Date: 20020122
Docket: CAC 169438

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Jordan, 2002 NSCA 11]

Roscoe, Flinn and Cromwell, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

PHILIP SCOTT JORDAN

Respondent

REASONS FOR JUDGMENT

Counsel: Kenneth W.F. Fiske, Q.C. for the appellant
Brad G. Sarson for the respondent

Appeal Heard: October 5, 2001

Judgment Delivered: January 22, 2002

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

Introduction:

[1] When a person is convicted after June 30, 2000, of certain offences (known as "primary designated offences") the judge is directed by the **Criminal Code of Canada**[1] to make an order authorizing the taking of samples from that person for DNA analysis. It is only where the person establishes that the impact of such an order on his or her privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice that the judge is not required to do so.

[2] The respondent, Mr. Jordan, pleaded guilty before Williams, J.P.C. to three offences including assault with a weapon. That offence is a primary designated offence. The Crown requested that the judge make a DNA order, but the judge refused to do so, holding that Mr. Jordan had established that its impact would be grossly disproportionate. The Crown now appeals the judge's refusal to make the DNA order.

[3] In my respectful opinion, the learned judge erred in refusing to make the order. There was nothing in the record which could support a finding that the offender had demonstrated that the impact of the order on his privacy or security of the person would be grossly disproportionate to the law enforcement objectives served by the taking of the sample. I would, therefore, allow the appeal and direct that the authorizing order issue.

II. Facts:

[4] The offences related to an attack by Mr. Jordan on Ms. Vanessa MacKinnon. They had a relationship out of which two children were born. On November 5, 2000, at about 6:00 a.m., Ms. MacKinnon came home, having gone out the evening before. Mr. Jordan expected her home at about 1:00 or 2:00 a.m. He was very upset by her late return, even though she had been at the hospital and

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[1] **Criminal Code of Canada**, R.S.C. 1985, c. C-46, s. 487.051(a); June 30th, 2000 is the date s. 5(1) of the **D.N.A. Identification Act**, S.C. 1998, c. 37, as amended S.C. 2000, c. 10 came into force: see s. 487.052 **Criminal Code**.

had on a hospital bracelet which she showed to him. Mr. Jordan grabbed Ms. MacKinnon's hair and throat. He threw her around the living room and the kitchen-dining area of the apartment. He grabbed an aluminum baseball bat, swung it back and forth saying now that the children were not home he could do what he wanted and that no one would find Ms. MacKinnon until the babysitter brought the children home. He forced her to the floor. He took a cord from a nearby radio and put it around her neck as if to strangle her. When she got her hands between the cord and her neck, he let go of the cord and grabbed her long braids and wrapped them across her throat. At the same time, he took a knife with an eight inch blade. While holding the braids across her throat, he held the knife over her and said that he was going to stab her. He brought the knife down, plunging it into the arm of a chair directly behind her and then threw the knife into the bedroom. Ms. MacKinnon escaped when Mr. Jordan stopped to make himself a cigarette.

[5] At the time of the sentencing, Mr. Jordan was 35 years old with an extensive criminal record dating back to 1983. His record included violent offences such as assault, assault causing bodily harm and assault with a weapon. His record also included convictions for obstruction of justice, failure to appear and breach of undertaking. He had been on probation at the time of the attack on Ms. MacKinnon.

[6] At the sentencing hearing, the Crown noted that Mr. Jordan had served two months on remand and requested a sentence of 60 days imprisonment on the basis that he should be given double credit for his remand time. The Crown also sought a two year period of probation. The judge imposed the sentence sought by the Crown.

[7] With respect to the DNA order, the judge invited submissions on whether its impact on Mr. Jordan's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice to be achieved through the early detection, arrest and conviction of offenders. Defence counsel submitted that the offence was "... on the lesser end of the spectrum for this particular kind of offence" and that, therefore, Mr. Jordan's privacy interests outweighed the interests of society. No evidence was called on behalf of Mr. Jordan on this, or any other, aspect of the case.

[8] The judge refused to make the DNA order, stating as follows:

> I have considered the circumstances of the offence. I have also considered the record of the accused which shows there are property offences and some violence in his past. And having considered those circumstances and the interest of the public for the early detection, arrest, and conviction of this particular accused, the circumstances of this particular case, as I said the record of the accused and the circumstances of this offence, on the offences that is before me, I am satisfied that this accused has established through counsel that if such an order were made, impact on his privacy and security would be grossly disproportionate to the public interest and protection of society and the proper administration of justice to be achieved through the early detection, arrest, and conviction of this offender. I will not order the DNA order, an order authorizing the taking of body substances for forensic analysis, for reasons that I have given will not be ordered.

[9] The Crown, pursuant to s. 487.054 of the **Criminal Code**, appeals the judge's refusal of the DNA order. The Crown submits that the judge erred in concluding that Mr. Jordan had discharged the onus on him of showing that the impact of the order was grossly disproportionate.

III. Scope of Review:

[10] This Crown appeal is brought under s. 487.054. The section does not specify to which court an appeal lies, the grounds for appellate intervention or the standard of appellate review.

[11] There was no dispute as to this Court's jurisdiction to hear the appeal. In relation to our jurisdiction, I would adopt the conclusion expressed on this point in **R. v .P.R.F. et al**[2].

[12] I must add a word about standard of appellate review. Unlike s. 487.052 considered in **R. v. Briggs** [3], s. 487.051(1)(a), which is relevant to this appeal, does not confer a discretion on the judge of first instance. Rather, the section

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[2] **R. v. P.R.F. et al.**, [2001] O.J. No. 5084 (C.A.)

[3] **R. v. Briggs** (2001), 157 C.C.C. (3d) 38 (Ont. C.A.); see also **R. v. P.R.F., supra**.

provides that the judge shall make the order unless the case falls within the exception set out in s. 487.051(2). If the exception is found to apply, the judge "... is not required to make an order". While this could be interpreted as conferring a discretion to make the order even if the exception applies, it is difficult to conceive of a judge doing so given that the applicability of the exception requires a finding that the order's impact on the offender would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice. I would conclude, therefore, that while s. 487.051(1)(a) and s. 487.051(2) require the judge to assess the balance between the offender's privacy and security interests and the legislation's law enforcement objectives, the decision to make or refuse the order is not discretionary; the judge is to make the order unless the exception applies in which case the order should not be made.

[13] The right of appeal under s. 487.054 is not expressly confined to questions of law. As noted, the refusal of an order under s. 487.051(1)(a) is not the result of the exercise of judicial discretion. It follows, therefore, that there is a full right of appeal in the sense that the decision will be reviewed on appeal to determine that the decision is correct in law and does not contain palpable or overriding errors of fact. In other words, while the judge's findings of fact are entitled to deference unless they are unreasonable, the judge's statement of the relevant legal principles and their application to the facts must be correct.

IV. Analysis:

1. Overview of the Legislation:

[14] The legislative history and an overview of the Forensic DNA Analysis provisions of the **Criminal Code** are set out by Weiler, J.A in **Briggs**[4]. I will, therefore, provide only a very brief summary to help place the question raised by this appeal in the context of the legislative scheme.

[15] There are two main aspects of the DNA analysis provisions of the **Code** which are found in ss. 487.04 through 487.091. The first aspect (which was enacted in 1995) provides for a warrant authorizing the taking of samples of bodily substances from a suspect for the purpose of forensic DNA analysis: see s.

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[4] **Supra** note 3.

487.05. The taking of such a sample may be authorized by a provincial court judge when he or she is satisfied by information on oath that:(i) a designated offence has been committed; (ii) a bodily substance has been found or obtained at the crime scene or from the victim; (iii) that the person from whom the sample is sought was a party to the offence; (iv) that the sample will provide evidence of whether the bodily substance found at the crime scene or on the victim was from that person; and (vi) it is in the best interests of the administration of justice to do so. To grant the authorization, there must be individualized suspicion in the sense that there are reasonable grounds to believe that the person was a party to the offence being investigated and that a sample of that person's bodily substances will provide evidence of whether the bodily substances found at the crime scene or on the victim was from that person.

[16] The second aspect of the forensic DNA provisions deals with orders for the taking from convicted persons of samples of bodily substances to be kept in a national DNA bank: see ss. 487.051 to 487.09. The national data bank itself is established under the **DNA Identification Act**[5]. As this appeal concerns the taking of a sample from a convicted person for inclusion in the data bank, it will be helpful to provide a brief overview of the data bank provisions and of the **Code** sections empowering a judge to order that samples be taken from convicted persons.

[17] The **Act** provides for the establishment of a national DNA data bank ("bank") for criminal identification purposes. The bank has two indices: a crime scene index and a convicted offenders index. The use of these indices was described as follows by Weiler, J.A. in **Briggs** [6]:

> [12] The profiles contained in these respective indices are compared against each other, together with new profiles that are submitted on an ongoing basis. Working together, the two indices create a highly effective and reliable tool that permits investigators to link crimes and apprehend recidivist criminal offenders. An officer investigating a fresh crime or an historical unsolved cold crime may submit a DNA profile from the crime scene. This profile will then be compared to other DNA profiles in both indices. If there is a "hit" (match) in the crime scene

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[5] **Supra,** note 1 (hereafter the "**Act**").

[6] **Supra** note 3 at para. 12.

> index, it would suggest that the same person committed the unsolved crimes. Linkage of DNA from various crime scenes can be of vital importance, particularly where the offences have been committed in different jurisdictions and the police may be looking for a serial offender. If there is a "hit" in the convicted offender index, it would suggest that the bodily sample at the crime scene is that of the offender.

[18] The **Act** deals with the storage of and access to the DNA profiles in the two indices. It recognizes and declares that "... the DNA profiles, as well as samples of bodily substances from which the profiles are derived, may be used only for law enforcement purposes" in accordance with the **Act**. There are detailed provisions governing communication of and access to information in the bank and there are specific prohibitions in relation to unauthorized use or communication of the DNA profiles in the bank.

[19] I turn briefly to the provisions for taking samples from convicted persons for inclusion in the convicted offenders index. Generally speaking, a judge is empowered to make an order authorizing the taking of samples for the purpose of forensic DNA analysis from persons who have been found guilty of certain listed crimes. The nature of the test to be applied by a judge in deciding whether to make such an order depends on the nature of the offence of which the offender has been found guilty and on whether it was committed before or after the **Act** came into force.

(i) Pre-**Act** offences:

[20] In the case of persons convicted of designated offences committed before the **Act** came into force, a judge may, on the application of the prosecutor, make the authorizing order "if ... satisfied that it is in the best interests of the administration of justice to do so." [7] . There are listed criteria which must be considered in applying this test. They are the criminal record of the offender, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the offender's privacy and security of the person[8].

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[7] **Criminal Code**, s. 487.052(1).

[8] **Criminal Code**, s. 487.052(2).

[21] There are also provisions authorizing the making of orders with respect to offenders who, prior to the coming into force of the relevant subsection of the **Code**, had been convicted of more than one murder committed at different times, of more than one sexual offence and serving a sentence of imprisonment of at least two years for one or more of those offences or who had been declared dangerous offenders. The **Code** empowers a provincial court judge to make such an order on the *ex parte* application of the prosecutor (i.e. without notice to the offender). The judge is to apply the same criteria as have been mentioned, that is, the offender's criminal record, the nature of the offence, the circumstances surrounding its commission and the impact of the order on the offender's privacy and security of the person[9].

(ii) Post-**Act** offences and convictions:

[22] With respect to offenders whose offences and convictions followed the coming into force of the **Act**, a judge is empowered to make an authorizing order, but the test to be applied varies according to whether the offence is a "a secondary designated offence" or a "primary designated offence" within the meaning of the **Code**.

[23] Designated offences are those which are either primary or secondary designated offences[10]. The list of primary designated offences is set out in s. 487.04. It includes sexual and violent offences such as sexual assault with a weapon, incest, murder, assault causing bodily harm and so forth. The list of secondary designated offences is also set out in the section. It includes a lengthier and more varied group of offences ranging from hijacking to mischief causing danger to life.

[24] Where the offender has been convicted of a primary designated offence, s. 487.051(1)(a) directs that the court shall make the authorizing order subject to the exception in ss. 487.051(2). As the exception is directly relevant to this appeal, I will set it out verbatim:

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[9] s. 487.055(1) and (3.1).

[10] s. 487.04.

> 487.051(2) The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

[25] No other statutory criteria are given with respect to the application of this exception.

[26] In the case of a secondary designated offence, the court may make the authorizing order if satisfied that it is in the best interests of the administration of justice to do so. In deciding whether it is, the court is to consider the same four criteria as have been mentioned earlier, that is, the criminal record of the offender, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the offender's privacy and security of the person[11].

2. Privacy, Security of the Person and the Public Interest in the Protection of Society and the Proper Administration of Justice:

[27] It is apparent that the intent of the DNA provisions is to strike a balance between, on one hand, the individual's rights to privacy and security of the person and, on the other, the requirements of effective law enforcement. In general, the legislation seeks to strike this balance by defining the outer limits of when it may be appropriate to make an authorizing order and leaving it to judicial discretion, within those outer limits, to decide how the balance should be struck in individual cases.

[28] The exception to this general approach is found in the section most relevant to this appeal, s. 487.051(a). As noted, that section provides that, with respect to a primary designated offence, the making of the order is not discretionary, but mandatory unless the offender establishes that its impact would be grossly disproportionate. Here, the judge's role is to determine whether the balance which the provisions attempt to strike is markedly lacking in the particular case such that

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[11] s. 487.051(b) and s. 487.051(3).

the impact on the offender's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice to be achieved through the early detection, arrest and conviction of offenders.

[29] This case does not raise the issue of the constitutionality of legislation. However, that does not mean that constitutional values are irrelevant to the issues in the appeal. Two important constitutional values are specifically referred to in s. 487.051(2) itself, namely, privacy and security of the person. This section, like the one considered by the Supreme Court of Canada in **R. v. Araujo**[12], represents what LeBel, J. referred to as a type of constitutional compromise. It must, therefore, be interpreted with "... a simultaneous awareness of the competing values of enabling criminal investigations and protecting privacy rights ...". It follows, therefore, that the scope and definition of privacy and security of the person in the constitutional jurisprudence is highly relevant to the interpretation of the section.[13]

[30] An individual's reasonable expectation of privacy is protected by the constitutional prohibition of unreasonable searches and seizures; a person cannot be deprived of life, liberty and security of the person other than in accordance with the principles of fundamental justice.[14] It follows that the scope and content of the rights to be free from unreasonable searches and seizure and to security of the person are relevant to the interpretation of s. 487.051 which refers to these same rights. The section directs that an order should not be made where its impact on these rights would be disproportionate. It is apparent that Parliament intended a constitutional balancing of interests which would be appropriate in the "usual" case or over the run of cases. The interpretation and application of the section therefore requires an assessment of the privacy and security of the person rights of

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[12] **R. v. Araujo**, [2000] 2 S.C.R. 992 at 1007

[13] see, for example, **R. v. K.P.**, [2001] J.Q. No. 439 (Q.L.) (Q.C.) at para. 17 and para. 22.

[14] **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the **Canada Act 1982 (U.K.)**, 1982, c. 11 [hereinafter **Charter**], s. 8 & 7.

the offender as referred to in s. 487.051 and the manner in which Parliament sought to balance these with the legislation's law enforcement objectives.

[31] It will be helpful to consider the purposes of the legislation, the reasonable expectation of privacy and the security of the person interests of the offender which may be implicated when an authorizing order is made and the factors or criteria relevant to the balancing of these interests and purposes. Given that this is the first occasion on which this Court has considered s. 487.051 and that the arguments of counsel in this case were not very wide-ranging, what follows, of necessity, is a very preliminary overview of the issues.

(i) Purposes of the legislative scheme:

[32] To determine the legislative purpose, one must look at both the **Act** and the relevant **Code** provisions. The **Act**, in s. 3, states its purpose: to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences. It recognizes the principle that the use of DNA profiles can facilitate the early detection, arrest and conviction of offenders which, in turn, serves the protection of society and the administration of justice.

[33] An assumption underlying the scheme as it relates to the taking of samples from convicted offenders is that the offender may offend in the future and the samples will aid in his or her detection and prosecution.[15] It has been noted that the "... focus on the legislation is clearly on violent and sex offenders, two groups which have historically had high recidivism rates...".[16] However, individualized grounds to believe that an offender will reoffend are not required. In other words, after conviction for a designated offence, reasonable and probable grounds to believe that the person will be a party to a future offence or that the sample will provide evidence of it are not required by the statute.

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[15]Vincenzo Rondinelli, "*Banking on DNA: Will Bill C-3 Usher in a New Era of Crime Fighting or Widen the Net of Social Control*", (2000) PDNA/RF - 002 (Q.L.). at para 73

[16]Ibid at para. 108

[34] I do not think that s. 3 of the **Act** is an exhaustive statement of the legislative purpose of the overall legislative scheme established by both the **Act** and the DNA provisions in the **Criminal Code**. As Weiler, J.A. pointed out in **Briggs**[17], this legislative scheme intended also, among other things, to deter potential repeat offenders, to promote the safety of the community, streamline investigations and, importantly, to assist the innocent by early exclusion from investigative suspicion. I will comment briefly on each of these.

[35] The DNA provisions may be seen as furthering the objective of deterrence — both general and specific. The fact that reliable identification may result from DNA analysis and, therefore, that the risk of apprehension and conviction is increased may, itself, deter criminal activity. In other words, the increased effectiveness of criminal investigation as a result of DNA technology will, as LaForest, J. put it in **Thomson Newspapers v. Canada (Director of Investigation and Research)**[18], "...enhance the law's potency as a deterrent to potential wrong doers." It has been noted that the retention of samples in a DNA data bank furthers the objective of specific deterrence of those whose samples are placed in the bank.[19]

[36] The DNA provisions also serve the objective of streamlining investigations. Comparison of a crime scene sample with the convicted offender index may serve to eliminate suspects who would otherwise require further investigation. Hill, J. referred to this in **R. v. S.F.**[20], noting that where a suspect is eliminated, investigative resources may be redirected so that law enforcement resources will be deployed in a more cost-effective manner.

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[17] **Supra** note 3; see also **R. v. P.R.F., supra** note 2.

[18] **Thomson Newspapers v. Canada (Director of Investigation and Research**, [1990] 1 S.C.R. 425 at 556.

[19] see, for example, **Washington v. Olivas**, 856 P.2d 1076 (1993)(Washington S.C.) at para. 48; **Landry v. Attorney General**, [1999] MA-QL 162 (Massachusetts Supreme Court).

[20] **R. v. S.F.**, [1997] O.J. No. 4116 at para. 55(Q.L.) (Ont. Ct. Gen. Div.); rev'd in part [2000] O.J. No. 60 (Q.L.)(C.A.).

[37] An important objective of the legislation is the protection of the innocent. At first look, one might say that there is no need for a DNA data bank to further this objective; a person falsely accused can always voluntarily submit a sample for analysis in order to be vindicated. That reaction, however, is simplistic. Resort to the bank may eliminate a potential suspect and thereby prevent investigation of that person. Moreover, there may be reasons apart from guilt for innocent suspects to refuse their consent for DNA testing. As Russell, J.A. perceptively points out in **R. v. S.A.B.**[21], "... it cannot be assumed that the innocent will voluntarily submit to DNA testing."

[38] Deterrence from criminal activity, increased investigative efficiency and elimination of the innocent from suspicion also, of course, tend to promote the safety of the community and the just administration of the criminal law.

[39] In summary, I would endorse the view of Weiler, J.A. in **Briggs** that the identification of the offender from whom the sample is sought in relation to other crimes is only one of several purposes of the legislative scheme. It also serves the important objectives of general and specific deterrence, of making criminal investigation more efficient, of protecting the innocent and, ultimately, of promoting the safety of the community.

(ii) Privacy and Security of the Person

[40] The privacy and security of the person interests of the offender which are referred to in section 487.051(2) overlap to a very considerable extent. Using the **Charter** jurisprudence as a guide to the interpretation and definition of these interests, we see that there are two main components, one relating to the privacy of information which may be obtained from bodily substances and a second relating to the broad notion of bodily integrity. There being no **Charter** challenge in this case, it is not my intent to offer any views on the question of whether these provisions withstand **Charter** scrutiny. Rather, my purpose is simply to attempt to understand the balance between interests protected by the **Charter** and the legislation's law enforcement objectives which Parliament has attempted to strike by enacting these provisions.

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[21] **R. v. S.A.B.** (2001), 157 C.C.C. (3d) 510 (Alta.C.A.) at para. 88.

[41] Like all **Charter** rights, those under sections 7 and 8 must be understood in the particular context in which they are asserted.[22] As Lamer, C.J.C. said in **Borden**[23], "[t]he inquiry under s. 8 involves a balancing of the reasonable expectation of privacy and the societal interests, including effective law enforcement. This balancing is highly sensitive to the context and circumstances in which the search or seizure is conducted." Similarly, in relation to section 7, LaForest, J. has said that "... the requirements of fundamental justice are not immutable; rather they vary according to the context in which they are invoked."[24] In short, context is relevant to the definition of the protected interest as well as to the appropriate balancing of it in relation to the overall interest of society.[25]

[42] The decision to grant or withhold authorization for a search or seizure requires the balancing of two interests: that of the individual to be free of intrusions of the state and that of the state to intrude on the privacy of the individual for the purpose of law enforcement. As Sopinka, J. pointed out in **Baron v. Canada**[26] :

> The circumstances in which these conflicting interests must be balanced will vary greatly. The strength of the interests will be affected by matters such as the nature of the offence alleged, the nature of the intrusion sought including the place to be searched, the time of the search and the person or persons who are the subjects of the search. ...
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> In order to take account of the various factors affecting the balancing of the two interests, the authorizing judge must be empowered to consider all the circumstances. No set of criteria will always be determinative or sufficient to

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[22] see the authorities referred to in **R. v. Wilcox** (2001), 192 N.S.R. (2d) 159 (N.S.C.A.) at para. 92 - 98

[23] **R. v. Borden**, [1994] 3 S.C.R. 145 at 155 (emphasis added).

[24] **R. v. Lyons**, [1987] 2 S.C.R. 309 at 361

[25] **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154 at 226

[26] **Baron v. Canada**, [1993] 1 S.C.R. 416 at 435; see also **R. v. Araujo**, [2000] 2 S.C.R. 992 at 1006-7.

> override the right of the individual to privacy. It is imperative, therefore, that a sufficient degree of flexibility be accorded to the authorizing officer in order that justice be done to the respective interests involved.[27]
> (emphasis added)

[43] I turn first to the offender's interest in the privacy of information which may be gleaned from samples of bodily substances. There is, I think, little doubt that the state sanctioned taking of a bodily substance without the person's consent is a search or seizure within the meaning of s. 8 of the **Charter**[28]. There being no **Charter** challenge to the authorizing legislation in this case, it is assumed for the purposes of this appeal that s. 487.051 provides lawful authority for the making of an authorizing order.

[44] As noted by Iacobucci, J. in **Borden**[29], there is a reasonable expectation of privacy with respect to what he termed the "informational content" of a person's blood. As LaForest, J. put it in **Dyment**[30], "... the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of human dignity."

[45] The sensitive and revealing information which may be generated by genetic testing must be taken into account in assessing this aspect of the privacy interest. As has been pointed out, DNA analysis can be used to generate more personal information than other types of medical testing, including information about other family members and future medical conditions.[31]

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[27] *Ibid*. at 436 -437.

[28] **R. v. Dyment**, [1988] 2 S.C.R. 417 at 431 - 432; **R. v Pohoretsky**, [1987] 1 S.C.R. 945 at 948; and **R. v. Borden, supra**, note 23.

[29] Supra note 23 at p. 161.

[30] See note 28 at 431.

[31] C. Scowby, "*Private Costs of 'Safer Communities': DNA Evidence and Data banking in Canada*" (1999), 5 Appeal 86 - 96; see also **R. v. P.R.F., supra** note 2 at paras. 20 and 21.

[46] As mentioned earlier, the legislative scheme provides safeguards against use of a DNA profile or samples of bodily substances for unauthorized purposes. These protections are in accordance with one of the principles set out in s. 4 of the **Act**, namely that DNA profiles and samples from which they are provided may be used only for law enforcement purposes in accordance with the **Act** and not for unauthorized purposes. However, as Rosenberg, J.A. wisely pointed out in **R. v. P.R.F.**, "[t]he risk that personal information about medical, physical or mental characteristics may be obtained and used for purposes other than forensic comparison cannot be entirely discounted.[32]

[47] In addition, it should be remembered that the reasonable expectation of privacy as regards identity may well be lower in the cases of persons who have either been arrested on reasonable and probable grounds that they have committed a serious crime or who have been convicted of a serious offence.[33]

[48] I turn to the second main component of the interests which are implicated by a DNA order. It is concerned with the integrity of the body, an element recognized in the jurisprudence under both ss. 7 and 8 of the **Charter**. As was noted in **Pohoretsky**[34], unauthorized invasion of bodily integrity is a serious violation of privacy. In **Dyment**, it was said that persons "... are protected not so much against the physical search ... as against the indignity of the search, its invasion of the person in a moral sense"[35]. Similarly, the integrity of the body also implicates the individual's security of the person in at least two ways. There is the purely physical aspect which is concerned with the physical impact of the taking of the sample. Second, there are the psychological and human dignity

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[32] **R. v. P.R.F., supra** note 2, at para. 21.

[33] see **R. v. Briggs**, supra note 3; **R v. Beare; R. v. Higgins**, [1988] 2 S.C.R. 387 at 413; and **Weatherall v. Canada (Attorney General)**, [1993] 2 S.C.R. 872 at 877; **R. v. P.R.F., supra** at para. 18; **R. v. Osmond**, [2000] O.J. No. 4267 (Q.L.).

[34] **Supra** note 28.

[35] **Supra** note 28 at p. 429.

aspects concerned not so much with actual or contingent physical harm as with the invasion of the person's human dignity. As Cory, J. observed in **R. v. Stillman**[36]:

> [51] The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 *Charter* right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. ...

[49] The legislation regulates the physical aspects of the taking of the sample by specifying the permitted means by which the samples may be obtained and by providing for judicial discretion to impose conditions in relation to the taking of the samples. The permitted means are set out in s. 487.06(1) which provides:

> 487.06(1) A peace officer or another person under the direction of a peace officer is authorized to take samples of bodily substances from a person by a warrant under section 487.05 or an order under section 487.051 or 487.052 or an authorization under section 487.055, by any of the following means:
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> (a) the plucking of individual hairs from the person, including the root sheath;
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> (b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
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> (c) the taking of blood by pricking the skin surface with a sterile lancet.
>
> (emphasis added)

[50] These three permitted methods of obtaining samples are physically invasive to only a very limited extent. Moreover, the authorizing judge may set out terms "... to ensure that the taking of the samples ... is reasonable in the circumstances"[37].

[51] In assessing the balance struck by Parliament in this legislation, I think that one should assume that the balance is premised on the assumption that, in the

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[36] **R. v. Stillman**, [1997] 1 S.C.R. 607 at para. 51. Of course, **Stillman** was a case in which there was no lawful authority for the investigative tests which had been undertaken and Cory, J. commented favourably on the DNA warrant provisions which had subsequently been enacted.

[37] **Criminal Code**, s. 487.06(2).

usual case, the utilization of any of these permitted methods of obtaining samples will be physically invasive to only a very limited extent. As pointed out by Finlayson, J.A. in **R. v. S.F.**[38], these methods will cause virtually no pain, discomfort or danger to the health of the offender.

[52] The method of taking the samples also relates, however, to the second aspect of the offender's bodily integrity. As Cory, J. said in **Stillman**[39], "Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy." In short, this aspect is not concerned simply with the degree or duration of discomfort or the risk of harm associated with the procedures for obtaining the sample, but with the broader notion that the exercise of authority over a person's body is an invasion of that person's dignity.

[53] This aspect is discussed by Weiler, J.A. in **Briggs**[40]:

> [35] Human dignity will also be impacted by the methods used to obtain the sample of DNA and the sites from which the samples are obtained. Dental impressions were taken from Stillman and the court held that this was a lengthy and intrusive process. By contrast, one of the methods for taking DNA provided for in the *Code* is the relatively quick and less discomfiting procedure of swabbing the lips, tongue and inside the cheeks of the mouth. Stillman had pubic hairs removed as well as hair from his scalp. The *Code* provides for the plucking of individual hairs including the root sheath but does not specify the location on the body from which the hair may be taken. However, the *Code* requires that the person who is authorized to take samples of bodily substances do so in a manner that respects the offender's privacy and that is reasonable in the circumstances (s. 487.07(3)). Thus, a person would not ordinarily be required to expose a part of the body that is not ordinarily exposed to view. If, as in *F.(S.), supra*, the hair is plucked from the head, the intrusion on the individual's privacy will be minimal. Finally, the *Code* provides for the taking of a drop of blood by pricking the surface of the skin. This may be done by pricking a finger. The person who is to take the sample must be a person with training or experience (s. 487.056(3)). A judge may specify the manner in which the sample is to be taken (s. 487.06(2)).

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[38] **Supra** note 20 at para. 27.

[39] **Supra** note 36 at para. 87.

[40] **Supra** note 3.

> The legislation therefore proposes a contextual approach to the making of an order authorizing the taking of a sample of a bodily substance to be used to conduct a DNA analysis. ...
> (emphasis added)

(iv) Summary:

[54] By providing this overview of the legislation's purposes and the privacy and security interests of offenders which may be implicated by the taking of samples, I am attempting to ascertain the balance which Parliament sought to obtain between the privacy and security interests of offenders on the one hand and the objectives relating to the administration of criminal justice on the other. In this case, there is no constitutional challenge, so the task of the judge exercising the statutory authority under s. 487.051(1)(a) is to attempt to give effect to that balance in specific cases.

[55] It is apparent to me that Parliament proceeded on the assumption that a person who has been convicted of a serious criminal offence, such as those offences which it listed as primary designated offences, has a considerably reduced expectation of privacy with respect to his or her identity. It is also clear that Parliament provided safeguards against the use of the samples or profiles generated from them for any other purpose. This, in part, is an answer to the concern about the loss of privacy with respect to the use of genetic information for purposes other than identity.

[56] I think it is also clear that the DNA bank provisions have purposes beyond the obtaining of evidence against a particular suspect in a future crime. These include deterrence, streamlining of investigations, the elimination of the innocent from investigative suspicion and, generally, the promotion of community safety. Individualized reasonable grounds to believe that the sample from the offender will afford evidence of a future offence is not an element of the legislative scheme. This, in my opinion, reflects not only the reduced expectation of privacy of such persons in their identity but also the broader legislative purposes which the scheme serves.

[57] With respect to bodily integrity, which relates to both privacy and security of the person, the legislation establishes procedures for obtaining samples which appear to be minimally intrusive from a purely physical point of view and which,

as a general rule, will not cause harm or trauma to the offender. It also confers on the authorizing court the discretion to include terms and conditions for the taking of the samples [41]. It is implicit in these provisions that Parliament limited the means by which the samples could be obtained with the potential for the invasion of bodily integrity in mind and provided, by means of the judicial discretion to impose conditions, a method by which the invasion may be kept within reasonable limits. For example, from the point of view of bodily integrity, there is a significant difference between taking hairs from one's head or arms and taking pubic hairs. The court asked to issue the authorizing order has the discretion to take this into account and specify the methods of taking the sample.

[58] To summarize, Parliament decided that, in general, the taking of a sample from a person convicted of the most serious criminal offences (i.e. those set out as primary designated offences) for the limited purposes of the DNA bank and pursuant to limited and judicially controlled methods does not unreasonably interfere with the offender's reasonable expectation of privacy or limit the offender's security of the person other than in accordance with the principles of fundamental justice. There being no constitutional challenge to the authorizing provisions, this legislative judgment must be accepted in interpreting and applying the provisions.

[59] In what circumstances would the impact of the order on the offender's privacy and security of the person be grossly disproportionate to the public interest in the protection of society and the proper administration of justice to be achieved through the early detection, arrest and conviction of offenders? In my view, this will be so if two factors are present. The first involves a comparison of the balance struck by Parliament in the legislation for the majority of cases on the one hand and the particular circumstances of the case before the Court on the other. If the circumstances of the particular offender or of the offence or of the risk of breach of privacy or security of the person vary markedly from the sort of cases which Parliament may be presumed to have had in mind in devising the legislative scheme, the impact of the order may be found to be grossly disproportionate. The second factor relates to the court's power to impose conditions in the authorizing order. The authorizing order should only be refused if the exercise of discretion to impose terms and conditions in the authorizing order cannot adequately restore the

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[41] **Criminal Code**, s. 487.06(2).

appropriate balance. As s. 487.051 makes clear, the burden of establishing that the order should not be made is on an offender who has been convicted of a primary designated offence.

[60] The factors which are relevant to the definition and scope of the protected interests provide guidance as to how consideration of this balance should be approached. While the full context of the particular situation must be considered, it may be helpful to note specific matters that will usually be relevant.

[61] Sopinka, J. in **Baron**[42] identified three factors relevant to the balancing of the individual's right to be free from state intrusion and the societal interest in law enforcement. They were, broadly stated, the nature of the offence, the nature of the intrusion and the circumstances of the individual who will be the subject of the intrusion. These provide a useful starting point for consideration of whether, in a particular case, the impact of the taking of DNA samples on the offender's privacy and security of the person will be grossly disproportionate to the state's law enforcement objectives. These factors, of course, cannot be considered in isolation from each other; it is the overall balance that is critical.

[62] As noted earlier, Parliament has set out, in a number of instances, statutory criteria which the court must consider in deciding whether to make a DNA authorizing order[43]. These criteria are not expressly made applicable to the orders like the one under consideration in this appeal following conviction for a primary designated offence. However, they for the most part mirror those identified in **Baron** and, in my opinion, it will generally be helpful to consider them in relation to the balance which Parliament attempted to strike in s. 487.051. These criteria reflect matters which are important to the consideration of the underlying **Charter** interests of the offender and help to identify some of the considerations which, in Parliament's view, may be relevant in balancing its law enforcement objectives with the privacy and security of the person rights of the offender. I will mention each one briefly.

(a) the criminal record of the person:

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[42] **Supra** note 26.

[43] see e.g. s. 487.051(3).

[63] How is the criminal record of an offender potentially relevant to the balance struck by Parliament in the legislation? There are at least three ways which, in my view, the record may be relevant.

[64] The offender's record may be relevant as one indicator of the likelihood that the offender will reoffend. An important purpose of the DNA bank is to assist in the identification of persons who have committed crimes. The more likely it is that an individual will commit other crimes, the more likely it is that the person's sample will help identify that person as the perpetrator of another crime.

[65] However, in considering the record for this purpose, two points must be kept in mind. First, as Weiler, J.A. pointed out in **Briggs**[44], the identification of offenders is not the only purpose of the DNA bank. It does not necessarily follow, therefore, that an offender who is considered unlikely to reoffend falls outside the intended purpose of the provisions. Second, it is implicit in the legislative scheme relating to convicted persons that individualized reasonable grounds to believe the person will reoffend are not required and, therefore, was not part of the balance which Parliament has attempted to strike.

[66] The offender's criminal record may also be relevant in the sense that a serious record for violent or sexual offences may indicate a degree of dangerousness to society which makes the interference with the offender's privacy and security of the person more readily justifiable than it would be, for example, in the case of an offender with a record of non-violent offences.

[67] The record may also be relevant to the extent that it tends to indicate whether the offender has been convicted of offences with respect to which DNA identification is generally a useful investigative tool. I will say more about this aspect in a moment.

(b) the nature of the offence and the circumstances surrounding its commission:

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[44] **Supra** note 3.

[68] It is apparent from a reading of the list of primary designated offences that the focus of Parliament's attention was the violent or sexual offender. However, as was pointed out by Braun, J.P.C. in **R v. K.P.**[45], a wide variety of facts and conduct may give rise to conviction for a particular offence. It follows that if the offence, in the particular circumstances, is not typical of the general nature of the listed offences or is such that the risk of recidivism appears to be low, these will be relevant considerations in determining whether the case is outside the balance which Parliament struck between the objectives of the DNA provisions and the offender's privacy and security of the person.

[69] A further consideration may be the relevance of DNA identification in the particular circumstances of the offence or, as mentioned earlier, whether the offender's criminal record indicates that DNA was or could have been a useful investigative tool.

[70] However, in taking these matters into account, two other aspects of the legislative scheme must be considered. First, and as noted earlier, the identification of offenders is not the only objective of the DNA provisions. The fact that DNA identification was not, or is not, likely to be useful with respect to the offender, may tend to show that obtaining the samples will not further the legislation's identification purpose. However, such evidence does not negate the testing of the offender in relation to the legislation's other purposes. Related to this is the point that the availability of DNA samples at crime scenes continues to expand as technology advances. As Weiler, J.A. points out in **Briggs**[46], early DNA cases generally involved samples from blood or semen found at the scene or on the victim. Now, however, microscopic deposits of biological substances can provide a DNA sample and, of course, there are ways in which a perpetrator may leave samples of DNA which are unrelated to the acts involved in committing the crime. In other words, as technology advances, the sort of crimes in which DNA evidence may be obtained and helpful will expand.

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[45] **R. v. K.P.**,[2001] J.Q. No. 439 (Q.L.) at para. 34.

[46] **Supra** note 3.

[71] Second, the legislation specifically does not require individualized suspicion in the case of offenders as opposed to suspects. In other words, the fact that there is little or no reason to think that the offender will reoffend and that, therefore, the sample will not serve a purpose in identifying the perpetrator of some future crime was not, in Parliament's view, a critical aspect of the balance in the case of taking samples from offenders.

(c) The impact of an order on the person's privacy and security of the person:

[72] The balance struck by Parliament assumes that the sample will be used only for the limited purposes set out in the **Act** and that, apart from such limited use, the individual's privacy as regards the "informational content" of the sample will be preserved. The balance also assumes that there is judicial discretion to assure that the taking of the sample is conducted in a way that infringes the privacy and bodily integrity of the offender as little as reasonably possible. It further assumes that there is virtually no pain, discomfort or danger to health involved in taking the sample.[47]

[73] It follows from this, in my view, that it is relevant to consider whether these assumptions are valid in the particular case. For example, evidence of a specific risk of misuse of the sample or particular dangers to the health of the offender if the sample is taken would tend to show that the circumstances of the particular offender are outside the balance which Parliament envisioned in crafting the legislation.

(d) The weighing process:

[74] In the case of an offender who has been convicted of a primary designated offence, the offender bears the onus of persuading the court that he or she falls within the exception set out in s. 487.051(2). This burden must be discharged through evidence on the record or by means of matters of which judicial notice may be properly taken. The exception applies only if the court concludes on the balance of probabilities that the impact of the order would be grossly disproportionate to the law enforcement and other objectives served by the

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[47] see **R. v. F.(S.)**, **supra** note 20 per Finlayson, J.A. at paras. 27 - 28

legislation. I think it may be taken from this language that the offender's onus will only be discharged if he or she demonstrates that the taking of the sample in the particular circumstances of the case would constitute an unjustified infringement of his or her **Charter** rights. To put it simply, the judge would have to be persuaded that the particular case was so far removed from the usual situations contemplated by the legislative scheme that the taking of the sample is not reasonably justified.

[75] In deciding whether this is the case, the judge must bear two key aspects of the scheme in mind. The first is that individualized grounds for belief that the offender will reoffend are not required and their absence, in general, will not, therefore, weigh very heavily against the making of the order. On the other hand, if the offender persuades the judge that the likelihood of recidivism is low, this will be entitled to due weight in the overall assessment of whether the impact of the order would be grossly disproportionate.

[76] Second, and related to the first point, the fact that DNA identification was not relevant to the underlying primary designated offence does not weigh heavily against the making of the order. This is because the scheme has purposes other than the identification of offenders and that technological advances are likely to change our traditional conception of the sorts of crimes in which DNA identification could play a part.

[77] In **R. v. P.R.F. et al.**[48], the Ontario Court of Appeal considered appeals in which orders had been refused under ss. 487.052 and 487.051(1)(b). As noted, under those sections, the Court has a discretion whether to make or refuse the order. The Court of Appeal stated, however, that it will usually be in the best interests of the administration of justice to make the order. Rosenberg, J.A., for the Court, said:

> [18] ... In balancing the offender's right to privacy and security of the person against the state interests in obtaining the offender's DNA profile, the court must consider the following. The legislation offers significant protections against misuse of the DNA profile information, thus minimizing an improper intrusion into the offender's privacy. Having been convicted of a designated offence, the offender already has a reduced expectation of privacy. In the ordinary case of an

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[48] **Supra** note 2.

> adult offender the procedures for taking the sample have no, or at worst, a minimal impact on the security of the person. Thus, in the case of an ordinary adult offender there are important state interests served by the DNA data bank and few reasons based on privacy and security of the person for refusing to make the order.
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> ...
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> [22] I agree with Weiler J.A.'s analysis of *Briggs* and with the importance of collecting DNA profiles for the salutary purposes she identifies. The courts must nevertheless keep in mind the distinction between routine fingerprinting and DNA profiling. This distinction is highlighted by the fact that under s. 487.051(3) and s. 487.052(2) the court is required to give reasons for making the DNA order. That said, and leaving aside other considerations, I would expect that in most cases the balance would be struck in favour of making the order under s. 487.051(1)(b) or s. 487.052, as the case may be.

[78] This reasoning applies even more forcefully to orders sought under s. 487.051(a) where the making of the order is not discretionary and where the offender has the onus of showing that its impact would be grossly disproportionate. Cases in which an order properly sought under s. 487.051(a) may be refused will be very rare indeed.

V. Disposition:

[79] In my view, the judge erred in law by not making the order on the record before him. While the primary designated offence giving rise to the conviction did not result in any serious injury and the offender appears to have regained control of himself on his own, the incident was violent and the circumstances dangerous. Mr. Jordan's record could not reasonably support a finding that there was little risk of recidivism. The fact that DNA identification was not implicated in this, or so far as we know in his other offences, is a factor which was entitled to little weight. There was no evidence of any exceptional risk to the offender's privacy other than that inherent in the scheme itself. There was no evidence that the taking of the sample would involve more than minimal and brief discomfort. There was no evidence that it would put Mr. Jordan's health at risk in any way. There was no suggestion, let alone any evidence, that the taking of the sample in the circumstances of this case would result in a violation of the offender's

Charter rights. There was, in short, no basis in the record or in matters of which judicial notice could be taken upon which the order could be refused.

[80] While after review of extensive material and considerable reflection, I have reached the conclusion that the order should have been made in this case, it appears to me that the learned judge was wise to have raised this issue with counsel and to do what he could to determine as best he could whether the offender's privacy and security of the person would be disproportionately affected by the order. As LeBel, J. noted in a different context in **R. v. Araujo**[49], the judge who is asked to grant an authorization for an intrusive investigative procedure is "... the guardian of law and constitutional principles protecting privacy interests". As he pointed out, the judge should not view him or herself as a rubber stamp or be reluctant to ask questions. Clearly the learned judge in this case took that direction from our highest court to heart.

[81] I would allow the appeal, direct that an order issue under s. 487.051 and remit the matter to the learned provincial court judge for settlement of its terms pursuant to s. 487.06(2).

Cromwell, J.A.

Concurred in:
Roscoe, J.A.
Flinn, J.A.

[49] See note 26.