I'd like to thank our witnesses for the information they've given to us. It's very helpful. We appreciate the time you've taken to come here.

Committee members, we're going to suspend for two minutes and then we will go in camera to discuss future business.

[*Proceedings continue in camera*]

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