Bubbles of Governance: Private Policing and the Law in Canada

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As one enters terminal three at Toronto’s Pearson International Airport, one notices the newness of the structures, the cleanliness of the walls and ceilings, and the brightness and bustle of the building. Passengers move about various cues for airline tickets, baggage checks, and car rentals. Perhaps less noticeable may be Canada’s federal police talking to a pair of constables from the Peel Regional Police Service. As they finish their discussion, the RCMP officers begin to patrol, nodding in acknowledgement to a pair of security officers from Excalibur Security making similar rounds. Further along, they watch two armed Brinks’ guards carry money satchels from a nearby currency exchange kiosk. They continue to wind by both Commissionaires issuing parking tickets and Group 4 Securitas security guards checking the luggage of passengers. On the lower level, Canada Customs agents check a suspicious traveller and call the R.C.M.P. and an Immigration Officer to attend. In a processing centre just off the tarmac, security guards from Metropol Security meet with the immigration officials as the suspicious detainee is handed over to the security firm for transport to the privately-run Mississauga Immigration Detention Centre. The detainee is handcuffed and placed in the caged rear of an unmarked van until his arrival. The Centre is on the airport commercial strip and disguised as just another inconspicuous motel. When one gets close enough, however, a 12 foot high chain-linked fence topped with barbed wire encircling the rear of the building comes into view.

Just an unremarkable tour of Canada’s busiest airport? Perhaps, but after taking this short imaginary stroll you will have come under the gaze of three federal policing agencies, one municipal police service, a quasi-public security force, four privately contracted security companies, and an unknown number of in-house airline security agencies all working alongside one another in a generally unproblematic chain of surveillance. This is the nature of securing peoples and properties in a risk market system. The RCMP took on the policing contract at the airport but must work alongside the local police service to conduct investigations and pass information on offenders and other threats. Part of the contract.

involves hiring a private security firm to undertake more monotonous policing functions. Similarly, the RCMP hired the Corps of Commissionaires to issue parking tickets so that their officers did not have to do so. The baggage-inspection contract was a separate bid won by the security multinational Group 4 Securitas. For their part, the Department of Immigration also contracted out the MIDC and detainee transport to Metropol Security.

There are myriad threats to social order in an airport, creating myriad opportunities for the selling, trading, and contracting of security provision. All of the providers, however, are governed by the same market logics for maintaining their clients: provide a service for a fee that is competitive and attractive to the buyer. In the US, growing litigiousness in the civil courts has resulted in institutions taking steps to minimise liability by enforcing regulations in certain spaces.\(^1\) Enforcement necessitates surveillance and agents to point out and react to violations. By attempting to minimise the risk of liability, therefore, social institutions come to rely more heavily on private security agents and technologies.

The purpose of this paper is to comment on the continuing entanglement of public and private policing by referring to the socio-legal context in which the overlap of mandates has come to fruition. Additionally, there exists a more general need to update scholarship on the powers of private security personnel in Canada. To the best of our knowledge, the last published legal analysis of private policing was an important pre-Charter examination by Stenning and Shearing.\(^2\) Given the rapid growth of the private security sector\(^3\) and the increasing likelihood that these private firms come to be engaged in 'parapolicing' activities similar to those of the public police, an updated examination of their legal status and powers is long overdue.

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\(^1\) G. L. Priest, "The New Legal Structure of Risk Control" (1990) 119 Daedalus 207.


\(^3\) If there is one 'truism' about private security, it is that the size of this sector has been expanding at a considerable rate when compared to public police services in North America. In the United States, the private security guardforce overtook the public police around 1977. In 1990, private security agents outnumbered the public police by about three to one in the U. S. A. See W. C. Cunningham, J. J. Strauchs & C.W. Van Meter, Private Security Trends 1970-2000: The Hallcrest II (MacLean, VA: Hallcrest Systems Inc., 1990). In Canada, there has also been a steady growth in private policing since the end of the Second World War. Current interpolations also suggest that private security officers outnumber the public police by over a three to one ratio in Canada. See C. D. Shearing, M. P. Farnell & P. C. Stenning, Contract Security in Ontario (Toronto: Centre of Criminology, 1980), C. Leclair & S. Long, The Canadian Security Sector: An Overview, Report (Toronto: Industrial Adjustment Committee on the Security Sector, 1996).
The study of private policing has spawned an interesting array of theoretical models to explain both the growth of the private security sector and its relationship to the state. It is not our intention here to conduct a comprehensive review of extant theorizing on the private police. But we do mean to point out two key conceptual relationships relevant to our examination of the powers of private security personnel in Canada that emerge from these analyses. These are: (1) the relationship of the private police to the state; and (2) the relationship between the private police, private property, public spaces and police services.

Private Police and the State

It is no surprise that many theorists of the police and the state are also accomplished structural analysts. This is because the very nature of central socio-legal dichotomies such as public-private, central-local, and labour-management are endemic to discussions of polis* and their mobilizations and missions. Some vulgar Marxists argue that private security firms are merely ‘private armies’ utilized by the bourgeoisie to quell labour unrest whenever needed, and enforce workplace order at all other times. There is compelling evidence that most western democracies experienced varying levels of state-sanctioned private policing under the direction of industrialists resolved to crush labour unionism. While the ‘iron fist’ of private policing was being exercised in the United States in an emerging industrial period (c. 1850-1940), Canadian labour, however, was being mercilessly subjugated by the fabled federal, and public R.C.M.P. in Regina and Estevan Saskatchewan, and during the Winnipeg General Strike.

Other Marxian approaches have focused on the private police as providing a legitimating or ‘buffer’ function for the bourgeois state. The fiscal crisis of the state is thus considered to result in a recrudescence of

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4 The term ‘police’ has been linked, historically, to the very idea of the city-state in Ancient Greece and later with the notion of safety and security. See also C. D. Shearing, “The Relations Between Public and Private Policing” in M. Tonry & N. Morris, eds., Modern Policing (Chicago: University of Chicago Press, 1992) at 219 [hereinafter “The Relations Between”].


policing for profit. In other words, the standard organization of policing is commodified under the capitalist mode of production. Thus, although we have experienced an epoch of mainly public policing, security provision under a capitalist superstructure will naturally return to a profit-motivated venture. These perspectives have elsewhere been critiqued for their teleological compulsions and for the fact that they do not describe the modern organization of either the fractured state or policing arrangements. Rather than a reserve army of strike-breakers and agent provocateurs, the modern organization of private security has been described as reflecting an evolving corporate loss prevention logic. This is not to minimize the fact that private security agencies can and do act at the behest of capitalists to protect their assets. Populations today, (be they workers, customers, or the general public) are controlled by a constellation of actuarial practices designed to minimize risks (both personal and litigious) and maximize ‘enjoyment.’

This is the “not so Mickey Mouse” Disney order of responsibilization and the dropping of ‘snowflake’ notices in order to manage dangers and losses to profit as well as manufacture a happy and compliant target population. In antithesis to perspectives that place the state at the centre of analysis, Foucauldian theorists have argued for local, fragmented conceptions of power that incorporate notions of discipline and surveillance. The state is thus de-centred in these

14 See also R. V. Ericson & K. D. Haggerty, Policing the Risk Society (Toronto: University of Toronto Press, 1997) for a description of how risk systems come to dominate the mobilizations of the public police in Canada.
conceptions, as neo-liberalism and governmentality are placed at the forefront. For policing, the implications become obvious:

By focusing primarily on the semi-autonomous relations of policing domestic security developed by private insurance companies, it has emerged quite clearly that the major processes of law enforcement are located in the nonstate field, and that these are formed in very significant ways independently of state initiatives for control.

Thus, in opposition to what they (often erroneously) see as Marxist Sociology's inherent reductionism and essentialism, 'postmodern' policing theorists insist that the objectives of governmental power are multiple, and that these techniques are dispersed and differentiated through locales largely beyond the state. Shearing has extended this argument to include the private police by noting that security is increasingly becoming a more 'generic function' that is no longer a monopoly of the state. The state thus becomes only one guarantor among others: "These emerging conceptions conjure up an image of the world in which corporate 'private governments' exist alongside state governments." In this emerging redistribution of security, neither the state nor the 'private governments' of corporations have ultimate legitimacy in the governance of policing and the protection of people and property. Given these multifarious relations, it is wise that we re-visit both the legal status and Criminal Code provisions that govern actions by private security personnel. Perhaps more important than provincial Security Guard Acts and the Code is the wide range of activities security agents engage in absent (or outside of) legislation, through contractual arrangements or simple consent and compliance. In any case, Canadian common law has continued to develop on the extent to which private security personnel (or private citizens) can rely on consent to conduct searches and seize materials to be used in evidence.

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17 "The Relations Between", supra note 4 at 425.


Private Property and the Private Police

The relationship between the owner and/or occupier of private property and the 'police' of that private property must also be considered in order to understand the late modern organization and provision of security. Perhaps the most well known consideration of the relationship between private property and policing is the oft-cited 'mass private property' thesis by Shearing and Stenning. The rise of large land holdings by corporations has resulted in a fundamental shift in the responsibility for maintaining peace. Expansive public access mall-ways and thru-ways have resulted in the squeezing out of public-area sites for assembling and shopping. This is partially the result of public markets being replaced by private malls so that the territories of public policing have shrunk in relation to private policing. Large corporate entities thus become legally responsible for the safety and security of 'denizens' passing through their particular 'bubbles of governance.'

The relationship between property and security is central to understanding the political economy of policing. These fundamental relationships change under particular modes of production, eliciting divergent means of achieving security. While late modern policing arrangements are undoubtedly tethered to the growth and/or shrinkage of public-private properties, the provision of security nonetheless remains a commodified process under capitalist relations.

This means that the law must necessarily protect the interests of private landowners if the current mode of production (or information) is to be supported. The sanctity of 'private peace' versus the public 'King’s Peace’ which extended to the King’s highways and other common lands, is considered foundational to the organization of modern society. This position is best exemplified in the famous Seamayne's Case dictum: “The House of everyone is to him as his castle and fortress as well for his defense against injury and violence, as for his repose.”

This right is enshrined not only by contract and tort but more importantly through provincial legislation forbidding trespass. The

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26 Seamayne (1604) 5 Coke 91; 77 E.R. 194 at 195.
expansive powers at landowners’ disposal allows them to prohibit activities on their properties under provincial statutes. Clearly, the ability to set standards for conduct on private property is made possible not only through the capacity of landowners to deny access to those who do not abide by the rules, but is also enshrined in Canadian provincial trespass Acts that additionally outlaw actions prohibited by the landowner. Not only does trespass allow the denial of access, but provisions for demarcating ‘prohibited activity’ recognize the legitimacy of private sites of governance. Private security personnel, as agents of the landowner or occupier, are thus empowered to enforce these ‘private codes.’

This raises some interesting issues concerning the rights of landowners to arbitrarily exclude persons from their property, especially in large public spaces such as shopping malls. This concern resulted in the formation of an Ontario Task Force after allegations were made concerning unduly restrictive enforcement of the Trespass to Property Act by owners of publicly-used property. The Report noted that specific ‘target groups’ such as young visible minority group members were being banned from these areas without the owner or security officer having to offer a rationale. For this reason it is important that we comparatively examine the various provincial trespass Acts in Canada.

In this paper, we argue that (1) powers of arrest under provincial trespass Acts can be expansive, allowing security officers a tremendous breadth of intervention and arrest. (2) Although the legal grounds for arrest by a private citizen or security officer are narrower than for a peace officer, the courts have effectively loosened these constraints in cases of wrongful imprisonment or arrest. This may result in the de facto expansion of private security guard’s arrest powers. (3) On the other hand, property owners and their agents are particularly open to tort actions, even if ‘innocent errors’ are made. (4) Finally, while it seems that a citizen’s arrest does not escape constitutional scrutiny, this does not mean that a security officer is held to the same constitutional standards as a peace officer in relation to arbitrary detention, security of the person, right to counsel, and search.

27 We will discuss the specific sections of provincial trespass Acts that make this possible in a later section of this paper.
Methods and Site of Inquiry

This paper is informed by an assessment of both Canadian case law and legislation (including Criminal Code and provincial statutes). Some additional ethnographic information on one particularly aggressive security firm in Toronto provides examples of how law is employed (and stretched) in praxis. In one area, this ‘Law Enforcement Company’ polices a neighbourhood the size of nine city blocks. The company has negotiated arrangements with at least two different landowners of over a dozen building complexes allowing Intelligarde security officers to leave sites unattended and assist their partners at adjacent properties in need of assistance. This unique contractual reciprocity benefits all clients because culprits can be pursued, captured and banned without fear of crime displacement. It also creates a multi-cliented, multi-tasked, multi-territoried, co-operatively governed police service that closely mirrors the municipal police. Geographically, the area is bordered by Howard Street to the north, Wellesley Street to the south, Sherbourne Street to the west and Parliament Street to the east. If we include the handful of MTHA buildings dotting the same territory, private agents police over three square kilometres of high-rise buildings, walkways, and roadways, as well as over 30,000 working-class persons in the heart of Toronto. Cityhome, Intelligarde’s major downtown client, is a publicly funded corporation with elected tenants’ associations who oversee security provision.

The observational data is based upon a larger study conducted by the primary author30 in which interviews with Intelligarde staff, and an ethnography of private security routine practices were analysed. Including both fieldnotes and interviews, Rigakos recorded contacts with approximately half of Intelligarde’s 141 staff. The ethnographic fieldwork produced 350 pages of notes and approximately 126 hours of observational data. Daily field observations lasted from one to 14 hours between September and early November 1997.

Arrest

A security officer can make a lawful arrest as a citizen or agent of a property owner under various provisions of the Criminal Code. Various trespass Acts allow for an agent of a property owner to arrest for the offence of trespass or for engaging in prohibited activity on private property. A security officer acquires his or her power of arrest from the common law, the Criminal Code of Canada31 or by specific statute. A

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30 See generally “Hyperpanoptics as Commodity”, supra note 11.
A private security officer is usually engaged in providing the service of private security to others, and thus does not fall within the statutory definition of peace officer found under s. 2 of the Code. A private security guard cannot arrest as a peace officer under s. 495 of the Code. Instead, under s. 494(1)(a) a citizen (including a security officer) who finds a person committing an indictable offence can arrest. Also, under s. 494(1)(b) a citizen may arrest a person who is freshly escaping someone who has lawful authority to arrest. Section 494(2) allows an agent of the owner or lawful possessor of property (e.g., a security officer) to arrest anyone found committing a criminal act on or in relation to that property. Judicial considerations of the power of arrest under the Code confirm that a security officer’s power of arrest is no different than that of any other ordinary citizen. Some provincial acts dealing with trespass allow for the agent of a property owner to arrest a person if he or she satisfies the definition of trespasser.

In order to effect a lawful arrest, security personnel making an arrest under the Criminal Code usually must find the arrestee committing the offence. Section 494(1)(a) of the Code reads:

(a) (1) Any one may arrest without warrant a person whom he finds committing an indictable offence.

Here a lawful citizen’s arrest without warrant requires the arresting person to see enough to know that an indictable offence has been committed; that is, he or she must see the essential elements of the offence being committed. In McCarthy, the Court found that a situation where a citizen who did not actually see the person he arrested kick his car but nonetheless heard the bang and turned to see only one possible suspect seemed to “constitute a case of finds committing.”

A minority position of courts has entertained the notion that ‘apparently’ finding one committing an offence is sufficient to make an arrest lawful. Gonzalez accepts the test of ‘apparently committing’ with reasonable grounds. This position is supported, it is argued, by the Supreme Court of Canada majority decision Biron. In Biron, s. 450(1)(b) (now s. 495(1)(b)), which allows a peace officer to arrest without warrant a person he or she finds committing a criminal offence,

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36 Gonzalez, supra note 34.
37 R. v. Biron (1975), 4 N.R. 45 [hereinafter Biron].
was interpreted to include where a peace officer finds a person apparently committing an offence. Here, under appropriate circumstances, a peace officer would be justified in arresting an accused who apparently committed an offence, even if an offence was found not to have been committed. Some lower courts have posited that this interpretation be extended "by parity of reason" to the similar provisions under s. 494(1)(a) dealing with a warrantless arrest by a citizen of a person found committing an indictable offence. Clearly, this expands the powers of private security personnel to where their authority would be approaching that of a peace officer.

This is not an approach adopted (or even mentioned as a possibility) by most jurisdictions. Indeed, in Kendall, the Court directly spoke out against importing the word 'apparently' into ss. 494(1)(a) or 494(2) because it creates a "more potent power of private arrest" than is intended by the Code, essentially giving citizens similar arrest powers as police officers. Still, the debate remains.

While s. 494(1) requires the arrestor to find the arrestee committing an indicatable offence, s. 494(2) allows for an arrest by the agent of a property owner for either a summary or indictable offence. Section 494(2)(b) reads:

494(2) Any one who is
(b) a person authorized by the owner or by a person in lawful possession of property may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

This section of the Code is rarely mentioned in the case law. Here ‘finds committing a criminal offence’ means observing either an indictable or summary offence being committed. However, most arrests mentioned in the case law are in response to an indictable offence or at least to a hybrid offence; that is, an offence that is indictable unless the Crown elects to treat the matter as a summary offence. While this section of the Code is not widely cited, its potential importance bears mentioning. For example, s. 175(1) of the Code lists causing a disturbance, indecent exhibition or loitering "in or near a public place" as offences punishable

38 Ibid. at 53.
41 In R. v. Huff (1979), 50 C.C.C. (2d) 324 at 328, the Alberta Court of Appeal decided that the 'finds committing an indictable offence' requirement could be satisfied if one found another committing a 'hybrid' offence, an offence punishable by indictment or by summary conviction on election by the Crown.
on summary conviction. If these offences occur in a shopping mall, which is both a public place and private property, presumably private security may arrest using the Criminal Code. Although, as we shall see, provincial trespass Acts provide ample authority to effect arrests in these instances, making the use of the Code less appealing.

A not uncommon scenario involving an Intelligarde security officer in a shopping environment occurs when a store employee, perhaps a cashier, finds a shopper committing an offence and thus has authority to make a citizen’s arrest, and while ‘pursuing’ the suspected individual enlists the support of store security. This is quite common in shopping areas such as the Jane-Finch mall. In fact, Rigakos42 has found that almost 30% of reported theft-related incidents on Intelligarde properties resulted in an arrest while the most common occurrences are tenant complaints or information. Here the security officer cannot rely on s. 494(1)(a) or s. 494(2)(b) to legitimize the pending arrest. Instead, he or she must rely on the information of others. Section 494(1)(b) reads:

494 (1) Any one may arrest without warrant
(b) person who, on reasonable grounds, he believes
(i) has committed a criminal offence, and
(ii) is escaping from and freshly pursued by persons
who have lawful authority to arrest that person.

A security officer can therefore arrest without finding the arrestee committing an offence. The reasonableness of the guard’s belief that the offence has been committed becomes the standard by which to judge the lawfulness of the arrest. Thus if the arrest turns out to be without merit, but the security officer’s belief is genuine and reasonable, it is the person who first claimed the authority to arrest who is open to a claim of false imprisonment, not the security officer who reasonably relied on the information of a person without lawful authority to arrest. This is why security officers in aggressive parapolicing organizations are schooled to take up chases when merchants or tenants are attempting to effect arrests. Joining the arrest is less risky to the security firm and is an important display of solidarity in support of ‘corporate citizen.

In Lebrun, an action of false imprisonment against a grocery store succeeded because the store manager did not have sufficient grounds for instructing a police officer to arrest a customer. The Court maintained that the defendant store had “brought about the constructive arrest of the plaintiff and it is therefore responsible to the plaintiff in damages.”43

42 The New Parapolic, supra note 23 at 174-175.
43 Lebrun v. High Low Food (1968), 69 D.L.R. (2d) 433 at 440 (B.C.S.C.) [hereinafter Lebrun].
However, relying on incomplete or vague information from a previously unknown individual who attempts an arrest would not be reasonable.44 Regarding the requirement that the person to be arrested is "escaping from and freshly pursued by persons with lawful authority to arrest that person," McGillivray, J.A. of the Ontario Court of Appeal wrote in *Dean* that "I am of the opinion that no narrow interpretation should be given the words 'escaping from' or 'freshly pursued by.'"45 The cautious security officer may decide to ask the suspect to accompany him or her back to the premises to be seen by the informant. This, however, is a tricky proposition – if the suspected person believes that he or she must go with the security officer to avoid public embarrassment46 or that if he or she refuses to go force will be used,47 he or she is legally detained. It is important, therefore, for security officers to quickly assess whether the pursuer saw the offence take place. In addition, there is authority that posits that unless a security officer makes it clear that his or her request can be refused, the person is detained because compliance is gained through the improper use of one’s ‘authority status’.48

### Arrest under Provincial Trespass Acts

Arrests pursuant to provincial statutes regulating trespass are the most common form of intervention by security agents. In Ontario, Intelligarde International presented 2,617 Notices Prohibiting Entry (NPE) to persons in a one year period.49 Of those, 35% were recorded as having no fixed address.50 The favoured method amongst security officers in The Law Enforcement Company is to use the Ontario *Trespass to Property Act*51 because there exists a perception that the courts are more comfortable dealing with arrests by security officers under provincial trespass statutes than the *Code*.

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50 Ibid. at 127.
51 Supra note 29.
Three of the nine provincial trespass Acts allow for the arrest of persons who engage in 'prohibited activity' on private property by either the owner/occupier or his/her agent. In Prince Edward Island, and Nova Scotia similar provisions also exist for arrest of any person engaging in "disorderly behaviour" on private property. The consequences of these rather wide-ranging 'private powers' have been rarely discussed in the legal literature. In fact, despite our exhaustive attempts, we could not find any existing definitions of 'prohibited activity' or 'activity prohibited by notice.' The implications of this nominal limbo clearly works in favour of the landowner or occupier. Most provincial trespass acts contain specific instructions on how to declare certain areas and access-points 'prohibited' through signage or other means. In the case of Ontario, Nova Scotia and P.E.I., provincial statutes also describe how to declare activities prohibited, but there are no stipulations about what may or may not be declared prohibited in the first instance. This gives security agents tremendous latitude to exercise, what for all intents and purposes amounts to private prosecutorial discretion.

In Ontario, this has resulted in some interesting interpretations by the parapolice of Intelligarde International. As far as security officers in this company are concerned, prohibited activity consists of anything they can justify as 'immoral, illegal, or unethical.' Section 2(b) of the Trespass to Property Act additionally grants security agents tremendous discretion because it also allows them to ask a person to leave a property without having to provide a reason. In practice, however, this section of the Act is typically used to avoid having to make an arrest. For instance, when someone is being lewd or boisterous on private property and this is not permitted, the offender may be arrested immediately under

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52 Saskatchewan does not have a trespass act. Arrangements under the Co-operative Security Program (a Regina Police Service initiative) provide that if a security officer asks a trespasser to leave and if he/she resists with force, the security officer arrests for assault. If the trespasser refuses to leave but remains peaceful, the police are called and upon further refusal the trespasser is arrested for obstruction.

53 Supra note 29 s. 2(1)(a)(ii); Protection of Property Act, R.S.N.S. 1989, c. 363, s. 3(1)(f); Trespass to Property Act, R.S.P.E.I. 1988, c. T-6, s. 2(1)(f).

54 Protection of Property Act, ibid at s. 7(b); Trespass to Property Act, Ibid at s. 6(b).

55 In fact, we searched both for any regulatory definitions as well as any definitions in the Acts. We then reviewed cases citing sections in the Acts dealing with prohibited activity and perused the definition sections of the Interpretation Act and the Criminal Code of Canada. We then searched the Canadian Abridgement Case Digest on line as well as the Canadian Encyclopaedic Digest (Ontario). Failing there, we decided to look up the phrases in Words and Phrases and Black’s Law Dictionary, as well as re-examining extant cases on QuickLaw. We could find no definition.

56 Much to the consternation of Raj Anand and his Task Force, supra note 28 at iii.

57 Supra note 29.
section 2(1)(a)(ii) for engaging in prohibited activity, or may be asked to leave. If the person in question refuses, the security officer may arrest under sections 2(1)(a)(ii) or 2(1)(b) of the Act. Thus, security officers have a long and slippery slope of options open to them so that they may ensure social order on private properties.

Given the dearth of oversight on this issue, some security companies have purportedly established long lists of prohibited activities in conjunction with landowners and delivered them to residents of buildings in downtown Toronto. This practice results in the de facto construction of ‘private codes,’ facilitating a private order of governance in the public access-ways of the building and property.

Intelligarde officers are instructed that they should request a person leave the property at least three times before arresting under section 2(1)(b), otherwise the courts might view their actions as overzealous. These sweeping powers are often buttressed by additional enabling mechanisms. Strategically placed signs prohibiting certain activities on private property can further extend a private security guard’s grounds to arrest. While there is nothing at any level of public governance in Toronto making loitering explicitly illegal, a well placed sign makes it a prohibited activity on private property and allows a security guard to either immediately arrest or request the departure of undesirable persons. If the offenders resist, they can now be arrested under section 2(1)(b) of the Act for ‘failing to leave when directed’. In other words, while courts might frown upon private law-making through the arbitrary posting of signs, they cannot very well take away a landowner’s right to remove individuals from his property found in direct violation of a prohibited activity. If those individuals refuse to leave, he (or his agent) is within his right to arrest them.

It is therefore common for Intelligarde officers to arrest persons for minor infractions of privately prohibited activities. Persons suspected of engaging in more serious criminal act may be dealt with under the Criminal Code if they are ‘found committing’ but this is typically a rarity – in Toronto’s public housing areas, the Trespass to Property Act is preferred. During one observed incident, an individual was suspected of dealing drugs on private property. The security officer informed him that there was no loitering in the area and that he would have to move on. When the security officer later saw the same man on the property, he had the option of either arresting him for ‘failing to leave when directed’ or engaging in prohibited activity – in this case loitering. But the point of

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59 Supra note 29 at s. 2(1)(b).
the arrest was to search the suspect for weapons pursuant to arrest\(^60\) and hopefully stumble upon the drugs which he could then (secretly and strategically) inform the police to search for when they arrived.

**False Imprisonment and Wrongful Arrest**

If a person is wrongfully arrested by a citizen, remedy may be sought in the form of compensation for the false imprisonment and perhaps assault and battery. In defending against this claim, the justifications offered by those making a citizen’s arrest demonstrate the true extent of citizen’s power of arrest. While a citizen under the Code is generally required to find the arrestee committing an offence, if the justification for an unlawful arrest is that one had reasonable and probable grounds to arrest, ‘finds committing’ is effectively expanded beyond what the words might suggest.

In order to consider the claim of false imprisonment, the defining characteristics of an arrest must first be demarcated. In Cannon, the interviews of two employees who were among a night-shift group suspected of theft provides a telling example of when one is under arrest. One employee (a male) attempted to leave the department store but found the exit to be locked and was told he was wanted in the office. He was held there for three hours while an investigation proceeded, including a search absent his verbal consent of his coat and person. Another employee (a female) was walked to the exit and was asked if she minded going to the office for a chat. She consented to this request. She clearly consented to a search, which involved no physical contact. The Court held that the man was falsely imprisoned while the woman remained voluntarily.\(^61\)

As the above passage illustrates, to make out a claim of false arrest one must first be detained. The state of being detained can be indicated by restraining another; however, actual physical contact (e.g., use of ‘force’) is not required. Being under the control of an accusor is enough,\(^62\) as is knowing that the arrestor is prepared to use force, if

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\(^{60}\) See Powers of Private Security, supra note 2 at 62-63, especially Dillon v. O'Brien (1887) 17 Cox C.C. 245 at 249-50, and Reynen v. Antonenko (1975) 30 C.R.N.S. 135. For post-Constitution Act rulings, see also F. P. Hoskins, “Search and Seizure” in J. E. Pink & D. C. Perrier, eds., From Crime to Punishment (Scarborough: Carswell, 1997) 303, and the case of Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257 S.C.C. where the court spells out that searches may be conducted on persons incidental to arrest in order to secure objects that may be used in evidence, weapons that may be a threat to public safety, or objects that may aid in escape.


necessary, to gain compliance.\(^63\) The use of one’s ‘authority status’ such that the arrestee feels bound to comply can constitute an arrest. Here the Court maintained that security officers must indicate clearly that one is not required to go with them in order to avoid making an arrest, otherwise the “moral pressure” from status and conduct is determinative.\(^64\) In a similar vein, compliance to avoid public humiliation or embarrassment can lead to a ‘psychological imprisonment’.\(^65\)

Once the person claiming false imprisonment proves the detention, the onus shifts to the defendant[s] to justify the imprisonment.\(^66\) There is an ongoing debate in the courts over what is required to raise an effective defence to a charge of false imprisonment. Some cases support the position that those effecting a citizen’s arrest are protected from civil action only if the offence has actually been committed; other cases hold that if a citizen acted on reasonable and probable grounds, this is a sufficient defence for an unlawful arrest. The debate is in good measure centred around the ‘proper’ interpretation of s. 25(1)(a) of the \textit{Code}. Its place in the \textit{Code} is presumably to justify reasonable action in enforcing the law, including a reasonable use of force. However, because tort law imports relevant provisions of the \textit{Code} into civil liability law in order to decide what defences are available to meet a charge of false imprisonment, this section is treated to analysis for the purposes of tort by the case law. It reads:

\textbf{s. 25 (1)} Every one who is required or authorized by law to do anything in the administration or enforcement of the law
\textbf{(b)} as a private person is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Traditionally, an arresting citizen needed to prove that the offence for which a person was placed under citizen’s arrest actually occurred before

\(^{63}\) \textit{Sinclair}, supra note 47 at 397.
\(^{64}\) \textit{Kovacs}, supra note 48 at 587.
\(^{65}\) \textit{Chaytor}, supra note 46 at 536. See also \textit{Campbell}, supra note 44 at 719. In \textit{R. v. Therens} (1985), 18 C.C.C. (3d) 481 [hereinafter \textit{Therens}], the Supreme Court of Canada affirmed a person could be subjected to ‘psychological control’ sufficient to constitute detention.
one was shielded against a claim of false imprisonment. In Otto and Otto, that the arrestee was acquitted of not having committed the offence in a criminal trial seemed to remove the ability of the defendant security officer to justify her arrest. However, in Hayward, the Court posited that a citizen’s arrest can be justified under what is today s. 494(1) if the defendants (here store security officers) can prove on a preponderance of the evidence that an indictable offence has been committed and that the arrestee committed it. Like Hayward, most courts have held that a civil standard of proof based on a balance of probabilities is sufficient to prove ‘finds committing’. Thus a failed criminal prosecution of the arrestee will not necessarily prevent the arrestor from establishing a justification for the arrest.

A series of decisions lay out this approach. Collectively, they posit that the protections afforded under s. 25(1)(a) to an arresting citizen only apply when the arrestee is found committing the offence. Section 25(1)(a) does not replace the ‘finds committing’ requirement under s. 494(1)(a) or s. 494(2) with that of simply having reasonable grounds to arrest. The Ontario Court of Appeal has also rejected a ‘reasonable grounds’ test. In denying the ‘reasonable and probable grounds defence’ of store security personnel in Banyasz, the Court concluded:

Under s. 449 [now s. 494] of the Criminal Code a citizen can make an arrest where he or she finds another committing an indictable offence. Where the defendant

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67 In Newhook v. K-Mart (1991), 363 A.P.R. 102 at 115-116 [hereinafter Newhook], the Newfoundland Supreme Court (T.D.) held that the defence against a claim of false imprisonment failed because the defendants failed to establish an intention on the part of the arrestee to defraud. Thus their arrest was not justified. Here the Court seems to be requiring the arresting citizen to determine the intention or mental guilt of the arrestee as part of the 'finds committing' requirement. By contrast, in Banerjee v. K-Mart (1983), 127 A.P.R. 252 at 255 the Newfoundland District Court maintained that the influence of s. 25(1)(a) on the 'finds committing' requirement was to require only that the defendants make out a prima facie case; that is, it seems, they need only prove the act of theft, not the guilty intent of the person arrested for the offence. This also seems to be part of the reasoning in the decision by the Nova Scotia County in McCarthy, supra note 35. The Newfoundland Court of Appeal in Sears Canada v. Smart (1987) 36 D.L.R. (4th) 756 at 761 [hereinafter Sears Canada], seemed to reject the interpretation of s. 25 present in Banerjee.


69 Hayward, supra note 66 at 355. See also Kovacs, supra note 48 at 590.

70 See Kendall, supra note 40 at 727, Newhook, supra note 67 at 119.

71 Dandurand v. Pier 1 Imports (Canada) (1986), 55 O.R. (2d) 329. At p. 330, the Court of Appeal, in an oral judgment delivered by Lacourciere J.A., maintained “A private person does not have the same liberty as a peace officer to act on reasonable and probable grounds that an offence has been committed.”

72 This section of the Criminal Code, along with s. 494(1)(b) have been re-enacted so that the words “and probable” immediately preceding the word “grounds” are now deleted.
is unable to prove that the person arrested has committed an indictable offence, the defendant cannot arrest merely on reasonable and probable grounds.\textsuperscript{73}

The Newfoundland Supreme Court, Trial Division, in \textit{Hayward}\textsuperscript{74} echoed the sentiment of the Ontario Court (General Division) in \textit{Kovacs}.

The two provisions do not justify the arrest by a private citizen of another person not found to be committing an indictable offence. The provisions do not excuse the apprehending person because she or he may have had reasonable and probable grounds for believing that the individual being apprehended was committing an indictable offence.\textsuperscript{75}

The message is that s. 25(1)(a) does not provide a ‘reasonable and probable grounds’ defence for those who exceed their lawful authority in making a private arrest, a defence which is available to a police officer under s. 495(1)(a). Its purpose is to protect those acting under the authority of law, not to empower a private citizen to arrest without warrant, a person who, on reasonable and probable grounds, he believes has committed an indictable offence. Its purpose is not to empower but to protect; it is a shield not a sword, a distinction critical, in my view, to understanding its effect. Otherwise it would serve to so scramble the carefully constructed distinctions between the powers of arrest of a private citizen and those of a police officer, as to obliterate them altogether.\textsuperscript{76}

Despite this very cautious approach to s. 25(1)(a), other courts in the majority have forwarded the position that the section provides a ‘reasonable grounds’ defence for a false imprisonment by a private citizen (for the purposes of tort), in a sense altering the ‘finds committing’ requirements under ss. 494(1)(a) and 494(2), even absent a crime having been committed. In \textit{Karogiannis}, the British Columbia Supreme Court held that a security guard who makes an arrest may justify it by demonstrating that he had reasonable and probable grounds for believing that the person he arrested committed the crime. In other words, the defendant was not required to prove actual commission of the offence (theft) because s. 25(1) was held to protect the security guard if he acted on reasonable and probable grounds.\textsuperscript{77}

\textsuperscript{73} \textit{Banyasz v. K-Mart Canada Ltd.} (1986), 33 D.L.R. 474 at 476.
\textsuperscript{74} \textit{Hayward}, supra note 66 at 354.
\textsuperscript{75} \textit{Kovacs}, supra note 48 at 590.
\textsuperscript{76} \textit{Kendall}, supra note 40 at 736.
\textsuperscript{77} \textit{Karogiannis}, supra note 39 at 256.
Similarly, in *Dendekker*, it was held by the Alberta Supreme Court that a security officer could justify a detention given reasonable and probable grounds for the belief that an offence had been committed, although the finding in this case was that the security guards in question failed to justify their actions.\(^78\) In *Lebrun*, the action in false imprisonment against a store manager succeeded because he did not have reasonable and probable grounds for instructing a police officer to detain a customer. The implicit reasoning provided by the British Columbia Supreme Court, as in *Dendekker*, is that the defence of reasonable and probable grounds for the belief that the arrestee has committed an offence is open to security personnel.\(^79\)

In *McCarthy*, the Nova Scotia County Court held that because there was sufficient doubt that the arrestee’s actions were wilful, the arrestor (now a defendant in a false imprisonment and assault action) could not rely on ‘finds committing’ and the citizen’s arrest was unlawful. However, under s. 25(1), he was “protected from both criminal and civil liability in making the arrest” because “he acted on reasonable and probable grounds” given that “any impartial observer would have ample cause to believe that [the person arrested] kicked the car in a fit of pique, and thus caused the damage wilfully.”\(^80\) It is highly unlikely that these decisions will have any marked effect on the new parapolice of late modernity. But, these rulings, in effect, bring the legal status of private security firms, with respect to arrest, closer to that of the public police at a time when the mobilisations, mandates and aesthetics of the two are becoming increasingly difficult to differentiate.

On a related issue, the *Criminal Code* does not negate the common law rule that an arrestor may justify his or her action by proving that the offence for which the arrestee was arrested was indeed committed and that there were reasonable and probable grounds for believing the person arrested committed the crime. In other words, if the person arresting another can prove that an offence was actually committed by someone, a decision to arrest a particular person based on a reasonable belief will justify the arrest and allow for a defence against false imprisonment.\(^81\) Like the more cautious approach to interpreting the impact of s. 25(1)(a), the common law rule requires that the arrestor establish that a crime has been committed. Commenting on the compatibility between the ‘finds committing’ requirement that a majority of courts ascribed to s. 25(1)(a) and the common law rule in the context of a defence against a false imprisonment action, Goodridge J. in *Hayward* writes:

\(^{78}\) *Dendekker*, supra note 33.

\(^{79}\) *Lebrun*, supra note 43.

\(^{80}\) *McCarthy*, supra note 35 at 477.

\(^{81}\) *Kovacs*, supra note 48 at 591.
In either case it would appear incumbent upon the defendant to establish that a crime was being committed. Under the Criminal Code it would be necessary, for justification, to show that the plaintiff committed it. Under the common law it would be sufficient to show that the defendant had reasonable grounds for believing that the plaintiff committed it.\(^{82}\)

In Sears Canada, the Newfoundland Court of Appeal, while partly siding with those who are more cautious in assessing the impact of s. 25(1)(a) on ss. 494(1)(a) and 494(2), attempts to solve the s. 25(1)(a) question by positing that “s. 449 [now s. 494] of the Code, and the application of s. 25(1) to it, is merely declaratory of the old common law position—no more, no less.”\(^{83}\) In the words of the Court:

\[I\]t is unnecessary to seek any strained interpretation of s. 25 . . . it goes no further and does no more than to provide justification for those actions which are authorized by law if the person acting did so on reasonable and probable grounds... There can be no doubt if there is no crime, there can be no justification. The only remaining question is whether it must likewise be demonstrated that the crime was actually committed by the person arrested before s. 25(1) and consideration of the defence of justification comes into the picture...

In my view...the proper interpretation is that while a crime must be demonstrated to have been committed, the actions of the arresting party may be justified if he has reasonable and probable grounds, judged objectively, for believing that the person he detains has actually committed it.\(^{84}\)

**Arrests by private Security Personnel and the Charter\(^{85}\)**

A citizen’s power of arrest is structured by statute and common law, and remedy is available in tort if this power is exceeded or abused. Another remedy that is possibly open to those who are unjustly arrested is the exclusion of evidence resulting from the arrest, or simply a stay of the proceedings against the arrestee. This becomes a possibility when an arrestee’s constitutional rights are violated, most often by the police. For a citizen’s arrest to be unconstitutional, however, it must first be shown

\(^{82}\) Hayward, supra note 66 at 354.

\(^{83}\) Sears Canada, supra note 67 at 760.

\(^{84}\) Ibid. at 759-760. See also Briggs v. Laviolette (1994), 21 C.C.L.T. (2d) 105 at 111.

that the *Charter* applies to the activity of one citizen arresting another. The question of application arises under s. 32(1) of the *Charter*. It reads:

32 (1) This Charter applies
(A) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(B) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *McKinney*, the Supreme Court of Canada discussed what factors make one a government actor or entity. Here the claim was being made by university professors that the university was government and that its policies (in this case mandatory retirement at 65) should be subject to *Charter* scrutiny. Their position was that the university exercises powers pursuant to statute, carries out public functions (partly with public funds) pursuant to statute and is in some cases a creation of statute. The legislature should not be able to avoid *Charter* responsibility (i.e., for age discrimination) by having ‘private entities’ carry out the purposes of a statute. The test set out for determining if an institution is ‘government’ does not apply well to the issue of private arrest. The important part of the majority opinion for citizen’s arrest law was that the Court maintained that serving a public purpose, even if the power to do so is created in statute, does not necessarily make one ‘government’.86

The Supreme Court affirmed this position in *Eldridge* when the Court wrote:

the mere fact that an entity performs what may loosely be termed a ‘public function’, or the fact that a particular activity may be described as ‘public’ in nature, will not be sufficient to bring it within the purview of ‘government’ for the purposes of s. 32 of the Charter.87

However, in this case, which dealt with the provision of health care services under the direction of the *Canada Health Act*, it was held that the government had delegated authority and power to health care bodies, whose actions were thus opened to *Charter* scrutiny. Although factually distinct from the situation in *Eldridge*, it is reasonable to extend this logic to a citizen’s arrest. Here the citizen can be seen as performing a

governmental function under statutory authority, and the decisions made while implementing governmental policy by arresting those ‘disturbing the Queen’s peace’ should be subject to the safeguards in the Charter.

More directly, in Lerke, the Alberta Court of Appeal ruled that the power of arrest, whether exercised by a private citizen or a state actor such as a peace officer, is an exercise of a governmental function. This is because the state has a monopoly on the right to seize one of its members, and this power is conferred upon a citizen or peace officer in limited circumstances. Historically and presently, “[d]erived from the sovereign [the power of arrest] is the exercise of a State function.”

The Court in Lerke rejected the argument that a ‘governmental function’ is missing from a citizen’s arrest in relation to private property because the purpose or function of the arrest is to advance or at least safeguard a private interest — that of the owner of a private business. Laycraft C.J.A. maintained that “this argument confuses motive and purpose.” The motive of a citizen making an arrest in relation to private property does not negate the purpose of conferring the power of arrest, which is not “private satisfaction” but “maintaining the Queen’s peace.” This is why the arresting citizen is not a party to the criminal proceedings which follow a lawful arrest.

In Wilson, the British Columbia Supreme Court explained the rationale behind this position:

There is good reason for the Canadian Charter of Rights and Freedoms to apply to the actions of a private individual who is acting under the authority of a statute of the Parliament of Canada. If the Charter did not apply in that circumstance, the application of the Charter could be circumvented by a government that chose to authorize private individuals to do what the Charter prohibited it from doing.

While it seems that a citizen’s arrest does not escape constitutional scrutiny, this does not mean that a security officer is held to the same constitutional standards as is a peace officer or other agent of the state, especially given the different statutory powers and obligations of these two groups. This can be seen by reviewing case law regarding arbitrary arrest, security of the person and right to counsel.

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89 The constitutional questions surrounding the inclusion of evidence obtained by parapolicing organisations under contract with public housing, port, or parks authorities (or other public places) are not trivial. The expansion of contracted private policing firms is central to the organisation of securing places and spaces in late modernity.
90 Lerke, supra note 88 at 135-136.
Arbitrary Detention

Section 9 of the Charter reads: "Everyone has the right not to be arbitrarily detained or imprisoned." An otherwise lawful arrest that constitutes an arbitrary detention under s. 9 of the Charter is a breach of constitutional safeguards, and proceedings may be stayed under s. 24(2) of the Charter. In the context of a citizen’s arrest by a private security guard, the ‘procedure’ of arresting instead of issuing a summons order (as is warranted) in addition to the failure of taking the arrestee to the nearest police officer was examined by the Ontario Court of Justice (Gen. Div.) for its constitutionality in Dean. The trial judge argued that restrictions placed on peace officers under s. 495(2) of the Code applied to warrantless citizen’s arrest under s. 494 of the Code, and stayed the charge of theft. On this account, s. 495(2)(e) would require a citizen who found a person committing an indictable offence to have reasonable grounds to believe that the person is unlikely to attend court in order to arrest, or else the arrest would be arbitrary and thus unconstitutional. If no reasonable ground to arrest existed, a summons notice should be issued. In addition, the trial judge maintained that the requirement to “forthwith deliver” to a peace officer any person arrested by one other than a peace officer under s. 494(3) Code required an arrestee to be taken to a police officer.

The Court of Appeal dismissed the lower court’s judgement, stating that restrictions listed under s. 495 of the Code were not within the purview of a private citizen making an arrest. Specifically, it is not suitable to give a private citizen the discretion to decide to arrest or release on summons. Regarding the issue of whether a person making a citizen’s arrest is required to take his or her charge to the nearest peace officer, the Court argued that to ‘deliver’ required only a transfer of custody, not the transport of the arrestee. The current procedure of the security officers in question was not based on a ‘blanket policy’ nor was it designed to serve the interests of the security office or the store. A prompt phone call to police satisfied the statutory requirement to ‘forthwith deliver’ and thus there was no arbitrary detention within the definition of s. 9 of the Charter.

As private and public police interdependency continues it will be interesting to see how important current procedure becomes in deciding arbitrary detention. In North York’s 33 Division, Intelligarde

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93 Ibid. at 181.
94 Ibid. at 183.
International security officers routinely drive arrested persons directly into the Metropolitan Toronto Police station house for detention or the issuance of a summons.

Security of the Person

Section 7 of the Charter reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” An otherwise lawful arrest can violate the constitutional guarantee of security of the person if “exceptional and drastic” force is used during the arrest. For example, in Wilson, the British Columbia Supreme Court dealt with a case where a security guard used a carotid throat hold (choke hold), rendering the arrestee unconscious. The guard’s action was held to violate the arrestee’s right to security, both at the trial level and at the Supreme Court. However, the decision at trial to issue a stay of proceedings as a result of finding excessive force used in the arrest contrary to s. 7 was overturned by Shabbits J. of the Supreme Court.

Shabbits J. recognized that “[t]he infringement of an accused person’s Charter rights can result in a remedy within that person’s trial.” But such a remedy usually relates to the exclusion of evidence, such as a statement obtained in violation of one’s right to counsel or real evidence obtained after an unconstitutional search. The remedy of exclusion of evidence was not available here because no evidence was obtained incidental to the arrest. Instead the remedy available was a stay of proceedings. However, Shabbits J. maintained that from a Charter violation it does not necessarily follow that there must be a remedy within a trial. This is especially true in this case given that there was no abuse of the trial process. More importantly, despite the Court’s position that an arrest occurs pursuant to statutory authority, the result being that a citizen’s arrest is a governmental function, the Court found it persuasive that “the respondent’s Charter rights were infringed upon by a private individual, and not by a peace officer or other governmental official.” Thus the stay of proceedings was set aside and a new trial was ordered.

95 Wilson, supra note 91.
96 Ibid. at 313.
97 Ibid. at 313.
98 Ibid. at 314.
Right to Counsel

Each and every arrest, whether undertaken by a peace officer or private citizen, must include informing the arrestee of his or her right to counsel. This is guaranteed in the Charter:

10 Everyone has the right on arrest or detention
(b) to retain and instruct counsel without delay and to be informed of that right

However, informing a person of his or her right to counsel is not necessary if the arrestee fails to prove that he or she was ‘detained’, or the ‘detention’ does not occur within the meaning of s. 10(b).

In Sawler, the accused alleged that she was detained and not advised of her right to counsel by store security but failed to demonstrate to the Court that she was either physically or psychologically restrained by security personnel. Her application to exclude evidence found after a consensual search was thus turned down. Similarly, in Tyab, a mutual fund manager who made incriminating statements during an interview with Securities Commission staff that were later used against him in a criminal prosecution failed to convince the British Columbia Court of Appeal that the meeting which he voluntarily attended constituted a detention. To be sure, the staff investigating his financial behaviour were ‘persons in authority’ but their statement to the manager that he could leave at any time negated the claim of detention by psychological compulsion.

While the Nova Scotia Court of Appeal in Sawler found it unnecessary to comment on whether, or to what extent, s. 10(b) applied to a detention by employees of a private business, the Court of Appeal in Ontario addressed the issue in Shafie. At trial, the judge decided that an employer’s accompaniment of his employee to the office of a private investigator who had been hired by the employer to investigate possible incidents of theft did not constitute a detention, partly because the door to the office was not locked. This was the holding despite the employee’s belief that to refuse to attend the interview would be an act of insubordination. The Court of Appeal, while supporting the trial judge’s decision not to exclude incriminating statements made by the employee during the interview, employed significantly different

99 See Sawler, supra note 19, and Tyab, supra note 19.
101 Sawler, supra note 19 at 413.
102 Tyab, supra note 19.
103 Shafie, supra note 100 at 28-29.
reasoning. Deferring to the Supreme Court’s decision in *R. v. Therens*,[^104] which was decided after *Shafie* was decided at trial, the Court of Appeal conceded that there was a sufficient degree of ‘psychological detention’ to conclude that the employee was detained. The question then became “whether a detention within the meaning of 10(b) of the Charter can be said to exist when the psychological coercion is brought about by a private person — in this case an employer in the private sector of the economy, or its agent — and not by a peace officer or other agent of the state.”[^105] In addressing this issue, the Court of Appeal maintained that *Therens* applied only to psychological control exercised by “a police officer or other agent of the State.”[^106]

Thus while the *Charter* does apply to a citizen’s *arrest* because it “is taken on behalf of the state,”[^107] “actions that, at the hands of the police or other state or governmental agents, would be a detention, do not amount to a detention within the meaning of s. 10(b) of the *Charter* when done by private or non-governmental persons.”[^108] In other words, provided by the British Columbia Provincial Court, Youth Division, in *J.C.*, “where a private person merely detains another the detention is not affected by the *Charter*, and the detainee is not protected by the *Charter*.”[^109] The rationale of this position attempts to insulate private relations form constitutional scrutiny:

> Any other conclusion would result in the judicialization of private relationships beyond the point that society could tolerate. The requirement that advice about the right to counsel must be given by a school teacher to a pupil, by an employer to an employee or a parent to a child, to mention only a few relationships, is difficult to contemplate.^[110]

However, case law suggests that actions of a private citizen may amount to a detention within the meaning of s. 10(b) of the *Charter* if the individual is acting as an agent of the state. This inquiry sufficiently differs from the initial question of whether the *Charter* applies to a citizen’s arrest to merit separate consideration. In *Lerke*, the issue was whether a situation of clear citizen’s arrest would attract *Charter*

[^104]: *Therens*, supra note 65. At page 505, the Supreme Court maintained that detention could occur as the result of psychological coercion where “the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.”

[^105]: *Shafie*, supra note 100 at 30.

[^106]: *Therens*, supra note 65 at 504.

[^107]: *Shafie*, supra note 100 at 32.

[^108]: *Ibid*, at 34. It would be interesting to know whether the Court intended the term ‘non-governmental persons’ to be extended to ‘corporate’ persons.


[^110]: *Shafie*, supra note 100 at 34.
Here we have private 'detentions', presumably for private purposes (at least nominally), which often end in evidence being provided to government agents for criminal prosecutions. Unlike the rationale in McKinney,112 there is no reliance on statutory authority in bringing an employee, for example, into the company office for an interview. Unlike the requirement in Eldridge,113 such an action does not amount to the implementation of a government policy. This is especially the case if the primary purpose of the private interview is to terminate employment if theft is discovered, not to use the interview as a basis for criminal proceedings.

In the context of detention at the hands of a private citizen, Paglialunga provides a useful example of a possible test for agency. Here a civilian employee of a police force stopped an individual and questioned him about his alcohol consumption, and called the police. There was no arrest – the employee had not touched or taken physical control of the individual nor had he blocked the way of the individual's vehicle. However, compliance with the employee's directions was based on the individual's belief that the employee was a police officer. This subjective belief was ruled reasonable because the employee wore a uniform similar to that of a police officer, acted in an authoritative manner and failed to properly identify himself in order to dispel the impression that he was an officer; thus there was a sufficient degree of psychological coercion to meet the test of detention. Still, the detention was not within the meaning of s. 10(b) of the Charter. This is because the detained individual's subjective belief was not relevant to the threshold issue of whether the employee was a state agent at the time of the detention. The decision in Paglialunga provides three factors relevant to finding agency. First, consider the character of employment and nature of the duties of the person alleged to be an agent. Second, determine if there is a nexus between that person's conduct or status with the state. Finally, consider the purpose of the contact with the detainee. Here the Ontario Court (Prov. Div.) found that the civilian employee's uniform was not sufficient to convert him into an agent of the state; more determinative was that the employee acted on his own initiative in stopping the individual he suspected of drinking; that is, the civilian employee's actions would have occurred without police intervention or encouragement. Thus the application to exclude evidence was denied.114

111 Lerke, supra note 88.
112 McKinney, supra note 86.
113 Eldridge, supra note 87.
An interesting counter-example exists to *Palialunga* that shares remarkably similar facts. The Alberta Provincial Court, in *Brandt*, held a *voir dire* to determine the admissibility of statements made to a ‘police agent’ before the arrival of the police. The issues here were whether a detention had occurred prior to the arrival of the police and whether the person who detained the accused acted as an agent of the state. On the facts, the ‘police agent’ was employed by the police as a park patroller. Her dress consisted of a police style uniform with flashes that read ‘Edmonton City Police Venturers’. When she found the accused committing what is alleged to have been an act of vandalism she and her partner identified themselves as working for the police and required the accused and a friend to remain where they were until the police arrived. No section 10 *Charter* warnings were issued at this time, and before the police arrived, potentially incriminating statements were made to the park patrollers.

The Court found that the accused was detained by one “clothed with the authority of a police officer” and the *Charter* should have been complied with, else “these agents be used to circumvent the requirement of the Canadian Charter of Rights and Freedoms,” either as the result of ignorance or deliberate intent. Again, this ruling is particularly relevant to the emerging constellation of policing practices in late modern society. It is quite common for police services to build into their municipal policing contracts, second tier policing outfits such as the Corps of Commissionaires or other private security firms. What are the constitutional requirements for these particular actors when transferring evidence or persons to the municipal police?

Even if private activity amounts to a detention within the parameters of s. 10(b), at least some courts have placed a lower expectation of right to counsel warnings on private citizens. In *Voege*, an arresting citizen informed the accused he was making a citizen’s arrest but told the arrestee that he did not know what rights are to be given to a person under arrest and thus did not advise of the right to counsel. Although the Court held that s. 10(b) of the *Charter* had been violated, it did not exclude the evidence (observations of the arresting citizen) gathered after the arrest because the breach was made in good faith and was not deliberate, wilful or flagrant.

In *Miskuski*, a security guard on the property of his employer stopped the vehicle of the accused because of alcohol consumption, asked the detainee to accompany him to another part of the premises, and

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117 Ibid.
called the police. The guard did not advise the accused of his right to counsel, despite detaining him within the meaning of s.10(b) of the Charter. Riemer J. of the Alberta Provincial Court termed this a ‘technical’ breach of the accused’s Charter rights (a term unlikely to have been used if a police officer failed to advise the accused of his relevant Charter rights) and did not exclude the evidence. Alarmingly, despite the growth of private security services and the relative amount of property they secure, there does not appear to be a commensurate judicial requirement that these officers act in accordance to the standard prescribed for peace officers regarding section 10(b) of the Charter.

Search and Seizure and the Charter

Private security acquires its power of search from a variety of sources. At a basic level, there is a consensual search, which requires no legal justification. Similarly, there are searches performed by security officers or management personnel that are a condition of employment. If a search is not consensual, there may be remedy in tort, especially trespass to person or battery, and depending on what actions are undertaken during the search, there may be criminal responsibility (e.g., for assault). Certain statutes allow for security officers to search individuals and goods, especially to ensure safety in mass transportation. And there is search incident to a lawful arrest. Except for a search incident to arrest, which along with statutory search is subject to Charter protections, the purposes of search, at least nominally, are private and in the case of statutes such as the Aeronautics Act, safety. But what if in the course of a private search evidence relating to a crime is found? Can the evidence be transferred to the authorities without the initial search attracting Charter scrutiny? If so, would certain arrangements, explicit or otherwise, whereby private actors might engage in search without the constitutional limitations placed on law enforcement in order to pass on evidence for use in a criminal procedure be disallowed by the courts?

Search Incident to Arrest

The Alberta Court of Appeal in R. v. Lerke ruled that a private citizen is entitled to search the person he or she has lawfully arrested where it is reasonable to do so. Indeed, “the powers of search of the private citizen making a valid arrest are the same as those of a police officer making a


valid arrest.”\textsuperscript{120} The entitlement flows from the fact that an arresting citizen faces some of the same concerns as an arresting officer, for with both

the search is needed for protection of the person making the arrest against later attack by the person arrested who might use a concealed weapon. It is also needed to obtain and preserve evidence related to the offence for which the arrest is being made. There is no rational ground to suppose that the private citizen needs less protection than does the peace officer nor is the need to obtain or preserve evidence less when the private citizen makes the arrest.\textsuperscript{121}

The Court of Appeal is especially sensitive to the safety needs of a private citizen making an arrest, although the statement seems less applicable to uniformed security officers, or at least those who carry something approximating a ‘night stick’ (e.g., a long aluminium flashlight, as in the case of Intelligarde) or ‘sensory irritant aerosol’ (e.g. pepperspray). In the words of the Laycraft C.J.A.:

A citizen may, on occasion, have greater need of a right to search than does the peace officer. Citizen’s arrests, infrequently as they occur, take place when police are neither present nor available. Often they result from a chase, in circumstances where violent reaction can be expected. The citizen has neither side-arm, badge nor uniform, let alone warrant, on which to rely. He lacks the coercive presence of these attributes of authority which help the peace officer to avoid violence. The right to search, at least to disarm, is essential.\textsuperscript{122}

What of a search incidental to arrest to recover evidence (e.g., stolen property) for criminal prosecution? \textit{Lerke} is less supportive of the reasonableness of a post-arrest search to seize or preserve property related to the offence. In the words of the Court:

Where the search is not for weapons, but only to seize or preserve property connected to the offence, different considerations apply. The urgency present in the search for weapons would not ordinarily be present in those cases... The course of wisdom and the requirement that the search be reasonable will usually dictate that the search for evidence be left until the person arrested is turned over to authority.\textsuperscript{123}

\textsuperscript{120} \textit{Lerke, supra} note 88 at 139.
\textsuperscript{121} \textit{Ibid.}
\textsuperscript{122} \textit{Ibid.} at 139.
\textsuperscript{123} \textit{Ibid.} at 140.
The question of what constitutes an ‘unreasonable’ search remains. The *Charter* applies to an arrest by either a peace officer or a private citizen, and in addition a search incident to arrest must be ‘reasonable’ and is not automatically allowed, as the search is governed by s. 8 of the *Charter* which reads: “Everyone has the right to be secure against unreasonable search or seizure.”

The fact situation in *Lerke* usefully illuminates what is an unreasonable search. Here a valid arrest was made under the *Petty Trespass Act*[^124] and s. 449(2) [now s. 494(2)] of the *Code* when a youth (Lerke), who was earlier asked to leave a tavern for want of age identification, returned to the bar. At this point, Lerke was asked to come into an office where he was placed under arrest for trespass. In time, a tavern employee reached into Lerke’s jacket without his consent to search for age identification, and recovered a plastic bag that was eventually determined to contain marijuana. There was no perception of danger justifying a search for weapons. As for a search for relevant evidence, the Court, beyond noting a lack of urgency, introduced the requirement that there be a nexus between the offence committed and the evidence sought for seizure or preservation. Here it was held that a search for proof of age was not connected to the arrest for trespass. Finding evidence of Lerke’s being underage was irrelevant to his act of trespass; “he was guilty of that offence regardless of age, once he re-entered after being asked to leave.”[^125]

Because the Court maintained that “[a]ny search of the person, even if courteously conducted, is a serious intrusion of personal privacy and a serious breach of one’s Charter rights if invalid,” it excluded the evidence obtained in the search from the criminal proceedings launched against Lerke.[^126]

In *R. v. Kozuchar-Thibault*, Corrin P.C.J. of the Manitoba Provincial Court, while citing *Lerke* as authority, disregarded the application of a stricter standard of justification to the search for evidence following an arrest. Here, although the police had already been called, the store ‘loss prevention officer’ conducted a search incident to arrest, a search that could have been conducted by police. To be sure, the search was connected to the offence for which the person was arrested and shoplifting may be described as a more serious offence than trespass. For Corrin J., the search was reasonable because it was conducted in an un abusive and responsible manner in order to confirm

[^124]: R.S.A. 1980, c. P-6, s. 4.
[^125]: *Lerke*, supra note 88 at 141.
[^126]: Ibid.
and secure the presence of stolen goods and thus did not violate the s. 8 Charter rights of the person arrested.127

Similarly, in *R. v. MacKenzie*, Harper, P.C.J. of the New Brunswick Provincial Court looked to *Lerke* as authority that a citizen has the same right of search incidental to arrest as a peace officer, but gave what might be described as a generous interpretation of the Alberta Court of Appeal’s approach to what constitutes a reasonable search. Harper accepted the testimony of the store security officer that the search he undertook following the arrest for shoplifting was to ensure that there were no weapons present and to prevent the accused from destroying or altering evidence. In what seems to amount to a reiteration of *Lerke*, minus the emphasis on the need for urgency as a justification for undertaking a search for evidence before transferring custody of the arrestee, Harper writes:

> The right of a citizen to make a search incidental to an arrest is valid in those cases where the objective of the search is to secure and discover evidence of the offence for which the arrest was made and/or to discover weapons that might be used to harm the person making the arrest or help the accused escape. The search must be reasonable and as non-intrusive as possible in order to satisfy the foregoing.128

Harper, P.C.J. goes further to argue that even if the security officer in *MacKenzie* had violated the s. 8 Charter rights of the person he arrested, the denial of her rights was minimal and “demonstrably justifiable” given that “to declare the articles seized inadmissible in evidence pursuant to s. 24(1) of the Charter would bring the administration of justice into disrepute.”129

**Search Pursuant to Statute**

It is no coincidence that at the beginning of this paper we provided a hypothetical tour of a Canadian airport to illustrate the myriad private and public security services one is exposed to in the course of taking a flight. Certain statutes authorise security personnel to undertake searches for the purpose of fulfilling the mandate of the statute. An often cited example is the *Aeronautics Act*. Two relevant sections are ss. 4.7(5) and 4.7(8) which read:

4.7 (5) No person who, before boarding an aircraft, is required by a security officer

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(a) to submit to an authorized search of his person, or
(b) to permit an authorized search to be carried out of
the goods that the person intends to take or have
placed on board the aircraft shall board the aircraft
unless the person submits to an authorized search or
permits an authorized search to be carried out, as the
case may be.

4.7 (8) Where goods are received at an aerodrome for
transport on an aircraft and are not accompanied by a
person who may give the permission referred to in
subsection (7), a security officer may carry out an
authorized search of the goods and, in carrying out
that search, may use such force as may be necessary
to gain access to the goods.

The primary purpose behind the authority to search is aircraft safety,
especially given the potential for terrorist attacks. But what happens
when a security officer who is authorized by statute to engage in searches
of luggage without the consent of the owner finds evidence of criminal
activity? The Aeronautics Act authorizes searches that undoubtedly
occur on a daily basis in Canadian airports which would require a search
warrant if police were to undertake them. Does this mean that if the
search extends beyond the purposes of the statute and becomes the basis
of a criminal investigation, incriminating evidence acquired from the
search is admissible in criminal proceedings?

The British Columbia Court of Appeal in Sandhu130 dealt directly
with this issue. Here a cargo agent at Vancouver airport, operating under
the authority of s. 4.7(8) of the Aeronautics Act, opened the
unaccompanied luggage of a person whose conduct when delivering the
bag for shipment the agent found suspicious. He found a large quantity
of money, not an illegal substance to be sure. However, the agent called
airport R.C.M.P., who counted the money. The shipment was let through
and the R.C.M.P. began to track air cargo shipments from and to the
suspected individual while airport personnel made further searches and
discovered money and eventually a sports bag containing a narcotic. The
R.C.M.P. allowed a controlled delivery of the substance and arrested a
number of individuals.

In the Trial Court’s opinion, the R.C.M.P. officer who was initially
called to count the money had reasonable grounds to obtain a search
warrant but did not do so, reflecting his and other’s misunderstanding of
the law. On appeal, it was held that the searches at the airport were

(Note), 45 B.C.A.C. 238 (Note).
unreasonable and violated the accuseds' rights under s. 8 of the Charter. However, it was also held that the admission of the seized evidence would not bring the administration of justice into disrepute, as there was a lower expectation of privacy for goods transported by air cargo.

Certain statutes may authorize search by private individuals for a specific purpose, but the Court may not allow the results of the search to be used by law enforcement. Williams speaks to this issue. Here the Nova Scotia Supreme Court considered whether evidence gathered under the authority of the Securities Act by an ex-R.C.M.P. officer, in good part for the benefit of a current R.C.M.P. officer, should be excluded. The Court frowned on the collaboration of the securities investigator and the R.C.M.P. officer. The former had a unique ability to obtain information without search warrant (although some activity might require judicial authority) and the latter profited from this. It was improper for the securities investigator, acting under the authority of the Securities Act, to pass over the 'fruits of his investigation' to another state agent who was governed by more stringent requirements authorizing a lawful search.

The Court's approach to this issue is summed up in Colarusso, where the Supreme Court of Canada held that constitutional rights of citizen's cannot be avoided by law enforcement claiming the 'fruits of a search' undertaken by an agent of the state for which the prerequisites of lawful search is less demanding. The above discussion is relevant to private security because it demonstrates that the Court has concerns about the propriety of a 'private actor' working under a statutory regime (thus becoming to some extent an agent of the state) providing state authorities with the 'fruits of a search' to be used in criminal proceedings. The message is that one state actor cannot hand on a 'silver platter' evidence that could not be obtained by another state actor who is operating under more restrictive rules of search. But what of purely private searches that result in incriminating evidence? Can the police benefit from this evidence? Is there a point where cooperation between the police and private security turns the latter into agents of the state and opens their actions up to Charter scrutiny?

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132 Ibid., at 17-18.
133 R. v. Colarusso (1994), 87 C.C.C. (3d) 193 at 222 [hereinafter Colarusso]. At p. 222, the Court wrote "the criminal law enforcement arm of the state cannot rely on the seizure by the coroner to circumvent the guarantees of Hunter, supra, as any seizure by the coroner pursuant to s. 16(2) [Coroners Act (Ont.)] is valid for non-criminal purposes only." One might extend this logic to reason that searches by private actors be valid for private (e.g., non-criminal) purposes only.
Private Search

Many searches by private security personnel can be termed ‘consensual’. In such circumstances the person who is searched has no recourse in tort and evidence obtained cannot be excluded because of a Charter violation. In Sawler, an accused shoplifter, who failed to prove that she was detained, emptied her pockets upon the request of a store security guard and turned over stolen merchandise. This case demonstrates that where consent to a search is given various potential remedies are negated.

Private search in the workplace provides a further example of ‘consensual’ search. Within the private government of corporate entities, it is not uncommon for there to be contractual agreements allowing for such searches. The right of an employer to instruct security to search employees can be written into collective agreements negotiated between management and the union bargaining team, with safeguards relating to respecting workers dignity and privacy being present in the agreement.

The remedy for an unlawful private search is to be found in tort. However, if evidence found during a private search is used for public purposes (i.e., a criminal prosecution) a Charter-based remedy seems more appropriate from the viewpoint of the accused. The question then arises of Charter application to private search.

The question hinges on whether the actor engaging in the private search was an agent of the state at the time of the search. In Fegan, decided before the Ontario Court of Appeal, the accused sought to have excluded evidence of his obscene telephone calls obtained by Bell Canada after complaints from some of its customers. The accused argued that use of a ‘digital number recorder’ (DNR) to identify the numbers he called constituted an unreasonable search under s. 8 of the Charter. But the Court of Appeal held that there was no Charter violation because Bell Canada was acting independently of authorities in gathering the evidence and was thus not an agent of the state when it made the interception. In the words of Finlayson, J.A.:

[T]here is no evidence that Bell Canada was acting at the request of the police to facilitate a criminal investigation. Similarly, in the absence of a police directive to install the DNR, the act of Bell Canada in itself conducting a ‘search’ does not amount to a government function as an agent of the Crown.

134 Sawler, supra note 19.
135 See Re Drug Trading., supra note 19.
The British Columbia Court of Appeal in Fitch used similar reasoning to the Ontario Court of Appeal in Fegan. Here a university security officer entered a student’s room in university residence to see if the student, who was in arrears for his rent, had abandoned the room. The security officer saw that it was not abandoned but noted stolen property, left the room and called his superior who in turn conducted a search and found further property stolen from the university. The police were summoned to the residence and after observing the stolen property obtained a search warrant.

The Court of Appeal held that the university security personnel had not violated the accused’s s. 8 Charter rights because the security officers did not act on behalf of the police when conducting the search. There was no state action, so s. 32 of the Charter did not apply. The first ‘search’ by university security was routine in a university setting, and reflected a lower expectation of privacy on the part of residents. The proper action at this stage would be to have the police obtain a search warrant on the power of the first security officer’s chance observation. However, in violation of university policy regarding the privacy rights of students, a second search was undertaken.

This subsequent search by a senior security officer was thus improper, but was still a private search, despite the fact that security personnel were effectively beginning a criminal investigation.¹³⁷ For the Court of Appeal, a definitive reason for not finding state agency was that the search was not prompted by “a specific request from the police or pursuant to a standing arrangement between them regarding such matters.” In this case, the police could have obtained a search warrant had they been informed after the first entry of what the security officer had observed, there was nothing in the conduct of police “resembling a finesse of the Charter by having the security personnel do what they could not.”¹³⁸ This reasoning, however, is particularly troubling when one considers the possibility of agents acting under the direct employ of the police, but given no specific instruction on search protocol. The R.C.M.P. and many municipal police services routinely contract out low-level policing functions such as ticketing to private firms. Can they act on behalf of the public police so long as there exists no directive or general expectation that they engage in crime detection?

In a similar vein, the Quebec Court of Appeal, in Caucci, maintained that the activity of a private security agency in stopping employees on the employer’s premises to conduct routine verification aimed at counter-acting theft indicated that it was an agent of the

¹³⁸ Ibid. at 191.
employer not an agent of the state. In this case, however, that the police had not prompted the search which eventually led to evidence being turned over to them seemed not to influence the decision.

There is a contrary precedent to the weight of judicial opinion represented above. The Alberta Court of Queen’s Bench, in Meyers, considered both the purpose of a private search and the level of police involvement as relevant to the question of state agency. The Court maintained that if the primary purpose of a search is to gather evidence for the purpose of laying criminal charges, the search is in furtherance of a government function. However, it also found on the facts of the case that the police had pre-knowledge of the search, and, in effect, gave their tacit approval.

In the Meyers case, a senior hospital administrator, acting on information from employees regarding the accused’s removal of hospital property from the premises, decided to open his lockers and search them. The administrator brought a locksmith and police officer to the locker area. The administrator, police officer and other senior hospital employees engaged in a discussion regarding the propriety of the intended search. The decision to search was made given that the lockers were hospital property. The Queen’s Bench judge found that the administrator resolved to open the locker before the police were called, thus negating the argument that police prompted the private search or that the hospital was in any way operating under a request to search by state authorities. Instead, the administrator “involved the police prior to entering the lockers because he contemplated that criminal charges would be laid if hospital property were found in the lockers.” The role of the police officer was limited, he “gave no instructions in this regard and did not participate in removing the property from the lockers.”

The Court, however, disliked this level of cooperation, especially given its appraisal that following the receipt of information, the police had sufficient evidence and time to obtain a search warrant. The police officer’s presence during a search undertaken despite the accused’s expectation of privacy along with his examination and identification of items to be used as evidence in a criminal proceeding indicated state agency. For the Court, the requisite level of police involvement was simple collusion, not instigation or active request followed by compliance.

141 Ibid. at 161.
142 Ibid. at 166.
143 Ibid. at 164-165.
The Court also considered the purpose of the search to be relevant to the question of state agency. O’Leary, J. writes:

In my view the purpose of the search is a relevant consideration, although standing alone it may not be conclusive. *If the primary purpose of the search is to discover evidence with a view to criminal charges being laid, the search would be in furtherance of a governmental or state function.* On the other hand, if the search is initiated for some private purpose, even an unlawful purpose, the fact that it reveals criminal activity which is then reported to the police would not serve to characterize the search as being in furtherance of a governmental state function. [144] [italics added]

In sum, private security not acting as an ‘agent of the state’ can hand over evidence on a ‘silver platter’ to law enforcement under *Meyers.* The law might be such that if private security moved beyond the private purposes of the employer in the process of search, its actions would become open to the scrutiny of constitutional safeguards, in which case the ‘fruits of any investigation’ could not be transferred to law enforcement without compliance with constitutional standards of search. This would elevate private security acting with a public purpose to the level of a private actor working under a statutory regime.

The Court has indicated in *Colarusso* [145] and *Williams* [146] that law enforcement agencies cannot avoid constitutional requirements regarding ‘reasonable’ search by claiming the evidence gathered under statutory regimes which do not face the same requirements to make a search constitutional. In the same way, it could be argued that much of what looks like private search has public components, and allowing the turning over of evidence because a search began with private purposes violates our constitutional rights. However, given decisions like *Fegan* [147] and *Finch,* [148] it seems private security can begin criminal investigations free from *Charter* scrutiny as long as its actions are not prompted or encouraged by law enforcement. The ‘purpose of the search’ test does not have the support of Courts of Appeal that the ‘at the instigation of law enforcement’ test does.

144 *Ibid.* at 165.
145 *Colarusso,* supra note 133.
146 *Williams,* supra note 131.
147 *Fegan,* supra note 136.
148 *Finch,* supra note 137.
Conclusions

In 1998, Chief Constable Ian Blair of the Surrey Police spoke before the Association of Chief Police Officers in Birmingham, U.K.. In a revolutionary speech which signalled the public police's recognition of what sociologists have been observing for over two decades, he noted “[w]ithin ten years, it is possible that a substantial proportion of the police function may be absorbed by other local authorities and by an unregulated private security sector...”. The tide of privatisation is well underway in the United States where gated communities are multiplying with public fear. There, it is commonplace for security services to police both indoor commercial areas and large outdoor residential spaces.

In Canada, the Ontario Police Services Act has been amended by the current government to make it possible for private policing services to compete alongside both provincial and municipal services. In the new municipality of Quinte West, Intelligarde International was awarded second tier policing duties under the Trenton Police. To date, the local police have failed to implement this program. But the time is now already upon us where the conflation of public and private policing will present the judiciary with centrally important decisions about the boundaries between public and private.

We have argued in this paper that the powers of arrest under provincial trespass acts can be expansive, allowing security officers a tremendous breadth of intervention and arrest. In addition, although the legal grounds for arrest by a private citizen or security officer are narrower than for a peace officer, some courts have effectively loosened these constraints in cases of wrongful imprisonment or arrest. These developments alone have immediate bearing on the training, deportment and authority of private security services, resulting in an expansion of private security guard's arrest powers.

But while private security firms are continuing to adapt to the demands of clients who require 'proactivity' and the effective pursuit of 'law enforcement' ideals, the judiciary has been slow to recognize this encroachment, continuing to maintain a lower standard of constitutional restraint from security officers. While sociologists and police practitioners continue to map the future of 'tier two' policing through

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150 R.S.O. 1990, c. P-15. Competitive bidding was made possible by Ontario’s Bill 105, which received royal ascent in June, 1997. Section 5 of the Act empowers municipal councils to “adopt a different method of providing police services.”
either loose working relationships or possibly through regulatory and hierarchical command, these developments have been ill considered in Canadian jurisprudence. The Canadian judiciary is two decades behind developments in private security resulting in a patchwork of competing formulae to test the actions of private security against the Charter. The assumption remains that, at some level, state and private interest can be disentangled, and that the requisite constraints to be placed on an arresting person can be ascertained in an unproblematic fashion. On the contrary, we have argued throughout, that given the current and evolving nature of private and public policing, these binary legal distinctions will amount to little more than a mere circumlocution of the actual overlap in mandate, legitimacy, and authority of these now inextricably linked spheres of governance.

Politicians, too, have been slow to make legislative changes to check the evolving nature of private security in Canada. While Ontario’s Police Services Act now contains provisions allowing for private agents to patrol public streets while under contract with a municipality, there are no new requirements for training and deployment for private security. Policy-makers are beginning to examine the role of government involvement as in the case of the recent National Conference on Public Police and Private Security sponsored by the Canadian Association of Chiefs of Police. More research is needed to map the growth, function and domains of private policing in Canada in order to provide a better empirical foundation for policy.

Abstract

In the last three decades, the public-private organization of policing in Canada has undergone significant change. It is now common sociological knowledge that there has been formidable growth in private security alongside evolving forms of private governance. These changing social relations have resulted in the prominence of actuarial practices and agents to enforce them. This paper examines how the Canadian socio-legal context affects and is affected by both private security and new, more aggressive, ‘parapolicing’ organizations. We update the state of knowledge on the powers of private security personnel by examining Criminal Code provisions in a post-Charter legal environment, comparing provincial trespass Acts, and analyzing how one aggressive ‘Law Enforcement Company’ as well as other private security firms, more generally, are both enabled and constrained by these legal provisions.
Résumé

L’organisation publique / privée des service policiers au Canada a subi une profonde modification depuis trois décennies. Il est maintenant de notoriété sociologique que la sécurité privée a connu une croissance formidable, accompagnée de formes évolutives de gouvernance. Ces relations sociales changeantes ont mené à une préméance de pratiques actuarielles et d’agents pour les mettre en œuvre. Cet article analyse de quelle manière le contexte socio-juridique canadien affecte et est affecté tant par la sécurité privée que par les organismes ‘parapoliciers’ plus récents et plus agressifs. Nous mettons à jour l’état des connaissances sur les pouvoirs du personnel de sécurité privée, en scrutant les dispositions du Code Criminel dans un environnement juridique post-Charte, en comparant les lois provinciales et en analysant comment une ‘Law Enforcement Company’ ainsi que d’autres entreprises de sécurité privées sont à la fois habilitées et contraintes par ces dispositions juridiques.

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