Submission on

Bill C-13: *Criminal Code*, *DNA Identification Act and National Defence Act* amendments

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (the CBA Section) welcomes the opportunity to express its views on Bill C-13: *Criminal Code, DNA Identification Act* and *National Defence Act* amendments. Members of the CBA Section include prosecutors, defence lawyers and academics from every province and territory.

The CBA Section has made previous statements on the subject of DNA data banking, most notably in our 1996 submission responding to a Consultation Document from the Solicitor General,[1] and our response to a Department of Justice consultation in 2002.[2] Our comments concerning the proposed amendments in Bill C-13 are consistent with our earlier positions and recommendations.

Both our previous submissions emphasized general principles that we continue to believe should guide laws pertaining to DNA data banking:

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1 National Criminal Justice Section, *DNA Data Banking* (Ottawa: CBA, 1996).

2 National Criminal Justice Section, *Submission on DNA Data Bank Legislation Consultation Paper (*Ottawa: CBA, 2002).

- Inclusion in a DNA data bank is an intrusion into both the bodily integrity and privacy of an individual. Of these two, the more significant is the privacy intrusion through state retention of the information contained in the DNA sample.
- The right of privacy is a significant interest that should be abrogated to the narrowest extent consistent with demonstrably justified objectives. Where there are ambiguities or uncertainties as to the actual extent of a problem or the impact of a proposed solution, the issue should be resolved in the manner most consistent with the right of privacy.
- Parliament must proceed very cautiously, and with continual guidance from the *Canadian Charter of Rights and Freedoms*, when consideration is given to expanding the list of designated offences where DNA sampling is permitted, or in the retrospective reach of the legislation.
- Expansion should only be considered on the basis of compelling evidence that a change is urgently required and likely to achieve its objective, and that any intrusion on individual rights is outweighed by a demonstrated state interest.
- A DNA data bank should function effectively not only as a tool for gathering inculpatory evidence, but also for gathering exculpatory evidence, to appropriately eliminate suspects and so safeguard against wrongful convictions or other miscarriages of justice.

These principles should be carefully considered in the context of changes proposed by Bill C-13. The government is required by legislation to review the current operation of the National DNA Data bank during this calendar year. In our view, the best time to consider whether, and what kind of amendments should be made to the data bank would be *following* such a comprehensive review, rather than just prior to a comprehensive review.

II. PROPOSED CHANGES TO LIST OF DESIGNATED OFFENCES

We have previously stated that to "balance the privacy interests at stake with the need to protect society from crime, the DNA data bank should exist only for homicide and serious sexual or violent offences, including breaking and entering and committing a sexual offence".[3] While we were somewhat reassured by the limited number of offences that were initially designated as eligible for inclusion, we have expressed ongoing concerns about an ever-expanding list of designated offences. The result would be a law with too broad scope, encompassing offences insufficiently serious to justify state seizure of bodily substances and ongoing retention of personal information.

Bill C-13's proposed significant expansion of the list of primary designated offences, those requiring inclusion in the data bank without judicial discretion, unfortunately leads us to conclude that our earlier concerns were well founded. There are some offences where the "consequent risk of future violence may be so low that the invasion of privacy of that individual greatly outweighs any future risk to society".[4] In determining whether an offence should be added to the list of primary designated offences, the state should consider whether the individual circumstances of both the offence and the offender are sufficiently serious to justify seizure and retention of the individual's bodily substance.

In our view, the offences in clauses 2 through 6 of the proposed Bill should not be added to the list of primary designated offences, given the spectrum of criminal behaviour that they involve. For example, possession of child pornography is a *Criminal Code* offence that includes no specified minimum punishment. An offender will be eligible for a broad range of sentencing options that can be tailored by a judge to the facts of the case. Such an offender may pose very little, or even no risk of violent

3 *Supra,* note 1 at 5-6.

4 *Supra, note 2 at 3.*

behaviour, including paedophilic tendencies. If this type of offence were to be included in the primary designated list, the sentencing judge would have no discretion to consider the offender's individual circumstances in deciding whether that offender should be included in the DNA data bank. Without a demonstrable risk, we should not assume that all admittedly deviant and anti-social behaviour warrants inclusion in the data bank.

As we stated in our 2002 submission, offences that can involve a broad spectrum of behaviour should be in the list of secondary offences so as to alleviate concerns about unnecessary sampling of convicted offenders by permitting judicial discretion. This measure would also enhance the cost-effectiveness of the national DNA data bank by relying on the judiciary to determine when sampling is required.[5]

III. "NCRMD" AND RETROACTIVITY

The CBA Section has raised strong concerns about the suggestion of taking bodily samples from those held not morally blameworthy because of their mental incapacity at the time of the offence was committed. We have noted that, under section 672.35, an accused found not criminally responsible by reason of mental disorder (NCRMD) is not guilty of the offence and under section 672.36, will not be considered as having a previous conviction for the purpose of any offence under any Act of Parliament. In our 2002 submission, we concluded "it is important that we draw and maintain this 'bright line', requiring a conviction to qualify for inclusion in our seizure regime and the DNA data bank scheme."[6]

There are competing interests between the need to protect these very vulnerable people and the need to protect society, and ultimately we recommended that measures to include those NCRMD in the data bank should only be taken after careful consultation

5 *Ibid.*

6 *Ibid.*, at 4.

and examination of the issue. We continue to believe that only homicide and serious sexual or violent offences should be included in the data bank. Further, as stated in our November 2002 submission, when NCRMD are involved:

> [T]he onus should always be on the Crown in these limited circumstances and the offences should be part of the list of secondary designated offences for which a discretionary order may be obtained. When asked to make such an order, judges should consider the same criteria as that currently listed in s. 487.051(1)(b) and (3)3 of the *Criminal Code*. In addition, they should give careful consideration to future risk presented by the offender and its impact on public protection under the circumstances.[7]

While the proposed amendments to sections 487.051(1) and 487.051(3) contain some of the safeguards previously proposed by the CBA Section, we believe that including those NCRMD within the primary designated offence regime precludes the careful consideration that should be required. In our view, people found NCRMD should be treated in the same way as young offenders and those discharged under section 730, and should only be included in the secondary designated offence regime. This would allow a judge to properly weigh all relevant considerations.

In terms of retroactivity, the CBA Section has previously maintained that "absent any compelling evidence that currently omitted offences are those where there is such a heightened risk of re-offending with a serious violent crime to the extent that inclusion is absolutely required for public protection, the list of offences in the retroactive scheme should not be further expanded."[8] The proposed amendments in Bill C-13 seem focused more on the offender than the offences involved. Including the NCRMD in the retroactive scheme would offend all previously recognized safeguards for these vulnerable people and impose a further consequence to individuals that the state has determined cannot be punished. Minimizing or eliminating risk to society is part of the

7 *Ibid.*, at 6.

8 *Ibid.*

regimen of the NCRMD disposition proceedings. The state should not further interfere with such individuals if the issue of risk has already been addressed at the time of disposition.

As to the expansion of retroactive offences to include break and enter offences where the indictable offence committed in conjunction with that offence is a sexual offence, the CBA Section reiterates that the retroactive scheme should not be extended without compelling evidence that such extension is necessary.

IV. PROCEDURAL ISSUES IN OBTAINING A SAMPLE

The CBA Section supports the amendment to section 487.056(1) regarding when samples should be taken. However, we recommend that the section include a qualification that if obtaining a DNA sample is not feasible when the order is made, it shall be taken as soon as is practicably possible. Such a proviso would alleviate any concerns of undue delay in imposing consequences on an offender.

The CBA Section supports the amendments to section 487.071. Providing safeguards to address the problem of taking DNA samples from those already included in the data bank ensures that the rights of individuals are not unnecessarily infringed.

As we have stated previously, the CBA Section opposes any legislative scheme that would require an offender to provide a subsequent sample because of errors or omissions made in the process of obtaining the sample. If an error occurs, the sample will be rendered useless or lost.[9]

9 *Ibid., at 8.*

A limited exception for re-sampling should be provided if the offender represents a significant danger to the public. In that case, the prosecutor should apply, the offender should be given notice, and the prosecutor should demonstrate that the interests of justice and public protection would be unduly at risk to not allow the re-sampling. In our view, the current proposed amendments do not properly balance all interests involved.

V. CONCLUSION

In our last submission concerning the DNA data bank, we concluded that once this sort of intrusion on privacy is permitted, it is rarely retracted or curtailed, and more often used to defend similar measures in contexts where they may not be justified. We urged the government to consider any expansion of the law with utmost caution.

In our view, Bill C-13 would create too wide a net for inclusion in the data bank, removing judicial discretion for a significantly increased number of offences and including mentally ill offenders within that category. Such a substantial extension of the DNA data bank surely calls for the findings of the government's comprehensive review of the existing regime before proceeding.