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## Presentation to the Standing Senate Committee on Legal and Constitutional Affairs

**C-75** - An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

Remarks by: Inspector Dale Weidman, Vancouver Police Department & Ms. Rachel Huntsman, QC, legal counsel with the Royal Newfoundland Constabulary. Representing:

**Canadian Association of Chiefs of Police**

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Distinguished members of this Committee, on behalf of Chief Constable Adam Palmer, President of the Canadian Association of Chiefs of Police, I am pleased to be given the opportunity to meet with each of you today.

I am Inspector Dale Weidman with the Vancouver Police Department. With me is Rachel Huntsman, QC, legal counsel with the Royal Newfoundland Constabulary. We are here today representing the Canadian Association of Chiefs of Police (CACP).

### **Introduction**

We are here to speak to two amendments being proposed under Bill C-75. These amendments are intended to address justice efficiencies, yet we believe them to have unintended consequences that will adversely affect police investigations and public safety.

We will first address the proposed reclassification of offences and its impact on DNA collection and fingerprinting. We will then discuss how DNA collection and fingerprinting will also be adversely impacted by the judicial referral hearing amendment that refers offenders charged with administrative of justice offences to a judicial referral hearing.

### **The Impact of Reclassification of Offences on DNA Collection**

Bill C-75 proposes to reclassify 118 indictable offences that are punishable by a maximum period of imprisonment of ten years or less from straight indictable to hybrid offences. The reclassification of these offences will allow the Crown to elect to proceed by indictment or summary conviction.

Seventy-four of these indictable offences are classified as “secondary generic designated offences” under section 487.04 of the Criminal Code, which means that upon conviction for one of these 74 offences the offender can be ordered to provide a DNA sample for submission to the National DNA Data Bank (NDDDB). Some of these offences both commonly occur and are significant such as: Disguise with Intent, Possession of Property Obtained by Crime, Criminal Negligence causing Bodily Harm and Theft over \$5000.00.

The submission of DNA samples to the NDDB is of enormous value to police investigations. The NDDB contributes to the administration of justice and the safety of Canadians by assisting law enforcement agencies in solving crimes by:

- Helping to identify suspects;
- Linking crimes together where there are no suspects;
- Determining whether a serial offender is involved when there are multiple crime scenes.

The submissions made to the NDDB for these 74 indictable offences have assisted law enforcement by matching DNA profiles from known offenders to profiles for primary and secondary offence investigations. As of February 1<sup>st</sup>, 2019, the NDDB received 9,368 submissions for these secondary offences, which led to 610 matches being made to a DNA profile in a criminal index: 231 matches were made to primary offences, which include 17 homicides and 21 sexual assaults, and 379 matches were made to secondary offences.

If these 74 offences are re-classified, there will undoubtedly be fewer submissions of DNA to the NDDB. The reason for this is that section 487.04 of the Criminal Code requires that the offence be prosecuted by indictment. Reclassification of these 74 offences will allow the Crown to proceed by summary conviction and the Crown will lose the ability to apply for the Order.

The CACP submits that it is not in the public interest to reduce the number of profiles submitted to the NDDB. The solution to this unintended consequence is really quite simple. If these 74 offences are reclassified, there should be an amendment to the Criminal Code that will list them as either primary designated offences or secondary designated offences. This amendment will permit a DNA Order to be made regardless of the Crown's election to proceed by indictment or by summary conviction.

## **The Impact of Reclassification of Offences on the Identification of Offenders**

The reclassification of offences under Bill C-75 will also impact the police's ability to fingerprint and photograph persons charged with criminal offences.

The importance of fingerprinting to the criminal justice system cannot be overstated. Fingerprints are used to:

- Correctly identify suspects;
- Establish if a suspect has a criminal record, outstanding charges or arrest warrants;
- Alert police and by extension the public, to risks associated to the suspect such as; gang affiliations, weapon offences, violence and suicidal tendencies.

Section 2(1) of the ICA provides that fingerprints and photographs may be taken from a person who is in lawful custody charged with or convicted of an indictable offence. This section places two conditions upon the police; the Information must be sworn before fingerprints can be taken and the charge must proceed by indictment. The police can fingerprint offenders who are charged with a hybrid offence, however, if the Crown elects to proceed by summary conviction the offence is no longer deemed indictable and fingerprints cannot be taken.

The reality facing police is that many offenders are not being fingerprinted and this problem is getting worse as more offences are being reclassified. For instance, offenders who are arrested and held in custody must be fingerprinted between the time the Information is sworn and their first appearance in Court. Since there can be delays in swearing the Information, it is often not possible to fingerprint the offender within this narrow window of opportunity. This is especially problematic in charge approval provinces.

The police also face difficulties with persons who are charged and released from custody before they are fingerprinted and with those accused who are given a date to appear for fingerprinting but fail to appear. While a warrant can be issued for the arrest of the accused and the police can lay a section 145 failure to appear charge, this is a

cumbersome and unwieldy process. Offenders can be difficult to locate and additional 'administration of justice' charges will be entered into an already overburdened judicial system.

The proposed reclassification of the 118 indictable offences and measures taken to promote the summary conviction procedure, such as raising the limitation period to twelve months (clause 318) and the maximum sentence for summary conviction cases to two years less a day (clause 319) will exacerbate the difficulties the police are now experiencing.

It is vitally important to the police that offenders have their convictions, outstanding warrants and charges entered on CPIC, which is a national record keeping system supported by fingerprints. This creates an accurate record of their risk to public safety and identifies them in subsequent investigations. From this perspective, not fingerprinting a person undermines the administration of justice and public safety by providing an incomplete picture of who it is the police are dealing with.

Now is the opportune time to fix this problem. The CACP proposes an amendment to the ICA to allow for fingerprinting on arrest, with proper safeguards in place, e.g. destroy fingerprints of persons not charged and only permit fingerprints taken before arrest to be used for identification purposes. The second option is to amend the ICA to allow fingerprinting for all Criminal Code offences or, at the very least, to allow fingerprinting notwithstanding the Crown's election.

### **The Impact of the Judicial Referral Hearing on DNA Collection and the Identification of Offenders**

Clause 234 of Bill C-75 proposes to add section 523.1 to the Criminal Code, which will create a new procedure for the handling of certain administration of justice offences, namely the offences of failure to appear and breach of undertaking or release order. The police will have the discretion whether to issue an appearance notice to an offender for a judicial referral hearing in place of laying a criminal charge.

When there is a referral to a Judicial Referral Hearing, the offender is not fingerprinted for that breach under the ICA, which means that the

offence is not entered into CPIC. This is problematic for the police because when there is no record created for these breaches, officers will not be able to conduct a full risk analysis when deciding whether offenders should be charged and detained in custody on other charges. It is in the public interest that police know when someone has been referred to a judicial referral hearing even though the charges that proceed to these hearings are considered to be “administrative of justice” offences. The fact remains that a section 145 charge is a breach of a bail condition, which is a red flag alerting police to potential risks in respect to the offender.

Furthermore, with no record, officers will not know how many times the person has previously been referred to a judicial referral hearing in place of having a charge laid against them. When an officer exercises their discretion, they need to know if the breach is a “one-off” or if they are dealing with someone who is flouting the “no charge” referral process with no regard for bail conditions.

Another concern of the CACP is that the administration of justice offences under section 145 of the Criminal Code were added to the list of secondary designated offences in the 2008 amendments to the Criminal Code. As of February 1<sup>st</sup>, 2019, the NDDB has received upwards of 43,753 submissions under this section. These submissions have yielded 1,511 matches to a DNA profile in a criminal index including 67 homicide and 121 sexual assault investigations.

When a police officer decides to send an offender to a judicial referral hearing for a section 145 offence, there is no charge meaning that there can be no submission of the offender’s DNA to the Convicted Offender Index of the NDDB.

## **Conclusion**

The CACP would like to thank those who have contributed to the modernization and increased efficiencies to the criminal justice system, as proposed in Bill C-75. Overall, we are pleased with the improvements recommended. We are hopeful that the areas of concern as described in this document will be given consideration to minimize the adverse effect that Bill C- 75 will have on policing and public safety.