

Guarding the Charter

Considering whether security guards are "agents of the state" under the *Charter of Rights and Freedoms* By Elliott Goldstein

Whether or not security guards are "agents of the state" depends upon the facts of the particular case, says the Supreme Court of Canada. In a recent decision based on a Manitoba case involving the search of a bus locker by security guards, Canada's highest court held that security guards are not "agents of the state."¹ However, "[W]hether private security guards are 'agents of the state,' ... invites a case-by-case analysis which focuses on the actions which have given rise to the alleged Charter breach by the security guards and the relationship between them and the state."

UNDER LOCK AND KEY

The facts of this case are uncomplicated. The accused rented a locker in a Winnipeg, Manitoba, bus depot. Security guards smelled a strong odour of marijuana coming from the locker. They told the Cargo Express agent and he opened the locker with his master key.

Marijuana was found in a duffel bag inside the locker. The security guards placed the marijuana back in the locker, locked it, and called the Winnipeg Police Service. Two officers attended, smelled the marijuana through the vent in the locker, and had the locker opened for them. The officers seized the marijuana and placed it in their cruiser.

The police officers did not have a search warrant. The officers told the security guards to keep an eye on the locker. The next day, the accused went to the locker, opened it and read the note that the police officer had left for him. He then left the premises and was arrested a short time later.

RULED BY RULINGS

At his trial in Provincial Court, on a charge of possession of marijuana for

the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drug and Substances Act*, S.C. 1966, c. 19, the accused plead not guilty and a *voir dire* was held to determine the admissibility of the marijuana seized from the bus depot locker.

Per Arbour, J (SCC):

"The trial judge first determined whether the Charter applied to the security guards. He held that it was clear from the evidence that the security guards were employed by a private security firm and that in order for the Charter to apply, they

must be found to have been acting as agents of the state. Considering the decisions of the British Columbia Court of Appeal in *R. v. Fitch* (1994), 47 B.C.A.C. 154 and of this Court in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, he concluded that the security guards were not agents of the state and that the Charter, therefore, did not apply to the initial search by them."

On appeal, the Manitoba Court of Appeal was satisfied that the initial search by the security guards did not violate s. 8 of the Charter because the security guards were privately employed and, therefore, were not subject to the Charter. On further appeal, the Supreme Court of Canada agreed with both lower courts that "there was no Charter violation since the security guards were private actors and were not agents of the state."

Per Arbour, J (SCC):

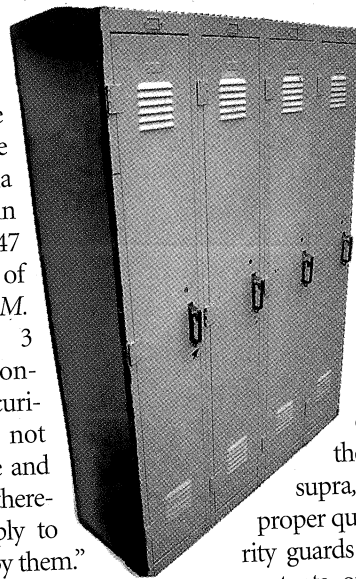
"Nothing in the evidence allows a conclusion that the security guards or

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 security guards cannot either be considered state agents. Based on the test set out in *Broyles*, supra, and *M. (M.R.)*, supra, the proper question is whether the security guards would have searched the contents of locker 135 but for the intervention of the police? On the facts here, **it is clear that the security guards acted totally independently of the police in their initial search.** In *M. (M.R.)*, the involvement of the police was even greater than in the case at bar, since the police had been contacted prior to the search and were present during the search.

"In the present case, the relationship between the police and the security guards developed **after** the security guards searched the appellant's locker. **The guards started an investigation**



on their own initiative, without any instructions or directions from the police. While the incident report forms used by the security guards contain spaces for police incident numbers and badge numbers, I agree with the Crown that this only reflects a general policy of the security company to cooperate with the police. It is only normal, considering their functions, that security guards may be called upon to contact the police on a regular basis. That does not put them in a "standing" agency relationship with the police. This is confirmed by the *Private Investigators and Security Guards Act* (the Act) which regulates the security guards' activities in Manitoba. Indeed, s. 35 of the Act expressly provides that security guards should not hold themselves out in any manner as performing or providing services or duties connected with the police.

"Volunteer participation in the detection of crime by private actors, or general encouragements by the police authorities to citizens to participate in the detection of crime, will not usually be sufficient direction by the police to trigger the application of the Charter. Rather, the intervention of the police must be specific to the case being investigated [see, on the specific issue of whether security guards were acting as agents of the state: *Fitch, supra*; *R. v. Caucci* (1995), 43 C.R. (4th) 403 (Que. C.A)].

"In the case at bar, there is nothing in the evidence which supports the view that the police instructed the security guards to search locker 135 and, therefore, the security guards cannot be considered state agents.

"While there has been a growing use of private security in Canada and while private security officers arrest, detain and search individuals on a regular basis, '[t]he exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected' (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 262).

"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. This is not the case here. As for whether private security guards are "agents of the state," the test in *Broyles, supra*, invites a case-by-case analysis which focuses on the

actions which have given rise to the alleged Charter breach by the security guards and the relationship between them and the state." [All emphasis added by author.]


In this case, the Supreme Court of Canada ruled that private security guards are not "agents of the state," which is particularly relevant to security guards who observe surveillance monitors. The events they see and record may well constitute "searches" within the meaning of the Charter, but if the court finds the guards

are not "agents of the state," the Charter will not apply to the video surveillance they conduct – even if the tapes are the results of a "search." ★

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Author's Note

1 *R. v. Buhay* [2003] S.C.J. No. 3, 2003 SCC 30. All quotes are from this case unless otherwise indicated.



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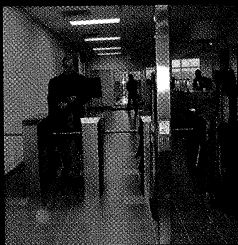
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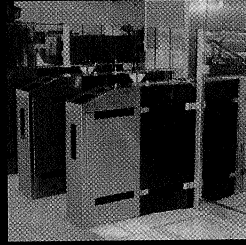
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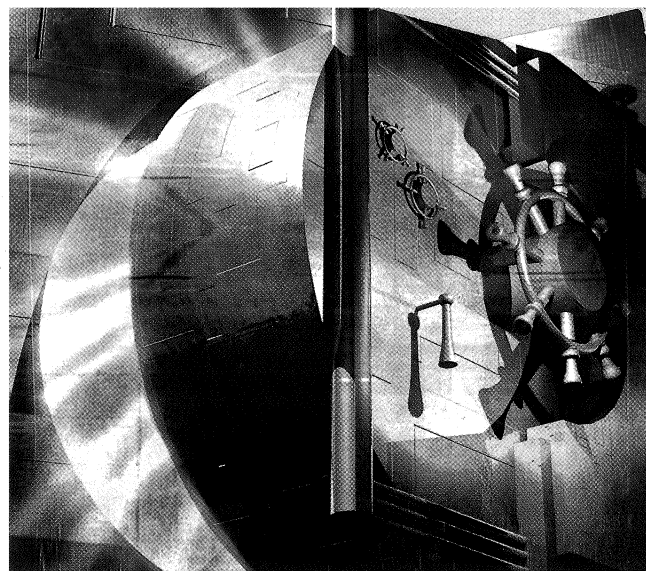
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