



Canadian Association of Chiefs of Police
Association canadienne des chefs de police

Written Submission to the Standing Senate
Committee on Legal and Constitutional Affairs

S-231 - An Act to amend the Criminal Code, the Criminal Records Act, the National Defence Act and the DNA Identification Act

Canadian Association of Chiefs of Police
Law Amendments Committee

November 23, 2023

About the CACP

The Canadian Association of Chief of Police (CACP) was founded in Toronto on September 6, 1905. It is dedicated to the support and promotion of efficient law enforcement and to the protection and security of the people of Canada. The Association is national in character. Its interests and concerns have relevance to police at all levels including municipal, regional, provincial, federal and First Nations.

The CACP includes a series of committees dedicated to dealing with a wide range of issues important to public safety and security and to improving Canadian policing and the criminal justice system. The mandate of the Law Amendments Committee is to improve the laws affecting policing, exploring both legislative and non-legislative options for change.

Introduction

The CACP welcomes the opportunity to support Bill S-231. For more than two decades, the National DNA Databank (NDDB) has been an important tool for law enforcement to identify people who have committed serious crimes in this country. However, the NDDB is underutilized and the CACP sees Bill S-231 as an opportunity to make the databank more effective for law enforcement by increasing the number of profiles in the Convicted Offenders Index and authorizing familial DNA comparisons in prescribed circumstances. We also support making the system more efficient by streamlining the process whereby a police officer may refrain from taking a DNA sample from an offender who already has a DNA profile in the NDDB.

After briefly outlining our support for key provisions of Bill S-231, this report will propose some further amendments concerning: seeking DNA orders after sentencing hearings; providing some flexibility for police enforcing DNA orders; and compelling familial DNA comparisons when prescribed conditions have been met.

Expanding the Convicted Offenders Index

The NDDB includes collections of DNA profiles for criminal identification purposes: a Crime Scene Index, a Victims Index, and a Convicted Offenders Index. It also includes collections for the purposes of finding missing persons, identifying human remains, and a voluntary donors index.

The submission of DNA profiles to the NDDB, and to the Convicted Offenders Index in particular, is of significant value to police investigations. The NDDB contributes to the administration of justice and the safety of Canadians by assisting law enforcement in solving crimes by:

- helping to identify suspects;
- linking crimes together where there are no suspects; and
- identifying the involvement of serial offenders.

Unfortunately, the Convicted Offenders Index is relatively small in comparison to similar DNA databanks in other countries.

Section 487.04 of the *Criminal Code* outlines a list of offences (primary designated offences) where those who have been convicted may be compelled to provide a sample of their DNA for the Convicted Offenders Index. The list includes a series of the most serious offences, such as murder, for which a DNA order is mandatory. The list also includes offences for which the mandatory DNA order includes a rebuttable presumption and secondary designated offences for which the DNA order is discretionary and is subject to the precondition that the Crown proceeded by indictment.

While other countries and American states have expanded their DNA database regimes over time to include all the offences that we would refer to as indictable or hybrid offences, Canada's list continues to be restrictive and this has caused the Criminal Offenders Index to remain diminutive when compared to other jurisdictions. As our CACP colleagues noted in their 2019 submissions to this committee on Bill C-75, the reclassification of indictable offences that are punishable by a maximum period of imprisonment of ten years or less from straight indictable to hybrid offences has meant that more offenders are now exempt from having to provide their DNA samples to the NDDB.

The CACP supports the repeal of the definitions of primary and secondary designated offences and replacing them with a definition making a primary designated offence any offence under the *Criminal Code* and other criminal statutes that is punishable on indictment by five years or more and a secondary designated offence as any indictable offence that is punishable by less than five years of imprisonment. Additionally, Bill S-231 will make DNA orders mandatory for all primary designated offences and mandatory for secondary designated offences unless the offender satisfies the Court that the impact on the privacy and security of the person would be grossly disproportionate to the public interest.

This is a critical change that will not only expand the availability of DNA orders, and thereby expand the overall utility of the Convicted Offenders Index, but it will also expand the availability of DNA warrants during criminal investigations since they are limited to investigations involving designated offences. Given the anticipated increase in the number of DNA samples that will be collected by police services and processed by the National DNA Databank, it will be important to sufficiently fund these agencies to handle the workload.

Familial DNA Comparisons

Advances in DNA technology have allowed police agencies to take unknown samples from crime scenes and find potential family members of suspects by looking for hereditary markers.

This law enforcement technique caught the world's attention when the "Golden State Killer" was arrested in Sacramento, California in 2018. By comparing the DNA profiles collected from various crime scenes with data from consumer DNA testing companies, American authorities identified a family member or members of their suspect, and this ultimately led to the identification, arrest, and conviction of 72-year-old Joseph James DeAngelo.

In Canada, familial DNA played a critical role in identifying the man who kidnapped, sexually assaulted, and murdered nine-year-old Christine Jessop in 1984.

Guy Paul Morin, wrongfully convicted of these crimes in 1992, was eventually exonerated in 1995, thanks in part to improvements to DNA testing. Almost twenty-five years later, the Toronto Police Service (TPS) used genetic genealogy and open-source genetic databases in the United States to identify Calvin Hoover as the potential offender. Investigators had a sample of the offender's DNA from the original investigation. A genetic profile from the sample was uploaded to the genetic databases to be compared against profiles from people who had consented to law enforcement use to provide genetic familial matches. Police used these matches to develop family trees that ultimately led to the identification of Mr. Hoover as a potential donor of the DNA sample left during the commission of the crime. Investigators ultimately obtained a warrant to test a sample of Mr. Hoover's blood and confirm his identity as Christine's likely killer.

If Bill S-231's expanded list of designated offences had been in effect in 2007, Mr. Hoover's DNA would have been added to the National DNA Databank when he was convicted of impaired driving. Christine's murder could have been solved 13 years earlier. Mr. Hoover, who died in 2015, could have stood trial for her murder. The Jessop family may have found justice, and Mr. Morin may have experienced a little more closure.

TPS is now embarking on a project to use genetic genealogy to investigate unsolved historical violence against vulnerable community members. The project involves setting up a roster of genealogists to assist the TPS caseload of historic sexual assault and homicide investigations with unknown offender DNA. Virtually all these cases involve victims from vulnerable groups. Toronto is also assisting other police services across Ontario. The project is the first of its kind in Canada.

Toronto has established guidelines to restrict the use of genetic genealogy to unsolved crimes involving serious violence. There are several checks and balances in these guidelines, including:

- strong evidence that the DNA profile from the crime scene is attributable to the perpetrator of the offence and that it is suitable for testing;
- exhausting all other reasonable investigative techniques, including direct testing of the crime scene DNA profile, before using genetic genealogy;
- Crown consultation;
- compliance with all genealogy database terms and conditions, including identifying themselves as law enforcement to any applicable database;
- rules for the collection, processing, storage, and destruction of biological samples and DNA profiles;
- confirmation of a suspect's identity through the DNA testing of a legally obtained biological sample; and
- strict prohibition against using a DNA profile to determine the donor's genetic predisposition for disease or any other medical condition or physical trait.

Bill S-231 would amend the *DNA Identification Act* to allow a search to determine whether a DNA profile submitted by police to the NDDDB for comparison could be that of a biological relative of a person whose DNA profile is in the Convicted Offenders Index or the Human Remains Index.

Having regard to the potential privacy concerns with familial DNA, the CACP appreciates that Bill S-231 would limit these searches to the most serious of criminal cases (i.e., potential imprisonment for 14 years or more) and in circumstances where other investigative avenues have been exhausted. We also understand that familial DNA comparisons can generate a significant number of DNA profiles. As such, we believe that Bill S-231 has taken a restrained approach that will reduce the likelihood of overtaxing the NDDB's finite resources.

The CACP submits that familial DNA comparisons have the potential to assist in solving cold case homicides and other serious violent offences across Canada.

Making the DNA Sample Process More Efficient

Section 487.071(2) of the *Criminal Code* has created a cumbersome process for offenders who have been ordered by the court to provide a DNA sample even though their DNA profile is already in the Convicted Offenders Index. Presently, police services must engage in a time-consuming endorsement and follow-up procedure to avoid taking a DNA sample from an offender whose DNA profile is already in the NDDB. The CACP supports the proposed amendment that would allow a peace officer to forgo the taking of a superfluous DNA sample in circumstances where they are satisfied that the person's DNA is already in the Convicted Offenders Index. This change will result in administrative efficiencies and savings that we will gladly reinvest into processing the increased number of DNA orders that we hope the passage of Bill S-231 will generate.

Complying with Fundamental Legal Principles

Any changes to the collection and use of DNA by law enforcement must respect the fundamental rights and freedoms guaranteed by the *Charter* including the right to be secure against unreasonable search and seizure. The proposed amendments continue to strike an appropriate balance between individual rights and the protection of the public through effective law enforcement. Similarly, Canada's DNA regime must remain consistent with the principles outlined in section 3 of the *Youth Criminal Justice Act* when it comes to the collection of DNA samples from young persons who have been convicted of criminal offences.

We are confident that the National DNA Databank will continue to afford considerable privacy protection to the DNA samples and other personal information that it maintains. Having said this, we do have some reservations with the proposed inclusion of the victims' index and voluntary donors index in familial DNA searches having regard to the particular privacy considerations surrounding victims of crime and those who have voluntarily submitted DNA samples. We query whether the inclusion of these indices in familial DNA searches will reduce the number of people who will voluntarily provide their DNA samples to law enforcement.

Proposed Further Amendments

Seeking a DNA Order After the Sentencing Hearing

The proposed section 487.053(3) of the *Criminal Code* would allow the court to make a DNA order in the 90 days after it imposes a sentence on a person, finds the person not criminally responsible on account of mental disorder, directs that they be discharged or directs that the sentence be suspended, as the case may be. This amendment is a tacit acknowledgement that, from time to time, the Crown may neglect to seek a DNA Order in appropriate circumstances. The CACP respectfully submits that the ability for the Crown to seek a DNA order post sentencing hearing should not be time limited or the Crown should be given the opportunity to seek leave to extend the time for seeking a DNA order in the appropriate circumstances.

Prescribing the Date, Time, and Place for the Taking of Bodily Samples

Section 487.051(4) of the *Criminal Code* permits the court to make an order authorizing the taking of bodily samples and requiring the offender to report at the place, day, and time set out in the order and submit to the taking of samples. If, for some reason, the police are unable to collect the samples at the place, day, and time set out in the order, they may arguably lose the lawful ability to collect the sample without a further order of the court (if available). The CACP submits that the offender and the police should be able to agree on a given time and date or reschedule the taking of DNA samples in appropriate circumstances, within a given time frame. This would be particularly useful in rural and northern regions where limited police resources and uncontrollable things such as inclement weather may make the taking of a sample on a particular day and in a particular place impossible.

Conducting a Familial DNA Comparison Should not be Discretionary

As previously discussed, the CACP supports the proposed amendment to the *DNA Identification Act* to allow for DNA comparisons to determine whether a DNA sample collected by police could be that of a biological relative of a person whose profile is in the NDDDB. The proposed section 6.41(2) of that *Act* provides that the Commissioner may conduct a familial DNA Comparison if the Commissioner is satisfied that:

- (a) the request is being made in connection with an investigation into a designated offence — or an offence that would be a designated offence if it occurred in Canada — for which the person may be sentenced to imprisonment for 14 years or more; and
- (b) other investigative procedures have been tried and have failed or are unlikely to succeed, or that the urgency of the situation requires the comparison of the profile to others.

The CACP submits that the word “may” should be replaced with the word “shall” and that the familial DNA comparison should be mandatory so long as the Commissioner is satisfied that the aforementioned preconditions have been met.

Conclusion

Overall, the CACP supports Bill S-231 and urges the committee to pass it along with the amendments that we have proposed. We would like to thank the Honourable Senator Carignan and his staff for drafting a Bill that will, hopefully, modernize the NDDB, increase efficiencies within law enforcement, and aid us in our investigation and solving of serious crimes. We submit that Bill S-231 sends a strong message of support for the NDDB as an important tool in criminal investigations. Moreover, we believe that this Bill will enhance safety and security for all Canadians.