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1 *R. v. Parsons* (1996), 146 Newfoundland & Prince Edward Island Reports 210 (Newfoundland Supreme Court Appellate Division); [1997] Supreme Court of Canada Applications for Leave to Appeal No. 43 (QuickLaw). Parsons's 1994 conviction by jury was overturned by the Supreme Court of Canada. His new trial was to begin in March of 1997.

2 "DNA Proves man innocent of mother's brutal murder" *The [Saskatoon] StarPhoenix* (4 February 1998) B7.

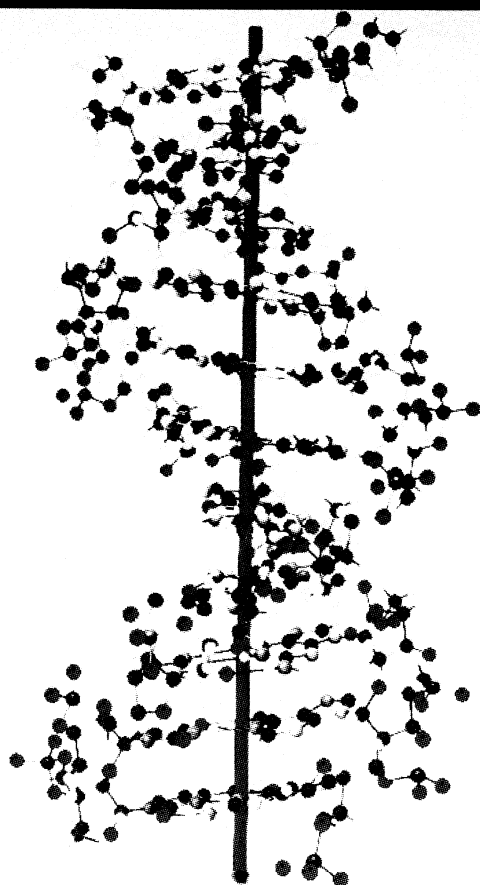
3 Milgaard was convicted of the murder of Gail Miller in 1969. His appeal of that trial was dismissed in 1971. See *R. v. Milgaard*, [1971] 2 Western Weekly Reports 226 (Saskatchewan Court of Appeal). Milgaard spent 23 years in prison before being released in 1992. See *Reference re Milgaard*, [1992] 1 Supreme Court Reports 866. DNA tests exonerated him of the killing in the summer of 1997.

# Private Costs of "Safer Communities": DNA Evidence and Data Banking in Canada

DNA evidence is a wonderful thing; just ask Gregory Parsons. In 1994, a jury convicted Parsons of the second degree murder of his mother who was stabbed more than 50 times in her home in 1991.<sup>1</sup> In February of 1998, DNA evidence exonerated the 26-year-old Newfoundlander of the crime.<sup>2</sup> You might also ask David Milgaard<sup>3</sup> or Guy Paul Morin,<sup>4</sup> both cleared of murder convictions by DNA testing that proved their genetic makeup did not match that of the real culprit. These and other recent criminal cases featuring DNA evidence have been given front page prominence by the media in this country.<sup>5</sup> In many ways, the celebrity DNA testing has earned has been well-deserved: DNA evidence has been responsible for pardoning the falsely accused and for punishing the genuinely guilty. But the portrayal of the role of DNA evidence in our criminal justice system as the great liberator and the great condemner has blinded the public to the inherent problems of science in the courtroom. Not only are the methods and techniques used in DNA testing rife with inconsistencies, but the collection and storage of DNA samples themselves raise issues of individual privacy and human rights which extend beyond the parameters of criminal law.

The federal government has attempted to prevent the abuses that can arise from the use of DNA evidence in the courtroom by adopting a two-step approach to the legislation of DNA testing. This paper will examine the second stage of that two-step approach, the DNA data bank. In particular, the following will evaluate the government's objectives in establishing a data bank, investigate the proposed structure of a bank, explore the potential problems that may accompany such a project, survey public reaction to the proposed DNA data bank, and test the constitutionality of the data bank itself. Ultimately, there are grave consequences in adopting a DNA data bank in Canada, especially where civil liberties are concerned. The government should not rush headlong into such a project without thoroughly considering the short and long term implications for the Canadian public.

The Canadian government has undertaken a two-stage approach to provide a legislative framework for the collection, use and storage of DNA evidence. The first stage



was concerned with obtaining DNA evidence from suspects; the second stage involved the collection of DNA information in a national data bank. Parliament took its first step toward regulating the use of DNA evidence in the courtroom in June of 1995 with Bill C-104.<sup>6</sup> The purpose of this legislation was to clarify under what circumstances a court could issue a warrant to obtain samples of bodily substances from a person,<sup>7</sup> the procedures under which suspects could be compelled to provide such samples for DNA analysis,<sup>8</sup> and how those samples could be taken.<sup>9</sup> Police would have to show that there are reasonable grounds to believe that the suspect committed a designated offence before applying for a warrant.<sup>10</sup> In the execution of the warrant, the peace officer would have to respect the privacy of the individual and carry out the search in a reasonable manner.<sup>11</sup> The samples obtained would be used in the course of an investigation for the designated offences.<sup>12</sup> Where the accused has been acquitted, the DNA sample and the information obtained from it would be destroyed.<sup>13</sup> Parliament left the court the option of ordering that the substance be preserved. Preservation may be ordered if the court is satisfied that the bodily substance might reasonably be required in the investigation of the person for another designated offence or of another person for the same or any other designated offence.<sup>14</sup>

This prospect of preserving a DNA sample has prompted the government to expand

4 Morin was found not guilty on February 7, 1986 of the sex slaying of his nine-year old neighbour, Christine Jessop. The appeal of the Crown for a new trial was allowed and affirmed by the Supreme Court of Canada. *R. v. Morin* (1987), 36 Canadian Criminal Cases (3d) (Ontario Court of Appeal); aff'd [1988] 2 Supreme Court Reports 345. At his second trial in 1992, Morin was convicted of the murder of Christine Jessop. Fresh DNA evidence was allowed in the appeal of his second trial and his name was subsequently cleared. See *R. v. Morin* (1995), 37 Criminal Reports (4th) 395 (Ontario Court of Appeal).

5 For example, Steven Truscott, convicted in the 1959 sex slaying of a 12 year old girl in Clinton, Ontario, has recently lobbied to have DNA testing done on evidence to prove his innocence. Truscott, who was 14 years old at the time of the murder, was sentenced to hang and spent four months on death row before his sentence was postponed. He was subsequently committed to life in prison. In 1967, the Supreme Court of Canada upheld the verdict. *Reference Re Truscott*, [1967] Supreme Court Reports 309. See also "Truscott seeks DNA test to clear name in 1959 murder" *The [Saskatoon] StarPhoenix* (13 September 1997) A19. Whether Truscott will get his chance at a DNA exoneration is unclear. As of October, 1997, the Ontario government had yet to locate the semen samples recovered from the victim's body that could clear Truscott. A Canadian Press story reported that the Centre for Forensic Sciences had lost the samples. The centre's records indicate that the samples would have been returned to the Crown. See "Ont. unable to find semen to test for Truscott's DNA" *The [Saskatoon] StarPhoenix* (4 October 1997) A14.

its undertaking to regulate DNA evidence beyond Bill C-104. Phase two of Parliament's plan, the creation of a DNA data bank to house collected samples and information on bodily substances, is the main focus of this paper. The steps taken by the government toward establishing a data bank have been recent: a Commons committee only started to address what to do with DNA evidence after it was collected in February of 1998.<sup>15</sup> As a result, the scholarly literature on a DNA bank in Canada is scarce. Government documents singing the praises of data banks are plentiful; American academic works on the problems of DNA data banking are also abundant.

The government's objective in legislating DNA evidence, particularly in creating and regulating a data bank, is to protect Canadians from crime. In August of 1995, the Department of Justice released a report entitled "Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda."<sup>16</sup> The report, written in response to a 1993 pledge to "protect the basic right of all citizens to live in peaceful and safe communities,"<sup>17</sup> included the government's purpose in implementing, among other things, DNA legislation:

At the heart of the Government's approach is the belief that traditional measures to deal with crime – law enforcement, the courts, and incarceration – must be supported by strong crime prevention efforts. The communities that resist crime best are those that actively address the social and economic factors that can lead to crime. Strong, healthy communities must be our first line of defence against crime.<sup>18</sup>

This same report included a brief summary of the government's initiative in the collection and storage of DNA evidence. Few details of the program were revealed. In a later news release, however, the government stated that a DNA data bank will help the police in the following ways:

1. It will assist the police in identifying and arresting repeat offenders by comparing DNA information from the crime scene to the convicted offender index;
2. It will assist in determining whether a series of offences was committed by a serial offender or whether more than one perpetrator was involved;
3. It will assist in linking and solving cases across jurisdictional lines by providing access to information that might otherwise not be obtainable;
4. It will help focus investigations by eliminating suspects whose DNA profile is in the data bank in a case where no match with crime scene DNA is found; and
5. It will provide a measure of a deterrence factor by increasing the certainty of detection.<sup>19</sup>

While the government's objectives in establishing a DNA data bank are noble, its perceptions of how the data bank will help solve crimes are based on misconceptions. First, the government's objective is coloured by its perception of the infallibility of DNA evidence and testing. DNA testing is not a sure thing in a criminal prosecution and it does have its limitations. For example, there are practical difficulties that arise in DNA testing such as insufficiency of material and the length of time to obtain results.<sup>20</sup> Additionally, a lack of uniform standards and quality controls allows problems that arise during testing to go unnoticed.<sup>21</sup> All of these factors contribute to the unreliability of DNA testing in general. Second, the government assumes that data bank samples and information will be properly

6 Bill C-104, An Act to Amend the Criminal Code and the Young Offenders Act, 1<sup>st</sup> Session, 35<sup>th</sup> Parliament, Canada, 1994-95.

7 Criminal Code, Revised Statutes of Canada 1985, c-46, section 487.05

8 See above, section 487.07.

9 See above, section 487.06.

10 See above, section 487.05.

11 See above, section 487.07(3).

12 See above, sections 487.05, 487.08, and 487.04 for a list of designated offences.

13 See above, section 487.09.

14 See above, section 487.09(2).

15 "DNA data bank goes to committee" *The [Saskatoon] StarPhoenix* (4 February 1998) B7.

16 Canada Department of Justice and Solicitor General Canada, "Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda" (Ottawa: August, 1995) (QuickLaw).

17 See above at 1.

18 See above at 1-2.

19 Government of Canada, News Release 1997-008, "Herb Gray and Allan Rock Introduce Bill to Establish a National DNA Data Bank" (10 April 1997).

20 M. Lussier, "Tailoring the Rules of Admissibility: Genes and Canadian Criminal Law" (1992) 71 *Canadian Bar Review* 319 at 324-25.

21 J.C. Hoeffel, "The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant" (1990) 42 *Stanford Law Review* 465 at 468-69.

22 Solicitor General of Canada, "Establishing a National Data Bank: Summary of Consultations" (Minister of Supply and Services Canada: Ottawa, 1997) at 19.

23 See above.

disclosed and not abused. The objective ignores the personal costs that must be paid by the individual for "safer homes" and "safer streets" as civil liberties may be lost in the name of crime prevention and the establishment of a DNA data bank. Finally, the government presumes that a data bank will have a direct affect on our communities by reducing crime – an attractive selling point to any voting member of the public. This argument is hard to swallow. For example, women's groups have argued that the government's focus should be on supporting women who are the victims of violent crimes and not data banks since most offenders who commit these kinds of crimes against women are known by their victims.<sup>22</sup> Women's groups "question the federal government's investment in a DNA data bank in these 'socially regressive times, as expenditures on all social infrastructure and support for basic social justice are massively reduced.'"<sup>23</sup> The government's objective projects an ideal situation – where DNA evidence and testing is reliable and where data bank information will have limited purposes. If this is to be a reality, safeguards must be incorporated into the legislation.

The proposed structure of the DNA bank is outlined in Bill C-3, the DNA Identification Act, which is not yet in force.<sup>24</sup> The purpose of the legislation, as referred to in the earlier 1995 "Toward Safer Communities" report, is "to establish a DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act."<sup>25</sup> The legislation recognizes that DNA evidence will play a role in the early detection, arrest, and conviction of offenders which will in turn aid in the protection of society and in the administration of justice.<sup>26</sup> The federal government has proposed that the DNA data bank will be established and maintained by the Royal Canadian Mounted Police, which currently operates six forensic laboratories across the country.<sup>27</sup> The data bank will consist of two indices: a crime scene index and a convicted offenders index.<sup>28</sup> The crime scene index will contain DNA profiles that are found at a crime scene, on or within the body of a victim, or on anything worn or carried by the victim at the time an offence was committed.<sup>29</sup> The convicted offenders index will contain DNA profiles derived from the bodily substances obtained pursuant to section 487.071(1) of the Criminal Code.<sup>30</sup> The data bank will be established by the Solicitor General of Canada and, as stated earlier, maintained by the Commissioner of the R.C.M.P.<sup>31</sup>

Bill C-3 also contains safeguards to protect the privacy of individuals.<sup>32</sup> Limitations on the communication of information in the data bank is one such precaution. Where the Commissioner is given a DNA profile for entry into the bank, he or she may communicate that the profile is already contained in the bank and may add any relevant information, other than the profile itself, that is in the bank.<sup>33</sup> Provisions are made for the communication of information with governments of a foreign state.<sup>34</sup> This is to facilitate the apprehension of suspects committing crimes in numerous jurisdictions. Limitations are also imposed on who can use the information in the DNA bank and on the use they can make of the information. The Commissioner has the discretion to grant access to information contained

24 Bill C-3, An Act Respecting DNA Identification and to Make Consequential Amendments to the Criminal Code and Other Acts, 1st Session, 36th Parliament, Canada, 1997 to Present. Bill C-3 was first introduced in April of 1997 but died on the Order Paper at the dissolution of Parliament. A few minor amendments have been made to clarify specific provisions of the Bill. See Solicitor General of Canada, News Release 1997-023, "Solicitor General Andy Scott Introduces Bill to Establish a National DNA Data Bank [Bill C-3]" (25 September 1997).

25 Bill C-3, see above, section 3.

26 See above, section 4(a).

27 See note 19.

28 See note 24, section 5. In the United States, the framework of data banks is somewhat different. The F.B.I. operates a national DNA data banking system known as CODIS (Combined DNA Index System). That system contains three main indices: a convicted offender index, a forensic index (or crime scene index), and a missing persons index. The missing persons index contains genetic profiles of unidentified bodies or body parts in hopes that that information could be searched against profiles of relatives of missing persons in order to make an identification. See Department of Justice Canada Criminal and Social Policy Sector, "Obtaining and Banking DNA Evidence: Consultation Paper" (21 September 1994) 3 at 7-8. In addition to CODIS, 43 American states have passed legislation to establish a DNA data bank as of October, 1995. See K. Inman & N. Rudin, *An Introduction to Forensic DNA Analysis* (CRC Press: New York, 1997) at 133.

29 See note 24, sections 5(3)(a),(b),(c),(d).

30 See above, section 5(4). In Bill C-3, section 487.071 reads as follows: "487.071 (1) There shall be transmitted to the Commissioner of the Royal Canadian Mounted Police for entry in the convicted offenders index of the national DNA data bank established under the DNA Identification Act the results of forensic DNA analysis of bodily substances that are (a) provided voluntarily in the course of an investigation of a designated offence by any person who is later convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act of the designated offence or another designated offence in respect of the same transaction and who, having been so convicted, discharged or found guilty, consents to having the results entered in the convicted offenders index; (b) taken in execution of a warrant under section 487.05 from a person who is later convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act of the designated offence in respect of which the warrant was issued or another designated offence in respect of the same transaction and who, having been so convicted, discharged or found guilty, consents to having the results entered in the convicted offenders index; (c) taken from a person in execution of an order under section 487.051 or 487.052; or (d) taken from a person under an authorization under section 487.055 or 487.091."

31 See above, section 5(1).

32 See above, section 4(b).

33 See above, section 6(1)(a) and (b).

34 See above, section 6(3) and (4).

35 See above, section 7.

in the data bank to individuals for the maintenance and operation of the bank and to personnel of any laboratories for training purposes.<sup>35</sup> The use of the information received from the data bank is limited to the administration of the DNA Identification Act only.<sup>36</sup>

Precautions were also taken with regard to the storage of information and samples. Generally, information on DNA samples will be kept indefinitely.<sup>37</sup> Information will be inaccessible, however, in some cases such as where an offender has been acquitted.<sup>38</sup> Moreover, samples of bodily substances will also be stored.<sup>39</sup> These samples may be subjected to further forensic analysis if technology has advanced since the time when the DNA was first analysed.<sup>40</sup> Access to the samples themselves is also limited.<sup>41</sup> Destruction is at the discretion of the Commissioner<sup>42</sup> except in some cases, such as an acquittal, where destruction will be mandatory.<sup>43</sup>

Without a doubt, the prospect of a Canadian DNA data bank is appealing. The question is will it reduce crime as the government claims? And if so, at what cost? One major criticism of DNA data banks is that while they "will undoubtedly prove useful in solving crimes, their primary shortcoming is that criminals must first commit a crime before their DNA can be collected and later used to identify them in subsequent crimes."<sup>44</sup> Several cases have been documented in the United States where the banking of DNA information has led to arrests and convictions. The first case solved by searching convicted offender DNA records was in Minnesota in 1991.<sup>45</sup> The semen recovered from the crime scene was searched against 1,200 DNA records on file at the Minnesota Bureau of Criminal Apprehension. A match was made and the suspect was later convicted of rape and homicide. The second case also involved a rape in Minnesota, however, there were no suspects in that crime. A search of the Bureau's records resulted in a match and a suspect was arrested.<sup>46</sup> The DNA banks in the U.S.A. have also worked to eliminate suspects in a crime. In April of 1993, the Illinois State Police, using the F.B.I.'s national data bank, found a match between a suspect and evidence left at a crime scene. The two suspects in this crime, who were initially identified by police, were released. American DNA banks have also linked crimes together. In Miami, Metro-Dade County Police ran a sample from an unknown suspect in a rape case. It matched DNA evidence from another rape that had already been solved by police. The suspect pleaded guilty to both crimes.<sup>47</sup> The Minnesota Bureau of Criminal Apprehension was able to link 18 unknown suspect rape cases together. The two men initially arrested were released after being eliminated as suspects through DNA testing. Two other suspects were subsequently apprehended and a positive DNA match resulted. All of these examples include suspects who had committed previous crimes and whose DNA was on file with a law enforcement agency. Legal scholar Jennifer Sue Deck recommends that "[i]f the government wishes to protect its citizens by using DNA to identify criminals the first time they commit a crime, it will have to look to other measures."<sup>48</sup>

Critics have also condemned DNA data banks for the same flaws that they criticize DNA evidence: uncertainty. The use of DNA evidence in a legal setting poses questions about the reliability of testing procedures themselves. Deck contends that DNA data

banking should be prohibited given the reservations about testing procedures and the legal context in which DNA evidence is used:

First, DNA profiling procedures are subject to multiple sources of error which distort the likelihood that two samples will be declared to match. Second, lack of industry and laboratory standards renders detection of any errors practically impossible. Third, studies show that once scientific testimony is received in the courtroom, jurors are incapable of assigning the proper weight to forensic evidence. Together, these factors suggest that it would be very difficult for a suspect identified through a national DNA databank to refute evidence of a match. Because suspects would be initially identified through a databank, which could itself contain erroneous test results, the risk of false conviction is too great to support the creation of a national DNA databank for criminal prosecution.<sup>49</sup>

Beyond the issues that surround the content of the data banks themselves lie the larger problems that are associated with the use of such information. The mass storage of material as sensitive and as revealing as DNA samples brings privacy issues to the forefront of the debate over DNA data banks. The very nature of the information that is being collected and stored in DNA data banks makes it necessary for governments to incorporate safeguards into their legislation in order to protect individual privacy. Genetic testing is far more sensitive than other types of medical testing for the following reasons:

1. Genetic testing can reveal much more personal information than other types of medical testing and evaluation methods;
2. Genetic testing can reveal future medical predictions;
3. Genetic disorders generally affect people throughout their lives and thus, knowledge of genetic information can have a dramatic impact on individuals;
4. The development and availability of genetic information could have potentially serious adverse financial, emotional, and social consequence;
5. Genetic testing may reveal information about other family members as well as information about the individual tested;
6. Genetic information is itself unique from other types of medical information in that it has its own social, historical, and political perspective.<sup>50</sup>

Legal scholars, such as E. Donald Shapiro and Michelle L. Weinberg, have argued that the abuses that can arise from the stockpiling of such sensitive information and material should caution, if not stop, governments in their bid to create data banks. Governments should be concerned with both current and future uses of genetic information. Shapiro and Weinberg write that:

The DNA profile or so-called DNA fingerprint holds information which describes an individual's entire genetic makeup, including physical characteristics and predisposition to disease. Because of the sensitivity of this genetic information, there are grave concerns about individual privacy and civil liberties. It is important that the law realize it is simply not a matter of what we can currently read from the DNA profile analysis, but what we will be able to read from this genetic information in the very near future.<sup>51</sup>

The potential for the misuse of genetic information stored in data banks is enormous. Shapiro and Weinberg contemplate that if criminal DNA data banks become the accepted norm in society, it is not far fetched to imagine that other aspects of our lives could also be touched by DNA data banks.<sup>52</sup> If data banks are successful and relatively uncontroversial in fighting crime, society will view them with high regard. It is not unforeseeable that

36 See above, section 6(6).

37 See above, section 9(1).

38 See above, section 9(2)(a).

39 See above, section 10(1).

40 See above, section 10(2).

41 See above, section 10(4).

42 See above, section 10(6).

43 See above, section 10(7) and 10(8).

44 J. S. Deck, "Prelude to a Miss: A Cautionary Note Against Expanding DNA Databanks in the Face of Scientific Uncertainty" (1996) 20 Vermont Law Review 1057 at 1058.

45 Department of Justice Canada Criminal and Social Policy, see note 28 at 23.

46 See above.

47 See above.

48 See note 44.

49 See above at 1078.

50 Ontario Law Reform Commission, *Report on Genetic Testing* (Toronto: The Commission) at 201.

51 E. D. Shapiro & M. L. Weinberg, "DNA Data Banking: The Dangerous Erosion of Privacy" (1990) 33 Cleveland State Law Review 455 at 472.

52 See above at 478-79.

data banks could incorporate the genetic material of the non-criminal element of society to increase the effectiveness of the data bank as a crime fighting technique.<sup>53</sup> What if this information was made available for non-criminal purposes? Insurance companies could use genetic testing to detect future diseases and deny coverage to "tainted" applicants. Employers could refuse to hire employees based on their genetic make-up.<sup>54</sup> Society may deny an individual a right to have children because of his or her genetic predisposition. "[I]f the government is allowed to control the recordation and preservation of human genetic data through the use of computerized DNA data banks...the government will have a degree of power over the individual that is unprecedented and obviously subject to abuse."<sup>55</sup>

The potential power of the government to invade genetic privacy and the willingness with which the public may embrace DNA banking as an effective crime-solving technique is already evident. On October 10, 1997, the majority of the male population in a French farming village "willingly" submitted their DNA samples to aid in the investigation of a murder.<sup>56</sup> The victim, a 13-year-old British girl on a visit to northwestern France with school mates, was raped and strangled in her youth hostel bed. There were no suspects in her death. It was a scene of "a remarkable process" where local authorities requested that all consenting male villagers between the ages of 15 and 35 submit for DNA testing in order to eliminate a large group of possible suspects. Investigators admitted that there was no evidence that the killer was a local man or that he belonged to the age group being tested. Testing was voluntary and all negative samples were to be destroyed. The French League of Human Rights stated that "[t]he voluntary aspect is a total illusion...What attitude will there be toward those who don't volunteer?...Pressure and enormous suspicion."<sup>57</sup>

A similar DNA "roundup"<sup>58</sup> took place in Britain in 1988. An investigation by Leicestershire police into the murder of two 15-year-old girls over a two and one half year period involved the taking of more than 5,500 blood and saliva samples from men in three villages near the crime scene.<sup>59</sup> Colin Pitchfork was eventually convicted of the crime but was not apprehended through the DNA roundup: a woman overheard a conversation in a local pub about Pitchfork's attempts to convince another man to submit a DNA sample for him. She reported the incident to police and Pitchfork was arrested. Later DNA tests implicated him. One of the law enforcement officials in charge of the investigation stated that "a strong sense of community outrage among close-knit villagers and an effective police public relations campaign effectively overcame apprehension among some residents that the tests were an invasion of their personal rights."<sup>60</sup>

Canada's federal privacy watchdog agency, the Office of the Privacy Commissioner, has also expressed concern about the impact of DNA fingerprinting and data banks on the public. In a report published by the agency, the Office argued that DNA fingerprinting could lead to discrimination by employers, insurance companies, mortgage-lenders, or immigration officials.<sup>61</sup> DNA technology could also lead governments to hand-pick students for entrance into costly university programs.<sup>62</sup> "The Genetics Testing and Privacy report says the temptation for abuse may be so great that the government will have to legislate controls

53 Hoeffel notes that "Lifecodes [a commercial DNA testing laboratory in the United States] is already planning to bank DNA information on newborns for parents who want to be able to trace and identify their children in case of kidnapping or runaways. In addition, immigration authorities have expressed an interest in participating in a DNA databank for their purposes." See note 21 at 535. See also Shapiro & Weinberg, above at 472.

54 Shapiro and Weinberg write that genetic screening is already taking place in the workplace. In a review of genetic screening in the workplace, the United States government found that 75 of the country's largest firms either already had screening in place or planned to initiate it in the near future. The authors write that "[t]hese tests would obviously be used to exclude some individuals from employment and to determine job assignments for others." See above at 481.

55 See above at 479.  
56 J. Noveck, "Desperate Village Tries DNA Dragnet" Associated Press (10 October 1997) (QuickLaw) [DNA Developments I: French Village Tested, ADGN/97-1126.]

57 See above.

58 See above.

59 See note 51 at 464-65.

60 See above at 464.

61 No author, "Genetic Watchdog" (1993) 2:1 Forensics, Policing and the Law (QuickLaw).

62 No author, "DNA and the Invasion of Privacy" (1994) 2:1 Forensics, Policing and the Law (QuickLaw).

on the collection, storage, and use of genetic information.”<sup>63</sup>

In January 1996, the federal government decided to consult several groups on DNA data banking. A series of consultations took place with Members of Parliament, provincial and territorial governments, police services, correctional institutions, privacy officials, women’s organizations, the legal community, victims’ groups and forensic science and genetic organizations. Support for a DNA data bank was, in the government’s words, “strong” but concerns were expressed over the scope of a data bank, its effect on privacy, and how it would be funded.<sup>64</sup> Provincial and territorial governments were in favour of the data bank, so long as the federal government assumed all costs for its maintenance and operation.<sup>65</sup> Support from organizations such as the Privacy Commissioner of Canada, the Canadian Human Rights Commission, and the Canadian Bar Association was contingent on “adequate limits and protections” being put in place.<sup>66</sup> These same organizations expressed a concern over the retention of biological samples in the data bank. It is the view of these organizations that the sample should be destroyed once the genetic identification information has been extracted from it. “These intervenors argue that the complexities of ensuring the security of the information and the long range protection of personal privacy would overshadow the value of retaining the samples.”<sup>67</sup> If samples are to be retained, it was widely expressed that strict criminal sanctions should be incorporated into the legislation for the use of the samples for any purpose other than forensic DNA identification.<sup>68</sup>

Some political reaction to the DNA data bank has been less cautious than that of privacy advocates. The Reform Party believes that the federal government’s current DNA data bank proposal does not go far enough. In a Canadian Press news report, Reform MP Jack Ramsay was quoted as saying that the proposed legislation was “nonsense.”<sup>69</sup> He argued that the legislation does not allow police to use science to its full potential. Ramsay thought that anyone accused of a crime should be required to give a DNA sample at the time of arrest, similar to the current practice of taking fingerprints.<sup>70</sup> Ramsay was also unhappy with the provisions in Bill C-3 that give a court the discretion to exempt a convicted offender from giving samples if his or her privacy or security would be grossly violated.<sup>71</sup>

If a national DNA data bank is to be established, should we leave it to the federal government to strictly police the data bank and protect our rights to privacy? Some academics argue that history tells us not to. Hoeffel reminds her readers, that in the past, the United States government has dabbled in “genetic redlining” – the experience of differentiated treatment based on apparent or perceived human variation.<sup>72</sup> She notes, for example, the eugenics movement of the 1920s which called for compulsive sterilization of “social undesirables.”<sup>73</sup> In upholding a Virginia law compelling sterilizations, U.S. Supreme Court Justice Oliver Wendell Holmes stated that those “who already sap the strength of the state” owe it to public welfare not to reproduce “in order to prevent our being swamped with incompetence.”<sup>74</sup> Hoeffel also cites state laws identifying carriers of the sickle cell anaemia gene as a more recent example of the American government implementing genetic screening

63 See above.

64 See note 22 at ii. The annual cost of operating the DNA data bank is estimated at \$3 million per year. See note 19. For more information on the proposed funding of the data bank see note 22 at 15-19.

65 See note 19 at ii.

66 See above at iii.

67 See above at 11.

68 See above at 13.

69 See note 15.

70 See above.

71 See above.

72 See note 21 at 534.

73 See above.

74 *Buck v. Bell*, 274 U.S. 200, 207 (1927) as quoted in above at 534.



legislation.<sup>75</sup> The pre-marital screening was done to discourage individuals with the gene from bearing children. Shapiro and Weinberg contend that “the history of governmental protection of individual privacy and autonomy [in the United States] is inconsistent with the aims of a free and democratic society.”<sup>76</sup> They argue that there are plenty of “examples of the [American] government running amok in violation of the privacy of information collected for other purposes.”<sup>77</sup> One cited example is the 1930s U.S. Social Security Act. When the Act was passed, Congress assured the American public that confidentiality and privacy of information would be protected. Even in a Canadian context, “[o]ne hardly needs to comment on how this protection has been rigidly enforced.”<sup>78</sup>

While we may not be able to trust the federal government to protect our right to privacy with respect to a DNA data bank, it may be that the courts of this country will come to the rescue. The current legal trend with respect to the collection of DNA evidence has been to protect the rights and privacy of the individual from whom a biological sample is obtained. In *Hunter v. Southam*,<sup>79</sup> the Supreme Court of Canada held that the right to be free from unreasonable search and seizure means that an individual is entitled to a reasonable expectation of privacy. A court must balance an individual’s right to privacy with the government’s interest in intruding on that privacy. In circumstances where a bodily substance is required for DNA testing, the privacy interests of the individual have been the paramount concern of the courts when the individual’s Charter rights have been violated in the collection of the samples. For example, in *R. v. Dyment*,<sup>80</sup> a blood sample collected by a physician for medical purposes was passed to police without any legal requirement to do so. The Crown used the sample to secure the accused’s conviction in an impaired driving charge. The Supreme Court of Canada held that the “use of a person’s body without his consent to obtain information about him, invades an area of privacy essential to the maintenance of his human dignity.”<sup>81</sup>

The Supreme Court of Canada has more recently affirmed its commitment to protecting individual privacy in cases such as *R. v. Stillman*<sup>82</sup> and *R. v. Feeney*.<sup>83</sup> In *Stillman*, the accused’s right to privacy outweighed the Crown’s right to have DNA evidence admitted at trial. The accused in that case was charged with murder. Despite Stillman’s resistance to provide bodily substances for DNA testing, the authorities were successful in obtaining samples from him. After his lawyer had left and under threat of force, Stillman (a young offender) gave up scalp and pubic hair samples, a saliva sample, buccal swabs, and teeth impressions. The police also seized a tissue discarded by the accused containing his mucous. All of the items were used for DNA testing. The Supreme Court held that the bodily samples (with the exception of the tissue) were obtained in violation of Stillman’s section 8 Charter rights (his right to be free from unreasonable search and seizure) and thus were not admissible as evidence. Supreme Court Justice Cory, writing for the majority, concluded that “the taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant’s privacy.”<sup>84</sup> Justice Cory emphasized that the privacy of

75 See note 21 at 534. This legislation began to be implemented in the early 1970s.

76 See note 51 at 477.

77 See above.

78 See above.

79 [1984] 2 Supreme Court Reports 145.

80 [1988] 2 Supreme Court Reports 417.

81 See above at 431-432.

82 [1997] 1 Supreme Court Reports 607.

83 [1997] 2 Supreme Court Reports 13.

84 See note 82 at 644.

an individual's body is to be respected in all instances:

Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy. No doubt this approach was the basis for the assault and sexual assault provisions. The body was very rightly seen to be worthy of protection by means of criminal sanctions against those who assault others. The concept of fairness requires that searches carried out in the course of police investigations recognize the importance of the body.<sup>85</sup>

The Court ultimately decided that the admission of Stillman's bodily substances as evidence would violate his right to a fair trial and would bring the administration of justice into disrepute.

The Supreme Court of Canada continued its commitment to the right to privacy in *R. v. Feeney*.<sup>86</sup> During a murder investigation, the police entered Feeney's residence without permission. Upon waking the accused and observing blood on his shirt, police officers arrested him. Subsequently, several pieces of evidence were seized from Feeney's home including his shirt, shoes, cash, and cigarettes. Feeney was later convicted of second degree murder. On appeal, the accused challenged the conviction based on the argument that his right to be free from an unreasonable search and seizure and his right to retain and instruct counsel had been violated. The Court held that the arrest was unlawful as the police did not have reasonable grounds to arrest prior to forcible entry into the accused's home. Supreme Court Justice Sopinka sought to show in his judgment for the majority that "the emphasis on privacy in Canada has gained considerable importance."<sup>87</sup> He wrote that "Charter values...significantly increase the importance of the legal status of the privacy of the home. In general, the privacy interest now outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited."<sup>88</sup>

Both *Feeney* and *Stillman* illustrate that the current members of the Supreme Court of Canada have a strong commitment to protecting the privacy rights of individuals in this country. These cases demonstrate, however, that this commitment is limited to a criminal context. It is not certain that the same rights will be extended beyond the scope of criminal law. For example, would the regard for privacy extend to a constitutional challenge to a national DNA data bank? American academics have hypothesized that a national DNA data bank could withstand a constitutional challenge. Deck argues that a U.S. data bank would not violate the Fourth Amendment. She says that in order for the government in that country to establish a DNA data bank under the DNA Identification Act of 1994, samples would have to be obtained from every citizen of the United States. Procuring those samples would trigger the Fourth Amendment, which, like section 8 of the Charter, protects citizens from unreasonable search and seizure. Deck argues, however, that given the Fourth Amendment interpretations by the United States Supreme Court over the last 30 years, the data bank would withstand a constitutional challenge. She writes:

Rather than focussing on the requirement that there be probable cause and procurement of a warrant before a search or seizure occurs, the Court has limited its inquiry

85 See above at 658.

86 See note 83.

87 See above at 45.

88 See above at 15.

in certain cases to whether the search or seizure is reasonable. The Court's current framework weighs the public interest in a certain procedure against the individual interest at stake and typically rules in favour of the public interest. The result is a string of cases that could enable a national DNA databank to withstand a Fourth Amendment challenge.<sup>89</sup>

Robert Astroff speculates that the fate of a Canadian DNA data bank in the face of a constitutional challenge would be much different than its American counterpart.<sup>90</sup> He argues that a data bank will likely violate section 8 and section 7 of the Charter. He also notes that "the establishment of a DNA data bank is inconsistent with the notions of privacy, liberty and personal security that exist in Canadian society."<sup>91</sup> Given the recent course the Supreme Court of Canada has taken in regard to privacy issues, it is probable that a DNA data bank will be rendered unconstitutional unless strict safeguards are implemented to ensure the restricted and confidential use of the information it would store.

Legal scholars have argued that the debate about DNA evidence and data banking should be conducted in the legislature and not the courtroom.<sup>92</sup> This conclusion may flow from the judiciary's limited understanding of DNA testing and analysis. Certainly the complexity and multitude of the issues surrounding DNA evidence and data banking would make the legislature the more appropriate forum in which to regulate these matters. Whether legislators will possess the knowledge necessary to legislate responsibly remains to be seen. Clearly, the establishment of a DNA data bank will lead to the erosion of our right to privacy in one sense or another. It is not unreasonable to foresee that a DNA bank established as a crime fighting tool could be expanded to include the genetic material of those who have not been implicated in any criminal activity. Therefore, the government must keep the potential for abuse of DNA technology and its impact on individual privacy at the forefront of the debate. Furthermore, it must implement its legislation cautiously, without violating the fundamental rights and freedoms of Canadian citizens.

89 See note 44 at 1064-1068.

90 R. E. Astroff, "Identity Crisis: The Charter and Forensic DNA Analysis in the Criminal Justice System" (1995-96) 4-5 *Dalhousie Journal of Legal Studies* 211 at 234.

91 See above at 234.

92 See note 21 at 355-56.