

# The Criminal Law Quarterly

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## Editorial

### Strip Searches

Strip searches are sometimes a regrettable necessity of the arrest process that may be necessary to discover weapons and preserve evidence. Nevertheless as the Supreme Court recognized a decade ago in *R. v. Golden*, [2001] 3 S.C.R. 679, strip searches are inherently demeaning and degrading. They should never be used as a matter of routine policy of search incident to arrest. In every case, there must be reasonable and probable grounds that the search is required to discover weapons or prevent the loss of evidence related to a valid arrest.

The Metro Toronto police reported to its police service board this summer that they conducted 31,072 searches in 2010 that involved the removal of the detainee's clothing, or in common parlance, "strip searches". They reported that an "item" was found in 9,448 of these cases without specifying whether the item was evidence or weapons or perhaps something more innocuous such as a piercing.

Reasonable and probable grounds is not a measure of perfection. Nevertheless, one would suspect that it would produce something more than a one-third success rate in discovering weapons or evidence related to the arrest, let alone "items".

The large number of strip searches conducted each year should be compared to the number of body cavity searches that were reported by the Toronto police: 38 in 2010 with "items" being found in 14 cases.

Body cavity searches are more difficult to perform because under Toronto police policy, they are supposed to be conducted at a hospital by a medical practitioner. In addition, the policy provides for an alternative of isolation should the detainee refuse the search. Although it may not be feasible to provide similar policies for strip searches, it does suggest that stricter standards for cavity searches have decreased their use and decreased the percentage of searches in which nothing is discovered.

There can be semantic arguments about whether strip searches are routine, but that is not the constitutional standard. The fact that strip searches are not conducted on all or even most arrestees is not good enough. The standard is that each search must be justified on reasonable and probable grounds. It is clear from the Toronto police's own figures that strip searches are performed in a very large number of cases — about 85 strip searches each day in 2010. In more than two-thirds of the strip searches, the police's own figures reveal that nothing was discovered.

The Toronto police are not alone and there are reports of high levels of strip searches from many other police forces. What can explain this disturbing state of affairs?

The publicly available procedures from the Toronto police suggest that there has been some attempt to implement *Golden*. The procedures provide that police officers must make a case-by-case assessment of each level of search required and provide reasons in their memorandum book and complete a search of person template. In addition, the officer in charge must be consulted before a strip search is conducted.

In theory, there are plenty of remedies for strip searches that are not justified by reasonable and probable grounds. If evidence is discovered, it could be excluded under s. 24(2) because of the seriousness of the violation both in terms of its adverse effects on the detainee's dignity and privacy and because of a failure to follow limits on strip searches clearly established by the Supreme Court in *Golden*.

Even if as occurs in most cases, no evidence is discovered as a result of the strip search, it may theoretically be possible to argue that the arrest and the obtaining of other evidence was tainted by the strip search if there was a close causal or temporal connection between the unconstitutional strip search and the obtaining of other evidence. That said, judges may be reluctant to exclude evidence of drugs and weapons found after a strip search.

Some courts have been so appalled by strip searches that they have stayed proceedings. See for example *R. v. Bonds*, 2010 ONCJ 561. Nevertheless, this is a difficult remedy to justify under the Court's restrictive stay doctrine.

Another possible remedy is damages. The Supreme Court in *Ward v. Vancouver (City)*, [2010] 2 S.C.R. 28 upheld a \$5,000 damage award under s. 24(1) of the Charter when Cameron Ward, a prominent Vancouver civil rights lawyer, was unconstitutionally strip searched a year after the Supreme Court decided *Golden*.

The Court in *Ward* rejected arguments by the government that damage awards would overdeter individual police officers, and it indicated a proper concern for compensation for non-pecuniary harms caused by strip searches, vindication of the Charter and deterrence of Charter violations.

Like the exclusionary remedy, however, the damage remedy may largely be illusory. Although the Court did not indicate that \$5,000 was either a

starting point or a cap for damages from an unconstitutional strip search, it is not economically rational for persons to litigate against the police and face the risk of adverse cost awards in the superior courts after the Court's otherwise promising decision in *Ward*. Small claims courts may be a more practical venue, but the Supreme Court's pessimistic conclusion in *Golden* at para. 67 that "the costs of bringing a civil action would far exceed the nominal damages awarded" likely still holds true in most cases.

Police complaints are also an option, but as in civil litigation they require complainants prepared to draw attention to themselves and invest in a process that may often not produce tangible benefits for them. Criminal prosecutions of police officers for assault or even sexual assault are also possible.

In *Golden* at para. 103, the Supreme Court stated that "Legislative intervention could be an important addition to the guidance set out in these reasons concerning the conduct of strip searches incident to arrest. Clear legislative prescription as to when and how strip searches should be conducted would be of assistance to the police and to the courts."

Parliament has not acted, but it is difficult to imagine legislation imposing restrictions additional to the constitutional minimum in *Golden* such as a warrant requirement. The Toronto police policy already provides for the possible intervention of the officer in charge as well as guidance on the manner in which strip searches are conducted.

Despite sustained attention by the courts to this issue over the last decade, we are left with the disturbing reality of high and increasing numbers of strip searches being conducted. Some way must be found to make strip searches more difficult for the police to conduct while also ensuring that they are available in those cases where there are reasonable and probable grounds to believe that they are necessary to discover evidence and preserve evidence.

Increased media attention and increased police reporting of the number of strip searches is a good first step but much work remains to be done. Most of that work needs to be done by police forces and police boards now that the courts have done just about all they can to restrict the use of strip searches with apparently so little success.

The recent controversy over strip searches is an important reminder that it remains much easier to change the law in the books than the law in the detention cells.

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