

File No. 39590

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

**YASIN MAHAD ALI**

**APPELLANT**  
(Appellant)

-and-

**HER MAJESTY THE QUEEN**

**RESPONDENT**  
(Respondent)

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**APPELLANT'S FACTUM**  
(YASIN MAHAD ALI, APPELLANT)  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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**HLADY LAW OFFICE**  
701 2nd Ave S  
Lethbridge, Alberta T1J 0C4

**Wade Hlady**  
Tel: 587-425-0760  
Fax: 587-425-0761  
Email: [wade.hlady@gmail.com](mailto:wade.hlady@gmail.com)

**Counsel for the Appellant**

**SUPREME ADVOCACY LLP**  
340 Gilmour Street, Suite 100  
Ottawa, ON K2P 0R3

**Thomas Slade**  
Tel.: (613) 695-8855  
Fax: (613) 695-8580  
Email: [tslade@supremeadvocacy.ca](mailto:tslade@supremeadvocacy.ca)

**Ottawa Agent for Counsel for the Appellant**

**PUBLIC PROSECUTION SERVICE OF  
CANADA**

900, 700-6th Ave. S.W.  
Calgary, Alberta T2P 0T8

**Janna Watts**

Phone: 403-299-3978

Fax: 403-299-3966

**Counsel for the Respondent**

**PUBLIC PROSECUTION SERVICE OF  
CANADA**

160 Elgin Street, 12th Floor  
Ottawa, Ontario K1A 0H8

**François Lacasse**

Tel.: (613) 957-4770

Fax: (613) 941-7865

Email: [francois.lacasse@ppsc-sppc.gc.ca](mailto:francois.lacasse@ppsc-sppc.gc.ca)

**Agent for Counsel for the Respondent**

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## PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

### Overview

1. This case is about whether or not the police had reasonable and probable grounds to conduct a strip search on Mr. Yasin Ali, pursuant to the test established in *R. v. Golden*.<sup>1</sup>
2. A strip search is perhaps the most invasive form of search authorized under the common law. It is inherently humiliating and degrading. Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault.<sup>2</sup> As a result, this Honourable Court in *Golden* instituted additional protections for Canadian citizens to safeguard individuals requiring that the police have reasonable and probable grounds to justify a strip search. If a strip search is to occur, it should be conducted seriously, in acknowledgement of the affront to dignity caused by the search. Judicial analysis of strip searches should be treated with the same rigour.
3. At Mr. Ali's trial, the issue of whether there were reasonable and probable grounds was not considered by the trial judge. She never identified *R. v. Golden* as the controlling case in determining the legality of strip searches. She never gave reasons whether there were reasonable and probable grounds justifying the strip search. She never considered the enhanced protections that a court must consider when determining whether a strip search can be justified. She did not consider whether the police had the right to strip search Mr. Ali.
4. This case is also about what evidence matters when determining if a strip search is justified.
5. In addition to ignoring the test in *Golden*, the Trial Judge mishandled the most important evidence concerning whether the police had reasonable and probable grounds, that being the actions of an accused during an arrest.
6. Evidence concerning Mr. Ali's actions came from two officers. One officer, Constable Odorski, observed Mr. Ali during the arrest. The other, Constable Darroch did not.

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<sup>1</sup> *R. v. Golden*, 2001 SCC 83

<sup>2</sup> *R. v. Golden*, 2001 SCC 83 at para. 90

7. Constable Darroch gave evidence concerning Mr. Ali's actions based on what he was told by Constable Odorski. The trial judge then made findings of facts concerning Mr. Ali's actions based solely on the evidence of Constable Darroch. She did not consider the fact that this evidence was hearsay, did not consider the fact that this evidence was appropriately objected to by defense counsel, and did not consider how Constable Darroch's evidence changed after the objection. Most importantly, she did not consider nor did she at any point acknowledge the evidence of Constable Odorski, the officer who observed Mr. Ali's actions, at any point in her decision.

8. At the conclusion of Mr. Ali's trial, there was no evidence that he did anything to give the police reasonable and probable grounds to justify the strip search. The trial judge did not consider this when she chose to allow the evidence. The majority of the Court of Appeal also did not consider Mr. Ali's actions but only considered whether the police believed they had reasonable and probable grounds to justify a strip search.

9. It should matter whether a person did or did not do something to justify a strip search since that goes to the core of assessing the police's belief. Furthermore, if a strip search was justified, an accused person should not be left with any doubt that his rights were considered and that the search was carefully analyzed. The psychological and emotional toll of a strip search cannot be undone and so it is vital that the court ensure that such searches are done in accordance with the law and in consideration of the rights of Canadian citizens.

10. The Appellant asks that this appeal be allowed for the dissenting reasons of Justice Veldhuis who found that:

- a. "[T]he trial judge did not turn her mind to the test to be met for a strip search as set out in *Golden*."<sup>3</sup> Rather than examine whether the police had reasonable and probable grounds for concluding that the strip search was necessary, the trial judge only examined whether the strip search was incident to arrest.
- b. The evidence did not support reasonable and probable grounds for a strip search. The trial judge "ought to have explained why she accepted the 'hearsay' evidence

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<sup>3</sup> *R. v. Ali*, 2020 ABCA 344 at para. 41. [AR, Tab 4]

as reliable.”<sup>4</sup> Further, the trial judge “erred in setting out that one of the factors supporting the strip search was that the appellant was ‘resisting arrest’” when there was no evidence to support this.<sup>5</sup>

- c. “[T]here was no legal basis for carrying out the strip search, and therefore find that s. 8 of the *Charter* was breached.”<sup>6</sup>
- d. “I would follow the guidance set out in *Golden* as to relief ... I would allow the appeal and conclude that an acquittal is the proper result.”<sup>7</sup>

### **Background & Key Facts**

11. Yasin Ali (“Ali” or the “Appellant”) is a black male who resided in Lethbridge and Calgary at the time, having moved out from Toronto seeking employment in the oil and gas sector. During the events in question, he was only 19 years old. He is now 26 years old and married. He has a three-year-old daughter and is expecting his second child in August of this year.

12. In April of 2014, the Lethbridge Police Service (“LPS”) began an investigation into a suspected drug trafficking operation. The investigation was initiated when two confidential informants stated to LPS member Constable Darroch that there were two individuals selling drugs in Lethbridge, specifically cocaine.<sup>8</sup> Both confidential informants had been compensated for their information in the past<sup>9</sup> and at least one of the individuals was compensated for providing this information.<sup>10</sup>

13. Information obtained by the informants indicated that the individuals selling drugs were black males, that one was larger and known as “Primo” or “Tim” and the other was skinnier and known as “Rick” or “Eric.”

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<sup>4</sup> *R. v. Ali*, 2020 ABCA 344 at para. 56. [AR, Tab 4]

<sup>5</sup> *R. v. Ali*, 2020 ABCA 344 at para. 57. [AR, Tab 4]

<sup>6</sup> *R. v. Ali*, 2020 ABCA 344 at para. 61. [AR, Tab 4]

<sup>7</sup> *R. v. Ali*, 2020 ABCA 344 at para. 63. [AR, Tab 4]

<sup>8</sup> Trial Transcript (“TT”), Evidence of Constable Darroch at 7/2-6 [Appellant’s Record (“AR”), Tab 8A]

<sup>9</sup> TT, Evidence of Constable Darroch at 49/2-4 [AR, Tab 8A]

<sup>10</sup> *Ibid.* at 48/36-38 [AR, Tab 8A]

14. Constable Darroch testified that the skinnier individual had a distinctive haircut similar to that of “Sideshow Bob”<sup>11</sup> a character on the television show “The Simpsons” who has curly, palm tree-shaped red hair. However, this information regarding “Rick” was not recorded in any of his communication with his confidential informants nor was it mentioned in the sworn “Information to Obtain” (“ITO”) where the only description of “Rick” was a “skinny black guy.”<sup>12</sup>

15. Constable Darroch testified that he learned from the confidential informants that the two black males were trafficking out of the apartment building at 413-12th Street South in Lethbridge, Alberta (the “Apartment building”) and that “they met people in the hallway and stairway.”<sup>13</sup>

16. Through information obtained from confidential informants, Constable Darroch learned that “Rick” was going to drop off money at the TD bank in Lethbridge and narcotics at two residences of suspected drug dealers. Surveillance did observe a black individual leaving the Apartment building and travelling to the TD bank, however, no transactions of narcotics occurred. No photographs of “Rick” were taken and there was no description given of the individual who attended the TD bank.<sup>14</sup> The officer who conducted the surveillance did not testify.

17. In addition to the information obtained by the confidential informants, Constable Darroch spoke to Terry Crowe, the landlord of the Apartment building. On April 24th, Mr. Crowe stated that he had heard complaints from tenants of black males coming and going from the apartment building.<sup>15</sup> Mr. Crowe had not witnessed any suspicious behavior himself and did not provide any description of the black males. At that time, Mr. Crowe did not know the apartment where the black males were residing.

18. The next time Constable Darroch spoke to Mr. Crowe who had advised Constable Darroch that he received complaints about a black individual exiting out of apartment #103 in the Apartment building. This was the first time that Constable Darroch had learned of a specific apartment within the building.<sup>16</sup> Constable Darroch did not identify the source of the complaints.

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<sup>11</sup> TT, Evidence of Constable Darroch at 7/12 [AR, Tab 8A]

<sup>12</sup> *Ibid.* at 42/18-22 [AR, Tab 8A]

<sup>13</sup> *Ibid.* at 16/35-37 [AR, Tab 8A]

<sup>14</sup> *Ibid.* at 17/39-41;18/1-5 [AR, Tab 8A]

<sup>15</sup> *Ibid.* at 15/34-37 [AR, Tab 8A]

<sup>16</sup> *Ibid.* at 44/10-15 [AR, Tab 8A]

Neither the person who provided the information to Mr. Crowe nor Mr. Crowe himself testified at Mr. Ali's trial.

19. After speaking to Mr. Crowe and learning that the black males were located in apartment #103, Constable Darroch spoke to his confidential informants again and despite their earlier information indicating that the black males were selling drugs out of a brown van or in the stairway and hallway of the apartment building, both informants were at that time able to inform Constable Darroch that drugs were being dealt out of Apartment #103 despite not having collaborated with each other.<sup>17</sup>

20. Apartment #103 was never under surveillance. No photos were taken of either of the suspected drug traffickers. The entire description of "Rick", as recorded by Constable Darroch was that of "Rick" being a "skinny black guy")

21. As a result of the information obtained by Mr. Crowe and the two confidential informants, Constable Darroch swore an information to obtain a search warrant for Apartment #103 on April 28, 2014. The warrant was granted in the afternoon and executed that same evening.

22. When the search warrant was executed, Apartment #103 contained Richard Schmidt, Julia Medwid, Allan Batty, and the Mr. Ali. Mr. Ali was the only black person in the apartment.

23. Constable Darroch did not interact with Mr. Ali as he was searching the residence, but instead dealt with Ms. Medwid.

24. Mr. Ali was arrested by Constable Odorski and was directed Constable to the ground. Mr. Ali took several attempts to get to the ground but was compliant with Constable Odorski's order. He was wearing jeans with basketball shorts on underneath and the jeans were hanging off his waist to the point where the basketball shorts were visible under the jeans.<sup>18</sup>

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<sup>17</sup> TT, Evidence of Constable Darroch at 46/ 7-9 [AR, Tab 8A]

<sup>18</sup> TT, Evidence of Constable Odorski, at 55/21-30 [AR, Tab 8A]



25. Constable Odorski searched Mr. Ali incidental to arrest. First, he removed Mr. Ali's jeans and then searched his basketball shorts. In the shorts, Constable Odorski found cash in one of the pockets and in the jeans he found a cell phone, money, and a small amount of marijuana.<sup>19</sup>

26. Mr. Ali provided Constable Odorski with the last name Jabril. He was the only individual arrested in the residence.

27. Constable Darroch reported to the staff sergeant on duty stating that he wished for Mr. Ali to be strip searched. The staff sergeant approved the strip search and it was conducted by Constable Iwaasa after Mr. Ali was transported to the Lethbridge Police station. Constable Iwaasa discovered 65 grams of crack cocaine on Mr. Ali during the strip search.

### **Procedural History**

28. Mr. Ali was tried in the provincial court of Alberta. Testimony was heard by Constable Darroch, Constable Odorski and Constable Iwaasa. Constable Darroch was the chief investigating officer, Constable Odorski was the arresting officer and conducted the initial search of Mr. Ali, and Constable Iwaasa conducted the strip search at the Lethbridge Police station. Mr. Ali did not testify on his own behalf. Counsel for Mr. Ali challenged the validity of the search warrant and the legality of the strip search. The trial began with the *voir dire*.

29. Given that the interpretation of the testimonial evidence is central to this appeal, the trial testimony will be reviewed in great detail. Particular attention will be given to evidence concerning the issue of hearsay and evidence that would be relevant in determining whether or not the police had reasonable and probable grounds to strip search Mr. Ali.

30. Constable Darroch testified first in the *voir dire*. He began by providing a significant overview of the investigation. When describing the arrest and search of Mr. Ali, he testified to the following:

Mr. Ali -- or I contained the scene as the search supervisor and the scene supervisor. I directed Mr. -- at that point, Jabril I believe was his last name or first name to be taken to the police station; my conversation with Constable Odorski of him being handcuffed and

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<sup>19</sup> TT, Evidence of Constable Odorski, at 56/36-38 [AR, Tab 8A]

kind of reaching around the nether region, the back of his pants. His pants were halfway down on the ground -- or halfway down.<sup>20</sup>

31. Continuing with his overview of the case, Constable Darroch stated:

When we first entered that residence, Mr. Ali would have had extremely minimal time to place anything around him or hide things because our entry was very quick and he was within line of sight to our left. My feelings at that point was that he had concealed or was always concealing the drugs on his person. I phoned at the time my staff sergeant, Staff Sergeant Ian Sanderson, who was still at Lethbridge Police Service. I explained the situation, and I requested that a full strip search of Mr. Ali be done just given the circumstances of how he was found to be arrested. His clear adjustments kind of on his back end towards his -- his buttocks area lead me to believe that he may be concealing evidence in that area.<sup>21</sup>

32. After concluding his overview of the case, Constable Darroch was questioned by the Crown. Describing the entrance to the apartment and the arrest of the individuals inside, Constable Darroch testified to Mr. Ali's actions, saying:

He was originally directed to the ground and then was handcuffed and was kind of reaching back in his nether region.<sup>22</sup>

33. Defense counsel objected to this testimony. Given that Constable Darroch had previously stated that he was in another room when Mr. Ali was arrested, and had said in his overview of the case that Constable Odorski had told him about the "reaching back in his nether region" action, defense counsel stated that the testimony of Constable Darroch regarding Mr. Ali's actions was doing was hearsay.<sup>23</sup>

34. The trial judge did not make a ruling as to whether or not the statement made by Constable Darroch was hearsay, but did instruct him to clarify where he was in relation to Mr. Ali and whether he saw Mr. Ali's actions.<sup>24</sup> Constable Darroch explained how he never saw Mr. Ali try to reach into his underwear or pants:

Sorry. I understand I'm rambling at times....Mr. Rick or Mr. Ali was to our left. At times, I did see him. He was still laying on the ground, pants were down, and he was making some motions like that. I did not see him reaching into his underwear or anything like that

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<sup>20</sup> TT, Evidence of Constable Darroch, at 9/20-27 [AR, Tab 8A]

<sup>21</sup> *Ibid.* at 9/29-37 [AR, Tab 8A]

<sup>22</sup> *Ibid.* at 25/10-12 [AR, Tab 8A]

<sup>23</sup> *Ibid.* at 25/14-177 [AR, Tab 8A]

<sup>24</sup> *Ibid.* at 25/14-21 [AR, Tab 8A]

specifically, and my role was simply to make sure he's safe and quarterback putting together all the other found-ins within the apartment and come to the conclusion of who was coming with us back to the police station and who was not. My information of what I saw there was very, very limited of seeing his interactions, of his physical actions, of what he was reaching for or anything like that. I did not see him reaching into his underwear or pants or anything like that. (Emphasis mine)<sup>25</sup>

35. It is after this clarification that Constable Darroch described his communication with Constable Odorski:

I had a conversation with Constable Odorski about what he had seen during the arrest of Mr. Rick, and that's where he provided me the information about, you know, the -- the pants being down and him not listening to great verbal direction that was given to Mr. Odorski.<sup>26</sup>

36. Cst. Darroch stated his rationale for the strip search as follows:

I took that information, given the fact we had money, we had scales, we had a phone that was ringing, we had evidence to support drug trafficking, that along with confidential informant information that I had been receiving that they don't trust people around them and that they keep all their drugs on their person lead me to believe that he likely had it concealed in his person in a nether region, and I made that phone call to Staff Sergeant Sanderson letting him know, Hey, just so you know, this person's coming into cells, and I would like a strip search done. I explained my grounds to him, and Staff Sergeant Sanderson agreed to that.<sup>27</sup>

37. Constable Darroch did not cite any movement of Mr. Ali towards his nether regions as a reason for the strip search.

38. Constable Odorski's testified after Constable Darroch. The following is every mention of Mr. Ali's actions over the course of Constable Odorski's testimony:

I gave the first person that I saw commands to get down on the ground. After a few commands, they got onto the ground. There was another male that was sitting on a couch. He was dealt with by Constable Darroch. The male on the ground, I secured and advised him he was under arrest for CDSA charges at that time.<sup>28</sup>

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<sup>25</sup> TT, Evidence of Constable Darroch at 25/28-39 [AR, Tab 8A]

<sup>26</sup> *Ibid.* at 26/3-6 [AR, Tab 8A]

<sup>27</sup> *Ibid.* at 26/8-15 [AR, Tab 8A]

<sup>28</sup> TT, Evidence of Constable Odorski at 54/6-10 [AR, Tab 8A]

Well, he was -- so once he was secured, he was prone out on the ground, so I searched him for officer safety and evidence at that time and eventually turned him over to the other investigators.<sup>29</sup>

...

So the -- the individual I arrested had a black toque on, a white shirt, and some gray jeans that were kind of half-off his -- hanging half-off him. I said -- I told him to get on the ground. Took him several attempts for him to get on the ground. He complied. Handcuffed him. I removed the pants that he was wearing at the time and set them aside and then searched the basketball shorts that he had on, and then I searched the pants he had on, and then he was turned over to another -- another police officer.<sup>30</sup>

...

As I said, he had a T-shirt on, a toque of some sort on his head, and then a pair of jeans that were kind of, like, hanging half-off, and then he went to the ground. And so once he was secured on the ground, instead of trying to, like, wrestle his pants back up or have him stand up with his pants half-off, I just simply took them off there and -- and searched him.<sup>31</sup>

...

Like, he wouldn't have been able to stand up in handcuffs with his pants without them being in the way, like, underneath his feet.<sup>32</sup>

39. Crown counsel did not question Constable Odorski about whether he had any communication with Constable Darroch. Constable Odorski's testimony in direct was focused almost entirely on Mr. Ali's actions prior to being searched, as well as what had happened during the search. On that point, he provided a fairly detailed play-by-play account of what had occurred during Mr. Ali's arrest. He never testified as to whether he thought Mr. Ali was hiding drugs or whether there were reasonable and probable grounds for a strip search.

40. Cross examination of Constable Odorski was brief. As Constable Odorski had already testified to the entirety of the interaction between himself and Mr. Ali, the remaining issue was to determine whether there would have been any opportunity for Mr. Ali to hide evidence, either when Constable Odorski was attending to another matter or when his attention was diverted. Constable Odorski denied focussing on anything other than Mr. Ali, saying:

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<sup>29</sup> TT, Evidence of Constable Odorski at 54/13-15 13-15 [AR, Tab 8A]

<sup>30</sup> *Ibid.* at 54/41, 55/1-5 [AR, Tab 8A]

<sup>31</sup> *Ibid.* at 55/9-13 [AR, Tab 8A]

<sup>32</sup> *Ibid.* at 55/22-24 [AR, Tab 8A]

Q Okay. From -- when you went into the apartment, you saw Mr. Ali right away. Correct? And you maintained a visual contact with him throughout?

A Yeah.

Q Okay. You didn't take your eyes off him when you were searching his pants or 37 anything like that?

A He was right there beside me the entire time.<sup>33</sup>

41. Constable Iwaasa also testified. With respect to a strip search, he testified that, though he performed the strip-search, he personally did not have reasonable and probable grounds to believe that Mr. Ali had drugs on him.<sup>34</sup>

42. At the conclusion of the *voir dire*, the drugs were admitted. The trial judge went on to find Mr. Ali guilty of possession for the purpose of trafficking.

43. Mr. Ali appealed to the Alberta Court of Appeal. He argued that the trial judge erred by failing to consider the Supreme Court of Canada's decision in *R. v. Golden* requiring that the arresting officers have reasonable grounds to independently justify a strip search and that the trial judge erred by considering inadmissible hearsay evidence when determining the constitutionality of the strip search.

44. In a split 2-1 decision, the majority of the Court of Appeal denied Mr. Ali's appeal.

## **PART II – QUESTIONS IN ISSUE**

45. The decision of the Court of Appeal of Alberta is appealed on the following grounds:

- a. whether the trial judge considered the correct test for a strip search;
- b. whether the trial judge erred in admitting unreliable hearsay evidence in her assessment of the police's grounds for conducting a strip search;
- c. whether the trial judge erred in finding that the Appellant's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* were not violated; and
- d. whether the proper relief is entering an acquittal.

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<sup>33</sup> TT, Evidence of Constable Odorski at 57/33-39 [AR, Tab 8A]

<sup>34</sup> TT, Evidence of Constable Iwaasa at 70/10 [AR, Tab 8A]

### PART III – STATEMENT OF ARGUMENT

#### The Trial Judge Considered the Wrong Test for a Strip Search

46. This Honourable Court’s decision in *R. v. Golden* sets out the test for determining the legality of strip searches. Due to the invasive and highly personal nature of a strip search, this Court found that the police must establish that they had reasonable and probable grounds to conduct the strip search in addition to reasonable and probable grounds justifying the arrest.<sup>35</sup>

47. The test for reasonable and probable grounds has both a subjective and objective component<sup>36</sup> and the onus is on the party performing the search to prove its reasonableness.<sup>37</sup>

48. The trial judge in the present case did not consider *Golden* when conducting her analysis of the legality of the strip search and in particular did not consider the requirement that the police required reasonable and probable grounds to justify a strip search.

49. In her decision on the *voir dire*, she cited two issues to be considered: (1) whether the Information to Obtain (“ITO”) could have been issued and (2) whether or not the strip search was conducted incidental to arrest.<sup>38</sup>

50. The trial judge identified the issues again after a recitation of the facts:

In terms of the law, as noted at trial, two issues emerged: The first was whether the authorizing judge could have granted the ITO on the basis of credibly-based probability, having regard to the totality of circumstances, and the second was whether the strip search was incident to arrest.<sup>39</sup>

51. Notably, neither counsel for Mr. Ali, nor counsel for the Crown claimed that one of the issues present in the case was whether Mr. Ali was searched incidental to arrest. In fact, this point was conceded by defense during argument.<sup>40</sup> Defense did argue that the police did not have

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<sup>35</sup> *R. v. Golden*, 2001 SCC 83 at para. 99

<sup>36</sup> *R. v. Rhyason*, [2007] 3 S.C.R. 108, 2007 SCC 39 at para. 12

<sup>37</sup> *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 160

<sup>38</sup> TT, Ruling (*Voir Dire*) at 2/3-6 [AR, Tab 2]

<sup>39</sup> *Ibid.* at 4/39-41, to 5/1 [AR, Tab 2]

<sup>40</sup> TT, Submissions by Mr. Hlady (*Voir Dire*) at 32/21-22 [AR, Tab 8B]

reasonable and probable grounds, with defense citing *R v Golden* and quoting paragraph 99 of the decision verbatim to establish its importance.<sup>41</sup> Paragraph 99 of *Golden* reads:

In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such 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 s. 8 of the *Charter*.<sup>42</sup>

52. The trial judge's analysis of the issues at trial was framed as follows:

Secondly, counsel for the accused argued that while he would concede that the strip search of the accused was conducted in a reasonable and appropriate manner, the accused was nevertheless deprived of his Section 10(b) right to counsel at the time he was strip-searched. What's relevant to me is whether you can consider the strip search which followed at the police station part of the search incident to arrest. I find that is the case.<sup>43</sup>

53. Again, there is no mention of *Golden* or the test for reasonable and probable grounds justifying the strip search and again the focus is on whether the search was incidental to arrest.

54. The trial judge mistakenly conflated the issue of Mr. Ali's right to counsel with the determination about whether the strip search of Mr. Ali was incidental to arrest. Support for this position can be found during counsel's submissions on the *voir dire* when both counsel were questioned about the case of *R. v. Debot*, with the trial judge asking:

So in this particular case, I'd ask you if either of you have any comments on the sequence since Mr. Ali was removed from the apartment and the strip search was conducted later at the police station. Any comments on how that impacts whether it's lawful or not in terms of the 10(b) rights?<sup>44</sup>

55. No questions were asked about the test in *Golden* during argument, nor were any questions asked about whether there were reasonable and probable grounds to justify a strip search.

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<sup>41</sup> TT, Submissions by Mr. Hlady (*Voir Dire*) at 14/2-15 [AR, Tab 8B]

<sup>42</sup> *R. v. Golden*, 2001 SCC 83 at para. 99.

<sup>43</sup> TT, Ruling (*Voir Dire*) at 7/8-12 [AR, Tab 2]

<sup>44</sup> TT, Submissions by Mr. Klassen (*Voir Dire*) at 30/27-31 [AR, Tab 8B]

56. Further support for the appellant's submissions can be found in the trial judge's reasons, as she only cites *R v Golden* twice in her decision.

57. The first time *Golden* is cited is in reference to the manner in which the strip search is conducted, with the trial judge only citing *Golden* to contrast the extreme manner in which Mr. Golden was searched with the more reasonable way that Mr. Ali was searched, stating:

I find, as noted, that the strip search was part of the search incident to arrest, and, therefore, the accused, although affirming that he wished to speak to a lawyer, was not entitled at that juncture to speak to counsel. Per *R. v. Golden* [2001] 3 SCR 679, the Supreme Court spoke of a common-law right of police to conduct a search incident to arrest may allow exclusion of evidence obtained in a manner which is unreasonable. In the present case, unlike in *Golden*, defence concedes that the manner of the search of the accused was reasonable and that it was performed in a way which did not infringe the privacy or personal dignity of the accused.<sup>45</sup>

58. The other time *Golden* is cited is in the trial judge's analysis of whether the search was conducted incidental to arrest:

59. The strip search in your case was not conducted on the scene. As the Supreme Court of Canada in *R. v. Golden* indicates, protecting your right to privacy and personal dignity is a priority, but I do not see how *Golden* can be respected if in this case the strip search was required to be conducted at the scene, at the location provided in the ITO, and which was the subject of the search warrant. It would be a perverse consequence if as a result of the decision in *Golden* no strip searches could be performed incident to arrest unless at the scene in a controlled setting.<sup>46</sup> This analysis is lacking an important consideration, that is, whether or not the strip search should have been performed at all.

60. The trial judge does not identify *Golden* as the authority in determining whether a strip search is justified, nor does she identify the test as set out in *Golden* that reasonable and probable grounds exist to justify the arrest. In fact, she explicitly rejects the requirement for reasonable and probable grounds by citing *Cloutier v. Langlois*, [1990] 1 SCR 158, stating:

To be clear, stated Justice L'Heureux Dubé, (as read)

...this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement

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<sup>45</sup> TT, Ruling (*Voir Dire*) at 7/31-38 [AR, Tab 2]

<sup>46</sup> *Ibid.* at 11/11-17 [AR, Tab 2]



is that there be some reasonable basis for doing what the police officer did.<sup>47</sup>  
(Emphasis mine)<sup>48</sup>

61. This finding in *Cloutier* is explicitly addressed at paragraph 98 of *Golden*:

In *Cloutier, supra*, this Court concluded that a common law search incident to arrest does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself: *Cloutier, supra*, at pp. 185-86. However, this conclusion was reached in the context of a “frisk” search, which involved a minimal invasion of the detainee’s privacy and personal integrity. In contrast, a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.<sup>49</sup>

62. The trial judge’s decision-making process is evident from the following paragraph of her reasons:

Following *R. v. Sloan* 2001 ABPC 116, a decision of this Court, I find that all the requirements for a search incidental to arrest as set out in *Caslake* have been met in this case. As well I find that the tests set out in *Collins* have also been met. And, furthermore, from *Debot*, where a constable detained an accused and proceeded to search him, we find support for the idea that the police in this case had reasonable and probable grounds for believing that you, the accused, were in possession of narcotics. The Court in that case agreed the search was incidental to arrest, a valid arrest, and therefore did not infringe Section 8 of the *Charter*.<sup>50</sup>

63. Notably, none of *Sloan*, *Caslake*, *Collins*, or *Debot* are cases dealing with strip searches. Additionally, despite being the only case cited by defense with respect to the justification of the strip search, the test in *Golden* was not identified in the trial judge’s summation nor was *Golden* cited in respect to tests that should be considered in determining the legitimacy of the search.

64. Even if the trial judge had applied *Golden* without properly identifying the correct test or relevant precedent, analysis of her reasoning is absent in the decision. Nowhere in reasons does she identify where she obtained the facts used to justify her conclusions. Constable Odorski, the

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<sup>48</sup> TT, Ruling (*Voir Dire*) page 8/6-41 [AR, Tab 2]

<sup>49</sup> *R. v. Golden*, 2001 SCC 83 at para. 98

<sup>50</sup> TT, Ruling (*Voir Dire*) page 10/8-15 [AR, Tab 2]

arresting officer and only witness to Mr. Ali's actions, is referenced only once in passing<sup>51</sup> and his testimony is never mentioned. There is no indication his evidence was considered.

65. The presumption that trial judges are presumed to know the law with which they work on a day-in day-out basis does not negate the need for reasons to show that the law is correctly applied in the particular case.<sup>52</sup> Even if she somehow did conduct an analysis of the test set out in *Golden*, she failed to show that said analysis was applied or how it was applied.

### **The Majority of the Court of Appeal Skirts the Issue**

66. The majority of the Court of Appeal accepted the Crown's submissions that, considered in the overall context, there were reasonable and probable grounds for the strip search.<sup>53</sup>

67. The majority's opinion did not directly address whether or not the trial judge considered *Golden* when determining whether or not the strip search was justified but instead stated that "the trial judge's reasons could have been focused more directly on the second aspect of the *Golden* test."<sup>54</sup>

68. However, the majority found that it was sufficient that the trial judge "recognized that the police must have both a subjective and an objective basis for a strip search."<sup>55</sup> The majority then conducted their own review of the evidence of the case to determine if the test in *Golden* had been met.

69. The majority of the Court of Appeal erred in coming to the conclusion that *Golden* was applied when determining whether the strip search of Mr. Ali was justified.

70. Firstly, the majority ignored the fact that, in the paragraph that they relied upon by to show that *Golden* was considered, the trial judge directly references the fact that she is citing *Cloutier* and not *Golden*.

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<sup>51</sup> "Evidence was given in the matter by Constables Darroch, Odorski, and Iwaasa of the Lethbridge Regional Police Service": TT, Ruling (*Voir Dire*) at 2/8-9 [AR, Tab 2]

<sup>52</sup> *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51 at para. 47

<sup>53</sup> *R. v. Ali*, 2020 ABCA 344 [AR, Tab 4]

<sup>54</sup> *R. v. Ali*, 2020 ABCA 344 at para. 17 [AR, Tab 4]

<sup>55</sup> *R. v. Ali*, 2020 ABCA 344 at para. 18 [AR, Tab 4]

71. Secondly, as previously mentioned, the majority failed to consider the fact that the trial judge specifically cites the portion of *Cloutier* that states that the test is not reasonable and probable grounds.

72. Finally, in finding that the reasons of the trial judge were sufficient,<sup>56</sup> they failed to consider the jurisprudence regarding sufficiency of reasons.

It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at p. 524).<sup>57</sup>

73. Conversely, Justice Veldhuis's dissent specifically addresses the entire context of the decision when making her determination that the trial judge did not consider *Golden* in her decision.<sup>58</sup>

74. Finally, as identified by Justice Veldhuis,<sup>59</sup> the majority failed to consider that, even if *Golden* was applied, an analysis that consisted of "the totality of circumstances, the facts outlined in the search warrant, and the accused's actions at the scene of the arrest" is not sufficient, especially on such an important point. This is a situation similar to *R v Sheppard* where the reasons are so generic as to be no reasons at all.<sup>60</sup> However, unlike the case in *Sheppard*, this was not a situation where the presiding judge had the excuse of a busy courtroom. In this situation, the trial judge had reserved her decision at the conclusion of the *voir dire* and then adjourned the matter again before giving her reasons.

75. The Trial Judge was made aware of the counsel's argument through a *Charter* notice prior to trial and in closing submissions. The argument raised was neither overly complex nor novel. Similarly, analysis of *Golden* need not have been overly complex. The majority's deference to the trial judge vastly exceeds what is appropriate or justifiable. By attempting to cobble together the trial judge's consideration of *Golden*, they allow for one line out of context to stand for an analysis

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<sup>56</sup> *R. v. Ali*, 2020 ABCA 344 at para. 18 [AR, Tab 4]

<sup>57</sup> *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] 3 SCR 3 at para. 16

<sup>58</sup> *R. v. Ali*, 2020 ABCA 344 at paras. 41, 47 [AR, Tab 4]

<sup>59</sup> *R. v. Ali*, 2020 ABCA 344 at para. 49 [AR, Tab 4]

<sup>60</sup> *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 at paragraph 60

of an entire issue, and they ignore the trial judge herself who specifically identifies the issues that she considered.

### **The Trial Judge Erred in Admitting Unreliable Hearsay Evidence regarding the Police's Grounds for Conducting a Strip Search**

76. Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because — in the absence of the opportunity to cross-examine the declarant at the time the statement is made — it is often difficult for the trier of fact to assess its truth. Thus, hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness.<sup>61</sup>

77. The issue is whether Constable Darroch's testimony concerning Mr. Ali's actions are hearsay. In particular, whether the evidence given by Constable Darroch was tendered for the truth of its contents, or for some other reason.

78. The trial judge did not address the issue of hearsay in her decision. She found as a fact that Mr. Ali made "adjustments to his clothing generally in the area of his buttocks"<sup>62</sup> and that he was reaching under his clothing in the area of his buttocks, which indicated to police he was concealing something.<sup>63</sup>

79. No evidence, hearsay or otherwise, was given that Mr. Ali ever reached under his clothing in the area of his buttocks.

80. The trial judge's reference to both Mr. Ali "adjusting" himself as well as referring to his "buttocks" indicates that this finding of fact was taken from Constable Darroch's introductory comments relating to relaying the reasons for a strip search to his supervisor.<sup>64</sup>

81. Constable Darroch later testified that he did not see Mr. Ali adjusting himself or reaching towards his buttocks. He also did not attribute his earlier testimony regarding Mr. Ali's "adjustments" to Constable Odorski. As such, the testimony of Constable Darroch concerning Mr.

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<sup>61</sup> *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865 at para. 1

<sup>62</sup> TT, Ruling (*Voir dire*) at 7/9 [AR, Tab 2]

<sup>63</sup> *Ibid.* at 11/29-30 [AR, Tab 2]

<sup>64</sup> *Ibid.* at 9/29-37 [AR, Tab 2]

Ali “making adjustments” and any contextually related comment concerning the same may not even qualify as hearsay as they do not cite the source of the information.

82. This evidence was improperly used to support a key finding of fact. While the trial judge does not cite Constable Darroch’s testimony as the source of her finding of fact, his testimony is the only one that could provide justification for her finding of fact that Mr. Ali was adjusting himself or reaching towards his buttocks. She does not consider that:

- a. Constable Darroch did not actually see the “adjustments,”
- b. Constable Darroch stated that he was told of the adjustments by Constable Odorski, and;
- c. Constable Darroch clarified his remarks after defense counsel objected to the hearsay nature of the evidence.

83. Most importantly, she does not consider the fact that Constable Odorski never testified to any such adjustments.

84. The majority of the Court of Appeal determined that the evidence was not hearsay because it was not being used for the truth of its contents. They did not focus on the “adjustments” finding at the trial level, instead focusing on testimony concerning Mr. Ali reaching towards his nether regions.

85. The first time the Court of Appeal references Mr. Ali reaching towards his nether regions, is as follows:

Constable Odorski had the most contact with the appellant. He reported that the appellant did not immediately comply with his commands, and that he observed him “reaching towards his nether region or the back of his pants” during the arrest.

86. The record is clear that Constable Odorski did not testify that Mr. Ali reached towards his nether regions or the back of his pants. The evidence concerning Mr. Ali’s “nether regions” was Constable Darroch’s description of what he testified that Constable Odorski told him. Even if Mr. Ali had in fact reached toward his nether regions, that action could have an innocent explanation. If Constable Odorski testified that Mr. Ali reached towards his nether regions, that testimony could

have been cross-examined upon, and Mr. Ali's actions could have been properly considered in the light of the test established in *Golden*. The majority's mischaracterization of this evidence is a significant error and affects the entirety of the Court's decision.

87. Any evidence concerning Mr. Ali's movements came from Constable Darroch. The majority states that this evidence of movement is not to be considered for the purposes of determining what happened during the arrest, but rather, what Constable Darroch believed when he ordered the strip search.

88. According to the majority, because Constable Darroch testified that he heard Mr. Ali had reached towards his nether regions, and because he was entitled to rely on this information, he had reasonable and probable grounds to justify a strip search. The evidence is therefore not being used to prove the truth of its contents (that Mr. Ali reached towards his nether region), but that Constable Darroch believed that Mr. Ali reached towards his nether regions. This finding would be based on Constable Darroch's testimony that he was informed of this fact by Constable Odorski.

89. Testimony concerning information that an officer heard from another officer can be used to show what the officer believed at the time. However, where the court of appeal erred is by then substituting the test in *Golden*. Instead of making a determination on whether the police had reasonable and probable grounds, the majority stated that the test was whether the police believed they had reasonable and probable grounds to justify the strip search.

90. The test for reasonable grounds has subjective and objective components. In particular, the requirement that there be an objective element to the test is especially important in this case. According to the majority of the Court of Appeal

In this case, 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.

91. With respect to the majority of the Court of Appeal, it does not depend on information known to, believed and reasonably relied on by the police team. To depend solely on what the

police thought at the time eliminates the Crown's burden of proving that the search was objectively reasonable and ignores the requirement for objective and ascertainable facts that permit an independent after-the-fact review and protect against arbitrary state action.<sup>65</sup>

92. Despite indicating that the hearsay evidence of Constable Darroch was only considered for the purpose of illustrating his belief at the time, the majority then immediately relies upon the evidence that Mr. Ali was reaching towards his nether regions when determining whether the strip search was justified:

The appellant was observed reaching towards his "nether region" and the back of his pants, which were below his waist. That certainly invited an inference that he was trying to hide something there.<sup>66</sup>

93. In fact, Mr. Ali reaching towards his nether regions is the most important piece of evidence relied upon by the majority when conducting their own analysis of *Golden* with the other factors being testimony that a confidential informant advised Constable Darroch that the individual would carry drugs in his pockets and the fact that Mr. Ali "resisted arrest."<sup>67</sup>

94. Mr. Ali did not have drugs in his pockets despite the information of the confidential informant. This fact, according to the majority, was evidence that would support the decision for a strip search as drugs usually kept in pockets would be relocated because of a police search.<sup>68</sup> In essence, the fact that the informant was wrong about Mr. Ali's drugs being in his pockets, increased the probability that Mr. Ali had hidden drugs in circumstances where a strip search would be necessary. To the majority, absence of narcotics was evidence of presence of hidden narcotics.

95. As for the evidence of Mr. Ali resisting arrest, the Court of Appeal was dismissive of this as a reason to justify a strip search, citing that it did not play a major role in Constable Darroch's decision to request a strip search be ordered, but also identifying that it would have provided an opportunity to hide narcotics. Notably, the majority again focuses on Constable Darroch's beliefs, as opposed to the factual circumstance determined at trial.

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<sup>65</sup> *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para. 45

<sup>66</sup> *R. v. Ali*, 2020 ABCA 344 at para. 21 [AR, Tab 4]

<sup>67</sup> *R. v. Ali*, 2020 ABCA 344 at para. 23 [AR, Tab 4]

<sup>68</sup> *R. v. Ali*, 2020 ABCA 344 at para. 21 [AR, Tab 4]

96. The only individual who characterized Mr. Ali of resisting arrest was the trial judge. None of the officers that testified stated that Mr. Ali had resisted arrest. Rather, Mr. Ali's actions in what the majority called "delayed compliance"<sup>69</sup> had an innocent explanation that was provided by the crown's witness and arresting officer and person to actually see the actions, Constable Odorski.<sup>70</sup>

97. When determining whether the strip search was justified, the majority of the Court of Appeal considered Mr. Ali's movements, confidential informant information that was discovered to be untrue, and Mr. Ali's actions in "resisting arrest". Their analysis relied on improper evidentiary findings and dangerous assumptions and cannot be supported by a proper consideration of the trial record. Perhaps most concerning, their analysis seemingly begins with the presumption that individuals who are being searched are drug dealers.<sup>71</sup>

98. In this portion of their analysis, the majority does not consider the fact that Constable Darroch believed that Mr. Ali reached towards his nether regions as they had previously relied upon when determining whether or not the "hearsay" was relevant. They only consider the fact that Mr. Ali actually reached towards his nether regions.

99. Belief is not enough. When determining whether a strip search is justified, facts matter. What actually happened at the scene matters. Counsel objected to Constable Darroch's evidence of Mr. Ali's actions because what Mr. Ali actually did or did not do was and the evidence concerning his actions should be reliable and entered in a properly admissible manner.

100. Ultimately, in finding the strip search justified, the majority of the Court of Appeal ignored the evidence of Constable Odorski, the officer who actually witnessed Mr. Ali's actions and accepted the evidence of Constable Darroch, who had not. Not only was the hearsay statement of Constable Odorski relied upon for the truth of its contents, but it was also relied upon over the actual testimony of Constable Odorski.

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<sup>69</sup> *R. v. Ali*, 2020 ABCA 344 at para. 23 [AR, Tab 4]

<sup>70</sup> *R. v. Ali*, 2020 ABCA 344 at para. 57 [AR, Tab 4]

<sup>71</sup> *R. v. Ali*, 2020 ABCA 344 at para. 21 [AR, Tab 4]



**Conclusion: The Appellant's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* were Violated**

101. At trial, the crown had not proven that there were reasonable and probable grounds to justify a strip search. Mr. Ali had not done anything to indicate he was hiding drugs, nothing in the circumstantial evidence of the case indicated that he was hiding drugs, and the police had no information prior to entering apartment #103 that would indicate that a strip search would be necessary to find hidden drugs.

102. The resulting strip search was therefore unlawful and a breach of Mr. Ali's rights under section 8 of the Charter of Rights and freedoms.

**Entering an Acquittal is the Proper Relief**

103. No section 24(2) analysis has been conducted on this matter at the trial level or the Court of Appeal. Mr. Ali has already served his sentence for this conviction. Mr. Ali submits that an acquittal is the proper remedy as a subsequent analysis of the admission of evidence would be merely hypothetical. In doing so, Mr. Ali adopts the reasoning of this Honorable Court's decision in *Golden*<sup>72</sup> as well as the decision of Justice Veldhuis at the Court of Appeal.<sup>73</sup>

**PART IV – SUBMISSIONS CONCERNING COSTS**

104. The Appellant does not seek costs and makes no submissions as to costs.

**PART V – ORDERS SOUGHT**

105. The Appellant requests that this Appeal be allowed for the dissenting reasons of Justice Veldhuis, that the decision of the Court of Appeal of Alberta be set aside, and that an acquittal be entered.

**PART VI – SUBMISSIONS ON CASE SENSITIVITY**

106. As noted in the Form 23, there is a sealing order in effect prohibiting disclosure of an Information to Obtain a Search Warrant. However, no documents filed with this Court are subject

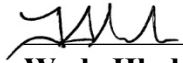
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<sup>72</sup> *R. v Golden*, 2001 SCC 83 at para. 119

<sup>73</sup> *R. v. Ali*, 2020 ABCA 344 at para. 63 [AR, Tab 4]

to that order. Accordingly, there is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2021

 as agent for

**Wade Hlady**

Counsel for the Appellant

## PART VII – TABLE OF AUTHORITIES

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