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R. v. Saeed: Penile Privacy and Penal Policy

Christine Mainville*

I. INTRODUCTION

What's in a swab? When it comes to the law of search incident to arrest, the answer to that question turns out to be significant. In *R. v. Saeed*,[1] the police took a swab of the suspect's penis, purportedly incident to arrest, in order to link him to a sexual assault that had just taken place. Faced with the question of whether this was a permissible extension of that common law search power, the Court focussed primarily on the privacy interest in the *information* contained in the swab, rather than on the privacy interest engaged by the intimate nature of the *area being searched*. Because the information sought related to the complainant rather than the accused, the warrantless search was deemed permissible notwithstanding its intrusiveness.

Instinctually, people with civil libertarian inclinations may well have hoped and expected the opposite result to be reached, based on the fact that the body part targeted was the suspect's penis. A search in respect of such an intimate place on one's body and the seizure of bodily samples therefrom must surely require prior judicial authorization, or exigent circumstances. But the line of cases that have endorsed strip searches and other types of searches of the person under the authority of the power to search incident to arrest meant that a closer look needed to be taken to resolve the issue. In many respects, the issue in *Saeed* was a contest between the authority of *Golden*[2] — in respect of strip searches — and that of *Stillman*[3] — in respect of the seizure of bodily samples. The Supreme Court in those earlier cases held that the common law search power permitted the former (albeit

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1 [2016] S.C.J. No. 24, 2016 SCC 24 (S.C.C.) [hereinafter "*Saeed*"].

2 *R. v. Golden*, [2001] S.C.J. No. 81, 2001 SCC 83, [2001] 3 S.C.R. 679 (S.C.C.) [hereinafter "*Golden*"].

3 *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.) [hereinafter "*Stillman*"].

under a modified search incident to arrest framework), but prohibited the latter. The application of *Stillman* was complicated by the fact that the search for bodily substances on Mr. Saeed did not target his own bodily substances, but rather those of the complainant. These were susceptible to degradation or to being washed off.

When considering whether new investigative methods could be performed pursuant to the power to search incident to arrest, the common law has striven to strike the appropriate balance between the privacy interests of the accused and valid law enforcement objectives. While the Court in *Saeed* considered a number of factors to make this determination, this article argues that it overstated the importance of the *informational* privacy interest being impacted, and failed to sufficiently recognize the acute personal privacy interest engaged in that area of the body aptly referred to in common parlance as a person's "private parts". It did so in spite of clear indications in *Grant*[4] that the level of intrusiveness of a bodily search will generally turn on the latter.

II. FACTS

The accused Saeed was suspected of having viciously raped a young woman he had just met at a small gathering. The 15-year-old complainant had been quite intoxicated and ended up staying at the host's apartment to sleep it off. Just prior to 4:00 a.m., she stepped outside to search for a friend with whom she had attended the party. She was suddenly attacked and sexually assaulted on the front lawn of the apartment building. In public view, the perpetrator pushed her to the ground, hit her several times and tore her clothes. The assault included penetration.

After hearing the complainant's screams, her two friends happened upon the assault in progress and pulled the man off of her. At least one of the friends recognized him as Saeed.[5] One of the friends drove the victim home, at which time the police were contacted. The victim was brought to the hospital where various injuries to her body were observed. The police arrived at the apartment building by 5:44 a.m. and arrested Saeed on the identification information provided by one of the friends. The arrest took place at 6:05 a.m. at the same location where the assault had taken place.[6]

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4 *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32 (S.C.C.) [hereinafter "*Grant*"].

5 This identification evidence was later weakened at trial.

6 *Saeed*, *supra*, note 1, at paras. 13-14.

Saeed was mistakenly released from the police station between 7:00 and 7:30 a.m., and was re-arrested at 8:35 a.m.[7] This apparently notable fact turned out to be a red herring given that Saeed appears to have remained in the presence of a police officer at all times during this mishap. Indeed, a police officer accompanied him back to the apartment building upon his release, at which time another officer who was still on scene at the apartment recognized that he should not yet have been released. Saeed was immediately re-arrested and turned back around for a second trip to the police station. Thus, at no time during this intervening period could he have taken a shower or otherwise cleansed himself of the DNA evidence that would prove so central at trial.[8]

At the station, Saeed spoke with counsel. The supervising officer at that point determined that a penile swab should be taken in order to preserve evidence of the complainant's DNA, which they believed would at that time still be located on Mr. Saeed's penis. The swab was not taken right away because the Officer trained to undertake this task was busy gathering evidence at the crime scene. When she returned about an hour later, she instructed an officer of the same gender as the accused on how to go about taking a swab. The swab was taken around 10:45 a.m. For a period of 30 to 40 minutes prior to the search, Saeed was handcuffed to the wall of a cell with no running water, in order to prevent the destruction of evidence.[9] (The handcuffs were intended to prevent him from licking his hands or otherwise washing away evidence.)

The swab ultimately revealed the presence of the complainant's DNA. At trial, the main issue was identity. The accused was convicted.

III. THE SECTION 8 CHARTER ARGUMENT

Both the trial judge and the Alberta Court of Appeal held that the DNA evidence obtained by way of the penile swab performed incident to arrest was admissible. However, both courts also held that the swab had violated Saeed's section 8 right to be free from unreasonable search and seizure. The majority in the Court of Appeal ruled that the search was governed by *Stillman*. In their view, *Stillman* dictated that a seizure of bodily material — which inevitably entails a significant infringement

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[7] *Id.*, at para. 15.

[8] Based on the expert evidence adduced at trial, that did not however exclude the possibility that the complainant's DNA could have otherwise been effaced. Still, the fact that he was erroneously released did not impact that one way or the other.

[9] *Saeed*, *supra*, note 1, at para. 21.

upon a person's dignity — requires the person's consent, a warrant, or exigent circumstances. The Supreme Court would come to disagree.

Recall that the issue in *Stillman* was whether the police could take hair samples, buccal swabs, and teeth impressions from a detained person, pursuant to the power to search incident to arrest. Justice Cory on behalf of a majority of the Court answered in the negative, given the invasiveness of the searches and seizures and the seriousness of the incursion on Mr. Stillman's privacy and dignity. Even the taking of a discarded tissue containing the accused's DNA was deemed to infringe section 8, in light of the fact that Mr. Stillman was in police custody (and thus not free to dispose of his bodily substances as he wished) and had expressly refused to provide any bodily samples to the police. Still, the Court held that the tissue evidence could be admitted on a section 24(2) analysis given that its seizure did not interfere with his bodily integrity and did not impact his dignity. That particular violation was thus deemed not to be serious.

Stillman has since stood for the proposition that the seizure of bodily samples from a person is impermissible in the absence of a warrant, consent, statutory authorization, or exigent circumstances. The defence in *Saeed* argued that *Stillman* was directly applicable, notwithstanding the fact that the bodily samples sought to be obtained from the accused were not his own.

The Crown in *Saeed* instead took the position that *Golden* ought to drive the analysis. The Crown did not argue that the general search incident to arrest framework was sufficient to adequately protect the privacy interests engaged. But it reasoned that a modified framework could do so, such that there did not need to be a *categorical* prohibition on the practice following an arrest.[10] *Golden* resolved the question of whether a strip search could be carried out incident to arrest. In that case, the strip search was aimed at the discovery of illegal drugs on the accused's person. Observing that a strip search had the potential to be "a humiliating, degrading and traumatic experience for individuals subject to them",[11] the Court devised a more stringent test to limit recourse to the procedure to instances where they were truly justified, and to ensure that they were performed in a reasonable manner. To be conducted incident to arrest, there must be grounds to believe a strip search is necessary to discover weapons or evidence

[10] *Saeed*, *supra*, note 1, at paras. 40 and 41.

[11] *Golden*, *supra*, note 2, at para. 83.

related to the reason for the arrest.[12] The search also needs to be carried out in accordance with restrictive guidelines.[13]

The issue before the Supreme Court in *Saeed* was thus largely framed as a contest between the *Stillman* approach and the *Golden* approach. The justices parted ways on which should apply, leading to three different results. The majority held that the penile search was permitted pursuant to the power to search incident to arrest, under a qualified test like that adopted by the Court in *Golden*. Justices Karakatsanis, concurring, and Abella, dissenting, rejected this modulated approach, essentially on the basis that *Stillman* was authoritative. Justice Abella would have excluded the evidence under section 24(2), whereas Karakatsanis J. held that the evidence could nevertheless be admitted. The divide between the two mainly rested on the characterization of the police conduct as stemming from good faith and the weight to be afforded to the police's failure to consider both a warrant and the possibility that the *Criminal Code* did not even provide for a warrant that would authorize this type of search and seizure.

IV. MOLDAVER J.'S MAJORITY JUDGMENT

The majority focussed its analysis on the requirement that a power to search incident to arrest must ultimately be reasonable.[14] When examining whether new investigative methods meet the reasonableness test, courts have tried to strike the appropriate balance between an accused's privacy rights and valid law enforcement goals. Justice Moldaver suggested that when the privacy interests at stake were "significant", one of two outcomes was possible: either they will be *so* significant ("almost inviolable") that the power to search incident to arrest will simply be unavailable, or they will be significant but to a lesser extent, such that a modified framework will be required for the search incident to arrest to be permissible. What's clear is that anytime a *significant* privacy interest is intruded upon, the traditional unmodified search incident to arrest framework will not apply: "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."[15]

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12 *Id.*, at para. 98.
13 See *Golden*, *id.*, at paras. 99 and 101-102.
14 *Saeed*, *supra*, note 1, at para. 4.
15 *Id.*, at para. 5.

Justice Moldaver acknowledged the undeniable: that a penile swab is a "significant intrusion" on an accused's privacy interests.[16] But he stopped short of declaring that the privacy interests engaged by this technique were near-inviolable. In his view, requiring that two criteria be met, over and above the three general prerequisites for a search to be validly conducted incident to arrest,[17] would suffice to render the warrantless search constitutionally permissible. The two criteria are:[18]

(1) there must be reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested; and

(2) the search must be conducted in a reasonable manner.

This last prerequisite, in turn, means that the penile swab will have to conform to several guidelines, akin to those that must guide the execution of a strip search.[19]

In other words, Moldaver J. set out pre-conditions for carrying out a penile swab incident to arrest similar to those applicable to strip searches pursuant to *Golden*. One might say that *Golden* thus prevailed over *Stillman*.[20] However, Moldaver J. did not dispute *Stillman*'s ratio. Rather, he distinguished it from the case at hand. The question thus becomes: What was it that, for the majority, sufficiently distinguished the privacy interests at stake in *Saeed* to those at stake in *Stillman*?

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[16] *Id.*, at paras. 6 and 56. See also para. 42.

[17] (1) That the search be pursuant to a lawful arrest; (2) that it be "truly incidental" to the arrest, *i.e.*, that it be "for a valid law enforcement purpose related to the reasons for the arrest"; and (3) that it be conducted reasonably. See, for instance, *id.*, at para. 37; *R. v. Fearon*, [2014] S.C.J. No. 77, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 27 (S.C.C.) [hereinafter "*Fearon*"].

[18] *Saeed*, *id.*, at paras. 6 and 42.

[19] *Id.*, at para. 78.

[20] The Criminal Lawyers' Association (CLA) presented a persuasive argument that reliance on *Golden* was misplaced, writing, *inter alia*, at 4-5 of its factum [hereinafter "CLA, Factum"]:

> A strip search, like other searches incident to arrest, is simply "a pragmatic extension to the power of arrest." … Often, the offence for which the detainee has been arrested cannot be substantiated, and the detainee cannot be dealt with, without the search. In contrast, DNA evidence from a genital swab will not yield useful results for weeks or months. It is of no immediate value to an investigation, or to the pressing decisions police must make, such as whether to lay a charge or give bail to a detainee. …
>
> Finally, strip searches are designed to respond to a strategy employed by offenders to avoid detection. … As a policy matter, prohibiting strip searches or requiring a warrant for everyone might encourage these tactics, and tend to hamper effective law enforcement. Those concerns do not apply to the taking of genital samples.

V. DISTINGUISHING *STILLMAN*: THE PRIVACY INTERESTS IMPACTED BY A PENILE SWAB

The case law has come to classify certain privacy interests as "territorial", "informational", or "personal". All three of these "zones or realms of privacy" were engaged in *Dyment*,[21] a seminal case involving a doctor taking a blood sample from a patient without the patient's consent or knowledge, and subsequently providing that sample to the police. The personal claims to privacy were described there as "those related to the person", in contrast to "those involving territorial or spatial aspects" and "those that arise in the information context".[22] While Moldaver J. does not resort to these categorical distinctions in describing the interests impacted by a penile swab, it is useful to conceptualize them in this way.

Justice Moldaver begins by distinguishing the privacy interests at stake in *Saeed* from the ones that were said to be impacted by the taking of bodily samples in *Stillman*. The first factor he cites to make that distinction is that "a penile swab is not designed to seize the accused's own bodily materials but rather, the complainant's."[23] He observes that "accused persons do not have a significant privacy interest in a complainant's DNA".[24] This factor thus focusses on the informational privacy interest at stake.

In support of the proposition that *Stillman* only applies to the accused's own bodily samples, he cites the following passage from Cory J.'s reasons: "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".[25] But quite apart from analyzing whether this was the extent of what *Stillman* stood for, Moldaver J. views this factor as carrying substantial weight in the ultimate analysis. In going on to find that the intrusion on the accused's privacy interests was not so significant as to fall outside the scope of the power to search incident to arrest, he again highlights the fact that the accused's own DNA or bodily substance — while it may be swept up in the process[26] — is not what was being sought.

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[21] *R. v. Dyment*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417 (S.C.C.) [hereinafter "*Dyment*"].

[22] *Id.*, at para. 19.

[23] *Saeed*, *supra*, note 1, at para. 45.

[24] *Id.*, at para. 47.

[25] *Id.*, at para. 44 (emphasis added by the Court), citing *Stillman*, *supra*, note 3, at para. 42, quoting with approval *Dyment*, *supra*, note 21, at 431-32.

[26] While Moldaver J. acknowledges that the accused's DNA will in all likelihood also be obtained from the swab, he underscores the fact that, in accordance with *Stillman*, the police could not make any use of it absent a warrant: *Saeed*, *supra*, note 1, at para. 67.

The second feature that Moldaver J. says distinguishes *Stillman* from the case at hand, is that a penile swab can in fact be *less invasive* than the procedures resorted to in *Stillman*:

> [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'.… 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.[27]

Again, these factors are cited later in the judgment when Moldaver J. conducts an independent analysis of the relative intrusiveness of penile swabs.[28] These considerations generally relate to the extent to which *the manner of search* impacts on the personal privacy interest engaged.

Finally, Moldaver J. cites the fact that "the accused's DNA or bodily impressions do not change, degrade, or disappear over time".[29] In other words, "there is no reason the police need to rush to seize this evidence."[30] By contrast,

> 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'.…[31]

Although this last factor does make *Saeed* distinguishable from the facts in *Stillman*, and is indeed a valid and persuasive consideration, it relates to the pressing law enforcement objective at hand, and not to the degree to which the search impacts the privacy interests of the accused. While it must therefore be factored into the ultimate balancing exercise, it does not assist with the determination of whether the privacy interests engaged are "so significant" as to be inviolable.

Aside from those factors that he says sets *Saeed* apart from *Stillman*, Moldaver J. does go on to consider more specifically the personal privacy interest being impacted. This factor relates both to the fact that the search is of a person, and to the actual area on the person being searched. In that respect, he concludes that while a penile swab relates to a most private area of the body, that is the only factor that renders the

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27 *Saeed*, *id.*, at para. 49.
28 See para. 55, *id*.
29 *Id.*, at para. 44; *Stillman*, *supra*, note 3, at para. 49.
30 *Saeed*, *id.*, at para. 44.
31 *Id.*, at para. 50.

search and seizure intrusive.[32] All other factors — as he distinguished them from *Stillman* — diminished the intrusiveness of the search.

VI. QUESTIONS RAISED BY THE RESULT IN *SAEED*

Because the majority in *Saeed* reaffirmed *Stillman*'s main holding — that the police cannot seize the accused's *own* bodily samples incident to arrest — the end result is that cutting off a lock of hair or clipping a fingernail will be off-limits incident to arrest, but swabbing the accused's penis will not be. The former have been deemed too intrusive to be conducted incident to arrest, without proper judicial authorization or the person's consent.[33] Ultimately, this necessarily turns on the informational privacy interest being impacted, *i.e.*, the fact that the bodily materials sought belong to the accused and thus reveal information about him.[34]

The length of time and level of intrusiveness involved in the taking of the bodily sample will not be determinative. While some of the procedures used in *Stillman* were invasive in respect of their duration and the pain or discomfort they occasioned, not all procedures captured by its holding will engage these considerations. Indeed, many of them are relatively non-invasive from a procedural and physical standpoint. Even if a buccal swab aimed at obtaining the accused's DNA is not accompanied by the taking of dental impressions as it was in *Stillman*, it

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[32] *Id.*, at para. 56.

[33] The United States came to a different conclusion when it addressed the taking of a buccal swab incident to arrest in the case of *Maryland v. King*, 133 S.Ct. 1958 (2013) [hereinafter "*King*"]. There, the U.S. Supreme Court held that taking and analyzing a swab for the arrestee's DNA during police booking procedures was minimally intrusive and thus permissible under the Fourth Amendment (the right to be secure against unreasonable searches and seizures) — even on a routine basis and in the absence of individualized suspicion. However, "[m]uch of the Court's analysis hinged upon its conclusion that DNA plays a critical role in the state's need to correctly identify arrestees.": S.J. Bachman, "Collection of DNA from Arrestees Charged with Serious Offenses Reasonable Under the Fourth Amendment", 44 Cumb. L. Rev. 319 at 322 (2013-2014) [hereinafter "Bachman"]. The analysis might therefore differ in the case of a penile swab where the DNA sought is *not* that of the arrestee and *not* for identification purposes.

[34] Interestingly, and again quite at odds with the analysis of its Canadian counterpart, the U.S. Supreme Court in *King* "largely confined its analysis to whether the *physical* intrusiveness of buccal swabbing outweighs governmental interests." The failure to fully consider the informational privacy interest at stake was not without its share of critics: see, for *e.g.*, C. Giannaros, "Unprecedented Infringement: Debunking the Constitutionality of DNA Collection From Mere Arrestees in Light of *Maryland v. King*", 28 J. C.R. & Econ. Dev. 455 at 471 and *ff.* (2015-2016); G.M. Dery III, "Opening One's Mouth 'For Royal Inspection': The Supreme Court Allows Collection of DNA From Felony Arrestees in *Maryland v. King*", 2 Va. J. Crim. L. 116 at 138 and *ff.* (2014) [hereinafter "G.M. Dery III"]; S.B. Noronha, "*Maryland v. King*: Sacrificing the Fourth Amendment to Build Up the DNA Database", 73 Md. L. Rev. 667 at 681 and *ff.* (2013-2014); Bachman, *id.*, at 335-36.

will remain impermissible as part of a search incident to arrest. *Stillman*'s ratio will no doubt continue to apply to such a swab, even if it is the only procedure being performed. Yet, just like a penile swab, that procedure is very quick and does not cause any pain or discomfort.

Instead, procedures aimed at obtaining the accused's own bodily samples will generally be off-limits as part of a search conducted incident to arrest, simply on the basis that the object is part of the accused's own body, whose integrity is not left whole. Because the penile swab does not *target* the accused's own bodily substance, it will generally be permissible incident to arrest.

From the perspective of the privacy interests that are impacted, is this defensible? While informational privacy interests are a relevant consideration, surely most would consider the swabbing of one's penis to be a far greater intrusion into personal privacy than the taking of nail clippings or the swabbing of a mouth. Yet the legal test is more stringent for a mouth swab than a penis swab, if what is being sought on the penis is not the accused's own bodily samples (which, logically, will almost always be the case, considering that the accused's DNA could be obtained less intrusively from many other parts of the body).

Justice Abella put it bluntly in her opening paragraph: "...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."[35]

Considering the criticisms that *Stillman* has attracted over time for its categorical approach to bodily samples, this incongruous result is perhaps not so surprising. Justice L'Heureux-Dubé might have had a point when she wrote in her dissent in *Stillman* that:

> [T]he type of search and seizure at issue constituted, in my opinion, minimal affronts to the appellant's bodily integrity. **Combing or plucking scalp hair is a procedure most people submit to daily without any risk, trauma or pain. The same can be said for the taking of buccal swabs which involves even less, if any, discomfort. The seizure of pubic hair, on the other hand, is more intrusive *given it involves an intimate part of the body*.**[36]

Looking back, this seems to be a most sensible statement. It also appears to reflect the course correction the Supreme Court took in 2009 in *Grant*,

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[35] *Saeed*, *supra*, note 1, at para. 131.

[36] *Stillman*, *supra*, note 3, at para. 174 (emphasis added).

when it began to distance itself from the *Stillman* approach — albeit in the context of section 24(2).

The *Stillman* approach is ultra-protective of bodily integrity, no matter the body part at issue. Everything emanating from the accused and deemed "conscriptive" was lumped in together for section 24(2) purposes. *Stillman*'s rationale was extended to all sorts of comparatively non-intrusive items including breath samples. Under section 24(2), all of these were rendered presumptively inadmissible because of the accused's compelled participation in the creation or discovery of the evidence. *Stillman*'s approach to the exclusion of evidence was long criticized for its overreach. These reproaches led — rightfully in my view — to a jurisprudential trend away from it.

VII. *GRANT* AND THE PRIVACY INTERESTS IMPACTED BY BODILY SEARCHES

Stillman led to anomalous results under section 24(2) of the Charter. That is why the readjustment that the Court made in *Grant* was a welcome change. Most significantly, the Court in *Grant* distanced itself from the reasoning in *Stillman* — grounded on the right against self-incrimination — regarding the sacrosanct nature of bodily substances or other things emanating from the accused, or obtained with the accused's participation. Indeed, in repositioning the place of bodily evidence in the section 24(2) analysis, the *Grant* Court rejected the notion, stemming from *Stillman*, that every type of bodily substance, because of its conscriptive nature, should be treated the same way. Instead, it recognized "the wide variation between different kinds of bodily evidence" and the differing impacts the taking of bodily evidence could have on the accused's rights:[37]

> ...Plucking a hair from the suspect's head may not be intrusive, and the accused's privacy interest in the evidence may be relatively slight. On the other hand, a body cavity or strip search may be intrusive, demeaning and objectionable. … [T]he *Charter* concerns raised by the gathering of non-testimonial evidence are better addressed by reference to the interests of privacy, bodily integrity and human dignity, than by a blanket rule that by analogy to compelled statements, such evidence is always inadmissible.[38]

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[37] *Grant*, *supra*, note 4, at para. 103.

[38] *Id.*, at paras. 103 and 104. See also para. 109.

This demotion of the concept of conscription implies, for instance, that the fact that a breath sample comes from the accused does not assist much with determining how intrusive it is. In many respects, *Grant* "broke free from the lopsided, and arguable ideologically driven *Collins-Stillman* framework".[39]

Grant pushed back against viewing the impact on the accused's interests solely from a self-incrimination lens, and mandated that the focus instead be on the interests impacted by the right at issue. Given that the right to be protected against unreasonable search and seizure seeks to protect privacy interests, the intrusiveness of the search will be dependent on the impact on those privacy interests, as well as on the person's bodily integrity and human dignity. The extent of the intrusion on the privacy interests at stake will be a factor of the expectation of privacy involved.

Interestingly, however, *Grant* seems to suggest that, when it comes to bodily searches, the informational privacy interest engaged is of less importance to the analysis than the personal privacy interest at play. Indeed, the Court specifically observed that "an unjustified strip search or body cavity search *is demeaning to the suspect's human dignity* and will be viewed as extremely serious *on that account*".[40] Critically, it added that "...[*t*]*he fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion*."[41] In other words, subsequent to *Grant*, the fact that information was obtained about the accused from the accused himself or with his participation, is not the be all and end all.

This prioritizing of interests is not necessarily anomalous. Expectation of privacy analyses have often been framed with a greater focus on one or the other of the privacy interests engaged. Indeed, a crucial part of the assessment first involves a determination of the nature or subject matter of the alleged search and evidence in issue.[42] The outcome of a given case will often turn on how that subject matter is defined and which privacy interest is accordingly prioritized. In *Tessling*,[43] for example, Binnie J. said that the analysis of whether

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[39] A. Cheon-Hayes, "From *Stillman* to *Grant*: When Form Becomes Substance" (Paper presented to the 2012 National Criminal Justice Conference: Seven, Eight, Night: Silence, Searches and Detention, Vancouver, April 2012), at 15.

[40] *Grant*, *supra*, note 4, at para. 114.

[41] *Id.*, at para. 114 (emphasis added).

[42] *R. v. Patrick*, [2009] S.C.J. No. 17, 2009 SCC 17, [2009] 1 S.C.R. 579, at paras. 26-27, 29 (S.C.C.) [hereinafter "*Patrick*"].

[43] *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 8-11, 24, 27-29 (S.C.C.) [hereinafter "*Tessling*"].

"FLIR" imaging of thermal energy or heat radiating from a residence could be conducted without a warrant was better viewed not from the lens of the territorial privacy interest in the home, but rather from the informational privacy interest engaged as a result of the information that could be gleaned from the home. This way of characterizing the issue led to a different result than had been reached in the lower court, where the emphasis had been on the territorial privacy interest at stake.[44]

Similarly, in *Patrick*, Binnie J. again viewed the subject matter of the search of the Appellant's discarded curb-side garbage as relating to information about what was going on inside his home. The reasonable expectation of privacy analysis therefore needed to proceed on that basis.[45]

In *S.A.B.*, the Court was asked to rule on the constitutionality of the DNA warrant provisions. The impugned procedures implicated both personal and informational privacy interests.[46] There, the Court was of the view that the informational privacy interest was "the central concern involved in the collection of DNA information by the state."[47]

Yet once *Grant* was decided, it stood for the proposition that when it comes to bodily searches, the predominant privacy interest engaged will in fact be personal, not informational.

These holdings in *Grant* deal with the section 24(2) inquiry into whether evidence obtained pursuant to a Charter violation would "bring the administration of justice into disrepute". In particular, they relate to the second step of that analysis aimed at determining the impact of unconstitutional police conduct on the accused's protected interests. Ultimately, the considerations engaged by the test of whether a particular type of search is so intrusive of a person's protected interests as to be impermissible incident to arrest are of the same nature. The result should turn on these same principles.

VIII. WHAT *GRANT* OUGHT TO HAVE MEANT FOR *SAEED*

There is no doubt that Moldaver J.'s reasons in *Saeed* are consistent with *Grant* to the extent that he does not engage in a consideration of the "conscriptive" nature of the evidence nor does he overemphasize the

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[44] See also *R. v. Gomboc*, [2010] S.C.J. No. 55, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 49 (S.C.C.).

[45] *Patrick*, *supra*, note 42, at para. 42.

[46] *R. v. S.A.B.*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678, 2003 SCC 60, at para. 40 (S.C.C.) [hereinafter "*S.A.B.*"].

[47] *Id.*, at para. 48.

sacrosanct nature of the body or the use that is made of it. However, one might question whether Moldaver J. gives too much weight to the lessened informational privacy interest engaged, and fails to give sufficient weight to the acute personal privacy interest at stake.

Indeed, post-*Grant*, Moldaver J.'s central emphasis on the fact that the search did not relate to the accused's own bodily samples seems misplaced. His statement that the level of intrusiveness of the penile swab is "limited" because it is only intrusive as a result of the body part searched, is also confounding. Even more at odds with the reasoning in *Grant* is the observation that "...[i]f 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'."[48] This appears to directly ignore the Court's indications in *Grant* that the type of bodily search performed and the area of the body searched — because of their impact on the personal privacy interest of the accused — should in fact be *central* considerations when assessing the impact of a search on the accused's privacy interests. *Of course* the swab would be far less intrusive if it was performed on the back of the hand. But that misses the point. The penile swab's high level of intrusiveness stems *primarily* from the fact that it relates to this most intimate area of the body.

This is not simply inconsistent with *Grant*, but also with other bodily search cases that pre-dated it, including *Golden* itself. There, Iacobucci and Arbour JJ. distinguished between various types of bodily searches, making it clear that a look inside a person's mouth is not in the same category as a look inside his anus:

> ...This definition distinguishes strip searches from less intrusive 'frisk' or 'pat-down' searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions. While the mouth is a body cavity, it is not encompassed by the term 'body cavity search'. Searches of the mouth do not involve the same privacy concerns, although they may raise other health concerns for both the detainee and for those conducting the search.[49]

Interestingly, more recently in *Fearon*, the Court lumped strip searches in with the seizure of bodily samples, even though the former's aim is for foreign objects:

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[48] *Saeed*, *supra*, note 1, at para. 56. See also para. 61.

[49] *Golden*, *supra*, note 2, at para. 47.

> In this respect, a cell phone search is completely different from the seizure of bodily samples in *Stillman* and the strip search in *Golden*. **Such searches are *invariably* and *inherently* very great invasions of privacy and are, in addition, a significant affront to human dignity**.[50]

The one case that Moldaver J. does rely on in support of his assertion that a key factor is the reduced expectation of privacy in the evidence seized, is *R. v. Monney*.[51] But *Monney* — which involved a bed pan vigil for drugs secreted on the person — was set in a border context where a person's expectation of privacy in all respects (and in particular in respect of contraband) is substantially reduced. The search was also conducted pursuant to statutory powers and on both those bases, has always been an outlier.[52]

This is also in contrast to *Greffe*,[53] where a rectal examination was conducted for contraband, but incident to the accused's arrest for traffic tickets. While the case ultimately turned on the search not having been connected to the reason for the arrest (one of the fundamental prerequisites of a valid search incident to arrest), Lamer J. (as he then was) observed that "it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demand the high standard of justification before such a search will be reasonable." This was so even though the body cavity search was being conducted to locate drugs, not anything in respect of which Mr. Greffe could hold a reasonable expectation of privacy.[54]

Following *Grant*, the impact on the person's bodily integrity also remains relevant to the analysis. Interestingly, in the context of determining whether a general warrant could have been resorted to for the penile swab, Moldaver J. acknowledged that there is "clearly a strong argument" to be made that it does encroach on bodily integrity.[55] If that is so, certain passages in *Stillman* on that point would be applicable to penile swabs, including the statement that "completely different concerns arise where the search and seizure infringes upon a person's bodily integrity, which may constitute the ultimate affront to human dignity."[56]

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[50] *Fearon*, *supra*, note 17, at para. 55 (italic emphasis by Court; bold emphasis added).

[51] [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652 (S.C.C.) [hereinafter "*Monney*"].

[52] See, for instance, *Golden*, *supra*, note 2, at paras. 73-74, where the Court explicitly stated that the border context was central to the analysis in *Monney* and that the reasoning in border cases is not directly applicable outside of that context. See also *Monney*, *supra*, note 51, at paras. 46 and 48; and *R. v. Simmons*, [1988] S.C.J. No. 86, [1988] 2 S.C.R. 495, at paras. 49 and 52 (S.C.C.).

[53] *R. v. Greffe*, [1990] S.C.J. No. 32, [1990] 1 S.C.R. 755 (S.C.C.).

[54] *Id.*, at para. 49.

[55] *Saeed*, *supra*, note 1, at para. 70.

[56] *Stillman*, *supra*, note 3, at para. 39. See also para. 42.

In light of all these statements, what *is* the correct assessment of the extent to which a penile swab intrudes upon a person's dignity, bodily integrity, and personal privacy?

IX. The Profound Impact of Genital Swabs on Personal Privacy

A person's "private parts" are named as such in recognition of the fact that they reasonably attract a very high expectation of privacy. An unwelcome intrusion on that part of the body would also be seriously demeaning of the person's dignity. Not to mention that "[l]ike any nonconsensual touching of a person's sexual organs, swabbing a detainee's genitals for evidence involves a direct physical interference with his sexual integrity."[57]

That Moldaver J. would state that "the evidence sought … does not implicate any particular privacy interest of the accused" because "the DNA belongs to someone else"[58] is eyebrow raising considering the personal privacy interest obviously impacted and the special importance that has been afforded to this interest. Indeed, in describing the recognized realms of privacy, Binnie J. in *Tessling* stated that: "Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal."[59] The reference to "objects or matters" concealed within a body confirms that the personal privacy interest is not exhausted by the fact that the evidence seized does not relate to the suspect or reveal information about him.

The area of the body targeted by the search — and how intrusive the search of that area is — are of central importance to the strength of a personal privacy claim. This was the Court's view, for instance, in the DNA context in *S.A.B.*:

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[57] CLA Factum, *supra*, note 20, at 2, referring to *R. v. Hutchinson*, [2014] S.C.J. No. 19, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 102 (S.C.C.) and *R. v. Park*, [1995] S.C.J. No. 57, [1995] 2 S.C.R. 836, at para. 38 (S.C.C.).

[58] *Saeed*, *supra*, note 1, at para. 55.

[59] *Tessling*, *supra*, note 43, at para. 21. See also *R. v. Pohoretsky*, [1987] S.C.J. No. 26, [1987] 1 S.C.R. 945, at 949 (S.C.C.). In the United States, personal privacy was also viewed as the core of the Fourth Amendment protection against unreasonable searches and seizures, at least until *King*, *supra*, note 33, came along: see *Schmerber v. California*, 384 U.S. 757, 767 and 770-71 (1966) and *Winston v. Lee*, 470 U.S. 753, 760 (1985), both cited in G.M. Dery III, *supra*, note 34, at 148-49.

> With regards to privacy related to the person, the taking of bodily samples under a DNA warrant clearly interferes with bodily integrity. However, under a properly issued DNA warrant, the degree of offence to the physical integrity of the person is relatively modest (*R. v. F. (S.)* (2000), 141 C.C.C. (3d) 225 (Ont. C.A.), at para. 27). A buccal swab is quick and not terribly intrusive. Blood samples are obtained by pricking the surface of the skin — a procedure that is, as conceded by the appellant (at para. 32 of his factum), not particularly invasive in the physical sense. With the exception of pubic hair, the plucking of hairs should not be a particularly serious affront to privacy or dignity.[60]

Justice Moldaver of course acknowledges that there would come a point where the level of intrusiveness would overcome the fact that the search does not relate to a bodily sample belonging to the accused. In fact, he concedes that he might draw the line at an even slightly more intrusive search, such as one that is "not restricted to the surface of the skin" as would be the case involving a vaginal swab. The distinction made between male and female genitalia, on the sole basis that the latter involves a mild form of penetration, strikes me as the difference between swabbing a person's lips as opposed to her inner cheek. Should such a trivial distinction be so consequential? Certainly where the level of intrusiveness is markedly different, it matters: consider the distinctions that have been made between bed pan vigils;[61] body cavity searches;[62] and, the "high water mark" of performing surgery to retrieve a foreign object from a person's body.[63] But that such important policy considerations should turn on such a trivial distinction as the ways in which male and female genitalia are constructed strikes me as an approach that, much like *Stillman*, will lead to incongruous results. Yet we were led to believe — in *Grant* — that the Court wanted to move away from that.

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[60] *S.A.B.*, *supra*, note 46, at para. 44.

[61] Where the police adopts a passive role and awaits natural excretion of certain bodily fluids. In *R. v. Poirier*, [2016] O.J. No. 3873, 2016 ONCA 582 (Ont. C.A.), for instance, the Ontario Court of Appeal implied that a bed pan vigil could be conducted pursuant to the common law power to search incident to arrest, provided it was conducted in a reasonable manner both as it relates to the duration of the search and the measures taken to protect the person's security of the person: see paras. 12 and 68-69.

[62] Defined in *Golden* as involving "a physical inspection of the detainee's genital or anal regions": *Golden*, *supra*, note 2, at para. 47. See also para. 48.

[63] In *Laporte v. Laganière J.S.P. et al.*, [1972] Q.J. No. 35, 8 C.C.C. (2d) 343 (Que. Q.B.), the police tried to do just that by obtaining a warrant to retrieve bullets from Mr. Laporte's body. Such a search cannot be performed incident to arrest *or* pursuant to a warrant: see *Golden*, *supra*, note 2, at para. 70.

X. CONCLUSION

The determination that a significant personal privacy interest is engaged in a given search does not end the analysis. The valid law enforcement objectives must be considered in the overall balancing act to determine whether the search power is available incident to arrest.

And no doubt there can be valid law enforcement objectives served by the collection of penile swabs, such as there were in *Saeed*.[64] Considering the potential for disposal or effacement, these objectives are arguably better served if the search can be conducted incident to arrest. This is particularly so given the fact that, as all the justices in *Saeed* surmised, there is likely no warrant currently available for this procedure.[65]

However, as Moldaver J. acknowledged, there will be cases where the privacy interests are *so* significant that they will effectively be inviolable: in those cases, law enforcement's valid goals will be of no matter. The question of whether a genital swab is one such case should, in my view and in light of the acute personal privacy interest involved, be revisited.

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[64] These appear to have been particularly concerning for the majority in this case, in light of the brutal nature of the offence, a sexual assault causing bodily harm: see paras. 32, 59-61, *supra*, note 1. Indeed, one might question whether the same result would have been reached in the face of less serious allegations or where identity was not truly in issue. Perhaps the threshold for permitting a penile swab incident to arrest can eventually be nuanced to take into account such factors.

[65] A general warrant could likely not be resorted to given the requirement that the search not interfere with a person's bodily integrity (s. 487.01(2) of the *Criminal Code*, R.S.C. 1985, c. C-46). Justice Moldaver acknowledged that there is a strong argument to be made that a penile swab does encroach on bodily integrity: *Saeed*, *id.*, at para. 70.