

CANADA / JUDGMENT

R. v. Harris

2025 BCSC 2149

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Supreme Court of British Columbia

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2025 BCSC 2149 R. v. Harris

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harris,

2025 BCSC 2149

Date: 20251023

Docket: 43496

Registry: Campbell River

Rex

v.

Tony Arthur Robert Harris

Corrected Judgment: The text of this judgment was corrected at para. 60 on March 13, 2026.

Before: The Honourable Justice Layton

Oral Reasons for Judgment regarding ss. 8 and 10(b) of the Charter

Counsel for the Crown:

E.L. Reaume

Counsel for the Accused:

S.J. Runyon

Place and Date of Hearing:

Campbell River, B.C.

October 21-22, 2025

Place and Date of Judgment:

Campbell River, B.C.

October 23, 2025

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Introduction

- [1] Mr. Harris is charged with three counts of possessing a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The drugs are cocaine (count 1), fentanyl and a benzodiazepine, namely, bromazepam (count 2), and methamphetamine (count 3). Mr. Harris is also charged with one count of possessing a non-restricted firearm contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] All of the charges arise from evidence located by police during a search of a vehicle in which Mr. Harris had been a passenger on December 13, 2023 in Campbell River.
- [3] Mr. Harris was arrested at the scene, after which Cpl. Ryan Warren searched him incident to arrest. In doing so, Cpl. Warren pulled out the waistband on Mr. Harris's pants and noticed a condom on his penis. This information, combined with other information I will describe, led another officer, Cst. Matthew Watkins, to conduct a strip search of Mr. Harris incident to arrest at the RCMP detachment.
- [4] The parties agree that in pulling out Mr. Harris's waistband and looking at his groin area Cpl. Warren also conducted a strip search.

- [5] Mr. Harris has applied under s. 24(2) of the Charter to exclude the drugs and firearm found during the vehicle search on the basis that his s. 8 Charter right to be secure against unreasonable search was breached by the two strip searches, and that his s. 10(b) right to counsel was also infringed because he was not given an opportunity to re-consult legal counsel prior to Cst. Watkins carrying out the strip search at the detachment.
- [6] The Crown concedes that the strip search conducted by Cpl. Warren breached s. 8 of the Charter, and that due to the principle of excision the subsequent strip search performed by Cst. Watkins also infringed s. 8. But the Crown contends that the second strip search was only deficient because of excision, a position with which the defence disagrees, asserting that this second search involved additional or independent police misconduct.
- [7] The Crown further argues that, in the circumstances of this case, the police had no obligation to provide Mr. Harris with an opportunity to re-consult counsel before carrying out the second strip search.
- [8] In these reasons, I will address how the strip searches breached s. 8, and also whether s. 10(b) was breached. The parties will make further submissions on s. 24(2) after these reasons have been delivered.
- [9] I will begin my discussion by providing an overview of the relevant evidence called on the voir dire.

Overview of the Relevant Evidence

- [10] The only two witnesses were Cst. Watkins and Cpl. Warren.
- [11] Cst. Watkins testified that at around 10:00 a.m. on December 13, 2023, he was informed that a building manager at 710 Dogwood St. had reported a vehicle in the parking lot, which was not associated with the building and the engine of which had been running for quite some time. The manager also stated that he had seen a bladed weapon and drug paraphernalia inside the vehicle.
- [12] Cst. Watkins and a colleague, Cst. Kelsey Marsden, drove their marked police cruisers to the open-air parking lot at 710 Dogwood St. The lot had about 40 or 50 parking stalls, most of which were occupied.
- [13] Cst. Watkins identified the vehicle in question, which was in a stall with its engine running and taillights on. He parked his cruiser with its front facing the driver's side of the vehicle, saw that there was a driver inside, and prepared to conduct an impaired investigation because the vehicle was running and there had been a report of drug paraphernalia.
- [14] Cst. Watkins approached the driver's side window of the vehicle, which was foggy, as if people had been inside for a time. Cst. Watkins could see figures in the vehicle, and saw the driver moving frantically. But given the fog on the window it was difficult to see what was happening inside.

- [15] Cst. Watkins announced himself, knocked on the window and asked the driver to roll it down. But the driver did not respond.
- [16] Cst. Watkins therefore opened the driver's door, and saw a female in the driver's seat, later identified as Deanna Sayers. The vehicle was registered in her name.
- [17] Cst. Watkins told Ms. Sayers that he was conducting an impaired investigation. He then saw a sword sticking out from the centre console, wedged between the console and the passenger seat, and also saw a man in the passenger seat, later identified as Mr. Harris.
- [18] Mr. Harris was trying to hide a piece of plastic tubing, which Cst. Watkins recognized as an item that drug users employ to consume drugs. Cst. Watkins did not know where Mr. Harris ended up putting the tubing. Mr. Harris was wearing clothes, at least on the upper half of his body, which is what Cst. Watkins could see. Ms. Sayer was also clothed.
- [19] Based on seeing the sword, Cst. Watkins told Cst. Marsden to arrest Mr. Harris for possession of a dangerous weapon. He removed Ms. Sayer from the vehicle and arrested her for the same thing. Ms. Sayer tried to push by him, saying that she needed to get something in the vehicle, but he stopped and handcuffed her. Cst. Watkins escorted Ms. Sayer to his police cruiser. He provided her with her Charter rights and put her in the back seat of the cruiser before returning to her vehicle to search it incident to the arrests.
- [20] Not long afterwards, Cpl. Warren arrived in his marked police cruiser and took custody of Mr. Harris from Cst. Marsden. Cst. Watkins had either already started searching the vehicle or did so shortly after Cpl. Warren arrived.
- [21] The parties agree that the items Cst. Watkins located during his search of the vehicle provided a lawful basis to arrest Mr. Harris for possession of a controlled substance for the purpose of trafficking. I will therefore not review those items in these reasons.
- [22] Rather, I will focus on what happened to Mr. Harris once Cpl. Warren arrived at the scene. These events start with Cpl. Warren moving Mr. Harris to the area of Cst. Marsden's police car and searching him incident to arrest.
- [23] Cst. Watkins testified that at one point he looked over at Cpl. Warren, who was on the other side of Ms. Sayer's vehicle. Cst. Watkins could nonetheless see Cpl. Warren over the trunk because her vehicle was a smaller sedan.
- [24] Cst. Watkins observed Cpl. Warren run his hands along or around the waistband of Mr. Harris's pants, similar to what police officers do in searching an individual on arrest. He then saw Cpl. Warren pull the waistband from Mr. Harris's person, so that it was "coming away".

- [25] Cst. Watkins testified that, right after Cpl. Warren made this motion, which took a second or two, he saw a shocked or puzzled look on Cpl. Warren's face, and Cpl. Warren retracted his hand from the area and asked Mr. Harris something like "why are you wearing this?" or "why do you have that?" Cst. Watkins testified that later on, but while they were still at the scene, Cpl. Warren recounted that he had seen a condom on Mr. Harris's penis. Cst. Watkins had not himself seen Mr. Harris's private parts.
- [26] In cross-examination, Cst. Watkins conceded that he made no notes of his observations of Cpl. Warren handling Mr. Harris's waistband. I nonetheless accept Cst. Watkin's evidence on this point. It is consistent with the evidence of Cpl. Warren, which I will review in a moment. It is also consistent with what Cst. Watkins saw when he later strip-searched Mr. Harris. In any event, I do not understand the defence to take the position that no condom was seen by Cpl. Warren or that his conduct in carrying out the search was materially different from what he and Cst. Watkins described in their evidence.
- [27] As for Cpl. Warren, he testified that after taking Mr. Harris to the area of Cst. Marsden's patrol car, he searched Mr. Harris from "top to bottom", looking for guns, knives, weapons, pepper spray, drugs, or personal effects. During this search, he found a folding pocket knife that was clipped to the front of Mr. Harrison's pants on the right side. He removed the knife.
- [28] Cpl. Warren testified that he next pulled Mr. Harris's waistband slightly away and gave Mr. Harris's pants a shake, to ensure there was nothing tucked into the waistband, like a gun, knife, pepper spray or drugs, as it is common for people to carry items in this location. In cross-examination, Cpl. Warren nonetheless conceded that a frisk or pat-down search over the top of a person's clothes would reveal whether a gun, knife or bear spray were hidden in the person's undergarments in the buttock or genital areas.
- [29] Critically, Cpl. Warren testified that as he pulled Mr. Harris's pants away he got a "snapshot glimpse" of Mr. Harris's pubic region and saw something on Mr. Harris's penis. Cpl. Warren said that he did not look any further because he knew that strip searching in public is unacceptable.
- [30] Cpl. Warren testified that he was confused by what he had seen during this "snapshot glimpse". He did not think about a condom right away, but he must have spoken to Mr. Harris because Mr. Harris said that he had just had sex and that was why he was wearing a condom. Cpl. Warren no longer recalled what he had asked Mr. Harris to prompt this response.
- [31] Cpl. Warren next ran a check on Mr. Harris, which indicated that he was on conditions not to possess knives or drugs. Cpl. Warren arrested Mr. Harris and provided Charter rights for possession of a controlled substance for the purpose of trafficking, possession of a dangerous weapon, and breach of a condition.
- [32] Mr. Harris wanted to speak to counsel, so Cpl. Warren arranged for him to speak to a legal aid lawyer privately in Cst. Marsden's patrol car. The phone call lasted about seven minutes.

- [33] Not long afterwards, Cpl. Warren and Cst. Watkins returned to the latter's patrol car, which is where Ms. Sayer was located. Both officers believed she was under the influence and unsafe to drive. Ms. Sayer was therefore issued a 24-hour driving prohibition, after which she was released from police custody at the scene. Neither officer took a statement from Ms. Sayers before releasing her, and Cst. Watkins documented no discussions with her.
- [34] Having by now heard from Cpl. Warren that Mr. Harris was wearing a condom on his penis, Cst. Watkins decided that a strip search should be conducted at the detachment.
- [35] In his testimony in chief, Cst. Watkins indicated that this decision was based on the following grounds:
- (a) he had seen Mr. Harris trying to hide plastic tubing that he believed was used to consume drugs, and therefore believed Mr. Harris was a drug user;
 - (b) he had located drugs in the car, and believed those drugs were possessed by Mr. Harris for the purpose of trafficking;
 - (c) in his experience, individuals sometimes hide drugs in private places like their underwear, or in a balloon in their anus, to avoid the drugs being located during a police search;
 - (d) Mr. Harris having a condom on his penis seemed odd or out of place, because Mr. Harris and Ms. Sayer were fully clothed when he first encountered them, and were not engaged in sexual intercourse, and he thus had a concern that there may be drugs in the condom;
 - (e) a strip search was necessary to ensure that Mr. Harris did not have any drugs on his person, which would constitute evidence of the drug offence for which he was arrested, otherwise Mr. Harris could dispose of the drugs in the toilet once lodged in the cells at the detachment;
 - (f) Mr. Harris could also get rid of the drugs by consuming them, perhaps leading to an overdose, which was a concern for Cst. Watkins given overdose issues in Campbell River.
- [36] Cst. Watkins testified that he discussed his decision to conduct a strip search with Cpl. Warren, who was his supervisor, because RCMP policy requires approval from a supervising officer to conduct a strip search. He told Cpl. Warren that, in light of the drugs located in the vehicle and the condom on Mr. Harris's penis, he was concerned that Mr. Harris might be hiding drugs that would constitute evidence, and may flush those drugs down the toilet or consume them, in the latter instance creating a risk of overdose. Cst. Watkins testified that, while Cpl. Warren approved the strip search, he was the one who had decided there was a basis to do it.

- [37] Cst. Watkins did not make contemporaneous notes regarding the process for conducting the strip search, because this was only the second time he had done a strip search. But about a week later a drug officer told him about the importance of documenting a strip search, and Crown counsel asked him to document the strip search as well. He therefore wrote a report 11 days after the strip search was conducted, setting out his grounds in support and the manner in which the search was carried out.
- [38] Cst. Watkins used this report to refresh his memory with respect to how the strip search was carried out, and he was cross-examined about the grounds set out in the report, which was marked as an exhibit for identification on the voir dire.
- [39] In cross-examination, it was put to Cst. Watkins that one of the points made in the report was that drugs had been located in the vehicle, in amounts consistent with Mr. Harris having possessed them for the purpose of trafficking, an inference further supported by other items located in the vehicle such as a weapon, and that Cpl. Warren had inadvertently seen that Mr. Harris was wearing a condom on his penis, which was out of place as Mr. Harris had been found sitting in the vehicle with a female but they were not engaged in intercourse and were fully clothed at the time.
- [40] Asked about this part of the report, Cst. Watkins agreed that because the door was closed and the window foggy he had not been able to see inside the vehicle, and he had not asked Ms. Sayer whether she had been having sex with Mr. Harris. He also agreed that no drugs were found on Mr. Harris when he was searched by Cpl. Warren, and that drugs were located "all over the vehicle". Cst. Watkins confirmed that he was aware that a person cannot be strip searched merely because they have been arrested for possession for the purpose of trafficking.
- [41] Also in cross-examination, Cst. Watkins was asked to explain how wearing a condom supports the inference that a person is concealing drugs. He explained that the drugs had been in the immediate area where Mr. Harris was sitting, in amounts consistent with possession for the purpose of trafficking, that in the circumstances wearing a condom appeared unconnected to sexual intercourse and was odd, and that in his experience people hide drugs in their anus using a balloon and a condom could be used for a similar purpose, as drug users would understand that police cannot search down to their skin in public spaces.
- [42] In further cross-examination, Cst. Watkins admitted that there was no indication that Mr. Harris's clothing had been out of place in any way, for example a twisted belt, and he had not seen Mr. Harris reach for his genital area. Cst. Watkins did not recall whether he had asked Mr. Harris if he was concealing drugs on his person.

- [43] After the lunch break, defence counsel put to Cst. Watkins that his reasons for conducting the strip search were that, first, Mr. Harris had been arrested for possession for the purpose of trafficking, second, Cpl. Warren had seen a condom on his penis, and third, the current opioid epidemic raised a concern about the threat of overdosing, thus providing a reason to take steps to ensure that narcotics are not ingested in a jail cell.
- [44] While Cst. Watkins agreed that these were his reasons, his testimony in both chief and cross-examination made clear that a fourth reason was his knowledge that individuals sometimes hide narcotics in their private areas. He was never challenged on this fourth point in cross-examination, and although not necessary to my conclusion that it formed part of his grounds, it is mentioned in his report as well.
- [45] Also in cross-examination, Cst. Watkins agreed that the police cells in Campbell River have video surveillance and there is a guard who can monitor the cameras and make direct observations. He further agreed that the guards make notes of the prisoner's well-being and ensure that they do not destroy evidence.
- [46] Before turning to review the evidence regarding how the strip search was conducted at the detachment, I will review Cpl. Warren's testimony regarding his authorization of the strip search.
- [47] Cpl. Warren testified that he authorized the strip search requested by Cst. Watkins, but he took no notes and no longer had any memory of the exchange. For example, he did not recall whether he told Cst. Watkins what Mr. Harris had said about why he was wearing a condom. Cpl. Warren agreed, however, that he had filled out the prisoner report for Mr. Harris, which stated that the reason for the search was "PPT/condom".
- [48] Cpl. Warren apologized for not taking notes and indicated that he understood that notes should be available. In cross-examination, he admitted to having been a police officer for almost 19 years and yet not having been familiar with the contents of the decision in *R. v. Golden*, 2001 SCC 83.
- [49] Cpl. Warren went on to state that, "for this situation", Cst. Watkins was a "very switched on" officer and had experience performing Cpl. Warren's job running the watch while Cpl. Warren was on vacation. Cpl. Warren could no longer recall the discussion he had had with Cst. Watkins, although he had a sense from reviewing the prisoner report that it related to the condom, but whatever Cst. Watkins' grounds had been, Cpl. Warren had agreed, knowing that Cst. Watkins had the experience to conduct a strip search in a respectful and policy-compliant way.
- [50] At about 11:00 a.m., Cst. Watkins returned to the RCMP detachment, where he conducted the strip search of Mr. Harris. Cpl. Warren remained with Ms. Sayer's vehicle in the parking lot.
- [51] Cst. Watkins described his process in strip searching Mr. Harris as follows:

- (a) he took Mr. Harris into a cellblock room;
 - (b) another officer stood outside the room, to assist in case there was any violence inside the room;
 - (c) the room had a taped off area in the corner that was not visible on CCTV;
 - (d) Cst. Watkins explained to Mr. Harris that events occurring inside the taped area would not be recorded;
 - (e) Cst. Watkins explained the process of the strip search to Mr. Harris, stating that he would give Mr. Harris direction regarding what to remove, and to follow this direction so as to make the search as unintrusive as possible;
 - (f) Mr. Harris then went inside the taped area;
 - (g) Cst. Watkins asked Mr. Harris to remove his shirt, and on observing nothing in that area, he asked Mr. Harris to put his shirt back on;
 - (h) Cst. Watkins then asked Mr. Harris to remove the lower half of his clothing, which he did;
 - (i) Cst. Watkins observed the condom and asked Mr. Harris to remove it, which Mr. Harris did himself, and Cst. Watkins saw nothing of relevance in the condom;
 - (j) Cst. Watkins next asked Mr. Harris to lift his penis and testicles, and Cst. Watkins saw no drugs in this area;
 - (k) Cst. Watkins then asked Mr. Harris to turn around and squat, at which point Cst. Watkins could see his anus, and on seeing no drugs in that area, Cst. Watkins directed Mr. Harris to put his clothes back on.
- [52] Mr. Harris was never completely naked. No one else was in the room. The strip search was not recorded. And Cst. Watkins never touched Mr. Harris's body.
- [53] Based on his notes, Cst. Watkins estimated that he arrived at the cells at 11:03 a.m., and that the strip search concluded at 11:10 a.m. Accordingly, the strip search took at most seven minutes.
- [54] After the search was done, Mr. Harris was permitted to call a lawyer and was booked into the cells by Cst. Watkins with the assistance of a guard. Cst. Watkins testified that the strip search was conducted prior to booking Mr. Harris into the cell because the usual process is to search an individual before booking them to ensure they have no weapons or anything that might cause harm, before putting them in a cellblock where there are civilian workers.

[55] In cross-examination, Cst. Watkins rejected that Mr. Harris moved slowly and that he therefore concluded Mr. Harris was under the influence of drugs. He did not document any indicia of impairment at the time Mr. Harris was booked into the cells. But Cst. Watkins agreed that, based on seeing Mr. Harris with the pipe with residue, he believed Mr. Harris was under the influence of drugs that day.

How Were Mr. Harris's Section 8 Rights Breached?

[56] In this section of my reasons, I will set out the legal principles governing strip searches, after which I will apply those principles to the circumstances of this case.

[57] As noted, the Crown concedes that both strip searches breached s. 8 of the Charter, but the parties disagree as to whether the second strip search only did so by reason of the principle of excision, as opposed to involving an additional and independent instance of state misconduct.

Legal Principles

[58] *R. v. Golden*, 2001 SCC 83 at para. 47 defines a strip search as, "the removal of some or all of a person's clothing 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".

[59] This definition encompasses pulling back a person's pants to view the portions of a detainee's underwear that covers their private parts: *R. v. Pilon*, 2018 ONCA 959 at para. 28; *R. v. Choi*, 2021 BCCA 410 at paras. 73-80.

[60] Strip searches conducted incident to arrest are conceptually different from and more intrusive than "frisk" or "pat down" searches, which do not involve the removal of clothing to view private parts, whether or not covered by undergarments: *Golden* at para. 47; *Choi* at para. 68.

[61] At common law, the police may conduct a search incident to arrest, including a frisk or pat-down search, provided that: (a) the person searched is lawfully arrested; (b) the search is truly incidental to the arrest, i.e., for a valid law enforcement purpose related to the reasons for the arrest; and (c) the search is conducted reasonably: *R. v. Stairs*, 2022 SCC 11 at para. 35; *Golden* at para. 24.

[62] *Golden* states, at para. 94, that a frisk or pat-down search will generally suffice to determine if the accused has secreted weapons on their person, adding:

Only if the frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person will a strip search be justified.

[63] Strip searches are conceptually different from other searches conducted incident to arrest because they represent a significant and direct interference with privacy, and are inherently humiliating and degrading for the people subjected to them. The negative impact may be especially traumatic for vulnerable individuals, for example those who have previously been subject to abuse. A strip search is highly intrusive even where the negative effects are minimized by the way in which it is carried out. *Golden* at paras. 83, 89-90; *Pilon* at para. 15.

[64] Given the significant intrusiveness of a strip search, preconditions additional to those normally imposed at common law must be met before a strip search will fall within the power to conduct a search incident to arrest, otherwise it will be in breach s. 8 of the Charter: *Golden* at para. 98. The additional preconditions are:

- (a) the strip search must be conducted for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for their arrest;
- (b) there must be reasonable grounds to conduct the strip search, in addition to the reasonable grounds required to justify the detainee's arrest; and
- (c) the strip search must be conducted reasonably, in a manner that "interferes with the privacy and dignity of the person being searched as little as possible".

Golden at paras. 99 and 104; *R. v. Tim*, 2022 SCC 12 at para. 66; *Pilon* at para. 16; *Choi* at para. 71

[65] Reasonable grounds will 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: *Tim* at para. 66; *R. v. Ali*, 2022 SCC 1 at para. 2. See also *Golden* at paras. 94 and 111.

[66] In assessing whether a strip search has been conducted reasonably, so as to interfere as little as possible with the detainee's privacy and dignity, *Golden* sets out the following eleven questions for consideration:

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?

Golden at paras. 101 & 104; Pilon at paras. 19-20; Choi at para. 71

- [67] Except in exigent circumstances, strip searches should be conducted at police stations, because when carried out in the field they represent a much greater invasion of privacy and thus pose a greater threat to the detainee's bodily integrity. Exigent circumstances will be established where police have reasonable grounds to believe it is necessary to conduct the strip search in the field rather than at the police station. There must be 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. Police must also show why waiting to conduct the strip search at the police station would have been unsafe. Golden at para. 102; Pilon at para. 18.
- [68] Finally, given their intrusive character strip searches are presumptively unreasonable. Where the constitutionality of a strip search is challenged, the Crown thus bears the onus of proving its legality at common law, and its compliance with s. 8 of the Charter. Golden at para. 105.

Analysis

- [69] Applying the legal principles just described, I will explain why both of the strip searches conducted by police breached Mr. Harris's s. 8 Charter right to be secure from unreasonable search.
- [70] Starting with the strip search performed at the scene of the investigation and arrests, Cpl. Warren did not comply with the preconditions established in Golden. Rather, this strip search was not Charter-compliant for three reasons.
- [71] First, Cpl. Warren had no subjective belief that the reasonable grounds standard had been met so as to justify conducting a strip search. That is, he did not purport to have believed that he had reasonable grounds to undertake a strip search at that time.

- [72] Second, the objective component of the reasonable grounds standard was not met. There was no evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest so as to justify conducting a strip search.
- [73] Third, even were the subjective and objective components of the reasonable grounds standard met, there were no exigent circumstances that would have permitted the strip search to be conducted in the field as opposed to at the detachment.
- [74] I will now turn to consider the strip search that Cst. Watkins carried out at the detachment.
- [75] The information about the condom, relied on by Cst. Watkins as part of his grounds for conducting this strip search, was obtained through the unconstitutional search conducted by Cpl. Warren. The state cannot rely on unlawfully obtained evidence to satisfy the reasonable grounds requirement for a strip search: *R. v. Zacharias*, 2023 SCC 30. It follows that the Crown cannot rely on the information about the condom unlawfully acquired by Cpl. Warren in seeking to show reasonable grounds for Cst. Watkin's strip search.
- [76] The Crown concedes that, absent this information about the condom, it cannot establish reasonable grounds for the strip search conducted by Cst. Watkins. I agree. It inexorably follows that this second strip search also breached Mr. Harris's s. 8 rights.
- [77] However, this is not the end of the inquiry, because as explained in *Zacharias* at paras. 48-49, additional or independent police misconduct associated with a Charter breach will tend to increase its seriousness at the first stage of the s. 24(2) analysis.
- [78] Mr. Harris argues that, even taking the information about the condom into account, Cst. Watkins lacked reasonable grounds for the second strip search, with the result that it constitutes additional or independent police misconduct, as opposed to a breach that is merely consequential upon the unconstitutional strip search carried out by Cpl. Warren.
- [79] The Crown disagrees, arguing that no additional or independent police misconduct exists because the grounds articulated by Cst. Watkins, including his reliance on the information about the condom, were sufficient to justify carrying out the strip search at the detachment.
- [80] Given the relevance of this issue to the s. 24(2) analysis, I will consider whether the reasonable grounds test is met based on the factors actually considered by Cst. Watkins, including the information regarding the condom.
- [81] In my view, if the information about the condom is taken into account, Cst. Watkins did have reasonable grounds to justify the strip search, because there was some evidence suggesting the possibility of concealment of evidence related to the reason for Mr. Harris's arrest, namely, illegal drugs.
- [82] I have come to this conclusion for a number of reasons.

- [83] First, Cst. Watkins had grounds to conduct a search incident to arrest for the offence of possession of a controlled substance for the purpose of trafficking, because Mr. Harris had been lawfully arrested for that offence. The defence does not suggest otherwise.
- [84] Second, Cst. Watkins' purpose in conducting the strip search was to discover evidence related to the reason for the arrest, that is, a controlled substance.
- [85] As noted, a corollary justification was to prevent harm to Mr. Harris were he to ingest hidden drugs while in a cell at the detachment. However, I am able to support my conclusion that the strip search was Charter compliant, but for the excision of the information unlawfully obtained by Cpl. Warren, without relying on this corollary justification, so I will only refer to it in passing in the remainder of my reasons.
- [86] Third, I accept Cst. Watkins' testimony regarding the grounds that he relied on in deciding to conduct the strip search. His failure to make contemporaneous notes of these grounds falls short of best practice, but he provided detailed notes to the Crown eleven days later, and I find him to be an honest, careful and reliable witness: *Golden* at para. 101; *R. v. Beaver*, 2022 SCC 54 at paras. 74-77; *R. v. Johal*, 2015 BCCA 246 at paras. 7, 31.
- [87] Moreover, although I would have come to the same conclusion regardless, the defence did not suggest that the reliability of Cst. Watkins' testimony regarding the grounds he relied on should be discounted because of the lack of contemporaneous notes.
- [88] Fourth, I find that Cst. Watkins' grounds satisfy the threshold of establishing some evidence suggesting the possibility of concealment of illegal drugs, which would constitute evidence related to the reason for Mr. Harris's arrest.
- [89] In particular, Mr. Harris had been a passenger in the vehicle found to contain different types of controlled substances. He was wearing a condom on his penis under his pants, and both he and Ms. Sayer appeared to have been fully clothed when Cst. Watkins opened the driver's door of the vehicle. Cst. Watkins therefore drew the reasonable inference that the condom may well have been used by Mr. Harris to hide drugs, especially given his experience-based knowledge that drug users or drug traffickers sometimes conceal drugs in their private areas.
- [90] I am not suggesting that this constellation of factors made it more likely than not that Mr. Harris was concealing illegal drugs in or around private areas of his body. But the test for reasonable grounds does not require proof on the balance of probabilities: *Beaver* at paras. 72(6). Rather, some evidence suggesting the possibility of concealment of illegal drugs is enough. It follows that the mere fact that a plausible alternative inference can be drawn does not mean that the reasonable grounds standard is not be met: *R. v. Alexander*, 2025 BCSC 1908 at para. 24.
- [91] It is for this reason that I do not accept the defence argument that the possibility that Mr. Harris and Ms. Sayer were having sex in the vehicle shortly before Cst. Watkins arrived precludes a finding of reasonable grounds. The observations made by Cst. Watkins just

before and then immediately after opening the door of the vehicle do not make unreasonable his inference that the couple were not having sex and that the condom affixed to Mr. Harris's penis may well have related to an attempt to conceal drugs. Nor were the police required to accept Mr. Harris's assertion that he was wearing the condom because he had just had sex or to make further investigative inquiries by questioning Ms. Sayer as to the origin and purpose of the condom.

- [92] For the same reason, I do not accept that Cst. Watkins' justifications for conducting the strip search fall short of the reasonable grounds standard because there was no evidence that: (a) his clothes were askew; (b) he was grabbing his crotch area or otherwise overtly acting in a manner suggesting that he was hiding something in his groin or buttock areas; or (c) he had a history of hiding drugs in those areas, whether in a condom or otherwise.
- [93] The same goes for the fact that, unlike in some other cases, there were drugs found in the vehicle and thus the police were not presented with a scenario where they fully expected to find drugs and yet none were present, thus supporting the inference that the drugs were concealed under the detainee's undergarments or in a body cavity.
- [94] The question was raised in oral argument as to whether, as the authorizing officer, Cpl. Warren was also required to have formed reasonable grounds in approving the strip search at the detachment: see, e.g., *Golden* at para. 101(3) and, although not cited by either party, *Beaver* at para. 72(8). However, I need not decide this issue, because I am satisfied that when he approved the strip search Cpl. Warren had the same grounds in mind as did Cst. Watkins.
- [95] I come to this conclusion because I accept Cst. Watkins' testimony that he conveyed his grounds to Cpl. Warren in seeking approval. But my conclusion is also supported by Cpl. Warren's recollection, albeit somewhat vague, that the grounds presented by Cst. Watkins were related to the reasons for the strip search that Cpl. Warren later recorded in the prisoner's report as "PPT/condom".
- [96] While Cpl. Warren's failure to take any notes relating to his approval of the strip search is problematic, especially given his at-that-time 17 years of experience as a police officer, for the reasons just given I am satisfied that he had reasonable grounds to approve the strip search at the time in question.
- [97] I also reject any suggestion that Cst. Watkins lacked reasonable grounds to conduct a strip search because Mr. Harris could have been put into a detachment cell by himself and placed under surveillance, either directly or through CCTV, to make sure that he did not attempt to flush away or consume any drugs that might be in the condom.
- [98] For one thing, Mr. Harris would likely have been able to flush away the condom without its contents being visible through direct or CCTV surveillance, by reaching into his pants, palming the condom in his hand, and then putting it in the cell toilet and flushing. Unlike in several other cases to which I was referred, this is not a situation where any attempt to dispose of concealed evidence would be immediately detected by the police and the

contraband easily recovered. Nor am I confident that direct or CCTV surveillance would have prevented Mr. Harris from consuming any drugs that might have been in the condom, at which point the risk of an overdose may well have been significant.

- [99] In any event, at some point in the not-too-distant-future Mr. Harris would have had to leave the police cell, either on his way to release from custody or to a pre-trial detention centre where he would be housed with other inmates. The police were not obliged to sit on their hands and allow either of these things to happen, without taking steps to determine whether, as indicated by reasonable grounds, Mr. Harris was in possession of concealed drugs.
- [100] Fifth, the strip search at the detachment was carried out reasonably, in a manner that interfered with the privacy and dignity of Mr. Harris as little as possible. I do not understand the defence to argue otherwise, except for Cst. Watkins' delay in making a record of the reasons for and the manner in which the strip search was conducted.
- [101] However, I do not view this delay as a fatal failure to comply with the eleventh and final question set out at para. 101 of Golden, which is, "Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?" The delay only amounted to eleven days, and I am satisfied that the report created by Cst. Watkins at the request of Crown counsel was accurate. I therefore view this report as constituting a proper record within the meaning of Golden.
- [102] Alternatively, I am not prepared to accept that the failure to make contemporaneous notes automatically renders unreasonable the manner in which the strip search was carried out. Golden does not suggest that every one of the eleven questions must be answered affirmatively. Indeed, Johal at para. 29 describes these questions as "useful indicators of the reasonableness of the strip search" (emphasis added). And in Johal itself, at para. 31, the strip search was held to have been carried out reasonably even though the officer conducting it had made no notes.

Was Mr. Harris's Section 10(b) Right Breached?

- [103] Mr. Harris says his s. 10(b) Charter right was breached because the police did not provide him with an opportunity to re-consult counsel before being strip searched at the detachment. He relies on the very recent decision in *R. v. Thompson*, 2025 ONCA 500, which establishes the existence of such a right in relation to strip searches conducted incident to arrest, subject to implementational issues that might complicate matters in particular circumstances (para. 76).
- [104] The Crown agrees that I should follow *Thompson* as a persuasive authority, and does not argue that the law as set out in *Thompson* should not apply in this province. The Crown took this position after considering a case I brought to the attention of the parties at the start of the voir dire, *R. v. West*, 2020 BCSC 1780.

- [105] Although the issue was not fully argued before me, I am satisfied that the compelling legal analysis undertaken in Thompson was not considered in West, and that horizontal stare decisis is therefore not engaged so as to preclude me from following the approach in Thompson. In particular, in West the accused argued that the right to re-consult counsel fit within the first category set out in R. v. Sinclair, 2010 SCC 35 at paras. 2 and 50, while Thompson holds that this right arises as part of a "new category of circumstance", i.e., a fourth category, which should be added to the non-exhaustive list in Sinclair. Compare West at paras. 39-40, 54, with Thompson at paras. 32-41.
- [106] Given the parties' positions, I need only briefly discuss the decision in Thompson, after which I will address the point on which the parties disagree, which is whether, based on the law as set out in Thompson, the police breached Mr. Harris's s. 10(b) right to re-consult counsel prior to subjecting him to the strip search at the detachment.

Legal Principles

- [107] Thompson recognizes, for the first time in Ontario (para. 103), that a detainee has a s. 10(b) right to re-consult counsel prior to being subjected to a strip search incident to arrest. Writing for the unanimous court, Justice Pomerance concluded that the purpose of the right to counsel, combined with the inherently invasive nature of strip searches, justified recognizing this right to re-consult. The court thus added a fourth category to the three categories identified in Sinclair at paras. 47-55, which will normally trigger a right to re-consult with counsel.
- [108] In coming to this conclusion, Justice Pomerance made three central points.
- [109] First, a strip search can be one of the most intrusive manners of searching and also one of the most extreme exercises of police power. It falls at the most serious end of the invasiveness spectrum, and can exacerbate the power imbalance that exists between detainee and police by requiring a detainee to assume the vulnerable position of being unclothed. Strip searches are inherently humiliating and degrading even when carried out in a way that minimizes intrusiveness to the extent possible. They have the potential to induce anxiety, uncertainty, distress and embarrassment, as well as undermining human dignity. They are therefore a possible source of distress for many detainees, but in particular those who have experienced sexual victimization, as well as vulnerable detainees such as Indigenous or racialized individuals or those who are transgender, gender diverse or non-binary. Thompson at paras. 48-57.
- [110] Second, providing a detainee with the opportunity to re-consult with counsel prior to a strip search is necessary to fulfil the purposes of s. 10(b). Granted, unlike with certain other nonroutine police procedures - like participating in a lineup or submitting to a polygraph - a detainee has no legal right to refuse to cooperate, and therefore strictly speaking has no decision to make regarding whether or how to exercise a legal right. But the right to counsel has benefits that go beyond educating the detainee about their legal options. Thompson at

paras. 42-47, 59-64.

- [111] For instance, it may be important for the detainee to understand that, despite the intrusiveness of a strip search, they continue to enjoy the right to silence. It may also be important for the detainee to know that refusing to comply with a strip search may result in more intrusive procedures, such as a body cavity search. Or a detainee who is able to speak to counsel may elect to disclose the presence of hidden contraband, which could obviate the need for a strip search. Plus, there is the psychological value of speaking to counsel, who can advise the detainee that the police are legitimately entitled to conduct a strip search, which is not intended to humiliate or sexualize them, and that certain safeguards will be employed. The right to re-consult counsel might also incidentally reduce the number of unauthorized or improperly conducted strip searches, because knowing that a lawyer will be consulted might cause police to view their grounds to search with a more critical eye and encourage police to follow proper procedures. Thompson at paras. 65-71.
- [112] Third, recognizing a right to re-consult counsel prior to a strip search strikes an appropriate balance between competing individual and state interests. Offering a detainee the ability to speak with counsel again prior to a strip search will not generally empower them to derail an interview, because the triggering event - the decision to strip search - is objectively discernible and controlled by the police, who can usually dictate the process so as to avoid interference with other investigative avenues. It is likely for this reason, at least in part, that Justice Pomerance recognized that implementing the right to re-consult will depend on the prevailing circumstances, and that the extent to which a detainee is entitled to counsel of choice, the length of time that police must hold off, the need to preserve evidence, and the impact of exigency will call for case-specific and fact-dependent determinations. Thompson at paras. 72-76.
- [113] As one of her final observations, Justice Pomerance added the caveat that these principles apply to a strip search that is being conducted incident to arrest, to search for weapons or evidence. They may not apply as categorically when the strip search is used to prevent contraband from entering a custodial setting, a context in which strip searches are aimed at maintaining the safety and security of jails. As noted in *Golden*, in contrast to searches incident to arrest, there is a greater need to ensure that detainees entering the prison population are not concealing weapons or illegal drugs prior to entry into that environment. Thompson at para. 78.

Analysis

- [114] Applying the law set out in *Thompson*, I agree with Mr. Harris that the police breached his s. 10(b) right to re-consult counsel prior to being subjected to the strip search at the detachment. The fact that he was able to speak to legal aid counsel about 20 minutes before is of no moment, because at that point he had no idea that he was going to be strip searched at the detachment.

- [115] Nor am I prepared to find that there was good reason to hold off implementing the right to re-consultation, to the point where it was not possible to wait any longer before conducting the strip search. Cst. Watkins provided Mr. Harris with the opportunity to speak to counsel again immediately after the strip search, which Mr. Harris accepted. I fail to see why Cst. Watkins could not have provided Mr. Harris with the same opportunity prior to conducting the strip search.
- [116] Indeed, although the Crown asked Cst. Watkins one or two questions in direct examination about the timing of facilitating this re-consultation vis-à-vis the strip search, no evidence was elicited to suggest that permitting Mr. Harris to speak to a lawyer in advance would have created any difficulties in terms of the police investigation or the safety of Mr. Harris or others at the detachment. The evidence therefore does not support a finding that permitting re-consultation prior to conducting the strip search was infeasible due to these or any other reasons.
- [117] In this respect, I can envisage the police employing safeguards at the detachment to permit Mr. Harris to speak to a lawyer prior to the strip search, similar to those used by Cpl. Warren to permit him to speak to counsel in the back of a police cruiser after the condom was observed. For example, a police officer could contact counsel on a cell phone, place Mr. Harris handcuffed in a room containing a window, and then permit him to speak to counsel using the speaker function on the phone. Police could also have done the same thing using a police vehicle at the detachment.

Conclusion

- [118] The police breached Mr. Harris's s. 8 Charter rights by subjecting him to a strip search at the scene of his arrest, and also by strip searching him again at the detachment. However, the second of these strip searches breached s. 8 only because of the principle of excision articulated in *Zacharias*, and thus does not constitute additional and independent police misconduct for the purposes of the s. 24(2) analysis.
- [119] The police also breached Mr. Harris's s. 10(b) Charter rights by not providing him with an opportunity to re-consult counsel prior to subjecting him to the strip search at the detachment.
- [120] The parties may now proceed to make their submissions regarding the application of s. 24(2), after which I will determine whether any evidence should be excluded as a result of the identified Charter breaches.

"D. Layton J."

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