# ESTABLISHMENT OF A NATIONAL DNA DATA BANK

Michael E.N. Zigayer*

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* Senior Counsel, Criminal Law Policy Section, Department of Justice (Canada).
INTRODUCTION

1 Only a decade has passed since DNA typing methods were first used in criminal investigations and trials in Canada. DNA typing enables forensic investigators to identify a DNA profile unique to the individual suspect and to compare this to DNA profiles derived from biological trace evidence found at crime scenes. In this way DNA profiles are used to determine whether a suspect's genetic makeup is consistent with the genetic makeup of samples collected at the scene of the crime. Today, law enforcement officials in Canada and around the world are increasingly relying on DNA-typing in the fight against crime.

2 Since the introduction of DNA typing in Canada, forensic DNA technology has evolved rapidly. The law has had to accommodate a new investigative technology and, in particular, to clarify the nature and extent of the state's power to compel an individual to provide samples of bodily substances for forensic DNA analysis under the Canadian system of criminal justice.

3 This process is continuing today with the advent of mitochondrial DNA evidence and the recent establishment of a national DNA data bank.

4 My presentation will be divided into two parts. In the first part I will briefly review the circumstances which led to the enactment of the DNA warrant scheme (Bill C-1044) in 1995. In the second part, I will discuss the creation of the National DNA Data Bank (through the enactment of Bill C-3 in December 1998 and Bill S-106 in June 2000). There will be a discussion of the legislation that serves as the blueprint for the structure of the data bank and the Criminal Code procedures governing the making of DNA data bank orders and authorizations.
Establishment of a National DNA Data Bank

I. – THE DNA WARRANT SCHEME

The release of Obtaining and Banking DNA Forensic Evidence on September 20, 1994. 

R. v. Borden

The case Tara Manning.

Bill C-104 introduced in the House of Commons.

Retroactive application of the DNA warrant scheme.

The ex parte application process for DNA warrants.

This discussion paper was released by the Department of Justice to solicit the views of Canadians on issues that included: (1) obtaining DNA evidence from a suspect in a criminal investigation (could the collection of samples be automatic on arrest or would judicial oversight be required; what offences would be subject to this investigative technique; what bodily substances could be collected; what justification would be required and what conditions would apply); (2) banking DNA evidence (what would be the purpose of a DNA data bank; what would be its structure; what offences would be subject to banking; privacy issues; whether to provide for the retention of bodily samples; funding, scientific and technological concerns); and, (3) laboratory regulation and accreditation (whether this was necessary to ensure the quality of the work of the forensic laboratories).


In the spring of 1995, political pressure was mounting on the Government to introduce legislative proposals for Parliament’s consideration before the summer recess. In part, this pressure was the result of the efforts of Mr. Michael Manning to see his daughter’s killer brought to justice. Michael Manning, the father of slain Dorval, Quebec, teenager Tara Manning, drew national media coverage with his cross-Canada tour to persuade the government to pass a law requiring suspects in violent crimes to undergo DNA testing.

On June 22, 1995, the Minister of Justice introduced Bill C-104. The Bill received all-party support, passed Third Reading without amendment later the same day and was then referred to the Senate. It was passed by the Senate and received Royal Assent on July 13, 1995.


The constitutional validity of the ex parte process stipulated in subsection 487.05(1) of the Criminal Code has survived several challenges. Hill, J., in F(S) v. Canada (Attorney General) [(1998) 11 C.R. (5th) 232 (Ont. Court of Justice - Gen. Div.) at paragraph 83 on page 261] was prepared to read down the ex parte nature of the warrant process. He held: “Despite the statute’s apparent call for an ex parte hearing, it may be reasonable, depending on the facts of the particular case, for a hearing, on notice, to be conducted. Such cases would be rare. [...] In my view, this element of the statute may, as required, be properly read down to include an ex parte hearing unless a hearing on notice is ordered by the court.

This reading down of the ex parte process was later overruled by the Ontario Court of Appeal [(2000), 141 C.C.C. (3d) 225 (Ont. C.A.) at paragraph 41 on page 244] when it held that a constitutional review of the warrant process did not justify such a comment. It held: “Accordingly, there is nothing constitutionally wrong with the legislation as drafted. For the reasons given, I would dismiss the respondent’s cross-appeal and allow the appellants appeal to reinstate the provisions of the Code authorizing the plucking of hair samples (s.487.06(1)) and deleting the reference to reading down in respect of the authorized ex parte application in s.487.05(1). In the result, the respondent’s application for declaratory relief would be dismissed.”

See also R. v. Feeney (1999), 23 C.R. (5th) 74 (BCSC) ruling on voir dire.

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II. – THE NATIONAL DNA DATA BANK

A. Background to the enactment of the DNA Identification Act

When the DNA warrant scheme (Bill C-104) was introduced in Parliament on June 22, 1995, both the Minister of Justice, Mr. Rock, and the Solicitor General Canada, Mr. Gray, told Canadians that legislation providing for a national DNA data bank would be addressed in a second legislative initiative.

After extensive consultations with Canadians and, in particular, provincial law enforcement authorities, the bar, police organizations and other interested groups, the Government introduced the DNA Identification Act (Bill C-3) in the House of Commons on September 25, 1997. Bill C-3 was passed by the Senate without amendment and received Royal Assent on December 10, 1998 but was not immediately proclaimed into force. Before approving it the Senate Legal and Constitutional Affairs Committee had, in its Sixteenth Report, recommended that improvements be made to the legislation to address gaps it had identified in the DNA legislative framework. In response, on November 4, 1999, Bill S-10, R. v. Daniel Roy, (1999), unreported ruling on voir dire, 500-01-03318-992, (Que. S.C.). An inmate in the Cowansville Penitentiary was the subject of a DNA warrant. When the police (accompanied by a nurse) arrived to execute a DNA warrant, Mr. Roy was advised of his rights to consult a lawyer and was provided with a copy of the provisions of the Criminal Code. Mr. Roy refused to provide a sample of his blood until he had spoken with a particular lawyer. He was then provided with a phone. At 11:20 am he told the police that this lawyer would not be available until after 2:00 pm and again refused to provide the blood sample authorized in the warrant. He then tried again to contact the lawyer until about noon when he returned to the room where the police and the nurse waited and indicated that he had spoken with a lawyer and finally provided a sample of his blood. Apparently unable to contact the lawyer of his choice Mr. Roy had spoken with another lawyer whose name he had found in the phone book. This lawyer had advised him to give his blood and that if there was a problem with the warrant, it could be challenged later. At trial, he argued that he had been denied his rights under s.10(b) of the Charter because the police had not permitted him to speak to the particular lawyer of his choice and that therefore the DNA evidence ought to be excluded. The Court dismissed this argument.

The Criminal Code authorizes the use of reasonable force in the execution of a DNA warrant. In R. v. Feeney [(1999), 23 C.R. (5th) 74 (BCSC) ruling on voir dire], it was argued that the ability of the police to use force in the execution of a DNA warrant contravened s.7 of the Canadian Charter of Rights and Freedoms. Oppal, J., found no merit to this argument. At page 24 he stated: [para. 39] “The accused has also argued that because the section contemplates the use of force in the event of non-compliance with the provisions of the warrant, the section again contravenes s. 7 of the Charter. With respect, there is no merit to this argument, for it is clearly in the public interest to permit authorities to use reasonable force for investigative and enforcement needs. As with any search, police officers must use the minimum force required.”

Before the Act could be proclaimed into force it was necessary for the RCMP to actually build the national DNA data bank, select and train its staff and to test its technology. At the same time, the RCMP and federal and provincial law enforcement officials would work on the actual logistics of sample collection and transmission to the National DNA Data Bank housed in the RCMP Head Quarters complex in Ottawa. The RCMP had estimated that it would take eighteen months to accomplish these tasks.

The Committee had just concluded its study of the legislation that reformed and modernized the military justice system, Bill C-25 (S.C. 1998, c.35, An Act to amend the National Defence Act and to make consequential amendments to other Acts) in November 1998 when it began its study of Bill C-3. It did not escape the Committee’s attention that the reformed military justice system lacked both a
the government’s third DNA legislative initiative, was introduced by the Government in the Senate. This legislation amended the National Defence Act to authorize military judges to issue DNA warrants in the investigation of designated offences committed by a person who is subject to the Code of Service Discipline. It also made it possible for military judges to make post-conviction DNA data bank orders.

This legislation made consequential amendments to both the DNA Identification Act and the Criminal Code. The DNA Identification Act amendments allow bodily substances, and the DNA profiles derived from them, that are taken as a result of a post conviction order or authorization by a military judge, to be included in the national DNA data bank. The Criminal Code amendments extend the prohibition against unauthorized use of bodily substances and the results of forensic DNA analysis to include those obtained under the National Defence Act. Other amendments to the Criminal Code clarified and strengthened the regime concerning the taking of bodily substances for the purpose of forensic DNA analysis enacted under Bill C-3.

Bill S-10 was assented to on June 29, 2000, and proclaimed into force along with Bill C-3 on June 30, 2000.

B. The DNA Identification Act

The DNA Identification Act creates a new statute to govern the establishment and administration of a national DNA data bank, and also amends the Criminal Code, the Criminal Records Act and the Access to Information Act. It authorizes the Solicitor General to establish a national DNA data bank to be maintained by the Commissioner of the RCMP (s.5(1)).

Significantly, the DNA Identification Act contains both a statement of purpose and a statement of principles. Until recently, such statements were not a usual feature of legislation enacted by Parliament in the criminal field. However, in recent years they have become more common as Parliament seeks to provide the courts with an indication of the intent behind the legislation and to assist the courts in interpreting the statutes in accordance with the wishes of
Parliament and, indeed, to assess the constitutionality of measures chosen by Parliament to address certain issues. These particular provisions reflect the importance that Parliament attached to the protection of privacy and to the need to place safeguards on the genetic information collected and stored in the national DNA data bank.

Section 3 identifies the specific purpose for which Parliament is establishing the national DNA data bank; to assist law enforcement agencies in the identification of persons alleged to have committed designated offences, and simultaneously, indicate Parliament’s intent that it be used to assist in the solving of crimes that may have occurred prior to the coming into force of this legislation. This provision could also be seen as an effort to address the concerns of privacy advocates who worry about “function creep” (i.e., the fear that eventually the data bank will be used for genetic research).

Section 4, on the other hand, contains a statement of the principles that will inform the operation of the national DNA data bank. It gives equal recognition to the value of DNA profiles in the early detection, arrest and conviction of offenders; and, the need to include safeguards in the legislation to protect the privacy of personal information contained in the DNA profiles and the bodily substances retained for the purposes of the data bank. The statement of principles responds to the concerns expressed during the consultation process in relation to the use and communication of, as well as access to, information and bodily substances retained in the data bank.

Section 5 of the DNA Identification Act sets out the blueprint of the new bi-cameral national DNA data bank, composed of a “crime scene index” and a “convicted offenders index”. In terms of its scope, the convicted offenders index contains DNA profiles derived from bodily substances described in s.487.071 of the Criminal Code. It should be noted that this legislation has prospective, retrospective and retroactive application.

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20 When the DNA warrant scheme was enacted in 1995, the issue of whether it should be given only prospective effect was raised in courts in British Columbia and Quebec (note 11 supra). This provision was intended, in part, to avoid any similar litigation.

21 The Government chose in Bill S-10 to make explicit in the Act, rather than in regulations made under it, that DNA profiles and the bodily substances from which they were derived may only be used for law enforcement purposes. This responded to the concern expressed by the Senate Standing Committee on Legal and Constitutional Affairs that such DNA profiles not be “a profile for medical reasons,” but for law enforcement purposes.

22 In particular s.487.071 provides for the inclusion of the results of forensic DNA analysis of bodily substances that are taken from a person in execution of an order under section 487.051 or 487.052, or taken from a person under an authorization made under section 487.055 or 487.091.

23 Prospective: this term describes the application of the new DNA data banking provisions of the Criminal Code to offences committed after the legislation had come into force – see section 487.51.

24 Retrospective: this describes the application of the data bank provisions of the Criminal Code where the designated offence was committed before the coming into force of the data bank legislation and where the person is convicted or discharged under section 730 of the Criminal Code of a designated offence after the coming into force of the legislation – see section 487.052.

25 Retroactive: this term describes the application of the new DNA data banking provisions of the Criminal Code where the person had, before the coming into force of the legislation, been either: (1) declared a dangerous offender under Part XXIV of the Criminal Code; (2) been convicted of more than one sexual offence and at the time of the application was still serving a sentence of at least two years.
The national DNA data bank compares DNA profiles and section 6 describes how this process functions. Subsection 6(1) places a duty on the Commissioner, each time a DNA profile is received for inclusion in the data bank, to search the data bank to determine whether or not the new profile matches with any profile already contained in the data bank. Second, the Commissioner is authorized to communicate the existence of a match and any information, associated with the DNA profile (other than the profile itself), to whatever Canadian law enforcement agency he considers appropriate. Subsection 6(2) specifically allows the Commissioner to communicate to authorized users of the “automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police” information relating to whether or not the DNA profile of a specific convicted offender is contained in the convicted offenders index. This provision will help local police to exclude previously convicted offenders as suspects in their investigation of a designated offence. When the DNA profile from the unsolved crime is compared against the convicted offenders index and no match is found with the DNA profile of a convicted offender who could otherwise have been a suspect, the police may focus the investigation on other suspects.

Subsection 6(5) foresees the conclusion of reciprocal agreements between the Government of Canada or the National DNA Data Bank (one of its institutions) with a foreign government or law enforcement agency under which information held in the National DNA Data Bank may be communicated “solely for the purposes of the investigation or prosecution of a criminal offence”. If such an agreement were in place with American law enforcement authorities subsection 6(3) would allow the Commissioner to compare a DNA profile submitted by an American law enforcement agencies with the information in the Canadian DNA data bank to help solve a crime committed in the USA. Subsection 6(4) would provide Canadian police a means, via the Commissioner, to access any American law enforcement DNA data bank for a similar purpose to help solve a crime committed in Canada. Subsection 6(5) establishes the rules governing such exchanges of information with a foreign government or law enforcement agency.

There will be effective oversight of the operations of the National DNA Data Bank. Under section 37 of the Privacy Act, the Privacy Commissioner is authorized to carry out investigations in respect of personal information under the control of federal government institutions to ensure compliance with the provisions of the Privacy Act. In addition, section 13 of the Act authorizes a committee of the House of Commons, a Senate Committee or a joint committee of the Senate and House of Commons to conduct such a review within five years after the Act comes into force. Nevertheless, the Senate Standing Committee on Legal and Constitutional Affairs sought an undertaking from the Solicitor General for one of those offences; or, (3) been convicted of more than one murder committed on separate occasions – see section 487.055.

Section 2 provides that for the purposes of this Act, the “Commissioner” is the Commissioner of the RCMP.

The Canadian Police Information Centre (CPIC) system.

When the legislation was before the Senate Standing Committee on Legal and Constitutional Affairs the new Solicitor General, Lawrence MacAulay, undertook to have this provision amended to permit a committee of the Senate to conduct such a review independently.
for the creation of an independent advisory committee, including a representative from the Office of the Privacy Commissioner, that would oversee the implementation of the Act and the ongoing administration of the DNA data bank. The Solicitor General later made good on that commitment.

The DNA Identification Act contains a provision requiring the Commissioner to “safely and securely store” bodily substances which remain after forensic DNA analysis has been completed. The bodily substances are retained to permit re-testing by the National DNA Data Bank if it becomes necessary to move from its present PCR-based technology to a newer technology in the future. This would occur in the event that forensic DNA technology evolves to permit the analysis of smaller samples taken from degraded materials or the quicker and more cost-effective production of results. Re-analysis of a bodily substance is necessary to ensure that an offender who had been included in the earlier convicted offender index would be included in the newer data bank.

C. Amendments to the Criminal Code

The proclamation into force of Bill C-3 has brought about several important consequential amendments to the Criminal Code. New provisions that govern the making of a DNA data bank order or authorization have been combined with the existing DNA warrant provisions. In the result several aspects of the two schemes found in sections 487.03 through 487.091 are common to both.

1. The requirement for a prior judicial authorization

It was evident, as the development of the legislation progressed, that whether it occurred at the time of arrest or charge or after conviction, the taking of bodily substances for the purposes of the DNA data bank would potentially raise issues under sections 7 (life, liberty and security of the person); 8 (reasonable search and seizure) and 12 (cruel and unusual punishment or treatment) of the Canadian Charter of Rights and Freedoms. Indeed, there was no issue associated with Bill C-3 that was so hotly debated both in Parliament and in the media than this one.

Before the House of Commons Standing Committee on Justice and Human Rights, the Canadian Police Association and the Canadian Association of Chiefs of Police advocated in favour of the legislative model in place in the

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[30] On September 28, 2000, Federal Solicitor General Lawrence MacAulay announced appointments to the DNA Data Bank Advisory Committee. This new committee will review and advise on the operations of the national DNA Data Bank, which began operations on June 30, 2000. The Committee will play a pivotal role in protecting privacy, and the legal and ethical rights of Canadians affected by the data bank. It will operate independently of the government and must report annually to the Commissioner of the RCMP. Its members were chosen because of their diverse expertise in the use of DNA information. Members include specialists in policing, science, genetics, medical ethics and the law, as well as a representative of the Privacy Commissioner of Canada and the Officer in Charge of the National DNA Data Bank.

[31] Subsection 10(1).

[32] A consolidated English version of these provisions is provided in an Annex to this paper.
United Kingdom. They pointed to the benefits that they believed would accrue to law enforcement in terms of intelligence if, whenever someone was charged with a designated offence, the police were authorized by statute to collect bodily substances from that person in the same way as they are authorized to take fingerprints. They suggested that under their proposal the data bank would hold more DNA profiles and, as such, there would, necessarily, be an increased likelihood of a match between a DNA profile in the crime scene index and a DNA profile kept in the convicted offenders index. This process, in the United Kingdom, has produced a considerable number of "cold hits" which have identified suspects where there was no other means of identifying one.

Fundamental to their proposal were: 1) the belief that the collection of bodily substances for forensic DNA analysis is no more intrusive of the suspect's privacy than the collection of fingerprints; and, 2) a reliance on the 1988 Supreme Court of Canada judgment which considered and validated the present practice of collecting fingerprints from persons accused of indictable offences at the time of their arrest.

Bill C-3 proposed a different scheme, one that would complement the DNA warrant scheme not render it redundant. The collection of bodily substances for the purposes of the national DNA data bank would take place if authorized by a judge after the offender had been convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act.

The Department of Justice had carefully reviewed the legal issues and concluded that the collection should take place after conviction, because of Charter and privacy concerns. Departmental officials, appearing before the Standing Committee on March 11, 1998, noted that the taking of bodily samples from an accused constitutes a search and to permit the taking of such samples simply on the basis of a police officer’s belief that the person has committed a designated offence, without complying with the procedural requirements of Bill C-104, would constitute a classic example of a warrantless search or seizure which would prima facie be unconstitutional.

In addition, they stressed that the Supreme Court has recognized a clear difference between the collection of fingerprints, on the one hand, and the collection of bodily substances for DNA analysis, on the other. As well, they

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33 In the UK, DNA samples are collected at the time of arrest in regard to a much broader list of offences and then used not only to confirm that the suspect was a party to the offence for which he is charged but also to permit the police to conduct a "fishing expedition" to see if the person has been involved in any other criminal offence. It must be remembered that the United Kingdom does not have a Charter of Rights and Freedoms.

34 Originally, their proposal was that the police be allowed to take samples on arrest, see CPA Brief to the Standing Committee at page 8 and the CACP Brief to the Standing Committee at page 4.


36 More persons are charged than are ultimately convicted.

37 As of July 2000, the United Kingdom's National DNA Database held 817448 DNA profiles from suspects; there have been 77,522 matches of suspects to crime scene; 11,073 matches of crime scene to crime scene; and 129,095 records removed following acquittal.


argued, the Supreme Court of Canada has attached important significance to the bodily intrusion required in taking DNA samples and expressed a high degree of respect for bodily integrity and the control of one’s bodily substances in its decisions in *Borden* in 1994 and *Stillman* in 1997. Finally, they referred to the utilitarian factors which the court had recognized in finding that fingerprinting at the time of arrest meets constitutional requirements\(^41\) and observed that currently the process of forensic DNA analysis takes too long to provide similar assistance to the Crown at the beginning of the criminal justice process. Indeed, in terms of cost-effectiveness, the computerized Criminal Histories and Fingerprint Repositories identification system maintained by the RCMP and used by police forces across Canada would still be the preferred identification technique\(^42\).

In the end, the Standing Committee passed the legislation with the requirement for prior judicial authorization. Still, there was considerable support within the Committee for the position advocated by the police. This was evident when the Standing Committee on Justice and Human Rights reported the Bill back to the House of Commons\(^43\).

It was then, in an effort to resolve this issue and perhaps expedite the passage of this important legislation through the House of Commons that the Minister of Justice, Anne McLellan, sought the opinions of three eminent jurists on this issue. On May 1, 1998, the Minister of Justice released a communiqué

\(^{41}\) In *Beare* Mr. Justice La Forest, speaking for the Court, stated at page 67: “Fingerprints serve a wide variety of purposes in the criminal justice system. These include linking the accused to the crime where latent prints are found at the scene or on physical evidence; determining if the accused has been charged with, or convicted of other crimes in order to decide whether, for example, he should be released pending trial or whether he should be proceeded against by way of summary conviction or indictment; ascertaining whether the accused is unlawfully at large or has other charges outstanding; and assisting in the apprehension of the accused should he fail to appear. As well, fingerprints taken on arrest are used to identify prisoners with suicidal tendencies, sex offenders, career criminals and persons with a history of escape attempts so that they can be segregated or monitored as may appear appropriate.

Fingerprints are also of great assistance in the judicial process. Thus, in addition to this utility in identifying an accused, they may also assist the Crown in determining the punishment it should seek by revealing, for example, whether the accused is a first offender or otherwise. This, of course, will be of assistance to the court in imposing an appropriate sentence.”

\(^{42}\) According to a National Police Services Consultation Document released by the Solicitor General of Canada in 1997, the system, which holds records compiled under statutory authority located in the *Identification of Criminals Act* and sections 667(1)(a), (c) and (5) of the *Criminal Code*, subsection 6(2) of the *Criminal Records Act* and sections 41(1), (2), 44(1) and 45 of the *Young Offenders Act*, contains about 2.7 million fingerprints and related criminal records. The repositories provide 24-hour access to fingerprints, criminal records and other identification data to police investigators and the courts. Each year the repositories receive more than 20 million inquiries through the Canadian Police Information Centre (CPIC).

\(^{43}\) The Ninth Report of the Standing Committee on Justice and Human Rights stated in part: “Some of those making submissions to us contended that the forensic DNA process established by the combination of Bills C-104 and C-3 was not comprehensive enough. They argued that by not expanding the ambit of the forensic DNA process, Parliament was making this investigative tool less effective in identifying perpetrators that it could otherwise be. Those supporting the forensic DNA process Parliament is putting in place say that to extend the scheme beyond the parameters set out in Bills C-104 and C-3 would put it in danger of being judicially struck down in whole or in part under the Charter of Rights, because its intrusiveness violates guaranteed privacy rights. In the absence of arguable constitutional impediments, the Committee would have preferred a charge-based approach.”
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titled FEDERAL GOVERNMENT STANDS FIRM ON NATIONAL DNA DATA BANK COMMITMENT which stated, in part:

36 When Bill C-3 was studied by the House of Commons Standing Committee on Justice and Human Rights, the Committee was asked to amend the Bill to permit the police to take DNA samples without prior judicial authorization at the time a person is charged with a designated offence, such as sexual assault. The position of the Department of Justice, based on current jurisprudence, was that such a proposal would be unconstitutional. In the end, the Bill was not amended.

37 Responding to a number of individuals and organizations that have continued to press for such an amendment, the Department of Justice sought legal opinions from former Justice Martin Taylor of the British Columbia Court of Appeal, and from former Chief Justices, Charles Dubin of the Ontario Court of Appeal and Claude Bisson of the Quebec Court of Appeal. Each concluded independently that this proposal would not survive Charter scrutiny.

38 “The federal government was confident in the legal position taken by Justice officials. However, we took the unusual step of seeking outside opinions on the issue. With the additional opinions of three eminent jurists confirming the position of the Department of Justice, it is now very clear that the government must proceed as planned,” said Minister Scott.

39 “We are confident that the Bill now before the House of Commons will pass Charter scrutiny. Canada will have a national DNA data bank firmly entrenched in legislation that will stand the test of time, and that will help police protect the safety and security of Canadians,” said Minister McLellan.

40 Eventually, Bill C-3 passed Third Reading in the House of Commons without amendment to this aspect of the bill and was referred to the Senate. The Canadian Police Association then sought to have the Senate Standing Committee on Legal and Constitutional Affairs amend the Bill whereas the Canadian Association of Chiefs of Police revised its position and came out in support of the legislation before the Committee. Ultimately, the Senate made no amendments to Bill C-3.44

41 The issue of whether DNA samples ought to be taken from suspects on arrest resurfaced on the eve of the September 11-12, 2000, Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice in Iqaluit. Ontario Solicitor General David Tsubouchi announced that he would press his Federal colleagues to change the law to permit DNA samples to be taken at the time of arrest, rather than at the time of conviction and to expand the scope of the retroactive scheme. The Federal Ministers did not agree to pursue Mr. Tsubouchi’s proposed changes to the legislation.

44 Grant Obst, the president of the Canadian Police Association, expressed his great disappointment that the bill had not been amended in a letter to the Chair of the Standing Committee on Legal and Constitutional Affairs as follows: “Additional victims will needlessly die and be sexually assaulted because amendments we proposed were not adequately addressed. I am afraid you fail to understand the significance of this bill, and what it means to public safety. It is not about genetic analysis of offender’s DNA, but about saving lives.”
2. **Whether inclusion in the DNA data bank should be mandatory**

The legislation provides for judicial discretion in the making of all DNA data bank orders though the procedure differs depending on whether the substantive offence was a primary designated offence\(^{45}\) or a secondary designated offence\(^ {46}\). In both cases, there is some measure of judicial discretion\(^ {47}\). The issue was the subject of serious debate before the House of Commons Standing Committee on Justice and Human Rights.

The Department of the Attorney General of New Brunswick and the Ministry of the Attorney General in Ontario were opposed to granting courts such discretion in respect of a person who had been convicted of a primary designated offence. Ontario submitted it was open to Parliament to:

\[\text{[d]etermine, in advance, that when a person is convicted of one of these serious offences, societal interests will outweigh individual interests in privacy. The gravity of the offence and the finding of guilt themselves indicate that the impact on the person's privacy is not "grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders".}\]

They suggested, further, that if the offender committed no further designated offences the impact on the person's privacy would be minimal, as no matches would be generated during searches of the data bank and, that inclusion in the data bank would not carry any undue or unwarranted stigma, particularly if inclusion was mandatory. They also pointed to the experience of other jurisdictions which maintain DNA data banks, particularly the fact that at least 40 American states provide for mandatory data bank collection with no allowance for discretionary exemption\(^ {49}\). Finally, they expressed concern at the prospect of the possible uneven and inconsistent application of the law by different judges and increased litigation.

Why then did Bill C-3 provide for a discretionary power in the courts to deal with persons convicted of primary designated offences? The answer lies, in

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\(^{45}\) Under paragraph 487.051(1)(a) and subsection 487.051(2), the court is obliged to make the order unless the offender who has been convicted of a "primary designated offence", is to satisfy the court that "were the order made, the impact on the security of the person’s or young person’s privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders".

\(^{46}\) Paragraph 487.051(1)(b).

\(^{47}\) The Canadian Police Association and the Canadian Association of Chiefs of Police were opposed to any judicial discretion, whether for primary or secondary designated offences, fearing this would provide too much authority to the courts and would result in a significant increase in litigation.

\(^{48}\) The Brief submitted to the Standing Committee on Justice and Human Rights on behalf of the Ontario Ministry of the Attorney General and the Ministry of the Solicitor General, at page 5.

part, in the Supreme Court’s judgment in *R. v. Baron*. On the basis of this judgment, the inclusion of a narrowly circumscribed discretionary power was reasonable and would contribute to the constitutionality of the overall scheme. With regard to the prospect of additional litigation, it would be equally valid to suggest that a mandatory data bank provision would have been subject to a constitutional challenge for being overbroad in scope or have resulted in numerous applications for “constitutional exemptions” from the application of the law. In the end, this additional litigation could have been as frequent and even more complex.

Furthermore, a parallel could be drawn with the *Criminal Code* provisions which apply to the making of firearms prohibition orders.

In summary, the legislation provided for judicial discretion in the case of primary designated offences to ensure the constitutionality of the provision as a whole. Legal authorities indicated that in cases of search and seizure a form of residual discretion is required in order to address those particular cases where it would not be appropriate to make an order. At the same time, it must be observed that the criteria for exercising such discretion have been set very high and that the burden of proof is on the accused to demonstrate that the impact on the person’s privacy and security of the person is “grossly disproportionate to the public interest in the protection of society and the proper administration of justice”.

### 3. “Prospective” DNA Data Bank Orders

Section 487.051 of the *Criminal Code* authorizes a court to make an order for the taking of samples of bodily substances for the purposes of the *DNA Identification Act* from persons convicted of designated offences that were committed after the coming into force of the legislation. Parliament has determined that different procedures will apply to the making of a DNA data bank order under section 487.051 depending on whether the offender was convicted of a primary designated offence or a secondary designated offence.

The list of primary designated offences in section 487.04 of the *Criminal Code* includes the most serious violent crimes, such as murder, aggravated

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50 [1993] 1 S.C.R. 416. Revenue Canada officers believed certain documents in possession of the Respondents could afford evidence of the commission of various alleged offences under the *Income Tax Act*. They obtained warrants under section 231.3 of the *Income Tax Act* from the Federal Court to search the Respondent’s residence and business premises. Section 231.3 of the *Income Tax Act* required the warrant to be issued if the three conditions set out in the section were met. The warrants were executed and documents seized. The Respondents brought an action in the Federal Court seeking a declaration that the warrant provision of section 231.3 of the *Income Tax Act* was inconsistent with the *Canadian Charter of Rights and Freedoms* and consequently of no force or effect. The unanimous Supreme Court of Canada held that section 231.3 of the *Income Tax Act* violated section 8 of the *Charter* because it eliminated the judge’s residual discretion not to authorize the search and, following *Hunter v. Southam*, for a warrant scheme to be reasonable under section 8 there must be a judicial discretion to grant or deny authorization.

51 It should be recalled that the predecessor legislation, subsection 100(1) of the *Criminal Code*, was amended (1991, S.C. c. 40), in the wake of *R. v Chief*, (1989) 51 C.C.C. (3d) 265, (Y.T.C.A.), [1990] N.W.T.R. 55, that held the former mandatory provision offended section 12 of the *Charter*. Subsection 100(1) was amended and subsections 100(1.1), (1.2) and (1.3) were added to the legislation to provide the necessary judicial discretion. Today, sections 109 and 113, operating together, provide the Court with the ability to balance the requirements of public safety and the exceptional circumstances of the offender who needs a firearm to sustain himself or his family or for employment purposes.
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sexual assault and assault with a weapon. When a person is convicted of a primary designated offence, section 487.051 requires the court to make an order for the individual to provide a bodily sample for the purposes of DNA testing, unless the offender establishes, to the court’s satisfaction, that the impact upon his or her privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.52

4. “Retrospective” DNA Data Bank Orders

The Criminal Code authorizes a court to make an order for the taking of samples of bodily substances for the purposes of the DNA Identification Act from persons convicted after June 30, 2000, of designated offences that were committed prior to the coming into force of the legislation. The procedure is slightly different from the procedure set out in section 487.051. It is different to the extent that it requires the prosecutor to make an application to the court for a DNA data bank order whether the offence is a primary or secondary designated offence. Absent an application by the prosecutor, there will be no hearing and no DNA data bank order made in respect of these offenders. However, once the prosecutor initiates the procedure described in section 487.052 of the Criminal Code the question may arise as to the burden of proof required to persuade the court that an order ought to be made.

The wording of s.487.052 does not attribute to either party a burden of proof to establish whether a DNA data bank order is either appropriate or inappropriate in the circumstances. The situation of the prosecution and defence in a hearing to determine whether a DNA data bank order is to be made is similar to their role in a sentencing hearing. As noted by the Supreme Court of Canada in R. v. Proulx53, each party is expected to establish elements in support of its position while the ultimate decision as to what constitutes the best disposition is left to the discretion of the judge. A comparison may also be drawn with the transfer procedure under subsection 16(1.1) of the Young Offenders Act54. To inform his or her decision, the judge can take into consideration all the evidence, no matter which party adduces it.

5. “Retroactive” DNA Data Bank Orders

The proposal to include a retroactive scheme in the legislation was controversial from the outset. Any retroactive scheme would confront one of the fundamental principles of our criminal justice system; that once a person is finally sentenced, the state cannot continue to impose further consequences based on that conviction. A justification for such a scheme could exist where there was a heightened risk that an individual would re-offend by committing a serious violent offence and, as a result, there existed an over-riding societal interest in the protection of the public from that individual.

As originally presented to Parliament, Bill C-3 proposed that two classes of offenders who were, at the time the legislation came into force, serving a

52 Subsection 487.051(3) of the Criminal Code.
sentence within the federal correctional system would be brought within the ambit of the national DNA data bank. “Dangerous offenders” and offenders convicted of more than one sexual assault could be compelled to provide DNA profiles for inclusion in the convicted offenders index of the national DNA data bank because these offenders present an elevated risk of recidivism justifying the need for special measures to protect the public.

55 Before the Standing Committee on Justice and Human Rights, the Criminal Lawyers Association warned that any such scheme might well offend the Charter because it applied ex post facto. The police, on the other hand, would have expanded the scheme in Bill C-3 to include a broader range of offenders. The Canadian Police Association’s Brief called for all inmates in federal or provincial custody on a designated offence to be included in the retroactive scheme. The Canadian Association of Chiefs of Police would have expanded the list to include persons convicted of manslaughter or murder. In the end, the Bill was amended by the Standing Committee on Justice and Human Rights during clause by clause review to provide for the inclusion of persons who had committed more than one murder55. There is still some pressure to expand the scope of the retroactive scheme.

56 Though the scope of section 487.055 of the Criminal Code is limited by design, it places a considerable administrative burden on federal and provincial law enforcement officials (the Correctional Service of Canada (CSC), the RCMP, provincial prosecutors and local police forces). There is an obligation to individually assess each individual who falls within classes of offenders identified in the legislation.

CONCLUSION

57 As was noted in the Foreword to the Justice Department’s consultation Paper Obtaining and Banking DNA Forensic Evidence in 1994:

DNA typing is a powerful comparative identification tool. Since its introduction in Canada in 1988-89, it has been instrumental in securing

55 As amended, section 487.055 (1) provides: “A provincial court judge may, on ex parte application made in Form 5.05, authorize in Form 5.06, the taking from a person who,
(a) before the coming into force of this subsection, had been declared a dangerous offender under Part XXIV,
(b) before the coming into force of this subsection, had been convicted of more than one murder committed at different times, or
(c) before the coming into force of this subsection, had been convicted of more than one sexual offence within the meaning of subsection (3) and, on the date of the application, is serving a sentence of imprisonment of at least two years for one or more of those offences,
for the purposes of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

56 On September 4, 2000, The Toronto Star reported that Mr. Tsubouchi, the Solicitor General of Ontario, would use the Iqaluit Ministers meeting to pressure the federal government to expand the retroactive DNA collection scheme to include all prisoners in federal jails and that he’d also like to see those in provincial jails tested. In a Government of Ontario Press Release dated September 8, 2000, Mr. Tsubouchi said that the retroactive scheme is seriously flawed, since the DNA collection only applies to serial sex offenders, serial murderers and dangerous offenders.
convictions in hundreds of violent crimes, from homicide to assault. It has also helped to eliminate suspects, sometimes in the face of damning allegations.

59 Since then there have been many more convictions but DNA evidence has also been used to exonerate persons who had previously been convicted.\(^{57}\)

60 Considerable care was demonstrated in crafting Bill C-104, Bill C-3 and Bill S-10 to respect constitutional requirements and to protect the privacy of genetic information relating to individuals which might some day be used in evidence in a criminal prosecution or contained in the national DNA data bank.

61 All Canadians will now be watching to see whether Canada’s National DNA Data Bank lives up to the expectations of its proponents.

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\(^{57}\) To date, there have been four cases in Canada where individuals previously convicted of serious crimes have been exonerated by DNA technology: David Milgaard, Guy-Paul Morin, Gregory Parsons, and Thomas Sophonow, the most recent case.
ANNEX

Consolidation of Canadian DNA legislation: ss.487.03 through 487.091 of the Criminal Code and ss.2 through 13.1 of the DNA Identification Act

CRIMINAL CODE

487.03 (1) Where
   (a) a warrant is issued under section 487.01, 487.05 or 492.1 or subsection 492.2(1) in one province,
   (b) it may reasonably be expected that the warrant is to be executed in another province, and
   (c) the execution of the warrant would require entry into or on the property of any person in the other province or would require that an order be made under section 487.02 with respect to any person in that other province,

   a judge or justice, as the case may be, in the other province may, on application, endorse the warrant and the warrant, after being so endorsed, has the same force in that other province as though it had originally been issued in that other province.

1993, c. 40, s. 15; 1995, c. 27, s. 1.

(2) When an order or authorization referred to in section 487.051, 487.052, 487.055 or 487.091 is made or granted, and it may reasonably be expected to be executed in another province, a provincial court judge of that province may, on application, endorse the order or authorization in Form 28.1. Once the order or authorization is endorsed, it has the same force in that province as though it had originally been issued there.

Forensic DNA Analysis

487.04 In this section and sections 487.05 to 487.09,

"DNA" means deoxyribonucleic acid;
"young person" has the meaning assigned by subsection 2(1) of the Young Offenders Act;
"adult" has the meaning assigned by subsection 2(1) of the Young Offenders Act;
"forensic DNA analysis" (a) in relation to a bodily substance that is taken from a person in execution of a warrant under section 487.05, means forensic DNA analysis of the bodily substance and the comparison of the results of that analysis with the results of the analysis of the DNA in the bodily substance referred to in paragraph 487.05(1)(b), and includes any incidental tests associated with that analysis, and

(b) in relation to a bodily substance that is provided voluntarily in the course of an investigation of a designated offence or taken from a person in execution of an order under section 487.051 or 487.052 or under an authorization under section 487.055 or 487.091, or a bodily substance referred to in paragraph 487.05(1)(b), means forensic DNA analysis of the bodily substance;

“designated offence” means a primary designated offence or a secondary designated offence;

Definitions

DNA
Young person
Adult
Forensic DNA analysis
Designated offence
"primary designated offence" means

(a) an offence under any of the following provisions, namely,

(i) section 151 (sexual interference),
(ii) section 152 (invitation to sexual touching),
(iii) section 153 (sexual exploitation),
(iv) section 155 (incest),
(v) subsection 212(4) (offence in relation to juvenile prostitution),
(vi) section 233 (infanticide),
(vii) section 235 (murder),
(viii) section 236 (manslaughter),
(ix) section 244 (causing bodily harm with intent),
(x) section 267 (assault with a weapon or causing bodily harm),
(xi) section 268 (aggravated assault),
(xii) section 269 (unlawfully causing bodily harm),
(xiii) section 271 (sexual assault),
(xiv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),
(xv) section 273 (aggravated sexual assault), and
(xvi) section 279 (kidnapping),

(b) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

(i) section 144 (rape),
(ii) section 146 (sexual intercourse with female under fourteen and between fourteen and sixteen), and
(iii) section 148 (sexual intercourse with feeble-minded, etc.),

(c) an offence under paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988, and

(d) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in any of paragraphs (a) to (c);

"secondary designated offence" means

(a) an offence under any of the following provisions, namely,

(i) section 75 (piratical acts),
(ii) section 76 (hijacking),
(iii) section 77 (endangering safety of aircraft or airport),
(iv) section 78.1 (seizing control of ship or fixed platform),
(v) paragraph 81(1)(a) or (b) (using explosives),
(vi) subsection 160(3) (bestiality in the presence of or by child),
(vii) section 163.1 (child pornography),
(viii) section 170 (parent or guardian procuring sexual activity),
(ix) section 173 (indecent acts),
(x) section 220 (causing death by criminal negligence),
(xi) section 221 (causing bodily harm by criminal negligence),
(xii) subsection 249(3) (dangerous operation causing bodily harm),
(xiii) subsection 249(4) (dangerous operation causing death),
(xiv) section 252 (failure to stop at scene of accident),
(xv) subsection 255(2) (impaired driving causing bodily harm),
(xvi) subsection 255(3) (impaired driving causing death),
(xvii) section 266 (assault),
(xviii) section 269.1 (torture),
(xix) paragraph 270(1)(a) (assaulting a peace officer),
(xx) section 279.1 (hostage taking),
(xxi) section 344 (robbery),
(xxii) subsection 348(1) (breaking and entering with intent, committing offence or breaking out),
(xxiii) subsection 430(2) (mischief that causes actual danger to life),
(xxiv) section 433 (arson - disregard for human life), and
(xxxv) section 434.1 (arson - own property),

(b) an offence under any of the following provisions of the Criminal Code, as they read from time to time before July 1, 1990, namely,
(i) section 433 (arson), and
(ii) section 434 (setting fire to other substance), and

(c) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in paragraph (a) or (b);

“provincial court judge”, in relation to a young person, includes a youth court judge within the meaning of subsection 2(1) of the Young Offenders Act;

1995, ch. 27, art. 1

487.05 (1) A provincial court judge who on ex parte application made in Form 5.01 is satisfied by information on oath that there are reasonable grounds to believe

(a) that a designated offence has been committed,
(b) that a bodily substance has been found or obtained
   (i) at the place where the offence was committed,
   (ii) on or within the body of the victim of the offence,
   (iii) on anything worn or carried by the victim at the time when the offence was committed, or
   (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
(c) that a person was a party to the offence, and
(d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in Form 5.02 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

(2) In considering whether to issue the warrant, the provincial court judge shall have regard to all relevant matters, including

(a) the nature of the designated offence and the circumstances of its commission; and
(b) whether there is
   (i) a peace officer who is able, by virtue of training or experience, to take samples of bodily substances from the person, by means of the investigative procedures described in subsection 487.06(1), or
   (ii) another person who is able, by virtue of training or experience, to take, under the direction of a peace officer, samples of bodily substances from the person, by means of those investigative procedures.

(3) Where a peace officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication and, for that purpose, section 487.1 applies, with such modifications as the circumstances require, to the warrant.

1995, c. 27, s. 1; 1997, c. 18, s. 44.
Establishment of a National DNA Data Bank

487.051 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, of a designated offence, the court

(a) shall, subject to subsection (2), in the case of a primary designated offence, make an order in Form 5.03 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1); or

(b) may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.

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

(3) In deciding whether to make an order under paragraph (1)(b), the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

487.052 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, of a designated offence committed before the coming into force of subsection 5(1) of the DNA Identification Act, the court may, on application by the prosecutor, make an order in Form 5.04 authorizing the taking, from that person or young person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1), if the court is satisfied that it is in the best interests of the administration of justice to do so.

(2) In deciding whether to make the order, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

487.053 An order shall not be made under section 487.051 or 487.052 if the prosecutor advises the court that the national DNA data bank, established under the DNA Identification Act, contains a DNA profile, within the meaning of section 2 of that Act, of the person or young person in question.

487.054 The offender or the prosecutor may appeal from a decision of the court made under subsection 487.051(1) or 487.052(1).

487.055 (1) A provincial court judge may, on ex parte application made in Form 5.05, authorize, in Form 5.06, the taking, from a person who

(a) before the coming into force of this subsection, had been declared a dangerous offender under Part XXIV,

(b) before the coming into force of this subsection, had been convicted of more than one murder committed at different times, or

(c) before the coming into force of this subsection, had been convicted of more than one sexual offence within the meaning of subsection (3) and, on the date of the application, is serving a sentence of imprisonment of at least two years for one or more of those offences,
for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

(2) The application shall be accompanied by a certificate referred to in paragraph 667(1)(a) that establishes that the person is a person referred to in subsection (1). The certificate may be received in evidence without giving the notice referred to in subsection 667(4).

(3) For the purposes of subsection (1), "sexual offence" means

(a) an offence under any of the following provisions, namely,

(i) section 151 (sexual interference),
(ii) section 152 (invitation to sexual touching),
(iii) section 153 (sexual exploitation),
(iv) section 155 (incest),
(v) subsection 212(4) (offence in relation to juvenile prostitution),
(vi) section 271 (sexual assault),
(vii) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), and
(viii) section 273 (aggravated sexual assault);

(b) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

(i) section 144 (rape),
(ii) section 146 (sexual intercourse with female under fourteen or between fourteen and sixteen), or
(iii) section 148 (sexual intercourse with feeble-minded, etc.);

(c) an offence under paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988; and

(d) an attempt to commit an offence referred to in any of paragraphs (a) to (c).

(3.1) In deciding whether to grant an authorization under subsection (1), the court shall consider the person's criminal record, the nature of the offence and the circumstances surrounding its commission and the impact such an authorization would have on the privacy and security of the person and shall give reasons for its decision.

(4) A summons shall be directed to a person referred to in subsection (1) who is on conditional release requiring the person to report at the place, day and time set out in the summons in order to submit to the taking from the person of samples of bodily substances under an authorization granted under that subsection and setting out the matters referred to in paragraphs 487.07(1)(b) to (e).

(5) The summons shall be accompanied by a copy of the authorization referred to in subsection (1) and be served by a peace officer who shall either deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, leave it for the person at their latest or usual place of residence with any person found there who appears to be at least sixteen years of age.

(6) Service of a summons may be proved by the oral evidence, given under oath, of the peace officer who served it or by the peace officer's affidavit made before a justice of the peace or other person authorized to administer oaths or to take affidavits.

(7) The text of subsection (8) shall be set out in the summons.
(8) If the person to whom a summons is directed does not report at the place, day and time set out in the summons, a justice of the peace may issue a warrant for the arrest of the person in order to allow the taking of samples of bodily substances from the person under the authorization.

(9) The warrant shall name or describe the person and order that the person be arrested without delay for the purpose of allowing the taking from them of samples of bodily substances under the authorization.

(10) A warrant issued under subsection (8) remains in force until it is executed and need not be made returnable at any particular time.

487.056 (1) Samples of bodily substances referred to in sections 487.051 and 487.052 shall be taken at the time the person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, or as soon as is feasible afterwards, even though an appeal may have been taken.

(2) Samples of bodily substances referred to in section 487.055 or 487.091 shall be taken as soon as is feasible after the authorization referred to in that section is granted.

(3) The samples shall be taken by a peace officer, or another person acting under the direction of a peace officer, who is able, by virtue of training or experience, to take them by means of the investigative procedures described in subsection 487.06 (1).

487.057 (1) A peace officer who is authorized to take, or cause to be taken under the direction of the peace officer, samples of bodily substances from a person in execution of a warrant under section 487.05 or an order under section 487.051 or 487.052 or under an authorization under section 487.055 or 487.091 shall, as soon as is feasible after the samples have been taken, make a written report in Form 5.07 and cause the report to be filed with

(a) the provincial court judge who issued the warrant or granted the authorization, or another judge of that provincial court; or

(b) the court that made the order.

(2) The report shall include

(a) a statement of the time and date the samples were taken; and

(b) a description of the bodily substances that were taken.

487.058 No peace officer or person acting under the direction of a peace officer incurs any criminal or civil liability for anything necessarily done with reasonable care and skill in the taking of samples of bodily substances from a person in execution of a warrant under section 487.05 or an order under section 487.051 or 487.052 or under an authorization under section 487.055 or 487.091.

487.06 (1) A peace officer or another person under the direction of a peace officer is authorized to take samples of bodily substances from a person by a warrant under section 487.05 or an order under section 487.051 or 487.052 or an authorization under section 487.055 or 487.091, by any of the following means:

(a) the plucking of individual hairs from the person, including the root sheath;

(b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or

(c) the taking of blood by pricking the skin surface with a sterile lancet.

(2) The warrant, order or authorization shall include any terms and conditions that the provincial court judge or court, as the case may be, considers advisable to ensure that the taking of the samples authorized by the warrant, order or authorization is reasonable in the circumstances.
(3) A peace officer, or any person acting under a peace officer's direction, who
is authorized to take samples of bodily substances from a person by an order
under section 487.051 or 487.052 or an authorization under section 487.055 or
487.091 may take fingerprints from the person for the purpose of the DNA
Identification Act.

487.07 (1) Before taking samples of bodily substances from a person, or
causing samples of bodily substances to be taken from a person under the
direction of a peace officer, in execution of a warrant under section 487.05 or an
order under section 487.051 or 487.052 or under an authorization under section
487.055 or 487.091, the peace officer shall inform the person from whom the
samples are to be taken of

(a) the contents of the warrant, order or authorization;
(b) the nature of the investigative procedures by means of which the
samples are to be taken;
(c) the purpose of taking the samples;
(d) the authority of the peace officer and any other person under the
direction of the peace officer to use as much force as is necessary for
the purpose of taking the samples; and
(e) in the case of samples of bodily substances taken in execution of a
warrant,

(i) the possibility that the results of forensic DNA analysis may be
used in evidence, and
(ii) if the sample is taken from a young person, the rights of the
young person under subsection (4).

(2) A person from whom samples of bodily substances are to be taken may

(a) be detained for that purpose for a period that is reasonable in the
circumstances; and
(b) be required to accompany a peace officer for that purpose.

(3) A peace officer who takes samples of bodily substances from a person, or a
person who takes such samples under the direction of a peace officer, shall
ensure that the person's privacy is respected in a manner that is reasonable in
the circumstances.

(4) A young person against whom a warrant is executed has, in addition to any
other rights arising from his or her detention under the warrant,

(a) the right to a reasonable opportunity to consult with, and
(b) the right to have the warrant executed in the presence of
counsel and a parent or, in the absence of a parent, an adult relative or, in the
absence of a parent and an adult relative, any other appropriate adult chosen by
the young person.

(5) A young person may waive his or her rights under subsection (4) but any
such waiver

(a) must be recorded on audio tape or video tape or otherwise; or
(b) must be made in writing and contain a statement signed by the young
person that he or she has been informed of the right being waived.

1995, c. 27, s. 1.

487.071 (1) There shall be transmitted to the Commissioner of the Royal
Canadian Mounted Police for entry in the convicted offenders index of the
national DNA data bank established under the DNA Identification Act the results
of forensic DNA analysis of bodily substances that are taken in execution of an
order under section 487.051 or 487.052 or an authorization under section
487.055 or 487.091.

(2) Any portions of samples of bodily substances referred to in subsection (1)
that are not used in forensic DNA analysis shall be transmitted to the
Commissioner of the Royal Canadian Mounted Police for the purposes of the
DNA Identification Act.

487.08 (1) No person shall use bodily substances that are taken in execution of a
warrant under section 487.05 or under section 196.12 of the National Defence
Act except to use them for the purpose of forensic DNA analysis in the course of
an investigation of a designated offence.

(1.1) No person shall use bodily substances that are taken in execution of an
order under section 487.051 or 487.052, under an authorization under section
487.055 or 487.091, in execution of an order under section 196.14 or 196.15 of
the National Defence Act, or under an authorization under section 196.24 of that
Act except
(a) to use them for the purpose of forensic DNA analysis; or
(b) to transmit any portions of samples of those bodily substances that are
not used in forensic DNA analysis to the Commissioner of the Royal
Canadian Mounted Police under subsection 487.071(2).

(2) No person shall use the results of forensic DNA analysis of bodily
substances that are taken in execution of a warrant under section 487.05 or
under section 196.12 of the National Defence Act except
(a) in the course of an investigation of the designated offence or any other
designated offence in respect of which a warrant was issued or a bodily
substance was found in the circumstances described in paragraph
487.05(1)(b) or in paragraph 196.12(1)(b) of the National Defence Act; or
(b) in any proceeding for such an offence.

(2.1) No person shall use the results of forensic DNA analysis of bodily
substances that are taken in execution of an order under section 487.051 or
487.052 or under an authorization under section 487.055 or 487.091, or in
execution of an order under section 196.14 or 196.15 of the National Defence
Act, or under an authorization under section 196.24 of that Act, except to
transmit them to the Commissioner of the Royal Canadian Mounted Police.

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence
punishable on summary conviction.

1995, c. 27, s. 1.

(4) Every person who contravenes subsection (1.1) or (2.1)
(a) is guilty of an indictable offence and liable to imprisonment for a term
not exceeding two years; or
(b) is guilty of an offence punishable on summary conviction and liable to a
fine not exceeding $2,000 or to imprisonment for a term not exceeding
six months, or to both.

487.09 (1) Subject to subsection (2), bodily substances that are taken from a
person in execution of a warrant under section 487.05 and the results of forensic
DNA analysis shall be destroyed or, in the case of results in electronic form,
access to those results shall be permanently removed, without delay after
(a) the results of that analysis establish that the bodily substance referred to
in paragraph 487.05(1)(b) was not from that person;
(b) the person is finally acquitted of the designated offence and any other
offence in respect of the same transaction; or
(c) the expiration of one year after
(i) the person is discharged after a preliminary inquiry into the
designated offence or any other offence in respect of the same
transaction,
(ii) the dismissal, for any reason other than acquittal, or the
withdrawal of any information charging the person with the

Offence

Destruction of bodily
substances, etc. —
warrant
designated offence or any other offence in respect of the same transaction, or
(iii) any proceeding against the person for the offence or any other offence in respect of the same transaction is stayed under section 579 or under that section as applied by section 572 or 795,

unless during that year a new information is laid or an indictment is preferred charging the person with the designated offence or any other offence in respect of the same transaction or the proceeding is recommenced.

(2) A provincial court judge may order that the bodily substances that are taken from a person and the results of forensic DNA analysis not be destroyed during any period that the provincial court judge considers appropriate if the provincial court judge is satisfied that the bodily substances or results might reasonably be required in an investigation or prosecution of the person for another designated offence or of another person for the designated offence or any other offence in respect of the same transaction.

(3) Bodily substances that are provided voluntarily by a person and the results of forensic DNA analysis shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after the results of that analysis establish that the bodily substance referred to in paragraph 487.05(1)(b) was not from that person.

1997, c. 18, s. 45

487.091 (1) If a DNA profile could not be derived from the bodily substances that were taken from a person in execution of an order under section 487.051 or 487.052 or under an authorization under section 487.055, a provincial court judge may, on ex parte application made in Form 5.08 within a reasonable time after it is determined that the DNA profile could not be derived, grant an authorization in Form 5.09 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of additional samples of bodily substances that is required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

(2) The application shall state the reasons why a DNA profile could not be derived from the bodily substances that were taken from the person under the initial order or authorization.

(3) Subsections 487.055(4) to (10) apply, with any modifications that the circumstances require and without regard to the words « referred to in subsection (1) who is on conditional release » in subsection 487.055(4), in respect of any person who is not in custody and from whom bodily substances are authorized to be taken under this section.

**DNA IDENTIFICATION ACT**

**INTERPRETATION**

2. The definitions in this section apply in this Act.

« Commissioner » means the Commissioner of the Royal Canadian Mounted Police.

**Definitions**

**Commissioner**

3. 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.

**Purpose**

**PRINCIPLES**

4. It is recognized and declared that

**Principles**
(a) the protection of society and the administration of justice are well served by the early detection, arrest and conviction of offenders, which can be facilitated by the use of DNA profiles;

(b) the DNA profiles, as well as samples of bodily substances from which the profiles are derived, may be used only for law enforcement purposes in accordance with this Act, and not for any unauthorized purpose; and

(c) to protect the privacy of individuals with respect to personal information about themselves, safeguards must be placed on

(i) the use and communication of, and access to, DNA profiles and other information contained in the national DNA data bank, and

(ii) the use of, and access to, bodily substances that are transmitted to the Commissioner for the purposes of this Act.

NATIONAL DNA DATA BANK

5. (1) The Solicitor General of Canada shall, for criminal identification purposes, establish a national DNA data bank, consisting of a crime scene index and a convicted offenders index, to be maintained by the Commissioner.

(2) The Commissioner’s duties under this Act may be performed on behalf of the Commissioner by any person authorized by the Commissioner to perform those duties.

(3) The crime scene index shall contain DNA profiles derived from bodily substances that are found

(a) at any place where a designated offence was committed;

(b) on or within the body of the victim of a designated offence;

(c) on anything worn or carried by the victim at the time when a designated offence was committed; or

(d) on or within the body of any person or thing or at any place associated with the commission of a designated offence.

(4) The convicted offenders index shall contain DNA profiles derived from bodily substances described in subsection 487.071(1) of the Criminal Code, subsection 196.22(1) of the National Defence Act.

(5) In addition to the DNA profiles referred to in subsections (3) and (4), the DNA data bank shall contain, in relation to each of the profiles, information from which can be established

(a) in the case of a profile in the crime scene index, the case number of the investigation associated with the bodily substance from which the profile was derived; and

(b) in the case of a profile in the convicted offenders index, the identity of the person from whose bodily substance the profile was derived.

6. (1) On receipt of a DNA profile that is transmitted under subsection 487.071(1) of the Criminal Code, subsection 196.22(1) of the National Defence Act or subsection 10(3) for entry in the DNA data bank, the Commissioner shall compare it with the DNA profiles in the data bank in order to determine whether it is already contained in the data bank and may then communicate, for the purposes of the investigation or prosecution of a criminal offence, the following information to any Canadian law enforcement agency or laboratory that the Commissioner considers appropriate:

(a) whether the DNA profile is already contained in the data bank; and

(b) any information, other than the DNA profile itself, that is contained in the data bank in relation to that DNA profile.

(2) Information as to whether a person’s DNA profile is contained in the convicted offenders index may be communicated to an authorized user of the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police.
(3) On receipt of a DNA profile from the government of a foreign state, an international organization established by the governments of states or an institution of any such government or international organization, the Commissioner may compare the DNA profile with those in the DNA data bank in order to determine whether it is already contained in the data bank and may then communicate information referred to in subsection (1) to that government, international organization or institution.

(4) The Commissioner may, on the request of a law enforcement agency in the course of the investigation of a designated offence, communicate a DNA profile contained in the crime scene index to the government of a foreign state, an international organization established by the governments of states or an institution of any such government or international organization.

(5) Subsections (3) and (4) apply only if the Government of Canada or one of its institutions has entered into an agreement or arrangement, in accordance with paragraph 8(2)(f) of the Privacy Act, with that government, international organization or institution, as the case may be, authorizing the communication solely for the purposes of the investigation or prosecution of a criminal offence.

(6) No person who receives a DNA profile for entry in the DNA data bank shall use it or allow it to be used other than for the purposes of the administration of this Act.

(7) No person shall, except in accordance with this section, communicate or allow to be communicated a DNA profile that is contained in the DNA data bank or information that is referred to in subsection (1).

7. Access to information contained in the DNA data bank may be granted to
   (a) any person or class of persons that the Commissioner considers appropriate for the purposes of the proper operation and maintenance of the DNA data bank; and
   (b) the personnel of any laboratories that the Commissioner considers appropriate for training purposes.

8. No person to whom information is communicated under subsection 6(1) or who has access to information under paragraph 7(a) or (b) shall use that information other than for the purposes referred to in that subsection or those paragraphs.

8.1 Access to the information in the crime scene index shall be permanently removed, in accordance with any regulations that may be made under this Act, if the information relates to a DNA profile derived from a bodily substance of
   (a) a victim of a designated offence that was the object of the relevant investigation; or
   (b) a person who has been eliminated as a suspect in the relevant investigation.

9. (1) Subject to subsection (2), section 9.1 and the Criminal Records Act, information in the convicted offenders index shall be kept indefinitely.

(2) Access to the following information in the convicted offenders index shall be permanently removed without delay after
   (a) in the case of information in relation to a person who has been convicted of a designated offence, the conviction is quashed and a final acquittal entered and;
   (b) in the case of information in relation to a person who has been discharged under section 730 of the Criminal Code of a designated offence,
      (i) the expiry of one year after the person is discharged absolutely, unless the person is convicted during that year of another offence, or
(ii) the expiry of three years after the person is discharged conditionally, unless the person is convicted during those three years of another offence;

9.1 (1) Access to information in the convicted offenders index in relation to a young person who has been found guilty of a designated offence under the Young Offenders Act shall be permanently removed without delay when the last part of the record in relation to the same offence is required to be destroyed under subsection 45(2), 45.02(3) or 45.03(3) of the Young Offenders Act.

(2) Section 9 nevertheless applies to information in the convicted offenders index in relation to a young person's record to which section 45.01 or subsection 45.02(2) of the Young Offenders Act applies.

10. (1) When bodily substances are transmitted to the Commissioner under subsection 487.071(2) of the Criminal Code or subsection 196.22(2) of the National Defence Act, the Commissioner shall, subject to this section and section 10.1, safely and securely store, for the purpose of forensic DNA analysis, the portions of the samples of the bodily substances that the Commissioner considers appropriate and without delay destroy any remaining portions.

(2) Forensic DNA analysis of stored bodily substances may be performed if the Commissioner is of the opinion that the analysis is justified because significant technological advances have been made since the time when a DNA profile of the person who provided the bodily substances, or from whom they were taken, was last derived.

(3) Any DNA profile that is derived from stored bodily substances shall be transmitted to the Commissioner for entry in the convicted offenders index and no person shall use such a DNA profile except to transmit it under this subsection.

(4) Access to stored bodily substances may be granted to any person or class of persons that the Commissioner considers appropriate for the purpose of preserving the bodily substances.

(5) No person shall transmit stored bodily substances to any person or use stored bodily substances except for the purpose of forensic DNA analysis.

(6) The Commissioner may at any time destroy any or all of the stored bodily substances if the Commissioner considers that they are no longer required for the purpose of forensic DNA analysis.

(7) The Commissioner shall nevertheless destroy the stored bodily substances of a person without delay

(a) if the person has been convicted of a designated offence, after the conviction is quashed and a final acquittal entered and;

(b) if the person has been discharged under section 730 of the Criminal Code of a designated offence,

(i) after the expiry of one year after the person is discharged absolutely, unless the person is convicted during that year of another offence, or

(ii) after the expiry of three years after the person is discharged conditionally, unless the person is convicted during those three years of another offence;

(8) Despite anything in this section, stored bodily substances of a person in respect of whom a pardon, within the meaning of section 2 of the Criminal Records Act, is in effect shall be kept separate and apart from other stored bodily substances, and no such bodily substance shall be used for forensic DNA analysis, nor shall the existence of such a bodily substance be communicated to any person.
10.1 (1) The Commissioner shall, without delay, destroy stored bodily substances of a young person who has been found guilty of a designated offence under the Young Offenders Act when the last part of the record in relation to the same offence is required to be destroyed under subsection 45(2), 45.02(3) or 45.03(3) of the Young Offenders Act.

(2) Subsections 10(6) and (7) nevertheless apply to the destruction of stored bodily substances of a young person relating to a record to which section 45.01 or subsection 45.02(2) of the Young Offenders Act applies.

11. Every person who contravenes subsection 6(6) or (7), section 8 or subsection 10(3) or (5)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction and liable to a fine not exceeding $2,000 or to imprisonment for a term not exceeding six months, or to both.

REGULATIONS

12. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

REVIEW OF ACT

13. Within five years after this Act comes into force, a review of the provisions and operation of this Act shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose.

REPORT TO PARLIAMENT

13.1 (1) The Commissioner shall, within three months after the end of each fiscal year, submit to the Solicitor General a report on the operations of the national DNA data bank for the year.

(2) The Solicitor General shall cause the report of the Commissioner to be tabled in each House of Parliament on any of the first 15 days on which that House is sitting after the Solicitor General receives it.