Legislative Summary **LS-545E**

BILL C-18: AN ACT TO AMEND CERTAIN ACTS IN RELATION TO DNA IDENTIFICATION

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LEGISLATIVE HISTORY OF BILL C-18

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	8 June 2006	First Reading:	29 March 2007
Second Reading:	4 October 2006	Second Reading:	9 May 2007
Committee Report:	2 March 2007	Committee Report:	14 June 2007
Report Stage:	28 March 2007	Report Stage:	
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Royal Assent: 22 June 2007

Statutes of Canada 2007, c.22

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BILL C-18: AN ACT TO AMEND CERTAIN ACTS IN RELATION TO DNA IDENTIFICATION*

Bill C-18, An Act to amend certain Acts in relation to DNA identification, was introduced in the House of Commons on 8 June 2006 **and given Royal Assent on 22 June 2007**. The bill amends the *Criminal Code*,(1) the *DNA Identification Act*,(2) and the *National Defence Act*(3) to facilitate the implementation of Bill C-13,(4) which was given Royal Assent on 19 May 2005 but has, save for a few sections, not been declared in force. One of the notable features of Bill C-13 is that it expanded the list of offences for which a DNA data bank order can be made.

Bill C-18 amends the *Criminal Code* to clarify that a warrant can be executed for the arrest of a person who fails to appear for DNA sampling (which will become an offence) and that bodily samples can be taken by any Canadian police force that arrests the person. The bill also adds attempted murder and conspiracy to commit murder to the offences covered by the retroactive provisions. These provisions apply to offenders convicted of a single murder, sexual offence or manslaughter prior to 30 June 2000, when the legislation that enabled the creation of the National DNA Data Bank came into force. Other parts of the bill will ensure that DNA data bank orders can be carried out even when, for logistical reasons, it may not be possible to take the sample at the precise time set out in the order.

The bill also proposes a number of changes to the *DNA Identification Act*. One of the changes is designed to permit the destruction of samples when a provincial Attorney General certifies that the order was made for an offence not intended to be included in the DNA data

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S.C. 1985, c. C-46.

(2) S.C. 1998, c. 37.

(3) R.S.C. 1985, c. N-5.

(4) *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, S.C. 2005, c. 25.

bank. This will eliminate the need for the Attorney General to make an application to the court to have the order quashed. Another change will ensure that information provided by the National DNA Data Bank can be used to investigate all criminal offences, not simply those offences designated to be included in the data bank. Amendments to the *National Defence Act* will bring these changes into the military justice system. **Although the bill was not amended in the Senate, the Standing Senate Committee on Legal and Constitutional Affairs did adopt certain observations. These observations noted, *inter alia*, a concern that no parliamentary review of the DNA provisions had been undertaken, even though such a review was supposed to start in 2005. The Committee noted that review of the DNA system was required so that Parliament may determine what, if any, changes are required to improve it and the manner in which it is used.**[(5)]

BACKGROUND

A. The Use of DNA

Deoxyribonucleic acid (DNA) is found within the chromosomes of living organisms. It is believed that no two people have the same DNA, except in the case of identical twins. This being the case, DNA from bodily substances found at a crime scene may be compared with DNA obtained from a suspect in order to determine whether both samples came from the same person. DNA analysis, therefore, can be an invaluable tool for either eliminating a suspect or providing persuasive evidence of guilt. Another valuable aspect of DNA is that it is very stable and can be used to make comparisons even after a great deal of time has elapsed.

DNA evidence has been used in criminal prosecutions in Canada since 1988. Court decisions, including those of the Supreme Court of Canada, however, had threatened the admissibility of such evidence at trial, especially in those cases where biological samples had been obtained without the consent of the accused.[(6)] In 1995, amendments were made to the

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(5) A complete copy of the observations is available at: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/lega-e/rep-e/rep14jun07-e.htm.

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

Criminal Code which set out the criteria and procedure for collecting the necessary material for DNA analysis.(7) These amendments provided legislative authority to collect bodily substances for DNA analysis, even though this would interfere with "bodily integrity."

The *Criminal Code* amendments (found in section 487.05) provided for a provincial court judge to issue a warrant when he or she had been satisfied that a designated offence had been committed. Designated offences were, generally, serious personal injury offences in which it was likely that DNA analysis might prove useful. The judge had to be satisfied not only that there were reasonable grounds to believe that evidence would be obtained as a result of the seizure and subsequent DNA analysis, but also that the issuance of the warrant was in the best interests of the administration of justice. Execution of the warrant did not depend upon the consent of the suspect, and a peace officer was entitled to detain a person against whom a warrant was executed in order to obtain a sample.

The amendments also tried to carefully circumscribe the use of evidence obtained under the new scheme and reasonably protect the individual's right to privacy. Thus, the bodily substances could be used only in the course of an investigation of the designated offence, and the forensic DNA evidence obtained from the analysis of the substances could be used only in connection with the investigation of designated offences. Provision was made for the destruction of the samples and the results of the analysis where it was established that the person from whom the substances were seized was not the perpetrator of the offence. This would occur as a result of either the analysis itself or the eventual dismissal of the charges against the suspect (by way of acquittal, discharge at preliminary inquiry or some other similar disposition). Provision was made, however, for a judge to make an order that neither the substances nor the results of the analysis be destroyed for whatever period the judge considered appropriate if the material might reasonably be required for investigation or prosecution of another designated offence.

Following the *Criminal Code* amendments, the Solicitor General of Canada sought public comment on the creation of a national DNA data bank that would facilitate the investigation of crimes without suspects and/or unsolved offences where DNA evidence from the perpetrator was still available.(8) In February 1997, the Solicitor General published a *Summary of Consultations*, which reviewed the comments submitted.(9)

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(7) *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*, S.C. 1995, c. 27.

(8) See *Establishing a National DNA Data Bank: Consultation Document*, http://ww2.psepc-sppcc.gc.ca/Publications/Policing/199601_e.pdf.

(9) *Establishing a National DNA Data Bank: Summary of Consultations*, http://ww2.psepc-sppcc.gc.ca/Publications/Policing/199611_e.pdf.

B. The *DNA Identification Act*

Following the period of consultation, the *DNA Identification Act* was introduced in Parliament on 25 September 1997 as Bill C-3. It was given Royal Assent on 10 December 1998, and was proclaimed in force in two stages on 8 May 2000[(10)] and 30 June 2000.[(11)] The Act was intended to provide a legal framework to regulate the storage and, in some cases, the collection of DNA data and the biological samples from which they had been derived.[(12)] Bill C-3 created a national DNA data bank and also amended the *Criminal Code* to expand the courts' authority to order the collection of biological samples for testing. The database is maintained by the Royal Canadian Mounted Police (RCMP) and is used to assist law enforcement agencies in the investigation of serious crimes. The *DNA Identification Act* authorizes the collection and storage, for DNA analysis, of biological samples from anyone convicted of a "designated" offence. The new legislation applied to offences already committed before the Act came into force.

The Act obliged the Solicitor General (now the Minister of Public Safety and Emergency Preparedness) to set up a national DNA data bank, consisting of two indices or databases. The "crime scene index" contains DNA profiles from bodily substances found at the scene of a "designated offence," or on or within the body of a victim or any other person or thing associated with the commission of a designated offence. The "convicted offender index" contains DNA profiles taken from offenders either with their consent or pursuant to a court order. The Commissioner of the RCMP is responsible for receiving DNA profiles for entry into the data bank. Once received, the new profiles are compared with those already held in the data bank and any matches are communicated to the appropriate laboratory or law enforcement agency, along with information concerning the crime(s) and/or offender(s) to which the new profile has been linked. This information is available to agencies that have access to the existing criminal records database maintained by the RCMP. Data comparisons and information sharing with foreign law enforcement agencies are permitted, provided there is an agreement that the information may be used only "for the purposes of the investigation or prosecution of a criminal offence."

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(10) SI/2000-37.

(11) SI/2000-60.

(12) For a fuller discussion of Bill C-3, see Marilyn Pilon, *Bill C-3: The DNA Identification Act*, LS-294E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, rev. 22 May 1998, http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/LS/c3-e.htm.

Communication or use of DNA profiles other than for the purposes of the administration of the Act is prohibited. Ordinarily, information in the convicted offender index is to be kept indefinitely, subject to the *Criminal Records Act*.[13] Access to that information, however, is permanently removed if a convicted offender is ultimately acquitted. Similarly, access to such data is removed one year following an absolute discharge, or three years following a conditional discharge, unless the individual is convicted of another offence in the meantime. DNA profiles relating to adult convictions, therefore, would ordinarily remain accessible unless a pardon was obtained. Separate provision was made in Bill C-3 for the removal of DNA information concerning young offenders.

The Commissioner of the RCMP is obliged to store "safely and securely" those samples of bodily substances received pursuant to the *Criminal Code* and thought necessary for DNA analysis; any remaining samples would have to be destroyed "without delay." The Commissioner also has the authority to order additional DNA testing of stored samples where this is justified by "significant technological advances." Any resulting DNA profiles must be provided to the Commissioner for entry into the convicted offender index. Stored biological samples cannot be used or transmitted except for the purposes of forensic DNA analysis. The Commissioner may grant access to bodily substances, in order to preserve them, and destroy samples no longer required for analysis. The Commissioner is obliged to destroy bodily substances when the person is acquitted or discharged; samples obtained from persons who have been pardoned must be kept separate and apart from other stored bodily substances and not be subjected to further DNA analysis.

There are penalties for the use of biological samples or the communication of DNA analysis results, other than in accordance with the requirements of the Act. When prosecuted by indictment, the maximum penalty is two years' imprisonment, while prosecution by summary conviction may result in a maximum fine of $2,000 or imprisonment for up to six months, or both penalties.

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(13) R.S.C. 1985, c. C-47. Section 6 of the *Criminal Records Act* allows for records in respect of which a pardon has been granted to be kept separate and apart from other criminal records and not disclosed without the prior approval of the Minister of Public Safety and Emergency Preparedness. Clause 25 of Bill C-3 made it clear that a judicial record of a conviction includes any information in relation to the conviction that is contained in the convicted offender index of the National DNA Data Bank.

As of 21 May 2007, the National DNA Data Bank had entered 113,342 profiles into the convicted offender index and 34,982 profiles into the crime scene index.(14) The match inventory recorded 7,185 offender hits (crime scene to offender) and 1,109 forensic hits (crime scene to crime scene). Over half of the investigations assisted by matching crime scenes to offenders involved break and enters (4,167), with smaller numbers for sexual assaults (984), armed robberies (815), assaults (474), and murders (437).

A DNA Data Bank Advisory Committee was established to monitor the operation of the data bank.(15) This committee includes a representative of the Privacy Commissioner of Canada as well as representatives of the police, legal, scientific, and academic communities. It advises the Commissioner of the RCMP on any matter related to the establishment and operation of the National DNA Data Bank. Furthermore, the Commissioner must submit an annual report to Parliament on the data bank's operation. The *DNA Identification Act* was scheduled for review by a parliamentary committee in 2005.

C. *Criminal Code* Amendments

In addition to establishing a national DNA data bank, Bill C-3 also made extensive amendments to the *Criminal Code* sections dealing with forensic DNA analysis. These amendments were intended to streamline the existing DNA warrant scheme. Thus, added to the *Criminal Code* was a series of forms to be used to obtain or grant warrants or orders and to report back to the court or justice on their execution.

Section 487.04 of the *Criminal Code* (the definitions section) was amended to distinguish between "primary" and "secondary" designated offences in order to provide different consequences following conviction. Primary designated offences are predominantly violent and sexual offences, many of which might involve the loss or exchange of bodily substances that could be used to identify the perpetrator through DNA analysis. Secondary designated offences are less likely to result in the loss or exchange of bodily substances. DNA profiles of offenders, therefore, are less likely to provide useful evidence.

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(14) Statistics provided by the National DNA Data Bank website: http://www.nddb-bndg.org/stats_e.htm.

(15) *DNA Data Bank Advisory Committee Regulations*, SOR/2000-181. The Committee's website is: http://www.rcmp.ca/dna_ac/index_e.htm.

Sections 487.051 to 487.091 of the *Criminal Code* created the scheme for collecting bodily substances from offenders for forensic DNA analysis and storage of the results in the National DNA Data Bank established under the *DNA Identification Act*. There are three foundation provisions for this scheme, which were added by Bill C-3: 487.051, 487.052, and 487.055.

Section 487.051 gives the court that finds an adult or young person guilty of certain offences the power to authorize the taking of bodily substances. Where an offender has been convicted of a primary designated offence, the court is obliged to make an order that samples be taken for DNA analysis, unless satisfied by the offender that the impact on his or her privacy and security of the person would be "grossly disproportionate" to the public interest in the protection of society. In the case of a secondary designated offence, the court can make an order for a sample to be taken if satisfied that it is in the best interests of the administration of justice to do so. To make this determination, the court shall consider the nature and circumstances of the offence, the criminal record of the offender, and the impact of such an order on his or her privacy and security of the person. The court must give reasons for its decision, and section 487.054 gives both the offender and the prosecutor the right to appeal.

Section 487.052 of the *Criminal Code* allows for the courts to order the taking of samples for DNA analysis from persons found guilty of a designated offence committed before the coming into force of the *DNA Identification Act* (30 June 2000). This gave Bill C-3 a retroactive effect. The prosecutor must make an application for such an order, and the court must base its decision on the same criteria as those used for secondary designated offence convictions. Once again, section 487.054 allows both the offender and the prosecutor to appeal an order under this section.

Related to section 487.052 in its retroactive effect is section 487.055, which provides for a court order for the taking of bodily samples for DNA analysis from certain offenders convicted prior to the coming into force of Bill C-3. By means of an *ex parte* (without notice) application, such an order can be made with respect to anyone who has been declared a dangerous offender, has been convicted of murder, has been convicted of a listed sexual offence and who is serving a sentence of at least two years, or has been convicted of manslaughter and, on the date of the application, is serving a sentence of imprisonment of at least two years for that offence. The definition of "sexual offence" includes sexual assaults and most sexual offences

involving children, as well as historical sexual offences (those found in previous versions of the *Criminal Code*). The considerations to be given by the judge to such an application are the same as those for making an order after the commission of a secondary designated offence. Offenders on conditional release are to be summonsed to report for the taking of bodily substances; failure to appear can result in the issue of an arrest warrant for the purposes of enforcing compliance.

The constitutionality of these retroactive provisions was challenged in the case of *R.* v. *Rodgers*.(16) The Supreme Court ruled that, while the taking of bodily samples for DNA analysis without consent constitutes a seizure within the meaning of section 8 of the Charter, the collection of DNA samples for data bank purposes from designated classes of convicted offenders is reasonable. The Court cautioned that care must be taken to protect the principles of privacy, individual security and procedural fairness guaranteed by the Charter of Rights. The majority of the Court concluded that the National DNA Data Bank strikes a "proper balance" between these interests and the benefits of DNA technology (identifying criminals and exonerating those wrongfully convicted). It noted that samples can be obtained only through a judge's order and for those convicted of certain offences. It was also noted that anyone convicted of a serious offence has a reduced expectation of privacy and cannot expect his or her identity to remain secret from law enforcement authorities. The majority of the Court held that section 487.055(1) of the *Criminal Code* is clear and unambiguous in permitting *ex parte* applications for DNA samples. Finally, the majority of the Court held that the taking of a DNA sample is not a "punishment" within the meaning of section 11 of the Charter but simply a consequence of being convicted of a particular criminal offence; it is a modern supplement to the taking of fingerprints or photographs, as provided for in the *Identification of Criminals Act*.(17)

Section 487.056 provides that samples are to be taken, by a peace officer or someone acting under the direction of a peace officer, at the time the person has been convicted or discharged, as the case may be, or as soon thereafter as is feasible after the authorization has been granted. This is to be done even though an appeal may have been taken. Section 487.057 obliges a peace officer to file a written report with the authorizing court concerning the taking of bodily substances. If a DNA profile could not be derived from the bodily substances obtained pursuant to sections 487.051, 487.052, or 487.055, section 487.091 provides that an *ex parte*

(16) [2006] 1 S.C.R. 554.

(17) R.S.C. 1985, c. I-1.

application may be made to a provincial court judge for authorization to take further samples. Section 487.071 requires offender DNA analysis results to be sent to the Commissioner of the RCMP for entry into the convicted offender index. In addition, leftover samples of bodily substances also have to be sent to the Commissioner, to be dealt with as required under the *DNA Identification Act*.

Section 487.08 of the *Criminal Code* was expanded to limit the use of bodily substances and the DNA analysis derived from them. Both can be used in the course of an investigation into any designated offence and both can also be transmitted to the Commissioner of the RCMP. Persons using the bodily substances or analysis results for any unauthorized purpose are liable to up to two years' imprisonment, if prosecuted by indictment, or up to six months' imprisonment and a $2,000 fine upon summary conviction.

D. *National Defence Act* Provisions

On 29 June 2000, Royal Assent was given to Bill S-10, *An Act to amend the National Defence Act, the DNA Identification Act and the Criminal Code*.[18] This bill amended the *National Defence Act* to authorize military judges to issue DNA warrants in the investigation of designated offences committed by a person who is subject to the Code of Service Discipline. The list of "secondary designated offences" was expanded to include certain offences unique to the *National Defence Act*. Bill S-10 also authorized military judges to order military offenders convicted of a designated offence to provide samples of bodily substances for the purpose of the National DNA Data Bank. These authorities are similar to those that may be exercised by a provincial court judge under the *Criminal Code*.

Bill S-10 also made related amendments to the *DNA Identification Act* and the *Criminal Code*. The *DNA Identification Act* amendments allowed bodily substances, and the DNA profiles derived from them, that are taken as a result of an order or authorization by a military judge, to be included in the National DNA Data Bank. The *Criminal Code* amendments extended the prohibition against unauthorized use of bodily substances and the results of forensic DNA analysis to include those obtained under the *National Defence Act.*

(18) S.C. 2000, c. 10.

E. Bill C-13

Bill C-13 received Royal Assent on 19 May 2005, yet only clauses 5, 16, 17, and 30.1 have come into force. These clauses expanded the scope of the retroactive provisions in section 487.055 of the *Criminal Code*, and enlarged the powers of the Commissioner of the RCMP upon receipt of a DNA sample under the *DNA Identification Act* so that he or she may review orders to test DNA samples and destroy those where the order is invalid.

Perhaps the most significant change to the DNA system made by Bill C-13 was the alteration to section 487.04 of the *Criminal Code* (the definitions section for forensic DNA analysis). Certain offences, such as those relating to child pornography and breaking and entering into a dwelling house, were moved from the list of secondary designated offences to the list of primary designated offences. Other offences were added to the list of primary designated offences, such as sexual exploitation of a person with a disability and intimidation of a justice system participant or journalist. Some offences added to the list of primary designated offences were found in previous versions of the *Criminal Code*, including: indecent assault on a female, indecent assault on a male, and acts of gross indecency. This will catch historical sexual offences. For each of the primary designated offences, a court will be obliged by section 487.051(1)(*a*) of the *Criminal Code* to make an order for the taking of samples from a person for DNA analysis. This obligation, however, can be overridden by an argument that the impact on the person's privacy and security of the person is grossly disproportionate to the public interest in the protection of society through the early detection, arrest and conviction of offenders.

A further significant change to the definition of "primary designated offence" in section 487.04 of the *Criminal Code* was the creation of a list of offences in paragraph (*a.1*). This is a list of 16 of the most serious offences in the *Criminal Code*, including murder, manslaughter, sexual assault with a weapon, and kidnapping. The importance of this list is found in the amended section 487.051(2) of the *Criminal Code*. This section denies a court any discretion to refuse to make a DNA order for any of the offences found in paragraph (*a.1*).

The bill also added a number of offences to the list of secondary designated offences. The new offences included: criminal harassment, uttering threats, breaking and entering into a place other than a dwelling-house, being unlawfully in a dwelling-house, and intimidation. The definition of secondary designated offences was also expanded to cover offences under the *Criminal Code* and certain provisions of the *Controlled Drugs and Substances*

Act[19] that are liable to a maximum sentence of five or more years' imprisonment and are prosecuted by indictment. For each of these added offences, a court may use section 487.051(1)(*b*) of the *Criminal Code* to make an order for the taking of samples from a person for DNA analysis. Before making such an order, the court must consider the person's criminal record, the nature and circumstances of the offence, and the impact of such an order on his or her privacy and security of the person.

Bill C-13 also amended section 487.051(1) of the *Criminal Code* so that, if a person is found not criminally responsible on account of mental disorder for a designated offence, he or she may be ordered to provide a sample of a bodily substance for DNA analysis. This changed the previous provision, which allowed for samples to be taken only from those persons who were convicted, received a conditional or absolute discharge, or, if a young person, were found guilty of a designated offence. In addition, when a court is considering whether to order a sample to be taken from a person who has committed a secondary designated offence, it shall now consider whether the person was previously found not criminally responsible on account of mental disorder for a designated offence. This will give the new mental disorder provisions a retroactive effect. The new mental disorder provisions were also extended to section 487.052 of the *Criminal Code*. This section deals with offences committed before the *DNA Identification Act* came into force on 30 June 2000. For these historical offences, those found not criminally responsible on account of mental disorder may be required to provide a bodily substance sample for DNA analysis.

The timing of DNA data bank orders was also affected by Bill C-13. It made provision for a DNA data bank order to be made after sentencing. The court may set a date and time for a subsequent hearing to determine whether to make the order. The court retains jurisdiction over the matter and may compel the attendance at the hearing of any person who may be subject to the order. The bill also added a new provision that allows a court to make an order requiring a person who must provide a bodily substances sample for DNA analysis to report at the place, day and time set out in the order and submit to the taking of samples. This provision will assist the administration of tests when the orders for sampling are not made at the time of sentencing.

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(19) S.C. 1996, c. 19.

Bill C-13 added section 487.0911 to the *Criminal Code*. This section creates a procedure for the review and destruction of samples taken from offenders under a DNA data bank order but who were not convicted of a designated offence. The Commissioner of the RCMP will notify the provincial or territorial Attorney General if an order or authorization for a DNA sample appears to be defective. The Attorney General must then review the order or authorization and the court record. If the Attorney General concludes that any defect is due to a clerical error, he or she shall apply to the judge who made the order or authorization to have it corrected and transmit a copy of the corrected order to the Commissioner of the RCMP. If, however, the Attorney General concludes that the offence to which the order or authorization relates is not a designated offence, he or she shall apply to a judge of the court of appeal for an order revoking the order or authorization and transmit a copy of the revoking order to the Commissioner of the RCMP. Sections 5.1 and 5.2 of the *DNA Identification Act* have been added to allow for the destruction of any bodily substances collected and any information transmitted with them if the order or authorization for their collection is revoked. Provision is also made for destroying bodily substances and information if the Attorney General does not respond to a notice of apparent defect about a DNA data bank order within 180 days. These provisions, therefore, will allow for the relatively speedy purging from the DNA data bank of suspect materials.

The *National Defence Act* provisions in Division 6.1, "Forensic DNA Analysis," were amended by Bill C-13 so that they will be in accord with the amendments being made to the *Criminal Code*. Thus, the definitions of a "primary designated offence" were amended and provision was made for a DNA data bank order to be made against a person found not responsible on account of mental disorder for a designated offence. Provision was also made for taking a bodily substance sample at a time other than that of sentencing. The new sections in the *Criminal Code* and the *DNA Identification Act* dealing with improper samples are mirrored in the addition of section 196.241, which makes the Director of Military Prosecutions responsible for examining and rectifying any defects in the DNA data bank order or authorization.

F. Bill C-72

On 2 November 2005, the previous government introduced Bill C-72, An Act to amend certain Acts in relation to DNA Identification. This bill was referred to the House of

Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on 21 November 2005, but died on the *Order Paper* with the calling of the General Election.

The stated intention in introducing Bill C-72 was twofold. The first purpose was to help implement the changes to the National DNA Data Bank made by Bill C-13. The second purpose was to bring about certain changes in the operation of the data bank, many of which are reflected in Bill C-18. Examples of changes common to both bills are those simplifying the procedure to destroy samples improperly included in the data bank, the allowance of hearings by video-conference for those offenders eligible for retroactive sampling, greater flexibility in the timing of the taking of DNA samples, and greater international sharing of information in the National DNA Data Bank.

DESCRIPTION AND ANALYSIS

Bill C-18 consists of 52 clauses. The following description highlights selected aspects of the bill and does not review every clause.

A. Clauses 3 and 5: Date of Designated Offence

Section 487.052 of the *Criminal Code* and section 196.15 of the *National Defence Act* make reference to the commission of a designated offence before the coming into force of the part of the *DNA Identification Act* that established the National DNA Data Bank (30 June 2000). Clauses 3 and 5 of Bill C-18 delete these two sections and, therefore, any reference to the date of the commission of the designated offence. As a result, the references in section 487.051 of the *Criminal Code* and section 196.14 of the *National Defence Act* to orders for the taking of bodily substances samples will apply to designated offences committed at any time, including before 30 June 2000. These clauses also afford a court 90 days after the imposition of sentence for a designated offence within which to set a date for a hearing to authorize the taking of samples of bodily substances. If there is such a delay, the court may require the offender to appear by closed-circuit television or any other means that allows the court and the person to engage in simultaneous visual and oral communication. There is a stipulation that the offender be given the opportunity to communicate privately with counsel.

B. Clause 9: Court Discretion

Clause 9 of Bill C-18 clarifies that the discretion not to impose a DNA order is not available to a court if the person is found guilty of having committed an offence listed in paragraph (*a.1*) of the definition "primary designated offence" in section 487.04 of the *Criminal Code*. These offences are considered to be the most "serious," such as murder, manslaughter, sexual assault with a weapon, and kidnapping. The discretion not to impose a DNA order is maintained for the other primary designated offences. If a person is found not criminally responsible on account of mental disorder for having committed any offence or is convicted of having committed a secondary offence, the court may, on application by the prosecutor, impose a DNA order if it is satisfied that it is in the best interests of the administration of justice to do so. Clause 9 also states that a person convicted of having committed a designated offence at any time – not just since 30 June 2000 – may be the subject of a DNA order.

C. Clause 11: Retroactive Orders

Section 487.055 of the *Criminal Code* allows for DNA orders to be made against certain persons who were declared a dangerous offender or convicted of certain offences prior to 30 June 2000. In the case of those convicted of certain sexual offences and manslaughter, the offender must be serving a sentence of imprisonment of at least two years on the date of the application for a bodily substance sample. Clause 11 adds to the list of those liable to be compelled to provide a bodily substance sample those convicted before 30 June 2000 of attempted murder or conspiracy to commit murder or to cause another person to be murdered and who, on the date of the application, are serving a sentence of imprisonment for that offence. The current two-year imprisonment requirement for the offences of manslaughter and certain sexual offences is removed so that an offender need only be serving a sentence of imprisonment of any length on the date of the application for a DNA sample.

Clause 11 also addresses the manner of appearance before the court of anyone given notice of an application under section 487.055. The court may require such a person to appear by closed-circuit television or any other means that allows the court and the person to engage in simultaneous visual and oral communication. There is a stipulation that the offender be given the opportunity to communicate privately with counsel.

D. Clause 12: Enforcement of Orders

The current *Criminal Code* makes reference to the enforcement of DNA orders, such as the issuance of a warrant for the arrest of a persons summonsed, found in subsection 487.055(8). This subsection and those related to it will be deleted. In their stead, clause 12 of Bill C-18 provides more generally (new section 487.0551) for an arrest warrant to be issued for a failure to appear at the place, day and time set out in an order or summons issued under any of the relevant sections of the DNA regime. Such a warrant has no jurisdictional limitation and may be executed anywhere in Canada. The warrant also remains in force until it is executed.

Clause 12 also adds an offence section (487.0552) to the *Criminal Code*. Failure to comply with an order to provide a sample under either the *Criminal Code* or the *National Defence Act*, without reasonable excuse, will make the offender liable to imprisonment for a term of not more than two years, if this failure is prosecuted as an indictable offence, or to the punishment available for a summary conviction offence. Section 787(1) of the *Criminal Code* states that the general penalty upon conviction for an offence punishable on summary conviction is a fine of not more than $2,000 or imprisonment for six months or both penalties. Finally, clause 12 makes clear that a "reasonable excuse" for failing to comply with an order to provide a DNA sample is a lawful command that prevents such compliance. In order to use this excuse, the offender must be subject to the Code of Service Discipline, within the meaning of subsection 2(1) of the *National Defence Act*.

E. Clause 13: Timing of Sample Collection

Clause 13 provides for greater flexibility in terms of when the collection of samples of bodily substances may take place. It will allow for samples to be taken when set out in an order "or as soon as feasible afterwards." The addition of this phrase will allow for unforeseen circumstances to be taken into account when trying to enforce an order for the taking of a DNA sample.

F. Clauses 21 and 30: Substantive Defects in Orders

If an Attorney General is of the opinion that the offence referred to in an order or authorization is not a designated offence, he or she is obliged by subsection 487.0911(3) of the

Criminal Code to apply to a judge of the court of appeal for an order revoking the order or authorization. If the order or authorization is revoked, a copy of the order is then to be transmitted to the Commissioner of the RCMP. Clause 21 of Bill C-18 removes the obligation on the Attorney General to apply to a judge in these circumstances and replaces it with an obligation to inform the Commissioner of the RCMP. Clause 30 amends subsection 5.2(3) of the *DNA Identification Act* to then require the Commissioner to destroy the bodily substances collected under an order or authorization and the information transmitted with them if an Attorney General or the Director of Military Prosecutions informs him or her that the offence to which the order or authorization relates is not a designated offence.

G. Clause 31: Communication of Information

Section 6 of the *DNA Identification Act* enables the Commissioner of the RCMP to communicate certain information to Canadian law enforcement agencies or laboratories. For example, if a DNA profile submitted to the Commissioner is already contained in the data bank, he or she may communicate any information contained in the data bank in relation to that DNA profile. Clause 31 of Bill C-18 amends subsection 6(3) of the Act to permit communication of this information outside of Canada. On receipt of a DNA profile from the government of a foreign state, the Commissioner may now communicate the same information to that government that was formerly restricted to Canadian agencies. Clause 31 also expands the investigations covered by this section of the Act to any criminal offence and not to designated offences only.

H. Clauses 34-46: Amendments to the *National Defence Act*

Bill C-18 amends the *National Defence Act* so that the military justice system and its relationship with the National DNA Data Bank will mirror the civilian justice system. There are, however, some differences between the two systems, and the bill reflects this fact. Thus, clause 34 of the bill adds section 119.1 to the *National Defence Act* to make it clear that failure to comply with an order or summons is an offence. This mirrors the addition of section 487.0552 to the *Criminal Code* except that in the military justice system no reference is made to indictable or summary convictions, simply to imprisonment for less than two years or to “less punishment.”

Similarly, clause 36 of the bill amends section 196.14 of the *National Defence Act* in a manner similar to clause 9, which amends section 487.051 of the *Criminal Code* to clarify the lack of discretion available to a court when imposing DNA orders for certain primary designated offences. In the military justice system, however, no young people will be tried, nor are discharges under section 730 of the *Criminal Code* an available punishment, so references to these two situations are removed.

COMMENTARY

No commentary on Bill C-18 has been noted to date.