THE CANADIAN BAR ASSOCIATION
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The Voice of the Legal Profession
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February 23, 2007

Mr. Art Hanger, M.P.
Chair
Standing Committee on Justice and Human Rights
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Hanger,

RE: Bill C-18, *An Act to amend certain Acts in relation to DNA Identification*

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (the CBA Section) concerning Bill C-18, *An Act to amend certain Acts in relation to DNA Identification*. The CBA Section welcomes the opportunity to express its views on this Bill.

The CBA is a national association representing 37,000 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. Members of the CBA Section include prosecutors, defence lawyers and academics from every province and territory.

I. INTRODUCTION

The CBA Section supports the government's efforts to reduce crime and increase public safety, and firmly believes those efforts must retain an appropriate balance with respect for the privacy rights of individuals.

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The CBA Section has made several previous submissions[1] related to DNA data banking. When DNA data bank legislation was first proposed, we were somewhat reassured by what was then a narrowly circumscribed list of designated offences. However, with each subsequent legislative initiative the list has grown, and we now believe that our initial concerns about the potential for an ever expanding data bank may have been well founded.

In 2005, the CBA Section commented on Bill C-13, expressing serious concerns about provisions to extend the retroactive scope of the regime and to make it applicable to persons found "not criminally responsible by reason of mental disorder." Our overarching comment was that it was ill advised to further expand the DNA data bank without the benefit of the required five year review of the initial legislation, which was due in June 2005.

The CBA Section's comments concerning the proposed amendments in Bill C-18 are consistent with our earlier positions and recommendations. Although Bill C-18 primarily contains amendments to the actual operation of the data bank, we are concerned that it would again expand the reach of the data bank. It proposes another expansion of the list of designated offences and increased sharing of DNA information. In our view, either further broad changes or minor technical adjustments should be based on the results of the long overdue review of the legislation.

As set out in our 2005 submission, DNA data banking should be always be guided by the following principles:

- 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.

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[1] National Criminal Justice Section, Submission on Obtaining and Banking DNA Forensic Evidence (Ottawa: CBA, 1995); National Criminal Justice Section, Submission on Bill C-104, *Criminal Code and Young Offenders Act* amendments (forensic DNA analysis) (Ottawa: CBA, 1995); National Criminal Justice Section, Submission on Solicitor General Consultation Document *Establishing a DNA Data Bank* (Ottawa: CBA, 1996); National Criminal Justice Section, Submission on Justice Canada Consultation Document *DNA Data Bank Legislation Consultation Paper* (Ottawa: CBA, 2002); National Criminal Justice Section, Submission on Bill C-13: *Criminal Code, DNA Identification Act and National Defence Act* amendments (Ottawa: CBA, 2005).

II. DESIGNATED OFFENCES

The CBA Section has repeatedly stressed concerns over an ever expanding list of both primary and secondary designated offences. Clause 8 of Bill C-18 would again expand this list.

For example, clause 8(5)(e) would add conspiracy and attempts to commit certain offences. Such offences may not actually result in the commission of an act, but rather only planning one. Of even greater concern is the proposal in clause 8(3) of Bill C-18, which would remove specific designated offences in favour of an encompassing provision for all offences that "may be" prosecuted by way of indictment, bringing in offences that were in fact prosecuted summarily.

When the CBA Section commented on Bill C-13 in 2005, it did not include section 487.04(a.1) in the primary designated offence list. The offences now under that section are unique in that they do not retain the discretion of a sentencing judge to dismiss an application for seizure of DNA. In our view, section 487.051(2) should allow sentencing judges to balance the privacy interests of the accused against the public interest in each particular case. The CBA Section urges that the discretionary power be restored and that clause 9 of the Bill allow for the exercise of judicial discretion for all primary designated offences.

III. COMMUNICATION OF DNA PROFILE INFORMATION

The CBA Section is very concerned about Bill C-18's provision to permit expanded use and sharing of an individual's DNA profile. Clause 31 of the Bill allows for communication of a DNA profile not just to investigate a designated offence, but for *any* criminal offence.

Further, we oppose the proposed increased powers of the Commissioner to communicate information relating to DNA profiles to foreign governments or their agencies or institutions. Under clause 31(4) of the Bill, once the Commissioner receives a DNA profile from a foreign state, the Commissioner would be permitted to communicate the same information to that foreign entity. The communication of such information was previously restricted to Canadian agencies only. Again, information could be communicated to a foreign body in relation to *any* criminal offence, and not just designated offences.

IV. CONCLUSION

We have previously noted 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 other contexts where they may not be justifiable. [2] Again, we urge the government to consider any expansion of the law with utmost caution.

The proposals in Bill C-18 validate the previous concerns we have expressed about expanding government powers to intrude on the privacy rights of the individual. We object to Bill C-18's additions to the list of designated offences and its increased powers to send DNA profiles to

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[2] See the CBA Section's 2005 submission, s*upra*, note 1.

foreign governments and their institutions. Finally, we urge the government to immediately proceed with the long overdue five year review of Canada's DNA data bank legislation.

Yours truly,

Original signed by Gaylene Schellenberg for Gregory DelBigio

Greg DelBigio
Chair
National Criminal Justice Section