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IDENTITY CRISIS: THE *CHARTER* AND FORENSIC DNA ANALYSIS IN THE CRIMINAL JUSTICE SYSTEM

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Law, including criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.¹

As a result of several highly publicized criminal cases (most notably the O. J. Simpson double murder trial in California), a tremendous amount of public attention has been focused on the subject of genetic testing. DNA typing is a powerful investigative tool that can help to identify or exonerate individuals who have been accused of committing serious crimes.² Since its introduction in Canada in 1988, it has been instrumental in securing convictions in hundreds of violent crimes, from homicide to sexual assault.³ Until recently, however, there has been no legislative framework to regulate its use.

On July 13, 1995, *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*⁴ received Royal Assent and its provisions are now in force. It represents the first attempt by Parliament to provide legal authority for the compulsion of bodily samples as a direct response to the development of genetic testing.

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¹ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 65.

² See e.g. *R. v. Morin* (1995), 37 C.R. (4th) 395.

³ *House of Commons Debates* (22 June 1995) at 14489.

⁴ S.C. 1995, c. 27.

The legislation empowers law enforcement officers to seize a bodily substance from an individual pursuant to a new type of warrant. The seizure may take place without the person's consent, when there are reasonable grounds to believe that a serious crime has been committed by the individual from whom the DNA sample will be taken. The effect of the law is to create a distinct code of procedure, designed to both authorize and regulate the seizure of DNA evidence from suspects in criminal cases. The legislation is remarkable for the invasiveness of the procedure it permits.

The impact of forensic DNA analysis on criminal investigations has been compared to that of traditional fingerprinting techniques when first introduced in the early 1900s.⁵ Unlike conventional fingerprinting, however, which identifies individuals on the basis of minute physical characteristics, DNA typing looks for differences which are far more intimate and go to the very essence of a person.

The advantages of DNA typing technology are unquestionable, but society must also be mindful of the potential dangers it presents to civil liberties. Forensic DNA analysis has innumerable "Orwellian possibilities,"⁶ but the legal community seems to be focused on the ability of the technology to identify criminal suspects. It is feared that courts may lose all sense of balance and restraint in the face of this novel scientific evidence, embracing it with little scrutiny of its actual reliability and little concern for its impact on the rights of individuals. As a consequence of the new legislation, Canadian judges and lawyers will be forced to deal with the implications of this technology.

DNA typing draws upon concepts in diverse scientific disciplines such as forensics, molecular biology, population genetics and statistics. In order to comprehend the legal issues involved in forensic DNA analysis, one requires a basic understanding of human genetics.⁷ These principles will be outlined in the first part of the paper.

⁵ J.L. Marx, "DNA Fingerprinting Takes the Witness Stand" (1988) 240 Science 1616.

⁶ J.C. Hoeffel, "The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant" (1990) 42 Stan. L. Rev. 465 at 466.

⁷ See generally Science Council of Canada, *Genetics in Health Care: Report 42* (Ottawa: Science Council of Canada, 1991) at 17-33, 99-105; Medical Research Council of Canada, *Guidelines for Research on Somatic Cell Gene Therapy in Humans* (Ottawa: Medical Research Council of Canada, 1990) at 11-23; Law

The second part of the essay traces the historical development of DNA testing from its introduction in England in 1988, to its present-day use in Canada. This will provide the necessary background for the analysis that follows.

The third part details the impact of the *Constitution* on the forensic DNA provisions of the *Criminal Code*. It will be shown that the new legislation, despite its laudable aims, infringes sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*. The analysis will demonstrate that it is unlikely that the violations of these rights can be saved by section 1. This will be followed by a discussion of the potential impact of section 24(2) on the new legislation.

The paper concludes with an assessment of the constitutional validity of DNA data banks. While the present law does not authorize such a measure, it is clear that this is the legislative course that has been charted by Parliament. It will be argued that the establishment of a DNA data bank is inconsistent with the notions of privacy, liberty and personal security that exist in Canadian society.

I. THE BLUEPRINT OF LIFE

The human body is made up of cells.⁸ Nearly all of these cells contain a nucleus and a cytoplasm. The nucleus contains two important structures: chromosomes and nucleoli. In every human cell there are 46 chromosomes, divided into 23 pairs. Each cell contains 23 chromosomes from the father and 23 from the mother. The chromosomes combine to form a genome, or genetic code.

Deoxyribonucleic acid, or DNA, has been described as the "blueprint of all life;" it is the molecule that contains the genetic code. DNA is present in the nuclei of all living cells with the exception of red blood cells,⁹ and can be extracted from any sample containing nucleated cells.¹⁰ All the cells of an individual have the

Reform Commission of Canada, *Human Dignity and Genetic Heritage: A Study Paper* (Ottawa: Law Reform Commission of Canada, 1991) at 5-14; D. Suzuki, *Genethics: The Ethics of Engineering Life* (Don Mills: Stoddart, 1990).

⁸ The body of a human being has more than 10,000,000,000,000 cells.

⁹ Blood contains many cell types in addition to red blood cells, and it is from these cells that DNA can be obtained when forensic evidence is a blood stain.

¹⁰ Hair shafts and fingernails are not made up of nucleated cells, and are therefore unhelpful for DNA typing. Further, saliva and urine are not made up of nucleated cells, but contain nucleated cells from the wall of the mouth and urethra respectively.

same DNA composition, which does not change during the course of his or her lifetime. Although the DNA of different individuals varies only slightly,¹¹ no two people, with the exception of identical twins, have exactly the same DNA composition.

The structure of DNA was discovered in 1953 by James D. Watson and Francis H. C. Crick. It includes two long chains linked together in the form of a double-stranded helix. In other words, DNA looks like a twisted rope ladder, a double thread held together by crosspieces and coiled like a spring.

An individual's genetic code is expressed by the arrangement of six chemical compounds. The long threads that make up the sides of the ladder contain alternating units of phosphate and a sugar called deoxyribose. The rungs of the ladder are made up of four bases called adenine, cytosine, guanine, and thymine (abbreviated A, C, G, and T). Each rung consists of two bases: A-T, T-A, C-G, or G-C. No other combination is possible because only the A-T and C-G pairs are chemically attracted to each other. In addition, only these pairs make rungs of the proper length to fit between the side pieces of the ladder. Any other combination is too big or too small.

These base pairs are repeated millions of times in every cell and their order determines the genetic characteristics of each individual.¹² Present technology does not allow scientists to look at the entire DNA chain contained in the 23 pairs of chromosomes of the cell. In 1985, however, the British geneticist Dr. Alec Jeffreys determined that by examining certain sections of these chemical combinations, scientists could differentiate between individuals.¹³ These sections of DNA are considered highly polymorphic, which is to say they differ greatly among individuals. The significance for forensics is that the larger the number of sites that match (between an evidence sample and a known sample), the more likely it is that a suspect is implicated in the crime. The other important point is that a non-match at any polymorphic site absolutely excludes an individual whose DNA profile is being compared.

¹¹ 99.9 per cent of the base pairs in human DNA are identical in all individuals.

¹² In total, human DNA contains about 3.3 billion base pairs.

¹³ A.J. Jeffreys, et al., "Individual-Specific Fingerprints of Human DNA" (1985) 316 *Nature* 316.

II. GENETIC JURISPRUDENCE

The trial of Colin Pitchfork, which involved the sexual assault and murder of two young girls, was the first criminal case to use forensic DNA analysis.¹⁴ The killings occurred in 1983 and 1986 in neighbouring villages in Leicestershire, England. For the intervening three years between the murders, the police had no leads, although they believed that the same man was responsible for both crimes. A month after the second murder, a youth, Richard Buckland, was arrested and soon confessed to the 1986 killing, but he firmly denied involvement in the 1983 murder.

Forensic DNA analysis was performed on samples of Buckland's blood and from the semen samples found on the victims. The results were discouraging to the police; while it was clear that the same individual had sexually assaulted the two victims, it was equally certain that the culprit was not Buckland. Thus, genetic testing freed an innocent man who would almost certainly have been convicted on the ground of a false confession.

Richard Buckland was released after three months in custody. He claimed that intense pressure and intimidation by the investigating officers had caused him to confess falsely, but an internal police investigation disclosed no improper conduct.

At this point, the police took an extraordinary step: using hospital and voting records, they compiled a list of all the males between the ages of 13 and 30 living in the adjoining villages of Narborough, Enderby and Littlethorpe. A letter was then sent to over 5,000 men, requesting their attendance to provide a blood sample for the purposes of forensic DNA analysis.

Several thousand blood samples were collected, but failed to provide a single match.¹⁵ One individual, Colin Pitchfork, failed to arrive at the first two appointments made for him, but he apparently co-operated on the third visit. The case was eventually resolved when it was learned that Pitchfork had convinced a co-worker to submit a blood sample in his place. A sample of Pitchfork's blood resulted in a DNA profile, identical to that produced by the semen specimens. Pitchfork pleaded guilty to

¹⁴ See generally *The [London] Times* (23 January 1988); and G. Greg Brodsky, "DNA: The Technology of the Future is Here" (1993) 36 Cr. L.Q. 10.

¹⁵ Over 97 per cent of the men responded to the first letter; the remainder were eventually found and voluntarily gave blood.

both counts of sexual assault and murder and was sentenced to life imprisonment.

The celebrated American decision of *People v. Castro*¹⁶ was the first case to thoroughly examine the methodology and results of forensic DNA analysis. The defendant, José Castro, was accused of murdering his neighbour, Vilna Ponce, and her two-year-old daughter in their Bronx apartment building. The police seized Castro's wristwatch, and determined that the small bloodstain found on it matched the DNA of one of the victims. Although the DNA evidence was held to be inadmissible due to the alleged use of a contaminated probe, this case is seen as giving "a sweeping endorsement of DNA typing as a potentially revolutionary tool in criminal law enforcement."¹⁷

The case of *R. v. Parent* introduced DNA evidence to Canadian jurisprudence in 1988.¹⁸ The accused was charged with eleven counts of sexual assault and breaking and entering. During the investigation, several articles of the victims' clothing and samples of the accused's hair and blood were collected and compared by a private laboratory. The test results, obtained during the course of the trial, exculpated Parent in four of the sexual assaults. The court held that other factors eliminated Parent as the offender in three other counts. Having been eliminated from a total of seven of the eleven counts, Roslak J. concluded that reasonable doubt existed as to whether Parent was the assailant in the remaining offences.

DNA evidence was next examined by a Canadian court in the 1989 decision of *R. v. McNally*.¹⁹ The case involved a man charged with sexual assault and identified in a photo line-up. Following a *voir dire*, Flanigan D.C.J. allowed the RCMP's DNA typing results. This marked the first time in North America that DNA evidence, obtained by a law enforcement agency, was admitted in court.²⁰ The accused changed his plea to guilty after the DNA evidence was admitted.

¹⁶ 545 N.Y.S. 2d 985 (Sup. Ct. 1989).

¹⁷ J.G. Petrosinelli, "The Admissibility of DNA Typing: A New Methodology" (1990-91) 79 Georgetown L.J. 313 at 326.

¹⁸ (1988), Alta. L.R. (2d) 18 (Alta. Q.B.).

¹⁹ (5 April 1989), Ottawa-Carleton 3751 (Ont. Dist. Ct.).

²⁰ B.D. Gaudette, DNA Typing: A New Service to Canadian Police (1990), 52:4 RCMP Gazette 1.

In 1990, the Ontario General Division considered the admissibility of DNA evidence in the case of *R. v. Keenan and Hunt*.²¹ Misener J. ruled that the results of DNA testing, performed by the RCMP, were admissible. The defendants maintained their innocence, despite the evidence against them, and were convicted at trial.

Forensic DNA analysis was subsequently used in the trial of Claude Bourguignon in 1991.²² The accused was charged with the sodomy and murder of his young nephew. Unlike the situation in *McNally*²³ and *Keenan and Hunt*,²⁴ which dealt solely with the admissibility of genetic evidence; in this case an expert witness was called on to testify as to the statistical probability of a coincidental match. The court admitted the evidence, but excluded the expert testimony. The comments of Flanigan J. are noteworthy:

This court does not think that the criminal jurisdiction of Canada is yet ready to put such an additional pressure on a jury, by making them overcome such fantastic odds and asking them to weigh it as just one piece of evidence to be considered in the overall picture of the evidence presented.²⁵

The court went on to find that there was a real danger that the jury would use the evidence as the sole measure of the accused's guilt or innocence and thereby undermine the presumption of innocence and erode the standard of reasonable doubt.²⁶

Evidence obtained by means of genetic testing was introduced in the trial of Carlos Terceira, accused of the murder of a six-year-old girl.²⁷ Following a *voir dire*, Silverman J. held that "evidence as

²¹ (11 December 1990), (Ont. Gen. Div.) [unreported].

²² *R. v. Bourguignon* (14 January 1991), (Ont. Gen. Div.) [unreported]; see also H. Levy, "The DNA Debate" Canadian Lawyer (14 September 1991).

²³ *Supra* note 19.

²⁴ *Supra* note 21.

²⁵ *Supra* note 22. It should be noted that other courts have rejected the distinction drawn by Flanigan J. and have admitted both DNA evidence and evidence regarding the statistical probability of a match. See e.g. *R. v. Lafferty* (1993), 80 C.C.C. (3d) 150. Sopinka J. alluded to this debate in *R. v. Mohan* (1994), 29 C.R. (4th) 243 at 253; however, the issue was not ultimately resolved as the specific point was not raised in the case.

²⁶ *Ibid.*

²⁷ *R. v. Terceira* (23 October 1991), (Ont. Gen. Div.) [unreported].

to the methodology and techniques" could be presented to the jury, but "evidence as to statistics, human or population genetics, and probabilities" should be excluded on the basis that there was "serious debate and controversy among the leading thinkers and experts in the field."²⁸

In the 1992 case of *R. v. Johnston*,²⁹ the Ontario General Division stated that two distinct branches of science were involved in DNA profiling: molecular biology and population genetics. Due to the complex interrelationship between the two disciplines, Langdon J. noted that "one must exercise extreme caution in areas where the different disciplines interface."³⁰ Due to the fact that a trial court possesses the residual discretion to reject evidence, the court held that where the prejudicial effect outweighs the probative value, the court can and should exclude the evidence.

DNA typing evidence was critical in the trial and subsequent appeal of Allan Legere, charged with four murders in the Miramichi region of northern New Brunswick.³¹ Prior to the trial, the RCMP stated that this would be "a test case for new forensic crime-testing procedures."³² Although Legere pleaded not guilty to all the killings, the jury found him guilty of four counts of first-degree murder.

III. CONSTITUTIONAL ANALYSIS

1. Section 8

Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.³³

²⁸ *Ibid.*

²⁹ 69 C.C.C. (3d) 395.

³⁰ *Ibid.* at 402.

³¹ *R. v. Legere* (1994), 95 C.C.C. (3d) 139 (N.B.C.A.); leave to appeal ref'd [1995] S.C.C. Bulletin of Proceedings, 10 November 1995, 1795.

³² K. Cox, "Legere Charged With Four Murders" *The Globe and Mail* (21 November 1990).

³³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), c. 11, s. 8 [hereinafter the *Charter*].

In examining the potential impact of section 8 on the forensic DNA provisions of the *Criminal Code*, it is necessary to assess the power to search and seize prior to the new legislation.

The Canadian criminal justice system is comprised of an interconnected web of values and assumptions that define the role of the individual, the role of the state, and the relationship between the two. Implicit in this web of principles is the conviction that the need for law enforcement must coexist with other concerns. Chief among these concerns is the privacy of the individual.

In *Hunter v. Southam Inc.*,³⁴ Dickson J. (as he then was), on behalf of a unanimous Supreme Court of Canada, established that the proper approach of the courts to the interpretation of the *Charter* should be one that is both broad and purposive.³⁵ The Court went on to hold that the guarantee against unreasonable search or seizure protected a "reasonable expectation of privacy."³⁶

In the subsequent case of *R. v. Dyment*,³⁷ the Supreme Court of Canada further expanded the privacy interest as follows:

Society has come to realize that privacy is at the heart of liberty in a modern state . . . Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government from prying into the lives of the citizen go to the essence of the democratic state.³⁸

In order to ascertain the extent of an individual's right to be secure against unreasonable search or seizure, a court must undertake a delicate balancing process. Section 8 mandates that a court weigh the public's interest in being free from government interference against the state's interest in intruding on an individual's privacy in order to advance its goals, notably those of

³⁴ (1984), 14 C.C.C. (3d) 97.

³⁵ *Ibid.* at 105-106.

³⁶ *Ibid.* at 108.

³⁷ (1988) 45 C.C.C. (3d) 244.

³⁸ *Ibid.* at 254.

law enforcement.³⁹ Determining at what point privacy must give way to official state intrusion is at the very crux of the analysis.

The unique informational aspect of DNA profiling⁴⁰ adds a new dimension to a section 8 examination of reasonableness in search and seizures. The balancing test for the reasonableness of such procedures involves weighing the need of law enforcement officers to obtain evidence against the invasion of individual privacy. The sort of privacy invasion implicated by gaining access to DNA profiling information goes beyond simple physical invasion and thus deserves heightened protection.

The Supreme Court of Canada has recognized that what determines "reasonableness" and what constitutes a "reasonable expectation of privacy" may vary according to the context, "depending upon the competing considerations at the heart of the issue."⁴¹ This proposition was stated by Wilson J. in *R. v. McKinlay Transport Limited*:

The standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.⁴²

In light of the relative infancy of the legislation (and the subsequent absence of case law), the standard of what constitutes a "reasonable expectation of privacy" has not been determined under the DNA provisions of the *Criminal Code*. However, the comments of Dickson C.J.C. in *R. v. Simmons*⁴³ point to a higher standard of constitutional protection for severe intrusions of bodily integrity:

[T]he greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection.⁴⁴

³⁹ *Supra* note 34 at 108. It has since been determined that this assessment must be made in the light of the totality of the circumstances of a particular case. See e.g. *R. v. Colarusso*, [1994] 1 S.C.R. 20 at 54 and *R. v. Wong*, [1990] 3 S.C.R. 36 at 62.

⁴⁰ Although the state may only intend to seize evidence that would identify the suspect as the perpetrator of the crime, the police are in fact seizing the medical, racial, ethnic and genealogical history of the suspect as well.

⁴¹ *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at 305.

⁴² (1990), 76 C.R. (3d) 283 at 298 (S.C.C.).

⁴³ (1988), 66 C.R. (3d) 297 (S.C.C.).

⁴⁴ *Ibid.* at 314.

In light of the invasive nature of a DNA seizure and the intimate details of an individual's private life that a genetic profile may reveal, it is suggested that this mandates a heightened protection against unreasonable searches and seizures under section 8.

In order to determine the constitutional validity of a search or seizure, the Supreme Court of Canada stipulated in *Hunter* that three requirements must be satisfied: (1) where "feasible" prior authorization is a "precondition for a valid search and seizure;"⁴⁵ (2) the person authorizing the breach of privacy must make the assessment "in an entirely neutral and impartial manner;"⁴⁶ and (3) there must be reasonable and probable grounds established upon oath to believe that an offence has been committed or that evidence will be found at the place of the search.⁴⁷

Application of these standards to the DNA provisions of the *Criminal Code* reveals that the legislation has been carefully drafted to meet these standards. First, the law provides that a bodily substance can only be obtained for DNA testing pursuant to a warrant.⁴⁸ Second, an application for a DNA warrant may not be entertained by a justice of the peace: the legislation mandates that a warrant may only be issued by a provincial court judge.⁴⁹ Third, the judge may only grant a warrant if he or she is satisfied on oath that there are reasonable grounds to believe the person to be tested was a party to the offence. The issuing judge must also deem that there are reasonable grounds to believe that analysis of bodily substances will provide probative evidence confirming or disproving the suspect's involvement in the commission of the offence.⁵⁰

The gravity of the offence will have a significant bearing on the balancing of law enforcement and individual privacy interests under section 8 of the *Charter*. The more serious the offence, the more compelling the societal interest in detection and prosecution of the offender.

The government could attempt to establish that the seizure of bodily substances is reasonable by pointing to the fact that the new

⁴⁵ *Supra* note 34 at 109.

⁴⁶ *Ibid.* at 110.

⁴⁷ *Ibid.* at 115.

⁴⁸ *Supra* note 4 at s. 487.05.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

DNA warrant is only available in connection with certain designated *Criminal Code* offences enumerated in section 487.04. These are, for the most part, serious offences involving violence or injury to the person, including homicides, sexual offences, assaults and arson.⁵¹

However, it should be noted that the *Charter* gives preference to the right of the individual to be free from state intervention over the interests of the state in advancing its purposes through such interference. The comments of Dickson J. are significant:

An assessment of the constitutionality of a search and seizure, or a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.⁵²

Section 487.07(1)(e) appears to tip the balance strongly in favour of the state. This provision authorizes a peace officer to use "as much force as is necessary" for the purpose of executing the warrant where there are reasonable and probable grounds to believe that a person is implicated in a serious offence.

It may be argued that even with respect to physical integrity, there comes a point where one's reasonable expectation of privacy, to remain reasonable, must yield to the state's intrusion. However, as Lamer J. (as he then was) stated in *R. v. Pohoretsky*,⁵³ "a violation of the sanctity of a person's body is much more serious than that of his office or even his home."⁵⁴

Following the judgment of Mr. Justice Lamer in *R. v. Collins*,⁵⁵ a search or seizure is considered unlawful if carried out with "unnecessary violence."⁵⁶ In allowing a peace officer to use "as much force as is necessary" to execute a DNA warrant, it is suggested that the new legislation infringes section 8 of the *Charter*.

⁵¹ The restriction on the availability of the new DNA warrant seems to indicate that non-consensual seizures of bodily substances are only justifiable in connection with offences of a particular nature and gravity. See e.g. R.M. Pomerance, "Bill C-104: A Practical Guide to the New DNA Warrants" (1995) 39 C.R. (4th) 224.

⁵² *Supra* note 34 at 106.

⁵³ [1987] 1 S.C.R. 945.

⁵⁴ *Ibid.* at 949.

⁵⁵ (1987), 33 C.C.C. (3d) 1 (S.C.C.).

⁵⁶ *Ibid.* at 15.

2. Section 7

Section 7 of the *Charter* states:

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.⁵⁷

The Supreme Court of Canada has interpreted section 7 broadly, such that it is now clear that it includes the review of the substance of legislation and guarantees far more than procedural fairness.⁵⁸ Section 7 has become perhaps the most powerful vehicle for the establishment of new protections for the accused in criminal law and will likely have a significant impact on the DNA provisions of the *Criminal Code*.

The wording of section 7 indicates that a two-step analysis is called for in determining whether an action of the state can be challenged. La Forest J. expressed this notion as follows in *R. v. Beare*:

The analysis of section 7 of the *Charter* involves two-steps. To trigger its operation there must be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.⁵⁹

In the context of the recent amendments to section 487 of the *Criminal Code*, an individual will likely have little difficulty in advancing a section 7 challenge by pointing to a threat to his or her liberty interest.⁶⁰ In the case of *Reference re Section 94(2) of the Motor Vehicle Act*,⁶¹ Lamer J. (as he then was) stated that the right to liberty will be violated by the mere potential of imprisonment:

⁵⁷ *Supra* note 33 at s. 7.

⁵⁸ *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.).

⁵⁹ [1988] 2 S.C.R. 387 at 401.

⁶⁰ A potential *Charter* challenge could also be launched on the basis of an infringement of the right to security of the person. See *e.g.* *R. v. Morgentaler* (1988), 62 C.R. (3d) 1 (S.C.C.).

⁶¹ *Supra* note 58. The most detailed discussion of the right to liberty under s. 7 is in the recent case of *Re Sheena B.* (1995), 176 N.R. 161 (S.C.C.).

Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment . . . be made mandatory.⁶²

All of the offences enumerated in section 487.05 carry sanctions that include imprisonment. Therefore, it is clear that the new legislation presents a threat to the liberty interests of individuals who are the subjects of DNA warrants.

The second step of the section 7 analysis—determining whether the deprivation of life, liberty, or security of the person is contrary to the principles of fundamental justice—has received significant attention from courts in sketching out the contents of the phrase “principles of fundamental justice.”

In the case of *R. v. Woolley*,⁶³ the Ontario Court of Appeal held that the right of a suspect or accused to remain silent is a well-established tenet of our legal tradition. It follows that “the protection given by this principle must come within the purview of section 7 of the *Charter*.”⁶⁴ The comments of Cory J.A. (as he then was) are relevant:

It has always been a tenet of our legal system that a suspect or accused has a right to remain silent at the investigative stage of the criminal process and at the trial stage. At the very least, it is clear that an accused person is under no legal obligation to speak to police authorities and there is no legal power in the police to compel an accused to speak.⁶⁵

It is suggested that evidence obtained pursuant to forensic DNA analysis has the effect of “speaking” for the suspect or accused, due to the unique informational characteristics of DNA. The logical extension of this argument is that by compelling the suspect or accused to provide a bodily substance, the state is effectively forcing the individual to give evidence against himself or herself. Thus by providing a DNA sample, an individual essentially

⁶² *Ibid.* at 311.

⁶³ (1988), 40 C.C.C. (3d) 531.

⁶⁴ *Ibid.* at 539.

⁶⁵ *Ibid.*

relinquishes his or her right to silence. This is tantamount to a *Charter* infringement of a most serious nature.

It is settled law that the scope of the right of a detained person to silence is confirmed by reference to other related rights:

The rights of a person involved in the criminal process are governed by ss. 7-14 of the *Charter*. They are interrelated: *Reference re section 94(2) of Motor Vehicle Act, supra*. It must be assumed that the framers of the *Charter* intended that they should be interpreted in such a manner that they form a cohesive and internally consistent framework for a fair and effective criminal process. For this reason, the scope of a fundamental principle of justice under section 7 cannot be defined without reference to other rights enunciated in this portion of the *Charter* as well as the more general philosophical thrusts of the *Charter*.⁶⁶

The most important of these related rights is the right to counsel under subsection 10(b) of the *Charter*. The importance of this right is stated by McLachlin J. in *R. v. Hebert*:⁶⁷

The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. . . . Read together ss. 7 and 10(b) confirm the right to silence and shed light on it.

The amendments to section 487 of the *Criminal Code* make no mention of the right of an adult suspect to retain and instruct counsel prior to the execution of a DNA warrant. This stands in stark contrast to the special rights explicitly conferred upon young persons.⁶⁸

⁶⁶ *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 at 34-35 (S.C.C.).

⁶⁷ *Ibid.* at 35.

⁶⁸ The definition of "young person" in s. 487.04 of the *Criminal Code* has the same meaning assigned by subsection 2(1) of the *Young Offenders Act*, which states: "Young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under eighteen years of age and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act." See e.g. Pomerance, *supra* note 51 at 233-234.

Following the maxim of *expressio unis est exclusio alterius*,⁶⁹ it may be argued that the mention of the right to counsel for young persons without the explicit recognition of the same right for adults, excludes adults from this constitutional guarantee. Subsection 10(b) of the *Charter* dictates that a person from whom a bodily substance is collected is required to be informed of his or her right to counsel, and afforded a reasonable opportunity to exercise that right. Thus, the new legislation may be challenged due to its unreasonable impact on adults.

Depending on the circumstances, it may be argued that the presence and assistance of counsel at the time of the execution of the warrant would have little impact on the position of the accused. However, given the stability of DNA in hair, blood and saliva, there is no need to proceed expeditiously with a search. The presence of counsel is necessary in order to inform the suspect of his or her constitutionally guaranteed rights, most importantly, the right to remain silent. To this extent, the suspect should be afforded a full opportunity to retain and instruct counsel notwithstanding that this might delay the execution of the warrant.

Where the subject matter of a *Charter* challenge appears to be covered by one of the specific protections in sections 8 to 14, an alternative argument may be advanced under section 7. The strongest authority for this proposition is the unanimous decision of the Supreme Court of Canada in *R. v. Hebert*.⁷⁰ The Court held that a pre-trial right to silence is a principle of fundamental justice protected under section 7, even though protection against self-incrimination was expressly declared in sections 11(c) and 13.

The decision in *Hebert*⁷¹ is consistent with the earlier ruling in *Thomson Newspapers Ltd. v. Canada*,⁷² which concerned a challenge to a power under the *Combines Investigations Act*⁷³ to compel testimony under oath. Although there was no majority opinion as to whether section 7 had been violated, all five justices who presided over the case recognized that section 7 could provide

⁶⁹ A maxim of statutory interpretation meaning the expression of one thing is the exclusion of another.

⁷⁰ *Supra* note 66.

⁷¹ *Ibid.*

⁷² (1990), 76 C.R. (3d) 129 (S.C.C.).

⁷³ R.S.C. 1985, c. C-34.

wider protection against self-incrimination than afforded in sections 11(c) and 13. In this way, it is suggested that the new legislation violates the *Charter*.

3. Section 1

It is reasonable to propose that the amendments to section 487 of the *Criminal Code* may violate the constitutional rights guaranteed by sections 7 and 8 of the *Charter*. However, the operation of section 1 makes it clear that these guaranteed rights and freedoms are not absolute. Rather, they are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁷⁴

The authoritative blueprint for justifying limitations on *Charter* rights under section 1 was established by the Supreme Court of Canada in *R. v. Oakes*.⁷⁵ The onus of proving that a limitation on a *Charter* right is reasonable rests upon the party seeking to uphold the limitation on a preponderance of probabilities.

The Court asserted that two criteria must be satisfied: (1) the objective of the limit must be of sufficient importance to warrant overriding a constitutionally-protected right or freedom; and (2) the means must be reasonable and demonstrably justified, in proportion to the importance of the objective. A limit will be proportional where the measure is carefully designed to achieve the objective, the right is impaired as little as possible, and there is proportionality between the effects of the limiting measure and the objective.

The determination of whether or not the new legislation will pass the initial stage of the *Oakes* test will depend upon the characterization of the objective. The government will likely attempt to characterize the objective of the legislation as broadly as possible. Examples could include the enhancement of "community safety" or the "preservation of the peaceful character of our society."⁷⁶ It is probable that a court will find that the objective relates to concerns that are pressing and substantial in a free and democratic society, thus necessitating the second part of the *Oakes* analysis.

⁷⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

⁷⁵ (1986), 26 D.L.R. (4th) 200 (S.C.C.).

⁷⁶ *Supra* note 3.

Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a three-pronged proportionality test. The first part of the analysis states that the means chosen must be "rationally connected" to the objective. Constitutional jurisprudence since *Oakes* has illustrated that a relatively low standard is applied at this stage of the test. The amendments to section 487 of the *Criminal Code* do not appear to be arbitrary, unfair, or based on irrational considerations, thus, it is likely that a court will find a "rational connection."

The second step in the proportionality test involves an assessment of whether the right or freedom is minimally impaired. Experience has demonstrated that courts will likely focus their attention on this part of the analysis.

There are several ways Parliament could attempt to establish that the legislation impairs *Charter* rights as little as possible: first, a number of statutory pre-conditions must be satisfied before the warrant may issue;⁷⁷ second, the warrant must be executed in compliance with certain, prescribed procedures;⁷⁸ third, the legislation places strict limitations on the use which may be made of a sample obtained under a DNA warrant;⁷⁹ and fourth, the new law mandates the destruction of bodily substances and test results in certain designated circumstances.⁸⁰

First, subsection 487.05(1) enumerates a number of statutory pre-conditions which must be satisfied prior to obtaining a DNA warrant. The legislation provides that a provincial court judge must be satisfied (by information on oath) that there are reasonable grounds to believe that: (a) a designated offence has been committed; (b) a bodily substance has been found; (c) a person was a party to the offence; and (d) forensic DNA analysis of a bodily sample from the person will provide evidence about whether the bodily substance found at the crime scene was from the subject of the warrant. In addition to these matters, subsection 487.05(1) also directs the issuing judge to consider whether the warrant is in the best interests of the administration of justice. Thus, a judge must be satisfied that the warrant will assist law enforcement officers in

⁷⁷ *Supra* note 4 at s. 487.05.

⁷⁸ *Ibid.* at s. 487.07.

⁷⁹ *Ibid.* at s. 487.08.

⁸⁰ *Ibid.* at s. 487.09.

determining whether the sample found at the scene of the crime was deposited by the person believed to be a party to the offence.⁸¹

Second, the government could argue that an individual's *Charter* rights are minimally impaired, as the legislation provides clear rules which direct when a person's privacy can be violated. Section 487.07 lists a number of statutory procedures which govern the execution of a DNA warrant. First, subsection 487.07(1) requires that the suspect must be informed of several matters prior to the execution of the warrant: (a) the contents of the warrant; (b) the nature of the investigative procedure to be carried out; (c) the purpose of obtaining a bodily sample; (d) the possibility that the results of forensic DNA analysis may be used in evidence; and (e) the authority of those executing the warrant to use as much force as is necessary.⁸² Subsection 487.07(2) authorizes the detention of an individual for the time period reasonably necessary to obtain the bodily substance. Further, subsection 487.07(3) mandates that those executing the warrant ensure that the privacy of the subject is respected in a manner that is reasonable in the circumstances. By explicitly enumerating these requirements, the government could argue that the new legislation impairs *Charter* rights as little as possible.

Conversely, the subject of the warrant could argue that the new legislation lacks sufficient safeguards to ensure that a search or seizure is reasonable. This would result in the law going beyond the minimal impairment of an individual's *Charter* rights. The recent amendments to the *Criminal Code* are silent in at least three areas.⁸³

First, the amendments to section 487 of the *Criminal Code* do not stipulate that the seizure of a bodily substance should be carried out in private. The execution of a DNA warrant in a crowded workplace, classroom, or public area, in front of an individual's co-workers, classmates, or friends could result in irreparable damage to a person's reputation. Thus, the seizure should be carried out in a private room, not accessible to public view.

⁸¹ Pomerance, *supra* note 51 at 230.

⁸² Further, if the subject of the warrant is a "young person," greater protection is afforded. In addition to the matters enumerated above, a young person must be given a reasonable opportunity to consult with counsel, a parent, or any other appropriate adult chosen by the young person and to have the warrant executed in the presence of such person.

⁸³ Pomerance, *supra* note 51 at 235.

Second, the law does not mandate that the procedure for obtaining a bodily substance should be performed under sanitary conditions. If the seizure takes place in an unclean environment, the sample may become contaminated, or the subject of the warrant may suffer an infection, especially if blood is drawn.

Third, the new provisions do not specify that the collection of samples should be carried out in accordance with approved scientific guidelines. The recent O. J. Simpson trial illustrates some of the problems that may arise when genetic evidence is not properly gathered. Following approved scientific guidelines would be consistent with subsection 487.05(1)(d) which provides that a provincial court judge must be satisfied that the forensic DNA analysis will provide evidence about whether the bodily substance found at the crime scene was from the subject of the warrant. This pre-condition cannot be met unless proper collection procedures are followed.

It may be argued that Parliament has attempted to remedy these deficiencies by the inclusion of subsection 487.06(2) in the legislation. This provision directs the issuing judge to impose "any terms and conditions which he or she considers advisable to ensure that the search process is reasonable." These will vary from case to case, according to the circumstances; however, in light of the intrusive nature of the seizure, consideration of human dignity and bodily integrity demand greater procedural safeguards than simply a discretionary power that may or may not be exercised.

A third argument that the current legislation minimally impairs individuals' *Charter* rights is that the law places strict limits on the use which may be made of bodily substances and the results of forensic testing obtained pursuant to a DNA warrant.

Subsection 487.08(1) provides that a bodily substance may only be tested in the course of an investigation of a "designated offence," that is, the offence in respect of which the warrant was obtained. Further, subsection 487.08(2) stipulates that the results of DNA testing may not be used, except in the course of an investigation of the designated offence or in the investigation of any other designated offence in which a warrant was issued or a bodily substance was found. However, subsection 487.08(2) appears to encompass the use of forensic DNA analysis in the investigation of a designated offence other than that specified in the warrant. Thus,

the new legislation has the potential to go beyond the minimal impairment of an individual's *Charter* rights.

A final argument that could be advanced on behalf of the government is that the new legislation mandates the destruction of bodily samples and test results in certain designated circumstances. Subsection 487.09(1) calls for the destruction of a bodily substance and the results of forensic DNA testing after (a) the results of DNA analysis establish that the crime scene sample did not come from the person tested; (b) the person is finally acquitted of the designated offence; or (c) upon expiration of one year after a discharge, withdrawal, or stay, unless proceedings have been recommended within that period.

Despite the apparent protection of individuals' privacy rights given by subsection 487.09(1), a sweeping exception is created in subsection 487.09(2). This provision gives a provincial court judge a discretionary power to make an order preserving the bodily substance and the results of forensic DNA analysis for an indefinite period of time.

Further, it should be noted that the legislation does not provide for the destruction of seized samples in the event that a guilty verdict is rendered. This means that the samples and results may be kept for some unknown future use.

In summary, the government could argue that the seizures authorized under the new legislation are constitutionally sound. The new law is premised on a model of prior judicial authorization, and incorporates several safeguards which ensure that seizures comply with the *Charter*.⁸⁴ While the objective of enhancing the criminal justice system is laudable, the state cannot pursue this goal in a vacuum; clearly, there must be respect for individual liberties.

It is evident that the government went to great lengths in an attempt to make this legislation constitutional; however, the serious nature of the intrusion demands greater procedural safeguards in order to ensure that an individual's rights are minimally impaired. Thus, the DNA provisions of the *Criminal Code* are likely to fail the second stage of the proportionality test set out in *Oakes*. Furthermore, even if a court finds that the legislation satisfies the first two elements of the proportionality test, it is suggested that

⁸⁴ *Ibid.* at 244.

due to the serious effects on individuals, the measures will not be justified by the purposes they are intended to serve.⁸⁵

4. Section 24(2)

Section 24(2) provides:

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 this *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.⁸⁶

Under the current statutory scheme, it may be possible to argue for the exclusion of DNA evidence on the ground that it may bring the administration of justice into disrepute. In *R. v. Collins*,⁸⁷ the Supreme Court of Canada stated that three factors should be considered in determining whether evidence should be excluded: (1) the effect of the admission of the evidence on the fairness of the trial; (2) the seriousness of the *Charter* violation; and (3) the effect that excluding the evidence would have on the repute of justice.

Absent factual evidence, it is impossible to predict the impact of subsection 24(2) on the new legislation. However, it should be noted that Canada's highest court has stated that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will, generally, go to the fairness of the trial and should generally be excluded."⁸⁸

The present legislation does not afford adults the opportunity to retain and instruct counsel prior to the execution of a DNA warrant. In light of the fact that DNA evidence has the effect of "speaking" for the suspect or accused, situations will invariably arise whereby self-incriminating evidence is gathered following a denial of the right to counsel. This evidence will go to the very fairness of the trial and should therefore be excluded.

⁸⁵ *Supra* note 75.

⁸⁶ *Supra* note 33 at s. 24(2).

⁸⁷ *Supra* note 55 at 19-20.

⁸⁸ *Ibid.* at 20.

IV. DNA DATA BANKS

A much greater threat to the constitutional rights of Canadians comes in the form of DNA data banks. "DNA banking" refers to the storage and dissemination of information derived from bodily substances.

On September 20, 1994, the Department of Justice released a consultation paper entitled, "Obtaining and Banking DNA Forensic Evidence."⁸⁹ This document was influential in the drafting of the present law.

The study recommends the enactment of additional legislation, governing the creation and regulation of DNA data banks. Thus, the current law may be simply the "first step in what may become a more comprehensive statutory scheme."⁹⁰ While the following comments are purely speculative (in light of the absence of legislation), they nonetheless raise some interesting issues of constitutional law that merit discussion.

A significant advantage of DNA data banks would be the clarification of the existing legislation. As the law presently stands, it is unclear how law enforcement officers are to proceed when they wish to use a suspect's DNA profile, obtained pursuant to a DNA warrant, in investigating other unsolved crimes.

One possibility would involve obtaining a new DNA warrant in connection with the unsolved offences. However, this step would necessitate the collection of another bodily substance from the suspect, an intrusion which is unnecessary, given that a substance has already been collected and tested. This approach is also undesirable on the basis that it forces duplication of laboratory procedures, thus placing a strain on scarce resources. It may be argued that the creation of a DNA data bank will obviate the need for a second bodily intrusion. This would be consistent with the best interests of the administration of justice called for in subsection 487.05(1).

Proponents of genetic technology also point to the utilization of DNA data banks in situations that arouse public sympathy. Possible examples include: tracking down serial murderers, finding missing children, reuniting broken families, and controlling sex offenders.

⁸⁹ Canada, Department of Justice, "Obtaining and Banking DNA Forensic Evidence" (Ottawa: Department of Justice, 1994).

⁹⁰ Pomerance, *supra* note 51, at 225.

However, the establishment of a DNA data bank poses an ominous threat to the rights guaranteed to all Canadians by the *Charter*. The potential dangers to civil liberties are described by Janet C. Hoeffel as follows:

Imagine a society where the government had samples of tissue and fluid from the entire population on file and a computerized data bank of each individual's DNA profile. Imagine then that not only law enforcement officials, but insurance companies, employers, schools, adoption agencies, and many other organizations could gain access to those files on a "need to know" basis or on a showing that access is "in the public interest." Imagine then that an individual could be turned down for jobs, insurance, adoption, health care, and other social services and benefits on the basis of information contained in her DNA profile, such as genetic disease, heritage, or someone else's subjective idea of a genetic "flaw."⁹¹

The establishment of a DNA data bank is inconsistent with the notions of privacy, liberty and personal security that exist in Canadian society. The technology has been available for decades to assemble a comprehensive data bank of Canadians' fingerprints, an act which over the years would have substantially contributed to the solving of crimes, but the government has not taken this drastic step.

The creation of a DNA data bank will likely violate the *Charter of Rights and Freedoms*. The mandatory collection of genetic samples almost certainly will be considered an unreasonable search or seizure under section 8 and will probably constitute a breach of the section 7 right to life, liberty, and security of the person.

V. CONCLUSION

The benefits that DNA typing provide to law enforcement are enormous. However, forensic DNA analysis has the potential to raise a number of sensitive privacy issues, due to the far-reaching information which can be extracted from a DNA sample.⁹² Certain provisions of the new legislation reflect these concerns insofar as

⁹¹ *Supra* note 6 at 533-534.

⁹² *Ibid.*

they seek to safeguard against inappropriate infringements of an individual's privacy rights. The soundness of this objective cannot be disputed, however, the measures chosen by Parliament may, in practice, prove to be less than ideal.

Despite the recent passage of the legislation and the lack of case law dealing specifically with the new provisions, it should be noted that the Supreme Court of Canada has already made explicit reference to statutory schemes involving the mandatory seizure of bodily substances.

In *R. v. Borden*,⁹³ Iacobucci J., writing on behalf of five of the seven justices who participated in the decision, stated that a statutory scheme whereby the police can demand a blood sample may raise *Charter* concerns.⁹⁴ In light of the fact that the composition of the Supreme Court has not changed since this judgment was rendered, this decision acts as a persuasive indication of how Canada's highest court is likely to regard the statutory provisions in the new legislation.

The erosion of the rights of the criminal suspect through the unrestrained use of scientific technology (such as DNA profiling) threatens the very foundations of a free and democratic society. We must not allow our enthusiasm over advances in forensics to overshadow principles of justice or the integrity of the individual. This technological innovation must be handled carefully if it is to fit into the societal vision created by the *Charter*.

⁹³ (1994), 92 C.C.C. (3d) 404 (S.C.C.).

⁹⁴ *Ibid.* at 422.