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PRIVATE SECURITY AND FUNDAMENTAL RIGHTS

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Private Security and Fundamental Rights

Private security has experienced spectacular growth in recent decades. The number of private and even public places where law and order and the protection of property is ensured by security guards rather than by police services is increasing. Some of the actions of these private officers can violate the rights and fundamental freedoms of individuals such as the right to privacy, freedom of expression and the right to demonstrate, protection against arbitrary arrest or detention and protection against unreasonable search or seizure. In many cases, the courts have had to determine the circumstances under which the actions of private security guards were or were not subject to review based on the *Canadian Charter of Rights and Freedoms*.¹

We shall begin by describing the trends in the judicial decisions concerning the applicability of the *Canadian Charter of Rights and Freedoms* in the field of private security before considering whether it is appropriate that security guards should be subject to requirements that they respect the fundamental rights of individuals when they engage in acts of a coercive nature such as arrests, detention, searches or seizures. To conclude the discussion, we shall examine some possibilities for reform.

1. General rules concerning the application of the *Canadian Charter of Rights and Freedoms*

The Supreme Court of Canada has been asked on many occasions to determine the scope of section 32 of the *Charter*, which states that the *Charter* applies:

¹ *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, 1982, (U.K.), c. 11.

(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 v. University of Guelph*,² the judges in the majority ruled that the *Charter* was an instrument for the control of government actions against individuals and that it applied solely to the actions of government. According to them, Parliament had deliberately excluded private relations from the application of the *Charter* and the courts must respect this decision. The *Charter* therefore applies solely to Parliament, the legislatures and those bodies that are part of the executive and administrative arms of government. When it is determined that a body is part of the government, all its actions are subject to the *Charter*, regardless of whether some of its activities could be classified as private.³

In the Court's view, the subjection to judicial review of all relations of a private nature could overly restrict the freedom of action of individuals and impose an impossible burden on the courts. According to La Forest J., the *Charter* is not the appropriate mechanism for controlling private activities. If the government wishes to protect fundamental rights in private relationships, it could do so by regulating these relations or creating administrative agencies mandated to protect the fundamental rights of individuals and promote human dignity.

In its decision in *Eldridge*, the Supreme Court added that the *Charter* applied to a body or an individual that is not part of the government within the meaning of section 32 but that performs a government function. In such a case, it is not so much the nature of the body taking the action that is decisive with respect to the applicability of the *Charter* as the nature of the act

² [1990] 3 S.C.R. 229.

³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

in question and the relationship that exists between the agent and the State when the action is taken. The *Charter* applies to the actions of private bodies when they are given responsibility by the government for implementing a legal scheme or a particular government program. However, it will apply solely to actions that are classified as government actions and will not result in review of the other private activities of this body.

2. Trends in the case law concerning the applicability of the *Canadian Charter of Rights and Freedoms* to the field of private security

2.1 Unreasonable search or seizure: s. 8 CCRF

Agents of the State wishing to conduct searches or seizures must, as a rule, have obtained the prior authorization of an impartial person. This authorization must be based on the existence of reasonable and probable grounds, established under oath, to believe that an offence has been committed and that evidence may be found at the site of the search.⁴ In all cases, a search must be conducted in a manner that is not unreasonable.⁵ The intensity of the protection against unreasonable search or seizure varies in line with the reasonable expectation of privacy an individual may enjoy in a given situation. Thus, according to the Supreme Court, this expectation of privacy is very high in the case of an individual's home,⁶ workplace and, even more so, his or her own body.⁷ Conversely, the expectation of privacy is not very high at customs,⁸ in penitentiaries⁹ and in educational institutions.¹⁰ In these last-mentioned cases, prior authorization for the search is not necessary.

⁴ *Hunter v. Southam*, [1984] 2 S.C.R. 145.

⁵ *R. v. Collins*, [1987] 1 S.C.R. 265.

⁶ *R. v. Dyment* [1988] 2 S.C.R. 417; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Tessling*, [2004] 3 S.C.R. 43.

⁷ *R. v. Pohoretsky*, [1987] 1 S.C.R. 945.

⁸ *R. v. Simmons*, [1988] 2 S.C.R. 495.

⁹ *R. v. Weatherhall*, [1993] 2 S.C.R. 872.

¹⁰ *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

The courts have held on a number of occasions that such a search was unreasonable, either because it represented an unwarranted intrusion into a person's privacy or because it was conducted in an unreasonable manner. When evidence is obtained in violation of an individual's constitutional rights, it is sometimes excluded when the courts feel that its admission at trial would bring the administration of justice into disrepute.

According to the current trends in the case law, these rights do not apply when the acts in question do not involve government actions or players.

In *R. v. Buhay*,¹¹ the Supreme Court ruled on the applicability of the *Charter* to a search of a locker at a bus depot conducted by a private security guard. The Court established the applicable test for determining when the act of a security guard must be regarded as a "government act" and may accordingly be subject to review under the *Charter*.

The Court felt that the *Charter* could not apply to the search of a locker by security guards. In paragraph 28 of the decision, the Court stated:

Nothing in the evidence allows a conclusion that the security guards or the agency by which they were employed can be assimilated to the government itself; nor can their activities be ascribed to those of the government. Private security guards are neither government agents nor employees, and apart from a loose framework of statutory regulation, they are not subject to government control. Their work may overlap with the government's interest in preventing and investigating crime, but it cannot be said that the security guards were acting as delegates of the government carrying out its policies or programs. Even if one concedes that the protection of the public is a public purpose which is the responsibility of the state, this is not sufficient to qualify the functions of the security guards as governmental in nature.

The determination as to whether the *Charter* applies is not made on the basis of the action of the security guard but rather on the basis of the relationship that exists between the guard and the State when the action is taken. Since private security guards act in the interests and under the direction of their employer, to which they are subordinate, the courts generally feel that violations committed by these guards of the fundamental rights of individuals cannot be considered acts of government.

¹¹ [2003] 1 S.C.R. 631.

In that case, security guards asked an employee of the bus depot, on the basis of mere suspicions, to open the locker. They discovered marijuana, put it back in place, locked the locker and alerted the police. When the police arrived on the scene, they smelt the odour of marijuana coming from the locker. Without obtaining a warrant, they directed the employee of the bus depot to open the locker and seized the drug. The Supreme Court upheld the trial judge's decision to exclude the evidence obtained without a warrant by the police on the sole ground that the employee of the bus depot had opened the locker at the express request of the police. The *Charter* applied because the employee acted on the orders of the police.

It is highly likely that the Supreme Court would have refused to apply the *Charter* if, instead of returning the drugs to the locker, the security guards had handed them directly to the police. Assuming that security guards do not usually act on the orders of the police services but rather tend to seek police involvement after conducting a search or a seizure, it is possible to conclude that, in these circumstances, the courts would not consider the unreasonable nature of the actions of the security guards in light of the *Charter*.

This reasoning is eloquently illustrated in the decision of the Supreme Court in *R. v. M. (M.R.)*,¹² which concerned the legality of the search of a student conducted by the deputy principal of a secondary school. The principal had received information that the student in question intended to sell drugs on the occasion of a school activity. The principal called the student into his office and searched him in the presence of an RCMP officer. The search led to the discovery of marijuana, which the principal immediately gave to the police officer. Until the principal gave him the drug, the RCMP officer remained silent. Beyond the question as to whether a secondary school is a government entity, the Court was careful to determine whether the search would have occurred in an essentially different manner had it not been for the presence of the police officer. Since the Court found that the search would have been

¹² [1998] 3 S.C.R. 393.

conducted in the same way, it felt that the deputy principal had not acted as an agent of the police officer and that the officer's presence during the search was not sufficient to bring the *Charter* into play. The Court felt that the primary goal of the search was to maintain school discipline and that this goal was insufficient to make the principal an agent of the police.

We may conclude from this decision and the one in *Buhay* that the unreasonable nature of an act of a person does not trigger the application of section 8 of the *Charter*, even though it is established the person conducting the unreasonable search or seizure hands the results of the seizure to the police.

These judgments and many others leads to the conclusion that the courts do not consider the effects of a violation of the rights of an individual but solely the goal sought by the private agent when he or she conducts a search or seizure. Since security guards act solely on the basis of their employers' interests, it will be difficult to persuade the courts that the *Charter* should apply when the employer in question is not a branch of government within the meaning of *McKinney* or when the police have not in one way or another influenced the agent's acts.¹³ In this regard, one author has written that, in order for the *Charter* to apply, [TRANSLATION] "the organizational link between agents of the State and private agents conducting a search or seizure must therefore not only exist but must also be influential if not causal".¹⁴

2.2 Illegal arrests: s. 10 CCRF

Section 10 of the Canadian *Charter* imposes three duties on police officers when dealing with persons they arrest or detain: to inform those persons promptly of their rights and the reasons

¹³ Readers may also consult *R. v. Broyles*, [1991] 3 S.C.R. 595 (the *Charter* did not apply to the police informer who obtained statements from an accused where it was not shown that the link between the informer and the authorities influenced the course of the conversation with the accused); *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 (Ont. C.A.) (use by Bell Canada of a number-recording unit did not trigger the application of the *Charter* to the extent that the company acted on the strength of complaints from customers rather than on instructions from the police); *R. v. Fitch* (1994), 93 C.C.C. (3d) 185 (B.C.C.A.) (the *Charter* did not apply to a security guard in a university residence who searched a student's room without a warrant).

¹⁴ F. Chevrette, H. Cyr and F. Tanguay-Renaud, "La protection lors de l'arrestation, la détention et la protection contre l'incrimination rétroactive", in G.-A. Beaudoin and E. Mendes, *Charte canadienne des droits et libertés*, 4^e ed. 2005, LexisNexis Butterworths, at p. 603.

for their arrest, to permit them to retain and instruct counsel without delay and to stop questioning them until they have had a chance to exercise this right. This right is considered so important that the courts have required peace officers to provide the physical conditions that makes it possible to exercise this right (private telephone), to indicate systematically to persons arrested or detained that there are legal aid schemes and duty counsel to which they may make use thereof.¹⁵

Evidence obtained in violation of the right to counsel, such as an incriminating statement that would not have been obtained otherwise, is very often excluded because this violation affects the fairness of the trial.¹⁶

Security guards sometimes make arrests as part of their work. Since a private security guard is not a peace officer within the meaning of the *Criminal Code*,¹⁷ he or she is considered to be a mere citizen who exercises the power of arrest provided in section 494 of the *Criminal Code*.

Section 494 of the *Criminal Code* reads as follows:

494. (1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a 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.

...

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

¹⁵ *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Brydges*, [1990] 1 S.C.R. 190.

¹⁶ *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *R. v. Brydges*, [1990] 1 S.C.R. 190.

¹⁷ R.S.C. c. C-46.

Since this citizen's power of arrest is conferred by law, the question has often arisen as to whether such an arrest could be classified as an "act of government" and whether the *Charter* must not accordingly apply to a security guard who makes an arrest.

The Supreme Court has not yet directly expressed an opinion on the applicability of the *Charter* to an arrest made by a private agent under section 494 of the *Criminal Code*. In *R. v. Asante-Mensah*,¹⁸ the Court had to determine whether an individual was entitled to use reasonable force in order to make an arrest under the *Trespass to Property Act*.¹⁹ The appellant, who had been arrested by an inspector employed at an airport, decided not to rely on the *Charter* in support of his appeal to the Supreme Court of Canada. The Court preferred therefore not to express an opinion on the matter:

It cannot be disputed, however, that the legislature has conferred a power of arrest on occupiers, and imposed a duty to deliver the person arrested to the police. A serious interference with personal liberty of a trespasser is thus clearly authorized by the *TPA* even if he submits, i.e., whether "reasonable force" is used or not. The appellant has abandoned the *Charter* challenge he advanced in the courts below. We must therefore interpret and apply the *TPA* as we find it.

Since the Court did not express an opinion on the applicability of the *Charter* to arrests made by security guards, we need to consider the decisions of the appeal courts of the different provinces on this issue.

The decisions of the superior courts on the subject may be divided into two groups, one favouring the application of the *Charter* to "private" arrests, and the other feeling that it is not an "act of government". This question is particularly important to the extent that evidence obtained in a search that is incidental to this arrest could, if the *Charter* applied, be excluded if the fundamental rights of the person arrested were violated.

The first line of authority in the case law, which favours the application of the *Charter* to

¹⁸ [2003] 2 S.C.R. 3.

¹⁹ R.S.O. 1990, c. T.21.

citizens' arrests, is based on the decision of the Alberta Court of Appeal in *R. v. Lerke*.²⁰ In that case, the Court found that the *Charter* applied to the arrest of an individual by the employees of a tavern and that the evidence obtained following a search of this individual should be excluded under subsection 24(2) of the *Charter*.

Recently, in *R. v. Dell*,²¹ the same Court has analysed the principles set out in *Lerke* and in subsequent decisions of other Canadian courts. A passage from this analysis should be quoted here to the extent that the decision in *Lerke* appears to be the starting point for most judgments concerning the application of the *Charter* to the exercise by an individual of the power of arrest conferred on anyone who witnesses an offence:

In *Lerke, supra*, this Court discussed the long legal history of citizen's arrest and its current statutory expression, noting that the foundation of the whole system of criminal procedure was the King's prerogative of keeping the peace. At that point in history, each citizen had a part to play in the criminal justice system, with not only the right to make arrests, but the duty to do so in appropriate cases. The right and duty were derived directly from the sovereign himself. The Court in *Lerke* held that because the power of citizen's arrest is derived from the sovereign, it is the exercise of a state function: at paras. 17 and 21. English historians conclude, the Court noted, that the citizen's right of arrest should not be analyzed as being derived from, or as consisting of some portion of, the rights and powers of a peace officer. Rather, a peace officer possesses the rights of a citizen with some additions: at para. 18.

Lerke has not been uniformly applied. Many lower courts have followed it, including: *R. v. Parsons* 2001 ABQB 42 (CanLII), (2001), 284 A.R. 345, 2001 ABQB 42; *R. v. Jones*, [2004] N.B.J. No. 510, aff'd 2005 NBQB 14 (CanLII), 2005 NBQB 14; *R. v. Voege* (1997), 31 M.V.R. (3d) 293 (Ont. C. J. Gen. Div.); *R. v. Dean*, (1991), 5 C.R. (4th) 176 (Ont. C. J. Gen. Div.); and *R. v. Wilson* 1994 CanLII 689 (BC S.C.), (1994), 29 C.R. (4th) 302 (B.C.S.C.). However, three appellate courts have held that the actions of private persons performing citizen's arrests are not subject to the *Charter*: *R. v. N.S.*, [2004] O.J. No. 290 (Ont. C.A.); *R. v. J.(A.M.)*, (1999), 137 C.C.C. (3d) 213, 1999 BCCA 366; and *R. v. Skeir*, 2005 NSCA 86 (CanLII), 2005 NSCA 86. In the first two decisions, the courts arrived at this conclusion on the basis that private persons (in *N.S.* a security guard and in *J.(A.M.)* victims of a burglary) do not become agents of the state when effecting a citizen's arrest. Notably, the specific government function exception relied on in *Lerke*, and recognized in *Buhay*, was not canvassed.²²

²⁰ *R. v. Lerke*, (1986), 67 A.R. 390 (Alta. C.A.).

²¹ 2005 ABCA 246 (Alta. C.A.).

²² *Id.* at paras 11, 12.

In our view, *Lerke* “is still good law”, as the Court stated in *Dell*. However, the superior courts of the other provinces tend to think that it was overturned in *Buhay*, which is not altogether certain.

The Nova Scotia Court of Appeal refused to apply the *Charter* to the arrest of an individual by the security guard of a store. In *R. v. Skeir*,²³ the accused left the store with a basketful of goods that had not been paid for. The Court of Appeal upheld the trial judge’s decision to refuse to apply the *Charter* to an arrest made by a security guard. According to the Court, “... the suggestion that s. 494 expressly delegates or abandons the police arrest function, which would subject arrests made by private security guards to the *Charter*, is inconsistent with the message in *Buhay*, par. 31”. Thus, in the Court’s view, an arrest by a security guard under section 494 of the *Criminal Code* is not a public function. The *Charter* will apply to a private arrest only in those cases where it is shown that the person who made the arrest acted as an agent of the State or the police. Consequently, as long as the Supreme Court of Canada has not decided the issue of the application of the *Charter* to citizens’ arrests, the courts in Nova Scotia will be required to follow the decision of the Nova Scotia Court of Appeal in *Skeir*.

There is accordingly a real battle in the case law concerning the applicability of the *Charter* to citizens’ arrests to the extent that the courts of appeal of the different provinces have not all come to the same conclusion. Thus, as long as the Supreme Court has not rendered a decision on the subject or the federal legislation has not been amended, the courts required to decide whether the *Charter* applies to arrests made by security guards will follow the path laid out by the court of appeal in their province. It should be noted, as will be indicated later, that the issue arises in a different light in Quebec because the *Charter of Human Rights and Freedoms*²⁴ protects the fundamental rights of individuals not only in their relations with the government but also between private parties.

²³ 2005 NSCA 86. Application for leave to appeal filed on 30.8.2005.

²⁴ R.S.Q., c. C-12.

2.3 Arbitrary detention or imprisonment: s. 9 CCRF

A person is detained when he or she is deprived involuntarily of his or her freedom even if only for a short period. Normally, a person may be detained only by a public authority that may do so only if it has reasonable and probable grounds to believe that the person is linked to the commission of an offence. There is only one exception to this statement. As we have seen, a member of the public may arrest a person caught in the act of committing an offence under section 494 of the *Criminal Code*. The person making the arrest must hand over the person arrested immediately to a peace officer. It is fully accepted that an individual has the power to detain the person until a peace officer arrives. Any other form of detention by a private person is equivalent to confinement and would therefore be subject to criminal sanction. The abolition of private detention and imprisonment for debt was one of the first fundamental rights to be recognized. Traces of this are found in *Magna Carta* (1215), which is also the source of the right to *habeas corpus* in order to determine the legality of any form of detention.

The Supreme Court has asserted that there was detention in cases not only of physical but also of psychological restraint. In *Therens*, the Court stated the following: "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist".²⁵

As we saw earlier, the courts do not seem inclined to apply the *Charter* to a search effected by a private party although they are more divided on the issue of the application of the *Charter* to arrests by a private person. What is the case with respect to detention?

²⁵ *R. v. Therens*, [1985] 1 S.C.R. 613, 644.

In the *Dell* decision, the Alberta Court of Appeal had to determine whether the *Charter* applied to detention for purposes of investigation by a security guard at a bar. The guard had surprised the accused in the washrooms at the bar as he was handling a small black container normally used to store photographic film. Suspecting that he was about to consume drugs, the guard intercepted him as he left the toilets and then called the manager of the establishment, who conducted a pat-down search to ensure that the customer was not armed. He then found the container in question and discovered in it what later proved to be cocaine. The manager gave the container to the accused and escorted him to the kitchen, where he was detained until the police arrived.

Although this was *prima facie* a similar situation to that in the *Lerke* case, the Court of Appeal explained that the chain of events must be distinguished to the extent that the search had been conducted by the manager of the bar before he made the arrest. The Court of Appeal made this distinction, which it described as “metaphysical”, because the detention was based on the security guard’s mere suspicion. Consequently, the Court of Appeal found that, when he was searched in the washrooms, the accused was detained but was not yet under arrest, whereas the search in *Lerke* had been conducted after the individual was arrested.

The Court of Appeal felt that, in the circumstances, the security guard did not act in order to foil the offence and to arrest someone in order to hand him over to the police but rather for other legitimate reasons connected with the security of the establishment. Since the Court considered that the presence of weapons and drugs in bars was a question of safety and that their excessive presence there could jeopardize the economic viability of these businesses, it concluded that detention by a security guard could not be likened to an “act of government” because it served other purposes than law enforcement. Also, the Court felt that detention and search under these circumstances could not be likened to a delegation of government powers and that consequently, the *Charter* did not apply in such a situation. Finally, on the basis of the

decision in *Shafie*,²⁶ the Court of Appeal noted that the subsequent use by the government in a trial of evidence obtained by an individual was on its own not sufficient to trigger the application of the *Charter*.²⁷

The question accordingly becomes much more complex in cases where an individual co-operates with the police services without being subject to their control. There is reason to ask what relationship must exist between an individual and the State in order for an assumption to be made, as the Supreme Court explained in *Broyles*, that the sequence of events was influenced by the involvement of the State.

In *R. v. Snow*,²⁸ an employee of Purolator detected a suspicious odour coming from a package, which he gave to the company's security department. The manager of the department had worked for the Sûreté du Québec for 26 years before being hired by Purolator. After opening the package and finding small sealed sachets of a white powder, the manager alerted the RCMP. The RCMP officer seized the package.

The Newfoundland Supreme Court felt that this was a seizure without a warrant. However, it held that the seizure was not unreasonable and refused to exclude the evidence under subsection 24(2) of the *Charter*. The Court ruled that the *Charter* did not apply when the package was opened by the security manager. In order to reach this conclusion, it considered the evidence of co-operation between Purolator and the RCMP. According to the judge, there was no agreement between the company and the RCMP to the effect that, when a suspicious package was discovered, the RCMP must be alerted before any other action was taken. Consequently, the security manager's motivation cannot be likened to the performance of a public function since the goal of the manager when he opened the packet was to ensure that Purolator's mission, which was to deliver parcels, was fulfilled safely. Finally, the seizure without

²⁶ (1989), 47 C.C.C. (3d) 27 (Ont. C.A.).

²⁷ See also *R. v. Broyles*, [1991] 3 S.C.R. 595, 609.

²⁸ 2005 NLTD 81 (Newfoundland and Labrador Supreme Court).

a warrant of bags of cocaine by the RCMP officer was not unreasonable since it was not an agent of the State who had intruded into the privacy of the accused; nor did the intrusion take place at his request.

This judgment confirmed the hypothesis that, in *Buhay*, the Supreme Court probably would not have applied the *Charter* if the security guards had given the marijuana directly to the police rather than returning it to the locker. Once again, we see that the application of the *Charter* in cases where there is co-operation between security guards and the police depends solely on the sequence of events.

2.4 Conclusion

The decisions concerning the application of the *Charter* to private agents is often nebulous and is not uniform from one province to another.

Although *Lerke* has not always been followed by the superior courts, it has struck the imagination. Prior to the decision of the Supreme Court in *Buhay*, the decision in *Lerke* was applied by the judges when the facts of the case represented, in their view, a serious and flagrant abuse of power. The decision in *Gingras*²⁹ is very eloquent in this regard. Following *Buhay*, even when facing such abuses, the courts have applied tortuous reasoning and made "metaphysical" distinctions that are virtually impossible to understand, even for lawyers. This kind of reasoning reached a paroxysm in *Wallis*.³⁰

(i) The decision in *Gingras*

A warehouse owner noted the disappearance of goods and suspected his employees of stealing them. He hired private agents to investigate. An employee was caught by these agents who were lying in wait. He refused to open his bag and the agents seized it by force. They found cartons of cigarettes and when they searched his person, they found other packages. They then

²⁹ *R. v. Gingras*, Court of Quebec, No. 9249-88, January 13, 1989, Judge Fortier.

³⁰ 2004 BCPC 577 (British Columbia Provincial Court).

took him to an office where he was confined for two hours before the police arrived. During that time, the agents did not allow him to exercise his rights and refused to allow him call his wife [TRANSLATION] “in order not to jeopardize the operation”. According to the employee, he was not even allowed to go to the toilet [TRANSLATION] “until the call of nature meant that they no longer had any choice”. He was handed over two hours later to the police, who read him his rights and allowed him to call his wife. The employee made an incriminating statement to the police.

At the trial for theft, the judge felt that the arrest and detention were unlawful. First, there was no offence being committed, nor did the agents have any reasons to believe that this employee in particular had robbed the employer. Second, according to the judge, the arrest of an individual when there is no right to do so seemed to be the very essence of arbitrary imprisonment. Following the decision of the Alberta Court of Appeal in *Lerke*, he found that the right to counsel had been infringed and he excluded the statement made to the police.

(ii) The decision in *Wallis*

A police officer received an anonymous call informing him that marijuana was probably being grown in the residence of the accused. The officer called one Mr. Ogilvie, an employee in the security department of BC Hydro to inform him of the call. Before going to work for Hydro, Ogilvie had been an employee of the R.C.M.P. for 25 years, ten of which he had spent in the drug squad. According to his testimony, his work for Hydro involved tracking down people who stole electricity.

After making the necessary checks, Mr. Ogilvie informed the police that electricity was being stolen. Prior to receiving this report, the police did not have sufficient evidence to obtain a search warrant, even though surveillance of the residence by the police had confirmed the information disclosed in the anonymous call. On the basis of this evidence of electricity theft, the police obtained a search warrant and discovered the cannabis grow-operation.

The trial judge considered that the *Charter* did not apply to the checks made by Ogilvie because he had not acted under the directions or the control of the police officer and the police officer had not attempted to control the actions of the Hydro employee either directly or indirectly.

According to the evidence adduced at trial, there was a directive within the police service to the effect that police officers must inform Hydro when they suspected that an individual was stealing electricity or when they investigated a case involving the production of cannabis. They were not to ask or demand anything but should limit themselves to stating that there was a possibility of electricity theft. For their part, the employees of the security department at Hydro received training given by a former police officer and learned that they must never receive directions from the police or act under their direction.

In the judge's view, the policy of the police of informing Hydro when they suspected electricity theft was irrelevant. He felt that Ogilvie had merely exercised his powers to investigate a case of electricity theft. The judge also took into consideration the fact that the police officer and Ogilvie were familiar with the principles set out by the Supreme Court in *Kokesch*,³¹ stating that he was convinced that the police officer had not given any order or directive to Ogilvie.

The Court rejected the defence argument that the *Charter* must be applied because even though no formal directive was given, the officer and Ogilvie really knew what they were talking about when the officer called Hydro to tell them that there might be a case of "electricity theft" at the accused's residence. The judge found that this could reasonably have been expected of two experienced people who exchanged information and that this was not sufficient to trigger the application of the *Charter*. He stated that, in order for the *Charter* to apply, it would have been necessary for Ogilvie to attempt to assist the police in discovering evidence other than the "theft

³¹ *R. v. Kokesch*, [1990] 3 S.C.R. 3.

of electricity" even though Ogilvie testified that, in his experience, 99.9% of cases of electricity theft occurred for the purpose of cannabis grow-operations.

According to this decision, respect for the fundamental rights of an accused depends solely on the evidence that the police services have given directives or formal orders to a security guard. It is therefore in the interests of the forces of law and order to develop methods of operation similar to those described in the judgment in *Wallis*. Should a judge decide that in a particular case the *Charter* must apply because a police officer has said this or that to the employee of a private company, the police will merely need to note the judgment and refine its practices in such a way that "the error" that led to the application of the *Charter* will not recur.

A reading of the judgment in *Wallis* raises the question of the impact that the decision in *Broyles* has on co-operation between the State and the private sector. The Supreme Court requires us to analyse whether the events would have happened differently if the State had not been involved. In *Wallis*, it must be noted that absolutely nothing would have happened if the State had not been involved.

3. The doctrine of "state action" in American law

With the exception of a number of differences that, in the final analysis, appear minor, Canadian courts have followed the principles developed by American courts concerning the application of the Constitution to security guards when their actions violate the fundamental rights set in it. The application of constitutional guarantees depends on the result of the test to determine whether the action of a private agent may be likened to "state action".³²

³² This part is taken primarily from the article by SLANSKY, D. A., "The Private Police", (1999) 46 *UCLA Law Review* 1165.

In *Burdeau v. McDowell*,³³ the Court decided that the Fourth Amendment of the US Constitution (protection against unreasonable search or seizure) did not apply to the search of an employee by an employer, even where the search was illegal. The Court refused to exclude the evidence given by the employer to the police since the employer was not connected in any way with the government. This principle has never really been questioned since. The courts have also considered that the Fifth Amendment (protection against self-incrimination) does not apply to statements obtained during questioning by a private person. In order for the constitutional protection to apply, it is essential to establish that the police were involved in obtaining the statement.³⁴

In *Griffin v. Maryland*,³⁵ however, the US Supreme Court held that the “equal protection clause” in the Fourteenth Amendment applied to an amusement park employee who was responsible for enforcing the company’s segregation policy. The Court held that the State was involved to the extent that the employee exercised the authority of a deputy sheriff, wore a sheriff’s badge and constantly identified himself as a deputy sheriff rather than as an employee of the amusement park. In a comment on this decision, Slansky writes: “*Griffin* was one of a series of postwar decisions loosening the state action limitation to facilitate an assault on private discrimination, cases in which the Court may well have been less concerned with doctrinal niceties than with the bottom line.”³⁶

In short, American courts have generally refused to apply the Constitution to security guards who do not have additional powers to those exercised by members of the public since they act for private interests. The mere fact that the State permits agents to act in a way that could contravene the rights protected by the *Bill of Rights* is not sufficient to support a finding of “state action”.

³³ 256 U.S. 465 (1921).

³⁴ *Arizona v. Fulminante*, 499 U.S. 279 (1991).

³⁵ 378 U.S. (1964).

³⁶ SLANSKY, D. A., “The Private Police”, *loc. cit.*, note 32, at page 1238.

Slansky identifies three criteria developed by the courts to determine the existence of government action but feels that they are usually insufficient for a finding that private security guards are government agents.

(i) *Assistance from the government*

If the government gives assistance to a private party and the party derives a benefit therefrom, it can be argued that there is government activity. This is the case for instance where security guards receive information or training from the police or use its equipment. However, this is not always sufficient to make them state agents since many other companies, banks for example, co-operate in this way with the police without being considered to be part of government. This is therefore to be determined on a case by case basis.

(ii) *Exercise of a traditional government function*

In *Evans v. Newton*,³⁷ the Supreme Court limited the application of the “public function doctrine” to the exercise of powers that traditionally are exclusively reserved for the State. However, the courts have very rarely recognized the existence of such powers reserved exclusively to the State. In the view of the courts, although security guards take actions usually associated with police officers and often wear uniforms that give them the appearance of police officers, it is difficult to maintain that, historically, the security of the public and of private property was something reserved exclusively to public police services.

(iii) *Consequences of government action*

If harm suffered by a person because a private party was truly aggravated by the intervention of the State, this could trigger the application of the Constitution. However, since the use at trial of evidence given to the authorities is permitted even though the private party that obtained the evidence acted improperly, it seems rather difficult to apply this test to security guards.

³⁷ 382 U.S. 296 (1966).

Slansky then asks what concrete effect a rule that some of the acts of private security guards may be classified as a state function might have on those officers. Unlike the police, who have no interest in the actions they take being found to be unconstitutional and evidence they collect being ruled inadmissible, security guards, as they serve a private client, are not necessarily concerned about the consequences of their actions on subsequent trials.

4. International human rights law

This section briefly summarizes some of the rules of public international law and seeks to determine whether the position taken by Canadian courts concerning the application of the *Charter* to private security guards complies with the principles of international human rights law and whether Canada meets its international commitments in this regard.³⁸

International human rights law provides guarantees that may generally be relied on solely against the State and its agents. In 2001, the International Law Commission of the UN adopted a document entitled *Responsibility of States for internationally wrongful acts*, which lays down a set of rules that can be used to determine under what circumstances a conduct or an omission may result in the responsibility of a State under international law and thus cause it to be classified as a breach of the State's international obligations.

The definition of State and its organs adopted by the International Law Commission is similar to the one adopted by the Supreme Court of Canada, in particular in *McKinney*. The Commission feels that all agencies performing legislative, executive, judicial or other functions are organs of the State, regardless of the agency's position in the organization of the State and of whether the organization is accountable to the central authority of the State or to a territorial authority. When action is taken by an agency of the State, it is attributed to the State even where it constitutes an abuse of power or is taken for an improper purpose.

³⁸ On this question, see the excellent document by A. Kontos, "Private" security guards; *Privatized force and State Responsibility under international human rights law*, in *In search of security: An International Conference on Policing and Security*, Law Commission of Canada, February 2003, Montreal.

In the case of actions of individuals or agencies that cannot be classified as agencies of the States, the State will be responsible when the domestic law delegates to private parties the power to take actions subject to the authority of the State. Thus, the Commission considers the situation where the law of the State gives a person the power to perform a public function normally exercised by the State. Similarly, conduct of a person that cannot be classified as State action but that in fact is performed under the instructions or control of a State agency constitutes the performance of a State function. These principles are very similar to those adopted by the Supreme Court of Canada in *Eldridge*.

Under international law, State responsibility arises when the State fails to fulfil its obligation to protect and guarantee the exercise by individuals of their fundamental rights, to prevent and investigate allegations of contraventions, to punish the guilty and to provide relief for victims even when the abuses are committed by private parties. States must act with all “due diligence”. Under this doctrine, the obligations of States are not limited to the prevention, prohibition and punishment of contraventions but also to positive measures to promote and ensure that individuals may exercise their rights.

5. Analysis of some initiatives to amend provincial legislation on private security

Provinces that are reviewing their legislation on the role of private security are coming to the conclusion that the legislation no longer reflects the reality of an industry that has undergone such phenomenal growth in recent years. We are proposing here to examine initiatives in Québec and Ontario.³⁹

³⁹ Other provinces have started reforms, but some appear to have been abandoned, or at least put on hold, notably in British Columbia and Alberta.

5.1 Québec

The *Private Security Bill* was tabled in the National Assembly on 16 December 2004. In 2005, it underwent wide consultation. The report on the consultation on the Bill was to have been presented on 18 October 2005 (we were not able to study this report). Detailed study of the Bill has not yet taken place, nor has it been adopted.

According to the Bill, the future Act will apply to the following activities:

- security, namely, guarding, watching or protecting persons, property or premises to prevent crime and maintain order;
- investigation, namely, searching for persons, information or property;
- locksmith work;
- activities related to electronic security systems;
- security transport;
- security consulting.

The Act does not apply to peace officers, inspectors appointed under an Act, police force employees who are not peace officers, volunteers, and any other person or category of persons exempted by regulation.

Security agencies and persons exercising the activities covered by the Act must obtain a permit issued by the “*Bureau de la sécurité privée*” (Bureau of Private Security). Applicants must show that they have the training required by regulation, that they are of good moral character, and that they have not been convicted of a criminal offence related to security activities, unless they have obtained a pardon.

The mission of the “*Bureau de la sécurité privée*” is to protect the public as regards the activities of private security agencies and agents. Its main functions are to ensure the

enforcement of the Act and related regulations, to issue permits, to deal with complaints, and to advise the Minister on any private security matter.

The Bureau has eleven members, four of whom are appointed by the Minister. The Act establishes no criteria for these appointments. The seven other members are to be appointed by the seven security agencies deemed by the Minister to be the most representative. It seems a little strange that no seat is kept for members of the public, given that the organization's mission is public protection. The members appointed by the Minister cannot be considered representatives of the public, because the legislation does not so specify, as it does when this is intended. The Bureau's Board will therefore be dominated by the agency representatives. In other provinces, one seat is traditionally reserved for a person having no link with any security agency.

The Bureau has the power to investigate in order to ensure that the Act is upheld. According to the Bill, it may conduct an investigation when a complaint is received, but is under no formal obligation to do so. If, after a preliminary analysis of a complaint, it has reason to believe that a criminal offence has been committed, it must refer the complaint to the competent police force.

When a complaint is received, the Bureau may designate a person to conduct an investigation. The Act provides no right for a complainant to present his or her views. Nor does the Act require the Board to make a decision or to give reasons. No right of appeal is provided.

The Act requires security agents to inform police without delay when, in the course of their duties, they become aware of an offence against public order, a terrorism-related offence, or an offence that endangers the physical well-being of a person. Security agencies must submit an annual report on the steps taken when becoming aware of the commission of criminal offences.

Lastly, the Bureau and the Government have the power to adopt regulations. The Bureau must adopt regulations on applications for permits, annual fees, insurance requirements for security agencies, the amount and form of the bond that agents must post, the conditions under which temporary permits are issued, and the standards of conduct required of security agents during the performance of their duties. The Bureau may adopt regulations on the nature and form of the books, registers and records that an agency permit holder must keep and preserve.

For its part, the Government may make regulations to identify persons exempted from the application of the Act, the standards for badges, identification and uniforms of agent permit holders, standards for the identification of vehicles used in the private security industry, the equipment allowed in those vehicles, and the training required to obtain a permit.

This Bill seems to be clearly inadequate for the protection of the public against possible abuse by security agents for the following reasons :

- it in no way guarantees that security agents are adequately trained;
- it does not set clear rules to ensure that members of the public cannot confuse private security agents with police officers, especially with regard to their uniform and vehicles;
- it creates no obligation for agents to act in such a way as to avoid the impression that they are police officers, or that they have any more extensive powers than the general public;
- it creates no obligation for security agents to identify themselves as such, to state their identity and that of their employers, or to specify their authority, and the limits to it;
- it creates no distinction in law between the role of police officers and that of security agents in premises that, while they are private, are open to the general public;

- it establishes no effective control mechanism for the industry;
- the Bureau is not set up as an independent organization, which is essential to provide adequate protection for the public;
- it provides for practically no gathering of information on security agencies and their agents, on the nature of the contracts they enter into, and on the public's right to information or reports on their activities;
- it does not prevent detention or search prior to arrest;
- it does not require agents and agencies to report to the Bureau incidents where force has been used;
- it provides the public with no rights, nor does it require agents to respect fundamental human rights. It makes no reference to the *Quebec Charter*.

5.2 Ontario

The Government of Ontario recognized the need to reform its legislation on security and investigation agencies following the death of Patrick Shand, who lost his life in an altercation with food market employees and security guards. As a result of this tragic death, a coroner's jury made 22 recommendations to better protect members of the public from security agents. Bill 159 has therefore been introduced in the Ontario Legislature. It seeks to amend the rules governing security agents and agencies. A second reading of the Bill took place on 2 May 2005. The Ministry of Community Safety and Correctional Services feels that Bill 159 acts on the recommendations to a considerable extent.

The Act applies to private investigators and security guards, that is persons who, for renumeration, conduct investigation or ensure the protection of persons or property. The Bill lists some of the occupations included in this definition, such as guards, bouncers, bodyguards, or those who perform services to protect property from theft or damage. The legislation does not

apply to lawyers, peace officers, insurance adjusters, and those who provide security advice but do not employ investigators or security guards.

The Act establishes a Registrar of Private Investigators and Security Guards to issue licences. All those included in the legislation must have a licence, and no-one may represent himself or herself as such unless he or she has a licence. For a licence to be issued, an applicant must have a clean criminal record, be at least 18 years old, have successfully completed all prescribed training, and passed the examination. An applicant may be required to provide his or her fingerprints, a photograph, and consent to a background check and to a verification of his or her status under the *Immigration Act and Refugee Protection Act*.

The Bill allows anyone to register a complaint against a security agent or agency. A "facilitator" is appointed to conduct an inquiry which the complainant has a right to attend. In rendering his or her decision the "facilitator" may include a recommendation that the licensee involved be required to take remedial instruction in order to be able to keep the licence.

The Act contains a section on General Duties and Standards of Practice for the profession. Those acting as security guards must carry their licence at all times, and must identify themselves and produce their licence on request. They must always wear a uniform that complies with the regulations, unless they are acting as a bodyguard or performing services to protect property. The Act also provides that security guards shall not hold themselves out as providing services or performing duties connected with the police. They may at no time use the terms "law enforcement", "police", or "officer".

Finally, the Minister may, by regulation, establish a code of conduct for security agents. The Minister may make general or particular regulations prescribing grounds on which a licence may be issued or refused, on training, uniform, and equipment requirements, on keeping and retaining information, on the inspection of agencies, and on offences under the Act.

Most of our criticism of the Québec Bill applies to the Ontario Bill as well. However, the latter seems a little more innovative than its Québec equivalent in the following aspects:

- it requires agents to act in such a way as to never give the impression that they are police officers, and to identify themselves at the request of a member of the public;
- it provides a complaint procedure which the complainant may attend;
- the power to make regulations resides with the Minister and not with the Registrar;
- within the organization established to oversee the application of the Act, the security industry does not have greater representation than the public.

Despite these few positive aspects, the Ontario bill cannot really be called progressive, nor can it be concluded that it meets the challenges of the massive expansion of private security into matters of public order.

Neither the Québec nor the Ontario Bill contains specific standards for the behaviour expected of security agents. Since the establishment of standards is in large part delegated to regulatory authority, the respect of human rights depends on the government of the day. It is understandable that these Bills do not create genuine professional corporations for the regulation of security agents, but one would have expected them to be more specific on behaviour that must be considered undesirable. Some acts could have been formally prohibited: abuse of power, excessive force, discrimination, holding oneself out to be a police officer or providing misleading information as to the extent one's authority, failure to immediately notify the police of arrest or detention, failure to allow a person to exercise his or her right to legal counsel, and failure to inform a person that he or she has freedom of movement.

These Bills have no precise rules on the use of force, on detention, or on interrogation. They do not require security agents to inform people they detain that a security agent's authority is limited. Case law makes a clear distinction between arrest and detention under Section 494 of

the Criminal Code. This distinction is well known by police, security agents, and the legal profession, but the public is generally unaware that it even exists. So security agents hold all the cards when it comes to blurring the limits of their authority. This allows them to cultivate the fear that they inspire and the aura of authority that they project when they are in uniform. There is certainly room to define the work of security agents more closely, and to make them subject to rules that require them to provide those with whom they deal with information that is essential to the exercise of their free will.

Both Bills establish an organization responsible for the application of the law. In Québec, the very make-up of this organization raises doubts as to its ability to protect the public. This is because it is dominated by the security industry and the public is not represented at all. In Ontario, the Registrar is appointed by the Minister; time will tell whether the Registrar will be able to respond effectively to public expectations for the oversight of security activities. On the other hand, neither piece of proposed legislation provides for the establishment of an independent and impartial body that can investigate and adjudicate complaints and impose penalties.

Lastly, the two Bills require records to be kept and reports to be submitted to the government. But simply passing information to the government on the identity of agents, and checking their criminal records, is not sufficient to allow the government and the public to understand the reality of this occupation, its actual activities, and its methods of operation. Why do these Acts not require incidents where force is used to be documented? Why are security agents not specifically required to record all situations of arrest or detention? If this were the case, we would have much more information on the frequency of these incidents.

6. Discussion

As we know them today, human rights are principally rights and freedoms against arbitrary or excessive powers of the State or its agents. The constitutions of France and of United States, the English Bill of Rights, as well as international human rights law, have been drafted in the

context of the all powerful State, the holder of the monopoly on the use of force, as Max Weber observed. The Canadian Charter reflects this concept.

The case can well be made that the all powerful State has gradually been replaced by a risk management State, whose major preoccupations are deregulation and the reduction of public expenses. The dizzying expansion of private security in North America and in other rich countries is, among other factors, the result of this desire to privatize public services for economic and competition reasons. In this new reality, all the structures that have been put in place over the centuries to protect the public's fundamental rights from the power of the State lose their validity if coercive acts, normally the monopoly of public power, are performed by non-governmental agents.

To counter the repressive apparatus of the State, everyone enjoys a number of rights and freedoms that serve to limit the action of agents of the State. These rights are considered "essential elements for the administration of justice founded on the dignity and worth of the human person and the rule of law."⁴⁰ Several of these constitutional guarantees, whose goal is to avoid the abuse of power, arbitrary actions and unjust treatment, could be applicable when actions that restrict freedoms, such as search, arrest, interrogation, or detention, are exercised by non-governmental agents.

Security agents or private investigators hired by property owners, companies, municipalities, governmental organizations, and the like, are routinely called upon to act in such a way as to impact on the private lives of members of the public, to restrict their freedom of movement, or the exercise of their freedom of expression and association.

These agents operate in places that go beyond the notion of private property, that are public in the sense that people live and conduct their affairs in these places. To illustrate this, all we have to do is follow any given individual through a day. If this journey is analyzed in the light

⁴⁰ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

of Section 32 of the Charter, it can immediately be understood that people spend a good deal of their time in workplaces, shopping centres, sports complexes, or entertainment venues, places where they are under the authority of the owner rather than that of the State. Naturally, since everyone must act in a responsible way, owners are putting their civil responsibility at stake if their representatives violate a person's fundamental rights. But we must ask how that responsibility helps someone who is required to appear in a criminal court because of evidence gathered illegally by a security agent. The consequences may be more far-reaching than the conviction itself. Having a police record has often dramatic consequences for workers: a prohibition to travel to the United States, a ban on certain activities or occupations, and so on.

Presently, the law seems incapable of accommodating the reality of the gradual privatization of public space, and the dramatic growth in private security. The scope of private security is constantly widening, but the law evolves much more slowly. Given that democratic institutions and courts in Canada are bound up in concepts established by the Constitution and the interpretation given to them by the Supreme Court, can it be said that they are in a position to construct and interpret Canadian law so that it promotes the respect of fundamental rights for all, and ensures that those rights are respected?

6.1 Societal Evolution

In *McKinney*, Justice La Forest recognizes that society is changing and that rights can be infringed by others than the government when he writes that:

Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces.⁴¹

⁴¹ *McKinney*, op. cit, note 3, p.262.

The work of the Law Commission of Canada shows the evolution of the responsibility to keep the peace in our society, the extent of the expansion of private security, and the inadequacies of the traditional distinction between public and private. These major changes lead us to wonder if Madame Justice Arbour's conjecture in *Buhay* is not about to come true. Indeed, she wonders "It may be that if the state were to abandon in whole or in part an essential public function to the private sector, even without an express delegation, the private activity could be assimilated to that of a state actor for Charter purposes."⁴²

If, as the SCC declared in *Eldridge*, "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",⁴³ it is appropriate to consider whether private agents should be subject to standards of conduct similar to those found in the *Charter*. In fact, if the actions usually reserved for public authority, such as arrest, detention, and search, can be done by anyone, without controls, with no requirement for accountability, and with no obligation to respect international human rights law or constitutional law, the possibility exists for the emergence of a parallel police force. Criminal penalties and civil responsibility are not sufficient protection in controlling the activities of private actors using coercive measures and whose actions can infringe on such fundamental rights as the freedom of movement.

Until a solution is found to the inadequacy of the privatization of social relationships, of fundamental rights and freedoms, and of the law presently in effect in Canada, the fundamental individual rights guaranteed by the *Charter* will always be at the mercy of:

- The interpretation of Section 32 of the *Charter* by courts seized of lawsuits dealing with private security agents;

⁴² *Buhay*, para 31.

⁴³ *Eldridge*, op.cit, note 2.

- The chain of events leading to a person's arrest and criminal trial, more particularly in regard to the relationship between security agents and the public police force. The case law makes it relatively clear how to avoid making the Charter applicable in a given case;
- The scope that higher courts and the Supreme Court will give to the notions of "public function" and of "delegation of authority", as well as the way in which they will interpret contracts made by governmental agents with purely private ones (for example the "private police forces" in some municipalities, or in public-private places such as universities, shopping centres, street festivals, and the like.)

6.2 Canada's International Solutions

As we have seen previously, even if the position of Canadian courts is similar to that taken by international human rights law with regard to State responsibility for actions performed by private security agents, Canada still has the responsibility to adequately protect its citizens against abuse and the violation of their rights. Given the evolution of the doctrine of State responsibility, the State has an obligation to act with diligence in protecting the fundamental rights that international law recognizes to everyone one.

The writer A. Kontos identifies certain positive obligations for which the State is accountable with regard to acts of security agents. He considers that a State has the obligation to enact legislation governing the work of private security agents. To the extent that current Canadian legislation is not sufficient to effectively protect individuals against a number of actions performed by security agents, it constitutes a failure of the obligation to act diligently to protect fundamental individual rights. Effective legislation to protect fundamental individual rights against abuses by security guards would involve standards for the training of agents, their licensing,

their uniform, the limits or restrictions on their authority (for example in the use of force) and the supervision of their activities by State bodies.

Even if private security agents are not agents of the State, and do not act under the control or direction of the State, Kontos is of the view that their conduct could engage State responsibility under international law. In fact, even if they have no more authority than other members of the public, security agents often exercise authority that border those of the State, such as search, detention, arrest, and the use of force. Since these functions are the very essence of their work, security agents are much more likely to perform actions that infringe on freedoms and individual rights than other members of the public.

In this sense, the idea of “functionality” or government action must be widened in Canada in order to conform with international law. As Alexis P. Kontos writes:

The conduct of private security guards exercising law enforcement powers beyond those of ordinary citizens should generally be deemed State conduct for purposes of international human rights law.⁴⁴

6.3 The roads to a solution

Courts have advanced several reasons for concluding that the *Charter* should not apply to acts of private security agents. In the *Shafie*⁴⁵ case, the Ontario Court of Appeal holds that recognizing the right to remain silent, and the right to a lawyer when investigations and interrogations are conducted by private persons would have the effect of institutionalizing private relationships to a point that society could not accept. According to the Court, this could lead to absurd situations where a parent might be required to advise a child of his or her right to retain the services of counsel, or a teacher to advise a student, or an employer to advise an employee.

The argument that a parent can be required to give a child the right to a lawyer before the child is questioned about, for example, where he or she has been, flies in the face of common sense, and of the courts's interpretation on case by case basis. Moreover, the obligation to

⁴⁴ “Private” Security, *loc. cit.*, note on p. 201.

⁴⁵ *R. v. Shafie*, (1989) 47 C.C.C. (3d) 27.

respect the public's fundamental rights could be imposed only, as we will see later, on people whose job consists in conducting enquiries or protecting people or property.

In the *McKinney* case, the Supreme Court justifies its position to the effect that the Charter cannot apply to purely private business acts when matters such as arrest, detention, or searches are involved by saying, among other things, that "To open up all private and public action to judicial review could strangle the operation of society. This could seriously infringe on the freedom to make contracts."⁴⁶ Justice La Forest added that it would "impose an impossible burden on the courts".⁴⁷

In Québec, private agents are required to respect the fundamental rights enshrined in the *Québec Charter of Human Rights and Freedoms*⁴⁸ which are almost the same as those in the *Canadian Charter of Rights and Freedoms*. They must therefore respect the right to be protected against unreasonable search and seizure, the right to be protected against arbitrary arrest and detention, the right to legal counsel, the right to remain silent, and the right to equality, and the freedoms of expression and association. Their actions, private in nature, are judicially reviewable without Québec society being paralyzed, and without private relationships being institutionalized to an intolerable degree.

(i) The Québec Example

In 1975, Québec adopted a *Charter of Human Rights and Freedoms*, which, unlike the human rights codes in other provinces and the *Canadian Human Rights Act*⁴⁹, is not a simply a law against discrimination, but a quasi-constitutional document⁵⁰ enshrining fundamental freedoms,

⁴⁶ *McKinney*, op.cit., note 2 on p. 262

⁴⁷ *Id*, p.263.

⁴⁸ *Charter of Human Rights and Freedoms*, R.S.Q., c-C-12.

⁴⁹ *Canadian Human Rights Act*, R.S. 1985, c. H-6.

⁵⁰ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, para 42 and 45

and political and legal rights. Professor Morel writes that [Trans] “the document is unequalled in scope when compared with other Canadian documents of the same type”⁵¹.

Article 55 specifies that the *Charter* applies to matters within the legislative competence of Québec. Unlike the *Canadian Charter*, it applies to relationships governed by private law in the province, and therefore [Trans.]) “broadens considerably the protected area of personal rights and freedoms”⁵².

The *Charter* has therefore been the key in deciding a number of legal challenges involving private security agents who have undertaken searches, arrests and the like. The *Charter* in fact contains several rights whose violation can be condemned: the right to personal inviolability (section 1), the right to the safeguard of dignity, honour and reputation (section 4), the right to respect for private life (section 5), the right to the peaceful enjoyment of property (section 6), the inviolability of the home (section 7), the right to non-disclosure of confidential information (section 9), as well as the classic legal guarantees (section 23 to 39). The pertinent provisions are cited below:

24. No one may be deprived of his liberty or of his rights except on grounds provided by law and in accordance with prescribed procedure.
- 24.1. No one may be subjected to unreasonable search or seizure.
25. Every person arrested or detained must be treated with humanity and with the respect due to the human person.
28. Every person arrested or detained has a right to be promptly informed, in a language he understands, of the grounds of his arrest or detention.
29. Every person arrested or detained has a right to immediately advise his next of kin

⁵¹ A. Morel, “La coexistence des chartes canadienne et québécoise : problèmes d’interaction”, (1986) 17 R.D.U.S. 49, p.51.

⁵² G. Couture, *L’admissibilité de la preuve obtenue en violation des droits et libertés fondamentaux en matière civile*, Wilson et Lafleur, Montréal, 1996, p. 22.

thereof and to have recourse to the assistance of an advocate. He has a right to be informed promptly of those rights.

30. Every person arrested or detained must be brought promptly before the competent tribunal or released.

Under section 49, any interference with these rights entitles the victim to obtain the cessation of such interference, and compensation for the resulting prejudice. In case of intentional interference, the person guilty of it may be required to pay punitive damages.

Interference with the rights enshrined in the Québec Charter may, in certain circumstances, also result in the exclusion of evidence. The *Québec Charter* has no provision equivalent to section 24(2) of the *Canadian Charter*. But a similar provision is to be found in section 2858 of the Civil Code of Québec⁵³ which reads “The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.”

In Québec, where the right to protection against unreasonable search and seizure is guaranteed by section 24.1 of the Charter, the protection has been applied to cases where private agents use surveillance and investigation methods that intrude into private life, such as video surveillance, drug-screening tests, the searching of employees’ and customers’ personal effects, and those of recipients of benefits from social programs. The Supreme Court has held that the analysis developed with regard to section 8 of the *Canadian Charter* also applies to section 24.1 of the *Québec Charter*.⁵⁴

Québec courts have held that the right to counsel is violated in cases of arrest or detention by private parties. For example, in a case⁵⁵ where a security guard employed by a Zellers store apprehended a 12-year-old girl and held her in the security area for ten minutes,

⁵³ *Code civil du Québec*, L.Q., 1991 c. 64.

⁵⁴ *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406.

⁵⁵ *Chevrier v VSC Investigation and Zellers*, Cour du Québec 550-32-007546-002, 8 December 2000, Gosselin J.

the judge found the arrest to be illegal in this case because no flagrant offence was being committed within the meaning of section 494 of the Criminal Code. The judge held that if a peace officer has no power to detain a person for the purposes of investigation, there is even less reason for a security guard, whom the law deems to be a private citizen, to claim more powers than the police. After pointing out that it was not clear whether the *Canadian Charter* could be applied to security agents without the status of a peace officer, the judge applied the *Québec Charter* and found that both section 24.1 (the right not to be deprived of liberty except on grounds provided by law) and section 29 (the right to advise next-of-kin and the right to counsel) had been violated. The judge awarded \$200 in moral damages for stress and humiliation.

In 1999, the Court of Appeal of Québec rendered two decisions that show how this protection is applied to private parties. In the *Bridgestone Firestone*⁵⁶ case, an employee had been followed, and placed under video surveillance during an absence due to a work-related accident. After noting that the *Canadian Charter* did not apply because the problem arose from a private relationship between an employer and an employee, the Court of Appeal applied the *Québec Charter*, and held that the right to private life guaranteed by section 5 had been violated, as had the rights enshrined in sections 3, 35 and 36 of the Civil Code. The Court examined the right to private life in the *Québec Charter* and based its findings on the principles set out by the Supreme Court in *Aubry v. Vice-Versa*.⁵⁷ The infringement of the right, however, was found to be reasonable and justified under section 9.1, the equivalent of section 1 of the Canadian Charter.⁵⁸

It is important to quote sections 35 and 36 of the Civil Code, mentioned by the Court of Appeal, since it sheds additional light on the extent of protection in the province of Québec.

35. Every person has a right to the respect of his reputation and privacy.

⁵⁶ *Syndicat des travailleurs(euses) de Bridgestone Firestone de Joliette v. Trudeau et Bridgestone Firestone*, [1999] R.J.Q. 2229.

⁵⁷ *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591.

⁵⁸ *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712; *Godbout v. Ville de Longueuil*, [1997] 3 S.C.R. 844.

No one may invade the privacy of a person without the consent of the person unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) entering or taking anything in his dwelling;
- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;
- (4) keeping his private life under observation by any means;
- (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) using his correspondence, manuscripts or other personal documents.

In the case of *Ville de Mascouche*⁵⁹ case, the telephone conversations of a municipal employee had been intercepted by a neighbour who had then passed the recordings to the mayor. Arguing that the employee had violated his confidentiality duty, the municipal council relieved her of her duties. For the majority judges Gendreau and Fish, the neighbour was neither an employee nor an agent of the municipality and, from this viewpoint, the *Canadian Charter* did not apply. In a dissenting opinion, Justice Robert felt that the neighbour was acting as an agent of the mayor. The Court held that the right to private life guaranteed in section 5 of the *Québec Charter* had been violated, and Justice Robert invoked the protection of section 8 of the *Canadian Charter*. The judges unanimously set aside the evidence obtained in violation of the rights because to use it would have put the administration of justice into disrepute. The majority judges, applying the *Québec Charter*, set aside the evidence under section 2858 of the Civil Code, while Justice Robert did so under section 24(2) of the *Canadian Charter*.

⁵⁹ *Ville de Mascouche v. Huguette Houle and the Commission municipale du Québec*, [1999] R.J.Q. 1925.

In another case, the Court of Appeal awarded damages for the violation of the right to privacy in a workplace.⁶⁰ A priest employed by the Hindu Mission of Canada was suspected of various acts of embezzlement. The employer decided to place a wiretap on the phone in the temple. After his dismissal, the priest sued for defamation, claiming that his right to private life had been violated. The Court found that section 5 of the *Québec Charter* had been violated, and awarded \$10 000 in moral damages, plus \$5 000 in punitive damages against those who had violated the right.

This example from Québec, where it is recognized that private parties must respect the fundamental rights enshrined in the *Québec Charter* while they perform their duties, could be followed in the rest of Canada. This could be done by amending the human rights codes of other provinces and the *Canadian Human Rights Act*. In Québec, the Charter establishes a Human Rights Commission to hear charges of discrimination, just as it does in the other provinces and under the Canadian Act. The commission only has jurisdiction in matters of discrimination and of the exploitation of the elderly or the handicapped. The violation of other rights and freedoms enshrined in the Charter, such as those mentioned above, is dealt with by courts and administrative tribunals.

(ii) Amendment of Human Rights Legislation

Another possible solution is to follow the Québec example by amending human rights legislation to include the classic fundamental rights and a rule allowing the exclusion of evidence. This solution has the advantage of avoiding problems of separation of powers. Private relationships fall under section 92 of the Constitution Act of 1867. Since security agents and their employees are private persons, their rights and obligations are primarily governed by the provinces. For relationships between individuals, the federal Parliament has jurisdiction only in federal matters listed in section 91 of the Constitution Act of 1867, including through criminal law or the

⁶⁰ *Srivastava v. Hindu Mission of Canada (Québec) inc.*, [2001] R.J.Q. 1111 (C.A.).

Canadian Human Rights Act. It does not have the power to regulate private security, nor to simply make private security agents subject to the Charter across Canada. With the exception of private security agents who play a role in the matters that are clearly within the exclusive jurisdiction of the federal government under section 91 of the Constitution Act of 1867, such as customs, prisons, employment insurance, or the postal service, any involvement of the federal government into private security matters would naturally run the risk of a constitutional challenge from a province or a private citizen.

The federal government could regulate security agents working in these areas by adding to the *Canadian Human Rights Act* guarantees similar to those in sections 24.1 and other sections of the *Québec Charter*. Another course of action would be to adopt parent legislation regulating the work of security agents in federal enterprises which are not part of the government under the Charter. However, we have seen that proposed legislation in both Ontario and Québec contain a number of gaps. It would therefore be preferable for the federal government, if it wanted to go the route of parent legislation, to ensure that it was more progressive, and therefore more likely to provide real protection for the public against abuses by private security agents.

(iii) Adoption of parent legislation on private security

A frequently-advanced solution is to have legislation at different levels that include private security services. Certainly, present legislation is out-of-date, and, as Kodros explains, parent legislation should be much more specific. Bills presently being considered in various provinces are clearly inadequate in attaining the goals described here: Canada's obligation to fulfill its international commitments, and for private security agents to respect the public's fundamental rights as they perform their duties.

(iv) Amendment of the Criminal Code

Another possibility that could be considered would be to amend the Criminal Code in such a way as to create an intermediate category between a private citizen and a peace officer. This new category would include private citizens whose jobs primarily involve investigations and the protection of persons and property. This recognition could in turn encourage changes in provincial legislations, especially in the supervision of security agents and their civil responsibility. This solution is not without problems. First, the Criminal Code deals only with arrest in case of a flagrant offence or fleeing after the commission of an offence. Searches or detention for the purposes of investigation, surveillance, and the like would not be covered. An alternative could be to include into the *Canada Evidence Act*⁶¹ a section similar to section 24(2) of the Charter, applying specifically to private security agents. Second, the actions of private security agents who violate fundamental rights of members of the public do not always concern criminal law. They may have employment consequences such as dismissal or a cut in benefits. To incorporate fundamental rights, and a rule excluding evidence into human rights legislation would fill a void, as it was done in Québec.

⁶¹ S. C., (1985), ch. C-5.