R. v. S.A.B.: PUTTING "SELF-INCRIMINATION" IN CONTEXT

LEE STUESSER*

I. INTRODUCTION

The Supreme Court of Canada in *R. v. S.A.B.* unanimously upheld the constitutionality of DNA warrants.[1] That result is not surprising. What is interesting is the route the Court chose to uphold the law. The defence presented a double-barrelled argument. First, it was argued that seizure of DNA under the warrants constituted an unreasonable search and seizure under s. 8 of the *Charter*.[2] Second, it was argued that by compelling an accused to provide DNA material the legislation violated the principle against self-incrimination found in s. 7 of the *Charter*. The Court eschewed arguments based on self-incrimination and concentrated on search and seizure as the more appropriate framework to determine the constitutionality of the legislation. In other words, the Court saw search and seizure as the primary issue and not self-incrimination.

II. THE FACTS

The accused was charged with the sexual assault and sexual exploitation of a 14-year-old girl. The girl found out that she was pregnant and told her mother that the accused had sexually assaulted her. She had an abortion and the police seized the foetal tissue for DNA testing. They then obtained a DNA warrant under ss. 487.04 to 487.09 of the *Criminal Code*[3] and seized a blood sample from the accused. Essentially the police conducted a paternity test. The DNA testing on five of seven samples established the probability that the accused was not the father of the foetus to be 1 in 10 million. A sixth sample was damaged and yielded inconclusive results. The seventh sample did not match the accused's DNA. According to the Crown DNA expert the seventh sample was determined to be a mutation and was therefore disregarded. The expert testified that mutations are well documented in paternity testing and that international guidelines state that at least two exclusions have to be noted before parental exclusion can be determined. No evidence was given as to the nature of the international guidelines referred to.

The defence, at trial and on appeal, besides challenging the constitutionality of the DNA warrant provisions, also took issue with the expert's evidence. It was argued that without evidence of the international guidelines the opinion of the Crown DNA expert lacked a factual foundation and the trial judge ought to have given no weight to the expert's evidence. This comment will examine both the constitutional challenges and the admissibility of the expert's opinion.

---

* Professor, Faculty of Law, University of Manitoba.

1 [2003] 2 S.C.R. 678, aff'g (2001), 293 A.R. 1 (C.A.).

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [*Charter*].

3 R.S.C. 1985, c. C-46.

III. THE LEGISLATION UNDER ATTACK

At issue on appeal were the provisions dealing with the search and seizure of DNA material for investigative purposes. Sections 487.04 to 487.09 of the *Criminal Code*[4] deal with the issuance of search warrants in order to obtain bodily samples for DNA testing. In order to obtain a warrant the police need to comply with s. 487.05. Sworn information is provided *ex parte* to a provincial court judge, who must be satisfied that there are reasonable grounds to believe:

- "That a designated offence has been committed."[5] The list of "primary" and "secondary" designated offences is long, but generally speaking includes crimes of violence, causing bodily harm or of a sexual nature.
- "That a bodily substance has been found" associated with the crime to match against any sample seized.[6]
- That the person named in the warrant was "a party to the offence."[7]

In addition, the provincial court judge must be satisfied that it is in the best interests of the administration of justice to issue the warrant.[8]

Under s. 487.05(2): "in considering whether to issue the warrant the judge shall have regard to all relevant matters," including "the nature of the designated offence and the circumstances of its commission,"[9] and whether a police officer or another person is qualified to take the samples.[10]

Section 487.06 governs the execution of the warrant. It authorizes the taking of samples by way of "plucking individual hairs,"[11] "taking of buccal swabs by swabbing the lips, tongue and inside cheeks"[12] or "the taking of a blood sample by pricking the skin surface."[13]

Before executing the warrant, a peace officer must "inform the person from whom the samples are to be taken of":[14]

- "the contents of the warrant";[15]
- "the nature of the investigative procedures by means of which the samples are to be taken";[16]

---

4 *Ibid.*
5 *Ibid.*, s. 487.05(1)(a).
6 *Ibid.*, s. 487.05(1(b).
7 *Ibid.*, s. 487.05(1)(c).
8 *Ibid.*, s. 487.05(1).
9 *Ibid.*, ss. 487.05(2), (2)(a).
10 *Ibid.*, ss. 487.05(2)(b)(i) and (ii).
11 *Ibid.*, s. 487.06(1)(a).
12 *Ibid.*, s. 487.06(1)(b).
13 *Ibid.*, s. 487.06(1)(c).
14 *Ibid.*, s. 487.07(1).
15 *Ibid.*, s. 487.07(1)(a).
16 *Ibid.*, s. 487.07(1)(b).

- "the purpose of taking the samples";[17]
- "the authority ... to use as much force as necessary for the purpose of taking the samples";[18] and
- "the possibility that the [bodily substances] may be used in evidence."[19]

Section 487.07(2) provides that a person may be required to accompany a peace officer and be detained for a reasonable period of time in order to obtain the samples. Section 487.07(3) requires that the person's privacy be respected in a manner that is reasonable in all the circumstances.[20]

Section 487.08 controls the potential use of the seized DNA materials. Essentially, the provision restricts the use of the samples to "forensic DNA analysis," which is defined in s. 487.04 as a comparison of the seized sample to the material found at the crime scene or on/within the victim of the crime. Therefore, use of the samples is confined to the investigation of the designated offence outlined in the warrant.

Section 487.09 deals with the destruction of the samples and the test results. Samples seized pursuant to a warrant are to be destroyed "without delay" if:

- the results are negative;
- the person is finally acquitted of the offence; or
- upon the expiration of one year after the person is either discharged after a preliminary inquiry or the charges are dismissed, withdrawn or stayed.

Samples given voluntarily are to be destroyed "without delay" after the results show that the substance found at the crime scene was not from that person.[21] There is an exception. Under s. 487.09(2) a provincial court judge may order that samples not be destroyed where the judge is satisfied that the substances might reasonably be required in an investigation or prosecution of the person for another designated offence, or of another person for the designated offence or any other offence in respect of the same transaction.

IV. The Challenge Under Section 8 — "Unreasonable Search and Seizure"

In challenging the provisions under s. 8 of the *Charter*, the difficulty that the defence faced was that the DNA warrant provisions appear to have been drafted to pass constitutional muster. In *Hunter v. Southam* the Supreme Court found that s. 8 protects a "reasonable expectation of privacy." Justice Dickson (as he then was) went on to explain that

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an

---

17 *Ibid.*, s. 487.07(1)(c).
18 *Ibid.*, s. 487.07(1)(d).
19 *Ibid.*, s. 487.07(1)(e)(i).
20 Note, there are additional provisions dealing with the obtaining of samples from young persons.
21 *Criminal Code*, *supra* note 3, s. 487.09(3).

> 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.[22]

As minimal constitutional imperatives, the Supreme Court in *Hunter* mandated that for a search or seizure to be reasonable 1) there had to be prior authorization, 2) by a person capable of acting judicially and 3) based upon reasonable and probable grounds.[23] A DNA warrant by its very nature constitutes prior authorization. The authorization is by a provincial court judge and is based on reasonable grounds.

The bottom line is that the DNA warrant provisions are a balanced response that respect the privacy of the citizenry, but at the same time ensure that valuable evidence can be obtained — evidence that both goes to prove guilt or innocence. The intrusion into the privacy of the individual is restrained. The physical intrusion is not particularly invasive. The use of the information is restricted. The samples are collected for the limited purpose of the specific investigation. Moreover, there are a number of other safeguards built into the legislation:

a) The jurisdiction to issue a DNA warrant is reserved for provincial court judges, and may not be exercised by justices of the peace (s. 487.05(1)).
b) DNA warrants are only available to further the investigation of the specific offences enumerated in s. 487.04.
c) Section 487.05 imposes highly specialized reasonable grounds requirements, which are carefully designed to address the unique issues arising in this context.
d) The issuing judge is expressly required to advert to certain relevant factors, including the qualifications of the person who is to collect the bodily substance (s. 487.05(2)).
e) The issuing judge must be satisfied that the warrant is in the best interests of the administration of justice (s. 487.05(1)).
f) Section 487.06(2) requires the issuing judge to impose any terms and conditions which are necessary to ensure that the seizure of a bodily substance authorized by the warrant will be reasonable in the circumstances. A number of such conditions were imposed in the case in appeal.
g) Pursuant to s. 487.06, a warrant under s. 487.05 may only authorize certain designated procedures.
h) Section 487.07 imposes a number of explicit requirements governing execution of the DNA warrant. Section 487.07(3) imposes an overarching requirement that the executing officer ensure that the privacy of the suspect is respected in a manner that is reasonable in the circumstances.
i) Sections 487.08 and 487.09 create a comprehensive and rigorous scheme governing disposition of bodily substances and results obtained under a DNA warrant. These provisions not only maximize the protection of privacy in biological and genetic material; they also place clear limits on the extent to which evidence obtained under DNA warrant can be used to incriminate the suspect.[24]

It is not surprising then that Arbour J., after citing many of the above safeguards, concluded that "in general terms, the DNA warrant provisions of the *Criminal Code* strike an appropriate balance between the public interest in effective criminal law enforcement for

---

22 [1984] 2 S.C.R. 145 at 159 [*Hunter*].
23 *Ibid.* at 109-115.
24 *R. v. F.(S.)* (2000), 141 C.C.C. (3d) 225 at para. 26 (Ont. C.A.), Finlayson J.A. [*F.(S.)*].

serious offences, and the rights of individuals to control the release of personal information about themselves, as well as their right to dignity and physical integrity."[25]

What the defence attempted to do in *S.A.B.* was to raise the constitutional bar. Three specific arguments were raised:

(1) That DNA warrants should only be available as a "last resort";
(2) That a standard of "reasonable grounds" was insufficient to support DNA warrants; and
(3) That the *ex parte* nature of the proceedings rendered them unconstitutional.

All of these arguments were given short shrift by the Supreme Court in *S.A.B.* In short staccato paragraphs Arbour J. rejected each argument in turn.

The "last resort" argument is based on the analogy to wiretap authorizations. Judicial authorization to intercept private communications cannot be issued unless the court is satisfied "that there is no other reasonable means of investigation."[26] Under s. 186(1)(b) of the *Criminal Code*, the judge, before authorizing a wiretap, must be satisfied that other investigative techniques have been tried and have failed, are unlikely to succeed or there is urgency in the matter. However, Arbour J. found this to be a false analogy. Wiretaps are far more invasive with respect to the information that they obtain and cast a net that is "inevitably wide." They intrude on the privacy interests of third persons who are not a target of the investigation. Accordingly, Arbour J. saw no need for a "last resort" condition to be imprinted onto DNA warrants.[27]

The defence next argued that the standard of "reasonable grounds" is insufficient for searches and seizures that violate bodily integrity and force self-conscription. Justice Berger, in the court below, accepted this argument. He held that a DNA warrant should only be issued if a judge is convinced by "clear, cogent and compelling evidence"[28] that the information in support of a DNA warrant is justified. The Supreme Court was not convinced. Justice Arbour simply noted that the standard of "reasonable grounds" was "well recognized in the law" and saw no reason to adopt a higher standard.[29] "Reasonable grounds" is the traditional standard for the authorization of searches and, in fact, the authorization of all matter of warrants.[30] It would be an unwelcome development to start to introduce a wide variety of thresholds.

The final argument was that the *ex parte* nature of the application for a warrant rendered the legislation unconstitutional. Most warrants are obtained without notice to the affected

---

25 *S.A.B.*, *supra* note 1 at para. 52.
26 *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 37.
27 *S.A.B.*, *supra* note 1 at para. 54
28 *R. v. S.A.B.* (2001), 293 A.R. 1 (C.A.) at para. 121 [*S.A.B.* (C.A.)].
29 *S.A.B.*, *supra* note 1 at para. 55.
30 For example, the "reasonable grounds" threshold is found in s. 529 of the *Criminal Code*, *supra* note 3, which authorizes the entry into a dwelling to effect an arrest; in s. 256 of the *Criminal Code*, which authorizes the taking of blood samples from those suspected of impaired driving; and in s. 117.04 of the *Criminal Code*, which authorizes searches for prohibited firearms and ammunition.

party. As noted by Arbour J., *ex parte* applications are "constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant."[31] Moreover, the legislation does not make *ex parte* proceedings mandatory. It is always open to the issuing judge to require notice to be given to the person.

The short time spent on these arguments really reflects the difficulty that the defence faced in challenging the legislation under s. 8 of the *Charter*. In terms of search and seizure law, the legislation is solid. With this door closed, it is not surprising then that the defence sought to challenge the law under self-incrimination. That is where we turn next.

V. THE CHALLENGE UNDER SECTION 7 — "SELF-INCRIMINATION"

In Canadian law, self-incrimination is a broad overarching principle. Chief Justice Lamer defined self-incrimination as:

> Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.[32]

Given this broad definition, compelling a person to provide a DNA sample appears to violate the principle against self-incrimination. So said the defence in *S.A.B.* However, such is too literal, too superficial an analysis. Sweeping statements on the principle of self-incrimination are misplaced if applied in all circumstances to all types of self-incriminatory evidence. As Iacobucci J. has observed: "the principle against self-incrimination may mean different things at different times and in different contexts."[33] This observation belies the mishmash of law surrounding self-incrimination in Canada.

There is a fundamental distinction between "testimonial" and "non-testimonial" self-incrimination. Compelling an accused to speak or to give a statement is "testimonial" self-incrimination. It is "non-testimonial" when accused persons are compelled to incriminate themselves in other ways such as the providing of breath, hair or blood samples. The common law has "carved a sharp and clear line between cases where accused persons were compelled to answer allegations made against them and cases where they were forced to participate in the provision of physical evidence."[34] Madam Justice McLachlin (as she then was), writing in dissent in *R. v. Stillman*,[35] advanced four reasons for the divide between "testimonial" and "non-testimonial" incrimination:

1. Testimony compelled from an accused raises concerns about the reliability of the evidence. Physical evidence taken from an accused has no comparable reliability concerns.

---

31 *S.A.B.*, *supra* note 1 at para. 56.
32 *R. v. Jones*, [1994] 2 S.C.R. 229 at 249.
33 *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 at para. 107.
34 David M. Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1989) 35 McGill L.J. 73 at 85.
35 [1997] 1 S.C.R. 607 at paras. 202-205 [*Stillman*].

2. For statements improperly taken from an accused there is a direct causal relation between the state action and the evidence obtained. On the other hand, physical evidence, even if improperly obtained, exists independently of the state actions.
3. The heightened degree to which compelled testimonial evidence violates the sanctity of a person's mind. "The mind is the individual's most private sanctum."[36]
4. "To render illegal the compelled use of the accused's body in gathering evidence against the accused would be to render inadmissible many kinds of evidence, which have long been routinely admitted."[37]

In *Stillman* the majority rejected McLachlin J.'s call to confine self-incrimination to "testimonial" evidence. Justice Cory, writing for the majority, concluded that a person "is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples."[38]

Care must be taken not to misapply and take out of context what Cory J. said in *Stillman*. That case was concerned with determining the admissibility of improperly obtained evidence under s. 24(2) of the *Charter*. The police had without legal authority forced Stillman to provide DNA material, hair samples and teeth impressions. It is in this context that the majority found that Stillman had been compelled to provide "conscripted" evidence. The case was not concerned with establishing "self-incrimination" as a free-standing constitutional right under the *Charter*.[39] One needs to look to the wording of s. 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.[40]

The principle against self-incrimination, as noted by Finlayson J., is

> not a constitutional right at all; it is one of a number of the principles of fundamental justice which are qualifiers or modifiers of those rights which are enshrined in s. 7.... The rules of fundamental justice do not prohibit the Crown from compelling the production of evidence, or even compelling the suspect to assist in its production; *they control the manner in which this evidence may be obtained.*[41]

Once the "manner" of seizing of DNA samples is seen to be reasonable it is difficult to see how this violates s. 7. Simply put, a reasonable search and seizure is consistent with the principles of fundamental justice.[42]

S.A.B. reinforces the different approach to "testimonial" versus "non-testimonial" self-incrimination. Although the Supreme Court did not turn back the clock and confine self-incrimination to testimonial conscription, the result illustrates a *de facto* difference in treatment. Simply put, "testimonial" self-incrimination is guarded more rigorously by the

---

36 *R. v. F.(S.)* (1997), 120 C.C.C. (3d) 260 at 309 (Ont. S.C.), Hill J.
37 *Supra* note 35 at para. 205.
38 *Ibid.* at para. 80.
39 *F.(S.)*, *supra* note 24 at para. 17.
40 *Supra* note 2.
41 *F.(S.)*, *supra* note 24 at para. 17 [emphasis added].
42 See *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 88.

courts then "non-testimonial" conscription. In "testimonial" cases such as *R. v. Hebert*,[43] a right to silence case, and *R. v. White*,[44] where compelled statements were used against the person, the principle of self-incrimination was invoked to fashion a *Charter* right. In contrast, the courts have in "non-testimonial" cases upheld the taking of fingerprints from suspects,[45] roadside breath demands,[46] and now the taking of DNA samples.

This is what the Court implicitly did. It would have been better and clearer if the Court had expressly stated that they were accepting the distinction between "testimonial" self-incrimination and "non-testimonial" conscription and that the latter, in the case on appeal, was better analyzed under search and seizure law — end of appeal. However, there was no such clear express statement. Instead the Court, as a "last matter," considered the principle against self-incrimination as part of its s. 8 analysis.[47] Such an analysis is redundant and confusing. The Court had already considered the fact that the taking of DNA samples violated the sanctity of a person's body was a factor to be weighed in the balancing of interest equation. It makes no sense to consider it anew. This portion of the judgment is simply a repetition of earlier argument. Moreover, Arbour J. turned to statements of principle from *White*,[48] which, whilst appropriate for considering "testimonial" self-incrimination, are ill suited to "non-testimonial" conscription. The Court in *White* identified two rationales for the principle against self-incrimination: 1) to protect against unreliable confessions or evidence and 2) to protect against the abuse of power of the state. The first rationale is of little concern with DNA samples and the second rationale has already been considered in finding the search to be a measured response. Surely a reasonable search under s. 8 cannot at the same time be an abuse of power by the state.

When Arbour J. began her analysis of the law, she stated that "the principles of fundamental justice that are alleged to be implicated by a DNA search and seizure, including the principle against self-incrimination, are more appropriately considered under a s. 8 analysis."[49] She is correct, but what is missing from the decision is "Why?" An explanation is in order. Instead we are left guessing and the result is further confusion in the already confusing law of self-incrimination.

VI. ADMITTING THE EXPERT OPINION EVIDENCE

The second ground of appeal alleged that the trial judge erred in allowing the expert's opinion to go to the jury on the "mutant" sample without proof of the international standards that gave rise to that opinion. Justice Berger in the Alberta Court of Appeal found that no weight should have been given to the expert's opinion because of the lack of proof as to the reliability of the international guidelines.[50]

---

43 [1990] 2 S.C.R. 151.
44 [1999] 2 S.C.R. 417 [*White*].
45 See *R. v. Beare*, [1988] 2 S.C.R. 387.
46 See *R. v. Thompson* (2001), 52 O.R. (3d) 779 (C.A.).
47 *Supra* note 1 at paras. 57-61.
48 *Supra* note 44.
49 *S.A.B.*, *supra* note 1 at para. 35.
50 *S.A.B.* (C.A.), *supra* note 28 at para. 131.

This issue centres on the permissible use of hearsay evidence by experts. Experts base their opinions on all matter of hearsay evidence. For example, take an opinion provided by a medical doctor; doctors first learn about the human body through reading textbooks and they are expected to keep abreast of new developments through learned journal articles or by attending symposiums where other experts share information. Their actual diagnosis in a particular case may be based on information supplied by others. Laboratory results, pulse rates, blood pressure and x-ray findings may all be made by others, but relied upon by the doctor. Lastly, doctors rely upon what they are told by their patients.

Justice Sopinka, in a short concurring judgment in *R. v. Lavallee*, noted that there is an important distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise and evidence from a party to the litigation.[51] In the doctor example above, Sopinka J. would conclude:

> A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this court has taken to the analysis of hearsay evidence in general.[52]

There is in other words "reliable" and "unreliable" hearsay. It would be absurd, and a complete waste of valuable court time, to require the actual proof of all matter of hearsay evidence relied upon by a given expert. The expert, quite correctly, can be cross-examined on the authorities relied upon and if such evidence is usually relied upon by the expert in giving the opinion. It is a different matter with respect to "unreliable" hearsay. The self-serving statements of an accused or party to an action are of concern. This basis for the expert's opinion cannot be challenged or tested unless properly proved. For example, in an impaired driving case an expert in alcohol toxicology is of the opinion that the accused probably was not impaired at the time of driving. This opinion is based on the accused saying that he had only two drinks in the hour before driving. The basis of the expert's opinion is suspect and without foundation unless the accused comes forward with some evidence to support the two drink scenario.

In *S.A.B.* the defence sought to challenge "reliable" hearsay. The DNA expert was giving an opinion based upon international guidelines — hearsay to be sure — but presumably reliable hearsay. It was open to the defence to challenge those guidelines and cross-examine the expert on them. For example, that was done in *R. v. Olscamp* to devastating effect.[53] The fact that the testing of the evidence could have been better does not necessarily weaken the expert's opinion or render it of no value. As Arbour J. found: "Absent such a challenge, the

---

[51] [1990] 1 S.C.R. 852 at 898.

[52] *Ibid.*

[53] (1994), 95 C.C.C. (3d) 466 (Ont. Gen. Div.). This case concerned diagnosis of sexual abuse and the fact that there was no accepted profile from which to make an accurate diagnosis.

expert was entitled to refer to the sources within her field of expertise to explain and support her conclusions."[54]

VII. CONCLUSION

S.A.B. is a helpful reminder of the importance of context. In both of the grounds of appeal the defence arguments were to a certain extent misplaced because the law upon which they relied was taken out of context. In particular, the principle against self-incrimination must be applied respecting the type of evidence involved. There is an important distinction between "testimonial" and "non-testimonial" evidence; they ought not to be treated the same. Similarly, in terms of expert testimony, there is reliable and unreliable hearsay; they too ought not to be treated the same.

[54] *S.A.B.*, *supra* note 1 at para. 63; see also: *R. v. Worrall*, 2004 CarswellOnt 669 (S.C.J.) (eC), where Watt J. ruled that there was no need to call the technicians who took the samples relied upon by the toxicologists and pathologists who testified; *R. v. Paul* (2002), 62 O.R. (3d) 617 (C.A.), where the Court found that it was improper for an expert to testify that his opinion was confirmed by fellow experts; *R. v. Skrzydlewski* (1995), 103 C.C.C. (3d) 467 (Ont. C.A.), where the Court found there was no need for a caution when an expert relies on hospital records in giving an opinion.