STRIP-SEARCHING OF WOMEN IN CANADA: WRONGS AND RIGHTS

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Illegal strip-searching of women, particularly by male police officers, remains a persistent problem in Canada, in spite of strong legal rulings that condemn this practice. The strip-searching of female detainees in the Prison for Women by male officers made national news in 1995. The Arbour Inquiry called these strip searches "cruel, inhumane and degrading" and determined that they violated the women's Charter rights. Strip-searching re-emerged as a major law and policy issue in 2001, when the Supreme Court of Canada in R v Golden ruled that strip searches must not be carried out as routine policy, and specified a legal standard that must be met before a strip search can be undertaken, as well as 11 safeguards to which police must adhere to execute a lawful strip search. Yet in 2008, more than a decade after the Arbour Inquiry and seven years after Golden, another strip search of a woman detainee (SB) by male officers took place, making national news in 2010 when a court ordered release of the videotapes of the strip search and granted a stay of proceedings in consequence of the Charter violations. This article surveys the case law post-Golden in which women allege illegal strip-searching has occurred in order to assess the size of the problem, the forms that these Charter violations take, judicial responses to women's claims, and whether and what remedies are provided. The authors argue that illegal strip-searching of women continues to occur in part because judges have failed to consistently and strongly condemn this form of police abuse, but also due to police resistance and their failure to meaningfully address police accountability through strong civilian complaints and police disciplinary processes. The authors conclude that it would be deeply disruptive of unauthorized police strip-searching of women if this practice were to be named sexual or criminal assault by judges.

Les fouilles corporelles illégales de femmes, particulièrement celles effectuées par des policiers de sexe masculin, demeurent un problème récurrent au Canada malgré une jurisprudence bien établie condamnant cette pratique. Les fouilles corporelles de détenues dans les prisons pour femmes réalisées par des hommes ont fait les manchettes nationales en 1995. La commission d'enquête Arbour a qualifié ces fouilles de « cruelles, inhumaines et dégradantes » et a conclu qu'elles violaient les droits garantis aux femmes par la Charte. Les fouilles corporelles

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sont réapparues comme un problème majeur de droit et de politique en 2001 lorsque la Cour suprême du Canada a affirmé, dans son arrêt R. c. Golden, que les fouilles corporelles ne doivent pas être effectuées de façon routinière. La cour a alors précisé une norme juridique à laquelle il doit être satisfait avant qu'une telle fouille puisse avoir lieu, et a fourni onze règles devant être respectées par la police dans le cadre de l'exécution d'une fouille corporelle légale. Pourtant, en 2008, plus de dix ans après les travaux de la commission d'enquête Arbour et sept ans après l'arrêt Golden, une autre détenue (SB) a fait l'objet d'une fouille corporelle aux mains d'agents de sexe masculin,.Cet événement avait fait la une nationale en 2010 lorsque la publication de l'enregistrement vidéo de la fouille a été ordonnée par un tribunal qui a accordé une suspension de l'instance en se fondant sur la violation de la Charte. Afin d'évaluer la taille du problème, les formes revêtues par ces atteintes à la Charte, les réponses judiciaires aux revendications des femmes et la question de savoir si des recours sont fournis, et, le cas échéant, lesquels, les auteures de cet article se penchent sur la jurisprudence postérieure à l'arrêt Golden dans laquelle des femmes allèguent avoir fait l'objet de fouilles corporelles illégales. Elles soutiennent que les femmes continuent de faire l'objet de telles fouilles, en partie parce que les juges n'ont pas condamné, avec constance et force, cette forme d'abus commis par la police. Elles soutiennent également que c'est en raison de la résistance et du défaut de la police de répondre efficacement au problème en responsabilisant ses agents au moyen de mécanismes de dépôt de plaintes par le public et en mettant en place des processus disciplinaires rigoureux au sein de la police. Les auteures concluent que le fait, pour les juges de qualifier cette pratique d'agression sexuelle ou de crime aurait de profondes répercussions sur les pratiques non autorisées utilisées par la police pour fouiller les femmes.

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1. Introduction

In 1995, a videotape of male guards strip-searching women in the Prison for Women made national news[1] and resulted in a federal inquiry led by the Honourable Louise Arbour.[2] The Arbour Inquiry, reporting in 1996, called these strip searches "cruel, inhumane and degrading."[3] The searches were

1 CBC, "The ultimate response", *The fifth estate* (21 February 1995) [*The fifth estate*].

2 *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) The Honourable Louise Arbour [Arbour Inquiry].

3 *Ibid* at 83.

also found to violate the *Corrections and Conditional Release Act*[4] and the *Charter of Rights and Freedoms*.[5]

In 2001, the Supreme Court of Canada in *R v Golden* ruled that strip searches must not be carried out as routine policy, recognizing that they are "inherently humiliating and degrading."[6] It specified a legal standard—"reasonable grounds to believe" that the detainee has a concealed weapon or evidence upon their person that is in danger of disappearing—that must be met before a strip search can be undertaken. It also laid out 11 safeguards to which police must adhere to execute a lawful strip search, including prohibitions on opposite-sex and public strip-searching in the absence of exigent circumstances, requirements for authorization by a senior officer and careful record-keeping, as well as requirements that detainees be allowed to remove their own clothing and that they not be fully naked at any time.

Yet in 2008, more than a decade after the Arbour Inquiry and seven years after *Golden*, another strip search of a woman detainee by male officers took place, making national news in 2010 when a court ordered the release of the videotapes of the strip search.[7] The detainee, SB, had been arrested for public intoxication. While being searched at the station, a female special constable put her hand down the back of SB's pants. SB yelled in protest while kicking backwards at the constable, striking her in the shins. SB was kneed twice in the back with great force, punched in the head, and taken down to the floor by four male officers who used a riot shield to pin her. Then, one of the officers, Sergeant Steve Desjourdy, cut off her shirt and bra. He deposited her in a cell in soiled pants without cover for her upper body and left her in that condition for over three hours.

At trial on charges of assaulting a police officer, SB was granted a stay of proceedings in consequence of the *Charter* violations occasioned by the illegal arrest and strip search.[8] After investigation by the Special Investigations Unit (SIU), Desjourdy was charged with sexual assault for his acts in stripping the woman. This charge ended in acquittal in 2013, but the judge described Desjourdy's behavior of leaving the woman topless for three hours in soiled clothing as "unnecessary and demeaning."[9] SB also initiated a $1.2 million tort suit against Ottawa police and the individual

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4 SC 1992, c 20.

5 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution* Act, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 2001 SCC 83 at para 90, [2001] 3 SCR 679 [*Golden*].

7 "Police chief responding to outrage over [SB] video", *CTV Ottawa News* (26 November 2010), online: <www.ottawa.ctvnews.ca>.

8 *R v SB*, 2010 ONCJ 561, [2010] OJ No 5034 (QL) [*SB* cited to QL].

9 *R v Desjourdy*, 2013 ONCJ 170, 1 CR (7th) 261 [*Desjourdy*].

officers involved, which ended in settlement for an undisclosed amount.[10] Internal disciplinary charges against Desjourdy resulted in a finding of discreditable conduct, his second disposition for conduct violating the *Police Services Act* involving a female detainee.[11] A third Ottawa woman has named Desjourdy as a defendant in a lawsuit alleging that four officers stripped her, assaulted her, and then left her naked for over nine hours in a cell.[12]

The *R v SB* and *R v Desjourdy* cases are puzzling in light of the straightforward jurisprudence indicating that strip searches must be justified by "reasonable and probable grounds to believe" that the accused is harbouring weapons or evidence that is in danger of disappearing. It is also clear that strip-searching of women by men is *prima facie* illegal absent emergency circumstances requiring immediate response. One might expect this power to be used only for serious criminal charges where the danger the accused poses to herself, the public, or police officers is both demonstrable and imminent. Instead, SB's case involved an arrest for public intoxication, which was later determined to be illegal because there was no evidence to justify the arrest. At the station, five officers were on-hand to contain any risk SB might have posed, and there seemed to be nothing to suggest concealment of weapons, potential loss of evidence, or suicidal behavior.

SB illustrates that acts of police who strip search women in Canada may be characterized as *Charter* violations, criminal offences, torts, or breaches of internal police policies; they may also, in specific circumstances, amount to human rights violations. What this case does not answer is whether police violation of rules regarding strip-searching is a common or rare occurrence. It also does not explain why these violations continue when the law has been so clear since at least 2001. And, it does not tell us whether the rights and remedies available in law are adequate to both address the wrongs and deter illegal strip-searching of women.

We start this paper by explaining our methodology and our decision to focus on women. We then examine the cases involving illegal strip searches of women to identify the circumstances in which they occurred, how the

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10 "Sgt. Steven Desjourdy guilty of discreditable conduct", *CBC News Ottawa* (8 April 2014), online: <www.cbc.ca>.

11 Gary Dimmock, "Desjourdy had previous run-in for how he treated female prisoner", *The Ottawa Citizen* (9 April 2014), online: <www.ottawacitizen.com>. According to the *Citizen*, the detainee had removed her own shirt and tied it to the cell bars. Desjourdy entered the cell and demanded that she calm down. She complied, but he then deliberately kicked her twice in the back as she kneeled on the floor, ordered a female officer to strip off the rest of her clothes, then tasered her when she reacted by grabbing at his leg.

12 Tony Spears, "Woman suing police for alleged cellblock assault", *Canoe* (16 May 2011), online: <www.cnews.canoe.com>.

courts are defining a "strip search", the rationales provided by police, and the judicial characterization of the harm. We then turn to the legal remedies available in order to catalogue the challenges of each. In our conclusion we raise questions that require more research and we speculate on why the law has been ineffective in stopping the illegal strip-searching of women.

2. Methodology

This paper is based upon cases published after 2001 that cited *Golden*, according to Quicklaw's "note up" function and CanLII's "cited by" function. Our research excludes French-language cases. Several cases included in our paper did *not* cite *Golden*, but were found referenced in other cases that did. While we included these cases in our analysis, it is possible that there are other reported strip search cases post-*Golden* that we did not find through our search methods. Due to the sheer number of cases involving male detainees alleging illegal strip searches, our data regarding these cases is largely limited to a search of the Quicklaw database citing *Golden*.

As indicated, our research focused on published cases, which may not reflect the full ambit of cases involving challenges to strip searches, nor the actual incidence of strip-searching, whether lawful or unlawful. Our method does not, however, raise the possibility of selection bias because both Quicklaw and CanLII publish all decisions distributed by the courts themselves, including oral decisions. Quicklaw also publishes all other unsolicited cases that are sent to them by their customers. Unfortunately, strip searches as reported by police departments do not include sufficient detail to assess either their legality or whether they have been challenged on this basis.[13] Apart from "court watch" studies, which have their own limitations, there is simply no other way to capture the cases in which Canadian judges are responding to claims of illegal strip-searching than by relying on cases published on these databases.

Furthermore, studies of published decisions do tell us something: they reflect judicial responses that are available on the public record and that convey to citizens, police, and lawyers the limits of police powers and whether and when those limits are enforceable by legal remedy. It seems

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[13] Some police services, such as the Toronto Police, may provide data on strip-searching, but even this is extremely limited. See e.g Justin Ling, "Justice Reminds Cops That Strip Searches Are Not Routine Procedure", *Vice News* (17 March 2016), online: <www.news.vice.com>, which notes that York Regional Police provide no data, and that the Toronto Police website has data only up until 2013 (strip searches accompanied 30% of arrests, down from 60% in 2011), and even then "[i]t's unclear if those numbers include strip searches that occurred when no arrest was made, or whether the majority of those searches occurred when an individual was held in a prison prior to getting bail".

therefore defensible to suggest that published decisions are more likely to shape future police conduct and are particularly relevant to the question of why illegal strip-searching continues fifteen years after the Supreme Court of Canada released its decision in *Golden*.

3. Focusing on women

If one looks at the available data regarding police–citizen interactions, arrests, and convictions, it is indisputable that men have a much higher rate of criminal offending and experience police intervention more frequently.[14] Not surprisingly, therefore, it appears that men are also more likely to experience illegal strip search, according to the main gauge we have available—reported decisions in which accused persons challenge the legality of the strip search for the purpose of a *Charter* remedy. Our study of criminal cases reported in the Quicklaw and CanLII databases citing the *Golden* decision found 124 cases by men alleging illegal strip search compared to 43 women.[15] Men's and women's cases had very similar statistical profiles in terms of findings of *Charter* violations and the granting of remedies, as we discuss briefly below.

However, limiting our study to the smaller number of women's cases not only allows us to examine them in more detail, but also to ask whether the law protects a group that is most acutely vulnerable in the context of strip searches by police. The Supreme Court of Canada, in *Golden*, recognized that strip-searching may have a more profound negative impact on women and minorities, noting that women may experience it as "visual rape" or the equivalent of a sexual assault.[16] Profound negative impacts were also referred to by the Arbour Inquiry, which found that strip searches are particularly devastating to women who have already experienced sexual violence[17]—a majority of those women who end up incarcerated in our prisons. The Canadian Association of Elizabeth Fry Societies illustrates this fact:

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[14] Statistics Canada, "Table 7: Number and rate of youth and adults accused by police, by sex and type of crime, 2009" in *Women in Canada: A Gender-based Statistical Report*, Catalogue No 89-503-X (Ottawa: Statistics Canada, 2009) *Statistics Canada*, online: <www.statcan.gc.ca>.

[15] These numbers exclude French language cases. Three of the 43 female cases found did not cite *Golden*, *supra* note 6 (*R v Schildt*, 2005 BCSC 1590, 26 MVR (5th) 301 [*Schildt*]; *R v Norman*, [2001] OJ No 5732 (QL) (Ct J) [*Norman*]; *R v Deveau*, 2014 ONSC 3756, 315 CRR (2d) 181 [*Deveau*]). One of the 124 male cases did not cite *Golden*, *supra* note 6 (*R v Tinham*, 2001 BCPC 117, 2001 CarswellBC 1341 (WL Can) [*Tinham*]).

[16] *Golden*, *supra* note 6 at para 90.

[17] *Ibid*, citing Arbour Inquiry, *supra* note 2 at 86–89.

> Federally sentenced women have high rates of childhood sexual abuse, commonly incestuous, violent, extended over a long period of time, and with multiple perpetrators. They also have high rates of re-victimization at the hands of violent men. As a result, the mere presence of men doing their bed checks, being forced to speak to male staff about their abuse and related triggers, being monitored by male staff and being strip searched, especially when male staff are present, also serves to re-victimize women in prison.[18]

Although the Supreme Court in *Golden* did not elaborate further, it is important to recognize that the institution of policing is not only paramilitary, but also dominated overwhelmingly by men.[19] The culture of policing has often been fairly hostile to women officers and intimidating for women who are arrested and detained.[20] Furthermore, without claiming that men's bodies—and particularly racialized men's—are never sexualized, the sexualization of women's bodies is a staple of mainstream media as well as pornography, widely consumed in North American society. In turn, the nature of policing and the widespread sexualization of women's bodies might suggest that stripping a woman, even by a female officer, may be experienced as a form of sexual domination. In fact, one of the most poignant comments in CBC's account of the strip search at the Prison for Women was made by then head of the Citizens' Advisory Committee, Dr. Robert Bater, who described the scene he witnessed as sadistic, calling the strip search a "phallic act."[21] The men involved—and those witnessing it—"cannot be unaffected."[22] Dr. Bater's comments initiated a flurry of protest among correctional staff and their families, forcing him to apologize for his remarks and ultimately to resign from the Citizens' Advisory Committee.[23] This extreme reaction and repudiation of the suggestion that there is a sexual aspect to the strip-searching of women by men provides a telling example of who holds the power to define the acts, and their implications for women who are searched as well as for the officers who perform these acts.

Apart from the gendered symbolic and psychological harm caused to women by strip-searching, it is also a powerful weapon in the hands

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18 "Long Term Effects of Abuse and Trauma", *Canadian Association of Elizabeth Fry Societies* (2013), online: <www.caefs.ca>.

19 Leigh Goodmark, "Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse" (2015) 5 BYUL Rev 1183; Statistics Canada, "Police officers by sex, Canada, 1986 to 2013" in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2013), online: <www.statcan.gc.ca>.

20 *Clark v Canada*, [1994] 3 FC 323, 76 FTR 241; Natalie Clancy, "More women alleging harassment want to join lawsuit against RCMP", *CBC News British Columbia* (31 May 2015), online: <www.cbc.ca>.

21 Arbour Inquiry, *supra* note 2 at 80–81.

22 *The fifth estate*, *supra* note 1.

23 Arbour Inquiry, *supra* note 2 at 81.

of individual officers who may use strip-searching to punish or humiliate women detainees, or as a guise for sexual assault.[24] The fact that the Special Investigations Unit investigated 41 Ontario police officers for sexual assault in 2014–15[25] indicates the potential for abuse of power and reinforces the need to deter illegal strip-searching.

4. The Golden requirements

In *Golden*, the Supreme Court of Canada set out the requirements and guidelines for constitutional strip searches incident to arrest. The Court declined to impose a warrant requirement, but held that strip searches conducted as a matter of routine were unconstitutional.[26] Officers must have reasonable and probable grounds to believe that a strip search is necessary "for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest." These grounds must be separate and apart from the reasonable and probable grounds for the arrest itself.[27]

Beyond these bare minimum requirements, the search, as any search conducted by authorities, must also be conducted reasonably. The Supreme Court found it necessary to carve out particular criteria for officers given the inherently degrading and humiliating nature of strip searches.[28] The Court set out 11 guidelines to assist officers with constitutional compliance:

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?

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24 *R v Greenhalgh*, 2011 BCSC 511, 2011 CarswellBC 968 (WL Can) [*Greenhalgh*]. See Amanda George, "Strip searches: Sexual assault by the state" (1993) 18:1 Alternative LJ 31 at 33 [George]. She describes officers penetrating women with their hands, requiring them to be interviewed while naked, and photographing them in this state. See also Nomaan Merchant & Sean Murphy, "Conviction highlights problem of sexual misconduct by police", *The Ottawa Citizen* (12 December 2015) D15: "A common thread among cases of police sexual misconduct was they involved victims who were among society's most vulnerable: juveniles, drug addicts, and women in custody or with a criminal history" [Merchant & Murphy].

25 "Stats Report: Total Occurrences for 2014-2015", *Special Investigations Unit*, online: <www.siu.on.ca/en/report.php?reportid=6>. Injuries in custody (154) constituted the overwhelming majority of allegations investigated by the Special Investigations Unit, but sexual assault was next (41), followed by vehicle injuries (38).

26 *Golden*, *supra* note 6 at para 90.

27 *Ibid* at para 99.

28 *Ibid* at para 90.

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?[29]

5. Overview of cases

As mentioned, our search found 43 criminal cases involving women's claims of illegal strip searches. It also revealed six tort claims and two decisions by human rights tribunals. The 43 criminal cases involving strip searches of women occurred in a variety of contexts. 29 cases involved arrestees being booked in at the police station.[30] Five cases involved videotaped monitoring

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[29] *Ibid* at para 101.

[30] *R v Dunwell*, 2016 ONCJ 133, 2016 CarswellOnt 3807 (WL Can) [*Dunwell*]; *Deveau*, *supra* note 15; *R v Korzh*, 2015 ONCJ 738, 2015 CarswellOnt 19935 (WL Can) [*Korzh*]; *R v McKanick*, 2015 ONSC 2128, 2015 CarswellOnt 6372 (WL Can) [*McKanick*]; *R v Fine*, 2015 BCPC 3, 2015 CarswellBC 142 (WL Can) [*Fine*]; *R v Meyn*, [2014] AJ No 1438 (QL), 2014 CarswellAlta 2741 (WL Can) (Prov Ct) [*Meyn*]; *R v Evong*, [2014] OJ No 6435 (QL), 2014 CarswellOnt 18953 (WL Can) (Ct J) [*Evong*]; *R v Vixaysongkham*,

of the accused using the toilet.[31] One involved a visitor to a prison caught carrying drugs on her person.[32] Two cases involved court appearances, and one involved the accused turning themselves in.[33] Seven cases involved border crossing.[34] Four cases involved the alleged strip-searching of women at street level, and one involved a *Liquor License Act* investigation.[35] Of the seven tort cases, three involved an arrestee being booked in at the police station,[36] one involved a border crossing,[37] and one involved the cavity search of an inmate after a sniffer dog drug detection that proved to be

2007 BCSC 183, 45 CR (6th) 198 [*Vixaysongkham*]; *SB*, *supra* note 8; *R v Bouchard*, 2011 ONCJ 610, 250 CRR (2d) 359 [*Bouchard*]; *R v Raugust*, 2004 SKPC 71, 258 Sask R 110 [*Raugust*]; *R v Lee*, 2013 ONSC 1000, 286 CRR (2d) 160 [*Lee*]; *R v Chasovskikh*, 274 CRR (2d) 312, [2013] OJ No 16 (QL) (Ont Ct J) [*Chasovskikh*]; *R v Mok*, 2012 ONCJ 291, 258 CRR (2d) 232 [*Mok*]; *R v Seki*, 2008 ONCJ 24, 2008 CarswellOnt 416 (WL Can) [*Seki*]; *R v FN*, 2005 ONCJ 412, 2005 CarswellOnt 4600 (WL Can) [*FN*]; *R v LLS*, 2009 ABCA 172, 457 AR 113 [*LLS*]; *R v PFG*, 2005 BCPC 187, 2005 CarswellBC 1204 [*PFG*]; *R v Mahmood*, 80 WCB (2d) 40, 2008 CanLII 51774 (Ont Sup Ct) [*Mahmood*]; *R v Depaepe*, [2007] OJ No 3925 (QL) (Ct J) [*Depaepe*]; *R v Layton*, 2006 BCPC 655, 2006 CarswellBC 3715 (WL Can) [*Layton*]; *R v Ferguson* (2005), 126 CRR (2d) 356, 15 MVR (5th) 74 (Ont Sup Ct) [*Ferguson*]; *R v NC*, 2004 ONCJ 99, 2004 CarswellOnt 2643 (WL Can) [*NC*]; *R v Deschambault*, 2013 SKPC 112, 288 CRR (2d) 85 [*Deschambault*]; *Norman*, *supra* note 15; *Schildt*, *supra* note 15 (unclear but likely police station booking); *R v Wilkinson*, 2014 ONCJ 515, 319 CRR (2d) 327 [*Wilkinson*]; *R v Smith*, 2014 ONCJ 133, 2014 CarswellOnt 3509 (WL Can) [*Smith*]; *R v Douglas*, 2003 BCPC 392, 113 CRR (2d) 102 [*Douglas*].

[31] *Deveau*, *supra* note 15; *Korzh*, *supra* note 30; *Mok*, *supra* note 30; *Chasovskikh*, *supra* note 30; *Smith*, *supra* note 30.

[32] *R v Vandenbosch*, 2005 MBQB 83, 29 CR (6th) 290 [*Vandenbosch*].

[33] *R v McKay*, 2013 ONCJ 298, 2013 CarswellOnt 7390 (WL Can) [*McKay*]; *R v Collins* (2012), 323 Nfld & PEIR 291, 1004 APR 291 (Prov Ct) [*Collins*]; *R v SF* (2003), 102 CRR (2d) 288, [2003] OJ No 92 (QL) (Ct J) [*SF* cited to QL], respectively.

[34] *R v Foster*, 2014 ONSC 7116, 325 CRR (2d) 60 [*Foster*]; *R v Lozano*, 2013 ONSC 1871, 2013 CarswellOnt 3546 (WL Can) [*Lozano*]; *R v Ebanks*, 2012 ONSC 5002, 2012 CarswellOnt 12219 (WL Can) [*Ebanks*]; *R v Jackman*, 2012 ONSC 3557, 2012 CarswellOnt 17211 (WL Can) [*Jackman*]; *R v Darlington*, 2011 ONSC 2776, 2011 CarswellOnt 9732 (WL Can) [*Darlington*]; *R v Nagle*, 2011 BCPC 481, 294 CCC (3d) 210 [*Nagle*]; *Greenhalgh*, *supra* note 24.

[35] *R v D'Andrade*, 2016 ONCJ 12, 2016 CarswellOnt 98 (WL Can) [*D'Andrade*]; *McKanick*, *supra* note 30; *R v Sepulveda*, 2005 BCPC 236, 2005 CarswellBC 1432 (WL Can) [*Sepulveda*]; *Douglas*, *supra* note 30. *Liquor License Act* violation: *R v Hornick*, 93 CRR (2d) 261, 2002 CarswellOnt 992 (WL Can) (Ct J) [*Hornick*].

[36] *Anoquot v Toronto Police Services Board*, 2015 ONSC 553, 124 OR (3d) 312 [*Anoquot*]; *Euteneier v Lee*, 113 CRR (2d) 44, [2003] OJ No 4239 (QL) (Sup Ct) [*Euteneier*]; *Rocha v Toronto Police Services Board*, 2008 CarswellOnt 8349 (WL Can), [2008] OJ No 5539 (QL) (Sup Ct (Sm Cl Ct)) [*Rocha*].

[37] *Nagy v Canada*, 2005 ABQB 26, 373 AR 338 [*Nagy*].

erroneous.[38] One involved a prisoner serving her sentence.[39] One case raised a question of law in a proposed class proceeding with both male and female plaintiffs: whether *Golden* applies in a "shared facility"—the Vancouver jail in this case—under section 13.1(1) of the British Columbia *Correction Act*. The judge hearing the motion found that it does.[40] The two human rights tribunal cases involved searches at the police station, with one of these involving multiple searches of someone described as "a pre-operative transsexual."[41]

A number of the strip searches involved more intrusive conduct, for which the Supreme Court in *Golden* requires a higher degree of justification. Almost one quarter of the 43 criminal cases challenging strip searches involved or alleged to have involved a visual inspection of the anal and/or vaginal area of the accused.[42] One case involved the physical touching of these areas; in another, the accused claimed a physical cavity search occurred but the judge rejected her evidence.[43]

Furthermore, in 16 cases—almost half of the strip searches—men were alleged to have been involved in the searches, either directly or indirectly as potential observers of police videotapes, in clear violation of *Golden*. In

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38 *Curry v Canada (AG)*, 2006 FC 63, 286 FTR 75 [*Curry*]. The claimant was returning to prison from an Unescorted Temporary Absence. When the sniffer dog indicated she had drugs on her person, she was strip-searched and no drugs were found (paras 3–4). She was then subjected to a cavity search (para 6). The claimant based her claim on the invalidity of her consent to the cavity search, and not the unreasonableness of the strip search *per se* (para 38).

39 *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6, 475 AR 1 [*Trang*]. In this case, the accused sought a declaration that her s 8 rights were violated based on her belief that others could see in the window or via camera while she was strip-searched (para 1062). It was found that she had a reduced expectation of privacy in a correctional facility, and her claim was dismissed (para 1097).

40 *Thorburn v British Columbia (Ministry of Public Safety & Solicitor General)*, 2006 BCSC 1613, 148 CRR (2d) 274 [*Thorburn*].

41 *SMS v Toronto Police Services Board*, 2013 HRTO 1546, [2013] OHRTD No 1547 [*SMS*]; *Forrester v Peel (Regional Municipality) Police Services Board)*, 2006 HRTO 13, 2006 CarswellOnt 9215 (WL Can) [*Forrester*], respectively.

42 *Jackman*, *supra* note 34; *Ebanks*, *supra* note 34; *Lozano*, *supra* note 34; *McKay*, *supra* note 33; *SF*, *supra* note 33; *Darlington*, *supra* note 34; *Seki*, *supra* note 30; *NC*, *supra* note 30; *Douglas*, *supra* note 30. In *Nagle*, *supra* note 34, the accused was stripped naked (para 35), in contravention of *Golden*, yet counsel did not appear to raise this issue, claiming only that the search of her luggage was in violation of s 8 (para 2).

43 *Greenhalgh*, *supra* note 24 at para 10; *Schildt*, *supra* note 15 at para 2, respectively. In the tort cases of *Curry*, *supra* note 38, and *Nagy*, *supra* note 37, the body cavity searches were proven.

four cases, the strip searches were carried out by male officers,[44] in another five cases male officers were either found or alleged to have been present during the search,[45] and in seven cases it was possible for a male officer to view the search via video monitoring or due to the search being conducted in open view.[46]

Overall, among the 43 criminal cases, 33 women were able to establish a *Charter* violation. However, 25 of these women were granted a remedy—a point that will be discussed later in this article. Two of the seven tort claims resulted in an award of damages, and one of the two human rights claims was successful. These results of approximately 50% of women's claims in criminal law being remedied are comparable to those of male accused: out of 124 cases studied, 73 men received recognition of a *Charter* violation, but only 61 were provided with a remedy.[47] Of the

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44 *SB*, *supra* note 8; *Deschambault*, *supra* note 30; *Greenhalgh*, *supra* note 24; *Sepulveda*, *supra* note 35 (in this case, however, the judge found that the lifting out of the accused's waistband did not constitute a strip search occurred because there was no visual inspection of the accused's private areas; see para 8).

45 *D'Andrade*, *supra* note 35; *Hornick*, supra note 35; *PFG*, *supra* note 30; *Douglas*, *supra* note 30; *Schildt*, *supra* note 15.

46 *Dunwell*, *supra* note 30; *Deveau*, *supra* note 15; *Fine*, *supra* note 30; *SF*, *supra* note 33; *Lozano*, *supra* note 34; *Chasovskikh*, *supra* note 30; *Mok*, *supra* note 30.

47 Stay of proceedings: *R v Hendrickson*, 2013 ONCJ 729, 61 MVR (6th) 269; *R v Madray*, 2013 ONSC 5364, 2013 CarswellOnt 11663 (WL Can); *R v SM*, 2013 ONCJ 219, 1 CR (7th) 299; *R v ZA*, 2012 ONCJ 541, 266 CRR (2d) 152; *R v Manuel*, 2012 ONCJ 392, 2012 CarswellOnt 8156 (WL Can); *R v McGee*, 2012 ONCJ 63, 92 CR (6th) 96; *R v Chowdhury*, [2011] OJ No 2171 (QL), 2011 CarswellOnt 3754 (WL Can) (Sup Ct); *R v Smith*, 2010 ONCJ 137, 2010 CarswellOnt 2346 (WL Can); *R v Gaeshingtsong*, [2009] OJ No 6444 (QL), 2009 CarswellOnt 10092 (WL Can) (Ct J); *R v Mesh*, [2009] OJ No 6194 (QL) (Ct J); *R v Powder*, 2008 ABQB 579, 455 AR 101; *R v Samuels*, 2008 ONCJ 85, 168 CRR (2d) 98; *R v Jutras* (2007), 221 CCC (3d) 543, 49 CR (6th) 320 (Ont Sup Ct); *R v JW*, 2006 ABPC 216, 398 AR 374; *R v Fryingpan*, 2005 ABPC 28, 373 AR 114; *R v Drury*, 2004 BCPC 188, 2004 CarswellBC 1442 (WL Can); *R v Jackson*, [2004] OJ No 4168 (QL) (Ct J); *R v Agostinelli*, 2002 CarswellOnt 4447 (WL Can), [2002] OJ No 5008 (QL) (Ct J); *Tinham*, *supra* note 15. Exclusion of evidence: *R v TWL*, 2016 ABPC 10, 350 CRR (2d) 46; *R v DE*, 2015 ABPC 66, 2015 CarswellAlta 564 (WL Can); *R v Ali*, 2014 ONSC 6609, 2014 CarswellOnt 17298 (WL Can); *R v Joseph*, 2014 ONCJ 559, 322 CRR (2d) 6; *R v Pete*, [2014] BCJ No 3218 (QL) (Prov Ct); *Meyn*, *supra* note 30; *R v Le*, 2014 BCPC 218, 321 CRR (2d) 49; *R v Magaya*, 2014 ONCJ 434, 14 CR (7th) 267; *R v LC*, 2014 NSPC 11, 343 NSR (2d) 119; *R v Pun*, 2012 ONSC 5305, 266 CRR (2d) 175; *R v Laporte*, 2012 MBQB 227, 283 Man R (2d) 9; *R v Smith*, 2012 ONCJ 116, 2012 CarswellOnt (WL Can) 2690; *R v Anderson*, 2011 ABPC 326, 530 AR 59; *R v McPhail*, 2011 ONCJ 315, 239 CRR (2d) 355; *R v Rhodes*, 2011 BCPC 64, 2011 CarswellBC 629 (WL Can); *R v Ali*, 2011 ONSC 424, 2011 CarswellOnt 251 (WL Can); *R v Schmidt*, 2010 ABQB 349, 496 AR 129; *R v Crawford*, [2009] OJ No 3113 (QL), 2009 CarswellOnt 4333 (WL Can) (Sup Ct); *R v NNM* (2007), 223 CCC (3d) 417, 159 CRR (2d) 50 (Ont Sup Ct); *R v Filli*, [2007] OJ No 3192 (QL), 2007 CarswellOnt 5281 (WL Can); *R v Barrett*, 2007 ABQB 174, 415 AR 254; *R v Wilson*, 2006

nine men who sought relief in tort, four received damages[48] and one was remitted for reconsideration.[49] Additionally, a class action headed by a male claimant was approved for 33 forensic psychiatric patients who were strip-searched over concerns about illegal substances being imported into the hospital.[50] It is not clear from the decision whether female patients are part of the class. Further, as mentioned above, a British Columbia judge ruled that *Golden* applies to "shared facilities" where both police prisoners and convicted persons are held.[51] Finally, four of the five human rights claims made by men for discriminatory strip searches were dismissed[52] and one was deferred pending the outcome of the related civil suit.[53]

In what follows, we turn to a more detailed examination of the claims. We examine: whether the conduct amounted to a strip search; whether the conduct violated *Golden* on the basis that it was performed as a matter of routine policy; and whether, if justified on the basis of reasonable grounds to believe that the accused was harbouring a weapon or evidence that was at risk of disappearing, the search complied with the criteria set out in *Golden*.

ONCJ 434, 148 CRR (2d) 33; *R v Login*, 2006 ONCJ 51, 138 CRR (2d) 254; *R v Logan*, 2005 ABQB 321, 388 AR 255; *R v So*, 2003 ABPC 211, 351 AR 212; *R v Keewatin*, 2003 ABPC 67, 352 AR 201 [*Keewatin*]; *R v Fors*, [2002] OJ No 5042 (QL) (Ct J). Sentence reduction: *R v Melo*, 2013 ONSC 4338, 286 CRR (2d) 343; *R v Auger*, 2012 ABPC 100, 2012 CarswellAlta 2236 (WL Can); *R v Muthuthamby*, 2010 ONCJ 435, 79 CR (6th) 64; *R v Grenke*, 2004 ONCJ 121, 7 MVR (5th) 89; *R v Carpenter*, 2002 BCCA 301, 4 CR (6th) 115; *R v Carrion-Munoz*, 2012 ONCJ 539, 265 CRR (2d) 360; *R v Dueck*, 2011 ABPC 53, 509 AR 380; *R v Padda* (2003), 46 MVR (4th) 167, 6 Admin LR (4th) 38 (Ct J). Acquittal: *R v Sandmaier*, 2006 ABQB 66, 396 AR 275; *R v Pringle*, 2003 ABPC 7, 324 AR 352 [*Pringle*]. Breach declared at *voir dire*: *R v Crocker*, 2011 BCSC 1361, 2011 CarswellBC 2571 (WL Can); *R v Radjenovic*, 2011 BCSC 1839, 2011 CarswellBC 3773 (WL Can); *R v Rosa*, 2008 ABQB 723, 462 AR 148. New trial ordered: *R v Hotte*, 2015 ABQB 323, 81 MVR (6th) 227; *R v Muller*, 2014 ONCA 780, 122 OR (3d) 721.

48 *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28; *Ilnicki v MacLeod*, 2005 ABCA 349, 376 AR 396; *Lamka v Waterloo Regional Police Services Board*, [2010] OJ No 6308 (QL) (Sup Ct); *Probert v Galloway*, 2011 CanLII 100790 (ON SCSM).

49 *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187, 553 AR 140.

50 *Murray v East Coast Forensic Hospital*, 2015 NSSC 61, 344 CRR (2d) 190. The other three tort claims were dismissed: *Peart v Peel (Regional Municipality) Police Services Board*, 2003 CanLII 42339 (ON SC), 2003 CarswellOnt 2447 (WL Can); *Cahill v Brookes*, 2014 CanLII 10794 (AB LERB); *Harvey v Laidler*, 2010 BCSC 1869, 2010 CarswellBC 3553 (WL Can).

51 *Thorburn*, *supra* note 40.

52 *Yaylacam v Toronto Police Services Board*, 2015 HRTO 715; *Anderson v Malachowski*, 2011 HRTO 2269; *Dungus v Toronto Police Services Board*, 2010 HRTO 2419; *Kampe v Toronto Police Services*, 2008 HRTO 304.

53 *Shallow v Toronto (City) Police Services Board*, 2013 HRTO 834.

6. When a search becomes a strip search

Golden defined a strip search as:

> the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments.[54]

While this seems to be clear and simple language, there remains controversy in the case law as to what conduct meets this definition. In *R v D'Andrade*, the judge was willing to recognize the accidental exposure of the accused's see-through bra and her breasts as a strip search, where a female officer had unzipped the accused's sweater in view of male officers.[55] Yet in other cases, judges were more accommodating of such exposures of women's bodies. In *R v Bouchard*, it was evidently unclear on the record the exact circumstances and manner in which the accused's bra was removed, but Justice Fraser concluded "I assume that she was asked to remove her own bra and hand it over"[56] and criticized her lawyer for using "the emotive phrase 'strip search[.]'"[57] In *R v McKanick*, Justice McCarthy ruled that a roadside search where a female officer pulled the accused's waistband out and looked down her pants to find the accused was not wearing underwear was not a strip search. Inexplicably, the judge characterized this as a "pat-down search,"[58] even though the Supreme Court in *Golden* clearly labelled the act of looking down a detainee's pants as a strip search.

Equally problematic was the judge's conclusion in *R v Wilkinson*, that the accused was not strip-searched because the pulling down of the accused's pants was the result of "her misunderstanding of [the officer's] instructions" to allow inspection of her waistband.[59] This decision effectively transfers the responsibility for an illegal strip search from a person in authority to another person who is in a very vulnerable position. Curiously, in *R v Smith*, the judge did not characterize the videotaping of the accused's privates while using the toilet as a strip search, but rather as a section 8 violation resulting from "excessive invasion of privacy." It does not appear that the accused's counsel argued that this was a strip search either, despite available case law characterizing filming a person who is using a toilet as falling within a strip search analysis.[60]

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54 *Golden*, *supra* note 6 at para 47.

55 *Supra* note 35 at paras 77–78.

56 *Supra* note 30 at para 35.

57 *Ibid*.

58 *McKanick*, *supra* note 30 at paras 60–61.

59 *Supra* note 30 at para 22.

60 See *Mok*, *supra* note 30.

Often, the accused's biggest hurdle in establishing whether or not a strip search occurred lies in a battle of credibility with the testifying officers. In *D'Andrade*, the judge rejected the male police officers' denials that they saw the accused's breasts, after careful scrutiny of their contradictory and evasive testimony.[61] On the other hand, in *R v Seki*, the woman's section 8 *Charter* claim, which alleged that she was asked to bend over naked and cough, was dismissed by the judge without comment on her testimony.[62] Similarly, in *R v Schildt*, the trial judge preferred the testimony of the police officers, and dismissed the accused's claim that she was subjected to a body cavity search in the presence of male officers.[63] In *R v Evong*, the judge rejected the accused's evidence that her nipples were exposed to male officers through her sheer dress after her bra was removed, based on her reactions to the search:

> The dress itself was never adduced before me and on the video I note that the defendant never appears to attempt to cover her breasts by folding her arms which one might think would be a natural reaction if her state of appearance and emotional condition was as described by her in the stand.[64]

This reasoning is problematic because assessing the legality of a search cannot be based on the accused's apparent reaction to it. Otherwise women who are experiencing shock or even dissociation during a strip search[65] and who do not display their emotions through their body language or facial expressions would be entitled to lesser forms of *Charter* protections. This reasoning is reminiscent of the erroneous belief that sexually assaulted women will display a traumatic response and that their failure to conform to this expectation indicates that they were not sexually assaulted.[66]

7. *"Routine policy" searches*

Half of the 43 criminal cases studied—22—involved searches conducted on the basis of routine policy,[67] in direct contravention of *Golden*. Although

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61 *Supra* note 35 at para 62.

62 *Supra* note 30 at paras 87, 90, 99–100, 102.

63 *Supra* note 15 at para 3. See also *Korzh*, *supra* note 30 at paras 11–12.

64 *Supra* note 30 at paras 22–23.

65 Cathy Pereira, "Strip Searching as Sexual Assault" (2001) 27:2 *Hecate* 187 at 189 comments: "For many women, a strip search will trigger flashbacks and will re-traumatize them as survivors of sexual abuse".

66 See e.g. *Jane Doe v Toronto (Metropolitan) Commissioners of Police* (1998), 39 OR (3d) 487 (Ct J (Gen Div)), 160 DLR (4th) 697 at para 66.

67 *Dunwell*, *supra* note 30; *Smith*, *supra* note 30; *Meyn*, *supra* note 30; *Evong*, *supra* note 30; *Foster*, *supra* note 34; *D'Andrade*, *supra* note 35; *Deschambault*, *supra* note 30; *Bouchard*, *supra* note 30; *Raugust*, *supra* note 30; *McKay*, *supra* note 33; *Lee*, *supra* note 30; *Ebanks*, *supra* note 34; *Jackman*, *supra* note 34; *SF*, *supra* note 33; *FN*, *supra* note 30;

Golden recognized that a custodial setting may justify different rules given the "greater need to ensure that [detainees] are not concealing weapons or illegal drugs"[68] that may be introduced to a prison population, it drew a clear line with respect to short-term police detentions, where detainees are unlikely to come into contact with other prisoners.[69] Different rules may be invoked to justify strip searches occurring within institutional settings, although even in those circumstances, some judges have insisted that *Golden* be adhered to.[70] For cross-border searches, a lower standard of "reasonable suspicion" has been upheld for strip-searching.[71] But even in these cases, male-on-female strip-searching is not permitted absent exigent circumstances.[72]

Some officers provided reasons for routine strip search policies that appear grounded in discriminatory reasoning about women's bodies and their clothing. For example, in *R v Lee*, "Constable Martin testified that it was the practice of supervisors on her shift to seize underwire bras from arrestees for safety reasons."[73] A preoccupation with women's bras being fashioned into weapons or otherwise posing safety concerns also appears in police evidence in *R v Desjourdy*, *R v Fine*, *R v Lee*, *R v Evong*, and *R v PFG*.[74] This kind of policy subjects women to a different standard of grounds for a strip search than men based on their undergarments, as recognized by the appellate court in *Lee*:

> The trial judge [...] did not consider the appropriateness of an unwritten police policy that leads to potentially differential treatment of female and male arrestees, with female arrestees wearing underwire bras being automatically and without exception subjected to a form of strip search.[75]

LLS, *supra* note 30; *PFG*, *supra* note 30; *Depaepe*, *supra* note 30; *Ferguson*, *supra* note 30; *Douglas*, *supra* note 30; *Layton*, *supra* note 30; *Norman*, *supra* note 15; see also *Rocha*, *supra* note 36.

68 *Supra* note 6 at para 96.

69 *Ibid* at para 97. See also *Evong*, *supra* note 30 at paras 63–64.

70 For post-*Golden* cases that ruled against blanket strip search policies even in institutional settings, requiring individual assessment and justification of grounds for such searches, see *SF*, *supra* note 33; *Keewatin*, *supra* note 47; *Pringle*, *supra* note 47; *Tinham*, *supra* note 15; *Norman*, *supra* note 15. On the other hand, the judge in *Douglas*, *supra* note 30, rejected this jurisprudence with no explanation.

71 *Golden*, *supra* note 6 at paras 73–74, citing *R v Simmons*, [1988] 2 SCR 495, 55 DLR (4th) 673.

72 See e.g. *Jackman*, *supra* note 34 at para 98.

73 *Lee*, *supra* note 30 at para 9.

74 *Desjourdy*, *supra* note 9 at paras 20–21, 101; *Fine*, *supra* note 30 at para 31; *Lee*, *supra* note 30 at para 9; *Evong*, *supra* note 30 at paras 30–31; *PFG*, *supra* note 30 at para 30.

75 *Supra* note 30 at para 46.

One state official explained their search policy by claiming that women present particularly high risks of concealing drugs and weapons, justifying routine strip-searching of all women. The director of the Vancouver jail claimed that:

> [W]omen more frequently hide such items in their body cavities and the likelihood of discovering contraband or weapons does not depend on the nature of the intended charge, or the age and economic status of the prisoner [...] that as a matter of policy the prisoners are strip searched before being booked in[.][76]

While the basis for this assertion was unstated, it is highly unlikely that either statistics or evidence beyond anecdotes is available to back up this claim. If the director's reasoning was premised instead on women's anatomy, it would still amount to prohibited discrimination.

In 15 of the 22 cases involving a routine strip search, the accused received a remedy.[77] For example, *R v SF* involved two young girls aged 15 and 17, who had been required to attend the police station with their parents some weeks after a complainant reported having been robbed by them. Although the use of a weapon was not specifically alleged against either girl, the officers insisted that it was appropriate to strip search them. In condemning the use of routine strip searches, Justice Katarynych commented:

> A spectre of foreboding and fear cannot be allowed to overwhelm both the ability and the motivation of the officers to fix their attention on factors specific to the person upon whom their decision is to be visited.[78]

In *McKay*, Justice Greene expressed particular concern about police attitudes regarding strip searches:

> Given the obvious emotionally damaging impact of strip searches, it is an affront to the administration of justice when the members of the system hold such cavalier attitudes about strip searches thereby exposing detainees to unnecessary intrusions on their privacy.[79]

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[76] *Douglas*, *supra* note 30 at paras 42–43.

[77] *Smith*, *supra* note 30; *Dunwell*, *supra* note 30; *Evong*, *supra* note 30; *Foster*, *supra* note 34; *D'Andrade*, *supra* note 35; *Bouchard*, *supra* note 30; *McKay*, *supra* note 33; *Lee*, *supra* note 30; *Ebanks*, *supra* note 34; *Jackman*, *supra* note 34 (excluded on s 10(b) grounds at para 125); *SF*, *supra* note 33; *LLS*, *supra* note 30 (for further explanation, see *infra* note 139); *PFG*, *supra* note 30 (for further explanation, see *infra* note 140); *Depaepe*, *supra* note 30; *Norman*, *supra* note 15. See also the section on Remedies below.

[78] *SF*, *supra* note 33 at para 61.

[79] *Supra* note 34 at para 85.

Several judges have noted the inadequacy of police training regarding strip-searching.[80] In *Foster*, the accused was strip-searched by Canadian Border Services and strip-searched again once turned over to the RCMP. Justice Bielby found that the officers simply acted according to routine policy:

> I also find that the breach [*sic*], to some extent, to be institutional or systematic based on the testimony of the RCMP officers. They were unaware of any policy or protocol in regards to strip searches and carried them out as a matter of routine. They did not consider whether or not a second search was necessary in the circumstances or that a previous search had been conducted. Either their training was insufficient or they failed to avail themselves of the necessary information and training.[81]

Justice Bielby went on to point out specific flaws in the officers' training in that case:

> All three officers testified that during training they were told that if drugs are found on one part of the body of a detainee, the likelihood is there are drugs hidden somewhere else on the body. This is referred to as, the one plus one principle or theory. The officers, however, could not recall ever finding a second location where drugs were found on a detainee, when conducting a strip search.[82]

Also concerning is the police testimony in *R v Dunwell*.[83] In this case, both officers who searched the accused acknowledged that her breasts were fully exposed at least once, yet neither believed that the accused had been strip-searched. It seems that even the most basic elements of *Golden* are escaping police attention in some jurisdictions.

Judges have also rejected police testimony that specific grounds for the strip search existed, finding in reality that they were conducted pursuant to routine policy. In *R v Ferguson*, Justice Thomas reasoned as follows:

> [T]he fact [that the sergeant] made no notes of what actually took place during the search and in fact made no note that a complete search was actually carried out suggests that the search was actually routine.[84]

In contrast, in *R v Layton*, despite officer testimony that the particular search was "routine," the judge found it to be justified by pointing to

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80 See *Evong*, *supra* note 30 at para 28; *Fine*, *supra* note 30 at para 29; *McKanick*, *supra* note 30 at para 100; *Bouchard*, *supra* note 30 at para 39.

81 *Foster*, *supra* note 34 at para 65. See also para 47.

82 *Ibid* at para 21.

83 *Supra* note 30 at para 30.

84 *Supra* note 30 at para 55. See also *FN*, *supra* note 30 at para 44.

specific circumstances that made the search reasonably necessary.[85] This reasoning ignored the fact that, in the officers' opinion, they were carrying out the search as standard or routine procedure, in clear violation of *Golden*. When judges explain away *Charter* violations even though police evidence demonstrates manifest disregard for the Supreme Court's clear directives, the reform potential of such significant rulings is surely blunted.

8. Failure to adhere to Golden guidelines

One the most contravened *Golden* guidelines in the surveyed cases is the requirement that "the police officer(s) carrying out the strip search are of the same gender as the individual being searched[.]"[86] In 16 of the 43 cases studied, men were alleged or found to have been involved in the searches, either directly or indirectly as potential observers of the search or of videotapes of the search.[87]

However, even if contravention of one of *Golden*'s guidelines was established, judges did not criticize the contravention in every case. In *R v Douglas*, the judge considered the failure of police to keep a record of the manner in which the strip search was performed to be "a minor concerns [*sic*]"[88] even though this is a crucial element of a constitutional strip search according to *Golden*. This judge also characterized the lack of justification for refusing to give the accused her bra back until after she was released as another inconsequential issue, despite recognizing that this likely "prolonged her humiliation and embarrassment."[89] Similarly, despite acknowledging that there were no grounds to proceed to a strip search after the pat down search was conducted, and that a proper record of the search was not kept, Justice Brown did not find any of these clear errors enough to justify a remedy in *R v NC*.[90]

In *R v Vixaysongkham*, the judge determined that the search was constitutional because it was carried out "respectfully" and the accused "was

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85 *Supra* note 30 at para 13. The judge cited a tip made to police that the accused would be obtaining cocaine to sell as well as a crack pipe found in her vehicle.

86 *Golden*, *supra* note 6 at para 101.

87 *Dunwell*, *supra* note 30; *SB*, *supra* note 8; *Deschambault*, *supra* note 30; *Greenhalgh*, *supra* note 24; *Sepulveda*, *supra* note 35 (for further explanation, see *supra* note 44); *D'Andrade*, *supra* note 35; *Hornick*, supra note 35; *PFG*, *supra* note 30; *Douglas*, *supra* note 30; *Deveau*, *supra* note 15; *Fine*, *supra* note 30; *SF*, *supra* note 33; *Lozano*, *supra* note 34; *Chasovskikh*, *supra* note 30; *Mok*, *supra* note 30; *Schildt*, *supra* note 15.

88 *Supra* note 30 at para 95. Officers also failed to take notes of the routine strip searches in *Meyn*, *supra* note 30 and *Foster*, *supra* note 34. However, the violations were recognized in these two cases, and both accused secured the exclusion of evidence.

89 *Douglas*, *supra* note 30 at para 95.

90 *Supra* note 30 at paras 20–21, 28–29.

not left standing naked for any longer than necessary."[91] Yet *Golden* clearly indicates that the accused should not be completely undressed at *any* time. In *McKanick*, after emphasizing that "the fact that a person was left naked for a period of time during a strip search is one of the *primary factors* for the court to consider when determining whether the search was reasonable,"[92] Justice McCarthy nonetheless held that "the mere fact a person was obliged to remain undressed for a period of time [does not constitute], on its own, an infringement of section 8 of the *Charter*."[93] Despite being "unable to find any exigent circumstances that would justify that level of intrusion," Justice McCarthy awarded the accused no remedy, because "a reasonable member of the public would not be shocked that a thorough and complete strip search of a suspected drug trafficker would involve a period of time during which the detainee was completely naked."[94] Again, such reasoning suggests that certain classes of accused persons cannot expect full protection of their section 8 rights.

In *R v Lozano*, Justice Dawson accepted the argument that the police's violation of the rule from *Golden* that a detainee must never be stripped completely naked was the unavoidable result of "the manner in which Ms. Lozano was dressed."[95] In this case, the accused was wearing a dress but was not wearing a brassiere. Judges ought to point out that there are ways for police to conform with *Golden* even in such circumstances. Police could present the woman with a cover-up, or instruct her to hold up the top or bottom of her dress as she is searched, in order to guard against placing her in such an acutely vulnerable position.

The videotaping of strip searches in some cases also contravened *Golden*'s requirement that "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."[96] Several courts have held that when videotaping permits other officers to view the strip search, this rule is thereby violated.[97] On the other hand, in *R v Collins*, the judge viewed this kind of contravention as a legitimate way of ensuring compliance with another *Golden* guideline, holding that "the search was captured on digital recording so there was

91 *Supra* note 30 at para 37. Note that in this case, the judge also erroneously held that the standard for strip-searching was not as high as reasonable and probable grounds (para 33).

92 *Supra* note 30 at para 123 [emphasis added].

93 *Ibid* at para 118.

94 *Ibid* at paras 135, 162.

95 *Supra* note 34 at paras 80–81.

96 *Supra* note 6 at para 101.

97 *Mok*, *supra* note 30 at paras 103–04; *Chasovskikh*, *supra* note 30 at paras 87, 99; *SF*, *supra* note 33 at paras 85–89.

a proper record kept."[98] But unless clear strictures can be placed (and enforced) with respect to who can view the videotapes, compliance with the law in *Golden* cannot be ensured. As noted by Justice Bielby in *Foster*:

> [I]f video cameras are in use [for strip searches], some protocol should be in place and reasonable step [*sic*] taken to ensure a detainee's privacy both at the time of the search and afterwards. The manner of storage and who has access and under what circumstances would also be relevant.[99]

Videotaping the strip search also carries the potential for further violation of *Golden* when male officers have access to viewing a woman's strip search. Thus the judge in *Fine* commented:

> [T]he reasonableness of videotaping everything in the detention area should not include videotaping and simultaneously broadcasting a strip search to a central monitoring area. […] Here, it appears videotaping inside strip search rooms and simultaneous broadcasting to a central monitoring location is a routine policy at the Kelowna detachment, and not related to the unique circumstances of any individual case. That "routine policy" breaches the intent and spirit of *Golden*. The interests of the police of maintaining safety in the search rooms and preserving evidence are not so compelling that they outweigh Ms. Fine's expectation of privacy that her strip search not be videotaped and monitored remotely.[100]

Similarly, in *SF*, Justice Katarynych noted the acute humiliation felt by two adolescent girls who were strip-searched and whose bare breasts were exposed to a video camera. Bearing in mind their "age and stage of development," the judge criticized the "level of casualness that crept into the manner in which these girls were searched, which resulted in unnecessary humiliation," particularly because the girls did not know whether and how many male officers had seen the footage.[101]

9. Judicial characterization of the wrong: Abuse of power, sex, and racism

In many of the cases, judicial commentary explicitly condemned illegal strip searches as a police abuse of power. In *R v Chasovskikh*, a case involving the videotaping of toilet usage at the police station, Justice West labelled the police conduct as "highly intrusive" and "an improper exercise of police power."[102] In *Greenhalgh*, where a border services officer was convicted

[98] *Collins*, *supra* note 33 at paras 28–29.

[99] *Supra* note 34 at para 28.

[100] *Supra* note 30 at paras 76–77. The videotape in this case was accessible to RCMP members and civilian commissionaires in an unlocked room (para 25).

[101] *Supra* note 33 at paras 85–87, 94.

[102] *Supra* note 30 at para 116.

of sexual assault for intentionally inflicting unwarranted strip searches on young women crossing the Canada-United States border, the sentencing judge remarked:

> [T]here must be a clear and unmistakable message from this court to all persons who have been entrusted with state authority, such as border guards, police officers and peace officers generally, that crimes of the nature committed here, involving gross abuse of trust and authority, will attract severe penalties.[103]

In *Bouchard*, a police officer said to an accused concealing her naked torso with a blanket: "You look so comfortable, maybe we should keep you longer." Justice Fraser responded by comparing the officer's conduct to that of Abu Ghraib guards.[104] In *R v SB*, Justice Lajoie described Sergeant Desjourdy's conduct as motivated by "vengeance and malice."[105]

For those 16 cases where women claimed that they were strip-searched by male officers or where it was possible for male officers to view the search, only a handful of judges commented specifically on the impact that such a contravention of the same-sex strip search requirement may have had on the women.[106] This is in spite of *Golden*'s recognition that "[w]omen and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault," especially those who have previously experienced abuse.[107] In *Deschambault*, Justice Tomkins avoided discussing the fact that male officers removed the accused's bra, reasoning that section 8 was already breached due to the lack of reasonable grounds for the strip search.[108] Among those cases where judges identified this particular harm, many of the judicial comments can be seen as relatively mild. For example, in *Bouchard*, Justice Fraser was "mindful of the gender implications" and their "significant impact on [the accused's] dignity."[109] In *SB*, Justice Lajoie commented, "[i]t is quite evident that none of these officers have received gender training, and that they do give only lip service to female dignity and privacy."[110] Justice Lajoie stayed the proceedings, remarking that it was "quite clear that the Ottawa Police Service has not been made aware, or is lending a blind eye to the recommendations of [*Golden*]."[111]

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103 *Supra* note 24 at para 72.

104 *Supra* note 30 at paras 21–22.

105 *Supra* note 8 at para 26.

106 See *Chasovskikh*, *supra* note 30 at para 98; *Mok*, *supra* note 30 at para 103.

107 *Supra* note 6 at para 90.

108 *Deschambault*, *supra* note 30 at paras 66–67.

109 *Supra* note 30 at para 45.

110 *Supra* note 8 at para 24.

111 *Ibid* at para 22.

However, Justice Hyrn in *R v Hornick*, a case involving male police officers raiding a women's-only event at a bathhouse, was more pointed about the impact of the men's conduct:

> The breach in this case is more serious than the breach in *Flintoff* in that the search here is a male on female search, and not a male on male search as it was in *Flintoff*. And it is aggravated by the fact that in this case, the patrons had a reasonable expectation of privacy to explore their sexuality in a safe and supportive environment[.][112]

Likewise in *PFG*, the youth court judge commented:

> A request of a female youth, from a First Nations background, to remove her brassiere, made by a male police officer, in the proximity of another male officer, is a situation which a reasonable and objective observer would perceive to be frightening, humiliating, and threatening to the young person, likely to make that young person feel as if her bodily integrity is being violated.[113]

This same judge also commented on the effects of routine strip searches as they apply to vulnerable persons:

> The difficulty is that general "one size fits all" policies or zero-tolerance policies are blunt instruments which can often cause other significant problems. These policies may, as in this case, lead to vulnerable persons experiencing legitimate feelings of violation at the hands of a powerful system that can seem to them to be unjust and bullying. These policies can also contribute to an atmosphere in which classes of prisoners such as members of First Nations are belittled and degraded.[114]

It is notable that *PFG* was the only criminal case that specifically commented on the accused's race or Aboriginal status as an indication of a heightened power imbalance or more terrifying experience for the woman being strip-searched. For example, in *SB*, a case in which the accused was an African-Canadian woman, analysis of the role of racism in heightening the *Charter* violation was absent in the judge's decision. Professor Tanovich has posited that racism may be a critical factor in explaining the police misconduct in this case:

> Was she initially stopped, for example, as the result of her being profiled as a sex trade worker given the time of night, location and the fact that she is Black and was seen speaking to the occupants of a van? Why was she arrested for public intoxication only after she repeatedly asserted her right to know why the officers

112 *Supra* note 35 at para 104.

113 *Supra* note 30 at para 41.

114 *Ibid* at para 43.

> had earlier stopped and questioned her? Why was she so physically violated by multiple officers in custody? It is not as though there was any real concern about her being violent, armed or a danger to the officers or to other prisoners. As noted earlier, before she was physically searched, she was not in any way aggressive or violent. She was compliant. Moreover, the officers who initially arrested her for public intoxication were present during the custodial search and would have made the other officers aware that she was arrested for the most minor of provincial offences. One would have expected one of the other officers to question why S.B. had been arrested in the first place given the narrow right of the police to arrest intoxicated individuals. And so, given what the officers knew at that time, including the fact that she did not have a criminal record, their conduct had to be grounded in something else […]
>
> Gendered and racialized violence also provide the only reasonable explanation for why the conduct of the police in this case departed so substantially from the minimum standards for a reasonably conducted strip search. This departure permitted the officers to use the strip search as a sexual weapon and a form of punishment to further her humiliation and degradation.[115]

Systemic racism was, however, considered in the recent civil case of *Anoquot v Toronto (City) Police Services Board*. This case involved a claim by a woman who alleged that by conducting a strip search after her arrest for theft under $5000, the Toronto Police infringed her section 15 *Charter* rights based on her Aboriginal status.[116] The defendants sought to strike two paragraphs from her statement of claim, claiming that they presented "irrelevant facts" and "scandalous, frivolous, and vexatious" evidence.[117] These paragraphs included information about how many times the accused herself had been subjected to strip searches by the Toronto Police, and statistics on the disproportionate representation of Aboriginal peoples in the criminal justice system.[118] In rejecting the defendant's motion, Justice Perell commented on the relevance of these passages:

> [T]he Defendants submit that whether or not Ms. Anoquot has been the subject of a Level Three Search on prior occasions has no relevance or probative value to the action because she has acknowledged that Level Three Searches are to be conducted on a case-by-case basis to determine if reasonable grounds existed for the search incidental to an arrest. The Defendants argue that whether or not a prior search was or was not reasonable has no bearing on the reasonableness of the search on September 15, 2011. With respect, the Defendants seem oblivious to the nature

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115 David M Tanovich "Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power" (2011) 79 CR-ART 132 at 2–3 (SSRN) [Tanovich, "Gendered and Racialized Violence"] [footnotes omitted].

116 *Anoquot*, *supra* note 36 at para 10.

117 *Ibid* at para 5.

118 *Ibid* at para 6.

> of the claim that Ms. Anoquot is making, which is that the Defendants employ a stereotypical approach and systemically strip search Aboriginals rather than engaging in a case-by-case analysis.[119]

Apart from these two cases, the racial identity of the accused was either not indicated or can only be speculated upon from reading the facts.[120] Given the Supreme Court of Canada's recognition in *Golden* that minorities—including African-Canadians and Aboriginal persons—may be particularly impacted by strip searches, it is concerning that so few decisions consider whether systemic racism may have been at play or how illegal strip-searching has particular repercussions or meanings for racialized women.[121] For example, researchers in Australia report that for Indigenous women, strip-searching by white men re-enacts colonial violence and is, in some cultures that have strict taboos around male/female contact, akin to torture.[122]

Some judges de-emphasized the humiliation and violation that women can experience when strip-searched. For example, in *R v Ebanks*, Justice Baltman relied on the fact that potentially more humiliating events happened to the accused at the hands of police (a "bedpan vigil") to determine that the strip search (conducted by female officers) could not have seriously affected her: "its impact in this case is lessened when seen in the larger context."[123] In *R v NC*, Justice Brown's reasoning reflected a similar notion, concluding that because another aspect of the case was more upsetting to the accused, the impact of the strip search must have been lessened: "her greatest concern, anxiety and state of being upset arose from the existence of the criminal charges, and not from the nature of the search."[124]

In the tort case *Euteneier v Lee*, the accused's own actions were cited to undermine the impact of her strip search. The claimant's clothing was forcibly removed in the presence of male officers after she feigned a suicide

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[119] *Ibid* at para 28.

[120] Possible to speculate only: *Darlington*, *supra* note 34 at para 6 (the accused was born in Jamaica); *Schildt*, *supra* note 15 at para 13 (the accused was arrested on an Indian reserve); *FN*, *supra* note 30 at para 18 (police officer testified that the accused yelled derogatory Jamaican words). This latter case is particularly troubling because the woman was arrested and held overnight to require her to testify as a complainant against her violent partner. She was shocked and extremely upset to find herself subjected to a full strip search and fought back physically. Her charges were, however, dismissed based on self-defence.

[121] *Golden*, *supra* note 6 at para 90; Tanovich, "Gendered and Racialized Violence", *supra* note 115 at 3.

[122] Jude McCullough & Amanda George, "Naked Power: Strip Searching in Women's Prisons" in Phil Scraton & Jude McCullough, eds, *The Violence of Incarceration* (Abingdon: Routledge, 2008) 107 at 115.

[123] *Supra* note 34 at para 53.

[124] *Supra* note 30 at para 27.

attempt with her bra. She was then handcuffed to the bars of the "bullpen" while naked, in view of officers both male and female. The Ontario Superior Court of Justice dismissed her claim,[125] holding that because she admitted that her actions were "stupid," there was therefore "no support for the allegation that forcibly removing [the claimant's] clothing in the presence of [the male sergeant] was, in itself, a failure to maintain her dignity or a failure to prevent her humiliation."[126] In other words, it seemed that the harm of being strip-searched was obviated by the accused's behaviour, as if it was an inevitable consequence that she would be forcibly stripped and then staged naked in front of male and female officers.

In only four cases did judges mention the potential *sexual* violation that an accused may feel when strip-searched.[127] A pedestrian in Australia described her experience of a police strip search as follows:

> I honestly felt that the only way to prevent the search becoming more intrusive or sexual was to remain as quiet and docile as possible. I later wondered why I was so passive. All I could answer was that it was an experience similar to sexual assault. I felt the same helplessness, the same abuse by a male in authority, the same sense of degradation and lack of escape.[128]

But with two exceptions, the judges in these four cases denied the possibility of sexual violation as implicated in the strip search. Aside from the sexual assault conviction decision in *Greenhalgh*, only in *Hornick*—where the Ontario Court of Justice concluded that the conduct of male officers in entering a women's bath house event where they knew the women were in a state of undress amounted to a constructive strip search[129]—did the judge condemn the wrong for having occurred "in a highly sexualized atmosphere."[130]

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125 *Euteneier, supra* note 36. While the claimant did not sue for a breach of her s 8 rights, she sued under ss 7 and 12 of the *Charter* for her treatment, including the forcible removal of her clothing.

126 *Ibid*. The Court of Appeal for Ontario upheld the dismissal of her claims: *Euteneier v Lee* (2005), 77 OR (3d) 621, 133 CRR (2d) 292 (CA).

127 *Hornick, supra* note 35 at paras 35, 53–55; *Desjourdy*, *supra* note 9 at para 93; *Raugust*, *supra* note 30 at para 79; *Greenhalgh*, *supra* note 24 at paras 36–38 (sentencing decision for a Border Services Officer already convicted of sexual assault).

128 Quoted in George, *supra* note 24 at 31.

129 The court held that, although the officers did not themselves require the women to remove their clothing, the circumstances were analogous to a strip search, given the "general implications of male police officers entering an all female event where many women are known to be in some state of undress and in a highly sexualized environment" (*Hornick*, *supra* note 35 at paras 37–38, 83).

130 *Ibid* at para 68.

In the other two cases, judges expressly rejected the claim that there was any "sexual" aspect to the searches at issue. In *Desjourdy*, the judge asserted that Sergeant Desjourdy cut off the accused's bra for "a valid law enforcement objective" and that there was "no sexual context" to his conduct.[131] Very worrisome is the reasoning in *R v Raugust*, where the accused and the police provided conflicting testimonies regarding the strip search. The judge concluded as follows:

> The version of the search described by the accused would constitute more of a sexual assault than a search. It is inconceivable that Cst. Grieco-Savoy, an experienced police officer, would do something of this nature at all, especially in broad view with the door open and the window unshuttered.[132]

With little explanation, the judge determined that the accused's account of events could not be true because it was unthinkable that an experienced officer would treat a female detainee with such callousness. In this reasoning, there is no recognition of the power of police, the sense of invincibility some may possess, or the fact that many police will not speak out if they witness another officer's wrongdoing.[133]

To conclude, many judges seemingly do not understand the particular impact of strip searches on women. Among those who do, most simply repeat the point from *Golden* that strip searches are inherently degrading. Very few judges acknowledge that such searches affect the sexual integrity of women and may be experienced as a sexual assault.

10. Remedies

The rate at which remedies are provided for unconstitutional searches may not vary drastically for strip-searching in comparison to other section 8 violations, such as illegal searches of vehicles or "frisk searches" upon detention. However, the Supreme Court of Canada in *Golden* was clear that strip searches pose particular and irreparable harms, even when carried out constitutionally, and that therefore illegal strip searches must be prevented:

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131 *Supra* note 9 at para 108.

132 *Supra* note 30 at para 79.

133 Louise Westmarland, "Police Ethics and Integrity: Breaking the Blue Code of Silence" (2005) 15:2 Policing & Society 145 at 157, 162 (not reporting fellow officers for assaulting prisoners); Jerome H Skolnick, "Corruption and the Blue Code of Silence" (2002) 3:1 Police Practice and Research 7 at 8, 11, 15 (refusal to report wrongdoing, including the anal rape of a prisoner, and culture of invincibility); David M Tanovich, "The Crown should align with justice, not the police", The *Ottawa Citizen* (11 December 2010) [Tanovich, "Crown Should Align"] (police culture of impunity).

> The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy. Furthermore, strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched.[134]

More recently, a majority of the Supreme Court reiterated the elevated degradation posed by strip searches in a case analyzing the constitutionality of cell phone searches:

> First, while cell phone searches […] may constitute very significant intrusions of privacy, not every search is inevitably a significant intrusion. […] So we must keep in mind that the real issue is the potentially broad invasion of privacy that may, *but not inevitably will*, result from law enforcement searches of cell phones.
>
> In this respect, a cell phone search is completely different from the seizure of bodily samples in *Stillman* and the strip search in *Golden*. Such searches are *invariably* and *inherently* very great invasions of privacy and are, in addition, a significant affront to human dignity. That cannot be said of cell phone searches incident to arrest.[135]

Given the Supreme Court of Canada's continued recognition of the profound injuries occasioned by unconstitutional strip searches as compared to other section 8 violations, one might expect judges to view illegal strip searches as more deserving of a *Charter* remedy. Further, the Court in *Golden* emphasized that women and minorities, as well as individuals who have previously been subjected to sexual abuse, may experience heightened trauma from a strip search or experience it as a sexual assault.[136] Judges should therefore consider whether strip searches conducted on female and racialized detainees have a more pronounced impact on their *Charter* rights to security of the person and to equal protection of the law, for example. However, in the context of illegal strip search challenges, our research found no drastic differences in securing remedies between female and male detainees,[137] and—with the exception of *PFG*, described above—no commentary on strip-searching as a potential form of racial oppression.

As mentioned earlier, of the 43 criminal cases involving the alleged or proven strip-searching of women, 18 resulted in no remedy to the accused even though in eight of these a *Charter* breach due to unauthorized and/or

134 *Supra* note 6 at para 89 [emphasis in original].

135 *R v Fearon*, 2014 SCC 77 at paras 54–55, [2014] 3 SCR 621 [emphasis in original].

136 *Golden*, *supra* note 6 at para 90.

137 See discussion *supra* note 15 and accompanying text.

unreasonable police strip searches was found.[138] Among the 25 successful cases, eight resulted in a stay of proceedings, and another 11 in the exclusion of evidence against the accused.[139] In one case a new trial was ordered; in two the accused's sentence was reduced; and one resulted in the accused's acquittal for assaulting a police officer in the execution of his duty because his "duty" did not include an illegal strip search.[140] However, the accused in this latter case may be considered to have not received a remedy *per se*, rather, the Crown simply wasn't able to prove the elements of the offence of assaulting a police officer. The accused was still convicted of the lesser included offence of common assault, even though the illegal strip search was the impetus for her to slap the officer and call him a "pervert."[141] In one case, the judge suggested that a sentence reduction would be appropriate at that further stage of the proceedings.[142] Additionally, in *Greenhalgh*,

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[138] No breach: *Vixaysongham*, *supra* note 30 at para 53; *Sepulveda*, *supra* note 35 at paras 11–12; *Schildt*, *supra* note 15 at para 2; *Layton*, *supra* note 30 at paras 13–15; *Mahmood*, *supra* note 30 at paras 151–54; *Seki*, *supra* note 30 at para 102; *Darlington*, *supra* note 34 at para 82 (the accused's s 10(b) rights were, however, breached since she was not given the opportunity to call counsel before the strip search, yet no remedy was awarded); *Collins*, *supra* note 33 at paras 7, 31; *Lozano*, *supra* note 34 at para 83; *Wilkinson*, *supra* note 30 at paras 22–23. Breach, no remedy: *Fine*, *supra* note 30 at paras 103–04; *McKanick*, *supra* note 30 at paras 157–62; *Deschambault*, *supra* note 30 at paras 52, 66, 73–74; *FN*, *supra* note 30 at paras 50–52 (but the accused successfully argued self-defence); *Vandenbosch*, *supra* note 32 at paras 45, 49, 59–60, 75 (search found to be unreasonable due to failure to provide right to counsel); *Ferguson*, *supra* note 30 at para 72; *NC*, *supra* note 30 at paras 21, 23, 31; *Douglas*, *supra* note 30 at paras 98, 104.

[139] Stay: *Dunwell*, *supra* note 30 at paras 42–43, 50; *Smith*, *supra* note 30 at paras 173, 214; *McKay*, *supra* note 33 at paras 67, 86; *Chasovskikh*, *supra* note 30 at para 119; *LLS*, *supra* note 30 at paras 9–10 (charge of assaulting a peace officer stayed, but not mischief charges); *SB*, *supra* note 8 at paras 23–27; *SF*, *supra* note 33 at paras 103, 150; *Mok*, *supra* note 30 at paras 104, 115. Evidence excluded: *Meyn*, *supra* note 30 at paras 3, 57; *Foster*, *supra* note 34 at paras 50, 71; *D'Andrade*, *supra* note 35 at paras 91, 98 (charges subsequently dismissed at para 98); *Deveau*, *supra* note 15 at para 22; *Bouchard*, *supra* note 30 at paras 45, 50 (resulting in acquittal); *Nagle*, *supra* note 34 at para 163 (excluded based on unconstitutional purse search, for further explanation, see *supra* note 42); *Depaepe*, *supra* note 30 at para 22; *Hornick*, *supra* note 35 at paras 85, 115; *Jackman*, *supra* note 34 at paras 125, 147 (excluded on s 10(b) grounds at para 125); *Norman*, *supra* note 15 at paras 13–15; *Raugust*, *supra* note 30 at para 89 (resulting in acquittal of driving while over .08, but the accused was still convicted of impaired driving).

[140] New trial: *Lee*, *supra* note 30 at paras 46–48. Sentence reduction: *Ebanks*, *supra* note 34 at paras 53–54; *Evong*, *supra* note 30 at paras 99–101 (resulting in an exception to the mandatory minimum sentence for refusing to provide a breath sample). Acquittal: *PFG*, *supra* note 30 at paras 9–10, 48–49 (the accused was acquitted of assaulting a peace officer engaged in the execution of his duty and convicted of the lesser included offence of common assault). The conviction in *PFG* is questionable in light of a detained person's right to resist unlawful police conduct (see *SB*, *supra* note 8).

[141] *PFG*, *supra* note 30 at para 10.

[142] *Korzh*, *supra* note 30 at para 33.

the border services officer was convicted of sexual assault for his use of strip searches of women crossing the border as a pretext to sexually assault them.[143]

Stays of proceedings and the exclusion of evidence are considered extreme remedies requiring a high degree of justification. Both of these remedies involve a balancing of interests, and a judge must be convinced that the seriousness of the *Charter* breach has a greater negative impact on the administration of justice than would staying the proceedings or excluding the evidence.[144] Thus, judges who ordered stays emphasized the need to maintain public confidence in the administration of justice. In *McKay*, Justice Greene reasoned that allowing the police conduct to go without remedy would "call into question the integrity of the justice system."[145]

A common hurdle for securing exclusion of evidence in a criminal proceeding is the timing of the *Charter* breach, whereby it played no role in obtaining evidence related to the accused's charge. In *R v Deschambault*, the accused was strip-searched by male officers and left in a cell wearing only her underpants. Justice Tomkins concluded that the accused's section 8 *Charter* rights were breached, noting the particularly humiliating circumstances:

> Ms. Deschambault was left, nearly naked, distraught in the cell and when she was observed later to place a mat over herself to cover her nakedness, another officer entered and removed the mat. She was under the observation of an officer - probably male […] – in her almost naked state. Eventually, she was given a paper suit but the officers who testified did not know when this occurred so we do not know how long Ms. Deschambault remained under observation in this undignified, degrading and humiliating state.[146]

Despite all this, Justice Tomkins cited the fact that the evidence was obtained before these breaches occurred as justification for providing no remedy:

> In this case, the actions that I have concluded constitute a *Charter* breach occurred after the breathalyzer tests had been taken and after the investigation of the offences with which Ms. Deschambault has been charged was concluded. There is nothing

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143 *Supra* note 24 at paras 37–38.

144 *R v O'Connor*, [1995] 4 SCR 411 at para 68, 130 DLR (4th) 235; *R v Grant*, 2009 SCC 32 at paras 67–68, [2009] 2 SCR 353 [*Grant*].

145 *McKay*, *supra* note 33 at paras 85–86. See also *SB*, *supra* note 8 at para 27; *Chasovskikh*, *supra* note 30 at para 112; *Hornick*, *supra* note 35 at para 115.

146 *Supra* note 30 at para 69.

> in the breach that elicited or assisted in obtaining any of the evidence of the offence. As such, there is no evidence that can be excluded pursuant to section 24(2).
>
> Therefore, Ms. Deschambault is left without a remedy for the *Charter* breach.[147]

Similarly in *Ferguson*, the accused was left without a remedy because "[t]here was no causal or temporal connection between obtaining the evidence and the unreasonable strip search of the appellant."[148] *Raugust* followed the same reasoning, providing no stay of proceedings because "the evidence to support [the accused's] charge is completely severable from the search at the detachment."[149]

However, if it can be demonstrated that the breach occurred as part of a single investigatory transaction, remedies of exclusion of evidence or a stay may nonetheless be granted.[150] For example, in *Foster*, Justice Bielby found that the evidence of the accused's statement was meaningfully linked to the *Charter* breach of the strip search, which itself turned up no evidence. Relying on *R v Flintoff*, Justice Bielby found:

> Turning know [*sic*] to a section 24(2) analysis, the recorded statement of Ms. Foster can be linked in a meaningful way to the *Charter* violation. The search and the recorded statement are part of the same chain of events. […]
>
> I find that the strip search conducted by the RCMP and the recording of Ms. Foster's statement were an integral part of the same transaction and there existed a temporal connection.[151]

Other judges have similarly refused to allow the lack of a causal connection to defeat the accused's claim for a remedy for illegal strip-searching.[152]

Another relatively common factor in decisions refusing a remedy seems to be the "good" intention, or the lack of a "bad" intention, on the part of the officers. In *FN*, Justice Feldman noted that the accused's individual circumstances were not considered, nor were "less intrusive methods of search used first to determine the necessity of such an interference with

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147 *Ibid* at paras 73–74.

148 *Supra* note 30 at para 69.

149 *Supra* note 30 at para 90 (however, the Certificate of Analyses evidence was excluded (para 89)). See also *Korzh*, *supra* note 30 at para 32; *LLS*, *supra* note 30 at paras 14–17.

150 *Hornick*, *supra* note 35 at para 99. See also *R v Flintoff*, [1988] OJ No 2337 (QL) at para 30, 1998 CanLII 632 (CA).

151 *Foster*, *supra* note 34 at paras 57, 62.

152 *Deveau*, *supra* note 15 at paras 15–16, 19; *Hornick*, *supra* note 35 at paras 99–100.

her personal privacy." Nevertheless, the accused's section 8 application was dismissed because the female police officer "intended as much as possible to limit the extent of the search" and "[w]hile the accused endured embarrassment and upset, the search and its circumstances [...] were not so egregious as to require a stay."[153]

In *NC*, Justice Brown also cited the lack of officer "bad faith" as justification for providing no remedy for the breach:

> While I have found that the police had no reasonable and probable grounds to justify the strip search incident to arrest, there is also no indication that there was any bad faith in doing [the] strip search after the arrest. […] The remedy sought is more in the nature of a punishment to the police for performing an improper search, rather than the rectification of a wrong that cannot be remedied by any other means.[154]

Justice Brown failed to elaborate precisely upon what "other means" of remedy were available in this case. In fact, the Supreme Court of Canada, in *Golden*, commented upon the inadequacy of civil remedies for illegal strip-searching:

> The cost of bringing such an action, the low amount of damages potentially recoverable and the ineffectiveness of civil actions as a remedy when real evidence was seized through an unlawful search likely explains the dearth of case law. Recent cases illustrate that damage awards in tort for unlawful strip searches remain low, and the costs of bringing a civil action would far exceed the nominal damages awarded.[155]

The justifications provided by courts post-*Golden* for refusing to grant a section 24 *Charter* remedy are puzzling. If the courts are using "good faith" in the balancing of the considerations under section 24(2) for exclusion, it then becomes important to ask what "good faith" or lack of "bad faith" means when officers flaunt the clear law as established by our highest Court fifteen years ago. This point was noted in *Fine*:

> Given that *Golden* has been the law in Canada for fourteen years, it is alarming to learn that police officers in Kelowna, according to Constable McLean, have not been properly trained, and at least in this case, not required to read the policy manual on strip searches before embarking upon one.[156]

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153 *Supra* note 30 at para 52. See also *Douglas*, *supra* note 30 at para 98.

154 *Supra* note 30 at para 28.

155 *Supra* note 6 at para 67.

156 *Supra* note 30 at para 61. But see paras 65, 102, where the judge held that the police misconduct was less serious, but not trivial. The judge found that, apart from breaching the requirement that the strip search be carried out in a private area such that it cannot be viewed

In spite of this observation, Justice Burdett nonetheless found that the police misconduct was at the less serious end of the spectrum and therefore undeserving of a remedy. Yet the Supreme Court in *R v Grant* has affirmed that "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith" and that therefore "deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence."[157]

Furthermore, a lack of intention to degrade or humiliate, as noted in some of the cases discussed above, should not amount to a mitigating factor in the section 24(2) analysis. The presence of such factors would in fact make the conduct not only a section 8 violation, but arguably a sexual assault in law. To refuse a remedy on this basis is akin to refusing a remedy for racial profiling because the officer did not harbor clear racist animus towards the suspect.

Only two cases studied involved criminal charges brought against the officer who carried out the search, and only one of those resulted in a sexual assault conviction.[158] An accused who wishes to ensure that the officer himself or herself is held accountable may prefer to seek damages in a tort case or file a police complaint. However, the chances of obtaining a satisfying remedy through these means are nowhere near guaranteed.

Of the seven tort cases involving women who reported that they were illegally strip-searched, only two resulted in the accused being awarded damages.[159] Although these few reported cases may not reflect the true number of suits—either because the cases are unreported or settled by police—very few women seem to have brought civil suits against the individual officers who subjected them to a strip search. Perhaps this is due to the sheer cost of initiating a civil action and to the fact that civil cases are generally not funded by Legal Aid services. Furthermore, it can be traumatizing and humiliating to re-live the event and to face the credibility attack that women who sue police will likely face.[160]

In two cases, female complainants brought their allegations to a human rights tribunal. In *SMS v Toronto (City) Police Services Board*, the female Muslim claimant described how two female police officers forced her

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by anyone other than the individuals conducting the search, the officers properly followed all of *Golden*'s other guidelines. See also: *Ebanks*, *supra* note 33 at para 52.

[157] *Supra* note 144 at para 75 [citations omitted].

[158] See *Desjourdy*, *supra* note 9; *Greenhalgh*, *supra* note 24, respectively.

[159] Damages: *Curry*, *supra* note 38 (damages awarded for s 10(b) breach at para 33; for further explanation, see *supra* note 38); *Nagy*, *supra* note 37 at para 126.

[160] Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2003) at 249–59.

to remove her hijab and all of her clothes.[161] She also said that she was transported to another police station by a male officer, still without her hijab.[162] Although the Ontario Human Rights Tribunal noted that the claimant "found her interaction with the police to be a distressing experience,"[163] the claim was dismissed according to the following reasoning:

> She has not indicated what further accommodation she required or could have been offered to her by the TPSB in these circumstances. Accordingly, there is no reasonable prospect of success for her allegation that this was discrimination on the grounds cited and it is dismissed on that basis.[164]

This reasoning places the onus of suggesting accommodation measures on the claimant in order to substantiate a discrimination claim. This is in addition to another hurdle of bringing a case involving strip-searching to a human rights tribunal—proving that the strip search was not only unlawful, but actually *discriminatory* on an enumerated ground in the relevant legislation.[165]

The other tribunal case, *Forrester v Peel (Regional Municipality) Police Services Board*, involved a claim by a pre-operative "transsexual woman" who was strip-searched by male police officers and "split-searched" by male and female police.[166] The Ontario Human Rights Tribunal commented extensively on the negative impact of strip searches by male police officers on "transsexual women,"[167] and ordered the Peel Police Services Board to provide such detainees with a choice of either a male or female officer to strip search them.[168]

Another possible recourse for a woman who has been strip-searched would be to file a complaint with a police complaints body. Even though this process cannot yield any form of compensation, it can result in discipline for the officer. In Ontario, however, it is impossible to assess whether strip searches form the basis of a significant number of complaints. Although the annual report tells us that 855 complaints regarding "unlawful

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161 *Supra* note 41 at para 13.

162 *Ibid* at para 16.

163 *Ibid* at para 48.

164 *Ibid* at para 55.

165 See Ontario's *Human Rights Code*, RSO 1990, c H.19, ss 1–9; *Canadian Human Rights Act*, RSC 1985, c H-6, ss 2, 3(1), 4.

166 *Supra* note 41 at para 1. In the "split search," the male officers searched the claimant below the waist, and female officers above the waist (para 5).

167 *Ibid* at paras 87, 388.

168 *Ibid* at para 25.

or unnecessary use of authority" were filed in 2013–14,[169] there is no way to discern from the public data how many of these complaints are based on conduct related to strip searches.

However, it can be said with relative certainty that this avenue of redress is more illusory than real. The 2013–14 report indicates that the Office of the Independent Police Review Department (OIPRD) received 3114 complaints in this period, 87.2% of them being related to "police conduct"—or 2715 complaints. The OIPRD screened out the majority of the 3114 complaints (1569 complaints) and screened in 1297. Of these, 1091 were sent for investigation by the same police service from which the complaint arose. Of those complaints investigated, 693 were closed after investigation, 127 were closed after the complainant requested a review of the investigation, 314 were withdrawn by the complainant during the investigation, and 216 were "informally resolved" during the investigation. Overall, the OIPRD reviewed 2697 complaints about police conduct between 2013 and 2014 (this includes unresolved complaints from prior years) and of these, 2516 were declared unsubstantiated; 109 less serious allegations were substantiated; and 72 serious allegations were substantiated.[170] This means that fewer than 7% of reviewed claims were substantiated. These meagre numbers give little real hope to those who seek acknowledgement of police abuse of power by illegal strip-searching through a police complaint. However, the OIPRD has recently announced that it is undertaking a systemic review of Ontario police policies and practices for strip-searching, raising the possibility that light will be shone upon these practices.[171]

11. Conclusion

The cases reviewed in this study demonstrate that police in Canada are indeed violating women's rights through illegal strip-searching. Although 43 claims may seem like a small number of cases, it is quite possible that many more women have been affected by such practices. Not all cases are reported in the databases and we will never know how many women initiated civil suits or made complaints to civilian or police review boards. More importantly perhaps, unless a citizen is charged with a criminal offence, we are quite unlikely to see their *Charter* violation claims litigated.[172]

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169 Office of the Independent Police Review Department, Annual Report 2013–14 at 15.

170 *Ibid* at 27.

171 Office of the Independent Police Review Director, "OIPRD to Review Police Practices for Strip Searches" (26 July 2016), online: <www.oiprd.on.ca/EN/PDFs/OIPRD.News.Release-PracticesforStripSearches_E.pdf>.

172 *Grant*, *supra* note 144 at para 75.

Furthermore, if strip-searching is experienced as sexual assault, it seems likely that the vast majority of women will not report it. For example, even in the prosecution of Oklahoma City police officer Daniel Holtzclaw for raping at least 12 women in his custody, most of the women "did not come forward until police identified them as possible victims after launching their investigation."[173] We simply cannot expect that women who have been illegally strip-searched will report the abuse to police—the same institution that facilitated the strip search.

Women strip-searched by police may also face the same barriers that women strip-searched by prison guards face in terms of reporting. Professor Debra Parkes, former president of the Elizabeth Fry Society of Manitoba, notes the factors discouraging women in prisons from coming forward with their claims about strip searches include: a lack of information about their rights; practical barriers such as a lack of literacy; a lack of legal aid; a belief that making a complaint would be futile; and a fear of reprisal from correctional staff.[174] The particular study in this article was conducted in Manitoba, where over 73% of the province's population of women prisoners is Aboriginal.[175] The forms of oppression, both individual and systemic, experienced by Aboriginal women may add a further barrier to reporting unauthorized strip-searching to authorities.

Given the clarity and simplicity of the Supreme Court ruling in *Golden*, it is difficult to understand why police continue to engage in unlawful strip searches. Apart from the fact that few women will be able to report and thereby put pressure on police to conform to the law by challenging this conduct, several other factors provide insight. One explanation may lie in the very uneven jurisprudence discussed above. Given the patterns of unlawful strip-searching, it is unfortunate that some courts are not heeding the Supreme Court's advice in *Grant*:

> In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.[176]

It seems that police need not fear criminal charges for their actions, and they may believe that their testimony will be preferred over that of women who complain, particularly where the allegation is serious. As well, police have fairly good odds in persuading judges that their acts did not amount to a strip search or that even if *Golden* was violated, the breaches were unintentional,

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[173] Merchant & Murphy, *supra* note 24.

[174] Debra Parkes et al, "Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba" (2008) 26:1 Windsor Yearbook of Access to Justice 85 at 102–03.

[175] *Ibid* at 86.

[176] *Supra* note 144 at para 75.

relatively minor, or otherwise ineligible for a *Charter* remedy. While some judges have been unequivocal in naming and condemning this form of police abuse, others have been more forgiving.

Another explanation for why the law, thus far, has been ineffective in stopping the illegal strip-searching of women can be found in the apparent gulf between what the Supreme Court has called unlawful conduct and what police continue to assert is their prerogative. In many cases studied, police asserted "policy" as the lawful basis for their actions. The widespread failures of police leadership and training around the constitutional parameters of strip-searching, emphasized by several judges, are suggestive of police resistance to the constraints imposed by the judiciary.

The penalty decision in Desjourdy's disciplinary hearing for his strip search of SB supports this theory. The Reasons for Decision by retired police superintendent Robert Fitches assert that as a result of her behavior, SB's shirt and bra were cut off "justifiably,"[177] even though a criminal court had already ruled that the strip search was both unlawful and a breach of SB's *Charter* rights.[178] According to the superintendent, the only problematic aspect of Desjourdy's behaviour was leaving her topless in a cell for more than three hours. The Disposition notes that Desjourdy had also been disciplined for his actions only days earlier against another female detainee, whereby the "common denominator" was "female and intoxicated."[179] According to Fitches, Desjourdy showed "poor judgment, or perhaps some anger issues"[180] in his behavior. Yet the superintendent concluded that in light of Desjourdy's "remarkable" personal and professional qualities,[181] there was no need to emphasize either general or specific deterrence.[182] Fitches found that Desjourdy's actions were inconsistent with his exemplary record and was prepared to assume that "something was amiss"[183] and that

177 Ontario Civilian Police Commission (OCPC), *In the Matter of Ontario Regulation 123/98 made under the Police Services Act, RSO 1990 CP 15 and Amendments Thereto; and in the Matter of Sergeant Steven Desjourdy #1255 and the Ottawa Police Service* (21 October 2014) at 1 [Desjourdy OCPC Penalty Hearing]. See also Reasons for Disposition: Ontario Civilian Police Commission (OCPC), *In the Matter of Ontario Regulation 123/98 made under the Police Services Act, RSO 1990 CP 15 and Amendments Thereto; and in the Matter of Sergeant Steven Desjourdy #1255 and the Ottawa Police Service* (8 April 2014), online: <www.ottawapolice.ca/fr/news-and-community/resources/Decision_Sgt_Desjourdy.pdf>.

178 *SB*, *supra* note 8 at paras 26–27, decided 27 October 2010 as compared to the disciplinary hearing decided 21 October 2014. In *Desjourdy*, *supra* note 9 at paras 108–109, decided 3 April 2013, charges were dismissed against Desjourdy for the sexual assault of SB related to the same strip-search that was found to have violated her s 8 rights in 2010.

179 Desjourdy OCPC Penalty Hearing, *supra* note 177 at 11.

180 *Ibid*.

181 *Ibid* at 12.

182 *Ibid* at 10.

183 *Ibid* at 13.

therefore there was no need for Desjourdy to "reform." Loss of pay for 20 days of service was the penalty imposed: a relatively minor sanction, but a common one for police misconduct.[184]

The lack of public availability of police force strip-search guidelines across major Canadian cities may also be suggestive of police resistance to the Supreme Court's limits on strip-searching. Toronto and Vancouver are the only police forces currently providing their search of person guidelines on their websites.[185] We attempted to obtain the guidelines from the forces of other major cities, but only two responded positively to our inquiries, and even then they requested that the information provided not be published. With regard to *Golden*'s 11 specific guidelines for *Charter*-compliant strip searches, Vancouver generally complies with 10, but Toronto makes specific reference to a mere three.[186] Neither notes that *Golden* requires that a strip search involve only a visual inspection of the genital/anal areas without physical contact.

Professor Tanovich has also commented on the role played by the Attorney General and prosecutors in the toleration of illegal strip-searching. He criticized the Crown for aligning with police rather than with justice:

> The Attorney General has an ethical and constitutional obligation to ensure that his prosecutors remain independent and do not "align" themselves with the police […] [I]n the [*SB*] case, we see perhaps one of the most egregious instances of "police alignment." As we now know […] a case management team as well as senior Crowns in the Ottawa office approved her prosecution. So why, upon considered reflection, did they reach their decision when the shocking videotape evidence revealed that she was the victim, not the police? Why did they ignore the very

[184] *Ibid* at 14. See also Richard Warnica, "Police offences rarely punished", *The Ottawa Citizen* (13 November 2015) C1, C6.

[185] This search included federal, provincial, and metropolitan police forces. Toronto's policy is available online: <www.torontopolice.on.ca/procedures/get.php?search_of_persons.pdf> [Toronto Search Procedure] and includes a policy specifically pertaining to searches of transgender/transsexual people, online: <www.torontopolice.on.ca/procedures/get.php?search_of_persons_transgender_transsexual_persons.pdf>. Vancouver's is available online at: <www.vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>. The link to Vancouver's policies indicates that "The Vancouver Police Department Regulations and Procedure Manual available to the general public via this website does NOT represent the entire Regulations and Procedures Manual, as a limited number of sections have been vetted to ensure confidentiality regarding specific operational deployment strategies and investigative techniques", online: <www.vancouver.ca/police/organization/planning-research-audit/regulations-procedures-manual.html> [emphasis in original].

[186] Toronto Search Procedure, *supra* note 185, only specifically mentions three of *Golden's* guidelines: (1) search is conducted in a private area, (2) officer(s) of the same gender, (3) detainee has the option to remove the item himself (if body cavity search).

> real possibility that [SB] was sexually assaulted by the officers? And why did they ignore that there was, in fact, no offence committed since individuals are entitled to use reasonable force (such as kicking) to resist an unlawful arrest and assault by police? There is no reasonable explanation other than they stepped out of their shoes as ministers of justice to protect the officers.[187]

In conclusion, our study indicates that the wrong of illegal strip-searching of women is not universally condemned by our justice system, whether by police, prosecutors, or judges. The room left open by the reported cases allows these practices enough immunity from scrutiny and condemnation to persist in Canadian society despite those cases that do recognize the wrong. The specific harms inflicted on women, particularly those stripped by or in the view of male officers, are barely perceptible in the jurisprudence. It would clearly be deeply disruptive of unauthorized police strip-searching of women if this practice was to be named sexual assault, or at least criminal assault, by prosecutors and judges.

At a time when the rate of women's reporting of sexual assault to police has dipped to 1-in-20,[188] it seems important to reflect on what our legal system tells police and women themselves about the inviolability of women's bodies. As one woman illegally strip-searched at the Prison for Women testified before the Arbour Inquiry:

> How they can walk in there, rip my clothes and say "It's okay, I was doing my job; it was professional." […] I don't know how any man can do that to any woman and say it was their job. As far as I know, it's a crime. […] And if something like that happened down the street, that's a crime. If you go in an apartment and rip a girls' [*sic*] clothes off, that's a crime. That's sexual assault.[189]

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187 Tanovich, "Crown Should Align", *supra* note 133.

188 See Statistics Canada, *Police-reported crime statistics in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 22 July 2015) at 17 (found by dividing the prevalence rate 58 by 100,000 and multiplying that by 100% to get 5%, or 1-in-20), online: <www.statcan.gc.ca>. The report also recognizes that reporting estimates for sexual assault are likely underestimated (at 17).

189 Arbour Inquiry, *supra* note 2 at 75.