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Chair

The Honourable Paul DeVillers

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

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● (1105)

[*English*]

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

We have with us, from the Department of Justice, Mr. Michael Zigayer, Senior Counsel, Criminal Law Policy Section; and Mr. Stanley Cohen, Senior General Counsel, Human Rights Law Section.

Do we have our witnesses from National Defence?

The Clerk of the Committee (Diane Diotte): They are in the room.

The Chair: They're in the room, okay.

We have, from National Defence, Dominic McAlea, Deputy Judge Advocate, Military Justice and Administrative Law; and André Dufour, Director, Legislative and Regulatory Services.

We'll commence our clause-by-clause review. We'll go to clause 1, and I see we have amendments proposed to clause 1. We'll start with Mr. Marceau when he's available.

[*Translation*]

(Article 1)

The Chair: Mr. Marceau, are you ready to present amendment BQ-1?

[*English*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Sorry, which one is mine?

The Chair: BQ-1.

[*Translation*]

Mr. Richard Marceau: It concerns adding attempted murder.

Following discussions with the parliamentary secretary and Mr. Zigayer and Mr. Cohen, it seems I have Government support for adding it. There doesn't seem to be a problem.

[*English*]

The Chair: Mr. Macklin.

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

Our position is that we're not adverse to this, but we believe that the attempt to commit murder is already captured under paragraph (d) of the definition of primary designated offence. As I said, we don't have a problem with the specific reference and we will support it, but I think it's already there as an included offence.

[*Translation*]

The Chair: Mr. Ménard.

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Attempted murder is a different offence from murder. Do you mean that if the sentence is different, the offence is defined differently? I tend to say that even though it goes without saying, it may be preferable to say so.

[*English*]

Hon. Paul Harold Macklin: That's why I did say that we are prepared to support it. The argument was just that we could also argue that it is included.

The Chair: You're supporting it.

Hon. Paul Harold Macklin: Yes.

The Chair: Is there any other discussion on BQ-1?

(Amendment agreed to) [See *Minutes of Proceedings*]

The Chair: We can move then to BQ-2.

Monsieur Marceau.

[*Translation*]

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

Amendment BQ-2 concerns people who take part in or are connected with organized crime.

Since someone who is involved in or acting on behalf of organized crime is not a member of the local Chapter of the Knights of Columbus, and since all members, from all political parties, had decided to reverse the burden of proof in the case of organized crime by adopting unanimously in the House a motion that had been presented by the Bloc Québécois, thus expressing very clearly their desire to fight organized crime, I believe the bill should provide for taking DNA samples from persons found guilty of these serious crimes.

Following discussions with the Government, and in spite of a certain initial resistance, Mr. Zigayer and our colleague Paul Harold Macklin had said they found it acceptable.

[*English*]

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin: I just want to clarify, though. We also suggested that the amendment should include section 467.12, so it's all-inclusive in this. We're now doing sections 467.11, 467.12, and 467.13.

I think, Mr. Chair, the positive side of this will be that a criminal-organization offence will now be placed on the same footing as a similar offence within the Criminal Code to deal with acts of terrorism. We think that is likely an appropriate amendment and we would support this.

[*Translation*]

The Chair: That's fine.

Is Amendment BQ-2 adopted?

(The amendment is adopted [See Minutes].)

The Chair: We go on to amendment BQ-3.

Mr. Richard Marceau: Mr. Chairman, I thank you once again for giving me the floor on this matter.

During past discussions, the Government didn't agree with me.

I prefer to say it right away. Pursuant to research carried out late last night and this morning, I have here a proposal that comes to us from Mr. Derrill Prevett, Crown Attorney with the BC Ministry of the Attorney General, Criminal Justice Division.

At the end of his submission dated January 27, 2005, he asked that we add everything relating to prison breach. I use the English term because I have the original English text here. Therefore, it is at the suggestion of the British Columbia Department of Justice that I insist on these amendments.

● (1110)

[*English*]

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin: Thank you. Section 144 is not included now in your current amendment, is that correct? Okay.

The government doesn't support the inclusion of section 145 in the list of secondary designated offences. This is the offence of failure to appear in court as required. We're of the belief that there is no legitimate rationale for including this offence, which is punishable by a maximum of two years' imprisonment, on this list.

The government doesn't support the inclusion of section 146 within the secondary designated offences. This is the offence of allowing someone to escape. Once again, there is no legitimate rationale for including this offence, which is punishable by a maximum of two years' imprisonment, in the list.

With respect to section 147 of the Criminal Code, it would already be captured by paragraph (a) of the new secondary designated offence definition.

With respect to section 148, it would already equally be captured by paragraph (a) of the new secondary designated offence.

So we would think that section 147 and section 148 wouldn't need to be included and we don't see the rationale for including section 145 and section 146. Again, it just doesn't seem to fit within the overall rationale of the DNA Act principles.

The Chair: Any further discussion, comments?

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: If the only justification for including them in the list of secondary designated offences was the gravity of the offence as determined by the maximum sentence associated with it—which is the usual criterion, I think the Government would be right. However, I think that we must also consider the potential use of fingerprints in solving crime. It seems true to me that someone who is illegally at large must be more likely to commit crimes than someone who is not. This must be properly understood.

I still have an open attitude, although I tend rather to worry about excessively harsh sentences—I know that very harsh sentences don't solve anything—and to worry about minimum sentences. However, it seems to me that DNA samples constitute the modern equivalent of fingerprints. They can be collected without resorting to techniques that constitute an intrusion of privacy. In fact, they are kept in a bank. I know that there are a lot of guarantees that samples held in this bank won't be used for purposes other than identification. Further, it makes it possible to solve crimes and to clear some people.

It seems to me that anything that increases certainty during the judicial process is beneficial to all parties involved in criminal law, whether from the point of view of the defence or the prosecution. I understand that at first they wanted to limit it. First, it is an expensive process, and we must be aware of that. However, it seems to me that to depend on only the severity of the sentence for the offence is not sufficient.

I am still open to the possibility that I could be convinced of the opposite, but it seems to me logical that people who escape may commit crime in order to live. I think that this logic would justify... On the other hand, in the case of secondary designated offences, there may nevertheless be a legal ruling in particular cases, and the judge may be convinced that it's not necessary.

Personally, I believe that this constitutes a sufficient reason for my colleague to present this amendment.

● (1115)

[*English*]

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin: Initially the response would be that, clearly, it is not just the amount of penalty that is at issue. Rather, if you go back to the original and fundamental reason for this bill, it was to deal with those acts in which there was sexual assault, aggravated activity—that is, when there was a likelihood that DNA would be left at a crime scene. It's not just the time of potential incarceration that's at issue here.

Mr. Zigayer would like to comment on this point, and I'll let him address that.

Mr. Michael Zigayer (Senior Counsel, Criminal Law Policy Section, Department of Justice): Thank you.

The one concern I have is we have one clause being proposed by the government to capture all offences for which the maximum penalty is five years or more. That's a broad generic class of offence. The proposal would add these offences to what is proposed to be paragraph (c) of the definition of secondary designated offence. You can see the list, as proposed in the government motion, is composed of offences that fell outside that, or fell below that five-year threshold, that still involve an act with a sexual connotation or an act of violence.

One has to remember that this failure to appear in court is an accessory type of offence. It follows some principal offence that got the person before the court in the first place. That may or may not have been a designated offence, but let's say it was. Would it be necessary to criminalize, to bring the failure to appear in court within the designated offence scheme? I think we would suggest probably not.

The last comment I'll have is that from my days as a prosecutor, especially in the Great White North, I know we often had people who failed to appear in court and didn't have a legitimate excuse. Sometimes they had a legitimate excuse, but I would be worried that for something that is really not a major offence, a significant offence, one would open the door to a DNA databank order.

I accept what Mr. Ménard has said with regard to the utility of DNA and databases in assisting in the solving of crimes. The position we are advocating or trying to articulate is that this is not really the same nature of offence as those others you see listed in paragraph (c).

The Chair: Thank you.

Any other comment before the question?

[*Translation*]

Mr. Richard Marceau: No.

The Chair: Is amendment BQ-3 adopted?

(The amendment is adopted [See Minutes].)

[*English*]

The Chair: Now we have amendments G-1 and BQ-4.

I'll ask the legislative clerk to explain the situation with respect to G-1 and BQ-4.

Ms. Susan Baldwin (Procedural Clerk): Amendment G-1 covers a fair piece of the bill. One line in there is also amended by BQ-4. This means we have a line conflict. We're not allowed to amend a bill in a line and then turn around and amend it again, but BQ-4 just touches a small part of the amendment, so if the committee wished, they could move BQ-4 as a subamendment to G-1. I suggest you discuss the two amendments together and see what you would prefer.

Amendment BQ-4 is a little confusing just at first glance, because it's hard to understand what it is, so I photocopied—and we have distributed—copies of the parts of the Criminal Code affected by these two amendments, by G-1 and G-2. If you adopt....

Does everybody have their papers?

● (1120)

The Chair: Does everyone have these?

Ms. Susan Baldwin: If you adopt.... My understanding, and I do hope I have this correctly—

[*Translation*]

The Chair: Excuse me.

Mr. Marceau.

Mr. Richard Marceau: I would like to raise a point of order.

Following discussions I had with the Government yesterday, I withdraw amendment BQ-4. We can proceed directly to amendment G-1.

The Chair: Do you withdraw amendment BQ-4?

Mr. Richard Marceau: Yes

[*English*]

The Chair: Okay.

(Amendment withdrawn)

The Chair: Then we'll go to Mr. Macklin on G-1, amendment BQ-4 having been withdrawn.

Hon. Paul Harold Macklin: This motion proposes the replacement of the present definition of secondary designated offence. In fact, the proposed amendment will significantly expand the scope of the definition by moving towards a generic definition based on the criteria of offence characterization, indictable offences, and sentence length, five years being the cut-off point. This represents a significant divergence from the original policy and design principles of the scheme, which of course limited the designated offence list to crimes involving violence, or of a sexual nature, or where there was a likelihood of biological material being left at the scene of the crime by the perpetrator.

Under proposed paragraph 7(a) of the new definition, all offences punishable by five or more years of imprisonment that may be prosecuted by indictment, including hybrid offences, are captured. Once this is enacted, police will be able to obtain DNA warrants in the investigation of these offences even if later the offence is prosecuted by means of summary conviction. However, it is only those offences that are, in effect, prosecuted by indictment that will fall within the definition for the purposes of making the DNA databank orders.

The same approach is taken in proposed paragraph 7(b), which will for the first time allow the use of DNA warrants in the investigation of serious drug offences punishable by five or more years of imprisonment that may be prosecuted by indictment. However, for the purpose of making DNA databank orders, only those drug offences that are prosecuted by indictment will fall within the definition. Because several of the offences under the present definition of secondary designated offence would not meet the new generic definition in proposed paragraph 7(a), it is necessary to include a provision in paragraph (c) that ensures that all of the offences included under the former definition are retained under the new definition.

Proposed paragraph 7(d) deals with certain historical but repealed offences. We're getting those included.

Proposed paragraph 7(e) re-enacts a provision that existed under the former legislation and included attempts to commit and conspiracy to commit the offences listed above.

That would be our G-1 motion.

The Chair: Mr. Cullen.

Hon. Roy Cullen (Etobicoke North, Lib.): What we're proposing here doesn't change the circumstances with respect to the responsibility of the court to submit DNA to the DNA databank for primary offences; we already are challenged in making sure that DNA does get to the DNA databank. Does broadening or changing the definition affect that at all?

Hon. Paul Harold Macklin: I think one of the arguments is that it will make more obvious the breadth of consideration that should be given. Some of the arguments that were advanced supposed that maybe people weren't aware of the actual areas where one should be taking or requesting DNA samples. I think this broadens that and makes it clear that once you look at a sentence of five years or more that is going to be prosecuted by indictment, it's automatic to look at that. We're hoping it's helpful in that process.

Mr. Michael Zigayer: One of the important things the Department of Justice will do if this legislation is enacted is engage in a very aggressive training initiative with respect to the judiciary and prosecutors, and we wouldn't want to leave out the defence lawyers either.

With regard to your specific question, the amendment we're looking at here amends the secondary designated offence list, and that's the one where the crown has the discretion in the first place. But it's also important for the judiciary to appreciate the present state of the law, where we have some courts of appeal saying tthe court should make the order in most cases. We don't deal in this motion with primary designated offences, but we do in the original bill.

● (1125)

The Chair: Mr. Toews.

Mr. Vic Toews (Provencher, CPC): I'm glad Mr. Cullen raised that point, because he expressed the concern during our hearings with the Law Reform Commission candidate that less than 50% of primary offences are now being subjected to DNA requirements. We have a great concern about that. We support this government amendment, but it does nothing to improve the chances of DNA being ordered. That issue will be the subject of the amendment the Conservatives are bringing, whereby on all primary offences the DNA is automatic. So we're talking about the serious offences. That's automatic.

With the secondary offences, then there is the discretion of the court, because of some of the issues that Mr. Zigayer and others have raised. We believe that there should be no discretion on the primaries, because we're looking at the time after conviction, and right now, for example, in fingerprinting we do this at time of charge for all indictable offences. This is after conviction on primary offences. The Conservatives are saying those should involve automatically ordering DNA, instead of the 50% rate we're getting now from the courts.

The Chair: But that will come on a subsequent amendment.

Mr. Vic Toews: Yes, but I just wanted to explain that.

The Chair: Mr. Comartin, before I put the question.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I would ask the officials if there are any concerns that we have skated too close to the line, or across the line, with regard to a potential charter challenge with these particular amendments.

Mr. Michael Zigayer: The important feature is that we have expanded the scope of potential orders, but there is still prosecutorial discretion to make the application in the first place and judicial discretion, even where the crown has made the application to approve or deny the order. That should prevent abuses, if there were going to be abuses. There's a check and balance there. We have to remember that we limit this—and we're talking about the generic situation—to the case where the crown has actually proceeded by way of indictment. With regard to the list of specified offences, and we've added four more just this morning, it doesn't matter what the crown election is. It is possible for the crown to make the application and for the court to order. But you're right, the generic approach is quite an important change to the scope of the legislation. It follows on a suggestion, I think, that was made by the Barreau du Quebec, which was to move to more objective criteria.

The Chair: Mr. Comartin.

Mr. Joe Comartin: I'm not sure I got an answer. Are you saying that because of the prosecutorial discretion and the ultimate discretion of the judiciary, that will survive a charter challenge?

Mr. Michael Zigayer: My colleague, Mr. Cohen, will answer.

Mr. Stanley Cohen (Senior General Counsel, Human Rights Law Section, Department of Justice): Rather than giving you a direct answer on that, I think there still are, as a result of the way in which the scheme is constructed, sufficient restraints within the act as to make it charter-viable. Obviously, it's important to keep in mind the overall tenor of the scheme, and the exercise of discretion is absolutely crucial to the way in which the courts will view this. So provided that those kinds of safeguards remain, we're not skating too close to the line.

The Chair: Satisfied, Mr. Comartin?

I'll call the question on G-1.

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 1 as amended agreed to)

(Clause 2 agreed to)

The Chair: On clause 3 we have amendment G-2.

Mr. Macklin, I understand G-2, C-1, C-2, and C-3 all involve the same subject, so the suggestion is that we deal with them all at once.

● (1130)

Hon. Paul Harold Macklin: All right, fair enough.

The Chair: We can discuss them all at once, and then we can resolve them individually.

Mr. Macklin on G-2.

Hon. Paul Harold Macklin: All right. I'll deal with amendment G-2 first.

When we originally introduced this bill, it included a provision that would make persons found not guilty by reason of a mental disorder in respect of a commission of a primary or secondary designated offence eligible for inclusion in the DNA bank. The significance of the primary versus secondary classification has to do with the nature of the procedural consequences flowing from the conviction, in terms of ordering the taking of a DNA sample from an offender.

This motion to amend clause 3 will replace the amendments to paragraph 487.051(1)(a) of the Criminal Code, and have the effect of ensuring that when a person is found not guilty by reason of mental disorder in respect of the commission of a primary designated offence, the procedure used to determine whether a DNA databank order should be made is the procedure applicable to secondary designated offences. The court may, on application of the crown, decide to make a DNA databank order based on the offender's criminal record, the nature of the offence and the circumstances surrounding its commission, and the impact on the offender's privacy and security of person.

That would be the change we are proposing.

The Chair: Any questions for the officials, or any discussions, before we go to Mr. Toews?

Mr. Cullen.

Hon. Roy Cullen: I'm wondering, Mr. Macklin, if you could explain that in layman's terms. What is the background for doing this, and what does this accomplish?

Hon. Paul Harold Macklin: The original idea was to make a fairly broad sweep with those who are found not guilty by reason of mental disorder, and to have them fall into the effective category of number one. In other words, you would have to find an exception in order for them not to be included, but now we're saying let's move it down, based on evidence that was brought before us, to the level of a secondary offence, where now, in fact, first one has to bring an application, and secondly, of course, the judge has to decide whether it's appropriate.

So I think we're making it easier on the person found not guilty by reason of mental disorder, in terms of the process that would be pursued, because there was concern about the effect on the individual.

The Chair: Mr. Comartin.

Mr. Joe Comartin: I had specifically asked for this amendment, Mr. Chair. It was a compromise position. I don't know if you recall, but I in fact got one of the witnesses to agree that this would be a compromise position from simply keeping people who have been found not criminally responsible out of the system completely, to including them, but allowing defence counsel to establish why samples should not be taken in certain cases. I don't think that part of the community is going to be satisfied with this compromise, but I think it is a reasonable one, and I'll support it.

The Chair: Mr. Toews.

Mr. Vic Toews: Just on that point, Mr. Comartin, the test that is being advocated here is not that the counsel for the person found not criminally responsible demonstrate that the individual should not be included, but indeed the crown would have to demonstrate this.

Hon. Paul Harold Macklin: That's correct.

Mr. Joe Comartin: But if you follow the way in which the process works in the courtroom, it gives defence counsel a much greater opportunity to put in the evidence to justify why the crown application should not go ahead. Placing the onus on the crown, I agree, is what the tenor is here. But you've practised in the criminal courts, and you know that if that's there, defence counsel would have a much broader latitude in front of the judiciary to put forward their position as to why that crown application should not go forward.

Mr. Vic Toews: So then my understanding is that regardless of how serious this offence is, simply because the individual has been found not criminally responsible, the DNA sample wouldn't be taken.

Mr. Joe Comartin: Unless the crown can establish.

Mr. Vic Toews: Unless the crown can establish.

● (1135)

Mr. Joe Comartin: Right.

Again, Mr. Chair, it is consistent with the way in which we treat people not criminally responsible.

The Chair: Is there any further discussion on amendment G-2 before I ask Mr. Toews to present amendments C-1, C-2, and C-3?

Mr. Toews.

Mr. Vic Toews: What I'm proposing in amendment C-1—I'll explain amendment C-2 a little further down the road—is that in the case of all primary designated offences, there would be a requirement on the court to take DNA samples after there has been a conviction on one of these serious offences. The Supreme Court of Canada has dealt with the issue in the context of fingerprinting, that even before conviction, even when there's only been a charge of an indictable offence, an individual is required to provide fingerprinting. It's automatic in all cases. The Supreme Court of Canada, in the Beare decision, indicated that there was no constitutional problem with that.

We have all kinds of mandatory implications that flow after conviction. If we look at things like licence suspensions, or licence prohibitions, upon conviction of, say, impaired driving, it is automatic. It flows automatically. There is no discussion as to whether or not there should be a prohibition; that is automatically done. Even the provinces can't interfere with work permits or anything like that. That is automatically done. We see similar types of situations where there's been a commission of an offence with a firearm. An automatic sentence flows as a result of that conviction.

What I'm suggesting in this context is that where there is a conviction under the serious primary offences, the court needs to take all DNA in those situations.

In respect of secondary designated offences, you'll see that the amendment mentions “subject to subsection (2), in the case of a secondary designated offence”. Now, that exception simply puts into place, in amendment C-2, that the court is not required to make an order in respect of the less serious offences, the secondary offences, where the privacy and security of the person would be grossly disproportionate to the public interest in the protection of society. So there is discretion on the part of the court in respect of the secondary, but not the primary.

With respect to individuals who are not criminally responsible, this is not an issue, I would suggest, of somehow discriminating against individuals who have been found not criminally responsible. These individuals, because they are in a very special category, do not deserve to be labelled as criminals, and yet there is a very significant concern on the part of public safety that these individuals do in fact pose significant harm, or potential harm, to the public. Whether or not they have the same mental capacity that convicted criminals do, they pose, in objective terms, the same risk, and the police deserve to have that kind of evidence on hand.

Simply, if it's a primary offence, it's automatic; if it's secondary, there is discretion. That would be the impact of those amendments.

Just on a technical point, does the government amendment contradict what I'm saying here? Is there a conflict?

The Chair: Yes. I'm told that it's an alternative; if G-2 is....

It's not an alternative?

Well, my understanding was that if G-2 passed, then C-1, C-2 and C-3 wouldn't. I think it's a choice between the two groups of amendments.

● (1140)

Mr. Vic Toews: All I can say at this point is that I would be prepared to consider the government amendment if it wouldn't affect, in any other way, my amendments.

The Chair: Yes.

Mr. Michael Zigayer: Mr. Cohen will want to talk about your amendments in a moment, but this would be a very fundamental change to the way this system operates. And while you are correct, sir, with regard to the Beare and Higgins case, which legitimized the taking of fingerprints before an individual was convicted, under the provisions of the Identification of Criminals Act, that was one of the questions: how can you be an offender or criminal if you haven't been convicted? At the time that was being debated, but that's the piece of legislation. But what I think Mr. Cohen will want to talk about is the fact that that is not the appropriate perspective in which to view the DNA databank legislation. It is more appropriate to be looking at this whole scheme under the legislation and the jurisprudence that deals with search and seizure. That is why it is fundamental that there be judicial discretion, because what you are contemplating is agents of the state, the police, executing a search upon the body of the individual to take a DNA sample for the purposes of the state. So you're authorizing a search.

Mr. Vic Toews: Just a moment. This is pursuant to a court order, this is not pursuant to any—

Mr. Michael Zigayer: A court order is a search warrant; it's not automatic.

Mr. Vic Toews: But what I'm suggesting is that it should be automatic when it flows from a court order. We're not talking about a police officer here executing anything less than a certificate of conviction from which automatic things flow. When there is a licensing provision, we take people's property when we take their license, but there isn't a court that would suggest—

Mr. Michael Zigayer: I appreciate that.

Mr. Vic Toews: —that that property is somehow constitutionally protected, where there has been a court order convicting the individual of an offence.

Mr. Michael Zigayer: I don't want to steal Mr. Cohen's thunder, but he'll be no doubt talking to you—

Mr. Vic Toews: There hasn't been any thunder so far.

Mr. Michael Zigayer: He will be no doubt talking to you about the case of Barron and the case of SAB, both from the Supreme Court of Canada, and he could talk about a range of cases.

The Chair: Mr. Cohen.

Mr. Stanley Cohen: Essentially, we're talking about the importance of judicial discretion and whether or not judicial discretion is a constitutional requisite. If you begin with Beare, you can begin to construct an argument, perhaps not in the context of fingerprints, but fingerprinting and licensing have not been recognized by the Supreme Court of Canada as analogous to taking of DNA. The Stillman case contains a very strong indication that there is a vast difference between the two kinds of procedures. The important thing, I think, to note—and I'm sensitive to what Mr. Ménard has said in this respect—is that there isn't a huge invasion of the person in respect of physical discomfort or what might be occasioned. But what the courts have focused on—and one can cite any number of occasions in the jurisprudence—is the informational aspect of privacy that is being invaded, and this is why discretion has loomed so importantly in the courts' decisions.

This is not a matter of looking well back, or even to the point in time when we first debated this matter in respect of Bill C-3 in 1998, but rather one of the more recent jurisprudence of the Supreme Court. If you examine the decision of the Supreme Court in the SAB case, the reason the legislation was commended by the courts and the reason the legislation has had the reception it has is that Parliament has moved with deliberation and restraint up till now. The safeguards that were built into the legislation caused the court to suggest that this was why the legislation is sufficient from a constitutional perspective. Judicial discretion has been repeatedly underlined as an important part of that restraint. I could quote to you from Madam Justice Arbour in the SAB case. Or I could discuss the importance of discretion as it was dealt with in the Supreme Court by Mr. Justice Sopinka in the Barron case, which was an income tax case involving search; the court actually struck down legislation, where the legislation did essentially what is being proposed here, which would not allow for judicial discretion. In Barron the court felt that much more had to be built into the situation in order for it to be a viable situation.

● (1145)

Mr. Vic Toews: Was there a conviction in Beare?

Mr. Stanley Cohen: In the Beare case?

Mr. Vic Toews: Yes.

Mr. Stanley Cohen: I would stand to be corrected on this, so I would rather suggest that we examine the case. I believe there was at first instance, I don't know—

Mr. Vic Toews: No, no. I'm saying was there a conviction before the search and seizure was authorized?

Mr. Stanley Cohen: No. By nature, search and seizures occur earlier in the process.

Mr. Vic Toews: That's right. But there wasn't a condition precedent that there be a conviction in that particular case.

Mr. Stanley Cohen: No.

Mr. Vic Toews: All right.

Thank you.

Mr. Stanley Cohen: But if you examine the case of SAB and the Supreme Court of Canada dealing with the DNA sampling regime, and if you examine the cases of Murrins in the Nova Scotia Court of Appeal or Briggs in the Ontario Court of Appeal, I think it becomes very clear that the constitutional situation is that judicial discretion is essential to fair procedure.

That's as far as I'll go in terms of the argument.

The Chair: Okay. Monsieur Marceau, then Mr. Cullen

[*Translation*]

Mr. Richard Marceau: I want to clearly understand Vic's amendment. Unfortunately, we didn't have time to discuss it just now.

Please correct me if I am mistaken: the system provides that if a person is found guilty of a primary designated offence, he must provide a DNA sample unless a judge rules that it is not necessary.

Mr. Michael Zigayer: The judge must issue an order to allow a sample to be taken, unless the convicted person can convince him to grant an exception.

Mr. Richard Marceau: All right.

Mr. Michael Zigayer: There's nothing automatic about it. It is at the judge's discretion. The judge must normally do so, but he also has to listen to the defence.

Mr. Richard Marceau: It is up to the convicted person to do so. I want to understand what Vic is trying to do.

The door allowing a person found guilty of a primary designated offence to try to convince the judge not to force him to give a DNA sample would be closed. Is this right?

[*English*]

Mr. Vic Toews: That's correct, because what we have seen with the present test is that less than 50% of primary designated offences are actually being DNA-ed. So the point is that on these serious offences that we specifically picked out of the Criminal Code, which you today have tendered as new additions to the primary offence, and which we agree with, are important enough because of the types of offences they are, including the unlawful escape from custody, that they should in fact automatically be done.

But in respect of the secondary offences, where there is some disagreement about the exact serious nature of this, if I can use that term in this context, we are agreed that there should be some discretion left.

Now, we have to look at other schemes. For example, when we heard the evidence of the British expert who came here and said that the British get DNA from all suspects and that it has been incredibly important, in terms of even break and enters, in linking them to violent crimes, quite simply, we are depriving our police of a very important tool by not making this mandatory at the primary.

If you look at the entire structure—we're not saying all offences need to be—we have made a very careful distinction between primary and secondary offences. Quite frankly, there are appropriate times to use mandatory requirements that the courts follow. In the last number of years, the courts have consistently upheld these types of mandatory provisions, including life imprisonment for second-degree murder, which flows automatically upon conviction. The discretion is taken away.

The Supreme Court of Canada was very clear about that in cases such as the Latimer decision, for example.

● (1150)

The Chair: Okay. Mr. Zigayer.

Mr. Michael Zigayer: I would just like to make an observation.

I've seen those statistics as well, and I would ask the committee to consider it may not be that the problem is with the legislation. It may simply be that crowns are not reminding the judge that he has a responsibility to make the order if it's a primary designated offence, unless the offender can satisfy him that the order ought not to be made.

Mr. Vic Toews: Let me just respond to that, because it is a good point. I know that our crowns in the provincial courts who do this kind of thing and make these kinds of orders are overworked. If there is discretion, they will simply forget about asking for the order. It is completely unworkable to ask our provincial crowns who are enforcing these laws to go into these hearings on secondary offences and demonstrate this kind of onus, this kind of test on the secondary offences that is there now.

I know what crowns are saying about this: they can't do it, they're not going to do it. All you're doing is trying to convince the public with fancy words that something is being done, when we know the reality is that the crowns don't have the time to do this. So I'm simply saying there is a legitimate constitutional argument to be made that this does not violate anyone's constitutional rights.

I'm prepared to consider the amendment my colleague from the NDP has suggested. I don't think it's necessary, but I'm prepared to do that. But if we are going to continue with these kinds of tests—the secondary test that is completely unworkable, and everyone on the street realizes it's completely unworkable, and the primary ones, where they're only getting 50%—what are we spending our time doing here?

In Great Britain the police take all DNA upon arrest. It has done wonders for dropping their crime rate. Yet we are too hesitant. Our justice department is too hesitant to go to the Supreme Court and say, "You know this is in the public interest". I've seen this time and again with the justice department. You're far too cautious. You have a good case.

The Chair: Mr. Cohen will respond, and then Mr. Cullen and Monsieur Ménard. Then we're going to put the question.

Mr. Stanley Cohen: I would just like to read one passage from the Murrins case in the Nova Scotia Court of Appeal. It deals with judicial discretion, and whether or not we are dealing with an issue that essentially implicates the Constitution and jeopardizes the validity of the legislation. Murrins basically upholds the provisions that were an issue in that particular case.

The court says:

> Bodily samples pursuant to s. 487.052 are not taken unless ordered by a judge after a hearing. Before making an order the judge is required to consider the statutory criteria and may consider whatever additional factors are relevant in the circumstances. The judge must also direct the manner in which the sample is taken and must provide reasons for the order. The section directs the judge to consider the impact of the order upon the offender's privacy and security interests.

The court here, as in the other cases I mentioned earlier, is basically saying this is what makes it viable from a constitutional perspective. I don't think it can be suggested that the statements we've seen from the Supreme Court of Canada in SAB, and from these high appellate decisions in Murrins and Griggs, are not essentially laying down guideposts for what will or will not apply from a constitutional perspective.

● (1155)

The Chair: Thank you.

Mr. Cullen.

Hon. Roy Cullen: Thank you, Mr. Chair.

This is an area that has been worrying and troubling to me for some time. In fact, I've been trying to get the committee focused on this, rather than this notion of the alleged backlog in DNA.

The fact that only 50% of the DNA is getting into the DNA databank for primary offences is totally unacceptable. While I understand that efforts being made to educate, convince, and cajole are very worth while, I have the same concerns as Mr. Toews that we may get there but it may take a long time. In the meantime, we're putting Canadians at risk.

I like the idea of judicial discretion, but if the judges are not exercising that discretion appropriately—that's my assessment right now—it seems to me that Parliament has to act.

I just have a few questions first for Mr. Zigayer. Primary offences include murder and rape, so these are pretty serious offences. We're talking about sending in the DNA after a conviction for such an offence—just so we're clear on that. Right now the Criminal Code says that the DNA needs to be sent to the DNA databank—I know this is not in legalese. The crown would make that application, a judge would rule, etc.

There is an exception, so could you read me that exception as it is now stated in the Criminal Code? I looked and I couldn't find it.

Mr. Michael Zigayer: To correct one thing, with the primaries, there's an obligation on the court to make the order unless the offender can demonstrate the exception. I'll read those provisions:

> Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, of a designated offence, the court
>
> (a) shall, subject to subsection (2), in the case of a primary designated offence, make an order in Form 5.03 authorizing the taking from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1);

The exception is:

> The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

When we designed this legislation back in 1997 or 1998, when it was presented to Parliament originally, we tried to make that as narrow as possible—in other words, a very high threshold. We have no information to substantiate the suggestion that the court is, improperly, not exercising its discretion. We have some information that we've obtained in consultations with prosecutors who say "I was afraid to remind the judge", or "I forgot to remind the judge". We're only talking about primaries, not the situations where the crown has the onus. I was of the view that it would take a year or two, maybe three, before the legislation, which was totally new in respect of process, would take hold and before we'd have appellate decisions giving instructions to the trial courts below. That is starting to happen now. Mr. Cohen has mentioned the Murrins case and the Briggs case. There's the Hendry case in the Ontario Court of Appeal, which essentially said that you should make the order in most cases.

I'm sorry. I won't go beyond that.

Hon. Roy Cullen: I'm not finished yet, Mr. Chairman.

The Chair: Go ahead, Mr. Cullen.

Hon. Roy Cullen: I believe I have as much time as I want.

● (1200)

The Chair: Certainly.

Hon. Roy Cullen: Thank you.

I know we all want to get out of here, so I won't be that long. I just want to establish what the rules are, and that's helpful.

The exception mentions where that person's privacy would be grossly affected and out of proportion to the requirements of the state etc. These are people who have been convicted of a murder or a rape. Obviously, 50% of these orders don't meet that hurdle. You may not say that, but someone is missing something here. If 50% of these orders are then deemed to have met this hurdle, I don't buy that.

Mr. Michael Zigayer: That may not be the case. In fact, I'm not aware of any cases where the court says, I'm refusing to make the order in this case. They could have done it in the case of Mr. Latimer, for example, who was convicted of killing his daughter. That might have been a case that was sympathetic enough for the judge to say, all right, we won't make the order in this case, or there could have been a similar homicide involving someone who is perhaps ill with a fatal disease. If I had been the defence counsel, I would have tried, in a case like that, to seek the exception. But we don't have that kind of jurisprudence. What we do have is anecdotal information from prosecutors that they haven't been reminding the court, that they were afraid to upset the judge, or something of that nature. I don't accept that prosecutors have too much work on their plate, and I don't accept the fact, with respect to the secondary criteria, that it's onerous. It's exactly the same information you're going to be bringing to the court with a sentencing application, making your argument on sentencing, as to what was the nature of the offence, what were the circumstances of the offence.

Hon. Roy Cullen: Just to interject for a moment, if you made the reasonable assumption that there would be some cases like that, where you could demonstrate that the impact on a person's privacy would exceed the needs of the state...although it would be pretty small.

Mr. Michael Zigayer: By any stretch.

Hon. Roy Cullen: It would be minuscule.

So if you're not getting up to 95% or whatever of the DNA that you'd normally expect, that means it's not available, then, to help solve crimes. Is that correct? The DNA is just not available to help the police solve crimes, if it's not in the databank. That's putting Canadians at risk, is it not, the fact that the DNA is not in the bank?

Hon. Paul Harold Macklin: Well, theoretically you're right, but in practical terms....

Mr. Michael Zigayer: You see, the thing is, the DNA warrant scheme exists—we're not talking about it here today—and DNA can be used to protect the public throughout the investigation and prosecution of a crime.

With regard to the quantity, the number of DNA profiles in the data bank, no one here will disagree that it seems to be underachieving in terms of the expectations we had for it back in 1998, when Parliament enacted this legislation. What I would like to suggest is that we really don't have a grip on the reason why. I wouldn't want to blame the courts automatically for a "mis-exercise" of discretion. They may be exercising their discretion appropriately. It may be that a person leaves the courtroom after sentencing and no one has thought, let us make that DNA databank order. And as we know from the doctrine of functus officio, once that is gone, you cannot return to the court. The court has completed its dealing with that case.

The Chair: Mr. Cullen.

Hon. Roy Cullen: Frankly, I just don't buy the argument. I think the courts are slipping up, and as a result we are not giving the police all the tools they need to solve crimes and to deter crimes.

I may be kind of rednecky on this, but to take a sample of someone's hair, or to cut off a little piece of hair, or to do whatever you have to do, and to even think that this would be a major invasion of someone's privacy.... I know it's more than that, because it goes into a databank, but the databank is all kept anonymously, etc.

In any case, I'm not going to belabour the point. I think Mr. Toews' amendment is a sound one, and I will be supporting it.

● (1205)

The Chair: Monsieur Ménard, Monsieur Marceau, and then I'll call the question.

[*Translation*]

Mr. Serge Ménard: When I spoke just now, I was perfectly aware of the fact that one gives more information when one provides a sample of a bodily substance than when one has his fingerprints taken.

We know that the State obtains important information on the individual and that the information that DNA can reveal is probably going to continue increasing as technology develops. We are speaking essentially of illnesses that someone might have, or any predispositions. It seems to me that this whole aspect has been taken into consideration in the measures that have to be taken to keep DNA data anonymous. This is what makes it acceptable to give the state all this information. An essential portion of this information can be used to solve other crimes, but another important part could be used for other purposes. As long as we have guarantees that it cannot be used for purposes other than identifying criminals or establishing a relation between the preserved sample and another sample taken at a crime scene, it seems to me that it is covered.

With respect to the aspect Mr. Cullen spoke about, I think the same as he does. Removing a hair for a DNA analysis is not particularly painful, even though it must be taken out by the root. Of course, with time, we hope that this will happen as little as possible, because hair falls out naturally.

[*English*]

Mr. Vic Toews: Let's not get into that.

[*Translation*]

Mr. Serge Ménard: Anyway, there are all the liquids. We can get samples in other ways.

I think like he does, but I am nevertheless very intrigued by the quotations from Justice Arbour that you gave us. You will understand that when we make policy, we don't have as much time to read our jurisprudence cases as when we practise law. When she wrote these things, was she a judge of the Appeal Court of Ontario or judge of the Supreme Court of Canada? If she was a judge of the Supreme Court of Canada, what type of case was it? Was she cognizant of the problem?

Mr. Michael Zigayer: It was the S.A.B. case, before the Supreme Court of Canada. Madam Justice Arbour wrote this judgment on behalf of the nine unanimous judges of the court. The case involved a warrant for the providing of bodily substances for DNA analysis. In her decision, she referred to the law that governs the collection of samples of bodily substances for the purposes of the national DNA data bank. She essentially says that we see the same components in this system: judicial discretion, respect for the person's privacy when the sample is taken, and several other criteria.

It is important to point out that the Canadian DNA data bank, like those in other countries, uses only what is called junk DNA, or ADN égoïste in French, or, in technical terms, highly polymorphic non-coding DNA. This means that we don't know the significance of this small part of the DNA molecule. We doesn't know if this means that the person has red hair, that he is going to die at 40, or that he will have some illness.

"Highly polymorphic" means that it changes a lot from a person to another. "Non-coding" means that we do not know what it does.

[*English*]

Again, that's important in protecting the privacy interests of the individual.

[*Translation*]

Mr. Serge Ménard: I understand. The court gives all the reasons that led it to decide the way it did in this case. That is what courts usually do. Sometimes, however, they give more reasons than necessary to justify their conclusions. If one of these reasons were removed, they would still arrive at the same conclusion in the case in question. The explanations that we had regarding DNA reassure me. For my part, I asked for additional explanations about DNA, and it seems that a very small part of the DNA is used. The whole system was explained to us. We were told how the law was followed to ensure that no one could have access to the bank and obtain information on a person whose DNA was on deposit, other than the fact that this DNA correlates exactly with the DNA in a bodily substance sample found at a crime scene.

I understand the concerns of my Conservative friends and I share them. We have a tool that allows us to make considerable progress in the application of justice, since we can find evidence that leads to convictions and that permits us to exonerate with assurance people who are unjustly suspected. Such a tool protects society in general, since it permits us to convict the guilty and avoid mistrials. This is why we believe that the bank should be as large as possible, in compliance with the provisions of the Charter. It seems to me that all necessary provisions to protect privacy exist elsewhere in the law, in order to ensure it. Everything was done so that only the part that can actually be useful to the administration of justice will be retained, which makes it possible to establish with certainty points of fact that will make it possible to convict or exonerate someone.

It's largely for this reason that I consider that the bank should be larger rather than smaller.

● (1210)

The Chair: Mr. Marceau.

Mr. Richard Marceau: In the first stage, when Members of Parliament made a list of primary designated offences, they said that these primary designated offences were so serious that they believed that bodily substances should be taken for DNA analysis in such cases. In the second stage however, they said that there were exceptions. I understand that these exceptions, which were to be rare, now represent 50 per cent of cases where there are convictions for primary designated offences.

Do we agree on these facts?

Mr. Michael Zigayer: I am not sure I completely agree with what you said. I don't know whether, in these 50 per cent of cases, the court exercised its judicial discretion. The rules were set out in the Criminal Code, but I don't know if the Crown or the court, following the conviction, failed to look at this part of the Criminal Code and immediately went on to passing sentence.

Mr. Richard Marceau: Your explanation doesn't really reassure me. A list of offences was established for which samples should be taken and some minor exceptions were provided. You tell us that the exceptions increased, or that the judges and the Crown didn't read the law that the Members of Parliament had adopted and therefore didn't apply the law as they should have.

It is interesting that the parliamentary secretary of the Minister of Emergency Preparedness wants it widened. We see a division within the Government in this regard, which is interesting enough. I have never seen that in eight years.

Are you telling us that it would be best to do what Vic Toews is proposing, but you fear that it would be declared unconstitutional by the courts?

● (1215)

Mr. Michael Zigayer: You asked two questions.

Personally, I don't believe that it would be good to adopt Mr. Toews' proposal because I believe that procedure is important. The procedure that we established in the Criminal Code should be applied.

Mr. Richard Marceau: You have just told me that it wasn't always applied.

Mr. Michael Zigayer: I said that it should be applied.

Do we believe that the adoption of this motion could cause constitutional problems? Absolutely. That is my personal opinion. Mr. Cohen is our expert in this area.

[*English*]

The Chair: Mr. Cohen, you had a comment, then we'll go to Ms. Neville, and then I'm going to put the question on this.

Mr. Stanley Cohen: I think it is wrong to say that we should be fearful of what the courts are doing or might do. When we're talking about the Constitution, I think we're basically reminding ourselves of what we believe should be the fundamental values at stake in the decisions we're making, and that the fundamental value that seems to have been at play here is one of fundamental justice and one of respect for the protection of privacy.

As I have read the cases until now, the decisions of the court emphasize the importance in the process. I appreciate what Mr. Ménard is saying, that you can read decisions and find room for manoeuvre, but the tilt in the cases I've cited—SAB, Murrins, Briggs, Hendry's been mentioned here, and one can go on—is hard to deny. If Parliament is merely going through some sort of symbolic exercise in order for the courts to tell it that there is essentially an action that's been taken by Parliament itself to derogate from the Constitution's terms, I think it's something that should give us pause. That, I think, is essentially what we should be having regard for when we consider the constitutional implications of the measure.

The Chair: Ms. Neville.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you, but Mr. Cullen just answered my question.

The Chair: As I said earlier, there's a line conflict, and there's inconsistency that would give different results. If G-2 passes, then C-1, C-2, and C-3 would not be put. Conversely, if G-2 is defeated, then C-1, C-2, C-3 would be put. That's my ruling.

I'll put the question on G-2.

Oui, Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: I would like to understand your decision, which I accept in advance.

The Chair: I am going to ask the clerk to explain it to us once more.

Mr. Serge Ménard: They could also show us the documents.

The Chair: Yes.

[*English*]

Ms. Susan Baldwin: The first one we're going to be voting on is G-2 on page nine. This is the government amendment.

After that, if G-2 is agreed to by the committee, then we will not be putting C-1, C-2, and C-3, because there's a line conflict and they are two mutually exclusive schemes. C-1 is at 8(a), C-2 is at 10(a), and C-3 is at 10(b).

We received some of these amendments at the last moment, so you may have the package that was distributed to your offices as opposed to the package that was handed out here. If you don't have the (a), (b), (c) page numbers, that's the reason. We just got the Conservative ones organized early this morning.

● (1220)

[*Translation*]

Mr. Serge Ménard: It's as though we didn't have enough.

[*English*]

The Chair: Yes, Mr. Toews.

Mr. Vic Toews: Why are we proceeding with G-2 before—

Ms. Susan Baldwin: It's a straightforward matter of the order in which they appear in the bill. G-2 starts before C-1. It's a strictly neutral way of proceeding by the order in which the amendments will be in the bill.

The Chair: Before the vote on C-2, I'm explaining the consequences very carefully.

Mr. Vic Toews: I'm not doubting your integrity or your ability to explain.

The Chair: Mr. Cullen.

Hon. Roy Cullen: If G-2 is defeated, are C-1, C-2, and C-3 mirror images? I want some clarity from the officials and the parliamentary secretary. In other words, if G-2 is defeated, are we also throwing out things other than what would be replaced by C-1, C-2, and C-3? I don't want to throw the baby out with the bathwater.

Are they complete inversions? Maybe the officials could describe what's in G-2 that, if it is defeated, will not be replicated in C-1, C-2, or C-3. Also, what are the implications of this development?

Mr. Vic Toews: Correct me if I'm wrong, but C-1, C-2, and C-3 don't have anything to do with G-2, other than the fact that they're found in the same provision. We can consider bringing G-2 forward in a separate context, but the fundamental principles of C-1, C-2, and C-3 have nothing to do with G-2, which deals with people found not criminally responsible.

Hon. Roy Cullen: Is there any way to deal with this?

The Chair: Mr. Macklin, do you have a comment?

Hon. Paul Harold Macklin: I think the clerk has properly characterized the issue. If we adopt C-1 subsequently, it would create a problem, because we've just amended the method of dealing with persons found not guilty by reason of mental disorder. This would create a conflict.

The Chair: Monsieur Marceau.

[*Translation*]

Mr. Serge Ménard: Can we know what C-1, C-2 and so forth are? I am told that it is on page 8, but amendment G-2 is on pages 4 and 5 in my documents.

Hon. Roy Cullen: Amendments C-1, C-2 and C-3 are on pages 8a, 10a and 10b.

Mr. Richard Marceau: In the meantime, I am going to ask my question, Mr. Chairman.

[*English*]

The Chair: Oui.

[*Translation*]

Mr. Richard Marceau: If, with Vic Toews' amendment we take away some of the judge's discretion, how does this affect the possibility that people who are not criminally responsible fall into the category of people who have committed a secondary designated offence? I don't see how these things contradict. That is all I want to know.

[*English*]

The Chair: Mr. Macklin.

Mr. Vic Toews: If that's what is going to bring a consensus to this committee, I'm prepared to agree with that. I don't know why it has to be an either-or. Mr. Comartin has brought forward a point; the government has recognized that point, but it seems to have nothing to do with the fundamental principle that Mr. Cullen has expressed concern about and Mr. Ménard has expressed concern about.

● (1225)

Mr. Richard Marceau: If we agree with your scheme, but we put NCRs in secondary offences, you're fine with it.

Mr. Vic Toews: I'm fine with that.

Mr. Richard Marceau: Okay, can we do that? I'm fine with that too.

Hon. Paul Harold Macklin: We could do that, but these amendments don't do it.

Mr. Vic Toews: We don't have to pass amendments C-1, C-2, and C-3 unanimously, but if we then unanimously say we will agree to amendments that accomplish amendment G-2 regardless of the fact that there might have been conflict, I'm in agreement with that. There's no problem here from the point of view of the Conservative Party.

The Chair: I'm going to ask the clerk to respond to that point.

Ms. Susan Baldwin: What we need to have when we all leave this room is a very clear understanding of exactly which words the committee has agreed to, because we can't proceed to report stage with a bill that's got a vague promise of something in it. We need the exact words.

There are two ways of doing that. You can redraft, making a new amendment out of all the amendments, but I need the exact wording for that, or we're going to land ourselves in a terrible mess when we get to report stage or try to reprint the bill, because we won't know exactly what goes in it. Or what we could do is take the relevant parts of your amendments, Mr. Toews, and amend amendment G-2 to include those so that we then are passing one clear-cut amendment.

I think it would take a little time to be able to put the two of them together properly. Perhaps we could have lunch and then do it.

The Chair: Yes, we could suspend for—

Ms. Susan Baldwin: I don't know whether the officials can help me with this or not.

Mr. Vic Toews: If we can—

Ms. Susan Baldwin: Can they do this?

Ms. Anita Neville: I'm not agreeing to it. I'm sorry.

Mr. Vic Toews: Then let's just have the vote if you don't want to agree.

Hon. Paul Harold Macklin: We're not in a position to agree to put at risk the entire scheme because in fact we won't allow an exception on the primary offence, and that's what you're trying to bring forward, that there would be no exception permitted on a primary offence.

Mr. Vic Toews: No, what I'm saying is that I'm willing to agree with essentially what is Mr. Comartin's idea to allow exceptions for the not criminally responsible. I'm prepared to agree with that. If we can facilitate that here within the next hour, I'm prepared to do it. If not, I'm proceeding on my amendments, and I can't support the government amendment, because even though it really has nothing to do with what I'm saying, there's some kind of a technical conflict, and that's unfortunate.

I want to say, on the record, that if a government member wants to bring this forward in another context at a future date, even if it's defeated now, I will support it. That's my personal commitment.

[*Translation*]

Mr. Serge Ménard: I think the same thing. For persons found not guilty by reason of mental disorder, we agree on the Government's position, but for discretion in the case of primary designated offences, we agree with the Conservatives' position. We therefore agree with both positions.

[*English*]

The Chair: Okay, then—

[*Translation*]

Mr. Serge Ménard: If we reject that, we reject the provision in favour of persons found not guilty by reason of mental disorder, whereas we wouldn't want to do that.

The Chair: You will have the opportunity to change it at the report stage.

Mr. Serge Ménard: If we adopt amendment C-2, I should point out that there is a mistake in the French, I believe.

[*English*]

The Chair: Mr. Maloney.

Mr. John Maloney (Welland, Lib.): The committee doesn't want to let this one stand down, move on, and give us a little bit of time to try to work it out?

The Chair: That was the suggestion. I thought it was rejected.

We have lunch ready. We could suspend for ten minutes and see if we could work something out while we eat and then come back and pick up the discussion.

We'll suspend for ten minutes.

● (1229)

(Pause)

● (1238)

The Chair: Could we have the members resume their places?

It's obvious that we're not going to get finished before one, and many of us have to be elsewhere at one o'clock.

What I suggest is that we stand the consideration of clause 3 down until a future meeting to allow an opportunity to try to come up with appropriate wording that would incorporate the two amendments we were talking about. We're not going to get finished anyway, so we'll have to complete this work at another date.

We can use the next 10 or 15 minutes to go through some of the other clauses and come back and pick up our consideration of clause 3 at a future meeting.

(Clause 3 allowed to stand)

(Clause 4 agreed to)

(On clause 5)

● (1240)

The Chair: On clause 5, we have government amendment G-3.

Mr. Macklin.

Hon. Paul Harold Macklin: This motion proposes a significant change to Bill C-13 and the scope of the retroactive application of the DNA databank legislation.

The existing retroactive provisions allow the crown to apply to the court for an authorization to take a DNA sample from certain offenders convicted prior to June 30, 2000, the date on which the DNA databank legislation came into force.

At its core, the DNA databank legislative scheme rests on the concept of dangerousness and recidivism, that some offenders will commit similar serious offences after the completion of their sentence or may have committed others before being convicted, and that DNA technology could link these offenders to these crimes.

The legislation was carefully crafted to encompass classes of offenders where the balance between the offender's interest in his personal privacy was perceived as less significant than that of the public's interest in the proper administration of justice and protection from such offenders in future crimes. The retroactive scheme applied to serial murderers, serial sex offenders, and persons designated by the courts as dangerous offenders. The Criminal Code set out a procedure under which in each case the crown had to satisfy a provincial court judge that the taking of the offender's DNA for the purposes of the DNA databank was justified. Subsequent judicial consideration of the legislation has approved of the approach taken and the importance of the procedural requirements. It has laid the foundation for an expansion today.

The procedural requirements of the retroactive scheme are preserved under the proposal before us today. However, the scheme will be widened by allowing an application where the offender has been convicted of only one murder, rather than two murders committed at different times, or only one sexual offence, rather than two sexual offences committed at different times. In addition, it would now also make persons convicted of manslaughter eligible for the scheme.

That would be the reasoning for this government amendment.

The Chair: Okay.

Mr. Toews.

Mr. Vic Toews: Certainly this has been one of our proposals as the Conservative Party. We are in agreement with this. Indeed, we'd be satisfied to see this hived off and brought forward as quickly as possible, even outside of this bill. If there's any way of doing that, we would consent to this at all stages immediately.

[*Translation*]

The Chair: Mr. Marceau.

Mr. Richard Marceau: Same thing here.

[*English*]

Mr. Joe Comartin: I'm fine with that.

Hon. Paul Harold Macklin: I take it it's agreed?

The Chair: I don't think we here have the authority to enact that suggestion, but we can deal with the government amendment.

Hon. Paul Harold Macklin: That's right.

The Chair: Does government amendment G-3 carry?

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 5 as amended agreed to)

(On clause 6)

The Chair: We'll go to government amendment G-4.

Mr. Macklin.

Hon. Paul Harold Macklin: On this particular motion to amend, we're amending section 487.056 of the Criminal Code. It's intended to simplify and clarify the legislation insofar as it sets out the time when DNA samples are to be taken from an offender after a court has made a DNA databank order.

As proposed in the bill, as originally drafted, it would still be possible for the DNA databank order to be executed on the day it was issued. It would also be possible for the court to fix a subsequent time for the taking of a sample. What this motion addresses is a situation where the offender has failed to appear for the taking of that particular sample and preserves the authority of the police to take that DNA sample.

(Amendemnt agreed to) [See *Minutes of Proceedings*]

(Clause 6 as amended agreed to)

(Clauses 7 to 11 inclusive agreed to)

(On clause 12)

The Chair: On clause 12, we have amendment G-5.

Mr. Macklin.

● (1245)

Hon. Paul Harold Macklin: This motion amends form 5.03 to include persons found not guilty by reason of mental disorder of a primary designated offence. This amendment to form 5.03 is consequential to the clause 3 amendment regarding a person found not criminally responsible on account of a mental disorder of a primary designated offence.

I suppose as a result of that we likely should set it aside at the moment.

The Chair: We'll have to let it stand down then and deal with it at our next meeting dealing with these issues.

Hon. Paul Harold Macklin: And I guess that is equally so for amendment G-6.

The Chair: Yes, amendment G-6 as well. Therefore we'll stand clause 12 down.

(Clause 12 allowed to stand)

(Clauses 13 to 15 inclusive agreed to)

(On clause 16)

The Chair: On clause 16, we have government amendment G-7.

Hon. Paul Harold Macklin: The motion to amend here is proposed with respect to subsection 5.1(2) of the DNA Identification Act. It specifies what the commissioner is to do with the DNA profile. It reflects the current practice and is intended to clarify the legislation.

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 16 as amended agreed to)

(On clause 17)

The Chair: On clause 17, we have government amendment G-8.

Hon. Paul Harold Macklin: With respect to the amendments here, section 6 of the DNA Identification Act describes what information contained in the national DNA databank the Commissioner of the RCMP may communicate and to whom. This motion clarifies the law with respect to so-called "moderate matches".

Under the provisions of the DNA Identification Act, the national DNA databank compares the DNA profiles of convicted offenders with those derived from evidence collected at a crime scene in an effort to identify a suspect in the commission of an unsolved designated Criminal Code offence. Crime scene DNA profiles are produced by regional forensic labs and then transmitted to the DNA databank to be included in the crime scene index. Convicted offender profiles are produced by the national DNA databank.

Now, it is not always possible for a regional lab to develop a complete DNA profile because of the degraded state of the crime scene evidence. Nevertheless, the incomplete profile may be uploaded to the crime scene index. Subsequently, when a match occurs between such a DNA profile in the crime scene index and another DNA profile in the national DNA databank, it can only be designated as an incomplete match. This is known as a "moderate match". The amendment sets out the procedure to follow in each of the situations that arise—that would be "no match", a "complete match", or now this category called a "moderate match".

The procedures for "no match" and "complete match" are unchanged from the current legislation. If the result is a moderate match, the national DNA databank will provide the profiles to the laboratory without identifying information. Where any of the profiles cannot be eliminated, the national DNA databank will provide the identifying information for those moderate matches.

So this was a practice that was carried on to deal with moderate matches until it was found that it was inappropriate to do so. What we're trying to do now is put in place the legislative authority to allow moderate matches to exist within the system and to be properly used.

The Chair: Is there any discussion on amendment G-8?

Yes, Mr. Breitkreuz.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Does any of this contradict some of the other intentions of some of the amendments we've set aside temporarily?

Mr. Michael Zigayer: No.

Hon. Paul Harold Macklin: No.

(Amendment agreed to) [See *Minutes of Proceedings*]

The Chair: Amendment G-9 to clause 17.

Mr. Macklin.

Hon. Paul Harold Macklin: Just a moment, Chair, if I could, please.

● (1250)

The Chair: It appears to deal with unauthorized use of information. This is page 22.

Hon. Paul Harold Macklin: This is a consequential amendment that relates to the changes that we've just added with the previous amendment. It's just a question of who you can communicate that information to. So as I say, it's strictly complementary and consequential to that amendment.

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 17 as amended agreed to)

(Clauses 18 to 22 inclusive agreed to)

The Chair: On clause 23, we have amendment G-10.

Mr. Macklin.

Hon. Paul Harold Macklin: This one again is consequential to the preceding one. I don't know that anything else needs to be stated on that.

The Chair: Are there any questions on that?

(Amendment agreed to)

(Clause 23 as amended agreed to)

The Chair: On clause 24, we have amendment G-11.

Mr. Macklin.

Hon. Paul Harold Macklin: We'll have to defer that one.

The Chair: That one we will have to stand?

Hon. Paul Harold Macklin: Yes.

Mr. Garry Breitkreuz: Is that because of the effect it has on the previous ones that—

The Chair: It relates to clause 3, does it? So we'll let clause 24 stand. We'll go on to clause 25.

(Clause 24 allowed to stand)

(Clause 25 agreed to)

The Chair: On clause 26, we have amendment G-12. This is page 27.

Mr. Macklin.

Hon. Paul Harold Macklin: This is a mirror image, in effect, of what we have in the Criminal Code, which is actually being placed in the National Defence Act. Am I correct on that?

A voice: Yes.

The Chair: The National Defence Act?

Hon. Paul Harold Macklin: That's correct.

The Chair: Are there any questions?

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 26 as amended agreed to)

(Clauses 27 to 29 inclusive agreed to)

The Chair: On clause 30, we have amendment G-13, page 29.

Hon. Paul Harold Macklin: This is what we call a coordinating amendment. The purpose is to complete the linkage among the various acts and is consequential.

(Amendment agreed to) [See *Minutes of Proceedings*]

(Clause 30 as amended agreed to)

The Chair: Shall clause 30.1 carry?

The Clerk: That would be amendment G-13. That one was carried.

The Chair: So clause 30.1 is carried.

I think we'll adjourn now. The clerk will send a notice.

Once the wording is worked out in advance on clause 3.... I think much of the discussion has been completed—

Mr. Vic Toews: Yes.

The Chair: —so we'll be able to do it at a very short meeting after one of our other meetings.

Mr. Garry Breitkreuz: Mr. Chair, on that point, I would like to see that happen maybe on Tuesday, if possible, right after we talk to the....

The Chair: Yes. So we'll adjourn, and we'll complete this work on Tuesday. The clerk will send a notice.

Thank you, everyone.

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