TRENDS & DEVELOPMENTS

PRIVATE LAW ENFORCEMENT – *Dodging the Charter*

INTRODUCTION

You are a university student whose residence room was searched for stolen goods by campus security without a search warrant. You are an employee whose actions in a public washroom were surreptitiously videotaped by your employer without prior judicial authorization. You are an employee who made incriminating statements to a private investigator hired by your employer, without first having been informed of your right to a lawyer. Could the evidence gathered be used against you in a criminal trial? Recent cases suggest that it can be, and that the Canadian Charter of Rights and Freedoms will not guarantee protection from such invasions of privacy.

Evidence gathered in violation of an individual's Charter rights may be excluded on the basis of section 24(2) of the Charter which states that the court may exclude evidence if admitting it in the proceedings would bring the administration of justice into disrepute. However, section 24(2) can only be invoked if it is first shown that the Charter has application. The Charter will only apply if the person gathering the evidence was acting as an agent of the state, or performing a government function. Purely private activities are not covered by the Charter. Consequently it is important to look at whom the courts have considered to be agents of the state, aside from police officers, and by what criteria these decisions have been made.

In a criminal trial, a finding that the person gathering evidence is not an agent of the state has two implications. First, such findings condone a private system of law enforcement which escapes the scrutiny of the Charter. The importance of not allowing this private, unregulated system to develop has been recognized by the courts. For example, it has been asserted recently that:

> ... there is good reason for the *Charter of Rights and Freedoms* to apply to the actions of a private individual who is acting under the authority of a statute. ... 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.[1]

The second implication is that the privacy interests of the individuals who are subject to an investigation may be violated. Two Charter rights most commonly violated during criminal investigations are sections 8 and 10(b). Section 8 guarantees that "everyone has the right to be secure against unreasonable search or seizure." This section can be viewed as the "privacy" provision of the Charter. Section 10(b) provides that everyone has the right, upon arrest or detention, "to retain and instruct counsel without delay, and to be informed of that right." Although both these rights might be infringed by private actors, the case law suggests that individuals' privacy interests are more often violated. If the evidence which is gathered through such a violation cannot be excluded at trial, the individual may be left with only a civil remedy for the violation.

ARRESTS AND DETENTIONS

Several recent cases suggests that this system of private law enforcement is developing in Canada. While in an early influential case, *R.* v. *Lerke*,[2] it was decided that the Charter does apply to "citizens' arrests,"[3] private investigations have not been held to be government functions when they occur outside of the scope of citizens' arrests. In the leading case of *R.* v. *Shafie*,[4] an employee was suspected of theft. After unsuccessful attempts to have the police investigate the matter, the employer hired a private investigator.[5] The employee was led to an office by his supervisor, believing that refusal to comply would have been an act of insubordination, and interviewed

Tanya Scharbach is a third year law student at the University of Victoria. She received her Bachelor of Arts in History from the University of Toronto.

by the private investigator behind a closed door. He made incriminating statements which were tape recorded. At no time was the suspect informed of his right to a lawyer.

The issue in this case was whether the employee's section 10(b) rights had been violated, and therefore the question arose of whether the private investigator was bound by the Charter. The court considered citizen's arrest cases such as *Lerke* and agreed that the Charter applied in those cases since an *arrest* is essentially a government function. However, the court found:

> ... actions that, at the hands of the police or other state or government agents, would be a detention, *do not amount to a detention within the meaning of section 10(b) ... when done by private or non-governmental persons.*[6] [emphasis added]

The court was concerned that "any other conclusion would result in the judicialization of private relationships beyond the point that society could tolerate."[7] However, it can be argued that society could and should tolerate the judicial scrutiny of a situation in which an employee is coerced by his employer into providing incriminating statements.[8] It can also be argued that a detention — which ultimately leads to an arrest — is as much of a government action as the making of a citizen's arrest.

Since *Shafie* was decided in 1989, it has been accepted in several jurisdictions,[9] including British Columbia as recently as 1994. The proposition that the Charter does not apply to situations where one private citizen detains another was reviewed and accepted by the British Columbia Supreme Court in *R.* v. *Wilson.*[10] A second B.C. case has adopted *Wilson*, firmly restating the idea that "where a private person merely detains another the detention is not affected by the Charter, and the detainee is not protected by the Charter".[11] These cases indicate that this reasoning may be extended to similar situations in the future.

SEARCHES

In the case of *R.* v. *Swanarchuk*[12] the reasoning of *Shafie* was applied to a situation in which a search, rather than a detention, had been conducted by a private citizen. *Swanarchuk* extends the reasoning in *Shafie* (that a *detention* by a private individual is not a government action) to *searches* by private individuals. In *Swanarchuk*, management at a Safeway outlet made surreptitious video recordings of their employees in a public washroom located on the store premises, because they suspected employees were using the washroom to hide

merchandise before stealing it. Monitoring took place during the night shift, when only the grocery store's employees had access. When a staff member entered the washroom, security personnel activated the video. If it became apparent that the person was there simply to use the washroom for its normal purpose, the recording equipment was deactivated but the video monitoring continued.

In its decision, the court noted that if these actions had been taken by agents of the state, the search would have been unreasonable. However, it rejected the accused's argument that since a citizen's arrest is a government function, a search is also a governmental function. Instead, the court affirmed *Shafie* and declared that the Charter does not apply to searches carried out by a strictly private actor, such as Safeway. The decision illustrates the threat which an application of *Shafie* can pose to an individual's privacy interests. Since the Charter does not apply to this type of evidence when it is introduced into a criminal trial, an accused is doubly disadvantaged: first, her privacy

is violated; and second, she is left with no Charter remedy for such a violation.[13]

In *Swanarchuk*, the court held that the state's subsequent role in tendering the evidence obtained by a private actor as part of a criminal prosecution does not trigger the operation of the Charter. It reached this conclusion despite the fact that a criminal trial is most certainly a government function. This raises a second issue when addressing searches conducted by private actors. If the protection of the Charter is not triggered simply because evidence is only *later* handed over to the police, what role does the *purpose* of the search play in determining whether or not a private actor is carrying out a government function? In other words, does it make a difference that the investigation was begun with the purpose of providing evidence to the police?

In *R.* v. *Meyers*[14] a warrantless search of staff lockers was conducted in a hospital. The hospital management initiated the investigation, but later worked in consultation with the police. The court stated that an otherwise private act will be converted into a government act where the primary purpose of the search is to discover evidence in order to press charges.[15] In addition, the court held that where a search is carried out by a private citizen at the instigation of, or in collusion with, the police or other government agencies, the private act will be converted into a government act.

However, the British Columbia Court of Appeal recently examined similar issues in *R.* v. *Fitch*[16] and came to a different conclusion. In that instance, University of Victoria security officers entered a student's residence room for the legitimate purpose of determining whether the student had abandoned the room. While making this inquiry, the security officers noted what appeared to be equipment that had been reported as stolen. The next morning, a second officer entered the room and conducted a search, opening a drawer under the bed. The police were called, and accompanied the security officers for a further search of the room. No warrants were obtained for these searches.

The Court of Appeal decided that university security personnel conducting a warrantless search for stolen property in a student's residence room were not state agents. Although not clearly articulated, it seems the court was following *Meyers,* in that the security guards would be state agents *if* they had been found to be working in concert with the police. However, despite the fact that the police were called in and accompanied the security personnel in a warrantless search, it was determined that the security guards and the police were not working in tandem. It is hard to imagine what more would be required to find that the security officers and the police were working together. However, in one important respect the court limited the decision in *Meyers*. The court in *Meyers* held that if the purpose of the search was to collect evidence in order to press charges, then the person conducting the search would be considered an agent of the state. Yet the court in *Fitch* held that the purpose was not important, and that simply embarking on a criminal investigation prior to involving the police did not make the security personnel state agents.

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Investigations, such as the one discussed above, have been grouped together with private detentions and searches as non-government functions. While there may be some room to argue that detentions and searches are not inherently government functions (especially if they do not result in the laying of charges), it is more difficult to see how this could be the case for private criminal investigations. On the contrary, such investigations should be viewed in the same light as citizens' arrests, which have been held to be a government function by their very nature.

OBSERVATIONS

The distinction between "arrest" on the one hand, and "detention" or "search" on the other hand, has the potential to create two separate systems of law enforcement within Canada. The

first is a public system which is regulated by the Charter. Under this system, violations of rights may be remedied by exclusion of evidence. The second is a private system which is not regulated by the Charter. Under this system, there is no possibility of exclusion of evidence under the Charter. In the end, it does not matter even that the infringement occurred for the express purpose of providing the police with evidence for use in a criminal prosecution. Unfortunately, the lesson to be learned from the above cases seems to be that private actors should conduct their own investigations before calling the police. In this way, evidence may be gathered in a manner unavailable to the police. Further, such evidence is admissible in a criminal trial, whereas it would be excluded if gathered by the police.

Finally, private actors who conduct their own investigations must have the financial resources to do so. Therefore, only those who can afford investigations will be in a position to present the police with evidence of criminal activity. As demonstrated in the cases examined above, certain private actors — those with financial resources — will find it easier to circumvent the Charter. For example, employers who are investigating theft by employees may collect evidence that the police either will not, or cannot, gather. Employers would be placed in a difficult position if they could not gather proof that employees were stealing. However, the police are put in an equally difficult position every day when gathering evidence of criminal activity. This difficulty has not been held to justify overriding individual rights in the pursuit of gathering evidence for criminal charges. Should employees' rights be sacrificed for the purpose of securing a criminal conviction? Such an unregulated, private system of law enforcement would leave parties vulnerable to precisely those abuses that the Charter is designed to prevent, including unreasonable searches or seizures.

ENDNOTES

1 *R.* v. *Wilson,* (1994) 29 C.R. (4th) 302 (B.C.S.C.) at 309.

2 *R.* v. *Lerke* (1986), 24 C.C.C. (3d) 129 at 134 (Alta C.A.). The reasoning behind the decision was that "the arrest of a citizen is a governmental function whether the person making the arrest is a peace officer or a private citizen."

3 The authority to execute a citizen's arrest can be found in several statutes, including the Criminal Code of Canada, and the Summary Convictions Act (now pt. XXVII of the Criminal Code).

4 *R.* v. *Shafie* (1989), 47 C.C.C. (3d) 27 (Ont. C.A.).

5 An argument could be made that private investigators, licensed by the government, should be considered government actors by the fact that they are government regulated and operate under a statutory regime.

6 *Shafie*, see note 4 at 34.

7 See note 4 at 34.

8 The issue of voluntariness of a confession at common law is beyond the scope of this paper.

9 *R.* v. *J.A.*, [1992] O.J. No. 182 (QL) (Unif. Fam. Ct.); *R.* v. *Sawler* (1991), 104 N.S.R. (2d) 408 (S.C.A.D.).

10 See note 1. Originally it seemed as if the courts in British Columbia would not be following *Shafie*. In an early case, *R.* v. *Deacon*, [1993] B.C.J. No. 973 (QL), the B.C. provincial court seemed to be moving toward broader Charter coverage of private detentions. In that case it was stated that "...when one citizen arrests another, the arrest is carried out on behalf of the state and must be done in accordance with the Charter ... The same must be said for a detention that is covered by section 10(b) ..." Unfortunately for those detained, *Wilson*, a later decision by a higher court, came to the opposite conclusion.

11 *R.* v. *J.C.*, [1994] B.C.J. No. 1861 (QL) (Prov. Ct. Youth Div.).

12 *R.* v. *Swanarchuk*, [1990] M.J. No. 686 (QL) (Q.B.).

13 Violations of privacy under the common law are beyond the scope of this paper.

14 *R.* v. *Meyers* (1987), 52 Alta. L.R. (2d) 156 (Q.B.).

15 However, the Court in this case did reach the same conclusion as *Swanarchuk* in deciding that where the search began for other purposes and *then* led to evidence being presented to the police, the search will not be considered a government action.

16 *R.* v. *Fitch*, [1994] B.C.J. No. 2027 (QL) (C.A.).