Legislative Summary **LS-479E**

BILL C-35: AN ACT TO AMEND THE CRIMINAL CODE, THE DNA IDENTIFICATION ACT AND THE NATIONAL DEFENCE ACT

Robin MacKay
Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-35

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	7 May 2004	First Reading:	
Second Reading:	12 May 2004	Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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 Peter Niemczak

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TABLE OF CONTENTS

Page

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BILL C-35: AN ACT TO AMEND THE CRIMINAL CODE, THE DNA IDENTIFICATION ACT AND THE NATIONAL DEFENCE ACT*

Bill C-35, An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act, was introduced in the House of Commons on 7 May 2004. The bill's purpose is to amend provisions in the *Criminal Code*(1) respecting the taking of bodily substances for forensic DNA analysis and the inclusion of DNA profiles in the national DNA data bank. It also makes consequential amendments to the *DNA Identification Act*(2) and the *National Defence Act*.(3)

The bill adds offences, including repealed sexual offences, to the lists of designated offences in the *Criminal Code*, provides for the making of DNA data bank orders against a person who has committed a designated offence but who was found not criminally responsible by reason of mental disorder, provides for the review of defective DNA data bank orders and for the destruction of the bodily substances taken under them, compels offenders to appear at a certain time and place to provide a DNA sample, and allows for a DNA data bank order to be made after sentence has been imposed.

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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.

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.

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.(4) In 1995, amendments were made to the *Criminal Code* which set out the criteria and procedure for collecting the necessary material for DNA analysis.(5) These amendments provided legislative authority to collect bodily substances for DNA analysis, even though this would interfere with "bodily integrity."

The *Criminal Code* amendments 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.

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(4) 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.

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

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 either as a result of the analysis itself or upon 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.(6) In February 1997, the Solicitor General published a *Summary of Consultations*, which reviewed the comments submitted.(7)

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(8) and 30 June 2000.(9) 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.(10) 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 data bank 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*

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(6) http://www.psepc-sppcc.gc.ca/publications/news/19960118_e.asp.

(7) http://www.psepc-sppcc.gc.ca/publications/Policing/199611_e.pdf.

(8) SI/2000-37.

(9) SI/2000-60.

(10) For a fuller discussion of Bill C-3, see the Legislative Summary prepared by the Library of Parliament, available on-line at: http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls1000/361c3-e.asp.

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 offenders 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."

Communication or use of DNA profiles other than for the purposes of the administration of the Act is prohibited. Ordinarily, information in the convicted offenders index is to be kept indefinitely, subject to the *Criminal Records Act*.[11] 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.

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(11) 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 Solicitor General. Section 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 offenders index of the national DNA data bank.

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 offenders 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, and 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.

A DNA Data Bank Advisory Committee was established to monitor the operation of the data bank.(12) This committee includes the Privacy Commissioner of Canada and representatives of the police, legal, scientific, and academic communities among its members. 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 operation of the DNA data bank, and the *DNA Identification Act* is 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

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

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.

Sections 487.051 to 487.091 of the *Criminal Code* create 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*. 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 more than one murder committed at different times, or has been convicted of more than one of a number of listed sexual offences and who was serving a sentence of at least two years. The definition of "sexual offence" includes sexual assaults as well as most sexual offences involving children. The considerations to be given to such an application by the judge 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.

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* 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 offenders 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 for 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*.(13) 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*.

DESCRIPTION AND ANALYSIS

Bill C-35 consists of 31 clauses. The following description highlights selected aspects of the bill and does not review every clause.

A. Clause 1: Addition of Offences

Clause 1 of the Bill adds a number of offences to section 487.04 of the *Criminal Code* (the definitions section for forensic DNA analysis). Offences added to the list of primary designated offences include: sexual exploitation of a person with a disability, causing bodily harm with intent – air gun or pistol, administering a noxious thing with intention to endanger life or cause bodily harm, overcoming resistance to the commission of an offence, robbery (moved from the list of secondary designated offences), extortion, breaking and entering into a dwelling-house (moved from the list of secondary designated offences), and intimidation of a justice

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

system participant or journalist. Offences added to the list of primary designated offences found in previous versions of the *Criminal Code* include: indecent assault on a female, indecent assault on a male, and acts of gross indecency. This will catch historical sexual offences. For each of these added 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 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.

Clause 1 also adds a number of offences to the list of secondary designated offences. The new offences include: criminal harassment, uttering threats, breaking and entering into a place other than a dwelling-house, being unlawfully in a dwelling-house, intimidation, arson – damage to property, arson for a fraudulent purpose, participation in activities of a criminal organization, commission of an offence for a criminal organization, and instructing the commission of an offence for a criminal organization. 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 the person's privacy and security of the person.

B. Clauses 3 and 4: Mental Disorder Provisions

Clause 3 amends 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 changes the previous provision that 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.

Clause 3 also adds 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.

Clause 4 extends the new mental disorder provisions 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. Clause 4 also replaces section 487.053 of the *Criminal Code* to allow 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.

C. Clause 5: Expansion of Retroactive Offences

Clause 5 replaces section 487.055 of the *Criminal Code*, which deals with DNA data bank orders made against those convicted prior to the coming into force of the *DNA Identification Act* on 30 June 2000. The new section expands the list of sexual offences included under the retroactive scheme by adding historical sexual offences such as indecent assault and acts of gross indecency. A new class of offender will also be added to the list of offenders who may be candidates for the retroactive scheme: those who have committed one murder and one sexual assault at different times.

D. Clause 11: Review and Destruction of Improper Samples

Clause 11 adds section 487.0911 to the *Criminal Code*. This section will create 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.

E. Clauses 14 to 22: Amendments to the *DNA Identification Act*

The *DNA Identification Act* will be amended to take into account the passage of the *Youth Criminal Justice Act*.(14) Thus, clause 14 will expand the definition of "young person" to include the meaning assigned by subsection 2(1) of the *Youth Criminal Justice Act* or subsection 2(1) of the *Young Offenders Act*,(15) depending upon which Act was in force at the time the young person committed a designated offence. Clauses 14 through 17 also amend the *DNA Identification Act* to take into account the provisions of the *National Defence Act* dealing with forensic DNA analysis. Those provisions are themselves amended in Bill C-35 (see below) to ensure that the military justice system remains consistent with the civilian justice system.

Clause 16 amends the *DNA Identification Act* to take into account the addition of section 487.0911 to the *Criminal Code*. As set out above, that new section will create 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. Clause 16 will add sections 5.1 and 5.2 to the *DNA Identification Act* 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.

Clause 19 replaces section 9.1 of the *DNA Identification Act* with a section that takes into account the enactment of the *Youth Criminal Justice Act*. Section 9.1 will now state that access to information in the convicted offenders index in relation to a young person found guilty of a designated offence shall be permanently removed without delay when the record relating to the same offence is required to be destroyed, sealed or transmitted to the National Archivist of Canada under Part 6 of the *Youth Criminal Justice Act*. In the same vein, Clause 21

(14) S.C. 2002, c. 1.

(15) R.S.C. 1985, c. Y-1.

replaces section 10.1 of the *DNA Identification Act* with a provision that stored bodily substances of a young person found guilty of a designated offence shall be destroyed without delay when the record relating to the same offence is required to be destroyed, sealed or transmitted to the National Archivist of Canada under Part 6 of the *Youth Criminal Justice Act*.

F. Clauses 23 to 30: Amendments to the *National Defence Act*

The *National Defence Act* provisions in Division 6.1, "Forensic DNA Analysis," are amended so that they will be in accord with the amendments being made to the *Criminal Code*. Thus, the definitions of a "primary designated offence" are amended and provision is 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 is 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.

G. Clause 31: Coming Into Force

The provisions of Bill C-35 come into force on a day or days to be fixed by order of the Governor in Council.

COMMENTARY

No commentary on the bill has been noted to date.