# R. v. C.S.

Ontario Judgments

Ontario Court of Justice

M.L. Cohen J.

March 17, 2009.

**[2009] O.J. No. 1115** | *246 C.C.C. (3d) 77* | *189 C.R.R. (2d) 146* | *2009 ONCJ 114*

SITTING UNDER the provisions of the Youth Criminal Justice Act, S.C. 2002, c. 1 Between Her Majesty the Queen, and C.S., a young person And between Her Majesty the Queen, and B.D., a young person And between Her Majesty the Queen, and K.M., a young person And between Her Majesty the Queen, and J.B., a young person

(97 paras.)

## Case Summary

**Criminal law — Young persons — Rights of young persons — Application by five young persons for a declaration that that the legislative scheme which permitted DNA orders was unconstitutional with regards to young persons allowed — Since the legislative scheme authorized a mandatory order upon a finding of guilt, there was no room left for the balancing of interests required by the Youth Criminal Justice Act — Therefore, the mandatory procedure was unfair and unreasonable — Also, due to stigmatization and labelling, the legislative scheme also violated the psychological security of young persons — Furthermore, the violations did not minimally impair the constitutional rights in question — Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8 — Criminal Code, s. 487.051(1), s. 487.051(2).**

**Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of person — Protection against unreasonable search and seizure — Remedies for denial of rights — Application by five young persons for a declaration**

**that that the legislative scheme which permitted DNA orders was unconstitutional with regards to young persons allowed — Since the legislative scheme authorized a mandatory order upon a finding of guilt, there was no room left for the balancing of interests required by the Youth Criminal Justice Act — Therefore, the mandatory procedure was unfair and unreasonable — Also, due to stigmatization and labelling, the legislative scheme also violated the psychological security of young persons — Furthermore, the violations did not minimally impair the constitutional rights in question — Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8 — Criminal Code, s. 487.051(1), s. 487.051(2).**

Application by five young persons for a declaration that sections 487.051(1) and 487.051(2) of the Criminal Code breached their Charter rights. Each of the five young persons had been found guilty of a designated offence and was the subject of a DNA application. The young persons took the position that the legislative scheme which permitted DNA orders was unconstitutional with regards to young persons. More specifically, they submitted that subjecting them to mandatory DNA orders violated their rights to privacy and security of the person and constituted an unreasonable seizure. On the other hand, the Crown took the position that the legislative scheme adequately and constitutionally addressed the young persons' concerns.

HELD: Application allowed.

Since the legislative scheme authorized a mandatory order upon a finding of guilt, there was no room left for the balancing of interests required by the Youth Criminal Justice Act. Therefore, the mandatory procedure was unfair and unreasonable, and violated the young persons' right to protection against unreasonable search and seizure. In addition, as result of the effects of stigmatizing and labelling on young persons, the legislative scheme also violated the psychological security of young persons. Furthermore, the violations were inconsistent with the principles of fundamental justice and did not minimally impair the constitutional rights in question. Therefore, the provisions were unconstitutional with regards to young persons. The legislative scheme could be saved by determining, for the purpose of process, designated offences committed by young persons under section 487.051(3) of the Criminal Code, which permitted individualized inquiries.

## Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 7, s. 8, s. 24(1)

Constitution Act, 1982, s. 52, s. 52(1)

Controlled Drugs and Substance Act,

Criminal Code, s. 487.04, s. 487.051, s. 487.051(1), s. 487.05(1)(b), s. 487.051(2), s. 487.051(3), s. 487.054, s. 487.055, s. 487.06, s. 487.08(1), s. 487.08(2)

DNA Identification Act, *S.C. 1998, c. 37, s. 10*(1)

Youth Criminal Justice Act, *S.C. 2002, c. 1, s. 14*(1), s. 82(1), s. 140, s. 140(1), s. 142

## Counsel

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M.L. COHEN J.

## Introduction

1 This decision concerns DNA orders and the *Charter* rights of young persons. Each of the applicants is a young person who has been found guilty of a designated offence and is the subject of a DNA application. Each claims the application of 487.051(1) or (2) of the *Criminal Code* breaches their rights under the Charter. The Charter claims implicate three pieces of legislation: sub-sections 487.051(1) and (2) of the *Criminal Code* which allow a court to order young persons to provide their bodily substances for inclusion in the National DNA Data Bank, the *DNA Identification Act*1 which regulates the operation of the Data Bank, and the *Youth Criminal Justice Act* which governs criminal proceedings involving young persons.

2 In Regina v. D.B2., the Supreme Court of Canada declared that young persons are entitled to a presumption of diminished moral blameworthiness as a principle of fundamental justice under section 7 of the Charter. However, as Justice Abella observes in D.B., "Special rules based on reduced maturity and moral capacity have governed young persons in conflict with the law from "the beginning of legal history". Canada's youth justice legislation has always recognized the heightened vulnerability, and reduced capacity for moral judgment of young persons. The *Youth Criminal Justice Act*, is a sustained expression of this tradition. In Regina v. R.C.3, Fish, J. concluded that Parliament intended the principles of the *Youth Criminal Justice Act* to be respected whenever young persons are brought within the Canadian system of criminal justice.

3 The importance of DNA as a forensic tool is not in question in this case. The value of DNA sampling is consistently acknowledged in Canadian jurisprudence because of its assistance in the detection, arrest and conviction of offenders, and in the early exclusion from investigation and exculpation of innocent persons. (Regina. v. Rodgers4). It is widely appreciated in Canada that DNA evidence has resulted in the exoneration of the wrongly convicted. On the other hand, it is also understood that the taking of bodily samples can involve significant intrusions on an individual's privacy and human dignity. Canadian courts have recognized that an individual's DNA contains the "highest level of personal and private information",5 and that the provisions of DNA legislation can conflict with privacy and security interests protected by the Charter.6

Nonetheless, weighing the significant forensic value of DNA sampling against its manifest intrusiveness, Courts have consistently affirmed the constitutionality of DNA legislation.

**4** Yet the youth justice context raises considerations which do not pertain to adults affected by DNA orders. Young persons are entitled to special protections of their privacy under the *Youth Criminal Justice Act.* Indeed, the protection of the privacy of young persons who are involved in criminal proceedings is a cornerstone of the *Act*. As Justice Charron stated in Rodgers, a proper balance between the competing interests involved in DNA applications must be achieved within the Canadian constitutional framework. The Charter is interpreted in light of the context in which a particular claim arises. The question is whether DNA legislation which is constitutional in the adult criminal justice context should be similarly judged in relation to young persons.

**5** The applicants contend that the legislative scheme which permits DNA orders is unconstitutional with respect to young persons, and they seek a remedy under section 52(1) of the *Constitution Act*. The Crown submits that the legislative scheme adequately and constitutionally addresses the concerns raised by the applicants in this case, and opposes the application.

## History of the Proceedings

**6** The four young people involved in this application were all found guilty of primary designated offences under the DNA provisions of the Criminal Code. They were separately charged on different informations, and were found guilty on different dates. In each case the Crown sought a DNA order:

* JB was found guilty of Assault causing Bodily Harm and received a sentence of 18 months probation and 40 hours of community service;
* KM was found guilty of robbery and received a sentence of eighteen months probation;
* BD was found guilty of breaking and entering a dwelling house and committing theft and received an absolute discharge;

* CS was found guilty of three counts of breaking and entering a dwelling house and committing the offence of theft, two counts of breaking and entering a dwelling house with intent to commit theft, and one count of attempting to break and enter a dwelling house. He received a 12 month conditional discharge.

7 Although the DNA hearings in respect of these young persons commenced on separate dates, in view of the importance of the issues involved in this matter, I invited the parties to participate together in the final portions of the applications. On consent of all parties, I requested, and permitted, the intervention of the Criminal Lawyers Association, and Justice for Children and Youth, a legal aid clinic specializing in the legal issues of young persons. At the hearing, the young persons testified, and the Crown led evidence regarding the manner of collection of DNA samples, and the operation of the National DNA Data Bank.

## DNA Legislative Scheme

8 The cases before me arise, in part, as a result of recent amendments to the DNA provisions in the *Criminal Code* enacted in 2008. The purposes, principles and prescribed operation of the National DNA Data Bank are set out in the *DNA Identification Act*, which was passed in 1998. They have been comprehensively described in Regina v. Briggs and Regina v. Rodgers, among other cases, and it is not necessary for me to review the provisions of the legislation in this ruling7. The DNA legislative scheme which permits the ordering of DNA on a finding of guilt has been in effect since 2000. I commence at the outset for me with a brief review of the recent changes to section 487.04 and 487.051 of the *Code.*

9 As in the previous legislation, Section 487.04 continues to make a distinction between primary and secondary designated offences. However, pursuant to the amendments, Section 487.04 now defines two sub-categories of primary designated offences in respect of which a DNA order can be made. A list of offences is enumerated for each new sub-category in sub-section (a) and (a.1) to (d) of the definition of primary designated offences. A third category is comprised of secondary designated offences. As in the previous legislation, Section 487.051 continues to set out the tests for the court to apply in making a DNA order. Each test remains contingent on the designation of the offence. However, there is one material difference from the former legislation:

Previously both tests in section 487.051 allowed the court the discretion to refuse to make a DNA order. This has changed.

10 In its current form Section 487.051(1) now requires a court to make a DNA order upon a finding of guilt in relation to category (a) primary designated offences. The order is mandatory. For other primary designated offences, now listed in (a.1) to (d) of the primary designated offence definition, the court is to apply the test which formerly governed all primary designated offences. Offences in this category are presumed to give rise to a DNA order, unless the person found guilty is able to satisfy the court that the order should not be made. Because this test creates a rebuttable presumption in favour of making the order, it involves a reverse onus. Both the mandatory test and the reverse onus test are in issue in this case. The test for secondary designated offences, set out in section 487.051(3), remains the same, except that the onus is now clearly on the Crown to make the application for the order. This burden rests on the Crown only in the case of secondary designated offences.

11 The applicants allege that subjecting them to a mandatory DNA order under section 487.051(1), or to a rebuttable presumption that the order should be made under section 487.051(2), violates their *Charter* rights to privacy and security of the person.

## Charter Analysis

12 It is well-established that the taking of bodily samples for DNA analysis without a person's consent constitutes a seizure within the meaning of s. 8 of the *Charter*.8 The breaches alleged in this proceeding can be analysed under section 8 as a specific instance of a violation of a section 7 *Charter* right or under section 7. In Rodgers, Charron J. stated that where a *Charter* argument

> ... concerns the procedural fairness of the very process that authorizes the seizure [of DNA] ... the question is necessarily encompassed in the s. 8 assessment of reasonableness and is more properly considered in that context9

13 Accordingly, although I intend to consider possible breaches of both section 7 and 8 in these reasons, I shall begin with section 8.

## Section 8

**14** Section 8 provides that everyone has the right to be secure against unreasonable search or seizure. To establish the application of Section 8 there must first be a search and seizure, and it must then be determined whether the search or seizure is unreasonable. For a search to be reasonable: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable10.

**15** The applicants agree that the taking of a DNA sample is a seizure which is authorized by law. Although the manner in which the seizure is carried out11 clearly interferes with bodily integrity, it has been repeatedly held that "the degree of offence to the physical integrity of the person is relatively modest".12 Accordingly the issue in this case falls within the second branch of the section 8 test: Is the law reasonable which authorizes the taking of DNA samples from young persons found guilty of primary designated offences?

**16** Section 8 protects an individual's reasonable expectation of privacy. What is reasonable is context-specific. If a person has a minimal expectation with respect to privacy, this may tip the balance in the favour of the state interest.13 As in Hunter v. Southam Inc14, an

> ... assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

Where the constitutional line of "reasonableness" will be drawn is a function of both the importance of the state objective and the degree of impact on the individual's privacy interest.

**17** The state objective in the case of DNA legislation is to assist in the identification of persons alleged to have committed designated offences. Other objectives have been held to include deterring potential repeat offenders, detecting serial offenders, streamlining investigations, solving "cold cases", and protecting the innocent by eliminating suspects and exonerating the wrongly convicted15 . Thus the state's interests in the collection of DNA are significant. As Justice Arbour observes in S.A.B., DNA sampling is "an identification tool of great value to the

criminal process". (par. 51) Nonetheless, the valid and important state interest in collecting DNA must be balanced against the privacy interests of those from whom the DNA will be taken.

18 In the case of Regina v. Dyment16, Mr. Justice La Forest stated that the first challenge in conducting the balancing required by section 8 of the *Charter* is to

> find some means of identifying those situations where we should be most alert to privacy considerations. Those who have reflected on the matter have spoken of zones or realms of privacy ... (par.19)

In my view, the *Youth Criminal Justice Act* mandates a zone or realm of privacy for young persons, which requires that the court be alert to privacy considerations in the case of young people found guilty of criminal offences. When assessing the existence of a reasonable expectation of privacy, if it wishes to be consistent with this legislation, the court must recognize a distinction between the cases of adults found guilty of designated offences, and those of young persons.

19 An analysis of the relationship between the DNA legislative scheme and the privacy and security interests of young persons must begin with an understanding of the fundamental relationship between DNA collection and privacy. The privacy interests affected by the DNA legislation have been considered in numerous decisions, and the following principles are well established:

* The making of a DNA order clearly engages two aspects of privacy protected by the Canadian Charter of Rights and Freedoms. The first relates to the person, and the second arises in what has been called the "informational context" (R. v. R.C. par. 25);
* The central concern involved in the collection of DNA information by the state is its impact on the informational aspect of privacy( R. v. S.A.B., par. 48);
* The notion of privacy derives from the assumption that all information about a person is in a fundamental way his or her own, to be communicated or retained by the individual in question as he or she sees fit. (R. v.Dyment) ;

* There is undoubtedly the highest level of personal and private information contained in an individual's DNA (R. v. S.A.B, par.48), and the potential intrusiveness of a DNA analysis is virtually infinite. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological makeup (R.v.R.C.).

20 These principles remind courts not to lose sight of the gravity and consequence of DNA orders. As Justice Fish stated in R.C.:

> The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a [page115] grave intrusion on the subject's right to personal and informational privacy.

21 In general terms, because of the strict operational requirements and comprehensive safeguards regulating the use of bodily substances, various provisions of the DNA legislation have been found to strike an appropriate balance between the public interest in effective criminal law enforcement for serious offences17, and the rights of individuals to dignity and physical integrity,18 and to control the release of personal information about themselves. Nonetheless, both the Supreme Court of Canada and the Ontario Court of Appeal have "sounded a note of caution about the latent invasiveness of DNA, which holds the key to reveal the entirety of a person's genetic makeup and predisposition towards certain behaviours and diseases."19 There is no Canadian case that says that the state's right to obtain DNA samples is absolute.

## Youth Criminal Justice Act and the Privacy Interests of Young Persons

22 Unlike adults, young persons have a high expectation of privacy within the criminal justice system. The *Youth Criminal Justice Act* provides in its Declaration of Principles that

a) the criminal justice system for young persons must be separate from that of adults and emphasize the following ...

(b) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected ...

23 Indeed, the protection of the privacy of young persons is one of the animating principles of the entire *Act*. Part 6 of the *Act*, which prohibits the publication and dissemination of information that would identify a young person as having been dealt with under the *Act*, is perhaps the most cogent expression of this philosophy. Every young person who is dealt with under the Act, from a youth who is investigated by a police officer on the street to a youth found guilt of the most serious offences, is presumed entitled to this protection. Its basis is well-understood and has been repeatedly stressed in Canadian jurisprudence: The intent of the privacy protections under the *Youth Criminal Justice Act* is to avoid labelling and stigmatization of young people who have committed criminal offences.

24 It is widely accepted that labeling young persons as criminals damages their prospects for rehabilitation. Both the Ontario Court of Appeal20 and Supreme Court of Canada21 have endorsed this view. In D.B., Abella, J. referred, in the context of publication, to the existence of a scholarly consensus that stigmatizing a young person at this early stage in his or her development can damage a youth's "developing self-image and sense of self-worth22, increase a youth's self-perception as an offender, disrupt the family's abilities to provide support, and negatively affect interaction with peers, teachers, and the surrounding community.23 Protecting the privacy of young persons who have been the subject of criminal proceedings is thus considered central to accomplishing the goal of rehabilitating young persons and reintegrating them into society. In Regina v. R.C., Fish, J. emphasized the public policy basis for this legislative preoccupation with the privacy of young persons:

> In protecting the privacy interests of young persons convicted of criminal offences, Parliament has not seen itself as compromising, much less as sacrificing, the interests of the public. Rather, as Binnie J. noted in F.N. (Re), *[2000] 1 S.C.R. 880*, *2000 SCC 35*, protecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long-term protection of society (par 42)

25 The concrete meaning of the privacy protections in the *Youth Criminal Justice Act* in the DNA context may be understood by examining the reasoning in the leading case of Regina v. Rodgers. In Rodgers, Justice Charron considered the constitutionality of section 487.055 of the *Code* which provides for ex parte DNA applications in certain circumstances. In considering

whether the offender, who had been convicted of multiple sex offences, had a reasonable expectation of privacy after conviction, she stated

> The relevant question then becomes whether Mr. Rodgers has any reasonable expectation of privacy in respect of his identity.

**26** She concluded that although the offender unquestionably had a residual privacy interest in the information contained in his DNA samples, he had lost any reasonable expectation of privacy in the identifying information derived from the DNA samples (the DNA profile). Justice Charron reasoned that a person convicted of designated offences could not reasonably expect to retain any degree of anonymity vis-à-vis law enforcement authorities after conviction, and thus, as a convicted offender, he had lost any reasonable expectation of privacy in respect of his identity.

**27** Such a conclusion does not follow ipso facto from a finding that a young person is guilty of a designated offence. Part 6 of the *Youth Criminal Justice Act* protects the identity of young people before, during, and after they are subject to proceedings under the *Act*. Indeed, the Supreme Court has held in D.B. that even where young persons have been sentenced as adults, the burden is on the Crown to demonstrate that lifting the publication ban protecting their identities is warranted24. Most importantly, section 82(1) of the *Act* provides that

> ... if a young person is found guilty of an offence, and a youth justice court directs under paragraph 42(2)(b) that the young person be discharged absolutely, or the youth sentence ... has ceased to have effect, ... *the young person is deemed not to have been found guilty or convicted of the offence ...* (my emphasis)

**28** Thus, under the *Youth Criminal Justice Act*, young persons do not lose a reasonable expectation of privacy in their identity after a finding of guilt, and the reasoning in Rodgers is distinguishable.

**29** I find that young persons who have been found guilty of designated offences have a reasonable expectation of privacy in their DNA. Indeed, considering the manner in which DNA orders are understood as affecting privacy interests, and the extraordinary value placed on the protection of the privacy of young people dealt with under the *Youth Criminal Justice Act*, I find it

fair to state that in making DNA orders against a young persons found guilty of a designated offence, the court is compelling persons who have arguably the highest right to privacy in the criminal justice system to produce to the state the highest level of personal and private information. Of course, it is open to Parliament to legislate in this area. Is the law which authorizes this seizure reasonable?

30 Both the Ontario Court of Appeal and the Supreme Court of Canada have held that courts deciding DNA applications must balance the interests involved "through the lens of the applicable youth justice legislation." In R.C., Fish, J. stated that it was clear that Parliament intended the principles of the *Youth Criminal Justice Act* to be considered in a DNA application even though no specific section of the *Act* modified the former sections 487.051(1)(a) or (2) of the *Code*.

31 The *Youth Criminal Justice Act* specifically addresses the requirements of procedural fairness for young persons. The Act guarantees young persons that special consideration will apply in respect of criminal proceedings against them, and in particular,

> young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

32 Furthermore, section 14(1) provides that

> *Despite any other Act of Parliament* ... a youth justice court has exclusive jurisdiction in respect of an offence alleged to have been committed by a person while he or she was a young person, and that person *shall be dealt with as provided in this Act. (*my emphasis)

33 Additionally, section 140(1) provides that:

> *Except to the extent that they are inconsistent with or excluded by this Act,* the provisions of the Criminal Code apply, *with any modifications that the circumstances require*, in respect of offences alleged to have been committed by young persons. (my emphasis)

34 As the Court reasoned in R.C., I take these sections to mean that despite the specific

procedure provided in the DNA legislation, the youth justice court must deal with DNA applications by taking into account the principles and characteristics of the *Youth Criminal Justice Act.* To the extent the DNA legislation prevents or obstructs the Court from engaging in this reasoning it fails to meet constitutional standards.

**35** Section 487.051(1) authorizes mandatory orders. Where a court is required to impose a mandatory order upon a finding of guilt, it has no possibility of balancing the interests involved through the lens of the *Youth Criminal Justice Act.* This mandatory procedure is unfair and unreasonable. Indeed it is a strange circumstance that requires a youth justice court to determine a DNA application, but prevents that court from considering the principles of the *Youth Criminal Justice Act* when doing so. In the result I find that section 487.051(1) is an unreasonable law and violates the applicants' rights under section 8 of the Charter.

**36** In addition, I find that section 487.051(2) is similarly unreasonable and violates the applicants' rights under section 8. Although it is implicit in R.C. that the wording of this section is capable of being interpreted in light of the *Youth Criminal Justice Act,* Fish, J. specifically stated that he had not been called upon to determine the constitutionality of the section and was not doing so.

**37** Section 487.051(2), is a reverse onus provision which requires a young person to establish, to the satisfaction of the court, that

> ... the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

**38** The Supreme Court has held, in the case of sentences, that "grossly disproportionate" means "more than merely excessive". To be "grossly disproportionate" a sentence must be "so excessive as to outrage standards of decency" to the extent that Canadians "would find the punishment abhorrent or intolerable".25 Clearly a very high standard is intended by these words.

**39** Parliament must be taken to have been aware of the enhanced privacy interests of young

person under the *Youth Criminal Justice Act* when the legislation was drafted. Presumably then, the test in section 487.051(2) assumes proportionality between the public interest and a youth's high privacy interests. Therefore, the burden on the young person must be to demonstrate an impact on his privacy which is grossly higher than that protected by the youth justice legislation. This is a standard which would be almost impossible to meet. As a result, section 487.051(2) prevents a fair balancing of the privacy rights of young persons against the identified public interests. The procedure is unfair and unreasonable.

**40** For all of these reasons I find that both sections in question violate the applicants' rights under section 8 of the *Charter.*

**41** Before proceeding to my section 7 analysis, I wish to briefly consider the changes to the DNA legislative scheme, as well as some of the evidence I heard on the Charter application. This evidence is relevant to the claims under both section 7 and 8 of the *Charter*.

## Changes to the DNA Legislative Scheme

**42** The amendments to sections 487.054 and 487.051 have resulted in a substantial expansion in the number and nature of designated offences. Robbery has been added to the list of primary designated offences and is in the mandatory category. Robbery is an offence which can be committed without actual physical violence. Under this legislation a twelve year old who grabs a baseball hat off a playmate and runs away with it can be found guilty of robbery, and be required, pursuant to a mandatory order, to surrender his or her DNA to the state.

**43** Assault with a weapon and assault causing bodily harm, both offences which can be prosecuted by way of summary conviction offences, are also included in this mandatory category. Again, under this legislation, a 12 year old involved in a consensual "schoolyard scuffle" in which one of the participants receives a minor injury, must be subject to a DNA order on a finding of guilt. These offences are commonly committed by young persons, and in many cases the underlying facts belie the seriousness of the actual charge.

**44** Breaking and entering a dwelling house has now been included in the list of "reverse onus"

primary designated offences. Breaking and entering a dwelling house is also a common property crime among teenagers and may be relatively minor on the facts. This is not to say that young persons do not commit serious robberies, assaults and break and enters. It is to say that in the youth justice court the actual facts of an offence can vary widely, and the mere designation of the offence tells you little about how serious it really is, or, for that matter, what the implications are in terms of the young person's likelihood to commit further offences.

**45** In considering the impact of the DNA provisions on young persons, it is important to recognize the trend that has developed over the short history of DNA legislation in Canada. The number of offences for which DNA can be ordered has steadily increased since the current legislative scheme was introduced in 2000. In that year, section 487.04 listed 16 primary designated offences (excluding historical sexual offences). Today the list of primary designated offences includes 17 mandatory offences and 35 reverse onus offences, making a total of 52 offences, (excluding historical offences and offences under the Security of Information Act), some from the former secondary category26. An enormous increase in the list of secondary designated offences has also occurred27.This increase must mean, and be intended to mean, that substantially more DNA orders will be made.

**46** To see how striking the transformation to the legislation has been in the relatively short period since its enactment, it is instructive to look at the characterization of the designated offences in Regina v. Briggs28, the seminal Ontario Court of Appeal decision from 2001. In Briggs, Weiler, J. described the features of the DNA legislation as it stood at that time:

a) Primary offences are the most serious offences in the Criminal Code and include murder and sexual offences

b) Secondary offences, such as robbery, are less serious than primary offences, but are serious on their own.

c) A Judge has discretion to make an order authorizing the taking of a sample of DNA with respect to both primary and secondary offences although that discretion would appear to be more limited with respect to primary offences.

**47** Although correct at the time, this summary would no longer accurately characterize the

present DNA legislation. Even in 2006, when Charron, J. in Rodgers reviewed the "safeguards aimed at protecting the informational privacy of individuals" she noted that

> ... designated offences, as defined under s. 487.04 of the Criminal Code, may generally be described as the more serious offences under the Code and offences in respect of which it may reasonably be expected that DNA may be left behind by the offender. (par.43)

48 As we have seen, this characterization, which was appropriate when made, is also no longer accurate. In my view, while it is open to Parliament to change the tests for DNA orders and to widen the net of designated offences, we may expect as a consequence, that the current DNA legislation will result in a substantial increase in DNA orders involving young persons

49 An additional aspect of the DNA legislative scheme which merits attention in this context is the question of the retention and destruction of records. Section 10(1) of the *DNA Identification Act* provides that

> The Commissioner shall, without delay, destroy stored bodily substances of a young person who has been found guilty of a designated offence under the Young Offenders Act or under the Youth Criminal Justice Act 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 Act29.

50 Although the former *Young Offenders Act* provided clearer timelines for the destruction or sealing of records than the *Youth Criminal Justice Act*, timelines are nonetheless prescribed in the *Act* under Part 6. These provisions dictate when a record relating to an offence is required to be destroyed, sealed or transmitted to the National Archivist of Canada. Considering that the DNA legislation came into effect in 2000, it is reasonable to suppose that a substantial number of biological samples provided by young persons would have been destroyed, and their profiles removed from the DNA Data Bank, by 2008. However, the evidence before me at the hearing did not support this supposition.

51 The evidence of Isabelle Trudel, the officer in charge responsible for the operation of the National DNA Data Bank, was that, as of January 7, 2009, the National DNA Data Bank had

received 21,169 biological samples provided by young persons. As of December 8, 2008, a total of 795 had been removed from access and destroyed. Of these only 535 had been destroyed because the retention period had expired. While it is true that the records retention period will be extended if a young person commits further offences, or offends as an adult during the retention period, I find it unreasonable to draw an inference that all but 535 of the young persons who provided their bodily samples fell into this category. This would mean that that 97.5% of young people who were subject to DNA orders had re-offended in a manner that would trigger a material extension of the records retention period. It is, in my view, much more or likely that these figures are evidence of a failure to comply with the provisions of the *DNA Identification Act*, and I so find.

**52** Ms. Trudel also testified that the DNA sample used to generate the DNA profiles of a young person for comparative purposes forms only a portion of the total bodily substance provided by the person. The remaining bodily substances, which contain the entire genetic make up of the sample providers, are not destroyed. They are maintained indefinitely in the National DNA Data Bank, in the same manner as the bodily substances and DNA profiles of adults, which are retained indefinitely. As Justice Charron pointed out in Rodgers, all offenders retain a residual privacy interest in the information contained in these DNA samples.

**53** It may be argued that the numerous safeguards incorporated in the DNA legislation are a complete answer to the privacy concerns of young persons. I would disagree. First of all, I am not satisfied that removal of access to and destruction of samples of DNA taken from young persons is actually taking place in accordance with the legislation. Secondly, it has been established in evidence before me that, while access to the DNA profile may have been severed in a very small percentage of cases, the DNA sample containing the entire genetic make-up of the young person is never destroyed. There may be good scientific reasons for retaining DNA samples rather than profiles, but the fact remains that by retaining the DNA samples, a young person's privacy is vulnerable to future changes to the legislation, or to the handling of DNA samples.30The concern raised by Justice Rosenberg in Regina v. Hendry *(2001), 161 C.C.C. (3d) 275*, (at par. 20), is most apt when it comes to young persons who have very long term privacy interests:

> A DNA profile is different. It is capable of providing the most intimate details of the person because it can show the person's genetic make-up. The DNA sample can be analyzed to determine, for example, if the person carries certain genes that make the person more susceptible to disease. It is not beyond the realm of possibility that in the future scientists may claim to be able to isolate genes that make a person more prone to violence. To guard against abuse, it is the policy of the DNA data bank to only use "non-coding" or "junk" DNA, that is, only that part of the DNA that does not predict any medical, physical or mental characteristics. This policy or convention is not, however, written into the legislation.

**54** Finally, I would note that the *DNA Identification Act* allows the National DNA Data Bank to share information on a case by case basis with foreign jurisdictions, in accordance with mutual legal assistance agreements. Ms. Trudel stated that this information sharing is done through Interpol and encompasses 83 foreign states.

## Section 7

**55** Interests in bodily integrity, personal autonomy and privacy are also encompassed by the protections of life, liberty and security of the person guaranteed by s. 7 of the Charter: (R. v. Stillman). Although I acknowledge that generally the question of the constitutionality of DNA seizures is adequately dealt with under section 8, I believe the constitutional argument under section 7 is of equal significance in this case.

**56** The analytical approach to a section 7 claim involves a two-step process:

* Has the government action resulted in a threshold violation of one or more of the rights described in section 7?
* If there is a threshold violation, is it inconsistent with the principles of fundamental justice?

**57** I have already found that a young person's right to a reasonable expectation of privacy

under section 8 of the Charter is violated by section 487.051(1) and (2). I also find that the psychological security of young persons, as an aspect of security of the person, is violated.

**58** As I have already noted, the *Youth Criminal Justice Act*, the *Young Offenders Act* before it, Canadian courts at all levels, and international covenants, conventions and resolutions respecting youth justice to which Canada has been a party, have all implicitly or explicitly recognized the need to protect young persons from the effects of stigmatizing and labelling in order to further their rehabilitation and reintegration31. I would suggest that this concern to avoid labelling bears directly on the question of the psychological security of young persons. As Justice Abella observed in Regina v. K.B.32, "We cannot assume ... as with an adult offender, that there will be minimal impact on a young person's privacy and security of the person" arising from a DNA order.

**59** Although the *DNA Identification Act* strictly controls the release of the information acquired through DNA sampling, this privacy safeguard does not protect a young person from the psychological impact of knowing he has surrendered to the state his most basic and extensive personal information. I believe that for a young person to carry with him or her into adulthood the knowledge that this private information is in a police data bank is a serious psychological burden, and one that is contrary to the anti-labelling philosophy of the *Youth Criminal Justice Act*. As the intervenor Justice for Children and Youth pointed out, young persons may perceive inclusion in the DNA Data Bank as a permanent label as a criminal. This is an important insight from a pragmatic perspective. In F.N. (Re), *[2000] 1 S.C.R. 880* at par. 14, Justice Binnie pointed out that "A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy."

**60** Thus I find that the threshold violation of the young persons' rights to privacy and security of the person under section 7 of the Charter has been established. Are the violations inconsistent with the principles of fundamental justice? I would answer in the affirmative. The application of section 487.051(1) and (2) to young persons breaches the presumption of reduced culpability of young persons. This presumption is a principle of fundamental justice.

**61** The mandatory provisions prevent the court from taking this presumption into consideration.

For example, Section 487.051(1) prevents a court entirely from considering the personal characteristics of the young person and the circumstances of the offence he or she has committed. Section 487.051(2) also limits the courts ability to consider the effect of this presumption in a particular case. As I have indicated, this section creates a virtually insurmountable barrier for a young person to meet in persuading the court that the DNA order should not be made. The young person is effectively disentitled to the benefit of the presumption.

62 I recognize that D.B. was a sentencing case, and that a DNA order is not a sentence. However, as Justice Fish stated in R.C. (par. 39), while not a sentence, a DNA order

> ... is undoubtedly a serious consequence of conviction. This is evident from the comprehensive procedural protections that are woven into the scheme of the DNA data bank. The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a [page115] grave intrusion on the subject's right to personal and informational privacy.

63 In any case, in D.B. , Justice Abella makes clear that that young people are entitled to a presumption of diminished moral culpability throughout all proceedings against them. For example in determining that the principle is sufficiently precise "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person"(par. 69), she states that:

> The principle that young people are entitled to a presumption of diminished moral culpability *throughout any proceedings against them*, including during sentencing, is readily administrable ...

64 Again, in deciding that the presumption of an adult sentence is inconsistent with the principle that young people are entitled to a presumption of diminished moral culpability, she states that:

> No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. ... By depriving them of this presumption because of the crime and despite their [page34] age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive

> protections to which their age entitles them, *including a youth sentence*, the onus provisions infringe a principle of fundamental justice. (par.76)

**65** In D.B., Justice Abella was considering reverse onus provisions in the *Youth Criminal Justice Act*. This reasoning applies equally to section 487.051(2) of the *Code*. Surely if the presumption that a young person has diminished moral culpability applies in determining whether a sentencing provision is constitutional, it must apply to whether a DNA provision consequent upon sentencing, is constitutional. As in D.B., the language of section 487.051(2) is mandatory, and the "default position" is the DNA order. As in D.B. sub-section 487.051(2) forces the young person to rebut the presumption of a DNA order, rather than requiring the Crown to justify the order. As in D.B., sections 487.051(1) and (2) stipulate that it is the offence, rather than the age of the person, that determines the process by which the order is made. The same understanding of the immaturity and vulnerability of young persons who commit that informed the Court's analysis of the need for special protections of their privacy, and for special procedural protections, should equally inform our analysis of the DNA legislation.

**66** I find that section 487.051(1) does not permit the court to consider the implications of the presumption of the diminished blameworthiness of young persons in the DNA context and thereby undermines entire rationale of the *Youth Criminal Justice Act* as I have explained it in these reasons. I find further that Section 487.051(2), which contains a rebuttable presumption that the order should be made, unfairly deprives the young person of the benefit of this presumption. In my view, as in D.B., the provisions of section 487.051(2) and (2) are inconsistent with the presumption of diminished moral culpability which is a principle of fundamental justice.

**67** I am not holding that DNA orders should never be made with respect to young persons. The Crown may still persuade a youth court judge that a DNA order ought to be made where a designated offence has been committed. But I am holding that a constitutionally fair procedure requires that the Crown bring the application and bear the burden of proof, and that the Court have the discretion to consider the applicable principles of youth justice law.

**68** Thus I have found that the DNA sections in question breach the young persons' rights under

section 7 and 8 of the Charter. The remaining question is whether the provisions can be saved by section 1.

## Section 1

**69** The young persons have established that their rights under section 7 and 8 of the Charter have been infringed. To justify the infringement, the government must show that the infringement is a reasonable limitation on their rights. (R. v. Oakes33) There are two steps to the inquiry: The first step requires an assessment of the importance of the objectives underlying the law. The second step requires an assessment of the proportionality of the means employed to achieve the objective. In this step, the objectives of the impugned law are balanced against the nature of the infringed right to determine whether the law is rationally connected to the objectives, whether the means impair the infringed right as minimally as possible, and are proportionate to the benefit achieved.

**70** The applicants concede the important objectives of the DNA legislation, and that there is a rational connection between the objectives of the DNA legislation and the impugned provisions. However, they submit that the means chosen do not minimally impair the constitutional rights in question. I agree.

**71** Section 487.051(1) prevents the young person from making an argument which might demonstrate that the order is not warranted by any objective standard. For example, one of the young persons in this case, K.M. pled guilty to robbery. He was with 3 young persons in a subway station when they observed a fourth playing with a portable play station. One of the other young persons grabbed the play station and ran off. K.M. held the victim back while the rest ran away. K.M. was immediately remorseful. There were no injuries. K.M. is 15 years of age, and he has no record, yet it is not open to him to make any submission about why the order should not be made. There is no question of a minimal impairment. The test is absolute.

**72** I also find section 487.051(2) does not minimally impair the constitutional rights in question. In the case of D.B.34, a young person found guilty of manslaughter challenged the

constitutionality of the provisions of the *Act* that give rise to a presumption of an adult sentence, and a presumption of the lifting of the publication ban. Justice Abella held:

> that impugned provisions place the onus on young persons to satisfy the court that they remain entitled to a youth sentence and to a publication ban. This onus on young persons is inconsistent with the presumption of diminished moral culpability, a principle of fundamental justice which requires the Crown to justify the loss both of a youth sentence and of a publication ban. The impugned provisions are therefore inconsistent with s. 7 of the Charter and are not saved by s. 1. To the extent that they impose this reverse onus, they are unconstitutional

**73** Section 7 violations can only be saved by section 1 in rare and exceptional circumstances. This case does not establish such circumstances35. The means chosen by Parliament to achieve the valid purpose of the legislation have resulted in effects which deprive young persons of their rights guaranteed under the Charter.

**74** I find that the breaches of section 7 and section 8 are not saved by section 1 and the impugned provisions are therefore unconstitutional.

## Remedy

**75** Trial judges presiding in the Ontario Court of Justice have jurisdiction to determine whether a law infringe the Charter, and it "has always been open to provincial courts to declare legislation invalid in criminal cases": (Regina v. Big M Drug Mart Ltd.)36 Two remedial provisions govern remedies for Charter violations which do not survive s. 1 scrutiny: ss. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. Section 24(1) confers on judges a wide discretion to grant appropriate remedies in response to *Charter* violations,37 however, it is generally seen as providing a remedy where the violation occurred as a result of some government action. Where the violation is the result of legislation, the proper remedial authority is s. 52(1) of the *Constitution Act, 1982*.38

**76** Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. If the constitutional defect of a law can be

remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. However, in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. In considering alternatives to striking down, the court must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the Charter.39

77 As I have noted, in R.C.,40 Fish, J. concluded that

> Parliament intended the principles of the Act to be respected whenever young persons are brought within the Canadian system of criminal justice.

78 To accomplish this objective, a court considering a DNA application must have the discretion to consider the principles of the *Youth Criminal Justice Act* in arriving at a determination. Judicial discretion is constitutionally required in order to provide a mechanism for balancing the rights of the young person and those of the state. Section 487.051(1) deprives the court of discretion and cannot be saved. Section 487.051(2) places an unconstitutional burden on the young person, cannot be reworded, and therefore cannot be saved.

79 However, Section 140 of the *Youth Criminal Justice Act* provides a solution to the question of the appropriate remedy under section 52(1). Applying this section respects the intention of Parliament as found in R.C., as well as the presumption of diminished moral culpability of young persons, while recognizing the importance of the state objectives in the DNA legislative scheme. Section 140 provides that:

> Except to the extent that it is inconsistent with or excluded by this Act, the provisions of the Criminal Code apply, with any modifications that the circumstances require, in respect of offences alleged to have been committed by young persons.

80 I find that the legislative scheme may be saved by modifying the application of section 487.051 in the case of DNA applications involving youths found guilty of committing primary designated offences. For purposes of process, but not for purposes of their specific designation

as primary designated offences, (an indicator of seriousness), all designated offences committed by young persons should be determined under section 487.051(3) of the *Code*. Youths found guilty of committing mandatory (a) offences, and reverse onus (a.1 to d) offences, should be dealt with under the section affecting secondary designated offences.

**81** Section 487.051(3) permits an individualized inquiry in which the trial judge is able to consider the application "through the lens" of the youth justice legislation. Under section 487.051(3), the onus is on the Crown to make the application and thus the Crown bears the burden of persuasion. Shifting the onus is consistent with recognizing the presumption of diminished culpability. The public interest is protected because "the best interests of the administration of justice" includes a consideration of the valid purposes of the DNA legislation. The enumerated factors allow the court to consider the youth's youth criminal justice record, and the nature and circumstances of the offence, factors which courts have always been considered in relation to DNA orders. In addition the Court can consider the impact of the order on the young person's privacy and security interests as they are understood in the particular case and in the *Youth Criminal Justice Act*. This solution respects the intention of parliament as expressed in the *Youth Criminal Justice Act*, and the important purposes served by the DNA legislative scheme.

## Application of the Test

**82** In the cases before me the Crown has sought a further opportunity to make submissions in the individual cases once he has had an opportunity to review these reasons. I have granted an adjournment for that purpose. However, in two of the cases he does not ask to make further submissions and both the Crown the Defence are content that I rule on the matter on the basis of the evidence already before me. How is the test to be applied?

**83** Section 487.051(3) provides as follows:

> a) The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make such an order in Form 5.04 in relation to ...

> (b) a person who is ... found guilty under the Youth Criminal Justice Act or the Young Offenders Act, of an offence committed at any time, including before June 30, 2000, if that offence is a secondary designated offence when the person is sentenced or discharged.
>
> In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

84 The case law suggests a number of factors that a court may consider in assessing the "best interests of the administration of justice". Although, as Justice Abella observes, the application of these factors, will necessarily be different between young and adult offenders, many will be appropriate for consideration in the youth context. For example, determining what order is in the best interests of justice will require the court to consider the purposes of the DNA legislation as expressed in the legislation. As articulated in Briggs, this consideration is not limited to the law enforcement advantages, but includes other important benefits like assisting in the early exclusion of the innocent from investigation and the exoneration of the wrongfully convicted. The offender's youth court record may be relevant. If the young person has no prior record, and the circumstances of the designated offence are relatively minor, the court may be justified in not making the order. A record for serious violent or sexual offences may indicate a degree of dangerousness to society which makes the interference with the youth's privacy and security of the person more readily justifiable than it would be, for example, in the case of a young person with a record of non-violent offences. If the offence, in the particular circumstances, is such that the risk of recidivism appears to be low, this will be a relevant consideration in determining whether the case is outside the balance between the objectives of the DNA provisions and the young person's privacy and security of the person.

85 The balance also assumes that there is judicial discretion to assure that the taking of the sample is conducted in a way that infringes the privacy and bodily integrity of the offender as

little as reasonably possible, and assumes also that there is virtually no pain, discomfort or danger to health involved in taking the sample.

86 On the other hand some considerations which may be apt in adult criminal court are of diminished significance in youth court. For example , courts have held that the DNA provisions may be seen as furthering the objective of deterrence -- both general and specific. It is suggested that the fact that reliable identification may result from DNA analysis and, therefore, that the risk of apprehension and conviction is increased may, itself, deter criminal activity. However Parliament has taken a different view of the efficacy of this analysis in the case of young persons. By policy choice, Parliament has not included general and specific deterrence as principles of youth sentencing under the *Act*. (R. v. B.W.P.; R. v. B.V.N.41) In fact, Parliament has expressly provided in the declaration of Principles to the *Act* that the youth criminal justice system is intended to prevent crime by addressing the circumstances underlying a young person's offending behaviour. As Justice Charron observed in B.W.P., the word "deterrence" appears nowhere in the *Act*.

87 The question of likely recidivism should also be approached cautiously with young persons. An assumption underlying the DNA scheme as it relates to the taking of samples from convicted offenders is that the offender may offend in the future and the samples will aid in his or her detection and prosecution. However, because many offences committed by young persons are a reflection of their immaturity and impulsivity, recidivism cannot be assumed. As Justice Fish observed in R.C.,

> ... Parliament has recognized in enacting youth criminal justice legislation that "most young offenders are one-time offenders only and, the less harm brought upon them from their experience with the criminal justice system, the less likely they are to commit further criminal acts"

88 There would have been little point in enacting the complex and detailed provisions of Part 6 of the *Act*, if it was assumed that young persons would be likely to re-offend in a serious manner. In fact, one reason that a young person's privacy is protected from the first moment he or she is dealt with under the *Act* is because it is assumed a young person will not re-offend, not re-offend seriously, or not re-offend because appropriate intervention are brought to bear.

89 A youth court also has to examine the record carefully to assess the weight to be given to the risk of recidivism. It cannot be assumed, as in the case of adults, that the number of entries is indicative of an entrenched pattern of anti-social behaviour.

90 Finally, the comprehensive philosophy of restraint in the *Youth Criminal Justice Act*, premised on the avoidance of stigmatizing and labelling, suggests that in promoting the safety of the public, less intrusive actions are to be preferred. This reasoning also suggests that a youth court should exercise greater caution in finding a likelihood of re-offending in youth court than might be the case with adults. Bearing these principles in mind, I turn to the cases of two of the young persons involved in this case.

B.D.

91 B.D. was found guilty on February 21, 2007, of one offence of breaking and entering a dwelling house. He has no youth court record but spent three days in custody after his arrest and eight months on bail. He and another young person walked to the rear of a house, kicked in a basement window, entered the house and stole money and property. He was seen running away from the home and was apprehended shortly after, still in possession of the property. The Crown sought a conditional discharge as a sentence and B.D. received an absolute discharge.

92 B.D. was 17 at the time of the offence. He explained his actions by saying he was asked to go along and complied. At the time of the offence he had been forced out of his home by his parent and was living on the street. He stated he was looking for money and was not intending violence. At the time of sentencing, he was living with his father and attending an academic up-grading program because he wanted to be an auto mechanic. His life had stabilized.

93 B.D.'s testimony at the DNA hearing was typical of the evidence I received from most of the young persons in this application. He did not understand the implication of a DNA order. He stated he understood that the DNA samples contain information about him, but when asked what kind of information, he replied:

> "Where I live, everything, my whole name, my date of birth, everything, I guess".

94 Because he received an absolute discharge the records retention period in his case is one year from the date he was found guilty. Since he was found guilty on February 21, 2008, that period has expired. He is a young person without a youth court record who pled guilty to an impulsive property offence, albeit a primary designated offence. Notwithstanding the important public interests served by the DNA legislation, considering B.D.'s high privacy and security interests, and considering the factors I have outlined above, I am declining to make a DNA order in this case.

C.S.

95 C.S.'s case is more difficult. C.S. was 15 years old at the time he committed these offences. He was found guilty on December 18, 2007, of committing or attempting to commit six offences of breaking and entering a dwelling house. The offences were committed on three separate dates between May and October, 2007. One of the break and enters was committed at 11:00 at night and the homeowners were asleep. C.S. has no youth court record. He spent a week in jail and was under a house arrest for a considerable period of time. He had been living with his mother on and off and there is a great deal of unresolved tension and mistrust in the relationship. He has not done well in school, in part because of overuse of marijuana. In the year before the sentencing he had acquired one credit in school, and I do not believe he has completed grade nine. At the time of sentencing he was residing with an adult family friend and had developed a plan for re-enrolling in school and entering a pre-apprenticeship program with the help of a planning agency in this courthouse. According to the probation officer who prepared his pre-sentence report, he appeared remorseful. Unfortunately at the time of sentencing, none of his plans had materialized.

96 C.S. received a conditional discharge for a period of twelve months. The access period for a conditional discharge is three years from the date of the finding of guilt. I have considered his age, the absence of a record, and his current intentions. I have also considered the pattern of offences, (of greater significance than the number), the fact that one offence was committed at night when it was reasonable to assume someone might be home, the instability of CS's past living arrangements, and the lack of evidence of his rehabilitation at the time of sentencing.

97 It is difficult to assess the likelihood of recidivism in C.S.'s case. He himself seemed unsure of it when he testified. The break in to a dwelling late at night when people were home is troubling. Although I am reluctant to make a DNA order at this time because of C.S.'s age and lack of a record, having weighed the public interest in ordering that a DNA sample be taken from him and retained in the DNA data bank, against the impact of such an order on his privacy and security interests in light of the principles and objects of youth criminal justice legislation as have described them in this judgment, I find the best interests of the administration of justice are served by ordering that C.S. provide a sample of his blood for purposes of analysis under section 487.051 of the Criminal Code.

M.L. COHEN J.

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1 *S.C. 1998, c. 37* as amended.

2 *[2008] 2 S.C.R. 3*.

3 *[2005] 3 S.C.R. 99*.

4 R. v. Rodgers, *[2006] S.C.J. No. 15* (S.C.C.) par.4 In so doing, she described both the efficacy and the hazards of government seizure and use of DNA samples.

5 R. v. Stillman, *[1997] 1 S.C.R. 607* (S.C.C.); R. v. S.A.B., *[2003] 2 S.C.R. 678* (S.C.C.).

6 R. v. R.C., *[2005] 3 S.C.R. 99* at par. 24.

7 The operation of the Data Bank is described by Mr Justice Fish in R v RC at par. 18: When a DNA order is made, a sample of one or more bodily substances -- blood, hair or buccal cells -- is taken and sent to the National DNA data bank of Canada, where it is assigned a bar code and separated from information identifying the offender. The biological sample is processed and a profile created from the non-coding portions of the DNA sequence. This profile is put in a database known as the Convicted Offenders Index. A separate index, the Crime Scene Index, contains DNA profiles from unsolved crime scenes. The two indices are routinely compared and, when a match is found, investigators are alerted to the discovery of a match.

8 R. v. Rodgers par. 25.

9 Rodgers, par. 23.

10 Rodgers, supra; R. v. Collins, *[1987] 1 S.C.R. 265*, at p. 278; R. v. Stillman, *[1997] 1 S.C.R. 607*, at par. 25.

11 Per s. 487.06 of the *Criminal Code*: Usually by pricking the surface of the skin to take a blood sample or buccal swab of the lips, tongue and inside cheeks of the mouth.

12 Per: R. v. S.A.B., *[2003] 2 S.C.R. 678* par. 44; R. v. F.(S.) *(2000), 141 C.C.C. (3d) 225* (Ont. C.A.), at para. 27).

13 R. v. Jarvis, *[2002] S.C.J. No. 76*(SCC) paras.69, 71.

14 *[1984] 2 S.C.R. 145*, at pp. 159-60.

15 See R. v. R.C., *[2005] S.C.J. No. 62* at par.23 and the cases cited therein.

16 R. v. Dyment, *[1988] 2 S.C.R. 417*.

17 Per: R. v. S.A.B., *[2003] 2 S.C.R. 678* "As it is presently constituted, the DNA warrant scheme limits the intrusion into informational privacy by using only non-coding DNA for forensic DNA analysis. As previously noted, s. 487.04 defines "forensic DNA analysis" as the comparison of the DNA in the bodily substance seized from a person in execution of a warrant with the results of the DNA in the bodily substance referred to in s. 487.05(1)(*b*). In other words, the DNA analysis is conducted solely for forensic purposes and does not reveal any medical, physical or mental characteristics; its only use is the provision of identifying information that can be compared to an existing sample. Additional factors limit the intrusion into informational privacy: s. 487.05(1) (*b*), s. 487.08(1) and s. 487.08(2) place limits on the use of the information obtained from DNA analysis including making it an offence to use a bodily substance obtained in execution of a DNA warrant except in the course of an investigation of the designated offence. That the DNA warrant scheme explicitly prohibits the misuse of information is an important factor that ensures compliance with s. 8 of the *Charter*.

18 R.v.S.A.B par 52; R. v. Rodgers.

19 R. v. R.C.; R. v. Dyck, *2008 ONCA 309*.

20 (F.N.) Re, *[2000] 1 S.C.R.880*, par. 14.

21 R. v. D.B., par. 86; R. v. R.C., par. 42.

22 R. v. D.B., *[2006] O.J. No. 1112* (Ont.C.A.) See also S.L. v. N.B., *[2005] O.J. No. 1411* 35 (Ont. C.A.).

23 Ibid, par.84, citing Nicholas Bala, *Young Offenders Law* (1997), at p. 215.

24 R. v. D.B.

25 R. v. Smith, *[1987] 1 S.C.R. 1045*.

26 In 2000, the legislation provided for 25 secondary designated offences, (excluding historical offences). The number today is well in excess of the 2000 figure, but by reason of the inclusion of hybrid offences depending on Crown elections, the calculation of the number of these offences will be a post hoc exercise. Some of these offences, like uttering threats or public mischief, are unlikely to leave DNA behind in their commission.

27 The significant expansion in the list of secondary offences will also increase the number of DNA orders against young persons. Secondary designated offences now include, in addition to specified offences like assault, threatening, breaking and entering a place other than a dwelling house, offences

> ... that may be prosecuted by indictment - or, for section 487.051 to apply, [are] prosecuted by indictment - for which the maximum punishment is imprisonment for five years or more,

Thus offences commonly committed by young persons, like theft and possession of a stolen automobile, and assault with intent to resist arrest, may now result in a DNA order. Secondary designated offences now also include offences under the *Controlled Drugs and Substance Act*

> that may be prosecuted by indictment - or, for section 487.051 to apply, is prosecuted by indictment - for which the maximum punishment is imprisonment for five years or more:
>
> (i) section 5 (trafficking in substance and possession for purpose of trafficking).

A drug trafficking charge in Youth Court involving a serious drug commonly arises from a $20 sale to an undercover officer. Again, while such an offence can raise many urgent concerns, the designation of the offence is not a good indicator of its gravity or of its long-term implications for recidivism. Furthermore, it is also relevant that these latter tests depend on an election by the Crown to proceed by indictment, since under the *Youth Criminal Justice Act*, there is no real disincentive for a Crown to elect to proceed by indictment, unlike in adult court. Under section 142 of the *Youth Criminal Justice Act*, the trial proceedings are the same as for summary conviction offences and the sentences will likely be the same as well. The only distinction lies in the records retention period, since records for indictable offences are retained longer. Thus, while the number of adult offenders subject to DNA orders will increase substantially as a result of these provisions, the impact on young persons may be even greater.

28 *(2001), 157 C.C.C.(3d) 38* (Ont.C.A.) leave to appeal to S.C.C. refused, *[2002] S.C.C.A. No. 31*, 162 C.C.C.(3d) vi - Where the Ontario Court of Appeal considered whether certain aspects of the DNA legislation were consistent with sections 7 and 8 of the Charter.

29 Under the former *Young Offenders Act*, subject to exceptions relating to the most serious offences, records were to be destroyed forthwith after the expiry of defined time periods. However, under the *Youth Criminal Justice* Act, there is no absolute requirement for the destruction of records. Destruction of records under Part 6 of the *Youth Criminal Justice Act*, including police records, is, generally speaking, a matter within the discretion of the body keeping the record or the Librarian and Archivist of Canada. No conditions are specified in the *Act* for the exercise of this discretion.

30 R. v. A.M., *2008 SCC 19*.

31 Quebec (Minister of Justice) v. Canada (Minister of Justice) *(2003), 175 C.C.C. (3d) 321* (Que. C.A.).

32 R. v. K.B., *[2003] O.J. No. 3553*.

33 *[1986] 1 S.C.R. 103* (S.C.C.).

34 *[2008] S.C.J. No. 25* Manslaughter is a presumptive offence under the YCJA. The first set of provisions, characterized by Justice Abella as the "onus provisions", required the court to impose an adult sentence on him unless he was able to demonstrate that a youth sentence was of "sufficient length" to hold him accountable. These provisions place "the onus on the young person to justify why an adult sentence should *not* be imposed, rather than on the Crown to show why the youth has lost his or her entitlement to a youth sentence." The young person also challenged the constitutionality of the provision that required him to justify the continuance of a ban protecting him from publicity, characterized by Justice Abella as the privacy provisions. These provisions, deal with "the loss of the privacy protection of a publication ban when a young person is convicted of a presumptive offence".

35 R. v. D.B. par. 89; In Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), *[1985] 2 S.C.R. 486*, per Wilson, J.

36 *(1985), 18 D.L.R. (4th) 321* (S.C.C.), per Dickson C.J.C. at page 338; R. v. Khan, *[2009] O.J. No. 111*, *2009 CanLII 583* (ON S.C.).

37 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

38 An individual remedy under s. 24(1) will "rarely be available in conjunction with an action under s. 52(1)" (Schachter*[1992] 2 S.C.R. 679* ; R. v. Ferguson, *[2008] S.C.J. No. 6*).

39 Schachter; Ferguson.

40 *[2005] 3 S.C.R. 99*.

41 *[2006] S.C.J. No. 27* (S.C.C.).

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