

Canada's DNA Databank: Public Safety and Private Costs

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I. INTRODUCTION

ON 30 JUNE 2000, THE *DNA IDENTIFICATION ACT*¹ ("DNAIA") came into force and ushered in a new era in criminal investigations. Henceforth, certain convictions will carry with them the requirement that the offender provide a sample of blood, hair, or saliva for the purposes of analysing his/her DNA profile. That information will be stored in a databank for comparison with substances left at a crime scene.

The accuracy of DNA sampling is such that if the collection and analysis of the two samples is done properly, a resulting match can virtually guarantee that the individual was the person who left the artifact at the crime scene. The correct identification of the perpetrator of a crime is of critical importance to the criminal justice system and, as a result, the forensic use of DNA is an important new tool for criminal investigations. Of equal importance to the justice system is the fact that DNA can exonerate suspects. This facet of DNA identification ensures that there are fewer wrongful convictions and also ensures that the police do not waste scarce resources investigating suspects who are not involved in the crime.

The DNA databank also has the potential to be a profound invasion of privacy. DNA, or deoxyribonucleic acid, has been described as the "building block of life."² It can tell a doctor whether a patient is at risk to develop a wide range

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¹ S.C. 1998, c. 37 [hereinafter *DNAIA*]. The DNA databank legislation encompasses not only the *DNA Identification Act*, but also amendments to the *Criminal Code*. References to the *DNAIA* will include references to the relevant sections of the *Criminal Code* unless otherwise stated.

² Canada, Solicitor-General of Canada, *Establishing a National DNA Data Bank* (Consultation Paper) (Ottawa: Ministry of Supply and Services, 1996) at 2 [hereinafter *DNA Data*].

of diseases, and it can establish familial relationships.³ In short, DNA can provide intensely private information about an individual. We have not yet determined the limits of the amount of information that DNA can provide. Although scientists have discovered that the relationship between genetics and disease is nowhere near as clear cut as originally thought, there still remains the possibility that genetics could provide clues to behaviour, intelligence, and other information about an individual.⁴

Thus, as important a tool as DNA is for criminal investigations, it is also a tool that carries with it a high price in terms of the potential to reveal private information. Although Canada now has a DNA databank, the issue still remains whether Canadians want to pay that price. Concerns have been expressed, notably by the Privacy Commissioner, that there is a risk that privacy rights will be infringed with the establishment of the databank and that the risks to privacy outweigh the benefits in terms of criminal investigations.⁵ The potential exists for both misuse and abuse.⁶ The right to keep private information private is at the heart of several *Charter* rights. Section 8 seeks to protect a reasonable expectation of privacy, and s. 7 protects an individual's right to security of the person. The legislation governing the DNA databank will not survive constitutional challenge unless privacy issues are appropriately addressed.

The DNAIA was created with one eye on the *Canadian Charter of Rights and Freedoms*,⁷ and the other on the various privacy concerns that were raised by those groups who were opposed to the databank. It has been so conservatively drafted that it barely fulfills its stated purpose—the assistance in the investigation and identification of perpetrators of serious criminal offences. This paper will examine what the privacy issues are with respect to DNA and will also outline how those privacy issues impact on the constitutionality of the DNA databank legislation. It will be suggested that the legislation will pass constitutional muster, but that the courts will have to be vigilant to ensure that the impor-

Bank (Consultation Paper)]. See also F.W. Drobner, "DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing" (2000) 28 Cap. U.L. Rev. 479 at 479.

³ E.T. Juengst, "I-DNA-fication, Personal Privacy, and Social Justice" (1999) 75 Chi-Kent L. Rev. 61 at 64, online: LEXIS (ALLREV).

⁴ *Ibid.* at 69.

⁵ Canada, Solicitor-General of Canada. *Establishing a National DNA Data Bank* (Summary of Consultations) (Ottawa: Ministry of Supply and Services, 1997) at v-vi [hereinafter *DNA Data Bank* (Summary of Consultations)]. See also Canada, Privacy Commissioner, *Genetic Testing and Privacy* (Ottawa: Ministry of Supply and Services, 1992).

⁶ See generally M.J. Markett, "Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks" (1996) 42 Case W. Res. L. Rev. 635, online: LEXIS (ALLREV).

⁷ Being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

tance of DNA as an investigative aid is never allowed to overtake Canadians' right to privacy.

A. History of the Forensic use of DNA

The development of the forensic use of DNA has revolutionised criminal litigation. Not since the introduction of fingerprinting as a tool for identifying the perpetrator of a crime, has science contributed so much to the field of criminal investigation and prosecution. DNA looks like a twisted ladder or double helix and contains 23 pairs of chromosomes, half of each pair having been inherited from one parent. Every individual human being has DNA that is unique to him or her, unless they are an identical twin. The only way to tell the difference between identical twins is by using fingerprints because, even though their DNA is identical, they have different fingerprints.⁸

DNA is found in all the cells of the human body.⁹ As such, when a bodily substance is left at the scene of a crime, it can be analysed for DNA and a profile extracted that can be matched against a substance taken from a suspect.¹⁰ A substance left at the scene of a crime is described as a DNA artifact. A person who supplies a bodily substance, whether it be blood, saliva, hair, or semen is a donor, and whatever substance s/he supplies for DNA analysis is a sample.¹¹ Once the DNA is analysed, the result is a DNA profile that can be compared to other DNA profiles. DNA analysis is useful because it is not necessary for the sample and the DNA artifact to be from the same source before it can be compared. For example, DNA from blood can be compared to DNA from semen, and DNA from hair can be compared to DNA from saliva.¹² Only a small sam-

⁸ Canada, Department of Justice, *Obtaining and Banking DNA Forensic Evidence* (Ottawa: Ministry of Supply and Services, 1994) at 2 [hereinafter *DNA Forensic Evidence*].

⁹ Y.H. Yee, "Criminal DNA Data Banks: Revolution for Law Enforcement or Threat to Individual Privacy?" (1995) 22 Am. J. Crim. L. 461 at 463.

¹⁰ The process by which DNA is analyzed is complex and not within the expertise of the author. The analyst will extract and focus on certain areas of DNA that are called "polymorphic" sections and that are highly variable. Effectively, what the forensic scientist will end up with is a chromatograph that resembles a colour version of the UPC code on products for sale. The scientist will compare the bar codes from a sample and an artifact to see if they came from the same donor.

¹¹ Different terms are used to describe the substance left at the crime scene, such as specimen, substance, or artifact. Also, different terms are used to describe the substance taken from the suspect. In order to avoid confusion over the origin of the substance, I have chosen the terminology set out above.

¹² *DNA Forensic Evidence*, *supra* note 8 at 3. See also V. Rondinelli, "Banking on DNA: Will Bill C-3 Usher in a New Era of Crime Fighting or Widen the Net of Social Control?" online: QL (PDNA) at para. 2.

ple is needed for comparison and although the age of the sample may affect the quality of the results, very old, even ancient, samples of DNA can be analysed.¹³

The uniqueness of DNA patterns, and the fact that comparisons can be made between DNA artifacts and samples so as to confirm or exonerate a suspect have led many commentators to equate DNA typing with fingerprinting. The term "DNA fingerprinting" has even been used to describe the process.¹⁴ Indeed, the similarity between the functions of the two processes has led many countries, including Canada, to establish DNA databanks. DNA databanks are used to compare DNA artifacts against the DNA profiles held in the databank, so as to speed up the identification of potential suspects.¹⁵

In 1985, in Britain, Alec Jeffreys discovered that certain sections of DNA varied sufficiently to be able to determine the individual from whom the samples had come.¹⁶ Most DNA in humans is common to all humans simply because it is the DNA of humans.¹⁷ However, in the sections that are highly individual, forensic scientists can match the profile of one sample to the profile of another to determine if the samples came from the same person. The more the profiles match, the more likely it is that the sample and the DNA artifact came from the same person. The Canadian DNA databank examines thirteen different loci (areas of DNA) to establish a match, although nine loci are considered sufficient to make a conclusive identification.¹⁸ If the profiles do not match, even at one section, then the scientist can absolutely exclude the donor as the person who supplied the DNA artifact.¹⁹ Significantly for some of the later

¹³ R.G. Federico, "The Genetic Witness: DNA Evidence and Canada's Criminal Law," online: QL (PDNA) at para. 4 and 6. This article notes that successful forensic testing has been done on samples that are five years old. DNA has also been extracted from samples as small as a single hair root and testing has been done on human samples that are 7,000 years old.

¹⁴ Yee, *supra* note 9 at 463.

¹⁵ One of the reasons cited for establishing Canada's DNA databank was the fact that it would shorten trials, encourage guilty pleas, and even possibly deter recidivism, all of which would ultimately lead to cost savings for the criminal justice system. See *DNA Databank* (Consultation Paper), *supra* note 2 at 2.

¹⁶ *DNA Forensic Evidence*, *supra* note 8 at 2. These sections of DNA are called "polymorphic" meaning that they differ from individual to individual. See also D. Bassan, "Criminal Investigations or Infringing on Charter Rights" (1996) 54 U.T. Fac. L. Rev. 246 at 250.

¹⁷ 99.9% of human DNA is the same in every human and only 0.1% differs among individuals.

¹⁸ Interview with Dr. R. Fourney, Officer in Charge, National DNA Databank (2 May 2000) [hereinafter Dr. Fourney].

¹⁹ *Ibid.*

analysis of privacy issues, a partial match can indicate that the sample and the DNA artifact came from persons who belong to the same family.²⁰

In 1987, two young girls living in Leicestershire, England were raped and murdered. The police had little evidence to go on except some DNA artifacts left at the scene. They decided to take samples from all the adult males living in the area, some 4,000 men, and compare their samples to the DNA artifacts. None of the samples that they took resulted in a match. However, Colin Pitchfork came to their attention when he asked a friend to take the test for him.²¹ When the police came to question Pitchfork about substituting someone else's DNA for his own, Pitchfork confessed to both murders.²² It was subsequently found that his DNA profile did match that of the DNA artifacts from the murders.

This case was followed shortly afterwards by the successful use of DNA evidence in both the United States and Canada. On a summer evening in 1989, in Ottawa, Paul Bourguignon Sr., bathed his two and half year old son, put him to bed, and left him in the care of his brother while he went over to his girlfriend's house for the night. The next morning, when Paul Sr. returned home, his son was missing. Paul Sr. and his brother went looking for the child. Several hours later, the child was found dead in a dumpster. An autopsy revealed that the child had been sexually assaulted and murdered. There was circumstantial evidence to link the child's uncle to the crime, but it was DNA evidence that would convict the uncle of the child's murder. It was the first time DNA evidence was admitted in a murder trial in a Canadian court.²³

Despite all the success that the forensic use of DNA has met, there are limitations on the usefulness of DNA. These limitations depend on several factors. Environmental conditions, particularly heat in combination with humidity, can affect the quality of the artifact.²⁴ Samples taken post-mortem are affected by the state of decomposition and the available sources for samples, with bone being the best source.²⁵ Other issues that can affect the successful use of DNA are the quality of the laboratory work, continuity, and contamination issues.²⁶

²⁰ M. Hibbert, "DNA Databanks: Law Enforcement's Greatest Surveillance Tool?" (1999) 34 *Wake Forest L. Rev.* 767 at 782-783.

²¹ Drobner, *supra* note 2 at 479.

²² *Ibid.*

²³ *R. v. Bourguignon* (1997), 118 C.C.C. (3d) 43, [1997] O.J. No. 3190, (Ont. C.A.), online: QL (CRIM).

²⁴ Federico, *supra* note 13 at para. 6-7.

²⁵ *Ibid.* at para. 8.

²⁶ Hibbert, *supra* note 20 at 798 and 802-804.

Many of the issues surrounding the quality of the laboratory work have already been addressed.²⁷ The processing of DNA samples has reached the point where quality controls are not only possible, but have been instituted.²⁸ The Canadian DNA databank has established numerous procedures to limit the possibility of errors. Each step in the process is isolated from the previous and following steps in order to reduce the possibility of contamination. Much of the process occurs using specialised machines and computers, so as to reduce the possibility of human error. Controls are built into the procedures that effectively signal any errors that occur during the processing. The RCMP laboratories use quality controls that meet international standards for use in DNA databanks, and their error rate is less than 1%. A match achieved through the databank cannot be used as evidence in a court.²⁹ Its only purpose is to assist in providing grounds for a DNA search warrant. This limitation means that any match from the databank must be confirmed through a fresh sample taken from the suspect. All of these procedures substantially reduce the possibility of a false match.

Even though there may be limitations on the usefulness of DNA evidence, many countries, including Canada, have rushed to establish databanks for storing and matching DNA. What, precisely, do they hope to achieve with these databanks?

B. The Establishment of DNA Databanks

At a minimum, the Canadian government hopes that a DNA databank will result in more effective crime investigation, with the concomitant effect that there will be fewer trials, shorter trials, more guilty pleas, and a greater certainty, particularly with respect to murder trials, that the right person has been convicted. Not to be forgotten in this analysis, is that all of these consequences also have the effect of saving the government money.³⁰

The DNA databank contains information coming from two different sources; the crime scene (the crime scene index) and from convicted offenders (the convicted offender index). The information in the crime scene index comes from DNA artifacts left at the crime scene by the perpetrator. The assumption is that the investigation of the crime has not yielded sufficient evidence to determine with any certainty who the perpetrator was. The expectation is that if a crime scene artifact matches a profile in the convicted offender

²⁷ See C. Scowby, "Private Costs of 'safer Communities': DNA Evidence and Data Banking in Canada" (1999) 5 Appeal 86 at 88.

²⁸ The information concerning the processing of DNA samples at the DNA databank was provided by F. Porelle, DNA Training and Collections Manager, and others during a tour of the databank on 30 May 2001.

²⁹ *Criminal Code*, *infra* note 37 at s. 487.08(2.1).

³⁰ *DNA Data Bank* (Consultation Paper), *supra* note 2 at 2.

index, then the police would have a solid investigative lead toward solving a heretofore unsolved crime.³¹ As a result, the identification of perpetrators and solving crimes are the key purposes of the DNA databank.

One of the most well known forensic uses for DNA, and a use that the government hopes the databank will also fulfill, is the exoneration of convicted offenders or suspects. In Canada, DNA has served to exonerate David Milgaard,³² and Guy Paul Morin,³³ among others. In the United States, DNA evidence has exonerated over 50 convicted offenders.³⁴ If DNA evidence can exonerate convicted offenders, it can also ensure that suspects are never brought to trial. DNA can absolutely eliminate suspects as being the person who left an artifact at the scene of a crime.³⁵

The potential of DNA evidence to convict should not, however, be exaggerated. Even the fact that a person has left an artifact at the scene of a crime does not automatically mean that that person is the perpetrator. Someone who is at the crime scene shortly before or after the commission of the crime might leave hair or other samples behind. In the context of a sexual assault, consent remains an issue even when the person who had relations with the victim is identified.³⁶

The Canadian DNA databank legislation is designed to work in conjunction with the DNA search warrant provisions of the *Criminal Code*.³⁷ The legislation sets out when and how a sample can be taken from a convicted offender. It also establishes who is required to provide a sample. Once a sample is taken, the DNAIA outlines what can be done with the sample and who can have access to the information.

³¹ *Ibid.* at 3.

³² "Milgaard Cleared by DNA, will get Compensation Offer," online: Canadian News Digest (Friday, 18 July 1997) <http://www.canoe.ca/NewsArchiveJuly97/candigest_jul18.html> (date accessed: 16 February 2001).

³³ "Police chief apologizes to Morin," online: World News Digest (Thursday, 31 July 1997) <http://www.canoe.ca/NewsArchiveJuly97/world_digest_jul31.html> (date accessed: 16 February 2001).

³⁴ Hibbert, *supra* note 20 at 803, footnote 164.

³⁵ Yee, *supra* note 9 at 465.

³⁶ *DNA Data Bank* (Summary of Consultations), *supra* note 5 at 6. It was for precisely this reason that a number of women's groups opposed the establishment of the DNA databank since they felt that it would not prove useful to women and might in fact make convictions in sexual assault cases more difficult to obtain where there was no DNA evidence. See also J.C. Hoeffel, "The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant" (1990) 42 *Stan. L. Rev.* 465.

³⁷ *Criminal Code*, R.S.C. 1985, c. C-41 [hereinafter *Criminal Code*].

Section 487.051 of the *Criminal Code* requires a court order before a sample can be taken from an offender. It provides that an order *must* be made where the offender is convicted of a primary designated offence and that an order *may* be made if the offender is convicted of a secondary designated offence. Even where the court must order that a sample be taken, it can decline to make the order if the offender shows that the taking of the sample would impact on his right to privacy or security in a way that would be grossly disproportionate to the public interest in protecting society. Where a secondary designated offence is involved, the court is required to look at a variety of factors relevant to both the offender and the public interest.

In establishing that only certain offences are covered by the legislation, Parliament has acknowledged implicitly that taking a bodily substance is an intrusive process and should be done only when it is necessary. The primary designated category of offences includes sexual offences, murder, manslaughter, kidnapping, and the more serious assault offences. The secondary designated list of offences includes less serious sexual offences and less serious assault offences, the more serious criminal negligence, dangerous driving, and impaired driving offences, robbery, break and enter, and some arson offences.³⁸ The primary category contains only serious offences that generally involve violence and which pose a substantial risk to public safety. These are also offences where one would expect DNA artifacts to be left at the scene or taken from the scene.³⁹ In *R. v. F.(S.)*,⁴⁰ the constitutionality of the DNA search warrant legislation was challenged. Justice Hill noted with respect to the list of included offences,

The importance of the DNA warrant is reflected by the nature of the designated offences in respect of which the warrant may issue. These are serious, indictable offences mostly involving violence against the person and serious risk to public safety. Experience has shown that identity is frequently a central issue in these prosecutions. The legislative restraint inherent in circumscribing the type of criminal investigations in respect of which a DNA warrant may issue underlines both the pressing justification and a minimization of the use of this investigative device. This form of legislative restriction to serious offences has, on other occasions, proven to be a significant factor in the balancing process.⁴¹

³⁸ *Ibid.* at s. 487.04.

³⁹ In assessing the reasonableness of the choice of sexual offenders and murderers for inclusion in a DNA databank, the United States Court of Appeals in *Rise v. Oregon*, 59 F. 3d 1556, 1995 U.S. App. LEXIS 17265, (9th Cir. 1995) noted that there was a high rate of recidivism among these types of offenders and that they were also more likely to leave evidence of a type from which DNA information could be derived.

⁴⁰ (1997), 120 C.C.C.(3d) 260, [1997] O.J. No. 4116, (Ont. Ct. G.D.), online: QL (CRIM) [hereinafter *F.(S.)*].

⁴¹ *Ibid.* at 283. Hill, J.'s decision was overturned in part by the Court of Appeal, but upheld in the main. See *R. v. S.F.* (2000), 141 C.C.C.(3d) 225, [2000] O.J. No. 60 at para. 17, online: QL (ORP) [hereinafter *S.F.*].

The legislative requirement to go through a balancing procedure with respect to both categories of offences ensures that privacy rights are always weighed against the state's need to obtain bodily samples for investigative purposes.

The police can submit samples to the databank for inclusion in the crime scene index so long as they know or believe that the samples contain DNA of the perpetrator. The crime scene index only contains samples which are believed to be those of perpetrators. It does not contain samples from victims.⁴² A search is run automatically whenever a sample is provided for inclusion in the convicted offenders index or the crime scene index. Any person whose DNA is stored in the databank will have a criminal record that is kept on the police computer system known as CPIC (Canadian Police Information Centre), and their record is flagged to indicate that the offender has DNA on file at the databank.⁴³ Thus if the police have a suspect whose DNA is on file and they submit artifacts from the crime scene to the databank, they will be advised if there is a match. If they do not receive information concerning a match, then they know that the artifact that they provided did not contain DNA from their suspect. The police can also request a DNA search warrant in any situation where they have reason to believe that a particular individual may be the perpetrator.

The DNAIA sets out a number of safeguards for protecting the privacy of persons who are ordered to provide samples for the DNA databank. The information can only be used by law enforcement agencies approved by the Commissioner of the RCMP.⁴⁴ Although the profiles and samples are kept indefinitely, there are provisions for expungement of the profile and destruction of the sample in the event that the offender is eventually acquitted of the offence.⁴⁵ At the databank, the samples are identified by a bar code only. The RCMP has a separate department that tracks the origin of artifacts, and profiles by case number or fingerprints. In the event of a match, the relevant bar codes are provided by the databank to the RCMP identification unit and they, in turn, provide case numbers or names to the appropriate police departments.⁴⁶

If there is a match at the databank, then it is expected that this information will be used to obtain a DNA search warrant pursuant to s. 487.05 of the *Criminal Code*. The only consideration that the judge must take into account before ordering the collection of a sample, apart from technical matters, is the nature and circumstances of the offence. This requirement is vaguely drafted, but would probably include the seriousness of the offence, who the victim was,

⁴² Dr. Fourney, *supra* note 18.

⁴³ *Ibid.*

⁴⁴ DNAIA, *supra* note 1 at s. 6(1).

⁴⁵ *Ibid.* at ss. 8.1, 9, and 10. Sections 9.1 and 10.1 provide similar protections for young offenders. Section 11 makes it an offence to contravene the above-noted sections.

⁴⁶ Dr. Fourney, *supra* note 18.

the manner in which the offence was carried out, and perhaps public reaction to the offence. The more serious any of these circumstances are, the more likely it would be that privacy considerations would give way to the public interest in solving the crime. A match from the DNA databank would be a highly persuasive piece of information for the court to consider in determining whether a warrant should be given.

Section 487.05 reflects the standard requirements of a search warrant as laid out in *Hunter v. Southam*,⁴⁷ but adds some new requirements. DNA warrants can only be obtained from a provincial court judge (instead of a justice of the peace) and only for certain offences. A warrant can only issue if there are reasonable grounds to believe that the collection of a sample will afford evidence *and* the judge has determined that it is in the best interests of the administration of justice to order a warrant. These requirements are more onerous than those which apply to standard search warrants.

The Canadian legislation provides that the DNA profiles and samples can only be used for law enforcement purposes and safeguards have been placed on access to and use of both profiles and samples.⁴⁸ Only "authorised users" can request information on whether a person's DNA profile is contained in the convicted person's index.⁴⁹ Once a sample has been taken after conviction, either it and/or the DNA profile taken from it will be sent to the databank and immediately compared with other profiles in the databank to see if there is a match. If there is, that information will be sent to "any law enforcement agency or laboratory" that the Commissioner of the RCMP considers appropriate. This information may be used for the "purpose of the investigation or prosecution of a criminal offence".⁵⁰ Access to the information contained in the databank may be granted to laboratories for training purposes.⁵¹ The information can only be used for the purposes of the "administration of this act."

Perhaps the most critical issue concerning the use of DNA in the forensic context is the potential for misuse of material that has the ability to reveal an individual's physical secrets; secrets that may be hidden even from the individual him/herself. With the advent of DNA databanks, the potential impact on individual privacy becomes acute. The privacy issues encompass a number of different aspects. Who is required to provide samples? When are they required to provide samples? What information is stored in the databank? Who has access to the information that is stored? What use can be made of the informa-

⁴⁷ [1984] 2 S.C.R. 145, 14 C.C.C.(3d) 97, online: QL (CRIM) [hereinafter *Hunter*].

⁴⁸ *DNAIA*, *supra* note 1 at s. 4.

⁴⁹ *Ibid.* at s. 6(2).

⁵⁰ *Ibid.* at s. 6(1).

⁵¹ *Ibid.* at s. 7.

tion? Why do we need this information, and is its storage really necessary? Any constitutional examination of the DNA legislation will have to address these questions.

II. PRIVACY ISSUES

IN ALL COUNTRIES WHERE DNA DATABANKS HAVE BEEN established, concern has been expressed over the amount of private information DNA contains. DNA databanks, particularly the one in Canada, contain a host of privacy protections. However, in the United States, Britain, and even in Canada, proposals have been made to take DNA samples from all persons who are arrested, and even from all citizens in the name of public safety.⁵² What right do individuals have to privacy in their genetic information? At what point does public safety become an intolerable intrusion in the personal lives of citizens? These are the questions posed by critics of DNA databanks. In order to understand the privacy issues, it is useful to know what the courts have determined a privacy right to be.

A. What is a Privacy Right?

The Supreme Court of Canada has defined what is meant by a right to privacy. In *R. v. Dymen*,⁵³ the Court stated,

Those who have reflected on the matter [of what a privacy interest is] have spoken of zones or realms of privacy. [A government report]⁵⁴ classifies these claims to privacy as those involving territorial or spatial aspects, those related to the person, and those that arise in the information context. ... As noted previously, territorial claims were originally legally and conceptually tied to property, which meant that legal claims to privacy in this sense were largely confined to the home.⁵⁵

⁵² In New York City, the police commissioner proposed that DNA samples be taken from all arrestees and the mayor of New York proposed taking samples from all newborns. See Hibbert, *supra* note 20 at 816. U.S. Attorney-General Janet Reno asked the Commission on the Future of DNA Evidence to look into the constitutionality of taking samples from all arrestees. See M. Higgins, "Acid Test" (1999) 85 A.B.A. J. 64 at 65. See also, "Recommendation of the National Commission on the Future of DNA Evidence to the Attorney General Regarding Arrestee DNA Sample Collection" (1999), online: Commission on the Future of DNA Evidence <<http://www.ojp.usdoj.gov>>. In Canada, various police associations and some provinces suggested that samples be taken at the time of charge. Ultimately, this idea was rejected because of possible conflict with the *Canadian Charter of Rights and Freedoms*. See *DNA Data Bank* (Summary of Consultations), *supra* note 5 at 7.

⁵³ [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82, online: QL (CRIM) [hereinafter *Dymen*].

⁵⁴ Canada, *The Report of the Task force established by the Department of Communications/Department of Justice: Privacy and Computers* (Ottawa: Information Canada, 1972).

⁵⁵ *Dymen*, *supra* note 53 at para. 19–20.

The Court goes on to note that it has already ruled that any invasion of the bodily integrity of a person is a violation of the sanctity of the body and a serious affront to human dignity. The Court then says,

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. ... In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.⁵⁶

The privacy concern with respect to DNA is two-fold. There is the violation of privacy involved in the taking of the sample and there is the violation of informational privacy. In the United States, only the second of these two concerns is seen to be a serious one. As one author has noted,

... the central concern with the mandatory iDNAfication does not seem to be the violation of a person's bodily integrity. Compared with the other infringements of personal freedom that legitimately accompany legal arrest, providing a saliva or cheek swab sample seems negligibly invasive. ... [I]t is not the exploitation or misappropriation of the person's body for others' gain that is centrally troubling either. Manual fingerprints and photographs also exploit suspects' bodies in order to incriminate them without raising special privacy concerns.

...

Rather, the important feature of iDNAfication is what the DNA analyzed can disclose about the person being identified. It is, in other words, individuals' "informational privacy" that is at stake in the prospect of widespread iDNAfication, and it is in those terms that the policy challenge of iDNAfication should be framed. What should society be allowed to learn about its citizens in the course of attempting to identify them?⁵⁷

In Canada, however, the debate is more complex. The first concern, that of the violation of privacy caused by the taking of a sample, is an issue in Canada because our courts have made it very clear that the violation of personal integrity involved in the taking of the sample is very serious. In *R. v. Pohoretsky*,⁵⁸ the Supreme Court of Canada dealt with the issue of taking blood samples for law enforcement purposes and it stated that this was, "a violation of the sanctity of a person's body [that] is much more serious than that of his office or even of his home."⁵⁹ This theme has been picked up in subsequent cases and in the context of DNA samples the Supreme Court of Canada has stated,

⁵⁶ *Ibid.* at para. 22.

⁵⁷ Juengst, *supra* note 3 at 63.

⁵⁸ [1987] 1 S.C.R. 945, [1987] S.C.J. No. 26, online: QL (CRIM) [hereinafter *Pohoretsky*].

⁵⁹ *Ibid.* at para. 5.

The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 *Charter* right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant's privacy.⁶⁰

The privacy issue raised with respect to the violation of physical integrity will have particular importance with respect to the issue of the constitutionality of the legislation. The Court's attitude towards the taking of bodily samples emphasises the importance that privacy issues will have in the debate over the constitutionality of the DNA databank legislation. The taking of a bodily sample is considered to be a serious invasion of privacy. As a result, the objective of the legislation is going to have to be both pressing and important in order to overcome the courts' reluctance to sanction any form of bodily intrusion.

B. Informational Privacy

Informational privacy can be defined as the right to keep private any information relating to the individual. Information is broadly defined as any knowledge or data that can be stored or classified.⁶¹ The concerns surrounding informational privacy require the balancing of the right of society to be protected against crime and the right of the individuals within that society to prevent private information from being misused. The problem is where to draw that balance. The courts have long accepted the idea that a person who is a suspect in a criminal investigation loses some right to protect his/her privacy.⁶² Specifically, a suspect who has been arrested for an offence cannot expect to preserve a right to privacy in his/her identity. One's face, or voice, marks on one's body, and fingerprints can all be used legitimately as tools to connect him/her to the crime or to eliminate him/her as a suspect. There is little, if any, right to privacy in these aspects of an individual's body.⁶³ DNA is an identification tool; if the amount of information revealed by DNA was no more than the amount of information conveyed by fingerprints or a photograph, society would probably have little difficulty accepting DNA databanks.⁶⁴

However, unlike fingerprints or a photograph, DNA can reveal a great deal more about a person. The samples taken from donors contain a full range of ge-

⁶⁰ *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321 at para. 51, online: QL (SCJ) [hereinafter *Stillman*]

⁶¹ *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) s.v. "information."

⁶² *Stillman*, *supra* note 60 at para. 61.

⁶³ *R. v. Beare*, *R. v. Higgins*, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57 at 78, online: QL (SCJ) [hereinafter *Beare*].

⁶⁴ *Juengst*, *supra* note 3 at 63.

netic information. These samples can be tested for AIDS, substance abuse, infections, familial relationships, race, and genetic predispositions to certain diseases.⁶⁵ The study of DNA is still too new to be sure exactly how much information might ultimately be revealed, but the spectre has been raised that it may even reveal information concerning predisposition to commit crimes.⁶⁶ The DNA databank keeps both the original samples and the profile. However, the DNA databank only uses the sections of DNA that are the polymorphic, non-coding sections of DNA often referred to as "junk" DNA. These sections are called "non-coding" because they apparently do not reveal any biologically significant information.⁶⁷ The scientists at the DNA databank use only non-coding material.⁶⁸ Given the fact that the only purpose of the profile is to establish identity, there is no need to look at other parts of the DNA.⁶⁹ Only the profiles are used for comparison purposes. The original samples can be accessed only if there has been an error in the processing or if technology changes and all samples must be re-processed.⁷⁰ These requirements reduce concerns about the misuse of databank information.

Once the analysis has been done, what is left is the bar code pattern on the chromatograph. The chromatograph contains only identification characteristics, and does not reveal any other sensitive information. It is this chromatograph that will be used for comparison purposes. The chromatograph, by itself, would meet the test of revealing very little more information than is revealed by fingerprints or a photograph. There is one exception. The chromatograph would still reveal sufficient information to allow a partial match to point to a member of the donor's family as being the person who left the artifact.⁷¹

The particular issues relating to informational privacy can be broken down into three categories; public policy issues, issues relating to the collection of information, and issues relating to the storage of information. Among the information that is readily available from DNA is information concerning race and family relationships. There are concerns about how such information could be used.

⁶⁵ A. De Gorgey, "The Advent of DNA Databanks: Implications for Information Privacy" (1990) 16 Am. J. L. & Med. 381 at 388.

⁶⁶ *Ibid.* at 389. See also Juengst, *supra* note 3 at 69.

⁶⁷ Juengst, *ibid.* at 65.

⁶⁸ Dr. Fourney, *supra* note 18. See also *DNA Forensic Evidence*, *supra* note 8 and *DNA Data Bank* (Consultation Paper), *supra* note 2.

⁶⁹ M.H. McKay, "Case commentary: Genetic Material and Section 8: The Other Side of Stillman" (1998) 8 W.R.L.S.I. 139 at 141.

⁷⁰ Dr. Fourney, *supra* note 18.

⁷¹ Juengst, *supra* note 3 at 79.

1. Privacy and public policy

Two separate issues arise under the heading of public policy. The first is the use of race in creating population statistics for establishing the probability that a given match is coincidental. The second issue concerns obtaining samples from family members when a partial match is found.

In order for a match to have any forensic significance, the court needs to know the likelihood that the match is coincidental. If one person in 100 could have that particular profile, then the fact of a match is less significant than if one person in 750 million could have that particular profile. The most common profile occurs once every 250 billion times. The total population of the world is 6.15 billion.⁷² The rarest profile occurs 7×10^{39} . This latter number is greater than the number of snowflakes that fell in Canada last winter.⁷³ A match could occur because the two donors are identical twins or a match could simply be a coincidence. Both these possibilities must be eliminated. Twins can be distinguished using fingerprints, and coincidence can be eliminated using population statistics.

The population database that is used for comparison purposes can be made up of the general population or it can be subdivided into racial groups. The objective in dividing the population database into racial subgroups is to provide a more conservative probability analysis. Racial subgroups share some common DNA and therefore there is a greater likelihood of a coincidental match. However, this division of the population database into racial subgroups raises policy concerns.

It is not of course the mere fact that race can be determined from a sample that is cause for concern because a photograph can reveal race. It is what is done with that information that becomes problematic.⁷⁴ In *I-DNA-fication, Personal Privacy, and Social Justice*, Dr. Juengst points out that,

... genetic studies tend to misdirect attention from the overwhelming social causes of the behaviors they purport to explain by encouraging a determinism that suggest that efforts at social reform are ultimately futile. Where this misdirection reinforces existing social policy inequities, it is likely to have an even more pronounced effect.⁷⁵

If samples are not grouped into racial sub-groups, then it can be argued that the statistical probability of a coincidental match becomes artificially inflated because people tend to mate within their racial categories and therefore certain

⁷² *World POPclock Projection*, online: U.S. Census Bureau <<http://www.census.gov/cgi-bin/ipc/popclockw>> (last modified: 5 October 2000, date accessed: 29 June 2001).

⁷³ Dr. Fourney, *supra* note 18.

⁷⁴ Juengst, *supra* note 3 at 70.

⁷⁵ *Ibid.*

genetic characteristics occur more frequently within races than among them.⁷⁶ However, when racial grouping is done, it tends to be along very traditional lines. In the United States for example, the categories chosen are Caucasians, African-Americans, and Hispanics.⁷⁷ Dr. Juengst argues that there is more cross-mating than might initially appear and that from a forensic perspective, the statistical differences between using a general population database and a racially distinct database are insignificant.⁷⁸ In the interests of social justice he suggests that,

... we should be careful to develop iDNAfication tools only in the context of background polymorphism frequency data that are not organized against socially defined racial categories. The price of this recommendation would be the loss of some degree of statistical resolution in assessing match significance; but it will be a loss across the racial board.⁷⁹

In Canada, the population statistics that are used are not broken down into any racial sub-groups. It was found that the statistical differences were simply not material.⁸⁰ A secondary concern with respect to racial information is the fact that identification with a particular race is largely social rather than genetic. The revelation that a person belongs genetically to a particular race when they believe themselves to belong to another could be psychologically devastating.⁸¹ Given the negative policy implications of sub-dividing population statistics along racial lines and given the fact that the greater accuracy that results from such a subdivision is minimal, Canada should not change its policy of using general population statistics. The benefits in terms of accuracy are far outweighed by the dangers inherent in making such ultimately artificial divisions.

There are many other circumstances in which the revelation of personal information contained in DNA could be devastating. Information concerning predispositions to certain genetic disorders could have a major impact on insur-

⁷⁶ *Ibid.* at 71.

⁷⁷ *Ibid.* at 73.

⁷⁸ *Ibid.* at 75.

⁷⁹ *Ibid.* at 73.

⁸⁰ Dr. Fourney, *supra* note 18. He uses the following analogy to describe the differences between using general population statistics and population statistics that are divided into sub-groups. An individual buys a house that sits on the San Andreas fault. He wants to put a substantial amount of money into renovations, but he is worried that the house will be swallowed up by the fault in the next earthquake. So, he consults an expert in earthquakes who tells him that there is one chance in 375 million that the house will be destroyed. Unsatisfied, he consults a second expert who uses a different method of calculation and who tells him that the chance of his house being destroyed is one in 750 million. There is a difference, but from the homeowner's perspective the chances in both scenarios are so remote as to be irrelevant.

⁸¹ Juengst, *supra* note 3 at 76.

ance and employment opportunities. This type of information goes well beyond that necessary for forensic purposes and from a privacy perspective ought not to be retained.⁸²

From a policy perspective, the ability to determine that a member of the donor's family may have supplied the DNA artifact can be troubling. It is impossible to know the precise degree of relationship in a partial match, although the closer the match, the more likely it is that a sibling is the donor of the artifact.⁸³ Absent any other indications of who the perpetrator might be, the police will want to test a number of family members. Should they be able to conduct testing on the basis of a partial match alone? The justification for DNA databanks is generally that the offenders who are targeted are the most likely to re-offend and that they have been convicted of offences where DNA artifacts are most likely to be involved. As noted by Michelle Hibbert in *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*,

The argument is that the state is free to reasonably intrude on their privacy interests by digitizing and releasing their genetic fingerprints because they have proven themselves to be offenders. However, this justification cannot be applied to the individual's previously non-databased sibling or other biological relative. They have not committed a crime that warrants this level of privacy intrusion, even if it can be viewed as falling under the rubric of "law enforcement" and, therefore, is permitted by state statutory law.⁸⁴

Although it may be legal and ethical to bank and search an offender's DNA, none of these justifications exist with respect to siblings or other relatives who are not part of the databank. Hibbert suggests that,

... where a law enforcement agency, either purposefully or incidentally, gathers information about a non-banked individual by comparing a DNA artifact to his or her sibling's profile digitized in the system, the state is intruding on the privacy of an individual who likely has not committed any act warranting this level of genomic intrusion.⁸⁵

Neither Canada's DNA databank legislation, nor the DNA warrant provisions preclude their use in collecting samples from the family members of a suspect in the event of a partial match. Canada's DNA databank is not set up to reveal partial matches that result from familial relationships, although it is possible that it will be able to do so in the near future.⁸⁶ This particular privacy issue has not been addressed in the Canadian context. Given the fact that the

⁸² *Ibid.* at 67.

⁸³ E.E. Wright, "DNA Evidence: Where We've Been, Where We Are, and Where We are Going" (1995) 10 Me. B.J. 206 at 207.

⁸⁴ Hibbert, *supra* note 20 at 784.

⁸⁵ *Ibid.* at 786.

⁸⁶ Dr. Fourney, *supra* note 18.

Canadian databank ultimately will be able to make partial matches based on familial relationships, it is important to determine the limits of privacy in this situation. While offenders are in the registry because they have committed a serious offence, their family members do not fall into the same category. The justification for the intrusion into the privacy of individuals who have committed serious crimes is that they are more likely to re-offend than persons who have not committed such crimes.⁸⁷ That justification does not extend to their family members. If the police have no more information than the fact that it is a member of the offender's family, they may have to take samples from a number of different members in order to determine who the perpetrator is. A warrant for a DNA sample should not be granted unless there is some further information that would tend to point to one particular family member. A partial match in and of itself, should not be sufficient to take samples from other family members. To do so would be an inappropriate invasion of privacy, and would amount to a fishing expedition. Given the serious nature of the affront to bodily integrity inherent in taking the sample, as well as the level of intrusion on informational privacy, the courts should be reluctant to grant a warrant without cogent evidence that there are reasonable and probable grounds for a warrant that exist apart from the partial DNA match.

2. Privacy in the collection of information

When and how samples are collected is also an aspect of privacy protection. Canada already has in place legislation that governs when samples can be collected from suspects. Both the DNA databank and the DNA warrant provisions define when and how samples can be taken.

The DNA warrant provisions permit samples to be taken from suspects where there are reasonable and probable grounds to believe that the suspect has committed a specific crime and there are factors that suggest that it is in the best interests of the administration of justice to collect the sample.⁸⁸ A sample can be taken from saliva, hair, or blood. A saliva sample is taken by rubbing a swab around the inside of the individual's mouth. Hair is plucked from the scalp, and blood is taken by using a lancet on a fingertip to produce a drop of blood.

As noted earlier, the DNA databank provides that samples can be taken from certain offenders after conviction and as part of the sentence. The methods used are the same as under the warrant provisions, and the offender can choose which method s/he prefers. All of these methods infringe bodily integrity and are subject to scrutiny under s. 7 of the *Charter*.

⁸⁷ Hibbert, *supra* note 20 at 783.

⁸⁸ *Criminal Code*, *supra* note 37 at s. 487.05.

The constitutionality of the DNA warrant legislation was challenged in the case of *R. v. F.(S.)*. Mr. Justice Hill examined the issues in detail, and on the subject of the methods used to take the samples, he had the following to say:

The DNA warrant regime restricts the state to specific methods of biological specimen collection and, as observed by La Forest J. in the context of fingerprinting legislation in *R. v. Beare*, *R. v. Higgins*, "Nor does the statute grant unlimited powers to use unrestricted methods to establish identity."

The authorities are limited by s. 487.06 of the Code to seizures by plucking of the hair including root sheath, the swabbing of specified sites in the mouth cavity or the taking of blood by pricking the skin surface with a sterile lancet. These restrictions, together with discretionary limitations imposed by the endorsement of conditions of execution in the warrant, served to strictly curtail the intrusion by government agents.

On the evidence, the seizure procedures are of short duration and involve no or minimal discomfort. There is neither inhumane nor abusive tactics. The legislation does not authorize state conduct which is brutal, humiliating or psychologically offensive. The seizure methodology leaves no lasting impression and does not risk the health of the subject. In short, there is a minimal intrusion with no unacceptable affront to human dignity.⁸⁹

There are procedural safeguards associated with the taking of samples, including advising the offender of the contents of the order and the purpose of taking the samples, the requirement that the privacy of the offender must be respected while the samples are taken, and the fact that the offender can choose the method of taking the samples.⁹⁰ These safeguards serve to ensure that although the taking of samples involves a breach of bodily integrity, that this process accords with the principles of fundamental justice.

If DNA databank information may reveal more than a photograph or a fingerprint, the only way in which to safeguard privacy interests is in controlling what information is stored and what use can be made of the information.

3. Privacy in the storage of information

Can we ensure that access to this information is sufficiently limited such that, even if larger amounts of information are revealed, that they cannot be used for improper purposes? In the context of the storage of DNA information, there are two issues that are important. The first concerns the potential misuse of stored information and the second concerns the amount of information that is stored in a DNA databank.

⁸⁹ *F.(S.)*, *supra* note 40 at 291–292.

⁹⁰ *Criminal Code*, *supra* note 37 at s. 487.07.

i. The potential misuse of information

Despite legislative efforts to prevent misuse of the DNA information stored in a databank, some authors have pointed out that in the United States, the courts' record with respect to ensuring the confidentiality of information in the possession of public institutions is not comforting.⁹¹ The impact of this trend on DNA databank information could be the following,

With the advent of DNA databanks, promotion of the government's interest in bureaucratic efficiency likewise could be used to justify the disclosure of an individual's genetic defects to other interested government agencies. Of course, some beneficial aspects of an increased awareness of a person's health status exist. If the results of DNA profiling were to leak out beyond the bounds of criminal investigation, one can imagine many benign uses to which such information might be put. For example, social agencies could be alerted to help rather than harm AIDS carriers or drug abusers, and insurance companies could cut rates across the board if certain high risk persons could be spotted sooner.⁹²

Of course, one can also imagine the many less than benign uses to which DNA profiles could be put. Canadian governments have also not always shown a profound respect for individual privacy. Social Insurance Numbers, which were instituted over the protests of many people concerned with privacy, were to be used only for the purpose of monitoring retirement benefits. They are now used routinely on many documents, some of which have no relationship with any government. It has been noted that,

With the increase in use of SINs, security breaches have proliferated in recent years. Parliament appears to have acknowledged the problem and a private member's bill has recently been introduced in the House of Commons dealing with the restriction of the use of SINs.⁹³

Recently the government of Ontario proposed that welfare recipients be tested for drug abuse and those who were found to be drug abusers would have to attend programs as a condition of receiving their benefits.⁹⁴ Clearly, the govern-

⁹¹ De Gorgey, *supra* note 65 at 393–396 noting that the U.S. Supreme Court in *United States v. Miller*, 425 U.S. 435 (1976), 1976 U.S. LEXIS 148 found that there was no privacy interest in bank records. In *Whalen v. Roe*, 429 U.S. 589 (1977), 1977 U.S. LEXIS 42, online: LEXIS (MEGA), the court found that the state may keep files on all persons using prescription drugs.

⁹² De Gorgey, *ibid.* at 396. In fairness to the author, this quote is taken somewhat out of context and it should be read as a tongue in cheek scenario of the “benefits” of releasing DNA information to other agencies.

⁹³ Rondinelli, *supra* note 12 at para. 124.

⁹⁴ “Welfare Recipients Told: Stop ‘Injecting’ Your Cheques” *Ottawa Citizen Online* (15 November 2000), online: Ottawa Citizen <<http://www.ottawacitizen.com/national/001115/4872948.html>> (date accessed: 12 February 2001).

ment did not view this legislative proposal as involving any breach of privacy rights. It was not until the government's privacy commissioner pointed out the problems associated with this legislative initiative that changes were made.⁹⁵

Some of the concerns with potential misuse of stored information are reduced by limiting the use to which the information can be put. In the United States, there are a wide variety of provisions concerning the use that can be made of information in their databanks. Some states' legislation permits research facilities to access the samples for the purpose of establishing population statistics information.⁹⁶ Other legislation permits access to the DNA information for the purposes of paternity suits.⁹⁷ It has been suggested by some elected officials in the United States that DNA databank information should be accessible to identify "deadbeat dads."⁹⁸ Other states restrict the use of the information to criminal proceedings, although even those proceedings would encompass more than what in Canada would be considered a *Criminal Code* offence.⁹⁹

It has been suggested that the potential for the misuse of DNA databank information is sufficiently serious that databanks should be prohibited.¹⁰⁰ The fear that the Canadian DNA databank will be extended to include non-criminals or that the information contained in the databank will be released to potential employers, insurance companies or others is misplaced. The legislation strictly limits access to the profiles and profiles are stored using bar codes and fingerprints.¹⁰¹ The identity of a profile cannot be discovered without accessing the fingerprint information that is stored with a different department of the RCMP. This separation of the profile and the identification information does not make it impossible to determine the identity of a profile, but it does make it difficult for the information to be accidentally or deliberately given out to an unauthorised user.¹⁰²

The use of DNA databanks for criminal investigations and the concerns about the use of DNA profiles for other non-criminal investigatory purposes are

⁹⁵ "Welfare Recipients Face Testing" *Ottawa Citizen Online* (4 May 2001) online: Ottawa Citizen <<http://www.ottawacitizen.com/national/010504/5013930.html>> (date accessed: 15 May 2001).

⁹⁶ Hibbert, *supra* note 20 at 821.

⁹⁷ Ohio, New Jersey, and Maryland all permit access to the information for the purposes of a "judicial hearing" which would include a paternity suit, so long as there is a court order. North Dakota also permits access to the information for the establishment of parentage, but does not require a court order. See *ibid.* at 788.

⁹⁸ New York mayor Rudolph Giuliani made this suggestion in 1998. See Hibbert, *ibid.* at 789.

⁹⁹ *Ibid.*

¹⁰⁰ Scowby, *supra* note 27 at 92.

¹⁰¹ Dr. Fourney, *supra* note 18.

¹⁰² *Ibid.*

two separate issues. Unquestionably, it would be a serious breach of privacy to permit access to the databank by non-authorised users for non-criminal purposes. However, that concern should not lead to the conclusion that DNA databanks should therefore be prohibited. The Canadian DNA databank contains strict limitations on the use that can be made of the profiles. These profiles cannot be accessed by employers, insurance companies or other non-criminal investigation purposes. It would require an amendment of the legislation before such access could occur and it is at that point that arguments concerning the breach of privacy should be raised.

The Canadian DNA databank substantially limits the use to which the information contained within it can be put. The information can only be used to assist in obtaining a DNA warrant and a warrant can only be obtained for certain designated offences as set out in the *Criminal Code*. The only people who will receive information concerning a match are law enforcement agencies. The Canadian DNA databank is therefore one of the most conservative in existence.

However, the fact that a match from the databank cannot be used as evidence is problematic. Asking a suspect to provide yet another sample of his DNA when a match has already been made is unnecessary. It does not appear that any consideration has been given to the fact that taking a second sample is an invasion of bodily integrity and therefore potentially a breach of s. 7 of the *Charter of Rights*.

ii. The amount of information stored

One of the main concerns raised by critics of DNA databanks is the fact that virtually all databanks keep both the original sample and the profile obtained from the sample. Most databanks in the United States keep their samples indefinitely. The Canadian databank also keeps its samples indefinitely. The argument for keeping the samples is that as technology is improved, samples can be re-tested without the necessity of going back to the donors and seeking new samples. If the manner in which the data is stored is changed, a lack of samples would once again require obtaining new samples or running two parallel systems, which would be inefficient. On the other side of the debate, commentators point out that the problem with retaining the samples is that all the personal genetic information is readily available. There are substantial storage costs associated with maintaining the samples and there is a substantially reduced protection of privacy.¹⁰³

Even if the sample is destroyed once a profile is taken, there still may be concerns with respect to privacy. There are concerns that what is considered

¹⁰³ *DNA Data Bank (Consultation Paper)*, *supra* note 2 at 8.

"junk" DNA today may reveal substantially more information about a person tomorrow.¹⁰⁴

The Canadian DNA databank legislation attempts to deal with many of the concerns associated with privacy. The uses to which information can be put have been limited. The list of people who have access to the information has been limited, and there are provisions for the expungement of information in the event that the offender is subsequently acquitted, or, in the case of a young offender, the offender reaches 18 years of age.¹⁰⁵ A balance had to be struck between the need to protect the public from crime and the need to protect individual privacy. The DNAIA attempts to do that. However, in an effort to increase privacy safeguards, the efficiency of Canada's DNA databank as an investigatory tool is substantially reduced.

The DNAIA is designed to work in conjunction with the DNA search warrant legislation. The standards that apply to the warrant scheme are different from those that apply to the DNAIA. The DNA warrant legislation requires the approval of a provincial court judge and the standard to be applied is not only that there be reasonable and probable grounds, but also that the judge consider the nature and circumstances of the offence. There is a substantial amount of caselaw that defines what kind of evidence constitutes reasonable and probable grounds. It must be more than suspicion, but does not have to amount to a *prima facie* case.¹⁰⁶

There is little caselaw setting out how a judge is to consider the nature and circumstances of the offence. Requiring the judge to take into consideration the nature of the offence would seem to suggest that the offence must be a serious one, but DNA warrants are already limited to serious offences. It would also seem to require a determination of whether the offence was one where DNA artifacts could be left at the scene. However, if there were no evidence left at the scene that could be analysed for DNA, there would be no point in requesting the DNA warrant. Therefore, if the request is being made, it is because there are DNA artifacts.

Asking the judge to consider the circumstances of the offence suggests that the judge has to look at the facts of the case. To what end? The only logical conclusion is that the judge must decide whether this is a particularly serious example of the given offence. However, given that Parliament has already defined the offence as a serious one by including it in the restricted list of offences for which a DNA warrant is available, it does not seem appropriate that the judge has to split hairs further and decide whether this is a *really* serious offence. The only other "circumstances" that might be relevant are whether the case has

¹⁰⁴ Higgins, *supra* note 52 at 65.

¹⁰⁵ DNAIA, *supra* note 1 at ss. 8.1, 9(2), 9.1, 10(7), and 10.1.

¹⁰⁶ R. v. Simmons, [1988] S.C.J. No. 86, 45 C.C.C.(3d) 296 at 316–317 [hereinafter Simmons].

received a lot of publicity, whether the police are under pressure to make an arrest, or the strength of the prosecution's case. The first two circumstances should not be matters that a judge consciously takes into account when deciding whether to grant a warrant. All cases are deserving of being fully investigated regardless of whether they receive media attention or not.

The strength of the prosecution's case is a circumstance that has already been taken into consideration when the judge looks into whether there are reasonable and probable grounds to believe that the seizure will afford evidence. The danger with taking this issue into consideration a second time is that the judge will interpret the phrase the "nature and circumstances" of the offence to mean that *more* than reasonable and probable grounds are necessary, and s/he will impose a higher burden of showing that the seizure will afford evidence. This approach could cripple the effectiveness of the DNA warrant scheme and impact negatively on the administration of justice. It is possible that the police could have circumstantial evidence that suggests a particular individual is responsible for a serious crime. However, although they have reasonable and probable grounds to believe that a seizure will afford evidence, they do not have a *prima facie* case, or even direct evidence linking their suspect to the crime. If the judge does not grant the warrant because s/he is imposing a higher standard than the norm, the police will not be able to analyse any DNA artifacts left at the scene. At trial, the suspect may well be convicted as a result of the circumstantial evidence. The suspect would then be required to provide a DNA sample for inclusion in the databank. If the DNA provided is then run through the databank and there is no match with the DNA artifacts from the crime scene, the suspect, who has just been convicted of the offence, will be exonerated. This hypothetical illustrates the importance of not imposing an unnecessarily high burden on the investigators seeking a DNA warrant.

The DNA warrant legislation and the DNA databank are both investigative tools. In the case of secondary designated offences, the courts have substantial discretion in deciding whether a sample should be ordered. If the police are prevented from using these tools, they lose their power to eliminate certain suspects, which in turn prevents these tools from limiting the number of wrongful convictions. In interpreting the phrase, "nature and circumstances" of the offence, the courts will have to be mindful of the necessity to find a meaning that does not prevent the warrant legislation from becoming an effective investigatory tool. This argument holds as well for the databank provisions. The courts should never lose sight of the fact that standards which prevent the effectiveness of the legislation will ultimately do more to harm offenders than good.

III. CONSTITUTIONAL ISSUES

THE RIGHT TO PRIVACY IS INCORPORATED INTO a number of sections of the *Charter*. Section 7 protects the right to security of the person, and s. 8 protects a

reasonable expectation of privacy. Section 12 protects human dignity by its protection against cruel and unusual punishment and s. 11 protects against repeated invasion of an offender's privacy. The privacy issues that have been raised in the previous sections come into sharper focus when the constitutionality of the DNAIA is considered. In this section of the paper, constitutional issues will be examined and it will be argued that the DNA databank legislation more than meets any constitutional requirements.

The DNA databank legislation implicates four sections in the *Charter*: ss. 7, 8, 11, and 12. Section 1 will be dealt with at the end of the analysis.

A. Section 7 *Charter of Rights*—Principles of Fundamental Justice and Self-Incrimination

The concept of self-incrimination, and the right not to be forced to incriminate oneself, has long existed at common law. However, it has been developed to a much greater degree since the advent of the *Charter*. Section 7 reads,

Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 is an overarching right that protects individuals against deprivation of their fundamental freedoms without due process. Sections 8 to 14, are specific examples of rights protected by s. 7. Any fundamental freedom that is not contained within the enumerated sections is still protected by s. 7.

Technically speaking, there is no free standing privilege against self-incrimination in the *Charter of Rights*.¹⁰⁷ There are however, certain sections that deal specifically with self-incrimination. Section 11(c) provides that any person charged with an offence has the right not to be compelled to be a witness in a proceeding against themselves in respect of that offence. Section 13 provides that a witness who testifies in a proceeding has the right not to have any incriminating evidence used against them in any other proceeding.¹⁰⁸

The privilege against self-incrimination is found in the common law as part of the rules against the admission of involuntary statements. At common law, therefore, the privilege against self-incrimination only applied to testimonial evidence.¹⁰⁹ It did not include physical evidence emanating from the accused.¹¹⁰ The entry point for physical evidence into the debate concerning self-

¹⁰⁷ S.F., *supra* note 41 at para. 17. See also *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1 at 46, online: QL (SCJ) [hereinafter *S.(R.J.)*].

¹⁰⁸ S.F., *ibid.* See also specifically *R. v. Hebert*, [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64, online: QL (CRIM), and *R. v. White*, [1999] 2 S.C.R. 417, [1999] S.C.J. No. 28, online: QL (SCJ).

¹⁰⁹ *Stillman*, *supra* note 60 at para. 200.

¹¹⁰ *Ibid.* at para. 208.

incrimination occurs in cases applying s. 24(2) of the *Charter*. Section 24(2) reads,

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In *R. v. Collins*,¹¹¹ the Court was called upon, for the first time, to determine how to apply s. 24(2). In that case, the Supreme Court of Canada determined that the nature of the evidence was crucial in determining whether the fairness of the trial would be compromised. If the evidence was self-incriminatory, *i.e.* came from the accused, then trial fairness would almost always be compromised. If the evidence was “real,” or in other words existed irrespective of the breach, then it would rarely operate to render the trial unfair. In describing self-incriminatory evidence, the Court stated,

... the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or *other evidence emanating from him*. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. [emphasis added]¹¹²

The distinction between “real” evidence and conscriptive evidence was picked up in a number of subsequent cases. Conscripted evidence has been held to include blood samples,¹¹³ breath samples,¹¹⁴ compelled line-ups,¹¹⁵ buccal swabs, hair samples, and dental impressions.¹¹⁶ Therefore, in Canada, most evidence which emanates from the accused is conscriptive evidence. If this type of evidence is obtained in violation of a *Charter* right, it is usually excluded from the trial.¹¹⁷

Not until *R. v. Stillman*, however, did the Supreme Court decide, somewhat tentatively, that conscriptive evidence was, in and of itself, protected by s. 7. In that case, the majority stated that,

¹¹¹ [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, online: QL (CRIM).

¹¹² *Ibid.* at 285.

¹¹³ *Dyment*, *supra* note 53 at para. 27.

¹¹⁴ *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] S.C.J. No. 30, online: QL (SCJ).

¹¹⁵ *R. v. Leclair and Ross*, [1989] 1 S.C.R. 3, [1989] S.C.J. No. 2, online: QL (SCJ).

¹¹⁶ *Stillman*, *supra* note 60 at para. 51.

¹¹⁷ L'Heureux-Dubé, J., in her dissent in *Stillman*, *ibid.* at para. 239, criticizes the fact that there is now an almost automatic exclusionary rule if the evidence that is obtained is “conscriptive.”

It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession. If it was obtained as a result of a breach of the *Charter* its admission would generally tend to render the trial unfair. Similarly, to compel an accused to use his body or to provide bodily substances in order to incriminate himself would generally render the trial unfair. This is so because the compelled production of bodily parts or substances is just as great an invasion of the essence of the person as is a compelled statement. *The unauthorised use of a person's body or bodily substances is just as much compelled "testimony" that could render the trial unfair as is a compelled statement.* [emphasis added]¹¹⁸

The Court then goes on to effectively extend the protection of s. 7 to conscriptive evidence on the basis that there is no distinction between testimonial evidence and conscriptive, physical evidence. It states,

The recognition of the right to bodily security and sanctity is embodied in s. 7 of the *Charter* which confirms the right to life, liberty and the security of the person and guarantees the equally important reciprocal right not to be deprived of security of the person except in accordance with the principles of fundamental justice. This right requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual to the particular bodily intrusion or interference required for the purpose of the particular procedure the police wish to undertake. *It follows that the compelled use of the body or the compelled provision of bodily substances in breach of a Charter right for purposes of self-incrimination will generally result in an unfair trial just as surely as the compelled or conscripted self-incriminating statement.* [emphasis added]¹¹⁹

If physical evidence emanating from the accused (conscriptive evidence) is protected by the s. 7 right to security of the person, then it follows that the *DNA Identification Act* has the potential to offend that section. Section 7 has been applied in a number of cases involving medical procedures and the issue of bodily integrity.¹²⁰ The general rule is that any violation of bodily integrity can only be done with that individual's consent. This rule was outlined in *Fleming v. Reid*¹²¹ where the court stated,

The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and

¹¹⁸ *Stillman, ibid.* at para. 86.

¹¹⁹ *Ibid.* at para. 89.

¹²⁰ *Bassan, supra* note 16 at 262–265. This author outlines the medical procedures issue in detail.

¹²¹ (1991), 4 O.R. (3d) 74, 48 O.A.C. 46, online: QL (CRIM).

the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.¹²²

This principle has been reiterated in a number of other cases including *R. v. Morgentaler*, which stated that state interference with bodily integrity constitutes a breach of security of the person.¹²³

State compelled interference with bodily integrity creates a *prima facie* breach of s. 7, if either the legislation as a whole, or the procedures are not in accordance with the principles of fundamental justice. It is not necessarily the fact that the accused is compelled to submit to the production of a bodily sample that is protected, it is the manner in which he is compelled to provide that sample that is protected.¹²⁴ If the offender is compelled to provide physical evidence, then there may be a breach of his s. 7 rights, if the evidence was taken from him in contravention of the principles of fundamental justice. To determine if the DNAIA meets the requirements of fundamental justice, it is important to know what constitutes a contravention of the principles of fundamental justice.

That question was initially posed in the post-*Charter* era in the case of *Reference Re Section 94(2) of the Motor Vehicle Act*.¹²⁵ Both Justice Lamer (as he then was) and Justice Wilson struggled with a definition of the "principles of fundamental justice." In the end, they said more about what it was not than what it was. The principles of fundamental justice are not to be equated with "natural justice,"¹²⁶ nor are they limited to procedural fairness.¹²⁷ The principles are both substantive and procedural and incorporate the basic tenets of justice.¹²⁸ None of these statements necessarily clarify the issue of what are the principles of fundamental justice and the complexity of the issue is summarised in the following statement by Wilson, J.,

What is "fundamental justice?" We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice?" I am not entirely sure. We have been left by the Legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of the person—surely one of the most basic rights in a

¹²² *Ibid.* at 88. See also *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119 at 135, [1993] S.C.J. No. 46.

¹²³ [1988] 1 S.C.R. 30 at 56, 37 C.C.C.(3d) 449.

¹²⁴ See *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 at 300–301 [hereinafter *Motor Vehicle Act*] and *S.(R.J.)*, *supra* note 107 at 109.

¹²⁵ *Motor Vehicle Act*, *ibid.*

¹²⁶ *Ibid.* at 303.

¹²⁷ *Ibid.* at 299.

¹²⁸ *Ibid.* at 303.

free and democratic society—then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.¹²⁹

Ultimately, the Court abandons any effort to give a comprehensive definition of the meaning of “principles of fundamental justice” and leaves it to be decided on a case-by-case basis.

There are two cases in particular that may provide some guidance concerning how the courts will handle a s. 7 challenge to the DNAIA. They are *R. v. Beare*, *R. v. Higgins*,¹³⁰ and *R. v. Stillman*.¹³¹

In *Beare*, the Supreme Court of Canada dealt with the issue of the constitutionality of the *Identification of Criminals Act*.¹³² This Act authorises the taking of fingerprints when an individual is charged with an indictable offence. The fingerprints are subsequently stored in a databank that can be searched to determine the identity of the individual charged, his criminal history, and other information. The similarity of this scheme with the DNA databank makes the analysis in this case useful.

In *Beare*, it was argued that the *Identification of Criminals Act* violated s. 7 of the *Charter* in that it required the fingerprinting of persons who had been charged, but not yet convicted of an indictable offence. In discussing fingerprinting, the Court noted that it was an invaluable tool for criminal investigation, that it was a quick and easy process, and that it was virtually infallible because no two person's fingerprints were alike.¹³³ The Court notes that,

Fingerprints serve a wide variety of purposes in the criminal justice system. These include linking the accused to the crime where latent prints are found at the scene or on physical evidence; determining if the accused has been charged with, or convicted of other crimes in order to decide whether, for example, he should be released pending trial or whether he should be proceeded against by way of summary conviction or indictment; ascertaining whether the accused is unlawfully at large or has other charges outstanding; and assisting in the apprehension of an accused should he fail to appear. As well fingerprints taken on arrest are used to identify prisoners with suicidal tendencies, sex offenders, career criminals and persons with a history of escape attempts so that they can be segregated or monitored as may appear appropriate.¹³⁴

The Court goes on to observe that fingerprints provide advantages to innocent persons as well, in that they can establish that another person was involved in the crime.¹³⁵ Finally, the Court finds that although the Act could infringe s. 7 of

¹²⁹ *Ibid.* at 323.

¹³⁰ *Beare*, *supra* note 63.

¹³¹ *Stillman*, *supra* note 60.

¹³² R.S.C. 1985, c. I-1, online: QL (RSCT).

¹³³ *Beare*, *supra* note 63 at 68.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 69.

the *Charter*, it did not because the legislation met the requirements of the principles of fundamental justice. In finding that there was no breach of the principles of fundamental justice, the Court engaged in a balancing process between the impact that the procedure of fingerprinting had on the individual and the need of law enforcement to rapidly identify criminals.

In weighing the impact of the process on the individual, the Court found that there were a number of intrusive procedures attached to the arrest and charging of an individual and that fingerprinting was probably the least of them.¹³⁶ The Court also noted that an individual would not be fingerprinted unless there were reasonable and probable grounds to arrest and charge, and that fingerprinting was required only when an individual was charged with indictable, and therefore more serious, charges.¹³⁷ The Court went on to find that the law enforcement purpose of the *Identification of Criminals Act* justified the invasion of privacy involved. Finally, the Court concludes that the procedure of fingerprinting had received judicial approval pre-*Charter* in the common law and therefore that the procedure could not be held to infringe the principles of fundamental justice.¹³⁸

*R. v. Stillman*¹³⁹ also provides some guidance as to how the courts might view the *DNAIA*. In *Stillman*, the majority of the Court noted that the principles of fundamental justice require that bodily substances only be taken from a person by the state if there is a "valid statutory authority or the consent of the individual".¹⁴⁰ Valid legislation must appropriately balance individual rights with the protection of society. In order to determine whether the *DNA Identification Act* successfully meets that criteria, it is necessary to look at *how* the state will take bodily substances from the offender and whether the purposes for which the samples are taken justify the invasion of bodily integrity. It is also important to know if less invasive procedures would achieve the same purpose.

The DNA legislation establishes a balance between the interests of the individual and the protection of society on a number of different levels. First, the legislation has established that only certain offences will trigger the operation of the legislation. Second, it has divided those offences into two sub-categories that determine whether an order is mandated or optional. Third, even where an order is mandated, the court has discretion to refuse the order if the offender can show that it would be essentially unfair in his particular circumstances.

¹³⁶ *Ibid.* at 71.

¹³⁷ *Ibid.* at 75 and 78.

¹³⁸ *Ibid.* at 74.

¹³⁹ *Stillman*, *supra* note 60.

¹⁴⁰ *Ibid.* at para. 89.

Lastly, the legislation provides the court with guidelines in deciding whether to make an optional order and that process itself requires a balancing of interests.

There are three possible procedures for taking samples. Buccal swabs, hair, or blood samples can be taken, and it is up to the offender to choose which method s/he prefers. This ability to choose is important. Of the three procedures, buccal swabs are the least invasive, causing no discomfort whatsoever. Plucked hair and blood samples are more invasive, with blood samples being the most invasive of the three. By leaving the decision of which method to choose up to the offender, consent to the specific procedure is obtained. There is no fundamental difference in the quality of the DNA sample whether it is epithelial cells, hair, or blood. This fact creates a problem. Clearly, if there is no difference in the quality of the sample, then only the *least* intrusive method should ever be used. Given the high value placed on the protection of bodily integrity, only the least invasive method of obtaining a sample could withstand a s. 7 challenge, and a court could find that the remaining two methods therefore breach s. 7 and should be eliminated. However, if that occurred, the lack of choice would also be problematic given that the courts have found that the state has no right to intrude on a person's bodily integrity without their consent. Any procedure that intrudes on a person's bodily integrity without their consent has been held to be inappropriate, therefore it is very important that a choice be left in the legislation, even though some of the procedures are more intrusive than others.

The importance of protecting bodily integrity also requires that the objectives of the legislation be of substantial and pressing importance. The legislation states that the purpose and principles of the DNAIA are to,

... help law enforcement agencies identify persons alleged to have committed designated offences

4. It is recognized and declared that

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

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

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

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

(ii) the use of, and access to, bodily substances that are transmitted to the Commissioner for the purposes of this Act.¹⁴¹

¹⁴¹ DNAIA, *supra* note 1 at ss. 3 and 4.

The objective of this legislation is to assist in the identification of suspects who may have committed designated offences. The importance of this law enforcement objective was set out in *Beare* where the Supreme Court stated,

Promptitude and facility in the identification and the discovery of indicia of guilt or innocence are of great importance in criminal investigations. This, along with its certitude, which is critical to the criminal justice system has resulted in the general use of fingerprinting by police forces throughout the world.¹⁴²

Inherent in, although unstated in the purpose and principles of, the *DNAIA* is the fact that identification of offenders through DNA is highly reliable and adds substantially to the certainty that the right person is being convicted. In examining the constitutionality of the DNA warrant provisions in *R. v. F.(S.)*, Hill, J. commented that the forensic use of DNA evidence is, "the most discriminatory science available to differentiate between biological sources."¹⁴³ He also noted that,

The existence of objectively reliable evidence of guilt frequently promotes the resolution of criminal charges without the necessity of a trial. In turn, the victims of crime are spared the anguish of court proceedings.

It is no under-statement to describe these features of the societal interest in DNA warrants as pressing, substantial and highly compelling.¹⁴⁴

The objective of the *DNAIA* is therefore a very important one. DNA profiles provide highly reliable identification evidence, which was found in *Beare* to be an important law enforcement asset. DNA evidence is also a tool that can exonerate suspects, thereby reducing the possibility of wrongful convictions. That factor is a very important facet of the *DNAIA*. Experience in Canada has shown that DNA testing has exonerated suspects in 25–30% of investigations conducted by the RCMP. Canadian laboratories have reported an exclusion rate of 22–30%.¹⁴⁵

Although, the *DNAIA* authorises the invasion of an individual's bodily integrity, which implicates the s. 7 right to security of the person, the legislation substantially limits the type of offences for which a sample can be taken. Only the most serious offences are targeted, as well as those where it is most likely that a DNA artifact will be left. The court is left with a substantial amount of discretion to ensure that taking a sample is ultimately in the best interests of

¹⁴² *Beare*, *supra* note 63 at 72.

¹⁴³ *F.(S.)*, *supra* note 40 at 280.

¹⁴⁴ *Ibid.* at 281.

¹⁴⁵ Testimony of Dr. Peel, Director of RCMP Forensic Laboratories at the Standing Committee on Legal and Constitutional Affairs (11 July 1995)—Report of Proceedings at 49:29, affidavit of Dr. Bowen (9 December 1996), affidavit of Pamela Newall (9 December 1996)—all cited in *F.(S.)*, *ibid.* at 282.

society. The objective of the legislation is one that the courts have previously found to be very important, and the legislation itself contains numerous provisions to protect the privacy of the information in the databank. It is this balancing process that is most likely to persuade a court that the legislation meets the requirements of fundamental justice. By balancing competing interests, the court is constantly required to judge the fairness of the process, and fairness is one of the most basic principles of fundamental justice.¹⁴⁶ This legislation is sufficiently circumscribed that, although there is a breach of bodily integrity, the limitations and the importance of the objective will fulfil the requirements of s. 7 of the *Charter*.

There is a secondary issue involving the databank and s. 7. Information concerning a match from the DNA databank cannot be used as evidence in court. It can only be used to obtain a DNA warrant. Any sample taken pursuant to a s. 487.05 warrant can only be used in the investigation of the offence for which the warrant was obtained.¹⁴⁷ If the databank finds that a suspect's DNA matches not just one sample in the crime scene index, but several, a warrant will have to be obtained for each one of the matches. It is not possible to obtain a single sample for all of the matches, unless a single warrant is obtained. However, a single warrant would be obtainable only if all the matches occurred within the same jurisdiction. If the matches found by the databank involved offences that took place in several different provinces, multiple warrants would have to be obtained. In that scenario, the suspect would have to provide several samples, pursuant to several warrants, even though only one sample is actually necessary. It is quite possible that the admissibility of the results of the multiple tests could be challenged in court as a breach of the suspect's s. 7 rights.

The DNA legislation will almost certainly be found to be constitutional if it is challenged under s. 7 of the *Charter*. However, the issue of constitutionality does not end there. The taking of bodily samples is a search and as such s. 8 of the *Charter* also comes into play.

B. Section 8 Charter of Rights—Search and Seizure

Section 8 of the *Charter of Rights* reads,

Everyone has the right to be secure against unreasonable search or seizure.

In *Hunter v. Southam*, the Supreme Court of Canada stated that in assessing the constitutionality of a statute authorising a search and seizure, it is important to focus on whether the impact of the search on the subject is "reasonable" or "un-

¹⁴⁶ *Motor Vehicle Act*, *supra* note 124 at 310–311.

¹⁴⁷ *Criminal Code*, *supra* note 37 at s. 487.09(1).

reasonable.” It was not sufficient to look at whether the legislation served some valid objective.¹⁴⁸ The Court then goes on to state that,

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from “unreasonable” search and seizure, or positively as an entitlement to a “reasonable” expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.¹⁴⁹

In determining the reasonableness of a statute authorising a search, the Court sets out three requirements,

1. prior authorization
2. by an impartial person, acting judicially
3. using a standard of an objectively reasonable probability that relevant evidence will be found.¹⁵⁰

Different standards have been developed in the context of administrative searches and in circumstances where there is a lowered expectation of privacy.¹⁵¹

1. What constitutes a search or seizure?

The answer to this question is based in part on whether in the circumstances of the search or seizure, there is a reasonable expectation of privacy. If there is not, then s. 8 of the *Charter* does not apply.¹⁵² On the issue of the taking of bodily substances, Canadian courts have repeatedly held that this conduct constitutes a search because there is a strong expectation of privacy with respect to bodily integrity.¹⁵³

Given that the taking of bodily substances would be considered a search or seizure, the next question becomes whether there is a reduced expectation of privacy in the context of this particular legislation. Generally, the courts have

¹⁴⁸ *Hunter*, *supra* note 47 at 107.

¹⁴⁹ *Ibid.* at 109.

¹⁵⁰ *Ibid.* at 110, 111, and 115–116.

¹⁵¹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C.(3d) 417, 67 D.L.R. (4th) 161 (S.C.C.), online: QL (CRIM).

¹⁵² J.A. Fontana, *The Law of Search and Seizure in Canada*, 3rd ed. (Toronto: Butterworths, 1992) at 14.

¹⁵³ *Pohoretsky*, *supra* note 58.

held that where there is a reduced expectation of privacy, the standards set out in *Hunter v. Southam* will be reduced.¹⁵⁴

2. What expectation of privacy do offenders have in the context of the DNA databank legislation?

The Canadian courts have decided that individuals have an expectation of privacy with respect to their bodily substances. However, the level of privacy inevitably varies with the context of the search. For instance, the Supreme Court of Canada has noted that a student at school does not have the same expectation of privacy that an adult in his own home might expect.¹⁵⁵ The expectation of privacy that an individual might have in an item in his possession is not the same as he might expect in an item that he has discarded.¹⁵⁶ The level of privacy that a citizen might expect during an investigation for a criminal offence will not be the same that he might expect after arrest or after conviction. The DNAIA provides that the only point in time when a sample can be taken for the databank is after a conviction.

In *Stillman*, Cory, J. briefly discusses the issue of the level of privacy that a convicted offender can expect. He states,

Obviously an accused person will have a lower expectation of privacy following his or her arrest and subsequent custody. *That expectation of privacy will be even lower when serving a sentence after conviction.* Therefore, it may well be that certain kinds of searches and seizures may validly be performed on a person in custody which could not validly be performed on persons who have not yet been arrested or convicted. [emphasis added]¹⁵⁷

In dealing with the issue of "frisk" searches of prisoners, the Supreme Court of Canada has held that,

A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices [frisk searches]. ... There being no reasonable expectation of privacy, s. 8 of the *Charter* is not called into play, nor is s. 7 implicated.¹⁵⁸

Two other Supreme Court of Canada cases have dealt with the issue of post-conviction expectation of privacy. In *R. v. Jones*, while discussing s. 7 of the *Charter*, the Court stated that,

¹⁵⁴ *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, [1998] S.C.J. No. 83, online: QL (SCJ)

¹⁵⁵ *Ibid.* at para. 33.

¹⁵⁶ See *R. v. Leblanc* (1981), 64 C.C.C.(2d) 31, 36 N.B.R.(2d) 675 (N.B. C.A.) where the police seized a sample of the accused's blood from the front seat of his car. Also *R. v. Arp*, [1995] B.C.J. No. 882, online: QL (CRIM) where the police seized cigarette butts that the accused had left in an ashtray.

¹⁵⁷ *Stillman*, *supra* note 60 at 348.

¹⁵⁸ *Conway v. Attorney-General of Canada*, [1993] 2 S.C.R. 872, 83 C.C.C.(3d) 1 at 4.

Once guilt has been established, our fundamental principles of justice dictate a focus on the most appropriate sentence for the guilty party. To assume that post-trial protection should be identical to pre-trial and trial protection ignores a rather critical intervening fact: the accused has been found guilty of a crime. Having so found, the court places greater emphasis on the interests of society in developing a sentence that is appropriate to the guilty party.¹⁵⁹

The other case of note is, *R. v. Lyons*.¹⁶⁰ In that case, the Supreme Court of Canada pointed out that ss. 7–14 of the *Charter* have a more limited scope in the post-conviction phase of the judicial process.

American caselaw has also dealt with the issue of the expectation of privacy possessed by a convicted offender. In a concurring judgment in *State v. Olivas*, Utter, J. commented that,

The final, and in my view, determinative consideration in conducting a minimally intrusive search balancing test is the privacy interests upon which the search in question intrudes. In these cases, [DNA databank legislation] the privacy interest is that of a convicted sex or violent offender in his or her identity. Under any form of analysis, this interest is minimal. It has been recognized that convicted persons, particularly those who are ultimately incarcerated, have a significantly diminished privacy interest. Furthermore, such individuals have a particularly limited privacy interest in the mere fact of their *identity*. The analogy to fingerprinting is extremely persuasive, in that both DNA typing and fingerprinting impinge on similar privacy interests. While the Fourth Amendment does impose certain constraints upon the fingerprinting of free persons, the constitutionality of fingerprinting convicted persons, even accused persons, is unquestioned. Since DNA typing is functionally equivalent to fingerprinting, nonconsensual blood extraction for DNA typing therefore intrudes upon a necessarily diminished privacy interest. [emphasis in the original, citations omitted]¹⁶¹

This theme has been picked up in some of the Canadian cases that have looked at the issue of the constitutionality of taking samples pursuant to the DNA databank legislation. In *R. v. Osmond*, the court noted that it was well settled law that a person's privacy rights do not attract the same protection after conviction as is afforded to them before conviction.¹⁶² In *R. v. Thompson*, the court observed that,

... a person has a lower expectation of privacy when one has been convicted of a criminal offence, and that what might be unacceptable in a pre-arrest situation is acceptable in a post-conviction situation.¹⁶³

¹⁵⁹ [1994] 2 S.C.R. 229, 89 C.C.C.(3d) 353 at 393, online: QL (SCJ).

¹⁶⁰ [1987] 2 S.C.R. 309, 37 C.C.C.(3d) 1, online: QL (SCJ).

¹⁶¹ 856 P.2d 1076 at 1093, 1993 Wash. LEXIS 156, online: LEXIS (MEGA) [hereinafter *Olivas*].

¹⁶² [2000] O. J. No. 4267, (Ont. Sup. Ct), online: QL (CRIM)

¹⁶³ [2000] A.J. No. 881 (Alta. Prov. Ct.) at para. 89, (2000), 85 Alta. L.R. (3d) 191, online: QL (CRIM).

The only cautionary note is sounded in *R. v. Minhinnick*, where the court states,

In my view, it is clear, however, that while the expectation of privacy or security of the person is lower for a prisoner, it is not completely extinguished. ... Bodily integrity remains a vital and important value in our society, even for serving prisoners.¹⁶⁴

The court in *Minhinnick* then states that, given the fundamental privacy values affected by the DNA databank legislation, that it would take "cogent and compelling" evidence with respect to the criminal record and circumstances of the offence before a court would order a DNA sample taken for a secondary designated offence.¹⁶⁵

All of this caselaw indicates that there is a much reduced privacy interest possessed by convicted individuals. However, as noted in *Minhinnick*, that reduction in privacy must be balanced against the intrusion into bodily integrity represented by the taking of samples. If the taking of bodily substances is a search, and if there exists an expectation of privacy, albeit a reduced one, the next step in the process is to balance the impact on the individual with the needs of society.

3. Does the legislation strike a reasonable balance between its impact on the individual and the needs of society?

In the *Beare* case, the Supreme Court of Canada stated that even if fingerprints were considered a search, the legislation was nonetheless reasonable using the same analysis as had been used with respect to the principles of fundamental justice.¹⁶⁶ The Court then proceeded to balance the law enforcement needs of society with the impact of the legislation on the individual. The Court noted that,

These procedures have been permitted because of the felt need in the community to arm the police with adequate and reasonable powers for the investigation of crime. Should fingerprinting be assimilated to these procedures? Many considerations, we saw, argue for that position. Promptitude and facility in the identification and the discovery of indicia of guilt or innocence are of great importance in criminal investigations. This, along with its certitude, which is critical to the criminal justice system, has resulted in the general use of fingerprinting by police forces throughout the world.¹⁶⁷

In the *Beare* case, the Court determined that the fingerprinting process was reasonable for three reasons; it was a quick, infallible procedure, that could both exculpate and inculpate; the procedure was limited to serious offences, and rea-

¹⁶⁴ [2001] S.J. No. 18 (Sask. Prov. Ct.) at para. 37, online: QL (CRIM) [hereinafter *Minhinnick*].

¹⁶⁵ *Ibid.* at para. 44.

¹⁶⁶ *Beare*, *supra* note 63 at 80.

¹⁶⁷ *Minhinnick*, *supra* note 164 at para. 34.

sonable and probable grounds were the basis for determining when fingerprints would be taken.

In the context of the DNA databank legislation, the procedures used for taking the samples are also quick, the results are largely infallible and the process is definitely useful both for exculpating and inculpating individuals. Samples can only be taken upon conviction for serious offences, which requires a finding of guilt beyond a reasonable doubt—a much higher standard than reasonable and probable grounds. Also, the legislation itself sets out the importance of the law enforcement objective. One of the important purposes of the Act is to solve old crimes. Dr. Fournery has observed that the databank is a tool that can re-open old cases where the police have not been able to locate the perpetrator. Since the inception of the databank, there have been 18 matches between the crime scene index and the convicted offender index involving old cases. There have also been seven matches within the crime scene index, giving investigators new insights into those crimes.¹⁶⁸

The key difference between the stated purpose of the fingerprint legislation as enunciated in *Beare* and the purpose of the DNA databank legislation is the fact that fingerprints are taken to confirm the identity or participation of an individual in a crime that has already occurred. DNA databank information will be used to identify an offender's participation both in past, unsolved crimes and in future crimes that have not yet been committed. Michael Kier raises concerns about the fact that DNA information will be used in connection with future crimes. He notes that when balancing government interests against the privacy interests of offenders, the justification for collecting a DNA sample from offenders for future law enforcement purposes is based on statistical data concerning recidivism rates. He states,

Until this case [*Jones v. Murray*], courts have required that searches undertaken be in response to an identifiable suspicion of current or past disobedience which would be presently confirmed or denied by the fruits of the search. In contrast, the *Jones* search was conducted to find evidence which would possibly be used in the future to confirm or deny future disobedience. Consequently, the *Jones* search is significantly more arbitrary than any search thus far addressed by the courts.¹⁶⁹

The fact that the DNA databank stores information to assist in solving future crimes increases the impact of the legislation on privacy rights. Unlike the DNA warrant provisions, the DNA databank legislation does not contain a requirement of reasonable and probable grounds to believe that the taking of the sample will afford evidence. Because of this fact, the databank legislation fails to fulfil one of the basic requirements that are set out in *Hunter v. Southam*. The

¹⁶⁸ This information is up to date as of 28 May 2001.

¹⁶⁹ M.W. Kier, "Comment: *Jones v. Murray*: Allowing the Government to Get Blood From a Stone" (1992) 42 Case W. Res. L. Rev. 635 at 649, online: LEXIS (ALLREV).

legislation targets offenders who are either repeat offenders, or who have committed serious offences. Part of the purpose of the court ordered samples is to solve future crimes, and therefore there are no reasonable and probable grounds. While *Hunter v. Southam* envisions situations where the requirements for a search might be reduced, it is unlikely that a DNA sample which involves a breach of bodily integrity, and which will ultimately be used in the criminal context, would qualify. The basis for obtaining the court order for a databank sample is the fact of conviction for a designated offence. The legislation does not set out the justification for using conviction as a basis for obtaining a sample. The only logical justification is that these targeted offenders are more likely to re-offend and also more likely to commit further serious offences where there is a reasonable likelihood that DNA artifacts will be found.

Statistical information was used in the United States to justify collecting samples from individuals convicted of certain offences. In the American case of *Jones v. Murray*,¹⁷⁰ the Court considered statistics that suggested that 62.5% of individuals convicted of serious offences were likely to re-offend within three years and that 22.7% would commit violent offences. The court also noted that in approximately 30% of all violent crimes, DNA artifacts were left at the scene. The court therefore concluded that a DNA databank would serve as a significant deterrent to recidivist activity and that this fact justified the intrusion on privacy rights.

Canadian statistics would suggest that there is also a high degree of recidivism among offenders who commit more serious crimes. When the lower expectation of privacy for offenders is combined with the recidivism rate for serious offences, the use of DNA profiles to solve future crimes is justified as reasonable and is not a breach of s. 8.

Another approach to the issue of the reasonableness of the DNA databank legislation was used in *R. v. Brighteyes*.¹⁷¹ The court in *Brighteyes* examined other search and seizure legislation that the Supreme Court of Canada has found to be reasonable. In particular, the court reviewed the caselaw concerning the electronic surveillance sections of the *Criminal Code*.¹⁷² It noted that these sections had been held constitutional in a number of cases, the most important of which was *R. v. Duarte*.¹⁷³ The court noted that the *Criminal Code* sections dealing with electronic surveillance were held to be a type of search and seizure protected by s. 8 of the *Charter*. The court also noted that these sections consti-

¹⁷⁰ 962 F.2d 302 (4th Cir. 1992), 1992 U.S. App. LEXIS 6322, online: LEXIS (COURTS). See also *Olivas*, *supra* note 161.

¹⁷¹ [1997] A.J. No. 362 (Alta. Q. B.), 54 Alta. L.R. 347, online: QL (CRIM) [hereinafter *Brighteyes*].

¹⁷² *Ibid.* at para. 37-39.

¹⁷³ [1990] 1 S.C.R. 30, 53 C.C.C.(3d) 1, online: QL (CRIM).

tuted a high water mark in terms of intrusive searches.¹⁷⁴ In *Brighteyes*, the court concludes that although the searches called for in the DNA warrant provisions are intrusive, that they are less intrusive than electronic surveillance and therefore the standards required are lower than those for electronic surveillance.¹⁷⁵ This particular analysis is deficient in some respects, in that not enough attention was paid to the high value that the Supreme Court has placed on bodily integrity and the need for a substantially pressing social need to justify any intrusion on bodily integrity.

In *R. v. Simmons*,¹⁷⁶ the Supreme Court of Canada examined the constitutionality of ss. 143 and 144 of the *Customs Act*¹⁷⁷ and identified three levels of intrusion with respect to searches,

1. Routine questioning, baggage search, a pat or frisk of one's outer clothing
2. A strip or skin search conducted in a private room
3. A body cavity search in which recourse is had to medical doctors, x-rays, emetics and other "highly invasive means."¹⁷⁸

In finding that the *Customs Act* was constitutional, the Supreme Court only had to deal with the first two levels of search and the Court commented that,

Searches of the third or bodily cavity type may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection.¹⁷⁹

As a result of the Supreme Court of Canada's comments in *Simmons*, it is clear that an intrusion on bodily integrity can only be justified where there are very pressing circumstances. The purpose of the legislation is the critically important one of accurately identifying the perpetrators of serious offences, and statistics support the use of DNA profile information in the investigation of future crimes. The limitations imposed by the legislation recognise the seriousness of the invasion of privacy involved in taking samples. The fact that the judge retains discretion to refuse to make an order even in the case of the primary designated offences also ensures that the objectives of the legislation are balanced against the circumstances of the individual offender. The expectation of privacy held by an offender after conviction is reduced. The methods used, although intrusive, are quick, relatively painless, and the results are definitive,

¹⁷⁴ *Brighteyes*, *supra* note 171 at para. 39.

¹⁷⁵ *Ibid.* at para. 57.

¹⁷⁶ *Simmons*, *supra* note 106.

¹⁷⁷ R.S.C. 1985, c.1 (2nd Supp.), C-52.6.

¹⁷⁸ *Simmons*, *supra* note 106 at 312.

¹⁷⁹ *Brighteyes*, *supra* note 171 at para. 28.

particularly with respect to the exoneration of suspects. All of these factors must be weighed against the expectation of privacy and the impact of the seizure of samples on the offender. The limits of the legislation and the provisions ensuring that the process respects the privacy of the offender ensure that the search and seizure provisions authorised by the DNAIA constitute a reasonable limit on the expectation of privacy enjoyed by offenders.

C. Section 11 & 12 Charter of Rights—Cruel and Unusual Punishment and *Res Judicata*

Section 12 of the *Charter* protects all convicted persons from punishments that are cruel and unusual in relation to the particular crime, or the particular criminal. This section also can be used to determine whether the punishment itself is appropriate in modern society. A punishment may be considered cruel or unusual if it impacts negatively on human dignity. In discussing the principles which underlie s. 12, Justice Cory stated that, “the principle of human dignity ... lies at the heart of s. 12. It is the dignity and importance of the individual which is the essence and the cornerstone of democratic government.”¹⁸⁰ The right to privacy is an inherent part of the principle of human dignity. If the DNAIA imposes a punishment, it may contravene the provisions of s. 12.

Section 12 only applies if a punishment is imposed. Does a requirement that a bodily sample be taken upon conviction constitute a punishment? This question was canvassed in the case of *R. v. Wigglesworth*,¹⁸¹ where Justice Wilson, speaking for the majority stated that a punishment that would attract constitutional scrutiny must be something that involves “true penal consequences.” In defining what that phrase means, she stated,

In my opinion, a true penal consequence which would attract the application of s. 11 [of the *Charter*] is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.¹⁸²

A court order to provide a bodily sample is neither a fine nor imprisonment, but rather a separate consequence of a finding of guilt. It is more akin to a probation order, in that it is part of the sentencing package, but it is not a sentence in and of itself. A requirement to provide a DNA sample is not something imposed for the purpose of redressing any wrong done to society, but instead it is done to protect society from future wrong doing and in an effort to prevent recidivism.

¹⁸⁰ *Re Kindler and Minister of Justice*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1 at 33 (S.C.C.), online: QL (CRIM).

¹⁸¹ [1987] 2 S.C.R. 541, 37 C.C.C. (3d) 385.

¹⁸² *Ibid.* at 402.

The issue of whether a requirement to provide a DNA sample is a "punishment" was examined in the American case of *Vanderlinden v. State*¹⁸³ where the court held that the purpose of the DNA databank legislation was law enforcement and the identification of criminals. Therefore, the legislation itself was not penal in nature, so the requirement to provide a DNA sample could not be considered to be a punishment. If the *DNAIA* does not impose a punishment then s. 12 does not apply.

If the *DNAIA* does impose a punishment then the next issue is whether that punishment is "so excessive as to outrage standards of decency."¹⁸⁴ This standard was approved by the Supreme Court of Canada in *R. v. Smith*, where the Court stated,

The protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed...The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin, C.J.C. in *Miller and Cockriell*: "whether the punishment prescribed is so excessive as to outrage standards of decency." In other words, though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive.¹⁸⁵

Given the very high standards that the Supreme Court requires before a punishment falls within the purview of s. 12, it is highly unlikely that the *DNAIA* would be found to offend s. 12.

Given the *DNAIA* has both retrospective and retroactive application, the provisions of s.11 must also be examined. The DNA databank legislation provides that samples can be taken from persons who are sentenced after the legislation comes into force, but who committed offences before the legislation came into force.¹⁸⁶ It also provides that individuals who have been convicted of certain offences and who are still serving a sentence may be required to provide samples. These individuals must have been designated as dangerous offenders, convicted of more than one murder, committed at different times, or convicted of more than one sexual assault, and sentenced to more than two years in jail.¹⁸⁷

Section 11 of the *Charter* provides,

¹⁸³ 874 F. Supp. 1210, 1995 U.S. Dist. LEXIS 1389 (D. Kan. 1995), online: LEXIS (MEGA).

¹⁸⁴ This was the standard that was outlined by the Supreme Court of Canada in *Miller v. Cockriell*, [1977] 2 S.C.R. 680, 31 C.C.C. (2d) 177, online: QL (CRIM).

¹⁸⁵ [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97 at 138-139, online: QL (CRIM).

¹⁸⁶ *Criminal Code*, *supra* note 37 at s. 487.052.

¹⁸⁷ *Ibid.* at s. 487.055.

Any person charged with an offence has the right ...

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Section 11 concerns the issue of punishment, and as already stated, it does not appear that the provisions of the DNAIA impose a punishment, therefore the retrospective and retroactive aspects of the legislation should not be affected by either ss. 11 or 12.

However, there remains a privacy issue. Once an individual has had a sentence imposed, s/he has a right to expect that there will be no further burden imposed. The retroactive sections of the DNA legislation target offenders who are clearly among the most dangerous criminals in Canadian society. The justification for the seizure of DNA samples from these offenders is that these people have committed serious offences and their privacy rights are reduced as a result. It has been noted that,

Whether or not courts would find [the DNAIA] as meting out punishment, it should be noted that retroactive and retrospective sampling may not be the least restrictive means to further the legislation's goals. Of course, the police have other options of obtaining samples from convicted offenders in custody. If police have reasonable and probable grounds to believe that an offender is linked to a designated offence, there is nothing to preclude them from applying for a DNA search warrant under the applicable sections of the Criminal Code.¹⁸⁸

Taking samples from offenders who have already been sentenced may constitute a breach of s. 7 rights. Section 7 precludes the taking of a sample in circumstances where there is a breach of the right to security of the person and the principles of fundamental justice. The argument for taking samples from multiple murderers and dangerous offenders is that they are among the most dangerous criminals in Canadian society and therefore the need to protect the public is increased. This argument is less persuasive with respect to sexual offenders. The primary designated offences include sexual assault simpliciter, which can involve relatively minor sexual touching. In the case of an historical sexual assault, touching of a sexual nature extended over a period of time would result in multiple convictions, and therefore exposure to the retroactive provisions of the DNAIA. Although, the section provides that the offender must be serving a sentence of at least two years, this limitation provides only a minimal threshold of seriousness. Unlike offenders who will be expected to provide samples for offences committed after the coming into force of this legislation, these sexual offenders will have an additional burden placed on them that was not part of

¹⁸⁸ Rondinelli, *supra* note 12 at para. 95.

their original sentence. The intrusion on privacy for these particular offenders may not be justified where the court order comes well after the imposition of sentence and there is no consideration of the seriousness of the particular offences.

If the courts determine that the legislation breaches any *Charter* right, then the discussion turns to s. 1 of the *Charter*.

D. Section 1 *Charter of Rights*—The *Oakes* Test

Section 1 of the *Charter* provides,

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Once a piece of legislation has been found to breach a *Charter* right, the courts must determine whether that legislation nonetheless represents a reasonable limit on that right. In order to make that determination, the courts look to the test set out in *R. v. Oakes*.¹⁸⁹

The *Oakes* test is a fourfold one. The government has the burden of showing that the impugned legislation meets all four of the following criteria:

1. the legislation must pursue an objective that is pressing and substantial so as to justify overriding a *Charter* right,
2. the measures adopted must be carefully designed to achieve the objective and must be rationally connected to that objective,
3. the measures adopted should impair as little as possible the right in question,
4. there must be proportionality between the effects of the measures and the objective of the legislation.¹⁹⁰

The objective of the DNA databank legislation is the identification of criminals in the context of some of the most serious crimes in the *Criminal Code*. The DNA databank legislation is closely related to the DNA search warrant legislation both in purpose and in organisation, and therefore the decision of *R. v. F.(S.)* dealing with constitutionality of those provisions, is instructive. Justice Hill outlined the importance of the objective of the DNA warrant legislation as follows:

The important government justifications of fostering effective crime control, protecting the innocent, enforcing society's criminal laws, and substantially improving the search for truth in the criminal trial process warrant the court-authorized intrusion upon bodily integrity. Excepting the authority to seize hair, the DNA warrant legislation is a rational and proportionate response designed to meet these objectives and does not re-

¹⁸⁹ [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, online: QL (CRIM) [hereinafter *Oakes*].

¹⁹⁰ *Ibid.* at para. 69–70.

sult in any over-reaching or unfair impact upon the individual subjected to a DNA warrant seizure.¹⁹¹

Identification of criminals and effective crime control, as well as the protection of innocent persons are all pressing and substantial objectives. The methods used to collect the samples are minimally intrusive, and necessary to carry out the objectives of the legislation. These methods do not have any substantial negative impact on the individual and would not of themselves attract constitutional opprobrium. The legislation provides for the non-consensual collection of either saliva, hair, or blood, and does not differentiate between the intrusiveness of each of these procedures. However, the legislation also provides that the offender can choose which method s/he prefers. This feature of the legislation permits the offender some control over the intrusiveness of the method. In so doing, the legislation ensures that there is minimal impairment of the right to privacy and security of the person in terms of the method of collection.

The procedures for determining when samples should be taken involve a substantial balancing of the protection of the individual and the interests of society. In the context of the DNA warrant legislation, it has been noted that,

The court's exercise of discretion to issue a DNA warrant is subject to further statutory control mechanism that the issuance, and in turn the execution, of the warrant ought to occur only where it is in the best interests of the administration of justice. This overarching and important judicial check parallels that in Part VI of the Code relating to wiretaps. ... [T]he prerequisite obliges the court to be satisfied that the granting of the authorization will further or advance the objectives of justice and, on a case-by-case basis, the court can strike a fair balance between the rights of the individual and the public's interest in the investigation of serious crime.¹⁹²

The databank legislation also provides the court with a substantial degree of discretion in determining in an individual case whether an order to produce a DNA sample is in the best interests of justice.¹⁹³

This balancing process ensures that the provisions in the legislation are rationally connected to its objective. The designated offences in the legislation are also the ones most likely to involve the retrieval of DNA artifacts from the crime scene.¹⁹⁴ Given the presence of artifacts, it is necessary to identify the

¹⁹¹ F.(S.), *supra* note 40 at 301. This decision was subsequently upheld by the Ontario Court of Appeal. See S.F., *supra* note 41. There was however, one change. Hill, J. found that it was not reasonable to permit the plucking of hair, and struck down that portion of the legislation. He did so on the basis of information that proved to be out of date. The Court of Appeal was provided with up to date information and restored the section that permitted the plucking of hair.

¹⁹² *Ibid.* at 289.

¹⁹³ *Criminal Code*, *supra* note 37 at s. 487.051(2).

¹⁹⁴ Bassan, *supra* note 16 at 281. This same argument is used to suggest that the DNA search warrant legislation would pass the *Oakes* test.

source of such artifacts. The objective of identifying the donors of artifacts can only be met by ordering that samples be taken, and the circumstances under which such an order can be made must take into account all the relevant factors. The accuracy of the testing procedures, the level of certainty that a match brings, and the potential to exonerate, are all factors that emphasise the value of DNA testing as an investigative tool.

By limiting both the types of offences that may require obtaining DNA samples and by providing that the court retain discretion in making the order, the legislation ensures that any breach of the right to privacy and security of the person is kept to a minimum. The government is not required to choose the least intrusive manner of achieving its objective,¹⁹⁵ and in the case of the DNA databank legislation, it is difficult to see how there could be a less intrusive manner of carrying out the objective.

The legislation may overstep the constitutional bounds only where it operates retroactively. In that case, there is no reduced expectation of privacy and in the absence of reasonable and probable grounds to believe that an offence has been committed, the intrusion on privacy is much greater with the result that the necessary proportionality between the objective of the legislation and the impairment of the right is not achieved. The retroactive provisions of the legislation suffer from the problem that was outlined in *R. v. Edwards Books and Art Ltd.* In that case the Supreme Court of Canada noted that,

... the effects of the limiting measures must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.¹⁹⁶

The retroactive provisions do impact on the right of security of the person in the case of sexual offenders to the point where the objectives of the legislation are outweighed by the abridgement of rights. Those offenders do not fall into the category of the most dangerous offenders in Canadian society and their privacy rights need to be more scrupulously protected given that the provisions of the DNA legislation were not in effect when they received their sentence.

The DNA databank legislation clearly impacts on an offender's right to privacy and security of the person, but it does so in a manner that is fair and that is as minimally intrusive as possible. In the event that the legislation was found to entrench on one of the rights in the *Charter*, it would be saved by s. 1.

IV. CONCLUSION

THE DNA DATABANK LEGISLATION adds a new investigatory tool to the criminal justice system. It is also a tool that will need careful monitoring because of

¹⁹⁵ *R. v. Swain*, [1991] 1 S.C.R. 933 at 983, 63 C.C.C.(3d) 481, online: QL (CRIM).

¹⁹⁶ [1986] 2 S.C.R. 713 at 768, 30 C.C.C.(3d) 385, online: QL (SCJ).

the potential for inappropriately invading privacy rights. Canada's legislation has been drafted with privacy concerns in mind and it goes a long way to ensure that the invasion of bodily integrity, which is a necessary component of the databank, occurs only when it is genuinely in the public interest. In the Canadian context, the courts have made it abundantly clear that both taking samples, and the forensic use of DNA impact on privacy rights and that they therefore should not occur without strong justification. In response to these issues, the DNA legislation has been limited to the most serious offences and substantial procedural guarantees have been included. It is likely that the Canadian DNA databank legislation will survive any constitutional challenge.

The greater concern is that the courts will interpret the requirements of the legislation in such a fashion that the effectiveness of the databank and the warrant provisions that go with it, will be limited. In balancing the rights of accused and the protection of the public, the pendulum must not be permitted to swing too far in either direction. The private cost of ineffective legislation will be borne by the offender who cannot prove that s/he is innocent. Public safety cannot be protected if the legislation is not permitted to provide proof that a suspect is indeed the perpetrator. Both objectives must be met. The courts should be wary of protecting the privacy of suspects to the point where they place onerous requirements on investigators trying to obtain samples for DNA testing. The DNA legislation has incorporated an appropriate balance in its provisions, and it should be permitted to carry out those objectives.

The privacy concerns surrounding the banking of DNA profiles should not be exaggerated. Despite those concerns, DNA has amazing potential to do good in the criminal justice system. It will give prosecutors and police more certainty that they have in fact prosecuted the correct individual, and it will help to limit the number of wrongful convictions. These objectives are worthwhile achieving because ultimately they enhance the effectiveness of the administration of justice which in turn enhances public confidence in the criminal justice system. The DNA databank can improve the ability of the justice system to solve crimes and increase confidence in convictions. The Canadian DNA databank and the DNA warrant provisions will enhance public safety, and these provisions have been crafted in such a fashion that the privacy costs are minimal.

