



# **DNA Data Bank Legislation**

## Consultation Paper

2002



Department of Justice  
Canada

Ministère de la Justice  
Canada

**Canada**

**DNA Data Bank**  
**Legislation**  
Consultation Paper

2002

Published by authority of the Minister of Justice and  
Attorney General of Canada  
by the Communications Branch  
Department of Justice  
Ottawa, Canada

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Printed in Canada

This paper is also available on the Department of Justice website at the  
following address: [http://www.canada.justice.gc.ca/en/cons/dna\\_adn](http://www.canada.justice.gc.ca/en/cons/dna_adn)

# DNA DATA BANK LEGISLATION

## Consultation Paper

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## **Introduction**

### ***Legislative history***

In 1995 Parliament enacted amendments to the *Criminal Code* under which a provincial court judge could issue a warrant authorizing a police officer to obtain a biological sample (hair, blood or saliva) from a suspect for the purposes of forensic DNA analysis in the investigation of certain designated *Criminal Code* offences. This legislation came into force on July 15, 1995.<sup>1</sup> The list of designated offences for which a DNA warrant may be issued at the investigative stage was intentionally limited to major crimes of violence or of a sexual nature where it was likely that bodily substances suitable for DNA analysis would be abandoned by the perpetrator on or in something related to the offence.<sup>2</sup>

In 1998 Parliament enacted the *DNA Identification Act*.<sup>3</sup> The *Act* created a new statute governing the establishment and administration of a national DNA data bank and amended the *Criminal Code* to permit a judge to make a post-conviction DNA data bank order authorizing the taking of bodily substances from a person found guilty of designated *Criminal Code* offences in order to include the offender's DNA profile in the national DNA data bank.

In 2000 Parliament enacted a third piece of legislation relating to the collection and use of DNA forensic evidence.<sup>4</sup> In addition to amending the *National Defence Act* to authorize military judges to issue DNA warrants in the investigation of designated offences committed by a person who is subject to the Code of Service Discipline, the legislation enables military judges to make post-conviction DNA data bank orders. This legislation also made a small number of changes to the provisions of the *DNA Identification Act*, and the *Criminal Code* that were enacted in 1998.

The *DNA Identification Act* and the later legislation amending the *National Defence Act*, the *DNA Identification Act*, and the *Criminal Code* were proclaimed in force on June 30, 2000. The *DNA Identification Act* provides that within five years after the *Act* comes into force, a review of the provisions and operation of this *Act* shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose.

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<sup>1</sup> S.C. 1995, c. 27, formerly Bill C-104, *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*.

<sup>2</sup> The list of *Criminal Code* offences classified as designated offences has been modified on several occasions. The present list of designated offences is attached as Annex "A" to this discussion paper.

<sup>3</sup> S.C. 1998, c. 37, formerly Bill C-3, *An Act respecting DNA identification and to make consequential amendments to the Criminal Code and other Acts* (short title: the *DNA Identification Act*).

<sup>4</sup> S.C. 2000, c. 10, formerly Bill S-10, *An Act to amend the National Defence Act, the DNA Identification Act, and the Criminal Code*.

### ***The operation of Canada's national DNA data bank***

The Solicitor General of Canada officially opened Canada's National DNA Data Bank, located in Ottawa, on July 5, 2000. The DNA data bank is maintained by the Royal Canadian Mounted Police and consists of two collections or indices of DNA profiles: a ***crime scene index***, containing DNA profiles derived from bodily substances found at a crime scene; and a ***convicted offenders index***, containing DNA profiles derived from bodily substances taken from offenders against whom post-conviction DNA data bank orders have been made.

The DNA profiles in the ***convicted offenders index*** are continually compared to those in the ***crime scene index*** and, if a match is obtained, the fact of this match may be used to found an application by police investigating an unsolved designated offence, for a DNA warrant to seek a new investigative sample of bodily substances from the individual. The DNA profile derived from the new sample would serve to exclude the individual as a suspect or become evidence in a prosecution for the crime.

Two years have now passed since the *DNA Identification Act* came into force. The national DNA data bank reports that as of May 14, 2002, **21,862** DNA profiles have been entered into the *convicted offender index* and **5,142** DNA profiles have been entered into the *crime scene index*. In addition, there have been **236** matches between crime scene DNA profiles and convicted offender DNA profiles and **16** "forensic matches" (crime scene to crime scene).

### ***Consultation with Canadians***

The Department of Justice, in conjunction with the Department of the Solicitor General, the RCMP and the Correctional Service of Canada, is seeking the views of Canadians regarding the provisions governing the DNA data bank at this time for several reasons. First, the legislation has been in operation for sufficient time to permit an early assessment of the benefits of the legislation as well as possible refinements that may be appropriate. Second, judicial consideration of the legislation by provincial courts of criminal jurisdiction and a number of provincial courts of appeal has, so far, confirmed the constitutional validity of the new legislation and raised issues of legislative interpretation that could be clarified in the law. Third, provincial Attorneys General have identified a number of issues relating to the scope and operation of the legislation that, from their perspective, may require remedial legislative action. Finally, a broad survey of the views of Canadians concerning this important matter of criminal law policy would be beneficial in anticipation of the Parliamentary review of the legislation that is to take place within the next three years.

You are invited to forward your comments by November 1, 2002, to the following address:

#### **DNA Data Bank Legislation Discussion Paper**

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## **Criminal Code DNA Provisions**

The provisions of the *Criminal Code* that govern the taking of bodily substances for law enforcement purposes have been carefully designed to be respectful of constitutional requirements.

The DNA profiles derived from bodily substances obtained from a suspect under a *Criminal Code* DNA warrant<sup>5</sup> are only to be used in the investigation and prosecution of a designated offence and are not to be included in the national DNA data bank. This approach is consistent with the constitutionally protected presumption of innocence and permits the use of the DNA information either to exclude the person as a suspect or as evidence against the person by establishing a link between that person and the alleged crime.<sup>6</sup>

The DNA profiles derived from bodily substances taken from offenders who have been convicted of a designated offence under a *Criminal Code* DNA data bank order are only to be included in the ***convicted offenders index***. The national DNA data bank helps law enforcement agencies identify or exclude offenders alleged to have committed other designated offences, including those committed before the coming into force of the *DNA Identification Act*.

The DNA warrant scheme and the DNA data bank scheme have a number of features in common, including:

- a list of designated offences (s. 487.04);
- investigative procedures to collect samples of bodily substances (s. 487.06);
- a requirement for a peace officer to inform the subject—**before** samples are taken under a DNA warrant or DNA data bank order--of the contents of the warrant or order, the purpose of taking the samples, and the nature of the investigative procedure that will be employed (subs. 487.07(1));
- a requirement that the samples are to be taken by a peace officer or another person acting under the direction of a peace officer, who is able by virtue of training or experience, to take them (subs. 487.05(2) and subs. 487.056(3)); and
- a requirement to ensure that the person's privacy is respected in a manner that is reasonable in the circumstances (subs. 487.07(3)).

### ***Judicial discretion***

Interference with an individual's bodily integrity in order to obtain bodily substances for law enforcement purposes potentially raises several issues under the *Canadian Charter of Rights and Freedoms*. Most importantly, therefore, under both the DNA warrant and the DNA data bank schemes an independent judicial arbiter determines whether it is appropriate, in the circumstances, to authorize an agent of the state to take samples of bodily substances from the individual for limited law enforcement purposes. In doing so the judge balances the rights of the

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<sup>5</sup> S. 487.05.

<sup>6</sup> Subss. 487.08(1) and (2).



individual and the law enforcement interests of the state. Judicial discretion is required to ensure the constitutionality of the scheme as a whole.

### ***Temporal scope of the Criminal Code DNA Data Bank provisions***

The *Criminal Code* permits the making of post-conviction DNA data bank orders and authorizations in three circumstances and is said to have **prospective**<sup>7</sup>, **retrospective**<sup>8</sup> and **retroactive**<sup>9</sup> application. Also, a provincial court judge can authorize the taking of additional bodily substances from an offender if a DNA profile could not be derived from the sample obtained under an earlier order.<sup>10</sup>

### ***Primary designated offences and secondary designated offences***

The *Criminal Code* classifies those offences that may be the subject of a DNA warrant or of a post-conviction DNA data bank order as either primary or secondary designated offences. The nature of the crime, the seriousness of the crime and the likelihood of bodily substances being left behind by the perpetrator of the offence at the crime scene or on something related to the commission of the crime were factors in determining whether an offence is included in these lists. With a few exceptions the list of designated offences is limited to violent offences and sexual offences where there is a likelihood of bodily substances being left behind by the perpetrator of the offence. Primary designated offences are the most serious of these offences.<sup>11</sup>

Some serious offences do not appear on either list because they do not meet the criteria. For example, drug trafficking, while a serious offence, is highly unlikely to involve DNA evidence.

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<sup>7</sup> Prospective: this term describes the application of the new DNA data banking provisions of the *Criminal Code* to offences committed **after** the legislation had come into force—see section 487.51.

<sup>8</sup> Retrospective: this describes the application of the data bank provisions of the *Criminal Code* to instances where the designated offence was committed **before** the coming into force of the data bank legislation and where the person is convicted, discharged under section 730 of the *Criminal Code*, or in the case of a young person, found guilty under the *Young Offenders Act* of a designated offence **after** the coming into force of the legislation—see section 487.052.

<sup>9</sup> Retroactive: this term describes the application of the new DNA data banking provisions of the *Criminal Code* where the person had, **before** the coming into force of the legislation, either: (1) been declared a dangerous offender under Part XXIV of the *Criminal Code*; (2) been convicted of more than one sexual offence and at the time of the application was still serving a sentence of at least two years for one of those offences; or (3) been convicted of more than one murder committed on separate occasions (i.e., serial murderers)—see section 487.055.

<sup>10</sup> S. 487.091.

<sup>11</sup> For example, the list of primary designated offences includes murder, manslaughter, sexual assault, assault causing bodily harm, kidnapping and, as a consequence of amendments made under the recently enacted *Anti-Terrorism Act*, S.C. 2001, c. 41, a range of terrorist offences.

### ***Differences in the treatment of primary and secondary designated offences***

The court is required to make a DNA data bank order where an offender is convicted or discharged of a primary designated offence unless the judge is satisfied that the impact on the offender's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society. The burden of proof is on the offender to convince the court not to make the order.

In the case of a secondary designated offence, the order may be granted if the judge is satisfied that it is in the best interests of justice to do so. The burden of proof is on the Crown to convince the court to make the order. In deciding whether to grant the order, the courts are required to consider the following factors:

- the criminal record of the person or young person,
- the nature of the offence and the circumstances surrounding its commission, and
- the impact such an order would have on the person's or young person's privacy and security of the person.

### ***Judicial consideration of the legislation***

When Parliament enacted the DNA warrant scheme it was anticipated that several of its aspects would be tested before the courts to determine whether they conformed to constitutional parameters. In some cases the entire scheme was challenged while in others the accused focused on one or more particular aspects of the legislation. While the Supreme Court of Canada has not yet had an opportunity to consider such matters, trial level courts and appellate courts have uniformly been satisfied that the legislation meets constitutional requirements. The constitutionality of the DNA data bank legislation has also come under judicial scrutiny and provincial appellate courts have now begun to review some of the early decisions made under it.

The courts have also been asked to interpret a number of expressions found in s. 487.055 which sets out the "retroactive" aspect of the legislation.<sup>12</sup>

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<sup>12</sup> In *R. v. McFarlane*, [2000] B.C.J. No. 2698 (B.C. Prov. Ct.) the court held that the words "declared a dangerous offender under Part XXIV of the *Criminal Code*" should be interpreted to include persons declared a dangerous offender under Part XXI of the *Criminal Code* (the provision as it existed before it was renumbered by the *Revised Statutes of Canada, 1985*). In *Re Garvey*, [2000] B.C.J. No. 2753 (B.C. Prov. Ct.) the court held that in determining whether, for the purposes of paragraph 487.055(1)(c), an offender was "serving a sentence of imprisonment of at least two years" at the time of the application, subsection 139(1) of the *Corrections and Conditional Release Act* should be used – in effect the court accepted a calculation of sentence based the merger of two consecutive sentences. In *Re Rolfe*, [2000] A.J. No. 1353 (Alta. Prov. Ct.) the court concluded that sexual assaults that were prosecuted as one offence occurring over a period of time could not be considered "more than one sexual offence" and that when the same facts underlie two convictions (in this case sexual assault and sexual interference with a person under 14 referring to the same victim) then the offences overlap and they only count as one conviction.

## Consultation Questions

### **ISSUE 1: Whether there is a need to amend the current lists of designated offences in s. 487.04 of the *Criminal Code***

Any legislative changes to the lists of designated offences would have an impact on both the *Criminal Code* DNA warrant scheme and the *Criminal Code* DNA data bank scheme. When examining whether it is appropriate to add a particular offence to either the primary or secondary list of designated offences (or to remove an offence), it is important to consider whether its addition is justified (in other words, to consider the nature of the crime, the seriousness of the crime and the likelihood of bodily substances being left behind by the perpetrator of the offence at the crime scene or on something related to the commission of the crime).

#### **(a) Historical sexual offences**

The present list of “primary designated offences” found in section 487.04 of the *Criminal Code* includes a number of “historical” sexual offences, offences that have, over the years, been repealed by Parliament and replaced with modern crimes. For example, the offences of rape, attempted rape, and indecent assault were repealed in 1983 and replaced with the tripartite classification of sexual assault that closely mirrors the three-tiered structure of assault offences in the *Criminal Code*.<sup>13</sup> Several of the historical sexual offences have been included in the list of designated offences.<sup>14</sup> Similarly, paragraphs 487.055(3)(b) and (c) define “sexual offence” for the purposes of the retroactive scheme.

The argument in support of the inclusion of the historical offences of “indecent assault female,” “indecent assault male” and “gross indecency” as designated offences rests on two assumptions: first, that offenders are still being convicted today for such offences which may have been committed more than twenty years ago (without resort to the DNA warrant scheme) and, secondly, more repeat sexual offenders would be captured under the retroactive scheme.<sup>15</sup>

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<sup>13</sup> The three levels of sexual assault are: (1) sexual assault (s. 271); (2) sexual assault with a weapon or causing bodily harm or with threats to a third party (s. 272); and (3) aggravated sexual assault (s. 273).

<sup>14</sup> For example, the following provisions of the *Criminal Code*, as they read before January 4, 1983, are listed, namely, section 144 (rape), section 146 (sexual intercourse with female under fourteen and between fourteen and sixteen), and section 148 (sexual intercourse with feeble-minded, etc.), as well as the offence under paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.) of the *Criminal Code* as it read before January 1, 1988.

Omitted from the list were: (1) indecent assault female (s. 149); (2) indecent assault male (s. 156); and (3) gross indecency (s. 157).

<sup>15</sup> An offender presently serving a term of imprisonment of two years or more for a sexual offence without another conviction for a “sexual offence” would not otherwise be a candidate for the retroactive scheme.

## **(b) Reclassifying existing designated offences and adding new offences**

Changes to the lists of designated offences are possible. Parliament recently made several changes to the definition of “designated offence” in the *Criminal Code* with the enactment of Bill C-36, the *Anti-Terrorism Act*.<sup>16</sup> The amendment expands the list of *Criminal Code* offences listed as “primary designated offences” to include certain offences that had previously been listed as “secondary designated offences”: section 75 (piratical acts); section 76 (hijacking); section 77 (endangering safety of aircraft or airport); section 78.1 (seizing control of ship or fixed platform); subsection 81(1) (using explosives); and section 279.1 (hostage-taking).

The amendment also affects certain new *Criminal Code* offences created under the *Anti-Terrorism Act*: section 83.18 (participation in activity of terrorist group); section 83.19 (facilitating terrorist activity); section 83.2 (commission of offence for terrorist group); section 83.21 (instructing commission of offence for terrorist group); section 83.22 (instructing to carry out terrorist activity); section 83.23 (harbouring); section 431 (attack on premises, residence or transportation of internationally protected person); section 431.1 (attack on premises, accommodation or transportation of United Nations or associated personnel); and subsection 431.2(2) (using explosive of other lethal device). It also deals with three offences under the *Security of Information Act*: section 19 (threats or violence); section 20 (approaching, entering etc., a prohibited place); and section 21 (harbouring and concealing).

### **Questions**

*Having regard to the purposes of the legislation and the criteria for inclusion of offences:*

*Should any new offences be added to the list of designated offences? If so, why? Should they be listed as primary or secondary designated offences?*

*Should any offences be removed from either list? If so, why?*

*Should any offences currently on the list of secondary designated offences be moved to the list of primary designated offences or vice versa? If so, why?*

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<sup>16</sup> S.C. 2001, c. 41, s. 17.

## **ISSUE 2: Whether there is a need to amend the *Criminal Code* to allow DNA samples to be taken from individuals found not criminally responsible by reason of mental disorder for inclusion in the DNA data bank**

In Canada no person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.<sup>17</sup> An accused who has committed the act or made the omission that formed the basis of the designated offence charged but who at the time of its commission was suffering from a “mental disorder” would be found **not criminally responsible by reason of mental disorder** if the court held that the disorder “rendered the person incapable of appreciating the nature or quality of the act or omission.”<sup>18</sup> As a result, such a person would not be “convicted” of the offence<sup>19</sup> and would be excluded from the DNA data bank regime in the *Criminal Code*. Consequently, that person’s DNA profile would not be included in the *convicted offenders index* where it might help resolve previous or subsequent designated offences that the person may have committed or may commit in the future.

### **Questions**

*Should judges be allowed to order that DNA samples be taken from persons found not criminally responsible? If so, why? Should this be restricted to certain designated offences? Why? If so, which ones?*

*If judges were to be allowed to order that DNA samples be taken from persons found not criminally responsible, should the burden always be on the prosecutor to apply to the judge for such an order? What criteria should be considered by the judge in making such an order?*

*If judges were to be allowed to order that DNA samples be taken from persons found not criminally responsible, should they be allowed to make such orders prospectively, retrospectively or retroactively? Why?*

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<sup>17</sup> Subs. 16(1) of the *Criminal Code*.

<sup>18</sup> Section 672.34 of the *Criminal Code* provides:

Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

<sup>19</sup> Section 672.35 of the *Criminal Code* provides:

Where a verdict of not criminally responsible on account of mental disorder is rendered, the accused shall not be found guilty or convicted of the offence, but ....

### **ISSUE 3: Whether there is a need to amend the *Criminal Code* to expand the scope of the “retroactive” aspect of the DNA data bank legislation**

As described above, the *Criminal Code* provides in limited circumstances for DNA samples to be taken from persons convicted before the coming into force of the DNA data bank legislation in June 2000.

Any retroactive legislative scheme would confront one of the fundamental principles of our criminal justice system: that once a person is finally sentenced, the state cannot continue to impose further consequences based on that conviction. This type of scheme could be justified where there was a heightened risk that an individual would re-offend by committing a serious violent offence and, as a result, there existed an over-riding societal interest in the protection of the public from that individual.

The present legislation enables the courts to retroactively authorize the collection of DNA samples from those offenders who represent the greatest risk to society: “dangerous offenders,” whose status has been determined by the court after a conviction; serial killers, who have high recidivism rates; and serial sex offenders--who, according to the Correctional Service of Canada, have the highest recidivism rates. The three categories of offenders currently included in the retroactive scheme present an elevated risk of recidivism justifying the need for special measures to protect the public.

Although a prosecutor makes application for such an authorization to a provincial court judge in the absence of the offender (*ex parte*), the order is not automatic. In deciding whether to issue the authorization, the court must consider the criminal record of the person, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person’s privacy and security of the person. As of May 14, 2002, the DNA profiles of 1,540 such offenders have been included in the national DNA data bank.

The *Criminal Code* contains a list of “historical” sexual offences that can form the basis of an application under the retroactive scheme. These are offences that have been repealed by Parliament and replaced with new offences (for example rape or sexual intercourse with stepdaughter). Some historical sexual offences (e.g., the historical sexual offences of indecent assault-male – section 156 in the pre-1983 *Code*) are not included in the list of designated sexual offences in the retroactive scheme. Because of this exclusion, a conviction for such an offence would not be counted for the purposes of determining whether an offender is an eligible target for a retroactive DNA data bank order.

#### **Questions**

*Should the retroactive scheme be expanded to include historical sexual offences such as indecent assault—male, indecent assault—female, and gross indecency? If so, why?*

*Are there other types of offenders not currently listed who should be considered as candidates for an application for a retroactive DNA order? If so, why?*

## **ISSUE 4: Whether there is a need to amend the *Criminal Code* to address certain procedural issues**

### **(a) Ensuring the attendance of the offender for hearings under ss. 487.051 and 487.052**

The DNA data bank provisions of the *Criminal Code* anticipate that the offender will be present in court when a DNA data bank order is made. Until he or she is convicted of the designated offence and sentenced, the accused is under the requirement to attend court as a condition of judicial interim release (bail). In Ontario, some judges have been sentencing offenders prior to resolution of the DNA data bank issue and there is a question as to whether they continue to have jurisdiction over the offender after the imposition of sentence. Amendments to the *Criminal Code* may be made to clarify that judges continue to have jurisdiction to make a DNA data bank order after sentencing and to establish a method of compelling appearance for the purpose of the retrospective and prospective DNA Data Bank hearings.

### **Questions**

*Should the Criminal Code be amended to permit a court to deal with a the making of a DNA data bank order after a sentence has been imposed and to establish a process for compelling the attendance of an offender for the purposes of the hearing? If so, what should the process be?*

### **(b) Ensuring the attendance of the offender for the execution of a DNA data bank order**

A DNA data bank order, like a DNA warrant or other search warrant, authorizes the police to take custody of certain materials – in this case the materials are samples of bodily substances from a convicted offender. The DNA data bank order is not directed to the offender. Rather, it is addressed to the peace officers in the territorial division and may be accompanied by those terms and conditions that a judge considers advisable in the circumstances.<sup>20</sup> The legislation also provides that when a court makes a DNA data bank order, the bodily samples “shall be taken at the time the person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, or as soon as is feasible afterwards.”<sup>21</sup> The legislation anticipated that DNA samples would, in most cases, be taken *immediately* upon conviction. However, if the matter of making a DNA order is dealt with at a later point (e.g., contemporaneous with the sentencing process if it has been adjourned), the collection ought to take place immediately after the DNA data bank order is made. Taking DNA samples from an offender immediately after the proceedings in the court are completed helps ensure that DNA data bank orders are executed.

Nevertheless, having a peace officer trained in taking the DNA sample available at the courthouse or other location at all times can be a strain on police resources. There is generally no difficulty in locating an offender who is sentenced to imprisonment and executing the order at a later point. However, this is not always the case with respect to an offender who is not sentenced to imprisonment. To facilitate the collection of DNA samples in these circumstances,

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<sup>20</sup> Subss. 487.051(a), 487.051(b) and 487.052(1).

<sup>21</sup> Subs. 487.056(1).

the *Criminal Code* could be amended to establish a mechanism that would require the offender to attend at a specified time and place to provide the DNA sample and for the arrest and detention for sampling of an offender who fails to appear.

### **Questions**

*Should the Criminal Code be amended to establish a process for compelling the attendance of an offender for the purposes of providing a DNA sample? If so, what should the process be?*

#### **(c) Obtaining additional samples of bodily substances from an offender**

Before samples of bodily substances are processed by the national DNA data bank to obtain a DNA profile, officials examine the documentation that accompanies them to ensure that no errors have been made in the identification of the offenders, that no samples have been improperly submitted and, generally to avoid any contamination of the information held in the data bank that might compromise its reliability for law enforcement purposes. On May 14, 2002, the national DNA data bank reported that it has rejected a total of 240 samples for a variety of reasons since it began its operations in 2000.<sup>22</sup>

Section 487.091 provides for orders to be made for additional samples if “a DNA profile could not be derived from the bodily substances that were taken from a person.” The order is made on *ex parte* application. There is however no provision in the *Criminal Code* to deal with instances of collection error (e.g., where the witness failed to sign the form). Such human errors are infrequent but they do occur.

### **Questions**

*Should the Criminal Code be amended to allow for re-sampling if the original sample is rejected by the DNA databank as a result of problems in the identification of the offender? If so, should the procedure be ex parte or should the offender have notice of the application?*

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<sup>22</sup>

<b>Sample Rejections</b>	
127	<b>Non-designated offences</b>
56	<b>Biological sample inadequate</b>
45	<b>Wrong collection kit used</b>
3	<b>No order (consent)</b>
9	<b>Other (represents a variety of administrative or clerical collection problems)</b>
<hr/>	
240	<b>Rejected samples</b>



**ISSUE 5: Whether there is a need to provide for re-sampling in some cases where access to the offender's DNA profile has, by operation of law, been permanently removed from the national DNA data bank**

*The effect of a successful appeal on the comprehensiveness of the DNA data bank*

Section 487.053 of the *Criminal Code* prevents the making of a DNA data bank order if the offender's DNA profile is already contained in the national DNA data bank. This provision was intended to avoid unnecessary sampling of convicted offenders and enhance cost-effectiveness in the operation of the national DNA data bank.

A situation may arise where an offender is convicted of a designated offence and his or her DNA profile is included in the *convicted offenders index* of the national DNA data bank while the conviction is appealed. Under the *DNA Identification Act*, if the appeal is successful, access to the offender's DNA profile in the *convicted offenders index* shall be permanently removed without delay after the conviction is quashed and a final acquittal entered.<sup>23</sup> If, between the time when the offender's DNA profile is added to the *convicted offenders index* and the time when the first conviction is overturned, this offender has been convicted of another designated offence no further DNA order will be made. Under the present law it would not be possible to return to the judge who could have made a DNA data bank order in respect of the second conviction notwithstanding the fact that the offender was convicted of a designated offence.

**Questions**

*Should the legislation be amended to ensure that it is possible to seek a DNA data bank order in such circumstances?*

*If so, to what court should the application be made and should the offender receive notice of the application?*

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<sup>23</sup> Subs. 9(2) and s. 9.1 of the *DNA Identification Act*.

## **Annex A**

### **PRIMARY DESIGNATED OFFENCES:**

#### *Criminal Code:*

- 75 (piratical acts);
- 76 (hijacking);
- 77 (endangering safety of aircraft or airport);
- 78.1 (seizing control of ship or fixed platform);
- 81(1) (using explosives);
- 83.18 (participation in activity of terrorist group);
- 83.19 (facilitating terrorist activity);
- 83.2 (commission of offence for terrorist group);
- 83.21 (instructing to carry out activity for terrorist group);
- 83.22 (instructing to carry out terrorist activity);
- 83.23 (harbouring or concealing);
- 151 (sexual interference);
- 152 (invitation to sexual touching);
- 153 (sexual exploitation);
- 155 (incest);
- 212(4) (offence in relation to juvenile prostitution);
- 233 (infanticide);
- 235 (murder);
- 236 (manslaughter);
- 244 (causing bodily harm with intent);
- 267 (assault with a weapon or causing bodily harm);
- 268 (aggravated assault);
- 269 (unlawfully causing bodily harm);
- 271 (sexual assault);
- 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- 273 (aggravated sexual assault);
- 279 (kidnapping);
- 279.1 (hostage-taking);
- 431 (attack on premises, residence or transport of internationally protected person);
- 431.1 (attack on premises, accommodation or transport of United Nations or associated personnel); and
- 431.2(2) (explosive or other lethal device).

#### *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970:

- 144 (rape);
- 146 (sexual intercourse with female under fourteen and between fourteen and sixteen);
- 148 (sexual intercourse with feeble-minded, etc.); and
- 153(1)(a) (sexual intercourse with step-daughter, etc.)..

*Security of Information Act:*

- 6 (approaching, entering, etc., a prohibited place);
- 20(1) (threats or violence); and
- 21(1) (harbouring or concealing).

**SECONDARY DESIGNATED OFFENCES:**

*Criminal Code:*

- 160(3) (bestiality in the presence of or by child);
- 163.1 (child pornography);
- 170 (parent or guardian procuring sexual activity);
- 173 (indecent acts);
- 220 (causing death by criminal negligence);
- 221 (causing bodily harm by criminal negligence);
- 249(3) (dangerous operation causing bodily harm);
- 249(4) (dangerous operation causing death);
- 252 (failure to stop at scene of accident);
- 255(2) (impaired driving causing bodily harm);
- 255(3) (impaired driving causing death);
- 266 (assault);
- 269.1 (torture);
- 270(1)(a) (assaulting a peace officer);
- 344 (robbery);
- 348(1) (breaking and entering with intent, committing offence or breaking out);
- 430(2) (mischief that causes actual danger to life);
- 433 (arson—disregard for human life); and
- 434.1 (arson—own property).

*Criminal Code, as they read from time to time before July 1, 1990:*

- 433 (arson); and
- 434 (setting fire to other substance).