



House of Commons  
CANADA

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

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JUST • NUMBER 021 • 1st SESSION • 38th PARLIAMENT

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**EVIDENCE**

**Thursday, February 17, 2005**

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**Chair**

**The Honourable Paul DeVillers**

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

Thursday, February 17, 2005

● (0900)

[English]

**The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)):** I call to order this meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We are continuing the study of Bill C-13, An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act.

We have before us this morning Gary Lunn, member of Parliament for Saanich—Gulf Islands, who has a presentation to make to us. I understand, Mr. Lunn, you have a private member's bill that relates to the subject matter of Bill C-13. I would ask you to make your presentation. Our usual procedure is about a 10-minute presentation and then questions and answers.

**Mr. Gary Lunn (Saanich—Gulf Islands):** Thank you, Mr. Chairman.

I am grateful to all the members for giving me the opportunity to come before your committee. It is the first opportunity I have had to sit on this side of the room.

I'm not going to read very much. I'm just going to speak from what I know. So if you could just give me a one- or two-minute warning, that would be helpful for me.

I want to begin by thanking my colleagues, especially Richard Marceau from the Bloc Québécois, who was very gracious to put my name forward as a witness. I also want to acknowledge another colleague, the Honourable Wayne Easter, who has been very supportive of my private member's bill all the way along. I want to put that on the record as well.

Let me try to encapsulate what this is about. Two or three years ago, Judy Peterson, whose daughter went missing, came to see me. At that point in time her daughter had been missing for about 10 years. She has never been found. There are hundreds of bodies in morgues across the country. DNA profiles have been taken and put into an index called the unidentified human remains index. DNA collected at crime scenes is put into another index. She was quite frustrated because she had DNA of her daughter, but there was no way legally to cross-reference that DNA. She said, "Maybe I could bring closure to this. There are other missing people out there, and maybe we could bring closure in those cases". That's where this idea started.

After writing letters to all the provincial ministers and speaking with the federal ministers, the RCMP, and the experts, trying to learn

more about this issue, we were able to move forward with a private member's bill. I have to admit that all the way along I've received support from members from all parties. So this is not an issue that is partisan or belongs to any political party. I call it Lindsey's law, which is her daughter's name.

Of course, under the rules for private member's bills, it had never seen the light of day, and that is just a process situation.

This is really where this bill belongs, in Bill C-13. I will briefly describe the bill. I've distributed it, Mr. Chair, to all of the members. It's now Bill C-240. Basically, it creates another index, a DNA database for missing persons, and it would link that database to the crime scene index and the unidentified human remains index.

National Missing Children Services processes something like 60,000 missing child cases per year. While the majority of those are solved within a few days or a week, there are over 2,000 outstanding cases at any given time. Children who are not found within the first week are often never found.

I understand that to date over 15,000 unidentified DNA profiles have been collected at various crime scenes across the country. They have no idea to whom that DNA belongs.

The whole purpose is to link these databases. If we could get even a few hits, I think it would go a long way. Say they got a hit on the crime scene index. The cost of a DNA sample right now is roughly \$100. To do a murder investigation costs \$750,000.

The intent of my bill is to help bring closure for families. If a person has gone missing and they have their DNA profile and they actually get a hit from a piece of DNA that was collected at a crime scene....

● (0905)

The obvious one, which we've seen in the news over the last few years, is the Pickton murder trial in Vancouver. From that crime scene they've collected numerous DNA profiles that are unidentified. If they can match that DNA with missing persons, they can pinpoint where they need to further that investigation. It obviously could be a very huge tool for the police.

I think the benefits are obvious. It's not a cost issue. I've spoken to the experts who run these indexes. They tell me the technology is in place. There's virtually no cost involved. There's absolutely no risk of mixing up the profiles. That was all quite reassuring.

There have been concerns raised, and I think it's prudent for me to put those on the table as well. The big one has been privacy concerns. There's concern that an innocent person could be incriminated if their DNA were found at a crime scene, or there might be missing persons who would not wish to be found. I believe we've addressed these concerns in the legislation.

First, if a missing person is found alive, they do not have to reveal their whereabouts. That DNA is deleted immediately from the registry. If you don't have the DNA of the missing person, the experts tell me the DNA from a biological relative is close enough to get a match.

Second, providing a sample—whatever DNA sample is provided from the family—is entirely voluntary by the biological family members, the people who are looking. This is not a compulsory thing. It's very clear in the legislation that this is a voluntary opportunity for people who have pushed to pursue this.

Third, the DNA is used solely for the purpose of finding the missing person. That is the wording I have in the proposed amendments. I acknowledge there are some people who would like to use this as a tool for crime investigations, but that's not the purpose of my bill. I haven't gone down that road, and I'll be specific as to why. I talked about it earlier. It could be a tool, and maybe that's something they want to investigate. But I don't want to risk the possibility of this not passing because of potential charter challenges or things like that. My intent with this is to help find missing people and make that linkage. For that reason I have not included it for the purpose of crime investigations.

There are a few other concerns. I had a very positive conversation yesterday with my honourable friend here, and he raised a few other issues. Obviously one is that the intent of Bill C-13 is to actually identify criminals. I believe I've encapsulated that by adding an amendment to that section in the bill that it's also to identify missing persons.

I think the strongest case they're going to put forward is a jurisdictional one. There's been some suggestion that this is in fact provincial jurisdiction. I want to state at the outset that what I'm asking you to do is to allow family members of missing people to submit DNA to be cross-referenced with federal DNA databases.

I have written every single provincial minister on this file. So has Ms. Peterson. Let me just read you a few excerpts from these files. I'm happy to leave all of these letters with the committee.

This one's from the minister from British Columbia:

British Columbia's position is that the current DNA legislation should be expanded to include legislative authority for the collection of DNA involving missing person cases. I fully support the development and enactment of this type of legislation.

This one's from Alberta:

I agree that steps must be taken to better utilize new technologies to identify human remains and bring closure to families of missing persons, wherever possible. Your proposal to expand the existing DNA database to achieve this goal is both innovative and timely.

I am pleased to offer my full support of the passage of Bill C-441.

● (0910)

**There are some people who have raised the issue of privacy concerns, but by and large they've all been very supportive. From Ontario:**

As you are aware, the process to review and amend the *DNA Identification Act* falls within the jurisdiction of the federal government. Ontario has been a strong supporter of the National DNA Data Bank through the work of the Centre of Forensic Sciences and the province's police services. Also, Ontario's Office of the Chief Coroner is strongly committed to vigorously utilizing all forensic science technologies in order to identify deceased persons.

Let me assure you that Ontario will continue to provide its input to the federal government in the consideration of a National Missing Persons Index.

From the Province of Quebec—and again they raise some of the concerns on privacy:

The Minister will ensure that guarantees and protections are provided to prevent any possibility of matching of DNA profiles of innocent persons with profiles in the crime scene index.

That was some of the concern, but again—and I can see I'm getting the hook, so I'll try to wrap up, Mr. Chairman—I'm willing to work with any provincial minister or province and make changes that are necessary to see that this goes forward. The goal here is to help these people who desperately need this tool.

Again, I have support from the RCMP Assistant Commissioner, who has written me a very long letter of support.

I'm willing to have all of these tabled with the committee, and I would ask you to support this initiative. I'm willing to work with the government members, with anyone, with some of the experts you'll hear from later, if they have constructive, positive suggestions and amendments that they think would be necessary. I'm more than willing to entertain a discussion with any of those people. The goal here is to create a missing persons database.

Thank you, Mr. Chairman.

**The Chair:** Thank you, Mr. Lunn.

We'll go to Mr. Breitkreuz for the first five-minute session.

**Mr. Garry Breitkreuz (Yorkton—Melville, CPC):** Thank you, Mr. Chairman.

Thank you, Mr. Lunn, for your initiative and for the hard work you've put in on this over many years. You need to be commended for this, and I especially appreciate the effort you have put forward to bring this here. I think everyone at this committee table would probably concur with that.

As I have reviewed this and studied it, to me it seems like a slam dunk. What are we waiting for? This is something that is good for us. It's an issue of compassion and justice in many cases.

I have to take issue with one thing you said, though, about how Bill C-13 is just to identify criminals. It's not, it's also to exonerate people. I think your bill could fit into Bill C-13, because the DNA samples that are collected could be of benefit to innocent people, and I think the category that you've described to us would fall within that.

Do you not think this is an issue of balance? If there are so many benefits from something like this, would they not outweigh the possible negative effects? I know you have protections built in there, but on balance wouldn't this have many more benefits than downside factors?

The other question I have for you is, could this be put in place for a trial period and then be reviewed like all other legislation, and even this act? Couldn't we try it for awhile? If the benefits are as you have described, we would maybe fine-tune it and continue with it, or we could pull it if it's not working. Couldn't that approach be used?

• (0915)

**Mr. Gary Lunn:** Let me try to give you some really quick answers here and stay within the timeframe, which I'm fully aware of.

First of all, you know, I want to put on the record that I'm just the spokesperson; it's not my initiative. This is Judy Peterson's, and I have to give credit where credit's deserved. Had she not come to me with this idea, I wouldn't be sitting here today.

What are we waiting for is a great question. You know, I've been pushing this...sometimes we can study things just too long. I know there will be suggestions coming forward that we should wait and maybe move on this in the fall. I think we've covered off the bases. I think we can go with this now. If there are some things we need to do to it, let's do them.

If we identify some problems, as you say, in a trial period, they can be rectified. Again, the goal here is to create an effective missing persons database. We'll take the comments and constructive criticism from wherever to try to make this even better.

So on the privacy issues, on balance I agree with you that the benefits far outweigh any potential concerns. But you know, in the days we live in there are always these concerns, and I think you have to build these protections in, and we've done that.

This is voluntary only. Nobody, under my legislation, is compelled to submit a DNA profile. So for that reason alone, I think those issues are covered off.

The only other thing I want to say on the balance question is with respect to the jurisdictional issues. Again, we are cross-linking. Even if somebody could make a strong argument that it is provincial jurisdiction, in all my correspondence that does not appear to be an issue. Quite the contrary, these are national, federal databases. To try to create a patchwork of 10 different ones across the country I don't think is the right solution here.

Every single province wants to try to help in any way they can, so I don't see the jurisdictional problem. As the Ontario minister said, they believe it's federal jurisdiction. As I say, on balance, if that argument's made, I wouldn't know if anyone would even challenge it, because it's absolutely obvious that this is something that should be done.

Thank you for your questions.

**Mr. Garry Breitkreuz:** You make a good point.

I'm going to share my time with Mr. Warawa, if there's time left.

**The Chair:** I have him next on the list.

There are 15 seconds left—that's sharing, but not too equitably.

**Mr. Gary Breitkreuz:** Let me make one closing comment.

I'm very familiar with another area where the provincial jurisdiction was challenged by the provinces in the Federal Court, and that's the gun registry. The courts decided that because it goes across the provinces, the federal government would have jurisdiction in that area. So I think you have a strong argument in this area.

You were probably wondering how I was going to bring the gun registry into this.

**Mr. Gary Lunn:** I don't think anyone would know better about that than you.

**Mr. Garry Breitkreuz:** Thank you very much.

**The Chair:** Thank you, Mr. Breitkreuz.

[*Translation*]

You have five minutes, Mr. Marceau.

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

There's no doubt in my mind that whatever the nature of the debate, our colleague Gary Breitkreuz will manage to bring up the subject of the gun registry.

Thank you very much for coming here today, Mr. Lunn. Thank you as well for your presentation. You are doubtless aware, further to the conversations that we have had and my comments to this committee, that I'm quite supportive of your initiative, in principle. I think it's an excellent idea.

It should come as no surprise to you that I have a problem with the sharing of responsibility scheme. Earlier, you read to us letters from several provincial justice ministers. I always guard provincial powers very jealously, for obvious reasons. I've already mentioned to you that my fear is that someone will seize upon a good idea to move into areas under provincial jurisdiction. As a sovereignty supporter, I wouldn't like to see us go there.

However, I do appreciate you're stating quite openly, both here and outside this forum — and I want to stress that fact — that there are many ways of implementing this bill, this mechanism, without infringing on provincial jurisdictions. You're quite receptive to that idea and you invited us to make some suggestions, adding that you were willing to work with everyone. I just wanted to say that I appreciate that.

Have you sought a legal opinion on the sharing of responsibility scheme to determine if this arrangement is valid? If not, could you possibly provide us with one?

If your bill requires amendments to ensure that responsibilities are properly shared, would you be open to the idea of making some changes?

• (0920)

[*English*]

**Mr. Gary Lunn:** Absolutely.

First of all, from all my research, I believe the federal government and some provinces have stated that it is within the purview of the federal government. The existing databases we're cross-referencing are federal databases.

That being said, in situations like this, it takes the cooperation of the provinces to make this work; they would be the ones collecting the samples and submitting them and who would have access to this. Even if we did this on a trial basis, as Mr. Breitreuz said, and if these concerns were raised or could be dealt with, I would be more than happy to entertain them.

Again, I'm not sure if you caught it, but I appreciate your bringing me forward before the committee to discuss these concerns. I would be more than willing to entertain discussions with any province if this is in fact a concern. It hasn't been a concern raised directly with me. In the letters, it has been something that we need to look at in a few provinces, but it doesn't seem to be, at least in my interpretation.... We just want to make sure this gets done.

So I don't see this as an issue. I actually believe this is totally within the jurisdiction. It's a difficult question to answer, and we could provide a legal opinion and get an expert to write a legal opinion, but when the section 91 and 92 powers were written or were being considered, I don't think anybody at that point in time was thinking of DNA profiles. What we're trying to do is purely on a humanitarian basis. Again, I don't think there's a province.... They would just like to see this work done.

Even going to the potential opportunities beyond the provincial jurisdictions we're talking about, there have been discussions with some experts saying that once this is created, there are other countries that have similar databases, which you could look at as the next step down the road for the sharing of information. As you know, missing persons are not confined to a country; they can cross borders. Even looking at the jurisdictional issues, those are the next steps. Obviously I'm not suggesting that at this point in time, but if you consider the goal we're trying to achieve, I think we can get past these.

If there are issues, I would be the first one to change my proposed legislation or amendments, or invite others to do so, to make this a reality.

[Translation]

**Mr. Richard Marceau:** Thank you.

[English]

**The Chair:** Thank you, Mr. Marceau.

Mr. Comartin, for five minutes.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Let me start by saying that I think everybody around the table feels the same way, that this is an index base that has to be pursued and created. It is how we go about it.

Let me start off by going back to one of the issues you did raise about privacy. I have gone through your private member's bill, and if we take the scenario of a young person who has run away from home intentionally because of abuse in the home, is this going to be a mechanism that the abusive custodial parent can use to track that person?

● (0925)

**Mr. Gary Lunn:** I don't see how that could possibly work, because the only indexes I'm suggesting they be cross-referenced with are for unidentified human remains—which they obviously wouldn't be in if they've run away from home—and the crime scene index. There is potential that a DNA profile could possibly be found at a crime scene and the person still be alive, but I believe we have put in the safeguards so that if it is in fact determined, they do not have to divulge their whereabouts and the DNA profiles would have to be deleted immediately. I am assured by the experts that this can be done.

I would only add that what you're talking about is possible. Is it likely? You have to say in this one situation—and we've tried to put in the safeguards to protect against it—that the potential good so far outweighs the potential harm.... And I'm not even convinced it is a harm, but if it is one—and we've tried to put the safeguards in—it is something that is still worthwhile to move forward on.

**Mr. Joe Comartin:** Mr. Lunn, I don't know if you appreciate this. The committee has been to the federal lab here in Ottawa. In the course of that, we determined we can't in fact destroy the samples once they are taken, because they're mixed in—that's not the right term, but one I can use in my language—with 90-plus other ones. The profile always stays there. If we are going to be able to destroy them, we would have to develop a new methodology for storing them. That's one of the technical problems.

I note that right at the end of the bill you're proposing the bill contain direction that they be destroyed. The reality right now is that if we use a similar manner of collecting and storing those samples, we will not be able to destroy them. So given the situation we were just talking about—of the abused individual—it would stay on record.

**The Chair:** Mr. Comartin, just as a procedural matter, we are now into some of the minutiae of the bill. The bill itself is not before us. Bill C-13 is. The subject matter is related, so I don't know, technically, if we need to be that concerned with the actual drafting of the bill per se. It's the subject matter that is of interest.

**Mr. Joe Comartin:** You wouldn't be suggesting, Mr. Chair, that I was being irrelevant?

**The Chair:** No. I would never do that.

**Mr. Joe Comartin:** Let me go back to the final point that I'll cover, because I'm sure my time is just about up. That is the jurisdictional issue.

One of the ways around it is to reach agreements with the provinces. Do you know if any effort has been made by any of the provinces to deal with the federal government on that basis?

**Mr. Gary Lunn:** I do. Again, I commend the Honourable Wayne Easter. When I spoke with him, he was very supportive. In fact, it was Mr. Easter who brought this forward to the federal-provincial-territorial meeting. I have a note here, written in hand, from Richard Coleman, the British Columbia minister, saying, "Gary, at the fed/prov justice meeting we unanimously agreed to move forward on this". So they have been moving forward.

I have always done it on a parallel track with my private member's process. I understand they will be releasing a report—possibly within weeks, possibly before we even get to the clause-by-clause on Bill C-13. They are moving forward, and I have to admit that they have been very supportive as well.

I want to state, though, that I still have every intention of proceeding forward, only because I have seen the wheels move so slowly. If there's an opportunity to make this happen and make it law, I want to take that opportunity for Judy Peterson.

**The Chair:** Thank you, Mr. Comartin.

Mr. Cullen, you have five minutes.

• (0930)

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

Mr. Lunn, I used to live in your riding, so—

**Mr. Gary Lunn:** I'm aware of that. You came out at every campaign.

**Hon. Roy Cullen:** I want to congratulate you on bringing this matter forward. I know what's involved. We all do, to some extent. My private member's bill on user fees took about three years, so I know the process on private member's bills, as we all do.

As Joe Comartin said, probably all of us around the table are sympathetic to what you're trying to accomplish. When we go to ministers, one of the things we all find is that people will be endorsing what you're trying to accomplish, but I'm surprised none of the provincial attorneys general you have spoken to at this point have raised the issue of jurisdiction. I think you'll find the government lawyers will argue that it raises some jurisdictional issues.

The other aspect you know about is that the federal-provincial-territorial ministers of justice are working on this missing persons index as well. They have identified it as a priority. In fact, they are coming out shortly with a public consultation document to review a range of issues, including jurisdiction, privacy, and various legal and other operational questions. I'm sure you'll be involved in that.

There is a technical question I want to put to you, but I wanted to put on the record some of the concerns I have with respect to jurisdiction.

What you're proposing here is really relief for families of missing persons. We understand the motive behind that, and we support it, I'm sure. It's clear, then, your primary objective and benefit of the creation of this missing persons index is primarily humanitarian.

[*Translation*]

In light of the fundamental humanitarian considerations associated with the creation of a DNA database on missing persons and the fact that a missing persons index would be used solely for the purposes of conducting a criminal investigation or for enforcing the legislation, one has to wonder if Parliament is truly qualified to legislate on such matters.

Furthermore, the identification of human remains, for instance the remains of a missing person, with the help of a missing persons

index would likely have legal repercussions as regards such matters as the status of relatives, wills, property, insurance and so forth.

[*English*]

So I think there are some jurisdictional issues. There are some privacy matters that hopefully would not be insurmountable. I draw your attention, colleagues, to the fact that the DNA profile of anyone who is known to have been a victim, even if they have not been identified, is not included in the crime scene index by virtue of Parliament. That could be changed by Parliament. Even cross-checking the missing persons index with the crime scene index would not in fact serve the intended purpose.

The DNA profile of a volunteer relative would raise some privacy concerns, which I think would be useful to discuss as part of this federal-provincial-territorial consultation and perhaps when your bill comes forward.

I just raise those points, Mr. Chairman.

Perhaps you could deal with that one especially, Mr. Lunn, about the fact that Parliament has restricted the use of DNA from the crime scene index and how that would raise some privacy issues if we are going to use a volunteer relative. Would that accomplish your mission and deal with privacy concerns?

**Mr. Gary Lunn:** I am very happy. Thank you very much for the question. I think it's a great question. This was raised yesterday in our discussions.

What we are talking about is this. They're saying that a DNA profile is collected at a crime scene. If they collect all of these profiles and they know that these few here are actually victims, they're not put in the crime scene index. The intent is only to put the criminals or the perpetrators into the index. Why would we then want to put in the missing persons?

Let me come back to the Pickton case. When you're collecting these DNA profiles, you don't know who the unidentified ones are. You don't know if they're the perpetrator. You don't know if there are other victims. When you're collecting these DNA profiles at a crime scene, you're really talking about the unidentified ones. So although you may have said that the whole intent of the crime scene index is only to collect DNA from the potential criminals, you don't know that. These are unidentified DNA samples.

They also could include identified ones of known criminals, but as I say, in the Pickton case, which is probably the highest-profile case in Canadian history with respect to DNA, there are numerous unidentified DNA profiles that have been collected.

Think about Ms. Peterson and Lindsey's profile. What if they did a cross-reference with her profile with the ones that are at the Pickton farm? In fact they have done this. The police investigating this have gone to the family and gone ahead and done it to get a hit. It's a perfect example of where they could find a missing person's DNA profile at a crime scene and it could bring closure for some families. That's what this is all about.

As for the privacy concerns, I stress that this is a voluntary program. Nobody but nobody would ever be forced or coerced in any way, shape, or form to submit a DNA sample. We could put in all the appropriate measures to do this. This is for people who are in desperate search of family members.

As for the jurisdictional issues, all my research tells me this is federal jurisdiction. We could argue this back and forth. We could spend months and years studying this—and for what? I think we should just sit down and do it. I don't think anybody in any province will be coming forward to say, this is our jurisdiction. I think they might come forward and say to the federal government, well, you can pay for the DNA testing.

To hold the legislation up because of that would really question our role as legislators. I would implore you not to go down that road. I am more than happy to entertain discussions with any province between now and when we do clause-by-clause with my colleagues, in cooperation with them, to address those issues if they're out there.

• (0935)

**The Chair:** Okay. Thank you, Mr. Lunn.

Again, members, procedurally I think the point of this morning's exercise is to get information, to be an opportunity for members to ask questions about the subject matter of Mr. Lunn's bill, which may or may not, depending on the wishes of members, find itself as amendments to Bill C-13 when we get to clause-by-clause consideration. So I think we have to look at it that way. There might be procedural issues we need to deal with at that time, there might be jurisdictional issues we're discussing, but I think it's more the subject matter than the particulars of the bill. I think it's an information-seeking process that we're going through right now.

Go ahead please, Mr. Warawa, for five minutes.

**Mr. Mark Warawa (Langley, CPC):** Thank you, Mr. Chairman.

I too would like to thank Mr. Lunn for being here today and for the work he's put in, and it's been extensive. So thank you.

I have some brief comments before I ask a question regarding provincial jurisdiction.

We had on Tuesday, two days ago, an expert witness who dealt with the DNA data bank in the U.K. It was very informative. It was surprising that the privacy concerns, which are legitimate, were not experienced in the U.K., as we would have expected them to be. There was general support from the public for the DNA data bank, which is far expanded compared to what we have in Canada.

Another interesting point was that when this expert witness was asked for recommendations of what their data bank should also include, they suggested that a missing persons data bank would be very good, and this is what you're bringing here to us today.

That expert witness also shared the fact that there is a linking of a person's profile with their family, and that siblings have very similar DNA markers. So if you have a missing person, and you have a national data bank, there is a way to connect and find out who that person may be. And so as you said, using the Pickton farm as an example, there is a way of then possibly being able to connect and

find out who that person was through family markers, which would be similar.

So I think you're on the right track. I do support your initiative. If there is a will to find a way of making this happen, to help families and also help police investigations, I think we can find a way of doing that. If there's a will to not have it happen, there will be ways of stopping what you're asking for. My hope is that we can find ways of making this happen in a proper way.

My question is regarding provincial jurisdiction. You said you've had letters from the attorneys general of the different provinces. Has there been support for what you're asking from all of them or a majority of them, and have they raised the issue of provincial concern?

• (0940)

**Mr. Gary Lunn:** Let me just say on the last question—I'll deal with that first—that all of them have been supportive in principle, as everybody here appears to be supportive in principle. Some have been outright in saying they would fully endorse our bill immediately. Another one said they're committed to moving it forward and going through the process, etc. That is clear.

The issue nobody—

**The Chair:** If I can interrupt you, Mr. Lunn, would you be prepared to present copies of those correspondences for the committee's review?

**Mr. Gary Lunn:** Absolutely. We can table those.

Let me just come back, though, to the jurisdiction, because we seem to be getting hung up on that.

We had an opportunity as far back as 1998 to deal with this issue. Back in 1998 there were discussions about a missing persons index and DNA legislation. It actually goes back to the early nineties, but it didn't materialize when the DNA Identification Act was passed in 1998. When Bill C-3 was amended in June 2000, unfortunately it wasn't dealt with then. Again in 2002, a review of the act was conducted. A missing persons index was not included then.

Again, I have to note, Bill C-13 provides another opportunity to date, and we're silent on this. I say it's a critical issue. I believe that. I have been pushing this for a number of years. I have to admit that the only minister who really has been wanting to push this forward—you can tell when someone's with you—is the Honourable Wayne Easter. I have had a difficult time getting engaged with any other minister to really take the bull by the horns to make this happen.

I come back to Mr. Breitzkreuz's point. If we put this into effect, if we pass these amendments into Bill C-13, if we need to change some of the amendments, as we can do in the clause-by-clause, to address some other concerns, if they can be done, I would be the first one to do it.

That doesn't preclude the government's continuing to proceed with their strategy. If in six months from now or a year from now they identify another concern, we can fix this. In fact, I think it could probably be done virtually with unanimous consent, because this is not a political issue. It would allow us to start today.

My fear, if we don't take this opportunity, is whether it would be next year that it happens, or would it be two years? When do you say "enough is enough" and "let's make it happen"?

The motives are all the right motives. There are tons of legislation we do in this Parliament that we don't perfect. We have to come back to fix it. If that happens in this case, then let's fix it. I say let's go for it now.

• (0945)

**The Chair:** Thank you, Mr. Lunn.

Madame Bourgeois.

[*Translation*]

**Ms. Diane Bourgeois (Terrebonne—Blainville, BQ):** No, I'm fine.

[*English*]

**The Chair:** Mr. Comartin, do you have any further questions?

**Mr. Joe Comartin:** No, thank you.

**The Chair:** Mr. Maloney.

**Mr. John Maloney (Welland, Lib.):** Mr. Lunn, you reference similar databases in other jurisdictions. Can you tell us what countries have this already?

**Mr. Gary Lunn:** I can't. I was speaking with some of the experts in this area. They're saying there's the opportunity to expand this. I believe they were referring to various states in the U.S., but I don't know specifically which ones.

**Mr. John Maloney:** If we already have such a system in jurisdictions elsewhere, I'm interested in knowing what problems, if any, would have arisen.

**Mr. Gary Lunn:** Yes, that would be a great thing too, a great question.

**Mr. John Maloney:** We don't have any information of that nature?

**Mr. Gary Lunn:** I'm sorry, I don't.

**Mr. John Maloney:** That's it, Mr. Chair.

**The Chair:** Thank you.

Seeing no further questions....

Oh, Mr. Comartin.

**Mr. Joe Comartin:** Just on that last question, we asked that of Mr. Maguire as he was leaving. He is going to be providing us with a list of jurisdictions that in fact do have the index.

**The Chair:** Good.

Thank you very much, Mr. Lunn, for your attendance here today. We salute your initiative.

**Mr. Gary Lunn:** Thank you, Mr. Chair, for this extraordinary opportunity to come before you as a witness and for the support from

all committee members. Hopefully we can work together to address any concerns and make this happen.

Thank you.

**The Chair:** Thank you.

We'll suspend for a few moments to allow our next witness to approach.

• (0946)

\_\_\_\_\_ (Pause) \_\_\_\_\_

• (0952)

**The Chair:** We'll reconvene, and here is our second set of witnesses.

Let the record show we are five minutes ahead of time.

**Some hon. members:** Oh, oh!

**The Chair:** That never happens in this place.

We have, from the Department of Justice, Michael Zigayer, senior counsel, criminal law policy section; and Louis Davis, senior counsel, constitutional and administrative law section.

I'm sure we'll be hearing more about the constitutional issues we were discussing with the previous witness, Mr. Lunn.

Mr. Zigayer, you will be starting.

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

Good morning, members of the committee.

Just by way of introduction, I wanted to advise the committee that I joined the Department of Justice as a prosecutor back in 1981. As you mentioned, I am the senior counsel in the criminal law policy section of the Department of Justice, and I'm chiefly involved in the development of criminal law policy and legislation.

In particular and with respect to DNA, I have been involved in the development of the DNA warrant scheme and the DNA data bank legislation. I have had a paper published by the University of Sherbrooke press. This paper was revised a number of times and on a number of occasions distributed and used as part of continuing legal education materials, even used by the Alberta judiciary, the provincial court judges conference, the Barreau du Québec, and others.

One thing of particular interest to this committee in the context of Bill C-13 is that I am working with the National Judicial Institute in the development of an electronic desk book to assist judges in applying the DNA legislation.

My colleague, Lou Davis, is a senior counsel in the constitutional and administrative law section of the department. He articulated with the Supreme Court of Canada in 1976, and as a justice department lawyer he has been a constitutional adviser to the federal government since 1978. He's also the author of a constitutional reference book.

Mr. Chairman, the Minister of Justice and the Minister of Public Safety and Emergency Preparedness want to express their appreciation to the committee for providing an opportunity for the Department of Justice to comment on Bill C-240. Indeed, they want to express their appreciation to Mr. Lunn, from whom you've just heard, for his continuing interest in the issue of a missing persons DNA database.

We would like to commence our presentation this morning with a short statement, and then we'll happily take questions.

The idea of creating a national missing persons DNA database has been a matter of growing interest not only in Canada but in other countries as well. On Tuesday of this week the committee heard from Mr. Chris Maguire of the U.K., who informed the committee there is presently no similar missing persons DNA database in the U.K. He personally would support the creation of one.

For this reason, again, I think we should commend Mr. Lunn for having raised the matter. He would give the credit to Ms. Peterson, but I think you can't get away from the fact that we're here today because of him.

Federal and provincial ministers responsible for justice issues have expressed support for the concept of a DNA missing persons index, or MPI, for humanitarian purposes, noting, however, that careful preparatory work would be necessary to ensure it would be as effective as possible.

• (0955)

[*Translation*]

Under the direction of federal, provincial and territorial ministers, a task force comprised of officials from British Columbia, Alberta, Saskatchewan, Quebec and Nova Scotia and of representatives of the departments of Justice, Public Safety and Emergency Preparedness and the RCMP have drafted a public discussion paper to gauge the support of Canadians across the country for a missing persons DNA database.

This discussion paper seeks to get Canadians' opinion on legal and operational privacy-related considerations arising from the creation of a missing persons DNA database to identify human remains.

This discussion paper is slated to be made public in a few weeks.

[*English*]

Indeed, I have a copy of it here. It has been submitted to the federal, provincial, and territorial deputy ministers for their approval as the next step in the process.

As was mentioned earlier by Mr. Lunn, we hope to see it released publicly in the first few weeks of March. Certainly, we would like to see it out there before clause-by-clause consideration. I don't want you to delay clause-by-clause on Bill C-13, but that's what I would hope to see.

**The Chair:** There are sometimes happy coincidences.

**Mr. Michael Zigayer:** Recommendations drawn from this exercise will be considered by federal, provincial, and territorial ministers. If an MPI, a missing persons index, were to be created, an appropriate legal framework would be required recognizing federal and provincial jurisdictions; building in protections for privacy; and

acknowledging the differing interests of police, coroners, families, and the missing persons themselves. It would have to address the form and manner for the giving of consent by family members for the collection of DNA material from the missing person's belongings and from the relatives themselves. It would also need to set out procedures for the collection, analysis, storage, and protection of the DNA information. The precise form of the legal framework would depend on decisions taken in relation to the model of an MPI.

In relation to the specific provisions of Bill C-240, there are a number of points the committee may find it helpful for us to highlight.

The purpose for the National DNA Data Bank, which Parliament set out in the DNA Identification Act, is the identification of repeat offenders. I'll quote section 3 of that act:

The purpose of this Act is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.

This purpose is not readily reconciled with that of an MPI. In particular, there are likely to be considerable privacy concerns arising out of the possibility of using a DNA profile derived from a missing person or from a relative of that person, even with their consent, to check it against either the crime scene index or the convicted offender index.

Bill C-240 proposes that two or possibly three collections of profiles from the unidentified human remains, from the missing person's personal property, and from family members should be cross-checked against the criminal indices already contained in the National DNA Data Bank. This would be problematic for several reasons. First, considering that the purpose of the MPI is to identify anonymous human remains, the committee may want to note that the DNA Identification Act includes a specific requirement in section 8.1 that access to the information in the crime scene index must be removed if it relates to a DNA profile that is known to be that of a crime victim, albeit an unidentified victim. This provision was inserted in the act following expressions of concern regarding the privacy interests of victims of crime.

More importantly, the DNA profiles in the crime scene index are anonymous. A comparison between the DNA profiles of anonymous found human remains in the MPI with anonymous DNA profiles in the CSI would not lead to the identification of the found human remains. It would not help achieve the intent of the legislation.

One of the important issues, which the consultation will address and which has to be discussed in any consideration of a humanitarian DNA missing persons index, is that of jurisdiction. Given the humanitarian objective of identifying anonymous human remains and given that missing persons investigations are led by local police and that provincial coroners have jurisdiction over unidentified human remains, the establishment of a DNA missing persons index would, we believe, fall properly within provincial jurisdiction and as such not fall within the legislative competence of the Parliament of Canada.

Nevertheless, there are ways in which the federal government could assist the provinces and territories in making the idea of a national missing persons DNA data bank a reality. For example, one possibility would be for the Department of Justice to work with their provincial and territorial counterparts to develop uniform legislation to govern the operations of such a database and to facilitate the establishment of provincial and territorial MPIs linked by computers in a network, creating a virtual MPI.

• (1000)

To some degree, this would be similar to the U.S. approach to its national DNA data bank. Each state has its own data bank and is connected to a virtual national DNA data bank, as opposed to our National DNA Data Bank, which exists only in one place and does all the work, the analysis, for samples provided from across the country.

The proposed humanitarian scheme would help in establishing the civil status of a person, i.e., the legal consequences of identification of a missing person as no longer alive. As my colleague Mr. Davis might discuss further later, this certainly has an impact on things such as wills and estates. That subject and related consequences are matters that come within provincial jurisdiction in relation to such matters as property and civil rights in the province, and generally all matters of merely local or private nature in the province.

There is obviously no basis for federal jurisdiction in the federal criminal law power, because the database is clearly not intended to be used for criminal law purposes. If it were, then this head of jurisdiction could support federal legislation.

In conclusion, the establishment of a missing persons index is a worthwhile objective, but it is our view that there are many fundamental and complex questions relating to operational, privacy, technological, and jurisdictional issues that need to be carefully addressed. The government believes that achieving the objective of an effective humanitarian MPI, which is an objective we all share, is more likely to be achieved following the federal-provincial-territorial consultations, this process that is under way, rather than proceeding with legislation at this point.

I'll close with that remark.

• (1005)

**The Chair:** Thank you, Mr. Zigayer.

Mr. Davis, did you have an opening statement?

**Mr. Louis Davis (Senior Counsel, Constitutional and Administrative Law Section, Department of Justice):** No, thank you, Mr. Chairman. My colleague has touched on the jurisdictional points. I'm just here to answer questions if people want to pursue them.

**The Chair:** Okay, we will do that then. We'll go to the questions.

Mr. Toews, for five minutes.

**Mr. Vic Toews (Provencher, CPC):** Thank you.

With respect, I don't understand what privacy concerns there could possibly be if there's informed consent by all of the parties either giving DNA or otherwise. What privacy concerns can there be?

**Mr. Michael Zigayer:** You have to consider that the missing person hasn't given his consent, and I think you'll appreciate that this

is a matter of some seriousness, because not all missing persons are victims. Not all missing persons want to be found. This morning there was a mention of runaways, but there are people who—

**Mr. Vic Toews:** Just hold on. I thought we were talking about human remains.

**Mr. Michael Zigayer:** Yes, but they're not the only part of the equation. I'm addressing that part of the equation. You're right with respect to the human remains. That's not the area where one would see a serious concern.

**Mr. Vic Toews:** So that isn't an issue with human remains. There are clearly no privacy concerns in that respect.

Let's move on to the next one. Where are the privacy concerns when somebody's missing? Everybody gives their consent. Are you saying that because somebody has been missing for a number of years, we have to get their consent before the whole process can move ahead?

**Mr. Michael Zigayer:** I'm not saying that. Many of the privacy concerns and the balancing of privacy interests with other social interests will have—

**Mr. Vic Toews:** And you don't think the balance is here when somebody has been missing for a number of years and a family is wondering where they are? At least people can find out where this individual is, and if they find out he doesn't want to be contacted, that's fine.

**Mr. Michael Zigayer:** You'll be only comparing the DNA profile that you obtained with someone's consent with found human remains. It's unlikely that it's going to be used to assist in the identification of people who are still alive.

Just to think back, you have this MPI. An MPI, at its simplest, is a collection, a warehouse, of three sorts of DNA profiles. You have the DNA profiles derived from unidentified human remains found in the woods, found in the city, or anywhere. In addition to that, there are the DNA profiles that have been derived from personal property, whether that is a hairbrush or a toothbrush, some other personal material. The third one is the DNA profiles derived from family blood relatives.

Each one has a different privacy interest. At the low end, I would think there is very little, if any, privacy interest in the abandoned or found human remains. At the other end, the persons who are voluntarily providing their bodily substances to assist in the identification of possibly a deceased relative have a privacy interest that must be protected. I think Mr. Lunn's bill recognizes that, because he would have the consent as a requirement.

But you heard the other day from Mr. Maguire about the links that have been drawn with the familial matchings, where someone was linked to a crime by the DNA profile of a sibling.

So this is not an issue that we've examined in great detail. This is an emerging issue in DNA analysis and technology. It's one of the things that I think ought to be examined in the course of these public consultations.

I am sorry if I am taking up your time.

**Mr. Vic Toews:** No. I have just a very quick question, because I know my time is at an end.

In terms of your comments that this somehow lies in provincial jurisdiction, if the Department of Justice were half as inventive in the gun registry as they are here.... It looks as if they're taking every possible step to avoid any responsibility; and really, this is just an issue of cost. I know it, from the time that I was the Attorney General. This was just shuffling off a program onto the provincial jurisdiction so the feds didn't have to pick up the cost. It's as simple as that.

Before I accept your word that there is any constitutional problem, I would like to see the constitutional advice that has been provided to the minister on this issue, quite frankly; otherwise I cannot accept your advice.

• (1010)

**The Chair:** I don't know if we are going to do that today, but we do have an expert here to give us some constitutional advice.

**Mr. Vic Toews:** No, I want to see what they've told the minister, as opposed to what they have been told to argue here.

Thank you.

**The Chair:** They're here now. We have a constitutional expert from the Department of Justice. Maybe we could hear from him.

Mr. Davis, do you have any comments?

**Mr. Louis Davis:** The only comment I can make is that my understanding from the way the committee operates and from long tradition is that the Department of Justice doesn't provide opinions to the committee; but as was mentioned earlier, the committee has the power to hear independent experts.

What I should add, though, with all due respect, is that what often happens in discussions in Parliament is that things tend to get short-circuited or misunderstood. Maybe I could just clarify one or two points while I have the opportunity.

I want to say, first, that I agree in many respects with what Mr. Lunn said. I want to clarify that there are some points that really aren't an issue.

I heard Mr. Lunn say that from a jurisdictional point of view, if someone had DNA from a missing child, for example, and wanted to compare that DNA with DNA held in an already established federal bank, there is no jurisdictional problem. I'm inclined to agree with him. The Department of Justice is not saying there is a jurisdictional problem with that, for example, and similarly with respect to a number of other things that were said.

I want to clarify that where there conceivably is a jurisdictional problem, federal-provincial cooperative arrangements are possible, because there are discussions going on. There are many options available. The fact that there are options doesn't mean there is a problem, but that you need consensus among the provincial and federal authorities that are involved for something to operate; because as a practical reality, if for whatever reason.... And the provinces may have their own reasons and legitimate reasons, even aside from.... I respect the views of the Bloc members of Parliament, who have reasons that perhaps aren't shared by others. But there are other legitimate provinces, too, that have concerns about how things operate.

Let me touch on one. If we're talking about the creation of a human remains databank as opposed to a request to compare DNA with an existing federal databank, Mr. Lunn emphasized—and I agree with him—that insofar as everything is voluntary, there really isn't a problem. Again, we're not arguing with him about that. But how do you get the DNA human remains into a databank? Who is going to do that? The people who collect those remains, for the most part, I understand, are local police officers and coroners. Local police officers and coroners are subject to provincial jurisdiction, and to legally require them to forward DNA remains anywhere would require provincial cooperation. That's a technical point.

As the chair said, these are points that can be resolved if the committee wants to focus on the subject matter as such. I'm not here to say that there is some kind of jurisdictional obstacle that can't be resolved. We're just pointing out the obvious, that there are provincial interests and that the provinces and the federal government are discussing the different options.

**The Chair:** Thank you.

*Monsieur Marceau, pour cinq minutes.*

[Translation]

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

Thank you, sirs, for coming here to share your viewpoint with us. Earlier, you responded to my question about jurisdiction. If you were to submit a written legal opinion on this specific subject, that is on potential jurisdictional problems arising from the bill and Gary Lunn's amendments, I'd certainly like to read it carefully.

Judging from what I'm hearing, the committee is very keen on the idea of creating a missing persons DNA database. I'd have to say that if there are no jurisdictional problems associated with this proposal, then regardless of what our colleagues opposite think, this bill will pass and the initiative will go forward. All I want is some assurances that there won't be any jurisdictional problems. As I told Mr. Macklin, I intend to vote in favour of the bill. The Conservatives will support it as well. From the informal conversations I've had with the NDP — and I can't speak for the NDP member on the committee — it appears that the party is at the very least in favour of the principle behind the proposed legislation.

So then, if we use this principle as a jumping off point, and assume that there is some interest in moving forward, and quickly, with this initiative... Even Mr. Cullen has said that the committee will grow weary if it takes three years to get a private member's bill passed. As MPs, we want to have some input and to make a difference. We got into politics to make a difference and Mr. Lunn will make a difference in the lives of many people if his bill passes into law.

If jurisdictional considerations present a problem, is there some way to word the amendments or the bill in such a way that, firstly, the missing persons DNA database can be operational and secondly, the myriad jurisdictional problems can be averted and thirdly, the initiative can be acted upon right now, instead of us merely saying that the opportunity has arisen to work on a missing persons DNA database initiative?

•(1015)

**Mr. Louis Davis:** I believe there is, in that Mr. Lunn did draft this proposed legislation. However, getting back to what I was attempting to explain earlier, the problem is this: we can set up a voluntary system and create a database in the process, but how can we be certain that the required data will be entered in the database? In order for that to happen, we need the cooperation of the provinces. With their cooperation, we wouldn't have any problems, either practical or legal. If the provinces endorse this approach and provide their assurances that the data will be entered into the newly created DNA database, then we won't encounter any problems. But as long as participation is voluntary, that we do not compel them through some legislative provision to comply...

**Mr. Richard Marceau:** I like your way of thinking, Mr. Davis. I'm not a law enforcement officer, but if I were one and discovered a body somewhere, my job would involve trying to solve this crime problem. Secondly, it looks good if I solve the crime. Not only is it my job to do so, but my chances would be greater and I would perform better if... As a police officer, if I had access to this resource or tool to help me solve a crime, then I would go for it.

Supposing you were a provincial justice minister having to report on the effectiveness of law enforcement organizations, or a mayor having to report on the effectiveness of a municipal police force. If either of these individuals were presented with an opportunity to use this kind of tool, is there some reason, in your opinion, whether humanitarian, political, legal or otherwise, why they might refuse to use it?

**Mr. Louis Davis:** I can't speak for the provinces, but based on what my colleague said, I believe the provinces are involved in discussions. While I feel there is a general consensus as to the usefulness of this tool, there are nonetheless some differences of opinion. I'm not an expert, but I know what I've read on the subject. There are differences of opinion as far as technological considerations are concerned.

What type of DNA are we talking about here? There are different types of DNA. I'm by no means an expert capable of making comparisons, but we'd have to use the same kind of DNA. Some provinces, for whatever reason, prefer one type over another. Opinions differ on how the database should be managed. For instance, how long should the DNA be stored? That's one issue that may come under provincial jurisdiction.

It's important to seek cooperation and a consensus. While everyone agrees that this is a good proposal and is willing to follow through, jurisdictional considerations cannot be discounted as inconsequential. They are not an obstacle as such, but they need to be addressed in a practical manner.

•(1020)

**Mr. Richard Marceau:** Thank you.

**The Chair:** Do you have anything further to say, Mr. Zigayer?

**Mr. Michael Zigayer:** Yes, I would like to follow up on something Mr. Davis said a few minutes ago. With respect to the collecting of DNA samples, this morning we discussed the fact that such samples would be obtained upon consent and that they would be taken from the human remains found.

My question is this: who will collect the samples? Mr. Davis and I already mentioned that the local police conduct the investigations. In the example you gave, the local police were the ones who found the body and the provincial coroner was then called in to oversee the case. According to the bill, the RCMP Commissioner will be the one to order samples to be taken from the family. However, in the province of Quebec, it is not the Commissioner's job to conduct investigations of this nature.

More importantly, as you've undoubtedly noted, the DNA Identification Act makes no mention of collecting samples, but simply of analyzing, storing and comparing the DNA profiles of convicted offenders or DNA samples taken at crime scenes. The Criminal Code grants the full authority to take samples, and sets out collection procedures, with a view to protecting the interests of the public, and so forth.

Bill C-240 could give rise to another concern and here again, I stress that the provinces have a role to play in this process. Local law enforcement agencies and coroners come under provincial jurisdiction. While voicing our support for the creation of a missing persons DNA database or index, it's important to recognize provincial, family and other interests that are at stake. It may not be so

[English]

—and maybe it's not the right word—premature,

[Translation]

because we're about to release this discussion paper that raises some questions. As my colleague stated,

[English]

do you use mitochondrial DNA or nuclear DNA? They don't speak to each other. Do you only go with nuclear DNA because of cost reasons? It's an important question; it's one of the questions that will be asked.

We're proposing 90 days so that people can respond. I don't believe the provincial attorneys general have considered the jurisdictional issue. They all support the principle. But when the question goes out, then they'll focus their attention on that.

•(1025)

[Translation]

**The Chair:** Please keep your comments brief, Mr. Marceau.

**Mr. Richard Marceau:** I have two comments to make about the last point mentioned, namely the discussion paper. Although I do support Bill C-13, I'm not comfortable with the fact that we could very well have waited until the comprehensive review of this paper. If you want any changes before then, then you're willing to make them. The proof is that we're working on Bill C-13 and that we've discussed the matter regularly at the table. That's my first point.

Secondly, it's a given that there is a certain level of interest in this initiative. I myself have sensed the will to move forward with the legislation. Under Bill C-13, for example, the RCMP would order the taking of a DNA sample, whereas in certain provinces, the order would come from the coroner. Given the vast resources available to you, as well as the team of highly qualified Justice department lawyers, would you be able, before we proceed with the clause by clause study, to make some suggestions to ensure that the objective sought by Mr. Lunn jibes perfectly with Bill C-13? Since the will exists, it will happen. All I'm saying is that we should work together to make certain everything is done right, because, in my opinion, this bill is going to pass this time around.

**Mr. Michael Zigayer:** For starters, Mr. Lunn and I met for the first time yesterday. In the five minutes we spent waiting for the others to join us, we glanced quickly at his bill and identified two or three minor changes that could be made by way of improvement. Therefore, the will to cooperate does exist. As I see it, the ministers also support the bill's underlying principle. How we go about accomplishing what we want to accomplish is the key consideration.

Secondly, why is Bill C-13 being tabled at this point in time rather than after the parliamentary review scheduled for later this year? The reason, quite frankly is because the amendments contained in Bill C-13 are extremely important to provincial attorneys general. They have been calling for some of these amendments since 2001. We held consultations in 2002 on the changes demanded by the provincial attorneys general. Since then, we've had to contend with the events of September 11 in the United States. We turned our attention to the drafting of Bill C-36 and to the draft legislation on organized crime, which was also being studied at the same time, and this caused some delays. We're not the only ones since 2002 to have bills of public interest under consideration. We waited until only recently to bring forward these proposals. MPs are not the only ones who have to wait for their bill to come under study.

**The Chair:** Thank you very much, Mr. Zigayer and Mr. Marceau.

You're next, Mr. Comartin.

[*English*]

**Mr. Joe Comartin:** I'm actually going to offer my time to Mr. Lunn, as I'd much prefer to hear the questions he has.

I just have one question. Are these witnesses going to be back one more time on Bill C-13 generally, or is this the last opportunity we're going to have?

**The Chair:** I don't believe there's any plan at this point to have departmental officials come back, unless the committee wishes otherwise. We can always agree to do that if it's deemed worthwhile, if there are outstanding issues we want to raise.

**Mr. Joe Comartin:** I do have some, but let me defer to Mr. Lunn, and we can take up whether they're going to come back on Bill C-13 generally.

**The Chair:** Okay.

Mr. Lunn.

**Mr. Gary Lunn:** Thank you very much, Mr. Chair.

I have a couple of short questions.

I want to emphasize the last point raised by my colleague Mr. Marceau, that I am more than willing to accept, from any source, amendments that will strengthen this bill. In fact, about two years ago, on our initial research, my office actually spoke with Mr. Zigayer on how to put this together. He was most helpful then.

When you asked which kind of DNA you use, it's the kind that works. It's that simple. We're wanting to cross-reference national databases, so whatever DNA you have in those national databases is obviously the kind of sample we want to take.

As for who collects it, I understand there could be some issues with the language and the drafting, because in not all provinces.... It's not the RCMP commissioner, specifically, in Ontario and Quebec. It might be different. I'm more than willing to entertain the correct procedure there.

If that were a hiccup to stop this from going forward, and I actually don't believe the jurisdictional one will be.... In a worst-case scenario, the family members voluntarily trying to submit DNA would gladly go to an independent lab, have the sample taken, pay for it, and submit it to the national reference, or one for cross-referencing. We have to stay focused on what we're trying to do. If that's a hang-up, I would be willing to consider that.

If you have some suggestions on drafting with respect to this provision or any other provisions, I'm asking you to please make that available to me and the committee, because I think we're all here for the same goal.

Again, I thank you for your comments.

• (1030)

**The Chair:** A response.

**Mr. Michael Zigayer:** Just for information purposes, the existing National DNA Data Bank uses nuclear DNA analysis. For the crime scene index and for investigative purposes, prosecutions all use nuclear.

The mitochondrial DNA is used when you have deteriorated samples. It was used, I think, when the family of the czar was discovered. Mitochondrial DNA analysis was used to determine whether or not it actually was the family of the czar, and I think they compared it with Prince Philip, who was a relative of some sort to the former czar.

It's an issue. Do you do both? That's a cost issue. It just means you can't compare the two together. Again, these are issues to be considered by those who will be paying the bill.

**Mr. Gary Lunn:** It sounds to me as though the nuclear is the cheaper one. If that's the DNA collected for these national databases, obviously that's the one, but I think you can leave it up to the technical experts. We don't need to try to decide it here.

**The Chair:** Thank you.

Is that it, Mr. Lunn?

**Mr. Gary Lunn:** Thank you very much.

**The Chair:** You have one minute left, Mr. Comartin.

**Mr. Joe Comartin:** Then I'll take it.

What about in the Milgaard-Fisher case? We went back 20-plus years to do that. They used nuclear in that one, didn't they?

**Mr. Michael Zigayer:** I don't know for sure, but I believe they did.

**Mr. Joe Comartin:** So it's really a very minor problem.

Let me extend that. Both Ontario and Quebec are using nuclear as well right now, aren't they?

**Mr. Michael Zigayer:** For crime investigations and criminal prosecutions, nuclear is used across the board.

**Mr. Joe Comartin:** Is the department at the level of actually having draft legislation, model legislation, they could turn over to the provinces?

**Mr. Michael Zigayer:** No. It's something we could get to and validate. At the federal-provincial consultations, we've had people from different jurisdictions working with colleagues here in Ottawa to develop the paper. The next step was to send the paper out and have Canadians provide their views. If there was an expression of support, the next step would have been to take it forward to develop—I don't know if I would call it boilerplate—that uniform legislative scheme, so there would be similarity, and then to deal with where to store it.

I didn't mean to take storing it at the National DNA Data Bank in Ottawa off the table. I gave an example of the U.S. model; there, the regional labs do the analysis, and retain the bodily substances and the product—the DNA profile—but they upload that DNA profile information, which is really what you need to make your match, through a network. So if a person disappeared in Newfoundland and human remains were found in British Columbia, you could determine the unfortunate demise of the person from Newfoundland by comparing the DNA profiles in this missing persons index.

**Mr. Joe Comartin:** That's really what Mr. Lunn is trying to do: begin to develop that base at the national level so that as the provinces come onside over the next number of years, they will begin to feed in what they've gathered and be able to do the comparisons. That's my understanding of his legislation. It would start that process.

•(1035)

**Mr. Michael Zigayer:** Mr. Lunn's legislation would modify the legislation that governs the National DNA Data Bank to give it this humanitarian purpose as one of its roles. I don't speak for the National DNA Data Bank, but my understanding is that it would present certain challenges that probably would be overcome in terms of sorting it out.

But there would be questions as to who does the actual analysis. Would it be done in the regions? You have to be concerned, and that is a concern.

**The Chair:** Thank you, Mr. Comartin.

Mr. Cullen, for five minutes.

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

Thank you, Mr. Zigayer and Mr. Davis.

I have a couple of questions I want to get to with respect to operation of the missing persons index, or its proposed operation. On

the question of jurisdiction, I know Mr. Lunn is saying he has a bill to deal with this, but it's going to be some time before it gets to Parliament. He also has some amendments, I believe, to incorporate his thinking into Bill C-13. That's really what we're discussing.

I think the government's perspective on this is that we should go through the federal-provincial-territorial consultations dealing with the issues that you've addressed, and by that time maybe Mr. Lunn's bill will be in front of the House and those issues will have been more properly focused on.

Let's assume for the moment that we're not going to get there, although I'm hopeful we can proceed that way. But let's say there are amendments that this committee adopts incorporating some of the concepts Mr. Lunn is talking about. There are then some further refinements, and ultimately it passes in the House of Commons and the Senate, but in your judgment these things are not constitutional, in the sense that they can't be implemented because of these jurisdictional issues. What is the effect of that? Will someone try to strike those provisions down, and who might they be? Or will it just mean those provisions will sit in the act and will be inoperable until you have some provincial and territorial buy-in?

Could you just talk about the consequences a little?

**Mr. Louis Davis:** Sure.

It all depends on the drafting and the details. If it's a federal policy choice of parliamentarians, it's not hard to imagine, for example, drafting a federal bill in such a way that it expressly provides that it will operate with the agreement of provinces and that it foresees such agreements. Obviously that becomes a condition of the operation of the bill as a practical matter so that the constitutional aspect is built in, so to speak. If a province doesn't agree or cooperate because they prefer a different route, then obviously it won't function in at least that province, depending on how many there are. That's one possible scenario.

Another scenario is to draft it without referring to such agreements, obviously leaving it open as a DNA national bank that is a hollow shell that provinces can obviously voluntarily feed into if they want to. You don't have to expressly refer to having an agreement. But the fact is that it won't operate on the ground if the provinces don't buy into it. That's not to say it would be unconstitutional; it's just that it won't have any real effect.

What I keep coming back to, what I keep trying to say, is that the jurisdictional discussion is not really as much about problems as it is about options and cooperation. I guess it's almost a question of which comes first. It may be that some people are suggesting we should build this system in law, and that it can then work if we get the cooperation. Or as I think my colleague is suggesting, the normal way we do things is by trying to consult the provinces, by trying to work out something that everybody sees as the best way to deal with the situation. We then mould the law to fit that together.

Those are policy choices, but I wouldn't want to leave the committee with the impression, as I think I heard from Mr. Toews at the beginning, that there's some jurisdictional roadblock that makes things impossible. That's not the point. The point is that there are options and there are provincial interests, and it's a question of the best way to deal with them.

**Hon. Roy Cullen:** So what you're saying is that if one were to incorporate language that would make it conditional—and in your judgment, that conditionality is required because of the need for the cooperation of the provinces and territories—you'd end up with the principles perhaps put into legislation but not operable until the parties are in agreement. While you'd have the principles in the bill, in your judgment it would still be inoperable until these issues were squared away.

I'd like to come back to a couple of examples, just to help me through this business of DNA and privacy. Let's say you have a runaway youth who has been missing for ten years. The relatives come forward and say they're prepared to offer up their DNA, and that is run against the DNA data bank. It's discovered that two weeks prior to that, the DNA of this youth, who is now maybe in his or her mid-twenties or something, is found at a crime scene. What then?

My second question, in terms of an example, is this. You have a relative who's saying they're prepared to put up their DNA and run it against the missing persons DNA data bank, if this is in operation. What happens then is that it is discovered that the relative's DNA is linked to another crime scene. This relative may or may not have committed the crime, but the DNA seems to link the two. Even though they've done this voluntarily, can they, in law, waive their privacy rights on that particular transaction or not?

• (1040)

**Mr. Michael Zigayer:** In December 1998—I think that's when it was—just as Bill C-3 was making its way through the Senate, there was a judgment from the Supreme Court of Canada in a case called *Arp*, in which the issue of consent and just how specific that consent needed to be for investigative purposes was discussed.

Mr. *Arp* was from British Columbia, and he was a suspect in some crime at some point. He voluntarily supplied a DNA sample and was not implicated in that particular crime. But the DNA sample was retained and the DNA profile was retained. A couple of years later, this same Mr. *Arp* was involved in some crime and the DNA profile that had been obtained voluntarily from him earlier was used in his prosecution in the secondary case.

At the Supreme Court level, they said Mr. *Arp* didn't say they couldn't use that profile, that he didn't put a limit on his consent. So this is an issue as you design the legislation. It's the nature of that waiver or the nature of that consent that's very important. Therefore, if my brother or one of my children disappeared and I wanted to avail myself of this National DNA Data Bank and I had concerns about being linked to some crime in the future or something I'd done in the past, then I suppose I could express my consent as being only for the purpose of identifying my brother or my missing children.

I'm not indicating to you that I have committed crimes in the past or intend to in the future, but that's a possibility. In fact, in your own interest, I wonder if there's not a privacy interest in retaining control over your genetic information so that it doesn't go out into the public. I think Mr. Rondinelli—

**Hon. Roy Cullen:** What about the issue of the runaway?

**Mr. Michael Zigayer:** The runaway linked to a crime? I'm assuming he's not the victim, he's the perpetrator, and we've linked him. His genetic profile has been found at a crime scene. He is a suspect, and because you've allowed the linkage of the missing

persons database with the criminal investigatory database, we've now managed to link him as a suspect in this crime.

This is an issue that I think is being asked. I don't want to express my personal view on it, but it is an issue that's being raised and the opinions will be sought in the course of this federal-provincial consultation.

• (1045)

**The Chair:** Thank you, Mr. Cullen.

Mr. Moore, for five minutes.

**Mr. Rob Moore (Fundy Royal, CPC):** Thank you.

It just seems to me that if there were political will to do this, you'd be here before us telling us how it was going to happen, rather than why it can't happen. I know you haven't said it can't happen, but as Mr. Breitzkreuz has said, we've seen recently with the gun registry that there were some real questions about provincial jurisdiction. Now we're dealing with the issue of a national day care program.

Those things have been controversial. This would be entirely uncontroversial. Mr. Lunn has already received letters of support from every province saying they want to proceed with this, so I'm wondering why wouldn't we proceed with this. We heard testimony the other day about police officers who have given DNA samples so they could be eliminated when their DNA was found at crime scenes, which it often is. But their concern was that they didn't want to be linked to some ongoing paternity tests. So they've quickly found a way to exclude those samples.

So if it is a real concern that... Heaven forbid we somehow collect a sample and solve a crime. But I'm wondering why there doesn't seem to be a political will. Is there some reason why we wouldn't want to proceed with this, beyond these small jurisdictional issues?

As for my other question, I just fail to see the privacy concerns. On one hand you have people whose child or relative is missing, so they voluntarily give their DNA. There doesn't seem to be a concern there. At the other end, the person we're seeking to link is either dead, so there is no privacy concern, or they're alive and their DNA is probably not on file. So this would really only link people to those who no longer have privacy concerns because they're deceased.

Perhaps you can comment on those two things.

**Mr. Michael Zigayer:** I'm very pleased to. There is a will to move forward. It's just a question of timing more than anything else.

On the process we've been discussing, the federal, provincial, and territorial ministers have expressed support in principle, but it wasn't absolute. They said they needed to look at the operational and legal issues involved. Part of our process of moving that forward is to seek the views of Canadians and stakeholders on these particular issues. The consultation document asked 14 separate questions. It's a very detailed document, and I'm sure that when it is made public you'll receive a copy and be interested to see what it asks, and the various issues.

We have not said there's a will that's lacking here. There is a will, but there's also the notion that we're working in partnership with the provinces and territories on this initiative. We're saying, if the consultation document is released at the beginning of March and we close it down 90 days later, we'll be into June. Parliament will adjourn. Theoretically, we could go back to Parliament in the fall with that product. It could be Bill C-240. It could be Bill C-240 with modifications. It could be a commitment on the part of the feds to work with their provincial and territorial counterparts to develop the legislation that is needed at that end.

There might be a need for legislation at the provincial, territorial, and federal levels to facilitate this process. As my colleague Mr. Davis said, if we build it they will come, like in the movie....

**A voice:** *Field of Dreams.*

**Mr. Michael Zigayer:** *Field of Dreams.* I am getting old. I forget things easily.

If we create the legislative mechanism that's needed at the federal level, Parliament can do that. As Mr. Davis said, when provinces get their legislation enacted and can participate, it'll grow incrementally. Perhaps there's a great interest in British Columbia. I don't know if there's as great an interest in this issue in other provinces really. But that's certainly another way of doing it.

We've just said yes, there is a will. The normal process is to ask people what they think and get their views. We haven't yet sought or obtained the views of the Canadian Bar Association, the Barreau du Québec, or the Privacy Commissioner—I don't know if he's commented on this.

• (1050)

**Mr. Rob Moore:** We've heard a lot from the Canadian Bar Association on Bill C-13 and I'm sure their views would be helpful. But using the analogy from that baseball movie, isn't that what Mr. Lunn's bill would do? That's building it.

We have an opportunity when we're dealing with this. We've heard how powerful a tool DNA can be. We have this need to solve these missing persons cases. I'm sure the result of your consultation will be overwhelming support, as we've seen. I think if we're onside at the federal level and the responsible provincial ministers are onside, then we should be proceeding as quickly as possible.

**The Chair:** Thank you.

Mr. Moore, there's another committee coming in at 11 o'clock, so we'll need to wind up.

Mr. Macklin and then Mr. Breitkreuz, very briefly.

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

As a point of interest, first of all, do we have any idea of how many missing persons there are in Canada?

**Mr. Michael Zigayer:** Yes. I have the consultation document here and it's one of the points raised in this. In the discussion of what is a missing person, it discusses the numbers. It says annually there's an increase of about 270 persons who are missing, whom I suppose the police generally consider as missing. They are missing long term. But there are different ways of getting on that list of 270, because different jurisdictions approach the issue differently.

I think there's an estimate that 4,500 to 4,800, long-term total, may be missing. I knew a wonderful lady when I was prosecuting in the NWT who went out for a walk one day and disappeared on the land. You wonder, was it misadventure, the bears? You just don't know. It could be people with Alzheimer's. It could be children who get lost or run away. It could be people who are the victims of crime.

**Hon. Paul Harold Macklin:** I have a second point.

With respect to the way in which labs operate, you say right now it's fairly consistent that we operate on a nuclear basis in terms of the research we do on samples collected. In terms of those who have facilities that do this on a regular basis, you say mitochondria is one level. Are there reasons why, if we were going to legislate, we should be going to that level? In other words, if we're going to do this, why don't we do it right? In other words, what's the best method we could have? Would the mitochondrial basis be the best level that we should be trying to get at?

What are the cost ramifications? Do you have any sense of that? For example, we know what the data bank here in Ottawa has in place today, we saw it, but I don't know that we had a good grasp of what it would cost if they had to change their system over to mitochondrial to meet what would be the highest standard of investigation that could be. If I'm a parent and I have a missing child, I want to make sure you're going to use the top-notch level of investigative tools to find and affirm my missing child if in fact you found remains.

**Mr. Michael Zigayer:** My understanding is that this nuclear PCR technology that the RCMP and the U.S. FBI, the western jurisdictions— as Mr. Maguire was saying the other day—use is the most advanced, the most discriminating.

There is an advantage to mitochondrial DNA in that it can assist you in analyzing particularly degraded samples. But if you wanted to compare it with the existing National DNA Data Bank, either the CSI or the convicted offender index, you would want to be speaking the same language. So as Mr. Lunn has suggested, you might want to go nuclear fundamentally but still reserve the capacity on the odd case to do a mitochondrial comparison.

•(1055)

**Hon. Paul Harold Macklin:** I realize you're not a geneticist, but the reality too is that they're using 13 markers at the present time, as I recall, to identify, out of the many markers that would be revealed, I gather, or the extensive information that would be revealed, by a process of nuclear evaluation.... Is there any context in which we should be looking at that? Is having 13 markers the standard we should continue to use, or should there be a broader standard if in fact we are going to go forward?

**The Chair:** I have to clear the room, and Mr. Breitzkreuz has one brief question.

**Mr. Michael Zigayer:** I'd defer that answer to the experts in—

**The Chair:** Yes, and I think it's also something that wouldn't be encompassed in any possible legislation. Those are operational issues as well, maybe.

But, Mr. Breitzkreuz, very quickly. We need to clear the room.

**Mr. Garry Breitzkreuz:** Yes, I want to pick up on something you said, that timing is very important. And I agree on that.

As I'm sitting here listening to all of the witnesses and the questions going back and forth, it seems to me we're almost approaching this like an accident scene, where a car has hit a jogger along the road and the victim's lying there in pain and agony. But we can't help him because we don't know who he is, because he doesn't have identification on him, and he's close to the county line and we don't know who to call. Timing is important for victims as well—you know, the pain and suffering that goes on here.

So my question is very simple. If the justice minister were to instruct you to write amendments to address privacy and jurisdictional concerns, and establish this human remains and missing persons index to help law enforcement, could you do it so that it would be workable and effective and the provinces could opt into it as they wished? Couldn't that be done rather quickly? This issue's been before us for years and years. Could that not be written in if the minister were to instruct you?

**Mr. Michael Zigayer:** Because of the demonstrated provincial interest in this matter, we would not do that without consulting them carefully and extensively. So it's not something that could be done overnight.

If you cut out that whole consultation, if you said, don't wait until June or the fall, bring us something in a month or so, we have in the past worked very carefully and assiduously on specific issues to achieve an objective. But as I said earlier today, it is our view that really the legislative authority for establishing missing persons DNA databases lies with the provinces. And if we were instructed by the minister to immediately engage the provinces in the development of that legislation, we'd definitely follow our instructions.

**Mr. Garry Breitzkreuz:** On the gun registry, they plowed ahead without consultation. I don't understand—

**The Chair:** It hurts me to cut you off when you're on your favourite subject, but we will have to adjourn.

Thank you very much.

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