ISSUES OF INTEREST

A Journal Devoted to Topical Policing and Legal Issues for Operational Police Officers in British Columbia

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John Post

Deeds Speak

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Finally, *Issues of Interest* is back after a hiatus of over sixteen months. In order to re-introduce *Issues of Interest*, we need to turn to its founder, Mr. John Post. John started his career in the criminal justice system as a police officer in June of 1959 with the Saanich Police Department. He was later seconded to Camosun College in the formative years of their Criminology Program, assisting in its development. In January of 1980 he became the Director of the JIBC Police Academy, but returned to the Saanich Police Department in 1983 as the Chief Constable. John retired from the Saanich Police Department in August of 1986, but remained active, working as part-time faculty in the Criminology Program at Camosun College.

John's accomplishments were many and his influence in the policing community was significant. For example, he assisted with writing the "Rules Regarding Training, Certification and Registration of Municipal Constables" (a Regulation attached to the *Police Act* of B.C.); he was a founder and charter member of the Police Educators' Conference; and significantly, he founded the Police Academy publication, *Issues of Interest*. John wrote and published the first volume of *Issues of Interest* in June of 1981 while he was the Director of the Police Academy. In that issue, he wrote the following introduction:

> *At the Academy we are attempting to tap all sources of information to assure that what we teach is accurate and current. In the process we continuously run across matters which are important to know for the working police officer. Through our courses we are in contact with a small segment of police personnel only and it was decided that an attempt should be made to be of service by means of a training bulletin. .... If you have any suggestions for improvement or any specific topics you would like to see covered, please let me know.*

John continued to write and edit *every volume* of *Issues of Interest* until he completed Volume 47 in August of 1995, finally retiring after 14 years of hard work and dedication to keeping the policing community current on important legal issues. Because of the important contribution that *Issues of Interest* made, the Police Academy made a commitment to continue its publication. Although the format and style may have changed, the Introduction that John wrote in 1981 is still its mission: a journal devoted to topical policing and legal issues for operational police officers in British Columbia; however, many of the "issues" will also be of interest to police officers and others working in the criminal justice system all across Canada.

One change made to *Issues of Interest* is the addition of an Advisory Board, the benefits of which are significant. The Advisory Board is comprised of a broad cross-section of leaders in the field of policing and criminal justice, and they will review and offer advice on all articles submitted for publication. Another change is that articles will be written by diverse authors who have special knowledge of particular "issues of interest" to the policing community (see back page for submission procedures). As a result, we hope to continue the tradition of excellence started by John.

At this point I wish this introduction and tribute to John could end, but life had prepared another ending. On November 30, 1996, John Post passed away, survived by three children, Joanne, Margaret, and John, their spouses, and their grandchildren. John's wife of over forty years, Gonda, had passed away earlier in 1995. Upon hearing of John's passing, Mr. Goble, President of the Justice Institute of British Columbia and friend, wrote to the staff of the JIBC, "John will be missed by his family and friends and will best be remembered

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for his wonderful smile, sense of humour and caring and supportive manner."

When John's wife Gonda passed away, he wrote an especially moving poem in remembrance of her, which is also a fitting memorial to him:

... dying was a gentle fading
like light slips from the sky at night
and Gonda went in reverend silence
from this flawed life to perfect light.

John Post

Issues of Interest, Volume 48, is dedicated to the memory of Mr. John Post.

An Introduction to Violent Crime Linkage

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The purpose of this article is to introduce a new and developing methodology for identifying serial sex offenders and solving what, at first glance, or after a prolonged investigation, appear to be unsolvable homicide or sex crimes. Although some police officers may have heard of the Violent Crime Linkage Analysis System (ViCLAS), there are still many investigators that are unaware of ViCLAS, have not fully come to appreciate this tool as an investigational aid, or the potential it possesses to provide suspects at any stage of an investigation. Other officers are only aware of ViCLAS because of the importance being placed on completing and submitting the *ViCLAS Crime Analysis Report* booklets. Although completing these booklets may appear daunting or a "waste of time," this article should convince investigators of the importance of reporting data. The power of this investigational aid, like any technology, is only beginning to be appreciated.

History[1]

In the early 1980's the public and police in the province of British Columbia were exposed to an unprecedented number of grisly serial murders committed by one person. That person was Clifford Olson, and the investigational and political fallout that followed these offences formed the catalyst for the development of the first computerized violent crime linkage analysis system in the province, the ATMS/STAIRS SexCri database. This program represented the first generation of an attempt to construct a computerized case linkage analysis system in the province. Due to a lack of adequate computer database technology available at the time, this system proved to be unsuccessful.

In 1990, the SexCri database was shutdown and a newly formed Violent Crime Unit, with three regular members of the RCMP and one civilian employee, was given the task of creating a new computer based case linkage analysis system primarily for sexual offences and for tracking homicides. This task involved research and audits of other case linkage analysis systems that were already in use in North America, taking the strengths of those systems and implementing them in a new database. Some of the weaknesses identified in other linkage programs, that had to be avoided, included the lack of a complete and consistent reporting method and the failure to include attempted offences in the database. A prototype system called MACROS (Major Crime Organizational System) was designed and ready for testing by the spring of 1991. After a year of data entries on the MACROS database, it was used successfully to identify case linkages for a field investigation, which confirmed the usefulness of the newly created database.

In the summer of 1992, based on the success of the MACROS database, the RCMP Violent Crime Analysis Section, at RCMP Headquarters in Ottawa, took the initiative to design and build a national case linkage analysis system. Two computer programmers were hired and given the task of developing the new national database using more advanced and powerful database software. The result, after collaboration with the newly formed ViCLAS Section in Vancouver, is the ViCLAS program which is in use today. The ViCLAS program and programmers are not standing still as a third generation ViCLAS program is currently under development. The new ViCLAS program will be more sophisticated and will increase the speed of performance, efficiently deal with more data, incorporate new analytical tools, and communicate with other police systems.

The ViCLAS system is national in scope as *all* police agencies in Canada are subscribers. There are 11 ViCLAS regional sites in Canada representing every province and territory. This program is also becoming international in scope in that several other countries are now using ViCLAS for violent crime case linkage. For example, several U.S. states have adopted the ViCLAS system and currently Australia, Belgium, Holland, and Great Britain are using ViCLAS. Several other European countries are also interested in this technology and these countries are arguing for the implementation of ViCLAS as a man-

datory violent crime case linkage analysis system for the entire European Community.

How Does It Work?[2]

There are 263 questions that are set out in the *ViCLAS Crime Analysis Report* booklet which allow ViCLAS analysts to search and compare cases in a variety of areas such as offender description, geographical location, method of operation, vehicle description, offender and victim verbal communications, the sequence of sexual acts committed, approaches, weapons used and other characteristics of the interaction. This data is important in that it also provides analysts with a behavioural profile of the offender. This process extends well beyond simple assailant descriptions, since an offender description is often not sufficient by itself for successful case linkages. In addition, offender descriptions are usually not available in sexual homicides or cases where the victim has not seen the offender. Descriptions are also distorted by factors such as darkness, victim fear and offender strategies in the form of disguises. It is vitally important to track how an offender commits his or her offenses because methods or patterns can not only identify a series of related offences it may also enable investigators to link offences where certain features changed because of offender experience or tactics. The utilization of a broad sample of characteristics from the information contained in the booklets is of particular importance for comparison purposes because it can ultimately reveal the unchangeable behavioural signature or fantasy patterns that usually drive an offender. ViCLAS analysts do not limit their analysis to information on ViCLAS, but will also rely on offender information from other sources (*e.g.* CPIC and other agency data bases). If a linkage is identified the ViCLAS Section will contact the respective agencies.

The timely and accurate completion of the ViCLAS booklets for *all* sexual assaults and homicides is critical to successful case linkage. For example, research has shown that certain sex offenders have an offending cycle in which they will commit several offences within a very short period of time (*e.g.* every 7 - 15 days) and not all of the offences are committed in the same geographical area.[3] Research has also determined that there is a dramatic decrease in the potential to link cases the lower the reporting rate of sexual assault data (*i.e.* 90% reporting = *81%* potential, 30% reporting = *9%* potential, 5% reporting = *.25%* potential).[4] ViCLAS is also valuable in quickly identifying specific homicide offences where investigators receive important information but details such as the victim's name, location of offence, jurisdiction or suspect information is unknown. Investigatively, the advantages of being able to access sex offences and homicide data across Canada is self-evident.

As an example of the importance that ViCLAS technology can have for investigators and departments, the following is an example of the first confirmed linkage by ViCLAS when it was in the MACROS prototype stage. On April 29, 1992 one of the ViCLAS analysts received a completed MACROS report on a rape case which had occurred in Maple Ridge, B.C. on April 19, 1992. The form indicated the name and particulars of the accused. After entering the new data from the form, further analysis revealed an unsolved rape case which had occurred in Maple Ridge on January 27, 1992 and both cases showed the following similarities: first, both victims were close in age (*i.e.* 15 and 16 years); second, the physical description and age of the offender in both cases matched the accused; third, the victims in both cases were walking alone along a residential street at night; fourth, the offender specifically told both victims prior to vaginal intercourse, "I won't come in you"; and fifth, the assault scenes were within three blocks of each other.

Based on this information, the analyst felt strongly that the accused was also responsible for the earlier unsolved case. When the analyst called to advise the investigator of the potential linkage the investigator immediately asked, "How did you know?". The investigator, it turned out, was already considering the accused as a suspect and was investigating the linkage. The final result is the suspect was charged and convicted of both sexual assaults. The offender was sentenced to four years in gaol and a five year firearms prohibition. Although this linkage occurred in the same jurisdiction, the potential to identify and link offences and suspects for crimes that may occur days, months, or years apart, in the same jurisdiction or a multitude of jurisdictions, is evident. ViCLAS is not restricted by jurisdictional, radio, computer, temporal or departmental boundaries and provides an invaluable tool to bridge investigational restrictions that currently exist.

ViCLAS is now a provincial policing initiative which has participation from all police agencies in B.C. and the Yukon. The ViCLAS Section is currently situated at the R.C.M.P. "E" Division HQ in Vancouver and is comprised of RCMP, Vancouver Police Department and civilian personnel. Please feel free to call us if you have any questions, suggestion or ideas about ViCLAS ((604) 264-2248).

Endnotes

[1] ViCLAS Section Newsletter, "A Brief Introduction to and Success Stories of ViCLAS (Violent Crime Linkage Analysis System)" 1:1 (1995) *ViCLAS News 1.*

[2] For an excellent introduction to profiling, see National Center For The Analysis of Violent Crime, *Criminal Investigative Analysis- Sexual Homicide* (U.S. Dept. of Justice: FBI, 1990), Robert R. Hazelwood and Ann Wolbert Burgess, "The Behavioral-Oriented [sic] Interview of Rape Victims: The Key to Profiling" and Robert R. Hazelwood, "Analyzing the Rape and Profiling the Offender" in Robert R. Hazelwood and Ann Wolbert Burgess, eds., *Practical Aspects of Rape Investigation - A Multidisciplinary Approach* (CRC Press, 1993), chps. 7 and 8.

[3] *Ibid.,* Hazelwood, chp. 8; see also John E. Douglas, Robert K. Ressler, Ann W. Burgess and Carol R. Hartman, "Criminal Profiling from Crime Scene Analysis" in National Center for the Analysis of Violent Crime, *Criminal Investigative Analysis - Sexual Homicide* (U.S. Dept. of Justice: FBI, 1990) at 7.

[4] This data arises from research undertaken by Detective Inspector K. Rossmo, Ph.D. of the Vancouver City Police Department, Vancouver, BC, Canada.

Fingerprinting the Accused: Legal Shades of Gray

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The British Columbia Supreme Court has recently ruled that the police can no longer take the fingerprints of a person in custody prior to a formal charge. The decision in *R.* v. *Connors*[1] and recent amendments to the *Identification of Criminals Act*[2] will significantly impact on the ability of the police to take fingerprints. In fact, the enforcement ability of police agencies, recent government justice initiatives, and many prosecutions may now be in jeopardy. This article will detail the relevant changes to the law in relation to the taking of fingerprints, some of the expected effects of those changes, and the ability of the police to fingerprint accused persons outside of the *ICA*.

The *Connors* Case

Corbett Connors was arrested for having care or control of a motor vehicle while impaired and for possession of stolen property on October 30, 1993. He was transported to the RCMP Detachment in Richmond where he provided two samples of his breath.[3] Connors was fingerprinted and photographed and then released on a promise to appear. Connors was not formally charged until an information was sworn on December 1, 1993. Connors eventually pled guilty to the impaired charge and his fingerprints were forwarded to the RCMP in Ottawa. The prints were subsequently matched to fingerprints left by a suspect in a robbery that occurred in Richmond on July 15, 1992, some 15 ½ months prior to the events of October, 1993. Connors was charged with the robbery.

At trial, Connors argued that the comparison fingerprint evidence was inadmissible because the fingerprints taken in relation to the impaired charge were illegally obtained. He submitted that for the police to have authority to fingerprint him under the *ICA* he had to have been in lawful custody *and* charged with an indictable offence at the time his fingerprints were taken. Mr. Justice Scarth concluded that "...the taking of Mr. Connors' fingerprints on October 30, 1993 was not authorized by the *Identification of Criminals Act*"[4] and further, "... the accused was forced whilst in custody to provide incriminating evidence under the guise of the purported exercise of a statutory power and in the circumstances where it would not exist apart from the violation of his right under s. 8 of the Charter."[5] The fingerprint evidence was excluded, the Crown called no further evidence, and the robbery charge was dismissed.

The central issue in *Connors* was the interpretation of s. 2(1) of the *ICA*:

> 2.(1) Any person who is in lawful custody, charged with, or under conviction of, an indictable offence,...may be subjected, by or under the direction of those in whose custody the person is, to ...(b) any measurements, processes or operations sanctioned by the Governor in Council that have the same object as the measurements, processes and operations practised under the Bertillon Signaletic System.

The focus of the Court was on the interpretation of the phrase "Any person who is in lawful custody, charged with, or under conviction of, an indictable offence ..." The presence of the comma after "lawful custody" left both a disjunctive and conjunctive interpretation open. If read disjunctively, the *ICA* authorizes the fingerprinting of any person who is: 1) in lawful custody; *or* 2) charged with an indictable offence; *or* 3) under conviction of an indictable offence. The police have traditionally relied upon the disjunctive interpretation. It has been common practice to fingerprint persons arrested for an indictable offence (which includes hybrid/dual offences[6]) prior to issuing a release document, swearing an information or any appearance before a justice where the accused is held in custody. The Court in *Connors*, however, found that the phrase is to be read conjunctively: in lawful custody *and* either charged with or under conviction of an indictable offence. At present, the decision in *Connors* and the application of that decision in two subsequent cases[7] has made clear that this practice is now improper.

On the other hand, *Connors* does not seem to impact on the ability of the police to require accused persons to appear for fingerprinting and photographs pursuant to a lawfully issued appearance notice, promise to appear, recognizance or summons. In such cases, persons appearing for the purpose of fingerprinting are deemed, under the *CC,* to be in lawful custody charged with an indictable offence.[8] Problems with fingerprinting only arise where an accused person is fingerprinted prior to being issued a release document, or where the person is fingerprinted, prior to a charge being laid, while being held in custody pending a bail hearing.

Connors is presently under appeal and is scheduled to be heard in mid-1997. Unfortunately, however, the issue over the interpretation of s. 2(1) is now mostly academic, since it was amended in 1992 and again in 1996.[9] The ambiguous comma has been removed and the section now reads:

> 2. (1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:
> (a) *any person who is in lawful*

custody charged with or convicted of

(i) *an indictable offence*, other than an offence that is designated as a contravention under the *Contraventions Act* in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, or...

(c) any person *alleged to have committed an indictable offence*, other than an offence that is designated as a contravention under the *Contraventions Act* in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, who is required pursuant to subsection 501(3) or 509(5) of the *Criminal Code* to *appear for the purposes of this Act by an appearance notice, promise to appear, recognizance or summons* [emphasis added].

It is now also clear legislatively that to fingerprint an accused person under the *ICA,* the person must be both in lawful custody *and* charged with or under conviction of an indictable offence. However, paragraph (c) makes it permissible to take fingerprints from a person that attends for the purposes of the *ICA* under certain release documents. The problem though is that s. 145(5) of the *CC* requires an appearance notice, promise to appear or recognizance be "confirmed" by a justice (*i.e.* an information is laid[10]) before any charges for failing to appear for fingerprinting can be pursued. Confirmation must occur before the date set for fingerprinting, otherwise there is no offence.[11] In the case of hybrid/dual offences, if the Crown has "elected" to proceed summarily by the time the release document is confirmed or before the date set for fingerprinting there is no longer any authority to obtain the fingerprints.

Common Law Authority to Obtain Fingerprints

Enforcement agencies have relied almost exclusively on the legislative authority granted by the *ICA* to fingerprint persons arrested for criminal offences. However, the right to fingerprint suspected criminals also exists at common law.[12] This common law power was addressed directly in *R.* v. *Buckingham and Vickers*[13] by the B.C. Supreme Court. In that case Robertson, J. held that, not only did the police possess the right at common law to take the fingerprints of an offender, but in addition "...the *Identification of Criminals Act* was passed to extend the common law right, not to cut it down."[14] The authority to fingerprint at common law has also been tacitly acknowledged by both the B.C. Court of Appeal,[15] and the Supreme Court of Canada. Mr. Justice La Forest, writing for a unanimous bench in *R.* v. *Beare,*[16] concluded that "...the great weight of authority in this country is that custodial fingerprinting is justifiable at common law ...".[17] He stated further:

> But it seems to me the common law experience strongly supports the view that subjecting a person to being fingerprinted in those circumstances does not violate fundamental justice.
>
> While the common law is, of course, not determinative in assessing whether a particular practice violates a principle of fundamental justice, it is certainly one of the major repositories of the basic tenets of our legal system....
>
> The common law experience reveals that the vast majority of judges who have had to consider the matter have not found custodial fingerprinting fundamentally unfair. Indeed, they were prepared to accept the procedure as permissible at common law and as being similar in principle to the authority to physically restrain a person in custody and to physically search that person...[18].

While it is true that the law is not settled on this point,[19] there seems to be fairly strong authority to suggest that the police do possess the right at common law to fingerprint those persons arrested for indictable offences (including hybrid offences). Further, the common law does not appear to require that a person be formally charged, as is required under the *ICA,* prior to fingerprints being taken. Further research is required on the common law authority but it still presents a potential option to alleviate the current situation.

The Impact of *Connors* and the *ICA* Amendments

In the aftermath of *Connors* and the amendments to the *ICA*, it appears that an accused person may be fingerprinted in the following circumstances:

1. Under a lawfully issued appearance notice, promise to appear, recognizance or summons for an indictable or hybrid/dual offence. Since ss. 501(3) and 509(5) of the *CC* deem a person that appears for the purposes of the *ICA* to be "in lawful custody charged with an indictable offence" it is possible to have the time for release and appearance for fingerprints coincide, which will permit officers to fingerprint the person as in the past. In the case of an appearance notice or promise to appear, it is crucial that the person be issued the release document *prior* to being fingerprinted. If the release document sets out a future date for fingerprinting, s. 145(5) of the *CC* requires that

the release document be "confirmed" by a justice before a failure to appear charge can be laid.

2. Where an accused is held in custody pending a bail hearing, and an information is sworn for an indictable offence prior to the hearing, the accused may be fingerprinted pursuant to the *ICA*.
3. Where an accused is held in custody and it is impractical to lay an information prior to the bail hearing, the Crown, at the hearing, may ask the Court to require the accused to attend for fingerprints and photographs as a condition of release. This option will rely solely on the discretion of the Crown and the Court. If the Crown elects to proceed by way of summary conviction at the bail hearing the *ICA* will no longer have any application and a Court is unlikely to require an accused to appear for fingerprints.
4. An accused person may be fingerprinted pursuant to the *ICA* in any circumstances where the accused is in lawful custody *and* charged with or convicted of an indictable offence, subject to the exceptions listed in the Act.
5. An accused person may be fingerprinted at any time with that person's *informed consent*.[20]

The present legislative scheme and the decision in *Connors* have the potential for some interesting and anomalous effects. For instance, a person accused of assaulting a stranger will, in most cases, be released on an appearance notice and can be compelled to appear for fingerprints and photographs. If convicted he or she will have a criminal record. However, a person charged with "domestic" assault is likely to be held in custody because of the potential for re-occurrence and the Province's direction regarding violence against women in relationships.[21] This second person cannot be fingerprinted unless the police lay an information prior to the accused's bail hearing. This is unlikely to happen in British Columbia as the right of the police to lay a formal charge is restricted by provincial policy in that charges must be approved by Crown Counsel prior to being sworn.[22] If the Crown elects to proceed by summary conviction, or if the Court refuses to require the accused to attend for fingerprints as a condition of bail, the accused cannot be fingerprinted and will not have a criminal record when convicted.[23]

Unfortunately, this second scenario has serious implications for the Province's *Violence Against Women in Relationships Policy.*[24] Where criminal convictions are unsupported by fingerprints they cannot be entered on police criminal record data banks. This will greatly reduce the ability of the police to identify repeat offenders effectively and accurately. Without the ability to check for, or prove, a criminal record, the police will be unable to assess properly the threat a victim faces in a situation involving domestic violence. Further, the Crown and courts often rely on police records of criminal convictions in determining bail conditions and sentence upon conviction for domestic violence. Without this information, it is conceivable that a significant number of repeat offenders will be treated as though they are appearing before the court for the very first time.

The change in the law with respect to fingerprinting is also apt to have a deleterious effect on the campaign against drinking and driving. Provisions in the *CC* that provide for harsher punishment for those convicted of successive drinking and driving offences can have little or no effect if an offender's criminal history is not readily accessible to police, prosecutors and the courts. Similarly, the inability to effectively prove certain convictions will have an adverse impact on the Province's policy regarding the screening, application and revocation process for firearms and related certificates, as well as the federal governments proposed firearms legislation. These are but three of the more obvious and worrisome consequences arising from the changes to the *ICA*. Given the potential consequences to these initiatives alone, it is clear that Crown Counsel will have to be more circumspect, diligent and formal in the election process for hybrid/dual offences. It is suspected that it will be some time before the full impact of the amendments is realized.

The effects of the decision in *Connors* and the amendments to the *ICA* may be offset somewhat by reliance on the deeming authority in the CC to fingerprint subjects coincident with release, and perhaps the right of the police at common law to fingerprint suspects. The government must realize that restricting fingerprinting to that time when a formal information has been laid not only increases operational and administrative costs for the entire criminal justice system, it also increases the potential for dangerous individuals to escape scrutiny. In the interim, it is important that police managers ensure that their personnel are aware of the changes in the law. Illegally obtained fingerprints may not only have a detrimental affect on the case in which they were obtained, but will also jeopardize any future case relying on that fingerprint evidence.

Endnotes

[1] (15 January 1996), Vancouver CC941349 (B.C.S.C.), (*"Connors"*).
[2] R.S.C. 1985, c. I-1 (*"ICA"*).
[3] Pursuant to s. 254 of the *Criminal* Code, R.S.C. 1985, c. C-46 (as amended) (*"CC"*).
[4] *Supra*, note 1 at 23.
[5] *Ibid.*, at 27.
[6] Pursuant to s. 34(1)(a) of the *Interpretation Act*, R.S.C. 1985, c. I-21 (as amended), "indictable offence" includes all hybrid offences until the Crown elects to proceed by way of summary conviction.
[7] *R.* v. *Lewis* (5 June 1996), Victoria 78596 (B.C.S.C) and *R.* v. *Mattu* (25 October 1996), New Westminster X043569 (B.C.S.C.)
[8] Sections 501(3) and 509(5).
[9] *An Act to Amend the Contraventions Act*

and to Make Consequential Amendments to Other Acts, S.C. 1996, c. 7, and *An Act Respecting Contraventions of Federal Enactments*, S.C. 1992, c. 47

[10] See s. 508 of the *CC.*

[11] See, *R v. Gauthier* (1983), 35 C.R. (3d) 159 (Que. C.A.).

[12] *Adair v. McGarry*, [1933] S.L.T. 482 (H.C.).

[13] (1943), 86 C.C.C. 76, [1946] 1 W.W.R. 425 (cited to C.C.C.).

[14] *Ibid.* at 78.

[15] *Brown v. Baugh and Williams* (1982), 70 C.C.C. (2d) 71, [1982] 5 W.W.R. 644, 38 B.C.L.R. 1; affd. [1984] 1 S.C.R. 192, 11 C.C.C. (3d) 1, [1984] 3 W.W.R. 577.

[16] [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481 (cited to C.C.C.).

[17] *Ibid.*, at 71.

[18] *Ibid.*, at 72.

[19] See, *Dumbell v. Roberts*, [1941] 1 All E.R. 326 (C.A.) and *R. v. A.N.* (1978), 39 C.C.C. (2d) 329 (B.C.C.A.) which question the common law authority.

[20] Those relying on a consent search have an onerous burden. See, generally *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.) and *R. v. Williams* (1992), 76 C.C.C. (3d) 385 (B.C.S.C.); affd. (1995), 98 C.C.C. (3d) 176 (B.C.C.A.). See also, *R. v. Head* (1994), 52 B.C.A.C. 121 (B.C.C.A.) for a more limited consent threshold test.

[21] See, British Columbia, Ministry of Attorney General, *Violence Against Women In Relationships Policy* (Victoria: Queen's Printer, August 1996).

[22] See, British Columbia, Ministry of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual.*

[23] Convictions not supported by fingerprints are not listed on CPIC. The alternative is to search each court registry.

[24] *Supra,* note 21.

Warrants to Obtain DNA For Analysis

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Deoxyribonucleic acid (DNA) analysis has potential application in a multitude of disciplines and is now encompassed within legislation proving to be a powerful investigative tool for the police[1]. Bill C-104 became part of the *Criminal Code*[2] on July 13, 1995, and provides specific warrant provisions that enable the police to take a "known" biological sample from an identified suspect. As noted by Chayko, Gulliver and MacDougall, "Unlike traditional analysis of hair, skin and fibre, which can only highlight similarities in external characteristics, DNA typing compares the genetic content of the known and unknown samples." [3] Like fingerprints, each individual human possesses a unique genetic signature. The DNA of any individual is identical whether extracted from root sheath hair samples, white blood cells, or a semen specimen. The unique genetic signature and identical DNA structure within all tissue of the same body provide the basis for DNA profiling. Of particular importance is that "The use of the new procedures should considerably reduce the weight of eyewitness testimony, which many believe is responsible for more miscarriages of justice than any other single type of evidence."[4]

Collecting Samples

Specific statutory procedures to obtain a bodily substance for DNA analysis are now available for crimes identified as "designated" offences in s. 487.04 of the *CC.*[5] Designated offences encompass a variety of property, violence and sexual offences. Section 487.06 authorizes a peace officer (or person under his or her direction) acting under authority of a warrant, to obtain and seize a bodily substance from an identified individual by three specific means: first, plucking hairs; second, a buccal swab; and third, blood by pricking the finger with a sterilized lancet. The wording of the legislation is problematic, however, in that it seems to indicate that only one of the three methods may be utilized to obtain a single sample. It is our understanding that Crown Counsel is recommending that warrants specifically allow the executing officer to utilize any one of the three methods permitted. While blood samples are the best source for comparison purposes, a hemophiliac, for example, would have legitimate concerns about the taking of a blood sample. If confronted with such a situation the officer would then have an option of taking a biological sample by one of the other means provided in the warrant.

There are a number of advantages and disadvantages associated with each of the three methods of collection.[6] In relation to *blood* samples, a mere five to six drops of blood on a sterile cloth can be obtained by pricking a finger with a sterile lancet. This form of sample provides an ideal source of high quality material suitable for all types of DNA analysis. There are no apparent disadvantages associated with this form of sample. *Plucked hairs*, properly collected (*i.e.* with root sheath attached), also provide an excellent source of high quality DNA for analysis. The sample, whether collected or located at the scene, must have root sheath cell material attached, otherwise it is of little value for DNA analysis. A sufficient sample usually consists of 10-15 hairs with good root sheaths. Section 487.06(1)(b) specifically provides for the taking of *buccal swab* samples by swabbing the lips, tongue and the inside of the cheeks to collect epithelial cells, but no provision is made for the taking of saliva samples. Buccal swab samples, when properly collected and of sufficient quantity, can provide high quality DNA for analysis. However, samples from the mouth can be contaminated with residual food particles in varying stages of decomposition, which makes analysis much more complicated. Unwilling donors, in order to avoid donations, can also dip the swab in a pool of saliva rather than providing the critical epithelial cells. As a result, buccal swab samples should not be self-collected.

One of the most important tasks for investigators is the proper collecting and handling of the DNA sample once it has been obtained. As noted in the FBI Guidelines on DNA:

> If DNA evidence is not properly documented prior to collection, its origin can be questioned. If it is not properly collected, its biological activity may be lost. If it is not properly packaged, cross contamination might occur, and if the DNA evidence is not properly preserved decomposition and deterioration may well occur.[7]

At present two basic techniques

exist for DNA analysis. The first is Restriction Fragment Length Polymorphism (RFLP). The second is Polymerase Chain Reaction Amplification (PCR). Using RFLP analysis, a dime-sized blood stain may yield sufficient extracted DNA (between 40-50 nanograms) for comparison.[8] In fact, 99.999% of the population may be excluded as the source of the sample by use of RFLP analysis.[9] PCR, however, allows analysis with smaller samples (between 4-5 nanograms) such as a trace of saliva on a licked envelope flap.[10] With the PCR method 99% of the population may be excluded as the source of a sample.[11] RFLP is the preferred technique of analysis unless the quantity or quality of the DNA in the sample is too limited.

Legal Issues[12]

It is recommended that investigators review the DNA provisions in detail. Individuals that are the subject of a warrant to provide a biological sample are clearly detained for the purposes of s. 10 of the *Charter*. Section 487.07(2) (a) and (b), however, provide that a person may be detained for a reasonable period for the purposes of executing the warrant and may be required to accompany the peace officer who executes the warrant for that purpose. Pursuant to s. 10 (b) of the *Charter,* investigators must inform an individual of the reasons for their detention, their right to counsel and afford a reasonable opportunity to exercise the right to counsel prior to execution of the warrant.

Biological samples can be obtained with the *consent* of an individual, but the consent must meet the requirements set out in *R. v. Head.*[13] Mr. Justice Donald, speaking on behalf of the Court in the *Head* case, held that it is necessary to determine: first, did the accused give his consent voluntarily; and second was the accused aware of the consequences.[14]

In addition, *abandoned* or *discarded* biological samples may also provide a source of DNA. In *R. v. Love*,[15] DNA testing was conducted on a mucous laden tissue which the subject had used to blow his nose and then discarded in a waste basket. In this case the accused was investigated by the police for a 1990 murder of a taxi driver. When requested, the accused refused to provide voluntary samples to the police. Two officers then be-friended the accused and spent time with him between July and August, 1992. In August, when the three were on a trip, they checked into a motel, the accused blew his nose, and threw the mucous covered tissue into the garbage. The police determined that the garbage can had a fresh liner and seized the tissue without a warrant. The accused was charged and convicted on this evidence. On appeal, the accused argued that the evidence was inadmissible because it was obtained as a result of an unreasonable search and seizure. The appeal was dismissed, with the Court finding that even though the officer's involvement with the accused was a prolonged invasion of his privacy, the actual seizure of the tissue did not involve a *Charter* breach since it was abandoned. In the case of abandoned or discarded samples, the accused must have no reasonable expectation of privacy if the sample is to be considered truly "abandoned."

It is anticipated that, like conventional s. 487 *CC* warrants, defence concerns will arise in relation to the quality and content of the information prepared to obtain the warrant. Therefore, it is recommended that investigators thoroughly and comprehensively set out the grounds for requesting a warrant to obtain a DNA sample.

Endnotes

1. For an excellent overview see, Jane M. Allain (Research Branch, Library of Parliament, Law and Government Division), Background Paper, *Forensic DNA Testing: Legal Background To Bill C-104* (Min. of Supply and Services, 1995).
2. R.S.C. 1985, c. C-46 (as amended) (*"CC"*).
3. G.M. Chayko, E.D. Gulliver and D.V. MacDougall, *Forensic Evidence in Canada* (Canada Law Book Inc., 1991) at 302.
4. Lorne T. Kirby, *DNA Fingerprinting* (New York: Stockton Press, 1990) at xv.
5. See, Fran MacLean, "The DNA Warrant: An Overview of Bill C-104" in *Charter and Evidence: Criminal Law Update '96* (Continuing Legal Education Society of BC, 1996) at 3.2.01 to 3.2.10 for an overview of the statutory provisions.
6. Pamela Newall (Research Scientist) Ministry of the Solicitor General and Correctional Services, Province of Ontario, Centre of Forensic Sciences, *Comparison Samples for Forensic DNA Analysis* (n.d.) at 2.
7. United States Department of Justice, *Federal Bureau of Investigation Guidelines for the Collection and Preservation of DNA Evidence.* (Forensic Science Research and Training, Ctr., FBI Laboratory, FBI Academy, Quantico, VA: n.d.).
8. *Supra,* note 6 at 1.
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. For more detailed discussion on the legal issues surrounding DNA, see, *supra*, notes 1 and 5, and Derrill W. Prevett, "Forensic DNA Evidence - A Primer" in *Charter and Evidence: Criminal Law Update '96* (Continuing Legal Education Society of BC, 1996) at 3.1.
13. (1994), 52 B.C.A.C. 121, 86 W.A.C. 121 (B.C.C.A.).
14. The Court did not adopt the six point consent criteria set out in *R. v. Wills* (1992), 12 C.R. (4th) 58, 70 C.C.C. (3d) 529 (Ont. C.A.).
15. R. *v. Love*, (8 April 1994) unreported (Alta. Q.B.).

Contributors:

Submissions on topical operational issues are invited from police officers and individuals in associated professions or disciplines. Articles must be typewritten, double-spaced on letter size paper, quotations must be indicated, and references fully cited in endnotes. Diskette submissions in ASCII format (i.e. "Text Only") are preferred. Articles should be 750 to 1,500 words. Authors must include brief biographical information on a separate sheet. The Editor reserves the right to alter grammatical construction, punctuation, citations and length of articles to conform with publication requirements. Contributions not accepted for publication will not be returned to the author unless accompanied by a stamped, self-addressed envelope.

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