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Private Parts Less Private During Police Searches

A person's reasonable expectation of privacy in the most intimate parts of their own body may not shield them from a police search if what the police are after is another person's DNA.

In *R v Saeed*, a seven-member majority of the Supreme Court of Canada continued the trend of expanding the common law police power of search incident to arrest in ruling that genital swabs may be taken by police without judicial pre-authorization.

When Ali Hassan Saeed was taken into custody as a suspect in a vicious sexual assault he was placed in a "dry cell" (a cell without running water or a toilet) and handcuffed to the wall. The police then requested that he swab his own genitals, thus conscripting him into providing evidence against himself. Had he not complied, the police would have performed the swab forcibly to test whether the complainant's DNA was present.

In ruling that judicial pre-authorization was not required, the Court distinguished genital swabs from the leading case of *R v Stillman* on a number of grounds: the swab is not designed to seize the accused's own DNA, but rather the DNA of the complainant to which the accused has no reasonable expectation of privacy; the method of swabbing is "less invasive than taking dental impressions or forcibly taking parts of a person"; and the complainant's DNA will degrade over time and is at risk of being washed off by the accused.

Justice Moldaver, writing for the Majority, was quick to note that the intrusion on an accused's privacy in such instances was without dispute, but found that intrusion to be sufficiently limited provided the search is conducted with sufficient care. Adopting the methodology of tailoring the common law power of search incident to arrest as done in *R v Golden* (which addressed strip-searches) and *R v Fearon* (which addressed the search of cellular phones), Justice Moldaver noted that in order to constitute a reasonable search, genital swabs must be conducted in accordance with strict parameters that narrow the common law power and tailor it to suit the unique privacy interests at stake.

A valid genital swab conducted incident to arrest was found to require: a lawful arrest; reasonable grounds to believe that the genital swab will afford evidence of the offence for which the

accused was arrested; and must be conducted in a reasonable manner. Justice Moldaver set down a list of ten requirements to be met in order to satisfy the standard of reasonableness.

Justice Moldaver stipulated that his reasons applied only to the swabbing of outer surface skin and should not be taken as deciding the question of whether a penetrative swab taken incident to arrest would be reasonable and therefore in compliance with the *Charter*. He also noted that it remained open to Parliament to enact an express legislative regime to provide greater direction to the police on such matters.

Justice Karakatsanis disagreed with the Majority's analysis, writing: "how we treat those suspected of serious criminal offences says a great deal about the values of our free and democratic society." Noting that genital swabs could not be performed without exposing, touching, and manipulating the most private area of the body in the presence of strangers, Justice Karakatsanis ultimately concluded that the common law power of search incident to arrest could not authorize the police to undertake such an invasive search without a warrant. Nevertheless, she agreed that the breach of Mr. Saeed's s. 8 *Charter* right did not warrant a remedy under s. 24 and would have admitted the evidence.

Justice Abella dissented on both the issue of the search and the admissibility of the evidence, citing the dictum from *Stillman* that "searches that violate bodily integrity 'may constitute the ultimate affront to human dignity.'" She questioned how, if the taking of hair, buccal, and dental samples constituted "the ultimate invasion," being forced to remove ones clothing and swab their genitals in front of on-looking uniformed police officers could fall short of this bar.

While she agreed with Justice Karakatsanis' analysis that the search could not be authorized pursuant to the common law, Justice Abella found that the seriousness of the *Charter*-infringing state conduct, the impact of the breach on *Charter*-protected interests, and the societal interests in the adjudication of Mr. Saeed's case on its merits weighed in favour of excluding the evidence pursuant to s. 24 of the *Charter*.