Should Canada adopt time-of-arrest approach to DNA?

BY MICHAEL McKIERNAN
Law Times

A series of international DNA blunders should have the Canadian government thinking twice about when it collects samples and who it shares them with, according to a Toronto criminal defence lawyer.

Ricardo Federico, co-chairman of the annual Canadian Symposium on DNA Forensic Evidence, says DNA evidence attracts an extremely high level of public reverence that's not always warranted.

"Scientists make mistakes and police make mistakes," says Federico. "It's as simple as that. Blunders exist and they are likely to continue to exist. I have a grave concern that the manner in which the global exchanges have happened in the past have created blunders and I believe in my heart and soul that it should be given greater watch."

A 2009 *Virginia Law Review* paper co-written by Peter Neufeld, a founder of the Innocence Project, examined 156 U.S. cases in which DNA evidence helped overturn wrongful convictions. It found that in several of the cases, invalid DNA evidence actually played a role in the original conviction.

One Texas man, Gilbert Alejandro, was implicated in a sexual assault by what the paper calls the "egregious testimony" of a DNA expert who claimed samples found at the scene could only have come from him. Post-conviction tests later excluded Alejandro and an internal inquiry at the lab found the expert hadn't conducted the tests properly.

Two other cases mentioned in the paper involved misleading statistics on mixed DNA samples that appeared to underestimate the chance that someone other than the suspect had contributed to them.

Federico also points to a U.K. case from 2003 in which 23-year-old bartender Peter Hamkin became a suspect in a murder in Italy. Italian authorities moved to extradite him after hitting a match on the U.K's DNA database with evidence found at the scene of the crime. Three weeks into the extradition process, a second test ruled him out after a watertight alibi placed him at work in Liverpool at the time of the murder. In fact, Hamkin said he had never left England and told a local newspaper it had been "the worst three weeks of my life."

'I think we're going to see more and more exchanges with other countries and we may see more blunders, too,' says Ricardo Federico. *Photo: Robin Kuniski*

The RCMP in Ottawa maintains Canada's 14-year-old national DNA databank. Its two databases contain about 75,000 unidentified samples from unsolved crime scenes and a further 250,000 samples collected by court order from people convicted of certain offences. Countries with agreements in place can send their own crime-scene samples to Canada in order to search for a match.

Federico says he'd like to put an extra layer of scrutiny between police and the databank in order to avoid having situations like Hamkin's repeat themselves in Canada.

"Do we really want the RCMP as the gatekeepers to the world when it comes to the exchange or should we have some sort of judicial intervention prior to a DNA profile exiting the country?" asks Federico.

David Bird, a retired former counsel with Justice Canada, told this year's DNA symposium that fears about international exchanges are overblown. Since 2000, there have been just 900 requests from foreign police forces while Canada has run its own crime-scene profiles through foreign databases on 148 occasions. Matches and exchanges are even more rare, said Bird.

"The sky is not falling when it comes to international exchanges," Bird told an audience at Osgoode Professional Development in downtown Toronto on April 28.

In fact, Bird said Canada is playing catch-up with other jurisdictions when it comes to DNA collection.

Police in Britain and 13 U.S. states take DNA samples from suspects on arrest for certain offences. In Canada, meanwhile, it takes a court order to add samples to the databank after conviction for certain offences. Legislation provides for 36 designated offences where a judge has no discretion and must order the sample taken. A second tier of indictable offences with maximum punishments of five years or more allows the Crown to make an application to the court in order to take a sample. Bird said that process has become cumbersome and complicated.

"We should be leaping forward and looking at the experience that other countries have in their DNA databank," said Bird. "The sky doesn't fall and the wrong people don't go to jail. We need to have an adult discussion about safeguards. . . . Can we put proper oversight to ensure that all the concerns about privacy creep, the surveillance society, and all the other bogeymen floating around out there get addressed so we can get on with making a decision on this? The U.S., the U.K., the world is going to time of arrest."

In a 2010 report, a Senate committee tasked with reviewing the DNA Identification Act recommended that Canada steer clear of time-of-arrest collection.

"If such a legislative change were to be introduced, it seems possible that a court would conclude that sampling upon arrest and charge violated sections 7 and 8 of the Charter, as well as the presumption of innocence guaranteed by section 11(d) of the Charter, particularly if the DNA profile was not destroyed as promptly as possible if the charges were dropped, stayed or reduced or if the accused person were acquitted," the report noted.

For Vincenzo Rondinelli, a defence lawyer with Lafontaine & Associates in Toronto who was also on a panel with Bird, that was a rare bright spot after years of "legislative creep" on DNA collection. "From Day 1, the message has been, 'Don't worry, it's only going to be a certain segment of the offender population where we'll collect,' to today where it's basically almost everyone," says Rondinelli. **LT**