SUPREME COURT OF CANADA

CITATION: R. *v.* Rodgers, [2006] 1 S.C.R. 554, 2006 SCC 15

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BETWEEN:

Her Majesty The Queen
Appellant / Respondent on cross-appeal
and
Dennis Rodgers
Respondent / Appellant on cross-appeal
and
Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick and Attorney General of British Columbia
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 66) Charron J. (McLachlin C.J. and Bastarache and Abella JJ. concurring)

DISSENTING REASONS: (paras. 67 to 99) Fish J. (Binnie and Deschamps JJ. concurring)

R. *v*. Rodgers, [2006] 1 S.C.R. 554, 2006 SCC 15

Her Majesty The Queen *Appellant/Respondent on cross-appeal*

v.

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Indexed as: R. *v*. Rodgers

Neutral citation: 2006 SCC 15.

File No.: 30319.

2005: November 15; 2006: April 27.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Search and seizure — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Legislative safeguards restricting use of DNA data bank as an identification tool only — Whether collection of DNA samples for data bank purposes from designated classes of convicted offenders reasonable — Whether data bank provisions strike an appropriate balance between public interest in effective identification of persons convicted of serious offences and rights of individuals to physical integrity and control of release of information about themselves — Canadian Charter of Rights and Freedoms, s. 8 — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

Constitutional law — Charter of Rights — Fundamental justice — Procedural fairness — Ex parte proceeding — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether ex parte nature of proceeding meets minimal constitutional imperatives of procedural fairness — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

Constitutional law — Charter of Rights — Double jeopardy — Benefit of lesser punishment — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether imposition of DNA sampling order amounts to "punishment" within meaning of ss. 11(h) and 11(i) of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

Criminal law — Forensic DNA analysis — Offenders serving sentences — Criminal Code provision permitting provincial court judge, on ex parte application, to authorize collection of DNA samples from three classes of previously convicted offenders — Whether judge lost jurisdiction when he proceeded ex parte in absence of any evidence demonstrating need to do so — Whether offender's certiorari application should be granted — Criminal Code, R.S.C. 1985, c. C-46, s. 487.055.

R was sentenced to four years in prison for a sexual assault, committed while he was on probation on a conviction for sexual interference. He was convicted prior to the proclamation of the 1998 *DNA Identification Act* and so was not ordered to provide a DNA sample when sentenced. Before his sentence expired, the Crown applied *ex parte* under s. 487.055(1)(*c*) of the *Criminal Code* for authorization to take DNA samples from R for inclusion in the national DNA data bank. The sample was not sought as part of an ongoing investigation of a crime. A warrant was issued and R first learned of the proceeding when served with a summons to attend to provide bodily substances. R applied for a declaration that s. 487.055 infringes ss. 7, 8, 11(*h*) and (*i*) of the *Canadian Charter of Rights and Freedoms*. Alternatively, he argued that the authorizing judge lost jurisdiction by proceeding *ex parte*. The Ontario Superior Court of Justice dismissed R's applications. The Court of Appeal upheld the constitutional validity of s. 487.055 but interpreted the provision as presumptively requiring an *inter partes* hearing and held that the authorizing provincial court judge had committed jurisdictional error by proceeding *ex parte*. The authorization was quashed and the application was remitted for reconsideration. The Crown appealed the quashing of the authorization and R cross-appealed against the dismissal of his constitutional challenge.

Held (Binnie, Deschamps and Fish JJ. dissenting): The appeal should be allowed and the cross-appeal should be dismissed.

Per McLachlin C.J. and Bastarache, Abella and Charron JJ.: The authorizing judge did not commit jurisdictional error in proceeding *ex parte.* The Court of Appeal erred in interpreting s. 487.055 of the *Code* as presumptively requiring an *inter partes* hearing. *Charter* values and principles should not be applied to interpret s. 487.055(1) because they only play a role in statutory interpretation if there is genuine ambiguity in the legislation. Since s. 487.055(1) is clear and unambiguous, the court must give effect to the expressed legislative intent to authorize *ex parte* applications. [6] [18-20]

Section 487.055(1) of the *Code* does not infringe s. 7 or 8 of the *Charter*. While the taking of bodily samples for DNA analysis without consent constitutes a seizure within the meaning of s. 8 of the *Charter*, the collection of DNA samples for data bank purposes from designated classes of convicted offenders is reasonable. These samples may only be used in order to create profiles in the DNA data bank. Unlike investigative DNA warrants, authorizations under the data bank provisions do not target suspected offenders nor particular offences nor do they gather evidence for use in specific prosecutions. The provisions put DNA technology to use to identify offenders in a manner analogous to fingerprinting and other identification measures. Society's interest in using this powerful new technology to assist law enforcement agencies in the identification of offenders is beyond dispute. The resulting impact on the physical integrity of the targeted offenders is minimal. Furthermore, in restricting the use of DNA sampling for data bank purposes to an identification tool only, Parliament has adequately answered any heightened concern about the potentially powerful impact that DNA sampling has on the informational privacy interests of the individual. In this case, R had no reasonable expectation of privacy in respect of his identity. Section 487.055 targets dangerous convicted offenders. Since R's identity as a multiple sex offender has become a matter of state interest, he has lost any reasonable expectation of privacy in the identifying information derived from DNA sampling. The data bank provisions strike an appropriate balance between the public interest in the effective identification of persons convicted of serious offences and the rights of individuals to physical integrity and privacy. Having regard to the competing interests at play, there is no constitutional requirement to link the convicted offender, on reasonable and probable grounds, to any particular investigation. [5] [25] [37-38] [42-44]

The presumptively *ex parte* hearing is a constitutionally valid legislative option. Notice and participation are not themselves principles of fundamental justice. The constitutional norm, rather, is procedural fairness. What is fair in a particular case depends entirely on the context and the constitutional question is referable to the minimal standard mandated by the *Charter*. In the context of s. 487.055, notice and participation are not required to satisfy the minimal constitutional norm. Having regard to the interests at stake and the procedural safeguards afforded by the legislative scheme, the *ex parte* nature of the proceedings meets the dictates of procedural fairness afforded under s. 7 of the *Charter*. Further, although there is no appeal from a s. 487.055 order, the decision of the judge is reviewable on *certiorari*. Lastly, the offender, by reason of his criminal conduct, is already known to law enforcement authorities and, depending on the circumstances, may be a logical suspect in future investigations regardless of any s. 487.055 order. What an offender stands to lose on a s. 487.055 application is to have his DNA profile made available to the state for identification purposes only. In the investigation of a crime, the use of a DNA profile illegally included in the data bank itself will provide grounds for an offender to quash a subsequent DNA warrant. It will also be open to the offender to challenge the admissibility of any DNA evidence at trial. [5] [47-54]

Section 487.055(1) of the *Code* does not infringe s. 11(*h*) or 11(*i*) of the *Charter*. These sections are inapplicable because the taking of DNA samples does not

constitute a punishment within the meaning of s. 11. The word "punishment" under ss. 11(*h*) and 11(*i*) does not necessarily encompass every potential consequence of being convicted of a criminal offence. As a general rule, a consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is imposed in furtherance of the purpose and principles of sentencing. A DNA sampling is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints. The fact that the DNA order may have a deterrent effect on the offender does not make it a punishment. [5] [63-65]

Per Binnie, Deschamps and Fish JJ. (dissenting): To hold an authorization hearing *ex parte* under s. 487.055 of the *Code*, absent any reason to proceed without notice or participation, does not satisfy the constitutional requirements of s. 8 of the *Charter*. The DNA data bank constitutes a substantial and novel invasion of privacy. Notice and an opportunity to participate should be given to those whose privacy interests are at stake except where competing interests require otherwise. While the nature and extent of procedural fairness depends on context, in this context, there is no reasonable basis to presumptively depart from the norm of providing notice and participation. Both context and principle favour *inter partes* s. 487.055 applications; *ex parte* proceedings should be exceptional. [77] [80-83] [95]

In this case, no justification was shown to proceed *ex parte*. First, it is impossible for a subject to destroy his DNA sample. Second, notice and participation in the hearing create no enhanced risk of flight. The state interest in proceeding *ex parte* where there is no reason to do so is therefore minimal, at best. In any event, an assessment of the state's interest must consider as well the competing interests of those whom the state is required to protect. A s. 487.055 target has a legitimate interest in presenting information that is relevant to the required exercise of judicial discretion and that may well persuade the judge not to issue an order. That person has the most to lose if the order is erroneously made and will often be in the best position to correct erroneous information upon which the judge might otherwise be required to rely. The statutory safeguard requiring consideration of the individual's interest is rendered illusory by proceeding *ex parte* without reason. Finally, the possibility that some errors by an issuing judge may be reviewed *ex post facto* by *certiorari* cannot be considered an adequate substitute for a fair hearing on an application for an order. *Certiorari* is only available on narrow jurisdictional grounds and an order wrongly made cannot be reversed on a demonstration of error alone. Recourse to proceedings in *certiorari* is of no comfort to persons who could have prevented an error from occurring but for their exclusion from the hearing and who have suffered the consequences of the errors without reason or justification. The s. 8 infringement is not justified under s. 1 of the *Charter* and, accordingly, s. 487.055 is of no force or effect to the extent of its inconsistency with s. 8. [71] [73] [86-90] [94] [98-99]

Cases Cited

By Charron J.

Discussed: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Beare*, [1988] 2 S.C.R. 387; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; **referred to:** *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *R. v. Briggs* (2001), 157 C.C.C. (3d) 38; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 312; *R. v. Monney*, [1999] 1 S.C.R. 652; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Grant*, [1993] 3 S.C.R. 223; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v. Murrins* (2002), 201 N.S.R. (2d) 288; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Finta*, [1994] 1 S.C.R. 701; *R. v. Bartle*, [1994] 3 S.C.R. 173; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *United States v. Kincade*, 379 F.3d 813 (2004); *R. v. Shubley*, [1990] 1 S.C.R. 3; *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 2004 SCC 81.

By Fish J. (dissenting)

Hunter v. Southam Inc., [1984] 2 S.C.R. 145; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60; *R. v. Stillman*, [1997] 1 S.C.R. 607; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

Statutes and Regulations Cited

Act to amend the Criminal Code, the DNA Identification Act and the National Defense Act, S.C. 2005, c. 25, s. 5.

Cal. Penal Code § 296.1 (West Supp. 2005).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 11, (*h*), (*i*), 12.

Criminal Code, R.S.C. 1985, c. C-46, ss. 487.04, 487.051, 487.052, 487.055, 487.057(1), 487.06(2), 487.07, 718.2, 718.3(1).

DNA Identification Act, S.C. 1998, c. 37, ss. 3, 4.

Fla. Stat. Ann. § 943.325 (West Supp. 2005).

Ga. Code Ann. §§ 24-4-60 to 24-4-65 (Supp. 2005).

Identification of Criminals Act, R.S.C. 1985, c. I-1, s. 2(1).

Mass. Ann. Laws ch. 22E, §§ 1-15 (LexisNexis 2003 & Supp. 2005).

Mich. Comp. Laws Serv. §§ 28.171 to 28.176 (LexisNexis 2001 & Supp. 2003).

N.J. Stat. Ann. §§ 53:1-20.17 to 53:1-20.30 (West 2001 & Supp. 2004).

N.Y. Exec. Law § 995 (Consol. 1995 & Supp. 2004).

Ohio Rev. Code Ann. § 2901.07 (LexisNexis Supp. 2005).

Va. Code Ann. § 19.2-310.2 (Supp. 2005).

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Borens and Cronk JJ.A.) (*sub nom. R. v. Jackpine*) (2004), 70 O.R. (3d) 97, 237 D.L.R. (4th) 122, 184 O.A.C. 354, 182 C.C.C. (3d) 449, 21 C.R. (6th) 284, [2004] O.J. No. 1073 (QL), allowing an appeal from an order of Trainor J., [2001] O.J. No. 3866 (QL), dismissing an application to quash an authorization for the taking of bodily substances for forensic DNA analysis. Appeal allowed and cross-appeal dismissed, Binnie, Deschamps and Fish JJ. dissenting.

Kenneth L. Campbell and *Michal Fairburn*, for the appellant/respondent on cross-appeal.

Gregory Lafontaine and *Vincenzo Rondinelli*, for the respondent/appellant on cross-appeal.

Ronald C. Reimer, for the intervener the Attorney General of Canada.

Sabin Ouellet and *Annie-Claude Bergeron*, for the intervener the Attorney General of Quebec.

Peter P. Rosinski, for the intervener the Attorney General of Nova Scotia.

William B. Richards, for the intervener the Attorney General of New Brunswick.

Beverly MacLean, for the intervener the Attorney General of British Columbia.

The judgment of McLachlin C.J. and Bastarache, Abella and Charron JJ. was delivered by

CHARRON J. —

1. Overview

1 This appeal concerns the constitutionality of the DNA data bank provision contained in s. 487.055 of the *Criminal Code*, R.S.C. 1985, c. C-46, which permits a provincial court judge, on *ex parte* application, to authorize the collection of DNA samples from three classes of previously convicted and sentenced offenders: (a) persons already declared to be "dangerous offenders"; (b) persons convicted of "more than one murder committed at different times"; and (c) persons convicted of "more than one sexual offence" and who, on the date of the application, are still serving a sentence of imprisonment of at least two years for one or more of those offences. In contrast to ss. 487.051 and 487.052 which target convicted offenders whose cases are still before the court for sentencing, applications under this provision will be referred to as retrospective applications.

2 Dennis Rodgers, a repeat sexual offender caught by this retrospective legislative scheme, challenges the constitutionality of the provision arguing that it infringes ss. 7, 8, 11(*h*) and 11(*i*) of the *Canadian Charter of Rights and Freedoms*. He argues that the provision does not meet minimal constitutional norms in three respects: (a) it allows for an *ex parte* proceeding in the absence of any justification for denying fundamental procedural fairness; (b) it permits the seizure of a DNA sample from a convicted offender without first establishing reasonable and probable grounds to link the offender to a particular unsolved crime; and (c) it punishes the offender again for a predicate offence and denies him the benefit of the lesser punishment in force at the time of his conviction for that offence. Alternatively, even if the legislation is constitutional, Mr. Rodgers argues that the authorizing judge lost jurisdiction when he proceeded *ex parte* in the absence of any evidence demonstrating the need to do so.

3 Mr. Rodgers' *Charter* application and his application for *certiorari* were dismissed in all respects by the Ontario Superior Court of Justice ([2001] O.J. No. 3866 (QL)). On appeal, the Court of Appeal for Ontario upheld the constitutional validity of the legislation but interpreted s. 487.055 as presumptively requiring an *inter partes* hearing ((2004), 70 O.R. (3d) 97). The court held that the authorizing provincial court judge had committed jurisdictional error when he proceeded *ex parte* in the absence of evidence justifying the failure to give notice to Mr. Rodgers. The authorization for the taking of bodily substances from Mr. Rodgers was therefore quashed and the application for the authorization was remitted to the Ontario Court of Justice for a determination on its merits. The Crown appeals the quashing of the authorization. Mr. Rodgers cross-appeals against the dismissal of his constitutional challenge.

4 There is no question that DNA evidence has revolutionized the way many crimes are investigated and prosecuted. The use of this new technology has not only led to the successful identification and prosecution of many dangerous criminals, it has served to exonerate many persons who were wrongfully suspected or convicted. The importance of this forensic development to the administration of justice can hardly be overstated. At the same time, the profound implications of government seizure and use of DNA samples on the privacy and security of the person cannot be ignored. A proper balance between these competing interests must be achieved within our constitutional framework.

5 For reasons that follow, I have concluded that the collection of DNA samples for data bank purposes from designated classes of convicted offenders is reasonable within the meaning of s. 8 of the *Charter*. Society's interest in using this powerful new technology to assist law enforcement agencies in the identification of offenders is beyond dispute. The resulting impact on the physical integrity of the targeted offenders is minimal. The potential invasive impact on the right to privacy has carefully been circumscribed by legislative safeguards that restrict the use of the DNA data bank as an identification tool only. As convicted offenders still under sentence, the persons targeted by s. 487.055 have a much reduced expectation of privacy. Further, by reason of their crimes, they have lost any reasonable expectation that their identity will remain secret from law enforcement authorities. Having regard to the interests at stake and the procedural safeguards afforded by the legislative scheme, I have also concluded that the *ex parte* nature of the proceedings meets the dictates of procedural fairness afforded under s. 7 of the *Charter*. Finally, ss. 11(*h*) and 11(*i*) of the *Charter* are inapplicable. The taking of DNA samples does not constitute a punishment within the meaning of s. 11 anymore than the taking of fingerprints or other identification measures.

6 I have also concluded that the authorizing judge did not commit jurisdictional error in proceeding *ex parte*. The Court of Appeal erred in interpreting s. 487.055 as presumptively requiring an *inter partes* hearing. The provision is unambiguous and expressly permits but does not require an *ex parte* proceeding. The failure to provide notice did not deprive Mr. Rodgers of procedural fairness. I would therefore allow the Crown's appeal, set aside the judgment of the Court of Appeal, dismiss Mr. Rodgers' cross-appeal and dismiss his *Charter* and *certiorari* applications.

7 Before turning to the facts and issues under appeal, I will review the DNA data bank provisions contained in the *DNA Identification Act*, S.C. 1998, c. 37, and the *Criminal Code*. A clear understanding of the legislative scheme and its purpose is necessary to deal with the constitutional arguments advanced by the parties.

2. The Legislative Scheme

8 The *DNA Identification Act* governs the creation, operation and maintenance of a national DNA data bank. The Act must be read in conjunction with the

Criminal Code provisions dealing with the collection and use of DNA samples. This Court in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60, described the DNA provisions as falling into two sets. The first, the constitutionality of which was upheld in *S.A.B.*, regulates the search and seizure of DNA material from a suspect for investigative purposes in respect of a designated offence. The second set of provisions governs the collection of DNA evidence from convicted persons for the purpose of inclusion in a national DNA data bank. Section 487.055, the impugned provision on this appeal, falls in this latter set.

9 There are three categories of convicted offenders in respect of which a judicial authorization to seize DNA samples may be obtained for data bank purposes. First, s. 487.051 applies in respect of offenders convicted of a designated offence after the proclamation of the *DNA Identification Act*. Second, s. 487.052 deals with convicted offenders who have committed a designated offence prior to the proclamation of the *DNA Identification Act* but are still before the court. (Designated offences are defined under s. 487.04 of the *Criminal Code* and, in general, may be described as the more serious offences under the *Criminal Code* in respect of which it may reasonably be expected that DNA may be left behind by the offender.) Third, s. 487.055 applies to three classes of offenders who have been convicted and sentenced prior to the proclamation of the *DNA Identification Act*: (a) persons already declared to be "dangerous offenders"; (b) persons convicted of "more than one murder committed at different times"; and (c) persons convicted of "more than one sexual offence" and who, on the date of the application, are still serving a sentence of imprisonment of at least two years for one or more of those offences. (The list of targeted offenders has since been expanded by deleting the requirement that there be "<u>more than one</u> murder <u>committed at different times</u>" and by including dangerous sexual offenders and persons convicted of manslaughter who, on the date of the application, are still serving a sentence of imprisonment of at least two years for that offence (S.C. 2005, c. 25, s. 5).) Only s. 487.055, the retrospective provision, is in issue on this appeal. However, the alleged s. 8 constitutional deficiency — the absence of reasonable and probable grounds linking the convicted offender to a particular investigation — is equally present in all three provisions.

10 Section 3 of the *DNA Identification Act* expressly sets out the purpose of the Act:

> **3.** The purpose of this Act is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.

Parliament's objective in establishing a national DNA data bank is further expressed in the statement of principles set out in s. 4:

> **4.** It is recognized and declared that

(*a*) the protection of society and the administration of justice are well served by the early detection, arrest and conviction of offenders, which can be facilitated by the use of DNA profiles;

(*b*) the DNA profiles, as well as samples of bodily substances from which the profiles are derived, may be used only for law enforcement purposes in accordance with this Act, and not for any unauthorized purpose; and

(*c*) to protect the privacy of individuals with respect to personal information about themselves, safeguards must be placed on

(i) the use and communication of, and access to, DNA profiles and other information contained in the national DNA data bank, and

(ii) the use of, and access to, bodily substances that are transmitted to the Commissioner for the purposes of this Act.

11 The safeguards aimed at protecting the informational privacy of individuals in accordance with the principles expressed under s. 4 are conveniently summarized by the intervener the Attorney General of Canada, at para. 58 of its factum as follows:

a) A DNA data bank authorization must be obtained on written application to a provincial court judge. The judge is required to consider specified criteria in determining whether a DNA data bank authorization should be granted.

b) The class of persons against whom a DNA data bank authorization may be granted is confined to a specified class of convicted violent offenders: s. 487.055(1), *Criminal Code.*

c) Bodily samples collected pursuant to a DNA data bank authorization may only be used for forensic DNA analysis for inclusion in the National DNA Data Bank. Unused portion[s] of bodily samples are required to be safely stored at the National DNA Data Bank: s. 487.08(1), *Criminal Code*.

d) It is a criminal offence to use bodily samples or results of forensic DNA analysis obtained under a DNA data bank authorization other than for transmission to the national DNA data bank. A breach of that provision is a hybrid offence that when prosecuted by indictment is subject to a maximum penalty of two years imprisonment: ss. 487.08(2) and (3), *Criminal Code*.

e) Use of DNA profiles and bodily samples at the National DNA Data Bank is strictly limited to the narrow purposes of comparing offender profiles with crime scene profiles. Any use of stored information or bodily

samples or communication of information they may contain is strictly limited to the narrow identification purposes of the Act. Access to the bank is restricted. Breach of any of those provisions is a hybrid offence subject to a maximum penalty of two years imprisonment when prosecuted by indictment: sections 6(6), 6(7), 8, 10(3), 10(5), 11, *DNA Identification Act*.

f) Communication of information as to whether a person's DNA profile is contained in the offenders' index may only be made to appropriate law enforcement agencies or laboratories for investigative purposes or to authorized users of the RCMP automated conviction records retrieval system: s. 6, *DNA Identification Act*.

g) Although the seized bodily samples are retained for safekeeping in the DNA data bank, they may only be used for further forensic DNA analysis where that is made necessary by "significant technological advances" since the time that the original DNA profile was derived. The results of such subsequent DNA analysis and any residue of the bodily sample are subject to the same rigid controls as the original profile and sample: s. 10, *DNA Identification Act*.

h) Where a DNA profile cannot be derived from a bodily substance obtained during the execution of a DNA data bank authorization, further samples may only be taken upon further authorization from a judge: s. 487.091, *Criminal Code*.

i) A DNA Data Bank Advisory Committee has been established by regulation. The composition of the Committee is stipulated as: a Chairperson, a Vice-Chairperson, a representative of the Office of the Privacy Commissioner and up to six other members who may include representatives of the police, legal, scientific and academic communities. Retired puisne Justice Peter Cory of this Court is one of two representatives of the legal community on the current Committee. The Committee's duties encompass "any matter related to the establishment and operation" of the Data Bank upon its own motion or at the request of the Commissioner. The Committee must report annually to the Commissioner: *DNA Data Bank Advisory Committee Regulations*, SOR/2000-181.

j) The Commissioner of the RCMP is required to report annually on the operation of the National DNA Data Bank: s. 13.1, *DNA Identification Act*.

k) The *DNA Identification Act* is expressly subject to a review of its provisions and operation by Parliament after five years. That review is anticipated in the fall of 2005: s. 13, *DNA Identification Act*.

l) The Act permits sharing of DNA profiles (but not stored bodily samples) with foreign governments and international organizations but only

> for legitimate law enforcement purposes pursuant to specific agreement or arrangement between the government of Canada and the foreign government or international organization: s. 6(4), *DNA Identification Act*. Regulations under the Act further require that such agreements or arrangements "shall include safeguards to protect the privacy of the personal information used or disclosed under it": *DNA Identification Regulations*, SOR/2000-300. [Footnotes omitted.]

12 The Crown also filed affidavit evidence from Dr. Ron Fourney, a research scientist employed by the RCMP since 1988 and the current officer in charge of the data bank, describing the practical operation of the data bank. Mr. Rodgers did not dispute the accuracy of this evidence. In his affidavit, Dr. Fourney explains in some detail how the anonymity of the samples and profiles is preserved, their physical security maintained, and the genetic privacy of the individuals ensured. Arbour J. in *S.A.B.*, at para. 49, considered similar evidence and commented as follows:

> [Forensic] 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. The evidence of Dr. Ron Fourney at the *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 43, November 25, 1998, at p. 43:46, confirms the scientific community's understanding of the DNA used for forensic analysis:
>
> > [A]s forensic scientists, we are interested in everything that does not code for anything. That is to say, we are looking at anonymous pieces of DNA. By international convention with Venice in 1993, forensic scientists all over the world agree that we will take STR markers — that is, short tandem repeat — or pieces of DNA. By convention, the only ones that we are permitted to use in forensics are those that do not predict any medical, physical or mental characteristics.

13 In addition to the statutory safeguards in respect of the informational privacy of individuals, the *Criminal Code* mandates a detailed procedure for collecting DNA samples. In *S.A.B.*, Arbour J. described in considerable detail the relevant provisions governing the execution of a DNA warrant obtained for investigative purposes. Most of the provisions apply equally to the taking of a DNA sample from a convicted offender for data bank purposes. The procedure is not in issue and need not be described again here. It is not disputed that the taking of DNA samples involves a minimal intrusion on the physical integrity of the offender.

14 Before turning to the constitutional issues, I will deal with the question of statutory interpretation and determine whether the Court of Appeal was correct in its interpretation of s. 487.055 as presumptively requiring an *inter partes* hearing.

3. The Meaning of *Ex Parte* Within Section 487.055

15 Section 487.055(1) reads as follows:

> **487.055** (1) A provincial court judge may, on *ex parte* application made in Form 5.05, authorize, in Form 5.06, the taking, from a person who
>
> (*a*) before the coming into force of this subsection, had been declared a dangerous offender under Part XXIV,
>
> (*b*) before the coming into force of this subsection, had been convicted of more than one murder committed at different times, or
>
> (*c*) before the coming into force of this subsection, had been convicted of more than one sexual offence within the meaning of subsection (3) and, on the date of the application, is serving a sentence of imprisonment of at least two years for one or more of those offences,
>
> for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

16 This Court in *S.A.B.* considered language to the same effect contained in s. 487.05 and held that the reference to *ex parte* proceedings is not mandatory. The authorizing judge may require that notice be given in a suitable case "to ensure reasonableness and fairness in the circumstances" (para. 56). Section 487.055 should be read in the same way. It only permits but does not require an *ex parte* proceeding.

17 Mr. Rodgers argues that the very discretion to proceed *ex parte* contravenes the principles of fundamental justice guaranteed under s. 7 of the *Charter*. For reasons that I will give later, I reject this contention. Doherty J.A., in writing for the Court of Appeal for Ontario, also rejected this constitutional argument finding that the power to proceed *ex parte* where circumstances warrant, in and of itself, did not contravene the principles of fundamental justice (para. 32). He upheld the constitutional validity of the provision. However, he then proceeded to incorporate s. 7 *Charter* principles in his interpretation of the meaning of *ex parte* in s. 487.055 and concluded that it should be read as presumptively requiring an *inter partes* hearing. He reasoned as follows (at paras. 33 and 45-46):

> The conclusion that s. 487.055 is not unconstitutional because it permits the judge to proceed *ex parte*, does not place the manner in which the judge exercises that discretion in an individual case beyond the pale of constitutional review. The judge must exercise that discretion in a manner which is consistent with *Charter* principles and specifically in a manner which ensures that the individual's right to liberty and security of the person will not be denied except in accordance with the principles of fundamental

> justice: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 150 C.C.C. (3d) 1, at pp. 1192-94 S.C.R., p. 53 C.C.C.
>
> . . .
>
> The discretion granted by s. 487.055(1) to proceed *ex parte* should be exercised in a manner that is consistent with *Charter* principles. Those principles require notice to the individual whose liberty and security of the person interests are potentially affected by the order unless the Crown can establish legitimate grounds (*e.g.* a real risk of flight) for proceeding without notice.
>
> A judge hearing a s. 487.055(1) application should start from the assumption that the target of the application whose liberty and security of the person will be significantly affected if the order is granted should receive notice of the application. It is open to the Crown to rebut the presumption of notice with evidence that in the particular circumstances, notice could frustrate the process contemplated by s. 487.055. Evidence showing a real risk of flight if notice was given, would clearly justify a decision to proceed *ex parte*.

Since the material in support of the application under s. 487.055 failed to address the need to proceed *ex parte*, Doherty J.A. concluded that the authorizing judge had no jurisdiction to grant the order (at paras. 53-54):

> Absent any justification for proceeding *ex parte*, the failure to give the appellants notice of the applications amounted to a denial of natural justice resulting in a loss of jurisdiction: *R. v. Compton* (1978), 42 C.C.C. (2d) 163, 3 C.R. (3d) S7 (B.C.S.C.) at p. 165 C.C.C.
>
> It is no answer to a finding that Glaude J. proceeded without jurisdiction, to argue, as the Crown does, that the orders were properly made. A "correct" result does not cure a loss of jurisdiction.

18 In my respectful view, Doherty J.A. effectively pre-empted any judicial review of the constitutional validity of the statutory provision by infusing *Charter* principles as part of the interpretative process. In doing so, he exceeded the proper limits of *Charter* values as an interpretative tool. It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can *only* play a role where there is a genuine ambiguity in the legislation. In other words, where

the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iacobucci J., writing for a unanimous court, firmly reiterated this rule:

> . . . to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

19 If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose — the determination of the constitutional validity of the legislation: *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752; *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42; *Bell ExpressVu*, at paras. 60-66; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74, at paras. 23-24.

20 There is no ambiguity here. The clear language of s. 487.055(1) indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice. While the Court of Appeal was correct in stating that the judge who exercises a discretion pursuant to a constitutionally valid enactment must do so in a manner which is consistent with the *Charter* principles, that is a separate question from the question of statutory interpretation. By interpreting the provision so as to accord with its view of minimal constitutional norms, the Court of Appeal effectively trumped the constitutional analysis, rewrote the legislation, and deprived the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights.

21 The plain and unambiguous meaning of *ex parte* in s. 487.055(1) of the *Criminal Code* is just that — *ex parte*. The question left to be determined is whether it was constitutionally permissible for Parliament to choose this procedural route for retrospective applications.

4. Constitutional Issues

22 As indicated earlier, Mr. Rodgers argues that s. 487.055 is unconstitutional on three grounds: (a) it allows for an *ex parte* proceeding in the absence of any justification for denying fundamental procedural fairness contrary to s. 7 of the *Charter*; (b) it permits the seizure of a DNA sample from an individual without first establishing reasonable and probable grounds to link the individual to a particular unsolved crime

contrary to s. 8 of the *Charter*; and (c) it punishes the offender again for a predicate offence and denies him the benefit of the lesser punishment in force at the time of his conviction contrary to ss. 11(*h*) and 11(*i*) of the *Charter*. The relevant *Charter* provisions read as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.
>
> . . .
>
> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

23 The Crown contends that the constitutional analysis on both grounds (a) and (b) should be conducted under s. 8, not because s. 7 is not triggered, but because s. 8 provides a more specific and complete illustration of the s. 7 right in this particular context, making any s. 7 analysis redundant. I agree. Mr. Rodgers' *ex parte* argument concerns the procedural fairness of the very process that authorizes the seizure. In these circumstances, the question is necessarily encompassed in the s. 8 assessment of reasonableness and is more properly considered in that context. As we shall see, what is fair depends entirely on the context. This Court described the rapport between s. 8 and principles of fundamental justice in *R. v. Mills*, [1999] 3 S.C.R. 668, where the interests at play were the right to make full answer and defence and the complainant's privacy right. This Court stated as follows (at para. 88):

> Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice. Moreover, as we have already discussed, the principles of fundamental justice include the right to make full answer and defence. Therefore, a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.

24 In my view, the same reasoning applies here. I will therefore deal with grounds (a) and (b) under the s. 8 analysis and then consider s. 11.

5. Section 8

5.1 *The Right to Be Secure Against Unreasonable Search or Seizure*

25 There is no question that the taking of bodily samples for DNA analysis without the person's consent constitutes a seizure within the meaning of s. 8 of the *Charter*. An individual's right to be secure against search and seizure, however, is not absolute. Section 8 only protects against "unreasonable" searches or seizures. To state it in the positive, s. 8 protects reasonable expectations of privacy. This Court has held that 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 reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 25). We are only concerned here with the second requirement, the reasonableness of the authorizing provision itself.

26 The notion of what is "reasonable", by its very nature, must be assessed in context. This Court in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, reiterated the need for a flexible and purposive test. Wilson J. stated (at p. 645):

> Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

27 Hence any assessment of reasonableness requires a balancing of the relevant competing interests. In the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60, Dickson J. described the s. 8 test as follows:

> [A]n 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 then becomes a function of both the importance of the state objective and the degree of impact on the individual's privacy interest. As we shall see, the parties take diametrically opposed positions on where the line should be drawn, each supporting their arguments on very different views of the competing state and individual interests at stake.

5.2 *The Parties' Positions*

28 Mr. Rodgers argues that the primary purpose of the DNA data bank is narrow — it is intended to assist law enforcement authorities to link suspects to unsolved crimes. He relies more particularly on s. 4(*a*) of the *DNA Identification Act* which recognizes and declares that "the protection of society and the administration of justice are well served by the early detection, arrest and conviction of offenders, which can be facilitated by the use of DNA profiles". He submits that s. 487.055 was enacted in furtherance of this objective as an investigative tool used by the state to gather evidence for potential use in future criminal proceedings.

29 Mr. Rodgers relies on the well-established constitutional threshold for subordinating the interests of the individual to the interests of the state in crime investigations. Although the test admits of exceptions, this Court in *Hunter* established three criteria to which searches and seizures must generally conform in order to meet the reasonableness standard mandated by s. 8 in that context. First, where possible, the search and seizure must have been approved by prior authorization. This "puts the onus on the state to demonstrate the superiority of its interest to that of the individual" (p. 160) and thus ensures that unjustified searches will be prevented before they occur. Second, the person authorizing the search must be "capable of acting judicially" (p. 162) in assessing in a neutral and impartial fashion whether a search is appropriate in the circumstances. Finally, the interests of the individual will yield to the interests of the state where there are reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that evidence of this is to be found through the search or seizure. The Court identified this threshold as "the point where credibly-based probability replaces suspicion" (p. 167). The Court added that "[h]istory has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement" (pp. 167-68).

30 The first two criteria are met but Mr. Rodgers submits that s. 487.055 fails to meet the minimal constitutional norm because it does not require the establishment of reasonable and probable grounds to believe that a particular offence has been committed and that the taking of a DNA sample from the convicted offender may afford evidence of that offence. By this argument, he effectively assimilates s. 487.055 to the DNA warrant provisions contained in the *Criminal Code* that allow for DNA sampling from a suspect based on the *Hunter* credibly based probability standard. He concedes that if his argument is accepted and this norm is adopted, the entire legislative scheme allowing for the collection of DNA samples from convicted offenders for data bank purposes would become redundant. All DNA samples would have been obtained under the authority of a search warrant obtained for investigative purposes in respect of a particular offence.

31 Mr. Rodgers submits that there is no justification for a less exacting standard where DNA samples are sought from convicted offenders for collection in the DNA data bank. He does not dispute the fact that there is a reduced expectation of privacy after arrest and even further when serving a sentence after conviction. He argues however that this is not conclusive in this case and that offenders retain subsisting privacy rights despite the reduced expectation of privacy. Lastly, he submits that an

individual's subsisting privacy interests are especially high upon completion of his or her sentence.

32 The Crown argues that the state's purpose in collecting DNA samples for inclusion in the national data bank is not focussed on a particular investigation in respect of a specific crime. The purpose of the legislative scheme is much broader and was correctly articulated by Weiler J.A. in *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), at para. 22, who defined it as follows:

> In this case, the state's interest is not simply one of law enforcement *vis-à-vis* an individual — it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

The Crown submits that the appropriate analogy is not to investigative search warrants but to fingerprinting as a means of identifying offenders. The Crown relies on *R. v. Beare*, [1988] 2 S.C.R. 387, where this Court, in a unanimous judgment, upheld the constitutional validity of the provisions of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, and the *Criminal Code* which permit the post-arrest, pre-conviction taking of fingerprints, photographs and other identification measurements as approved by regulation, without any prior judicial authorization. The Court rejected the constitutional challenge having particular regard to the important societal interest in identifying offenders, the arrested person's lower expectation of privacy, and the lack of any significant aggravation to the intrusion of privacy. Given that DNA profiling is just a more sophisticated, modern, efficient and reliable means of gathering identification evidence than traditional fingerprinting, the Crown takes the position that "*neither* s. 7 nor s. 8 of the *Charter* require even prior judicial authorization, let alone a full hearing on notice, to permit the routine and minimally intrusive taking of bodily samples from *the most dangerous convicted offenders in Canada*, so long as such samples are used solely for identification purposes" (appellant's factum, at para. 53 (emphasis in original)).

33 Mr. Rodgers strongly disputes that any such analogy is appropriate, arguing that the potential impact on the privacy of the individual is far more significant with DNA sampling than with fingerprinting. He describes the greater potential impact as follows (at para. 55 of his factum):

> Fingerprints only provide evidence of the identity of a person and the unique pattern of a finger's skin. In contrast, DNA goes beyond criminal identification purposes and reveals an incredible amount of personal information about an individual including, but by no means limited to, his or her relationship to other persons, ethnic traits, physical characteristics, and medical conditions. The type of personal information that can be

> revealed by DNA will only expand as scientists continue their research in the area of the human genome. The fact that the DNA profiles loaded into the DNA Data Bank contain only non-coding portions of an individual's DNA is of no import since the *DNA Identification Act* mandates the permanent retention of bodily samples seized pursuant to s. 487.055. Thus, the state retains in its possession *all* genetic information that can be derived from an individual's DNA. [Emphasis in original.]

Given this significant privacy interest, Mr. Rodgers submits that, not only is the prior judicial authorization necessary but, absent individualized evidence that the subject will either flee or that evidence will be destroyed, there can be no justification for hearing s. 487.055 applications *ex parte*. Unlike the situation with investigative applications for a DNA warrant, surprise and secrecy are not essential — the subject of the application is either in prison or, if under some form of release, will be compelled by summons to attend for sampling. Further, the time and resources needed to litigate an *inter partes* hearing is not a significant factor and cannot amount to a justification for denying the offender the right to be heard. Mr. Rodgers therefore takes the position that the procedure contemplated under s. 487.055 is fundamentally unfair contrary to s. 7 of the *Charter*.

34 For reasons that follow, I am unable to accept Mr. Rodgers' position.

5.3 *The Hunter Criteria Not Applicable*

35 There is no question that, absent exceptional circumstances, where the government has embarked upon a criminal investigation and is seeking evidence to substantiate an investigative theory, the individualized credibly based probability standard established in *Hunter* will be the constitutional norm. The fact that the suspect is a convicted offender may form part of the reasonable and probable grounds advanced in support of the authorization, but it does not change the threshold that must be met. It is important to note, however, that this Court in *Hunter* itself recognized that this individualized credibly based probability standard may vary depending on the context (p. 168). Even within the narrow compass of criminal investigative activity, exceptions to the requirements of reasonable grounds to believe and prior judicial authorization have been recognized. For example, in the context of customs border searches, this Court concluded that the *Hunter* criteria for assessing the reasonableness of a search for the purposes of s. 8 were inapplicable: see *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 312; *R. v. Monney*, [1999] 1 S.C.R. 652. See also *R. v. Caslake*, [1998] 1 S.C.R. 51, on the common law power to search incidental to arrest, and *R. v. Grant*, [1993] 3 S.C.R. 223, on warrantless searches in circumstances of urgency. As I will explain, the *Hunter* criteria are not applicable in this context either.

36 The DNA *warrant* provisions are akin to the other warrant provisions contained in the *Criminal Code*. They allow for the gathering of evidence from a suspected offender in respect of an investigation into a specific offence. Those

provisions fall clearly within the scope of the *Hunter* paradigm. The subject of the proposed search and seizure, whether or not he or she is a convicted offender, has the constitutional right to be left alone by law enforcement authorities unless and until there are reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found by means of the DNA sampling and analysis. The constitutional validity of these provisions was reviewed and upheld by this Court in *S.A.B*.

37 Unlike the warrant provisions, the DNA *data bank* provisions do not target suspected offenders in respect of particular offences. Rather, they target offenders who have been convicted of different categories of offences. They do not provide for the gathering of evidence for use in a specific prosecution. Rather, they provide for the collection of samples solely for the purpose of creating DNA profiles for inclusion in the data bank. In any future investigation, a comparison between DNA evidence obtained at a crime scene and the data bank DNA profile will either serve to exonerate or identify a suspect. However, if a crime scene DNA profile matches an existing profile in the data bank, the sample is not released. Usual investigative methods, including DNA warrants, must be resorted to in order to gather evidence in pursuit of the investigation. Dr. Fourney describes the procedure as follows:

> 14. Whenever a new DNA profile is entered into one of the indices, the data bank looks to see if it matches an existing profile in either of the indices. Where there is a match or "hit", the data bank notifies the Canadian Police Services Information Centre (CPSIC) who can then match the SUN with the identity of the donor. CPSIC has no access to the DNA profile, but has the ability to decode the SUN to determine the identity of the donor. When there is a "hit" CPSIC informs the laboratory that generated the crime scene profile that there has been a match between that crime scene sample and a particular individual. At no time is the sample or profile released to anyone outside the data bank. <u>Instead, local investigators use traditional investigative methods, including DNA warrants, to further their investigation.</u> [Emphasis added.]

38 In my view, in considering the purpose of the DNA data bank provisions, the appropriate analogy is to fingerprinting and other identification measures taken for law enforcement purposes. The purpose of the legislative scheme is expressly set out in s. 3 of the *DNA Identification Act* — "to help law enforcement agencies <u>identify</u> persons alleged to have committed designated offences, including those committed before the coming into force of this Act". The DNA data bank provisions contained in the *DNA Identification Act* and the *Criminal Code* are intended to put modern DNA technology to use in the identification of potential and known offenders. The *DNA Identification Act* is a modern supplement to the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, which provides as follows:

> **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:
>
> . . .

Section 2 goes on to identify classes of persons charged and convicted of particular offences who are subject to the identification process. It is beyond dispute that DNA sampling is a far more powerful identification tool than fingerprinting. Therein lies the heightened societal interest in adding this modern technology to the arsenal of identification tools.

39 I am also of the view that a useful analogy can be drawn between DNA sampling and fingerprinting in considering the impact on the privacy interest of the concerned individuals. DNA sampling impacts on the privacy interest of the subject in two ways: it interferes with the bodily integrity of the person and it engages the informational component of privacy. With respect to the first, it is not disputed that the degree of offence to the physical integrity of the person is relatively modest and Mr. Rodgers takes no serious issue with this component of the privacy interest. The impact of DNA sampling on the physical security of the person was considered fully in *S.A.B.* and, the Court concluded that "the statutory framework alleviates any concern that the collection of DNA samples pursuant to a search warrant under ss. 487.04 to 487.09 of the *Criminal Code* constitutes an intolerable affront to the physical integrity of the person" (para. 47). The same statutory framework governs the taking of samples pursuant to DNA data bank orders and raises no greater constitutional concern in respect of the physical security of the person than does fingerprinting or the other identification procedures considered in *Beare*.

40 The potential impact on the informational component of privacy, however, is far more significant. It was also discussed in *S.A.B.* and the Court recognized that "[t]here is undoubtedly the highest level of personal and private information contained in an individual's DNA" (para. 48). It is mainly for that reason that Mr. Rodgers submits that the analogy to fingerprinting does not assist in assessing the constitutionality of the DNA data bank regime. Mr. Rodgers correctly notes that DNA can reveal personal information that goes far beyond the identity of the person. However, his argument ignores the legislative provisions enacted in furtherance of the statement of principle contained in s. 4 of the *DNA Identification Act* where Parliament expressly recognizes and declares that safeguards must be placed to protect the privacy of individuals. These safeguards, described earlier in this judgment, strictly limit the use that can be made of samples obtained for inclusion in the data bank to the comparison of offender profiles with crime scene profiles for *identification* only.

41 Given this analogy between DNA sampling and fingerprinting, I agree with the Crown that this Court's analysis in *Beare* is instructive. Similar arguments to those raised on this appeal were made in *Beare* where the requirement that a person appear for fingerprinting under the *Identification of Criminals Act* following a charge but before

conviction was challenged on the ground that it contravened ss. 7, 8, 9, 10, 11(*c*) and 11(*d*) of the *Charter*. The impact on the privacy interest of the person resulting from being subjected to fingerprinting, observation, photographing, and other measurements was considered as part of the Court's s. 7 analysis. The Court rejected the constitutional challenge based, in part, on the following reasoning (at p. 413):

> It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his being taken in custody he will be subjected to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it.
>
> I am unable to accept that a provision providing for fingerprinting as an incident of being taken into custody for a serious crime violates the principles of fundamental justice. While a search of one's premises requires a prior authorization based on reasonable and probable grounds to believe both that the offence has been committed and that evidence will be found, the custodial fingerprinting process is entirely different. It involves none of the probing into an individual's private life and effects that mark a search.
>
> Apart from this, the invasion of privacy on arrest on reasonable and probable grounds is a far more serious violation of the right to privacy. It is not significantly aggravated by the taking of the fingerprints of the person in custody. As already mentioned, there are many cases where the United States courts, including the Supreme Court, have refused to accord constitutional protection against a general discretion in the police to take fingerprints from persons in custody; see Moenssens, *supra*, at pp. 62-70.

The Court specifically rejected the Court of Appeal's opinion in that case that the legislation was constitutionally deficient because it did not require that reasonable and probable grounds linking the fingerprinting to the particular offence be established. La Forest J., writing for the Court, summarized the reasoning of the Court of Appeal as follows (at p. 411):

> The judges in the Court of Appeal thought their objections to the discretionary features of the legislation could be met if the following conditions were satisfied: a peace officer, in addition to having reasonable and probable grounds for believing the accused had committed an offence, had reasonable and probable grounds for believing that fingerprinting would likely provide evidence relating to the offences, or reasonably doubted the

> identity of the accused, or believed on reasonable and probable grounds that fingerprinting would provide evidence of the subject's identity.

La Forest J. rejected this approach stating that it ignored "the wide variety of reasons for which fingerprints may legitimately be used" (p. 411). In the same way, I am of the view that Mr. Rodger's main argument on s. 8 ignores the distinct purpose of establishing a national DNA data bank for identification purposes and the variety of reasons for which DNA profiles may legitimately be used. In assessing the reasonableness of the legislation, it is this societal interest which must be balanced against the privacy interests of the individual.

42 Mr. Rodgers correctly concedes that, as a person who has been convicted and is serving a sentence, his expectation of privacy is greatly reduced: see *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at p. 877; *Stillman*, at para. 61. As Weiler J.A. aptly put it in *Briggs* in the context of assessing the impact of the DNA data bank legislation (at para. 34):

> A person convicted of a crime has a lesser expectation of privacy not because that person's worth as a human being is less, but because the person's right to make choices about his or her life is curtailed.

Mr. Rodgers unquestionably has a residual privacy interest in the information contained in his DNA samples. However, in restricting the use of DNA sampling for data bank purposes to an *identification tool only*, Parliament has adequately answered any heightened concern about the potentially powerful impact that DNA sampling has on the informational privacy interests of the individual. The relevant question then becomes whether Mr. Rodgers has any reasonable expectation of privacy in respect of his *identity*.

43 The class of persons against whom a DNA data bank authorization may be granted is confined to offenders who have been convicted of designated offences. As stated earlier, 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. Section 487.055 targets the most dangerous convicted offenders — Mr. Rodgers falls in that class. Can persons convicted of designated offences, in particularly the category of offender targeted under s. 487.055, reasonably expect to retain any degree of anonymity *vis-à-vis* law enforcement authorities after their conviction? Bateman J.A. in *R. v. Murrins* (2002), 201 N.S.R. (2d) 288 (C.A.), concluded that the reasonable expectancy of a person convicted of a designated offence would be the opposite (at para. 41):

> A person convicted of a designated offence would reasonably expect the authorities to gather and retain identifying information, such as fingerprints, distinctive body markings, or eye color. The bodily sample here is simply another form of identification.

I agree. In my view, Mr. Rodgers' identity as a multiple sex offender has become a matter of state interest and he has lost any reasonable expectation of privacy in the *identifying information* derived from DNA sampling in the same way as he has lost any expectation of privacy in his fingerprints, photograph or any other identifying measure taken under the authority of the *Identification of Criminals Act*.

44 Having regard to the competing interests at play, I conclude that there is no constitutional requirement to link the convicted offender, on reasonable and probable grounds, to any particular investigation. The data bank provisions strike an appropriate balance between the public interest in the effective identification of persons convicted of serious offences and the rights of individuals to physical integrity and the right to control the release of information about themselves.

5.4 *Procedural Fairness*

45 The remaining question is whether the making of s. 487.055 orders without requiring notice to and participation by the convicted offender breaches fundamental fairness. (Sections 487.051 and 487.052 which target convicted offenders whose cases are still before the court for sentencing are silent on the question of notice. Given that orders under those provisions are routinely made at the time of sentencing, the offender is usually present at the hearing.)

46 Mr. Rodgers submits that *ex parte* hearings are exceptional and limited in their use where some harm could result from the giving of notice. In support of his argument, he relies on the following words of Arbour J. in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at paras. 25 and 38:

> *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party: *Attorney General of Manitoba v. National Energy Board*, [1974] 2 F.C. 502 (T.D.). The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example).
>
> . . .
>
> It remains to determine whether the requirement in s. 51(3) that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is contrary to the principles of fundamental justice. As I have already noted, the circumstances in which a court will accept *ex parte* submissions are exceptional. The circumstances in which a

court will be obliged to hear *ex parte* submissions at the request of one party are even more exceptional. [Emphasis added.]

47 I will return later to the circumstances and the conclusion of the Court in *Ruby*. However, it is important to note at the outset that the fallacy in Mr. Rodgers' argument is that it presupposes that notice and participation are themselves principles of fundamental justice, any departure from which must be justified in order to meet the minimal constitutional norm. As I read his reasons, Fish J. adopts the same reasoning. With respect, it is my view that this is not the proper approach. The constitutional norm, rather, is procedural fairness. Notice and participation may or may not be required to meet this norm — it is well settled that what is fair depends entirely on the context: see *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 99; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14; *R. v. Finta*, [1994] 1 S.C.R. 701, at p. 744; *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 225; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 540; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Ruby*, at para. 39.

48 The extent to which context is all important on questions of procedural fairness is plain from an analysis of *Ruby* itself. The ending words to para. 38 quoted above, not relied upon by Mr. Rodgers, read as follows:

> The question is whether, in the context of this case, such a provision is consistent with the principles of fundamental justice. I believe that it is. [Emphasis added.]

In *Ruby* the Court was assessing the procedural fairness of a mandatory *ex parte in camera* proceeding held in response to an access to information request by Mr. Ruby under the federal *Privacy Act*. The request was challenged by the government who claimed the benefit of certain exemptions under the Act. The Court reiterated the well-established principle that what is fair will depend on the context. The Court then explained why fairness, as a general rule, will require notice and participation (at para. 40):

> As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position . . . .

The Court accepted that, in the case at hand, the exclusion of the appellant from the government's submissions was an exceptional departure from this general rule because it left him "in an informational deficit when trying to challenge the legitimacy of the

exemptions claimed by the government" (para. 40). Notwithstanding this impact on Mr. Ruby, the Court recognized that "the general rule does tolerate certain exceptions" (para. 40). Following its contextual analysis, the Court concluded as follows, at para. 51, on the question of procedural fairness:

> In this case, given the statutory framework, the narrow basis of the appellant's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, I find that the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7. [Emphasis added.]

49 The particular circumstances that informed the Court's conclusion are not relevant to this case and need not be reviewed in any greater detail. However, the analysis in *Ruby*, as in several other cases cited earlier, is very instructive. This Court has made it clear, not only that what is fair in a particular case depends entirely on the context, but that the constitutional question is referable to the *minimal* standard mandated by the *Charter*. Parliament and the legislatures can, and often do, legislate beyond minimal constitutional requirements on matters engaging constitutionally guaranteed rights and freedoms. It would be an unfortunate result if legislators became hesitant to do so for fear of expanding their constitutional obligations. This point was made in *Chiarelli*, at p. 742. The Court held that s. 7 of the *Charter* did not give a non-citizen who was otherwise deportable for criminality a right to an appeal hearing based on compassionate grounds. The Court then stated the following in respect of alleged constitutional deficiencies in the hearing that was provided by statute (at p. 742):

> It is entirely within the discretion of Parliament whether an appeal on this basis is provided. Accordingly, Parliament could have simply provided that a certificate could issue without any hearing. Does the fact that Parliament has legislated beyond its constitutional requirement to provide that a hearing will be held enable the respondent to complain that the hearing does not comport with the dictates of fundamental justice? It could be argued that the provision of a hearing *ex gratia* does not expand Parliament's constitutional obligations. I need not resolve this issue in this case because I have concluded that, assuming that proceedings before the Review Committee were subject to the principles of fundamental justice, those principles were observed.

50 The Crown argues that this is a case where Parliament, in requiring prior judicial authorization under s. 487.055, has chosen to exceed minimal constitutional norms. The Crown therefore submits that the *ex parte* nature of the application cannot be constitutionally infirm because Parliament could have passed constitutionally valid legislation requiring the mandatory taking of bodily samples for DNA data bank purposes from s. 487.055 offenders *in the complete absence of any prior judicial authorization*. The Crown notes that, significantly, American appellate courts have consistently and uniformly upheld the constitutional validity of a variety of state and federal legislative initiatives requiring the compulsory DNA profiling of certain convicted offenders,

without prior judicial authorization and without requiring any degree of individualized suspicion of a crime by the target. The courts have held that such legislation does not offend the Fourth Amendment right against "unreasonable searches and seizures". In its leading decision on this point, the 9th Circuit of the U.S. Court of Appeals in *United States v. Kincade*, 379 F.3d 813 (2004), concluded as follows, at para. 3:

> In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues-squarely holding that the DNA Act satisfies the requirements of the Fourth Amendment. [Footnote omitted.]

The vast majority of state statutes also have a mandatory retrospective aspect in respect of offenders who were serving sentences for enumerated offences at the time the legislation was proclaimed in force, often as a condition of parole. By way of example, see the following statutes: Cal. Penal Code § 296.1 (West Supp. 2005); Mich. Comp. Laws Serv. §§ 28.171 to 28.176 (LexisNexis 2001 & Supp. 2003); Va. Code Ann. § 19.2-310.2 (Supp. 2005); N.Y. Exec. Law § 995 (Consol. 1995 & Supp. 2004); Fla. Stat. Ann. § 943.325 (West Supp. 2005); N.J. Stat. Ann. §§ 53:1-20.17 to 53:1-20.30 (West 2001 & Supp. 2004); Ohio Rev. Code Ann. § 2901.07 (LexisNexis Supp. 2005); Ga. Code Ann. §§ 24-4-60 to 24-4-65 (Supp. 2005); Mass. Ann. Laws ch. 22E, §§ 1-15 (LexisNexis 2003 & Supp. 2005).

51 It is not necessary to decide in this case whether a similar legislative scheme would be constitutionally valid in Canada. Parliament has not chosen this route — it has provided for prior judicial authorization. Given the potential impact on the informational component of a person's right to privacy, this additional safeguard, coupled with the legislative restrictions placed on the use that can be made of collected samples for identification purposes only, may well be a wise choice — whether or not it exceeds Parliament's constitutional obligations. The determinative question becomes whether, in all the circumstances, Parliament's choice of a presumptively *ex parte* hearing is fundamentally unfair. In my view, it is not. Keeping in mind that there is no constitutional guarantee to the most favourable procedure available, it is important to note that the chosen procedure in this case does provide the offender with the following safeguards:

> (1) prior judicial authorization must be obtained on written application to a provincial court judge: s. 487.055(1);
>
> (2) the applicant must establish that the targeted offender falls within one of the designated categories of offenders;

(3) the judge has the discretion to give notice to the offender affected by the application;

(4) the judge has the discretion not to order DNA sampling;

(5) in deciding whether to grant the authorization, the judge is statutorily required to "consider the person's criminal record, the nature of the offence and the circumstances surrounding its commission and the impact such an authorization would have on the privacy and security of the person": s. 487.055(3.1);

(6) the judge may require conditions to ensure that "the taking of the samples . . . is reasonable in the circumstances": s. 487.06(2); and

(7) the police must report back in writing to the provincial court judge: s. 487.057(1).

52 Further, although there is no appeal from a s. 487.055 order, the decision of the judge is reviewable on *certiorari*. Without doubt, errors in the record can be made. However, giving the offender notice and an opportunity to be heard is not the only procedure by which any error could be corrected. It is not as if DNA samples can be taken surreptitiously without the knowledge of the targeted person. Before taking any samples, the person acting under the authority of a DNA warrant, order or authorization, has the duty to inform the subject, among other matters, of the contents of the authorizing document and the purpose of taking the samples: s. 487.07 of the *Criminal Code*. Hence, the offender will be apprised of the basis for obtaining the order. As the absence of a precondition to the making of the order would go to jurisdiction, any such error would be reviewable on *certiorari*.

53 Finally, in determining whether the chosen procedure meets minimal constitutional imperatives of procedural fairness, the *ex parte* nature of the proceeding must be considered in the context of what is truly at stake on a s. 487.055 application. As noted earlier, any person whose conduct has earned a s. 487.055 classification cannot reasonably expect that his or her identity will remain private *vis-à-vis* law enforcement authorities. Indeed, the offender, by reason of his criminal conduct, is already known to law enforcement authorities and, depending on the circumstances, may be a logical suspect in future investigations regardless of any s. 487.055 order. What an offender therefore stands to lose on a s. 487.055 application is to have his DNA profile made available to the state *for identification purposes only*. The inclusion of the DNA profile in the data bank can serve to effectively eliminate him as a potential suspect in future investigations, or it can serve to identify him as a person connected to the crime under investigation. If the latter, his procedural rights with respect to any potential use of the DNA data bank profile in that investigation are far from exhausted. If a "hit" is generated in the DNA data bank, and the offender's DNA is subsequently gathered by way of a DNA warrant, it will be open to the offender to challenge the admissibility of

any DNA evidence at trial on the basis that he or she was illegally included in the data bank itself, if that be the case. Where the "hit" constituted the basis of the DNA search warrant, illegal inclusion in the data bank itself may provide grounds for quashing the warrant. A warrantless search would thereafter be considered *prima facie* unreasonable and may provide ground for *Charter* relief at trial. The admissibility of the evidence will also remain subject to all the usual rules of evidence.

54 Because of the retrospective nature of the application, offenders targeted by s. 487.055 are finite in number but they are nonetheless numerous. As noted by the intervener the Attorney General of British Columbia, the National DNA Data Bank website statistics show that in excess of 1,900 samples have been obtained through this *ex parte* process. The offenders, although still under sentence at the time of the application, are no longer before the courts. Some are the most dangerous and violent criminals in Canadian prisons. The Crown submits that requiring their attendance at full *inter partes* hearings would create a significant risk to public safety and cause a substantial expenditure of public resources. While these factors alone could not justify a breach of fundamental fairness, I find no such breach in this case. In light of the interests at stake and the panoply of procedural safeguards that are in place, I conclude that a presumptively *ex parte* hearing is a constitutionally valid legislative option.

55 For these reasons, I conclude that the DNA data bank legislative scheme meets the constitutional requirements of s. 8 of the *Charter*.

6. Sections 11(*h*) and 11(*i*)

56 Finally, Mr. Rodgers contends that s. 487.055 infringes both ss. 11(*h*) and 11(*i*) of the *Charter* "because it inevitably punishes the offender again for a predicate offence and denies the offender the benefit of the lesser punishment". For convenience, I again reproduce ss. 11(*h*) and 11(*i*):

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

57 Mr. Rodgers first raised this constitutional argument before the Court of Appeal and, in that court, only in respect of s. 11(*i*). He now relies on both ss. 11(*h*) and 11(*i*). However, his argument is still entirely focussed on whether the imposition of a DNA sampling and analysis order amounts to a "punishment" within the meaning of s.

11. The Court of Appeal summarily dismissed Mr. Rodgers' s. 11 argument stating that "the taking of the sample is not a punishment anymore than would be the taking of fingerprints or the taking of a photograph of a convicted person: *R. v. Briggs*, *supra*, at p. 446 O.R., p. 72 C.C.C.; *R. v. Murrins* (2002), 162 C.C.C. (3d) 412, 92 C.R.R. (2d) 285 (N.S.C.A.) at pp. 442-48 C.C.C." (para. 28). Mr. Rodgers appeals from that finding.

58 First, it is necessary to consider whether s. 11 applies at all to a s. 487.055 application. As the introductory words of the section make it plain, the protection extended by s. 11 can only be invoked when "[a] person [is] charged with an offence". Therefore, in and of itself, the application for a DNA order does not at all engage s. 11. It cannot be contended that Mr. Rodgers is "charged with an offence" on any reasonable meaning of the term and, as I understood his argument, he is not claiming the protection of s. 11 on that basis. He relies, rather, on the charges that were brought in respect of the index offences — namely the multiple sex offences in respect of which he was convicted and which form the basis of the application for a DNA data bank order. There is no doubt that s. 11 applies to those criminal proceedings and the question then becomes whether the imposition of a s. 487.055 order constitutes further "punishment" for those offences.

59 What constitutes a "punishment" under s. 11 has yet to be fully explored. The Crown, in part, relies on *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, and submits that this Court, in the context of a complaint about "double jeopardy", described "punishment" as the imposition of "true penal consequences" such as "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large . . ." (p. 561). The test in *Wigglesworth* was also applied in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 21-23, and in *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 2004 SCC 81, at para. 57. It is important to put the *Wigglesworth* test in context. As I will explain, it applies to determine whether s. 11 is triggered but does not purport to restrict the meaning of "punishment" in the context of a criminal proceeding to encompass only imprisonment and heavy fines.

60 In *Wigglesworth*, the question before the Court was whether the s. 11(*h*) protection against double jeopardy extended to police disciplinary proceedings so as to preclude a subsequent criminal trial based on the same conduct for which the police officer had been internally disciplined. A similar question was raised in *Shubley* in respect of internal prison disciplinary proceedings. In *Martineau*, the question was whether the s. 11(*c*) right against self-incrimination could be invoked in the context of forfeiture proceedings commenced under the *Customs Act*. In each case, the Court applied the two-prong test established in *Wigglesworth* to determine whether the proceeding in question came within the purview of s. 11 — a person charged with an offence can claim the protection of s. 11 if either (1) the proceedings are, by their very nature, criminal proceedings; or (2) the punishment invoked involves the imposition of "true penal consequences". It is in this context that the Court explained, at p. 561, what it meant by "true penal consequences":

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

61 The Court made it clear however that, under the first branch of the test, "all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11" (p. 560). Under the second branch of the test, a proceeding that is *not* criminal or quasi-criminal in nature but attracts a "true penal consequence" (such as imprisonment or a fine of a certain magnitude) will be equated to a criminal or quasi-criminal proceeding for s. 11 purposes. However, what constitutes a "punishment" within a criminal proceeding is not limited to those two sanctions. Such an interpretation would not accord with the liberal and purposive approach that must be taken in interpreting *Charter* rights. For example, if an offender is charged with a criminal offence, tried, convicted and sentenced to a term of probation or a small fine, it could not be argued that the protection of s. 11(*h*) would not extend to second criminal proceedings commenced in respect of the same offence because the probation or the small fine did not constitute "punishment" for his crime. Likewise, if the punishment for an offence has been varied between the time of commission and the time of sentencing so as to abolish the availability of a conditional discharge for that offence, it could not be argued that the conditional discharge did not constitute a "punishment" within the meaning of the s. 11(*i*) protection. The accused would be entitled to the benefit of the less severe sanction in force at the time of commission of the offence.

62 In its ordinary sense, "punishment" refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence. The *Criminal Code* uses the words "punishment" or "punishable" to describe the range of sanctions available on sentencing. For example, an offence will be described as "punishable" on summary conviction and the offender will be "liable to a fine . . . or [a term of] imprisonment": s. 787(1). Section 718.3(1) provides that "[w]here an enactment prescribes different degrees or kinds of <u>punishment</u> in respect of an offence, the <u>punishment</u> to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence". The words "sentence" and "sanction" are also used interchangeably: see for example s. 718.2.

63 This does not mean, however, that "punishment" under ss. 11(*h*) and 11(*i*) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be

liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing. In this respect, the protection afforded by s. 11 must be contrasted with s. 12 of the *Charter* that protects against cruel and unusual "treatment" or punishment. For example, DNA sampling, ordered as a consequence of conviction, would undoubtedly constitute a "treatment" and, if the physical method for obtaining a DNA sample were cruel and unusual, redress could be obtained under s. 12.

64 However, I agree with the conclusion reached by the Court of Appeal and find that the imposition of a s. 487.055 order, although a consequence of the convictions on the index offences, does not constitute a punishment within the meaning of s. 11. I find none of Mr. Rodgers' arguments persuasive. First, his concern about the potential dangers of equating the taking of DNA samples to fingerprinting is a matter for consideration under s. 8, not s. 11. Second, the fact that the DNA order may have a deterrent effect on the offender does not make it a punishment. As aptly noted by Bateman J.A. in *Murrins*:

> The fact that the existence of a DNA profile may deter offenders from committing future crimes is a residual benefit but does not bring the order into the category of a punishment. The order is in furtherance of the legitimate state interest in solving crime rather than its interest in sanctioning the offender. [para. 102]

As stated by the Crown in its factum, "[w]hile it is true that many punishments are aimed at having a deterrent effect, that does not mean that every deterrent measure is, by definition, 'punishment'. For example, random traffic stops to check for alcohol consumption hopefully have the effect of deterring people from drinking and driving, but no one could properly characterize a R.I.D.E. stop as 'punishment'". Finally, the argument that there is a definite stigma attached to the taking of a DNA sample is not persuasive. Other than a notation on the records of the Canadian Police Services Information Centre, there is no information that a person's DNA sample is in the data bank. If there is any stigma, surely it flows from the convictions upon which the order is based. In any event, the fact that a treatment may occasion a certain stigma does not turn it into a punishment. Stigma may be occasioned by the simple fact of being arrested and charged with a criminal offence.

65 The DNA sampling and analysis is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints. I therefore conclude that ss. 11(*h*) and 11(*i*) have no application to this case.

7. <u>Disposition</u>

66 For these reasons, I would answer the constitutional questions in the negative. Section 487.055(1) of the *Criminal Code* does not infringe ss. 7, 8, 11(*h*) and 11(*i*) of the *Charter*. I would also conclude that there is no reason to interfere with the authorization judge's discretion to proceed with the s. 487.055(1) application on an *ex*

parte basis. He was statutorily authorized to do so and no suggestion has been made that, if indeed so authorized, he did not exercise his discretion judicially. I would therefore allow the Crown's appeal, set aside the decision of the Court of Appeal for Ontario, dismiss Mr. Rodgers' cross-appeal and dismiss his *Charter* and *certiorari* applications.

The reasons of Binnie, Deschamps and Fish JJ. were delivered by

FISH J. (dissenting) —

I

Overview

67 I agree with two of Justice Charron's principal findings. With respect, however, they lead me to a different conclusion.

68 First, I agree that s. 487.055(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, with which we are concerned here, cannot pass constitutional muster unless it complies with s. 8 of the *Canadian Charter of Rights and Freedoms*. In Charron J.'s words, "[t]here is no question that the taking of bodily samples for DNA analysis without the person's consent constitutes a seizure within the meaning of s. 8 of the *Charter*" (para. 25). Section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure."

69 Accordingly, the outcome of this appeal depends on whether the impugned provision is reasonable within the meaning of s. 8.

70 Second, I agree with Charron J. that s. 487.055(1) contemplates discretionary judicial orders without notice to the persons against whom those orders are made. I should think it obvious that this discretion must be exercised in accordance with the relevant factors explicitly set out in s. 487.055(3.1) of the *Criminal Code* and any other factors that are implicitly relevant.

71 Accordingly, it seems to me that the core issue on this appeal is whether there is any reasonable basis for presumptively excluding the subject of the order from the hearing at which it is made. That person, after all, has the most to lose if the order is erroneously made — and will often be in the best position to correct erroneous information upon which the judge might otherwise be required to rely.

72 The Crown advances several reasons that are said to justify proceeding *ex parte*. First, it is said there will be few cases in which an application for a DNA order under s. 487.055(1) can, or will, be successfully opposed. With respect, this does not appear to me to be a persuasive argument for depriving those against whom the order would otherwise be wrongfully made of the opportunity to prevent this from happening.

73 Another justification, advanced by my colleague, is that errors made by the issuing trial judge are subject to prerogative review. With respect, I find it difficult to

understand how the possibility of a cumbersome and expensive *ex post facto* review on narrow jurisdictional grounds can be considered an adequate substitute for a fair hearing on the application for an order — a simple and expeditious opportunity to prevent erroneous orders and unwarranted seizures *from occurring*. As Dickson J. (later C.J.C.) stated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, s. 8 of the *Charter* "requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place" (p. 160 (emphasis in original)).

74 Finally, it is argued that giving notice to the subject of a s. 487.055 order might lead to frustration of the purposes of the proposed DNA seizure. This proposition does not resist even summary analysis.

75 Section 487.055 requires convicted offenders, upon notice, to appear at a given time and place in order to provide a bodily sample. If they are no longer in custody and do not flee when they receive this notice to appear, it is difficult for me to understand why they would flee if they are instead given notice that an application for the order will be made and informed of their opportunity to make appropriate representations. If they are still in custody, then I think it absurd to suggest that they might flee if they are likewise given notice of the contemplated application.

76 And finally, in either instance, persons who are notified of the application before the order is made can hardly thereupon hide or destroy their bodily samples so as to prevent their seizure, should the order sought by the authorities be made by the judge!

II

Proceeding *Ex Parte*

77 Mr. Rodgers argues that holding the authorization hearings *ex parte*, absent any reason to proceed without notice or participation, does not satisfy the constitutional requirements of s. 8. I agree.

78 Like Charron J., I believe that s. 487.055(1) contemplates presumptively *ex parte* hearings. The judge is empowered to hold the hearing *inter partes*, but the statute presumes that the data bank order will be issued without notice or participation.

79 Speaking for a unanimous court, Doherty J.A. held that procedural fairness and *Charter* principles "require notice to the individual whose liberty and security of the person interests are potentially affected by the order unless the Crown can establish legitimate grounds . . . for proceeding without notice" ((2004), 70 O.R. (3d) 97, at para. 45). Charron J., on the other hand, finds that because the constitutional norm of procedural fairness depends on context, notice and participation are not necessarily required.

80 This Court has indeed asserted, repeatedly, that the nature and extent of procedural fairness depends on context (Charron J., at para. 47). In this regard, however, I find particularly instructive the most recent formulation of the governing principles.

81 In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, a unanimous Court permitted departure from the "general rule" that

> a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position. [para. 40]

82 And, while recognizing that this rule is not absolute, the Court took care to emphasize that "the circumstances in which a court will accept *ex parte* submissions are exceptional" (para. 38). The contextual approach does, as Charron J. states, permit departure from the norm of providing notice and permitting participation in the hearing. But only "exceptionally", as the Court stated in *Ruby* — and, in my view, not without cause or justification.

83 In this case, context and principle both favour *inter partes* and not *ex parte* hearings. Unlike in *Ruby*, we have been shown no serious reason at all to depart from the venerable norm of providing notice and participation, and there are important grounds for not doing so.

84 The Court has noted the kind of compelling reasons for which, exceptionally, *ex parte* hearings will be permitted. In *Ruby*, Arbour J. explained that they are limited to cases where the "delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given" (para. 25). Similarly, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60, the Court upheld the constitutionality of *ex parte* proceedings for DNA warrant orders "because of the risk that the suspect would take steps to frustrate the proper execution of the warrant" (para. 56).

85 None of these factors justifies proceeding *ex parte* in this case.

86 First, it is impossible for a subject to destroy his DNA sample. "[B]odily samples . . . are usually in no danger of disappearing": *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 49. And DNA evidence in particular can be obtained through a variety of approved tests.

87 Second, as mentioned earlier, notice and participation in the hearing create no enhanced risk of flight. Section 487.055 applies only to offenders who, on the date of the application, are still serving a sentence of imprisonment. Offenders in custody are not in a position to flee; those who are on parole and are minded to flee are perhaps less and not more likely to do so if they are afforded an opportunity to oppose the order. Proceeding *ex parte* carries with it no element of surprise: under s. 487.055, a data bank

order simply requires the subject to report at the place, date and time set out in the summons. Neither the capacity nor the motivation to flee would in any way be enhanced by providing notice and permitting participation in the hearing. The state interest in proceeding *ex parte* where there is no reason to do so is therefore minimal, at best.

88 In any event, an assessment of the state's interest must consider as well the competing interests of those whom the state is required to protect. As the Court explained in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, determining the "nature and extent of procedural safeguards" requires balancing the "competing interest of the state and the individual" (p. 657).

89 A s. 487.055 target has a legitimate interest in presenting information that may well persuade the judge not to issue an order. Parliament contemplated that there would be instances in which an order might be properly denied, and has for this reason required the authorizing judge to consider all of the relevant factors, including "the person's criminal record, the nature of the offence and the circumstances surrounding its commission", as well as "the impact such an authorization would have on the privacy and security of the person" (s. 487.055(3.1)).

90 Proceeding *ex parte* makes it more difficult — often impossible — for the judge to consider these factors. The statutory safeguard requiring consideration of the individual's interest is thus rendered illusory by proceeding *ex parte* without reason.

91 Offenders targeted by an application may well have information, to which they alone are privy, that is relevant to the required exercise of judicial discretion under s. 487.055(3.1). Moreover, the *DNA Identification Act*, S.C. 1998, c. 37, came into force after offenders covered by s. 487.055 had been convicted. At the time of their convictions, unlike others included in the data bank, these offenders had no reason to place on the record information that might be relevant to a DNA data bank order.

92 The risk inherent in denying them that opportunity is further heightened where the offender entered a guilty plea and there was no full trial. Factors relevant to a DNA order but not to the sentence are in such cases unlikely to have been canvassed at the time. Information that is relevant on an application under s. 487.055(3.1) would thus be absent from the record placed before the judge who must decide it.

93 Charron J. points out that under s. 487.07 of the *Criminal Code*, the person taking the sample has the duty to inform the subject of the "contents of the authorizing document and the purpose of taking the samples" (para. 52). In her view, this ensures that the offender will be apprised of the basis for the order, and if he or she feels that basis is insufficient, that error is reviewable on *certiorari*.

94 *Certiorari*, as mentioned earlier, is a costly and cumbersome *ex post facto* procedure available on narrow jurisdictional grounds. An order wrongly made cannot be reversed on a demonstration of error alone. In my respectful view, recourse to proceedings in *certiorari* is of no comfort at all to persons who, but for their exclusion

from the hearing, would have prevented that error from occurring — and would not have suffered the consequences, without reason or justification.

III

Summary and Conclusion

95 The DNA data bank constitutes a substantial and novel invasion of privacy. A "hit" between a sample in the data bank and one in the DNA crime index will often qualify as a sufficient basis for obtaining a DNA search warrant for the offender. While traditional investigative techniques are still required, the DNA data bank facilitates the process, pointing to specific offenders who remain in the data bank for life. These considerations underline the importance of providing notice and affording those whose privacy interests are at stake an opportunity to participate in the hearing except where competing interests otherwise require.

96 In the present matter, we have been shown no cause or justification for proceeding *ex parte*, while the reasons for giving notice are both compelling and self-evident. The judge retains discretion, in any event, to order an *ex parte* hearing when there is a reasonable basis for doing so in the particular circumstances of the case.

97 For all of these reasons, as stated at the outset, I have concluded that s. 487.055 of the *Criminal Code* is inconsistent with s. 8 of the *Charter*.

98 In its admirably succinct treatment of the remaining issue — whether the impugned statutory provision is a "reasonable limit" within the meaning of s. 1 of the *Charter* — the Crown simply "relies upon the considerations advanced in support of the conclusion that [s. 487.055] permitted only 'reasonable' searches and seizures". Since those considerations fail to persuade me in respect of s. 8, they necessarily fail as well with regard to s. 1.

99 To the extent of its inconsistency with s. 8 of the *Charter*, s. 487.055 is therefore, in my respectful view, of no force or effect.

Appeal allowed and cross-appeal dismissed, BINNIE, DESCHAMPS *and* FISH JJ. *dissenting.*

Solicitor for the appellant/respondent on cross-appeal: Crown Law Office, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Lafontaine & Associates, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Edmonton.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Office of the Attorney General, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General, Vancouver.