

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Saeed, 2016 SCC 24, [2016] 1 S.C.R. 518 | **Appeal heard:** December 1, 2015  **Judgment rendered:** June 23, 2016  **Docket:** 36328 |

Between:

Ali Hassan Saeed

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario,

Canadian Association of Chiefs of Police and

Criminal Lawyers’ Association (Ontario)

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 91)  **Reasons Concurring in the Result:**  (paras. 92 to 130)  **Dissenting Reasons:**  (paras. 131 to 168) | Moldaver J. (McLachlin C.J. and Cromwell, Wagner, Gascon, Côté and Brown JJ. concurring)  Karakatsanis J.  Abella J. |

R. *v.* Saeed, 2016 SCC 24, [2016] 1 S.C.R. 518

Ali Hassan Saeed Appellant

v.

Her Majesty The Queen Respondent

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Attorney General of Ontario,

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**Indexed as: R. *v.*** Saeed

2016 SCC 24

File No.: 36328.

2015: December 1; 2016: June 23.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for alberta

*Constitutional law — Charter of Rights — Search and seizure — Search incident to arrest — Accused arrested in connection with sexual assault — Police have reasonable grounds to believe complainant’s DNA is present on accused’s penis — Police seek penile swab from accused — Accused complies in privacy of police cell — Police do not attempt to obtain warrant — Complainant’s DNA detected on swab and introduced as evidence at trial — Whether common law power of search incident to arrest authorizes penile swabs — Whether swab was unreasonable and contrary to accused’s right to be secure against unreasonable search or seizure — If so, whether evidence discovered in search should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).*

Around 4:00 a.m. on May 22, 2011, the complainant was viciously attacked and sexually assaulted. At 6:05 a.m., the accused was arrested and was advised of his right to counsel. He was mistakenly released and re‑arrested at 8:35 a.m. Based on the complainant’s allegations, the supervising police officer felt that there were reasonable grounds to believe the complainant’s DNA would still be found on the accused’s penis and a penile swab should be taken. The penile swab could not be taken immediately. Around 9:30 a.m., the accused was handcuffed to a wall in a cell with no toilet or running water to preserve the evidence. He spent about 30 to 40 minutes handcuffed in the dry cell. The supervising officer did not seek a warrant for the swab, because in his view, the swab was a valid search incident to arrest. The swab took place at around 10:45 a.m. before two male officers who blocked the cell’s window with their bodies. The police permitted the accused to conduct the swab. The accused pulled his pants down and wiped a cotton‑tipped swab along the length of his penis and around the head. The swab was tested and revealed the complainant’s DNA.

At trial, the central issue was the identity of the complainant’s assailant. The accused challenged the admissibility of the evidence of the complainant’s DNA obtained from the penile swab. The trial judge ruled that the penile swab violated the accused’s s. 8 *Charter* right to be free from unreasonable search and seizure. However, she admitted the DNA evidence under s. 24(2) of the *Charter* and relied on it to convict the accused of sexual assault causing bodily harm and unlawful touching for a sexual purpose. The Court of Appeal dismissed the accused’s appeal. The majority held that taking the swab violated s. 8 of the *Charter* but the evidence was admissible under s. 24(2). McDonald J.A., concurring in the result, held that s. 8 was not violated.

*Held* (Abella J. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon, Côté and Brown JJ.: The accused’s s. 8 *Charter* rights were not breached and the evidence of the complainant’s DNA obtained from the swabbing was properly admitted.

To be reasonable and therefore consistent with s. 8 of the *Charter*: (1) a search must be authorized by law; (2) the authorizing law must be reasonable; and (3) the search must be conducted reasonably. Determining whether the common law power of search incident to arrest may reasonably authorize a penile swab involves striking a proper balance between an accused’s privacy interests and valid law enforcement objectives. In some cases, an accused’s privacy interests will be so high as to be almost inviolable. In those cases, the common law power of search incident to arrest must yield, and a search will be allowed only where the accused consents, or a warrant is obtained, or perhaps in exigent circumstances. In others, while the accused’s privacy interests may be significant, they will not be so significant as to preclude the power of the police to search incident to arrest. In these cases, the existing general framework of the common law power of search incident to arrest must instead be tailored to ensure the search will be *Charter*‑compliant. This case falls into the second category.

A penile swab does not fall within the scope of *R. v. Stillman*, [1997] 1 S.C.R. 607. First, a penile swab is not designed to seize the accused’s own bodily materials but rather, the complainant’s. Accused persons do not have a significant privacy interest in a complainant’s DNA. Second, a penile swab is in some ways less invasive than taking dental impressions and the forcible taking of parts of a person. Third, unlike with the accused’s bodily materials or impressions, evidence of the complainant’s DNA degrades over time. In sum, a penile swab implicates different privacy interests and law enforcement objectives than seizures of an accused’s bodily samples and impressions.

The common law power of search incident to arrest must be delineated in a way that is consistent with s. 8 of the *Charter*. There can be no doubt that requiring a penile swab is an intrusion on an accused’s privacy. A penile swab has the potential to be a humiliating, degrading and traumatic experience. On the other side of the ledger, it can serve important law enforcement objectives. It can enable the police to preserve important evidence that runs the risk of degrading or being destroyed. Sexual assaults are notoriously difficult to prove and this type of evidence is highly reliable. A penile swab can be crucial in the case of complainants who are unable to testify. The privacy interests at issue are similar to those implicated in strip searches and they can be protected by a similar approach. As with strip searches, the common law must provide a means of preventing unjustified searches before they occur and a means of ensuring that when these searches do occur, they are conducted in a reasonable manner. The reasonable grounds standard and guidelines regarding the manner of taking the swab provide these two protections. These two modifications to the common law power of search incident to arrest ensure that it is *Charter*‑compliant.

The police may take a penile swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested. The reasonable grounds standard will prevent unjustified searches before they occur and will hold the police to a higher level of justification before they can take a penile swab. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed. The potential for destruction or degradation of the complainant’s DNA will always be a concern in this context.

The swab must also be conducted in a reasonable manner. The following factors will guide police in conducting penile swabs incident to arrest reasonably. A swab should, as a general rule, be conducted at the police station. It should be conducted in a manner that ensures the health and safety of all involved. It should be authorized by a police officer acting in a supervisory capacity. The accused should be informed shortly before the swab of the nature of the procedure, its purpose and the authority of the police to require the swab. The accused should be given the option of removing his clothing and taking the swab himself or the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary. The officers carrying out the swab should be of the same gender as the accused unless the circumstances compel otherwise. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances. The swab should be carried out in a private area. It should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time. A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.

In light of these requirements, the penile swab in this case did not violate the accused’s rights under s. 8 of the *Charter*. The accused was validly arrested. The swab was performed to preserve evidence of the sexual assault. The police had reasonable grounds to believe that the complainant’s DNA had transferred to the accused’s penis during the assault and that it would still be found on his penis. The swab was performed in a reasonable manner. The police officers were sensitive to the need to preserve the accused’s privacy and dignity. The accused was informed in advance of the procedure for taking the swab and its purpose. The swab itself was conducted quickly, smoothly, and privately. The swab took at most two minutes. The accused took the swab himself. There was no physical contact between the officers and the accused. The officers took detailed notes regarding the reasons for and the process of taking the swab. The swab did not fundamentally violate the accused’s human dignity.

*Per* Karakatsanis J.: How we treat those suspected of serious criminal offences says a great deal about the values of our free and democratic society. Given the profound impact that a genital swab can have on an individual’s privacy and human dignity, the common law power of search incident to arrest does not authorize the police to take genital swabs. Since the penile swab taken from the accused was not authorized by law, it was unreasonable and in violation of s. 8 of the *Charter*. However, in the exceptional circumstances of this case, the evidence obtained in breach of the *Charter* was nonetheless admissible under s. 24(2) of the *Charter*.

Section 8 of the *Charter* balances an individual’s interest in privacy with the state’s interest in investigating and prosecuting crime. The common law power to search an individual incident to arrest must evolve in a way that is consistent with *Charter* principles. Some kinds of searches fall outside the scope of the common law power because they do not reflect a reasonable balance between the individual’s interest in preserving dignity and privacy and the state’s interest in investigating crime.

The principles animating *R. v. Stillman*, [1997] 1 S.C.R. 607, suggest that it would not be a reasonable balancing of the competing individual and state interests for the common law to authorize genital swabs. A swab of the genital area is far more damaging to personal dignity and privacy than a swab of the inside of the mouth or a pluck of hair from the head. Genital swabs are substantially more invasive and dehumanizing. One cannot be taken without exposing, touching and manipulating the genitals, the most private area of the body, in the presence of others. It is difficult to conceive of a more personal or private interest in our bodies. Moreover, although the purpose of a genital swab may be to search for residue deposited on the individual’s genitals, an effect of the seizure is to put the individual’s DNA in the hands of the state, available for undetermined potential future use.

Turning to society’s interests in effective law enforcement, genital swabs can advance compelling state interests. Sexual assault is a very serious offence. It is notoriously difficult to prove. A search for the victim’s DNA on the genitals of the arrested person can yield highly probative physical evidence. However, the state interests are no more compelling here than they were in *Stillman*. Further, as in *Stillman*, it is not clear in this case whether there is any other lawful means to conduct genital swabs. Without finally deciding the issue, there is no warrant obviously available for genital swabs. If no warrant is available, then it simply does not follow that the common law can advance state interests by allowing the police to take a genital swab before the sample degrades in the time it would take to obtain a warrant. Finally, the troubling compromise of an individual’s dignity during detention in a dry cell cannot be used to justify the greater affront to dignity that a genital swab would represent. One indignity cannot justify another.

Balancing the competing individual and state interests, it is not reasonable to permit the police to take warrantless genital swabs under the common law power of search incident to arrest.

Recognizing that the traditional safeguards for the common law power are insufficient to protect the enhanced privacy interests at stake with genital swabs, the majority proposes a heightened threshold test for this specific search incident to arrest: the police must also have reasonable grounds to believe the genital swab will reveal and preserve evidence of an offence. Additional requirements for particular types of searches incident to arrest should be avoided. A specific threshold test is much less effective in safeguarding privacy than judicial pre‑authorization. Moreover, defining the threshold requirements is a nuanced exercise which may be best left to Parliament.

In the exceptional circumstances of this case, the trial judge’s decision to admit the evidence should be upheld. In considering the seriousness of the *Charter*‑infringing state conduct, the trial judge found that the officer who directed the swab did not appropriately consider the accused’s *Charter* rights and the ambit of the police’s power of search incident to arrest, but that there was no actual bad faith on the part of the police. Where the police act on a mistaken understanding of the law where the law is unsettled, their *Charter*‑infringing conduct is less serious. The impact of the breach on the *Charter‑*protected interests of the accused was obviously serious, and weighs against admitting the evidence. There is no doubt that this was a very intrusive search that engaged the core of the accused’s bodily privacy. Finally, society’s interest in the adjudication of the case on its merits weighs in favour of admission. The DNA evidence was reliable and probative. The evidence was very important in the Crown’s case. The assault was particularly heinous and society has a keen interest in the adjudication of this case on its merits. Having regard to all the circumstances, on balance, the trial judge was justified in concluding that the admission of the evidence would not bring the administration of justice into disrepute.

*Per* Abella J. (dissenting): The evidence should be excluded.

In determining whether evidence should be excluded under s. 24(2) of the *Charter*, three factors are to be balanced under *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353: the seriousness of the *Charter*‑infringing state conduct; the impact of the breach on *Charter*‑protected interests of the accused; and the societal interest in adjudication on the merits. No factor is determinative or absolute.

The first factor engages its own continuum. The key is not so much whether the conduct fits within a compartment called “good faith” or “bad faith”, but whether the police reasonably believed they were respecting the *Charter*. As a police officer’s disregard of *Charter* requirements becomes more deliberate or flagrant, his or her conduct approaches the “bad faith” end of the spectrum. The police did not make any inquiry to determine whether a swabwould be probative. The accused had ample opportunity to wash away the evidence and it would have been impossible for the police to know whether the best source of DNA evidence was a genital swab. The police nonetheless chose the most invasive option. Restrictions on obtaining bodily samples as part of a search incident to arrest werealreadyarticulated by this Courtand the police must be taken to have been aware of them. The police are required to get prior judicial authorization yet there was no explanation for why they took no steps towards obtaining either a general warrant or a telewarrant. There were no exigent circumstances. The only testimony demonstrating any concern about the need to preserve evidence was a vague statement by one officer. Most significantly, it is by no means clear that a warrant was even legally available. There is no statutory authority for a warrant in these circumstances. The police officers failed to establish reasonable and probable grounds that the evidence sought would still be present on the accused’s genitals. They handcuffed him to a pipe against a wall and deprived him of access to water or bathroom facilities. He was instructed to expose the most private part of his body and swab it in front of two uniformed police officers. All of this occurred without consent and without prior judicial authorization. These circumstances fall at the opposite end of the “good faith” continuum.

The next *Grant* question is the impact of the breach on the *Charter*‑protected interests of the accused. This Court has found that the taking of hair, buccal and dental samples is the ultimate invasion of an individual’s privacy and that strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out. The impact of the genital swab on the accused’s *Charter*‑protected interests was therefore as profound as one can imagine. The invasion of dignity and bodily integrity does not depend on whether it is penetrative, painful or uncomfortable. A genital swabdoes not just require the individual to expose his or her genitals to state scrutiny, it asks that individual to violate his or her own bodily integrity by collecting potentially self‑incriminatory evidence from the most private area of his or her body.

The third *Grant* factor is society’s interest in an adjudication on the merits. This factor is nuanced and multi‑faceted. What is weighed is the seriousness of the offence, the reliability of the evidence and its importance to the Crown’s case. The seriousness of the offence can point both towards inclusion and exclusion of the evidence. What is of utmost importance is the long‑term reputation of the justice system — the public has a vital interest in a justice system that is beyond reproach.

The reputation of the justice system weighs against admission of the evidence. The law is clear that judicial authorization is required to conduct invasive searches with a view to obtaining bodily samples. The police officers’ unjustified and unexplained avoidance of this requirement weighs against admissibility. So does their disregard for the likelihood that a warrant was not even available. The deliberate failure to consider a warrant in the absence of exigent circumstances is, at its best, careless; ignoring the legal possibility that under Canadian law the police were not even entitled to take a penile swab, is fatal.

**Cases Cited**

By Moldaver J.

**Distinguished:** *R. v. Stillman*, [1997] 1 S.C.R. 607; **referred to:** *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Monney*, [1999] 1 S.C.R. 652; *R. v. Legere* (1988), 89 N.B.R. (2d) 361; *R. v. Laporte*, 2016 MBCA 36, [2016] M.J. No. 104 (QL); *R. v. Parchment*, 2015 BCCA 417, 378 B.C.A.C. 146; *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1; *R. v. Smyth*, [2006] O.J. No. 5527 (QL); *R. v. H. (T.G.)*, 2014 ONCA 460, 120 O.R. (3d) 581; *R. v. H.‑G.*, 2005 QCCA 1160.

By Karakatsanis J.

**Discussed:** *R. v. Stillman*, [1997] 1 S.C.R. 607; **referred to:** *R. v. Caslake*, [1998] 1 S.C.R. 51; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Laporte*, 2012 MBQB 227, 283 Man. R. (2d) 9; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657.

By Abella J. (dissenting)

*R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Chuhaniuk*, 2010 BCCA 403, 292 B.C.A.C. 89; *R. v. Washington*, 2007 BCCA 540, 248 B.C.A.C. 65; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Dhillon*, 2012 BCCA 254, 93 C.R. (6th) 260; *R. v. Voong*, 2013 BCCA 527, 347 B.C.A.C. 278; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215.

**Statutes and Regulations Cited**

*Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*, S.C. 1995, c. 27, s. 1.

*Canadian Charter of Rights and Freedoms*, ss. 8, 10(*b*), 24(2).

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 151, 272(1)(c), 487.01, 487.05, 487.06(1).

*Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, ss. 62(1), (10), 63, 65.

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Madden, Mike. “Marshalling the Data: An Empirical Analysis of Canada’s Section 24(2) Case Law in the Wake of *R. v. Grant*” (2011), 15 *Can. Crim. L.R.* 229.

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Paciocco, David M. “Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning” (2011), 58 *C.L.Q.* 15.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.

Stewart, Hamish. “Section 24(2): Before and After *Grant*” (2011), 15 *Can. Crim. L.R.* 253.

APPEAL from a judgment of the Alberta Court of Appeal (Watson, McDonald and Bielby JJ.A.), 2014 ABCA 238, 5 Alta. L.R. (6th) 219, 315 C.C.C. (3d) 127, 314 C.R.R. (2d) 338, [2014] 12 W.W.R. 291, [2014] A.J. No. 739 (QL), 2014 CarswellAlta 1181 (WL Can.), affirming the accused’s convictions for sexual assault causing bodily harm and sexual interference. Appeal dismissed, Abella J. dissenting.

Peter J. Royal, Q.C., and Conor Davis, for the appellant.

Maureen J. McGuire and Melanie Hayes‑Richards, for the respondent.

Melissa Adams and Susan Magotiaux, for the intervener the Attorney General of Ontario.

David Lynass and Greg Preston, for the intervener the Canadian Association of Chiefs of Police.

Howard L. Krongold and Vanessa MacDonnell, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon, Côté and Brown JJ. was delivered by

Moldaver J. —

1. Introduction
2. The common law power of search incident to arrest is an ancient and venerable power. For centuries, it has proved to be an invaluable tool in the hands of the police. Perhaps more than any other search power, it is used by the police on a daily basis to detect, prevent, and solve crimes. This case is no exception. By the same token, it is an extraordinary power. Searches incident to arrest are performed without prior judicial authorization, and they inevitably intrude on an individual’s privacy interests. That, too, is the case here.
3. The appellant, Ali Hassan Saeed, was convicted of sexual assault causing bodily harm and unlawful touching for a sexual purpose. At his trial, the Crown introduced evidence showing that the complainant’s DNA was found on Mr. Saeed’s penis within several hours of the assault. Police obtained this evidence through a warrantless penile swab, conducted at the police station following Mr. Saeed’s arrest.
4. Mr. Saeed objected to the admission of this evidence. He argued in the courts below, and now before us, that his right to be secure against unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* was violated because the police performed the penile swab without his consent or a warrant.
5. At issue, once again, is the scope of the common law power of the police to search incident to arrest. Courts have examined and re-examined this power as new investigative methods and types of evidence have presented themselves. But no matter the context, to be constitutional, searches incident to arrest must be reasonable.
6. Reasonableness in this context involves striking a proper balance between an accused’s privacy interests and valid law enforcement objectives. In some cases, an accused’s privacy interests will be so high as to be almost inviolable. In those cases, the common law power of search incident to arrest must yield, and a search will be allowed only where the accused consents, or a warrant is obtained, or perhaps in exigent circumstances. In others, while the accused’s privacy interests may be significant, they will not be so significant as to preclude the power of the police to search incident to arrest. In these cases, the existing general framework of the common law power of search incident to arrest must instead be tailored to ensure the search will be *Charter*-compliant.
7. For reasons that follow, I am of the view that this case falls into the second category. To be precise, I am satisfied that while a penile swab constitutes a significant intrusion on the privacy interests of the accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner.
8. Applying those requirements to this case, I conclude that the police had reasonable grounds to conduct the swab and that in carrying it out, they took reasonable steps to respect Mr. Saeed’s privacy. It follows that Mr. Saeed’s s. 8 *Charter* rights were not breached, and that the evidence of the complainant’s DNA obtained from the swabbing was properly admitted. Accordingly, I would dismiss the appeal.
9. Facts
10. In the early morning hours of May 22, 2011, the complainant, age 15, and her friend S, age 14, attended a small party at an apartment building in the city of Edmonton. Another of the complainant’s friends, a man called Skip, joined them. There were three men at the party other than Skip. One was introduced as Ali.
11. The complainant and S drank alcohol at the party. At some point, the complainant became tired. She was very intoxicated. S and Skip helped her to a bedroom to sleep. Around 4:00 a.m., the complainant awoke and discovered that S and Skip had left the apartment. She then went outside to find S.  When she reached the front yard of the building, she was viciously attacked, in full public view, by a man who pushed her to the ground, hit her multiple times, tore her clothes, called her names, and proceeded to sexually assault her.
12. In the meantime, S and Skip returned to the apartment and found that the complainant — and Ali — were gone. S went outside to look for her friend and heard the complainant screaming. She saw her friend on the ground outside of the apartment with a man on top of her. The man’s pants were pulled down and he had a knife in his hand. S recognized the man as Ali. She yelled for Skip to separate them. Skip pulled the man off the complainant.
13. Skip drove the complainant and S to the group home where they both lived. The police were called and they arrived at the home around 5:00 a.m.
14. The complainant was taken to the hospital. She had bruises, cuts, and scrapes all over her body, including her face. The examining nurse, who had special training with respect to sexual assault cases, noted tenderness in the complainant’s outer vagina but no other injuries in the genital area.
15. Constable Mitchell took S back to the apartment building to investigate. They arrived at around 5:44 a.m. S directed Constable Mitchell to the apartment where she and the others had been partying, and told him that the assailant’s name was Ali.
16. Constable Mitchell knocked on the apartment door. Mr. Saeed answered. When asked his name, he said it was Ali. Constable Mitchell arrested Mr. Saeed immediately and advised him of his right to counsel under s. 10(*b*) of the *Charter*. It was 6:05 a.m.
17. Mr. Saeed was taken to the police station but mistakenly released sometime between 7:00 a.m. and 7:30 a.m. Constable Mitchell was still at the scene when an officer brought Mr. Saeed back to the apartment. Constable Mitchell re-arrested Mr. Saeed at 8:35 a.m. He once again advised Mr. Saeed of his s. 10(*b*) rights.
18. Constable Mitchell returned to the police station with Mr. Saeed. They arrived at 8:50 a.m. Mr. Saeed was immediately permitted to speak to a lawyer. He took up the opportunity and finished the call at around 9:20 a.m.
19. At some point that morning, the complainant disclosed to investigating officers that the sexual assault had involved penile penetration. This information was relayed to Detective Fermaniuk, who had a supervising role in the investigation. Based on this information and the proximity in time of the assault to the arrest, Detective Fermaniuk felt that there were reasonable grounds to believe the complainant’s DNA would be found on Mr. Saeed’s penis. Accordingly, he determined that a penile swab should be taken from Mr. Saeed to preserve this evidence.
20. The penile swab could not be taken immediately after Mr. Saeed finished speaking to counsel because Constable Craddock, the officer responsible for collecting physical evidence, was not at the station. She was completing an interview with the complainant and photographing her injuries. In anticipation that a swab would be taken, at around 9:30 a.m., after Mr. Saeed had finished speaking to counsel, Detective Fermaniuk directed Constable Mitchell to place him in a dry cell, with no toilet or running water, to preserve the evidence. Mr. Saeed was handcuffed to the wall to prevent him from licking his hands or otherwise washing away evidence. Mr. Saeed was fully clothed.
21. In his time on the force, Detective Fermaniuk had not personally been involved in taking a penile swab. He testified that he considered getting a warrant for the swab, but he did not follow up on this because in his view, the proposed swab was a valid search incident to arrest. He also testified that taking a swab was more respectful of Mr. Saeed, as applying for a warrant would have resulted in Mr. Saeed being handcuffed to a wall for several hours while the warrant was obtained. He did not consider getting a telewarrant.
22. Constable Craddock returned to the station at around 10:00 a.m. Detective Fermaniuk requested a penile swab be performed, and Constable Craddock agreed that a swab was appropriate based on the allegation of penetration. Seizing DNA evidence such as a penile swab would ordinarily have been part of Constable Craddock’s job. However, in view of her gender, Detective Fermaniuk directed Constable Mitchell to perform the penile swab. Constable Craddock explained the procedure to Constable Mitchell.
23. Mr. Saeed spent about 30 to 40 minutes in total handcuffed in the dry cell. At around 10:10 a.m., he was escorted from the cell to speak with an interpreter. Acting Detective Kachkowski informed Mr. Saeed of the possibility that the police might take DNA swabs from him and arranged for a phone call with the interpreter. During the call, Acting Detective Kachkowski repeated to Mr. Saeed the reason for his arrest and once again advised him of his s. 10(*b*) rights. Mr. Saeed indicated that he had already spoken to a lawyer, and that he understood that he was not required to make any statements.
24. The call with the interpreter was used to prepare Mr. Saeed for the process of taking the swab. Constable Craddock explained the process of obtaining a swab to the interpreter, and had the interpreter repeat the process back to her to make sure that the interpreter understood. Mr. Saeed then spoke directly to the interpreter about the swabbing process. The interpreter informed Mr. Saeed how the swab would be taken, and that he could choose either to take the swab himself, or to have a male officer take it for him.
25. Following the call with the interpreter, Mr. Saeed was escorted back to the dry cell, where Constable Craddock took pictures of him fully clothed. Several scratches on his face were apparent. She left the room.
26. The swab took place at around 10:45 a.m. Constable Mitchell, Detective Fermaniuk, and Mr. Saeed were the only persons in the cell at the time. The cell had a small window, located towards the top of the door. During the swabbing process, the officers blocked the window with their bodies so that no one could look into the room. Constable Craddock stood outside the closed door.
27. The procedure took at most two minutes. Mr. Saeed was fully clothed, but pulled his pants down in order to take the swab. Constable Mitchell handed Mr. Saeed a swab with a cotton tip and a four to five inch-long handle. Under Constable Mitchell’s direction, Mr. Saeed wiped the cotton tip of the swab along the length of his penis and around the head before returning the swab to Constable Mitchell. The swab came into contact only with the skin on the outside of Mr. Saeed’s body. Mr. Saeed then pulled up his pants. Constable Mitchell returned the swab to Constable Craddock, who sealed it in order to preserve the evidence.
28. The swab was tested. It revealed the complainant’s DNA on Mr. Saeed’s penis.
29. At trial, the central issue was the identity of the complainant’s assailant. The main evidence implicating Mr. Saeed came from the testimony of the complainant and S, and the DNA evidence from the penile swab. The complainant testified to the assault, but in cross-examination, she recanted her identification of Mr. Saeed. S maintained her identification of Mr. Saeed, but her identification was far from ironclad. She was intoxicated when she witnessed the sexual assault, did not know Mr. Saeed well, and identified him for the first time to police only when she saw Constable Mitchell leading him from the apartment building.
30. As indicated, Mr. Saeed challenged the admissibility of the evidence of the complainant’s DNA obtained from the penile swab. The Crown called Kenneth Hunter, a forensic specialist, to provide expert opinion evidence. Mr. Hunter testified that he would expect to find the complainant’s vaginal DNA on the accused’s penis for a period of time after a sexual assault involving penile penetration, if no condom was used. He further stated that urination by the accused, humidity, warmth, sweat, and the natural bacteria present on the accused’s skin could all cause this type of DNA evidence to degrade. An accused could also wash off or wipe away the DNA evidence.
31. Mr. Hunter could not state definitively the time frame within which a swab must be taken, due to the many factors that affect how long a complainant’s DNA will remain on the accused’s penis — including whether the accused chooses to destroy the evidence. Mr. Hunter referred to a study on DNA transfer conducted on consenting couples who were not permitted to wipe or wash after intercourse. The study found that DNA degradation began five hours after intercourse for some couples, but for others, degradation did not begin until twenty-four hours after intercourse. However, because of the likelihood that an accused will urinate, wash, or wipe away the evidence, Mr. Hunter testified that a swab should be taken as soon as possible. Mr. Saeed did not give evidence on the s. 8 application.
32. Decisions Below
    1. Alberta Court of Queen’s Bench — Sulyma J.
33. The trial judge ruled that the penile swab violated Mr. Saeed’s s. 8 *Charter* right to be free from unreasonable search and seizure. She concluded that exigent circumstances are required to justify conducting a warrantless penile swab. Exigent circumstances — namely, the imminent loss of evidence — did not exist in this case. However, the trial judge noted that based on the factors governing the reasonableness of strip searches set out in *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, the police conducted the swab in a reasonable manner.
34. The trial judge admitted the evidence from the penile swab under s. 24(2) of the *Charter*, having regard to the factors set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. She found that there was no bad faith on the part of the police.
35. Mr. Saeed did not testify at trial. On the evidence before her, the trial judge convicted him of sexual assault causing bodily harm under s. 272(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, and unlawful touching for a sexual purpose under s. 151 of the *Criminal Code*. In convicting Mr. Saeed, the trial judge relied on S’s identification and the DNA evidence. Mr. Saeed appealed his convictions.
    1. Alberta Court of Appeal, 2014 ABCA 238, 5 Alta. L.R. (6th) 219 — Watson, McDonald and Bielby JJ.A.
36. The Alberta Court of Appeal unanimously dismissed the appeal. The court divided on whether the taking of the swab violated Mr. Saeed’s s. 8 rights, but agreed that the DNA evidence was properly admitted at trial.
37. For the majority, Watson and Bielby JJ.A. held that taking the swab violated Mr. Saeed’s rights under s. 8. In their view, the seizure of bodily material that may infringe upon a person’s dignity was governed by this Court’s decision in *R. v. Stillman*, [1997] 1 S.C.R. 607. And because a penile swab infringes on a person’s dignity, absent Mr. Saeed’s consent, the police were required under *Stillman* to obtain a warrant for the swab. There were no exigent circumstances in this case that would justify bypassing the warrant requirement.
38. Justice McDonald, concurring in the result, held that Mr. Saeed’s s. 8 rights were not violated because the swab was a valid search incident to arrest. He distinguished *Stillman*, holding that it applies only to samples of an accused’s own bodily substances. In his view, the search here was effectively a strip search and was therefore governed by the requirements in *Golden*. The police met these requirements.
39. Analysis
40. To be reasonable and therefore consistent with s. 8 of the *Charter*, a search must meet three requirements: (1) the search must be authorized by law; (2) the authorizing law must be reasonable; and (3) the search must be conducted reasonably (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10). The Crown relies on the common law power of search incident to arrest as the authorizing law.
41. The existing general framework for a valid search incident to arrest purports to authorize a broad range of searches. It requires only that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 27).
42. Despite this broadly framed power, in some contexts, the accused’s privacy interests are so high that the police are precluded from relying on the power of search incident to arrest, because if the common law authorized such a search, it would not be reasonable and therefore not consistent with the *Charter*. In others, while the police may rely on the power of search incident to arrest, the power must be tailored to ensure that the accused’s heightened privacy interests receive adequate protection. In other words, in these contexts, the common law power of search incident to arrest must be modified to permit only reasonable searches — that is, searches that are *Charter*-compliant.
43. Although Mr. Saeed has challenged the manner in which this search was conducted, the main issue on this appeal is whether the police were entitled to rely on the common law power of search incident to arrest to take the penile swab, given the particular privacy interests at stake here. There is no real dispute that the police met the existing requirements of the general framework for a search incident to arrest. Mr. Saeed was validly arrested and the police had a legitimate law enforcement purpose related to his arrest for performing the search.
44. The Crown submits that the police were entitled to rely on the common law power of search incident to arrest, with some modifications, to take the penile swab. The Crown points to this Court’s decision in *Golden*. In *Golden*, this Court modified the common law power of search incident to arrest in respect of strip searches, to ensure it conformed to the *Charter*. Specifically, *Golden* stated that the police must have reasonable grounds to believe the strip search is necessary in the particular circumstances and follow certain restrictive guidelines in carrying out the search (paras. 98-99 and 101). The Crown maintains that similar modifications for penile swabs will bring the existing general common law framework in line with the *Charter*.
45. Mr. Saeed accepts the law as set out in *Golden*, but submits that it does not apply here. He says that the question of whether the police were entitled to rely on the common law power of search incident to arrest can instead be resolved by a straightforward application of this Court’s decision in *Stillman*. In that case, the Court held that the common law power of search incident to arrest cannot reasonably authorize the police to seize the accused’s bodily samples and certain impressions, such as dental impressions. Instead, the police must have either consent or a warrant. Mr. Saeed says that a penile swab is a seizure of a bodily sample, and therefore, as the police had neither his consent nor a warrant, they were not entitled to take the swab.
46. With respect, I disagree with Mr. Saeed’s submission. In particular, I reject his argument that this case can be decided on a straightforward application of *Stillman*. But that is not the end of the matter. An accused’s privacy interests are invariably implicated by a penile swab. While I would reject Mr. Saeed’s argument that the privacy interests are so high as to require the police to obtain either consent or a warrant, I agree that the common law power of search incident to arrest must be tailored to protect the enhanced privacy interests involved. In my view, the police may take a penile swab incident to arrest if they have reasonable grounds to believe the swab will reveal and preserve evidence of the offence, and if the search is carried out in accordance with guidelines that are designed to respect the accused’s privacy interests and interfere with them as little as possible.
    1. Stillman Does Not Apply
47. As indicated, Mr. Saeed submits that a penile swab falls within the scope of *Stillman*. I disagree.
48. Three factors played a significant role in the Court’s decision in *Stillman* that the police must have consent or a warrant to seize the accused’s bodily samples and certain impressions. First, seizing samples of *the accused’s own body* to obtain information about him without his consent intrudes on an accused’s privacy and dignity in a very significant way (*Stillman*, at para. 42, quoting with approval *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). Second, forcefully removing the accused’s hair and taking his dental impressions — a two-hour long procedure which involved inserting instruments and substances into the accused’s mouth — was highly intrusive (*Stillman*, at paras. 44 and 46). Third, the accused’s DNA or bodily impressions do not change, degrade, or disappear over time (*Stillman*, at para. 49). In other words, the accused has a significant privacy interest in his own bodily samples, the methods for taking these samples and impressions are invasive, and there is no reason the police need to rush to seize this evidence.
49. The same cannot be said of a penile swab. First, a penile swab is not designed to seize the accused’s own bodily materials but rather, the complainant’s. The privacy interest accused persons have in their own samples and impressions stems, in part, from the fact that these samples and impressions are part of their bodies and can reveal personal information about them. The complainant’s DNA is not part of the accused’s body, and does not reveal anything about him.
50. In *R. v. Monney*, [1999] 1 S.C.R. 652, this was the very reason upon which the Court distinguished *Stillman*. In that case, the Court considered the power of customs officers to conduct a “bedpan vigil” and seize drugs from an accused’s expelled faecal matter. Justice Iacobucci, writing for the Court, concluded that the accused’s privacy interest in his own bodily fluids did not extend to the drugs contained in his bodily waste, as the drugs sought were not “bodily samples containing personal information relating to the [accused]” (para. 44; see also para. 45).
51. The same principle applies here. The evidence sought is not personal information relating to the accused. Accordingly, accused persons do not have a significant privacy interest in the complainant’s DNA, any more than they have a significant privacy interest in drugs that have passed through their digestive system.
52. That said, I accept as a practical reality that swabs are likely to contain bodily substances of the accused from which his DNA could be obtained. But the fact that the evidence sought is the complainant’s DNA, and not information about the accused, changes the context. Unlike the situation in *Stillman*, taking a penile swab raises only a risk that an accused’s privacy interest in the information contained in his bodily substances will be intruded upon. And, as I shall explain, this risk is manageable. Put simply, if an accused’s DNA is obtained through a penile swab and the swab was taken without a warrant authorizing such seizure, or the accused’s consent, the accused’s DNA cannot be used for any purpose.
53. Second, a penile swab is in some ways less invasive than a two-hour long process for taking dental impressions and forcefully removing hair from an accused’s body. As a general rule, it will be quick and painless. It is not penetrative. No objects or substances are placed inside the accused. Nor does the swab involve “the forcible taking of parts of a person” (*Stillman*, at para. 41, quoting with approval *R. v. Legere* (1988), 89 N.B.R. (2d) 361 (C.A.), at p. 379). While the accused is required to expose a private area of his body to conduct the swab, the procedure for taking the swab is not invasive.
54. Third, unlike with the accused’s bodily materials or impressions, evidence of the complainant’s DNA degrades over time. The accused can also destroy this evidence, whether intentionally or accidentally. It cannot be said that this evidence is in “no danger of disappearing” or that there is “simply no possibility of the evidence sought being destroyed if it [is] not seized immediately” (*Stillman*, at para. 49).
55. In sum, the issue in this case cannot be resolved by a straightforward application of *Stillman*. A penile swab implicates different privacy interests and law enforcement objectives than seizures of an accused’s bodily samples and certain impressions.
    1. The Police Can Rely on the Power of Search Incident to Arrest
56. Even though *Stillman* does not apply, the question remains: Are an accused’s privacy interests in this context so high as to require consent, a warrant, or exigent circumstances, or can the police rely on the common law power of search incident to arrest in taking a penile swab?
57. The principles and policy considerations which this Court has identified in *Fearon*, *Golden*, and *Stillman* provide the framework needed to resolve this question. In short, our task is to weigh the privacy interests and law enforcement objectives involved and “delineate the scope of the common law power . . . in a way that is consistent with the *Charter* right to be protected against unreasonable search and seizure” (*Golden*, at para. 87). This Court has, in *Fearon*, and in “both *Stillman* and *Golden*, . . . modified the common law power in relation to particularly invasive types of searches in order to make that power consistent with s. 8 of the *Charter*” (para. 44).With respect, these authorities do not bear out Karakatsanis J.’s statement that the common law power can only be tailored to comply with the *Charter* “in the rarest of cases” (para. 118).
58. There can be no doubt that requiring an individual to expose and swab his genitals is an intrusion on an accused’s privacy. Much like a strip search, a penile swab has the potential to be a “humiliating, degrading and traumatic experience” for the accused (*Golden*, at para. 83). A penile swab may be all the more humiliating because it requires more than a mere visual inspection of the accused’s genitals.
59. But that is not the end of the story. Swabbing itself is not inherently invasive. It can be conducted in a matter of minutes. It is not penetrative. The cotton swab touches only the accused’s outer skin. It does not cause pain or physical discomfort. It does not pose any risk to the accused’s health. And the evidence sought — the complainant’s DNA — does not implicate any particular privacy interest of the accused. The DNA sought belongs to someone else.
60. In short, this search is a significant intrusion on the accused’s privacy because of the body part searched. If the same search was conducted elsewhere on the accused’s body — the back of his hands, for example — there could be no suggestion that the swab was a “humiliating, degrading and traumatic experience”.
61. Unlike my colleague Karakatsanis J., I do not find the approach in the United Kingdom to be particularly helpful in assessing the privacy interests implicated here. The regime in the United Kingdom operates in an entirely different context, with different rules. The treatment of penile swabs in the United Kingdom cannot be considered in a contextual vacuum. For example, in the United Kingdom, if an individual refuses to consent to a penile swab without “good cause”, this can be used by the court or jury in determining whether that person is guilty of the offence charged (*Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 (“*P.A.C.E.*”), s. 62(10)). Further, while the United Kingdom allows these swabs to be taken only with consent, it allows for hair (other than pubic hair) and saliva samples to be taken without consent or a warrant, unlike in Canada (*P.A.C.E.*, s. 63). At bottom, while the majority of the Court in *Golden* found *P.A.C.E.* useful in the context of strip searches (para. 101), it does not follow that *P.A.C.E.*’s treatment of penile swabs — or any other type of search incident to arrest — reflects Canadian constitutional standards.
62. On the other side of the ledger, a penile swab conducted incident to arrest can serve important law enforcement objectives.
63. Penile swabs performed incident to arrest enable the police to preserve important evidence. If this evidence is not promptly seized, it runs the risk of degrading or even worse, being destroyed by the accused. As my colleague Karakatsanis J. accepts, sexual assaults are notoriously difficult to prove (para. 107). This type of evidence is highly reliable. It can be crucial in the case of complainants who are unable to testify, such as children, adults with disabilities, or those who have died or suffered serious injuries as a result of the offence or otherwise (see, for example, the first complainant in *R. v. Laporte*, 2016 MBCA 36, [2016] M.J. No. 104 (QL)). And of course, a penile swab incident to arrest may serve, in the end, to exclude a particular suspect.
64. The facts of this case demonstrate the usefulness of a penile swab performed incident to arrest. By taking the swab, the police obtained evidence which was highly probative of Mr. Saeed’s involvement in the crime, and preserved evidence which might otherwise have been destroyed.
65. At bottom, while there is no disputing that a penile swab intrudes on an accused’s privacy, the intrusion is limited. In my view, it is not so substantial as to require the police to obtain consent or a warrant. Permitting these swabs to be taken only with the accused’s consent — as in the United Kingdom — would strike an inappropriate balance in the Canadian context. It would countenance an approach that effectively disregards the interests of victims of sexual assault, where the evidence is most likely to be pertinent, and all but ignores the public interest in bringing sexual offenders to justice.
66. The privacy interests here are similar to those implicated in strip searches, and they can be protected by a similar approach*.*  Both strip searches and penile swabs involve law enforcement inspecting private areas of an accused’s body. While a strip search does not always require touching of the accused’s private areas, both strip searches and penile swabs can involve such contact (see *Golden*, at paras. 101 and 114; see also *R. v. Parchment*, 2015 BCCA 417, 378 B.C.A.C. 146). The guidelines set out in *Golden* contemplate the touching of an accused’s private areas to remove evidence or weapons (para. 101, see guideline 10). This process could certainly involve the exposure and possible manipulation of an accused’s genitals, a potentially humiliating experience to be sure. Hence, the need for explicit guidelines designed to ensure, so far as possible, that the search is conducted in the least humiliating manner. So too, penile swabs must be conducted with the same care.
67. As with strip searches, therefore, the common law must provide a means of preventing unjustified searches before they occur — to minimize the number of accused affected by this type of search — and a means of ensuring that when these searches do occur, they are conducted in a reasonable manner — to minimize the impact a swab can have on an accused who is subjected to one.
68. The reasonable grounds standard and guidelines regarding the manner of taking the swab provide these two protections. The reasonable grounds standard prevents unjustified searches before they occur (*Golden*, at para. 89). It holds the police to a higher level of justification before they can take a penile swab, thereby limiting the number of cases in which accused persons will be required to expose their genitals for a swab. Detailed guidelines regarding the manner of taking the swab ensure that when a penile swab is taken, it is “conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible” (*Golden*, at para. 104). Both serve to protect the accused’s privacy while ensuring the police are free to pursue the valid objective of preserving this highly probative, perishable evidence. These two modifications to the common law ensure that it is *Charter*-compliant, or in other words, that it is reasonable.
69. I would add that, in some ways, allowing the police to take a penile swab incident to arrest is more beneficial to an accused than requiring a warrant. If the police were required to obtain a warrant, during the time needed to obtain it, they would either have to keep the accused handcuffed without access to water or toilet facilities (perhaps for several hours) in order to preserve the evidence, or run the risk of the accused destroying the evidence. Realistically, the police are going to choose the former, leaving accused persons to wait for an indefinite period in an uncomfortable and potentially degrading position. On the other hand, if the police are able to exercise their common law power of search incident to arrest and take a swab promptly, the waiting time for an accused will be minimal. Looked at that way, a prompt swab would seem more humane than requiring an accused to wait for a warrant to issue.
70. Mr. Saeed makes one further argument in favour of requiring a warrant. He says that because an accused’s DNA is likely to be collected in the course of taking a penile swab, if the police are not required to obtain a warrant, there is nothing to prevent them from using penile swabs to obtain the accused’s DNA, thereby avoiding *Stillman* and the warrant procedures set out in the *Criminal Code*.
71. In my view, this argument is flawed. *Stillman* continues to govern the procedure for seizing the accused’s own bodily materials. The police must obtain consent or prior judicial authorization in order for evidence of the accused’s DNA to be legally obtained. The police cannot use a penile swab incident to arrest to circumvent *Stillman* and the warrant procedures set out in the *Criminal Code*. If DNA of the accused is obtained through a penile swab and the swab was taken without a warrant authorizing such seizure, or the accused’s consent, the accused’s DNA cannot be used for any purpose.
72. If Mr. Saeed’s argument were to be accepted, swabs of an accused’s person incident to arrest would never be permitted. Lower courts have held — and Mr. Saeed appears to accept — that the police may dab or swab an accused’s hands incident to arrest to check for gunshot residue or to obtain a sample of blood visible on the accused’s skin (see, for example, *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1 (Ont. C.A.), at paras. 139-45; *R. v. Smyth*, [2006] O.J. No. 5527 (QL) (S.C.J.)). Either of these procedures might enable the police to obtain the accused’s DNA, but the police are not entitled to use them for that purpose.
73. Similarly, the police are entitled to seize evidence found on the accused during a reasonable strip search incident to arrest, such as the bag found between the accused’s buttocks in *Golden*. The police could in theory test such evidence to obtain the accused’s DNA. But if the police were to use a strip search to obtain the accused’s DNA, they would clearly be in violation of the accused’s s. 8 rights.
74. I add this final point on warrants. I recognize that the question of whether the police can obtain a warrant to take a penile swab is not settled. The only possible source of authorization at present is the general warrant provision in s. 487.01 of the *Criminal Code*. But this warrant power cannot “be construed as to permit interference with the bodily integrity of any person” (s. 487.01(2)). “Bodily integrity” is not defined in the *Criminal Code*, and this Court has not defined it in the context of s. 487.01(2). Clearly, a strong argument can be made that taking a penile swab interferes with an accused’s “bodily integrity”. At the same time, some courts have upheld general warrants for photographs of an accused’s genital or anal areas, including situations where the taking of the photographs has required touching or manipulation of the accused’s private areas (see, for example, *R. v. H. (T.G.)*, 2014 ONCA 460, 120 O.R. (3d) 581, at para. 48; *R. v. H.-G.*, 2005 QCCA 1160, at para. 4 (CanLII)). At the very least, there is a lack of clarity regarding the availability of a general warrant in these circumstances (*Laporte*, at para. 65).
75. Assuming for argument’s sake that at present, a warrant authorizing the taking of a penile swab is not available, my conclusion would not change. It is true that if no warrant is available, the indignity occasioned to an accused while waiting for a warrant and the possibility that the evidence might degrade or be destroyed during this time frame cannot be relied upon to support the police common law power of search incident to arrest. But the unavailability of a warrant in no way precludes the operation of the common law power of search incident to arrest (*Fearon*, at paras. 16 and 45). In *Golden*, the unavailability of a warrant did not prevent the Court from holding that strip searches can be conducted as an incident of arrest in appropriate circumstances. Importantly, while the Court noted that there were a few legislative provisions governing searches of the person, these provisions were “directed at the circumstances under which particular types of evidence may be obtained from a person” and they did not address “the scope of police powers to conduct personal searches for evidence or weapons incident to arrest” (para. 85). Absent legislative guidance, it fell to the Court “to determine the scope of the common law power to search as an incident to arrest, and what the limits are to this power in the context of strip searches” (*Golden*, at para. 85).
76. In the end, while I have not found it necessary to decide whether a warrant is available, Parliament might wish to establish an express, comprehensive legislative regime for these and other intrusive searches, such as body cavity searches, to provide greater direction to the police. The common law power of search incident to arrest, as modified in these reasons, is not the only solution.
    1. Requirements for Conducting a Valid Penile Swab Incident to Arrest
77. I turn now to the requirements for taking a penile swab incident to arrest.
78. First, as with every search incident to arrest, the arrest itself must be lawful. The swab must be truly incident to the arrest, in the sense that the swab must be related to the reasons for the arrest, and it must be performed for a valid purpose. The valid purpose will generally be to preserve or discover evidence (*Caslake*, at para. 19).
79. Second, the police must also have reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested. These grounds are not to be confused with the reasonable grounds required for the arrest. They are independent. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed.
80. For example, the police will generally lack reasonable grounds if the alleged sexual offence did not involve contact between the suspect’s penis and the complainant. Similarly, if the suspect is arrested several days after the alleged offence, the police will probably lack reasonable grounds because it is likely that the evidence will have degraded or been wiped or washed away in the interim.
81. To be clear, meeting the reasonable grounds standard is more than a mere pro forma exercise. The potential for destruction or degradation of the complainant’s DNA will always be a concern in this context. The greater the time frame between the alleged offence and the swab, the more difficult it will be for the police to establish reasonable grounds for believing that the swab will afford evidence of the offence for which the accused was arrested.
82. Finally, the penile swab must be conducted in a reasonable manner. Above all, the police must take care to respect the privacy of the accused. To this end, I would outline a number of factors to guide police in conducting penile swabs incident to arrest reasonably:

1. The penile swab should, as a general rule, be conducted at the police station;

2. The swab should be conducted in a manner that ensures the health and safety of all involved;

3. The swab should be authorized by a police officer acting in a supervisory capacity;

4. The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab;

5. The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary;

6. The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise;

7. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances;

8. The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it;

9. The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time; and

10. A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.

1. Some of these factors require further explanation. As with strip searches, penile swabs should generally be performed at the police station. This requirement is even stricter for penile swabs than strip searches. Safety concerns may justify a strip search for weapons in the field. Safety concerns are highly unlikely to justify a penile swab in the field. However, I would not rule out the possibility that a penile swab may reasonably be performed in another suitable location, such as a hospital, if there is some valid reason for doing so.
2. The police may use force in taking a penile swab incident to arrest, but only if the force used is “necessary and proportional in the specific circumstances” (*Golden*, at para. 116). In other words, as with strip searches, if the accused resists the swab, the police may only use the minimum amount of force necessary to obtain it. The fact that an accused resists does not entitle the police “to engage in behaviour that disregards or compromises his or her physical and psychological integrity and safety” (*Golden*, at para. 116).
3. As a general rule, the police must explain to the accused the procedure for taking a swab before it is taken, to ensure the accused understands the nature of the procedure and the steps it involves. Reviewing the procedure with the accused in advance can only help to keep the procedure quick and efficient. Giving the accused the option of taking the swab himself enables the accused to minimize the intrusiveness of the swab. A detailed record of how the swab was conducted is important for after-the-fact review of these searches to be effective (*Fearon*, at para. 82). And it is likely to focus police officers’ attention on whether their conduct is reasonable (*Fearon*, at para. 82).
4. These factors require the police to take great care in performing a penile swab and will often ensure that the swab is performed in a reasonable manner. But they will not be determinative in every case. As this Court observed in *Golden*, the greater the intrusion on the accused’s privacy, the higher the degree of justification required before the search may be carried out, and the greater the constraints there will be as to the manner in which it may be performed (para. 87). The same logic applies here. My colleague Karakatsanis J. raises the concern that a “genital swab is even more intrusive in the context of a female individual” (para. 101). These reasons should not be taken as deciding the question of whether a penetrative swab performed in accordance with the common law police power of search incident to arrest would be reasonable and therefore *Charter*-compliant. They are restricted to genital swabs conducted on the outer surface of the skin.
5. At bottom, whether a particular penile swab incident to arrest complies with s. 8 will depend on the facts of the case. The onus is on the Crown to establish that the police had reasonable grounds to believe the swab would reveal the evidence sought and that the swab was conducted in a reasonable manner.
6. Application
7. In light of the requirements set out above, taking the penile swab did not violate Mr. Saeed’s rights under s. 8 of the *Charter*.
8. There is no question that Mr. Saeed was validly arrested. And as indicated, the swab was performed for a valid purpose related to Mr. Saeed’s arrest: preserving evidence of the sexual assault for which Mr. Saeed was arrested. The only questions remaining are whether the police had reasonable grounds to believe the swab would afford the evidence sought, and whether the swab was taken in a reasonable manner.
   1. The Police Had Reasonable Grounds
9. The police had the required reasonable grounds. The nature of the allegations gave the police reasonable grounds to believe that the complainant’s DNA had transferred to Mr. Saeed’s penis during the assault. And the timing of the swab — within several hours of the assault — gave the police reasonable grounds to believe that the complainant’s DNA was still there at the time of the swab. The police had no reason to think that Mr. Saeed had taken steps to destroy the evidence, especially given that he was in police custody for most of the time following the assault.
10. Mr. Hunter’s expert opinion evidence confirmed the reasonableness of the officers’ belief that the complainant’s DNA had transferred to Mr. Saeed, and would likely still be there at the time of the swab. I would emphasize that the issue at this stage is not whether the police knew the science behind DNA degradation testified to by the Crown’s expert, Mr. Hunter. The police are not required to know to a scientific degree of certainty that evidence of the complainant’s DNA will be found on an accused’s penis in order to justify a swab. Rather, the issue is whether, when they took the sample, the police had reasonable grounds to believe that evidence of the complainant’s DNA would be found on Mr. Saeed’s penis.
    1. The Swab Was Conducted in a Reasonable Manner
11. The Crown has established that the swab was performed in a reasonable manner. In short, the police officers involved in the swab were sensitive to the need to preserve Mr. Saeed’s privacy and dignity.
12. Mr. Saeed was informed in advance of the procedure for taking the swab and the purpose of the swab. The swab itself was conducted quickly, smoothly, and privately. The swab took at most two minutes. Mr. Saeed took the swab himself. There was no physical contact between the officers and Mr. Saeed. The officers involved took detailed notes regarding the reasons for and the process of taking the swab.
13. While the process of taking a penile swab from Mr. Saeed intruded on Mr. Saeed’s privacy, it did not fundamentally violate his human dignity. Far from it. The police conducted a well-grounded search incident to a valid arrest. They took care to minimize the intrusion on Mr. Saeed’s privacy. I therefore conclude that the search did not breach Mr. Saeed’s s. 8 *Charter* rights.
14. Conclusion
15. For the reasons set out above, the penile swab taken incident to Mr. Saeed’s arrest did not violate his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. The police had reasonable grounds to believe that the swab would afford evidence of the complainant’s DNA, and they conducted the swab in a reasonable manner. The evidence from the penile swab was therefore properly admitted at trial. Accordingly, I would dismiss the appeal.

The following are the reasons delivered by

1. Karakatsanis J. — How we treat those suspected of serious criminal offences says a great deal about the values of our free and democratic society. This case is no exception. My colleague Moldaver J. concludes that the common law should empower police to swab a person’s genitals on arrest — without a warrant. Given the profound impact such state conduct can have on an individual’s privacy and human dignity, I cannot agree.
2. Section 8 of the *Canadian* *Charter of Rights and Freedoms* balances an individual’s interest in privacy with the state’s interest in investigating and prosecuting crime. While the state’s interest in obtaining probative evidence is undeniably important, a genital swab represents a profound affront to individual privacy and human dignity. Obviously, a genital swab cannot be taken without exposing, touching and manipulating the genitals, the most private area of the body, in the presence of others. Regardless of whether it can be lawfully used, a genital swab also gives the police a sample which contains the individual’s DNA. It is difficult to conceive of a more personal or private interest in our bodies.
3. As a result, I conclude the common law power of search incident to arrest does not authorize the police to take genital swabs. Since the penile swab taken from Mr. Saeed was not authorized by law, it was unreasonable and in violation of s. 8 of the *Charter*.
4. However, on balance, I agree with the courts below that the evidence obtained in breach of the *Charter* was nonetheless admissible under s. 24(2).
5. Analysis: Section 8
6. Section 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search or seizure.”
7. The common law authorizes the police to search an individual incident to arrest; however, this power is an exception to the general rule that a warrantless search is presumptively unreasonable (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 13). Although the precise limits of this common law power are not defined, that does not mean the power is unlimited (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 186). It must evolve in a way that is consistent with *Charter* principles, particularly the *Charter* right to be free from unreasonable search and seizure (*Cloutier*, at p. 184; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at paras. 86-87). In *R. v. Stillman*, [1997] 1 S.C.R. 607, Cory J. emphasized the importance of placing limits on the power of search incident to arrest:

When [the police] are carrying out their duties as highly respected and admired agents of the state they must respect the dignity and bodily integrity of all who are arrested. The treatment meted out by agents of the state to even the least deserving individual will often indicate the treatment that all citizens of the state may ultimately expect. Appropriate limits to the power of search incidental to arrest must be accepted and respected. [Emphasis added; para. 47.]

1. Thus, some kinds of searches fall outside the scope of the common law power of search incident to arrest because they do not reflect a reasonable balance between the individual’s interest in preserving dignity and privacy and the state’s interest in investigating crime. The issue in this appeal is whether expanding the common law to permit the police to take genital swabs incident to arrest would strike a reasonable balance between these competing individual and state interests.
2. In *Stillman*, this Court held that mouth swabs, dental impressions and hair samples cannot be taken as part of searches incident to arrest because they represent too great an infringement of bodily integrity and affront to privacy and dignity. Although *Stillman* did not deal with genital swabs, the principles animating the decision suggest that it would also not be a reasonable balancing of interests for the common law to authorize genital swabs.
3. As Moldaver J. acknowledges, genital swabs represent a significant interference with individual dignity and privacy. He concludes, however, that the seizures at issue in *Stillman* are more physically intrusive than genital swabs. He suggests that a genital swab can be conducted in a matter of minutes, touches only the individual’s outer skin, does not cause pain or physical discomfort, and does not pose any risk to the individual’s health. He concludes that dental impressions and hair samples are actually *more* physically invasive than genital swabs: dental impressions because they can take up to two hours to create; hair samples, one infers, because they can cause some pain to remove.
4. I cannot agree. A swab of the genital area is far more damaging to personal dignity and privacy than a swab of the inside of the mouth or a pluck of hair from the head. In ideal circumstances a genital swab may take only a few minutes, but it still requires an individual to expose and manipulate his or her genitals in the presence of other persons. If the individual resists the swab, the process can be more protracted and especially invasive.[[1]](#footnote-1) A genital swab is even more intrusive in the context of a female individual. Genital swabs are substantially more invasive and dehumanizing than mouth swabs, hair samples and dental impressions.
5. Moldaver J. further distinguishes *Stillman* on the basis that there is no informational privacy at stake here because it is not the purpose of a genital swab to collect biographical information from the individual. Rather it is to test for the presence of the DNA of another person — the victim of a sexual assault. However, the Court in *Stillman* was concerned about far more than informational privacy in one’s own DNA. The main principle animating *Stillman* was a concern to protect human dignity, which — whatever the degree of informational privacy at stake — is all the more pronounced in the case of genital swabs.
6. Cory J. emphasized in *Stillman* that taking bodily samples engages a strong privacy interest related to human dignity. It “may constitute the ultimate affront to human dignity”, he said (para. 39). He reiterated: “It has often been clearly and forcefully expressed that state interference with a person’s bodily integrity is a breach of a person’s privacy and an affront to human dignity” (para. 42). Notably, he found that the common law power of search incident to arrest does not go so far as to authorize the police to take bodily samples because the taking of bodily samples is “highly intrusive” and “violate[s] the sanctity of the body which is essential to the maintenance of human dignity” (para. 51). This resonates with this Court’s repeated emphasis on the close relationship between bodily privacy and human dignity (see, e.g., *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 21; *Golden*, at paras. 87 and 98-99; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, at p. 949). In my view, my colleague’s discussion of *Stillman* betrays an unduly narrow reading of the decision and the fundamental interests it sought to protect.
7. Further, although the *purpose* of a genital swab may be to search for “residue” deposited on the individual’s genitals, an *effect* of the seizure is to put the individual’s DNA in the hands of the state. As the expert evidence in this case indicated, this residue is indivisible from the person’s own bodily substances: the sample also contains the individual’s DNA. Whatever its purpose, a genital swab has the result of giving police a DNA sample from the individual.
8. As Moldaver J. notes, it would presently be unlawful for the police to treat the genital swab sample as evidence of the individual’s DNA. In principle, the courts would supervise any such future use. But the sample would nonetheless exist and remain in the hands of the police, available for undetermined potential future use. The law may subsequently evolve, or the sample might be used by the police — perhaps improperly — for purposes other than to generate evidence the admissibility of which would be scrutinized in court.
9. The highly invasive and dehumanizing nature of genital swabs has been recognized in the United Kingdom, where genital swabs are treated as a particularly invasive kind of search and seizure. Under the U.K. legislation *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 (*P.A.C.E.*), a genital swab is governed by the rules for “intimate samples”, not body *searches*, and is prohibited altogether except on consent (ss. 62(1) and 65). Genital swabs and other intimate samples — like blood, urine, and semen samples — are in a separate category from both strip searches and non-intimate samples — such as hair samples and other swabs. The definition of an intimate sample makes no reference to the purpose of the sample. What makes these samples “intimate” under *P.A.C.E.* is the high degree of bodily invasion, not the purpose of the search.
10. Turning to society’s interests in effective law enforcement, I agree with my colleague that genital swabs can advance compelling state interests. Not only is sexual assault a very serious offence, but it is also notoriously difficult to prove. A search for the victim’s DNA on the genitals of the arrested person can yield highly probative physical evidence.
11. However, I do not agree with Moldaver J. that the state interests are more compelling here than they were in *Stillman*. My colleague says the kind of evidence collected by genital swabs is inherently transient and vulnerable to destruction, whereas the kind of evidence collected by mouth swabs, hair samples and dental impressions is in no danger of disappearing. He concludes that the common law can advance important state interests by ensuring the police can collect genital swab evidence before it disappears. However, in stressing that genital swabs enable the police to preserve evidence which could otherwise disappear, my colleague implicitly assumes that this is evidence that the police could eventually collect lawfully, presumably upon obtaining a warrant. But if there is no lawful means by which the police could collect the evidence, ever, it would not matter how long the evidence lasts. Nothing would be lost when the evidence disappeared — no state interests would be compromised — because even if the evidence had survived, the police would have had no lawful authority to collect it.
12. This was the case in *Stillman*: at the time of the seizures, the *Criminal Code* provision authorizing a warrant for that kind of DNA evidence had not yet been enacted and thus the effect of the decision was that there was no other lawful means by which the police could have obtained that evidence. As a result, the question of whether the evidence would disappear could not have been relevant to the scope of the common law power at that time: at the time of the seizures, the police could not obtain the DNA evidence *at all*. Thus, the fact that the evidence was in no danger of disappearing in *Stillman* is not a basis upon which to distinguish the evidence in this case.
13. Similarly, it is not clear whether there is any other lawful means by which the police can conduct genital swabs. Without finally deciding the issue, there is no warrant obviously available. The general warrant provision in s. 487.01(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, empowers a judge to issue a warrant to do anything that would, if not authorized, constitute an unreasonable search or seizure — but that subsection cannot be “construed as to permit interference with the bodily integrity of any person” (s. 487.01(2)). Genital swabs also do not appear to fall within any of the special warrants. While it is not necessary to decide this issue here, I note that if no warrant is available for genital swabs, then it simply does not follow that the common law can advance state interests by allowing the police to take a genital swab before the sample degrades in the time it would take to obtain a warrant. Perishability alone cannot transform an unlawful seizure into a lawful one.
14. Finally, Moldaver J. suggests that in order to prevent an individual from destroying the evidence a genital swab would collect, the police must detain the individual in a way that makes wiping his or her genitals impossible. Here, this meant handcuffing Mr. Saeed to a pipe in a dry cell, without access to water or a toilet. My colleague reasons that such a form of detention is itself undignified, but this indignity can be prevented if a warrantless genital swab is carried out as soon as possible.
15. This manner of detention certainly involves a further and troubling compromise of the individual’s dignity. I note, first, that the trial judge did not make a finding of fact that this manner of detention is *necessary* to preserve the evidence a genital swab would collect. The expert could not identify the time frame within which the residue will degrade naturally. And, although there was evidence that an individual can dissipate the residue by wiping or washing his or her genitals, there was no evidence that detention in a dry cell is the only means by which this can be prevented.
16. More fundamentally, even if this practice was proven necessary to preserve perishable evidence, this necessity could not be used to justify the greater affront to dignity that a genital swab would represent. One indignity cannot justify another. It would be ironic indeed if s. 8 did not protect individuals from the indignity of genital swabs *precisely because* it protects them from the indignity of detention in dry cells.
17. Balancing the competing individual and state interests, I find — as did the Court in *Stillman* — that the individual’s freedom from such an indignity and invasion of privacy must prevail. In *Stillman*, the individual privacy interests at stake in mouth swabs, dental impressions and hair samples were so important that the Court held the common law does not authorize such seizures — even though there was, at that time, no other lawful means by which the police could have obtained that kind of evidence. (The *Criminal Code* warrant for a mouth swab or hair sample was enacted *after* the seizures in *Stillman*: *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*, S.C. 1995, c. 27, s. 1.) In my view, the individual privacy interests at stake in this case are even more compelling: this kind of examination of a person’s genitals is a profound affront to privacy and dignity. The state interests in this case, while strong, are no more compelling than they were in *Stillman*. I conclude it is not a reasonable balancing of the competing interests to permit the police to take warrantless genital swabs under the common law power of search incident to arrest.
18. Moldaver J. indeed agrees that the traditional safeguards for the common law power are insufficient to protect the enhanced privacy interests at stake with genital swabs. His solution is to add a higher threshold of police justification. The traditional threshold test for a search incident to arrest requires only that the arrest be lawful and the search be conducted for a valid purpose connected to the arrest; no further justification is needed for the search itself (*Cloutier*, at pp. 185-86). My colleague proposes to create a specific test for genital swabs with an additional requirement: the police must also have reasonable grounds to believe the genital swab will reveal and preserve evidence of an offence.
19. Only once before has this Court imposed a heightened threshold test for a particular type of search incident to arrest in order to protect the interests engaged by s. 8 of the *Charter*. In *Golden*, the majority of the Court held that the police may conduct a strip search incident to arrest only when they have reasonable and probable grounds for the strip search. Iacobucci and Arbour JJ. explained their reasoning as follows (para. 98):

In *Cloutier*, *supra*, this Court concluded that a common law search incident to arrest does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself: *Cloutier*, *supra*, at pp. 185-86. However, this conclusion was reached in the context of a “frisk” search, which involved a minimal invasion of the detainee’s privacy and personal integrity. In contrast, a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.

1. It follows from this passagethat a higher degree of justification than reasonable and probable grounds is required for searches which are more intrusive than strip searches. Genital swabs, which require touching and manipulation of the genitals (and result in what is in fact a DNA sample), are without doubt more intrusive. A straightforward application of *Golden* thus implies that something more than reasonable and probable grounds is required for genital swabs.[[2]](#footnote-2) My colleague’s threshold test of “reasonable grounds to believe” is insufficient.
2. More fundamentally, additional requirements for particular types of searches incident to arrest should be avoided. When the traditional test for search incident to arrest — the arrest must be lawful and the search must be conducted for a valid purpose connected to the arrest — is insufficient to protect the individual privacy and dignity interests at stake, the search is not authorized by the existing common law. Only in the rarest of cases should the court impose an additional requirement and thereby create a new test specific to that type of search.
3. This is so for at least two reasons. First, a specific threshold test is much less effective in safeguarding privacy than judicial pre-authorization. As Moldaver J. acknowledges, the purpose of s. 8 is to prevent unjustified searches before they happen, not simply to decide after the fact whether a search should have happened (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160; *Golden*, at para. 89). Additional threshold requirements for the test for search incident to arrest must be applied in the field by the police who are focussed on law enforcement. Judicial oversight would only come after the fact, and only in a subset of cases — where incriminating evidence is found, charges are laid, and the lawfulness of the search is challenged at trial. It would come as cold comfort to someone who has suffered the indignity of a genital swab, for example, to learn some time later that it never should have happened because there were no reasonable and probable grounds for it. Judicial pre-authorization minimizes the risk of unjustified searches occurring much more effectively than does an additional threshold requirement for the test for search incident to arrest.
4. A second problem with judicially imposed threshold requirements for specific types of searches incident to arrest is that defining these requirements is a nuanced exercise which may be best left to Parliament. Not only must the right balance be found between the competing privacy and law enforcement interests; the framework must be workable for the police. The common law power of search incident to arrest is a blunt tool, but this makes it relatively straightforward for the police to use. Rather than complicating matters with various add-ons intended to perform different functions, it should be left to Parliament to equip the police with additional tools tailor-made for specific functions.
5. Thus, I certainly agree with Moldaver J. that Parliament could choose to create a legislative regime for genital swabs that balances the need to obtain and preserve evidence with the need to safeguard privacy interests, much as it did for DNA samples.
6. In conclusion, I recognize that genital swabs can provide important evidence of serious offences. In principle, they can be an effective law enforcement tool. However, the state interest in law enforcement must be considered in light of the profound impact on privacy and human dignity inherent in a genital swab. The common law power of search incident to arrest has limits. I conclude that it does not authorize the police to take genital swabs.
7. Because it was not authorized by law, the swab the police took from Mr. Saeed’s penis was carried out in breach of s. 8 of the *Charter*.
8. Analysis: Section 24(2)
9. In the exceptional circumstances of this case, I would nonetheless uphold the trial judge’s decision to admit the evidence obtained from Mr. Saeed in breach of the *Charter*. In deciding whether the admission of the evidence would bring the justice system into disrepute, the three factors to consider are (1) the seriousness of the *Charter-*infringing state conduct, (2) the impact of the breach on the *Charter-*protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71).
10. A trial judge’s findings on these issues are entitled to considerable deference and should be overturned only if the judge did not consider the proper factors or made an unreasonable finding (*Grant*, at para. 86; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82). In this case, the trial judge (and both sets of reasons from the Court of Appeal, 2014 ABCA 238, 5 Alta. L.R. (6th) 219) held that the evidence should be admitted. In my view, the trial judge’s exercise of discretion should not be disturbed.
11. In considering the seriousness of the *Charter*-infringing state conduct, the trial judge found that the officer who directed the swab did not appropriately consider Mr. Saeed’s *Charter* rights and the ambit of the police’s power of search incident to arrest, but that there was no “actual bad faith” on the part of the police. She considered that the *Charter*-infringing state conduct was serious. However, where the police act on a mistaken understanding of the law where the law is unsettled, their *Charter*-infringing conduct is considered to be less serious (*Cole*, at paras. 86-87; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 69 and 71). If anything, the trial judge erred in the appellant’s favour by overstating the seriousness of the state conduct. Since the law respecting genital swabs was unsettled at the time this swab was taken and the police acted on their understanding of the law, the first factor does not weigh in favour of the exclusion of the evidence.
12. The second factor — the impact of the breach on the *Charter-*protected interests of the accused — was obviously serious, and weighs against admitting the evidence. There is no doubt that this was a very intrusive search that engaged the core of the accused’s bodily privacy. The trial judge found that the process “violated a very core value of privacy, an accused’s privacy with respect to his genitals, and his right to not being exposed”. In addition, in *Côté*, this Court noted that “[i]f the search could not have occurred legally, it is considerably more intrusive of the individual’s reasonable expectation of privacy” (para. 72). As discussed above, it is doubtful whether a warrant is available for this evidence. If the police could not have lawfully obtained this evidence at all, either under search incident to arrest or under any warrant, then this would further heighten the impact on the accused’s *Charter*-protected interests (*Côté*, at paras. 58-74). As the trial judge held, the second factor weighs strongly in favour of exclusion.
13. The third factor — society’s interest in the adjudication of the case on its merits — weighs in favour of admission. This inquiry asks “whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (*Grant*, at para. 79). Three relevant considerations are the reliability of the evidence, the importance of the evidence to the Crown’s case, and the seriousness of the offence (*Grant*, at paras. 80-84), although the latter may “cut both ways” in some cases (para. 84). First, the DNA evidence was reliable and probative. Second, the evidence was very important in the Crown’s case. In finding that Mr. Saeed was in fact the attacker, the trial judge considered the DNA evidence alongside eyewitness accounts. Although the Crown’s case would not have been gutted without the DNA evidence, the Crown conceded on appeal that a conviction may not have reasonably flowed from the remaining evidence. Third, aggravated sexual assault is a serious offence: while society has an interest in a justice system that is beyond reproach when the penal stakes are high, this brutal public assault of an adolescent girl was particularly heinous, and society also has a keen interest in the adjudication of this case on its merits. Taking all these considerations together, the third factor weighs in favour of admitting the evidence.
14. Having regard to all the circumstances, the evidence should be admitted. The impact of the *Charter* breach on the accused was very serious. Going forward, in the face of settled law, it would be difficult to justify its admission. However, the law on this issue was unsettled at the time of this seizure and the police acted on their understanding of the law. Furthermore, society has a strong interest in the adjudication of this brutal sexual assault. On balance, I conclude that the trial judge was justified in concluding that the admission of the evidence would not bring the administration of justice into disrepute.
15. Conclusion
16. In the result, I would dismiss the appeal.

The following are the reasons delivered by

1. Abella J. (dissenting) — In *R. v. Stillman*, [1997] 1 S.C.R. 607, this Court concluded that searches that violate bodily integrity “may constitute the ultimate affront to human dignity”. The case involved the taking of hair samples, buccal swabs, and dental impressions. Because those searches were found to be “highly intrusive” and “the ultimate invasion of the appellant’s privacy”, the evidence was excluded. If the taking of hair, buccal and dental samples are “the ultimate invasion” of an individual’s privacy, one wonders how to conceptualize a search whereby an individual is required to remove his clothes and swab his penis in front of two uniformed police officers.
2. While I agree with Justice Karakatsanis that the search was a breach of s. 8 of the *Canadian* *Charter of Rights and Freedoms*, I do not, with respect, share her view that the resulting evidence should be admitted.
3. In determining whetherthe evidence should be excluded under s. 24(2), three factors are to be balanced in accordance with *R. v. Grant*, [2009] 2 S.C.R. 353:

* The seriousness of the *Charter*-infringing state conduct;
* The impact of the breach on *Charter*-protected interests of the accused; and
* The societal interest in adjudication on the merits.

1. While the public clearly has an interest in the adjudication of a case on its merits, it also has an interest “in ensuring that the justice system remains above reproach in its treatment of those charged with . . . serious offences”: *R. v. Spencer*, [2014] 2 S.C.R. 212, at para. 80; see also *R. v. Taylor*, [2014] 2 S.C.R. 495. No factor, in other words, is determinative. And, of equal significance, none is absolute.
2. The first factor engages its own continuum, as Doherty J.A. pointed out in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.):

Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights: see Hill, “The Role of Fault in Section 24(2) of the *Charter*”, in *The Charter’s Impact on the Criminal Justice System* (1996) at p. 57 (Cameron, ed.). What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct. [para. 41]

1. The key, as a result, is not so much whether the conduct fits within a compartment called “good faith” or “bad faith”, but whether the police reasonably believed they were respecting the *Charter*: David M. Paciocco and Lee Stuesser, *The Law of Evidence* (7th ed. 2015), at p. 408; *R. v. Buhay*, [2003] 1 S.C.R. 631; *R. v. Chuhaniuk* (2010), 292 B.C.A.C. 89, at para. 34.
2. Ryan J.A., for the majority, elaborated on the “good faith” analysis in *R. v. Washington* (2007), 248 B.C.A.C. 65, where she explained:

Although good faith is not fully defined in the jurisprudence, the underlying notion is [that] good faith is present when the police have conducted themselves in manner that is consistent with what they subjectively, reasonably, and non-negligently believe to be the law. This is perhaps better understood as a contrast to situations where the police deliberately, flagrantly and wilfully breach a *Charter* right to gain some perceived advantage, that advantage usually being the avoidance of compliance with the *Charter*. [para. 78]

1. In other words, as a police officer’s disregard of *Charter* requirements becomes more deliberate or flagrant, his or her conduct approaches the “bad faith” end of the spectrum: *R. v. Morelli*, [2010] 1 S.C.R. 253; *R. v. Dhillon* (2012), 93 C.R. (6th) 260 (B.C.C.A.); *R. v. Voong* (2013), 347 B.C.A.C. 278.
2. Where does the police conduct fall on the spectrum in this case? Even though the trial judge did not conclude that the police acted in bad faith, neither did she find good faith. This is hardly surprising in the circumstances. Mr. Saeed was initially arrested at 6:05 a.m., released from custody sometime between 7:00 a.m. and 7:30 a.m., and then re-arrested at 8:35 a.m. When he arrived at the police station at around 8:50 a.m., he was placed in a dry cell with his hands cuffed behind his back to a metal pipe which was positioned low to the ground. He was made to sit on the floor in this position for almost an hour without the opportunity to use the washroom or drink water.
3. At 10:26 a.m., he was directed to expose his genitals and wipe a cotton-tipped swab around the head of his penis in the presence of two police officers. Mr. Saeed did not consent to the search. While the swab was conducted, Mr. Saeed was described by one of the officers as being “naked”.
4. Nor did the police make any inquiry to determine whether a swabwould even be probativebefore chaining him to a pipein a dry cell. Mr. Saeed had been free for an hour and a half when he was re-arrested. Despite the fact that he had ample opportunity to wash away the evidence, not only before the initial arrest but also during the time that he was left alone at his apartment before he was re-arrested, the police did not ask whether he had washed or wiped himself during that time. This is a crucial information gap, since expert evidence at the trial indicated that without knowing whether he had washed, it would have been impossible for the police to know whether the best source of DNA evidence was a genital swab or Mr. Saeed’s underwear. The police nonetheless chose the most invasive option.
5. The police testified that they considered that the search was authorized as being incidental to arrest. Restrictions on obtaining bodily samples as part of a search incident to arrest werearticulated in *Stillman*,14 years before the events in this case occurred, and wereconfirmed in *R. v. Golden*, [2001] 3 S.C.R. 679, four years later. The police must therefore be taken to have been aware of them: *R. v. Kokesch*, [1990] 3 S.C.R. 3, at p. 34.
6. Those decisions confirmed that a search incidental to arrest does not authorize invasive searches of an individual in order to get bodily samples as evidence: *Golden*, at para. 24; *Stillman*, at paras. 42-49. That means the police were required to get prior judicial authorization. Yet there was no explanation for why the police sought no prior judicial authorization. Their evidence was that they began to consider obtaining a genital swab from Mr. Saeed at 8:10 a.m., before he was in police custodyfor the second time.In the two and a quarter hours between when they decided to obtain the swab and when they got it, they took no steps towards obtaining either a general warrant or a telewarrant for the search.
7. Their evidence was that they took no steps to obtain a warrant because they wanted to “speed up the process of collecting the evidence” and felt that taking the time to apply for a warrant would leave Mr. Saeed handcuffed to the pipe for too long. One of the officers said that Mr. Saeed was handcuffed to the pipe to “preven[t] him from licking his hands and possibly washing away some of the DNA evidence that we wanted to preserve”.They never explained why there was no time to get a telewarrant. When asked “[d]id you ever at all during this point of the investigation turn your mind to the possibility of applying for a telewarrant?” the answer was “[n]o, I did not.”
8. Moreover, as the trial judge found, there were no exigent circumstances. She found that the only testimony demonstrating any concern about the need to preserve evidence so as to justify a search incidental to arrest was merely a “vague statement” by one of the officers.
9. It is not for the police to unilaterally decide to waive an accused’s s. 8 *Charter* protections by deciding that it is more in his interests that the swab be performed quickly than that it be performed constitutionally. It is true that the Crown led expert evidence to show that DNA evidence may begin to degrade in as little as five hours, but, notably, there was no evidence from the police that they were even aware of this information, let alone sought to act in accordance with it. But even if the police were concerned with obtaining the evidence within fivehours, that time had already elapsed when they finally took the swab.
10. But the most significant problemwith this warrantless search is that it is by no means clear that obtaining a warrant for the genital swab was even legally available. There is no statutory authority in the *Criminal Code*, R.S.C. 1985, c. C-46, for the issuance of a warrant in these circumstances.[[3]](#footnote-3)
11. Section 487.01 of the *Code* provides for the issuance of a general warrant, and expressly states that “[n]othing . . . shall be construed . . . to permit interference with the bodily integrity of any person” (s. 487.01(2)). Warrants for the taking of bodily samples for forensic DNA analysis are available under s. 487.05 of the *Code*. But warrants issued under this provision are limited to the investigative procedures in s. 487.06(1). *None* of the procedures set out in s. 487.06(1) includes conducting genital swabs.
12. Taken together, we have circumstances that in myrespectful view fall at the opposite end of the “good faith” continuum. The police officers failed to inquire and obtain the requisite information to establish reasonable and probable grounds that the evidence sought would still be present on Mr. Saeed’s genitals. They nevertheless proceeded to handcuff him to a pipe against a wall and deprive him of access to water or bathroom facilities. He was then instructed to expose the most private part of his body and swab it in front of two uniformed police officers. All of this occurred without Mr. Saeed’s consent and without prior judicial authorization. And on top of this deliberate disregard for Mr. Saeed’s s. 8 rights, is the fact that the *Criminal Code* appears not to countenance such searches at all.
13. The next *Grant* question is the impact of the breach on the *Charter*-protected interests of the accused, where we are to examine “the interests engaged by the infringed right and . . . the degree to which the violation impacted on those interests”: para. 77.
14. This Court concluded in *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, that “[s]trip searches are inherently humiliating and degrading *regardless of the manner in which they are carried out* and thus constitute significant injury to an individual’s intangible interests”: para. 64 (emphasis added).Surely this means that the invasion of dignity and bodily integrity does not depend on whether, as the majority concludes, it is “penetrative”, painful or uncomfortable.What is a more private anatomical zone than the genital area?
15. A genital swabdoes not just require the individual to expose his or her genitals to state scrutiny, it asks that individual to violate his or her own bodily integrity by collecting potentially self-incriminatory evidence from that most private of areas. The impact on Mr. Saeed’s privacy interests is as profound as one can imagine, leaving far in its wake the prior “ultimate” baseline from *Stillman*.
16. The third *Grant* factor is society’s interest in an adjudication on the merits. This too is nuanced and multi-faceted: *R. v. Harrison*, [2009] 2 S.C.R. 494, at paras. 33-34. What is weighed in considering this third factor is the seriousness of the offence, the reliability of the evidence and its importance to the Crown’s case: *Grant*, at paras. 83-84.
17. As the majority of this Court explained in *Grant*, the seriousness of the offence can be a relevant consideration at this stage of the analysis, but it points both towards inclusion and exclusion of the evidence. What is of utmost importance in weighing the third factor is the long-term reputation of the justice system:

In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet . . . *it is the long-term repute of the justice system that is s. 24(2)’s focus*. As pointed out in *Burlingham*, [[1995] 2 S.C.R. 206,] the goals furthered by s. 24(2) “operate independently of the type of crime for which the individual stands accused” (para. 51). And as Lamer J. observed in *Collins*, [[1987] 1 S.C.R. 265,] “[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority” (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. . . *. [W]hile the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high*. [Emphasis added; para. 84.]

1. In Professor Hamish Stewart’s view, “[t]his passage might well be interpreted as holding that although the seriousness of the offence enhances the public interest in a trial on the merits, it also enhances the disrepute associated with the admission of unconstitutionally obtained evidence; on this interpretation, in most cases, the seriousness of the offence will be a neutral factor”: “Section 24(2): Before and After *Grant*” (2011), 15 *Can. Crim. L.R.* 253, at p. 257; see also p. 262; *R. v. Côté*, [2011] 3 S.C.R. 215, at para. 53.
2. The view in *Grant* was reiterated in *Harrison*, where the Court said, “the public . . . has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high”: para. 34. Later, in *Côté*, a majority of this Court noted:

The seriousness of the offence . . . has the potential to “cut both ways” and will not always weigh in favour of admission (*Grant*, at para. 84). While society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high for the accused person. [para. 53]

(See also *Spencer*, at paras. 79-80, and *Taylor*, at para. 38.)

1. And although the reliability of the evidence and its importance to the Crown’s case are relevant, bodily evidence will be excluded, the majority of this Court said in *Grant*, “where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused’s . . . bodily integrity and dignity is high . . . notwithstanding its relevance and reliability”: para. 111.
2. These passages from *Grant* and *Harrison* are clear that, at the very least, the seriousness of the offence should have a limited role in the third stage of the *Grant* test, as it had in *Morelli*. Mr. Morelli was charged with possession of child pornography. The evidence was obtained through an improperly obtainedsearch warrant. A majority of the Court found that Mr. Morelli’s s. 8 rights had been violated. Without the evidence, the Crown had no case. Nevertheless, even though the police did not breach the accused’s rights intentionally, the Court excluded the evidence, stating that “we are required by *Grant* to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused”: para. 108. Similarly, in *Taylor* this Court excluded blood samples despite the fact that they were “reliable and key to the case” because they were taken in breach of the accused’s s. 8 rights: para. 38. And, it bears noting, this Court in *Stillman* and *Côté*, both murder cases, excluded the evidence.
3. David M. Paciocco has expressed concern, however, that notwithstanding this Court’s clear direction on how to apply the third *Grant* factor, courts have been overly focused on the seriousness of the offence resulting in unduly favouring the inclusion of evidence:

We have struggled to maintain a meaningful purposive approach to s. 24(2) and we have struggled to maintain doctrinal consistency between it and related constitutional remedies. The truth is that the fortunes of the exclusionary remedy have at times been driven more by the politics of exclusion than the pursuit of remedial purpose. Principles do not perform their usual role of directing conclusions; instead they are selected from time to time to explain policy choices that have been made.

(“Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning” (2011), 58 *C.L.Q.* 15, at p. 16)

1. One empirical analysis of 100 cases applying the *Grant* framework from 2010 demonstrated that at the very least there was some confusion in how to interpret the third factor:

With respect to classification of the third *Grant* factor — society’s interest in adjudication on the merits — much more interpretive discretion was exercised. Courts do not seem to coherently or uniformly write about this factor. . . . It is difficult to extract meaningful conclusions about the data from the third factor, since courts are considering the factor in different ways. Theoretically, the factor should always be high: society always has a high interest in seeing a case adjudicated on its merits. It is unclear, however, how courts are actually “balancing” this abstract, largely unquantifiable factor alongside the first two *Grant* factors, and how they are assessing this factor in cases where unreliable evidence is being considered, or where evidence that is not central to the case is being considered.

(Mike Madden, “Marshalling the Data: An Empirical Analysis of Canada’s Section 24(2) Case Law in the Wake of *R. v. Grant*” (2011), 15 *Can. Crim. L.R.* 229, at p. 236)

1. Ultimately, based on his empirical analysis of the jurisprudence, Madden concluded that “courts at all levels seem to have ignored or departed from fairly clear suggestions that were laid down by the SCC in *Grant*”: p. 250.
2. Another empirical study of the post-*Grant* s. 24(2) jurisprudence reached similar conclusions: Justin Milne, “Exclusion of Evidence Trends post *Grant*: Are Appeal Courts Deferring to Trial Judges?” (2015), 19 *Can. Crim. L.R.* 373. Milne looked at 60 appellate court decisions from 2011 to 2015 reviewing trial judges’ application of *Grant*, to see whether appellate courts were deferring to the *Grant* analyses by trial judges. He found that despite this Court’s strong endorsement of deference to trial judges’ *Grant* analyses in *Côté*, there was no change in the levels of deference shown. Moreover, he found that appellate courts across Canada were more likely to defer to trial judges’ analyses when evidence had been admitted and the offence was serious. He also found that appellate judges who did not show deference frequently interfered with the trial judge’s findings at each stage of the *Grant* analysis: p. 375.
3. The case before us provides an opportunity to confirm the Court’s guidance in *Grant* and *Harrison*.
4. The trial judge relied on the seriousness of the offence at the third stage to counter the “serious” breach of Mr. Saeed’s rights. She acknowledged that “[t]here are certainly dangers to the repute of the justice system in admitting this evidence”, but did not elaborate on what those dangers were. Nor did she refer to society’s heightened interest in protecting the *Charter* rights of those who are accused of serious offences. By failing to consider a relevant factor in the analysis, her analysis is subject to reassessment by this Court: *Côté*, at para. 87.
5. Even though the DNA evidence is reliable and important to the Crown’s case, it is not necessarily vital. Another witness provided eyewitness testimony identifying Mr. Saeed as the perpetrator and, as was noted by the trial judge, S’s evidence was strongly corroborated by the fact that she was able to guide the police to Mr. Saeed’s apartment.
6. But whether or not there is other available evidence, the reputation of the justice system weighs against admission of the evidence. The police arrested, released, and re-arrested Mr. Saeed, handcuffed him to a pipe in a dry cell, and, without taking any steps either to obtain a warrant or a telewarrant, proceeded to conduct a genital swab for the purposes of obtaining DNA evidence. The law is clear that judicial authorization is required to conduct invasive searches with a view to obtaining bodily samples. The police’s unjustified and unexplained avoidance of this requirement weighs against admissibility. So does their disregard for the likelihood that a warrant was not even available for such intrusive searches.
7. Put another way, the deliberate failure to consider a warrant in the absence of exigent circumstances is, at its best, careless; ignoring the legal possibility that under Canadian law the police were not even entitled to take a penile swab, is fatal.
8. In these circumstances, based on public confidence in the integrity of the justice system, I would exclude the evidence and order a new trial.

**APPENDIX**

**Information for general warrant**

**487.01 (1)** A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person’s property if

**(a)** the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

**(b)** the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

**(c)** there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

**Limitation**

**(2)** Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

. . .

**Information for warrant to take bodily substances for forensic DNA analysis**

**487.05 (1)** A provincial court judge who on *ex parte* application made in Form 5.01 is satisfied by information on oath that there are reasonable grounds to believe

**(a)** that a designated offence has been committed,

**(b)** that a bodily substance has been found or obtained

**(i)** at the place where the offence was committed,

**(ii)** on or within the body of the victim of the offence,

**(iii)** on anything worn or carried by the victim at the time when the offence was committed, or

**(iv)** on or within the body of any person or thing or at any place associated with the commission of the offence,

**(c)** that a person was a party to the offence, and

**(d)** that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in Form 5.02 authorizing the taking, from that person, 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).

. . .

**Investigative procedures**

**487.06 (1)** A peace officer or a person acting under a peace officer’s direction is authorized by a warrant issued under section 487.05, an order made under section 487.051 or an authorization granted under section 487.055 or 487.091 to take samples of bodily substances by any of the following means:

**(a)** the plucking of individual hairs from the person, including the root sheath;

**(b)** the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or

**(c)** the taking of blood by pricking the skin surface with a sterile lancet.

*Appeal dismissed,* Abella J. *dissenting.*

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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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1. See, for instance, *R. v. Laporte*, 2012 MBQB 227, 283 Man. R. (2d) 9. [↑](#footnote-ref-1)
2. Further, as noted above, the U.K. legislation upon which the Court relied in *Golden* distinguishes between a genital swab and strip searches (*P.A.C.E.*, s. 65). Unlike strip searches, genital swabs are prohibited except on consent and with the authorization of an inspector (*P.A.C.E.*, s. 62(1)). This is so even though the purpose is to obtain DNA information about someone other than the individual. [↑](#footnote-ref-2)
3. The relevant provisions are in an Appendix at the end of these reasons. [↑](#footnote-ref-3)