Senate Sénat
CANADA

Public Protection, Privacy and the Search for Balance: A Statutory Review of the *DNA Identification Act*

Final Report

The Honourable Joan Fraser
Chair

The Honourable John D. Wallace
Deputy Chair

Standing Senate Committee on Legal and Constitutional Affairs

June 2010

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TABLE OF CONTENTS

ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Tuesday, March 16, 2010:

The Honourable Senator Carstairs, P.C. moved, seconded by the Honourable Senator Joyal, P.C.:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the provisions and operation of the *DNA Identification Act* (S.C. 1998, c. 37); and

That the papers and evidence received and taken and work accomplished by the committee on this subject since the beginning of the Second Session of the Fortieth Parliament be referred to the committee; and

That the committee report to the Senate no later than October 28, 2010 and that the committee retain all powers necessary to publicize its findings until 90 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Gary W. O'Brien
Clerk of the Senate

MEMBERSHIP

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

40TH PARLIAMENT, 3RD SESSION

The Honourable Joan Fraser
Chair

The Honourable John D. Wallace
Deputy Chair

and

The Honourable Senators:

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George Baker, P.C.
Pierre-Hugues Boisvenu
Claude Carignan
Sharon Carstairs, P.C.
*James S. Cowan (or Claudette Tardif)
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Other Senators who have participated from time to time on this study during the 3rd Session of the 40th Parliament:
The Honourable Nancy Greene Raine, Terry M. Mercer, Dennis Patterson, Maria Chaput, Richard Neufeld, Dennis Dawson, Robert W. Peterson, Marie-P. Poulin (Charette).

Other Senators who have participated from time to time on this study during the 2nd Session of the 40th Parliament:
The Honourable Tommy Banks, Larry W. Campbell, and Pierre Claude Nolin

The committee wishes to acknowledge the special contribution and excellent work of Ms. Jennifer Bird, Analyst from the Library of Parliament in the preparation of this report.

The committee would also like to thank the following staff for their excellent work in the preparation of this report:

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Céline Éthier, Policy Advisor

INTRODUCTION

On 26 February 2009, this committee received an Order of Reference from the Senate[1] to study the provisions and operation of the *DNA Identification Act* ("the Act").[2] The Order of Reference was issued in accordance with section 13 of the Act, which mandated a review of this statute by a parliamentary committee within five years after the Act came into force.

The *DNA Identification Act* constituted one of the two key components of Bill C-3, *An Act respecting DNA identification and to make consequential amendments to the Criminal Code and other Acts.*[3] When it came into force on 30 June 2000,[4] the *DNA Identification Act* created a national databank to facilitate the forensic identification of individuals in relation to crimes that had been committed. It also established a legal framework to regulate the storage, and in some cases, the collection and disposal of both deoxyribonucleic acid (DNA)[5] profiles[6] and the biological samples from which they had been derived. The legislative framework established by the *DNA Identification Act* was designed to complement the system for DNA collection provided by the *Criminal Code* ("the Code").[7] Amendments to the *Criminal Code's* DNA collection scheme, empowering courts to authorize the taking of DNA samples from individuals convicted of certain "designated offences"[8] outlined in the Code, constituted the second key component of Bill C-3.

Section 13 of the *DNA Identification Act* states:

> Within five years after this Act comes into force, a review of the provisions and operation of this Act shall be undertaken by any

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[1] See Senate, *Debates*, 2nd Session, 40th Parliament, 26 February 2009 at p. 285, available on-line at: http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/013db_2009-02-26-E.pdf.
[2] S.C. 1998, c. 37.
[3] Ibid.
[4] The *DNA Identification Act* came into force in two stages. Sections 2, 3 and 12 of the Act came into force on 8 May 2000, through an *Order Fixing May 8, 2000 as the Date of the Coming into Force of Certain Sections of the Act*, SI/2000-37, and the remaining sections (1, 4 to 11 and 13 to 25) came into force on 30 June 2000, through an *Order Fixing June 30, 2000 as the Date of the Coming into Force of Certain Sections of the Act*, SI/2000-60.
[5] Deoxyribonucleic Acid (DNA) is a nucleic acid or macromolecule contained in the chromosomes of all known living organisms as well as in some viruses. It contains the genetic instructions or code necessary to allow organisms and these viruses to develop.
[6] A DNA profile is a digital file that summarizes selected elements of genetic information located on human chromosomes.
[7] R.S.C. 1985, c. C-46.
[8] What constitutes a "designated offence" is defined in section 487.04 of the *Criminal Code.*

> committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose.

In its original form, section 13 required a review of the Act to be conducted by either a committee of the House of Commons or a committee of both Houses of Parliament. However, in 2000, with the coming into force of Bill S-10,[9] section 13 of the *DNA Identification Act* was amended to permit a Senate committee to conduct this review as well, if designated or established to do so. Section 13 of the Act was amended in accordance with undertakings given to the Standing Senate Committee on Legal and Constitutional Affairs by the Solicitor General of Canada during the course of the committee's hearings on Bill C-3. The committee reported Bill C-3 to the Senate without amendment,[10] despite some concerns raised by members in relation to the bill, on the strength of a letter from the Solicitor General to the then chair of this committee, in which the Solicitor General undertook to:

- create a DNA Data Bank Advisory Committee, membership of which was to include a representative from the Office of the Privacy Commissioner;
- pre-publish the regulations to accompany the *DNA Identification Act*, and make them available to the Senate for comment and evaluation;
- have the RCMP Commissioner include, as part of his annual report to the Minister, a report on the operation of the National DNA Data Bank;
- clarify in the regulations that what is meant by a "DNA profile" is not a "profile for medical reasons"; and
- amend the *DNA Identification Act* to give a committee of the Senate the same authority to conduct the parliamentary review mandated by section 13 of the Act as a House of Commons or a joint committee.[11]

Given that the *DNA Identification Act* came into force in its entirety by 30 June 2000, a committee of the Senate, House of Commons or both Houses of Parliament should have initiated a comprehensive review of the provisions and operation of this statute prior to 30 June 2005. Unfortunately, no review was commenced by any parliamentary committee prior to that date. However, in February of 2009, the Senate issued an Order of Reference to this committee, authorizing it to conduct such a review; and in the same month, the House of Commons Standing

[9] *An Act to amend the National Defence Act, the DNA Identification Act and the Criminal Code* (S.C. 2000, c. 10).
[10] Senate, Standing Committee on Legal and Constitutional Affairs, *Sixteenth Report*, 1st Session, 36th Parliament, 8 December 1998, available on-line at: http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/lega-e/rep-e/rep16dec98-e.htm.

Committee on Public Safety and National Security began its own statutory review of the Act. Both committees were required to report the results of their reviews to their respective Houses of Parliament by 30 June 2009. The House of Commons committee held three meetings on this study between 24 February and 28 April 2009[12] and reported the results of its review to the House of Commons in June 2009.[13] Key recommendations made by the House of Commons committee in its report included:

- that the Government of Canada amend the *DNA Identification Act* and related laws to allow for the automatic taking of a DNA sample from everyone convicted of a designated offence immediately upon conviction;

- that the Government of Canada and the provincial governments of Ontario and Quebec immediately allocate additional funding to the RCMP, Ontario and Quebec forensic labs;

- that the Government of Canada maintain the National DNA Data Bank and all associated facilities as a public service and authorize the use of private facilities solely in exceptional overflow circumstances;

- that the Government of Canada amend the *Criminal Code* to allow a suspect of a designated offence to voluntarily provide a DNA sample for an exoneration test; and

- that the federal, provincial and territorial ministers of Justice and Public Safety determine the best way of proceeding to create a Missing Persons Index and a Victims Index at the National DNA Data Bank.[14]

The Government of Canada responded to the House of Commons committee's report on 19 October 2009 by stating that the recommendations contained in it were "acceptable in principle to the Government" and that it would "consult with the provinces, law enforcement

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[11] Ibid.

[12] During the course of its statutory review of the *DNA Identification Act*, the House of Commons Standing Committee on Public Safety and National Security heard from representatives of the RCMP, the National DNA Data Bank Advisory Committee, the Department of Justice, the Canadian Association of Chiefs of Police, the Criminal Lawyers' Association, the Office of the Privacy Commissioner of Canada, the Laboratoire de sciences judiciaries et de medicine légale and the Centre of Forensic Sciences. Transcripts of the testimony provided by these witnesses are available on the committee's website at: http://www2.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Language=E&Mode=1&Parl=40&Ses=2&Cmte=SECU&Stac=2605846.

[13] House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the DNA Identification Act*, 2nd Session, 40th Parliament, 18 June 2009, available on-line at: http://www2.parl.gc.ca/content/hoc/Committee/402/SECU/Reports/RP3994957/securp02/securp02-e.pdf.

[14] Ibid. Please note that the recommendations referenced above have been paraphrased. A full list of the recommendations made by the House of Commons Standing Committee on Public Safety and National Security can be found at pp. 13 – 14 of that committee's report.

and other stakeholders on a priority basis with a view to developing a consensus on how best to proceed."[15]

While this committee had held several meetings with respect to its own statutory review of the *DNA Identification Act* prior to the original reporting deadline of 30 June 2009, members were of the view that additional hearings would be required in order to obtain an accurate picture of all of the issues involved. In light of the rapid scientific advances in DNA analysis and the significant changes that had been made to the *Criminal Code* framework for DNA collection it would probably be necessary to recommend significant legislative and policy changes in relation to the *DNA Identification Act* and the *Criminal Code.* Accordingly, during the 2nd Session of the 40th Parliament, the committee sought and received two extensions of the original reporting deadline from the Senate.[16] Unfortunately, the statutory review of the Act was pre-empted by the study of government bills, and the committee was unable to complete its study before the 2nd Session of the 40th Parliament concluded. The committee did not want to leave this important study incomplete, however, and following the commencement of the 3rd Session of the 40th Parliament, we sought and received a new Order of Reference from the Senate to continue it. The committee's current Order of Reference requires us to table our final report in relation to our statutory review in the Senate no later than 28 October 2010.[17] This report sets out the results of our review of the provisions and operation of the Act, as well as our recommendations.

[15] Government Response to the 2nd Report of the House of Commons Standing Committee on Public Safety and National Security, *Statutory Review of the DNA Identification Act*, 2nd Session, 40th Parliament, 19 October 2009, available on-line at: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4144321&Language=E&Mode=1&Parl=40&Ses=2.

[16] See Senate, *Debates*, 2nd Session, 40th Parliament, 18 June 2009, p. 1263, available on-line at: http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/048db_2009-06-18-E.pdf and Senate, *Debates*, 2nd Session, 40th Parliament, 9 December 2009, pp. 1947 and 1948, available on-line at: http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/pdf/079db_2009-12-09-E.pdf.

[17] See Senate, *Debates*, 3rd Session, 40th Parliament, 16 March 2010, pp. 100 – 101, available on-line at: http://www.parl.gc.ca/40/3/parlbus/chambus/senate/deb-e/pdf/006db_2010-03-16-E.pdf.

OUR STUDY AND ITS CONTEXT

It would be impossible to fully understand the findings or recommendations contained in this report without knowledge of how the framework governing the use of DNA technology by Canada's criminal justice system has evolved over time. Accordingly, this section of our report provides a brief description of the process currently used to create DNA profiles. It also provides an outline of how DNA samples obtained from individuals during the course of a criminal investigation were used as evidentiary tools prior to the enactment of the *DNA Identification Act*. This section also describes the legislative scheme introduced by that Act, which, among other things, created the National DNA Data Bank ("the Data Bank"), and the major amendments which have since been made to the *DNA Identification Act*, the *Criminal Code*, and the *National Defence Act*[18] in relation to DNA collection and analysis. Finally, this section provides an overview of the new methods or types of DNA forensic analysis that are beginning to be used both in Canada and in other jurisdictions.

When DNA identification technology started to become available in the 1980s, law enforcement officials, Crown prosecutors and other participants in the Canadian justice system were quick to recognize its potential as a forensic identification tool. It is hard to overstate the value of this technology as a mechanism to differentiate or distinguish one individual from another. No other forensic identification technique (fingerprints, tool marks, tire tracks, ballistics, and so forth) is as effective in either eliminating suspects or providing persuasive evidence of guilt. As was eloquently stated by the United States' National Academy of Sciences in its February 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*:

> DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of a false positive are quantifiable and often miniscule.[19]

The reason that DNA is such an effective identification tool is because although almost all of the genetic information in the human genome is the same from one person to the next,

[18] R.S.C. 1985, c. N-5.

[19] National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward, National* Acadamies Press, Washington, D.C., 2009, p. 130.

enough of the DNA found in each of us is different to distinguish one individual from another. In fact, it is believed that no two people have the same DNA, except for identical twins.

A. Current Process Used to Create DNA Profiles

The taking of DNA for the purpose of forensic analysis is accomplished by first taking samples of bodily substances from individuals. This may be done by:

- plucking individual hairs from the person in question, including the root sheath;
- taking buccal swabs by swabbing the lips, tongue and inside cheeks of the person to collect epithelial cells; or
- obtaining blood from the person by pricking his or her skin with a sterile lancet.[20]

Once the sample has been taken, it is then sequenced in a forensic laboratory by a qualified technician. The technician does not sequence the individual's entire genome (the complete hereditary information found on all 23 pairs of chromosomes) but instead sequences only small, select regions on the person's chromosomes that are known to exhibit high levels of variation among individuals. The sequences in question are known as short tandem repeats (STRs).[21] The advantage of using STR sequences in forensic analysis of DNA is that there are many possible variations of these segments in the human population, these variations can be identified by using techniques that determine the length of the segment in question, and a small amount of DNA may be enough to conduct an analysis.[22]

A DNA profile is created by digitally summarizing the information contained in STR markers taken from 13 different loci (the specific location of a gene or DNA sequence on a chromosome), as well as a DNA marker that differentiates between the X and Y chromosomes. By using 13 STR numbers plus an identifier for sex to create the DNA profile, the possibility of

[20] See section 487.06(1) of the *Criminal Code.*

[21] STRs have tandem repeats of only three to four base-pairs (two nucleotides or molecules, which, when joined together, create structural units of DNA on opposite and complementary DNA strands connected via hydrogen bonds). These STRs may be repeated in the DNA molecule from a few to dozens of times.

[22] Because the samples are so short, technicians use another technique, known as polymerase chain reaction (PCR) to increase the size of the sample in order to make it easier to analyse. For more information on STRs and how DNA profiles may be created using PCR/STR technology, see Thomas Curran, *Forensic DNA Analysis: Technology and Application*, BP-443E, Parliamentary Information and Research Service, Library of Parliament, September 1997, available on-line at: http://www2.parl.gc.ca/content/lop/researchpublications/bp443-e.pdf.

a random match between the profiles of two individuals is thought to be in the order of one in billions or even trillions.[23]

B. Bill C-104, An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)

DNA forensic evidence was used for the first time in a criminal prosecution in Canada in 1988. At that time, Canada had no legislation authorizing the seizure of bodily tissue samples for that purpose, with or without the consent of an accused. As DNA evidence began to be used more widely in Canada's courts, accused persons began challenging the admissibility of such evidence at trial, on the grounds that the taking DNA samples violated rights protected under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* ("the Charter"),[24] particularly where it could be shown that these samples were taken without the consent of the accused. Courts, in turn, began ruling such evidence inadmissible in the absence of a legislative framework safeguarding the rights of accused persons.[25]

Responding to such judgments, Parliament enacted Bill C-104, *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*[26] in 1995. This statute amended the *Criminal Code* to allow courts to authorize the taking of DNA samples from adults and young people suspected of having been parties to "designated offences." Under the scheme introduced by Bill C-104, provincial court judges were empowered to issue a warrant authorizing a peace officer, or another person acting under the direction of a peace officer, to obtain samples of bodily substances for forensic DNA analysis, if satisfied that there were reasonable grounds to believe that a designated offence, as defined in section 487.04 of the Code, had been committed, and that a bodily substance found at the crime scene, on the victim, or on another person or thing

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[23] See John Butler, "Background Information," *Short Tandem Repeat DNA Internet DataBase (STRBase), STR Training Materials*, National Institutes of Science and Technology (United States), available on-line at: http://www.cstl.nist.gov/strbase/training.htm.

[24] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 7 of the Charter guarantees the right to life, liberty and security of the person while section 8 of the Charter protects against unreasonable search and seizure.

[25] See, for example, *R.* v. *Borden, [1994] 3 S.C.R. 145 and R.* v. *Stillman, [1997]* 1 S.C.R. 607, in which the Supreme Court of Canada ruled DNA evidence inadmissible because bodily substances had been seized by police who had neither the consent of the accused, nor any prior judicial authorization. In particular, in the *Stillman* decision, the Court concluded that the taking of bodily substances could not be justified as a search incidental to an arrest and violated the accused's rights under sections 7 and 8 of the Charter.

[26] S.C. 1995, c. 27. A copy of the Royal Assent version of this statute is available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/351/Government/c-104/c-104_4/c-104_4.pdf.

associated with the commission of the offence, would provide evidence linking the individual from whom the sample was obtained with the offence. Prior to issuing the warrant, the judge also had to be satisfied that the issuance of the warrant was in the best interests of the administration of justice (section 487.05 of the Code).

With respect to what constituted "designated offences" for which DNA collection warrants could be issued, section 487.04 of the Code, as originally enacted, limited these offences to 37 serious personal injury and sexual offences where it was likely that DNA evidence could prove useful.

In an effort to protect the privacy of accused persons, Bill C-104 also amended the Code to provide restrictions on the use of samples collected. For example, the bill contained provisions specifying that the forensic DNA evidence obtained from the analysis of the bodily substances could be used only in connection with the investigation of designated offences. Samples were to be destroyed where it was established that the person from whom the substances were seized was not the perpetrator of the offence. However, a judge could order the retention of the substances and the results of analysis for whatever period he or she considered appropriate if the material might reasonably be required for investigation or prosecution of another designated offence.

C. Bill C-3, An Act respecting DNA identification and to make consequential amendments to the Criminal Code and other Acts

Following the enactment of Bill C-104, the former Solicitor General of Canada, the Honourable Herb Gray, sought public comment on the creation of a National DNA Data Bank designed to facilitate the investigation of crimes without suspects and/or unsolved offences where DNA evidence from the perpetrator was still available.[27] Following a consultation period, the *DNA Identification Act* (Bill C-3) was introduced in Parliament on 25 September 1997.[28] As stated in the introduction to this report, Bill C-3 had two separate components: it created the National DNA Data Bank and a legal framework to govern the storage, collection and

[27] See *Establishing a National DNA Data Bank: Consultation Document*, available on-line at: http://ww2.ps-sp.gc.ca/Publications/Policing/199601_e.pdf and *Summary of Consultations*, available on-line at:http://ww2.ps-sp.gc.ca/Publications/Policing/199611_e.pdf.

[28] A Royal Assent version of Bill C-3, *An Act respecting DNA identification and to make consequential amendments to the Criminal Code and other Acts,* supra note 2, is available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/361/Government/C-3/C-3_4/C-3_4.pdf.

destruction of DNA samples and profiles held at the bank (the *DNA Identification Act);* and it amended the *Criminal Code* to expand the courts' authority to order the collection of biological samples from persons who had been convicted of designated offences. The new legislation was retroactive, applying to offences already committed before it came into force.

D. Legislative Framework Established by the *DNA Identification Act*

Under the framework created by the *DNA Identification Act,* the Minister of Public Safety (formerly the Solicitor General) must establish, and the Commissioner of the Royal Canadian Mounted Police (RCMP) must maintain, a National DNA Data Bank ("the Data Bank") for criminal identification purposes.[29] The Data Bank houses two indexes: a crime scene index (CSI), which contains DNA profiles derived from bodily substances found at the scene where a designated offence[30] appears to have been committed, or on or within the body of a victim, other person or thing associated with the commission of the offence;[31] and a convicted offenders index (COI), which contains DNA profiles derived from samples taken from individuals convicted of designated offences either with their consent or pursuant to a court order.[32] The RCMP Commissioner is responsible for receiving DNA samples and profiles for entry into the Data Bank. Once received, the new profiles that have been generated are compared with those already held in the Data Bank, and any matches are communicated to the appropriate laboratory or law enforcement agency, along with information concerning the crime(s) and/or offender(s) to which the new profile has been linked.[33]

Matches can be identified in one of two ways. First, new DNA profiles entered in the CSI are compared with profiles from other crime scenes. These matches can identify links between various offences, helping investigators solve crimes. Second, new CSI entries are compared with COI entries to see whether a convicted offender whose profile is already in the index can be associated with this new crime. This is where the other portion of Bill C-3, the part allowing for collection of DNA samples from convicted offenders, comes into play. Without the necessary mechanism to ensure that DNA samples are collected legally from offenders, so that the

[29] See section 5(1) of the *DNA Identification Act.* With respect to the duties of the Commissioner in relation to the Act, section 5(2) specifies that the Commissioner may delegate his or her duties to others.
[30] As stated previously, what constitutes a designated offence is defined in section 487.04 of the *Criminal Code*. See also Appendix 1.
[31] See section 5(3) of the *DNA Identification Act.*
[32] See section 5(4) of the *DNA Identification Act.*
[33] See section 6(1) of the *DNA Identification Act.*

matching between the CSI profiles and COI profiles can occur, the Data Bank would be much less useful in helping to solve crimes.

Match information is available to agencies that have access to the existing criminal records database maintained by the RCMP.[34] Data comparisons and information sharing with agencies of foreign governments or international organizations are also permitted under the Act, provided there is an agreement in place between the Canadian government and the foreign government specifying that the information communicated may be used only "for the purposes of the investigation or prosecution of a criminal offence."[35] Communication or use of DNA profiles and related information other than in accordance with the provisions of the Act is prohibited.[36]

Ordinarily, information in the COI is to be kept indefinitely, subject to the *Criminal Records Act*.[37] Access to that information, however, is permanently removed if a convicted offender is ultimately acquitted. Similarly, access to such data is removed one year following an absolute discharge, or three years following a conditional discharge, unless the individual is convicted of another offence in the meantime.[38] DNA profiles relating to adult convictions, therefore, would ordinarily remain accessible unless a pardon was obtained. A separate provision was made in Bill C-3 for the removal of DNA information concerning young offenders.[39]

The Commissioner is obliged to store "safely and securely" those samples of bodily substances received pursuant to the *Criminal Code* and thought necessary for DNA analysis; any remaining samples have to be destroyed "without delay."[40] The Commissioner also has the authority to order additional DNA testing of stored samples where this is justified by "significant technological advances."[41] Stored biological samples cannot be used or transmitted except for the purposes of forensic DNA analysis.[42] The Commissioner may grant access to bodily substances, in order to preserve them, and destroy samples no longer required for analysis.[43] The Commissioner is obliged to destroy bodily substances when the person is acquitted or

[34]See section 6(2) of the *DNA Identification Act.*
[35]See sections 6(3) to 6(5) of the *DNA Identification Act.*
[36]See sections 6(6) and 6(7) of the *DNA Identification Act.*
[37]See section 9(1) of the *DNA Identification Act.*
[38]See section 9(2) of the *DNA Identification Act.*
[39]See section 9.1 of the *DNA Identification Act.*
[40]See section 10(1) of the *DNA Identification Act.*
[41]See section 10(2) of the *DNA Identification Act.*
[42]See section 10(5) of the *DNA Identification Act.*
[43]See sections 10(4) and (6) of the *DNA Identification Act.*

discharged; samples obtained from persons who have been pardoned must be kept separate and apart from other stored bodily substances and may not be subjected to further DNA analysis.[44]

It is an offence to use biological samples or to communicate DNA analysis results other than in accordance with the requirements of the Act. If these offences are prosecuted by indictment, the maximum penalty is two years' imprisonment, while prosecution by summary conviction may result in a maximum fine of $2,000 or imprisonment for up to six months, or both penalties.[45]

A DNA Data Bank Advisory Committee ("the Advisory Committee") was established to advise the Commissioner on matters relating to the establishment and operation of the Data Bank.[46] This committee includes a representative of the Privacy Commissioner of Canada as well as up to six representatives of the police, legal, scientific, and academic communities. The RCMP Commissioner, as the official responsible for maintaining the Data Bank, must, through the Minister of Public Safety, submit an annual report to Parliament on the Data Bank's operation.[47] Finally, the *DNA Identification Act* also contains the parliamentary review clause which forms the foundation for our committee's current study.[48]

E. Bill C-3's Amendments to the *Criminal Code*

In addition to establishing the Data Bank, Bill C-3 also made extensive amendments to the *Criminal Code* sections dealing with forensic DNA analysis. These amendments were intended to streamline the existing DNA warrant scheme by adding a series of forms to be used to obtain or grant warrants, as well as orders, and to report back to the court on their execution. Bill C-3 also amended section 487.04 of the Code with respect to what constituted a designated offence for which courts could order the collection of DNA samples from individuals. For the first time, offences were divided into two categories: primary designated offences, of which there were 30, and secondary designated offences, of which there were 27.

The distinction between primary and secondary designated offences introduced by Bill C-3 was not relevant to section 487.05 of the Code, which gives police officers the ability to obtain

[44]See sections 10(7) and (8) of the *DNA Identification Act.*
[45]See section 11 of the *DNA Identification Act.*
[46]*DNA Data Bank Advisory Committee Regulations,* SOR/2000-181.
[47] See section 13.1 of the *DNA Identification Act.*
[48] See section 13 of the *DNA Identification Act.*

warrants from courts to collect DNA from those suspected of having committed designated offences. However, the distinction was relevant to a new section of the Code introduced by Bill C-3, which empowers courts to order the collection of DNA from those convicted of designated offences (section 487.051 of the Code). Collected samples are then turned into DNA profiles at the Data Bank, and uploaded to the COI established under the *DNA Identification Act.* Offences classified as primary designated offences were predominantly violent and sexual offences, many of which might involve the transmission of bodily substances that could be used to identify the perpetrator through DNA analysis. Those classified as secondary designated offences were less likely to result in the loss or exchange of bodily substances. DNA profiles of these offenders were therefore considered to be less likely to provide useful evidence.

Section 487.051 of the Code also established tests for courts to employ when deciding whether to issue an order for the collection of a DNA sample from those convicted of designated offences. In the case of primary designated offences, courts were generally required to make a collection order upon conviction, unless satisfied by the offender that the impact on his or her privacy and security of the person would be "grossly disproportionate" to the public interest in the protection of society and in the proper administration of justice. By contrast, in the case of secondary designated offences, courts were empowered to make such orders if satisfied that it was in the best interests of the administration of justice to do so, having considered the nature and circumstances of the offence, the criminal record of the offender, and the impact of such an order on his or her privacy and security of the person. The court was also required, in the case of secondary designated offences, to give reasons for the decision to issue an order.

Once a court issues an order for the collection of DNA from a convicted offender, section 487.071(3) requires that the sample, as well as a copy of the order issued by a judge, be sent to the RCMP Commissioner. Under section 5.1(2) of the *DNA Identification Act,* the Commissioner is responsible for ensuring that a DNA profile is created from the sample, and added to the COI, unless, of course, the offender's profile is already in the COI.[49] By contrast, with respect to the CSI, there is no obligation for law enforcement officials to send DNA profiles generated from samples taken from crime scenes, or the samples themselves, to the Data Bank. It is up to the relevant provincial authorities as to whether they choose to provide such samples and profiles to the Data Bank and have the DNA profiles in question added to the CSI.

[49] See section 487.071(2) of the *Criminal Code*.

In amending the *Criminal Code* to permit courts to order the collection of DNA samples from convicted offenders, Bill C-3 also made the application of these provisions retroactive. Under new section 487.052, courts could order the taking of samples for the purpose of creating DNA profiles from persons who had been convicted of designated offences before the coming into force of the *DNA Identification Act* (30 June 2000).[50] The prosecutor had to apply for such an order, and the court had to base its decision on the same criteria as those used for secondary designated offence convictions. Bill C-3 also added section 487.055 to the Code, as a related provision to section 487.052. Section 487.055 allowed courts to order the taking of bodily samples for DNA analysis from certain specified offenders convicted prior to the coming into force of Bill C-3. By means of an *ex parte* (without notice) application, such an order could be made with respect to anyone who had been declared a dangerous offender, had been convicted of murder, had been convicted of a listed sexual offence and who was serving a sentence of at least two years, or had been convicted of manslaughter and, on the date of the application, was serving a sentence of imprisonment of at least two years for that offence.[51]

F. Bill S-10, *An Act to amend the National Defence Act, the DNA Identification Act and the Criminal Code*, Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, and Bill C-18, *An Act to amend certain Acts in relation to DNA identification*

Following the coming into force of Bills C-104 and C-3, Parliament enacted three new statutes that significantly expanded the scope of the DNA collection and storage framework found in the *Criminal Code* and the *DNA Identification Act.* The first of these was Bill S-10, *An Act to amend the National Defence Act, the DNA Identification Act and the Criminal Code*.[52] Bill S-10 was primarily designed to make the *Criminal Code* amendments introduced by Bill C-104

[50]As in the case of a collection order made under section 487.051 of the Code, section 487.054 allowed both the offender and the prosecutor to appeal an order made under section 487.052 of the Code. Section 487.052 was repealed by the coming into force of Bill C-18 on 1 January 2008, but its retroactive effect was maintained through amendments to section 487.051 of the *Criminal Code* and section 196.14 of the *National Defence Act,* which now state that orders authorizing the taking of samples can be granted for an offence committed at any time, including before 30 June 2000. The amendments to the *Criminal Code* introduced by Bill C-18 will be discussed in further detail in a later section of this report.

[51]The definition of "sexual offence" included sexual assaults and most sexual offences involving children, as well as historical sexual offences (those found in previous versions of the *Criminal Code*). In deciding whether or not to make a collection order under section 487.055 of the Code, judges apply the same test as the one applicable to collection orders for secondary designated offences outlined in 487.051(3) of the Code. Offenders on conditional release are to be summoned to report for the taking of bodily substances; failure to appear can result in the issue of an arrest warrant for the purposes of enforcing compliance.

[52] S.C. 2000, c. 10. Bill S-10 received Royal Assent on 29 June 2000. A Royal Assent version of Bill S-10 is available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/362/Private/S-10/S-10_4/S-10_4.pdf.

and Bill C-3 apply in equal measure to individuals convicted of designated offences under the Code of Service Discipline[53] by military judges at courts martial.

The second and third of these acts were Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*[54] and Bill C-18, *An Act to amend certain Acts in relation to DNA identification.*[55] Both bills came into force in full on 1 January 2008. Bills C-13 and C-18 expanded the scope of the retroactive provisions found at section 487.055 of the *Criminal Code*. They also created a new category of primary designated offences known as mandatory primaries (now found at part *(a)* of the definition of "primary designated offence" at section 487.04 of the *Criminal Code*), as well as a new category of so-called "generic" secondary designated offences. With respect to those few offences now in the mandatory primary category, courts no longer had any discretion as to whether to issue an order for DNA collection from those convicted of such offences (see current section 487.051(1) of the Code). With respect to the generic secondary designated offences, rather than being described by reference to the section number for the offence in the Code, as most primary and secondary designated offences still are, these new secondary designated offences are described by the maximum length of sentence one can receive if one is convicted of them. Through the addition of this "generic" secondary designated offence category to section 487.04 of the Code, the number of secondary designated offences was enlarged to include all offences under the *Criminal Code* and certain provisions of the *Controlled Drugs and Substances Act*[56] that carry a maximum sentence of five or more years' imprisonment and are prosecuted by indictment. Finally, Bills C-13 and C-18 amended sections 487.051 and 487.055 of the *Criminal Code* so that a court could order a person found not criminally responsible on account of mental disorder

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[53] The Code of Service Discipline is found in Part III of the *National Defence Act.* Among other things, this Code sets out who is subject to the military justice system as well as the service offences for which persons subject to the military justice system can be charged.

[54] S.C. 2005, c. 25. For a fuller discussion of Bill C-13, see Robin MacKay, *Bill C-13: An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, LS-490E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 9 November 2004, http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/38/1/c13-e.pdf. A Royal Assent version of Bill C-13 is also available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/381/Government/C-13/C-13_4/C-13_4.PDF.

[55] S.C. 2007, c. 22. For a fuller discussion of Bill C-18, see Robin MacKay, *Bill C-18: An Act to amend certain Acts in relation to DNA identification*, LS-545E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 January 2007, http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c18-e.pdf. A Royal Assent version of Bill C-18 is also available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-18/C-18_4/C-18_4.PDF.

[56] S.C. 1996, c. 19.

for having committed a designated offence to provide a DNA sample. The *National Defence Act* was also amended to make the above changes to the *Criminal Code* apply to offences committed under the Code of Service Discipline in equal measure.

G. Additions to the List of Designated Offences Since Bills C-13 and C-18 Were Enacted and the Emergence of New DNA Forensic Identification Technologies

Other statutes enacted since Bills C-13 and C-18 came into force have continued to add offences to the lists of primary and secondary designated offences found at section 487.04 of the Code. For example, Bill C-2, the *Tackling Violent Crime Act*,[57] which came into force in its entirety on 2 July 2008, added one new offence[58] to the list of primary designated offences for which courts are required to make a DNA collection order upon conviction (section 487.04(*a*)). Similarly, Bill C-14, *An Act to amend the Criminal Code (organized crime and protection of justice system participants*),[59] which came into force on 2 October 2009, added three new offences[60] to the same section of the definition of primary designated offences found at section 487.04. Furthermore, Bill S-2, An Act to amend the Criminal Code and other Acts,[61] which introduces amendments to Canada's sex offender registration system[62] will, if enacted in its current form, add several additional offences to the definitions of both primary and secondary designated offences found in section 487.04 of the Code. It will also move some offences now found in the secondary designated offence category to the primary category.

As the above overview demonstrates, the legislative framework for DNA collection from those suspected of having committed and those convicted of designated offences has evolved considerably, both in detail and in breadth, since the first relevant legislation respecting DNA

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[57] S.C. 2008, c. 6. A Royal Assent version of this statue is available on-line at: http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=2&Mode=1&Pub=Bill&Doc=C-2_4.

[58] The new offence added to the definition of primary designated offence found at section 487.04(*a*) of the Code by Bill C-2 was section 244 of the Code (discharging firearm with intent).

[59] S.C. 2009, c. 22. A Royal Assent version of this statute is available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/402/Government/C-14/C-14_4/C-14_4.PDF.

[60] The new offences added to the definition of primary designated offence found at section 487.04(*a*) of the Code by Bill C-14 were section 244.2 of the Code (discharging firearm— recklessness), section 270.01 of the Code (assaulting peace officer with weapon or causing bodily harm) and section 270.02 of the Code (aggravated assault of peace officer).

[61] Bill S-2 was given third reading in the Senate on 11 May 2010, and first reading in the House of Commons on 26 May 2010. A copy of Bill S-2 is available on-line at: http://www2.parl.gc.ca/content/hoc/Bills/403/Government/S-2/S-2_1/S-2_1.PDF.

collection for criminal law purposes was enacted. Furthermore, based on an examination of the legislation enacted since Bills C-13 and C-18 came into force, as well as an examination of at least one bill still before Parliament (Bill S-2) as of 18 June, 2010, it would appear that this growth could continue over time.

The number of offences classified as designated offences has grown exponentially since the original legislative framework was put into place. Currently, a court may issue a warrant authorizing DNA collection from you if you are suspected of having committed any one of more than 265 designated offences[63] now listed at section 487.04 of the *Criminal Code*. In addition, a court must order DNA to be collected from you if you have been convicted of one of the 19 primary designated offences for which issuance of a collection order by a court upon conviction is mandatory. A court may also order collection of a DNA sample upon conviction if you are convicted of any one of the remaining 246 offences.

The fact that the system of DNA collection for criminal justice purposes has expanded so greatly since 1995 raises the question of whether the resources of the criminal justice system have been strained by the enlargement of this regime. It is vital to answer this question, given that pressures to both expand the framework for DNA collection and add to the number and types of DNA profiles stored at the Data Bank will probably increase in the future. This is particularly likely, given how useful DNA collection and analysis, as forensic tools, have been to law enforcement and the court system, and given that other jurisdictions collect DNA from a wider array of individuals for criminal justice purposes than Canada does. For example, some jurisdictions, such as the United Kingdom (U.K.), [64] as well as some U.S. states,[65] have criminal

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[62] See Senate, *Debates*, 3rd Session, 40th Parliament, 29 March 2010 at p. 198, available on-line at: http://www.parl.gc.ca/40/3/parlbus/chambus/senate/deb-e/pdf/012db_2010-03-29-E.pdf.

[63] This number was obtained from page 6 of the National DNA Data Bank, *2008 – 2009 Annual Report*, available on-line at: http://www.nddb-bndg.org/train/docs/Annual_2008-2009_e.pdf. This report also indicates that most of these new offences have been added since 2008; prior to 2008, there were only 59 designated offences: 38 primary designated offences and 21 secondary designated offences.

[64] For a brief summary of how the United Kingdom's system of DNA collection for criminal law purposes has evolved over time, please see GeneWatch (U.K.)'s website at: http://www.genewatch.org/sub-537968. It should be noted, however, that the U.K. government is considering some changes to its blanket policy of indefinitely retaining the fingerprints, DNA samples and DNA profiles of all individuals arrested in England and Wales in the wake of the 4 December 2008 decision of the European Court of Human Rights in *S.and Marper* v. *The United Kingdom*, [2008] ECHR 1581, where the Court found that the U.K. government policy in this regard violated Article 8 of the European Convention of Human Rights, which protects the right to privacy. Between May and August 2009, the Home Office held consultations on a proposed new system for retention of fingerprints, DNA samples and DNA profiles, and in November 2009, the former Secretary of State for the Home Department, Alan Johnson, published the U.K. government's proposals for a new retention policy regarding these items. Information regarding the consultations and the U.K. government's proposals is available at: http://www.statewatch.org/news/2009/may/uk-

legislation in place that allows collection of DNA samples from individuals upon arrest, while many other U.S. states automatically collect DNA from individuals convicted of any felony (an offence where the punishment is more than one year in jail).[66]

In addition, techniques for DNA forensic analysis have advanced greatly since the *DNA Identification Act* was enacted in 2000. These advances will also likely create pressure to expand the scope of both the DNA collection system, as well as the amount of genetic information stored at the Data Bank. To illustrate this point, it may be helpful to recall that in 1995, Canadian forensic labs were using a type of DNA analysis called restriction fragment length polymorphism (RFLP) analysis, which used much longer segments of DNA for analysis than the current PCR/STR technology uses. The old RFLP technology needed much more non-degraded DNA available from a sample to ensure a scientifically viable result.[67] In addition, at that time fewer than 13 loci on the chromosomes were used to create a DNA profile,[68] which meant that the results were less precise than they are now, and that there was a greater chance of a false positive match between the profiles of two different people, particularly if they were related in some way.[69] By 1998, when the *DNA Identification Act* received Royal Assent, PCR/STR technology was just starting to be used by Canadian forensic labs.[70] Now it is the Canadian forensic laboratory standard. Furthermore, newer types of analysis are proving their value in other forensic contexts and in other jurisdictions. Some of these include:

- the use of 16, rather than 13, loci to create a more accurate DNA profile that would discriminate even more accurately between individuals than the current 13 loci profile;

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ho-dna-consult.pdf, http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2788.pdf, and http://webarchive.nationalarchives.gov.uk/20091016095602/http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=408478&SubjectId=2.

[65] As of As of August 2008, 13 states allowed for the collection of DNA samples from arrestees, including Alaska, Arizona, California, Kansas, Louisiana, Maryland, Minnesota, New Mexico, North Dakota, South Dakota, Tennessee, Texas, and Virginia. See U.S. Department of Justice, Office of the Inspector General, Audit Division, *Audit of the Convicted Offender DNA Backlog Reduction Program*, March 2009 at p. vii, available on-line at: http://www.justice.gov/oig/reports/OJP/a0923/final.pdf.

[66] Ibid. at p. 28.

[67] Thomas Curran, *Forensic DNA Analysis: Technology and Application*, supra note 22 at p. 15.

[68] Ibid. at p. 20.

[69] It is important to note that while the Data Bank uses 13 loci to create a profile, in operational casework, labs will still use 9 loci. See testimony of Dr. Ron Fourney, Director, National Services and Research, RCMP, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 4*, 2nd Session, 40th Parliament, 25 and 26 March 2009, p. 21.

[70] Thomas Curran, *Forensic DNA Analysis: Technology and Application*, supra note 22 at p. 12.

- the use of miniSTRs and single nucleotide polymorphisms (SNPs) for forensic DNA analysis. These techniques allow smaller and smaller portions of DNA to be analysed, and thus are very useful in identifying individuals when only extremely small samples of DNA are available, as in the case of bombings, fires or natural disasters;

- the use of Y-STRs, in which analysis is only conducted on the DNA on the Y chromosome. As the DNA found on that chromosome doesn't change or mutate much, it is very similar between men who are closely related, as the Y chromosome is passed down by inheritance paternally. Y-STR analysis can therefore be very useful in identifying missing persons, if the missing person is male and one is able to obtain DNA from a male relative;

- the use of mitochondrial DNA for analysis. Mitochondrial DNA is found outside of the nuclei of cells and is passed down by inheritance maternally. It is identical between mother and child or between siblings who have the same mother. Because there are many sets of mitochondrial DNA in each cell (as opposed to only one nucleus in each cell), mitochondrial DNA analysis is very useful for identifying old or degraded human remains. It can also be used to identify persons when only a human hair shaft, without a root sheath, is available for analysis, since mitochondrial DNA exists in the hair shaft, while nuclear DNA does not;

- the use of familial or kinship searching, whereby DNA samples obtained at crime scenes are matched against the DNA of convicted offenders stored in a forensic DNA data bank, and the results of a partial match (where some but not all of the data obtained from the 13 loci are the same) are conveyed to law enforcement officials.[71] The partial match indicates that the person who left DNA at the crime scene is a close relative of an offender whose DNA profile is in the data bank, and thus gives police another investigative tool to identify persons of interest or suspects who may have left DNA at a crime scene.[72]

While some of these techniques may already be used in Canada by forensic labs in the absence of other evidence to assist police officers in their investigations,[73] or even as evidence at

[71] Some U.S. states, such as Colorado and California, allow their state DNA data bases to convey the results of partial matches to law enforcement officials, while others, such as Maryland, prohibit such activities. The U.K.'s national data bank conveys the results of partial matches to law enforcement officials in the case of a limited number of serious crimes.

[72] For additional information on these four new techniques, please see Amelia Bellamy-Royds and Sonya Norris *New Frontiers in Forensic DNA Analysis: International Practices and Implications for Canada*, PRB 08-29E, Parliamentary Information and Research Service, Library of Parliament, 3 March 2009, available on-line at: http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0829-e.pdf. Also see the testimony of Dr. Ron Fourney, supra note 69.

[73] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, May 2009, at pp. 16 - 19. This report is available on-line at: http://www.rcmp-grc.gc.ca/dnaac-adncc/annurp/annurp-0809-eng.pdf.

a criminal trial,[74] none of these techniques is currently used in Canada to create DNA profiles for the purpose of adding them to the Data Bank. In addition, the *DNA Identification Act* prohibits communication of partial match results to law enforcement officials. Section 6 of the *DNA Identification Act* specifies that the Data Bank can only communicate a profile and related information if the profile in the Data Bank exactly matches the profile of the sample sent in by police, or if the person's DNA profile cannot be excluded as a possible match because there is a technical limit on the completeness of the profile sent in by law enforcement officials.[75] However, the National DNA Databank Advisory Committee has indicated in its most recent annual report that it would be helpful if the Data Bank could avail itself of some of the new analytical techniques, as long as appropriate safeguards are put into place.[76]

[74] See, for example, *R* .v. *Woodcock,* [2006] O.J. No. 5185 (Ont. S.C.J.), in which the Ontario Superior Court of Justice held that mitochondrial DNA evidence was admissible at trial, but did not conclusively prove that the accused person was the donor of the sample found at the crime scene.
[75] See sections 6(1)(*c*) and 6(1)(*d*) of the *DNA Identification Act.*
[76] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009,* supra note 73 at pp. 16 – 19.

THE SCOPE OF OUR STUDY

The fact that Parliament has continued to add new varieties and types of offences to the list of designated offences found at section 487.04 of the Code, coupled with the fact that more DNA profiles are being uploaded to the Data Bank each year,[77] would appear to indicate that law enforcement officials and other participants in the criminal justice system find DNA forensic evidence, as well as the Data Bank, to be both reliable and useful. However, the exponential growth of the number of designated offences has almost certainly meant more work for, as well as increased strain on the resources of:

- courts, which must decide whether to issue collection orders;
- police and Crown prosecutors, who must apply for such orders;
- forensic labs, which analyse the DNA samples collected for the CSI index; and
- the Data Bank, which creates the DNA profiles that are added to the COI index.

These pressures, coupled with the fact that many individuals who appeared as witnesses before our committee indicated that they would like to see the legislative framework for DNA collection expanded in order to make more effective use of some of the emerging new technologies available for forensic DNA analysis, have influenced our committee's approach to this statutory review. In our opinion, it is necessary for this review to be comprehensive, encompassing more than a mere review of the provisions and operation of one statute. An examination of the workings of the *DNA Identification Act* must necessarily refer to the entire criminal justice and DNA collection framework. To do otherwise would be to take an inappropriately narrow approach, preventing our committee from understanding the full extent to which DNA collection evidence is relied upon in the criminal justice system, as well as the cumulative impact the legislative framework in question has had on both the system and on those from whom DNA evidence is collected. Accordingly, for the purposes of this review, we have examined the framework for the collection of DNA evidence from suspects and those convicted of designated offences in its entirety. We have also attempted, in analysing the legislative

[77] To illustrate, in 2007, the Data Bank added 17,194 profiles to the COI. See National DNA Data Bank *2007 - 2008 Annual Report* at p. 10. This report is available on-line at: http://www.nddb-bndg.org/train/docs/Annual_2007-2008_e.pdf. In 2009, following the enactment of Bills C-13 and C-18, the Data Bank received 34,000 samples for the COI. See National DNA Data Bank *2008 – 2009 Annual Report*, supra note 63 at p. 5.

framework, to adopt the approach advocated by the Supreme Court of Canada in *R.* v. *Rodgers*.[78] In that case, Justice Charron, writing for the majority, stated:

> There is no question that DNA evidence has revolutionized the way many crimes are investigated and prosecuted. The use of this new technology has not only led to the successful identification and prosecution of many dangerous criminals, it has served to exonerate many persons who were wrongfully suspected or convicted. The importance of this forensic development to the administration of justice can hardly be overstated. At the same time, the profound implications of government seizure and use of DNA samples on the privacy and security of the person cannot be ignored. A proper balance between these competing interests must be achieved.[79]

[78] 2006 SCC 16.
[79] Ibid. at para. 4.

WITNESSES WE HEARD FROM

In the course of our study, the committee met with representatives from the National DNA Data Bank, National DNA Data Bank Advisory Committee, RCMP, Department of Justice Canada, Office of the Auditor General of Canada, Office of the Privacy Commissioner of Canada, Public Safety Canada, Office of the Federal Ombudsman for Victims of Crime, Victims of Violence (Canadian Centre for Missing Children), Canadian Resource Centre for Victims of Crime, Canadian Association of Elizabeth Fry Societies, John Howard Society of Canada, Canadian College of Medical Geneticists, Ontario's Missing Adults, RCMP Forensic Science and Identification Services, Centre of Forensic Sciences of the Government of Ontario, Laboratoire de sciences judiciaires et de médecine légale, Maxxam Analytics International Corporation, Warnex PRO-DNA Services Inc and Criminal Lawyers' Association. We also received written briefs from the Wyndham Forensic Group Inc. and Dominique Robert and Martin Dufresne, Professors of Criminology at the University of Ottawa.

GENERAL OBSERVATIONS

DNA forensic analysis and the ability to match DNA profiles between crime scenes or between convicted offenders and crime scenes, are invaluable tools in the investigation and prosecution of criminal offences, the protection of society and the exoneration of the innocent. Everything contained in this report, in relation to both the witness concerns described herein, as well as the committee's findings in relation to the framework for DNA collection and analysis, should be viewed in the light of the committee's understanding and appreciation of this salient fact. At this time, the committee also wishes to express its appreciation for all those who play a role in ensuring Canada's system of DNA collection and analysis functions efficiently and effectively, despite the fact those who work in this system are often required to perform their jobs under challenging conditions or circumstances.

WITNESS CONCERNS IN RELATION TO THE *CRIMINAL CODE*

None of the witnesses who appeared before our committee during this study indicated that section 487.05 of the *Code*, requiring law enforcement officials to apply for a warrant from a judge before collecting DNA from an individual suspected of having been a party to a designated offence, was problematic in terms of its application. However, several witnesses, including representatives from the RCMP, the Department of Justice and the National DNA Data Bank Advisory Committee ("the Advisory Committee") informed us that the system established under section 487.051 of the *Criminal Code*, requiring issuance of a court order before a DNA sample can be collected from a person convicted of a designated offence, was administratively cumbersome and could be improved. As was stated by Richard A. Bergman, Chairperson of the Advisory Committee, when he appeared before us on 2 April 2009:

> [O]ur post-conviction system in Canada is complex and ... provide[s] a considerable challenge to the judiciary and prosecutors at the time of conviction, as well as to police during the subsequent process to obtain a biological sample from a convicted offender.[80]

Witnesses identified the following problems with respect to the current legislative framework for obtaining DNA samples from those convicted of designated offences:

- judges sometimes refuse to issue collection orders for primary designated offences, even in cases where it is mandatory for them to make such an order (section 487.051(1));[81]

- in the case of "generic" secondary designated offences identified by the length of sentence one could receive for having committed such an offence (see parts (*a*) and (*b*) of the definition of "secondary designated offence" found at section 487.04 of the Code), collection orders may only be made when the Crown proceeds by indictment. Sometimes, these orders are erroneously requested by Crown counsel and made by judges in circumstances where the Crown elects to proceed summarily;[82]

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[80] Testimony of Richard A. Bergman, Chairperson, National DNA Data Bank Advisory Committee, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 5*, 2nd Session, 40th Parliament,1 and 2 April 2009, p. 9.

[81] Testimony of David Bird, Counsel, Legal Services – RCMP, Department of Justice, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 4*, 2nd Session, 40th Parliament, 25 and 26 March 2009, p. 68.

[82] Testimony of Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 4*, 2nd Session, 40th Parliament, 25 and 26 March 2009, p. 69.

- section 487.057 of the Code requires law enforcement officials to report back to the court when an order has been executed. When representatives from the Department of Justice appeared before the committee, they indicated that this "report back" provision did not appear to have much of a purpose;[83]

- post-conviction DNA collection orders[84] only authorize taking from the offender the number of samples reasonably required for forensic analysis, rather than the number of samples necessary to obtain a suitable sample. Accordingly, if there is something wrong with the samples initially taken, the Crown is required to apply for and obtain another order before additional samples may be collected;[85]

- DNA orders cannot always be executed on the spot, in the courthouse at the time of conviction, and as a result are often issued after the fact, at the sentencing hearing, or even later.[86] In circumstances where police resources are lacking in a community, a judge will issue an order to report to the police station by a certain date to provide a sample. Delayed taking of a sample may prevent the police from locating the offender in order to have the order carried out, or the offender may be transferred out of the jurisdiction and the police may fail to ensure that the order is passed on to the other jurisdiction for execution;[87]

- if errors are made in completing the court forms at the time that the judge made the order, the Data Bank must return the defective order, and the police must ask prosecutors to obtain a new corrected order, or the Data Bank must obtain a legal interpretation as to whether the offence in question is, in fact, a designated offence, and therefore whether the sample may be entered into the COI; [88] and

- there is duplicative effort on the part of judges, as judges are required to consider whether to issue a DNA order in every case, even if someone has already been previously convicted of a designated offence and his or her DNA is already in the Data Bank.[89]

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[83] Ibid. at pp. 66 – 67.

[84] The text of these orders is found on forms 5.03 to 5.061, Part XXVIII of the *Criminal Code.*

[85] Testimony of Corporal Jennifer Derksen, Policy Analyst, Operational Policy and Compliance, Community, Contract and Aboriginal Policing Services, RCMP, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 4*, 2nd Session, 40th Parliament, 25 and 26 March 2009, p 63.

[86] See sections 487.053(1) and (2) of the *Criminal Code.*

[87] Testimony of David Bird, Counsel, Legal Services – RCMP, Department of Justice, supra note 81 at p. 59 and Letter from Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice to Jessica Richardson, former Clerk of the Standing Senate Committee on Legal and Constitutional Affairs, 8 June 2009, p. 1.

[88] See sections 5.1 and 5.2 of the *DNA Identification Act*, section 2.2 of the *DNA Identification Regulations*, SOR/2000- 300, section 487.091(1) of the *Criminal Code*, and letter from Greg Yost, ibid.

[89] See sections 487.051 and 487.071 of the *Criminal Code* and the testimony of Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice, supra note 82 at p. 86.

Witnesses also provided a wide variety of suggestions as to how the *Criminal Code* could be amended to make the post-conviction DNA collection system simpler and less cumbersome to administer. For example:

- representatives from the RCMP and victims groups proposed amending the Code to allow the taking of DNA samples from everyone who is in lawful custody and charged with an indictable offence, as is done with respect to fingerprints under the *Identification of Criminals Act*;[90]

- members of the National DNA Data Bank Advisory Committee recommended amending the Code to allow the taking of samples from adult offenders who, upon arrest, are charged with one or more primary designated offences as defined in section 487.04, [91] or alternatively, amending the Code to allow the taking of DNA samples from anyone convicted of a designated offence as defined in section 487.04, without the need to apply for and obtain a court order; [92]

- Department of Justice representatives proposed simplifying the categorization of primary and secondary designated offences, so that instead of listing offences primarily by name and section number under the definitions of primary secondary designated offences found at section 487.04 of the Code, they are defined generically, by length of sentence[93] (i.e. define primary designated offence under the Code as any offence carrying a maximum sentence of 10 or more years, and secondary designated offence as any indictable offence or offence where the Crown can elect to proceed by indictment), or some other similar scheme;[94]

- the Privacy Commissioner of Canada suggested going no further than amending the Code to allow the automatic taking of DNA samples from anyone convicted of one of the 19 primary designated offences as defined in part (*a*) of the definition of that term (in other words, merely removing the need for a court order, the issuance of which is already mandatory, in the case of these 19 offences);[95]

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[90] R.S.C. 1985, c. I-1. See testimony of Corporal Jennifer Derksen, Policy Analyst, Operational Policy and Compliance, Community, Contract and Aboriginal Policing Services, supra note 85 at p. 63 and the testimony of Heidi Illingworth, Executive Director, Canadian Resource Centre for Victims of Crime, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 66.

[91] Testimony of Richard A. Bergman, Chairperson, National DNA Data Bank Advisory Committee, supra note 80 at pp. 9 -10.

[92] Testimony of the Honourable Peter Cory, Member, National DNA Data Bank Advisory Committee, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 5*, 2nd Session, 40th Parliament,1 and 2 April 2009, p. 13.

[93] This is already done in the case of some secondary designated offences, in accordance with parts (*a*) and *(b*) of the definition of "secondary designated offence" found at section 487.04 of the *Criminal Code.*

[94] Testimony of Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice, supra note 82 at p. 91.

[95] In a letter dated 16 June 2009 from Jennifer Stoddart, Privacy Commissioner of Canada to the Honourable Joan Fraser, Chair, and the Honourable Pierre Claude Nolin, former Deputy Chair, Standing Senate Committee on Legal and Constitutional Affairs, the Privacy Commissioner stated, "[W]e would be concerned about further elimination of discretion that would result from the mandatory provision of samples," as it would "prevent a judge from

- Department of Justice representatives further recommended ensuring that the DNA sample is, in fact, taken at the time of conviction, rather than at some future date, regardless of whether the sample is taken pursuant to a court order or automatically on conviction without need for a court order;[96] and

- Department of Justice representatives also proposed amending the Code to provide that, in the event that DNA was not collected from an offender prior to the expiry of the time limit for collection added by a judge to the order, a DNA sample may be taken from him or her at the correctional facility at which he or she has been incarcerated, at any time prior to the expiry of his or her sentence, without the need for the police to obtain a new collection order.[97]

It should be noted, however, that not all witnesses who appeared before our committee believed that the current post-conviction collection provisions contained in the Code were problematic. Several witnesses, such as representatives from the Criminal Lawyers' Association, the Canadian Association of Elizabeth Fry Societies, the John Howard Society of Canada, and the Office of the Privacy Commissioner of Canada instead viewed the amendments introduced by Bills C-13 and C-18, as troubling, because they made the issuance of DNA collection orders upon conviction mandatory in certain circumstances. In the opinion of these witnesses, it would be more appropriate not only to restrict the number of offences for which DNA is collected, but also to preserve the rights of courts to decide whether a DNA collection order should be issued once someone has been convicted of any designated offence.[98] Representatives from the Office of the Privacy Commissioner effectively summarized the key concerns expressed by this group of witnesses, stating:

> We have clearly moved a long way from the original rationale of only taking samples related to violent and sexual offences that are likely to leave bodily substances to what is becoming a national registry of an increasingly large number of convicted offenders. … [W]e would have concerns about further expansion of the list of designated offences. We

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determining on a case-by-case basis, whether the privacy invasion is proportional to the benefit being derived from adding an individual's name to the NDDB [the National DNA Data Bank]" (p. 8).

[96] Testimony of Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice, supra note 82 at p. 58.

[97] Testimony of David Bird, Counsel, Legal Services – RCMP, Department of Justice, supra note 81 at p. 79.

[98] Testimony of Vincenzo Rondinelli, Lawyer, Criminal Lawyers' Association, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 3*, 3rd Session, 40th Parliament, 31 March 2010, p 12; Testimony of Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 8: Testimony of Craig Jones, Executive Director, John Howard Society of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 12.

believe that the forced taking of DNA is inherently intrusive and becomes unjustified in the case of less serious offences.[99]

[99]Letter from Jennifer Stoddart, Privacy Commissioner of Canada to the Honourable Joan Fraser, Chair, and the Honourable Pierre Claude Nolin, former Deputy Chair, Standing Senate Committee on Legal and Constitutional Affairs, supra note 95 at p. 8.

THE COMMITTEE'S FINDINGS WITH RESPECT TO SPECIFIC *CRIMINAL CODE* CONCERNS

After having reviewed all of the above testimony, our committee formed the opinion that in order to address some of the administrative problems created by the current system of court-ordered DNA collection from those convicted of designated offences, changes to the system are necessary. However, for the reasons provided below, we are of the view that allowing automatic DNA collection from those who are in lawful custody and charged with an indictable offence, as is done with fingerprints under the *Identification of Criminals Act*, would not be a fitting solution to these administrative problems.

A. Problems Associated with Amending the Criminal Code to Collect DNA from those Arrested and Charged with Indictable Offences

When representatives from the Privacy Commissioner's office appeared before the committee, they stated that "inclusion in a DNA databank entails in principle a deep intrusion of an individual's privacy," because of the "breadth and sensitivity of information a DNA sample contains. It constitutes a veritable life code, capable of revealing almost all facets of a person's mental and physical characteristics."[100] We agree with this perspective. We also note that the Office of the Privacy Commissioner's position in this regard appears to be supported by the reasoning of the majority of the Supreme Court of Canada in *R.* v. *Rodgers.*[101] In *Rodgers*, the majority of the Court held that collecting DNA from individuals who are in prison for designated offences, pursuant to an *ex parte* order issued by a court under section 487.055(1) of the *Criminal Code,* did not violate the offender's section 7 and section 8 Charter rights[102] and was roughly equivalent to fingerprinting in those particular circumstances.[103] However, the Court came to this conclusion for three reasons: because the collection scheme for convicted offenders established by the *Criminal Code* and *DNA Identification Act* strictly restricted the manner in which DNA information collected from the offender could be used; because the scheme prohibited the collection and storage of DNA in the Data Bank from mere suspects; and because

[100] Testimony of Chantal Bernier, Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 6*, 2nd Session, 40th Parliament, 22 and 29 April 2009, p. 10.
[101] *R.* v. *Rodgers*, supra note 78.
[102] As stated previously in this report, section 7 of the Charter guarantees the right to life, liberty and security of the person, while section 8 protects against unreasonable search and seizure.
[103] *R.* v. *Rodgers*, supra note 78 at para. 39.

an offender, upon having been found guilty of omitted a designated offence, has a much diminished expectation of privacy in terms of the seizure of his or her genetic information.[104]

Arguably, some of the factors that the Supreme Court of Canada relied upon in upholding the constitutional validity of the impugned provisions in *Rodgers* would not be present if Parliament were to amend the *Criminal Code* and *DNA Identification Act* to allow for the automatic sampling of DNA from individuals at the time they were placed into lawful custody and charged. If such a legislative change were to be introduced, it seems possible that a court would conclude that sampling upon arrest and charge violated sections 7 and 8 of the Charter, as well as the presumption of innocence guaranteed by section 11*(d*) of the Charter, particularly if the DNA profile was not destroyed as promptly as possible if the charges were dropped, stayed or reduced, or if the accused person were acquitted. Our view on this matter is further supported by the European Court of Human Rights' 2008 decision in *S. and Marper* v, *The United Kingdom,*[105] in which that Court found that the U.K. government's blanket policy of indefinitely retaining the fingerprints, DNA samples and DNA profiles of all individuals arrested in England and Wales, regardless of whether they are subsequently convicted, violated Article 8 of the European Convention of Human Rights, which protects the right to privacy.

In addition, other witnesses who appeared before us pointed out that although the taking of DNA samples from individuals in lawful custody who are charged with indictable offences would solve some administrative and resourcing problems, it would create others. For example, if the taking of samples from individuals in these circumstances, without the need for a court order, were to be permitted, significant new resources would have to be allocated to the Data Bank to both store the samples and profiles collected and to destroy those samples and remove the profiles if a charge did not result in an accused person being convicted of a designated offence.[106] Finally, when representatives from the Office of the Privacy Commissioner of Canada appeared before us, they suggested that allowing samples to be taken upon arrest and charge might have a disproportionate impact on those who are overrepresented in the justice system (i.e. aboriginal offenders and other minority groups),[107] because their profiles would end up in the Data Bank with greater frequency than other individuals. For the above reasons, we believe that

[104] Ibid. at paras. 5, 36 and 40.
[105] *S. and Marper* v.*The United Kingdom,* supra note 64.
[106] Testimony of Richard A. Bergman, Chairperson, National DNA Databank Advisory Committee, supra note 80 at p. 9.
[107] Testimony of Carman Baggaley, Strategic Policy Advisor, Office of the Privacy Commissioner of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 6*, 2nd Session, 40th Parliament 22 and 29 April 2009, p. 12.

the automatic taking of samples from individuals in lawful custody that are charged with indictable offences would be an inappropriate legislative amendment at this time.

B. Amending the Criminal Code to Allow the Automatic Taking of DNA Samples from Adults Convicted of Designated Offences: The Committee's Preferred Option

It is important to note that the committee deals with the collection of DNA from adults convicted of designated offences separately from the collection of DNA from young offenders in this report. In our view, the collection of DNA from young offenders convicted of designated offences raises different concerns from those raised by the collection of DNA from adult offenders, and therefore warrants a different approach. We have come to this conclusion because both case law and the *Youth Criminal Justice Act* (YCJA)[108] emphasize the need for enhanced procedural protections for young persons who come into contact with the criminal justice system. The approach that the committee endorses with respect to DNA collection from young offenders will be described in detail in a later section of this report. This section deals with the collection of DNA from adults who have been convicted of designated offences.

Although the committee does not support amending the *Criminal Code* to allow the collection of DNA from those arrested and charged with indictable offences, we are, however, of the view that the reasoning of the Supreme Court of Canada in *R.* v. *Rodgers* would likely support allowing the automatic taking of DNA samples from adults convicted of any designated offence without the need for a court order, given the diminished expectation of privacy these offenders have, and given the strict controls contained in the *DNA Identification Act* on how the DNA collected from offenders may be used. This was also the view of retired Supreme Court of Canada Justice Peter Cory when he appeared before the committee to testify in his capacity as a member of the National DNA Data Bank Advisory Committee. Justice Cory expressed doubts about whether DNA sampling upon arrest and charge should be allowed, but with respect to sampling upon conviction, he stated:

> I think the act should be amended in this regard. This [the taking of DNA samples upon conviction of a designated offence] should be an administrative item. There is less expectation of privacy after a conviction. Administratively, DNA should be taken as soon as a conviction is registered. It does not matter whether it is taken by police or by that magical officer, the sheriff of the particular judicial district. Whenever the case is on the list that can, in turn, lead to an order for DNA, that particular DNA should be taken. We are wonderfully

[108] S.C. 2002, c. 1.

> protected because we say ‘‘not until you have been proven guilty beyond a reasonable doubt.’’ At that moment, your expectations [of privacy] are gone and a DNA sample taken should be taken.[109]

While allowing such sampling would almost certainly create some additional costs, both for police and the Data Bank, in terms of time spent taking samples as well as in processing those samples and turning them into profiles,[110] these changes would likely result in reduced costs and effort in other parts of the criminal justice system. For example, law enforcement officials, prosecutors and courts would no longer have to spend time and energy correcting defective orders or trying to locate offenders who leave the jurisdiction before a sample is taken. In addition, judges would not have to spend valuable and expensive court time issuing these orders. We also note that when the House of Commons Standing Committee on Public Safety and National Security made a similar recommendation in its June 2009 report following its own statutory review of the *DNA Identification Act,* the government accepted that recommendation in principle in its October 2009 response to that committee's report. Our committee therefore recommends that the *Criminal Code* be amended to allow the immediate and automatic taking of a DNA sample from any adult who has been convicted of a designated offence as defined in section 487.04 of the Code.

RECOMMENDATION 1

That the *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted in Canada of a designated offence as defined in section 487.04 of the *Criminal Code.*

We are also in substantial agreement with two other related recommendations contained in the House of Commons report: (1) that the *Criminal Code* be amended to allow DNA samples to be collected from offenders against whom collection orders were not made at the time of conviction, but who are still serving sentences for designated offences at the time that the *Criminal Code* amendment, allowing for immediate and automatic collection of DNA samples from persons convicted of designated offences, comes into force; and (2), that the *Criminal Code* be amended to allow DNA to be collected from Canadian citizens or residents who are convicted

[109] Testimony of the Honourable Peter Cory, Member, National DNA Data Bank Advisory Committee, supra note 92 at p. 13.

[110] A representative from the Department of Justice advised us that "[m]aking DNA sampling automatic on conviction of all primary and secondary designated offences could result in 100,000 new profiles annually" to the Data Bank," as opposed to the approximately 34,000 profiles the Data Bank had received in 2008/2009. See the testimony of Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice, supra note 82 at p. 58 and the National DNA Data Bank, *2008-2009 Annual Report*, supra note 63 at p. 7.

outside of Canada of offences that, if committed in Canada, would constitute designated offences. With respect to the latter recommendation, we have broadened the application of the House of Commons committee's recommendation, so that a DNA sample could not only be taken from Canadian citizens convicted abroad of offences equivalent to designated offences in Canada, but also from adults who are not Canadian citizens but who ordinarily reside in Canada. The committee believes that collection of DNA from adult offenders who are Canadian citizens or residents, and who have been convicted abroad of offences equivalent to designated offences in Canada, should occur at the time that these offenders enter or re-enter Canada. This is the approach taken in Bill S-2, An Act to amend the Criminal Code and other Acts,[111] with respect to the timing of the requirement for sex offenders convicted abroad to register as such on the National Sex Offender Registry, and we are of the view that a similar approach, in terms of the timing of DNA collection, should occur here. Like the House of Commons committee,[112] we see no reason why adults who are still serving sentences for designated offences in Canada at the time that automatic collection becomes a reality, or Canadians or those who ordinarily reside in Canada who commit designated offences abroad, should be treated differently from offenders who are convicted of designated offences in Canada after the *Criminal Code* amendment outlined in Recommendation 1 comes into force.

RECOMMENDATION 2

That the *Criminal Code* be amended to allow for collection of a DNA sample from an adult convicted of a designated offence in Canada who has not previously been the subject of a post-conviction collection order, but who is still serving a sentence for a designated offence at the time that the *Criminal Code* amendment outlined in Recommendation 1 comes into force.

RECOMMENDATION 3

That the *Criminal Code* be amended to allow for the collection of a DNA sample from an adult who is a Canadian citizen, or who ordinarily resides in Canada, if he or she is convicted outside of Canada of an offence that, if committed in Canada, would constitute a designated offence, provided that the conviction occurs at any time after the *Criminal Code* amendment outlined in Recommendation 1 comes into force.

[111] Bill S-2, supra note 61.

[112] See House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the DNA Identification Act*, 2nd Session, 40th Parliament, 18 June 2009, supra note 13 at p. 9.

C. Exercising Caution in Expanding the List of Designated Offences

The committee was intrigued by the Department of Justice's suggestion that it might be appropriate to amend the *Criminal Code* to classify primary and secondary designated offences differently. As stated in an earlier section of this report, Department of Justice officials had advocated potentially amending section 487.04 of the Code so as to describe primary and secondary designated offences not by name and section number, which is how most of the offences set out in section 487.04 are currently described, but by the maximum length of sentence one could receive for the offence in question, or by the nature of the offence itself ((i.e.) indictable as opposed to a summary conviction offence). The committee agrees that the Department of Justice proposal would indeed simplify the current system of classification, and for that reason, we find this proposal attractive. However, we also recognize a difficulty in taking this approach: in doing so, it then becomes extremely challenging to quantify the exact number of primary and secondary offences in existence. This has already created difficulties with respect to the generic categories of secondary designated offences found in parts (*a*) and (*b*) of that definition. The Code now classifies, as secondary designated offences, all *Criminal Code* or certain *Controlled Drugs and Substances Act* offences prosecuted by indictment for which a maximum term of imprisonment of five years or more may be imposed. As a result, it is becoming increasingly difficult to obtain an accurate picture of exactly how many designated offences there are, and therefore how much more work Parliament is imposing on the police, the Data Bank and the forensic labs in relation to DNA collection and the processing of DNA samples and profiles. If all designated offences listed at section 487.04 of the Code were described by maximum length of sentence, or by the nature of the offence (summary vs. indictable), this would only add to the current challenges in quantifying the increased workload these organizations are experiencing as a result of legislative changes made by Parliament.

This committee also wishes to highlight that, in deciding to recommend the collection of DNA from all offenders convicted of those offences currently classified as designated offences, we are mindful of the concerns expressed by the Office of the Privacy Commissioner of Canada, the Criminal Lawyers' Association, the John Howard Society of Canada and the Canadian Association of Elizabeth Fry Societies regarding the significant number of designated offences that have been added to the list of offences found at section 487.04 of the Code since the original DNA collection scheme was introduced. As stated previously in this report, while the legislative

regime in 1995 classified only 37 very serious violent or sexual offences as designated offences, more than 265 offences are now classified in this manner. Some of these, like assault (section 266 of the Code), uttering threats (section 264.1) and intimidation (section 423), can apply to behaviour that is very serious in nature, but also to behaviour that is relatively minor.

Accordingly, while it may well be necessary, in the future, to add offences to the list found in section 487.04, or to change the classification system in accordance with the Department of Justice's proposals, the committee urges the government to exercise caution in adding to the list, doing so only if such additions are demonstrably necessary. To do otherwise might distort the legislative framework and run the risk of violating the Charter.[113] It would also almost certainly strain the resources of police agencies, the Data Bank, and the forensic labs that process the DNA samples taken at crime scenes. Adding to the list of designated offences also increases the number of offences for which the police can obtain DNA warrants, as well as the number and types of crime scenes from which DNA can be collected for the purpose of uploading DNA profiles to the CSI. As will be discussed more thoroughly in a later section of this report, the RCMP Central Forensic Laboratory, as well as the Ontario and Quebec government forensic laboratories, have advised us that with the resources currently available to them, they have not been able to keep up with the additional workload that Bills C-13 and C-18 have imposed upon them. In addition, as representatives from the Criminal Lawyers' Association told the committee, there comes a point at which, if the number of designated offences grows too large, the police will have insufficient resources to follow up on all of the hits achieved by matching information found in the Data Bank to a sample from a local crime scene. It is for these reasons that the committee believes that the government should exercise caution and prudence when considering adding new offences to the list of designated offences. We also believe that if the government does add significant numbers of new offences to the list, it should ensure that the police, forensic labs and the Data Bank are adequately funded to deal with the increased workload that will inevitably occur.

[113] In the past, courts have, for the most part upheld the constitutional validity of the DNA collection regime established by the *Criminal Code* and the *DNA Identification Act*. However, in many of the decisions, they have done so because DNA collection was permitted for only the most serious offences contained in the *Criminal Code.* See for example, *R.* v. *Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), and *R.* v. *Rodgers*, supra note 78. If more designated offences are added to the list, and many of them are less serious than the ones currently listed, it seems possible that a court might come to a different conclusion in the future, particularly if the Act is amended to make DNA collection post-conviction automatic, rather allowing for the taking of DNA pursuant to a court order.

D. A Separate System for Collecting DNA from Young Offenders Convicted of Designated Offences

As indicated previously, the committee is recommending the taking of DNA automatically, without need for a court order, only from adults. After reviewing both the case law available as of 24 May 2010, and the testimony received from various witnesses, we have come to the conclusion that a separate system, which, in certain circumstances, maintains a considerable degree of judicial discretion over whether to collect DNA from young offenders convicted of designated offences, should be maintained.

Currently, section 487.051(1) of the Code makes it mandatory for courts to issue DNA collection orders for young offenders and adults alike if they have been convicted of one of the 19 primary designated offences found in part *(a)* of the definition of that term. For the remaining primary designated offences described in section 487.04,[114] issuance of a collection order is presumptive (section 487.051(2)): a DNA collection order will be issued against an offender who has committed one of the remaining primary designated offences unless he or she is able to establish to the satisfaction of the court that the impact of the order on 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. The onus is on the young offender and his or her counsel, rather than on the court or the prosecutor to demonstrate this. Certain witnesses who appeared before our committee, most notably representatives from the National DNA Data Bank Advisory Committee, suggested that neither mandatory nor presumptive tests should be used in the case of young offenders. In their view, the *Criminal Code* should be amended so that the courts employ the test outlined in section 487.051(3) for secondary designated offences when deciding whether to issue a DNA collection order against a young offender convicted of *any* designated offence. Section 487.051(3) first requires the prosecutor to apply for a DNA collection order, and then requires a court, when deciding whether it is in the best interests of the administration of justice to make the order, to consider the person's criminal record, whether he or she had been previously found not criminally responsible by reason of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission, and the impact that such an order would have on the person's privacy and security of the person. Section 487.051(3) does not, however, expressly require the court to consider the public interest in the protection of society when making a collection order for a secondary designated offence.

[114] See Appendix 1.

As stated by Richard A. Bergman, Chairperson of the Advisory Committee:

> We [members of the Advisory Committee] continue to hold the view that young offenders, due to their impressionable age, should be subject to a DNA order with discretion only after conviction.[115]

Later in his testimony he clarified his position further, stating:

> [F]or young offenders, I continue to believe that because of the tender age, that discretion should cover all categories - compulsories, primaries and secondaries. I believe the law should state that.[116]

The Honourable Peter Cory, member of the Advisory Committee, took this notion a bit further, suggesting that some of the criteria found in the preamble and principles of the *Youth Criminal Justice Act* (YCJA) should be incorporated into the test used by courts when deciding whether to issue a DNA collection order against a young offender convicted of a designated offence.[117]

In at least two recent instances, courts have also determined that a different test should be used when collecting DNA samples from youths than when collecting samples from adults convicted of designated offences. In *R.* v. *M.G.*[118] for example, a Nova Scotia Provincial Court judge refrained from issuing a DNA collection order against a young offender convicted of assault with a weapon (a primary designated offence for which the issuance of a DNA collection order is now mandatory, but which, at the time of the accused's conviction, was a presumptive primary designated offence). The judge incorporated the principles found in section 3 of the YCJA into the test for whether or not to issue the order, relying on the 2005 Supreme Court of Canada decision in *R.* v. *R.C.*[119] as authority for the principle that she must do so. In *R.* v. *R.C.*, the Supreme Court of Canada held that while no specific provision of the YJCA modified section 487.051 of the Code, Parliament clearly intended that YJCA principles would be respected whenever young persons are brought into contact with the criminal justice system. The Supreme Court of Canada further stated that in creating a separate criminal justice system for young persons, Parliament has recognized their heightened vulnerability and has sought to extend enhanced procedural protections to them, and to interfere with their personal freedom as

[115] Testimony of Richard A. Bergman, Chairperson, National DNA Data Bank Advisory Committee, supra note 80 at p. 9.
[116] Ibid. at p. 28.
[117] The Honourable Peter Cory, member of the National DNA Data Bank Advisory Committee, supra note 92 at p. 28.
[118] 2008 NSPC 54.
[119] 2005 SCC 61.

little as possible.[120] Accordingly, the Nova Scotia judge in the *R.* v. *M.G.* case concluded that when employing the presumptive test for a DNA collection order against a young offender, a judge must incorporate both the principles outlined in section 3 of the YCJA, as well as the principles outlined in the test for issuing a secondary designated offence collection order under section 487.051(3) of the Code.[121] She did so, and after considering these principles and weighing all the relevant factors, concluded that the DNA collection order should not be issued in this case.[122]

More interestingly, in *R.* v. *C.S.*,[123] a case that was decided after Bills C-13 and C-18 came into force, and therefore following the introduction of the new category of mandatory primary designated offences into the Code, a judge from the Ontario Court of Justice held that both the mandatory test for issuing a collection order found at section 487.051(1) of the Code and the presumptive test outlined at section 487.051(2) violated the section 7 and 8 Charter rights of the four young people whose cases were at issue before her. With respect to section 487.051(1) of the Code, the judge found that since the legislative scheme made an order mandatory upon a finding of guilt, there was no room left for the balancing of interests required by the YCJA. Accordingly, she concluded that the mandatory collection requirements, as applied to young people, were unfair and unreasonable, violating their rights to protection against unreasonable search and seizure guaranteed by section 8 of the Charter.[124] With respect to section 487.051(2), the judge found that the reverse onus nature of this provision requires young people to demonstrate an impact on their privacy that is higher than what is required by the YCJA. Accordingly, she found that the presumptive collection test also violated the rights of young people under section 8 of the Charter.[125] She further concluded that the legislative scheme established by sections 487.051(1) and (2) violated the psychological security of young offenders through labelling and stigmatization, thereby violating their rights to life, liberty and security of the person under section 7 of the Charter.[126] Finally, the judge held that neither section 487.051(1) nor section 487.051(2), as applied to young offenders, could be saved by section 1 of the Charter[127] because neither provision minimally impaired the Charter rights of young offenders.[128] The Court accordingly read sections 487.051(1) and (2) down,[129] and

[120] Ibid. at paras. 36, 39, 41 and 51.
[121] *R* v. *M.G.*, supra note 114 at paras. 4 to 6.
[122] Ibid. at para. 23.
[123] 2009 ONCJ 114.
[124] Ibid. at para. 35.
[125] Ibid. at para. 39.
[126] Ibid. at paras. 57 to 59.
[127] Section 1 of the Charter protects the rights guarantees by the Charter subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[128] *R.* v. *C.S.*, supra note 123 at paras. 70 to 74.

instead of applying the test for primary designated tests as required by the Code, the judge applied the test for secondary designated offences along with the principles outlined in section 3 of the YCJA to decide whether DNA collection orders should be issued for the four young offenders in question. It is important to note that the Ontario youth court judge's decision in *R.* v. *C.S.* is currently being appealed to the Ontario Court of Appeal.

It is interesting to note, however, that not all courts have come to the conclusion that the mandatory collection of DNA from young offenders, at least as it pertains to the 19 primary designated offences for which issuance of collections orders is also mandatory, is problematic. For example, in *R.* v. *C.J.T.*,[130] the Saskatchewan Court of Appeal overturned a Saskatchewan youth court judge's decision to decline to make a DNA collection order against a young offender convicted of robbery. Robbery is one of the 19 primary designated offences for which a DNA collection order is mandatory. The youth court judge had relied on the Supreme Court of Canada's decision in *R.* v. *R.C.* as authority for the principle that he retained discretion over the decision as to whether or not to make the collection order. The Saskatchewan Court of Appeal stated that when *R.* v. *R. C.* was decided, judges did indeed have discretion as to whether or not to issue collection orders against young and adult offenders alike, for all designated offences, although the test was different depending on the nature of the offences. However, the Court of Appeal concluded that with the coming into force of Bills C-13 and C-18, Parliament had deliberately chosen to remove that discretion in the case of the 19 primary designated offences listed at part (*a)* of the definition of "primary designated offence" found at section 487.04 of the Code. Accordingly, the Court of Appeal found that the youth court judge had incorrectly applied the law in this particular case, and issued a DNA collection order against the young offender in question. No Charter arguments were made before the Court.

Given the case law cited above, as well as the suggestions for change made by the Advisory Committee, our committee is of the view that it would be inappropriate to amend the *Criminal Code* to allow the automatic taking of DNA samples from young people convicted of *any* designated offence. To do so would fail to take into account the principles outlined in section 3 of the YCJA, in particular the principle found at section 3(1)*(b*)(iii) of that Act, which states:

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[129] Section 52(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, allows courts to find that a law is of no force and effect to the extent that it is inconsistent with Canada's Constitution. As the Charter is part of Canada's constitution, this gives the courts the power to strike down laws, or modify them in such a way as to make them consistent with the Charter. One common method used by courts when they find that a legislative provision is inconsistent with the Constitution is to "read down" legislation, or interpret a statute that is inconsistent with the provisions of the Constitution in a manner that is consistent with constitutional provisions.

> 3. (1)(*b*) the criminal justice system for young persons must be separate from that of adults and emphasize the following:
>
> > (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.

However, the committee is of the view that DNA collection from young offenders should be done automatically, without need for a court order, for the 19 primary offences currently listed in part (*a*) of the definition of "primary designated offence" found at section 487.04 of the Code. Making the collection of DNA from young offenders convicted of these specified designated offences automatic is, in our view, consistent with the reasoning of the Saskatchewan Court of Appeal in *R.* v. *C.J.T.* It also recognizes that these 19 offences are among the most serious of those contained in the Code.

For the remaining primary designated offences and all secondary designated offences listed in section 487.04, we believe that courts should retain discretion as to whether to issue DNA collection orders against young offenders convicted of these offences. Having said this, the committee believes that neither the test outlined in section 487.051(2) nor the test found at 487.051(3) of the Code is appropriate. The test outlined at section 487.051(2) requires the young offender to establish, to the court's satisfaction, that the impact of the collection order on 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. In other words, section 487.051(2) puts the onus on the young offender to establish these facts, rather than merely requiring the court to weigh these two interests, and decide which outweighs the other in each particular case. The test outlined at section 487.051(3) of the Code, while satisfactory in many respects, and while not imposing an onus on the young offender to demonstrate that a collection order is not warranted, does not specifically require the court to consider the public interest in the protection of society when deciding whether or not to recommend a collection order against a young offender. The committee therefore recommends that collection of DNA from young offenders convicted of designated offences listed in parts (*a.1*) to (*d*) of the definition of "primary designated offence" and all offences described as "secondary designated offences" at section 487.04 of the Code proceed only pursuant to a court order issued by a judge, and that the test employed by judges in deciding whether to issue such an order against a young offender be the one currently found in section 487.051(2) of the *Criminal Code.* However, we are of the

[130] 2009 SKCA 129.

view that the young offender should not be required to demonstrate that the impact of the collection order on 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. Instead the court should merely weigh these two interests and determine the outcome.

RECOMMENDATION 4

That the *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any young offender convicted in Canada of a designated offence as defined in part (*a*) of the definition of "primary designated offence" found at section 487.04 of the *Criminal Code.*

RECOMMENDATION 5

In the case of young offenders convicted of primary and secondary designated offences for which a DNA collection order upon conviction is not mandatory, that the *Criminal Code* be amended to require courts, before issuing a DNA collection order against a young offender convicted of such offences, to determine whether the impact of the collection order on the young offender'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.

WITNESS CONCERNS AND COMMITTEE FINDINGS IN RELATION TO THE *DNA IDENTIFICATION ACT*

This section of the report outlines witness concerns in relation to the *DNA Identification Act*, as well as our specific findings and recommendations in relation to this subject.

A. Retention and Destruction of Young Offenders' DNA Samples and Profiles at the National DNA Data Bank

In certain recent cases involving DNA collection from young offenders, courts have expressed serious concerns about the fact that they had evidence before them to indicate that neither the DNA samples nor the DNA profiles of young offenders convicted of designated offences were being destroyed or archived by the Data Bank as required. The committee decided, as a result, to inquire further into this matter during its statutory review.

Sections 9, 9.1, 10 and 10.1 of the *DNA Identification Act* deal with the retention and destruction of both DNA samples and profiles housed at the Data Bank. With respect to DNA profiles, section 9 of the *DNA Identification Act* provides that as a general rule, an adult's DNA profile housed in the COI shall be kept indefinitely (section 9(1)), unless and until every order or authorization for the collection of DNA from the offender in question has been set aside (section 9(2)(*a*)), or until the offender has been finally acquitted (section 9(2)*(b*)). In either of these two cases, the DNA profile shall be removed from the COI without delay. An adult offender's DNA profile shall also be removed from the COI one year after the day on which he or she receives an absolute discharge, or three years after the day on which he or she receives a conditional discharge, for a designated offence, as long as no new collection order or authorization has been issued against him or her in the intervening period (section 9(2)(*c*)).

In the case of the DNA profiles of young offenders, the retention rules are different, and also considerably more complex. One must read the records retention provisions found in Part 6 of the YJCA, in conjunction with section 9.1 of the *DNA Identification Act*, to determine the length of time that a young offender's profile may be retained in the COI. Section 9.1 of the *DNA Identification Act* specifies that if a young person has been convicted of a "presumptive offence" as defined in the YJCA,[131] or has been convicted of a second offence contained in the schedule to

[131] Such offences include murder, manslaughter, aggravated sexual assault and certain serious violent offences committed by young people over 14 years of age. See section 2(1) of the YCJA.

the YJCA (a schedule offence) following a conviction for a first designated offence within the period of time his or her profile is required to be retained at the Data Bank,[132] then the profile retention rules applicable to adults will apply to him or her (section 9.1(2) of the *DNA Identification Act*). For all other young offenders who have DNA profiles in the COI, section 9.1(1) of the *DNA Identification Act*, when read in conjunction with sections 119 and 120 of the YCJA, specifies that their profiles must be retained for three years or five years before being destroyed, or indefinitely, depending upon the nature of the offence for which they were convicted. In addition, young offenders subject to an initial three-year or five-year retention period, who are convicted of another offence as a young offender during the retention period will have their profile retained by the Data Bank for an additional three or five years, depending on whether the second conviction was for a summary conviction or an indictable offence .

With respect to the retention and destruction of the bodily samples from which DNA profiles are made, section 10 of the *DNA Identification Act* empowers the RCMP Commissioner to decide which bodily samples should be retained and which should be destroyed (section 10(1)). This provision presumably exists to ensure that some samples remain at the Data Bank for re-analysis in case new DNA technology is developed (section 10(2)). Section 10(5) further specifies that all bodily samples stored at the Data Bank can be used only for forensic DNA analysis.

Having said this, in some cases, DNA samples must be destroyed. With respect to adults convicted of designated offences, the conditions governing when all their DNA samples stored at the Data Bank will be destroyed are the same as outlined for DNA profiles in section 9 of the Act (see section 10(7)). However, in the case of bodily samples collected from adults who have received a pardon, section 10(8) of the *DNA Identification Act* indicates that the bodily samples of adults shall not be destroyed, but rather kept separate and apart from other samples.

As in the case of the retention rules regarding DNA profiles described above, the sample retention rules applicable to adults apply to young offenders convicted of presumptive offences under the YCJA. Adult rules also apply to young offenders, who, within the records retention period for their first offence as a youth, are convicted as an adult of a second schedule offence, as defined in the YCJA (section 10.1(2) of the *DNA Identification Act*). However, for the remaining young offenders, section 10.1 and Part 6 of the YCJA provide that their DNA samples may be

[132] See section 120(6) of the YJCA.

kept for three years, five years or indefinitely, depending upon the nature of the offences for which they received their convictions. A young offender subject to a three- or five-year retention period, who is convicted of a second offence during that period while still a young person, will have his or her bodily samples retained for an additional three or five years, depending on whether the second conviction was for a summary conviction or an indictable offence.

While the above rules are certainly complex, and therefore likely challenging to administer, we are of the view that the Data Bank should nevertheless be required to comply with its own enabling statute. Accordingly, during our study, we asked representatives from the Department of Justice and the Data Bank to provide the committee with any available statistics regarding the retention of DNA samples and profiles of young offenders, and an explanation of why so many samples were being retained. We wished to learn whether the concerns expressed by judges in certain cases were valid, and whether there were problems with respect to recordkeeping at the Data Bank that needed to be addressed. On 18 June 2009, we received a letter from the then Minister of Public Safety, the Honourable Peter Van Loan, summarizing the results of an internal review the Data Bank conducted of all DNA samples and profiles it had received from convicted young offenders between 1 June 2000 and 6 April 2009. Of the 21,743 samples and profiles received by the Data Bank during that period, we were advised that:

- 20,865 were linked to criminal records that had not yet reached the end of their retention periods (10,403 being still within their original 3 or 5 year retention period, 2,619 having been archived for an additional five years because they were taken in relation to a schedule offence, 7,569 having been converted to an adult file because the individual committed an offence as an adult within the retention period, and 256 having been retained in accordance with other provisions of the YCJA); and

- 878 records had reached the end of their retention periods, with the samples and profiles either having already been removed or destroyed, or in the process of being removed or destroyed, by 6 April 2009.[133]

It would appear, based on the above information, that the Data Bank is retaining and destroying the samples of young offenders convicted of designated offences in accordance with the requirements outlined in sections 9, 9.1, 10 and 10.1 of the *DNA Identification Act*. The committee was gratified to learn that this is the case, particularly given the emphasis that section 3(1)(*b*)(iii) of the YCJA places on the need to provide enhanced procedural protections for the

privacy rights of young persons. If the courts that had expressed concerns about retention of DNA samples and profiles at the Data Bank had had this information, it might well have influenced their decisions. For this reason, the committee recommends that the Data Bank publish, in its annual reports, statistics on the number of DNA samples and profiles of adult and young offenders contained in the Data Bank, as well as the reasons for why they are being retained, as was done for us in the letter we received from the former Public Safety Minister. This should help to avoid any future confusion, by the courts or by Parliament, regarding how the Data Bank is implementing its records retention and destruction policies.

RECOMMENDATION 6

That the National DNA Data Bank publish statistics in its annual reports on the number of DNA samples and profiles, for both adult and young offenders, stored at the National DNA Data Bank, along with reasons for their retention.

B. Collection of Accurate Statistics on How the National DNA Data Bank Assists the Criminal Justice System

Another issue that was raised by witnesses was that it can be difficult to determine, based on the statistics provided by National DNA Data Bank in its annual reports, the degree of assistance that Data Bank hits actually provide to police and to the criminal justice system generally in either providing persuasive evidence of guilt or in exonerating the innocent. Anecdotal information provided by numerous witnesses suggests that the Data Bank is tremendously useful both to law enforcement officials in their investigations and to the criminal justice system as a whole. However, as highlighted by Professors Dominique Robert and Martin Dufresne of the University of Ottawa in their 5 May 2010 submission to the committee:

> The only official data available (in the [National DNA Data Bank's] annual reports) are the number of criminal cases in which the data bank was used ("cases assisted", "matches"). Saying that the [Data Bank] was used to help resolve a matter (arrest or acquittal) provides no insight as to the nature of that "help." Was the data bank all the investigators had to go on? Did it simply help strengthen partial evidence which had already been gathered by the police? Or was it used to confirm what was already overwhelming evidence? Having no way to qualify or measure

[133] Letter from the Honourable Peter Van Loan, former Minister of Public Safety, to The Honourable Joan Fraser, Chair of the Standing Senate Committee on Legal and Constitutional Affairs, 18 June 2009.

> that contribution makes it hard to determine the value of the NDDB, particularly in terms of financial and social costs.[134]

Representatives from the Criminal Lawyers' Association made a similar point when they testified before the committee, stating:

> In looking at the metrics available to us for our data bank, how can we measure the success? The metric that seems to be bandied around is the number of investigations that are aided or assisted by hits at the National DNA Data Bank. The website, as of March 12, 2010, indicates that 989 murder investigations were assisted by the hits. The data bank has a total of 14,435 profiles broken down into different offences. At the end of the day, what does that statement mean? Did the investigations end up in convictions or guilty pleas? What does "assisted"" mean? This issue is not unique to our country. The U.S. is having that same issue in terms of how they measure assistance with hits.[135]

While the committee has no reason to doubt the anecdotal evidence it heard regarding the utility of the Data Bank during the course of its study, and believes the Data Bank to be an invaluable tool that assists law enforcement officers in their investigations, we are of the view that better data on how exactly the Data Bank assists law enforcement officials would help to demonstrate the value of the Data Bank in a more concrete and measurable fashion. Such data would also likely assist the Data Bank in any future efforts to expand and to garner additional financial resources as necessary. The committee therefore believes that the Data Bank should work cooperatively with law enforcement organizations to collect statistics describing the specific nature of the assistance that the Data Bank provides, through matches to the convicted offenders index (COI), in police investigations, as well as whether or not this data has played a role in exoneration. We are also of the view that the Data Bank should publish statistics relating to these matters in its annual reports to Parliament.

[134] Letter from Dominique Robert and Martin Dufresne, Professors, Department of Criminology, University of Ottawa to the Standing Senate Committee on Legal and Constitutional Affairs, 5 May 2010, p. 1. See also, National DNA Data Bank *2008-2009 Annual Report*, supra note 63 at pp. 8 – 9 and 22.
[135] Testimony of Vincenzo Rondinelli, Lawyer, Criminal Lawyers' Association, supra note 98 at p. 10.

RECOMMENDATION 7

That the National DNA Data Bank work cooperatively with law enforcement organizations to collect statistics describing the specific nature of the assistance it provides in police investigations through matches to the convicted offenders index (COI), and that the National DNA Data Bank publish these data, including data on exoneration, in its annual reports to Parliament.

C. Ensuring that Access to an Offender's Information in the Convicted Offenders Index is Immediately Removed and the Bodily Samples Used to Create DNA Profiles Are Immediately Destroyed Upon Final Determination of an Offender's Successful Appeal

If the *Criminal Code* is indeed amended to remove the need for prior judicial authorization before DNA can be collected from adults convicted of all designated offences, or from young persons convicted of the 19 primary designated offences for which a DNA collection order is now mandatory, the committee believes that it would also be advisable to take steps to ensure that access to offenders' information in the COI is immediately removed, and that the bodily samples of offenders used to create DNA profiles are immediately destroyed, upon final determination of offenders' successful appeals.

Currently, sections 487.056(1) and sections 487.056(4) of the *Criminal Code* allow a DNA sample to be taken from an individual convicted of a designated offence even though there may be an appeal pending. Sections 9(2)(*b*) and 10(7)(*b)* of the *DNA Identification Act* mandate the removal of an offender's information from the COI, and the destruction of all DNA samples taken from the offender "without delay after the person is finally acquitted of every designated offence in connection with which an order was made or an authorization was granted," which one could interpret to mean upon final determination of a successful appeal, as long as the offender has no other convictions for designated offences remaining on his or her criminal record. However, sections 9(2)(*a*) and 10(7)(*a*) of the *DNA Identification Act* appear to potentially conflict with the former provisions somewhat, as they mandate the removal of the offender's information from the COI, and the destruction of all DNA samples taken from him or her, only when the court order authorizing the DNA collection has been finally set aside. Section 9(2)(*a)* of the Act, specifically, has resulted in situations where, although DNA should not have been taken from an offender in the first place, it has subsequently been used as foundation for a

search warrant to obtain new DNA samples from the person in question pursuant to a new offence with which he or she had been charged.[136] In order to ensure that final determination of a successful appeal will result in the immediate destruction of samples taken from an offender and housed at the Data Bank, as well as immediate removal an offender's information from the COI, as long as he or she has no other convictions for designated offences on his or her criminal record, the committee believes that the *DNA Identification Act* should be amended to clarify this.

RECOMMENDATION 8

That the *DNA Identification Act* be amended to clarify that, in circumstances where there has been a final determination of an accused offender's successful appeal of his or her conviction for a designated offence, no other further opportunities of appeal are available to the Crown or to the accused, and the accused offender has no other convictions for designated offences on his or her criminal record, the accused offender's information should be immediately removed from the convicted offenders index (COI) after the expiry of all appeal periods, and the DNA samples taken from the offender and stored at the National DNA Data Bank should be immediately destroyed.

D. National DNA Data Bank Advisory Committee to Examine Whether the Framework for DNA Collection and Analysis Requires Adjustment in Light of Conflicting Information Regarding the Ability of "Junk" DNA to Reveal Information Regarding the Medical Conditions or Physical Characteristics of Individuals

Another issue of concern to the committee is whether the information contained in the DNA profiles stored at the Data Bank is truly "non-coding" or "junk" DNA, meaning that the 13 loci used to create a profile cannot be used to predict medical, physical or mental characteristics of the individuals from whom the DNA samples were taken. When Dr. Ron Fourney, Director of

[136] Such was the case in *R.* v. *Newell*, 2009 NLCA 18, which dealt with a case where an individual, who was convicted of robbery at trial, had a DNA collection order made against him and then had his robbery conviction overturned at appeal. However, following his successful appeal and prior to his DNA profile being removed from the COI at the Data Bank, the police, knowing that an appeal was pending, used the fact that he had his profile on file at the Data Bank as grounds to obtain a warrant under section 487.05 of the Code, to investigate him for other robbery offences. The Court of Appeal held that the new warrant, issued, in part, on the basis that the individual in question had his profile in the Data Bank, was valid and did not violate section 8 of the Charter because section 9(2)(*a*) of the *DNA Identification Act* allowed the offender's DNA profile to be retained until the order authorizing DNA collection had been finally set aside, which it had not been at the time the new warrants for DNA collection were issued. The Newfoundland Court of Appeal therefore found that Mr. Newell had no reasonable expectation of privacy on the date that the DNA warrants were issued.

National Services and Research of the RCMP, the scientist in charge of the Data Bank, appeared before the committee in March 2009, he stated:

> [I]t is important to realize that the pieces of DNA that we are looking at do not code for anything that we know of. We cannot tell you if you will have hair loss; if you are prone to diabetes; if you will be tall, short or have blue eyes, with the markers that we currently use today. All we know is that they are variable from person to person and, because of the fact that they are variable, it means that they are freely evolving, and the chances are that they will never code for anything. They are spacer pieces of DNA within our genome or blueprint.[137]

Other scientists who appeared before the committee, however, had a different view. For example, when he testified before us in May 2009, Dr. Martin Somerville, President of the Canadian College of Medical Geneticists, stated:

> The information that is obtained from the analysis of the 13 DNA markers used for identification purposes can have direct medical relevance. There are numerous claims that these regions are anonymous and, other than gender, do not provide specific medical or physical information about the donor, but the use of these markers can, in fact, detect the presence of changes in the copy number of very large segments of DNA. In other words, it is not designed to do this, but it can do it by circumstance. It is not a very sensitive way of getting medical information, but it can. The list of conditions that this type of profiling can detect includes, but is not limited to, any difference in the number of sex chromosomes as well as Down syndrome or what is commonly known as trisomy 21. DNA profiling will very effectively detect that.
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> No DNA information is truly anonymous, since any portion of the DNA has potential to reveal personal details about an individual. It is only since the completion of the human genome project in 2003 that the complexity and relevance of what was previously labelled as junk DNA has been realized. In essence, that term has fallen out of favour.[138]

The committee recognizes that sections 4(*b*) and 10(5) of the *DNA Identification Act* prohibit the transmission and use of the DNA samples stored at the Data Bank for any purpose except forensic DNA analysis. The committee also recognizes that section 6(1) of the Act severely restricts the type of information that can be communicated to law enforcement agencies

[137] Testimony of Dr. Ron Fourney, Director, National Services and Research, RCMP, supra note 69 at p. 25.

about a match. Nevertheless, given that there are conflicting expert opinions regarding whether personal characteristics or medical information can be derived from analysis of the 13 loci currently used to create profiles, and given that the Data Bank may well begin using more than 13 loci to create profiles (i.e. profiles created using 16 loci),[139] the committee believes it would be advisable for the Advisory Committee to conduct a public consultation on the issue of whether or not the loci used by the Data Bank to create a DNA profile can or should be used to reveal personal characteristics or medical information about individuals, in order to assist police in identifying offenders. Once this consultation has been completed, the Advisory Committee should publish the results of this consultation, as well as a recommendation as to whether, in its view, the framework for DNA collection and analysis provided by the *DNA Identification Act* needs to be adjusted in order to preserve an appropriate balance between the objectives of protecting society and the administration of justice and protecting the privacy of individuals, as outlined in section 4 of the Act.

RECOMMENDATION 9

That the National DNA Data Bank Advisory Committee conduct a public consultation on the issue of whether or not the loci used by the National DNA Data Bank to create a DNA profile can or should be used to reveal personal characteristics or medical information about individuals, in order to assist police in identifying offenders.

RECOMMENDATION 10

That the National DNA Data Bank Advisory Committee publish the results of its public consultation, along with a recommendation as to whether or not, in its view, the framework for DNA collection and analysis provided by the *DNA Identification Act* should, as a consequence, be adjusted, in order to preserve an appropriate balance between the objectives of protecting society and the administration of justice and protecting the privacy of individuals, as outlined in section 4 of the Act.

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[138] Testimony of Dr. Martin Somerville, Canadian College of Medical Geneticists, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 24.

[139] In its most recent annual report, the National DNA Data Bank Advisory Committee suggested that the use of 16 loci was being considered by the Data Bank. See National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, supra note 73 at p. 16.

E. Use of the National DNA Data Bank for Exoneration Purposes

The reason that DNA is such a useful forensic tool is that it is more effective than other types of forensic technology in differentiating between individuals. It therefore provides extremely valuable evidence in terms of associating someone with a particular crime or demonstrating, in a highly particularized and individualized fashion, their non-involvement. In judgment after judgment, courts have referred to DNA as a vital technology, capable of both implicating the wrongdoer and exonerating the innocent. While much of the focus in the preceding sections of this report has been how on this technology can be employed legally, expeditiously and safely to assist in holding individuals accountable for the crimes they commit, some attention must also be devoted to the second objective: eliminating people as suspects or exonerating the innocent.

For example, it is important to remember the cases of Guy Paul Morin and David Milgaard, two individuals who, in highly publicized criminal trials, were wrongly convicted of murder. Without DNA testing, these individuals might still be in prison for crimes they did not commit. This committee accordingly concurs with the decision of the House of Commons Standing Committee on Public Safety and National Security to recommend, in its June 2009 report, that section 3 of the *DNA Identification Act* be amended to firmly establish that one of the purposes for which the Data Bank was created was and is to help exonerate the innocent. Individuals are already able to, and often do, voluntarily provide DNA samples to the police for the purposes of potential exoneration. However, the committee believes that the *DNA Identification Act* should also be amended to provide individuals who are suspected by law enforcement officials of having committed a designated offence with some ability to access the information contained in the Data Bank for exoneration purposes, following the decision to charge them and before trial. In particular, the committee believes that accused persons and their counsel should be able to obtain relevant information regarding analyses performed by the Data Bank on DNA samples obtained from them, in connection with the designated offences with which the accused persons have been charged.

RECOMMENDATION 11

That section 3 of the *DNA Identification Act* be amended to state that the purpose of this Act is to establish a national DNA data bank to assist law enforcement agencies in identifying persons alleged to have committed designated offences, including those committed before the coming into force of this Act, as well as to assist in the exoneration of the innocent.

RECOMMENDATION 12

That the *DNA Identification Act* be amended to allow accused persons and their counsel to request and receive, from the National DNA Data Bank for criminal defence purposes, relevant information regarding analyses performed on DNA samples obtained from the accused person in connection with the designated offences with which they have been charged.

In addition, our committee believes that *convicted* offenders and their counsel should be allowed similar access to relevant information about the samples and profiles stored at the Data Bank for exoneration purposes, at least in cases where there has been a significant change or advance in DNA technology since the time the offender was convicted. As stated previously in this report, although section 10(1) of the *DNA Identification Act* requires the RCMP Commissioner to destroy the bodily sample used to create the profile at the Data Bank, it allows the RCMP Commissioner to retain other portions of bodily samples taken from the individual if the Commissioner considers retention to be appropriate. Presumably, the Act empowers the Commissioner to retain some portions of samples in case DNA analysis technology advances, allowing scientists to glean better, different or more precise information from a sample.

Section 10(2) of the Act states:

> 10. (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.

If the Commissioner is empowered to authorize the lab to perform a new analysis of a DNA sample for the purpose of obtaining more or better information from it for law enforcement purposes, a person convicted of a designated offence should be provided with relevant information obtained from these analyses for exoneration purposes. Accordingly, we recommend that the *DNA Identification Act* be amended to state that when the Commissioner is of the opinion that a new forensic analysis of bodily substances stored at the Data Bank should be performed in accordance with section 10(2) of the Act, and the bodily substance in question was taken from an individual whose DNA profile is contained in the COI, that the Commissioner be required to provide the convicted offender with the results of this new analysis, so that he or she has the opportunity to use this information for exoneration purposes.

RECOMMENDATION 13

That the *DNA Identification Act* be amended to require the Commissioner of the Royal Canadian Mounted Police to provide offenders whose profiles are stored in the convicted offenders index (COI) with relevant information and the results of analyses that are performed on their bodily samples in accordance with section 10(2) of the Act.

F. International Exchange of Information Contained in the National DNA Data Bank

Sections 6(2) to 6(7) of the *DNA Identification Act* govern how and in what circumstances DNA profiles contained in the Data Bank may be shared with foreign states, institutions of those states, international organizations established by the governments of states, and institutions of these international organizations, as well as how and in what circumstances one of these foreign entities may submit a DNA profile contained in their DNA data banks with DNA profiles stored at the National DNA Data Bank for comparison purposes.

Before information-sharing of either of these types can occur, section 6(5) of the Act specifies that the foreign or international organization in question must have entered into an information-sharing agreement or arrangement with Canada, in accordance with section 8(2)(*f*) of the *Privacy Act.*[140] Section 8(2)(*f*) of the *Privacy Act* specifies that the Government of Canada can only share the personal information of individuals in its possession with a foreign state, international organization, or institution of either of these two entities, if there is an agreement in

place between Canada and the foreign entity in question specifying that any personal information the Canadian government shares with that entity will only be used by the foreign entity for the purposes of "administering or enforcing any law or carrying out a lawful investigation." Section 6(5) of the *DNA Identification Act* also specifies that information and profiles stored at the Data Bank may only be communicated to foreign states, international organizations and their institutions if "communication is necessary for the purpose of the investigation or prosecution of a criminal offence."

In terms of what information may be communicated once these criteria have been met, foreign entities that provide DNA profiles to the Data Bank can have these profiles matched to profiles contained in both the CSI and the COI (section 6(3) of the *DNA Identification Act*). By contrast, when the Data Bank provides a DNA profile to a specified foreign entity, it can share only a profile stored in the CSI, and can do so only if a Canadian law enforcement agency, in the course of an investigation, expressly asks them to share the profile (section 6(4) of the *DNA Identification Act*). Having said this, however, section 6(2) of the *DNA Identification Act* specifies that "[i]nformation 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." Accordingly, a foreign or international entity who is authorized to use the RCMP's automated criminal conviction records retrieval system, also known as the Canada Police Information Centre (CPIC) system, could also potentially obtain notification that a person's profile is in the COI.

With respect to what information can be communicated for comparison purposes, section 6(3) specifies that the Data Bank can communicate only the fact that a requested profile is not in the Data Bank or that there has been a match. If there has been a match, the Data Bank can then provide the profile in question and the name of the person attached to the profile to the foreign entity. The match must be exact before information can be shared (all 13 loci on the 2 DNA profiles being compared must match each other). Sections 6(6) and 6(7) of the *DNA Identification Act* prohibit the use of the profiles contained in the Data Bank and the communication of information regarding the profiles, except in accordance with the Act.

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[140] R.S.C. 1985, c. P-21.

A review of the above provisions demonstrates that the *DNA Identification Act* imposes fairly strict limits or controls on information sharing between the Data Bank and foreign entities. The question that remains, however, is whether these limits and controls go far enough. In observations in its report to the Senate on Bill C-18,[141] this committee expressed concerns about one of the information-sharing provisions described above, stating:

> We have reservations about the sharing of information found in the National DNA Data Bank with foreign jurisdictions. Our concern is that these jurisdictions may ask for information from the Data Bank in their efforts to resolve offences which are not offences under Canadian law. For example, non-violent political dissent may be considered a criminal act in certain jurisdictions and we do not wish to see the Data Bank facilitating the prosecution of these offences. Therefore, we recommend that one of the criteria for the sharing of information with foreign jurisdictions be that the offence alleged to have been committed in the foreign jurisdiction be considered an indictable offence under Canadian law and that appropriate legislation or regulations be prepared.[142]

In other words, it was this committee's view that information sharing should be restricted to situations in which foreign entities are investigating offences in their jurisdictions that would be equivalent to indictable offences under Canadian law. We are largely still of this view today, although our view on this subject has been altered somewhat in light of the terms contained in several of the Mutual Legal Assistance Treaties (MLATs) Canada has signed with other countries, and in light of the provisions contained in the *Mutual Legal Assistance in Criminal Matters Act*.[143]

Because the suppression, investigation and prosecution of crime, particularly in an increasingly globalized world, often requires cooperation with foreign law enforcement authorities, Canada enacted the *Mutual Legal Assistance in Criminal Matters Act* in 1988. This Act gives Canadian courts the power to issue orders, including search warrants and evidence-gathering orders, to obtain evidence in Canada on behalf of a foreign state or entity for use in a criminal investigation or prosecution conducted by the state or entity in question. However, the legislation only implements requests made pursuant to a treaty or administrative arrangement

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[141] Senate, Standing Committee on Legal and Constitutional Affairs, *14th Report*, 1st Session, 39th Parliament, 14 June 2007, available on-line at: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/lega-e/rep-e/rep14jun07-e.htm. The Standing Senate Committee on Legal and Constitutional Affairs reported Bill C-18 back to the Senate without amendment, but with observations.

[142] Ibid.

under the Act. Accordingly, when looking at Canada's obligations in terms of disclosure and provision of information to a foreign state or entity, one must look at the MLAT Canada has signed with that entity to determine when and in what circumstances, Canada is obligated or permitted to provide assistance.

Currently, Canada has signed MLATs in criminal matters with 39 countries or international organizations.[144] Under the terms of these treaties, parties may request assistance from each other in:

- examining objects and sites;
- exchanging information and objects;
- locating or identifying persons;
- serving documents;
- taking evidence from persons;
- providing documents and records;
- transferring persons in custody; and
- executing search and seizure requests.

In terms of providing documents and records, "records" is defined in the *Mutual Legal Assistance in Criminal Matters Act* as meaning "any material on which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device." This definition is broad enough to include a DNA profile created by the Data Bank. In terms of in what circumstances legal assistance may be provided to a foreign state or entity, this varies from MLAT to MLAT. For example, in the case of the MLAT in criminal matters between Canada and the United States, Articles I and II of the treaty, when read in conjunction, specify that Canada may only provide legal assistance to U.S. authorities relating to the investigation, prosecution and suppression of offences for which a term of imprisonment of more than one year under U.S. law may be imposed, or in relation to an offence described in the

[143] S.C. 1988, c. 17.
[144] See the Canada Treaty Information website at: http://www.treaty-accord.gc.ca/search-recherche.asp?type=&page=TLA.

Annex to the treaty.[145] This includes the provision of records, such as DNA profiles. By contrast, under the MLAT in criminal matters between Canada and the Netherlands, Canada may provide legal assistance to authorities in the Netherlands for the prosecution any offence created by the legislature of the Netherlands, the Netherlands Antilles or Aruba.[146]

With respect to countries with whom Canada has not concluded an MLAT in criminal matters, section 6(1) of the *Mutual Legal Assistance in Criminal Matters Act* specifies that the Minister of Foreign Affairs may, with the agreement of the Minister of Justice, enter into an arrangement to provide legal assistance (including the provision of records) to the state or entity in question, but only with respect to an investigation relating to an "act that, if committed in Canada, would be an indictable offence."

It would appear, therefore, that when Canada has entered into an MLAT in criminal matters with a foreign state or entity, the circumstances in which Canada will provide legal assistance, including records, to that entity to assist in a police investigation or criminal prosecution, are determined by the specific terms of the treaty. In cases where there is no treaty, the Minister of Foreign Affairs, in agreement with the Minister of Justice, retains the discretion to provide legal assistance, including records, to the foreign state or entity, but only in relation to an act that, if it had been committed in Canada, would constitute an indictable offence. Having said this, if a foreign state or entity is an authorized user of CPIC, that foreign state or entity can obtain confirmation that an offender's profile is contained in the COI. In the interest of maintaining consistency with the terms of the MLATs in criminal matters that Canada has signed with foreign states or entities, the provisions contained in the *Mutual Legal Assistance in Criminal Matters Act*, as well with section 6(2) of the Act, which allows authorized users of CPIC to obtain confirmation that an offender's profile is in the COI, the committee is of the view that the *DNA Identification Act* should be amended to specify that information stored at the Data Bank can only be shared with foreign states and entities in accordance with the terms of any Mutual Legal Assistance Treaty in criminal matters signed between Canada and the foreign state or entity, and/or in accordance with section 6(2) of the *DNA Identification Act*, presuming that it applies. In the event that there is no Mutual Legal Assistance Treaty in criminal matters between Canada and the state or entity in question, the Act should be amended to specify that information

[145] See the definition of "offence" found at Article I, and Article II of the MLAT between Canada and the United States. This treaty is available on-line at: http://www.treaty-accord.gc.ca/text-texte.asp?id=101638.
[146] See the definition of "offence" found at Article 1, and Article 2 of the MLAT between Canada and the Netherlands. This treaty is available on-line at: http://www.treaty-accord.gc.ca/text-texte.asp?id=101636.

stored at the Data Bank can only be shared with a foreign state or entity for the purpose of investigating an offence alleged to have been committed in a foreign jurisdiction, which, if it had been committed in Canada, would constitute an indictable offence under Canadian law, and/or in accordance with section 6(2) of the *DNA Identification Act*, presuming that it applies.

RECOMMENDATION 14

That the *DNA Identification Act* be amended to specify that information stored at the National DNA Data Bank can only be shared with governments of foreign states, institutions of these governments, international organizations established by the governments of states, or institutions of these international organizations in accordance with the Mutual Legal Assistance Treaty (MLAT) in criminal matters signed between Canada and the foreign state or international organization in question, and/or in accordance with section 6(2) of the *DNA Identification Act*, presuming that it applies.

RECOMMENDATION 15

That the *DNA Identification Act* be amended to specify that, in the event that there is no Mutual Legal Assistance Treaty (MLAT) in criminal matters in force between Canada and a government of a foreign state, institution of that government, international organization established by the government of states, or institution of that international organization, information can only be provided to the foreign state or international organization in question for the purpose of investigating an offence alleged to have been committed in a foreign jurisdiction, which, if it had been committed in Canada, would constitute an indictable offence under Canadian law, and/or in accordance with section 6(2) of the *DNA Identification Act*, presuming that it applies.

G. Kinship Analysis/Familial Searching

One of the most controversial subjects on which our committee heard evidence during the course of our study was on the subject of whether the *DNA Identification Act* should be amended to facilitate kinship analysis or familial searching.

As explained in an earlier section of this report, kinship analysis or familial searching begins as an ordinary Data Bank search. Law enforcement authorities provide DNA samples obtained from crime scenes to the Data Bank and the samples are turned into profiles, which are in turn, compared to the other profiles contained in the CSI, as well as to the profiles in the COI. However, currently, section 6 of the *DNA Identification Act* specifies that the Data Bank can only communicate a profile and related information if the profile in the Data Bank exactly matches the profile of the sample sent in by police, or if the person's DNA profile cannot be excluded as a possible match because there is a technical limit on the completeness of the profile sent in by law enforcement officials. Sections 6(7) and 11 of the *DNA Identification Act* make it an offence to communicate any information stored at the Data Bank except in accordance with section 6 of the Act. As a result, the Data Bank cannot inform law enforcement officials that there has been a close or partial match. The Act would need to be amended for such communication to occur.

If the Act allowed for this type of communication, the Data Bank could advise law enforcement officials that while the profile they submitted for comparison did not exactly match a profile contained in the CSI or COI, it closely matched another profile stored in one of these indices. The police would then know that they were likely looking for a close relative of the individual whose profile was already on file at the Data Bank. Through this type of searching, police agencies might be able to narrow down their list of suspects for a particular offence, thus enabling the police to solve crimes more quickly and in a more targeted fashion. It is for these reasons that representatives from the RCMP, when they appeared before us, spoke in favour of allowing the Data Bank to communicate close match results to police agencies.[147] It should be noted, as well, that kinship analysis and familial searching are already being done at the regional level by forensic labs, since these labs are not subject to the *DNA Identification Act.*[148] Furthermore, the U.K.[149] and many U.S. states allow close match results to be communicated, at least for certain serious offences. However, it should also be noted that some U.S. states, such as Maryland, expressly prohibit familial searching of their state DNA data banks, while others have

[147] Testimony of Corporal Jennifer Derksen, Policy Analyst, Operational Policy and Compliance, Community, Contract and Aboriginal Policing Services, RCMP, supra note 85 at p. 63.
[148] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, supra note 73 at p. 17.
[149] Testimony of Richard A. Bergman, Chairperson, National DNA Data Bank Advisory Committee, supra note 80 at p. 10. Mr. Bergman advised that kinship analysis has been used successfully in approximately 16 percent of 160 high profile cases in England.

legislation and policy that is silent on this subject.[150] In addition, it is important to note that kinship analysis or familial searching is not currently used as a crime solving tool by the Federal Bureau of Investigation's forensic laboratory.[151]

While RCMP representatives spoke in favour of amending the *DNA Identification Act* to allow for kinship analysis or familial searching at the Data Bank, the majority of witnesses who appeared before our committee expressed serious concerns about the potential negative consequences to the justice system that could arise from this type of searching. These witnesses expressed doubt that the benefits of such searching would outweigh the potential problems created. Some of the reasons witnesses gave for opposing kinship analysis or familial searching were practical in nature (Department of Justice officials, for example, indicated that "kinship analysis, while undoubtedly a hot topic, is unlikely to result in many matches because it can be highly demanding of police resources").[152] However, most witnesses expressed concerns about how such searches could infringe upon the privacy of innocent citizens or affect the presumption of innocence. Some of the concerns identified by various witnesses were:

- Kinship analysis or familial searching would turn persons whose profiles are in the COI into unwitting genetic informants against their relatives. The person in the COI may have been guilty of a crime, but given that the match in question is only a close match, may not be guilty of the crime the police is currently investigating. It would also associate the genetic profiles of innocent citizens (i.e., other relatives of the person whose profile is in the COI) with crime scene profiles, thereby turning them into suspects in the eyes of the police;[153]

- Kinship analysis or familial searching could lead to genetic surveillance of certain groups of people who are overrepresented in the justice system, such as Aboriginal persons or other racial or ethnic minority groups. Members of groups that are overrepresented in the justice system could be asked to give samples more often for comparison, because the police think there might be greater likelihood of finding a match;[154] and

- Kinship analysis or familial searching risks revealing other personal information about individuals that is not related to a crime, but may have a significant impact

[150] Natalie Ram, "State Policies for DNA Crime Databases Vary Widely" Science Progress, Centre for American Progress, 2 November 2009, available on-line at: http://www.scienceprogress.org/2009/11/map-state-dna-policies/.
[151] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*,, supra note 73 at p. 17.
[152] Testimony of Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice, supra note 82 at p. 58.
[153] Testimony of Carman Baggaley, Strategic Policy Advisor, Office of the Privacy Commissioner of Canada, supra note 107 at pp. 12 and 17.
[154] Testimony of the Honourable Peter Cory, Member, National DNA Data Bank Advisory Committee, supra note 92 at pp. 17 – 18.

> upon them, such as the fact that the person you always thought of as your parent is not in fact your parent, or the fact that your long-lost brother has a criminal conviction, and that his information is in the COI.[155]

These concerns led representatives from the Advisory Committee to suggest that that if Parliament wanted to consider recommending kinship analysis or familial searching, such searching should perhaps be permitted only when a crime has been committed that constitutes one of the 19 primary designated offences for which issuance of a DNA order upon conviction is currently mandatory. They also suggested additional restrictions, such as requiring provincial Attorneys General to approve a request to search the Data Bank for a close match or, alternatively, for a judge to issue a warrant before the Data Bank can be searched for a close match. In either case, they also proposed amending the relevant legislation to specify that a close match search should be allowed, and close match results communicated by the Data Bank, only in cases where the authorizing authority is satisfied that no other evidentiary or investigative leads are available.[156] However, the Privacy Commissioner's Office suggested that even that restricted type of use might be problematic, remarking that if kinship analysis or familial searching is allowed for these 19 offences, it might one day open the floodgates to kinship analysis and familial searching for all designated offences, thereby following the pattern in the growth of the number of designated offences generally.[157]

After considering the evidence and the concerns raised by witnesses, the committee believes that before kinship analysis or familial searching be permitted, the Department of Justice further study the matter to determine how to appropriately craft a provision that would balance the need to protect society, the need to protect privacy rights, and the need to preserve the presumption of innocence. We are certainly of the view that such searching should not be allowed unless a series of restrictions on the ability to conduct such a search are put into place. We invite the Department of Justice to further analyze the impact that allowing kinship analysis or familial searching might have on the protection of society, the administration of justice, the privacy of individuals and the presumption of innocence.

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[155] Testimony of Dr. Martin Somerville, President, Canadian Council of Medical Geneticists, supra note 138 at p. 26 and testimony of Carman Baggaley, Strategic Policy Advisor, Office of the Privacy Commissioner of Canada, supra note 107 at p. 19.

[156] Testimony of Richard A. Bergman, National DNA Data Bank Advisory Committee, supra note 80 at p. 11, and National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, supra note 73 at p. 19.

[157] Testimony of Carman Baggaley, Strategic Policy Advisor, Office of the Privacy Commissioner of Canada, supra note 107 at p. 16 and letter from Jennifer Stoddart, Privacy Commissioner of Canada, 16 June 2009, supra note 95 at p. 5.

RECOMMENDATIONS REGARDING RESOURCING FOR THE NATIONAL DNA DATA BANK AND THE RCMP, ONTARIO AND QUEBEC FORENSIC LABS

A. Increased Financial Resources for the National DNA Data Bank

The committee recognizes that, if all of our recommendations for changes to the *Criminal Code* and *DNA Identification Act* are adopted by the government, some cost savings to the criminal justice system will result. It is evident, for example, that if the Code is amended to provide that DNA samples may be collected automatically from all adults and from some young offenders convicted of designated offences without need for a court order, this will save time and money in our court system, since Crown prosecutors will no longer need to apply for orders in the case of secondary designated offences, and separate hearings will not have to be held so that judges may issue post-conviction collection orders in these circumstances. It also seems likely that police agencies will experience some savings, since they will no longer have to spend time and money locating offenders who leave the jurisdiction before a DNA sample can be taken, or arrange to have new samples taken due to minor defects in court orders, although police agencies might also face some cost increases, as a result of having to collect more DNA samples from offenders than ever before.

However, the recommendations, if adopted, will almost certainly impose new costs on the Data Bank. When Department of Justice representatives appeared before us, they advised us that the automatic collection from those convicted of primary and secondary designated offences upon conviction "could result in 100,000 new profiles annually [being added to the COI]." [158] Given that the Data Bank received approximately 34,000 samples for the purposes of adding profiles to the COI in 2008 – 2009,[159] if this predicted increase to 100,000 samples a year occurred, the Data Bank would definitely require additional resources. This was confirmed by Dr. Ron Fourney, Director of National Services and Research, RCMP, when he appeared before our committee on 17 March 2010. He stated:

> Once we go past 60,000 samples the sheer number of samples, processing, and logistics of the operation have to change. Even the space allocation of your equipment must change. More important, we want to maintain the same high level of standard. I wish to draw to senators' attention that we do not have any waiting for samples to be processed in

[158] Testimony of Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice, supra note 82 at p. 58.
[159] National DNA Data Bank, *2008-2009 Annual Report,* supra note 63 at p.7.

> the Convicted Offender Index. It is routinely processed within the five-day turnaround. We have been able to manage that by holding on. With the change in legislation, we went from 18,000 samples about a year ago to 34,000 samples today. That is a big change to accommodate without changing staff or equipment.
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> Beyond 60,000 samples, we have to start looking at new types of equipment and, potentially, adding a few more staff. With automation and a more robotic way of loading equipment, I hope to offset the labour needs to reduce the cost somewhat. We are currently in consultation with colleagues at the Department of Justice Canada with the understanding that if things change, we will have to predict the cost. We are working on that as we speak.[160]

Accordingly, our committee believes that, if the Code is amended to allow for the automatic taking of DNA samples from all adult offenders following conviction for designated offences as well as for the automatic taking of DNA samples from young offenders in some cases, additional financial resources should be made available to the Data Bank to ensure that it can accommodate the increased workload that will inevitably result.

RECOMMENDATION 16

If the *Criminal Code* is amended to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted of a designated offence, as well as for the immediate and automatic collection of a DNA sample from young offenders convicted of certain designated offences, the Government of Canada should ensure that sufficient financial resources are made available to the National DNA Data Bank to enable it to process the increased number of samples sent to it so that profiles can be included in the convicted offenders index.

B. Additional Resources for the RCMP, Ontario and Quebec Forensic Labs

The Data Bank is not the only participant in the DNA forensic identification system that is likely to need additional financial resources in the near future. The RCMP, Ontario, and Quebec forensic labs, all of whom process DNA samples and create DNA profiles that are uploaded to the CSI, may also require additional funding. Unlike the Data Bank, this need for additional

[160] Dr. Ron Fourney, Director, National Services and Research, RCMP, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 3rd Session, 40th Parliament, *Issue No. 1*, 10, 17 and 18 March 2010, pp. 59 – 60.

funding does not result from any of the recommendations we are making in this report, but because these labs, particularly those of Ontario and Quebec, have advised us that they are having great difficulty keeping up with the additional demand for analysis of crime scene samples created by the coming into force of Bills C-13 and 18 in 2008.

While the Data Bank is responsible for processing the DNA samples collected for addition to the convicted offenders index, it is the RCMP forensic laboratories in Halifax, Ottawa, Regina, Edmonton and Vancouver, and two provincial laboratories, the Ontario Centre for Forensic Sciences, and the Laboratoire de sciences judiciaires et de médecine légale in Quebec, that are responsible for analysing the biological samples the police collect at crime scenes, and then uploading DNA samples profiles to the crime scene index. The provinces and territories using the RCMP labs are therefore required to contribute to the costs of the biology casework analyses that occur at these labs. The amount of their contribution is determined by means of Biology Casework Analysis Agreements (BCAAs) signed between the provinces and territories which use the RCMP labs and the federal government. The federal government also negotiates BCAAs with Ontario and Quebec; however, in the case of these two provinces, funding flows the other way, from the federal government to Quebec and Ontario, since the provincial governments of these provinces pay the costs of operating their respective forensic labs, and the federal government wants to ensure that all provinces are equipped to provide samples and profiles to populate the CSI. If the CSI is under-populated, matches between the CSI and COI will be much less frequent and the Data Bank may start to lose its effectiveness as a crime-solving tool.[161]

We were already aware, prior to the commencement of our hearings, that both the Auditor General of Canada and the Auditor General of Ontario had conducted audits in 2007 of the RCMP forensic labs and Ontario forensic labs, respectively, and noted similar problems with respect to processing at these labs. The problems identified had little to do with the quality of the work being done, although some quality control issues were noted.[162] Instead, they had to do

[161] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, supra note 73 at pp. 13 – 14.

[162] For example, when Sheila Fraser, the Auditor General of Canada, appeared before this committee in April 2009, she indicated that when the RCMP Forensic Labs adopted its new automated process in 2005, whereby robots are used at certain states of the process to speed up analysis results, the RCMP Labs noticed discrepancies with respect to the results achieved through the use of automated and manual processes, a quality control issue that was not addressed for quite some time. She also suggested that the new automated process should not have been subject only to internal review by the RCMP Forensic Labs staff before implementation, but also to external independent validation and review, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 6*, 2nd Session, 40th Parliament, 22 and 29 April 2009, p. 30.

with the fact that samples were not being processed in a timely manner.[163] Accordingly, we were eager to see whether the RCMP and Ontario labs had addressed the timeliness issues identified in the federal and provincial Auditor General reports, and whether the Quebec lab was experiencing similar problems.

What we discovered was not reassuring. While all three laboratories had taken steps to address some of the timeliness issues to the best of their ability, the huge number of new designated offences added in 2008 to the list found at section 487.04 of the Code had added significantly to the workloads of all three labs. Nor was there an expectation that this demand would slacken off in any way in the near future. As was stated in a November 2009 report prepared by General Consulting Services (GCS), Public Works and Government Services Canada for Public Safety Canada to assess the working capacities of these labs:[164]

> [I]n discussions with police forces and the laboratories, there is a consensus that demand for case processing will continue to increase for the foreseeable future, regardless of the observed downwards trend in crime. This can be attributed to an increase in DNA collection at crime scenes (referred to as DNA yield) due to its usefulness and the response by police to the changes in legislation (related to Bill C-13/18) which make it possible to upload DNA profiles to the CSI of [the Data Bank].[165]

The RCMP forensic labs seemed best positioned to manage the increased demand for services occasioned by the coming into force of Bills C-13 and C-18. They were using three strategies to increase efficiency and reduce demand: (1) a new streamlined procedure for forensic analysis, whereby police officers in the field are put immediately in touch with someone at the lab at the initial stages of investigation, so that they can negotiate diary dates and receive preliminary analysis results as soon as possible (this program is in the pilot state, and is designed

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[163] See Office of the Auditor General of Canada, *Report of the Auditor General of Canada*, "Chapter 7", May 2007, available at: http://www.oag-bvg.gc.ca/internet/docs/20070507ce.pdf . See also, testimony of Sheila Fraser, Auditor General of Canada, ibid. at p. 29, where she states that "FLS [RCMP Forensic Laboratory Services] management did not respect targets for completing and communicating analysis results. And, in some cases, staff changed the due date on service requests, making it appear as if the FLS was meeting targets when, in fact, they had simply been altered." See also, Office of the Auditor General of Ontario, *Report of the Auditor General of Ontario, "*Chapter 3.02", December 2007, available at: http://www.auditor.on.ca/en/reports_en/en07/302en07.pdf. At p. 60, the report states: "The [Ontario] Centre's 90-day target for completing 80% of its cases was set without the benefit of input from clients on their requirements and was much longer than targets set by forensic science laboratories in other jurisdictions, which generally set targets of 30 days or less."

[164] Government Consulting Services, Public Works and Government Services Canada, *DNA Forensic Laboratory Service Cost and Capacity Review*, 30 November 2009.

to be rolled out nation-wide by 2011);[166] (2) increased automation of laboratory processes, (this automation has, in turn, increased the lab's productive capacity);[167] and (3) strict limits placed on provinces and territories through the BCAAs, restricting the number of secondary designated offence samples the provinces and territories who use RCMP lab services can submit to the labs for analysis each year.[168] However, it is important to note that if the RCMP is finding it necessary to set limits in its BCAAs on the numbers of DNA samples collected at crime scenes its labs will process each year, law enforcement officials and courts may not have forensic DNA evidence available to them as fully as they should. Accordingly, there may be a need to provide future funding to the RCMP labs to enable them to process more secondary designated offence crime scene samples.[169]

We were also advised by representatives from the Laboratoire de sciences judiciaires et de médecine légale in Quebec that its BCAA with the federal government was about to lapse due to ongoing disputes over the federal decision to freeze funding provided to the Quebec lab at 2006 levels. In the past, BCAAs between Canada and Quebec were negotiated for three years at a time, which enabled the Quebec lab to make some longer term plans regarding improvements to equipment and the hiring of new staff. However, we have been informed that without multi-year agreements in place, the Quebec lab can no longer make long term plans, and the processing backlog occasioned by the coming into force of Bills C-13 and C-18 has only made things worse in terms of this lab's ability to respond to the demands placed upon it.[170] Secondly, we were advised by both the Quebec and Ontario labs that they are unable to keep up with the increased workload imposed by Bills C-13 and C-18, and that they are effectively doing triage on the DNA samples they get. Samples that are collected in relation to the most serious offences, or offences

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[165] Ibid. at p. 11.

[166] Testimony of Peter Henschel, Assistant Commissioner, Director General, Forensic Science and Identification Services, RCMP, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 1*, 3rd Session, 40th Parliament, 10, 17 and 18 March 2010, pp. 28 and 29.

[167] Government Consulting Services, Public Works and Government Services Canada, *DNA Forensic Laboratory Service Cost and Capacity Review*, supra note 164 at p. 14.

[168] Ibid. at pp. 11 – 12.

[169] It is also possible the RCMP forensic labs may not need any additional funding to meet the requirements imposed on them by Bills C-13 and C-18. This was the conclusion that GCS reached in its capacity review of the three forensic labs. See Government Consulting Services, Public Works and Government Services Canada, *DNA Forensic Laboratory Service Cost and Capacity Review*, supra note 164 at p. 29. The GCS report indicated that the RCMP was not achieving the throughput it was capable of, and was processing cases less efficiently than either the Quebec or Ontario labs at the time the review was conducted. Accordingly, GCS suggested that perhaps more effective procedures, and not additional funds, would be required at the RCMP labs. See ibid. at pp. iv, 11 and 29.

[170] Testimony of Bob Dufour, Director General, Laboratoire de sciences judiciaries et de médecine légale, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 1*, 3rd Session, 40th Parliament, 10, 17 and 18 March 2010, pp. 61 – 67.

which represent the most danger to public safety, are processed first, in accordance with service standards, but the rest of the samples, such as those collected from break-and-enters or drug offences, must wait.[171] All samples are processed eventually, but perhaps not in a timely enough fashion to prevent a court from ordering a stay of proceedings in a criminal trial on the basis of section 11(*b*) of the Charter, which gives accused persons the right to trial in a reasonable time. Bills C-13 and C-18 have also increased the workload of scientists who work at all three forensic labs another way. Given that there are now more designated offences and therefore more crime scenes from which DNA may be collected, there is also more DNA evidence being used at trial. This means that forensic scientists employed in our federal and provincial government labs must spend more time testifying as expert witnesses in court, which reduces the amount of time they can spend in the lab processing samples.[172]

It is also important to note that GCS, in its November 2009 report, indicated quite strongly that the Ontario and Quebec labs would require additional funding to assist them in handling the increased demands placed on them by Bills C-13 and C-18. In the case of the Quebec lab, GCS indicated that it would likely need almost $13 million over the next three years to keep up with demand. This would allow the lab to hire new staff, pay its operating and management costs and purchase new equipment.[173] With respect to the Ontario lab, GCS estimated that it would require almost $11 million over the next three years, dedicated to the same three items, in order to keep up with demand.[174]

Our committee recognizes that in the 2010 Budget,[175] the Government of Canada allocated "$14 million over two years to increase the ability to process DNA samples so that the results could be added to the National DNA Data Bank."[176] If the monies outlined in the budget are allocated to the Quebec and Ontario forensic labs, they will go some ways towards allowing both of these labs to keep up with the increased demands placed on them. However, as indicated

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[171] Testimony of Anthony Tessarolo, Director, Ontario Centre of Forensic Sciences and Frédérick Laberge, Administrator, Laboratoire de sciences judiciaries et de médecine légale, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 1*, 3rd Session, 40th Parliament, 10, 17 and 18 March 2010, pp. 79 – 81.
[172] Ibid.
[173] Government Consulting Services, Public Works and Government Services Canada, *DNA Forensic Laboratory Service Cost and Capacity Review*, supra note 164 at p. 28.
[174] Ibid. at p. 29.
[175] Budget 2010, *Leading the Way on Jobs and Growth*, tabled in the House of Commons by the Honourable Jim Flaherty, Minister of Finance, 4 March 2010, available on-line at: http://www.budget.gc.ca/2010/pdf/budget-planbudgetaire-eng.pdf.
[176] Ibid. at p. 126.

in the GCS report, additional funding may also be required for these labs, and it is possible that the RCMP labs may also need additional funding in the future, given the cap that the RCMP has placed in BCAAs signed with the provinces and territories on the number of samples for secondary designated offences it will process in a year. Accordingly, our committee believes that the Governments of Canada, Ontario and Quebec should ensure that adequate and sustained funding is provided to the Quebec, Ontario and RCMP forensic labs to ensure that they are equipped to handle the increased demand for analysis placed on them by Bills C-13 and C-18. We also recommend that the Government of Canada consider negotiating BCAAs with the Ontario and Quebec labs for longer periods of time (i.e. the three year periods such agreements had initially been put in place for). Longer agreements should enable the Quebec and Ontario labs to engage in better long term planning when hiring new staff and purchasing new equipment, which, in turn, would likely increase the productivity and efficiency of both of these labs.

RECOMMENDATION 17

That the Governments of Canada, Quebec and Ontario should ensure that adequate and sustained funding be made available to the Quebec, Ontario and RCMP forensic labs to enable them to process the increased numbers of DNA samples sent to them as a result of the coming into force of Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, S.C. 2005, c. 25 and Bill C-18, *An Act to amend certain Acts in relation to DNA identification*, S.C. 2007, c. 22.

RECOMMENDATION 18

That the Government of Canada consider negotiating multi-year Biology Casework Analysis Agreements (BCAAs) with Ontario and Quebec, in order to better enable their provincial forensic laboratories to engage in multi-year planning to meet their workload needs in relation to forensic DNA analysis pursuant to the *Criminal Code* and the *DNA Identification Act*.

C. Exploring the Possibility of Contracting Out DNA Forensic Analysis to Private Labs or Entering into Public Private Partnerships with Such Labs

In addition to ensuring that the RCMP, Ontario and Quebec forensic labs are provided with adequate and sustained funding and longer BCAAs to assist them in responding to increased demands for their services, the Government of Canada might wish to consider other solutions regarding workload and capacity at the forensic laboratories. One such solution might be to contract with private forensic laboratories to perform some of the DNA analysis and casework, entering into public/private partnerships with private laboratories for these purposes. However, as pointed out by representatives from the Quebec provincial forensic lab, entering into public/private partnerships with private forensic laboratories and allowing these labs to upload DNA samples and profiles to the CSI raises certain quality control issues. For example, questions arise as to how to ensure that these facilities are subject to an independent audit mechanism, equivalent to that provided by the federal and provincial Auditors General in relation to the government-operated laboratories, as well as in relation to chain of evidence and accreditation issues. These questions would need to be addressed before evidence processed by private labs would be accepted by the courts, police agencies and the Data Bank.[177] We are confident, however, that mechanisms could be put into place to manage such challenges.

We were advised by representatives from the Ontario provincial forensic lab that the Government of Ontario had undertaken three separate studies which addressed, in whole or in part, whether forensic services in Ontario should be privatized and in what circumstances, all of which concluded that they should not.[178] We believe, however, that the time may be ripe for a re-examination of this idea. It must be remembered that all three of the studies referenced by the Ontario forensic lab were done in the 1990s, when use of DNA technology in Canada was in its infancy, and when courts were still becoming accustomed to receiving DNA evidence. It is very possible that by now, in 2010, the situation has changed.

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[177] Testimony of Bob Dufour, Director General, Laboratoire de sciences judiciaries et de médecine légale, supra note 170 at p. 91.

[178] Letter from Anthony Tessarolo, Director, Ontario Centre of Forensic Sciences, to Shaila Anwar, Clerk, Standing Senate Committee on Legal and Constitutional Affairs, 18 March 2010. The two studies referenced in the letter were S Ashman and J. Campbell, "Organization of Ontario Government Laboratories", Management Board Secretariat, February 1990, David Balsillie, "Report of the 1993 Review of the Organization of Ontario Government Laboratories," Management Board Secretariat, March 1993, and Mr. Justice Archie Campbell, "Report of the Bernardo Investigation Review," June 1996, p. 73.

Indeed, a small degree of DNA forensic analysis in Canada is already being performed by one private laboratory, Maxxam Analytics, which has an agreement with the RCMP labs to handle overflow of their forensic analysis workload in peak times, or when there is rush processing to be done. Under the terms of the agreement, Maxxam Analytics is empowered to upload the DNA samples they analyze for police services, and the profiles created from those samples, directly to the CSI at the Data Bank.[179] We were advised by representatives from Maxxam Analytics, that, in the agreement, the RCMP included many terms and conditions designed to ensure that the forensic analysis conducted by Maxxam Analytics conforms to the RCMP's standards, and will be acceptable to courts, police agencies and to the Data Bank. These terms and conditions include:

- requiring Maxxam Analytics to obtain lab accreditation equivalent to that maintained by the RCMP, Quebec and Ontario labs;
- providing that all samples processed by Maxxam Analytics under the terms of the its agreement with the RCMP actually belong to the RCMP, so that if Maxxam Analytics goes out of business or is sold, no samples will be lost;
- using encryption technology to transmit the results of the analyses to the RCMP, so that only certain authorized people can view the results of these analyses;
- having all staff sign confidentiality agreements to ensure that information obtained from the analyses remain private;
- obliging all staff who work in the lab, including the cleaning staff, to maintain up-to-date enhanced reliability security clearances; and
- having the RCMP audit Maxxam Analytics' work on a yearly basis to ensure that the terms of the agreement, and quality control standards, are being complied with.[180]

In Budget 2010, the Government of Canada announced that it is already considering the possibility of some sort of privatization in the area of DNA forensic services.

[179] Testimony of Wayne Murray, Director, Forensic and DNA Services, Maxxam Analytics, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 2*, 3rd Session, 40th Parliament 24 and 25 March 2010, p. 6

[180] Ibid. at pp .6, 9 – 15 and 29. See also, Wyndham Forensic Group, Submission to the Standing Senate Committee on Legal and Constitutional Affairs *Re the Provisions and Operation of the DNA Identification Act*, 8 April 2010,

The Government of Canada stated:

> In order to improve the effective processing of forensic materials and help law enforcement more efficiently tackle crime, the Government will explore options for different delivery models, including potential privatization of the RCMP Forensic Laboratory Services. A new approach should improve the timeliness of processing samples, ensure sound financial administration and increase research and development in forensic science.[181]

However, representatives from Maxxam Analytics indicated, when they appeared before the committee, that although they were "fan[s] of complementarity and public-private-sector partnerships," they were of the view that "private enterprise could contribute to the solution" of the backlog, rather than functioning "solely as the solution."[182] In other words, Maxxam Analytics was not seeking wholesale privatization of forensic laboratory services. After hearing from Maxxam Analytics and other private labs, the committee recommends that Government of Canada seriously explore the possibility of entering into public/private partnerships with qualified and reliable private forensic labs, which would allow these labs to conduct DNA forensic analysis for police agencies and upload DNA samples and profiles to the CSI at the Data Bank. However, we emphasize that appropriate terms, conditions and safeguards should be put into place with respect to such partnerships.

RECOMMENDATION 19

That the Government of Canada explore the possibility of entering into public/private partnerships with qualified and reliable private forensic labs, which would allow such labs to conduct DNA forensic analysis for police agencies and upload DNA samples and profiles to the crime scene index (CSI) at the National DNA Data Bank. However, appropriate terms and conditions, such as independent auditing mechanisms, recognized accreditation, confidentiality agreements, encryption technologies, arrangements ensuring government ownership of the DNA samples, and security clearances for employees should be components of such partnerships.

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which contains many of the same suggestions regarding how potential problems associated public/private partnerships in this arena could be overcome.

[181] Budget 2010, supra note 175 at p. 126.

[182] Testimony of Wayne Murray, Director, Forensic and DNA Services, Maxxam Analytics, supra note 179 at p. 23.

CREATION OF MISSING PERSONS, UNIDENTIFIED HUMAN REMAINS AND VICTIMS INDICES AT THE NATIONAL DNA DATA BANK

Another important issue raised by witnesses who appeared before us is that Canada currently has no missing persons index (MPI) at the Data Bank to assist law enforcement officials in identifying missing persons. There is also no index containing DNA collected from unknown deceased persons (some of whom cannot be identified because only part of a body may be located). Furthermore, there is also no way for victims to volunteer to keep their DNA profile on file at the Data Bank once they have been excluded as a suspect in relation to a designated offence, to assist the police in investigating linkages between unsolved crimes. This is because, in respect of the DNA of missing persons, unidentified dead persons or unidentified human remains, there is often no crime scene to collect DNA from. Section 5(3) of the *DNA Identification Act* specifies that there must be a link between a designated offence and a DNA sample before that sample can be turned into a profile and uploaded to the CSI. Furthermore, in the case of a victim's DNA, even if there is a link between the sample and a designated offence, section 8.1 of the *DNA Identification Act* specifies that DNA profiles must be removed from the CSI once it has been determined that the DNA sample used to create the profile came from a victim or an eliminated suspect. Accordingly, the DNA of missing people, unidentified human remains and victims cannot be kept in the CSI.

Almost all of the witnesses who appeared before us, but particularly the former Federal Ombudsman for Victims of Crime and representatives from the Canadian Resource Centre for Victims of Crime, Victims of Violence (Canadian Centre for Missing Children), and Ontario's Missing Adults, spoke in favour of creating a missing persons index, an unidentified human remains index, a broader victims index, or some combination of all three indices and housing those indices at the Data Bank. It was acknowledged that such informal indices are maintained at the government forensic labs that process DNA samples, which often store samples and subject them to appropriate DNA analysis, including mitochondrial and Y-STR analysis,[183] when asked to do so, in the hopes that missing people or unidentified dead people will finally have their

[183] See the testimony of Amarjit Chahal, Senior Director and Technical Leader, Warnex PRO-DNA Services Inc, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 2*, 3rd Session, 40th Parliament 24 and 25 March 2010, pp. 8 – 9. Mr. Chahal's firm specializes in mitochondrial DNA analysis, and he indicated in his testimony that this technology has developed to the stage where it could be used in contributing to a national missing persons index. It would be particularly useful for creating DNA profiles for unidentified and degraded human remains, given that there are more copies of this type of DNA in human bodies than there are copies of nuclear DNA, and therefore, more chance that useable mitochondrial DNA would be found in such remains, despite their age and/or stage of decomposition.

identities confirmed, bringing closure to their families. However, all witnesses acknowledged how much more effective these indices would be if they were maintained by the Data Bank and if searches could be conducted on a national level.[184]

Witnesses recognized that some progress had been made towards the development of such indices at the Data Bank. A summary of information as to what has occurred to date in terms of negotiations between the federal, provincial and territorial governments to create, at minimum, an MPI, was provided in the National DNA Data Bank Advisory Committee's *2008 – 2009 Annual Report.* The Advisory Committee stated:

> The Advisory Committee continues to follow the progress of discussions between Public Safety Canada and the Federal, Provincial, Territorial (FPT) Working Group in relation to the establishment of a National Missing Persons Index (MPI) in Canada. This group was created in 2003. In 2005, public consultations took place and three sub-groups were created to study definitions of missing persons, costing issues and a funding formula. In 2006, the Federal Government indicated that it did not support a model whereby the federal government would pay for all MPI related costs. In 2007, representatives from a number of Federal and Provincial agencies met in Ottawa and participated in a process mapping exercise which produced possible model options. There has been very little further progress on the further development of an MPI reported to the Advisory Committee since that time. It is the Committee's understanding that both limited regional forensic laboratory capacity and funding issues are major challenges to the achievement of an agreement among the various jurisdictions involved. It is expected that FPT discussions on this issue will resume after the Parliamentary Committee reports (Senate and House of Commons committees) from the statutory review of the *DNA Identification Act* are published...[185]

This perceived lack of progress has caused those who advocate for victims, and particularly for the missing, much frustration. However, we were able to learn, during the course of our hearings, that more progress has been made toward the development of this index than it

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[184] Testimony of Steve Sullivan, former Federal Ombudsman for Victims of Crime, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 40; testimony of Heidi Illingworth, Executive Director, Canadian Resource Centre for Victims of Crime, supra note 90 at p. 56; testimony of Sharon Rosenfeldt, President, Victims of Violence (Canadian Centre for Missing Children), *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, pp. 58 – 59; and testimony of Lusia Dion, Founder and Director, Ontario's Missing Adults, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 7*, 2nd Session, 40th Parliament, 6 and 7 May 2009, p. 53.

[185] National DNA Data Bank Advisory Committee, *Annual Report, 2008 – 2009*, supra note 73 at p. 13.

might, at first, appear, and that the slow progress on this issue is a result of the many challenging jurisdictional, Charter, privacy, logistical and financial issues that must be addressed before such indices could be added to the Data Bank.

With respect to financial issues, we were advised by officials from Public Safety Canada that the federal/provincial and territorial working group had created a costing and implementation plan for a MPI, although not for the other two indices. Costs would differ, depending upon whether a person was classified as missing after 30, 60 or 90 days, with the costs declining the longer it takes for a person to be considered missing. The committee was told that the initial start-up cost for a MPI would be $10 million, with an ongoing cost of $3.5 million a year to maintain the index if a person was considered missing after 30 days, $2.65 million a year if a person was considered missing after 60 days, and $2 million a year if a person was considered missing after 90 days.[186]

With respect to the numerous other challenges that will need to be worked out before an MPI, unidentified human remains index, or a victims index could be established, such concerns include:

- the fact that with respect to an unidentified human remains index or victims index, human remains and crime scene DNA are under the jurisdiction of the provincial coroners. Accordingly, the Office of the Federal Ombudsman for Victims of Crime had suggested that it may be necessary to let each province determine its level of involvement with such indices, if they were to be established;

- whether consent would have to be obtained (and from whom) in the case of a dead victim, before the profile could be uploaded to the victims index;

- whether a profile uploaded to the MPI, unidentified human remains index or victims index should be compared only against the crime scene index (CSI) or also against the convicted offenders index (COI). Lusia Dion, from Ontario's Missing Adults, for example, suggested that there should be a firewall between the MPI, in particular, and the COI, while other witnesses suggested that comparisons to the CSI might be even more problematic than comparisons to the COI, because it might lead to implicating the victim in an unsolved crime, rather than merely revealing that a missing person is in jail;

[186] Testimony of Barry MacKillop, Director General, Law Enforcement and Border Services Directorate, Public Safety Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 2*, 3rd Session, 40th Parliament, p. 41.

- how and in what circumstances mitochondrial DNA analysis should be used in relation to these new indices and the already existing indices, given that such DNA is the same between mothers, siblings and their children. This might make mitochondrial DNA useful for the purpose of an MPI or an unidentified human remains index, but difficult to justify using in relation to the CSI or COI;

- how particularized the consent for use of DNA should be (i.e. should people be able to specify that you can use one purpose but not another) and what mechanisms should be provided to allow consent to be withdrawn if people have a change of heart;.

- missing persons who are adults and missing persons who are children presumably raise different issues – some adults may, for example, want to go missing; and

- cost and resource implications for RCMP, Ontario and Quebec forensic labs and the Data Bank if these indices are created.[187]

While acknowledging the breadth and complexity of the issues that remain to be addressed, our committee believes that such challenges and difficulties can be surmounted, if the will to negotiate and to work towards creative solutions is also present. We are supportive, in principle, of the creation of all three indices at the Data Bank. Having said this, we are of the view that the federal, provincial and territorial governments should first focus their attentions on the creation of an MPI and an unidentified human remains index, given that these indices would be much less expensive to create, and contain many fewer profiles than a victims index, which would presumably contain DNA profiles derived from DNA samples collected from all victims whose DNA was collected from a crime scene, as long as the victims in question consented to keep their DNA profile stored in the Data Bank.

In addition, in order to assure the public, particularly the relatives of the unidentified and the missing, that progress is being made towards the creation of such indices, the committee recommends that the Data Bank include, in its annual reports to Parliament, updates on the progress it has made towards the development of an MPI and an unidentified human remains index at the Data Bank, until such time as both indices are created and established.

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[187] Testimony of Richard A Bergman, Chairperson, National DNA Databank Advisory Committee, supra note 80, letter from Jennifer Stoddart, Privacy Commissioner of Canada, supra note 95 at pp. 2 -5 and 7 -8; testimony of Lusia Dion, Ontario Missing Adults, supra note 184 at p. 65; testimony of Steve Sullivan, former Federal Ombudsman for Victims of Crime, supra note 184 at p. 46; and testimony of Greg Yost, Counsel, Criminal Law Policy Division, Department of Justice, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 2*, 3rd Session, 40th Parliament, 24 and 25 March 2010, p. 39.

Once these two indices have been established at the Data Bank, the committee believes that the Government of Canada, in conjunction with the provincial and territorial governments, should then consider the feasibility of creating a victims index at the Data Bank, taking into account the costs and challenges that the creation of this particular index might entail, as well as the benefits such an index might provide.

RECOMMENDATION 20

That the Government of Canada reopen discussions, on an urgent basis, with the provinces and territories to further the goal of establishing a missing persons index and an unidentified human remains index at the National DNA Data Bank.

RECOMMENDATION 21

That until such time as a missing persons index and an unidentified human remains index are established at the National DNA Data Bank, the National DNA Data Bank publish, in its annual reports to Parliament, updates regarding what progress has been made, each year, towards the establishment of these indices at the National DNA Data Bank.

RECOMMENDATION 22

That, immediately following the establishment of a missing persons index and an unidentified human remains index at the National DNA Data Bank, the Government of Canada consider the feasibility of a victims index and undertake discussions with the provinces and territories to explore the possibility of establishing such an index at the National DNA Data Bank.

APPENDIX 1 – Designated Offences in the Criminal Code

Original List of designated offences found at section 487.04 of the *Criminal Code*, as introduced by Bill 104, *An act to amend the Criminal Code and the Young Offenders Act (Forensic DNA Analysis)*, S.C. 1995, C. 27	List of designated offences found at Section 487.04 of the *Criminal Code* **as of 19 May 2010**
"**designated offence**" means	"**primary designated offence**" means
(a) an offence under any of the following provisions of this Act, 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(2)(a) (using explosives), (vi) section 151 (sexual interference), (vii) section 152 (invitation to sexual touching), (viii) section 153 (sexual exploitation), (ix) section 155 (incest), (x) subsection 212(4) (offence in relation to juvenile prostitution), (xi) section 220 (causing death by criminal negligence), (xii) section 221 (causing bodily harm by criminal negligence), (xiii) section 231 (murder), (xiv) section 236 (manslaughter), (xv) section 244 (causing bodily harm with intent), (xvi) section 252 (failure to stop at scene of accident), (xvii) section 266 (assault), (xviii) section 267 (assault with a weapon or causing bodily harm), (xix) section 268 (aggravated assault), (xx) section 269 (unlawfully causing bodily harm), (xxi) section 269.1 (torture), (xxii) paragraph 270(1)(a) (assaulting a peace officer), (xxiii) section 271 (sexual assault),	(a) an offence under any of the following provisions, namely, (i) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of a person under the age of eighteen years), (ii) section 235 (murder), (iii) section 236 (manslaughter), (iv) section 239 (attempt to commit murder), (v) section 244 (discharging firearm with intent), (vi) section 244.1 (causing bodily harm with intent – air gun or pistol), (vi.1) section 244.2 (discharging firearm – recklessness), (vii) paragraph 245(*a*) (administering noxious thing with intent to endanger life or cause bodily harm), (viii) section 246 (overcoming resistance to commission of offence), (ix) section 267 (assault with a weapon or causing bodily harm), (x) section 268 (aggravated assault), (xi) section 269 (unlawfully causing bodily harm), (xi.1) section 270.01 (assaulting peace officer with weapon or causing bodily harm), (xi.2) section 270.02 (aggravated assault of peace officer), (xii) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), (xiii) section 273 (aggravated sexual assault),

(xxiv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), (xxv) section 273 (aggravated sexual assault), (xxvi) section 279 (kidnapping), (xxvii) section 279.1 (hostage taking), (xxviii) section 344 (robbery), (xxix) subsection 348(1) (breaking and entering with intent, committing offence or breaking out), (xxx) subsection 430(2) (mischief that causes actual danger to life), (xxxi) section 433 (arson - disregard for human life), and (xxxii) section 434.1 (arson - own property),	(xiv) section 279 (kidnapping), (xv) section 344 (robbery), and (xvi) section 346 (extortion), (a.1) an offence under any of the following provisions, namely, (i) section 75 (piratical acts), (i.01) section 76 (hijacking), (i.02) section 77 (endangering safety of aircraft or airport), (i.03) section 78.1 (seizing control of ship or fixed platform), (i.04) subsection 81(1) (using explosives), (i.05) section 83.18 (participation in activity of terrorist group), (i.06) section 83.19 (facilitating terrorist activity), (i.07) section 83.2 (commission of offence for terrorist group), (i.08) section 83.21 (instructing to carry out activity for terrorist group), (i.09) section 83.22 (instructing to carry out terrorist activity), (i.1) section 83.23 (harbouring or concealing), (i.11) section 151 (sexual interference), (ii) section 152 (invitation to sexual touching), (iii) section 153 (sexual exploitation), (iii.1) section 153.1 (sexual exploitation of person with disability), (iv) section 155 (incest), (iv.1) subsection 163.1(2) (making child pornography), (iv.2) subsection 163.1(3) (distribution, etc., of child pornography),

	(iv.3) subsection 163.1(4) (possession of child pornography), (iv.4) subsection 163.1(4.1) (accessing child pornography), (iv.5) section 172.1 (luring a child), (v) subsection 212(1) (procuring), (v.1) subsection 212(2) (procuring), (v.2) subsection 212(4) (offence – prostitution of person under eighteen), (vi) section 233 (infanticide), (vii) section 271 (sexual assault), (vii.1) section 279.01 (trafficking in persons), (viii) section 279.1 (hostage taking), (ix) paragraph 348(1)(*d*) (breaking and entering a dwelling-house), (x) section 423.1 (intimidation of a justice system participant or journalist), (xi) section 431 (attack on premises, residence or transport of internationally protected person), (xii) section 431.1 (attack on premises, accommodation or transport of United Nations or associated personnel), (xiii) subsection 431.2(2) (explosive or other lethal device), (xiv) section 467.11 (participation in activities of criminal organization), (xv) section 467.12 (commission of offence for criminal organization), and (xvi) section 467.13 (instructing commission of offence for criminal organization), (xvi.1) to (xx) [Repealed, 2005, c. 25, s. 1]
(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),	(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), (iii) section 148 (sexual intercourse with feeble-minded, etc.), (iv) section 149 (indecent assault on female), (v) section 156 (indecent assault on male), and (vi) section 157 (acts of gross indecency),

(c) an offence under the following provision 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, namely, paragraph 153(1)(a) (sexual intercourse with stepdaughter, 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, (c.1) an offence under any of the following provisions of the *Security of Information Act*, namely, (i) section 6 (approaching, entering, etc., a prohibited place), (ii) subsection 20(1) (threats or violence), and (iii) subsection 21(1) (harbouring or concealing), and
(d) 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.), 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*);
(e) an attempt to commit an offence referred to in any of paragraphs (a) to (d);	
	"**secondary designated offence**" means an offence, other than a primary designated offence, that is
	(a) an offence under this Act that may be prosecuted by indictment – or, for section 487.051 to apply, is prosecuted by indictment – for which the maximum punishment is imprisonment for five years or more, (b) an offence under any of the following provisions of the *Controlled Drugs and*

	Substances Act that may be prosecuted by indictment – or, for section 487.051 to apply, is prosecuted by indictment – for which the maximum punishment is imprisonment for five years or more: (i) section 5 (trafficking in substance and possession for purpose of trafficking), (ii) section 6 (importing and exporting), and (iii) section 7 (production of substance), (c) an offence under any of the following provisions of this Act: (i) section 145 (escape and being at large without excuse), (i.1) section 146 (permitting or assisting escape), (i.2) section 147 (rescue or permitting escape), (i.3) section 148 (assisting prisoner of war to escape), (i.4) subsection 160(3) (bestiality in presence of or by child), (ii) section 170 (parent or guardian procuring sexual activity), (iii) section 173 (indecent acts), (iv) section 252 (failure to stop at scene of accident), (v) section 264 (criminal harassment), (vi) section 264.1 (uttering threats), (vii) section 266 (assault), (viii) section 270 (assaulting a peace officer), (ix) paragraph 348(1)(*e*) (breaking and entering a place other than a dwelling-house), (x) section 349 (being unlawfully in dwelling-house), and (xi) section 423 (intimidation), (d) an offence under any of the following provisions of the *Criminal Code*, as they read from time to time before July 1, 1990: (i) section 433 (arson), and (ii) section 434 (setting fire to other substance), and (e) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit (i) an offence referred to in paragraph (*a*)

	or (*b*) – which, for section 487.051 to apply, is prosecuted by indictment, or (ii) an offence referred to in paragraph (*c*) or (*d*).

APPENDIX 2 – RECOMMENDATIONS

RECOMMENDATION 1:	That the *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted in Canada of a designated offence as defined in section 487.04 of the *Criminal Code.*	p.35
RECOMMENDATION 2:	That the *Criminal Code* be amended to allow for collection of a DNA sample from an adult convicted of a designated offence in Canada who has not previously been the subject of a post-conviction collection order, but who is still serving a sentence for a designated offence at the time that the *Criminal Code* amendment outlined in Recommendation 1 comes into force.	p.36
RECOMMENDATION 3:	That the *Criminal Code* be amended to allow for the collection of a DNA sample from an adult who is a Canadian citizen, or who ordinarily resides in Canada, if he or she is convicted outside of Canada of an offence that, if committed in Canada, would constitute a designated offence, provided that the conviction occurs at any time after the *Criminal Code* amendment outlined in Recommendation 1 comes into force.	p.36
RECOMMENDATION 4:	That the *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any young offender convicted in Canada of a designated offence as defined in part (*a*) of the definition of "primary designated offence" found at section 487.04 of the *Criminal Code.*	p.44
RECOMMENDATION 5:	In the case of young offenders convicted of primary and secondary designated offences for which a DNA collection order upon conviction is not mandatory, that the *Criminal Code* be amended to require courts, before issuing a DNA collection order against a young offender convicted of such offences, to determine whether the impact of the collection order on the young offender's privacy and security of the person would be grossly disproportionate to the public	p.44

	interest in the protection of society and the proper administration of justice.	
RECOMMENDATION 6:	That the National DNA Data Bank publish statistics in its annual reports on the number of DNA samples and profiles, for both adult and young offenders, stored at the National DNA Data Bank, along with reasons for their retention.	p.48
RECOMMENDATION 7:	That the National DNA Data Bank work cooperatively with law enforcement organizations to collect statistics describing the specific nature of the assistance it provides in police investigations through matches to the convicted offenders index (COI), and that the National DNA Data Bank publish these data, including data on exoneration, in its annual reports to Parliament.	p.50
RECOMMENDATION 8:	That the *DNA Identification Act* be amended to clarify that, in circumstances where there has been a final determination of an accused offender's successful appeal of his or her conviction for a designated offence, no other further opportunities of appeal are available to the Crown or to the accused offender, and the accused offender has no other convictions for designated offences on his or her criminal record, the offender's information should be immediately removed from the convicted offenders index (COI) after the expiry of all appeal periods, and the DNA samples taken from the offender and stored at the National DNA Data Bank should be immediately destroyed.	p.51
RECOMMENDATION 9	That the National DNA Data Bank Advisory Committee conduct a public consultation on the issue of whether or not the loci used by the National DNA Data Bank to create a DNA profile can or should be used to reveal personal characteristics or medical information about individuals, in order to assist police in identifying offenders.	p.53
RECOMMENDATION 10	That the National DNA Data Bank Advisory Committee publish the results of its public consultation, along with a recommendation as to	p.53

	whether or not, in its view, the framework for DNA collection and analysis provided by the *DNA Identification Act* should, as a consequence, be adjusted, in order to preserve an appropriate balance between the objectives of protecting society and the administration of justice and protecting the privacy of individuals, as outlined in section 4 of the Act.	
RECOMMENDATION 11	That section 3 of the *DNA Identification Act* be amended to state that the purpose of this Act is to establish a national DNA data bank to assist law enforcement agencies in identifying persons alleged to have committed designated offences, including those committed before the coming into force of this Act, as well as to assist in the exoneration of the innocent.	p.55
RECOMMENDATION 12	That the *DNA Identification Act* be amended to allow accused persons and their counsel to request and receive, from the National DNA Data Bank for criminal defence purposes, relevant information regarding analyses performed on DNA samples obtained from the accused person in connection with the designated offences with which they have been charged.	p.55
RECOMMENDATION 13	That the *DNA Identification Act* be amended to require the Commissioner of the Royal Canadian Mounted Police to provide offenders whose profiles are stored in the convicted offenders index (COI) with relevant information and the results of analyses that are performed on their bodily samples in accordance with section 10(2) of the Act.	p.56
RECOMMENDATION 14	That the *DNA Identification Act* be amended to specify that information stored at the National DNA Data Bank can only be shared with governments of foreign states, institutions of these governments, international organizations established by the governments of states, or institutions of these international organizations	p.61

	in accordance with the Mutual Legal Assistance Treaty (MLAT) in criminal matters signed between Canada and the foreign state or international organization in question, and/or in accordance with section 6(2) of the *DNA Identification Act,* presuming that it applies.	
RECOMMENDATION 15	That the *DNA Identification Act* be amended to specify that, in the event that there is no Mutual Legal Assistance Treaty (MLAT) in criminal matters in force between Canada and a government of a foreign state, institution of that government, international organization established by the government of states, or institution of that international organization, information can only be provided to the foreign state or international organization in question for the purpose of investigating an offence alleged to have been committed in a foreign jurisdiction, which, if it had been committed in Canada, would constitute an indictable offence under Canadian law, and/or in accordance with section 6(2) of the *DNA Identification Act,* presuming that it applies.	p.61
RECOMMENDATION 16	If the *Criminal Code* is amended to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted of a designated offence, as well as for the immediate and automatic collection of a DNA sample from young offenders convicted of certain designated offences, the Government of Canada should ensure that sufficient financial resources are made available to the National DNA Data Bank to enable it to process the increased number of samples sent to it so that profiles can be included in the convicted offenders index.	p.66
RECOMMENDATION 17	That the Governments of Canada, Quebec and Ontario should ensure that adequate and sustained funding be made available to the	p.71

	Quebec, Ontario and RCMP forensic labs to enable them to process the increased numbers of DNA samples sent to them as a result of the coming into force of Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act,* S.C. 2005, c. 25 and Bill C-18, *An Act to amend certain Acts in relation to DNA identification*, S.C. 2007, c. 22.	
RECOMMENDATION 18	That the Government of Canada consider negotiating multi-year Biology Casework Analysis Agreements (BCAAs) with Ontario and Quebec, in order to better enable their provincial forensic laboratories to engage in multi-year planning to meet their workload needs in relation to forensic DNA analysis pursuant to the *Criminal Code* and the *DNA Identification Act*.	p.71
RECOMMENDATION 19	That the Government of Canada explore the possibility of entering into public/private partnerships with qualified and reliable private forensic labs, which would allow such labs to conduct DNA forensic analysis for police agencies and upload DNA samples and profiles to the crime scene index (CSI) at the National DNA Data Bank. However, appropriate terms and conditions, such as independent auditing mechanisms, recognized accreditation, confidentiality agreements, encryption technologies, arrangements ensuring government ownership of the DNA samples, and security clearances for employees, would have to be components of such partnerships.	p.74
RECOMMENDATION 20	That the Government of Canada reopen discussions, on an urgent basis, with the provinces and territories to further the goal of establishing a missing persons index and an unidentified human remains index at the National DNA Data Bank.	p.79
RECOMMENDATION 21	That until such time as a missing persons index and an unidentified human remains index are established at the National DNA Data Bank, the	p.79

	National DNA Data Bank publish, in its annual reports to Parliament, updates regarding what progress has been made, each year, towards the establishment of these indices at the National DNA Data Bank.	
RECOMMENDATION 22	That, immediately following the establishment of a missing persons index and an unidentified human remains index at the National DNA Data Bank, the Government of Canada consider the feasibility of a victims index and undertake discussions with the provinces and territories to explore the possibility of establishing such an index at the National DNA Data Bank.	p.79

APPENDIX 3 - WITNESS LIST

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
40th Parliament 2nd Session			
Royal Canadian Mounted Police	Fourney, Ronald M	2009-03-25, 26	4
Department of Justice Canada	Yost, Greg	2009-03-26	4
Royal Canadian Mounted Police	Derksen, Jennifer	2009-03-26	4
Department of Justice Canada	Bird, David	2009-03-26	4
National DNA Data Bank Advisory Committee	Cory, Peter	2009-04-02	5
National DNA Data Bank Advisory Committee	Bergman, Richard A	2009-04-02	5
Office of the Auditor General of Canada	McRoberts, Hugh	2009-04-22	6
Office of the Auditor General of Canada	Fraser, Sheila	2009-04-22	6
Office of the Auditor General of Canada	Stock, Gordon	2009-04-22	6
Office of the Privacy Commissioner of Canada	Bernier, Chantal	2009-04-22	6
Office of the Privacy Commissioner of Canada	Baggaley, Carman	2009-04-22	6

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
Canadian College of Medical Geneticists	Somerville, Martin	2009-05-06	7
Canadian Association of Elizabeth Fry Societies	Pate, Kim	2009-05-06	7
The John Howard Society of Canada	Jones, Craig	2009-05-06	7
Canadian Resource Centre for Victims of Crime	Illingworth, Heidi	2009-05-07	7
Office of the Federal Ombudsman for Victims of Crime	Taché, Joanne	2009-05-07	7
Office of the Federal Ombudsman for Victims of Crime	Sullivan, Steve	2009-05-07	7
Ontario's Missing Adults	Dion, Lusia	2009-05-07	7
Victims of Violence (Canadian Centre for Missing Children)	Rosenfeldt, Sharon	2009-05-07	7
40th Parliament 3rd Session			
Royal Canadian Mounted Police	Fourney, Ronald M	2010-03-17	1
Royal Canadian Mounted Police	Henschel, Peter	2010-03-17	1
Laboratoire de sciences judiciaires et de médecine légale	Laberge, Frédérick	2010-03-18	1
Laboratoire de	Dufour, Bob	2010-03-18	1

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
sciences judiciaires et de médecine légale			
Ministry of Community Safety and Correctional Services	Newman, Jonathan	2010-03-18	1
Ministry of Community Safety and Correctional Services	Tessarolo, Anthony	2010-03-18	1
Warnex Pro-DNA Services Inc	Chahal, Amarjit	2010-03-24	2
Maxxam Analytics	Westecott, Martin	2010-03-24	2
Maxxam Analytics	Murray, Wayne	2010-03-24	2
Public Safety Canada	MacKillop, Barry	2010-03-25	2
Department of Justice Canada	Yost, Greg	2010-03-25	2
Criminal Lawyers' Association	Rondinelli, Vincenzo	2010-03-31	3