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Strip Searches in Canada and the Constitutional Right to be Free From Unreasonable Searches and Seizures

Wayne K. Gorman

On January 18, 1997, in a restaurant in Toronto, Mr. Ian Golden, a black male, was observed by the police selling what they believed to be cocaine. As a result, he was arrested and searched. The search included a "pat-down" search, but also included the police undoing and pulling back Mr. Golden's pants and underwear. The police saw a white substance within a clear plastic wrap protruding from between Mr. Golden's buttocks. The police then forced Mr. Golden to bend over a table. Mr. Golden's buttocks and genitalia were completely exposed. Mr. Golden defecated. The police retrieved a pair of rubber dishwashing gloves from one of the restaurant's employees and removed the package. By this point, Mr. Golden was face-down on the floor. The package was found to contain 10.1 grams of crack cocaine.

At his trial, Mr. Golden sought to have the crack cocaine excluded. He argued that the strip search was unconstitutional because it occurred in violation of section 8 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, which indicates that "Everyone has the right to be secure against unreasonable search or seizure."[1] Mr. Golden's argument was dismissed by the trial judge and he was convicted. His appeal to the Ontario Court of Appeal was unsuccessful. He was granted leave to appeal to the Supreme Court of Canada.[2] The Supreme Court indicated that the question raised by the appeal was the following:

> *Whether the search incident to arrest power is broad enough to encompass the authority to strip search an arrested individual is the question before us, and is one that has never been put directly in issue before this Court.*[3]

Earlier this year, the Supreme Court of Canada considered the constitutionality of strip searches again.[4] Subsequently, in *R. v. Tim*, 2022 SCC 12, the Supreme Court applied *Golden* to a strip search at a police station after a motor vehicle accident in which a handgun was found on the driver of the vehicle as a result of a search incidental to arrest.

THIS COLUMN

In this column, I trace how strip searches have been assessed by Canadian courts between *Golden* and *Ali and Tim*. Interestingly, three years after *Golden* was issued, it was suggested by one author that Canadian "police services continue to struggle with implementing the *Golden* principles…case law and current police policies suggest that the principles developed in *Golden* are neglected by police services in major Canadian cities."[5] A subsequent study into strip searches conducted in relation to Canadian women found that the "cases reviewed in this study demonstrate that police in Canada are indeed violating women's rights through illegal strip-searching."[6] In *R. v. Muller*, it was noted that the police involved in that case had a "routine policy" of strip searching "anyone and everyone charged with possession of drugs for the purpose of trafficking" (at paragraph 72).[7] In *Ilnicki v. MacLeod*, the police conducted a strip search upon Mr. Ilnicki, after arresting him pursuant to a warrant issued when he failed to appear in court for a highway traffic offence.[8]

I will commence with a review of what was decided in *Golden*, then look at how *Golden* has been interpreted at the appellate level and applied at the trial level. In the latter instance, I will concentrate on the time-period of January 1, 2020 to January 31, 2022. As will be seen, my review of trial court decisions in this column raises serious concerns as to whether Canadian police are conducting improper strip searches and failing to follow the guidelines set out in *Golden*.

I will be considering strip searches conducted by the police in what *Golden* describes as "in the field",[9] not by prison authorities[10] or at border crossings.

Footnotes

1. Canadian Charter of Rights and Freedoms, Section 8 of the Constitution Act, 1982.
2. *See* R. v. Golden, [2001] 3 S.C.R. 679 (Can.).
3. *Id.* at ¶25.
4. *See* R. v. Ali, [2022] SCC 1 (Can.).
5. *See* Brady Donohue, *Operationalizing* Golden*: Measuring the Efficacy of Judicial Oversight*, 1 WINDSOR REV. LEGAL SOC. ISSUES—DIGITAL COMPANION, 1 (2014).
6. *See* Michelle Pusutka and Elizabeth Sheehy, *Strip-Searching of Women in Canada: Wrongs and Rights*, 94 CAN. BAR REV., 241, 275 (2016).
7. R. v. Muller, 2014 ONCA 780 (Can.).
8. Ilnicki v. MacLeod, 2005 ABCA 349 (Can.).
9. R. v. Golden, [2001] 3 S.C.R. 679, ¶102 (Can.).
10. *See* Florence v. Board of Chosen Freeholders, 566 U.S. 318 (2012); R. v. Monney, [1999] 1 S.C.R. 652 (Can.); R. v. Gerson-Foster, 2019 ONCA 405, ¶¶108 and 109 (Can.0. In Brown v. Polk County, Wisconsin, 141 S.Ct. 1304 (mem.) (2021), in which an application to decide "what degree of suspicion the Fourth Amendment requires to justify the physically penetrative cavity search of a pretrial detainee," was denied, Justice Stevens indicated that "the degree of suspicion required for a search should be substantially informed by the availability of less intrusive alternatives. This Court does not lightly permit an entire category of warrantless, invasive searches when less offensive options exist. Particularly searches of those who have not been convicted of any crime."

The first question is: what constitutes a strip search in Canada?

WHAT IS A STRIP SEARCH?

In *Golden*, the Supreme Court defined a strip search as involving "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."[11] The Court suggested that "it is unquestionable" that strip searches "represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them.[12] Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive."[13]

Subsequently, in *R. v. Tessling*, which did not involve a strip search, the Supreme Court indicated that:

> [p]rivacy 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. The state cannot conduct warrantless strip searches unless they are incident to a lawful arrest and performed in a reasonable manner…in circumstances where the police have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.[14]

Finally, in *Vancouver (City) v. Ward*, the Supreme Court indicated that strip searches "are inherently humiliating and degrading regardless of the manner in which they are carried out."[15]

More recently, in *R. v. Downes*, the British Columbia Court of Appeal described strip searches as constituting serious infringements "of personal privacy."[16]

APPELLATE COURT COMMENT ON GOLDEN'S DEFINING OF A STRIP SEARCH

The Supreme Court's defining of what constitutes a strip search in *Golden* has been the subject of considerable appellate comment. In *R. v. Choi*, for instance, before the British Columbia Court of Appeal, it was suggested that the "definition distinguished 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.'"[17]

The British Columbia Court of Appeal held in *Choi* that "to fall within the *Golden* definition, a search must involve the removal or rearrangement of clothing so as to permit an inspection of the private areas of the body of an arrestee, whether those areas are fully exposed or they are covered by undergarments alone."[18] The Court of Appeal also indicated that "the purpose of a strip search is to enable police to inspect private areas of the body, which is inherently humiliating and thus requires additional safeguards to protect personal privacy and dignity."[19] However, the Court of Appeal also suggested that "a visual inspection of an arrestee's genital and anal areas," constitutes a search that "falls at the low end of intrusiveness for strip searches."[20]

"'[W]hen Sergeant Train pulled on the waistband of the shorts ... he was engaged in a strip search.'"

The search in *Choi* involved a visual inspection of the waistband of Mr. Choi's underwear, not his genital or anal area. The Court of Appeal concluded that "[u]nless the area of the body inspected is inherently private, whether exposed or covered by an undergarment, the search will not fall into the category of a strip search and the additional safeguards will not apply."[21] Does this mean that a male police officer can put his hand down the top portion of the pants of a female suspect without following the *Golden* guidelines?

In *R. v. Pilon* the accused was arrested in a motel room.[22] The police observed him repeatedly trying to place his hands in the front and back of the shorts he was wearing. The police took Mr. Pilon into

> the bathroom in the motel room. There, Sergeant Train conducted a strip search, which consisted of pulling the waistband of the appellant's shorts away from his body, so that Sergeant Train could view his genital area, and reaching in and pulling out objects attached by the elastic band. Sergeant Train was wearing surgical gloves at the time and did not touch the appellant's genitals. The objects retrieved were a pill bottle containing fentanyl patches and a ball of electrical tape with crack cocaine inside.[23]

The Ontario Court of Appeal concluded that "when Sergeant Train pulled on the waistband of the shorts in an effort to view the appellant's underwear, he was engaged in a strip search. The search was not an accident and therefore the principal basis for the trial judge's finding that it was reasonable is unsustainable."[24]

Finally, on this point, in *R. v. Byfield*, during a search of the accused at the scene, an officer discovered "a large hard object in the appellant's groin region, which he believed was 'non-anatomical.'"[25] The officer reached into the accused's underwear, finding a package containing cocaine.[26]

It was argued that because the accused's clothes were not removed and his genitals were not exposed, this did not constitute a strip search. The Ontario Court of Appeal disagreed. It noted that in *Golden*, "the Supreme Court of Canada made it clear

11. *Golden*, 3 S.C.R. at ¶47.
12. *Id.*
13. *Id.* at ¶83.
14. R. v. Tessling, [2004] 3 S.C.R. 432, at ¶21 (Can.).
15. Vancouver (City) v. Ward, [2010] 2 S.C.R. 28, at ¶64 (Can.).
16. R. v. Downes, 2022 BCCA 8, at ¶86 (Can.).
17. R. v. Choi, 2021 BCCA 410, at ¶68 (Can.).
18. *Id.*
19. *Id.*
20. *Id.* at ¶73.
21. *Id.* at ¶80.
22. R. v. Pilon, 2018 ONCA 959 (Can.).
23. *Id.* at ¶6.
24. *Id.* at ¶28.
25. R. v. Byfield, 2020 ONCA 515 (Can.).
26. *Id.*

"[N]o doubt strip searches exist on a continuum."

almost 30 years ago [*sic*] that the re-arrangement of clothing in circumstances similar to this case does constitute a strip search."[27]

However, the Court of Appeal also held that the search was reasonable. It concluded that the evidence presented at the trial demonstrated that

> the searching officer's safety concerns were real and that it was appropriate to conduct a second pat down search. Given his discovery of the unknown object in the appellant's groin area, further investigation was reasonable and necessary. We disagree with the appellant's submission that, because the police station was only four minutes away, the strip search could have waited until then. The strip search was necessary to ensure the safety of all concerned (as described above) during this journey to the police station, even if that journey was to be brief.[28]

In summary, the conceptualization of what constitutes a strip search as set out in *Golden* suggests a broad and encompassing rule. This is illustrated by the decision in *Byfield*. Having said this, no doubt strip searches exist on a continuum ranging from what occurred in *Golden* to much less intrusive searches. This may be irrelevant in determining if the search complied with section 8 of the *Charter*, but crucial in determining if any evidence obtained should or should not be excluded.

Having considered what constitutes a strip search, I now intend to return to *Golden* to analyze the Court's overall ruling.

THE SUPREME COURT'S RULING IN GOLDEN

The Supreme Court commenced its consideration of the constitutionality of strip searches in *Golden* by noting that "a search will be reasonable within the meaning of s. 8 of the *Charter* where (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner."[29] The Court held that thus, "the first question is whether the common law of search incident to arrest authorizes the police to conduct strip searches. If it does, the next question is whether the common law is reasonable. If the strip search was authorized by law and the law is reasonable, the final question is whether the strip search of the appellant was conducted in a reasonable manner."[30]

A POWER TO STRIP SEARCH INCIDENT TO ARREST?

The Supreme Court concluded in *Golden* that a warrantless search of the person, conducted incident to arrest, is permitted under the common law.[31] The Court held that in

> order for a strip search to be justified as an incident to arrest, it is of course necessary that the arrest itself be lawful.…The second requirement before a strip search incident to arrest may be performed is that the search must be incident to the arrest. What this means is that the search must be related to the reasons for the arrest itself... reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. Where arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances.[32]

Subsequently, in *Tim*, the Supreme Court indicated that a strip search "can be justified at common law as incident to a lawful arrest where there are 'reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest'.…Reasonable and probable grounds exist to justify a strip search 'where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest'.…The strip search must also be conducted reasonably, in a manner that 'interferes with the privacy and dignity of the person being searched as little as possible," (at paragraph 66).

However, the Supreme Court indicated that strip searches "cannot be carried out as a matter of routine police department policy applicable to all arrestees."[33] The "fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being 'incident to lawful arrest' as discussed above. Rather, additional grounds pertaining to the purpose of the strip search are required."[34]

THE ADDITIONAL GROUNDS REQUIRED

The Supreme Court stated that strip searches:

> are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe section 8 of the *Charter*."[35]

Finally, the Supreme Court held that strip searches:

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27. *Id.* at ¶13.
28. *Id.* at ¶15.
29. *Golden* at ¶44.
30. *Id.* at ¶45.
31. *Id.* at ¶87.
32. *Id.* at ¶¶91–93; The *Criminal Code of Canada*, R.S.C. 1985, now includes a number of provisions that allow the police to obtain search warrants to search a person. For instance, section 487.092, allows for "body impressions" (footprints, teeth impressions, etc.) to be obtained; section 320.29, allows for blood samples to be taken; section 487.01, allows for searches and seizures "in relation of a person or a person's property." The former can only be authorized if the search will not interfere "with the bodily integrity of any person"; and section 487.05, allows for bodily substances to be obtained for the purpose of DNA analysis.
33. Golden at ¶95.
34. *Id.* at ¶98.
35. *Id.* at ¶99.

should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station.[36]

The Court held that strip searches:

conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances."[37]

The importance of complying with the *Golden* requirements is illustrated by the decision of the Ontario Court of Appeal in *Muller*. In *Muller*, the Court of Appeal held that a strip search conducted at a police station in the following circumstances was conducted unreasonably and in violation of the *Charter*:

The strip search was carried out in an appropriate room at police headquarters by two officers of the same gender as the appellant. However, no supervisory authorization was sought, much less obtained. Rather than close the door to the search room, as was the usual practice, the officers left the door open. The appellant was required to stand naked, facing a hallway accessible by other persons of either gender. The search was videotaped and available for viewing by others at various places in the station. The evidence was unclear about whether the appellant had been informed that he was being videotaped. Nor was he given the choice to remove the plastic bag from between his buttocks himself. A police officer removed it, albeit without touching the appellant's genitalia. Apart from the videotape, the police created no adequate record of the strip search.[38]

ARE STRIP SEARCHES LIMITED TO SAFETY CONCERNS?

In *Pilon*, it was argued that for a strip search to be valid, it "must be related to a safety concern and not the preservation of evidence."[39] The Ontario Court of Appeal declined to answer this question. Justice Hourigan suggested that "it is at least arguable that the Supreme Court in *Golden* left open the possibility that the need to preserve evidence could qualify as exigent circumstances that permit a field search."[40] However, Justice Hourigan held that it was not necessary to answer the question raised because "in the present case I am not satisfied that there was an exigent need to preserve evidence. I leave open the possibility that another case might provide a factual matrix that presents very serious and immediate concerns about the preservation of evidence such that there is an urgent and necessary need to conduct a strip search in the field."[41]

"'[T]he arresting officers had no reasonable and probable basis for conducting the strip search in the restaurant.'"

The answer to the question the Ontario Court of Appeal declined to answer may have been found in the Supreme Court of Canada's decision in *R. v. Saeed*.[42] In *Saeed*, which will be considered later in this column, the Supreme Court indicated that bodily searches incident to arrest were permissible to "preserve evidence of the offence for which the accused was arrested" or to "reveal and preserve evidence of the offence."[43]

THE SUPREME COURT'S CONCLUSION IN GOLDEN

The Supreme Court concluded in *Golden* that

the search at issue in this appeal was unreasonable, and violated the appellant's rights guaranteed under section 8 of the *Charter*.…In this appeal, the Crown has failed to prove that the strip search of the appellant was carried out in a reasonable manner. More specifically, the evidence adduced at trial fell far short of establishing that a situation of exigency existed so as to warrant a strip search outside of the police station.[44]

The Supreme Court also concluded that:

the arresting officers had no reasonable and probable basis for conducting the strip search in the restaurant. No information was given to them by Constable Theriault that the appellant had reached into his pants to remove any substances, nor had they ever witnessed such conduct themselves. There was no bulging or protrusion in the appellant's buttock area to suggest that he was concealing evidence. In the result, the decision to strip search was premised largely on a single officer's hunch, arising from a handful of personal experiences. These circumstances, coupled with the absence of exigency discussed above, compel us to conclude that the police officers' decision to strip search the appellant in the restaurant was unreasonable.[45]

Thus,
[w]here the circumstances of a search require the seizure of material located in or near a body cavity, the individual being searched should be given the opportunity to remove

36. *Id.*
37. *Id.* at ¶102.
38. *Muller* at ¶83.
39. *Pilon* at ¶21.
40. *Id.*
41. *Id.* at ¶27.
42. R. v. Saeed [2016] 1 S.C.R. 518 (Can.).
43. *Id.* at ¶¶6 and 42.
44. *Golden* at ¶¶105 and 107.
45. *Id.* at ¶110.

> **"The Supreme Court took the opportunity provided ... to offer guidance to the police in the conducting of strip searches."**

the material himself or the advice and assistance of a trained medical professional should be sought to ensure that the material can be safely removed.[46]

GUIDANCE TO THE POLICE

The Supreme Court took the opportunity provided by the appeal in *Golden* to offer guidance to the police in the conducting of strip searches by indicating that the "following questions…provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?[47]

The Supreme Court does not suggest in *Golden* that this is an exhaustive list or that a failure to follow it will result in a strip search being unreasonable. However, in its subsequent decision in *Saeed*, the Court suggested that the police "must…follow certain restrictive guidelines in carrying out" strip searches.[48] This suggests a much stricter approach to the guidelines than suggested in *Golden*. However, in *R. v. Lee*, though it was acknowledged that "the strip search at the police station was not perfect, in terms of its compliance with the guidelines set out in *R. v. Golden*," the Ontario Court of Court of Appeal concluded that the strip search was still reasonable because "in the circumstances of this case, it was a minor deviation."[49] Similarly, in *R. v. Davis*, 2020 ONCA 748, the Ontario Court of Appeal agreed with the trial judge's conclusion that the failure of the police in that case to have "have kept a proper record respecting 'the reasons for and the manner in which the strip search was conducted' was "a 'minor deviation from the *Golden* guidelines, insufficient to found a *Charter* breach.'"[50]

Though the Supreme Court indicated that these questions provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*, they would also appear to provide a framework for trial judges in determining if a strip search incident to arrest is in compliance with the *Charter*.

A SUMMARY

I would summarize the holding in *Golden* in the following manner:

1. the Court defined a strip search as involving "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments";[51]
2. all strip searches "represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them. Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive";[52]
3. a warrantless search of the person conducted incident to arrest is permitted under the common law;[53]
4. in order for a strip search to be justified as an incident to arrest, the arrest must be lawful;[54]
5. the search must be related to the reasons for the arrest itself;[55]
6. a strip search designed to preserve evidence must involve the need to preserve the evidence and to prevent its disposal by the arrestee. Where "arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances";[56]
7. strip searches "cannot be carried out as a matter of rou-

46. *Id.* at ¶114.
47. *Golden*, at ¶110.
48. *Id.* at ¶40.
49. R. v. Lee, 2018 ONCA 1067 at ¶15 (Can.).
50. R. v. Davis, 2020 ONCA 748, at ¶22 (Can.).
51. R. v. Golden, [2001] 3 S.C.R. 679 (Can.).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*.
56. *Id.*

tine police department policy applicable to all arrestees";[57]

8. there is no automatic authority to carry out a strip search incident to lawful arrest. Additional grounds "pertaining to the purpose of the strip search are required";[58]
9. strip searches "are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest';[59]
10. the strip search must be conducted in a manner that does not infringe section 8 of the *Charter*. Thus, they "should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station";[60]
11. exigent circumstances "will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station";[61]
12. strip searches conducted in the field can "only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field";[62] and
13. the Court provided a non-exhaustive list of questions (or guidelines) that can assist the police and trial judges in determining if a strip search incident to arrest is in compliance with the *Charter*.[63] A failure to comply with these guidelines does mean that the strip search will be deemed to be unreasonable.

Thus, "the inquiry into the unreasonableness of a strip search is not co-extensive with the basis for the arrest to which it is said to be incident. As with all searches incident to arrest, a strip search must be for a purpose related to the arrest. But reasonable and probable grounds beyond those that justify the arrest are required to render the strip search reasonable. And where the purpose of the strip search is to discover or prevent the destruction of evidence, the mere possibility that evidence might be found falls short of what is required."[64]

THE EXTENSION OF GOLDEN TO PENILE SWABS

In *Saeed*, the police took a "penile swab" from the accused during a sexual assault investigation. The police supported their authority to do so by relying on their power to search incident to arrest. The circumstances involved were described by the Supreme Court of Canada in the following manner:

> after Mr. Saeed had finished speaking to counsel, Detective Fermaniuk directed Constable Mitchell to place him in a dry cell, with no toilet or running water, to preserve the evidence. Mr. Saeed was handcuffed to the wall to prevent him from licking his hands or otherwise washing away evidence. Mr. Saeed was fully clothed.…The procedure took at most two minutes. Mr. Saeed was fully clothed, but pulled his pants down in order to take the swab. Constable Mitchell handed Mr. Saeed a swab with a cotton tip and a four to five inch-long handle. Under Constable Mitchell's direction, Mr. Saeed wiped the cotton tip of the swab along the length of his penis and around the head before returning the swab to Constable Mitchell. The swab came into contact only with the skin on the outside of Mr. Saeed's body. Mr. Saeed then pulled up his pants. Constable Mitchell returned the swab to Constable Craddock, who sealed it in order to preserve the evidence.…The swab was tested. It revealed the complainant's DNA on Mr. Saeed's penis.[65]

"The police supported their authorization to [conduct a penile swab] on their power to search incident to arrest."

The Supreme Court concluded that that:

> while a penile swab constitutes a significant intrusion on the privacy interests of the accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner… the police may take a penile swab incident to arrest if they have reasonable grounds to believe the swab will reveal and preserve evidence of the offence, and if the search is carried out in accordance with guidelines that are designed to respect the accused's privacy interests and interfere with them as little as possible.[66]

The Court held that the "privacy interests here are similar to those implicated in strip searches, and they can be protected by a similar approach."[67] The Court indicated that "as with every search incident to arrest, the arrest itself must be lawful. The swab must be truly incident to the arrest, in the sense that the swab must be related to the reasons for the arrest, and it must be performed for a valid purpose. The valid purpose will generally be to preserve or discover evidence."[68]

The Court also held that "the police must also have reasonable

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See* R. v. Gonzales, 2017 ONCA 543, at ¶142 (Can.).
65. *Saeed*, at ¶¶ 18, 25, and 26.
66. *Id.* at ¶¶6 and 42.
67. *Id.* at ¶62.
68. *Id.* at ¶74.

"[T]he Court ... set out 'a number of factors to guide police in conducting penile swabs incident to arrest reasonably.'"

grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested....Finally, the penile swab must be conducted in a reasonable manner."[69]

As in *Golden*, the Court took the opportunity presented to set out "a number of factors to guide police in conducting penile swabs incident to arrest reasonably:"[70]

1. The penile swab should, as a general rule, be conducted at the police station;
2. The swab should be conducted in a manner that ensures the health and safety of all involved;
3. The swab should be authorized by a police officer acting in a supervisory capacity;
4. The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab;
5. The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary;
6. The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise;
7. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances;
8. The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it;
9. The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time; and
10. A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.[71]

WHOSE DNA WAS BEING OBTAINED?

One of the factors that led to the Supreme Court's conclusion in *Saeed* that the search was *Charter* compliant was the fact that the penile swab was used by the police to obtain DNA material belonging to the victim rather than the accused. Thus, Justice Moldaver indicated that:

> a penile swab is not designed to seize the accused's own bodily materials but rather, the complainant's. The privacy interest accused persons have in their own samples and impressions stems, in part, from the fact that these samples and impressions are part of their bodies and can reveal personal information about them. The complainant's DNA is not part of the accused's body, and does not reveal anything about him.[72]

However, in an earlier decision, the Supreme Court had held that that the police must have consent or a warrant to seize bodily samples and certain impressions from an accused person.[73] This distinction caused one author to note that "[b]ecause 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."[74]

THE APPLICATION OF GOLDEN BY CANADIAN TRIAL JUDGES IN 2020 TO 2022

Golden was considered by a number of trial judges in the period of January 1, 2020 to January 31, 2022. They contain numerous comments suggesting the rules set out in *Golden* are not always being followed by Canadian police.

2020

In *R. v. Sekhon*, for instance, a strip search was found to have violated section 8 of the *Charter* because the "grounds for the strip search...was partially based on the police's knowledge and experience that individuals will generally try to hide drugs when they are stopped for trafficking."[75] Similarly, in *R. v Lerch*, the strip search conducted in that case was found to be unreasonable because the police officer involved indicated in his evidence "that the principal reason for the strip search was the fact that Mr. Lerch was arrested on [*Controlled Drugs and Substances Act*] charges and he said that it is his standard practice to seek approval for a strip search in such cases."[76] In *R. v. Gomez*, Justice Fraser lamented the fact that "almost 20 years after the *Golden* decision police are either not keeping a proper record of strip searches or that they are not providing the record to the Crown."[77]

2021

In *R. v. Smith*, the trial judge suggested that "[e]ither the three officers involved in Mr. Smith's strip search weren't aware of the law established in *Golden* or chose to ignore it. The former is an outrageous systemic failure. The latter is high-handed disregard for Mr. Smith's *Charter* rights."[78] In *R. v. Sidhu*, the trial judge pointed out that the police officer who conducted a strip search in

69. *Id.* at ¶¶ 75 and 78. One study concluded that in the United States, "the results of DNA analysis from penile swabs have generally, but not always, been admitted at trial where exigent circumstances existed for the seizure" (see John Burchill, *Persistence and Variability of DNA: Penile Washings and Intimate Bodily Examinations in Sex-Related Offences*, 42 MAN. LAW J., 69, 78 (2019)).
70. *Saeed* at ¶78.
71. *Id.*
72. *Id.* at ¶45.
73. *See* R. v. Stillman, [1997] 1 S.C.R. 607(Can.).
74. *See* Christine Mainville, R. v. Saeed*: Penile Privacy and Penal Policy*, SCLR: OSGOODE'S ANNUAL CONSTITUTIONAL CASES CONFERENCE, 195, 203 (2019).
75. R. v. Sekhon, 2020 BCSC 2180, at ¶160 (Can.).
76. R. v Lerch, 2020 BCSC 441, at ¶56 (Can.).
77. R. v. Gomez, 2020 ABQB 439, at ¶104 (Can.).
78. R. v. Smith, 2021 ONCJ 650, at ¶75 (Can.).

that case had testified that "strip searches in trafficking arrests were fairly routine. He was asked if in almost every case of possession for the purposes of trafficking and trafficking he would feel it necessary to do a strip search and he said 'correct.'"[79] The trial judge noted that despite *Golden* suggesting that "a proper record be kept of the reasons for and the manner in which the strip search was conducted," that "did not occur here. Indeed, the record in this case does not even indicate that the strip search was approved."[80] Similarly, in *R. v. Brown*, it was pointed out that "there was no cogent or proper record or log made of the search, or at least presented in evidence before me.…The lack of details surrounding the strip search in this case is remarkable."[81]

In *R. v. Rodriguez*, a police officer testified "he could not think of an instance when he had not requested a strip search" in drug-trafficking investigations. The officer testified that "he has requested a strip search in all instances, but he said that he does try to base his decision on the circumstances."[82] This evidence led the trial judge to point out that "[t]his is the type of generalized suspicion that *Golden* set its face against. Being charged with a particular type of offence alone is not an appropriate basis for a strip search."[83]

2022

More recently, in *R. v. Bootsma*, 2022 ABQB 45, a strip search was found to be unreasonable because "the police were not looking for weapons or evidence related to the arrest on an outstanding warrant; the police did not demonstrate they had reasonable and probable grounds for the search; and, without exigent circumstances, the field strip search was not conducted in a reasonable manner."[84]

Having said this, Canadian trial judges concluded in several decisions that the police had conducted constitutionally correct strip searches.[85]

This is undoubtedly a limited review of judicial pronouncements in strip search cases, but it has been suggested that "studies of published decisions do tell us something: they reflect judicial responses that are available on the public record and that convey to citizens, police, and lawyers the limits of police powers and whether and when those limits are enforceable by legal remedy. It seems therefore defensible to suggest that published decisions are more likely to shape future police conduct and are particularly relevant to the question of why illegal strip-searching continues fifteen years after the Supreme Court of Canada released its decision in *Golden*."[86]

> **"Canadian trial judges concluded in several decisions that the police had conducted constitutionally correct strip searches."**

As we can see from these decisions, the issue arises primarily in drug possession cases. This makes sense because drugs are relatively easy to hide and to place in an area of the body that is out of sight. In addition, there are concerns about drugs making it to into lock-ups and as regards the potential dangers such drugs can subsequently cause to the person hiding them. However, these are concerns inherent in drug investigations. Being charged with a drug-related offence is not a basis upon which a strip search can be conducted. As pointed out by the Alberta Court of Appeal in *R. v. Upright*, such searches must be based upon "appropriate, fact-specific considerations" that justify the strip search.[87] They cannot be based upon "impermissibly vague criteria that could apply to a vast category of offenders" or where there is "a bare assertion that the [accused] should be searched simply because [the accused] was charged with drug trafficking offences."[88] Similarly, in the Unites States it has been held that "[A] post-arrest strip search must be based upon reasonable suspicion that an arrestee is hiding contraband beneath his or her clothing, and . . . a search involving visual examination of an arrestee's anal and genital cavities—a distinctly elevated level of intrusion, which must be separately justified—may not be performed except upon a 'specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.'"[89]

R. V. ALI

In *Ali*, the accused was convicted of the offence of possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*.[90] The evidence presented against him at his trial included drugs found as a result of a strip search. The Alberta Court of Appeal noted that "when he was strip searched three white baggies containing cocaine were found in his 'butt crack area.'"[91]

79. *R. v. Sidhu*, 2021 YKTC 47, at ¶50 (Can.).
80. *Id*, at ¶71.
81. R. v. Brown, 2021 ONSC 3862 at ¶¶18 and 19 (Can.).
82. R. v. Rodriguez, 2021 ABQB 372, at ¶232 (Can.).
83. *Id.*
84. R. v. Bootsma, 2022 ABQB 45, at ¶86.
85. *See*, for instance, R. v. Tonkin, 2020 ONSC 5206 (Can.), R. v. Black, 2020 ONSC 495 (Can.), R. v. Francis, 2020 ONSC 391 (Can.), R. v. Chahine, 2020 BCPC 294 (Can.), R. v. Curry, 2020 ONSC 86 (Can.), R. v. Hector, 2021 ONSC 7543 (Can.), R. v. Calhoun, 2021 ONSC 2634 (Can.), R. v. Drakes-Simon, 2021 ONSC 130 (Can.), and R. v. Martin, 2021 ONCJ 82(Can.). In *Martin*, the accused was stripped searched and her brassiere was removed. After the search was completed, the police refused to give it back to her. The trial judge concluded that the strip search was reasonable, but that retaining the brassiere was not: "the officer failed to consider the specific circumstances in this case. Instead she relied on her own personal policy. A policy that is not supported by any evidence and appears to be nothing more than a discriminatory practice that causes additional hardship to women held in custody. Moreover, even if there was some justification for seizing the bra, the failure to provide a replacement undergarment is not acceptable. In my view Ms. Martin's section 8 rights were violated when the officer seized her bra and failed to provide a replacement bra and thereby deprived her of her necessary undergarment" (¶ 37).
86. *See* Michelle Psutka and Elizabeth A. Sheehy, *Strip-Searching of Women in Canada: Wrongs and Rights*,94 CAN. BAR ASS'N, 241 at 245–46 (2016).
87. R. v. Upright, 2020 ABCA 227 (Can.).
88. *Id.* at ¶24.
89. *See* People v. Curry, 2021 NY Slip Op 01890 (N.Y. App. Div. 2021)..
90. R v. Ali 2020 ABCA 344 (Can.); *Controlled Drugs and Substances Act*, R.S.C. 1985.
91. *Ali* at ¶3.

> **"Justice Cote [needs punctuation for name, see text] also concluded that any evidence obtained as a result of the strip search was admissible."**

The Court of Appeal indicated that on the *voir dire* to determine if the drugs found as a result of the search was admissible, Constable Darroch (the lead investigator) testified that he had been told by another officer (Constable Odorski) that he had seen the accused "reaching towards his nether region."[92] Though Constable Odorski testified on the *voir dire*, he "was never asked any questions about these observations, either in chief or during his cross-examination. It was Constable Darroch who testified that he had obtained this information from Constable Odorski, and that he had relied on that information in deciding to recommend a strip search."[93] Constable Darroch passed on the information he received from Constable Odorski to the Staff-Sergeant who made the decision to proceed with the strip search.

The accused appealed from conviction. The Alberta Court of Appeal (with Veldhuis J.A. dissenting) dismissed the accused's appeal from conviction. It concluded that the trial judge did not err in holding that the strip search was reasonable. The Court of Appeal indicated that the trial judge:

> was not required to find, as a matter of fact, that the appellant "reached towards his nether region." If such a finding had been necessary to sustain a conviction, it could only have been made based on admissible evidence. The trial judge, however, was only required to decide if, at the time the decision was made to conduct a strip search, the police team had "reasonable and probable grounds" to conduct that search. That depended on the information known to, believed, and reasonably relied on by the police team, specifically the Staff Sergeant. The fact that some of it may have been inadmissible as evidence at a trial was irrelevant.[94]

In her dissent, Justice Veldhuis held that the evidence presented, "including the presence of the cell phone, scale, cash, marijuana and the lack of cocaine found on the appellant after his pat down and pocket search; information from the informers; and the short period of time, do not support reasonable and probable grounds for a strip search.…While there was evidence that Officer Darroch subjectively believed that the appellant had secreted drugs on his body, there was no objective evidence to establish reasonable and probable grounds that drugs would be found there."[95]

The accused appealed as of right to the Supreme Court of Canada. The appeal, with a dissent, was dismissed.

THE SUPREME COURT'S RULING

The majority of the Supreme Court held that "[w]here a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest.…These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest."[96]

The majority concluded that:

> there were reasonable and probable grounds justifying the strip search: the police had confidential source information that their target was in possession of a large quantity of cocaine and that he kept most of his drugs on his person; Mr. Ali was found next to a table with drugs, other than cocaine, and with items consistent with drug trafficking, including a scale, money, and a ringing cell phone; Mr. Ali's pants were partially down as he was being arrested; and one of the officers reported seeing Mr. Ali reaching towards the back of his pants. Viewed in its totality, this was clearly some evidence suggesting the possibility that Mr. Ali had concealed drugs, particularly cocaine, in and around the area of his buttocks.[97]

In her dissenting judgment, Justice Côté concluded that the Crown "failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*. As such, I find that Mr. Ali's s. 8 *Charter* rights were violated, substantially for the reasons of Veldhuis J.A., at paras. 27–61."[98]

However, Justice Côté also concluded that any evidence obtained as a result of the strip search was admissible. Justice Côté concluded that "the seriousness of the police conduct in this case was at the lowest end of the spectrum"; the "impact of the strip search on Mr. Ali's privacy interests, while serious, was somewhat attenuated by the reasonable manner in which it was conducted" and the Crown "would have no case without this evidence. There is a strong societal interest in adjudicating this case on its merits."[99] Justice Côté concluded as follows:

> On balance, I conclude that excluding the evidence would bring the administration of justice into disrepute. To be clear, I would emphatically re-affirm the principles arising from *Golden* and the high threshold the Crown must meet to justify a warrantless strip search. However, while the Crown failed to meet that threshold in this case, the conduct of the police did not undermine the integrity of the justice system. Therefore, I would not exclude the evidence.[100]

R. V. TIM

The Supreme Court's decision in *Tim* arose out of the accused being arrested for a weapon offence after a handgun was found on him. It was found as a result of a search incidental to arrest fol-

92. *Id.*
93. *Id.* at ¶¶ 9-10.
94. *Id.* at ¶15.
95. *Id.* at ¶¶ 58–59.
96. *Id.* at ¶2.
97. *Id.* at ¶3.
98. *Id.* at ¶7.
99. *Id.* at ¶¶13–15.
100. *Id.* at ¶16.

lowing a motor vehicle collision. The strip search, conducted at a police station, played a minor role in the Supreme Court's decision thus its description of how it was conducted was brief: "The appellant was asked to strip down to his underwear and an officer searched around his waistband to see if he had hidden anything else. No more contraband was found" (at paragraph 12).

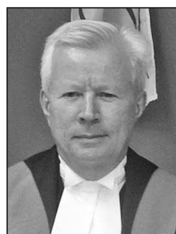
In relation to the strip search, the Supreme Court held that it "was incident to [the] weapons arrest, because it was for the purpose of discovering concealed weapons or evidence related to the offence for which the appellant was lawfully arrested.…Strip searches unquestionably 'represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them'.… However, the strip search here was minimally intrusive, as it was conducted reasonably, in a manner consistent with this Court's guidelines for strip searches.…It was performed at the police station, it was limited to the appellant's underwear waistband, and the appellant wore his underwear throughout the search.…I therefore conclude that the strip search did not infringe s. 8 of the *Charter*" (at paragraphs 68 and 69).

CONCLUSION

The decision in *Ali* was brief and presented orally. It may, as a result, be disappointing to those who saw it as an opportunity for the Supreme Court of Canada to revisit a landmark decision that is over two decades old, particularly as to how it impacts women and minority groups. It is illustrative of a worrisome trend of the Supreme Court of Canada routinely rendering brief oral decisions in cases of significance.[101]

What is clear from *Golden* and *Ali* is that the Supreme Court of Canada has created a broad police power to bodily search suspects. As some of the cases reviewed illustrate, this power to search though not unlimited, appears to require minimal evidence in support of strip searching or taking penile swabs from suspects.[102] The use by the Supreme Court in *Ali* of the words "some evidence suggesting the possibility of concealment" of evidence, illustrates the low threshold that has been crated.[103]

Finally, the trial decisions reviewed raise serious concerns that Canadian police are not even complying with the minimal requirements described.



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101. In 2020, the Supreme Court of Canada rendered oral judgments in a number of potentially significant cases. See, for instance, R. v. Reilly, [2020] S.C.C. 27 (Can.)(which involved the constitutionality of holding by the police of individuals charged with an offence in contravention of Canada's bail laws); R. v. Li, [2020] S.C.C. 12 (Can.) (dealing with the defence of entrapment); R. v. Kishayinew, [2020] S.C.C. 34 (Can.) (dealing with the issue of the capacity of an intoxicated complainant to consent to sexual activity); R. v. Doonanco, [2020] S.C.C. 2 (Can.)(which considered the requirement of the Crown to disclose expert medical reports to the accused); R. v. Slatter, [2020] S.C.C. 36, (Can.), (which considered how trial judges are to assess the evidence given by individuals who have an intellectual or developmental disability); and R. v. Delmas, [2020] S.C.C. 39 (Can.)(in which the issues of stereotypical reasoning and the consequences of failing to conduct a *voir dire* before considering a complainant's prior sexual activity with the accused were raised).

    In 2021, this trend continued. See, for instance, R. v. Lai, [2021] S.C.C. 52 (Can.) (dealing with the right to be tried within a reasonable period of time as protected by section 11(b) of the *Charter*); R. v. Reilly, [2021] S.C.C. 38 (Can.) (dealing with the admissibility of evidence unconstitutionally obtained); R. v. Dingwall, [2021] S.C.C. 35 (Can.) (dealing with the admissibility of circumstantial evidence); R v. Waterman, [2021] S.C.C. 5 (Can.)(dealing with the requirement of expert evidence in sexual assault trials); R. v. Strathdee, [2021] S.C.C. 40 (Can.) (dealing with liability for group assaults leading to a death); and R. v. Morrow, [2021] S.C.C. 21 (Can.)(dealing with how the offence of attempting to obstruct the course of justice should be defined).

102. As an example, in R. v. Johal, 2015 BCCA 246 (Can.), the British Columbia Court of Appeal concluded that the following generic circumstances were sufficient for a strip search to be conducted (at paragraph 31):

    > Johal was operating a dial-a-dope operation and he sold crack cocaine to an undercover officer, yet there were no other drugs found in his vehicle. In the experience of the arresting officers, traffickers sometimes conceal drugs in their underpants or rectum. The facts were quite similar in Golden and the Court held that there were reasonable and probable grounds for a strip search at the police station

103. In R. v. Saeed*: Bodily Integrity and the Power to Search Incident to Arrest*, 81-1 SASKATCHEWAN L. REV. 87 (2018), Meagan Ward argues that reasoning of the Court in *Saeed* "has the potential to broaden the scope of the power to search incident to arrest by allowing for searches, no matter how intrusive":

    > While the power to search incident to arrest is an exception to the warrant requirement, it is an extraordinary power. Accordingly, the courts must carefully delineate and limit its scope. As stated by Cory J. in *Stillman*, "[n]o matter what may be the pressing temptations to obtain evidence from a person the police believe to be guilty of a terrible crime, and no matter what the past frustrations to their investigations, the police authority to search as an incident to arrest should not be exceeded." While sexual assaults are unquestionably serious crimes, the reasoning of the majority in *Saeed* has the potential to broaden the scope of the power to search incident to arrest by allowing for searches, no matter how intrusive, where individuals do not have a privacy interest in whatever is sought by the search. In addition, the majority's reasoning suggests that law enforcement officers have the ability to search for anything, regardless of the privacy interest implicated, so long as they do not intend to tender as evidence what they recover from the search. It is for this reason that courts must be careful in interpreting and applying Saeed, and more broadly, the search incident to arrest doctrine.